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AUSTRALIAN BROADCASTING COMMISSION

PM PROGRAM, 16 MAY 1983

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The Hon Mr Justice M D Kirby CMG  
Chairman of the Australian Law Reform Commission

RECORD OF PART OF THE PM PROGRAM ON MONDAY 16 MAY  
— INTERVIEW BETWEEN THE HONOURABLE MR JUSTICE KIRBY  
AND WALTER PEARSON

The announcer, Huw Evans, introduced the program by indicating that the Law Reform Commission was continuing its inquiry into Aboriginal customary laws and was this week conducting a series of consultations in Western Australia. As the Chairman of the Commission, Mr Justice Kirby, told Walter Pearson, there was a fundamental difficulty arising from the failure of the Australian legal system to recognise Aboriginal customary laws. Walter Pearson asked Mr Justice Kirby to what extent Aboriginal customary laws had been recognised by the Australian legal system.

Mr Justice Kirby

The legal theory was that this country was acquired by settlement, not conquest. On that basis no detailed arrangement was made between the newcomers and the indigenous people and their legal system. Accordingly very little recognition has been afforded by the general Australian legal system to the laws of the indigenous people. The view that was taken was the basis on which, for the very large part, the law of the indigenous people has just been ignored.

Walter Pearson

In your considerations of the role of Aboriginal tribal law in the Australian legal system, will you be considering that basic premise?

Mr Justice Kirby

We will. The Minister, Mr Holding, came to a meeting we had with consultants and suggested that that was a fundamental error in the Australian legal system. He suggested that we should rethink it and certainly, in view of the Minister's statement, we will have to do just that.

Walter Pearson

If you rethink it and we accept that the Aboriginal people were conquered, what sort of impact would that have on Australian law and on Australians generally?

Mr Justice Kirby

Nothing immediately. But in other countries that the British moved into, in Africa and in the United States, as it later became, in Canada, New Zealand, where a country was conquered, a Treaty was normally established with the indigenous people. This meant that a basis was worked out for the recognition of some at least of the indigenous laws. What the Law Reform Commission is now trying to do is to work out how we can do that task 200 years on and work out a proper relationship with the laws for the Aboriginal people, at least to some of them, as to those Aboriginals who continue to live by traditional ways.

Walter Pearson

Does that mean then that the premise in integrating the Aboriginal tribal laws into the Australian legal system will be the establishment of a Treaty? Does that follow?

Mr Justice Kirby

It does not follow necessarily. Of course, you will be aware that Dr Coombs and others have been urging a Makarrata or a Treaty and a Senate Committee has been looking at the legality of this. One can approach the matter in different ways, for example by establishing an institution that would seek to adapt at least some of the Aboriginal laws for recognition in the majority legal system, so a Treaty isn't necessary. But it certainly would be one way to redress the legal balance that was struck 200 years ago.

Walter Pearson

What do you say to those people who argue that what we are setting up in this sort of situation is two sets of laws, one set of laws for white people and one for the black people and in effect what we've got is an apartheid situation?

Mr Justice Kirby

We already have two sets of laws. Some people have said that the most reassuring thing about Aboriginal customary law is that whatever the Law Reform Commission says, it will continue to operate in the wilds of the Australian desert. We already have laws which govern Aboriginals but they have been eroded in the traditional situations by the television set, the radio, alcohol and so on. It's not a matter of setting up two different laws. It's a matter of recognising the reality of Aboriginal traditional ways and reinforcing them in proper circumstances, so that they support individual self-respect and community self-respect.