

# reform

a regular bulletin of law reform news, views and information  
Australian Law Reform Commission, Box 3708, GPO, Sydney, 2001, Australia

Editorial committee: I. Freckelton, R. Harmer, B. Hunt, R. Phillipps, V. Pursell, L. Re, D. Shiff,  
W. Tearle, G. Zdenkowski

**october 1984 no 36**

## **in this issue**

justice michael kirby CMG	130	ninth ALRAC	149
stoneybroke	135	contempt and family law	152
punishment	136	industrial democracy	155
courts and judges	139	odds and ends	157
defamation and sensitive private facts	142	new reports	163
disorganised crime	144	new references	164
video nasties	145	what's going on in the LRC's	164
sex discrimination and law reform	147	personalia	166
index to <i>reform</i> , issues 1 to 35		reforming <i>reform</i>	168

## **justice michael kirby CMG**

He has put Australia on the map so far as the law is concerned. But that is not his greatest contribution. The greatest contribution I think he has made is that he has put law on the map so far as the people of Australia are concerned.

J.B. Piggott, CBE, Chairman, Tasmanian Law Reform Commission. 9th Aust Law Reform Agencies Conference, 1984.

The foundation Chairman of the ALRC, Justice Michael Kirby, CMG, has stepped aside from that post to take up an appointment as President of the New South Wales Court of Appeal. On 24 September 1984, after almost a decade of

complete devotion to the cause of law reform in Australia, Justice Kirby returned to the bench as a full-time appellate judge.

Justice Kirby's departure represents the end of an era for the Commission. He was appointed on 4 February 1975 as the Chairman and first full-time member of the Commission. As such, he presided over it from its modest beginnings, in two disused robing rooms tucked away behind the Industrial Court in Sydney, growing into the organisation of today, with 4 full-time

and 11 part-time Commissioners, employing 34 staff, and with offices in both Sydney and Canberra. During that time Justice Kirby became very well known as a dedicated and enthusiastic advocate for law reform. His influence on contemporary Australian society widened through his appointments to many other offices of responsibility. In 1983 he was named a Companion of the Order of St Michael and St George, and soon afterwards was elevated to the bench of the Federal Court of Australia.

As might be expected of a person with such prominence in public affairs, Justice Kirby has his critics as well as his supporters. But on one thing all are agreed: Justice Kirby's reputation as a 'workaholic' is fully justified! The popular image of the former Chairman as a 'workaholic' is certainly an accurate one. His reputation as a tireless worker was well established before his term of office at the Commission. Speaking of Justice Kirby's time at the bar, another Sydney barrister recalled: 'When I got out of bed at 7.30 am I had the unpleasant knowledge that Kirby had been working in his chambers for at least an hour.'

As Chairman of the Commission, he was well known for working 7 days a week, although it is believed that there were some Christmas Days when he was absent from the Commission. One story told of the early days of the Commission recalls the Chairman and another foundation Commissioner, Mr Gareth Evans (now Federal Attorney-General), pacing up and down with a dictaphone in each hand (one for text, the other for footnotes), preparing the Commission's first reports. Whatever the accuracy of that story, Justice Kirby's reputation as a workaholic is borne out by an examination of those first reports. The first two references were received from the then Attorney-General on 16 May 1975. The Commission's first report, *Complaints against Police*, was completed on 7 August 1975. The first *Annual Report* was also completed on that day. Four weeks later saw the completion of the next report, *Criminal Investigation*.

Just what was Justice Kirby doing all that time

to earn such a reputation? The following are some of his principal activities during the period of his office:

**all commission references.** Justice Kirby was a member of every Division of the Commission since its inception. He was either principally responsible for, or contributed to the preparation of, each of the Commission's 23 reports to date, and to those which are currently in preparation. Indeed, over the years some Commissioners discovered to their astonishment the extent to which the Chairman took an interest in the detail of both content and style of draft reports that were circulated for comment.

**reform itself.** Regular readers of *Reform* will know that all previous 35 issues were prepared under Justice Kirby's editorship. But he was by no means a mere supervising editor. Each of the preceding issues of this bulletin was written by Justice Kirby himself. His practice was to set aside one weekend every 3 months, during which he would dictate *Reform* from cover to cover. Members of the editorial committee now sharing this task will sorely miss his willingness to assume sole responsibility for its preparation, and his ability to write interesting and entertaining articles in the space of one or two days.

**correspondence.** His high media profile was such that he attracted vast amounts of correspondence. The Chairman himself prepared thoughtful individual replies to each letter forwarded to him. In this aspect of his work, he was fortunate indeed to have had the complete support and assistance of his hard-working personal secretaries over the years, Mrs Rae Hay, Mrs Jennifer Clark, and Mrs Anna Hayduk.

**wider interests.** In 1974 Justice Kirby was appointed a Deputy President of the Australian Conciliation and Arbitration Commission. Other offices which he has held include membership of the Administrative Review Council of Australia, the Australian National Commission for UNESCO, the Australian Institute of Multicultural Affairs, and the Executive of

CSIRO. He has had a long association with universities. He was a Fellow of the Senate of the University of Sydney from 1964 to 1969, and Deputy Chancellor of the University of Newcastle from 1978 to 1984. Since February 1984 he has been Chancellor of Macquarie University. Justice Kirby is associated with many scholarly journals, and with numerous cultural activities. He is Patron of the Friends of the Museum of Applied Arts and Sciences (Sydney), and he is a Member of the Council of the Australian Opera.

*beyond law.* Justice Kirby has consistently looked beyond the confines of 'mere law' to both the relationship between law and other disciplines and the international ramifications of law reform. Recent speeches he has made include, 'Pharmacy and Law Reform', 'Cable TV – Protecting Individual Rights', 'Breastmilk Substitutes, Bioethics and Law Reform', 'Freemasonry, Reform and the Future', 'Orthodontists, Dentistry and Law Reform', and even 'Urology and Law Reform'. Particularly notable has been his awareness of the need for different law reform agencies, both in Australia and abroad, to communicate with each other and learn from each other's experiences. He has encouraged this wherever possible. His Honour has also participated in the work of UNESCO and the OECD in relation to the consequences of trans-border data-flows: to the uninitiated, computers talking to each other in different countries and across the world. In 1983 in recognition of his work on the relationship between law and science in the 1980's he was appointed to the board of CSIRO and has since been active on its executive.

A subject of longstanding and particular involvement on the part of Justice Kirby has been bioethics. His contribution in this field has been truly international. In September, 1983 at a conference on Bioethics and Law in London, he crystallised his approach to the issues in characteristic fashion:

The need to develop institutional means of responding to bioethical questions is plainly urgent. For the good health of the rule of law, whether in

Britain, Australia or elsewhere, it is necessary to give urgent attention to the institutions that will be adequate to respond to the numerous problems now being presented by medical and other sciences. It is the misfortune of the present generation to face at the one instance in history, the quandaries of nuclear fission, the microchip and new information technology and rapid advances in biotechnology. Scientists have proved themselves ingenious and inventive. It is up to lawyers, philosophers theologians and law makers to prove themselves equally competent.

He is a great admirer of Lord Denning. They have much in common. Each has a distinguished command of language, each is a marvellous communicator. Denning once wrote that he acquired his skill, in part, by practice: 'I crossed out sentence after sentence. I wrote them again and again' (*The Discipline of Law*, 1979). Justice Kirby likewise is modest enough to admit of the value of refining – he looks upon the word processor as an indispensable modern aid. He has long praised the English language, urged the art of plain English (and the odd wink or sniff) and damned inarticulate Australia. In 1983 Justice Kirby was named Rostrum 'Speaker of the Year'. At times it was difficult for other Commission personnel to keep track of their Chairman's many speaking engagements, both within Australia and overseas. It was possible to have had a conversation with him about some issue in the morning, and again in the late afternoon, only to discover that, in the meantime, he had been to Melbourne to deliver an address.

*the judiciary revealed.* In 1983 the ABC invited Justice Kirby to deliver the Boyer Lectures, joining the company of other prominent Australians such as Sir MacFarlane Burnet, Professor Julius Stone, Mr Bob Hawke, Professor Manning Clark and Sir Zelman Cowen. He took as his theme 'The Judges', and invited his audience behind 'the purple curtain' which shields the judiciary from the public gaze. These lectures exemplify the Kirby approach to social and legal issues in five ways. Firstly, they broke new ground. Previously, public examination of the judiciary in Australia was rare; public discussion of the judges by fellow judges was unheard of. Secondly, Justice

Kirby adopted a style which made the issues readily comprehensible, without 'talking down' or over-simplifying. Thirdly, they were informative. An enormous amount of information was packed into a small space. Fourthly, they were critical. They frankly discussed many of the problems confronting the judiciary, and the need for reform. Among the issues he identified are the under-representation in the judiciary of many elements of the Australian community, the need for a formal system of judicial training, and the need for a formal system of review of complaints against the judges. Finally, they were controversial. They caused, and continue to cause, a great deal of comment and debate, not all of it complimentary.

Perhaps the most publicised attack on the lectures came from a fellow judge, Justice Peter Connolly of the Supreme Court of Queensland. In a review of the lectures, Justice Connolly characterised them as 'shallow, superficial, trendy, and ... ungracious.' In a speech in reply delivered in Brisbane, Justice Kirby welcomed Justice Connolly's 'forthright, if somewhat irascible' contribution, effectively rebutted Justice Connolly's assertions and took the opportunity to stress the issues that are central to the lectures. In the main, however, the response to the lectures was one of approval. Indeed, some thought Justice Kirby had not gone far enough in his criticisms. Whatever view one takes of the lectures themselves, it is clear that they have set the agenda for a vigorous, frank and healthy debate concerning the judiciary which will eventually result in some needed reforms.

***a view from outside.*** In the ALRC's first *Annual Report*, Justice Kirby reviewed the history of law reform in this country ('Years the Locusts have Eaten'), and indicated the approach to be adopted by the new national law reform body. A full assessment of the first 10 years of the ALRC has yet to be written. That history will necessarily relate Justice Kirby's deep involvement in the process of legal and social change, and the development of law reform techniques. While the complete account must await another day, the views of two eminent

lawyers, each a former Commissioner, might be noted. In 1978 the then Governor-General, Sir Zelman Cowen, said:

[U]nder the direction of a talented and very able Chairman, Mr Justice Michael Kirby, who matches great intellectual capacity with a flair for publicising the issues in law reform, ... [the Commission] has attracted public interest to a degree unparalleled in my experience ...

And Professor Alex Castles paid the following tribute:

In a fashion which follows in the mould of those like Felix Frankfurter, who have had the great facility of making the law intelligible to a wide audience, Michael Kirby shows a capacity to engage the attention of his readers, take them to the heart of legal issues and expose the problems which deserve their attention. He moves easily and readably from discussions on the role of law reform in contemporary Australian society, the operations of agencies working in this field, and their difficulties, through to an examination of individual topics which have raised his concern or have been the subject of his Commission's formal activities.

***and from within.*** It is entirely appropriate for this bulletin to give its readers an idea of the work of Justice Kirby as seen from within the Commission. From the perspective of the Commission itself, four principal contributions come to mind:

- The first is his astonishing contribution to each of the Commission's references. As mentioned above, Justice Kirby was involved in the preparation of each of the Commission's reports. He made a highly detailed contribution to each report, including those for which he was not primarily responsible. His particular gift was an ability to set a particular reference within its wider legal and social context. Commissioners and staff, working over long periods on the detail of a project, appreciated his ability to place the issues of a particular reference (be it privacy, debts, insurance or whatever) into a global context.
- Possibly his greatest contribution was

the manner in which Justice Kirby insisted in following up the Commission's reports. He was particularly concerned that the reports of the Commission were given thoughtful consideration within the appropriate government departments. Until Justice Kirby, the received view had been that Commissions such as ours had discharged their duty upon delivery of their reports. Fortunately this was not the view of the Chairman. He had a keen awareness of the processes of government, and managed to keep the Commission's reports alive and their recommendations before both the public and the administration.

- Central to the former Chairman's approach to law reform was his belief in the involvement of the public at all stages in the Commission's work. Accordingly, public hearings were held at which members of the public could present their views on issues which were before the Commission for consideration. Apart from these special occasions, Justice Kirby made use of opportunities presented by his speaking engagements, and by the media, to explain to the widest possible audiences how they might best contribute to the processes of law reform. It is clear that Justice Kirby attached great importance to this aspect of the Commission's reform technique. In his book *Reform the Law* he wrote:

In one sense, the role of the Australian Law Reform Commission in promoting community debate and professional acceptance of the needs of reform may be a more lasting and pervasive contribution to law reform in Australia than any particular project, even where followed by Federal legislation.

- Although Justice Kirby was keen to take a leading role in publicising the Commission's work, he always recognised Commission personnel whom he believed had succeeded in their work. He was generous in his recognition of

the contribution of personnel to the reports and other activities of the Commission.

This brief account of Justice Kirby's involvement with the Commission will necessarily be incomplete. But this opportunity should also be taken to record the appreciation of those who worked with the Chairman for his generosity at a more personal level. A definite highlight of the Commission's year was the Christmas Party, which Justice Kirby used to host at his harbour-side home in Sydney. In fact, although on two occasions other commitments prevented him from attending the party, he still made his home available to the Commission caravan at Christmas. This is not the place to record the history of those parties, but they were always memorable!

*future.* This has been an important year for Justice Kirby. In the course of a speech in March 1984, he recounted various stages of his life. He mentioned that, having already received 'that supreme Australian accolade — the book launch', he had then reached the pinnacle by being invited to open a Sydney bookshop! 'How can one compare the mere launching of a single book with the opening of a whole bookshop?' 1984 was to see Justice Kirby move into another phase of his professional life: full-time judicial office, and the leadership of the NSW Court of Appeal.

Justice Kirby will preside over the Court of Appeal at a time when the judiciary is the subject of considerable public discussion and controversy. He brings to that office his encyclopaedic knowledge of the law, an orderly, logical and principled approach to legal decision-making, and an insight into the many aspects of Australian life which were the subject of his study during his term of office at the Commission, and his involvement in other institutions, both here and abroad. In accepting the challenges of the Presidency of the Court of Appeal, Justice Michael Kirby has the continued support and friendship of his colleagues at the Commission. He will be missed. We wish him well.

## stonybroke

'O money, money, money, I'm not necessarily one of those who think thee holy, But I often stop to wonder how thou canst go out so fast when thou comest in so slowly.'  
(Ogden Nash, Hymn 1934)

The task of reviewing the principles, methods and systems of Australian insolvency law is one that is compelling if not daunting. It might be likened to that of the biographer,

'One pictures the biographer, however cheerfully he may have undertaken his task, glowering with sullen determination and resentment at the huge mass of intractable material any life must represent.'  
(Graham Greene, Essay on GK Chesterton 1944)

Regardless, work has commenced on the Commission's General Insolvency Inquiry reference. It is being led by Ronald Harmer, one of the new full-time Commissioners (see *Personalia*, in this issue).

Like the biographer, he has undertaken the project with cheer and optimism. Whether he is to be afflicted by the mid-term crisis of the biographer, remains to be seen. However, the early progress of the reference suggests not.

Within the few weeks since Mr Harmer's appointment it has become apparent that this reference has very wide support. Already:

- Detailed submissions on the Reference have been received from the Australian Institute of Credit Management and the National Credit Managers' Association.
- A close consultative link has been established between the ALRC and the Companies and Securities Law Review Committee (see [1984] *Reform* 109). The Commission and the Committee have a joint interest in the law and practice relating to corporate insolvency. Liaison between the two bodies will be invaluable.
- Mr Harmer has met informally with representatives of various interested bodies, including the Executive of the Insolvency Practitioners Association of Australia. That body is representative of

most liquidators and registered trustees in bankruptcy throughout Australia. It is engaged on preparing a submission to the Commission.

- At government level welcome support and co-operation has been volunteered by two government agencies, the Official Receivers in Bankruptcy throughout Australia (through Mr PJ Wenn, the Inspector General in Bankruptcy) and the Registrars in Bankruptcy (through Mr JT Howard, the Principal Registrar of the Federal Court of Australia). Both of those agencies can afford the Commission considerable experience and guidance.

These are healthy beginnings. Mr Harmer said that he was most encouraged by the very positive response that he had already received. It is a project where there is an obvious need for extensive consultation. Particularly so because of the considerable economic, commercial and social factors that must be brought to account in the final deliberations.

*the road ahead.* Mr Harmer said that the likely passage of the Inquiry will involve, in this order:

- the publication in the near future of a consultative paper in which the more apparent and important considerations are outlined. Submissions on those or additional perceived areas for reform consideration would be invited from interested persons and bodies;
- an intensive research programme with publication of research papers on the major areas of consideration;
- extensive consultation with a distinguished and representative panel of honorary consultants;
- the publication of a discussion paper which will express the tentative recommendations of the Commission and to which critical response will, as always, be urged;
- a series of public seminars to enable the discussion papers and any criticisms of