



## Kirby, Michael (b. 1939)

by Linda Rapp

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Michael Kirby, former Justice of the High Court of Australia from 1996 to 2009, is respected not only for his legal acumen but also for his devoted commitment to the cause of social justice in his homeland and also around the globe. Since his coming out in 1999, he has been a proud and visible member of the glbtq community.

A native of Sydney, born March 18, 1939, Michael Donald Kirby was educated in the city's public schools. Identified as an exceptional student, he was selected for an "opportunity class" in grade school and then attended Fort Street High School, Australia's oldest public school. For much of his service on the High Court, he was the only Justice to have gone to public schools. A staunch champion of the public education system, he feels that his experience gave him "a slightly different perspective of life" from that of his colleagues, and one that he considers particularly valuable "because 67% of our population is educated in public schools."

Kirby continued his studies at the University of Sydney, earning degrees as Bachelor of Arts (1959), Bachelor of Laws (1962), Bachelor of Economics (1966), and Master of Laws with First-Class Honors (1967).

Kirby began to practice law as a solicitor in 1962 and became a barrister in 1967, when he was admitted to the bar of his home state of New South Wales.

As an officer of the court, Kirby felt obligated to provide *pro bono* services. "I do believe in volunteer work," he stated. "As a young solicitor I carried a heavy load representing clients for the New South Wales Council for Civil Liberties."

In 1975 Kirby was appointed as Chairman of the Commonwealth Law Reform Council, a position that he held until 1984, and also as Deputy President of the Australian Conciliation and Arbitration Commission, on which he served until 1983. In that year he received an appointment on the Federal Court of Australia, becoming the youngest person to sit on that bench. The next year he was chosen as a judge and the president of the New South Wales Court of Appeal, where he served until his appointment as one of the seven Justices of the High Court of Australia in 1996.

On the High Court, Kirby was frequently in dissent, particularly in constitutional cases. "This," stated Kirby, "is not a badge of honor; but neither is it a mark of dishonor. The dissent is an appeal to the future" since in the history of jurisprudence, dissents from the status quo have often proved to be harbingers of social change.

Journalist Monica Attard observed that Kirby's "judgments are notoriously long and detailed." She characterized him as "a compassionate man who won't allow precedent to trample the rights of ordinary people. It's a huge responsibility that he's assumed."

Kirby noted that he was often joined in dissent by Justice Mary Gaudron, the only woman to have served on

the High Court and who has since retired. He stated that "those who have witnessed discrimination may sometimes be more inclined to perceive legal injustice. This point helps to explain a number of cases in which [we] dissented together."

Kirby lamented the paucity of women in the higher echelons of the Australian judicial system, saying, "A woman's experience of society, in the law, and in the legal profession, is different from that of a man. . . . Their presence on the Court can be a corrective."

So, he eventually concluded, could be the presence and visibility of an openly gay man.

Although most Australians were unaware of Kirby's sexual orientation, his homosexuality had been an open secret in the legal community. He chose to come out publicly in an understated way, including "p. [i.e., partner] Feb. 11, 1969 Johan van Vloten" to name his life partner and recognize the duration of their union in the 1999 edition of *Who's Who in Australia* (published in November 1998), a bold move under any circumstances but especially in light of the fact that their partnership had begun fifteen years before the repeal of laws against same-sex sexual relationships by the government of New South Wales.

Only belatedly--in April 1999--did the Australian press take note of the disclosure in Kirby's entry, one of the most extensive in *Who's Who in Australia* because of his numerous accomplishments. The news sparked some negative comment on conservative radio talk shows and in letters to newspaper editors, but the Australian public was generally accepting of the news.

Kirby would later state that "a point had been reached when it became appropriate to be more explicit in the acknowledgment of someone who had contributed so much to my life." He noted with regret that when he had taken leave of the New South Wales Court of Appeal and when he was appointed to the High Court, van Vloten had "had to make do with a reference to 'family and loved ones'" in his acknowledgments.

Kirby's homosexuality became an issue, however, in 2002, when Senator Bill Heffernan alleged that Kirby "had used commonwealth cars to 'trawl for rough trade'" with male prostitutes. In support of his charges, Heffernan offered what he claimed was the driver's log.

The purported record included not only travel for Kirby but also for parliament member Laurie Brereton, who, it turned out, had been away on vacation with his family at the time.

Brereton said of the clumsy fabrication, "Inspector Clouseau could have worked out that this was a very funny job sheet for an Easter Saturday. . . . The document is false. It raises a number of very important issues."

Because of the false accusations against Kirby, Heffernan was forced to resign from his cabinet post as parliamentary secretary and was censured by the Senate but was not removed from office.

From the Senate floor, Heffernan said, "I want to extend to Michael Kirby my sincere apology and deep regret for the allegations I made in this place. I withdraw them unreservedly. . . . I know that with the widespread media coverage of my speech, his personal standing has been harmed. I do not expect him to accept my apology, but nonetheless I give it because I recognize the personal hurt that must have been suffered."

Despite the manifest inadequacy of the apology--sincere or not--from a person who acknowledged the "personal hurt" certainly felt by the victim of the mendacious attack, Kirby accepted it, graciously offering to extend "my hand in a spirit of reconciliation."

At the same time, however, he took the occasion to decry homophobia, saying, "Out of this sorry episode, Australians should emerge with a heightened respect for the dignity of all minorities."

Kirby stated in a 1999 speech that "working for human rights of disadvantaged people or people suffering from discrimination is a moral obligation."

Unlike U.S. Supreme Court Justice Antonin Scalia, Kirby is a firm believer in looking to international law for wisdom and guidance on such issues. In 2005 he stated, "For years, I have expressed the view that international law, especially that relating to human rights, may assist, as a contextual element, in the interpretation of the Constitution, the construction of ambiguous legislation, and the filling of gaps in the common law."

Kirby's diverse interests led him to become the first president of the Arts Law Centre of Australia in 1983. He later noted that the foundation of the organization coincided with the onset of the AIDS pandemic, which, he said, "took its toll on people in the arts, as in all other fields of life. It became important to provide legal advice on wills and estate planning for young people who would ordinarily not have thought of such things." He expressed the hope that "whatever [future crises] will be, the Arts Law Centre of Australia will be ready to respond with expert advice and empathetic care."

Kirby's advocacy has gone far beyond Australia. He has served as a member of the World Health Organization's Global Committee on AIDS (1988-1992) and of United Nations panels on HIV/AIDS (2001-2002, 2004 to present) and as United Nations Special Representative in Cambodia (1993-1996). He was a member of the Ethics Committee of the Human Genome Organization (1995-2005) and of the International Bioethics Committee of UNESCO (1995-2005). As part of his work with the latter, he chaired the group that wrote the *Universal Declaration of Bioethics and Human Rights*.

He has also served as the President of the Court of Appeal of the Solomon Islands (1995-1996) and was long a member of the Executive Committee of the International Commission of Jurists, eventually becoming president of the organization (1995-1998).

For his accomplishments Kirby was made a Companion of the Order of St. Michael and St. George in 1983 and received Australia's highest civil award as a Companion of the Order of Australia in 1991. In the same year he won the Australian Human Rights Medal. His work for equality was also recognized in 1999 when he was named Laureate of the UNESCO Prize for Human Rights Education.

Kirby is a member of the Anglican Church and considers himself a religious person who adheres to the "good values and loving values" that were instilled in him from childhood. He is, however, disappointed that the church is not more accepting of homosexuality. In a 2003 interview he stated, "We're going to have to get through this rather dark period. We're going to have to get through it, I hope, without hurting a lot of young people who are torn between their love of their religion, which they associate with their parents and their upbringing and their family, and the need to be true to themselves, which is terribly important."

Kirby has spoken in favor of same-sex marriage, both for the social affirmation of such unions and for the legal and economic benefits currently denied to gay and lesbian couples. He has called his long committed relationship with van Vloten "a great blessing in my life."

"For the stressful, pressured work of a professional lawyer, a loving and supportive home life is specially precious," said Kirby in a 2005 speech.

Van Vloten attended High Court functions with Kirby and accompanied him to formal luncheons and dinners with the Queen, the Prime Minister, and the Governor-General, as well as to other official events.

Kirby struck an optimistic note in remarks at the opening ceremonies of the 2002 Gay Games in his home city of Sydney.

"Ours is the world of love, questing to find the common links that bind all people. We participate because, whatever our sexuality, we believe that the days of exclusion are numbered.

"In our future world, everyone can find their place, where their human rights and human dignity will be upheld."

In his speech, Kirby honored "people of courage," including activists Rodney Croome and Nicholas Toonen, who led a long and eventually successful campaign to have homosexuality decriminalized in Tasmania; Neal Blewett, an early leader in the effort to combat AIDS in Australia; and Paris mayor Bertrand Delanoë, the victim of a homophobic stabbing.

He praised Gay Games founder Tom Waddell and cited other openly gay athletes, such as Olympic champion Greg Louganis, Australian rugby star Ian Roberts, and American rugby player Mark Bingham, who had planned to attend the Sydney games but died on September 11, 2001 while trying to help regain control of the hijacked United Airlines Flight 93 and to save the lives of those aboard.

"Indeed," declared Kirby, "I think of everyone who affirms the fundamental unity of all human beings. Who rejects ignorance, hatred, and error. And who embraces love, which is the ultimate foundation of all human rights."

In 2009, Kirby retired from the High Court. Fittingly, given his frequent comments about the desirability of women in the judiciary, he was succeeded by a woman, Justice Virginia Bell.

Upon his retirement, he accepted a number of honorary academic appointments at Australian universities.

He has continued to be outspoken in favor of equal marriage rights. In May 2012, for example, he told a Parliamentary committee considering a marriage equality bill that despite his having risen to become a significant member of the Australian judiciary, he always felt that he was a "second-class citizen" and would remain so until gay people had equal rights, including equal marriage rights.

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