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ORAL HISTORY SECTION

Law in Australian Society

Recorded interview with :
THE HON JUSTICE MICHAEL KIRBY

b.1939

Interviewer: Peter Coleman
Date of interview: 8 July 1995 & 20 March 1996

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THE HON. JUSTICE MICHAEL KIRBY

interviewed by Peter Coleman

TRC-3296: Cassette 1/Side A

Peter Coleman: It is July the 8th, in the President's Chambers, in the Supreme Court of New South Wales. Peter Coleman talking with Michael Kirby, just to get that identification on the tape.

Michael Kirby: We're having a nice cup of English tea.

Peter Coleman: Yes. Well, we could discuss the weather but I think we're supposed to explore the mind of Michael Kirby, which is more interesting even than the weather.

Michael Kirby: It might be more stormy.

Peter Coleman: May I begin with a question? There seem to be at least two Michael Kirbys - there no doubt are many - but at least two: one is the lawyer trained in if not solving problems then settling disputes as best as is possible and the other Michael Kirby who sees if not insoluble problems then tremendous difficulties, the more pessimistic Michael Kirby as opposed to the optimistic problem solver. Is that right, that there are these two, and if this is so which is winning at the moment?

Michael Kirby: Oh, I'm optimistic. I don't know that the part of me that is not the purely professional lawyer, judge, is unduly pessimistic. Otherwise I'm sure I would probably not spend a lot of time on things that I felt were completely insoluble. But you're probably right that there is a certain schizophrenia there. A lot of my life is just spent as a judge, as a lawyer sitting in court solving problems. That is quite satisfying in the sense that it's my legitimacy, it's my daily bread, it's my work pattern and it's something I can do and I do pretty well. It's something which has a beginning, a

middle and an end. Case-by-case they pass through the process and they are decided, one way or the other, I hope rightly and justly.

But then my other activities open my mind to a broader vista. I heard a very interesting thing at the Dalai Lama's meeting in New Delhi which I have just come from which gave me an insight into myself. The point that was being made by one of the commentators was that as the world becomes more and more specialised we are increasingly alienated from the world. That as we narrow our mind into the very small focus of our particular profession we are divorcing ourselves from the variety, complexity and magnificence of the world. It then occurred to me that perhaps my endeavours to be interested in a whole range of other things is a quest for harmony with the world as it is, which harmony can't always be given by the law which is rather narrowing in some respects. So, I'm not pessimistic, I'm interested.

Peter Coleman: I was interested in what you said about complexities because in a number of your papers - not exclusively legal but with a heavily legal flavour always inevitably - your papers on journalism, on biotechnology, on parliamentarians, on the Republican movement, and a number of the issues in which you have concerned yourself, you have been very critical, sometimes it seems justifying at least a suspicion of pessimism if not the accurate description. Your comments on the media are very sceptical.

Michael Kirby: But I hope constructive. I feel I was very greatly influenced in my early life by my religious upbringing. By my upbringing as an Anglican in the Sydney Dioceses. By the fact that as a small boy I went to a Methodist Church because to go to the Anglican Church involved crossing Parramatta Road which was regarded as too dangerous, though in all truth it had a trickle of traffic in comparison to today. But I grew up in a strong Protestant tradition and a sort of Methodist-type tradition of trying to improve the world and improve myself as part of improving the world. So, though I am critical of things, and they include institutions such as parliament and the media, I hope that my criticism is directed to trying to point ways in which maybe it will be

possible to improve things, as for example by a greater parliamentary attention to the real issues of society and not just to the current entertainment.

And similarly with the media, a greater diversity of opinion. There is a Stalinist element in some parts of the media at the moment which will not tolerate points of view that are contrary to the perceived orthodoxy. I don't like that at all and I suppose it is my Methodism that is bringing out in me ...

Peter Coleman: Have you yourself suffered from that Stalinism, and I know you're using the word loosely to mean authoritarian intolerance. Have you suffered from that where they haven't given you a fair go?

Michael Kirby: I don't really think so. I mean, I'm not by any means a major media performer and therefore I'm not really out there in front-line. I imagine others feel this more acutely than I because I'm, to be honest, really not particularly questing for media attention. It is something that tends to come with a speech or an address or this or that or an article but it's not something I'm sort of going out for. I did in the Law Reform Commission because it was part of the job. If I thought I had something useful to say I'm not unhappy if it's covered in the media. Sometimes I positively say to my staff, "Now, that essay might be of interest to a news editor for an article" and they might take an excerpt. So, to that extent I'll put it forward if I think it's useful and of general interest. But I'm not, like a politician is, out there, anxious about their media "image" ...

Peter Coleman: His daily quota?

Michael Kirby: ... or whether there are enough photographs of me in the paper this month. That's not my bag.

Peter Coleman: But the point I had in mind was that when one reads a number of your papers at once and you see that you run through the social authorities that most

people look to, whether it's the parliament or the press or science - I don't know that you've had so much to say about the church or so much critical to say about the church - to some extent the judiciary, but no, not that either. It often seems that one of the few fields that you think is capable of giving a lead is the judiciary, is our lawyers. You don't seem to have too much confidence in parliamentarians or journalists or scientists, possibly lawyers and churchmen; I'm not sure. I'm just taking two groups that you haven't been very critical of.

Michael Kirby: Well, I haven't said much about churchmen because I really don't put myself forward as a particularly strong churchman. I say my prayers. My religion is a personal and private thing to me. Two of my colleagues, Justices Handley and Sheller, are at the moment at the Anglican Synod so they are much more able to speak for the churches than I do. I am just a private citizen and Anglican. But the judiciary, well, I think there is a role in the judiciary and I think it has in Australia, in recent years, tended to shoulder that role. I think it should continue to do so. I believe the people generally do trust judges and though many are boring and many are very orthodox and some are racist and conservative, by and large, according to their lights they are striving to do the right thing. I think that's a good aspect of our institutions.

I do get discouraged by the level of political debate and that is a sort of symbiosis between banal politicians and second-rate media often. But I do believe in both the institutions of parliament and of the media and I hope that my comments are directed towards something constructive by trying to bring parliament back to be a real place of debate and community opinion and representation and diversity of community opinion, tolerance of diversity and the media as something more than the sort of CNN world in which we are increasingly entering which I find really discouraging. The Murdoch CNN world of superficialities and trivia and brevity and images and gloss and chitchat amongst half-baked people. We are told that's what the community wants. I wonder if that is what they want or if it is just that they want it because that's what is served up.

In New Delhi last week they were complaining that they were going to remove the Grand Trunk Road in order to put forward a super highway up the north of India from Delhi and knocking down all of the stalls and other things in order to put up McDonalds and Kentucky Fried. It seems as though this is all part of the inevitable globalisation and part of it is inevitable. But aspects of it I don't like, particularly this trivialisation of the media.

Peter Coleman: Getting back to the judiciary, I take it then that you don't agree with Sir Garfield Barwick in his strict legalism as far as the bench is concerned?

Michael Kirby: This is a spectrum; people are at different points in the spectrum. I would be at a different point than, say, some people who are more adventurous. For example, I do believe that the judges should obey parliament and I do not believe that the judges should disobey parliament. I do believe that the boldest strokes of creativity should be left to parliament.

I have often asked myself if I had been sitting in the Mabo case¹ would I have taken the view that the majority did there because in all truth though I supported what happened and I liked the outcome myself it was a very big departure from settled legal principle in matters of land law which are traditionally matters that you don't interfere with as a judge. You leave to the elected representatives in parliament. I am torn on the Mabo matter between, on the one hand, the admiration for the explosion of a myth that Australia was terra nullius for the purpose of the old principles of international law administered by the Colonial Office, on the one hand, and my real belief in judicial restraint in matters of fundamentals.

But the fact has to be faced that we had representative government for 150 years and our elected representatives never did anything to repair what would appear, historically, to have been a wrong start in this country. It was ultimately left to the

judges of the High Court, six of them, to take that bold step. So, I rather liked the result. But I'm not sure that I would have done it myself.

Peter Coleman: That's an interesting balance. You plainly approve?

Michael Kirby: I approve the result; I'm not sure that I approve the techniques. I have to confess that I am uncomfortable about the fact that some of the judges in the majority are upon other things extremely cautious. For example, Justice Brennan - now Chief Justice Brennan - is most critical in other areas of judicial creativity. But when it came to a matter which was intensely important to himself, namely justice for Australian Aborigines, he was as creative as the rest. That is perhaps where all of us stand: that we interpret what is important and what is the proper province of judges by reference to our own value systems, perhaps unconsciously.

Justice Brennan, who would not take the steps of limiting the use of confessions to police² and was extremely cautious about the provision in courtrooms of legal counsel in serious criminal trials,³ matters which were integral to the court system, and who wouldn't take those steps nonetheless took the boldest step of completely changing Australia's settled land law as it affected Australian Aborigines and did so in a case that did not even involve Australian Aborigines but islanders off the coast of Queensland. So, the bottom line is if you're in the High Court of Australia and it's important to you and you believe that law and justice requires it then what you say goes and unless it's constitutional it can be changed by parliament - but de facto it may be very difficult for parliament to change it.

Peter Coleman: On the judiciary in general, if you were giving those Boyer lectures now would you vary what you had to say?

¹ Mabo v Queensland [No 2] (1992) 175 CLR 1.

² McKinney v R (1991) 171 CLR 468.

³ Dietrich v R (1992) 177 CLR 292.

Michael Kirby: Oh yes, of course I would.

Peter Coleman: In the light of 10 years experience on the bench no doubt?

Michael Kirby: I was much criticised at the time, not least by Justice Connolly who in Queensland was put up, I suspect, as a stalking horse is the word they were using in England about the election of Mr Major. He said, "What is this man daring to comment on the judiciary. He's not a real judge at all", I suppose that was a fair comment because at the time I was at the Law Reform Commission and had been for nine years. But actually I had to look at what I wrote and a lot of the predictions for the future which caused such anxiety at the time have come to pass: more women on the courts; pressure for more; pressure for a greater diversity in appointments, solicitors and members of ethnic communities, not to create a representative judiciary but simply to ensure that the judiciary is not just all white, male, GPS school-type people, but that it reflects a greater diversity, as our population does; the dropping of the Mr from the title; the cameras in courtrooms; the dropping of the wig by the High Court of Australia; greater technology in the courts, the beginning of the movement to computerised decision making, automated decision making; greater use of retired judges in arbitration and the like.

All of these, which created a hubbub when I predicted them 10 years ago, have come to pass. Now it's hard to see what all the fuss was about.

Peter Coleman: But in what way would you vary your basic approach, or are you saying you would not vary it?

Michael Kirby: Well, I think I would be able to speak of the judiciary with greater insight, having sat on the Court of Appeal for 11 years now. I would, I suppose, have to emphasise that people come at problems very much influenced by their fundamental premises in life. When I go into a case and I know the facts of the case and their legal arguments I can predict pretty accurately where my colleagues will end up and

doubtless they can predict pretty accurately where I will end up. Of course, there are then cases where a judge surprises you. For example, yesterday when I got home from overseas I was told that one of the judgments had come in in a case where we had discussed the matter and I had actually prepared the headnote on the assumption that I was going to be dissenting. But he sent in a concurrence with my opinion. So, I suppose it's true to say that though there are elements of the predictable there are also elements of the unpredictable.

Peter Coleman: Well, Mabo perhaps would not have been predicted.

Michael Kirby: Yes, maybe it would not, though if you knew some of the players and their very deep commitment to equality for Australian Aboriginals then you would have known that that was an issue on which there were special factors. I think it is healthy and good for Australia that at a critical moment in our history we happened to have a High Court which was sympathetic to Australian Aboriginals. That would not have been the case in the Barwick High Court. Distinguished and all as those lawyers were, they would not have had the legal imagination or empathy - or some might say the revolutionary zeal - to do what the Mason High Court did with Mabo.

Peter Coleman: Before leaving the professions, could we talk briefly about science and scientists and your views on biotechnology and your papers on science and the law. Am I reading them correctly to see in your treatment of that profession, as of some other professions, an awareness of complexity and a certain scepticism - your concern with the ethical questions raised by biotechnology which many of the biotechnologists seem to ignore, for example?

Michael Kirby: Yes, well I had a very interesting experience in this regard. I gave a speech for ANZAAS in Perth - it was the ANZAAS lecture - on the human genome project. I got a letter of protest soon afterwards from a scientist in Adelaide, one of the few scientists who's actually working on the human genome project in Australia. He criticised me for alarmism and for causing unnecessary anxiety and for being too

critical of scientists. Subsequently, about a year later, he wrote me a very honest letter in which he said that he'd seen some things happening that he didn't like himself and was made more sensitive to the issue by having read my lecture - which I sent him the full text of in answer to his letter. He wrote back and said that he'd changed his mind and he thought that I did the right thing by raising the matter.

Now, it may have been the right thing or the wrong thing or I may have made a good lecture or a bad lecture but certainly the issues that are raised by the human genome project and biotechnology generally are terribly important. They are not matters, it seems to me, to be left just to scientists because of the fact that they do affect the future of our species. In the area of genetics it is often said, "Well, you can leave this to self-regulation". Sir Gustav Nossal, the President of the Australian Academy of Science, has said recently, "Nothing is going to happen for 20 years". But when I was in New York last November the front page of the *New York Times* had a story of a scientist at the University of Connecticut who is now manipulating the germ line of mice for the purpose of tending to problems of infertility, which of its nature tends to involve the manipulation of the germ line.

Now, I thought that there was an international moratorium on touching the germ line because what you do to a patient who has an illness is the affair of that patient. You can take risks with that patient. But what you do to the patient's progeny and send forward into future generations is something to do with everybody because then you are manipulating the future of the human species. And, just as they've now created huge pigs with very lean meat which freeze to death because they don't have enough fat and which are much bigger, similarly there's no reason why they could not do that with human beings. It presents a very big quandary as to whether we're going to have giant human beings or beautiful human beings or blonde human beings or 10 foot human beings. And whether that is something that we want to have happen and if we don't want to have it happen how we're going to stop it, because at the moment it is all being left to self-regulation.

I think there is a role for a person, like myself, who is interested in these things and knows a little about the issues of legal regulation, from the work we did in the Law Reform Commission on human tissue transplants, to raise this for a public debate. Not to create alarm or panic but simply to counter the suggestion of Sir Gustav Nossal that this is just a matter that can be left to the scientists.

Peter Coleman: And you don't think the scientists generally are as aware of these matters as keenly as they should be?

Michael Kirby: I don't think they're aware of all the ethical implications. They get a bit impatient when you start talking about them. I think for two reasons: one, the natural creativity of scientists and their fascination with new knowledge and new technology; and, secondly and increasingly, the megabucks that are tied up with the genetic developments. There is now a lot of money tied up in this. This happened during the Reagan administration in the United States when the Congress enacted legislation, in effect, to deny universities federal funding if they did not get patents on developments of American universities which were patentable.

I saw in the *Economist* a note when Jonas Salk died that he always refused to seek a patent on his vaccine. Similarly, Watson and Crick, who unravelled the double helix, might have sought a patent or intellectual property protection. However, in those days these were regarded as the common property of humanity. Nowadays people patent whole areas of the human genome on the off chance that it might be at some stage useful in future genetic research. I think all of this is a rather unfortunate development.

Peter Coleman: At this point could we turn to your life story. You touched briefly on the religious background that you had as a child, perhaps we could use that as a starting point for discussing your childhood, on to your youth and your early professional years?

Michael Kirby: Well, I had a fairly orthodox life story. I grew up in Concord in Sydney which is a working class/lower middle class area. My father was a clerk; my mother went to work when all of the children - I have two brothers and one sister ...

Peter Coleman: All alive?

Michael Kirby: All alive and all younger than I am; I was the eldest. When they had finished their schooling my mother went to work. She worked first for Grace Bros in the toy department - which was a wonderful job to have on the Empire Days because that meant we got extra supplies of discounted crackers. Then she subsequently went to work for the ABC and worked there until she retired.

Peter Coleman: In what department of the ABC?

Michael Kirby: Personnel I think; she was a clerk there.

Peter Coleman: And your father was in what field?

Michael Kirby: He ended by working for CSR and before that for BP. At a stage in the 1950s he started his own business. The business came from his early work which had been for Pauls, the tool merchants. He made some jointers - woodworking machinery. He developed this special jointer, and apparently it was a very good product. But one of the credit squeezes hit and the capital dried up and he lost everything in his business. He didn't become bankrupt but the business folded and then he went back to working for employers. He was always employed and always a very good provider. He was an only child himself. I think he was determined that his children would have a very stable and happy childhood, and that I have to say both my parents gave us all.

My mother was a late child in her family which had come from Northern Ireland to Australia. My mother was born in Berwick in Victoria, but soon after her parents had arrived in Australia from Northern Ireland. My grandfather was a journalist in Sydney

Peter Coleman: On your mother's side?

Michael Kirby: On my mother's side. In Sydney, he worked for the *Farmer and Settler* newspaper and then for the *Sydney Morning Herald*. He was apparently a very cultivated man. My mother's family were educated university people in Northern Ireland. There are books and things that I've seen that show that my great grandfather on my mother's side was a Fellow of the Royal Society of Ireland, I think it was called. He was an archaeologist. His sisters were painters and botanists and some of the paintings of one of the sisters are said to be in the National Gallery of Ireland, something I haven't explored.

So, they were quite a cultivated family. It's from my mother's side, I suppose, that I received my Protestant values which are quite important to me, I think, to my make up of serious dour, hardworking energy.

Peter Coleman: Are all your siblings of the same general disposition?

Michael Kirby: I would think so, in general. In fact, I was speaking to my brother David's wife - Judith - yesterday and they have just been up to Bali - he's a QC. She said that she despairs of the Kirbys because she found after a few days of holidaying he was getting anxious about it all and getting rather anxious to get back to his work. I said that that was a very bad comment for my future coming retirement because if that happens after only a few days then it rather discourages the notion of the idyllic retirement where one can sit back and contemplate one's navel and the world.

Peter Coleman: I don't see you doing that somehow.

Michael Kirby: You don't, no?

Peter Coleman: Perhaps if the Dalai Lama gets to you.

Michael Kirby: Yes. I went last night to a function of a group of people who have been trying to get me in to learn meditation. Intellectually, I think there would be a lot in meditation and it would be a thing I would like to explore before my time is up. But I just haven't ever had the time to learn meditation. They seem very peaceful and calm people and I think of myself as quite a calm person. But it would be nice to have some organised framework for calmness and I think meditation can help in that.

Anyway, on my father's side, my father's father was a member of a large Catholic family. My father's mother, a very cultivated and intelligent woman, was a Protestant. These were days - my father was born in 1916, my mother in 1915 - when religious bigotry and division were much stronger in Australia than today. There was a lot of pressure on my father's father's side not to get entangled with this Protestant girl. Ultimately he did and my father was born but partly because of the pressure, partly as I suspect because of my paternal grandfather's personality, that marriage didn't work. There was a divorce there when my father was at a young age. His father really walked out of his life.

Then a very remarkable thing happened. I never met my paternal grandfather. He changed his name. He remarried. He had children. My father, who is a very Christian man, really could not bring himself to forgive his father for having deserted him. I think my father was deeply, deeply scarred and hurt by that. I believe it profoundly affected the way in which he related to his children because he was seeking, through his children, to build what he had lost. But I often thought it would have been interesting to meet my grandfather, who lived to a great age - 90-odd - and who was here in this very city. But out of loyalty to my father and respect for his views I never

did meet him. I have been told that that family, many of whose members I have met - my grandfather's sisters for example who are lovely people and I've met them - they were kind to my father in his childhood so he kept some links with them.

But I believe that the achievements of myself and my brothers and sister were matters of pride to my paternal grandfather. It's one of life's ironies that he walked out of his son's life and then came later, as I understand it, to regret it and wish there had been a link. But you tend in life to reap what you sow. I suspect that this was just my father's view that this is what he deserved. One might say that that is a stern morality, but it's a sort of Protestant morality that if you do unkind things and are not generous and charitable then that is the sort of thing that will happen to you.

I still think I would have liked to have met him. I do believe that an important part of my personality is forgiveness and reconciliation. I really did accept that aspect of my Christian upbringing. I've often been puzzled by the fact that my father did not feel able to find that in him. But it wasn't for me to forgive my grandfather because I didn't know him; he was, as far as I was concerned, a non-person.

Peter Coleman: You knew your grandmother?

Michael Kirby: I knew my father's mother, yes. She was very close to us. Indeed, in her last decade lived in my parents' home and I would see her with my parents every week. I still see my parents every week, which is a blessing. Anyway, that long discursus is a sort of background of grandparents and parents.

Peter Coleman: And the formation of values, or the modification of values.

Michael Kirby: Yes. My brother, Donald, is a solicitor. He is a partner at a large firm in Sydney, McClellands, which is the firm of Jim McClelland. One of his partners is Greg Keating who is the brother of the Prime Minister. He has a busy practice. My other brother, David, is a QC. My brother Donald was a twin and his twin died at 18

months when he developed pneumonia as a small child. That profoundly affected my parents, especially my father. He still goes very regularly to the grave at Rookwood Cemetery and brings home white roses which are growing on the grave. He always puts them in the house at Concord where I grew up.

I think that the loss of the twin led to a bonding between my brother Donald and my brother David: when David came along he became a sort of surrogate twin. I don't know much about twinning but I gather there's a sort of very close empathy between twins. Donald then created another twin and they're very close, my brothers. Then along came my sister, Diana, who is the only non-lawyer. My paternal grandmother's sister, Gloria, who was a communist ...

Peter Coleman: Wait a minute, your maternal ...

Michael Kirby: This is my father's mother's sister.

Peter Coleman: Your aunt?

Michael Kirby: My aunt, my great-aunt. She was a communist and a very definite person; a great friend of Jessie Street's.

Peter Coleman: What was her name?

Michael Kirby: Gloria Boes; she died recently. She said that our family totally lacked imagination. There were too many lawyers. We should have an honest worker like a plumber amongst us. Well, we didn't have that but my sister, Diana, is a nursing sister at Royal Prince Alfred Hospital. She looks after oncology patients and is very well regarded - has treated a number of judges in their last journey. She's very, very intelligent. Given other opportunities, she would have gone on to be, I suspect, a medical practitioner or something like that. But she's a senior nursing sister there. She's learned extra things like massage because she says with cancer patients a lot of

their relatives and others don't like to touch them. There are all sorts of distancing factors. Well, she says it's important for them to know that they are still human beings. She's very well regarded and I have great admiration for her. I think the pressure she works under is greater than that which any of the three lawyers works under.

So, there we are, one relatively happy and youthful family.

Peter Coleman: This Anglicanism must have been overwhelmingly, of course, a matter of the air you breathe, but was it formalised in particular ways such as quite regular attendance at church?

Michael Kirby: Oh yes, every Sunday.

Peter Coleman: And apart from Sunday, other Anglican activities?

Michael Kirby: Not really, no. I would go to church. I sang in the choir at St Andrew's Strathfield when I ultimately graduated from the Methodist Church. I still sing my hymns too fast, having learnt hymn singing in a Methodist church. Strangely - well, perhaps not so strangely but a sign of the times - the Methodist Church, the Wesley Methodist Church, is now a Korean Church in Concord because, of course, the Methodists missioned Korea. Whereas in my day that was a very, very busy church and they used to park all the way up Sydney Street, Concord, where I grew up, to go to the Methodist Church, then it fell off when it became a Uniting Church. Now it's packed again with Korean Australians. Now they park all along the street again. So, that's just a change of time.

But I went to the Anglican Church. I saw above the altar the Australian flag and the Union Jack. I sang prayers for the King's Majesty and then the Queen's Majesty. I came to love the *Book of Common Prayer*. I'm very irritated by the Synod for

dropping those prayers - it's just as well I wasn't there: I would have been denouncing this.

Peter Coleman: Have you participated in Synods?

Michael Kirby: No, I've really not been a particularly active church member, though I would count myself as an Anglican Christian.

Peter Coleman: Were there any Anglican preachers in your childhood or youth that were significant or was it simply a matter of the daily life?

Michael Kirby: Yes, there were significant preachers. Dean Barton Babbage used to come to the Fort Street School and give lectures every Thursday. I still have a close friendship with Stuart Barton Babbage - in fact, I have to write to him because he was recently honoured in the Queen's Birthday honours list in the Order of Australia. I always thought he was very impressive. I thought he was very English - he was in fact a New Zealander. He later just missed out on being Archbishop of Sydney and Archbishop of Melbourne. But he is a very enlightened Anglican. He's a very compassionate and kind man. He's very interested in the efforts on AIDS. He is very supportive of a compassionate approach in the Anglican Church on that subject, which isn't a universal feeling in the Sydney diocese. In fact, he's really not a Sydney diocese person at all.

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Justice Michael Kirby (continuing): But he was a big influence. He's a very good preacher. I remember he used to lecture the boys. I don't know what's happened to the Anglican Church, it used to be such a dominant force; it seems to have dwindled away. But the Anglicans came out on Thursday. They virtually filled the school hall and all the others went off into little classes. But most boys were Anglicans.

Stuart Barton Babbage used to lecture us, thundering about the evils in the *Old Testament*. I remember his punishment, if any boy so much as opened his mouth during one of his sermons was to get the boy to come on the stage, bend over and he had a pin and he would stick a pin in the boy's backside. This would be regarded as cruel child abuse nowadays, but he got by with that. I constantly remind him of this. He denies it. But I have pretty good recollection. I thought it was a very typical *Old Testament*-type punishment.

I remember once at the local church the Minister, who was a very quiet, gentle, kindly man, a Mr Dillon, Pastor Niemöller came along. He was one of the German Protestants who stood out against Hitler with a number of those who were involved in the attempt on Hitler's life in 1944, many of whom were leading German Protestants and most of whom were hanged. But Niemöller came out. He's the one who said, "At first they came for the Jews and I did nothing, then they came for the communists and then ..." and he says, "There was no-one left to protest". He was a very impressive preacher. I remember him very vividly. But most sermons, like most of my speeches, were eminently forgettable.

Lately I've got to know others. I think Austin Day at Christ Church St Lawrence is another very saintly man. He is a really good and kind man, another man involved in the struggle against HIV/AIDS and with ministering to people who are very, very sick. On the other hand, when I go to Christ Church St Lawrence ...

Peter Coleman: Is that the church you usually go to?

Michael Kirby: No. To be honest, I don't go regularly to any church, I'm just too busy. I spend most of my Sundays in here. Occasionally I will go to the churches. When I'm overseas and have more time I'll make a point. When I was in Delhi I went to St James Church at Kashmir Gate, which was a church bombarded during the so-called Mutiny of 1857. It is a beautiful Anglican Church, the oldest church in Delhi. Or in Geneva there is an Anglican Church right in the middle of Geneva shopping centre. I'll go to that service there. I wouldn't say I'm a churchgoing person. But I would not count myself as a non-believer: I am an Anglican Christian.

Peter Coleman: I'm sorry, I interrupted you, you said, "When you go to Christ Church St Lawrence".

Michael Kirby: When I go there I feel I've gone through a spiritual experience because for me, having been brought up in the Anglican Diocese of Sydney, it's a very Catholic performance. There is loads of incense. There are canopies. There are people kneeling in the aisles. Kissing of bishops' rings. Lots of what we would regard as the Mariān heresy. It's a full performance and indeed many of the people there, including many in the choir, are Catholics because many of them find uncongenial the changes in the Catholic liturgy.

But, though I feel in a way uncomfortable, having been brought up in the plain simplicity of Protestant Anglicanism, I always know at the end of the service that I've gone through a spiritual experience. That's a source of some confusion to me because intellectually I'm attracted to the simplicities of the Protestant direct line to God. But in terms of going to that service you begin to realise that liturgy is not an entirely rational thing. It's an assistant to undergoing something that is not normal and something which is bigger than one's self.

So, there we are. And I think my Anglicanism is not unimportant for my views on constitutional stability and institutional fundamentals. If you have that every Sunday in your formative years honesty requires that you confess that that has had an effect on you. I suppose if we sort of put it into the equivalent of the communist youth league of Consomol, then this was my Consomol. I was being given brainwashing every Sunday in my prayers for the King's Majesty or the Queen's Majesty.

Peter Coleman: I think it must go a little deeper because the ex-Consomol types seem to be greatly relieved when they are ...

Michael Kirby: They're released?

Peter Coleman: When they are released, yes.

Michael Kirby: I mean, if I believe the reports when I come back, the Anglican Primate of Australia has endorsed the Republic. So maybe he's somebody who's trying to get out of his Consomol past. But I'm quite happy. I suppose my own view is you keep some things stable as an assurance, a bed-rock, and then you play around a lot with other things. I don't quite know whether that is inconsistent: if it is, well, let it be inconsistent.

Peter Coleman: We've talked about your family and your church, now I guess Fort Street High School must figure prominently; it usually does with people who have been there.

Michael Kirby: Yes, I was very happy at high school. I arrived in 1951 ...

Peter Coleman: Should we talk about your first, primary school, before Fort Street, if you think it's significant?

Michael Kirby: Yes, all of my schooling was significant.

Peter Coleman: Well, please do.

Michael Kirby: It is significant to one's self. At Macquarie University when I was Chancellor and I gave a little talk at graduations they used to raise their eyebrows and say, "Not Miss Pontifex again?". Miss Pontifex was my first teacher. She was my teacher in primary school and I remember her. I remember the smell of the paper, it was shiny paper, just after the War - because I would have been going there in '46 to the North Strathfield Infants School. I remember the "A" in the book. As I began my journey into the alphabet I can distinctly remember the book. It was a departmental textbook with this shiny paper. I suppose because of War time austerity and Mr Dedman I wasn't able to smell shiny paper before that time. So, I remember my first class.

I had very good teachers at those schools: Mrs Godwin in third class, when I went up to the so-called big school. Mr Casimir his name was - who I suspect must have been descended from the Polish kings. He was the fourth class teacher. He was very much down on smoking. Now, neither of my parents smoked. So I didn't really need a brainwashing on smoking. But it was very vivid. He used to go on and on about it. It possibly did have an effect on me. I've never been tempted to smoke and I've never smoked, I've never been interested. He was a good teacher. Then in fourth class I sat the tests for IQ - tests that they used to have in those days, maybe still do - for the opportunity schools. Then I was whisked away ...

I remember we went into Bridge Street in Sydney and they were doing the finals. I remember going to Bridge Street to the Education Department and I did the finals. These were problem solving IQ tests. So, I was sent away to the Summer Hill Opportunity School. I spent two years there.

From there I was chosen to go to Fort Street - as I now know there was no question but that I would've gone to Fort Street because I was on the stream of the opportunity classes. But I was full of apprehension as to whether I would get to this renowned school. My mother asked me what I wanted. I pitched my request at a point where I thought I could bring it off. I said I wanted 10 shillings, which was probably quite a sizeable amount in those days. But I got it for getting to Fort Street and I went on to that school.

I had very good teachers there. Various old boys I've spoken to since at dinners have complained about the level of teaching and I suppose ...

Peter Coleman: You mean not high enough?

Michael Kirby: Yes, they've complained that they didn't think much of the teaching.

Peter Coleman: That it was over-rated?

Michael Kirby: Well, that they didn't find the teachers satisfying to them.

Peter Coleman: Such a range of famous old boys, you know, from Jim McAuley, John Kerr, the names go on.

Michael Kirby: If you think of it rationally, it was one of the key public schools, with North Sydney and Sydney High, which was the net for talented boys - and girls in the case of those three schools - from the working class/lower middle class of the whole of Sydney. So, you were bound to have talented boys, and girls. They were full of the tradition when I got to Fort School. I mean, the school motto was *Faber est quisque suae fortunae* - Each Man is the Maker of his Own Fortune. We had that drummed into us. So here I was, this small Protestant boy with this strong feeling that you can change the world and you should try to change the world and make it a better place ...

Peter Coleman: Who was your headmaster?

Michael Kirby: When I arrived Mr Mearns. When I left Mr Shaw. They changed over at my third year. I was there for five years. Every Thursday - I think it was Thursday - at assembly we would honour, "I honour my God, I serve the King, I salute the flag". Then the whole school would turn. Over the honour board where the names of the fallen in the First World War were recorded there was the Union Jack. Then you would turn back and you would follow the school captain, "I will at all times and in all places uphold the honour of my school. For what I am the school will be".

And of course throughout the years from time to time famous old boys would come. I remember Justice Charles McClelland, who was the father of the present Chief Judge in Equity and was then Chief Judge in Equity and a Judge of Appeal in this State, came out. He seemed to me infinitely graceful and so elegant and intelligent and professional. This was the image that the school was trying to inject.

Peter Coleman: And was it clear by your fifth year that you were going to be a lawyer?

Michael Kirby: I think so; yes, I would say it was. The penny only dropped in mathematics in my fifth year. I had a very good teacher, Mr Coroneos, who wrote books on mathematics. He has visited me here in my chambers of recent times - he's still alive. Ultimately I saw what mathematics was about. I believe I came first in the state in general mathematics. But earlier on I hadn't been so interested in mathematics. That sort of hived off sciences. The idea of cutting up rats was just not congenial to me so out went medicine. I wasn't pious enough so religion was out. And I didn't think I would have the patience to be a teacher so that was gone.

I had no lawyers in my family and I didn't have any models that I was pursuing in terms of getting into the legal profession. But by a process of elimination, and I

suppose by dint of my school abilities which lay in English, history, economics and so on, I was directed to the law. I came first in the State in modern history on the leaving certificate. I've sometimes thought that perhaps if I had chosen what I truly and really liked I might have pursued a life as an academic historian. But I don't think that ever really occurred to me, partly because of the feeling that all of this education was necessary to lead somewhere practical and hence it led into law.

Peter Coleman: And you went straight into law or did you do arts?

Michael Kirby: Arts.

Peter Coleman: Arts/law?

Michael Kirby: Yes; I got a university bursary.

Peter Coleman: So, the law part was still in a sense not so much a commitment as an option?

Michael Kirby: No, I think everybody in those days really who was going to do law did arts law.

Peter Coleman: I see, right.

Michael Kirby: Certainly if you had a good leaving pass, as I did - I had a maximum pass.

Peter Coleman: And the arts was two years arts, was it, and then four years law?

Michael Kirby: Yes, after that you came down to the first year at the law school, which was your third year of arts.

Peter Coleman: Is that still the practice for lawyers to do arts?

Michael Kirby: I'm not too sure. I think most do another graduate courses before. But increasingly, I believe, they do economics or commerce or some do science.

Peter Coleman: Before we get into the university years, just finishing off with Fort Street, have you kept in touch in any serious way or do you believe that it's maintained the standards that were its great tradition? Has it changed or are you out of touch?

Cassette 2/Side A

Michael Kirby: I have kept in touch. I contact regularly the teacher who was very influential in my time there, my German teacher, Mr Ron Horan. He's sort of Mr Chips of Fort Street. He keeps the old boys' union, or the old school union - the school has now amalgamated, the boys and the girls school - and he keeps that going. In fact, thanks to one of the members of our year we have a fairly regular get-together, generally once a year. In fact next week all of us, or most of us, who were interested - that will be about 30 or 40 of a year of 90 I suppose - are going to see *Victoriana* which is at St Paul's College which will be a very suitable nostalgia trip for us with some of the ...

Peter Coleman: With Lloyd Waddy conducting.

Michael Kirby: Yes, and with *Land of Hope and Glory* and all these old things which are nostalgia elements of our past.

Peter Coleman: But the school's academic standards are the same or similar?

Michael Kirby: Well, they had a report about a fortnight ago of the performance of the schools in the top 200 and Fort Street was still one of the top schools. So, I think some of the selectivity of the schools fell off for a time but then, to great credit of Dr Metherell, he really restored the selective high schools. To the great credit of Mr Carr he seems to be standing up to the teacher unions and is insisting that these schools be maintained. They are the flagships of public education and I've been a strong supporter of public education. So has John Howard who went to Canterbury Boys' High School.

I'll always put my name to supporting excellence in public education and speaking up for the rights of gifted and talented children. I'm patron, so I have some association with the Australian Organisation for Gifted and Talented.

So, it's important, it seems to me, to encourage the talents of children whose parents can't afford to send them to the GPS schools. But I was surprised that Fort Street did quite well, better than I had thought it would in that category. It was one of the top schools.

Peter Coleman: Okay, now turning to the university, were any particular teachers significant either in arts or in law? You were very active in student affairs, of course, in the SRC and later the Senate and the union, but on the academic side?

Michael Kirby: Well, on the academic side I had some very good lecturers. I remember in psychology Bill O'Neil was a very good lecturer in Psychology 1 and John Anderson was one of my lecturers, Professor Stout in philosophy. I must have been one of the last years that was taught by John Anderson - this was '56 when I came up to university - I'm not sure how long he was lecturing after then. I was also lectured in logic by Professor Stout. I got to know him later on in the University Senate. So, they were quite influential in those days.

I came up rather full of myself after having come first in the State in history. Instead of doing modern history I did ancient history and I almost failed. I don't know why; I think the penny mustn't have quite dropped.

Peter Coleman: I know it's often said of brilliant high school boys that they sometimes have a difficult first year. I've heard this said. How much research has gone into it I don't know but many brilliant high school boys think it's a little easier than it may be.

Michael Kirby: Well, maybe that's a factor. I did come first in English 1 so I wasn't

...

Peter Coleman: Well, you were obviously working hard.

Michael Kirby: Oh yes, I worked very hard. But I think a factor was I was very happy at Fort Street. In my last year I was a prefect. I was very popular, I was in the plays. I was a champion debater. I was involved in refereeing football and I was ...

Peter Coleman: The prefect?

Michael Kirby: I was a prefect, yes. I'd been on the editorial staff of the school magazine. I would have been one of the most popular and well known boys at the school. So, to come from that into the anonymity of the university, I was a bit depressed - I suppose you would now say I was undergoing stress and needed therapy. But ultimately I pulled the shattered remnants of my life together and built the same sort of situation at the university by getting into student politics.

Anyway, of the lecturers in the law school, Dr Currey in history, the history of law, which I really didn't see at the time was so important - I wondered why I was learning about all these Norman kings and ...

Peter Coleman: This is legal history or ...

Michael Kirby: This is legal history, yes, in the law faculty when I came up there in my third year at university. But, the more I sit in a judge's seat the more you realise how terribly important legal history is to the law and to the concepts and development of the law and to procedure, which is the essence of the justice ideas of the English tradition that we have inherited. So, he was important. David Benjafield was a very good lawyer and such an inspiring man. He was in a wheelchair and he was full of enthusiasm. I always remember feeling how inspiring he was, that he was disabled but always full of happiness and enthusiasm.

Bill Morison was a great lecturer. He had such a logical mind and his lectures were a joy. I've had Bill Morison to lunch with the judges here to be honoured by them and Ron Parsons - I didn't think Professor Parsons was such a good lecturer. But that might have been because I was sharing lecture notes with Murray Gleeson, who's now the Chief Justice. We divided up the subjects. I contend that I'm still weak in company law because he kept half the notes from me. He contends that I kept half the constitutional law notes from him. But we both did pretty well during the course.

Anyway, Julius Stone I suppose was the greatest influence, as he was on so many others. Indeed, one High Court judge has said that to understand the developments of the High Court in recent years you really have to understand the tremendous influence of Professor Julius Stone.

Peter Coleman: What did he mean by that?

Michael Kirby: Well, Stone was a legal realist. He was in the tradition of Roscoe Pound and he really did not swallow the declaratory theory.

Peter Coleman: The activist theme is (inaudible)?

Michael Kirby: Well, greater insight into what you are doing. Not deceiving yourself, that you were simply an instrument for settled principles. How could that idea ever truly have been believed by judges who knew anything of the history of the common law, when the whole thing was invented by judges? I mean, how could they possibly have believed that it would come to a point where there'd be no more invention, there can be no more creativity, from now on the invention's in the past and we simply apply. It was a fantasy and Lord Reid⁴ exploded it in 1971 by saying it was a fairy story. When Stone was teaching that in the fifties and sixties we were still in the era of complete and absolute legalism.

⁴ Lord Reid, "The Judge as Law Maker" (1972) 12 JL of Public Teachers of Law 22.

Sir Owen Dixon, our Chief Justice, was saying the law would have lost its meaning if it was simply invention.

Somewhere between that steadfast adherence to the legal method and the application of principle and not simply making it up by the seat of your pants and recognising that you do have an essential creative role and that that is part of the function of a judge of the common law lies where I stand. And where I suspect most appellate judges today stand, somewhere on the spectrum.

But Julius Stone's great importance was that he really did not accept the complete and absolute legalism. He did not accept the declaratory theory. He taught the various other theories, including the legal realism view that the judge did have a necessary beneficial creative function. Two decades down the track that is really having its great impact on the Australian legal system. And it's a healthy impact because it involves self-insight and that self-insight should teach two things: it should teach the creative opportunity but it should teach also the responsibility for deference to parliament which is elected and to the judicial method of developing principles in a logical, consistent and not excessively bold way. So, they were my teachers at law school.

Peter Coleman: And your involvement in student politics?

Michael Kirby: That was a complete accident. I was absent one day from class, which would have been rare - it shows how many things in life depend on chance. A question of the nomination to the Law Society of the Sydney University came up. Murray Gleeson then nominated me ...

Peter Coleman: In your absence?

Michael Kirby: In my absence. He asserts that he then set upon the world a juggernaut of student politics which became completely uncontrollable in the end. He takes personal responsibility for the chaos he sent forth. But the fact was I was then

elected to the Law Society. I went on to become the president of the Law Society. I went on to negotiate better wages for articulated clerks and I remember calling on Justice Manning - later Sir Kenneth Manning - in his chambers as he endeavoured to dissuade me from doing this. He was then the president of the Society - at that stage a judge was the president. He said that if I went on with this he would have to resign as president. Naturally I was not going to be deflected from my extremely popular campaign and the prospect of becoming the president of the Law Society opened up upon his lamentable resignation.

So, he resigned. I became president - they changed the constitution. We adopted a judicial patron. I think somebody else was chosen who was more amenable to our ways: Sir Kenneth Jacobs became the patron of the Law Society of the University and I became the president. That led on to my being elected to the SRC for the law faculty. That led on, the next year, to my being elected president of the SRC of Sydney University, which in turn led on to my being elected, in due course, treasurer and then president of the Union of Sydney University and then fellow of the Senate at the university representing undergraduates.

Peter Coleman: When you say "led on to", they followed each other but there was nothing automatic about them?

Michael Kirby: No, they were bitterly and hard contests. In fact, I was elected twice president of the SRC - I think I'm the only creature in captivity who underwent that ordeal twice. What happened was I was elected and then I finished my year. Then a fellow named Bob McDonald was elected but he went on to become the first full time president of NUAUS - the Australian students' body. Then he had to resign as president of Sydney SRC for that purpose. So, I stood again on a platform of stability and continuity and also a platform of getting the president of the SRC into the Senate of Sydney University. At that stage the Senate papers, under Vice Chancellor Sir Stephen Roberts, were very secret and they were not shared with the students.

Roddy Meagher was the student senator. He treated with complete disdain the SRC and all of its ways. Little did I realise that 20 years down the track I would be sitting with him in court. Naturally, I denounced him and all of his conservative and uncongenial ways. I conducted a very skilful campaign to be elected to the Senate. But I had a most formidable adversary in Peter Wilenski.

Peter Coleman: I was going to say, yes, who was himself formerly a president of the SRC?

Michael Kirby: Yes, yes, and president of NUAUS. Anyway, Peter Wilenski won. He defeated me in the ballot and for some years we were not particularly friendly - when you're defeated you tend to feel these wounds. I don't think that was such a big factor in my case because I really did accept Christian reconciliation, and I still do. But we became very good friends later on.

Peter Coleman: You were elected the following year?

Michael Kirby: He then went off to Oxford - he won some sort of scholarship, so he didn't hold the office for very long. He went off to Oxford University and resigned. I think there had to be another election and I was elected and I held the office, I think, for five years. I was then a solicitor working during the day. I'd rush down to the Senate meetings, rush to the graduations.

Peter Coleman: The Senate is a pretty significant collection of people for a young person.

Michael Kirby: Yes, I was rather overawed to tell the truth.

Peter Coleman: I think a young person would be a little bit.

Michael Kirby: I used to sit at that table and they would sit ... I was there at the last Senate meeting that Sir Charles Bickerton Blackburn presided as chancellor. I was there for the election of his successor Sir Charles McDonald, a real gentleman, a lovely man. Yes, I found it very ... I was very nervous and very over awed by these things.

Peter Coleman: But a wonderful experience?

Michael Kirby: Yes, it was a wonderful experience. Betty Archdale was there, Professor Stout. The table divided really between what one might call the conservative establishment and the liberal academics. Naturally, I tended to side with the latter. They were days when really the university was run on a very undemocratic basis. The administration shared as little as possible information with the Fellows at the Senate and the Senate was not sufficiently, looking back on it, assertive of its powers and rights. You wouldn't get away with it today. But this was one of Australia's oldest institutions. It was the government of the oldest university in the country. Here I was sitting at this grand table in this great room and all these much admired and fabled characters. But it was a good experience.

Peter Coleman: Oh, for a young person, yes.

Michael Kirby: I met Fred Deer there and he was always very supportive, very nice. I went down to the university last week for the ceremony to honour the benefactors. I sat on the front - they invited me to sit on the front row, not that I'm a benefactor but just a citizen. It brought back memories of sitting there as a young graduate Fellow elected to represent the undergraduates, sitting there watching the graduation ceremonies. And I rather liked them, I must admit; some people found them tedious. Not I.

Peter Coleman: Were you expected to go to each year's graduation ceremony?

Michael Kirby: Yes. Well, as a Fellow of the Senate I was entitled to go to any and in those days they used to expect you to go. I used to go to as many as I could in the sense that these were my constituents. So, I would sit there and ...

Peter Coleman: Yes, they were your constituents, more so than they were the constituents of other senators.

Michael Kirby: Yes, but they were passing out. But I rather enjoyed it. I suppose this is my institutional Anglicanism coming out again. It was just part of the ceremonial of life. I was happy to be a dangerous radical on some things - matters of substance and ideas such as greater openness in the Senate papers and discussion with the students and revelation of plans of university and so on. But in fundamentals I was quite happy for the ceremonial to go on and to be part of it.

Peter Coleman: And to take an interest in it, not just sit there and read a book?

Michael Kirby: Oh, no, no, I was interested and in a sense I felt privileged to be part of all that. In those early days I used to be nervous. It's only lately, in fact, that I really don't feel any nerves about public performances. In those days I used to be very angry with myself that I would get so anxious before I spoke on a point at the Senate. Often as Chancellor at Macquarie I would try to ease the path of any new member who was speaking because I could remember how uncomfortable and anxious I had been in my early days.

Peter Coleman: On the SRC or the union or the Senate were there any great issues at that time that agitated the councils?

Michael Kirby: Well, one of the issues was putting the quotas on Asian students and the students generally had opposed that. In fact, as we now know, those Asian students of the sixties and seventies who are now ministers and professors and doctors

and so on in their own countries are great friends of Australia. By and by that was a wonderful investment that we made in the future relationships with our region. I think it was very short-sighted of us to cut that off, just as it was short-sighted of Mrs Thatcher to levy such high charges and effectively cut off that mode of influence of British universities in Asia. But we did it and the students, rather wisely - possibly for the wrong reasons, simply because they were strong on anti-discrimination - stood up against it. They protested it and I protested.

There were also issues where I have to pay tribute to Peter Wilenski, about women's rights. Peter was years ahead of other people. Certainly he was ahead of me, in recognising the discrimination against women in universities. So, these were some of the big issues. But I wouldn't pretend that in the time I was there, which was in the middle sixties/early to middle sixties, that there were revolutions on the campus.

Peter Coleman: But there were intimations?

Michael Kirby: There were intimations of things to come.

Peter Coleman: The sixties were the sixties just the same, yes.

Michael Kirby: Yes, but see I was on the Senate from, I think, '64 to '69 and ...

Peter Coleman: The real revolutions were in the early seventies I suppose, were they; I'm not sure?

Michael Kirby: That and the Vietnam War, and that period was just a little bit after me. In fact, it all looked a rather quiet time in comparison and it's become a quiet time again.

Peter Coleman: There were NUAUS rows, weren't there, in that period?

Michael Kirby: Yes, oh yes. I went to Nigeria for NUAUS. When I came back there was some debate about things that had occurred on the visit. That led to some criticism of me by John Slee, now of *Sydney Morning Herald* fame, who was a vice-president of NUAUS from Adelaide. It was unfair criticism. There had been a member of the delegation who really hadn't pulled his weight, Graham Richardson, who I believe later became a member of federal parliament - he's a doctor in Western Australia. I had been critical of him and Slee had picked up some of his criticism.

Anyway, it was rather a tedious tale. The net result of it was that it led to a bit of a fracas within NUAUS. It robbed me of my chance to be vice-president - Slee went on to become vice-president. This was part of his politics on that of course. I didn't want to become president because the presidency was by then a full time position. But ultimately, in a way, I was vindicated because contrary to the establishment within NUAUS the members of NUAUS elected me to be an honorary life member of NUAUS, which was a rare thing in those - Sir Gerard Brennan, the Chief Justice of Australia was a president of NUAUS in the days of part time presidency and an honorary life member. So, it all came reasonably good in the end.

But I didn't take such an active part in the national as, say, Peter Wilenski did. My concentration basically at that stage of my life was being a solicitor, being an advocate solicitor, which was something relatively new, or not so common, and which was very demanding, but doing these student politics things at the same time.

Peter Coleman: Shall we turn to the beginnings of your professional career then as a solicitor?

Michael Kirby: Yes. Well, as an articled clerk I'd worked for a small firm. I found it very difficult to get articles because my family had no connection with the law. I found that very hurtful because I had a very good pass and a very good degree, very good education. Effectively, I found that as I applied to the large firms I couldn't get a

job. One of my great aunts - not the lady who was a communist but another one - was an excellent stenographer. Aunt Lilyanne typed up these beautiful what we call now resumés. They were sent around to all the big firms. I was interviewed by a few of them but always rejected. I found later that the people who got the jobs were people who had some connection with the firm or with the law. Anyway, I ultimately ...

Peter Coleman: Just to get this clear, in rejecting you and others like you what were they assuming you would do, get jobs with the minor firms or in the suburbs or what?

Michael Kirby: Well, they didn't care, they just didn't ...

Peter Coleman: No. Well, what in fact did they do then, the applicants who were rejected?

Michael Kirby: Well, they would then look around for anything that they could get.

Peter Coleman: In the city or suburbs?

Michael Kirby: Well, mainly in the city I suppose because they were going to the Sydney Law School. Don't forget, the numbers were not so great. The market could basically cope with the numbers. But Barry O'Keefe was my lecturer, a tutor in criminal law. Vernon Treatt QC, who later became the leader of the opposition in the State, was the lecturer in crime. Barry O'Keefe was the tutor in crime. He was just a very junior barrister.

After one tutorial I mentioned my problem, that I wasn't able to get articles. I had a good Arts course and a good education. He then suggested this small firm, M A Simon, which was a firm of litigation lawyers. It was really a two-solicitor firm. So, I made an application to them. They accepted me.

I remember my first day, my master solicitor there was Ramon Burke, who is now Judge of the Compensation Court. My fellow articled clerk was Frank Marks, who is now Judge of the Industrial Court of New South Wales. I remember my first day when Frank Marks took me up to the Compensation Court and I sat in the back of Judge Rainbow's court. I don't remember who was appearing in our interest for the worker - this was a firm that did work for the Labor Council and work for the workers in compensation cases. I remember Adrian Cook, later a judge of the Family Court, was the barrister for the respondent. He was very effective and effectively destroyed my client with films.

But it was such an exciting thing for me and I thought, "Can I be actually paid six pounds a week for this? This is a marvellous life", because, until then, I'd never been in a courtroom. So, here I was - and I was I suppose 20 or thereabouts ...

Peter Coleman: First year law?

Michael Kirby: First year law, 19 or 20, and sitting in the back of court "instructing" counsel. Getting doctors to court. Rushing around. Watching the negotiations for settlements. Watching the way cases were being dealt with. I found it very exciting and I loved it. I found it quite stressful. Sometimes my heart was pounding at different points when the point of decision was reached.

There were two judges who greatly influenced me in those days, because most of the work I did was compensation work. One of them was Judge Conybeare, who was the Chairman of the Compensation Court. He was quite a formal man, quite an austere and reserved man, and I rather liked that. He was very judicial in his mien and I liked that. He was very correct, very courteous to everybody. He could have a short temper if barristers were not well prepared or if they kept him waiting but he was basically very correct. He always at the end of every case disciplined himself to give proper reasons and he would go through the case, state the facts, state the applicable

law, state the conclusion and even when you lost you felt that this was the judicial performance.

Another judge there - and now both of these are dead - was Judge Dignam. He'd been a friend of Dr Evatt and he'd been appointed Ambassador to Ireland. When that appointment expired he came back. They gave him a job as the Judge of the Compensation Court. He didn't seem to be able to give reasons and he would simply announce, "This claim fails. There will be an award for the respondent". I'll never forget the feeling of depression, disgust, confusion, embarrassment as I would leave the court with some hapless worker who was a person generally twice or three times my age. I would have to try to explain why he lost without benefit of the judge's reasons.

I think this greatly affected my own view about the judicial role, the obligation of reasons, the necessity to act in a way that was courteous and fair but firm and to be part of a reasoned and, if possibly, manifestly just and lawful enterprise.

So, these early days can greatly affect you. This has made me realise that there must be young people coming into my court who look at how we perform and I hope that 20 years or 30 years hence no-one will ever say of me as they said of Judge Dignam that, "It's not a just performance".

Peter Coleman: You describe an articulated clerk's life as absolutely deeply involved in the life of the law. Well, now articles have been abolished, haven't they, and now you have the College of Law?

Michael Kirby: Yes.

Peter Coleman: What do you think of the College of Law?

Michael Kirby: Well, that had to come because there just were no jobs, there were no articles and so people had to ...

Peter Coleman: Well, why were there no articles?

Michael Kirby: There were not enough jobs in the firms, there were not enough firms, there was pressure on the numbers ...

Peter Coleman: Oh, you mean the production of lawyers was so great that there were more than the market could absorb?

Michael Kirby: Yes. But apparently now they're going back to a shorter version of articles. They're going to combine the College of Law with a shorter version of articles. I think that's a good thing because of the fact that it is an experience of real life. There's nothing quite like a real live case to make you concentrate the mind.

Peter Coleman: Yes, yes, yes.

Michael Kirby: I completed my law course, I graduated in law - I got second class honours LLB. Murray Gleeson got first class honours, I think by keeping the best notes from me.

Peter Coleman: First class honours in a particular subject?

Michael Kirby: No, they gave it over the whole faculty. In those days they only ever gave about three or four first class honours. I went to a Law graduation recently and they gave about 20 or 15 first class honours.

Peter Coleman: So, you could for example be the world's greatest examinee in company law but if not so good in constitutional law or whatever it brought you down?

Michael Kirby: If you had a few dips then you got second or you didn't get honours at all - if you had a failure you didn't get honours at all. I never had a failure. But I was concentrating partly on student politics and other things and that was diverting me a bit from my work in the faculty. But anyway, I got a very good pass and I went on to do a master of law later and got first class honours master of law. In fact, afterwards I did an economics degree at night as well - Sir Frederick Deer had had a BA LLB BEc and that sort of rather encouraged me towards that.

Peter Coleman: What did you do your masters in?

Michael Kirby: Well, my essay was actually upon the communist doctrine of the withering away of the state. Essentially it was to explode the idea that Marx's view that the state would wither away in the context of Soviet communism was completely antithetical to the authoritarian nature of the soviet regime. I did it with the benefit of a large number of original works from Russia which had been secured by Ilmar Tamello who was a Reader in Law at the university. He was Estonian and had translated these articles from the Russian into English. So, I had this huge mass of original material which I analysed.

Peter Coleman: And was it the availability of this material that interested you in the theme or was the theme of some general interest to you?

Michael Kirby: Well, I had worked with Stone on one of his successor books to *Province and Function of Law*.⁵ Stone had asked me to work in the area of the communist theories of law. Don't forget that this was in the heyday of Khrushchev and the period of the denunciation of Stalin - this was in 1959, or rather the LLM essay would have been in 1963 or thereabouts.

⁵ Julius Stone, *Social Dimensions of Law and Justice*, Maitland, 1966, chapter 10.

But it was in the aftermath of that period. I suppose because I had gained something of a reputation, possibly because of student politics, to be slightly a leftie, that Stone thought, "Well, he'll be interested in that and he can help me as a research student in that". So, that I did. I worked on that chapter and that led on to doing this LLM thesis.

Peter Coleman: Yes, at that time too the Soviet Union was at one of its peaks of prestige I think. I mean, it was commonly held - and I don't mean by communists, but at large - that its economy was booming and it may even overtake the west.

Michael Kirby: That's right. It was up in the style and Soviet science seemed to be at least there, there was a real possibility that it was ... and there was a little bit of an element of liberalism in the Khrushchev denunciation of Stalin. One sort of thought, well, maybe after all these people did have some secret. But anyway, I did my thesis. Actually, it would be quite interesting for me, if I could only find it, to read it. It wasn't a full thesis, it was a long essay. So, that's what I did.

Peter Coleman: Anyhow, you'd finished your articles, you're a graduate. How long did you stay with this ...

Michael Kirby: With this M A Simon? Well, I finished there on graduation. They asked me to stay and to go up and open a branch office in Newcastle. I might have done that, because they did quite a lot of work in Newcastle. But the idea of going and living in Newcastle didn't particularly attract me so I didn't accept that and began to look around.

I sought, and obtained, a job with Ebsworth & Ebsworth, which is a big firm, very respectable, very old, very commercial, a large admiralty practice. But for the hand of fate I might well have gone on to become Sydney's leading admiralty lawyer. However, a federal election intervened and the seat of Evans was lost by Fred Osborne

who then had to return to his seat in Ebsworth & Ebsworth. Therefore, they didn't want another lawyer and so the offer was tenderly but firmly withdrawn.

I therefore had to find another position. I often remind Ebsworth & Ebsworth of this today. From time to time they have me to their functions and I always tickle them up about having cast me aside so ...

Peter Coleman: Discourteously.

Michael Kirby: But subsequently I went on to get to a job with a firm called Hickson, Lakeman and Holcombe. Hickson I never knew. Lakeman and Holcombe were two very brilliant lawyers - I suppose they would have been in their forties at that time. Lakeman was an extremely elegant and sophisticated man. His wife was a painter. He was very civilised, very intelligent, worked in property law and made an awful lot of money. Holcombe was very brilliant, a first class honours graduate. Had been a barrister, had not succeeded as a barrister - hated barristers. He urged me to come in as legal counsel to the firm. This is not an uncommon thing nowadays but in those days it was quite uncommon.

Peter Coleman: I'm not sure what it means.

Michael Kirby: It means a solicitor does the work of an advocate in court.

Peter Coleman: Oh, legal counsel, I see.

Michael Kirby: Doesn't use a barrister. So, what he wanted to do was to get me into the firm and going down to the Compensation Court and doing the advocacy work. His scheme was actually very forward looking.

Peter Coleman: Was this because he didn't like barristers?

Michael Kirby: I think it had a bit to do with it. But he was an early forward thinker of what is now quite a large movement for the big firms to imitate the American firms of lawyers and have in-house counsel who are the advocates for the firm. So, he thought too that this would open a niche of practice that would be very useful to his firm. So, his idea was that I would do all the smaller legal problems that came up in the course of the whole firm - from criminal, commercial, property and so on - but at the same time that I would do advocacy, mainly in compensation cases.

So, that is what I started to do. I started to go to the Compensation Court and argue my own cases. I had quite a lot of success. Because I was extremely thorough. I was - and still am - very serious about my duties. I used to work very hard on the cases and I was having good success for insurance companies against the workers. So, we started to attract some of the big insurance companies to the firm who thought, "Well, this is a nice thing. We can get the legal costs and cutting out the barristers. The success rate is the same, if not better, and why shouldn't we use young Kirby".

The result was that one-by-one all of the big insurance companies started to come to Hickson, Lakeman and Holcombe. They included Manufacturers' Mutual, Prudential Insurance, Eagle Star Insurance Company, South Australian Insurance Company, Century Insurance. They all started to come. I was getting a good portion of their work. Much of that work has stayed with Hickson, Lakeman and Holcombe and it's no doubt produced millions for them over the years, though I don't think they now have in-house counsel; I think they've gone back to the old pattern of briefing barristers. I used to find it very stressful, very hard work to be both a solicitor and a barrister combined, because you finished the day in court and then you'd have to come home and start preparing the subpoenas and all the tedious work of a solicitor.

So, that was what I did. They made me a nominal partner - I went on the letterhead, though I wasn't a capital partner. Then after six years - a little too long in retrospect I think - I said, "Well, I want to go to the Bar". They put all sorts of attractive morsels

in my path to try to get me to stay. But in the end I said, "No, I want to go to the Bar".

Peter Coleman: Was this the firm where Chris Murphy worked? I seem to remember an article he wrote about you and that firm.

Michael Kirby: I don't think so, I don't think he ever worked there.

Peter Coleman: No, I'm sorry.

Michael Kirby: He may have but it doesn't ring a bell.

Peter Coleman: I think he wrote an article about a lawyer, and he contrasted his career with yours, a lawyer who died as an alcoholic who was at that firm. But I'd better withdraw that and qualify it; I'm not sure.

Michael Kirby: I remember that article but I can't recall who it was.

Peter Coleman: It was another ...

Michael Kirby: Oh, you're quite right, Bob English. He hasn't died, I think, he's simply ... he had an alcohol problem but he's a very nice man. He's written novels, which is a kind of death.

Peter Coleman: Look, I'm sorry. My memory ...

Michael Kirby: He's quite a good friend of mine. I see him from time to time. He's written novels and maybe he'll write the great Australian novel and have the last laugh on all of us.

Peter Coleman: He was a solicitor with you?

Michael Kirby: He was a solicitor. He was a very able solicitor too. I didn't have much to do with him because basically he was doing land title conveyancing where I was the sort of troubleshooter of the whole show. But he was a very able, talented man, he just had a marital problem and then he had an alcohol problem, but that can happen to anybody.

Peter Coleman: I see. So, this article is by the way, it has no ...

Michael Kirby: Yes, it has no great significance. But I got on well with Holcombe especially because he was extremely bright and very ambitious and I fitted into his plans. But after six years I thought I'd done everything that I could've done there. So, from '62 to '67 - so it was really five years - I did this at Hickson, Lakeman and Holcombe. Then I went to the Bar.

Peter Coleman: So, what year was this?

Michael Kirby: It was 1967. I was admitted to the Bar in that year. I went on from there to Wentworth Chambers, started on the eighth floor, taking chambers from a Mr Ellis who had moved to Canberra - he later became Justice Ellis of the Family Court. Then I moved into a front room in Wentworth Chambers. I liked that because I spent so much time in my chambers that I liked to have the natural light. I got into a pattern of life, which hasn't all that much changed, of working extremely hard.

At the Bar when I started off, from '67 to the end of '69, I was mainly doing Compensation Court work. Then at the end of '69 I decided to go overseas for a year. So I went on a journey which is one of the most enjoyable parts of my life, in a Kombi van, overland - Australians were doing that a lot at the time, but not generally "distinguished", high-earning, self-important barristers.

Cassette 2/Side B

Justice Michael Kirby (continuing): So, I travelled from India first of all up to Singapore and drove up to Thailand - the Vietnam War was going on across the border at the time - then back to Malaysia, shipped across to India and travelled all over India, spent three months in India, then travelled through to England. I took a year doing this.

Peter Coleman: You must have been very confident of your professional position to be able to take a year off at that stage?

Michael Kirby: Well, to be honest I suppose I was.

Peter Coleman: I mean, some might say that would be a time to be consolidating.

Michael Kirby: Well, I suppose that's true. I knew I would never really starve. But it was something I wanted to do and I did it.

Peter Coleman: Purely to see the world or was there some ...

Michael Kirby: To see the world, to have time to read and to think. I had a lot of books. I remember one of the books I had was a life story of Joseph Stalin and when I arrived ...

Peter Coleman: Who wrote that?

Michael Kirby: I forget the name of the author but it was big with a blue cover.

Peter Coleman: Not Boris Zubarine *?

Michael Kirby: I'm not sure. But when I arrived at the border of Romania, then under Ceaucescu, they looked through my Kombi van. They discovered this volume. There was great consternation, I remember the excitement at the border. So, they took all my books and they said, "We know people like you. We've dealt with people like you before. We had a Kombi van come through here last week and they had a whole load of *Bibles*". I said, "Oh, no wonder you put those in a box". So, they put them in a box and sealed it and wrote it in my passport and I had to declare it as I left. Very aggressive, very authoritarian.

Peter Coleman: You were allowed to get the books back?

Michael Kirby: I was allowed to take the books but they were in a box that was sealed.

Peter Coleman: And had to remain sealed, I see.

Michael Kirby: The fact of the seal was written on my visa. But it was very interesting to go to those countries. In fact, Justice Meagher is going there in a few months time. So I have given him a few hints of the places to go to. There were wonderful camping grounds in eastern Europe. Because they were poorer that was often the way that people went on their holidays in eastern Europe, often to Constanza or cities on the Black Sea. I was there in the year '70 - it might have been '69/'70 - when one of the British elections took place. There was a change of government. It was from Heath to Wilson or Wilson to Heath - I think it was Heath lost and Wilson came in.

Peter Coleman: I think that's right, yes.

Michael Kirby: I remember it was a beautiful night. Very still. A starlit sky in an idyllic camp with lovely trees and surrounded by eastern European people and here I was listening to the BBC for the election results. I remember getting out of the Kombi

when it was clear that the change of government had occurred and walking around and looking at these people and thinking that for all the faults of our system, which are many, we could at least turf them out. We could get rid of them. And that that was a wonderful thing. I really felt quite excited. I still remember the feeling that that is a great blessing. It's a wonderful thing peacefully to change a government.

Anyway, I finished that year and then I came back to practice, in '71.

Peter Coleman: Back to your chambers at Wentworth?

Michael Kirby: Yes. That was from December '69 until December '70. My brother, Donald, at that stage had a home - and still owns it - in London, in Waterloo. I spent a good three months there just going to the theatre, going to opera, music, having a wonderful time and realising that life was not just about slavery on the problems of compensation cases.

Peter Coleman: Your practice was still largely a compensation practice?

Michael Kirby: At that stage, yes. I made an awful lot of money. But it wasn't particularly stimulating to me. It was very taxing. It really taught me self-organisation and the setting of standards and I always took my duties very seriously. But going overseas in a way allowed me to clear the decks. When I came back I effectively let it be known that I was not going to do that work.

So, I then moved into work very largely in the industrial field, in industrial cases, election disputes. I did a lot of work with Neville Wran, with Jack Sweeney, some little work - not much - with Lionel Murphy, with Bill Fisher. So I was really manoeuvring, working my way into an industrial practice which I was very interested in because it was sort of tapping my knowledge in my economics degree and I was interested in industrial relations issues.

So, I started doing that. That continued during the period from '70 until '73. Then I went overseas again for another year. During that period that I was away the Whitlam government being in office had appointed Elizabeth Evatt and Mary Gaudron to the Arbitration Commission. I remember reading in London about that and thinking, "Gee, if I'd been back there maybe I would have been appointed". So, I came back. I got back into my practice. It always came bigger and better when I came back from these things. That led me ... in December '74 I was asked to become a member of the Arbitration Court.

Peter Coleman: Before getting to that, you made the second trip not all that long after the first one?

Michael Kirby: Yes, I would have probably gone on doing that if I had stayed at the Bar. It was very enjoyable and it was a way I could get away from just doing legal cases.

Peter Coleman: This is going to run out in a second so maybe I'll stop it now and put on the next tape and then we'll know where we are.

Cassette 3/Side A

Peter Coleman: The purpose of this trip, was it like the first one, did you go in a caravan?

Michael Kirby: Yes, yes, I did the same.

Peter Coleman: So, a repeat?

Michael Kirby: It was a repeat. Well, I'd enjoyed the first one. Thinking back on it, it may be that this is simply an illustration of the thesis that I learned at the feet of the Dalai Lama last week: that I was seeking to escape from an imprisonment of my mind in the repetitive, highly specialised work of legal cases and to broaden my mind into a wider range of thinking and activities to be in greater harmony with the world. But whether it had some high point or I just wanted to sit on a few beaches and read a few books, that is what I decided to do. When I did it I always found that I came back to bigger and better work. So, it seemed to be a ...

Peter Coleman: A good idea?

Michael Kirby: A suitable idea to clear the decks. My first period of practice, of two years or so, had been an enormous number of compensation cases. That really made me very skilled in getting through work at high pressure. My second period were commercial cases, Supreme Court trials and industrial work and I loved the industrial work so I was sort of steering myself to that. My third period when I came back in July '74 I was beginning to be briefed by the Commonwealth Crown, as it was called then, and getting briefs in the High Court, getting briefs in constitutional cases. I was in the double dissolution case, Cope v Cormack,⁶ I was doing work with Dennis

⁶ (1974) 134 CLR 432.

Mahoney as his junior in the Mikasa⁷ case in the Commonwealth Industrial Court and the High Court. So, I was getting better and better work.

Then in November 1974 I was asked to see Jack Sweeney *, whom I'd known before his appointment to the Commonwealth Industrial Court. He had been one of the influential silks in my second phase. He asked to see me. He said, "Michael, I don't know whether I'm offering you your life's desire or life imprisonment but I've been asked to inquire whether you would be interested to be appointed to the Arbitration Commission". I was then 35 years of age. The Arbitration Commission in those days was a great national body. The Australian Industrial Relations Commission is nowhere near as influential today as the Arbitration Commission was. I'd grown up in the forties, fifties and sixties with this Arbitration Commission, headed by Sir Richard Kirby first - who was not a relation of mine - and then by Sir John Moore. It had, next to the High Court, probably the greatest influence of any national court-like body.

Peter Coleman: A great headline court.

Michael Kirby: It was. And it was also very important in the economy because of the national wage cases.

Peter Coleman: That's what I mean, yes.

Michael Kirby: And in the equal pay decisions and the award decisions. It was basically power wrapped up in law. I liked that and I was interested in that. So, I didn't know what to do. I talked about it with my family, I talked about it with my clerk - he said, "Boss, you've got to take it".

Peter Coleman: Who was your clerk?

⁷ (1972) 127 CLR 617.

Michael Kirby: Greg Isaac. Various other people urged me not to. Michael McHugh said, "You take this job you will sink like a stone without trace and never be heard of again. Don't take it".

Peter Coleman: What was in his mind?

Michael Kirby: Well, it is in a sense a siding of the law. It is not the mainstream of the law. He apparently thought that I had a future in the mainstream of the law. Anyway, I thought about it and I talked about it with my family and to be asked to accept appointment to the Bench at 35 was relatively rare. I mean, Mary Gaudron had been offered and appointed at 32. But it was the sort of thing that generally came to people much later in life. In a way, as I look back, it was something of a presumption even to contemplate it, though I knew I would do a good job at it. So, the long and short of it is that after thinking about it for a day or so I let it be known that I would.

I was then presenting a case in the Full Bench of the Arbitration Commission on a dispute involving the SECV and the electricity strike in Victoria. I was acting for all the unions. So I had John Halfpenny there for the Metalworkers Union, I think, and various right wing unions. I was being briefed by Bernie Gaynor, who had acted for the National Civic Council. So I had the whole gamut of the labour unions. I was rather enjoying my life as an advocate. I was really doing rather well in the industrial field and enjoying it. I could see my life then as one involving industrial disputes and solving those. I was perfectly happy that that should be my career.

I was appointed, I was welcomed. I remember quoting Sir John Kerr during my welcome speech about the importance of industrial law to the fabric of Australia. He'd been very much involved in the industrial law field and was very good at it and he was a judge of the Commonwealth Industrial Court at the time. I remember Tom Hughes, who was then the President of the Bar, came and welcomed me on behalf of the Bar. So, I was there, settled in in December 1974 to be a judge of the Arbitration

Commission. I recruited my first associate. I was then set up over in Temple Court and I assumed that that would be what my career would involve.

Then a few weeks later, in December '74, I got in the lift at Temple Court. And into the lift in that very characteristic stride came Lionel Murphy, Federal Attorney-General. He had known me; but not very well. He said, "Oh, Michael, just the person I want to see. Why don't you come up and have a glass of champagne".

Now, Lionel was a much more congenial man than I am - he could polish off the whole bottle of champagne. But I went up later to see him. He said, "There's one thing I want to ask you", so I thought, "Oh, well, I'll go up and see what it is". So, I went up and he said, "We've set up this Law Reform Commission. It's been there for the past two years and I can't get a chairman that I want. Various names have been urged upon me. But they're not the people I want. I don't want an old troglodyte, I want somebody young who'll breathe life into this institution. I want you. Will you take it?".

To be completely honest, being a person somewhat lacking in imagination, I was not really very inclined to take it. I was very happy being a judge at the Arbitration Commission.

Peter Coleman: How long had you been a judge of the Arbitration Commission?

Michael Kirby: I was a judge there for 40 days and 40 nights.

Peter Coleman: Forty days and 40 nights, right.

Michael Kirby: During that time I'd been assigned the maritime industry. Now, if they'd assigned me the meat industry, as they did to Mary Gaudron, and I'd been tromping around in gumboots ...

Peter Coleman: And abattoirs, slaughtering beasts.

Michael Kirby: In abattoirs, I'd probably have been quite happy to be relieved.

Peter Coleman: Oh, it's a famous incident - Hal Woolton, didn't he make his career there?

Michael Kirby: It wouldn't have been my scene I suspect - I hadn't escaped the medical profession to end up on the slaughterhouse with the Arbitration Commission. But I'd been given the extremely clean, but highly disputatious, maritime industry. So, I'd been going on inspections on ships in the Gulf of St Vincent, being "piped on board". I had sort of mental images of myself as the lord high admiral of the modern Australian Arbitration Commission. So, to be completely candid, Lionel's suggestion that I should take on this new and unknown task wasn't ...

Peter Coleman: Six weeks after you'd settled into the ...

Michael Kirby: Exactly, it wasn't all that congenial. If it had come later it probably would have been but at that time I was perfectly happy to do the Arbitration Commission. Several people have suggested to me that I was appointed to the Arbitration Commission to pick up the handle of "Mr Justice" in order to give respectability to my appointment to the Law Reform Commission. Well, that is not how it happened.

Peter Coleman: Yes, a bit deep, a bit deep.

Michael Kirby: The facts were just not that way. I was appointed to the Arbitration Commission by Clyde Cameron, who was the Minister for Industrial Relations. I had no real connection with Lionel Murphy up till he saw me in the lift. Perhaps if I'd not got in the lift he would never have thought of me and would never have asked me to

do this thing. Anyway, the long and short of it is that Geoffrey Robertson, now QC - probably in years to come Lord Robertson of Northcliff - a young Sydney barrister whom I'd helped ...

Peter Coleman: Is this him?

Michael Kirby: I'd helped him to get his Rhodes Scholarship.

Peter Coleman: Good heavens, is that the same man?

Michael Kirby: Yes, Geoff Robertson.

Peter Coleman: Geoff Robertson, *Reluctant Judas*. I noticed the same on the shelf but I didn't know it was ...

Michael Kirby: Oh, he's quite prolific in his writing. Anyway, he said, "You've got to do this. This is a wonderful thing. Sir Leslie Scarman is the English equivalent. This will be a great mind-opener for you. They need somebody like you and you're just the person. Lionel's right, you should take it, it will be great".

Peter Coleman: Now, how did he come to be proffering advice?

Michael Kirby: He had been a student politician. He'd become president of the Sydney SRC. He'd asked me to give him a reference as a young law graduate for him to become Rhodes Scholar. I gave him that reference and he went on to become Rhodes Scholar. He went over to Oxford, he stayed in England, though visiting here from time to time. He became a barrister over there and is now one of their leading QCs. He's a leading barrister. He's the one who revealed the perfidy of the government in England at the moment that led on to the Scott Inquiry. So he's a very important counsel in England at the moment. He knew about the English institutions and he ...

Peter Coleman: He was visiting Sydney at the time?

Michael Kirby: He was just visiting, just by chance. He said, "You take it". So, I had another talk to my family and a think about it and then I ultimately said, "Yes, I'll take it". So, I then had the embarrassing task of going to Sir John Moore and saying, "Well, look, I've just started with you but will you give me indefinite leave of absence whilst I take on this position?". I was appointed for five years and I went on to establish the Australian Law Reform Commission.

Peter Coleman: And what did Sir John say?

Michael Kirby: He was quite supportive. I think Murphy had spoken to Clyde Cameron and so for one reason or another they were quite accepting of my appointment there.

Peter Coleman: It added something to the Arbitration Commission I suppose, that one of our judges is on leave running the Law Reform Commission?

Michael Kirby: Well, the Arbitration Commission had become something of a pool of people doing that: Elizabeth Evatt had gone off and done the Royal Commission into Human Relationships and she also went off to become the Chief Judge of the Family Court but she never surrendered her commission at the Arbitration Commission.

Peter Coleman: Chief Judge of the Family Court.

Michael Kirby: I went on and did this and I set up the Australian Law Reform Commission.

Peter Coleman: Now, it had been in operation for a couple of years?

Michael Kirby: No, the statute had been enacted but nobody had been appointed.

Peter Coleman: Ah, but you were the first?

Michael Kirby: I was the first appointee. There were appointed at the same time three other appointees, namely Mr Gareth Evans, Professor Alex Castles of Adelaide and Professor Gordon Hawkins of Sydney, and subsequently two additional appointees were made, namely Mr Gerard Brennan QC of Brisbane and Mr John Cain, solicitor of Victoria.

Peter Coleman: So, you were the first. Where did you set up?

Michael Kirby: Well, we had no office space and effectively I set it up in the anteroom to the Judge's Chambers of the federal Judge in Bankruptcy, Bernard Riley. During the day he would walk through my little office where we were setting up the Law Reform Commission. But pretty soon Mr Kevin Crotte of the Attorney-General's Department was assigned to me to find building space. We found space in 99 Elizabeth Street and set up a whole floor there. We went on to recruit staff: to get typewriters, to recruit a secretary of the Commission - who was Mr George Brouwer who came from the Prime Minister's Department - and to start our work.

Within days of the establishment of the Commission we were given our first task which was to prepare a report on complaints against the police and also on a criminal investigation - this was in connection with the proposal to establish the so-called "Australia police", which later became the Federal Police.

Peter Coleman: Yes. So, there is you and Gordon Hawkins and Gareth Evans and Alex Castles?

Michael Kirby: Yes, but I was the only full time commissioner.

Peter Coleman: And these other three - and there were others later - were in the building with you? Your building was their headquarters?

Michael Kirby: Yes. They were part time commissioners. They would come as required for meetings. But effectively it was me and my personal staff to start with.

Peter Coleman: So, I should imagine that first reference about the police would have involved Gordon Hawkings?

Michael Kirby: It did - it involved us all because we were just a very small show at that stage. Gerard Brennan was appointed, with John Cain, within a matter of weeks. So they came very quickly afterwards. I think the Department - this is the way you get the symbiosis between the stable elements in our Constitution and the political elements - I think the government wanted to appoint John Cain, who was then, I don't think he was even a member of parliament in Victoria. He was an aspiring Labor politician and Labor lawyer. They wanted to appoint him. The Department perhaps said, "Well, it might be appropriate if you were to appoint a Brisbane silk who is a person who is not antithetic to the idea of reform". That went along and so Gerard Brennan and John Cain were appointed, with my entire support, within weeks.

So, we then had a team. But I was the only full time commissioner.

Peter Coleman: A team is one thing but you would have needed professional staff as well as typists?

Michael Kirby: Yes, well we recruited our first professional officer within a matter of weeks and we recruited typists. It was a very, very busy time. I was rushing around the country seeing various people. I went and saw Sir Garfield Barwick up at

Darlinghurst. He gave me quite a bit of time and talked about reform - I'm sure that he was very suspect of my appointment and my capacities.

Peter Coleman: Why?

Michael Kirby: Well, I was very young. He would have seen that there would be other people in the law, such as Dick Blackburn - later Sir Richard Blackburn - who might have been interested in the job and might have been a more orthodox appointment.

Peter Coleman: And he may have suspected anything that was Lionel Murphy's creation I suppose?

Michael Kirby: He might have. Or anything of the Labor Government's creation. But he was very correct to me. I've always had a, shall we say a correct but not a warm relationship with Sir Garfield Barwick. I ensured, as Chancellor of Macquarie University, A, that we introduced medals, university medals, and, B, we introduced honorary degrees and he got one of the first because he had been the first chancellor. I've had a few run-ins with Gar from time to time because he's, of course, a very strong-willed person and very opinionated. From time to time I've been accused of the same sins. Anyway, I went around talking to all the chief judges and getting ideas.

Peter Coleman: That must have been an extraordinary busy period. That's why I harp on it a little bit, to create a Law Reform Commission ex-dillio* is pretty stuff.

Michael Kirby: Oh, it was very busy. Fortunately I recorded it all. I kept notes, and in fact this led to a bit of a fracas because my practice was to keep notes - a memoranda of discussions with the person so that I could share it with the other members of the Commission. I didn't think in terms of principle or practicality it should be a one person show.

I sent one of these notes to Justice Fox, who was rather a formal sort of a man. He got in touch with me and said that he thought that was shocking and that I should destroy the notes, that these were personal conversations and that a gentleman would not keep a record of this kind. But I explained to him that the whole purpose of the conservation was to share the ideas with the other members of the Commission.

Peter Coleman: Was this an account of your conversation with Fox or an account of your conversation with somebody else?

Michael Kirby: An account of a conversation with Fox.

Peter Coleman: And you let him have a look at it to correct it as it were, comment on it?

Michael Kirby: That's right.

Peter Coleman: I see, and he was taken aback.

Michael Kirby: I suppose it's probably true to say that most judges would have conversations with judges and not keep formal records. But I wasn't seeing him as a judge. I was seeing him as a person establishing a new national institution. So, anyway, Fox and I later came to have quite a good relationship. These things all pass. All is passing; all of these battles ...

Peter Coleman: And are all these notes in the archives as it were, in your archives or in the ...

Michael Kirby: They'd be in the Law Reform Commission archives. The one thing that I've kept are a full set of the reports of the Commission and of the discussion papers and issues papers and a full set of all the speeches I've made back to the very

beginning. I think you've seen that set. We're up to about 3,000 now. There's been an awful lot of speeches - forests have been chopped down in honour of my speeches.

Peter Coleman: The impression gained is that the Law Reform Commission was very largely you, although you had these very prominent assistant commissioners.

Michael Kirby: Well, that wouldn't be quite right. That sounds a rather immodest comment. There's an element of truth in that the reality was at the beginning I was the only full time commissioner. Indeed, I was the only full time professional staff. But that soon changed. But even in that early time Gareth Evans was, I think, appointed a full time commissioner for a short period. He was not then in politics. He was a senior lecturer or a lecturer at Melbourne University Law School. I'd known him in student politics because he'd been president of Melbourne SRC. So I'd seen him in NUAUS circles. He was Garry Evans then. He became Gareth later. He then sat down and wrote the *Criminal Investigation* report, which was the second report of the Commission. It was a brilliant production. I mean, he is a very, very clever man. My report on *Complaints against Police ...*

Peter Coleman: This was the first report?

Michael Kirby: Yes, there were two reports. They were companion volumes. We were given a deadline. There was no power under the Act to give a deadline. But my objective was to meet the deadline to show the productivity of the Commission and that it was useful to government. So, we produced these two reports. We had these wonderful meetings in Canberra. Again I had that feeling that I had at the table of the university Senate or my first days in court. That really I was very privileged to be taking part in this, that this was the beginning of a new national institution. I felt it was a very useful national institution, I felt it would be a way of helping the Parliament. It would be a way to help governments.

Peter Coleman: Did it ever occur to you when you were deciding whether to take it on or not, or later, that this might be abolished with a change of government?

Michael Kirby: Well, it did occur to me. I made it my business in my rounds of consultations to consult very closely with Senator Greenwood, who was then the Opposition spokesman on legal matters, and Senator Durack and various other Opposition, Bob Ellicott, and others.

Peter Coleman: It was obvious that it was ...

Michael Kirby: Partly because, I suppose, of my Anglican institutional upbringing I did believe in neutrality. I did not believe in being partisan.

As a footnote, when Bob Hawke came into Parliament he wrote me a letter saying, "I am arranging a team of people to be my advisers and I would like you to be one of my team". I suppose if I had had a different conception of the judicial life and the judicial role and of neutrality of the public sector, it could have been in my interest to negotiate some informal basis. But I wrote back and said that in my opinion that was completely impossible in my position as a Crown officer. I was very happy to send him all the documents of the Commission and all my papers and so on if he would like that. But I couldn't accept any appointment in any team of that kind. I think that showed a certain institutional ignorance on his part or a misjudgment of my personality.

So, I made it my business to see the Opposition. I think that was a factor in making sure that when November '75 came, 20 years ago, that the Law Reform Commission survived.

Peter Coleman: Well, anyhow, you were saying you wrote the first and Gareth wrote the second.

Michael Kirby: I wrote the first report. By comparison to Gareth's effort mine is a pedestrian effort. Mine, on the other hand, passed into law and Gareth's, despite his ministerial office never has.

Peter Coleman: Went into philosophy.

Michael Kirby: But Gareth's was the first time an Australian book had been written on all of the law of criminal investigation, from investigation, arrest and the procedures through the police to the court. It's been a hugely influential report. It has been enacted, in parts, in the Defence Code and in the Northern Territory and in various special legislation picking up bits and pieces. I believe it's been tremendously influential in High Court decisions because ultimately the High Court has manoeuvred its way to many of the solutions, for example on the confirmation of conversations with police that the Law Reform Commission was suggesting.⁸

Indeed, Justice Brennan's dissent in one of the cases of McKinney and Judge⁹ was to the point that he had taken part in the Law Reform Commission and he still supported the proposal of the Law Reform Commission. However, he thought this was a matter to be done by Parliament and not by the courts. But the other judges, the majority, took the view that the courts had waited long enough, that the courts had their own responsibility to make sure of the integrity of their process and that they should do so.

Anyway, the Commission became established. A change of government occurred and the new government had a reformist Attorney-General in Ellicott. He was very supportive of the Law Reform Commission. He was always a little distant to me. Of course, they were very partisan days. I think possibly he felt, because of my age and other things ...

Peter Coleman: Had you figured in any way in the dismissal controversies?

⁸ See eg *McKinney v R* (1991) 171 CLR 468.

⁹ (1991) 171 CLR 468.

Michael Kirby: Not at all. The day Whitlam was dismissed I in fact went over to Sir John Moore and Terry Ludeke¹⁰ because I sort of went back to my basics - in the Arbitration Commission. I was in 99 Elizabeth Street. I crossed the road and went over there to see them because they were then my closest judicial colleagues. I remember that their great concern on that day was not the loss of the government but the loss of Jim McClelland as the minister because they felt that he had at least become a Minister of Industrial Relations who was able to keep control of the more restive elements in the unions. But, no, I had nothing to do with it.

I have my own opinions, which I think I've expressed from time to time. They are mainly to the point that the way Sir John Kerr acted was not, in my opinion, correct. He undoubtedly had the power to dismiss - that's the Sovereign's power. But to have the Leader of the Opposition hovering around the back of Government House is not the way I conceive a monarch would act and the representatives of the monarch should not act in that way.

Peter Coleman: Even if the Leader of the Opposition had come unexpectedly early, it seems to me - and I don't know what your opinion is - that he should have been advised to go away, not wait in the next room.

Michael Kirby: Yes, he should have. It was unseemly and I always test the Governor-General's action by how I would conceive the Queen to act. The argument to the other side is that the Governor-General is not the Queen - the Queen has permanency, the Governor-General doesn't, the Governor-General could be dismissed. But people die for the Queen, people die for the Crown, to lose a job is a risk of the office. I mean, I am sure that my position in supporting the Constitution has cost me various opportunities. I take my oath of allegiance seriously. It must mean something more than just words. Therefore, that's more important, as it seems to me, than to

¹⁰ Deputy President of the Australian Conciliation and Arbitration Commission.

hang on to or gain jobs. There are times in life where you have to act with what you think are very important principles.

This was a time when it seemed to me that Sir John Kerr, as the Queen's representative, as the Crown's representative, was bound to say to Whitlam, "Unless you get supply by Tuesday I am going to call on the Leader of the Opposition". And that should have been done up-front. It should have been done publicly. There should have been no ums and ahs about it.

The suggestion that Whitlam would have sought the Queen's agreement to dismiss Sir John Kerr is, I think, a misreading of Whitlam's constitutionalism. But even if he had, and even if the Queen had dismissed Sir John Kerr, then Sir John Kerr would have lost a position. But that is not as important as obeying principles of manifestly correct conduct. That's just my personal opinion.

Peter Coleman: And the successor Governor-General, had Sir John been dismissed, would, I assume, on this scenario be in exactly the same position?

Michael Kirby: Well, he might well have been but, in practical terms, I regard that as extremely unlikely.

Peter Coleman: I don't mean would have adopted the same policy but would've been back to square one as it were.

Michael Kirby: Yes, but Whitlam would have had to wear the political opprobrium of sacking the Governor-General. This would have been so clearly damaging that, A, I don't think as a matter of practicality it would have happened and, B, Whitlam, unlike many leaders since and before, is a lawyer and therefore Sir John Kerr as a lawyer would have had to estimate what he would have done. I don't think, knowing Whitlam and his great love of history and his knowledge of constitutionalism, that he

would have taken both the historical and political opprobrium of sacking the Governor-General.

But at the bottom line my view would be that that manifest correctness of behaviour of people who are Crown officers is so important that that's more important than gaining an office or keeping an office. That's just a conception I have in my mind.

Peter Coleman: Well, that was a slight diversion because we were dealing with 1975 and the continuation of the Australian Law Reform Commission with a different minister.

Michael Kirby: Well, one report led into another. Ellicott gave us the reference on the inquiry into privacy.

Peter Coleman: You felt no tremors on the change of government?

Michael Kirby: No, because in the Liberal Party policy speech there was a promise to refer privacy to the Law Reform Commission.

Peter Coleman: Oh, yes. I only meant tremors of changes of the type of reference that you would get.

Michael Kirby: Well, that didn't worry me in the least because I had this conception in my mind of institutional continuity. I suppose that betrays a certain dispassionate non-radicalism.

Peter Coleman: Actually, I would have thought Bob Ellicott had not dissimilar Protestant upbringing and would have had a similar idea of institutional continuity?

Michael Kirby: Absolutely. I had a lot in common with Ellicott. He also went to Fort Street by the way. I once took somebody to see him and I said to this judge, I

think from foreign parts, "This is Mr Ellicott. I live in his electorate. In fact, I'm one of his electors", and Ellicott's answer, quick as a flash, was, "The judge is one of my constituents; that he is one of my electors I have my doubts". But there we are. I think, in that, he underestimated me because I have not had a steady pattern in my voting in my life; I've voted as I thought was appropriate in the particular election.

Peter Coleman: But the references thing?

Michael Kirby: I think there is a bit of truth in what Jim Staples said in 1975, that true conservatives, true constitutional conservatists, would have voted for the return of the Whitlam government. But most of the people were not true constitutional conservatives. They just wanted to get rid of the government.

Peter Coleman: What is the meaning of that? Oh, you mean as a protest against the dismissal?

Michael Kirby: Yes. But I think that dismissal eating its nasty way away in the mind of the Labor Party and its politicians has done a lot of damage to the institution of constitutional monarchy in Australia. I suspect that has laid the ground with Fenian sympathies admixed to lead on to republicanism.

Peter Coleman: What sort of sympathies?

Michael Kirby: Fenian, Irish nationalistic sympathies, to lead - together with various other motivations - to the moves for a republic.

Peter Coleman: Well, that was even said at the time I think. There was that famous telegram that Kerr received from Donald Horne, you know. John Kerr was putting, or his staff was putting the congratulatory telegrams in this pile and the disapproving telegrams in that pile and in the congratulatory telegram pile was one from Donald Horn saying, "Congratulations, you have just abolished the Australian monarchy", but

it got into the congratulatory pile by error. But what I'm getting at is that view that this style of dismissal was advancing the cause of republicanism was around even then, let alone with the passing years.

Michael Kirby: I think that is a false view myself. At least I understand the view but I think it's a false argument because, in a way, one of the reasons that people were shocked by what Sir John Kerr did was that it seemed so antithetical to constitutional monarchy. This is a governmental system of manifest propriety and ultimate deference to the people's representatives. In a way, an elected president, elected by the people or elected by parliament, is much more likely, it seems to me, to conceive of himself or herself as having the authority and legitimacy to do what Sir John Kerr did than a Governor-General, because such a president might consider they have the legitimacy. It was the lack of political legitimacy of his office, in a way, that shocked many people about what Sir John Kerr did.

I personally at the time was not particularly shocked. I had gone to luncheons at the Bar common room and people were talking about what might happen. People were talking about the possibility of dismissal. I knew that there were these great reserve powers. There were conventions but the powers were there. So, I wasn't particularly shocked about it happening. But when I heard about the way it had happened that was not my conception of proper Crown action. I suppose I'm just overly affected by ideas of propriety and correctness and ultimate deference to the people's elected representatives.

Anyway, Ellicott came in. He was very supportive to the Law Reform Commission. He gave very good references, forward-looking references such as the human tissue transplant reference.

Peter Coleman: And staff and conditions and everything was okay?

Michael Kirby: Everything was fine. The Commission grew and became seen as something useful. The Fraser government had come in with such a big vote but with still an anxiety about its own image. I think it was keen to have a sort of image that it wasn't opposed to reform in particular areas. Ellicott was on that wing of the Liberal Party. So that's where we went ahead with our work.

Peter Coleman: And what were the major references - the human tissues?

Michael Kirby: Well, human tissue transplants, the debt recovery project, privacy I've mentioned, sentencing reform ...

Peter Coleman: Aboriginal law?

Michael Kirby: Aboriginal law reform, yes.

Peter Coleman: And these assistant commissioners, were they with you the whole time?

Michael Kirby: Well, there were two levels of commissioners. There were full time commissioners and part time commissioners. Very soon, about a year after, and during the Liberal government the full time commissioners started to come. Professor David Kelly came from Adelaide and we got Mr Bruce Debelle, now Justice Debelle, also from Adelaide. We got George Brouwer, as I said. He became the Secretary of the Commission - he came from Canberra. One by the one the commissioners, part time and full time, were appointed. Sir Zelman Cowen was appointed a part time commissioner and had to resign when he became Governor-General.

Peter Coleman: Is it fair to say that any one or other of these commissioners was of great importance?

Michael Kirby: Yes, they all had an impact on me. I would say David Kelly had a great impact on me because he taught me conceptualising problems. He was an academic. He's very interested in plain English writing. He was an expert in debt recovery, which seems very tedious and boring but it's a very practical and important area of the law. He came along. He took to task my great efforts, one of which had been a report on ACT traffic law on driving under the influence. He took a chapter of my report where I'd said, "This is what they do in Germany, this is what they do in America, this what they do in France, this is what they do in Belgium, this is what they do in the Netherlands". He said, "That's completely unconceptual and a completely unsatisfactory way to write a report. What you have to do is take a concept, blood extraction, and then analyse in a conceptual way how different countries deal with it and what the advantages and disadvantages are of each. But simply to digest what they do requires the mind at the end of it then to shake itself and to do the conceptualising that you should do".

So, that's had a big impact on me as a judge. I think if I have one thing which distinguishes me from a lot of other judges, I hope I don't just regurgitate what X said in England in 1865 and what Y said in the High Court in 1910. This is the old way of writing judgments, which I regard as very unconceptual.

My eyes were opened to this by David Kelly who was a great academic and a big influence on my life, and a very able - if somewhat eccentric and often rather plain speaking - person. He was sacked by Mrs Jan Wade¹¹ in Victoria from the office of the Law Reform Commissioner of Victoria. I don't wonder that Mrs Wade fell out with him because he would have told Mrs Wade what he thought about her and she would have ultimately told him what she thought about him.

But he was a very able man - quite a conservative man in some ways but very talented and a big influence.

¹¹ Attorney General for Victoria in the Kennett Government.

So, we all had an influence on each other.

Peter Coleman: But he was the most significant of them?

Michael Kirby: Well, I would say he and George Brouwer, who had come from Prime Minister and Cabinet. He was a very proper, very able administrator. He later went on, when John Cain became Premier of Victoria, to become the head of Premier and Cabinet in Victoria. He later served in the present Victorian government but left recently.

Peter Coleman: To come to Sydney?

Michael Kirby: No, he had a falling out in that he was asked by a Minister to do something he didn't think was right and he didn't do it. He would have the same conceptual idea about proper conduct in public life on the part of Crown officers, though I suspect he's a closet republican. But he's a very proper public servant.

So, they all had their influence on me. I suppose I had some influence on them. We all talk of those years as a golden time.

Peter Coleman: Yes, which were great, first of all because you were establishing the Commission but also what were the great reports, the reports that had the most influence I mean?

Michael Kirby: Well, I think that's really for others to say. But the reports that had great excitement certainly include the human tissue transplant report, because there was Sir Gerard Brennan - Mr Brennan - and Sir Zelman Cowen taking a rather conservative view and there was myself and David Kelly taking a different view.

They were great debates and Sir Zelman Cowen often talks to me about how wonderful he found that time: to have a group of talented lawyers with the ultimate responsibility of writing the report, gathering around them the group of consultants and experts in the field and then going out and consulting with the whole community. It is a wonderfully exciting enterprise. That report led on to legislation in every state and territory of Australia which is basically uniform and which has weathered rather well over 20 years. It was, in a sense, a forerunner of procedures for consultation on these very sensitive matters and helping the legislators to actually do something about hard problems and not simply to put them in the too-hard basket.

So, its importance in a way transcends the particular subject matter. It demonstrates that in the 1970s, eighties and nineties you can help democratic legislatures to cope with difficult controversial problems.

Peter Coleman: And other reports?

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Michael Kirby: Well, the reports are all there. I think it's really for others to talk about their success or otherwise. The Law Reform Commission has rather changed in recent times. It has lately become, to some extent, more inclined, I think, to do work that will be of immediate and rather shorter run utility. The result has been that a lot of its reports move very quickly into legislation.

I remember something Sir Clarrie Harders, who was then head of Attorney-General's Department, said to me at the very beginning in my memorandum of discussion with him. He said, "Don't get too close to the Department. Your value is in being something extra, something different, something outside, something not too close to politicians or to bureaucrats but something that is tapping talent and ability that otherwise wouldn't be available to government". That was very wise advice because being a practical common lawyer, I had my eyes on getting legislation through and working closely with officials.

Well, now the circle has come around a full measure. Now that is basically where Alan Rose, who was one of Sir Clarrie Harders' successors, has the Commission today. It works much more closely to the administration. To that extent it's probably more immediately useful. But there is a need for somebody to be looking into the distant future and dealing with big issues and laying down reports that help parliament to cope.

Peter Coleman: Yes, well that helping parliament is interesting because you are of the view, I think, that parliament is not incurable, that through the Law Reform Commission and through other ways it can do what many people say it can't do.

Michael Kirby: Absolutely. I'm a parliamentary person. I wrote a judgment in the BLF case,¹² much criticised the academic literature, in which I pointed out that if parliament makes clear its wish and if there's no constitutional inhibition upon it, then it's the duty of the courts faithfully to carry that into effect. That's what I strive to do as a judge.

That view has been criticised in some circles. Some academic circles consider it insufficiently tender to the idea that there are rights that run so deep that even parliament can't take them away. Well, my own view is that parliament can take them away. They're answerable to the people in elections. But some people say that's an overly naive view about the parliament.

Peter Coleman: And you also defend parliament, I think, against international covenants?

Michael Kirby: Well, I have a view, in my judicial life, that the international principles need to be harmonised in some way with our domestic law and that we've come to that point in human history where international law is being developed, quite naturally, for international problems. We are at a moment in time where we have to somehow harmonise the two. But that can be done by judges in making their decisions, at the crossroads, where legislation is ambiguous or where there's a gap in the common law, using the international covenants of principles to develop the common law or construe the ambiguous statute.

On the other hand, I feel that the price of that is that parliament has to have some appropriate part in the consideration of treaties. If you going to make them influential then, as the High Court said recently in a case of Teoh,¹³ you can't have them being

¹² Building Construction Employees and Builders' Labourers' Federation (NSW) Minister for Industrial Relations (1986) 7 NSWLR 372 (CA)

¹³ Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273.

introduced by the backdoor where the legislators haven't really had any say and it's purely the act of the executive government and the executive government of the Commonwealth at that. Not even the views of governments all over the country, simply the acts of one particular executive government.

However, I'm not opposed to international principle. I'm not living in the past. I think we have to reconcile international law with domestic law and it can be done.

Peter Coleman: This period at the Law Reform Commission was also the period in which you yourself became much involved in international organisations I think, UNESCO and others?

Michael Kirby: Yes. The first that I became involved in was the OECD. I was sent to that body in Paris when we got the reference on privacy. The OECD decided to do an inquiry into privacy principles in transborder data flows. So it seemed natural, at the time, for the government to send me over there. I was sent and when I arrived I soon found that they wanted me to be the chairman. There was a dispute between Europe and the United States so they couldn't get the usual Swedish chairman and so they asked me. So, I became the chairman of the group.

The work of that group became quite influential. It affected the development of the law in countries as far apart as Australia, Japan, the Netherlands and elsewhere. In fact the principles that that group proposed were ultimately the principles adopted in the *Privacy Act* of the Commonwealth.

So, they are the basic principles of privacy. That, in turn, taught me the way in which international bodies can help in the development of principles which will be useful to the development of the law in your own country. It was again very exciting for me to take part in an activity of this kind and to be seeing very clever minds from different legal traditions being brought to bear upon common problem. To see how Americans, with the First Amendment constantly ringing in their ears, approach issues of privacy

protection as against, say, French lawyers who could still remember, or have vivid recollections and stories of, the manila folders of the Gestapo and the misuse of information. The different approaches that occur in these two legal traditions. It began my journey into international organisations.

I thought you were going to say that I became well known in television and radio and talkback and so on in Australia, something that led Gareth Evans to assert that I had to be pushed into the public media but that having embraced it I did so with an excessive enthusiasm. Coming from him I think that's a little bit rich. I must say Bob Ellicott always encouraged me to do that.

Peter Coleman: To go public?

Michael Kirby: He said it was very important for the Law Reform Commission to involve the public and that that was, in a sense, it's insurance policy against parliamentary and political indifference. He was looking at it as a politician and a parliamentarian. I was looking at it from the point of view of utility. But I soon got the message about its political importance. And I believe it put the Law Reform Commission on the agenda as a national institution. I hope it will stay there.

Peter Coleman: As an institution which any journalist pursuing any relevant theme would think to ring up; ring you up?

Michael Kirby: Yes. And sometimes only marginally relevant things.

Peter Coleman: Yes, in the hope of getting something to ...

Michael Kirby: Well, something on the law. On its role in society. I think I had a part in opening up the law. It was no longer to be confined to the priestly caste. It was to be discussed as a very important element of governance in the community.

Peter Coleman: It coincided with the growth of legal journalism too.

Michael Kirby: It did, yes, and probably there was a symbiotic relationship: one feeding off the other. Once you got a judge who was willing to go on television and talk about things - and, I hope, to do so in a responsible and not simply crazy way - then it became much more respectable to open up the law and to confront publicly its problems and its weaknesses and its strengths.

Peter Coleman: And there were these writers like Malcolm Turnbull, John Slee, Richard Ackland and so on.

Michael Kirby: Yes, there's a whole coterie of them now. They probably owe some of their great success to my early endeavours!

Peter Coleman: Yes, indeed. But returning to the international forums, could we follow it through from the OECD?

Michael Kirby: Well, the OECD was the first and then I became involved ...

Peter Coleman: Did you find these generally as exciting as, say, the Law Reform Commission itself or more exciting or were they a chore?

Michael Kirby: Well, they all had to be squeezed into short available time. So I would rush off and do my stint as chairman of the group. In international institutions I've since discovered that what is expected of a chairman is that he will say as little as possible, not intervene and do as little as possible and then leave it to the secretariat. But that's not my style at all: I intervened constantly. I conducted votes, which is something the OECD has never before, or since, done. I generally pummelled the Americans and the French into a concordance. And we got our principles in the end.

What used to surprise them - and it still does in international things that I take part in - is I'm a very hard worker. I would be at the end of the day preparing the document of our agreement for the next day. So then it will be typed up early in the morning. They would have it on their desk the next day. This is completely different to the way most international bodies work. They generally work through a secretariat and they have chairmen as decorations; well, I'm no decoration.

Peter Coleman: Or front people?

Michael Kirby: Yes.

Peter Coleman: Which is something like the eternal Public Service attitude I think?

Michael Kirby: Yes, exactly. It generally works pretty well. Probably if I'd been older - see, when I went to the OECD that was 1978 so I was 38 or 39 and I was full of energy. I was keen to make a success of it. And it was a success. There is no doubt that has been very influential. It led on later to another OECD committee, which I was invited back to chair, which was on the data security. This is the wider issue in that privacy is individual, data security is the general question of confidentiality and security of computers and so on. We produced guidelines there by much the same technique, though I suppose it could be said that I'd slowed down a bit by that time - that was 10 years later.

But in the meantime I've taken part in a lot of international activities. I've taken part in a number of Commonwealth Secretariat judicial meetings on the very point that we were just discussing of the influence of international principles, human rights principles, on domestic law and how we reconcile the two of them. That led to the so-called Bangalore¹⁴ principles which were developed in, I think, 1988.

¹⁴ See (1989) 63 Australian Law Journal 497

The participants there included a whole range of people who were top lawyers. One of them was not a Commonwealth lawyer at all, Judge Ruth Bader Ginsberg, who was a judge then of the District of Columbia Federal Appeals court. She's recently been appointed to the Supreme Court of the United States.

So, I worked in the Commonwealth Secretariat. We've had a series of those meetings which I believe have been influential in the development of Australian law. I consider that the essence of the Bangalore principles has now been embraced by the High Court in the *Mabo* case,¹⁵ in *Dietrich*¹⁶ and in *Teoh*.¹⁷ Not always with full attribution, I must say. But attribution isn't as important as influence.

I also took part in the World Health Organisation and the Global Commission on AIDS. That was a very important subject which has continued to take up what time I can give it. I was appointed to the ILO fact finding conciliation commission on freedom of association. That led on to being a member of the three person mission to South Africa to study South Africa's labour laws in advance of the change of government to the Mandela government. The report of that body, which comprised Sir William Douglas, former Chief Justice of Barbados, Justice Lalah, now the Chief Justice of Mauritius, and myself, the report to the ILO was basically accepted by the South African government. It is now the basis of the reformed Labour Relations Bill which is before the South African parliament at the moment, I understand. It derived in part from my background in industrial relations and was a sort of return to the fold for me.

I chaired the constitutional conference of Malawi. I'd gone there for UNDP, the United Nations Development Program. This was at the time of the transition from the Banda government to the democratic government. I'd taken part in a conference there preparing for democracy. They couldn't agree, the opposition, many of whom had

¹⁵ (1992) 175 CLR 1 at 42.

¹⁶ (1992) 176 CLR 344.

¹⁷ (1995) 183 CLR 273.

been in prison for a long time under Dr Banda and the government couldn't agree on any local or even African chairmen. But they liked me, both of them.

Peter Coleman: Where did they find you, as it was?

Michael Kirby: Well, I had gone there earlier for a seminar for UNDP. I'd presented a paper. I'd talked to them both.

Peter Coleman: Now, UNDP means?

Michael Kirby: United Nations Development Program and it's basically the funder of development programs.

Peter Coleman: So, you were there and they sized you up as it were?

Michael Kirby: Yes. And so I got this urgent fax asking me to come back to be chairman of their constitutional conference, which it was a great privilege. To do so I got leave of absence, went over there and chaired their conference.

I was told that throughout the length and breadth of Malawi, which isn't a very big country, they were broadcasting this whole session. They said very nice things about my part in it. I enjoyed doing it. I believe I was neutral and I strove to be completely fair to both the government and the opposition. Immodestly, I think I'm quite a good judge. I really do strive to be fair and impartial, because no-one is completely fair or impartial.

Peter Coleman: What were you asked to actually do in the end?

Michael Kirby: Chair it and help them face up to the issues of difference and as far as possible to resolve them for the drafting of the constitution.

Peter Coleman: You didn't have to draft a constitution?

Michael Kirby: Oh, no. It had been drafted. But it had a number of key problems. I had to ensure that the constitutional conference debated them, that they were put to the vote and decided.

Peter Coleman: And do you keep your connection with Malawi?

Michael Kirby: I haven't really been back since the conference. I keep up with developments through the media. I got a nice letter from the new President of Malawi, who was one of the participants in the conference, after the change of government. I keep an interest of course. But I haven't been closely involved in that.

Peter Coleman: And then there's UNESCO, you've been involved in UNESCO.

Michael Kirby: Yes, I went to UNESCO in 1983 as part of Australia's delegation to UNESCO. I had been on the Australian National Commission for UNESCO. I went in the UNESCO General Assembly under general conference with Gough Whitlam leading the delegation, Susan Ryan as the minister leading it. That led on to my participation in a couple of expert groups of UNESCO concerned with the rights of peoples to self determination, which is a very important issue. I chaired one and was rapporteur to another.

Peter Coleman: Now, again how were you recruited - if that's the word - for this particular mission; was that as Chairman of the Law Reform Commission or through other involvements?

Michael Kirby: I'm not sure how. In this life one thing tends to lead to another. I mean, people see you in one setting. So they might see you in a UNESCO setting and that gets through to somebody in UNDP.

More recently I've been appointed to be a member of the international jury for the award of the UNESCO Prize for Teaching Human Rights. I'm sure that arose out of my work in the committees on the definition of the right of people to self-determination. So, these things lead on to each other.

Peter Coleman: And the Red Cross?

Michael Kirby: Well, that was just a speaking engagement in Perth - in the 50th anniversary of the United Nations I'm getting lots of invitations to speak on United Nations themes. That was just one such matter. But then in 1994 I was appointed to be the Special Representative of the Secretary General for Human Rights in Cambodia and that is now my principal international responsibility. That takes me up to Cambodia about five times, four times, a year.

Peter Coleman: What is the agenda on those missions?

Michael Kirby: Well, to be the eyes and ears of the international community.

Peter Coleman: Reporting to?

Michael Kirby: To the General Assembly and to the Commission on Human Rights - the General Assembly in November of each year, the Commission on Human Rights in March. To report on the progress in respect for human rights in Cambodia, to report on the good news and the bad news, and again to do it neutrally.

Peter Coleman: Human rights as affected by government or as affected by civil war or what?

Michael Kirby: Well, the whole gamut of human rights: the right to health, the right to food, the right to work, the right to health et cetera.

Peter Coleman: Oh, I see, the state of the country?

Michael Kirby: Yes, the right to fair trial. The right to freedom of the press. The right to freedom of religion. The right to democracy. The right to a clean environment. So, it's a whole range of activities and it's a big job.

Peter Coleman: And this takes you there once a year?

Michael Kirby: No, no, no, about five times a year. I tend to go on one long mission of about 10 days and then short missions of about three days during the rest of the year.

Peter Coleman: Well, say, on a three day mission, what would that be, to receive reports on the ground?

Michael Kirby: Well, I would go there. I would meet one of the Prime Ministers. I would meet various other ministers. I would generally try to get out of Phnom Penh and go a rural area, a provincial city, see how the non-governmental organisations are going, check on their work.

Peter Coleman: The very fact that you're coming frequently I guess keeps them on their toes to some degree.

Michael Kirby: Well, I hope so.

Peter Coleman: To some extent at least.

Michael Kirby: I hope so. They're very cautious. As time goes by rather anxious about the idea of their sovereignty being impeded by an external guardian of this kind.

But the United Nations spent an awful lot of money and invested a tremendous effort and energy in the success of Cambodia. It is, I think, one of the general successes of the United Nations. I believe I have the full support of the Secretary-General of the United Nations for my work in Cambodia.

Peter Coleman: Are you optimistic about the future of Cambodia?

Michael Kirby: On balance, yes. There are problems but I am optimistic. I continue to report the problem areas and also their achievements; there are both. In the press in Australia you don't get much of the achievements. You get only the problems. There are plenty of them. But there are achievements and they include the establishment of a government, of a parliament, the beginnings of a judiciary, the establishment of a civil society of non-governmental organisations, free press. These are things we just take for granted. But they've only really been in Cambodia in the last three years.

Peter Coleman: Well, now, your association, since it's so current, with the Dalai Lama, what was the route for that?

Michael Kirby: I think that comes out of two things. First, I'm Chairman of the International Commission of Jurists. This is a body in Geneva. It is one of the largest international non-governmental organisations. It is concerned with the rule of law and human rights. I am the Australian Commissioner. They have 45 commissioners from different countries, elected by different commissioners, and I am currently in my tenth year of the maximum 15 years service as commissioner from Australia. My only predecessor was Ted St John, QC, who had been an Australian commissioner.

Peter Coleman: Yes, whose obituary you wrote somewhere I read recently.

Michael Kirby: Yes. So, that is the body of which I'm executive chairman. That body is going to conduct a mission to Tibet, if it can get in there. The Chinese are not

all that helpful in that respect. Alternatively it will conduct a mission seeing the refugee communities of Tibet.

Peter Coleman: You have a kind of application to the Chinese government now?

Michael Kirby: Well, we put in application for visas but our letters have been ignored. So the result will be that we'll probably take a different course. But the ICJ sends missions to trouble spots in the world. We sent one to Kashmir recently. It sends trial observers. It sent a trial observer to the trial of Nelson Mandela 30 years ago. When he was elected President he remembered that and he sent an invitation to me, as Chairman of the ICJ, to come to his inauguration, which I did. Of course, it was a great occasion. So, that was typical of the man. But such a man also is the Dalai Lama - I would say Mandela and the Dalai Lama are two of the most wonderful human beings I've met in my life.

So, the work of the ICJ is relevant to the issues of Tibet and my work in the UNESCO group on the rights of peoples to self-determination is also relevant. It was in that capacity that I was there and I delivered my speech at the 60th birthday celebrations and I met His Holiness and he had a very frank talk about the situation of Tibetans at the moment.

Peter Coleman: Well, now we have jumped a little bit because we were at the Law Reform Commission which led into these international involvements and then we're up to 1995. What about the ending of your Law Reform Commission stint?

Michael Kirby: Well, I was extended by the Fraser government - they gave me a further five-year term. It was a little uncertain as to whether I would be extended because Peter Durack was by that time the Attorney-General.

I didn't have such a warm relationship with Senator Durack as I had with Bob Ellicott. Tis was partly because he was from a different part of the continent; partly because I

think he was a much more conservative politician; partly because I think he was much more uncomfortable than Ellicott was in the public persona of the Chairman of the Law Reform Commission; and partly because he, I think, was a rather indecisive reformer and didn't really have his heart in law reform.

Peter Coleman: No, as Bob Ellicott did.

Michael Kirby: He didn't want to have too many waves and that fitted in no doubt with his political philosophy, which is fair enough. But he was the Attorney-General for the longest period in my term as Chairman. I saw nine of them I think in all, Attorneys and acting Attorneys - they came and went. I just stayed on as Chairman. But he was not very supportive of the work of the Law Reform Commission. I think he would probably acknowledge that himself.

But ultimately I was extended for another five years, otherwise I assume I would have gone back to my original commission in the Arbitration Commission. But I didn't. I stayed there. Then with the change of government Gareth Evans, as Attorney-General, appointed me to the Federal Court. That was something that ought to have been done earlier.

Peter Coleman: In what sense ought to have been done earlier?

Michael Kirby: Well, it was really appropriate.

Peter Coleman: You were on leave from one federal court.

Michael Kirby: I was on leave from the Arbitration Commission, which is not strictly a court. It was really not appropriate. It was more appropriate that the Chairman of the national Law Reform Commission should be a judge of a national court. But Durack was not inclined to appoint me there and I suspect that Sir Nigel Bowen was not all that inclined to have me appointed there.

Peter Coleman: Why, what would be their reason?

Michael Kirby: Well, I imagine two things: first ... well, probably three things. First, a feeling that I was young and inexperienced for they were sage, gray and heavy with years. Secondly, a feeling that I was probably of a more radical persuasion than they were, though if they really knew me they would have known that I am not to be put in a radical box. And, thirdly, they were probably concerned about public speaking.

Peter Coleman: Public speaking, meaning concerned about controversy?

Michael Kirby: Yes.

Peter Coleman: That you were a controversial figure or that you enjoyed controversy?

Michael Kirby: Well, that I was involved in discussing the law publicly.

Peter Coleman: Oh, and a judge of the Federal Court should not be, right.

Michael Kirby: That was something that was then, and still is in some areas, uncongenial to some lawyers of a more conservative or conventional mould. I may be being unfair to Sir Nigel Bowen because, when I was ultimately appointed to the Federal Court on a change of government by Gareth Evans, Sir Nigel gave me a very warm welcome. I sat in the Federal Court occasionally. He had a very unusual habit, Sir Nigel, of coming and sitting in the back of the courtroom - this is something I've never known any other chief judge before or since ever to do. But he used to come and sit. It wasn't just me, he wasn't just checking up on me, he used to do it to all new judges.

If I have a skill - and this sounds slightly boastful - I am a very good chairman. I've done a lot of chairing over my life. I'm a very good presiding judge, I think. I try to be very fair and to run it efficiently and smoothly and pleasantly and I think I must have passed his test because he was always very agreeable to me.

But I don't think he wanted me to be a judge of the Federal Court. The long and short is that during the Fraser government I wasn't a judge of the Federal Court and was not appointed. And I rather resented that. I felt that was unfair because I had this feeling that the institution of the Law Reform Commission should have as its chairman a judge of the Federal Court.

But, anyway, that was cured by Evans. Then, in 1984, the post of President of the Court of Appeal in New South Wales fell vacant. Rather, it was to fall vacant when Justice Athol Moffitt retired. I was asked, I think by Neville Wran but it might have been by Paul Landa as Attorney-General, if I would accept appointment. As I was then into my ninth year and coming to the end of my tenth, nearly the end of the tenth year in the Law Reform Commission - I was three months short of 10 years - I thought, "Well, that would be an appropriate thing. I can't just keep on doing the Law Reform Commission. That's not good for me and it's not good for the Commission". So I accepted that appointment. I came here to the Court of Appeal. Here I still am 11 years later.

If I my life is divided into periods of approximately decades then I am outstaying my welcome in the Court of Appeal.

Peter Coleman: If you life is divided into decades, well what would have been the decades that we've covered?

Michael Kirby: Well, my first decade at primary school. My second at high school and university. My third as a practising lawyer. My fourth in the Law Reform Commission. My fifth in the Court of Appeal.

Peter Coleman: And what would be the various possibilities for the next decade?

Michael Kirby: Well, who knows? Who knows where they will lead? I don't know, I have no idea.

Peter Coleman: But your involvement in the international institutions must open up possibilities for your consideration?

Michael Kirby: Possibilities. But as you would know, those posts, certainly at a certain level, depend very much on governmental support and upon the number of slots for your particular country and upon other features that are very largely out of the control of the candidate. So, I'm not at all sure that one could count on anything in that department. But you learn over life not to put your trust in princes - certainly I've put no trust in princes.

Cassette 4/Side A

Peter Coleman: This is the National Library oral history program. It is the 20th of March, 1996, and this is Peter Coleman interviewing Mr Justice Kirby of the High Court. Since we'll end with your translation to the High Court, shall we start with your translation to the Court of Appeal and how you found your brother judges?

Michael Kirby: Yes, well a few months before I was appointed to take up the post, in September '84, I was called over by Athol Moffitt, who had not then gone out of office as President. He was my predecessor as President of the Court of Appeal. There waiting to see me, were Athol, Harold Glass¹⁸ and Bob Hope¹⁹. They fixed me with their beady eyes and said, "We've heard a rumour that you're going to be appointed". Now, I didn't know exactly what was going to happen. My recollection is that much earlier Lionel Murphy - whom I knew quite well and who was then on the High Court, and I believe had not yet become involved in his troubles - had told me that he had suggested to Neville Wran, whom I also knew, that I should be appointed to replace Athol Moffitt.

So, the rumour was partly true. But I played a very straight bat. I went over there and looked around the room - I thought the room was magnificent, though Athol's furniture was a little austere I thought. I just said, "Oh, I don't know, I've heard these rumours too but ...". I'm afraid I wasn't entirely candid with them. Knowing that many a slip occurs 'twixt the cup and the political lip', I thought that it was best just to see what happened. And so it was. They fixed me with their eyes and cross-examined and interrogated me as to whether I was going to get the job.

Peter Coleman: What, seeking your better information about it or ...

Michael Kirby: Yes, they'd heard this horrible rumour.

¹⁸ The Hon Justice H H Glass AO, Judge of Appeal 1974-1987.

¹⁹ The Hon Justice R M Hope AC CMG, Judge of Appeal 1972-1989.

Peter Coleman: And they wanted to know had you actually been sounded out?

Michael Kirby: Yes.

Peter Coleman: I see. So, it was a rumour to them. They didn't have hard information?

Michael Kirby: That's right. Of course, as you know, Phillip Street is a hall of rumours. There were always rumours buzzing around. So this was nothing different. But they wanted to get it from the horse's mouth, so I was brought over and they asked me was it true. I could tell them honestly that I didn't know. Although I didn't tell them everything that I knew, that the likelihood was that I would indeed succeed Athol Moffitt.

Now, I'm not sure when Athol's term was up²⁰ - I think it was in April or May or thereabouts and that was about the time that I was summoned over. I remember sitting there with them and feeling a little bit uncomfortable. The atmosphere was such that in a very delicate way I was let known that I would not be their favoured choice. Indeed, some things were said, I dimly remember - one should record these things at the time but I didn't - that Bob Hope had a legitimate expectation of the post. He was the senior judge. He'd been doing a series of Royal Commissions. He was an extremely able and ...

Peter Coleman: And he was one of the three talking to you?

Michael Kirby: Yes, he was one of the three. But I don't think he would have ... he would never have been so indelicate as to press his own cause. But I think things were said by Harold Glass more than anybody else, because I've known Harold quite well at

²⁰ It expired on 25 June 1984. He served as a Judge of the Supreme Court of New South Wales from 1970 to 1984.

the Bar. I'd known him as an articled clerk. I'd briefed him. I would have had a good relationship with Harold. But Harold left me in no uncertain terms that the right thing to do was to back off.

Peter Coleman: Really?

Michael Kirby: And that Bob Hope would be the appropriate person to be the successor to Athol Moffitt.

Peter Coleman: So, the purpose of this interview was to get you to back off, in effect?

Michael Kirby: Oh, I think it might have been, I think it might have been, not so much on Bob Hope's part, because my recollection - Hutley was also there. Indeed, it may be a trick of the mind, maybe Hope wasn't there at all and that could figure. I remember there were three. Certainly there was Moffitt, plus Hutley, plus Glass, and I think Bob Hope was there; there may have been four.

Anyway, the long and short of it was the purpose was to get me to back off and butt out. But I had come to the end of my use-by date in the Law Reform Commission. My appointment to the Federal Court had been rather long in coming - it had only come when Gareth Evans became Federal Attorney-General. Bob Ellicott didn't appoint me to the Federal Court, something which I thought was a wrong at the time. Whatever he thought of me, I thought the Chairman of the national Law Reform Commission should have been appointed to the Federal Court. But anyway, the position was that the choices before me were rather narrow: they were to go to the Federal Court or, if offered, to take the Court of Appeal.

I was attracted by the Court of Appeal because it seemed to me as a court of general jurisdiction it was a fascinating court with a great width of interesting work. The Federal Court then was in its comparative infancy. Its work was very largely in a few

limited areas of federal law - it's expanded since but its work wasn't all that interesting. It didn't have such a great variety of work. If I'm completely honest I think the possibility that the presidency of the Court of Appeal might be an appropriate point from which to be appointed to the High Court of Australia had gone through my mind. It did go through my mind. So, that had happened, of course, before with Jacobs.²¹

Peter Coleman: And would this have been in the minds of this panel of people?

Michael Kirby: Well, I think, in fairness to them their main concern was that Bob Hope, who had given honourable service to the State and to the Court, who was known to be a very brilliant lawyer, who was an extremely decent human being, should not be passed over. If I stand back from it and look at it as a completely objective thing, as one should, I can sympathise very much with their point of view and I can understand it.

Peter Coleman: But was this panel - to call it that - did it advance criticisms of your work on the Law Reform Commission or was it simply pressing Bob Hope's claim?

Michael Kirby: I think it was pressing his cause and reminding me of my junior status. It's natural that every judge of every court thinks that their court is the most important institution around. Otherwise somebody as important as they would not be sitting on it. Certainly, that's true of the High Court of Australia. It's not much less true of the Court of Appeal of New South Wales. So, what they did was not wrong. It was understandable and, looked at completely objectively, it was justified, at the time. But I'm afraid I had, I suppose, a pushy streak. I wasn't going to back off. When offered the position in the Court of Appeal I took it. I didn't delay too long in deciding.

²¹ The Hon Sir Kenneth Jacobs. President of the Court of Appeal (NSW) 1972-1974. Justice of the High Court of Australia 1974-1979.

Peter Coleman: May I ask how this interview - to call it that - this discussion, this meeting ended? I mean, the message was clearly received but you didn't respond to it as it were?

Michael Kirby: Well, I sort of fended it off because at that stage I didn't have a firm offer and therefore I wasn't in a position to say, "Well, look, it's too late boys, I've taken the job". Also I hope I have enough insight into myself and my weaknesses and my strengths to understand a viewpoint of other people. Let's look at it objectively: here was I, a person who had been for 10 years nearly the head of a national Law Reform Commission but I hadn't ever been really a practising judge, not for very long anyway.

The Court of Appeal in New South Wales was, and still is, the busiest appellate court in the nation. The President of that court is in a very important and responsible position. Here was a very senior judge who'd given his all to the law and to the nation in royal commissions and inquiries and who was a liberal, interesting, erudite, fast-thinking and respected lawyer. Now, compared to him I was, objectively, really not equivalent. I can understand that myself. But I'd had an unusual background. I'd worked in the Law Reform Commission. I'd seen the law from a different perspective. I think my life had made me perhaps sensitive to issues in the law and in the administration of justice that were slightly different and I thought I had something to offer.

When the offer came to be appointed the President I indicated that I would accept the offer. It's interesting that since then I've often spoken to Bob Hope. I've indicated to him what I've just indicated to you, that objectively speaking I could understand my unwelcomeness at that time. But it is a sign of his very large spirit that from the minute I was appointed there was not the slightest discontent exhibited, there was no animosity or unfriendliness ...

Peter Coleman: Factionalising or ...

Michael Kirby: On the contrary. He is a very large spirit and he made me very welcome. He was away for a little while when I first arrived doing a Royal Commission - I think into the Ivanov affair or the Coombs/Ivanov affair ...

Peter Coleman: It would have been about that time, yes.

Michael Kirby: Something like that. But he made no effort to undermine me ever. On the contrary, he showed me friendship and institutional loyalty. And he has said that he thought that I brought to the job qualities which were different than he could offer but which had their place. That is again typical of his largeness of spirit. I think I would, in a reverse situation, probably have approached it in a similar way - I hope I would - but he certainly did approach it in that way.

Not so Frank Hutley who I don't think was very happy with my arrival at all. I'd known Frank Hutley as a lecturer in the law school - then not all that long before. After all, I was only at the time 44 and I'd left the law school about 20 years earlier. I'd briefed him at the Bar. I'd had cases with him at the Bar, with him and with Harold Glass together. We had a lot of cases, big important cases, for the Metal Workers' Union. Frank Hutley, it's come to my notice that he was rather antipathetic to my appointment. As reported to me he was speaking - as he was a bit inclined to do - with great one might say candour, gossip on a personal basis. Very personal comments about me which were not really relevant to my fitness for the office.

But there it is. I came along, he was there for about a month and then his expiry date arrived²² and he had to retire. He was replaced by Michael McHugh QC, who was the President of the New South Wales Bar. He had been President of the Australian Bar and the New South Wales Bar, an accomplished leader of the Bar.

²² Justice Hutley retired on 22 October 1984. He died on 2 September 1985.

He had written a book with Harold Glass on employers' liability. He was a person who, like Bob Hope, would have had a legitimate expectation that he might have been offered the presidency instead of me. But when the dice finished, and the casino wheel turned around, the finger ultimately pointed to me. I was offered the job and I took it.

Peter Coleman: Did Frank Hutley develop his dissatisfaction in more public statements? I remember he had a public exchange with you on legal philosophy.

Michael Kirby: I think that was years before.

Peter Coleman: That was before, oh.

Michael Kirby: That was during my Law Reform times, and that was fair enough because that was a time when I was putting forward, very publicly, a whole series of propositions that promptly upset various people. I don't think philosophically there would have been all that much difference between Frank Hutley and myself on many topics. Certainly he'd never been a very fashionable barrister, partly because he was inclined to speak very, how can I put this, he was inclined to speak unkindly of other people. If he didn't like them or didn't respect them he could be very direct and very unkind about them and rather personal, things that I've really always myself tried, most of my life anyway, to avoid.

But when I arrived, the institution tends to take over in these places, courts. He had organised the list. I sat with him for a number of times in the month we served together. I often joked that he had me sitting on the very day I was sworn in. It's a normal convention that when a judge is sworn in they have that day off for their family and friends and loved ones and celebration and so on. But not Frank Hutley for me. I think he was determined to show that this was going to be no bed of roses, that I had taken on a very difficult job and it would be brought home to me very soon that the job was too big for me and perhaps with a little bit of luck I would go!

Well, it didn't happen that way. The more I was confronted with that sort of tactic, the more determined I got to make myself a success in the position.

Peter Coleman: Well now, your other judges at that time of course included Harry Glass who was among the panel who interviewed you, as it were?

Michael Kirby: Yes, well you can call him Harry, and I think I called him Harry when I was briefing him, but by the time I came along to the Court of Appeal he was Harold, and very much so.

Peter Coleman: Oh, sorry.

Michael Kirby: I can forgive you - I don't know that he would forgive you.

Peter Coleman: I see. Oh, well, I'm sorry. When I met him he was Harry.

Michael Kirby: Yes, well he became Harold. It's a bit like Garry, Gareth Evans, you know. When I knew Gareth first of all he was Garry but things change.

Peter Coleman: Well, Jeanette Howard was Jenny when I first met her, names change.

Michael Kirby: Is that right? Well, when people become important their names become extended. Anyway, Harold, I think, was also rather unhappy about my arrival. Unhappy that one of his minor acolytes had not responded to his words of caution, advice and urging.

Peter Coleman: Namely you?

Michael Kirby: Yes.

Peter Coleman: Oh, I see.

Michael Kirby: And I suppose he would have thought that my appointment would close off his own opportunities to become the President, if that was in his mind. That would have been an entirely natural ambition for him. He was an extremely talented man, very gifted in expression, very gifted in oral argument in the court but also very gifted in crafting very well constructed and brief judgments. But I think I won Harold over in due course. He took over the role of mentor and guide and he rather liked that and I respected him and didn't resent it. In fact, I was happy to have as much guidance as I could from any of them because all of them were much more experienced judges than I was.

I brought different things. I was interested in where the particular case fitted in to the whole body of the law. This is something I'd learned in the Law Reform Commission. I was interested not in solving the particular case by reference to a rule, if only I could find it, but trying to see how the particular case and its solution fitted into the concept and adopting a conceptual approach that I'd learned in the Law Reform Commission. And as well as that I was interested in the issues of social policy which lay behind the choices that had to be made to solve one case one way or another way where the choice was open. So, these were things basically that my life of 10 years in the Law Reform Commission had taught me.

When I went to the Law Reform Commission I was just an ordinary barrister who'd been brought up in the common law: find the rule, find the facts, apply the rule to the facts, end of problem.

Peter Coleman: But you were a student of Julius Stone which gave you, did it not, a greater interest in the policy aspects of ...

Michael Kirby: I was, yes, but in daily practice, especially in those times, you virtually never heard anybody in the courts talk about legal policy or legal principle - of the sources of legal decision making, the only one that really mattered was legal authority. Legal principle and legal policy tended to be left to the higher reaches and as the practicing lawyer - at least at the levels at which I was practising when I was at the Bar and as a solicitor - you didn't really tend to get all that very much into the choices and so Julius' teaching really didn't swim into my ken until I was appointed to the Court of Appeal, or earlier in the Law Reform Commission but from the point of view of legal practice in the Court of Appeal.

Then I had to really adapt my background, which was very unusual - I don't think any appellate judge in Australia before, or since, has had such a background. It's a very odd background. But it's a legitimate background. I knew it was legitimate and I knew that I'd had an experience that was of some use. It was really up to the politicians to decide who should be appointed, and I've never been in favour of judges appointing judges, never - the fact that politicians can appoint a person can be abused. But it's also a way in which, in a very limited fashion, we render our judiciary accountable at the beginning to the people. I don't think that's such a bad thing. It's been in the tradition of the English legal system for a long while.

Peter Coleman: But did I interrupt you on Harold Glass?

Michael Kirby: Well, Harold sat beside me - so many years I went into that court room, Harold was there on my right because he was the most senior judge when Bob Hope was away. When Bob Hope came back ... now, who was more senior, Harold or Bob? I'm not sure about that one.²³ But anyway, they were both very senior and very experienced judges. And they grew to like me - Harold again, and Bob whom I hadn't really known very much - for the first time. Bob had served on the Council for

²³ Justice Hope was senior having been appointed a Judge of Appeal in August 1972. Justice Glass was appointed in March 1974.

Civil Liberties for a while and I'd been there and he'd been President of the Council for Civil Liberties and that was a sort of sign of the type of man he was. He was a liberal, very talented, good black letter lawyer, and it's a wonderful combination of course. Often you get people who are wonderfully liberal but they're hopeless lawyers. But Bob Hope was really first class in every way. The choices were there between a decision that led on to justice in the particular case or injustice but the inflexible application of some old rule. Bob Hope would always strive to do justice. And that is my own approach. So, we usually agreed.

Bob Hope and I were intellectual brothers; Harold not. Harold prided himself on sort of semi-inflexible finding of the rule and application of it. He thought that was the judicial function.

Peter Coleman: In his late years he wrote a novel which ...

Michael Kirby: Yes, he gave it to me and I scanned it. He wrote it under a pseudonym because of his orthodoxy and conservatism.

Peter Coleman: Did he? I remember he gave me a copy and I have to say, with all respect to him as an old friend, in my opinion it was a very bad novel, from a literary point of point.

Michael Kirby: Yes. Well, it was a novel that revealed his interests.

Peter Coleman: It had plenty of ideas in it but not ... but he thought it was ...

Michael Kirby: A masterpiece.

Peter Coleman: He was very upset that it had not received the acknowledgment that it did.

Michael Kirby: Well, you know, I think it showed Harold's limitation. Harold, for all his intellectual gifts, really didn't live in a much bigger world than Phillip Street, Sydney, Australia. The novel, typically enough, was about lawyers and that was the world he knew well. I suppose that's a fair thing for a novelist, especially a first novelist, to write about. But Harold loved music and that was something which I shared with him. He loved Lieder and in fact he would go around singing, mainly Schubert Lieder. This was before my Mahler period. Otherwise I would have been competing with him singing my Mahler songs - I don't think he would liked Mahler too much; Mahler wouldn't have been easily singable in duets!

Harold loved love songs, very romantic songs. He would sing them in a very studied German. He was very proud of his French and German. He tried to keep it up, and he really did know a lot about, and truly loved, music, and that gave us a bridge in the early times. Irma, his wife, was always very nice to me. So, we built a bridge there.

With Bob Hope it wasn't difficult at all because basically his philosophy was very similar to my own. But it could have been a very uncomfortable time. In a way it began very uncomfortably for me, very, very stressful; it was very stressful at first.

Peter Coleman: Clearly.

Michael Kirby: I was suddenly plunged into one of the senior judicial posts of the country. I was sitting in the motion list soon after my appointment disposing with ex tempore reasons of really quite tricky and complicated cases. So I would get in there at five o'clock and four o'clock and I would read all the detail and I would get into my head, try to see what the issues were and be ready to give the decisions. So, it was a very stressful time. I used to write out in my hand writing the facts and the issue involved and sometimes a draft of how I would resolve it - of course, if argument changed my mind I would have to finish it in a different way. But in order to protect myself I worked 100 per cent harder to make sure that I didn't muck it up or didn't

bear out the beliefs of people that I would not be able to do this job. At least when I left, everybody seemed to acknowledge that I had measured up.

Peter Coleman: But how long did it take, do you think, to convince the sceptics?

Michael Kirby: Well, there would be still some sceptics today - the law is full of sceptics. But that is a healthy thing - and no doubt in some departments I didn't do as well as other appointees might have done. But I certainly didn't muck up the job. And I believe that, in time, even those who were very critical of the appointment came, rather grudgingly at first, to see that there was something different that I had to offer. That is what I'd had in the back of my mind when I was asked would I take it. I did think my experience in the Law Reform Commission and my lingering memories of Julius Stone's instruction were a good reason enough for me to take on the position.

Peter Coleman: Among the other judges was Gordon Samuels; he was there when you arrived.

Michael Kirby: Yes, absolutely. His Excellency²⁴ was there. He was even then very much an excellency: always so elegant, always so confident. Now, imagine the contrast between me, arriving there with beady eyes on me as I performed my tasks, working a thousand times harder than any of the others in order to be able to do it with apparent aplomb, and Gordon Samuels who could do everything with total aplomb anyway. He was extremely experienced but also a very elegant man with a great self-confidence, a very good turn of phrase, a great command of the English language, a wonderful voice, a beautiful accent.

There aren't many people that I've sat beside who have given as good an ex tempore judgment as Gordon Samuels could give and I don't think there's anybody who's given a better one. He really was a very gifted extemporary judgment giver.

²⁴ Hon. Gordon Samuels, Judge of Appeal from 1974 to 1992 was appointed NSW Governor in 1995.

Sometimes when you actually read them they didn't read quite as well as they'd sounded at the time, because of his magnificent presentation. But he was very much central casting in the judiciary because he just looked the part, sounded the part, acted the part and did it at a very high level of accomplishment.

Peter Coleman: Did he support you as it were or did he ... you know, how did he fit into this tension?

Michael Kirby: Well, he was a very close friend of Harold Glass - they were a natural team. Their chambers were side-by-side - and I think he was very, very sceptical at the beginning. Of course, all of these men were men of 10 years plus up on me. They had a lot of self-regard and pride in themselves and in their institution and in their accomplishment. They didn't want to have at its head somebody who was going to let it down. I think over time, Gordon came to share the view that Harold Glass ultimately reached, but not with the same enthusiasm as Harold because I think Harold and I had a rapport that went back to early days.

Harold and I, basically, had come up in a similar sort of way: we'd both been compo lawyers, we'd both been the workers' friends, we'd both worked for the union firms, we both had kept our self-regard in the sense that we kept a notion that we were lawyers and we were not just going to be hacks and we were always going to look on every problem as a potential legal problem and prepare for it accordingly. We were both extremely hard working and very disciplined - that's something I shared with Harold, perhaps more so than with Gordon and Bob.²⁵ They lived, in many ways, a freer life. But that gave me links with Harold that I never really quite had, right to the end, with Gordon Samuels. Gordon would have felt that he could have done a much better job than I, right to the end, and he would have done a very good job, differently.

²⁵ The Hon. Justice Hope.

Peter Coleman: And was that a reasonable ambition for him? He was one of those who may well have become President?

Michael Kirby: Yes, if natural seniority had flowed then there would have been the situation, which has happened since my departure, that the senior judge who was there at the time would get the appointment and for a few years would take the position. That after all, I think, had been the case with my predecessors - I'm not too sure about that, except the first: I think Sugerman²⁶ was probably the top of the list; Jacobs probably and Moffitt probably. So, they would have had a natural expectation that the culmination of their career would end up as President of the Court of Appeal. But look what's happened: Gordon has finished up as the Governor of New South Wales and he's had a very interesting post-judicial career. We got onto quite a good level, though I never felt it was at a level of personal friendship that I believe did develop with Harold Glass and with Bob Hope.

Peter Coleman: Other judges at the time of your appointment would have been Dennis Mahoney and John Priestley. *

Michael Kirby: Yes. Dennis Mahoney, of course, is now the President. Dennis is a very enigmatic character in my book. He keeps very much his own counsel. He would have had a very similar outlook to the others about my advent because he has a lot of pride - deserved pride, is a very fine lawyer, a great technician. He's very reserved and he wouldn't have liked this flamboyant speechmaker turning up in the Court of Appeal and invading his space. He wouldn't have thought that was quite seemly.

Peter Coleman: You're the flamboyant ...

Michael Kirby: I'm afraid so, yes. I hate to admit to this but ...

²⁶ The Hon. Sir Bernard Sugerman, President of the Court of Appeal (NSW) 1970 to 1972. He was a Judge of the Supreme Court of New South Wales from 1947 to 1972.

Peter Coleman: They're not the words that would have come immediately to my mind but by the Court of Appeal standards perhaps.

Michael Kirby: Well, at the time I'd just come from the Law Reform Commission where every Sunday night there was a news release of some kind. When Bob Ellicott gave the Law Reform Commission - or was it, I think it might have been Peter Durack - an inquiry into sovereign state immunity it is alleged that he said to one of his officials, "Now, let's see if Kirby can make that a headline". But lo and behold, a press release was issued on a Sunday night and the obscure matter of sovereign immunity suddenly became a matter of the greatest national importance and urgency and anxiety!

Dennis Mahoney wouldn't have liked that because Dennis is a very reserved and modest - not modest in a sense of modest of his talents. But he doesn't like outward show. I'm afraid that I was a bit too much outward show for his taste. But he had not really got on very well with Athol Moffitt - he would probably not want this to be said too loudly but I don't think there was any real secret about it. He and Athol Moffitt were chalk and cheese, they were absolutely different. Athol rather domineering and a semi-autocratic sort of a person; Dennis very confident of his own abilities, quiet, resourceful and introspective. The two just never got on. Athol Moffitt made it rather difficult for him when he wanted to go on various overseas or local functions. Athol was not too forward in changing the list to suit his convenience.

Now, when I got to the Court of Appeal I thought that was ridiculous, in part because I myself wanted to have flexibility about the list because I had my overseas activities and also local activities that would sometimes take me on a day off. I always thought the judges worked so hard that if you could modify the list and adjust the list, even at short notice, and swap cases, so long as at the end of the year everybody had done their darg and everybody had done a fair share of the burden. I made sure I did and I made sure the other judges did. Dennis Mahoney really appreciated that. So, I believe

that when I arrived he had many of the same reservations. But it was in a sense better the new devil than the old devil he'd got to know and found rather difficult.

I'd been Dennis' junior in a lot of quite important work as my practice had changed at the Bar - I'd been his junior in the Mikasa²⁷ litigation which was a big litigation concerning the first real test case in the trade practices area on resale price maintenance. Harold Glass and Andrew Rogers had been our opponents. I'd gone away to Melbourne and fought the case in the Federal Court with Dennis. It was finished in the High Court just as Dennis was appointed to the Supreme Court in, I think, 1972. But in any case, Dennis, I think, came to appreciate the fact that I was a little bit more understanding and more flexible in my administration of the court, understanding of the burdens that the judges shared. He took a great load of that burden because he's the longest serving judge in New South Wales, and deservedly now my successor for a year as the President.

He, I think, really, well, he said it at a dinner in my honour given by the judges of appeal - falsities are said at these things - he said that I had stood in the rain for 22 years and never got wet. This was an interesting way to express on the one hand his conception that it was folly to stand in the rain, especially for such a long time, and on the other hand his astonishment that the water had not, up to that time, penetrated.

Peter Coleman: That's very nice. And John Priestley?

Michael Kirby: He's known as Bill Priestley.

Peter Coleman: Bill Priestley, Lancelot John Priestley, known as Bill, yes.

Michael Kirby: He had been appointed to the court when Ray Reynolds retired, about a year before I came. So he was a relative newcomer in the court.

²⁷ (1972) 127 CLR 617.

There was a real gulf between, say, his age level - well, there seemed to be a big gulf between his age level and that of the other judges, and in fact there was a gulf, a gulf of about 10 years. He had been appointed by the Wran government. He was a very good technical lawyer, a man with a background in tax law. He was, nonetheless, extremely interested in legal policy. He says that the period he served on the Court of Appeal with Michael McHugh and myself were the golden years of his judicial service because with Bob Hope, Michael McHugh, myself and Bill Priestley we really, in the court which was then effectively a court of seven, had a strong group of judges who were determined to apply the law and to be good technicians, but also to look for justice in the case and never to forget that we were sworn to do justice.

So, Bill Priestley became a true friend and a good colleague. I think there was never really much resentment in his case - he never showed any resentment to my arrival. And of course after I had been appointed, those who came after came into a Court of Appeal with me as the President and then there was an entirely new relationship. It was a new relationship with the judicial appointees and a new relationship with the Bar because I was up there. I was sitting there day by busy day doing the work.

Peter Coleman: That transition wasn't too long, was it?

Michael Kirby: Well, I was plunged into it at 11.30 on the morning of my swearing in. So, the transition ...

Peter Coleman: Oh, I mean the change in the court, the new appointees were fairly ...

Michael Kirby: Well, there weren't all that many. I think there was a fairly stable period once Michael McHugh came - he replaced Justice Hutley. But the next one to go, I think, was Harold Glass when he became grievously sick. But there was a long period then of about six years or so when ... that's my recollection. The statistics, the years and the dates, will all be recorded in the law almanacs. But that is my recollection, that there was a period of stability. Bill Priestley often says, "They were

the glory days", because he's very interested in American history and American constitutional history and that apparently is some expression that was used by somebody in the American context.

And they were really very exciting times because these were people who I was feeling comfortable with. We were able to do good things and good work, working at a very great pace, churning it out at a very high level. I think they were golden days. And certainly they were very happy days. By contrast to my current position, there was much more dialogue. There was much more interaction, there were more sparks flying off people like Hope and Glass and Mahoney and Priestley and McHugh and myself. It was a sort of very vivid interaction of personalities. We were thrown into virtually daily contact, sitting in different configurations, generally in groups of three. There was a lot of interaction - I can't emphasise that enough: it's a big contrast to what I notice in the High Court where there isn't really a lot of interaction. I miss that. I really liked it there because I liked a lively intellectual debate amongst colleagues. I think that was a really good strength of the Court of Appeal at that time.

Peter Coleman: More so in the first years than in the latter years of your presidency?

Michael Kirby: Well, the court grew, it grew in numbers. It changed in personality and my relationship with those who came later was different. I was then established President. In a way their relationship to me was more respectful, in a sense, because I was the President. I'd been the President for a long while and in the case of, say, the newly arrived judges they - Justices Powell and Sheller and Cole - they showed me a courtesy and a respect which I suppose was the natural institutional respect that I myself now show to Sir Gerard Brennan in the High Court. It's something that's drummed into lawyers. It's something that we do naturally because we understand institutions and hierarchies. But in a way I always felt a little bit uncomfortable with these very senior and able people and in my first arrival in the Court of Appeal, for those first four or five years, I was really earning my entitlement to be amongst them ...

Peter Coleman: And the sparks flew or ...

Michael Kirby: And that led to the sort of very energetic environment which was a bit different. I suppose I have to also say that as time went on my international activities became more important in my life. Therefore, the Court of Appeal assumed a significance in my own mind and priority of things which was still very high - because that was what was paying my salary and that was my basic legitimacy and my core job. But it wasn't everything in my life; whereas when I was first appointed like the Law Reform Commission it really was everything and I was giving it my all. Then I really mastered it and after that I took on other responsibilities. Maybe it's like a love affair: you give your entire devotion in the early times and then it settles down to a comfortable and perhaps less stressful, less sparking but nonetheless agreeable, time. The Court of Appeal really started very turbulently - I can't emphasise that enough.

Peter Coleman: Oh, well, you have emphasised it, yes.

Michael Kirby: I hope so.

Peter Coleman: Well, among the new appointees would have been Roderick Pitt Meagher.²⁸

Michael Kirby: Oh, yes, Justice Meagher. Well, I miss him, I think, most of all in the High Court. Because though we are intellectual rivals, or enemies you could almost say, in terms of our philosophy, nobody in the court seemed to me to be a more agreeable person. He is a very, very interesting human being. He is extremely quick in his mind. He's extremely witty and very savage. He has an unkind streak about other people that I don't have but sometimes that can be witty and amusing - though I feel ashamed of being amused. He loves painting, he loves music.

²⁸ Judge of Appeal, 1989-still in office.

He regards the law as, I think, an interruption to these more important things of life. And as I got more and more into my international activities, I was inclined to see that there might be a little bit of truth in that view, that in the big picture of things and in terms of the rings around Saturn and the statues of Ramses II, that being President of the Court of Appeal of New South Wales, Australia, was not really all that big a deal. Roddy Meagher didn't have to reflect long to see that point of view and to give expression to it.

He did his job with the minimum of fuss, the minimum of effort - sometimes less effort, I think, than he should have done. But as a colleague he was really very nice. I think he felt that the time we shared together in the Court of Appeals was a very special time. Contrary to the rumours of the Bar - which I might say he often fed both by his speeches and by his judgments - we were probably the closest in the terms of personal friendship. He would go to the Bar and denounce for me going off to another AIDS conference or to a conference on breast milk substitutes or something of that kind. In judgments he would attack my point of view as a tedious rodomontade.²⁹ But I never minded that because I would always try to give as good as I got. But I always knew that there was no venom at all in his heart.

Peter Coleman: I think the press had difficulty in recognising that. Some of the press reporting implied there was much greater ...

Michael Kirby: Yes, the press love to have black and white. They love to have enemies. They love to have entertainment. They love to exaggerate reality. The truth of reality is often too boring for them. So, they, I think, were not convinced that this was so. But even yesterday, or was it Monday - yes, Monday - I got a bottle of wine wrapped in green wrapping paper from him because it was his birthday on Sunday and my birthday on Monday this week. He generally sends it to me wrapped in green, knowing that my natural preference would be for it to be wrapped in orange.

²⁹ An extravagant boasting.

It was a lovely card signed with love and telling me that he hoped that the card, which had a beautiful picture of the Madonna and child, would turn me into a Christian and the envelope was marked, "Comrade Kirby".

Cassette 4/Side B

Michael Kirby (continuing): I think he looks on me, still a little, as a dangerous leftie. Although in all truth I'm a completely safe centrist. During our time in court I would often amuse myself in the boring bits by drawing pen sketches of the barristers or of the court and sometimes I would intrude V I Lenin into my pen drawings. I gained quite a skill in drawing V I Lenin in profile and I would have the hammer and sickle there above us in the court. I'd draw Roddy, a huge monster of a judge, sitting there and myself with a halo around my head and one of the other judges sitting beside us. He said he was going to keep those, and he should have: they would be extremely valuable in years to come!

But that is something that would never happen in the High Court. There's a sense of seriousness, and I miss that interaction. I don't think you have to conceive of your position as so important that you can't have the sparks and you can't have the ideas and you can't have the humour. But perhaps that will develop in time in my new post, as it did in the Court of Appeal.

Peter Coleman: There are two other judges in the lists which you haven't mentioned: Clarke and Handley. *

Michael Kirby: Yes, John Clarke is about to go I believe. He has indicated he intends to retire. That's the wheel of life and he will retire and have a civilised life. He came to the court with a very strong reputation in common law. He had a great trial background in common law. I think he was appointed to the court because he was the judge who presided at Neville Wran's defamation action against Mike Carleton * and the ABC. And though the jury didn't agree, everyone agreed - both Wran and Carleton - that John Clarke conducted the trial with impeccable fairness and absolute accuracy. He's quite a short-fused man, John Clarke. He can often, in court, be very surprising in the extent to which he, apparently unflappable and dignified, he suddenly can become very short and very bad tempered. Bob Hope could sometimes do that: he

could sometimes become very short - because he was so quick himself he got very impatient with people who were a bit slow.

But John Clarke is a good technician. He really added to the Court. He was a great worker in the Court of Appeal. He assumed a great burden. He became very interested, towards the end of my reign, with the subject of the administration of the court. He really took it on himself to go down to the registry and find out all the files that had been lost and the cases that were awaiting hearing. He was very agreeable to me. I don't, of course, know what any of these people really in their souls think about myself. I only speak of what I think of them. But everybody after McHugh, basically, came to the Court of Appeal of New South Wales in which I was, and had for a time, been the President.

And every judge, most of the judges who were appointed into the Supreme Court, had appeared before me as barristers in the Court of Appeal. There aren't many of them sitting there now in the trial divisions of the Supreme Court of New South Wales who hadn't appeared before me as barristers in the Court of Appeal. That's the nature of 10 years, 11, 12 years of service in a position like that.

Peter Coleman: And Handley, Kenneth Robert Handley?

Michael Kirby: I'd known Ken Handley for a very long time because he had been a good friend of mine in my university days. I'd known at that time a woman, Lyn Curetan, who had worked for him. I think as a stenographer. He was always very proper. Ken is a very proper person. He and I shared in common two things: one, we were both Anglicans; and, two, we both had a great respect for the constitutional arrangement of the Queen and the Crown. I suppose we could both trace that to our Anglicanism and to our upbringing in that tradition where every Sunday we would say a prayer for the King's Majesty. That sort of idea gets into your subconscious.

So, that gave me, especially as the republican debate came along and I took a modest part in it, a link with Ken Handley. I think Ken would have been a person who, although he came later, would have prided himself on having what he would consider to be greater legal skills than myself. That would be natural because he was, with McHugh, really one of the top two or three QCs who appeared in the High Court. He and McHugh had in common an ability to summon up from their mental computers a case that was relevant to each problem, and not only the name of the case - which was often difficult for me to remember - but the very volume of the *Commonwealth Law Reports* and even the page of the *Commonwealth Law Reports* where they appeared. I was sitting with McHugh today. He was able to say, when counsel mentioned a case, that it was in volume so and so and on page so and so. He's got one of those photographic memories. Handley's much the same.

My respectful criticism of that approach to the law is that sometimes you can get too bogged down in the cases and not stand back from them and look at the concept and look at the legal policy and the legal principles involved. That of course, I think, was my forte and that was what I was interested in. But Ken Handley as a technician was really without peer. He was a very good man to sit with in court. He was very economical in his judgments: he would not write too much; he hated long-winded things and he was really quite stern on himself in that respect.

The only judge, and I've mentioned in passing, but who I really respect and who I think is a great judge is Simon Sheller. Simon was appointed straight from the Bar to the Court of Appeal. I don't think I was asked about him - maybe the Chief Justice was asked. There was a period when I was asked and there was a period when I wasn't asked. It depended a bit on the Attorney-General. I think it is a courtesy to ask, though consistent with what I have said before I think ultimately it's for the Attorney-General as the political person responsible and the Cabinet to make the decision. I do not believe in judges feathering the nest with their own mates. I am not in favour of that at all. But I would not have favoured Simon Sheller to be a judge of the Court of Appeal because I always thought him to be a little bit posh and a little bit

precious in his advocacy. He has this rather English voice. But when he came I found in him a judge who was really wonderful, not only extremely efficient and not only very conceptual and very tight in his judgment writing but always concerned about justice and willing to extend principle where that was available and required. He is a truly wonderful and thoughtful colleague. I really got to know and respect him enormously and I like him immensely. I think he's a great judge.

Terry Cole was at Fort Street with me. He was the vice-captain in the year before my year, in the end of the time at Fort Street. He is extremely efficient. He came from the Commercial Division. I've known him forever because of our school days. He is rather a conservative man and he thought I was sometimes barmy and I felt he was sometimes unduly hard of heart. But we worked very well together and he was a great colleague in the court.

Phillip Powell was reputed to be a thunderbus in his Division, in the Equity Division where he sat for a long while. When he was appointed to the Court of Appeal he was reputed to be extremely ill-tempered, very rude to barristers, rather slow with his judgments and by and large rather disagreeable. Now, all I can say is that in the Court of Appeal he either went through a transmodification or he was one of those people who worked better in a collegiate system. Although his philosophy was often quite different to mine - and he and Cole were rather similar in their outlooks - we worked very well together. He often agreed with me and he was extremely well behaved when we were sitting, generally rather well behaved, when we were sitting together. So, Phillip Powell became, I think, quite a good acquisition to the Court of Appeal. So, there are my colleagues, colleagues of the past.

Peter Coleman: Yes, they are your colleagues but there is also, of course, the Chief Justice and the Chief Judge in Equity and Chief Judge at Common Law and so on. Are these people that are relevant to ...

Michael Kirby: Sure, we should say, I suppose, as we've had a little cameo feature on each of the others, let me say something about the Chief Justices that I served under. Sir Laurence Street, who was the Chief Justice when I came. Well, I don't think he was all that happy that I was appointed either. Indeed, I would think he was rather unhappy about it: unhappy because the person whom he would have favoured was not appointed, unhappy because he would have been very anxious about the reputation of the Court and the office and so on. He is the son, as you know, and grandson of a Chief Justice. Therefore, he was very protective of the institution.

We had lots of battles, Sir Laurence Street and I. I've always regarded that as a shame because I think in many ways he and I have rather similar outlooks in life. I think his social philosophy is quite enlightened in my view. I put that down to his mother, Jessie Street. But his institutional philosophy is rather rigid and inflexible, and so it proved in the Court of Appeal. When I arrived he would not sit the judges of appeal, the judges of the Court of Appeal, in the Court of Criminal Appeal. I took the view that that was both wrong from the point of view of those judges, but also wrong for the administration of criminal law. And I knew that my view in that regard was supported by the High Court who felt that there was a need to get judges in the Court of Criminal Appeal who hadn't necessarily a commitment to their colleagues' points of view or who would bring a fresh sight to the Court of Criminal Appeal.

I think Sir Laurence who gave, with Gordon Samuels, amongst the better ex tempore judgments I ever heard, was very keen to keep the position where, as I found it when I ultimately got to the Court of Criminal Appeal, effectively he gave the judgment in every case. It was a tremendous burden to accept. Now it's shared around amongst the judges. But he did it and he was not all that happy with, and did not tend to invite, judges who would not agree with him. And the judges of appeal, being the senior judges and rather opinionated and good lawyers, would not be of a kind who would simply go along and say, "I agree". They would make up their own minds and sometimes dissent. I think it was his anxiety that Priestley, McHugh and I, especially,

would have a different viewpoint on cases and would rock the nice little boat of the Court of Criminal Appeal.

Anyway, that led to lots of ructions. I wrote endless letters. I wouldn't give up. I remember Winston Churchill's advice to the boys of Harrow, "Never give up, never give up, never give up". That was really what I did with Sir Laurence.

I made one big mistake once in my relationship with Sir Laurence Street.

Cassette 5/Side A

Michael Kirby (continuing): I went to Washington to one of the first AIDS conferences. We'd just got the Judge of Appeal into the Court of Criminal Appeal. I'd sat with him and the question, which is a difficult question, arose as to whether or not if a prisoner found guilty of an offence is suffering from a terminal condition of HIV/AIDS that should be a matter that should be taken into account to reduce their sentence on the basis that otherwise they'll die in prison. I went to Washington fresh from this occasion. In that conference when the case stood reserved for judgment I basically put the problem to the audience. And I didn't resolve it. I didn't say how I was going to decide the matter. But I put it and then took a vote on it. Now, that was a mistake. That was something I should not have done whilst the matter stood for judgment.

Unbeknownst to me there were reporters present who were reporting the AIDS conference all around the world. One of them was from the *Sydney Morning Herald*. So the story was reported in New South Wales. Sir Laurence Street, I think with some justification, got quite upset about it. There was a tremendous impasse as to whether or not the judgment would go down or would have to be reargued. I was rather embarrassed that that would lead to a sort of public humiliation that I had done the wrong thing. He was in a strategically strong position to administer the humiliation. Anyway, the long story came to an end when I suggested that Gordon Samuels should be an arbitrator between us. The other judge sitting with us was Jack Slattery who was a very fine man looking for a solution. But he supported the Chief Justice. He thought what I had done was wrong.

Gordon Samuels listened to all points of view. He looked at everything and decided that, ultimately, I had made a mistake but that Laurence was getting a bit too carried away with it and that the resolution of the matter was simply to withdraw the judgment I had written - which was a dissenting judgment - and to let the matter pass in a very low-key way. And that's ultimately the way the problem was solved.

Peter Coleman: And did Jack Slattery agree with that?

Michael Kirby: He went along with it, yes. None of us, of course, changed our basic positions or the orders which we favoured. But we basically dealt with it in a low-key way. This left the big issues of principle to be decided in a subsequent case. As it happens, the law has developed in a way favourable to the point of view that I held. I wrote to Laurence when he had written me a very nice letter about my appointment to the High Court, because somebody had said to me that it must have been very hard in those first years with Sir Laurence Street and I said to him that this had been said to me but that save for our difference over the Court of Criminal Appeal and save for the difference over the Washington speech - where I acknowledge that he was right and that I was wrong - really we had more in common than most other judges because we were of a similar social outlook on many things.

Now, as to Murray Gleeson, his successor as Chief Justice who was Chief Justice when I left, he was at the Law School with me. He came through the same year as I did. He and I shared notes at the Law School - I still claim to be weak in company law because that was a subject he did and he gave me his notes which I suggest might have been expurgated. He contends that he's also suffered from the fact that I kept away from him half the notes in constitutional law. Perhaps it's just as well I kept them all for myself - I hope I kept them all for myself. (I deny that I kept them away from him.) But he has been an excellent Chief Justice. He is a very reserved man. Even though we have this friendship going back for so many years I always felt that there was an element of reserve there. I've wondered in my mind whether he kept that reserve in order to ensure that in running the court he would show no favours to anybody and everybody would be treated as a judge under his chieftomship. Certainly I never felt that the warmth, the friendship that had existed when I had known him in the university, was ever there in the most recent times.

But his ability and his capacity and his willingness to look at the administration of the court in fresh ways really were admirable. Sometimes I felt that, like some of the other judges of a conservative persuasion, he would be content to find the rule and simply apply the rule and find the simple solution to the problem. To me the world and its burdens and wrongs and misdeeds and crimes are more complicated. I suppose that's just an aspect of our different upbringing, our different experience in life, our different outlook. But for all that our relationship was proper and he was always quite - I should say very - supportive of my efforts to combine with my judicial work my work in international bodies. He could have been difficult in that regard. But Laurence Street was also quite agreeable. I think both of them knew that I was something of a workaholic and that, by the end of the year, they'd get more work out of a part time Kirby than they'd get out of a full time other person.

Peter Coleman: There's also the Chief Judge in Equity, the Chief Judge at Common Law, Criminal Division. Are they ...

Michael Kirby: Well, they're not people that I had a lot of daily contact with. I mean, they were colleagues. I think some of them found me a bit hard to take - not so much the Chief Judges in Equity but successive Chief Judges at Common Law, Jack Lee * and also David Hunt. I think they found my liberal humanist philosophy and different approach to the technique of judging sometimes a bit annoying. But in both cases we found some common ground. I tried to work towards common ground in that respect: Jack Lee, in that both of us didn't favour, at this time, a republic, and that was something that Jack Lee found in me an unexpected stream of reliable and redeeming conservatism. David Hunt, well, he's a very able judge and he found sitting with me that even when we disagreed I was always completely relaxed - I've never really resented other people having a different point of view.

Michael McHugh once said to me, and I think I might have told you this before, that the President shouldn't dissent. The President should lead his troops. But I could not be the President and I couldn't be a magistrate if I didn't express my sincere point of

view and opinion on the legal problem in hand. I think that is the judicial burden and obligation, duty and privilege. So, whenever I got a problem I would just give my conscientious best to it. If I disagreed with the majority, no skin off my nose that they reached a different view. That's exactly what I would expect them to do and to give expression to. And I think ultimately people, including David Hunt and Jack Lee, came to the point of view, "Well, he may be barmy and we may not be able to change his mind and some of his views are obviously heretical and completely unacceptable, but they are technically expressed, they're expressed in a way that doesn't embarrass us. We may disagree but that's it. He's done his best and we do our best". That's the culture that I sought to encourage.

Peter Coleman: Jack Slattery, another Chief Judge at Common Law.

Michael Kirby: Well, Jack and I go back to compo days when we both did battle in the Compensation Court. He's had a wonderful and distinguished career. He's a real gentleman, but with a steel streak in his spine. He was a very able judge, especially in criminal trials. I sat with him a few times in the Court of Criminal Appeal, mainly with Sir Laurence Street. He would generally side with Sir Lawrence Street on issues. That was possibly because of their common philosophy, possibly because of their shared background working in the Court of Criminal Appeal for a long time. But he was a person who was always quite agreeable. I didn't quite feel the same tensions that I did with, say, Jack Lee and David Hunt because Jack Slattery might have felt the same tensions but he's such a gentleman he would never show them, even to me.

Peter Coleman: There's the Chief Judge in Equity, Helsham *.

Michael Kirby: Yes, well Michael Helsham was a very unusual man, apparently conservative and rather conservative in his judgments. He had many redeeming features. He had on the back of his door, I remember, a well known poster at the time - now no doubt politically incorrect and unacceptable - of a woman tennis player lifting her skirt to scratch her bottom and with no pants on. This was something which

seemed to be completely out of character with this rather austere-looking conservative judge. But he had a dilly bag I remember and he used to walk up and down from Circular Quay with a dilly bag - I never knew what was in it. It looked like some remnant from the flower people in San Francisco. But this always struck me as rather out of character with this rather austere person.

But his real character has come out since his retirement because he's gone on to broadcasting. He broadcasts now for 2MBS-FM and his great love is music. His wife is quite zany and I think he's zany too. I think that's a good thing. But he kept it pretty well under check and rather disguised - you'll pore over the New South Wales law reports but in his judgments you won't find too much zaniness. But there it was, bubbling away, waiting to get out - maybe it will be the same with me.

Peter Coleman: Well, I was hoping to move on to some of the leading cases or cases where you have comments to make about their being reversed, but before we do is there anything more that should be said about the Court of Appeal and your brother judges before we move on?

Michael Kirby: Not really, I think we've covered them.

Peter Coleman: You seem to me to have covered it but ...

Michael Kirby: Oh, and perhaps too much, too indiscreetly, said too much. Maybe the only last thing to be said arises from your reference to brother judges. It's a pity that I never had a sister judge in the Court of Appeal. It wasn't for want of suggestions on my part. There has now been, since my departure, appointed Margaret Beasley from the Federal Court who will become a judge of appeal shortly. I think that's a wonderful thing because it's wrong to have the senior judges of the court all men. We've had women lawyers and judges around for long enough now to have been able to appoint a woman judge to the Court of Appeal. But it never happened.

Peter Coleman: You say that it wasn't for want of trying on your part?

Michael Kirby: No, I suggested names.

Peter Coleman: Suggested names to the Attorney-General?

Michael Kirby: Yes, I suggested a list of names to Attorneys-General ...

Peter Coleman: But it never got ...

Michael Kirby: It never came to the barrier.

Peter Coleman: Never even got close?

Michael Kirby: No, no - well, I don't know.

Peter Coleman: No, but as far as you know.

Michael Kirby: One of them that I suggested was Jane Mathews who had been a District Court judge of the Supreme Court. She, having been passed over in the Supreme Court, went over to the Federal Court and is now the President of the Administrative Appeals Tribunal. I let it be known that I thought she would be entirely appropriate because she was a very senior and experienced judge and she's also a very nice and loving and kind person. I think she would be a good judge in the Court of Appeal.

Someone suggested to me that a decision she'd made during the period when she'd been Chairman of the Anti-Discrimination Tribunal, the Equal Opportunity Tribunal, had upset some politicians in the Liberal Party or the Coalition. Whether that was so or not or whether they just didn't think that she was the best person, who knows? But

the fact is that she wasn't appointed. No woman was appointed. So we continued during the whole of my service to be a group of middle-aged gents.

Peter Coleman: As far as the Supreme Court is concerned. I think the District Court had Angela Karpin.

Michael Kirby: Yes; there are a couple now on the District Court and Carolyn Simpson * has come to the Supreme Court of New South Wales. But Bob Hope said on his retirement that his associate of that year had complained to him that when he came to the Court of Appeal he had hoped that he would see the wonderful elucidation of great legal principles and all he found were a group of middle-aged gentlemen striving to do justice. Bob, typically, took that as a compliment. I would also regard it as a compliment. But it should have been middle-aged ladies and gentlemen, not just middle-aged gentlemen.

Peter Coleman: Well, shall we turn to some of those cases, such as Osmond's³⁰ and Quin's³¹ case for your comments?

Michael Kirby: Yes, well Osmond was a case that came down reasonably soon after I arrived. It was within the first year. It was a case involving a question of whether administrators have to give reasons at common law. Federal legislation had been introduced to require administrators to give reasons for administrative decisions. But such legislation hadn't been introduced in the State sphere. The case was one where a person with established seniority had been by-passed by another applicant for a position and he was able to demonstrate that he had lots of things going for him. A reasonable expectation that he might be appointed. But he was passed over and for him it was basically the end of the line. The question was: did the body that made the decision, that passed him over, have to give him any reasons or could they say, "Well, that's it, sport" and no reasons. They gave no reasons. He came up to the Court of

³⁰ Public Service Board of NSW v Osmond (1986) 159 CLR 656

³¹ Attorney General (NSW) v Quin (1990) 170 CLR 1

Appeal and asked that they be required by the common law - there being no statute - to state their reasons.

The position was that Priestley and I³² were convinced that the common law had moved to that point. The common law is the creature of the judges acting to fill the gaps and to bring to bear the reasonableness of commonsense. Well, we gave effect to our decision and upheld the appeal. Justice Glass, Harold Glass, dissented. The matter was then taken up to the High Court. I remember Chester Porter, QC, argued it before us and argued it in the High Court. He had a great win. The High Court, I think unanimously, overturned the decision of the Court of Appeal. It said, in effect, that if this is to come it must come by statute. It wasn't something the judges could do.

In my decision I had referred to a whole range of cases from not only the traditional sources of the law - Lord Denning had said some things in England that helped. In the United States and Canada there were some decisions that helped. In New Zealand there were a couple of decisions that helped. But I'd also made the mistake of referring to what the Supreme Court of India had said and what the Supreme Court of Fiji and a few other places had said. When it came to the High Court, Sir Harry Gibbs, who wrote the leading judgment, said that the learned President in his review had referred to a number of foreign countries but there the decision may have been affected by local constitutional or other legal conditions and that that really wasn't a very helpful way to go about things. In effect, I was ticked off for having troubled to look at the position in other common law countries.

Now, the position is that in New South Wales the common law still reigns. Parliament has not provided, as federal parliament has - under Ivor Greenwood and Bob Ellicott, to their great credit - that administrators have to give reasons. In the state sphere they don't and won't.

³² Osmond v Public Service Board [1984] 3 NSWLR 477 (CA).

They rely on Osmond's case to have completely uncommunicative decisions which, though they are the donees of power given by parliament and are themselves acting under the authority of the people's representatives in parliament, and exercising functions for which they're paid by parliament, they don't give reasons. That did not seem to me to be a correct statement of rational legal principle. It didn't then, it doesn't now and maybe some future time that case will present for re-consideration. I think if it'd been presented a few years later the High Court may have reached a different view, given the changing character and viewpoint of the High Court.

But that was an early decision which really disappointed me. Most decisions by the time they get to the Court of Appeal or the High Court can go either way. Therefore, to be completely candid, because I have this somewhat dispassionate view of my role as a judge and of justice, I can just accept decisions one way or the other and I honestly do not get upset - except on very rare occasions and then not very upset - by the fact that a decision goes one way or the other whether a majority reaches one view. I know that they're almost always, if not always, trying to do their conscientious best. Because I insist on that for myself I would never dream of debating with them or harrying them or trying to get them to change their mind.

So, this was the state of the right to reasons. It was the decision in Osmond. It was one of the few that I felt should have gone the other way. I didn't like the slight touch of xenophobia in the reasoning, that because these foreign people in India and Fiji and other places may have some funny ways of their own we don't have to pay any attention to them. I think that that really is out of place with our modern conception of the law of common law of Australia and where it is going.

Now, so far as the case of Quin,³³ that was a case where one of five magistrates in New South Wales during the Labor government - the Wran government - were not reappointed when the courts of petty sessions were abolished and the Local Court of New South Wales was created. The reason they were not appointed was never revealed to them. Ultimately, in the course of proceedings which they brought, it came out that there'd been a secret committee that had said one goes to sleep, one is drunk, one's always late, one's always rude. They'd never been confronted with these things. So they'd never been given a chance to put their point of view in a way that could affect the decision maker. That seemed to me to be wrong.

When one looked at the history of reconstitution of courts and tribunals in Australia, the federal position was always quite rigid: if you have a court which is a Chapter 3 court under the Constitution, you may abolish it - as the government is about to abolish the Industrial Relations Court. But you leave it on the books. Whilst ever one of the judges of that court is alive and has not retired or died it remains in being.

Peter Coleman: As Murray Wilcox * ...

Michael Kirby: As Wilcox and as before him, when the Arbitration Court was struck down in 1956, Sir Richard Kirby was kept in office. So far as I know maybe he's still the last remaining judge of the old Arbitration Court, with a history going back to, I think, to the year 1903. Similarly with the Commonwealth Industrial Court - later the Australian Industrial Court. When that was abolished Justices Dunphy and Joske were judges of that court and they were somewhat irascible and difficult people. They were not appointed by Bob Ellicott to the new Federal Court of Australia. They and I were not appointed to that court. But their court was not abolished. It remained in being until the judges had retired or died. That has been so in the federal sphere, possibly for constitutional reasons, the pretty rigid position, and also with tribunals, it's been mirrored. Similarly, in the State sphere.

³³ (1990) 170 CLR 1.

I traced in my judgment how this had really been our tradition in Australia. That when you appoint people to judicial office, in order that you get people who will not be subject to the whims of political chance and pressures, that you don't just abolish them and their tribunal. If you do abolish the tribunal for reasons of policy, either you have to replace them on the new tribunal or you have to find some other position acceptable to them or you have effectively to pension them off. That is the price as a community we pay to make sure that our judges and our decision makers have independence. Now, that point of view found favour with Bob Hope, and originally with Dennis Mahoney, but ultimately Dennis Mahoney took a different view.

It went up to the High Court once and they refused special leave. But we determined that the decision maker had to reconsider the matter and to deal with the matter without these considerations - which had never been put to the ex-magistrates - in mind. It went back to them and they confirmed their original decision. The only magistrate of the five who was still pursuing it was Mr Quin. He came back to us in the Court of Appeal. It was this time that Bob Hope and I took the view that it had not been done correctly and that whilst we could not order the Crown to appoint them as magistrates, we did make an order that the matter should be reconsidered, absent the factors which were said to be to their discredit in the case of Mr Quin. Justice Mahoney dissented. It went up to the High Court. The High Court reversed the Court of Appeal. Effectively it said that judicial appointments are Crown gifts. It's not for courts to do anything that interferes with the complete freedom.

Now, my own feeling was that that was not a real answer to the way in which Bob Hope and I had expressed it. More importantly, it was a very, very bad signal to be sent out to the governments of Australia. Since then we've seen a number of cases where, with governments of different political persuasions, tribunals and courts have been abolished, people have not been reappointed - Justice Staples was not reappointed by the Labor government, the Hawke government, to the new Industrial Relations Commission when the old Arbitration Commission was abolished. In

Victoria, the Accident and Compensation Tribunal was abolished and all nine undoubted judges of that tribunal were just put out of office. They were given, I think, a year's salary or something like that. But they were not properly dealt with.

Since then there have been examples all around the country and whenever people complain about it the governments concerned simply say, "Well, look at Quin".

Peter Coleman: And the High Court.

Michael Kirby: "And look at what the High Court has said, it's condoned this". I think this is a case where the judges didn't look down the tunnel of the years and see the way which the law could operate. You've got to perceive the importance of a case. You've got to see how, given one decision, it might really have very bad ramifications. I believe this is the case with Quin. I think Quin sent a very bad signal for judicial and tribunal independence in this country. So, it's another case that disappointed me. Maybe again one day that can be repaired.

The third case in this trilogy of thousands and thousands of cases I sat on in the Court of Appeal was not a case where I dissented at all. It was a case involving the BLF union³⁴ which both federal and state parliaments took steps to wind up. They were in the middle of litigation and they came along to the Court of Appeal and asserted that parliament had no power to intrude into the judicial branch of government whilst a matter was before the courts. Now, that sort of argument might have had something going for it in the federal sphere where you have the Chapter 3 of the Constitution protecting the third branch of government, the judicial branch, separated and with constitutional guarantees and status and function. In the State sphere there is no such division. When it came up to us there were arguments put to us that the court should find a principle of the common law to override parliament and that parliament could not do this. It was not only against conventions but it was against the law.

³⁴ BLF Case (1986) 7 NSWLR 372.

Chief Justice Street and Justice Priestley did not exclude that there might be ultimately a point where the courts would intervene in such a case. They pointed to the fact that on one view that common law itself is the reason why parliamentary statutes are respected - they are respected because courts say they have to be obeyed. That's one theory of the common law. My own view was that if parliament of a State makes a law and if it clear and if it's unambiguous then the courts have a duty to obey it. It's not their function to undermine it or to use the techniques that are available if the law is unclear. If the statute is clear the courts, like any other person in the society, must obey it.

Since writing that judgment in the BLF case I've been the object of a lot of criticism amongst academics who don't like the result and say the court should have stood up for fundamental freedoms. Well, I'm as much for fundamental freedoms as anybody - more than most. But if in a State context the act of parliament is plain then judges, I think, have to be obedient to the parliament and to the statute. They have no business imposing their views, which may or may not be right, over the views of the people's representatives. If the citizens don't like what the members of parliament do then they can throw them out, as happened very recently in Australia. When governments fall out of favour they can be dispensed with. But judges are much harder, and rightly much harder, to get rid of.

Peter Coleman: These cases which involved disagreement with your judgments, did they involve any sense of the humiliation that you referred to in your paper on stress?

Michael Kirby: No, I don't think I felt humiliation. I believe that there are some judges who comb through the judgments of the Court of Appeal and the High Court for what they think are intended barbs and insults but I don't. I sometimes felt, as for example with Sir Harry Gibbs' dismissal of the foreign decisions that I relied on in *Osmond*, that that showed a certain narrowness of mind. I say that with a lot of respect for Sir Harry Gibbs because I got to know him quite well in the constitutional

battle about the republic. I got to see his sterling qualities. But that was just a different approach. He has a different approach to the law and to authority and to precedent than I have, probably because of our different lives and backgrounds and experience and view of the world. But I didn't feel humiliated. I can't really think of a single case where I was reversed - and they weren't all that many - where I feel humiliated.

The emotion is better described as disappointment because much more than being reversed are the cases where a dissent by me was not taken up by the High Court. Now, since I've come to the High Court I realise that that court is really quite strict in the number of cases it takes on by special leave. Therefore, I was really a little naive in expecting that every perceived mistake on the part of my colleagues in the Court of Appeal, even one leading to what I thought was an injustice or a seriously wrong legal principle, would be picked up by the High Court. Because the High Court has to keep its mind on its own very big workload, on its national responsibilities, on its need to share the cases it takes around the whole nation, on its need to look to the national importance of the issue, to look beyond local State legislation and to look to whether a particular case is a vehicle, a good vehicle, for arguing the matter, and most important problems will re-present at some later time.

So, there are lots of reasons why my dissents were not necessarily disagreed in but were not brought up on special leave, as I've discovered myself sitting in that different context. So, if I was sometimes disappointed it was a transitory fleeting thing. I would just then be getting on with the cases I was looking at because you just didn't have a lot of time to stop and pause. And where they reached a different view and reversed me, sometimes I would say, "Well, I was wrong". Sometimes I would say, "Well, that's just a different opinion and they have the last word". But it doesn't cause a lot of heartburn to me. I think it's a bad judge who gets too upset. We're all in the system. We all have our place and we all have to do our best. A judge who never makes a mistake and is never reversed is, in my opinion, a rather timid judge.

Peter Coleman: But the life that you've described is certainly a life of tension. It may be a bad judge who gets weighed down totally by the tension, but nevertheless there seems to be no escape from the debate, the disagreement and the frequent failure to convince and to win a point.

Michael Kirby: Yes, but because I insist on it for myself I have to respect other people's right to see the world in a different prism. I do respect that right and insist upon it for myself. So, that is not much of a source of stress. In fact, in the High Court Justice McHugh has described it as a group of gladiators emerging every now and then from their castles and then at the end of the day going back into the castles. Really, that is very much a description of the High Court as I've found it. There isn't as much inter-communication as there was in the Court of Appeal.

But, by the same token, that may change. It depends a bit on personalities. I believe in Sir Garfield Barwick's time that he, being a great proponent of the will, would call judges together and would hector and harry them and in the end they just didn't come because they didn't want that to happen.

Peter Coleman: Come to?

Michael Kirby: To meetings, to be harried.

Peter Coleman: Oh, discussions?

Michael Kirby: Yes. They preferred to simply reach their own conclusions and not to be hassled about it. In the Court of Appeal there were discussions. They were very gentlemanly and very respectful of other points of view. Everybody knew how absolutely counterproductive it would be to try and "heavy" a person because at this level at least no judicial officer is going to be heavied. So, that is really not such a source of stress. I suppose there's a lot of stress going on because just the fact that

you're sitting in court, you're hearing argument, the arguments are often passionate and often difficult in your own mind to resolve. That can lead to a certain tension. Then when your colleagues disagree there's probably some unconscious tension and you're probably absorbing lots of stresses that you don't really acknowledge very much.

Peter Coleman: Well, you have written a paper on stress.

Michael Kirby: Yes, yes. I did it because I thought a lot of people won't even talk about it. I think it is an important feature. For my own part, I think it is a real burden on a judge if they can't make up their mind quickly. I don't have a lot of difficulty in that regard - I may be right or I may be wrong but the pressure of my life is such that I don't have a lot of time to tarry and therefore I've got to be quick. And I am pretty quick. I think in the Court of Appeal I was the second or third quickest: Justice Cole was very, very quick; Justice Meagher was very, very quick; and I would have been number three, I was very quick.

And my experience over 12 years of judicial life is that when you get it on paper and you're satisfied with the result of your reasoning, it doesn't tend to change very much. Therefore, the enemy of action is the blank page. I think in all creative work - and I suppose you can call judicial writing, to some extent, creative. It's a terrible burden if you don't do it reasonably quickly because then the next case has blotted out the details of the case that came and you then have to go through the whole awful business of reading the transcript and experiencing the argument on paper for a second time. That's something I like to spare myself.

Peter Coleman: I'm trying to recall your solution to the problem of stress in the paper, do you ...

Michael Kirby: Well, one of the solutions is to acknowledge that it exists. Another is to try to find its sources - for example, if you're a magistrate banished to country

towns you've got to try to find ways in which you can form friendships and the like without having embarrassments that may trouble you in court. You've got to avoid some obvious sources of worsening the stress such as alcohol, tobacco ...

Peter Coleman: Well, I think, if I recall your paper, there are some who succumb to the stress by alcoholism.

Michael Kirby: Oh, yes, I think you're right, yes. Not many, it's really remarkable that the number who succumb to alcoholism is so small. I remember Frankie Stephen *, a judge of the District Court, in my earliest youth as an articled clerk. He had to be helped off the bench by about 11 o'clock in the morning. I gather he would take onto the bench, literally, it was a glass of gin, it wasn't water. He had an alcohol problem. And he was a fine mind in his youth. He wrote essays on the law of equity and he was, in his lucid moments at the beginning of the day, quite good. But it didn't last long. This was simply a physical illness: he was addicted to alcohol. But in my time I've never had to work with anybody, thank goodness, who had that problem, though I have heard that some judges when they get bored - I think that's another source of resort to alcohol, when they feel that there's no challenges and opportunities and they've done it all before and heard it all before and seen it all before, that is a critical time.

And, of course, it tends to coincide with an age - about my age now, I suppose - when people are really finished with raw youth, passing through middle age and have only got the decline ahead. That can itself be rather stressful to people. In some ways the fact that the law is so similar, day by busy day, means time disappears. I don't believe you can say of a life in the law on the judiciary that time has fled because you haven't noticed because you've been enjoying yourself so much. I don't think that can be said. But certainly one year merges into another. Cases merge into others. Time just goes and lo and behold you're an old gent. That can be a source of stress to people.

So, there are plenty of sources of stress. I do hope that members of the legal profession and the judiciary will read my essay³⁵ and try to find solutions to solve it.

Peter Coleman: Well, I mean, what are the solutions?

Michael Kirby: Well, owning up to it, facing up to it, looking ...

Peter Coleman: That's the article in the *Australian Bar Review* of September 1995?³⁶

Michael Kirby: Yes. There are various physiological things that can be done: vitamin B is said to be helpful if have a deficiency in that regard. I have started walking in Canberra. I bought an apartment at Kingston and I walk to and from the High Court every day now. I find that is really lovely. The lake is just lighting up at the time I walk past it. The ducks are squawking and you realise how beautiful Australia is and how this is a really very Australian environment. So, that is very nice and I look forward to that. I'm losing weight. I've always been a non-exercise person. This is a view I've shared with Roddy Meagher. He and I both denounce sport of any kind and exercise in particular as meaningless to the purposes of life. But since I've started walking to and from work I've really come to enjoy it.

Peter Coleman: This is for you; what advice, as it were, are you giving Attorneys-General or the standing committees or the Bar Associations?

Michael Kirby: To be honest, my essay was a sort of a pot boiler that was a collection of lots of truths ...

Peter Coleman: Well, a discussion opener I'd say more than a pot boiler.

³⁵ M D Kirby "Judicial Stress - an Update" (1997) 71 ALJ 774.

³⁶ M D Kirby "Judicial Stress" (1995) 1 *Aust Bar Rev* 101.

Michael Kirby: Lots of truths written by various people, including psychologists and psychiatrists, in the United States mainly but also in Canada. It's a subject which in the macho atmosphere of the law in Australia there was a great disinclination to talk about it. I don't myself feel that I have a really big difficulty in coping with stress. When I was younger, when I was in the Law Reform Commission for example and I had to make a major speech, I was fearsomely nervous, fearsomely nervous. But I've got to a point in my life now that I can cope.

Peter Coleman: Excuse me, a major speech to whom?

Michael Kirby: Oh, to conferences ...

Peter Coleman: To anyone, I see.

Michael Kirby: Every week ...

Peter Coleman: Despite all these speeches that you gave?

Michael Kirby: Yes, despite them all. And television, I used to be so terribly nervous of television. I can sometimes see in old television things how I blink so much, sort of nervous twitch. And I used to look at Gordon Samuels, for example, and see him making speeches on public occasions. He seemed to be ever so full of aplomb and self-assurance and I thought, "I will never be like that". But I think I can say that with the passage of time and various offices and having been a university chancellor and various international activities and court things, that you do reach a point where suddenly, really quite suddenly, the tension of presenting yourself seems to roll away.

Now I get a little bit apprehensive when I have a major thing to do. But it's nothing like it used to be. For example, when I first got into the Court of Criminal Appeal, after all that harassing of Sir Laurence Street, and had to give an ex tempore

judgment I would often be very stressed, very stressed, because generally I was disagreeing with him. So against the background and the situation and the tensions that existed it was a very stressful time. But somehow or other, over the years, I've just had to cope with all this. And I thought, well, I've had that experience and I'd write about it.

Peter Coleman: Oh, the idea of writing about it was your idea?

Michael Kirby: Yes.

Peter Coleman: It was in the *Bar Review* and I thought maybe one of the editors had approached you.

Michael Kirby: No, no. I once went to a conference in Canada and I was supposed to talk about the clericalisation of the judicial life - that is to say how clerks, young employees, were taking over the job of writing judgments. Well now, that really wasn't a big feature of the judiciary in Australia and therefore I wasn't really about to throw very much light on that. But I talked at lunch about stress. I could see how stressful they found it, that I was talking about this. This was in Ottawa to the assembled judges of Canada. I thought this was an important subject to talk about. This was soon after I'd come to the Court of Appeal. Possibly it had been triggered off by the fact that my life then was quite stressful.

But I put those papers to one side. There they were gathering dust for a long while and then I was asked to speak at the inaugural session of the judicial training course - for the first time they had judges-in-training. So, I thought, well, hang it, I'll speak to them about stress. So, I did and I then dictated it up the next day and it was then published in the *Australian Bar Review* and that's the way these things happen.

Cassette 5/Side B

Peter Coleman: Fine. And the other recent article to the Australian Advocacy Institute in May last year?

Michael Kirby: Yes, that was on techniques of appellate advocacy.

Peter Coleman: "10 Rules of Appellate Advocacy". What I have here is a paper; has it been published?

Michael Kirby: Yes, it was published in the *Australian Law Journal*.³⁷

Peter Coleman: In the *Australian Law Journal*, yes.

Michael Kirby: Well, it was just an attempt to gather together some of my own impressions, from having been an appellate judge for 10 years, of the things that tended to go down well with appellate judges. Gordon Samuels had his first XI and they were the most horrible barristers who appeared before us. We would often debate whether a person got on to the first XI or not.

Peter Coleman: Excuse me, is horrible meaning effective or incompetent?

Michael Kirby: Terrible, incompetent.

Peter Coleman: Oh, incompetent, not horrible effective, but horrible ineffective.

Michael Kirby: No, no, no, you could bear anything if they're effective and if they've done their work. They were incompetent ... well, people who you thought were not really doing the best for their clients and that put extra burdens on the judges.

³⁷ (1995) 69 ALJ 994.

But the list got so big that Gordon, who was not quite as charitable as I would, found a second XI. So, that was gathering. Had he remained a judge, who knows, there might have been a world cup series of teams, a vying of XIs.

So, I thought, well, I'll try and write down for the Advocacy Institute my thoughts on this. That made me think about what were the sources of skill as an appellate advocate. I then encapsulated them into 10 rules. I refrained from calling them the 10 commandments because I thought that might give the wrong idea about my own impressions of my infallibility. But then I circulated the paper to the other judges and they made some very helpful comments and criticisms and corrections. So, the paper as published is basically just my impressions about things to do and not to do. It's not a bad paper, I think.

Peter Coleman: Yes, well, you mention the first XI and so on of incompetent counsel, would you care to say something about the most competent counsel, the famous - not famous but going to be famous - advocates that have appeared before you?

Michael Kirby: Well, there are some whom I regard as very good, because somehow they're on the same wavelength as my own mind. But in such cases you really have a dream day because they speak to you directly and simply about the problem in hand and they think as you do, as a judge in effect. Somehow they can get their mind into the gear of the decision maker and speak in a way that helps the decision maker sort out his or her own thoughts. I'd say of all the barristers that I've seen, Sir Maurice Byers is wonderful in that respect; Bob Ellicott is, I think, a wonderful barrister. Some people don't find him so but I've always had a lot of respect for him as a principled person. I'd liked his advocacy. I'm afraid I'm a bit like putty in his hands. He's a bit like Sir Garfield Barwick - he is, after all, related - he's got a very simple mode of expression ...

Peter Coleman: Hard to disagree with?

Michael Kirby: Yes.

Peter Coleman: It's a gift to be able to present your arguments.

Michael Kirby: Very simply. He speaks as if we're just a group of children, and I think that's what upsets some people. But I think most great issues can be reduced and the skill of a great advocate is to reduce them to simplicity. Tom Hughes, "frosty Tom", staring up into the corners of the court, can always inject an element of drama. He's never forgotten that persuasion is the key to the art: to try to get into the mind of another person and find that weak moment of decision making where the critical crunch point is reached and a decision is made. If you can leap quickly to that point - if you could only bottle that, if you could find out what it is that makes a person jump one way or the other in decision making and focus and focus and focus again on that, then you'd be really as great an advocate as Tom Hughes is. So, he's a fine advocate.

David Jackson, who we get all the time in the High Court; David Bennett, another very good advocate. Roddy Meagher was a very good advocate. He had great self-confidence. He would simply come in and brush away all the cobwebs of the case and all the detail and say, "Well, look, there's only really one issue in this case and that is this". Now, that takes tremendous courage to do that because you can't be sure that some crazy judge won't think some other issue is the important thing in the case. But he would do that. Of course, he does it also in his judgments. They are very brief, he keeps it brief and concentrates on the particular issue. So, these are some of the fine advocates I have seen.

Peter Coleman: Chester Porter?

Michael Kirby: Yes, Chester's ... He has a very engaging style. He seems to be so low key, but he's another fine advocate. There are many of them. They come into the

court and when you look down and see their name you know you're going to have a good day. Of course, one of the things about my new role in the High Court is that I'm seeing now the advocates from all over the country and that's a wonderful privilege.

Peter Coleman: Including advocates whom you've simply not seen before, I presume?

Michael Kirby: Yes. We tended to get some interstate advocates at the Court of Appeal; but now in the High Court we really do see the nation of advocates and that's a great privilege.

Peter Coleman: Well, this might be the moment to turn to the final theme of your translation to the High Court. You've given two speeches, at least - one was farewelling the Court of Appeal and one was on the swearing-in of the occasion.

Michael Kirby: Well, one was made in the Banco Court when I left the Supreme Court and the other was on the swearing-in. I've said some things about the High Court. Maybe my translation to the High Court is a matter for another time because it's pretty soon. I'm just there, I'm the number seven. I'm no longer sitting in the middle. I'm very much the junior. I have new colleagues. When I come to institutions I tend, unfortunately - I hope this isn't all my own fault - to cause tensions and ruffle feathers. I don't think it's been all that different in the High Court.

Peter Coleman: Really?

Michael Kirby: And that just seems to be my fate. It might be just the part of somebody new. In the Law Reform Commission I upset an awful lot of people because I went around the nation saying that there were things in the law that needed to be reformed. A lot of people didn't like that, especially in the legal profession, the judiciary. They said, "What's this young whippersnapper who hasn't had enough

experience doing talking about these things?" When I came to the Court of Appeal there were the tensions about which we've spoken today. Coming to the High Court there've been a few tensions, partly to do with my international obligations and other activities. Partly, I think, just different perceptions of the world and of the place of the Court in the world. I'm sure that there'll be other tensions yet to come. But they'll possibly be sorted out, as they have in the past. That may be a subject for a fruitful conversation in the years to come.

Peter Coleman: Yes, well that gives us a third bite at the cherry.

Michael Kirby: Well, if you're willing I'll be willing but perhaps we should leave it at that.

Peter Coleman: Yes, I think that's a suitable moment to stop. Thank you very much.

Michael Kirby: Thank you, Peter, for being so indulgent.

[End of interview with Justice Michael Kirby]