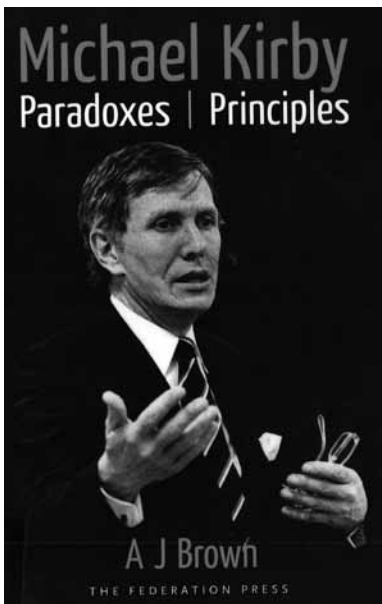


## Michael Kirby: Paradoxes and Principles

By Professor AJ Brown | The Federation Press | 2011



Professor AJ Brown's long awaited biography of Michael Kirby deserves much acclaim. As with all biography, its interest in part lies in the degree of interest of the underlying subject. This was never going to be a problem with Michael Kirby who, it must be acknowledged, has had an extraordinary career. Indeed one might venture he has had a number of extraordinary careers. But good biography does much more than simply relate the narrative of the careers of famous and impressive people. It puts the subject career in the wider political, social and institutional context, bringing it alive and bringing its importance out against that background. This biography achieves that goal, and does so in a highly readable and attention holding style.

Correctly described by Malcolm Turnbull at the book's launch as the best Australian judicial biography since David Marr's biography of Barwick, this is the account of a singularly driven individual whose

life has been lived extraordinarily publicly for the past 50 years. For the most part, that has not only been a matter of choice but desire and indeed tactic. Even the private dimension, shielded so deliberately and carefully from the public eye for so many years, became an increasingly important part of the public dimension following Kirby's famous 1998 amendment to his *Who's Who* entry and thus publicly, but without the usual Kirby fanfare, 'outing' himself and acknowledging his long-standing relationship with Johan von Bloten. Once public, Kirby, as if to make up time, referenced that relationship to illustrate continuing inequality and discrimination in the treatment of same-sex couples when it came to matters of fundamental social and economic importance such as superannuation arrangements. Brown skillfully integrates the personal, private side of the Kirby story with the public dimension.

*Correctly described by Malcolm Turnbull at the book's launch as the best Australian judicial biography since David Marr's biography of Barwick, this is the account of a singularly driven individual whose life has been lived extraordinarily publicly for the past 50 years.*

The biography follows a conventional chronological path, and thus tracks the Ulster background, the modestly circumstanced upbringing, the opportunity classes and the selective high school, Fort Street, the story of whose then most famous alumnus, HV Evatt, in many ways suggested a pathway for future achievement. Unlike Evatt, Kirby never followed a party political path although, as Brown makes clear, his

political patrons were very much of the ALP – Lionel Murphy, Neville Wran and Gareth Evans, each of whom was instrumental in key appointments. Notwithstanding such connections, part of the Kirby paradox, captured by Professor Brown in the title to the book, is that this liberal progressive was and is also an ardent constitutional monarchist who worked closely with conservative figures such as Tony Abbott and Lloyd Waddy in the republican debates. This is not the only paradox to which Brown points.

Absence from party politics did not mean that Kirby was not a skilled politician, and those political skills were refined during no less than a 14 year period of engagement with student politics at Sydney University, overlapping with his years at Hickson Lakeman & Holcombe and then at the junior bar. Brown attributes Kirby's prolonged involvement

in public student life in part to a loneliness occasioned by the lack of a private life bound up with Kirby's homosexuality and the social constraints of the time. In due course, Brown demonstrates those political skills being deployed in the early work of the Australian Law Reform Commission to which, Brown discloses, Kirby was a slightly reluctant appointee but through which he began to build both a domestic and international public

profile and reputation.

Brown makes the valuable point that many of the early law reform projects were not necessarily 'big ticket', attention grabbing sweeping reforms but rather involved the reform of areas of great practical importance. Early projects were to be of lasting significance including the insurance reference which led to the passage of the *Insurance Contracts Act 1984 (Cth)* and the admiralty reference which resulted in the *Admiralty Act 1988 (Cth)*. The account of the Australian Law Reform Commission years, the intellectual vibrancy and energy harnessed under Kirby's leadership, and the very significant legislative reforms which emerged from its work serve sadly to highlight the diminished institution it has become as a result of successive funding cuts, with now only one permanent commissioner.

Kirby's drive and ambition is referenced in his somewhat audacious request, on being appointed president of the Court of Appeal in 1984 to continue concurrently as chairman of the Australian Law Reform Commission, a request not acceded to. Brown captures well the paradox that, at the time of the announcement of his appointment as president of the New South Wales Court of Appeal, Kirby was Australia's best known judge but had hardly ever sat in that capacity. This flowed largely from the fact that he had retained, and exercised, the right to refer to himself as Mr Justice Kirby – a title to which he became entitled on appointment as a deputy president of the Conciliation and Arbitration Commission but which role he in

truth only discharged for a handful of months – throughout his many years as permanent chair of the Australian Law Reform Commission. The public perception of him as a 'judge' was further reinforced by his 1983 Boyer Lectures entitled 'The Judges' which, Brown correctly observes, not only further raised Kirby's profile but also shed unprecedented public light on the role and importance of the third arm of government. The significance of those lectures in terms of building the public's understanding of the work of the courts and their societal importance cannot be underestimated.

*The story of the six days following Senator Heffernan's cowardly assault on Kirby under the cloak of parliamentary privilege and based upon forged Commonwealth car records makes for compelling reading.*

Brown gives a fine account of Kirby's years on the Court of Appeal, his notable judgments such as *Osmond* and the *BLF* case, and what is generally acclaimed as the 'rescue' of that court, under his courteous leadership, from a low period of unattractive incivility which reflected poorly on the institution and which was corrosive of relations between bench and bar. The important role of Sir Laurence Street in easing Kirby's entry to the Supreme Court of New South Wales and embracing the Kirby enthusiasms and energy, when a less welcoming course was open, is given some emphasis. The Street/Kirby relationship was tested, however, in the case of *Bailey v DPP* where, as Professor Brown records, Kirby fell foul of failing to resist the temptation of referring to a

recently argued but still reserved case in one of his many public international addresses, leading to a stubborn impasse only ultimately resolved, it would appear, by Sir Laurence and Justice Slattery joining in a terse and delphic judgment of such an unusual character that it was bound, on further appeal, to result in a retrial, the only result that the chief justice saw as acceptable following Kirby's foray into the public arena. Brown notes that, despite counsel of varying degrees of directness from friends and colleagues upon his taking up the presidency of the Court of Appeal, Kirby continued to speak publicly

on topics which could compromise his ability to participate in cases including following his elevation to the High Court. This was one of a number of matters that contributed to considerable tension from time to time with his judicial colleagues.

The biography tracks a number of Kirby's key professional relationships through the course of his career. These include his early encountering in law student politics of the younger Mary Gaudron, of whose forceful style, it appears, Kirby was somewhat disapproving. Her later rapid elevation to the deputy presidency of the Conciliation and Arbitration Commission was something of a professional wake-up call and challenge to the ambitious Kirby, and it was to that same commission in an identical role that Kirby was soon

after appointed. For all this rivalry, more apparent on Kirby's part than Gaudron's, it was Gaudron, Brown points out, of all the High Court judges who stood up most for Kirby in relation to the Heffernan Affair, dealt with by Brown in a dramatic and absorbing chapter entitled 'Six Days that shook the Court'. The story of the six days following Senator Heffernan's cowardly assault on Kirby under the cloak of parliamentary privilege and based upon forged Commonwealth car records makes for compelling reading. The partial disclosure of the stances taken by individual justices during that period may be viewed by them, with the probable exception of Mary Gaudron, as involving gross breaches of confidence and it remains to be seen whether or not they, and in particular Chief Justice Gleeson, will choose to respond.

*Sir Gerard's naturally cautious instincts, however, and deep concern for the institution of the judiciary led him, on Kirby's initial appointment to the Court of Appeal, to counsel Kirby politely against his engagement with matters that were or could come before an appellate court.*

Kirby's relationship and interaction with Gleeson is one topic that recurs as the progress of Kirby's career is tracked. As Brown portrays it, from Kirby's perspective at least, this relationship was deeply competitive, from law school days, through the Supreme Court of New South Wales and to the High Court. Certainly the contrast in personality could not be starker. Brown's account appears to be given very much from Kirby's perspective although he acknowledges



interviews with Gleeson in 2009 and 2010.

Other key relationships tracked include those of Kirby with Gareth Evans and Sir Gerard Brennan. The relationship with Evans originated in national student politics, was harnessed through the law reform commission and ultimately took the form of Evans' political patronage

and influence leading to Kirby's appointment to the High Court in 1996, following Sir William Deane's surprise appointment as governor general. Kirby's relationship with Sir Gerard Brennan, chief justice at the time of his appointment to the High Court, also had its origins with the law reform commission, with Brennan an undoubted Kirby supporter. Sir Gerard's naturally cautious instincts, however, and deep concern for the institution of the judiciary led him, on

Kirby's initial appointment to the Court of Appeal, to counsel Kirby politely against his engagement with matters that were or could come before an appellate court. The Brennan–Kirby relationship evidently became further strained on Kirby's elevation to the High Court as he continued to be engaged in and with an array of organisations, and to speak, locally and internationally, on a wide range of topics which could potentially imperil his ability to discharge his constitutional and institutional duty as one of a seven member bench. He was unable to sit, for example, on the *Stolen Generations Case*, because of an intervention by the International Commission of Jurists, and on *Croome's Case*, because of his past links to gay law reform.

Kirby is on record as saying that he would have felt more at home on the Mason Court. That may well be, however it is difficult to imagine him in that very different milieu not following his apparent need to stand out and mark himself out as different in his reasons for judgment. Brown's biography contains a discussion of some of

Kirby's notable judgments on the High Court such as *Wik*, *Kartinyeri*, *Cattanach*, *Al Kateb*, *Workchoices* and *Thomas v Mowbray*. There is also a clear account of his judicial philosophy and methodology, based upon considerations of principle, policy and precedent which Brown links, presumably with input from Kirby, to Sir William Deane's judgment in *Oceanic Sun Line Special Shipping v Fay* (1988) 165 CLR 197, and which was fully articulated in Kirby's Hamlyn Lectures.

As to his time on the High Court, anecdotal evidence suggests that there is much truth in Brown's judgment that the professional dynamic of the High Court was one to which Kirby 'would never fully adjust, and which he never accepted'. Brown observes Kirby's isolation on the High Court, noting that whilst his 'judicial approach was now resonating with greater authority in the outside world, within the court, his audience had gone from small to vanishing'. The awkward occasion of Kirby's unofficial farewell sitting in Court Room No 1 of the High Court upon his retirement, apparently and, on one view, unedifyingly boycotted by all of his sitting colleagues, was a graphic illustration of his isolation. Brown's insight into the almost institutionalised refusal of Kirby's colleagues to join in his reasons for judgment in the many cases where there was agreement as to the result, is interesting; he observes that Kirby had sought in his years on the Court of Appeal to reduce the number of separate opinions



in a case whilst in his later years on the High Court, and perhaps driven by a desire to rationalise his forced isolation, he spoke publicly and privately of the importance of 'vigorous intellectual independence' and the value of individual reasons for judgment.

History will, of course, be the ultimate judge but it may well be that one of Michael Kirby's more significant contributions whilst on the High Court will not be jurisprudential at all but rather will be the determined and principled change he caused to be brought about in relation to the acceptance of his de facto partner, Johan von Bloten, to the rights and entitlements of the spouses of other justices, a matter of principle with implications for lawmaking well beyond the instant case of the federal judiciary. Brown gives a detailed account of Kirby's campaign initially for equal travel and social entitlements and then more substantive superannuation entitlements. This was a campaign that spanned Kirby's entire tenure at

the High Court and was a source of institutional tension both within the court and in terms of its relationship with the then federal Attorney General Daryl Williams. On Brown's account, the lack of support in the form of the deafening silence of Williams in response to a number of formal requests and inquiries from the court on this topic do not do him credit. Kirby's quest to secure equality of treatment in terms of entitlements and superannuation was eventually only won with a change of government on the eve of his retirement.

The great intellectual and physical demands of high judicial office are well known. What is so striking about the Kirby story is that, for the vast majority of his domestic judicial career, there was a concurrent international career of breathtaking proportions which included his work as chair of the OECD project on Transborder Data Flows and the Protection of Privacy, as the Secretary General's Special Representative to Cambodia, as a member of the Global Commission

on AIDS, as a member of UNESCO's Bioethics Committee, the Human Genome project, and presidency of the International Commission of Jurists.

Other aspects of the international engagement demonstrate how the skills of the advocate, in the marshalling of evidence and the clear and skilful presentation of rational argument based upon

so many of his speeches contain two or three opening paragraphs emphasising his own achievements and career in a way which is entirely unnecessary and, with the greatest respect, often simply self-indulgent. With the possible exception of the connotation implicit in the title to the final chapter – The Victory Lap – Brown does not really delve into just what the forces were that underpinned and seemingly continue to underpin Kirby's craving for recognition and accolade. Perhaps David Ash will explore this in his prosopography of Kirby due to be published in the 2023 winter issue of *Bar News*.

*With the possible exception of the connotation implicit in the title to the final chapter – The Victory Lap – Brown does not really delve into just what the forces were that underpinned and seemingly continue to underpin Kirby's craving for recognition and accolade.*

Working with a vast library of speeches and correspondence, Professor Brown skillfully weaves this extensive international engagement into the narrative and makes the valid point that, notwithstanding the burden of work assumed at both domestic and international levels, such was the drive, industry and diligence that Kirby never exposed himself to the charge of spreading himself too thinly. The detail of Kirby's international contribution will not be as well known to readers of this review as his judicial work, and Professor Brown's account creates a valuable historical record. It is a contribution for which Kirby has justly won much praise internationally. Some of the international work, such as the formulation in 1988 of the Bangalore Principles on the domestic application of international human rights norms, came to inform his domestic work.

that evidence, can be applied well beyond the courts, and the common law world.

Unlike the recent biography of Mary Gaudron by Pamela Burton, this is a biography in which the subject not only cooperated but, it would appear, fully participated. So much so, indeed, that in the weeks following its publication, it was Kirby who appeared to be running the book's promotional campaign and publicity. The book's dust jacket makes reference to the author having been provided with exclusive access to 117 metres of personal and official papers, no doubt meticulously kept and indexed. This leads to the one paradox not really touched upon or grappled with in the book, and one that has puzzled me for many years. That is why, for a man of such undoubted talent and ability, generous spirit and sustained achievement in so many areas,

This last observation should not detract either from the immense contribution of the man himself to public life, both within Australia and globally, nor from the very high quality of the biography. It is a fine work to be read not only by lawyers but also by, to use a favourite Kirby phrase, his fellow citizens.

**Reviewed by Andrew Bell SC**