Introduction

When invited by Jason Monaghan of The Federation Press to curate a new anthology of papers and speeches by the Hon. Michael Kirby AC CMG, I felt daunted by the scale of the task. I had the tremendous opportunity to serve as one of Michael Kirby's two Judge's Associates in 1991, when he was President of the Court of Appeal of New South Wales. By that time, Michael Kirby had already written and delivered hundreds of papers and speeches, from his appointment as inaugural full-time President of the Australian Law Reform Commission in 1975, onwards. I knew well that his writings and speeches had only multiplied since 1991.

One of those papers was titled "AIDS: A New Realm of Bereavement" (reproduced as Chapter 33 herein), given to the Third International Conference on Grief & Bereavement in Contemporary Society, in Sydney. What caught my attention about this paper in 1991 was the fact that one of Australia's most senior and prominent judges was talking publicly about grief and bereavement. His willingness to speak outside the four corners of the law – something frowned upon by traditionalists – was both exciting and, I thought, brave. I wanted to bring that side of Michael Kirby's papers and speeches to this collection.

In this anthology, I have chosen to sample not only the vast range of topics upon which Michael Kirby has cast his gaze, the extraordinary diversity of groups to whom he has spoken, and the roles he has occupied, but also the social, legal and technological changes that Australia and the world have undergone in the half-century in which he has been publicly writing and speaking. When Michael Kirby, Jason and I met over lunch in the café of the State Library in Sydney to discuss the merits and shape of this project (Michael Kirby was sceptical of the desirability and demand for a second "Festschrift" focused on him), we agreed that this book should also have a strong biographical theme. This inspired a focus on the extent to which the items selected said something about Michael Kirby himself. It also spurred the division of the book into Parts: Michael Kirby as *Boy, Son and Student*; as a legal *Practitioner*; and then *Law Reformer*, and so forth. Not all of the papers are written in the capacity of the title of the Parts. Some are much-later reflections on his life and time in that capacity, as in "Remembering Teachers" and "Memories of Hickson, Lakeman and Holcombe". Further, the subject-matter of the papers in each chapter is not mutually exclusive. Some papers would have been equally at home in the *Internationalist* chapter as in *Human Rights and Social Inclusion Advocate*.

A number of the papers and speeches included in the book have been published elsewhere. I have chosen to have them reproduced here because they may not have reached the audience they deserved or were otherwise worthy of re-publication. Some groundbreaking pieces, such as Michael Kirby's paper on "Judicial Stress", which was published in the *Australian Bar Review*,[1] were at the time and likely remain accessible

1 (1995) 13 *Australian Bar Review* 101.

to those most likely to read them; for this reason I made the difficult decision not to include them in this anthology.

The papers and speeches which have survived the selection process and found their way into these pages are but fragments of Michael Kirby's intellectual, professional and avocational DNA. I trust, nevertheless, that they give an authentic and compelling insight into this complex, intelligent, passionate and irrepressible jurist.

Introduction to Part I – Kirby as Boy, Son and Student

In Part I of this collection are four speeches or papers in which Michael Kirby reflects upon his childhood, his family, and his education, and, in doing so, also describes aspects of Australian society and culture during his youth and afterwards.

In "Growing Up Gay in Australia" (2009), a speech given to a twilight meeting of the Sydney University Law Society in August 2009, more than eight years before same-sex marriage was to be legalised in Australia,[2] Michael Kirby reflects not only upon his personal journey of self-awareness, love and candour, but Australia's journey too. He touches upon the horrors of the HIV-AIDS pandemic in the 1980s and 1990s, when millions worldwide died in the absence of effective treatments. Many of those who are not old enough to remember those days will perhaps struggle to understand the fear, prejudice and hysteria of the era, including in Australia, when LGBTI+ people were often demonised. At that time, Michael Kirby brought his stature as President of the Court of Appeal of New South Wales to the fight against stigma, and for humane care and treatment of sufferers of HIV/AIDS, domestically and internationally, as he continues to do today. Although he expresses doubt in this speech that he and his life partner, Johan, will marry should same-sex marriage be legalised in Australia, they did in fact marry on 11 February 2019 – the fiftieth anniversary of their meeting.

In "Remembering Teachers" (2011), Michael Kirby remembers the somewhat imperious Miss Pontifex, the motherly Mrs Godwin, the Socratic George Bohman, and the "Mr Chips" of Fort Street, Ron Horan, and others; as well as the public school education he enthusiastically and gratefully received in 1940s and 50s Australia. He wonders playfully about a career in architecture that never was, and contemplates the values he learned from his teachers.

In "The Role of Universities in Modern Democracies: Riddles and Paradoxes" (2020), Michael Kirby discusses the role of universities and what a university education should be. He remembers his own tertiary education at the University of Sydney from 1956, including his foray into student politics, and reflects on student politics today. He argues that the defunding of university student self-government and societies "is repaid in dividends of disinterest in national and State politics. Many students have turned their attention from their country and the world to the narrow confines of selfish self-absorption". Finally, he considers and applauds the internationalisation of Australian universities, stresses the importance of teaching and the student experience, and observes the early effects of the COVID-19 pandemic on universities.

2 On 8 December 2017, following a voluntary national postal survey conducted by the Australian Government between 12 September and 7 November 2017 in which 7,817,247 or 61.6% of respondents voted "Yes" for marriage equality.

In his breakfast speech to the Justices of the Supreme Court of Nigeria, "Constitutional Adjudication and Learning from Each Other: A Comparative Study" (2012), Michael Kirby commences by reflecting on a trip he took on behalf of the National Union of Australian University Students to Nigeria in 1963, his first overseas sojourn, just after graduating in law and continuing his studies in economics. He describes the epiphany he felt after being challenged on Australia's "White Australia" policy and its poor treatment of Aboriginal Australians, and its effect on his views and values thereafter, before discussing the importance of comparative law.

Introduction to Part II – Kirby as Practitioner

In Part II of this collection are five speeches or papers in which Michael Kirby reflects upon his early career and the practice of law in the 1960s, as well as the importance of service and idealism.

In 2008, Michael Kirby was asked to speak at an alumni dinner for the law firm Hicksons ("Memories of Hickson, Lakeman and Holcombe" (2008)), where he worked as a solicitor from 1962 to 1967. In his speech, he laments an opportunity to become a leader in maritime and shipping law that was snatched away by a 1962 Federal election result; records the early influences on his view of insurers and insurance law; remembers how he juggled his work as a lawyer, his continued evening study of Economics, and the trip to Nigeria, Ghana, Malaya and Singapore discussed in Part I in "Constitutional Adjudication and Learning from Each Other: A Comparative Study" (2012); and recalls a female employee being dismissed on the spot in about 1965 for arriving at the office in a pants suit. He pays tribute to his early mentor, Bruce Holcombe.

In "For the Idealists in the 'Greediest Profession'" (1990), a speech he gave at the Law Graduation Ceremony of the University of Sydney on 19 May 1990, Michael Kirby first acknowledges the tragic loss, 13 days earlier, of the recently retired Vice Chancellor, Professor John Manning Ward, his wife and daughter, as well as the wife of the Registrar, Keith Jennings, in a train crash north of Sydney. He then quotes Yeats and Joseph Story, one of the most distinguished judges of the Supreme Court of the United States, when considering legal education and a new generation of lawyers. Michael Kirby asks his audience: "Are you, the new graduates, mere recruits to greed?", whilst calling for idealism and the service of the community, and listing things "Antipodean followers of the dreams of Martin Luther King [can still] do in the law in our country".

In "Human Rights: An Agenda for Action" (1991), Michael Kirby's brief acceptance speech upon being awarded the Australian Human Rights Medal, he salutes the organisations dedicated to the furtherance of respect for human rights in Australia, and the countless individuals striving every day to advance and defend the rights of their fellow citizens in many highly practical ways. He then uses the occasion to encourage his fellow lawyers – particularly the young – not to see their calling as just a money-making job, but to be and remain unashamedly idealistic.

In "Billable Hours in a Noble Calling" (1996), Michael Kirby again takes up the issue of legal practice as a business versus the traditional culture of professional service. In the 1990s, law firms in Australia became significantly larger and more profit-driven. In this context, Michael Kirby asks: "is the idealism and selflessness of professionalism

finally dying out in the law such that we will attend the funeral before the century is out?" He also quotes from a book by the then Dean of the Yale Law School, Professor Anthony Kronman, about "a crisis in the American legal profession". Nearly 30 years on, Michael Kirby's question, and Professor Kronman's alarm, are more relevant than ever both in Australia and around the world. Finally, he ponders an even deeper malaise in legal practice today.

In the final piece on his experience of, and views on, legal practice, Michael Kirby writes a "Letter from an Aged Judge to a Disillusioned Lawyer" (2020). He is responding to a letter written by an anonymous commercial solicitor who feels "very conflicted and confused" about his or her own practice of law. The correspondent asks: "do I have the right to decline instructions where I feel that the engagement leads to nothing good, for no opportunity for justice or, perhaps worse, where I am engaged to achieve something which I think is detrimental to society/the environment as a whole?" Michael Kirby offers both perspective and encouragement.

Introduction to Part III – Kirby as Law Reformer

In Part III of this collection are seven speeches or papers on a subject that is both key to Michael Kirby's meteoric rise in the law, and dear to his heart: law reform. Of additional interest are the changes in technology and society that have accompanied his journey in this area.

Michael Kirby's life and career have witnessed huge changes in society, the law, the country and the world. One of the greatest areas of change in that time has been in technology. In his first years as the inaugural full-time President of the Australian Law Reform Commission ("ALRC"), computers were just escaping the confines of universities, governments and big business. "Society, Technology and Law Reform" (1977) is a paper given by Michael Kirby at a seminar on that subject conducted jointly by Monash University and the Law Council of Australia at Monash University on 27 January 1977. In it he explores the tension between laws as principles laid down or espoused at a given point in time, and a society changing "at a dazzling pace", before explaining the contribution that a law reform agency like the ALRC can make to the resolution of that tension. In a stark reminder of the time of the paper, he reports: "I have heard it said that by 1984 there will be 100,000 computers in use in Australia alone". He also mentions the reference on *Privacy* then before the ALRC: it would lead, in December 1983, to the ALRC report on *Privacy* (ALRC Report 22) that considered the impact of, amongst other things, information technology, on privacy, and to the *Privacy Act 1988* (Cth). Little could he have imagined that some 40 years later, in the age of Facebook, Instagram, X and TikTok, billions of people would happily abandon their privacy on as many smartphones and tablets, each with more computing power than the largest of computers to be found in 1977. Or could he?

"An Australian Bill of Rights?" (1978) was a public address Michael Kirby gave in Melbourne on the eponymous subject. In it he recounts the debates in the United States by its founders which led to the inclusion there of a Bill of Rights, as well as the debate in Australia by the fathers of Federation which did not. The strongest argument for a bill of rights, enforceable in the courts, Kirby observes, citing Frank Walker,

the former Attorney-General of New South Wales, is that it provides the judiciary with general principles to which they can appeal to deal with the truly unacceptable and outrageous cases: those instances where legal injustice has been allowed to be perpetuated by Parliamentary indifference, administrative complacency and judicial restraint. Arguably even more apt now than in 1978, he observes that in "Australia the danger to our rights is not in a frontal assault upon them. It is in their slow erosion by a mass of well-meaning legislation, or the indifference of a community bent on material advancement alone".

In "Should We Recognise Aboriginal Tribal Laws?" (1980), a breakfast broadcast on ABC Radio, Michael Kirby asks in January 1980 a question answered (at least in respect of customary title to land) by the High Court of Australia twelve and half years later, on 3 June 1992, in *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

In "Science, Sex and Society" (1988), the Inaugural Occasional Address to Monash University's Centre for Reproductive Biology, Michael Kirby contemplates the "still experimental and imperfect procedure" of IVF; marvels at the conviction of a rapist in Britain after "[f]ragments of DNA, unique to the individual, were compared and accepted as identical"; notes new techniques for analysing embryos for genetic defects; and considers some of the myriad of legal issues arising from these and other (then) new biotechnologies. After noting the shift in Australian public opinion since the 1970s on the issues of abortion, IVF and the rights of the unborn, he asks rhetorically whether legislation prohibiting or prescribing aspects of these issues should be passed in the absence of clear community support, before observing that "the real question is not whether law is needed and whether it will come. It is whether, in the design of our laws, we ensure that they are not knee jerk reactions, grounded in ignorance, unaware of relevant scientific knowledge and indifferent to personal utility resting on nothing more than prejudice or moral notions developed in quite different times". Finally, on the issue of criminal sanctions against homosexuality, he asks "a question legitimately asked by all thinking and civilised people in our country …: what is the role of the law in the enforcement of perceptions of morality in respect of private sexual behaviour between consenting adults?"

In light of the failure of the 2023 "Indigenous Voice to Parliament" referendum to amend the Commonwealth Constitution, it is interesting to join Michael Kirby in remembering the failed 1999 referendum. "A Century Reflection on the Australian Constitution – The Republic Referendum, 1999" (2000) is adapted from the text of the RG Menzies Memorial Lecture delivered by Michael Kirby at King's College, London, on the eve of the centenary of the passage of the *Commonwealth of Australia Constitution Act 1900* (Imp). In it – after some introductory remarks about Robert Menzies himself – Michael Kirby considers the mechanism for constitutional amendment borrowed from Switzerland and found in s 128 of the Commonwealth Constitution; the history of republicanism in Australia; and the results of the 1999 referendum, including ten reasons for its failure; and asks whether the latter has any implications for the United Kingdom.

In "ALRC, Law Reform and Equal Justice under Law" (2000), a speech Michael Kirby gave at a dinner for the 25th anniversary of the establishment of the ALRC in 1975, he first humorously remembers how he came to be the ALRC's founding

chairman and the ALRC's very early days, before noting that it was those who least often witnessed "equal justice under the law" – Aboriginal Australians and Torres Strait Islanders, women, victims of domestic violence, those accused of crimes – "[i]n short, the people who otherwise often lose out" – who were all a major focus of the ALRC in its early years. Finally, he laments that he did not do more then for "another minority taught by the centuries to hide itself in shame – homosexuals and others disadvantaged by law because of their sexuality" and observes that "equal justice under law is an aspiration yet to be realised in Australia".

A major theme in the articles and speeches of Michael Kirby over the past 50 years has been the impact of science and technology on society and on the law. In his early book *Reform the Law* (OUP, Melbourne, 1983), looking back on almost a decade of engagement with institutional law reform, he identified the impact of technology as one of the main stimuli for law reform generally and for the work of the ALRC in particular. He returned to this theme in 1983 in his *Boyer Lectures* for the Australian Broadcasting Corporation. "Impact of Technology and Generative AI" (1983, 2025) is a composite of the closing section of the *Boyer Lectures* and Michael Kirby's Foreword to a new book, *The Cambridge Handbook of Generative AI and the Law*, edited by Mimi Zou, Cristina Poncibò, Martin Ebers and Ryan Calo. The former was addressed to "The New Technology". The latter indicates how far the technology has developed in 30 years. Even 40 years ago, by reference to what he described as the "structural models for computer-aided legal analysis", Michael Kirby was already predicting automated systems. In the current age, these have now developed into generative artificial intelligence (AI). The extract from the last of the author's *Boyer Lectures* in 1983 was prescient for its time. Further, unpredictable, changes lie ahead.

Introduction to Part IV – Kirby as Judge

In Part IV of this collection are fifteen speeches or papers by Michael Kirby in which he discusses his work as a judge, the role and future of the judiciary generally, and the proper function of the criminal law.

In "The Future of the Judiciary" (1987), Michael Kirby, writing for a New Zealand audience, tries his hand at predicting the future of judges, their work, method and technique. Did his predictions – now nearly 40 years old – come true? You decide. But the discussion under the heading "III Judicial Technique – 1. Using technology" reveals how far technology in and around the courtroom has come since 1987, as well as just how long we have been talking about the potential of Artificial Intelligence or, in today's impatient parlance, "AI".

Having touched upon the effect of a Bill or Charter of Rights on the role and function of judges in the preceding paper, in "Human Rights: The Role of the Judge" (1991), a paper delivered by Michael Kirby at the University of Hong Kong, Department of Law's International Conference on the Bill of Rights (20-22 June 1991), he focuses on that theme. He opens with the exclamation "How resilient is the common law of England!" But, in view of developments in Hong Kong in the ensuing 35 years, the exclamation must surely have become a question, notwithstanding the preservation of the laws previously in force in Hong Kong, including the common law, in Article 8 of

the *Basic Law*. Michael observes that "[t]he judiciary is often deflected from passion by the instruction of forebears, who remind current officeholders of the need to protect the individual, defend minorities, and uphold proper procedures even where doing so may frustrate the achievement of the democratic will". Whether that observation applies to the interventions of United States' courts during President Donald Trump's second administration is yet to be seen.

In "Dealing with Drugs" (1992), Michael Kirby questions the wisdom and efficacy of the criminalisation of the use of "drugs" in Australia and internationally. After outlining the confusing regime of statutory prohibitions at Federal and State level, he notes the great monetary and social cost of "drug" detection, enforcement and punishment, before suggesting that "a sober reflection upon our current strategy is necessary with the lifting of voices, where appropriate, to suggest that entirely new strategies should be considered".

In "The Abolition of Courts and Non-Reappointment of Judicial Officers in Australia" (1994), Michael Kirby first gives a brief history of judicial independence in England before expressing concern for the continued observance of that principle in post-colonial Australia. Of particular concern to him are instances of the abolition of courts and independent tribunals and the creation of new courts or tribunals to which some only of the former officeholders are appointed; a practice he describes as "a shocking erosion of the principle of independence of judicial and like decision-makers". Such instances have not, however, been confined to the history bin of twentieth-century Australia. On 28 May 2024, Federal Parliament passed legislation[3] to abolish the Administrative Appeals Tribunal ("AAT") and replace it with a new body called the "Administrative Review Tribunal" ("ART"), after concerns by the incoming Labor government that the AAT had been packed with former Liberal and National Party politicians by the previous Liberal-National Coalition government, and thereby "politicised".[4] Accordingly, this paper and the concerns expressed in it are as relevant in the 2020s as they were in the 1990s.

In "Farewell Speech" (1996) and "Speech on the Occasion of his Swearing in and Welcome as a Justice of the High Court of Australia" (1996), Michael Kirby first looks back with both humour and a critical eye upon his eleven and a half years as President of the Court of Appeal of the Supreme Court of New South Wales before, four days later, addressing a ceremonial sitting of the High Court of Australia on the occasion of his swearing in as that Court's fortieth Justice. These speeches are included in this volume, not only for their biographical significance, but also because of the important legal developments and figures mentioned in them, and Michael Kirby's involvement in and connection to those changes and persons. Contrary to his prediction in the second of the speeches, his words on the occasion of his swearing in as a Justice of the High Court have not simply "h[u]ng in the air and then evaporate[d] and are gone".

In "The Globalisation of the Media and Judicial Independence" (1994), a paper delivered to a conference on Media and the Judiciary in Madrid, Spain, organised by the International Commission of Jurists, Michael Kirby opens with simple propositions:

3 *Administrative Review Tribunal Act 2024* (Cth).

4 "'Politicised' Administrative Appeals Tribunal abolished, after attorney-general declared its reputation ruined" (*ABC News*, Jake Evans, 16 December 2022).

"[t]he media of communications have changed radically in recent years. The ownership of the media has also changed. The professional ethics of the media have changed as well", and observes that these changes affect the legal system and the judiciary. Although this paper predates the explosion of smart phones and internet media ("news" and social) and the advent of the Dark Web, Al Jazeera, Starlink and TikTok, the themes discussed by him are more relevant than ever in the age of Mark Zuckerberg, Jeff Bezos and Elon Musk, not the least being the threat to the rule of law itself.

In "Judicial Accountability in Australia" (2001), one of a series of lectures on the jurisprudence of the Commonwealth given in Brisbane on 6 October 2001, at a function organised by the University of Queensland and the Commonwealth Legal Education Association, Michael Kirby considers developments in the accountability of judges. He asks: how does one deal with the rude judge? The slow judge? The ignorant judge? The prejudiced judge? The sleeping judge? The absentee judge? The eccentric judge? How can judicial accountability be improved without weakening the principles of judicial independence?

In "Black and White Lessons for the Australian Judiciary" (2002), a paper based on a lecture at the University of Adelaide Law School on 12 August 2002, Michael Kirby uses the "celluloid metaphor" of the Australian film *Black and White*. He describes features of the case of Rupert Max Stuart that reached the High Court in 1959 and outlines the imperfections of the legal process. He acknowledges that the prisoner's life was ultimately saved, not by the legal system or the judicial process, but by a dedicated group of journalists and other citizens who shared the High Court's expressed "anxiety" about the case but were more determined to give effect to that "anxiety". He next describes improvements in the criminal justice system since 1959, before suggesting that the Stuart affair illustrates how cleverness is not enough in the law. There must also be a commitment to justice.

After almost a decade sitting on Australia's apex court, in "Ten Years in the High Court – Continuity & Change" (2005), Michael Kirby provides a rare, rear-view mirror insight into the workings of the High Court – its practices, personnel, decision-making and disagreements. Perhaps most interesting from a legal perspective are his reflections on a more conservative period of the Court's history, following the dynamic Mason Court, and on the cases which still managed to develop the law over the period of his tenure; as well as those that did otherwise. One of the cases discussed is *Al-Kateb v Godwin* (2004) 219 CLR 562. In that case, the High Court by majority held that the Commonwealth Executive could lawfully hold in indefinite immigration detention persons in Australia without a valid visa who could not, for one reason or another, be deported. Michael Kirby dissented. In this paper, in the context of his advocacy in *Al-Kateb* for considering international legal norms when interpreting the Commonwealth Constitution, he writes of the "interchange" of reasons for decision with Justice Michael McHugh: "it is now in the law reports. It will influence future generations". Notably, in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137, *Al-Kateb* was unanimously overturned (in part) by a new generation of High Court judges.

In "Judicial Dissent – Common Law and Civil Law Traditions" (2006), Michael Kirby examines the historical and procedural differences between the common law and civil law traditions with respect to judges' dissenting reasons. He examines the causes

and advantages (or otherwise) of those differences, and asks whether transparency, accountability and the integrity of the work of the judicial branch of government may be the most compelling reason for allowing the expression of dissenting judicial opinions.

In "50 Years in the Law: A Critical Self-Assessment" (2009), as Michael Kirby approaches his retirement from the High Court of Australia, he looks back critically at his successes and shortfalls. Amongst the former he counts his contribution to the transition from a strictly literalist approach to statutory and constitutional interpretation to a purposive one "which takes more closely into account the legislative history, background materials and contextual considerations that help a court to arrive at the true object of a written law". As to the latter, they include, in his estimation, that there might have been more he could have done "to try to build consensus with [his] colleagues in the High Court" in the cases in which he dissented. He writes: "[t]o the extent that I may occasionally have not worked hard enough to secure consensus, I see this as a shortfall".

"Judicial Farewell" (2009) is Michael Kirby's speech to the standing-room-only audience in Court 1 on his last day as a Justice of the High Court of Australia. As a former Judge's Associate to Michael Kirby, I had travelled to Canberra to be present and was in the audience. His speech was humorous, self-deprecating, and expressed his thanks to the many who had worked with him over the decades, as well as to his family. And, in contrast to the occasion of his appointment to the High Court, he felt free to name as well as thank his partner of (then) almost 40 years, Johan van Vloten.

In "The Internationalisation of Domestic Law and Its Consequences" (2010) or "A Public Conversation between the Hon Justice Antonin Scalia, Associate Justice of the Supreme Court of The United States of America and the Hon Michael Kirby", Michael Kirby returns to the Banco Court of the Supreme Court of New South Wales to speak at the American Bar Association Section of International Law conference on *Cross Border Collaboration, Consequences and Conflict: The Internationalisation of Domestic Law and its Consequences*. In his speech, Michael Kirby rejects Justice Scalia's dismissal of the discussion of foreign legal authorities as "meaningless dicta" and his observations that the court "should not impose foreign moods, fads or fashions on Americans"[5] and, further, Justice Scalia's "originalist" approach to constitutional interpretation.

"Where Does Truth Lie?" (2015) developed from an address to the Department of Statistics and Mathematics, Queen's University of Ontario, Canada, and to Winton Capital Management in London. In it Michael Kirby first traces the history of the law's search for truth through fact finding by juries and judges in common law countries. He then explores the way judges resolve conflicts in evidence at trial, the way appellate judges solve such conflicts in an appeal from the trial decision, and the techniques that need to be observed by decision-makers to allow for cultural phenomena affecting witness testimony, by examining three cases in which he has been involved: two as a judge, and one as chairman of the United Nations Commission of Inquiry (COI) into North Korea. Michael Kirby notes that, unlike academic writers, journalists and other commentators, the decision-maker does not have the luxury of walking away. He or she must do the best that is possible to unveil the truth.

5 *Lawrence v Texas*, 539 US 558 at 598 (2003) citing *Foster v Florida*, 537 US 990 (2009). See Lord Bingham, Hamlyn Lectures 2009, "Foreign Moods, Fads or Fashions" (Tspt Lecture 2, ms4).

Introduction to Part V – Kirby as Human Rights and Social Inclusion Advocate

In Part V are fourteen speeches or papers by Michael Kirby discussing and advocating for groups in society that have historically been mistreated, discriminated against, or simply voiceless.

In a succinct but powerful paper – "Aboriginal Bicentenary?" (1988) – Michael Kirby surveys the "depressing" treatment of Australia's first peoples as Australia approached its Bicentenary in 1988, including the fact that the rates of Aboriginal imprisonment far exceeded those of non-Aboriginal Australians. He asks: "[h]ow can we possibly justify a society and a criminal justice system which seems to condemn a high proportion of the descendants of the original inhabitants of this continent to a life of recurring imprisonment, with all the anti-social consequences which that entails?" He feels provoked to "denunciation for the failure to honour political promises of effective land rights legislation, sacred site protection, mining royalties for Aboriginals and the regulation of a Treaty between representatives of Aboriginal Australia and representatives of those who came later". Forty years on, the rate of incarceration of First Nations peoples – not to mention their deaths in custody – has not improved. It remains a national disgrace. And whilst native title to vast tracts of land and waters (mainly in remote areas) has been recognised, the legal process for such recognition is lengthy and exacting. Sacred sites, such as the 46,000 year-old Juukan Gorge in Western Australia, continue to be destroyed by mining companies such as Rio Tinto. Traditional owners still receive an embarrassingly small portion of the mineral wealth generated by their lands. And whilst Victoria moves ahead with a treaty between that State and its first peoples, Michael Kirby insists that "[t]he faded idea of a national Treaty, such as has occurred in Canada, New Zealand and other Dominions of the Crown, should be revived and life should be breathed into it".

As I mention in my general introduction to this book, "AIDS: A New Realm of Bereavement" (1991) was remarkable to me. Today it is no challenge to find on the internet articles and advice on grief and bereavement. But in 1991 it was not a topic spoken much of in public. Michael Kirby's paper on the AIDS pandemic, its effects on People Living with AIDS (PLWA) and their carers, families, friends and communities, written in terms of bereavement coloured by a particular sense of shame (which many patients experience from having acquired HIV) and despair (from the lack of a cure), was both novel and moving. Not until the effects of COVID-19 was bereavement to be given similar attention. Reading this paper in 1991 was to realise both Michael Kirby's breadth of knowledge, and his willingness to use his intellect and stature to make a difference in the world beyond the NSW Court of Appeal and the law.

In "Disability and Human Genome: To Ignore is to Decide" (2000), Michael Kirby recounts the issues and debates at the first meeting of the International Bioethics Committee of UNESCO (IBC) to be held in South America, in Quito, Ecuador, which he attended. The paper gives a snapshot of developments in biotechnology, such as the use of embryonic stem cells for medical research and therapies, and related bioethical questions, as they stood at the turn of the Millenium. But, as he hints at in the title of his paper, "[i]f the international community, and domestic law, say nothing on

experimentation with embryonic stem cells, the result will be that such experimentation will certainly proceed". As, indeed, it has, albeit under guidelines developed by the IBC and others since this paper. But Michael Kirby goes further in light of the termination of foetuses found to have genetic conditions that would result in profound disabilities, querying how far down the "road of elimination" our societies will go. "Is it conceivable, either in the short term or some time in the coming century, that a foetus will be aborted for no reason other than that it manifests the gene for Huntington's Disease? Or for sickle cell anaemia? Or for schizophrenia? Or for early onset baldness? Or (if it ultimately be shown to be a genetically influenced condition) homosexuality?" And when, he asks more broadly, is "human variety a disability?"

In 2002 Sydney hosted the world Gay Games. Michael Kirby spoke at the opening ceremony. The text of that speech – "Courage" (2002) – is both succinct and inspiring. It needs no introduction.

In "The Dreyfus Case a Century On – Ten Lessons for Australia" (2006), an address given at the Jewish Museum of Australia, Melbourne, on 26 March 2006, Michael Kirby recalls one of the world's most infamous miscarriages of justice: the Dreyfus Affair. Alfred Dreyfus, a (non-observant) Jewish Captain in the French Army, was convicted – and reconvicted – of treason by military tribunals after the discovery of a letter signed "D", disclosing French military secrets to the German Embassy in Paris after the disastrous (for the French) Franco-Prussian war of 1870. A secret dossier given to the first panel of judges and the inclusion of forged letters in Dreyfus' file were but two of the travesties of the case. Michael Kirby goes on to draw ten lessons from the Dreyfus Affair, starting with the need for vigilance against miscarriages of justice and prejudice against stigmatised minorities, and including the maintenance of secularism: the separation of religion and the State. These are lessons as compelling in 2026 as they were in 2006, if not more so, in an Australia that has recently witnessed the firebombing of synagogues in Melbourne, the racist graffitiing of a mosque in Sydney, and homophobic attacks.

In "Fundamental Human Rights and Religious Apostasy" (2007), Michael Kirby considers one of the oldest internationally recognised human rights – freedom of religion and conscience, which necessarily includes freedom *from* religion and the ability to *change* one's religion. In particular, he looks at the decision of Malaysia's highest appellate court in the *Lina Joy* case, and the implications flowing from it for Malaysians who wish to convert from Islam (Malaysia's "religion of Federation"), and for Malaysia's Constitution and system of government. He concludes that it is clear from the *Lina Joy* case and a number of similar cases that Malaysian judges have given "a most restricted scope to freedom of religion", before tackling the broader issue of Muslim beliefs and the universality (or otherwise) of human rights. Finally, he reviews several cases in Britain and Australia, before looking at suggestions for reconciling rules that prohibit or seriously impede the renunciation of the Islamic faith, with the right to change one's religion, as freedom of religion is expressed to contemplate in international human rights instruments.

In "Deconstructing Homophobia" (2010), speaking in Hong Kong on World Anti-Homophobia Day (17 May), Michael Kirby lists the kinds of preventative measures that can be taken to reduce the risk of transmission of HIV throughout the world. On that

list is the removal of criminal penalties against men who have sex with men, together with the introduction of anti-discrimination legislation. Given the date of his speech, he then focuses on the causes of the main impediment to the abovementioned measures – homophobia – and asks: "[w]hat can we do to combat the feelings of animosity, repugnance and fear that lie at the heart of centuries-old attitudes towards people of minority sexual orientation or gender identity?". His analysis and answers traverse both the more obvious causes of homophobia (religion and law) as well as the deeper ones (fear of "the other", human anatomy and cultural values), before identifying the agents of change.

In "The Sodomy Offence: England's Least Lovely Criminal Law Export" (2011), Michael Kirby describes the influence of the British Empire on the intercontinental spread of the criminal offences involving adult, private, consensual same-sex activity, as well as newer developments that give hope for progress. Of the drive to repeal such criminal sanctions, Michael observes that "[t]his imperative does not exist only to achieve an effective response to the AIDS epidemic. It is also there for the proper limitation of the criminal law to its appropriate ambit; for an end to oppression of vulnerable and often defenceless minorities; [and] for the adoption of a rational attitude to empirical scientific evidence about human nature …".

In 2024-2025, the status and treatment of transgender people in the United States and elsewhere have become highly topical. More than a decade earlier, in a summation of a United Nations Development Program roundtable in Hong Kong, recorded in "Transgendered Persons, Legal Disharmony and Attitudinal Change" (2014), Michael Kirby considered the challenges faced by transgender people and identified ten propositions for urgent law reform to improve the lives of this much maligned and persecuted minority. Michael Kirby's advocacy for the rights and dignity of transgender people, powerful in this paper, is needed as much today as in 2014: perhaps more.

In "Marriage Equality Law and the Tale of Three Cities – How the Unimaginable became Inevitable and Even Desirable" (2016), Michael Kirby charts the transition of marriage from canon to common law and statute in England and thereafter, in its colonies, as well as the legal consequences for unions inside and outside of the institution. He then recounts the process by which marriage for same-sex couples was legalised in New Zealand and the United States, before focusing on the developments in Australia before the 2017 same-sex marriage postal survey. He concludes by drawing ten conclusions from his chronicle.

In "Municipal Courts and the International Interpretive Principle: *Al-Kateb v Godwin*" (2020), Michael Kirby returns to, and examines in greater depth, the 4:3 decision of the High Court of Australia in *Al-Kateb v Godwin* (2004) 219 CLR 562 and the theory of constitutional law that placed him amongst the dissenters. The paper revisits the suggested "heresy" of holding that international human rights law constitutes a consideration that may influence the interpretation of the Australian Constitution and other legal texts. Accessing universal human rights law, including in constitutional adjudication, was endorsed in the Bangalore Principles 1988. He suggests that interpreting statutory language to hold that indefinite detention of a visa-less refugee applicant would be a breach of universal human rights is not dissimilar to the common law principle of interpreting statutes so as to uphold basic rights. But is an

analogous approach permissible in deciding the meaning of constitutional language? He invokes legal principle and judicial opinions to support the application of his suggested "interpretive principle". Although arguably invoked by the majority of the High Court in *Mabo (No 2)* (1992) 175 CLR 1, in the context of declaring the common law, so far this approach has not been accepted for constitutional elaboration in Australia. But should this be so in the age of global problems, multilateralism and internationalism? As noted in the introduction to "Ten Years in the High Court – Continuity & Change" (2005) in the previous section, in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137, *Al-Kateb* was unanimously overturned (in part) by a new generation of High Court judges.

In "Miscarriages of Justice in Australia: Unfinished Business" (2021), Michael Kirby commences with a short history of criminal law and procedure in Australia, including the adoption from England and Wales of "common form" criminal appeals, before turning to some of the most notable miscarriages of justice, including the Chamberlain, Mallard and Pell Cases. He finishes by identifying three particular issues which have, he argues, intervened to limit the capacity of courts of criminal appeal to protect possibly innocent prisoners from the risks of a miscarriage of justice, and suggests it is time for Australia to follow the UK, New Zealand and Canada in establishing a Criminal Cases Review Commission or "CCRC".

The complexity of dealing with human remains, as well as past and new practices traced to ancient and recent times, illustrate a growing sensitivity to displaying and using such objects. In "Justice, Ethics and Culture in Dealing with Human Remains: Australian and Other Indigenous Lessons" (2022), Michael Kirby starts by tracing the emergence of controversies from ancient times to recent times of war. He then examines trade in body parts, including in collections and dissection for medical training before introducing a topic of special importance in contemporary Australia: the display of body parts of Indigenous peoples. Michael Kirby then considers the disrespect and indifference to the topic of Indigenous remains and the growing role of international law. He concludes by looking to the future and, especially, modern museum practice, including with respect to the *UN Declaration on the Rights of Indigenous People*. A new methodology for dealing with law, ethics and culture is introduced but, he warns, there is much to be done. This paper provides a start.

In "The Centenary of the First Abolition of Capital Punishment in Queensland – A Study in Law and Human Dignity" (2022), Michael Kirby marks the centenary of the abolition in Queensland of the death penalty on 1 August 1922, and the relaunch of Barry Jones' 1965 book, *The Penalty is Death*. He traces the history in Britain and Australia of both reforms to criminal law and procedure, as well as resistance to such reform, particularly to the abolition of the death penalty. After recalling some high profile miscarriages of justice involving sentences of death, as well as what he was doing the morning of the last execution in Australia on 3 February 1967, Michael Kirby considers countries in which the death penalty has been abolished or restricted, as well as those which remain stubbornly wedded to the practice of killing people in the name of justice, such as Burma, Singapore and the United States. Finally, he articulates his strident opposition to capital punishment anywhere in the world for any reason; warns that, so long as countries close to our shores continue with the barbaric practice

of capital punishment, it survives; and calls on Australians to lift their voices against the countries and regimes concerned.

Introduction to Part VI – Kirby as Internationalist

Since retiring from the High Court, Michael Kirby has taken on some high profile roles on the international stage. But his international work started long before. Part VI of this collection contains six papers that take us from South African to North Korea and places in between.

In "Images of the Inauguration of Nelson Mandela" (1994), Michael Kirby shares his impressions of the inauguration of South Africa's first post-Apartheid President: Nelson Mandela. He was invited to the inauguration in his capacity as Chairman of the Executive Committee of the International Commission of Jurists. His is a literary snapshot of a significant moment in modern African and international history.

In January 1994, Michael Kirby travelled to the Kingdom of Cambodia in his new capacity as Special Representative of the Secretary-General (of the United Nations) for Human Rights in Cambodia. He was to make six further missions to that country, upon which he would report to the United Nations Commission on Human Rights. "Cambodia – A Departing Assessment" (1996) is Michael Kirby's final report, following the announcement of his appointment to the High Court of Australia from 1 May 1996. In it, he reports on his seventh and final trip to Cambodia, for ten days in January 1996. He is able to report progress on a number of fronts: health, education and the protection of Cambodia's cultural heritage. In other areas – limitations on opposition parties, access to media, and the state of Cambodia's judiciary and prisons – his report is far from rosy. He calls attention to "worrying evidence of a reversion to autocracy". Has much changed since then?

"The Commonwealth of Nations Today: Historical Anachronism or Focus for Universal Values?" (2010) is Michael Kirby's London Doughty Street Lecture 2010 for The Royal Commonwealth Society, given on 1 June 2010. Just after he gave this speech, it was announced that Michael Kirby had been appointed to the Eminent Persons Group on the future organisation of the Commonwealth of Nations. In this lecture, he addresses changes that have occurred since he, as a student, addressed a school assembly on Empire Day, 24 May 1954; how those changes came about; the activities that the Commonwealth performs well; the values that it proclaims that it holds in common; and some of the problems that it must face as it adjusts to a very different era of global relationships and challenges. Notwithstanding the reluctance of its leadership to call out certain forms of discrimination by some members, as it once did in relation to Apartheid in South Africa, Michael expresses a degree of optimism for the future of the Commonwealth of Nations based on shared values.

Michael Kirby was Chair of the UN Commission of Inquiry on Human Rights Violations in DPRK (North Korea) in 2013-2014. In "UN Commission of Inquiry on Human Rights Violations in the Democratic People's Republic of Korea: Ten Lessons" (2014), he briefly explains the background to, and form of, that inquiry, before distilling a number of lessons from its work, including: the desirability of drawing on the power and vitality of oral testimony in public hearings; the importance of engagement with local

and international civil society organisations; and the value of continuous engagement with national and international media. He suggests a number of conclusions about this significant international human rights inquiry, observing that "[n]o one now has the excuse of saying that they are not aware of the affronts to human rights in DPRK".

The year 2015 was the 800th anniversary of the signing of *Magna Carta* by a recalcitrant King John and his rebellious barons. In "Magna Carta 1215 to North Korea 2015: Advancing the Ideal of Legal Restraints on Governmental Power" (2015), Michael Kirby traces the history of attempts to constrain by law the authoritarianism of monarchs and tyrants, from thirteenth-century Runnymede, England, to twenty-first century Pyongyang, North Korea.

"Self-determination" takes its meaning from its context; likewise the word "people". In "Self-Determination of Peoples – Origins, Applications & Problems in the Russo-Ukraine War of 2022" (2022), Michael Kirby returns to the topic of the self-determination of peoples in the context of Russia's invasion of Ukraine in 2022 and the following war of attrition. Although controversial, the idea of self-determination has a long history, which he describes. It is relevant to the Ukrainian conflict, as recognised by President Putin; although unfavourably. International law has not developed clear principles and institutions to give the concept effect. This article describes the work of an expert group of UNESCO (1985-91), which Michael Kirby chaired, charged with defining who constitute a "people" and how their self-determination might be achieved. The special nuclear urgency of the Ukrainian, Crimean and Donbas war demands fresh attention to the people's rights of self-determination. Michael Kirby asks: Is it a potential solution or part of the problem?

Introduction to Part VII – Kirby as Biographer

In the final section of this anthology, Michael Kirby writes about three other towering figures of Australian law, as well as the person who quietly supported and enabled him through his own long and glittering career.

In "HV Evatt, the Anti-Communist Referendum and Liberty in Australia" (1990) we glimpse Michael Kirby as biographer. He was influenced by, and held in high regard, a number of international and Australian figures, including Lord Denning, whose photograph was one of many on the wall of his Judges' Chambers in the New South Wales Court of Appeal when I was his Judge's Associate in 1991. I do not recall whether there was a photograph of Dr Evatt on that wall, but it is clear from this paper that Michael Kirby holds him in high regard for his stand against the authoritarian tendencies of the Menzies Government, as evinced by the attempts to ban the Australian Communist Party in 1950-1951. In 1990 Michael Kirby observed that "it is timely to remind ourselves of an Australian politician who saw clearly an important principle at stake and adhered to true principle despite great political dangers – including to his own urgent ambitions". As important principles of liberty and democracy come under attack around the world, it is again timely to remember HV Evatt.

In "Lionel Murphy – Ten Years On" (1996), the text of the Annual Lionel Murphy Memorial Lecture given by Michael Kirby in the Senate Chamber of the Old Parliament House, he remembers Lionel Murphy a decade after the latter's untimely death from

cancer. He does so just weeks after following in Murphy's footsteps to the bench of the High Court of Australia. He is "proud to speak to his memory as his fellow citizen and as a friend".

In "RP Meagher and I: Best of Times/Worst of Times" (2011), Michael Kirby remembers his fellow University of Sydney student politician, barrister and appellate judge, Roderick "Roddy" Pitt Meagher, whom he knew for half a century. When Meagher was appointed to the Court of Appeal of New South Wales in January 1989, Michael Kirby, then President of that Court, "knew that [they] would have philosophical differences" but he "respected his intellect, his scholarship, his advocacy, his legal writing and his international reputation as a lawyer of high talent".

In the final paper, an original written for this collection, Michael Kirby reflects on his spouse and partner in life, Johan van Vloten. After revisiting their meeting, travels and other aspects of their life touched upon earlier in the book, he focuses on the sacrifices Johan has made for his success, pointing out that none of his judicial and other appointments would otherwise have been possible. This paper is a moving tribute to Johan, to whom Michael Kirby gives the last, inspiring words.

Dr Paul Vout KC