

ON MICHAEL KIRBY

Fare well, Justice Kirby

ELISA ARCIONI provides an insight into life as one of Justice Kirby's associates

Who can believe it? 'The great dissenter', the judge with a Facebook site dedicated to him,¹ the person known affectionately to his associates as 'our Judge', Justice Michael Kirby has reached the end of his federal judicial tenure. Justice Kirby has turned 70 and, as required by section 72 of the *Constitution*, must leave his office in the High Court of Australia.

Analysis of the Judge's jurisprudential influence will flow soon enough. This piece is instead a reflection on the experiences of his associates to provide some different insights, such as into the workings of his High Court chambers. Those chambers consisted of a small team — the Judge, his indomitable personal assistant Janet Saleh and the two associates. There was never any doubt that the associates (who changed annually) were the least expert of the four. But between the Judge and his PA, no-one can say who had the upper hand. Janet, may you enjoy your retirement (that coincides with the Judge's) and may 'The Edit Queen' live on for many happy years without ever having to see another 'edit'.

The well-known workaholic

A Kirby associate's average day shows the breadth and volume of work that travelled through those chambers. Most High Court associates work exclusively on judgments. In addition to the Kirby judgment-load (often greater in page numbers than in other chambers) the Kirby associates had to arrange travel, cups of tea, lunches for numerous people, handle dozens of pieces of correspondence and dabble in some typing. You name it, we did it.

Although our workload sometimes felt overwhelming, the following anecdote from Edward Brockhoff² shows that the Judge worked more than we did, managing to fit in an extraordinary amount of extra-judicial activity:

I once accompanied the Judge on a trip to Adelaide. He was there for exactly 24 hours. In that time, he delivered a speech at a gala dinner for law students; a speech at a breakfast for young lawyers; attended a graduation ceremony; dined with law faculty; delivered speeches at two universities and attended an opening of barristers' chambers. I was exhausted. The Judge was just getting started.

Strength against opposition

The workload was particularly challenging in 2002, due to two external factors. The first was Gaudron J's retirement, which required all outstanding judgments to be delivered before her departure. The second, being the more trying of the two, was referred to by Kirby J in a message inscribed to me at the end of my year:

The year 2002 had its dark side — in the Court and in the world. The events of March 12th will be written on our hearts — like s 92 of the *Constitution* was written on the heart of Latham CJ. But like the old jurisprudence of s 92, these events and all else pass away... When you look

back on your time in the High Court of Australia think of the earnestness and bright spirit with which we tackled so much together.

The 'dark side' to which the Judge referred was the scandalous (and subsequently unreservedly withdrawn) allegations made by Senator Heffernan under the veil of parliamentary privilege. In the wake of Heffernan's attack, Kirby J received thousands of emails, letters and phone calls. All but a handful of these were expressions of support in response to what Robert Manne described as 'the most virulent expression of homophobia Australian public life had witnessed in very many years'.³

Characteristically, on the morning following the allegations, Kirby J did not let them distract him from his work. He continued with his judicial and extra-judicial activities and quickly set about responding to every piece of correspondence he had received.

Walking the talk

Perhaps in response to having experienced discrimination, Kirby J sought to assist others in overcoming barriers to success. This was especially true of his method of recruiting associates — much sought-after positions which help open doors into academia and private practice. Unlike most High Court judges, who relied upon recommendations and unsolicited applications, Kirby J advertised at every Law School in the country. Without compromising on standards, he actively sought to employ students from regional or smaller universities.

Justice Kirby thereby opened up the opportunity to all students. This can be contrasted with another judge who has acknowledged that he could be accused of bias towards certain universities, but stated that he could justify his choice of associates on the basis of 'merit'. Justice Kirby's process meant that he also reached out to those equally 'meritorious' applicants who had no relationship with the legal community and who may not even have known that the otherwise unadvertised positions existed.

The contrast between Kirby J's open recruitment process and the approach adopted by many on the Court mirrors that which often emerged between their respective approaches to the law. This contrast is revealed in the following anecdote from Katharine Young.⁴

I have a memory of the judge explaining his interpretive theory of the *Constitution*. 'I'm a Maximalist, Katie' he said, thrusting his arms in the air as if embracing the world. 'Many on the court are Minimalist, but I'm a Maximalist.'

Judicial 'rock star'

All the Kirby associates soon realised, if they hadn't been aware of it before their appointment, that Kirby

REFERENCES

1. The Justice Michael Kirby Appreciation Society, see [facebook.com/group.php?gid=2320132248](https://www.facebook.com/group.php?gid=2320132248).
2. Edward is one of the Judge's last two associates, for the year 2008/2009.
3. Robert Manne, 'The descent of Howard', *The Age* (Melbourne) 18 March 2002. See theage.com.au/articles/2002/03/17/1015909916190.html.
4. Katharine was Justice Kirby's associate in 2001, currently SJD Candidate and Graduate Fellow, Edmond J Safra Foundation Center for Ethics 2007–2008, Harvard Law School.

J has a huge fan club (as well as some detractors). This celebrity was nowhere more evident than when he visited Australian universities. I recall students asking him to sign anything from a copy of the *Constitution* to the shirt on their back, which was often printed with a logo such as 'We Love Kirby' or 'Kirby Rocks'.

What was more surprising to me was his interaction with other public figures. One day, waiting for a plane in Canberra and sitting in the Qantas Lounge with the Judge, I saw the Dalai Lama. The Judge asked if I'd ever met the spiritual leader of Tibet, to which I, not surprisingly, answered 'no'. In response, the Judge invited the Dalai (with whom he obviously had a friendship) to join us, introduced me and engaged in an inclusive discussion. I never imagined such an experience to be part of the job description of judge's associate.

Humanity

The last stories I relate convey the humanity of Kirby J. The warmth and sociability of the Judge is well-known, and demonstrated to me through his interest in my family. He came to dinner at my house to meet them and sends his best wishes to them whenever I see him. During Court sittings, he would always invite my partner (now-husband) to the monthly Judge and associate dinners. In each of his years on the Court, Kirby J invited his past and present associates and their partners to celebrate his birthday with him. Most recently, that invitation extended to my then 10-month-old daughter.

Justice Kirby expected a lot from his associates, but was never unreasonable. Andrew Leigh remembers the day he forgot to bring a judgment to Court when Kirby J was to deliver it:⁵

It was my first month on the job. I was standing behind the Judge's chair in Courtroom No 1 when he asked 'Where is it?' My stomach turned over as I realised my omission — I had forgotten the judgment. I wanly whispered that I could give him a pile of papers that might look to the rest

of the courtroom like a real judgment. He firmly replied 'No'. I briskly walked from the courtroom in the hope that I might get up to chambers and back with the judgment in time. Needless to say, I failed, and the transcript for the morning reads:

'Kirby J: I concur with Chief Justice Brennan, and will deliver my reasons when they arrive.'

I expected him to be furious at lunchtime, but he graciously accepted my apologies, smiled and said 'We all make mistakes Andrew'.

Justice Kirby's humanity was also evident in his dealings with the international community, as remembered by Katharine Young:

In 2006, Kirby J gave a keynote address to an international gathering of judges at Harvard Law School. The setting was very serious and formal, perhaps even a trifle conservative. Justice Kirby's speech described the trend of judges citing each other's opinions and learning about each other's systems of law and about international law: a trend, of course, which he was part of setting. Towards the end of the speech, the subject turned to the human rights implications of same-sex marriage. Justice Kirby gave an expert summary of equality jurisprudence, and then mentioned his and his partner Johan's thoughts on marriage. It was a celebration of judicial candour, as well as of equality in the law, and I doubt it will be forgotten by many of the judges, law professors and students present.

5. Andrew was Justice Kirby's associate in 1997/1998 and is currently Associate Professor, Economics Program, Research School of Social Sciences, The Australian National University.

Fare well

Justice Kirby will be remembered as a unique justice of the High Court of Australia. His associates will remember him as an extraordinary boss and the time working for him as fascinating, demanding and sometimes surprising. I'm sure we will all hear about his activities post-judicial office. From all of us, Judge, fare well but not farewell.

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- Addressing salary levels and working conditions within CLCs;
- Responding to demographic change and need within the legal profession; and,
- Increasing the commitment of public sector funding to legal service provision.

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