

*The Hon Michael Kirby AC CMG**

JOHN JEFFERSON BRAY — A VIGILANT LIFE

BY JOHN EMERSON

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INTRODUCTION

*Mortals are aware of present things.
The gods, full and sole possessors
of all Knowledge, are aware of things to come.
... The secret sound
of approaching events reaches them.
And they pay it reverent attention. While out in the street
the people hear nothing at all — C P Cavafy¹*

A merit of John Emerson's excellent and insightful biography of John Jefferson Bray, Chief Justice of South Australia 1967–78, is that Emerson has opened each chapter with an apt quotation from one of Bray's published poems. Bray was an accomplished poet and, as Emerson demonstrates, this was not the only unusual feature of the man. Although Bray had a distinguished lineage and rose to the highest public offices in South Australia (Supreme Court Chief Justice, University Chancellor, Deputy to the Lieutenant-Governor), he remained his own man. He did so despite the dangers. He did not join the Adelaide Club. He disdained official cars and walked to work. He had a close circle of artistic friends. He wore shorts in public and he frequented noisy pubs. He went swimming at public beaches. And he declined to wear a hat.

I think that Bray would have approved of my conceit in reversing the tables and illustrating this review with poems of C P Cavafy, an Alexandrian Greek who hardly ever revealed details about his sexual life but wrote frankly about homoeroticism in his

* Justice of the High Court of Australia (1996–2009); Member of the Global LGBT Forum, Berlin (2015–present). Patron of the Pinnacle Foundation (2012–present) and of the Kaleidoscope Foundation (2013–present).

¹ C P Cavafy, 'Wise Men' in C P Cavafy, *The Collected Poems: With Parallel Greek Text* (Evangelos Sachperoglou trans, Oxford World's Classics, 2008) 31.

poetry.² Anything might turn up in poetry. It might be true or it might be imagination. But in the courts of law, the truth should prevail.

JOHN BRAY'S LIFE

I

Bray's forebears included English settlers in the American colonies. Specifically, a 'soldier of fortune' in the Virginia colony, Captain John Smith. According to legend, Smith's life was saved by the 12 year old daughter of an Indian chief who was about to kill him. That daughter was Pocahontas, a princess who was taken to England and who later married John Rolfe. She left a son whose progeny included the Jeffersons, who provided Thomas, the third President of the United States of America, and the Brays of South Australia. Bray's branch of the family came to Adelaide in 1837 on board the *Hartley*, in the form of Thomas Quinton Stow. Proud of his links to the Native American princess, Bray sometimes joked that he was 'John Jefferson Pocahontas'. Although he lacked an acknowledged royal status, in terms of the South Australian community, he came close. Stow's eldest son became in 1865 one of South Australia's first three Queen's Counsel. In 1875 Stow was elevated to judge of the colonial Supreme Court.

Another of Bray's forebears was John Cox Bray, born in Adelaide in 1842. He entered the Colonial Parliament in 1871 and rose to be Premier of South Australia. He attended the Federation Conventions in Sydney in 1883 and 1891. The family became wealthy from land purchases and legal practice. They intermarried with other famous families of the colony, the Downers and the Bonythons.

A grandson of the former Premier, John Jefferson Bray was born on 16 September 1912. Emerson's research shows that on that day, the Governor-General of Australia (Lord Denman) and the Prime Minister (Andrew Fisher) were in Adelaide to celebrate the commencement of the building of the continental railway line from Port Augusta to Kalgoorlie. Bray's family boasted mansions and servants. His home life followed a punctual and disciplined pattern, with public rectitude and plain English food.

The young J J Bray was enrolled at St Peter's College in Adelaide. He was confirmed into the Anglican Church. At school, he was shy and introverted. However, when he was withdrawn from the boarding school to become a day student, things improved. He would have finished as dux of the school but for a weakness in Latin. Emerson suggests that his failure in Latin was because he was concentrating on the erotica of

² Evangelos Sachperoglou, 'Introduction' in C P Cavafy, *The Collected Poems: With Parallel Greek Text* (Evangelos Sachperoglou trans, Oxford World's Classics, 2008) xi.

Catullus, which was, unsurprisingly, not part of the curriculum.³ In a speech on his return to St Peter's College in 1978, he complained:

The pressures to conformity were great. I resisted them as silently and unobtrusively as I could and the lessons I learnt in so doing have enabled me to resist them with much less trouble ever since. I hasten to add that I am not recommending nonconformity for its own sake. If you can conform happily no doubt you would be foolish not to do so. Some people can't.⁴

The gift of a motorbike from his ever hopeful father was disdained and never used. He also never learned to drive a motor vehicle.

Bray began the study of law at the University of Adelaide in 1929, still only 16 years of age. He was admitted to practice in 1933. He immediately decided to work towards a Doctorate of Laws. His thesis, as finally approved, was on 'Bankruptcy and the winding up of companies in private international law'.⁵ He later admitted ruefully that he had never once been able to put his thesis, for which he was awarded the rare LLD degree, to practical use.

From the point of view of daily practice, more relevant were Bray's observations of leading members of the Adelaide Bar, as they presented their arguments and contested their cases. Typically, when he won a prize for the thesis, he diverted the money involved to a student who was in financial hardship. The Great Depression of the 1930s was a difficult time for many throughout the State. Whilst at the University, Bray cheered things up by becoming a close friend of Max Harris, writer and iconoclast. Unsuccessfully, he sought academic appointments in Adelaide, Melbourne, Sydney and Wellington, New Zealand. His application for appointment to the Sydney chair of jurisprudence and international law was not successful. The post went to Julius Stone, who was to prove highly influential, if often controversial. Bray, like Stone later, took up the presentation of comments on public affairs on radio.

II

By 1945, Bray's life had settled into a stable routine. Professional work in his legal office. Part-time activities as a law lecturer (jurisprudence and Roman law) and broadcasting. Weekly engagements with a small circle of close friends. They encouraged him in his literary writings: plays and poems often inspired by stories, safely divorced from contemporary controversy and anchored in the classics of ancient Rome and Greece. By the middle of the 20th century, one of the controversies in the legal profession of South Australia concerned the qualifications of solicitors

³ John Emerson, *John Jefferson Bray — A Vigilant Life* (Monash University Publishing, 2015) 21–2.

⁴ *Ibid* 23.

⁵ *Ibid* 34.

and barristers and the possible establishment of a separate Bar (an idea that Bray did not favour).⁶

From research amongst court records, Emerson identifies the cases Bray argued, chiefly before the State Supreme Court and the High Court of Australia. Some of the cases clearly demanded legal ingenuity (such as overcoming the bias of testamentary law against bequests to ‘illegitimate’ children).⁷ Bray’s growing engagements as counsel were recognised by his appointment to silk in March 1957. He won an important success in the High Court in 1958 in a capital case that drew the distinction between justifiable homicide and excusable homicide: *R v Howe*.⁸ Not for the first or last time, his old adversary was Roderic Chamberlain (known as Joe), by then the State Crown Solicitor. Bray’s junior in *Howe*’s case was Len King, later to be his successor as Chief Justice of South Australia.

Bray, a voracious reader, joined the Libraries Board where he was to serve until 1987 (a remarkable 43 years). In 1960 he was elected Chair of the Adelaide Writers’ Festival Committee. This engagement with the world he loved most had occasionally to take second place to important appearances as a barrister. His cases included a number of briefs in a saga described by Emerson as ‘Watershed 1959’. Litigation arose out of the conviction of an Australian Aboriginal, Rupert Max Stuart, for the murder of a nine year old girl. Objections were raised to the conduct of the trial by the Crown Solicitor, Chamberlain. At News Limited, then substantially based in Adelaide, a young Rupert Murdoch stepped up coverage of the case, critical of the conviction. After the State appeal court and the High Court declined to intervene, Murdoch called for a Royal Commission. The government eventually established one. However, it appointed Chief Justice Mellis Napier and Justice Geoffrey Reed to conduct the inquiry. Reed had been the trial judge in the Stuart case and Napier had presided in Stuart’s unsuccessful appeal. Such poor judgment in naming the investigators added to media suspicion and attacks.

Bray unsuccessfully sought leave on several occasions to appear in the inquiry as Mr Stuart’s lawyer. Following certain conduct of the Commission, Murdoch’s counsel, the Sydney silk Jack Shand QC, walked out of the inquiry declaring that it would not give Stuart a ‘fair go’.⁹ There was by then great urgency in the matter because the accused was scheduled to be hanged very soon. Murdoch and his newspaper were accused of attempting to discredit the members of the Supreme Court, sitting as the Royal Commission. The enterprise descended into farce when Rupert Murdoch and the editor-in-chief of *The News*, Rohan Rivett, were challenged by police who arrived at their offices, without notice, and demanded interviews. Rivett was eventually charged, along with News Limited, upon nine counts of criminal libel. In these criminal proceedings, Murdoch declined to answer questions.

⁶ Ibid 75.

⁷ Ibid 81.

⁸ (1958) 100 CLR 448 (*Howe*).

⁹ Emerson, above n 3, 123.

Bray, who had sat through the Royal Commission and witnessed the events that led to the media attacks, picked up Shand's brief for the media interests. Emerson carefully takes the reader through the jury trial and the skilful address by Bray in defence. On all but one count, the jury entered verdicts of not guilty. The remaining count, on which the jury could not agree, was withdrawn by the Crown 10 weeks later. Murdoch moved to Sydney to run and grow his media empire. John Bray had won not only a significant case, but great public esteem for his skilful castigation of both the government and the 'prosecut[orial] ... immoderation'.¹⁰

III

*Beware of grandeurs, oh my soul,
and if you cannot overcome your own
ambitions, pursue them, at least, with hesitancy
and circumspection. The more you advance,
the more questioning, more careful you must be* — C P Cavafy¹¹

The immediately following chapters in this biography examine, successively, Bray's life and loves as a poet and his important cases. The latter included his appearance in a trial for damages in the High Court: *McHale v Watson*.¹² The claim was founded on the fact that the plaintiff and defendant were permanent residents of different states of the Commonwealth.¹³ The claim in negligence and trespass was based on an alleged failure of parental supervision of a child. This claim was rejected at trial by Windeyer J and by a majority on appeal to the Full High Court, sitting in Adelaide. The argument is reproduced by Emerson to demonstrate the ingenuity of Bray's analogical reasoning. The problem of being such a senior and talented advocate was that Bray was picking up all the hard or impossible cases. Emerson also outlines Bray's arguments in the case of Glen Valance,¹⁴ based on the alleged mental illness of the prisoner. The argument failed before the High Court and Valance, the last person to be hanged in South Australia, went to the gallows on 24 November 1964. Capital crimes added a special burden for counsel, especially one as sensitive Bray.

In 1965, the Australian Labor Party (ALP) won office in the South Australian State election under Premier Frank Walsh following decades of Coalition government. The new government took the initiative of appointing Australia's first female Supreme Court judge, Roma Mitchell. Sir Herbert Mayo, one of the two last judges who had opted for life appointment instead of retiring at 70 with a judicial pension, then retired. The only 'lifer' to remain in office was Sir Mellis Napier, the Chief Justice.

¹⁰ Ibid 144.

¹¹ C P Cavafy, 'The Ides of March' in C P Cavafy, *The Collected Poems: With Parallel Greek Text* (Evangelos Sachperoglou trans, Oxford World's Classics, 2008) 33.

¹² (1964) 111 CLR 384.

¹³ *Australian Constitution* s 75(iv).

¹⁴ *Valance v The Queen* (1961) 108 CLR 56.

The State Attorney-General, Donald Dunstan, discovered that Sir Mellis ‘could not afford to retire’ because of family obligations.¹⁵ Dunstan thus began working on the venerable judge, who had turned 83 in 1965, to remove the impediment. As Emerson explains, a deal was struck with the government, involving lengthy paid leave after retirement; the purchase of the retiree’s law library; and the incumbent’s retention of the office of Lieutenant Governor. Dunstan’s proposal to appoint Bray as Chief Justice divided the Walsh Cabinet. As he was to tell Bray in a conversation in the street (chosen for fear of covert interception if carried out in official chambers) the police commissioner McKinna had given Cabinet an adverse briefing on Bray’s character. This alleged that Bray had been ‘openly in a homosexual relationship in 1960s Adelaide, when homosexual activity was still illegal’.¹⁶

Emerson is careful about the detail of the steps that then followed. Reproduced in the document, in response to the ‘inanity and ... banality of McKinna’s report’,¹⁷ is the full handwritten text of a memorandum in which Bray takes apart the foundations of the allegations against him.¹⁸ He admits to hotel drinking with friends and acquaintances and occasional interaction with lesbians and homosexuals, including ‘transvestites’.¹⁹ But he denied any wrongdoing. And he was critical of the ‘lamentable episode’ that showed ‘either the police keep a dossier on everyone, or everyone of any degree of prominence, or else that I have been singled out for special attention’.²⁰ Bray was especially critical of the fact that the allegations ‘seem to centre around a period during which I was professionally engaged in litigation which was likely to be displeasing to the government of the day’.²¹ This was a singularly shabby episode in the history of South Australia. If only for Emerson’s analysis of it, this biography is to be welcomed and should be read.

The outcome of the event was that Dunstan persisted with Bray’s appointment. Napier arranged a court welcome. He sought to have Bray elected to the Adelaide Club. Bray must have allowed his name to be advanced for that purpose. However, the nomination to the Club was ‘blackballed’.²² When Napier persisted, Bray eventually explained his conclusion that ‘the Chief Justice ought not to be a suppliant’.²³ Emerson records the bitterness at Bray’s appointment on the part of Chamberlain, who described Bray as ‘that bachelor’ and his friends as ‘types’.²⁴ Allegedly, Chamberlain had been promised the central seat by the Playford Government before it lost office in South Australia. When Bray arrived at the special sitting and announced his

¹⁵ Emerson, above n 3, 187.

¹⁶ Ibid 190.

¹⁷ Ibid 191.

¹⁸ Ibid 192–6.

¹⁹ Ibid 194.

²⁰ Ibid 195.

²¹ Ibid.

²² Ibid 198.

²³ Ibid 199.

²⁴ Ibid.

commission, the words of welcome fell to be given by the most senior puisne judge, Chamberlain. They were economical in the extreme.²⁵

Bray took the occasion to take aim at his critics:

Necessary restrictions surround [the judicial] office. Not all things which are permitted to other men are permitted to him. But I believe that the provisions of the self-denying ordinance which judges in the past have so conscientiously imposed upon themselves, can reasonably be submitted to review in the light of the changing nature of the age in which we live, and of the way of life of a democratic and egalitarian community.²⁶

IV

Emerson then proceeds to portray the 11 years of the brave Chief Justiceship of Bray. He places it firmly in the 'Dramatic Dunstan Decade'.²⁷ He is precise and critical in his description of an unexpected occurrence when Dunstan was joined by Bray and some friends at an Easter weekend away at Robe. This was imprudent because the approach of a State election in 1968 afforded special reasons for maintaining a distance between the executive government and the judiciary. One suspects that Bray, and possibly also Dunstan, were presented with an arrangement made in their absence by others who were insensitive to the appearances.

Emerson then provides a selective analysis of some of the 600 judicial opinions that Bray authored in the 11 years he served as Chief Justice of South Australia. Some of them took Bray back to a recurring theme that appeared both in his judicial and extrajudicial writings.²⁸ Especially a dislike of excessive censorship.²⁹ In a number of cases, and on a wide range of legal topics, Bray's opinions were approved and cited by the High Court of Australia.³⁰ Unusually, his dissenting reasoning was picked up, cited and applied in a restatement of the law by the House of Lords.³¹

²⁵ [1967] SASR vii. Memorandum of a special sitting of the Full Court held on Friday 10 March 1967 on the occasion of the presentation of Dr J J Bray QC's commission as the Honourable Chief Justice of the Supreme Court of South Australia.

²⁶ *Ibid* viii.

²⁷ Emerson, above n 3, 205.

²⁸ See, eg, J J Bray, 'The Juristic Basis of the Law Relating to Offences against Public Morality and Decency: Being the Third Wilfred Fullagar Memorial Lecture' (1972) 46 *Australian Law Journal* 100; J J Bray, 'Censorship' (1964) 13 *Australian Library Journal* 60, 60–70. See also Emerson, above n 3, 215–16.

²⁹ *Simmons v Samuels* [1971] 1 SASR 397, 399–400; *Romeyko v Samuels* [1971] 2 SASR 529, 530.

³⁰ See M D Kirby, 'Bray's Impact on Australia's Jurisprudence' in Wilfred Prest (ed), *Portrait of John Bray* (Wakefield Press, 1997) 96–7, 100.

³¹ *Director of Public Prosecutions for Northern Ireland v Lynch* [1975] AC 653, 682–3, 695, 724.

Still, for such an experienced, thoughtful, principled and influential Australian judge, the treatment of his judicial decisions in little more than 20 pages is disappointing. It is difficult, in a general biography, to make judicial writing sing with the melodies that attract non-lawyers. Getting excited about the nuances of criminal and civil law is not the stuff of what the public sees as an interesting life. It would have been tedious for Emerson, or anyone else, to comb through the 600 judicial opinions in order to identify recurring themes. However, I am left by this section of the book with a feeling that more, even much more, needed to be written about Bray the judge. On his methodology; recurring values; digressions; on his leadership technique; dissents; and overall legacy. The subtitle of this biography, *A Vigilant Life*, indicates, perhaps, why Emerson has not embarked upon that project. It might need a different author with a different range of interests. Or the same author with more time. I am sure that there is much more to be told of Bray the judge and Chief Justice than appears in the few pages of the book.

The closing phase of Bray's service as Chief Justice coincided with large scale anti-Vietnam War demonstrations in Adelaide; increased anxiety about individual police misconduct; and the discovery of a huge number of Special Branch files kept by police on many citizens, including the Chief Justice.

In the end, following earlier investigations, Acting Justice Michael White of the Supreme Court of South Australia opened an investigation into the police files in November 1977. He delivered his report six weeks later. He found over 40 000 indexed cards referencing and cross-referencing about 28 500 individuals who were fully identified and 11 500 who were referred to with just a first name or description.³² Whilst Acting Justice White found that some records reflected 'genuine security value', many others were 'scandalously inaccurate'³³ and concentrated on trade unionists, Australian Council of Trade Unions personalities, all ALP candidates and elected members, with no corresponding files about Liberal Party or Country Party personalities.³⁴ The focus on members of the Council for Civil Liberties, homosexuals, anti-apartheid demonstrators, women's libertarian movement members, divorce law reformers and about half the judges of the Supreme Court suggested an inappropriate and unacceptable political bias in a Crown agency obliged constitutionally to be politically neutral.

Dunstan was outraged at being misled by the police. For his part, the new police commissioner, Harold Salisbury, an Englishman, was 'furious at what he viewed as political interference in security matters'.³⁵ Salisbury was dismissed from office. A further Royal Commission under Justice Mitchell was announced in February 1978. Private litigation was commenced on all sides. Rumours were rife. Tension was high.

³² Emerson, above n 3, 234, citing South Australia, Royal Commission into the Special Branch Security Records, *Interim Report* (1977) 7.

³³ Emerson, above n 3, 234.

³⁴ South Australia, above n 32, 10.

³⁵ Emerson, above n 3, 237.

It was in these circumstances that Bray received a precautionary medical report about his vascular and respiratory condition. He gave notice of early retirement and left office as Chief Justice on 27 October 1978.

V

*He ... took off his golden garments,
and threw away his royal-purple shoes.
He quickly dressed
in simple garb and fled;
emulating an actor who,
when the performance comes to an end,
changes costume and departs* — C P Cavafy³⁶

Emerson endeavours to pull the threads of the life of this unusual man and judge together in the concluding 15 pages of his biography. He suggests that Justice Roma Mitchell accepted appointment as the Salisbury Royal Commissioner, in terms of a letter she later wrote to Bray, because she hoped ‘I could avoid any adverse publicity for you which would have been monstrously unfair’.³⁷

The biographers of Justice Mitchell declare that ‘[t]here is ... a great silence at the heart of these events, a silence that changing times can now render voluble.’³⁸ As Margary and Round point out, ‘Roma Mitchell could only have been grieved at the damage done to such giants of those times by the longstanding prohibition on homosexual relations’.³⁹ Bray appears to have left office searching for the solitude and freedom from tension that was his lifelong predilection. Dunstan, who was no stranger to controversy and strong emotions, also resigned by reason of his ill health a year following the Salisbury Royal Commission report. He was aged 52 and partly unfulfilled given the large talents that he had already demonstrated as a reformer.

The last chapter of Emerson’s book explores some aspects of the personal life of Bray, which I feel sure some friends and admirers of Bray might have preferred had been left unsaid. One curious point unearthed by Emerson was a letter Bray received in 1967 from Professor Enid Campbell (1932–2010), the noted legal academic. She was 20 years younger than Bray. She wrote a delicate note to him that effectively proposed a personal relationship whilst apologising for any shock that her approach might cause. She stated that she had a ‘hankering to know you better ... you have made an impact on me and in so doing have breached defences which I had imagined

³⁶ C P Cavafy, ‘King Dimitrios’ in George Savidis (ed), *Collected Poems* (Edmund Keeley and Philip Sherrard trans, Chatto and Windus, 1990) 18.

³⁷ Emerson, above n 3, 244.

³⁸ Susan Magary and Kerrie Round, *Roma the First: A Biography of Dame Roma Mitchell* (Wakefield Press, 2007) 219.

³⁹ *Ibid.*

to be impregnable'.⁴⁰ According to Emerson, the correspondents exchanged letters for years. However, Bray's defences to marriage were never to be overcome.

There were other private letters that have turned up which Emerson reveals. In one of them, the writer and political commentator Christopher Pearson, who later claimed to have been Bray's lover,⁴¹ wrote frankly about a relationship between Bray and a male 'Scottish admirer'.⁴² That letter ends recording the declaration by Bray that 'romantic sexual attachments are no part of my plan of life',⁴³ whilst acknowledging enjoyment of the company 'in and out of bed'.⁴⁴

Bray objected to being classified as a 'gay' poet when an invitation to that rank was offered to him. Emerson draws a distinction between occasional participation in homosexual activity and identification as 'homosexual' or 'gay'. Bray's life and times would have left him with a disinclination to adopt a label for himself. The discovery that, both before and after he was Chief Justice, he was the subject of intensive police surveillance in relation to his friends, as well as his private and possibly sexual life, troubled him deeply. The production in the book of Bray's handwritten response to the police surveillance files showed to him by Dunstan in February 1967 clearly demonstrates the extreme distaste and horror he felt for the invasions of his privacy and personal dignity by the police.

CONCLUSION

Emerson's book portrays Australian society, and Adelaide's in particular, at a time of serious oppression and harassment of sexual minorities. The indignities have not yet been eliminated; but things have greatly improved. This book is an antidote to the assertions of those who abhor the 'gay agenda' and who yearn for the 'good old days'. In Australia, those days were not so good for Aboriginals, people of colour, women, people with disabilities and gays. Emerson's biography of John Bray demonstrates powerfully that the old days were not so good for a brilliant, influential and gifted lawyer cum poet who served as Chief Justice of South Australia in a time of much change and challenge.

⁴⁰ Emerson, above n 3, 248.

⁴¹ Jane Cadzow, 'The Wayward Ways of Christopher Pearson', *Good Weekend* (Victoria), 30 March 1996, 27–31.

⁴² Emerson, above n 3, 246.

⁴³ *Ibid* 247.

⁴⁴ *Ibid*, quoting letter to 'Ian M'.