

## ON MICHAEL KIRBY

Judges can champion human rights explicitly and implicitly: in their judgments, their speeches, their (non-judicial) writing, and their lifestyle choices. We are particularly aware of this judicial capacity for effecting change since we both write, research and teach in the area of access to justice.

In preparing lectures, reading students' assignments and conducting our access to justice research, the judge whose work is most often cited and referred to is Michael Kirby. He has been by far the most prolific judge in Australia, writing in Australian and overseas law reviews, journals and the popular press 'in support of a disparate range of human rights and liberal causes as well as issues more directly related to the administration of justice.'<sup>1</sup>

It is not, however, because of the range and extent of Kirby's writing that we see it so often referred to. Students enjoy reading Kirby's decisions because they are eminently readable, written and structured clearly, with headings and extensive footnotes. But the primary reason for the frequency of citations is evident to anyone who reads Kirby's decisions, papers and speeches: his passion for human rights, and for equality before the law, supported by research, analysis, experience, insight, history, anecdote, cross-cultural awareness, humour, wit, and consistent positions of principle.

Kirby's opinions and ideas consistently illustrate his understanding of what it is to be in a minority group in Australian society – in cases concerning, for example, asylum seekers, prisoners, people with disabilities, and people living with HIV/AIDS. Accordingly, his reasoning is often expressed in astute opinions that are cited by those who are trying to understand how law can best result in just outcomes for all Australians.

Fittingly, several of the articles in this issue highlight what Kirby has seen as the destructive consequences of legal constructs that are based on stereotype, and follow his lead in identifying steps that need to be taken to pursue equal access to the law for all. Although he regards stereotyping as anathema to human rights, Kirby recognises that there are some differences between people that do need to be understood in the application of the law and celebrated in its practice. For instance his judgments have recognized that women continue to bear the brunt of childcare and other domestic tasks and that these activities should be considered as valuable contributions to relationships and society.<sup>2</sup> Similarly, in his extra-curial writing Kirby has advocated<sup>3</sup> that more barristers and judges and

law firm partners, need to be female – not 'simply male lawyers in skirts' but because, through their experiences and values, they can 'see issues, including issues of legal theory and practice' differently.<sup>4</sup>

In light of his views that a woman's perspective 'has a legitimacy which should find greater reflection in the judiciary', and that such a judiciary 'will tend to be more alert to discrimination and stereotyping in all of their manifestations', it is appropriate that Kirby's place on the High Court bench should be taken by a woman, Virginia Bell.

Kirby has not only 'talked the talk', publicly identified the challenges that face minorities in Australia; in a quiet way he has 'walked the walk', giving effect to his commitment to equality of opportunity by, for example, always employing one male and one female associate, and employing associates from a wide range of law schools, old and new. One of his former associates, Elisa Arcioni, writes in this issue, joining an eclectic collection of perspectives on Kirby's High Court career: the cover illustration of Ralph Heimans' portrait 'Radical Restraint', Simon Rice's review of Kirby's reliance on the *Alternative Law Journal*, and a significant contribution by Kirby himself, canvassing a wide range of possible reforms to law reform processes and the appellate judiciary. Various articles in this issue address concerns of the type that have been close to Kirby's heart, such as access to justice, control of state powers, anti-discrimination, and human rights.

Although Kirby's compulsory retirement is a loss to Australian jurisprudence, his decisions will remain freely accessible through AustLII <[austlii.edu.au/au/cases/cth/HCA](http://austlii.edu.au/au/cases/cth/HCA)>, his speeches as a High Court judge through the High Court <[www.hcourt.gov.au/publications\\_05.html](http://www.hcourt.gov.au/publications_05.html)>, and his earlier speeches through the NSW Law and Justice Foundation <[lawfoundation.net.au/judgments/Kirby](http://lawfoundation.net.au/judgments/Kirby)>.

The title of this issue, 'Challenge into the Future', is from a speech Michael Kirby gave in London in 2006.<sup>5</sup> The phrase is a simple reminder of Kirby's own invaluable role in the legal and intellectual life of Australia: recognising and addressing the challenges that carry us forward. As Michael Kirby leaves the High Court, we are confident that in his walk down other avenues of public life he will continue to make his characteristically courageous, provocative, thoughtful and gracious contributions to debates on fairness, equality and human rights in Australia.

PATRICIA EASTEAL and SIMON RICE

## REFERENCES

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2. See, eg, Patricia Easteal, 'Women' in Ian Freckelton and Hugh Selby (eds) *Appealing to the Future: Michael Kirby and His Legacy* (2009).
3. Michael Kirby, 'Women Lawyers - Making a Difference' (Paper presented at Women Lawyers' Association of NSW, Sydney, 18 June 1997) <[www.hcourt.gov.au/speeches/kirbyj/kirbyj\\_womenlaw.htm](http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_womenlaw.htm)> accessed 28 January 2009.
4. Citing Denise Réaume, 'What's Distinctive About Feminist Analysis of Law', *Legal Theory* 2 (1996) 265; Susan Williams, 'A Feminist Reassessment of Civil Society' 72 *Indiana LJ* 417.
5. Michael Kirby, 'Appellate Advocacy — New Challenges' (Speech delivered at The Dame Ann Ebsworth Memorial Lecture, London, 21 February 2006) <[www.hcourt.gov.au/speeches/kirbyj/kirbyj\\_21feb06.pdf](http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_21feb06.pdf)> accessed 28 January 2009.