

# The Hon. Michael D. Kirby AC CMG

17 June 2019

Mr David Tune AO PSM,  
Former Secretary, Department of Finance,  
Chair of the Review into the National Archives Authority of Australia,  
c/- Council of Australasian Archives and Records Authorities,  
Queen Victoria Terrace,  
Parkes ACT 2600

By email: [review@naa.gov.au](mailto:review@naa.gov.au)

Cc:

## *SUBMISSION TO THE TUNE REVIEW*

Dear Mr Tune,

I was overseas at the time of the announcement of the inquiry into the National Archives of Australia (Tune Review) being conducted by you. I apologise for the lateness of this submission. I understand that the time for submissions has been extended to Monday, 30 June 2019. Thank you for the opportunity to make a submission.

### *Obligatory deposits:*

2. I am not expressing an institutional or governmental viewpoint in this submission. Mine is the submission of a user of the services provided by the National Archives of Australia (NAA). I begin by stating, that in this capacity, I have received outstanding assistance and support from NAA and its officers since a relationship was established, relevantly after 6 February 2009. That was the day upon which I resigned from my last federal office, as a Justice of the High Court of Australia.

Earlier, between 1 January 1975-September 1984, I held various other federal offices as:

- \* Deputy President of the Australian Conciliation and Arbitration Commission (1975-1983);
- \* Commissioner (part-time) of the Australian Law Reform Commission (January-February 1975);

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- \* Chairman (inaugural appointment) of the Australian Law Reform Commission (February 1975-September 1984);
- \* Member of the Administrative Review Council (1976-84); and
- \* Judge of the Federal Court of Australia (June 1983-September 1984).

In respect of the foregoing appointments I was subject to obligations under the *Archives Act 1983* (Cth) to deposit identified records as required by the Act. This I did in a first tranche of deposits in 1984.

3. In September 1984, I was appointed a Judge of the Supreme Court of New South Wales; Judge of Appeal of that Court; and President of the Court of Appeal of the Supreme Court of New South Wales. In 1988, 1990 and 1993, I served as Acting Chief Justice of the Supreme Court of New South Wales. In those State offices I was not subject to the federal legislation, although during that period (1983-96) I was also appointed to various part time federal offices including:

- \* Member of the Council (part time) of the Australian Institute of Multicultural Affairs (1981-1984);
- \* Member of the Executive Board of the CSIRO (1983-86); and
- \* Member (part time) of the Australian National Commission for UNESCO (1983-85);
- \* Delegate to the General Conference of UNESCO Paris (1983).

4. On and from 6 February 1996 I appointed a Justice of the High Court of Australia and relinquished my State and other appointments before taking up that office. Once again I became subject to obligations under the federal *Archives Act*. I resigned my office as a Justice of the High Court of Australia on and from 6 February 2009, shortly before my 70<sup>th</sup> birthday on 18 March 2009.

#### *Records of Non-Statutory Offices*

5. Before and during my service respectively as President of the New South Court of Appeal and as a Justice of the High Court of Australia, I fulfilled a number of functions for the OECD, Commonwealth Secretariat and United Nations activities. These were fulfilled with the agreement with the relevant state or federal governments concerned. Without detailing all of the relevant offices, they included:

- \* Chairman of the OECD Expert Group on Transborder Data Barriers and the Protection of Privacy (1978-80);
- \* Member of the Executive, Chairman of the Executive, and President of the International Commission of Jurists, Geneva (1983-98);
- \* Member of the World Health Organisation Global Commission on AIDS (1989-1992);

- \* Member of the International Labour Organisation Commission on Freedom of Association and Member of the ILO Mission to South Africa (1991-1992);
- \* Chairman of the OECD Expert Group on Data Security (1989-91);
- \* Member of the Expert Group of UNESCO on the Rights of Peoples, Rapporteur of the Group and Chairman of the Group (1989-91)
- \* Special Representative of the Secretary-General of the United Nations for Human Rights in Cambodia (1993-6)
- \* President of the Court of Appeal of Solomon Islands (1995-96);
- \* Member (second term) of the Australian National Commission for UNESCO (1998-2007);
- \* Member of the Ethics Committee of the Human Genome Organisation (1995-2003)
- \* Member of the UNESCO International Bioethics Committee (1996-2005);
- \* President of the Institute of Arbitrators and Mediators Australia (2009-2010);
- \* Member of the Commonwealth Secretariat Eminent Persons Group on the Future of the Commonwealth of Nations (2010-11);
- \* Member of the UNDP Global Commission on HIV and the Law (2011-12);
- \* Chairman of the United Nations Human Rights Council's Commission of Inquiry on Human Rights Violations in DPRK (North Korea) (2013-14);
- \* Member of the Lancet UNAIDS Commission of Essential Medicines (2014-15);
- \* Member of the High-Level Panel of the Secretary-General of the United Nations on Access to Essential Healthcare (2015-16);
- \* Member of the UNAIDS Reference Group on HIV and Human Rights (2004-);
- \* Member, Vice-Chair and now Co-Chair of the International Bar Association's Human Rights Institute (2015-)
- \* Member of various bodies connected with LGBTIQ rights nationally and internationally (1998- );
- \* Member of various cultural, educational and other bodies, national and international.

6. I have included this over lengthy identification of some of the bodies with which I have been connected over 50+ years to indicate the range and variety of my offices, federal, state and in civil society over an extensive period. If my engagements with student bodies at the University of Sydney and other institutions are included, and my participation on university councils (Sydney University, University of Newcastle and as Chancellor of Macquarie University) are thrown in, the range of activities can be seen as broad and varied. It extends over more than 50 years, virtually from my school days. Inevitably, such positions accumulated a lot of archival and personal records going far beyond, but including, my judicial activities, federal, state and overseas.

7. Upon my retirement from office as a Justice of the High Court of Australia, I sought advice from the National Library of Australia and universities as to where my archives

(beyond those required by the *Archives Act 1983*) should be deposited. The unanimous view was that they should go to the NAA. This would permit both compulsory and voluntary deposits to be housed in the one venue. The NAA, through its then Director-General, agreed to this course. A substantial deposit of my public and private records was therefore made to the NAA after 2009. That deposit has been supplemented by subsequent tranches of deposits, the most recent being in late 2018.

*Ambit of deposits: paper and digital*

8. In addition to paper and electronic deposits, I have also transferred to the NAA my extensive collection of photographs including photograph negatives (in the era of film) and photographic and filmed electronic images. Together with moving film, video film and other media records, these include unique collections. They cover:

- \* *Family and personal* photographs;
- \* Photographs of *Australian civil society* in organisations which I have been engaged;
- \* Photographs of *international* activities (as above);
- \* A unique photographic record from beginning of the *HIV/AIDS epidemic* and the international response to that epidemic after 1988 up to date;
- \* A unique photographic record of *Human Genome Project* and the International Bioethics Committee that produced the UNESCO *Universal Declaration on Bioethics and Human Rights*. I served as the chair of the Committee that drafted that Declaration adopted by the General Conference of UNESCO in 1985;
- \* Photographs of activities in *Australian universities*;
- \* Photographs of activities undertaken for the *Commonwealth Secretariat*;
- \* Photographs of work as a UN mandate-holder in respect of *Cambodia* (1993-6) and DPRK (*North Korea*) (2013-14) and as chair of the Constitutional Conference of Malawi (1989);
- \* Photographs and other records of the *LGBTIQ emergence* in Australia from criminalisation to aspirations of equality.

9. In the organisation of this deposited material much attention has been paid in successive offices to appropriate classification and filing of hard copy and other materials. However, necessarily considerable demands have been placed on the officers of NAA once the deposit has been transferred to NAA.

*Difficulties in retrieval and digitisation*

10. The successive officers of NAA with whom I have dealt since my engagement with them from 2009 have, without exception, been dedicated, cooperative and helpful in supervising the deposits and, where needed, occasionally providing access for the retrieval of deposited materials. This is an area of weakness in current arrangements because of lack of physical facilities, resources and delay in securing access.

11. The staff of the NAA have been specifically helpful in advice to me concerning the deposit of photographic materials. For example, they have advised on the urgent need to remove photographs from plastic interleaved albums in which the photographs have earlier been retained. And to preserve video and filmed records from destruction. These are urgent tasks. However, they have not been able to be pursued successfully because of the lack of funds and expert staff.

12. Likewise, I have discussed with the present Director-General and officers of NAA the digitisation and identification of my photographs as an urgent project. It is possible, that in the future, the photographs showing behind-the-scene images of the Court of Appeal of New South Wales, the Court of Appeal of Solomon Islands and the High Court of Australia, being unique, will be a most valuable part of my deposit. However, the value will depend upon digitisation and identification of the photographs. Moreover they will depend on my own survival to a time when I can assist in the identification of the subjects of the photographs. At the time of writing this submission, I am 80 years of age. Securing my cooperation and participation in identification should therefore, ideally, take place within the next couple of years. My understanding is that this will not be possible within the current and likely future resources of the NAA unless there is a substantial enhancement of resources. So an opportunity for cooperation will pass at considerable cost to the value of the deposit as part of Australia's historical records. And if this happens to my records it will obviously affect the records of other citizens deposited with NAA.

13. The large contemporary shift in deposited material in the NAA from hard media to electronic copy will greatly alter the types of deposits, beyond compulsory deposits in the future. My substantial deposit will be one of a number on the cusp on the change of technology from papers to electronic data. However, digitisation of selected materials in my deposit would be enhanced and facilitated by the careful filing practices that have been observed by me and my personal assistants over 40 years.

14. Care in the collection, preservation, identification and deposit of records will often arise out of a love of history. History built on sound data is more likely to be reliable than history built on impressions, anecdotes and imperfect recollections. Accordingly, the reliability and authenticity of our nation's view of its history is inevitably affected by the NAA's resources.

*Importance to reflect our democracy*

15. The NAA is the most important repository of Australia's historical sources. Whilst my deposit is specialised and particular, the variety, duration and, in some cases, significance of the offices I have held, should make the deposit useful to historians of the period. Additionally, the digitisation of photographic and hard copy paper materials would enormously enhance the value of my deposit. In my opinion, the inability of NAA to attend properly to my materials, beyond storage, indicates that similar

problems must exist with other deposits and thus with the preservation, accessibility and presentation of our national archives to a wider potential public.

16. I therefore urge your Inquiry to consider its task against principle of the democratic function of the NAA in holding up a mirror to the people of Australia based on the availability of records deposited with the National Archives particularly but not limited to, governmental and public records. At least in my case, the records are well organised, well filed, carefully assembled, updated, varied and of general public interest. But their utility will not be maximised if the records remain in boxes and are not made more generally available, where relevant, to researchers and experts, but also to private citizens (including those many thousands with whom I have interacted over my long public career).

17. I therefore urge the Inquiry to support the case establishing the importance of the NAA to the record of Australian democracy, its society and its institutions. In particular, funding should be urgently made available to enhance and expedite the digitisation of hard copy papers, photographs, video and other film. Especially, whilst the subjects of such records are still alive and capable of identifying and describing the records so as to preserve and enhance their utility.

Necessarily, these submissions are limited to my own engagement with NAA. They have been prepared to address the particular matters of concern to me. I will be available to Mr Tune and his colleagues, should they feel that it would be useful to have a face to face encounter with a citizen who has had extensive dealings with NAA. And who knows the importance of NAA to interpret the history of Australia to itself, based upon available and well-preserved records.

18. As far as I am concerned, my submission is a public submission and I am happy for it to be made available to the public in support of my proposals.

Sincerely,  
With respect,

A handwritten signature in black ink, appearing to read 'Michael Kirby', written in a cursive style.

MICHAEL KIRBY