ON MICHAEL KIRBY

Justice Kirby and references to the *Alternative Law Journal*

SIMON RICE wonders at the impact of our Journal

In a recent trivia quiz on law reform and social justice, I had to warn contestants that, despite their instincts, the answer to four of the 10 questions was not 'Michael Kirby'. The answer to one was; the answers to the other three were Lionel Murphy, Isaac Isaacs and Professor Michael Coper.

But here is a question I didn't ask, to which 'Michael Kirby' *is* the answer: 'Which High Court judge has referred to Alternative Law Journal articles in their decisions more often than any other judge?' The only other judges to do so at all are Brennan CJ, McHugh J and Murphy J (once each), the latter two referring to the journal when it was the Legal Service Bulletin (in *Pollitt v R* [1992] HCA 35; (1992) 174 CLR 558 and *Koowarta v Bjelke-Petersen* [1982] HCA 27; (1982) 153 CLR 168 respectively).

Negligence

Chief Justice Brennan's reference was in the same case, and to the same article, as the first of the eight cases in which Kirby J referred to the Alternative Law Journal; *Romeo v Conservation Commission of the Northern Territory* [1998] HCA 5, (1998) 192 CLR 431. Justice Kirby was one of five judges who dismissed an appeal and confirmed that a young woman, aged 16, who had fallen in a nature reserve and become a paraplegic, was not entitled to damages from a public authority. In an earlier High Court decision, *Nagle v Rottnest Island Authority* [1993] HCA 43, (1993) 177 CLR 423, a public authority had been held liable in similar circumstances.

The *Nagle* decision was controversial, and was criticised by Sandra Berns in an Opinion piece, 'Judicial paternalism and the High Court' (1993) 18 *Alt LJ* 202. Berns' view was that '*Nagle* imposes an unrealistic standard of care on public authorities', and that '[t]he court's paternalistic attitude is truly remarkable'. Justice Kirby noted the criticisms of *Nagle* and referred to the Berns' Opinion, but for purposes of deciding *Romeo* he distinguished *Nagle* on its facts. Chief Justice Brennan, who had dissented in *Nagle*, cited Berns' Opinion and, alone of the seven judges, said *Nagle* should be overruled.

The race power

Three months after the decision *Romeo*, the High Court decided the important 'Hindmarsh Island Bridge case', *Kartinyeri v Commonwealth* [1998] HCA 22, (1998) 195 CLR 337. Justice Kirby was in sole dissent. At issue was the constitutional validity of legislation that removed the protection against development that the *Heritage Protection Act* offered to aboriginal land. The majority view was that the legislation was valid under the 'race' power: s 51(xxvi) of the *Constitution*. In Kirby J's view, the race power did not extend to a law that 'is detrimental to, and adversely discriminates against, people of the Aboriginal race of Australia by reference to their race'.

In recounting the background to the litigation, particularly a failed challenge against a South Australian Royal Commission into the indigenous claims concerning Hindmarsh Island, Kirby J referred to Maureen Tehan's article, 'A tale of two cultures' (1996) 21 *Alt LJ* 10, in which Tehan gives an account of legal and related events in the long-running case, including the political background, the Federal Court cases, and Royal Commission inquiry and findings.

Battered woman syndrome

At the end of the same year, 1998 — a busy one for the Alternative Law Journal in the High Court — Kirby J was part of a narrow (3:2) majority in *Osland v R* [1998] HCA 75, (1998) 197 CLR 316, upholding the conviction of Heather Osland for the murder of her husband. Mrs Osland's appeal relied in part on directions given by the trial judge on the defences of provocation and self-defence as they related to battered woman syndrome. On this question all judges agreed that the appeal failed, but Kirby J added lengthy comments on battered woman syndrome, discussing issues about the accuracy of its name, and its status as a scientific phenomenon on which expert evidence could reliably be given.

In considering the extent to which the manifestation of battered woman syndrome is culturally specific, Kirby J referred to Ian Freckelton's Brief: 'Battered Woman Syndrome' (1992) 17 *Alt LJ* 39. Reporting on *Runjancic and Kontinnen v R* (1991) 53 A Crim R 262, the first case in which evidence of battered woman syndrome had been admitted in a superior court in Australia, Freckelton discusses the extent to which women can be assumed to react in a particular way to the experience of living in a violent relationship. He notes that:

> [t]he danger is that women who are the subject of domestic violence come to be expected to exhibit 'classic signs' of battered woman syndrome and in fact, because of their particular personality or background, do not fit the mould (for instance because of their cultural background), their attempts to mount defence of self-defence, provocation and duress will be undermined.

Lawyer's immunity

The following year the case of *Boland v Yates Property Corporation Pty Ltd* [1999] HCA 64, (1999) 167 ALR 575 offered the High Court the opportunity to reconsider the scope of its decision in *Giannarelli v*

Wraith [1988] HCA 52, (1988) 165 CLR 543, in which it had confirmed the legal profession's immunity from claims of negligence for court-related work. Apart from Kirby J, only Gaudron J was prepared to reconsider *Giannarelli*, but as she upheld the appeal on other grounds she felt it unnecessary to do so.

Although Kirby J agreed with the result in the case, allowing the appeal and setting aside the orders of the Federal Court, he was alone in his support for the Federal Court's reservations about the scope of the High Court's decision in *Giannarelli*. Justice Kirby referred to Simone Brookes' article, 'Time to abolish lawyers' immunity from suit' (1999) 24 *Alt LJ* 175, the title of which states clearly Kirby J's own view. Brookes' analysis of the advocates' immunity is based on a comparison with the liability of medical practitioners, an analogy rejected by McHugh J in *D'Orta-Ekenaike v Victoria Legal Aid* (below). Justice Kirby referred to Brookes when commenting on the oft-noted contrast between the 'ever more stringent obligations of care' imposed on other professionals and 'the immunity accorded by the law to its own'.

Some years later, the case of *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12, (2005) 223 CLR 1 gave Kirby J the chance to restate his call to reconsider *Giannarelli*. After committal, trial, conviction, appeal, re-trial and acquittal on a charge of rape, Mr D'Orta-Ekenaike sued his lawyers, who relied on the *Giannarelli* immunity. Although Gleeson CJ, Gummow, Hayne and Heydon JJ were blunt in saying '*Giannarelli* should not be re-opened', and McHugh J was of the same mind, Kirby J saw the issue not as a 're-opening' of *Giannarelli*, but as a necessary clarification of its meaning and scope. In a long and detailed analysis Kirby J again referred to Brookes' article.

Fresh evidence

In *Re Sinanovic's Application* [2001] HCA 40, (2001) 180 ALR 448 Kirby J sat alone to decide whether to give leave to an applicant to re-open an application for special leave to appeal after the application had previously been refused by Gummow and Callinan JJ. The applicant was illiterate, indigent and incarcerated, and Kirby J allowed his wife to speak on his behalf. The applicant could show neither exceptional circumstances nor fresh evidence, and so the application was refused.

In his decision Kirby J observed that a:

> good instance of the discovery of … fresh evidence recently arose in [*R v Button* [2001] QCA 13, where] DNA evidence, discovered after a trial and before the hearing of the appeal in that Court, conclusively demonstrated that the prisoner was innocent,

and referred to a note about the case in (2001) 26 AltLJ 97 at 97–98. The note was a contribution by Jeff Giddings to the national round-up column DownUnderAllOver, and recounts how the Queensland Court of Appeal released a man on the basis of evidence that had arisen after his conviction.

Free speech

In *ABC v Lenah Game Meats Pty Ltd* [2001] HCA 63, (2001) 208 CLR 199 Kirby J agreed with the result, allowing an appeal against the decision of the Full Court of the Tasmanian Supreme Court to injunct the ABC's screening of a television program, but on different grounds from the majority. Kirby alone found that the discretion had miscarried because it 'was granted without appropriate consideration of the constitutional principle in *Lange* protecting freedom of communication concerning governmental and political matters'. The other judges found it unnecessary to decide this ground of appeal.

The subject matter of the television program was the commercial 'processing' of brush-tailed possums. Kirby J saw this as being within the scope of the constitutional principle in *Lange*, saying that '[t]he concerns of a governmental and political character must not be narrowly confined', and that 'concerns about animal welfare [and the export of animals and animal products] are clearly legitimate matters of public debate across the nation'. In observing that '[m]any advances in animal welfare have occurred only because of public debate and political pressure from special interest groups', Kirby J referred to an article by one of the McLibel co-defendants, Dave Morris, 'McLibel: do-it-yourself justice' (1999) 24 *Alt LJ* 269. In the article Morris tells the story of the McDonald's Corporation's infamous suit for defamation in response to leaflets that claimed that McDonald's caused animal suffering.

Asylum seekers

Re Woolleys [2004] HCA 49, (2004) 225 CLR 1 was one of the many asylum seeker cases to reach the High Court. Four Afghani children, held with their parents in Baxter Immigration Centre, sought orders for habeas corpus, prohibition and injunction. In seven separate opinions the High Court unanimously dismissed the application. Kirby J agreed that children were lawfully detained, saying that the relevant terms of the *Migration Act* were clear, valid, and 'the result of a deliberately devised and deliberately maintained policy of the Parliament'. In noting that the position in relation to detention of asylum seekers is different in Europe, Kirby J referred to a Brief on asylum seekers by Jane McAdam, 'Australia and Europe – worlds apart' (2003) 28 *Alt LJ* 193 in which McAdam details the many ways in which treatment of asylum seekers was more humane in Europe than in Australia.

In each of these eight decisions, Kirby J referred to material in the Alternative Law Journal to support argument, and to provide background and detail. His use of the Journal illustrates the wide range of topics it covers, from evidentiary rules and criminal defences to asylum seekers and lawyers' negligence, and shows too the useful diversity of ways in which the Journal publishes material: refereed articles, shorter descriptive 'briefs', reporting of current issues, and editorial opinions.

It seems apt that it is the High Court judge who has in his decisions been most attuned to the effect of law on minority groups and the marginalised who has found most to rely on in Australia's 'alternative' law journal.

SIMON RICE teaches law at ANU.