'BUT could you do it warts and all?'

When in 2002 Michael Kirby greeted my proposal for a biography with this response – in writing, very helpful for lawyers and historians – I was doubly sure this was the makings of a great life story.

As some colleagues said at the time, his was a life still unfolding. But even with six years left to run in the High Court of Australia, Kirby was Australia’s most famous and controversial judge, and a world-renowned figure for his work in promoting universal human rights, bioethics and effective policy responses to challenges such as HIV/AIDS. I knew that sooner or later someone was going to write a book about his life and career.

Three years before, at a dinner to celebrate the retirement of one of my academic mentors, I first heard Kirby say that a number of journalists wanted to write his biography, but he didn’t think the timing was right. Besides, to be a true judicial biography it needed to be written by a lawyer.

The need to do this grew. In 2007 Kirby suffered a well-publicised attack in parliament by a senior Liberal senator, essentially for being gay, implying that this biased him towards paedophiles, and even more outrageously that he might be one. These smears were supported by a single – fabricated – document appearing to suggest that Kirby had used an official car to transport a ‘young male companion’. The different reactions to this proved to be, as commentators said at the time, a defining moment. But defining what? In the shadowy years of the Howard government, it was difficult to discern. But someone had to have a go.

There was also a bigger story in the life and career of Michael Kirby. His fame had originally been won, in the 1970s and 1980s, as one of the world’s most effective legal and judicial communicators, before he became a ‘real’ judge. This in itself was full of paradoxes. How could a young man win fame as a great, socially important judge, when most of the legal and judicial profession did not see him as
a judge at all? The conventions of the judiciary spoke of reticence to get involved publicly in social and political issues, so how had Kirby managed to do it on such a grand scale? What did his celebrity status say about what society wants from its judges?

There was another paradox too, which other law reformers could see once they got close – the extent to which he danced on the edge of his own image as a legal and social progressive. Despite earning a public reputation as something of a radical, Kirby’s more routine, underlying message was one of faith in existing institutions. I saw it most clearly as a sometimes radical law student visiting his chambers in the 1980s. I commented that it was unfortunate he had to keep a very tired picture of Her Majesty Queen Elizabeth II hanging prominently on his wall. After all, something far more vibrant, interesting and socially relevant could be hanging there.

I assumed the washed-out royal photo was just an ageing part of the court decor. But the middle-aged Kirby fixed me with a chilling stare. I later learned this came from a stern, royalist Ulster-Scots grandfather. His tone left absolutely no room for doubt or challenge. ‘The Queen,’ he said slowly and pointedly, ‘is a wonderful woman.’

It was not just his faith in what I considered to be conservative institutions that struck me as strange. Nor my surprise that he thought Australia’s political challenges would somehow be improved ‘by encouraging adherence to a foreign cult’, as the Queensland judge Bill Pincus later described it privately to Kirby. It was the emotional, cultural nostalgia that underpinned this transfixing stare. Gareth Evans would later tell me how he explained it to the republican Paul Keating, as simply ‘tribal’: ‘You’re a tribal character, he’s a tribal character, it’s a tribal issue, it’s got nothing to do with rationality.’

But to a student, Michael Kirby seemed like a man from another planet. Only later did I realise it was this planet, but another epoch. He embodied a nest of paradoxes I then found perplexing and fairly uninspiring – but a quarter-century later considered fascinating.

By early this century, Kirby had gone from strength to strength as a visionary, a symbol of tolerance, diversity and reform, helping navigate a path into an uncertain future. Yet he did so with values and skills typical of someone who was also a conservative throwback. In one conversation, he could readily paint a perfect picture of why things were not right and should not be allowed to stay the same, but repel suggestions that the political institutions that had produced them might benefit from any substantial, systemic change. Someone had to try to make sense of this, or at least properly describe it. Better it be someone who saw the paradoxes, and was interested in what they meant for the development of our institutions, than one of the many who apparently did not.
Kirby’s reply that any biography should be ‘warts and all’ was the clincher. His greatest impact came from being a voice for transparency in the byzantine legal profession. His greatest opponents were those who did not think the general public could ever properly understand judicial decision-making, and therefore should not be educated in it. But whether hopelessly conservative or dangerously progressive (or, in reality, both), Kirby had a public resonance built on identifying the social and political principles at the heart of important legal questions. His career was built on his talent for laying bare the inner worlds of lawyers, judges and legislators. I smiled when the Weekend Australian’s review of Michael Kirby: Paradoxes & Principles was titled ‘A life laid bare’. It was the only way a biography of Kirby could be sensibly approached.

By the time I began work on the book Michael Kirby was a celebrity of thirty years’ standing. As a judge he had the luxury, even more than most politicians, of being able to insulate himself from those whose advice he might find too personal or critical. He engaged with public audiences and interest groups and academic scholars and students like no other judge, but fewer and fewer people were in a position, or had any motivation, to be brutally honest with him. Apart from select judicial colleagues, with whom he increasingly begged to differ, these were essentially only family members, some of whom had also given up. The enduring exception was his partner of many years, Johan van Vloten.

On the other hand, no one had made so many public commitments to the importance of humanity and transparency as elements of judicial life. From his roots in mid-western Sydney and Fort Street High School, intricately interwoven with his own brand of elitism, came a liberal egalitarianism that said every citizen, the lowlier the better, had the right to question absolutely anything. Few public figures had such commitment to open and frank debate. True to his rationalist view of the law, he believed instinctively in Cartesian and Marxian dialectics as paths to truth – also central to the legal system. Let the best opposing ideas be thrown at each other with full force, persuasion and logic, and by definition the winner is right. The only good biography of Michael Kirby would be one that challenged, with evidence, whichever presumptions its author thought should be assaulted.

NO BIOGRAPHER OF a living subject should hope to produce a book about which the subject does not complain – possibly bitterly. That is a recipe for an entirely ‘authorised’ biography: censored, or at least self-censored, and therefore moving closer to simply being ghostwritten on behalf of the subject. There may be value in such work, when a subject’s memoirs are important and would not otherwise be produced in a readable form. But it’s not biography.

Even when not bound by express or implied conditions for co-operation, judicial biographers face a special problem. As Edward White of the Virginia Law School wrote in 2003, there is always the fear that the biographer may ‘if not sanitise the
subject, at least not linger over personal issues that might be thought to be inconsistent with the image of...judges as figures of integrity, probity, and a certain heroic austerity’. Discussing challenges posed by a never-completed biography of the famous American judge Oliver Wendell Holmes, Jr, White wrote: ‘But who is to say that the assessment of Holmes’s life and career would be adversely affected by knowing that he was, for a time, in love with a woman other than his wife? And who is to say that a judge and his close followers should seek to control the portrait of the judge offered to posterity?’

In Michael Kirby’s case, the blessing was that even a critical biographer was not going to open up too many fresh cans of worms – almost every can had already been opened, if not by Kirby, thanks to his own penchant for publicity, then by those who reacted against him. The task was to craft a story shaped by proportion and context, which was well researched and factually accurate, insightful and rational, which challenged assumptions but was fair and persuasive. The project was a biographer’s dream – to explain the personal journey of such a unique character, to dispel myths and expose little-known realities, and, by explaining him in true historical detail, to use his fame, controversy and drama to point the reader at some of the large political questions posed by his roles as law reformer, judge and social icon.

Part of the story’s power would be in telling it as soon as possible after he retired from the High Court, when no actual litigation could be affected but people still had a live memory of the events and interest in these questions. After all, what does a modern society want and expect from its senior judges? How well is it dealing with conceptions of its own identity and challenges of change?

But this meant the clock was ticking. There was an absurd amount of material in Kirby’s archives. And an impossible range of topics and number of people who traversed his multiple professional lives. How to write in six or seven years the type of book that traditionally took biographers three decades to complete, long after the subject died? And do so with the story still unfolding every day?

Apart from time and resources, the answer lay in making the most of Kirby’s co-operation, while retaining enough detachment to do a proper job. A challenge. But co-operation is vital. Without it, you can produce a serious life review or critique – such as Chris Masters’ Jonestown (Allen & Unwin, 2007), about Alan Jones – but to call it a biography is a stretch. Co-operation garners access to personal papers, or most of them, as well as the right to burrow for any information you think you aren’t getting. It gets you more useful, contemporaneous documentary evidence with provenance than can be obtained any other way. Biographical research is, above all, historical research. Accuracy is paramount. Stories and legends passed down ex post facto based on what a person became, not who he was at the time, are rarely as useful: they are distracting and downright annoying. As in legal evidence, contemporaneity trumps legend every time.
But even more importantly, the subject’s co-operation is the key that permits others to open up. Those who only want to say bad things about a public figure will do so whether or not the project has any blessing. The same is true of those who only want to say nice things. But those closest to a subject – the family, friends and colleagues who really know him, who admire him but have been frustrated by him, whose advice has been given but ignored, who tried to warn him of the dangers into which he fell – these are the people whose evidence is gold. I learned early that the privilege of being a university-based researcher is that people respect your independence enough to tell the naked truth, when they otherwise might not. But for a biography of a living subject, a little more is needed – permission to speak freely. And in this case, many of those key witnesses knew Kirby’s values well enough to take his permission at its word.

Sure enough, it turned out that Michael Kirby, as human as anyone else, had airbrushed his own past. Usually in innocent ways. A recollection of a key moment of reflection under a crystal starry sky, while camping beside the Black Sea in 1970, as told in one later speech, could not have happened that way – in fact, it had been stormy and raining. Sometimes in less innocent ways, which pricked my own experience. Believe some speeches, word for word, and you might think that Kirby had ‘participated’ directly in the liberation of, or even personally ‘liberated’, the Walgett cinema from apartheid-style discrimination, during the New South Wales Freedom Rides of 1964–65. But unlike Charles Perkins or Jim Spigelman, the young Michael Kirby, in his double-breasted suits, did not actually undertake ‘direct action’, attend political protests, flout too many laws or get himself arrested. He provided legal representation for those who did – after the event. It was an important role, not to be belittled, but not the role some later speeches implied.

Here was a sliver of the Kirby paradox – happy to present himself, in hindsight, as a little bit more daring and radical than he actually was. This is splitting hairs, Kirby defenders might say. Let them say it. Kirby is a living subject, so he can also defend himself, even though the book is for posterity, and must be balanced and scholarly.

In any event, it is on both small issues of accuracy, as well as bigger ones, that the biographer of the living subject has to decide where his primary allegiances lie. I always had a clear answer, thanks largely to having had a journalist father, to whom I dedicated the book. Perhaps some biographers fret, but I had two basic principles inculcated from birth: what does the reader need to know from this story in order to have a real picture, and how is their interest going to be held? Splitting the right hairs, provoking the right question, using the incongruities to get the reader inside the real story of a life worth telling. This is the biographer’s first loyalty. Not to preserve or endorse the subject’s reputation, nor the praises of admirers.
WHEN THE PROJECT started I did not contemplate showing Kirby the text before the book was published. Nor did he ever suggest it. But then came a piece of advice from a great scholar and colleague, Patrick Weller: ‘Show him drafts...don’t promise anything, but it’s the fastest way to check facts, get a reaction and cut to the chase.’ A proper journalist’s instinct, married to the Marxian dialectic: don’t beat around the bush. If you are confident and want to be critical, how better to test and shore up your position than by exposing it to the person most likely to react against it?

But if he didn’t like it, would he keep co-operating? This was Michael Kirby, a man rightly renowned for his generosity, so the answer was probably yes. But even Kirby is human. At the very least, there were elements of family history whose accuracy only he and other family members could properly check. So I decided to start with those sections, a few months after he retired from the High Court in February 2009.

He promised only factual corrections; but I never deluded myself that this was all I would get. As the book developed, accompanied by corrections and queries, the writing took on elements of a dialogue. I revealed the first, too-long drafts chapter by chapter. Practicalities dictated this was the way to do it, but in other projects it would probably also be wise. After all, a subject’s too-negative reaction is not likely to make the author more generous in subsequent chapters. Michael became keen to receive each next instalment, ‘so I can see what became of me’.

Thus came 592 suggestions for corrections or changes. Most were minor and factual. For many, rewriting and editing made the suggestions irrelevant anyway. Others were beside the point, or helped a final point be made equally well or more clearly in a different way. And in key respects, some reactions enriched the book. Twenty-four of my subject’s suggestions ended up supplying new evidence of his perspective, using words or ideas that came not from earlier papers, speeches or interviews but directly from his response to my drafts. They let me crystallise and faithfully reflect his position, often in his own words, even when based on assumptions I still intended to lay bare for critical readers. An ideal outcome, made possible by the co-operation of a subject, who was not only alive, but very much kicking.

But thirteen of the 592 suggestions required definite rejection. Michael Kirby was indeed only human. They were understandable edits or reinterpretations but still, in my view, thirteen that would have compromised the real story. The decision to reject was just as valuable – it meant I knew exactly where I stood, and I was forced to check. As on many other touchy issues, if in doubt I had access to the counsel of Australia’s best law and politics publisher, Christopher Holt. But on these thirteen suggestions, I was in no real doubt.
My subject generously offered to read the proofs for any last factual or spelling errors, but ultimately agreed this would cross a line. There were still things that, while he might accept what I had written, he did not agree with, and were certainly not presented as he suggested. If he tried to correct some things but not these, in the final stages, a reasonable reader could assume he was ‘authorising’ the result. That would not be fair on him, nor an accurate reflection of the book. A biography is not the subject’s story. It is my story of him. The mere fact of co-operation gives cause for wonder, as well it should. But he was clear on the reality, and so was I.

WHAT WOULD OTHERS decide? As the book made its way into the world, in early 2011, erroneous assumptions that this was Michael Kirby’s story, a memoir and not a biography at all, became my greatest fear. Some bookshops presented it this way, grasping the living subject’s fame as most important to selling books. ‘Oh, it’s the co-author,’ one admirer greeted me innocently. I swallowed fury and pride before explaining the truth – which persuaded her to buy the book.

I could live with this, provided the book still had its intended effect. Richard Posner, the prolific American judge and biographer, suggested that judicial biography was not ‘cost-effective’ because the amount of time and effort could be better employed writing on matters more directly relevant to judges, legal academics, practitioners and the world. Possibly said in jest, it was nevertheless true. Michael Kirby knew this, too. In the same reply in 2002, he had asked: ‘But surely you have better things to do with your time?’ And the answer was yes, I probably did.

The advantage of this living subject – almost larger than life – was to produce a biography that was not simply historical, to give meaning to days gone by, but to demonstrate that history is alive now, that we are all making it now, and to use the currency of its themes to help others reflect and find their own longer-term view of what is happening now, as we struggle to achieve our oft-stated aim of becoming a more democratic and more accountable, open and tolerant, fairer society.

John Ritchie, a former general editor of the Australian Dictionary of Biography, once described the biographer as ‘like an archaeologist, inferring from fragments... That should not deter us. Don’t search for Grand Theories of Human Behaviour. Get on with telling the story. Practise biography rather than preaching or philosophising about it. By resolute and dogged steps awareness can be won.’

But the biographer of the living subject also has special advantages: he is not just an archaeologist, but an anthropologist, a sociologist, a political scientist and, just like some judges themselves, an activist. While deploying all the best scholarly methods, he can work with more than fragments, and present a life story that is both
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past and present, to collide with the society around it. A servant of history and the
reader, but also an architect. If he chooses to see it, he is his own warrior of ideas,
devising which pieces of shrapnel might bounce off the story into current and future
debates, the point sometimes made obvious through the eyes of the characters,
sometimes in almost undetectable slivers.

Fortunately, the result worked, or at least so it appears. Even as Kirby helped
launch the book, in two different cities, both official launchers – Malcolm Turnbull
and Michael Lavarch – seemed genuinely intrigued about how I got away with it. In
the *Canberra Times* a long-term watcher of politics and the law, Jack Waterford,
commented on the unusual sight of a living subject indulging deeply in the
promotion of a biography over which he had no control: ‘Kirby joined the publicity
roadshow…mostly seeming so flattered to be the subject of such an exhaustive
portrait that his protestations that the book was very tough on him seemed only to
be ritual. In fact the book is tough indeed, and some of its judgments, or discussions
about the mystery and mystique of the judge, must have been difficult for Kirby to
swallow. The more so, perhaps, because they reflect some of the persistent criticisms
of people who have been friends and colleagues, but not unsparing ones, over the
years.’

But for the story to achieve any of its aims, it above all had to reveal a real life. I
waited for the magic words, and then they came: Richard Ackland, in the *Sydney
Morning Herald*, described the biography generously, and finally, and more
importantly, as ‘warts and all’.