

**Interview of Justice Michael Kirby, High Court of Australia
by Kathryn O'Brien, Law student at the University of Sydney**

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JUDICIAL ATTITUDES TO PLAIN LANGUAGE AND THE LAW

Research project supervised by Professor Peter Butt

KOB: Thank you very much for agreeing to see me, and for forwarding me a copy of your review of Professor Kimble's book, *Lifting the Fog of Legalese*.¹ I am delighted to have the opportunity to speak to you.

You mentioned that you are a judge with an unorthodox opinion, in that you support the plain language movement. In the course of my research, I have found that very few judges will say they are against plain language, but it will sometimes emerge that they nevertheless have some strong reservations about it.

Justice Michael Kirby: Some lawyers have got a lot of issues on this topic I'm afraid. I've seen this in the courts over the years. There are some judges - indeed I would say many, and even possibly most - who are psychologically resistant to any talk of "plain language", or "plain English", or "new language", or changing things long established. They love to mock so-called plain English drafts and to point to their defects. Now, some of those drafts do have defects. Indeed, virtually every draft of anything ever written by a human being has defects. But nothing gives

¹ (2006) 80 *Australian Law Journal* 623.

antagonistic lawyers greater pleasure than pointing to suggested defects in plain language drafts. This seems to vindicate, for them, the priestly cast of the legal profession and their own psychological and emotional resistance to the plain language movement. I always distance myself from such remarks.

KOB: In the book review you note that you are a patron of Clarity, an international organisation devoted to improving legal writing. What sparked your interest in plain language to begin with?

Justice Kirby: I think it goes back to my time in the Law Reform Commission. I was appointed Chairman, as the title was then named, of the Australian Law Reform Commission in 1975. In 1976, the first full-time Commissioner was appointed - that was Professor David St L Kelly. He was also appointed the Commissioner in charge of the insurance contracts reference. That led to a very careful scrutiny of all the insurance policies then in force in Australia. That led, in turn, to his realisation of the obscurities, antiquities and misleading, complicated and uncommunicative features of many insurance contracts. That led to him becoming very interested in the plain language movement. That, in turn, led to his making contact with Professor Vernon Countryman, an American Professor who was very much involved at the time in the plain language movement in that country. I'm talking about the early 1980s. In due course, that led to my becoming interested in it, because I was Chairman of the Commission, and a member of the division of the Commission which was working on the project. So I just became interested in this issue. I began to read about it. I began to see examples of plain English. And from that, and later contacts with Professor Peter Butt, and other distinguished Australian writers who were involved, most

particularly in Victoria - there was a whole cabal of them in Victoria - I became quite committed to the efforts to introduce plain language in legal writing.

So that's how it came about historically. I suppose my emotional predilection for plain English went back long before Professor Kelly and Professor Countryman.

Probably it goes back to my earliest upbringing, and my early teaching, and my love of clear and simple English, which is my native language. It is, of course, a language which is inherently disputable. That's because English, unlike many languages, is the combination of two powerful linguistic streams: the language of the original Anglo Saxons, the Germanic base, which is the language we speak in the kitchen, and the language of professions, scholarly work, and complex specialised writing, which was infused with the French language of William the Conqueror. This is the language we tend to speak and write in courts and in legal prose. So we have this combination of languages in the one tongue. It makes English a language very rich for literature and poetry, but somewhat ambiguous and therefore needing of attempts to adopt simple expression in matters of important legal obligations as a matter of conscious strategy.

KOB: You note in the book review that legal argument is often so complex that it can't always be simplified in the manner that Professor Kimble suggests. I was wondering if you could elaborate on the reasons why you have some hesitations about Professor Kimble's suggestions?

Justice Kirby: If you have a look at the *Commonwealth Places (Application of Laws) Act 1970* (Cth), for example. Just have a look at that statute. It was drafted by Mr John Ewens, QC, who was the first parliamentary counsel of the Commonwealth.

He was a brilliant man, basically a mathematician. His son became a Professor of Mathematics at Monash University and at, I think, Chicago University. So that was the sort of mind John Ewens had. He was gifted with great skills in legal drafting. He drafted the *Insurance Contracts Act 1984* (Cth) arising out of the work of the Australian Law Reform Commission. Earlier, he had drafted the *Commonwealth Places Act*. If you read that Act, or if you read, for example, some of the Limitation statutes that have been considered in the last year by the High Court of Australia,² you will see how complicated are the concepts. As a consequence, the expression is also complicated. Some concepts in law are quite complicated. The more the judges don't give effect to the legislative purposes, the more determined the legislators become to spell them out in great detail. This leads to legislative expressions which are very detailed and complicated. Sometimes it is difficult to reduce the concepts to simple expression. On the other hand, as Professor Joseph Kimble points out in his book, and as I pointed out in my review,³ there are some simple rules that you can adopt which will help you to speak and write more clearly in English. Short sentences; more direct expression; avoidance of clichés; writing more closely to the way we speak – these and other simple rules are ways in which lawyers can make legal expression clearer and simpler.

The sad thing is that this subject and its techniques are not really taught in Australian law schools. There was an attempt at Sydney Law School to introduce such teaching, but it did not endure. Professor Butt was involved in it. There is a need to introduce this subject at the early stages of legal education, because otherwise, once people have fallen in love with the “wheretofores”, and the “whereupons”, it is almost impossible

² See, for example, *Queensland v Stephenson* (2006) 80 ALJR 923.

³ J Kimble, *Lifting the Fog of Legalese: Essays on Plain Language* (2006) reviewed (2006) 80 ALJ 623.

to rescue them and to capture their hearts as well as their minds, and bring them back to expressing things simply as they basically do in the kitchen. Prefer the Anglo Saxon word to the French, and you have another rule for simpler expression, because that is the language in our genes, our basic language, the Germanic language, before the Conqueror came along and complicated things.

KOB: Some of the judges I have spoken to have commented that judges have written increasingly longer judgments over the last one hundred years or so. Why do you think judgments have become longer?

Justice Kirby: That is because many contemporary judges no longer believe that legal matters can be simply solved by taking out a magnifying glass and looking at words - words in the Constitution, words in the statute, words in the common law decisions. For me, as an example, context in the law is everything.⁴ Therefore, it's necessary, in my mode of reasoning, to explain the context, including the social context of the problem in hand, in order to explain how I come at my decision. That may make the reasons longer. But I think my reasons are simpler and clearer. Many students tell me that that is so. Of course, they might just be flatterers, and perhaps I shouldn't pay any heed whatsoever to students. But I often need to know a lot about a particular branch of law in order to explain to myself why I come to a conclusion. Especially so if my conclusion is different from that of my colleagues. I need to have a clear view of the facts; a clear statement of the applicable law; a clear explanation of the issues that emerge; and I do feel an obligation to explain, acknowledge and

⁴ *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 at 548 [28], applied in *Siemens Ltd v Schenker International (Australia) Pty Ltd* (2004) 216 CLR 418 at 460 [128]; *Al-Kateb v Godwin* (2004) 219 CLR 562 at 624 [174]; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212 at 229 [64]; *Maroney v The Queen* (2003) 216 CLR 31 at 51 [63].

answer the principal arguments of the parties. I do this out of a sense of natural justice, to make it plain that I have considered, addressed and reached a conclusion on the main arguments. Not everybody feels that that is necessary. Some don't even think it's appropriate. I must respect their way of doing things. But that is the way I do things. It's very largely connected with a contextual view of legal problems. Psychologists say that women are generally more contextual, and that men tend to be more linear and verbally logical. Maybe it is my female genes that are having this effect in me. However, if I go down that path, we won't know where we might end up. So I don't think I will explore that further! But there would be lots of explanations. They're the main ones.

KOB: At the end of your book review, you argue that: "Lawyers are often quite good in oral communication. What we need is to get them to *write* in the simple way in which the best of them *speak*."⁵ Does this mean that you find, for example, that barristers' oral submissions are often clearer and simpler than their written submissions?

Justice Kirby: Written submissions tend to be tighter. Lawyers have got to put it down and view it, and study it, think about what they've written. That, therefore, tends to make written submissions more precise and better thought out. On the other hand, persuasion isn't always about logical communication. Persuasion includes sending signals through electronic messages in the brain to other parts of the brain, but also to the heart, and to feelings of empathy, intuition, emotion. Therefore, written communication has perhaps a different role, supplementary to oral

⁵ (2006) 80 ALJ 623 at 624.

communication. What we are now seeing in the world, the Anglo common law world, is a gradual increase in written communication, to the cost of time spent hearing oral communication. One aspect of that move is that you do get more formalised writing. It is more precise. But it is more formal. That means it's going to have more French words in it. And to be more complicated, and to include references often necessary to the complexities, the exceptions, the qualifications, the analogies, the cross-references, and all of the variations that go into a complex legal argument. Oral communication, on the other hand, has to speak more clearly and directly to the recipient. It therefore tends to have more Germanic words, and to be simpler. This is because that's the way we talk when we're trying directly to persuade.

KOB: You note that word processors “risk embalming current errors for regurgitation by future generations, even future centuries.”⁶ Some of the judges that I have spoken to have commented on the rise of what they call ‘cut and paste judgments’. This is a reference to a perceived tendency among some judges to write judgments that are peppered with large slabs of submissions, or slabs of other judgments, that have been ‘cut and pasted’ into a Word document without being carefully thought through. Do you agree that the word processor can facilitate sloppy writing in this way?

Justice Kirby: I don't know about that, though that very point was put to me only yesterday by a colleague in the High Court. He expressed the same concern. He expressed the anxiety that the problem with ‘cut and paste’, or the computerised

⁶ (2006) 80 ALJ 623 at 624.

equivalent, is that slabs will be included without properly digesting what is included, and without it actually going into the writer's brain.

I'm not a great one in my reasons for quoting slabs in the opinions of other people. I did learn in my time in the Law Reform Commission the great importance of synthesising and conceptualising. Therefore, you won't see lots of slabs of quotations in my reasoning. Yet including them is not an uncommon way of writing reasons. It varies between judges. It isn't a judgment-writing style that I like myself, because I think it's important for the judge to say what he or she thinks, rather than what other judges or authors, in earlier times, have written about problems that can never be quite the same problem that is before the court where the decision is being made.

Having said that, there are two qualifications. First of all, I am now a justice of the High Court. Therefore, it isn't perhaps as important for me to have slabs of other people's writing as it is if you are in a court under the High Court. There, it may on occasions be important to set a passage out, a critical passage out of a decision of the High Court or perhaps a Court of Appeal, because it expresses part of the binding rule that governs the legal determination of the case. Secondly, judges of trial, and to some extent judges of intermediate courts when they're conducting an appeal by way of re-hearing, often have to include critical passages of the evidence. They must do so at some length in order to explain the factual determinations that they reach. Once you get to the High Court, at the second level (or sometimes third level) of appeal, you are really dealing usually with issues that are more conceptual and have already been refined. So it isn't necessary, in my view, to have large passages of detailed

judicial or textual elaborations or factual evidence. At least, it isn't normally necessary or useful. The task is different once you get to the High Court.

But that's just my opinion. Every judge is independent, not only from outsiders, but from other judges, including other judges in his or her own court. Other judges will have different writing styles, consider different things important and write in different ways. Furthermore, different generations tend to witness different styles of writing. If we now read Oliver Wendell Holmes, Jr in the United States Supreme Court it seems very flowery. Yet he was undoubtedly a great judge, and very influential. The way things are written by judges does tend to follow fashions of writing. That is just going to vary from time to time. Style is just a feature of changing times.

KOB: In terms of changing writing styles, one judge I spoke to mentioned that in older judgments, you tend to come across a lot of biblical allusions - for example, 'Who is my neighbour?' in Lord Atkin's speech in *Donoghue v Stevenson*. The judge mentioned that you do not tend to see biblical allusions in more recent judgments, there is no longer an assumed knowledge of the Bible. Have you noticed that sort of change in judgment writing?

Justice Kirby: We are a less religious society than we once were. We are also a multicultural and multi-religious society. Insofar as religion is still important, we all know that we have to respect a variety of religions, and not simply the Christian religion. That has probably led to people being less inclined to quote from the holy book of particular religions. When I was young, as was normal, natural, and in any case, it was what happened in my case, I was sent to Sunday school, then to church.

Then I was confirmed. I still count myself as a member of the Anglican Church, and of the Christian religion. It is just part of me. I love the liturgy of the Anglican Church in the *Book of Common Prayer*. It is most marvellous language, very spiritual in my opinion. It was written by Archbishop Cranmer and his colleagues. I find intensely moving. Yet I believe that many younger people today find that language a big turn-off. Therefore, there are moves to simplify the liturgy.

Of course, there are some things that are not so easily simplified, because they have a mystical or spiritual content in the language that is chosen. Perhaps it was chosen precisely because it is not everyday language. “O God, who art the author of peace and lover of concord, in knowledge of whom standeth our eternal life, whose service is perfect freedom.” How would one translate that into plain language? “God. You invented peace. Believing in you is not a burden, it’s freedom⁷.” You see - it wouldn’t be quite the same. So it’s a matter of horses for courses. Nevertheless, there’s a big difference between an insurance contract, a bill of sale, or an Act of the Parliament and a prayer-book. So what is appropriate to the mystical language that lifts the mind into a different and other-worldly realm, and reminds the participant of spiritual and non-worldly values, is not necessarily what is appropriate to a commercial contract, or a judicial decision on a negligence action. Horses for courses should be our guiding rule.

KOB: On the first page of your book review, you note that the use of the second person – the pronoun ‘you’ – can make writing more approachable to the ordinary reader. Judges I have spoken to have noted that some legislation - the *GST Act*, for

⁷ *Book of Common Prayer*, Second Collect for Peace.

example - is written in the second person. A provision will say that “you must not” do something, instead of “a person must not” do something. Do you approve of the use of the second person as a drafting technique to make legislation seem ‘friendlier’ and easier to understand?

Justice Kirby: That is particularly hated by many judges. They hate it. And they react very adversely to it. And I suspect that some, though I won’t name names, then try to show how foolish and stupid it is. I must admit I don’t like a statute written in the second person. I like a statute to be in the language of a command from Parliament, which is going to be in the third person. However, maybe I will get used to statutes in the second person. So far, there aren’t many of them. I think we should be open-minded to the fact that there may sometimes be a place for different ways of expressing parliamentary commands, as, for example, in consumer legislation, which an ordinary person can pick up and understand more easily if it is expressed in the second person. The passive voice is the most horrible enemy of clear expression. Justice McHugh always used to denounce it and try to avoid it, and I try to avoid it.

It would actually be interesting to me to have someone go through one of my opinions and to critique it from a plain language point of view. No doubt I could learn lessons from that. True, it is getting a little late in the day, given that I only have a bit more than two years to go in judicial office. However, one is always learning. I would be quite happy to continue to learn. Keep an open mind, I say.

On the other hand, I would not sacrifice things that seem important to me, such as the obligation to answer the submissions of parties. To me that’s not negotiable because I

regard it as part of the judicial function. By my arguments I cannot always persuade a party whose cause I reject. But I hope I can persuade them that I've given serious and thoughtful attention to their submissions about those questions. Maybe my attitude in this respect comes from the fact that I don't regard myself as a true member of an elite. I came from ordinary citizens. My mind is still there with ordinary citizens. I therefore feel an obligation to explain to ordinary citizens and so far as it is possible to speak in their language. This is a mighty well spring for plain language.

KOB: Thank you very much for your time and consideration, I am delighted to have had this opportunity to speak to you.

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