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MACQUARIE RADIO NETWORK

AUSTRALIA OVERNIGHT

INTERVIEW BY MR OWEN DELANEY

BROADCAST FROM 2GB, SYDNEY AND THROUGHOUT AUSTRALIA 4.4

WEDNESDAY 18 JULY 1984

AUSTRALIAN FAMILY LAW - THINKING POSITIVELY

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AUSTRALIAN FAMILY LAW - THINKING POSITIVELY

The Hon Justice MD Kirby CMG

Chairman of the Australian Law Reform Commission

INTRODUCTION

Delaney: There has been a great deal of discussion on the Family Law Act and the Family Law Courts recently with the horrendous attacks on the persons of the people involved in the court systems and on the buildings. The legal profession has failed to defend the Family Court and the media has lacked balance in giving prominence to every critic and crank according to the Australian Law Reform Commissioner, Mr Justice Michael Kirby. And certainly now he has asked us (and pleaded in fact) to support the Family Court. I think it is a feeling shared by many of us who have ever had anything to do with the old system. There certainly are many critics of the Family Law Court and there are critics of the Family Law Court who have never had anything to do with it. We have Justice Michael Kirby on the line.

INTERVIEW

Delaney: Thank you for joining us.

Kirby: Thank you for having me again.

Delaney: One of your legal colleagues, I'll say this with the greatest respect, suggests that you might be doing a little grand standing. Now I couldn't imagine that.

Kirb Well, I was told about that. But if I am 'grand standing', I'm sitting almost alone in the grand stand. Because that was my point. That here we have an attack, not only on the Family Court but our institutions and there was a deafening silence on the part of most of the leaders of the legal profession. In fact, I should say there have been a number of exceptions. In fairness I should also say that when the reforms came in, the organised legal profession organised supported them. But these terrible attacks are out of line with our tradition. And there hasn't been the support for our institutions, the Rule of Law and the Family Court that I would have expected.

Delaney: Look, I agree with you entirely. I think anybody who is a thinking person couldn't see it any other way. The Governments collectively have offered a reward of \$500,000. I always feel about rewards, it's like closing the door after the horse has gone.

Kirby: Yes, but on the other hand it is, I believe, the highest reward that has ever been offered. There is no doubt that the politicians of all parties have rallied around and said the right things. It is the balance in the media that I have been concerned about. I was overseas when it occurred. I was attending conferences in Rome and Paris. And I came back and scoured the papers and it is the print media where I think, especially, there has been a lack of balance: reminding the community (so they can assess these things) of the positive reforms that have been achieved under the Family Law Act and in the Family Court.

Delaney: We look at the hundreds of thousands of people who have been through the Family Court and while not everybody is satisfied a very large number of people are satisfied.

Kirby: Well, I think I should say two things. First of all, it is almost inevitable that the business of family matrimonial dissolutions is going to be painful. Something that began in joy and happiness is ending up in a shabby court room with corridors crowded with lots of other people. So it is inevitably a painful process. And I can understand, in part the stress and pain that people go through. Secondly I am the last person as a professional reformer, who would say that the Family Court or Family Law Act are above reform. Indeed three projects which the Law Reform

Commission is engaged on at the moment, (projects on matrimonial property law, contempt law and domestic violence) are relevant to Family Law reform. But there are legitimate ways of reforming our laws in Australia. We after all live in a society where we can work for the improvement of the law. Dynamite and death to families and the like are not the ways of Australia. I therefore believe that with one voice, all citizens, especially lawyers should speak out. Speak to the media. And make sure the other message is got over clearly.

Delaney: One of the things that concerns me is the total undermining of the justice system. It just doesn't mean by bombing a Judge or killing his wife or killing another Judge or bombing another Judge's home is going to reflect just on the Family Court. It is going to reflect, surely, if this continues and it's not brought to a stop, it's going to reflect on the whole justice system. How can a Judge or Magistrate go into a situation in a completely unbiassed way and not have this in the back of his mind?

Kirby: Yes. That is one of the really abiding concerns: that this will lead to the erosion of the respect for law, simply because of the violence that is done by what is obviously one disturbed mind or perhaps a very small number which can then distort the whole system. The other bad effect it might have is to drive the judiciary (which is already very isolated from the rest of the community to some extent inevitably) into even greater isolation with police cars following them home and guards living in the home. That always strikes me as reminiscent of a South American republic.

Delaney: I was just thinking that.

Kirby: A society which has inherited so many fine traditions from Britain such as free courts that are independent of the executive government. These are wonderful traditions. We must all of us, as citizens, fight hard to preserve them and defend them.

Delaney: Well, thinking about the prospects of the Family Court itself and the Family Law Act it was brought in in 1975 to ease the burden of divorce to take away the onus of having to stand up and be accused or be an accuser. How often does one look back in that early era and find that you had to go along with your cap in your hand and say well it's this and it's

that and toe the legal line just to make the thing legal and accept blame for something you had not done? It appears that most of the critics we've had on the Programme over the last 18 months concerning the Family Court feel that it's a matter of whose lawyer can encourage the greatest lies. Now that's a worry.

Kirby:

Yes. If that is the case (and I am sure it sometimes happens) it is a worry. And I repeat. I am not saying that the Family Court is beyond criticism. Indeed the Judges of the Family Court, more than Judges or Magistrates in any other Court, have been foremost in helping us in the Law Reform Commission, in a self critical way with the reform of their procedures and their laws. So I'm not saying that the system or the institution is beyond improvement. But I just think there should be more balance. There should have been more balance in the week following Justice Watson's wife's terrible death in the comments: calling to notice, as you say, the terrible way in which we used to do it. I mean I'm old enough to remember my first week as an articled clerk where I had to sit down with a mature woman and take down discretion statements later parading before the court and before the newspapers, and the community the most intimate and private details of personal life. I think that this is something the Family Court has done away with along with many other reforms. It is just a question of getting balance. Not to say it is beyond improvement, but to get the balance right.

Delaney:

One of the other things that I find amusing is the attitude and the outspokenness of some Church leaders suggesting that the fact divorce is easy to get, I think they see this as an erosion of their whole structure. I find that almost intolerable and an interference we can well do without.

Kirby:

Well, one has to respect the point of view of the people of that view. They have a religious conception of life and of society. They sincerely and sometimes passionately hold it. No doubt they hold it believing that marriage breakdown is a terrible thing (as often it is especially with children involved). But we have to face the fact that, first of all, we live in a secular society in Australia which the Constitution guarantees. Secondly, there are many people who don't actively hold those religious views. And thirdly whether they do or don't one in every 2.6 marriages in our present Australian society fails. Therefore, somebody has to sort out the consequences. Somebody has to sort out the dissolution of the

marriage, the distribution of the property, the custody of any children. That somebody turns out to be a Judge of the Family Court. We have got to have somebody to do this very difficult and painful job. We have got to have rules by which it is done. Let us by all means get the best people (although that will not be made easier by these assaults on the Judges and their families) and get the best laws. The way to do it is, the way of stable institutions and law reform, not dynamite.

Delaney: You're right. It's certainly un-Australian and it's certainly not the way most of us would like to have the issues resolved.

Kirby: Yes, I mean we have to constantly remind ourselves of the reforms: court counsellors, the removal of the front page stories, systems for the divisions of the property by the Registrars, separate representation for children. These are notable reforms. In some ways Australia leads the world in these reforms. We should be thinking positively and not just negatively about the reforms but keeping an open mind to the constant improvement and renewal of the system.

Delaney: Alright. Just finally, do you think that the simplistic attitude of some people by bringing back the cap and gown and raising the dais is going to bring back the respect of the Court should be held in by everybody?

Kirby: I don't believe so, I believe that that's a very naive view. But I have to respect the fact the many lawyers, especially senior lawyers brought up in different traditions, say that if the Judge is just sitting there without a uniform, looking like your neighbour, then why respect his point of view?

Perhaps the answer is that all Judge's should be (as the American Judges are) dressed in a simple black robe. In other words instead of having this 17th century court dress which we have at the moment, we should have all Judges in a simpler robe, but none the less a cloak of authority to indicate that they speak on behalf of the community. But much more important than wigs, robes and elevation of the dais, I think is the improvement of the physical environment of the Family Court. My understanding is that litigants are thrown together, often in cramped conditions where under great personal stress and the tension they are going through, the dissolution of something which was once very precious, they are then put in this terrible situation in conditions which are not

terribly conducive to a dignified end to the marriage. Now that is not the fault of the Judges of the Family Court. And I know that Senator Evans is conscious of this. We have budgetary restraint. But I do hope that this is something that, in the wake of these terrible events, we will be looking at. It is a positive improvement that we can bring about to make the inevitable pain of family breakup and marriage dissolutions as painless as society can make it.

Delaney: Thanks for joining us Justice Kirby. Talking from the Law Reform Commission, Justice Michael Kirby on Australia overnight.