

BOOK REVIEW:
**MICHAEL KIRBY – A PRIVATE LIFE – FRAGMENTS,
MEMORIES, FRIENDS¹**

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Since his retirement from the High Court in 2009, the Hon Justice Michael Kirby has been the subject of a full-length biography and a television documentary.² Justice Kirby has now published a memoir. This book is essentially a compilation of interesting events in Kirby's life, which collectively document his quest for homosexual law reform from the 1950s to the present. Each chapter of the memoir, which is preceded by an appropriate vignette, is a self-contained story that recounts his involvement in this quest. After reading the memoir, I decided to write this review because the experiences and ruminations of a highly distinguished jurist are germane to the development and maintenance of a cohesive and just society.

I have known Michael Kirby for a long time. Although he might not remember it, he and I were two of the ten people who in 1982 attended the funeral of Professor Ilmar Tammelo who had taught Kirby at the University of Sydney Faculty of Law in the 1960s. Kirby was always most gracious in his dealings with me and supported my attempts to make a contribution to scholarly life as a lawyer and academic in Australia. One expects nothing

¹ Michael Kirby, *A Private Life: Fragments, Memories, Friends* (Allen & Unwin, 2011).

² A J Brown, *Michael Kirby: Paradoxes and Principles* (Federation Press, 2011); *Michael Kirby: Don't Forget the Justice Bit* (Directed by Daryl Dellora, Film Art Media, 2010).

else from a truly gifted and admirable person such as Michael Kirby. He kindly wrote the Foreword to my book *Commercial Law of the European Union* (Springer, 2010) which I co-authored with Adjunct Professor John Trone.

In his memoir, Kirby vividly describes the discrimination suffered by homosexuals in the Australia of the 1950s, 1960s and 1970s. I found his discussions of life in 1950s Sydney especially interesting because it covered a time when I was not in Australia, but growing up in Belgium. As is often the case with any form of discrimination, the climate in which gay people were expected to live was horrendous. There was a societal expectation that they would pretend to be heterosexual and would not reveal the reality of their homosexuality. Statute books often criminalised homosexual conduct. Furthermore, when Kirby was a youngster, the police in New South Wales waged a campaign to discredit gay people, fired on by an intolerant Commissioner of Police.

In Australia, statutes that criminalised homosexual behaviour between consenting adults in private were only wholly expunged from Australian statute books following the *Nicholas Toonen case*.³ Toonen was a gay activist who lodged a complaint with the United Nations Human Rights Committee in 1991. He alleged that his right to privacy under Article 17 of the *International Covenant on Civil and Political Rights*⁴ had been violated by Tasmania's criminalisation of homosexual conduct between consenting adults in private. The Committee decided that Article 17 of the Covenant had indeed been violated. Following the Committee's decision, the

³ (1994) 112 ILR 328.

⁴ Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

Commonwealth passed a law overriding Tasmania's criminal statute.⁵ It is not my purpose in this short review to consider the constitutional issues associated with the Toonen case, including the extent to which the Commonwealth Parliament is authorised to pass laws to implement decisions taken by international bodies, which in itself is a contentious constitutional issue. I merely refer to the Toonen case to indicate that it finally succeeded in destroying the 'don't ask, don't tell' mentality which existed in Australia for most of the twentieth century.⁶

As from chapter 2, Kirby describes in a warm, gentle, yet serious manner his precarious journey in Australia and overseas as a homosexual man. Every chapter details a different aspect of this journey. In chapter 2, he discusses the 1957 Wolfenden report⁷ in the United Kingdom which recommended that 'homosexual behaviour between consenting adults in private should no longer be a criminal offence' (p 26). He focuses on the contribution made by Alfred Kinsey, a Professor at the University of Indiana in Bloomington, who from 1948 courageously undertook a study on male sexual behaviour to ascertain what actually occurs during human sexual conduct. Kirby is highly flattering of both Kinsey and Wolfenden, describing each of them as 'a child of the enlightenment' (p 32). In his view, 'Each in his different way contributed to the advancement of the human condition' (p 32). In chapter 3, Kirby recounts his loneliness and desperation at not being able to express his sexual awakening during his youth. He tells the story of seeing the film *East of Eden* (starring James

⁵ *Human Rights (Sexual Conduct) Act 1994* (Cth).

⁶ The phrase 'Don't Ask, Don't Tell' famously originated in the United States. That policy has now been repealed. See *Don't Ask, Don't Tell Repeal Act of 2010*, Pub L No 111-321, 22 December 2010, 124 Stat 3515.

⁷ *Report of the Departmental Committee on Homosexual Offences and Prostitution*, Cmnd 247.

Dean) a total of 24 times. It was an obsession that was to last until 2000 when Kirby visited Dean's birthplace, the small village of Fairmount, Indiana.

Chapter 4 offers an insight into Kirby's private life. He discusses how he met his long-time partner, Dutchman Johan van Vloten at a bar in the Rex Hotel, in Kings Cross, Sydney. In his narrative, Kirby reveals that his relationship with van Vloten was preceded by a first love affair with a Spanish man, named Demo. Kirby describes how he responded positively to a call from Demo to spend a weekend with him in Melbourne, after he and Johan had moved in together. He feigned surprise that Johan was still there in the Sydney apartment when he returned from Melbourne (p 83). In my view, this was the most candid comment in the memoir because it provides readers with unprecedented access to Justice Kirby's private life.

In chapter 5, Kirby discusses his visit in 2000 to Riverview College, a prestigious Catholic Jesuit college in Sydney where he spoke about the topic of homophobia, which generated a lot of comment in the media. Chapter 6 details Kirby's visit to Zambia, a strongly anti-gay country, even though 1 out of 6 Zambians suffered from HIV infection. His speech to the highest judicial officers of Zambia was certainly a courageous effort to highlight the scourge of AIDS. In chapter 7, he recounts a visit to the Salvation Army which had invited him to a social justice conference in 2007, withdrawn the invitation and finally re-invited him once again. The penultimate chapter tells the story of his visit to the Indian fort city of Bassein where he met Prince Manvendra, who had outed himself as a homosexual in India 'where most of the politicians and leaders are still silent' on this issue (p 183).

This book is very well written, eminently readable and most interesting. In fact, once you start reading the memoir, it is ‘unputdownable’ – a horrible and unpardonable word that expresses a delightful experience. I had expected his memoir to deal with the numerous legal achievements of Justice Kirby during his illustrious career as a judge. But, in essence the book focuses on Kirby’s quest to seek homosexual law reform in Australia and throughout the world. Kirby himself dispels the idea that his memoir is an autobiography. Indeed, he clearly indicates in the Introduction that his memoir does not constitute an autobiography because it does not deal with his career ‘as a practising lawyer, in university bodies, the Council for Civil Liberties, the Australian Law Reform Commission, the courts and international agencies’ (p ix).

Nevertheless, in telling his stories, he occasionally reveals how his attitudes towards societal events and reforms impacted upon his judicial role. He reminds us that, in essence, a judge is the product of his own experiences and that any pretence that the law is wholly objective is a chimera. He reveals in the Introduction the influence on him of his ‘great teacher’ (p x) Julius Stone, who taught his students ‘that judges and lawyers had to be very aware of the impact on their minds and values of their life’s experiences’ (p x). Of course, Stone’s observation is certainly a controversial description of the judicial role of judges because the view that ‘judicial experience and values were, and should be immaterial to case outcomes’ (p x) is still firmly implanted into the DNA of the legal profession. All of these issues are worthy of sustained scholarly discussion in Australia, a message which was communicated to me soon after my arrival in Australia in 1975 when I became the last full-time research assistant to Professor Stone.

The memoir’s pivotal point comes at page 91 where Kirby states:

The slow process of reform in relationship recognition has been a persistent feature of successive governments, Coalition and Labor, in Australia over the past decade. Whilst so many countries have leapt ahead to 'open up' marriage to same-sex couples, Australian governments have refused even to contemplate civil union or civil partnership. ... This is a humiliating and outrageous denial of civic equality. According recognition in matters of pensions, money and material things is good and fitting. But denying equality in a matter that concerns the dignity and respect due to precious long-term relationships is hurtful, and against society's interest. Money is not enough. Dignity, recognition and acceptance are precious in their own right.

A review of homosexual law reform throughout the world reveals that the realm of private morality or immorality is not the law's business. Kirby's view of same-sex marriage is presumably based on the utilitarian principle that society's interests are served by increasing the total amount of satisfaction of its members. In contrast, a social conservative believes that, although same-sex and heterosexual marriages may be functionally equivalent from a utilitarian point of view, same-sex marriage violates the moral law, as bequeathed to humanity by the Bible. A social conservative would not be swayed by the many references in the memoir to the power of science which, according to Kirby, has overhauled the arguably immature messages of the Bible. Hence, for social conservatives it is unlikely that 'when the simple scientific truths are placed alongside the words of scripture understanding will follow' (p 164).

In his memoir, Kirby does not chide the Gay and Lesbian Mardi Gras which is held annually in Sydney every March. In 2000, the Mardi Gras was condemned by the Catholic and Anglican Archbishops of Sydney because it 'was a horrible spectacle of eroticism that promoted a homosexual "lifestyle"' (p. 97). To my mind, the Mardi Gras may be

criticised not because it promotes a homosexual lifestyle, but because of its public display of eroticism and promotion of hedonism as a lifestyle. In doing so, it detracts from the cause of sexual reform in Australia that Kirby seeks to promote for the gay community by emphasising hedonism over personal responsibility and stability.

I attended the launch of Kirby's memoir in Perth. In his lively and spirited talk, Kirby suggested that, although he has been actively involved in homosexual law reform, he is a 'traditional' sort of person, whose aim is certainly not to start a world revolution. It is a sentiment that is also expressed in his memoir where he proffers the view that 'in fundamentals I am a little conservative' (p 190). However, in actively denouncing discrimination on the ground of sexual orientation, he may well have made a lasting, progressive and positive contribution to Australian society.

I noticed one mildly amusing mistake in the memoir. Justice Kirby states that everyone had told him that his 'German accent was good. No, it was superb – almost native' (p 75). His teacher used to say that he had a 'natural feeling' for the German language, which is expressed in German as *Sprachgefühl*. But, unfortunately, the impact of the teacher's assertion is somewhat weakened by the incorrect spelling of the word as *Sprachtsgefühl*.

In short: this memoir comes highly recommended because it provides readers with an unprecedented insight into one of the great legal minds of Australia and documents, by way of self-contained stories, Kirby's and Australia's quest for openness and greater equality.