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INTERVIEW WITH MR. JOHN LAWS

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

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Laws: We quite often hear reports about the Law Reform Commission in Australia, we often mention the Law Reform Commission in Australia and so we should. It's a body that's been perhaps a little too hidden away from the general public and maybe you think it doesn't concern you, I assure you it does. The Law Reform Commission of Australia has done a number of things to the laws in the country that affect each and every one of us in our daily lives, probably done more to bring Australia out of the dark ages in some judicial aspects than anything else and the man who heads the Law Reform Commission is a man for whom I have a great deal of respect and regard and I'm sure that you would share that, the man is Mr. Justice Kirby and I'm delighted to say he's taken some of his very valuable time to join me in the studio. Good morning Judge. Nice to see you.

Kirby: Good morning, good to be here.

Laws: And this Law Reform Commission is your single solitary sole occupation and a fairly demanding one I assume.

Kirby: Yes, it's a full-time job. The Act requires that I serve in this job full time for seven years and I'm now up to my fifth year. These are the seven lean years of my life.

Laws: Why are they the lean years Judge?

Kirby: Well I think reforming the law is a difficult task, the law inevitably tends to get out of date and trying to drag it into the 20th century before the 20th century is over is not an easy task.

Laws: in what areas do you think we've perhaps progressed the furthest as far as law reform is concerned?

Kirby: Well, I think in the areas of the reform of the law of human tissue transplantation, the law dealing with complaints against police, the handling of investigations by police, matters of this kind.

Laws: Now, prior to your becoming the man in charge of this Law Reform Commission, what was your experience in the Judiciary? What had you done prior to this?

Kirby: Well I came up the fairly orthodox path, I'd been a Barrister, before that a Solicitor for some years and then I was appointed to head the Commission, as I say, I've been in that task for five years. I was appointed to the Arbitration Commission and when I finish with the Law Reform Commission that's where I'll go back.

Laws: Do you ever question the morality of the law?

Kirby: Of course. In fact in dealing with the reform of the law it's necessary to ask yourself some fairly fundamental questions as to what the purposes of the law are and are those purposes in line with the morality and attitudes and social values and the technology of today.

Laws: Do you think that the law is open to question on morality?

Kirby: Yes of course it is and it should be because morality changes, society's moral values are changing and it's important that the law should not be too far out of step with the general consensus of the moral rules in society.

Laws: Has the Law Reform Commission looked closely at the law on homosexuality for example?

Kirby: No, we're a Federal Commission and we work on tasks that are specifically assigned to us. That area of the law is basically a State matter, except in the territories, it's not a matter which has been assigned to the Commission yet.

Laws: Have you given any consideration to those sorts of laws, as a human being what's your attitude to the laws that are existent in most states?

Kirby: Well I think it's important for me to confine my attention to the matters that are given to the Commission. The Commission's tasks are by and large fairly controversial as you'll see if you see a list of the tasks we've been assigned, and I think it's probably wise to stick to the controversies I have rather than the controversies I might have in the future.

Laws: You don't want to be involved in that one?

Kirby: I think, as a citizen, of course I have my own views but I don't think my views as a citizen are any more valuable than the views of any other citizen. I think my views on matters which have been sent to us by the Federal Attorney General are perhaps more relevant.

Laws: Well I would question that your views wouldn't be any more valuable than anybody else's, with your experience one would assume that they would be but we shan't press the point, that's not that important. As far as divorce law in Australia is concerned, do you think we're headed in the right direction there?

Kirby: Well that is a Federal area responsibility, but it's not again one that's been assigned to the Law Reform Commission. They've set up a separate body called the Family Law Council. And that body, which until recently

was headed by Justice Elizabeth Evert, is the body which really has the responsibility for Family Law Reform. I think we're basically headed in the right direction in Family Law, yes.

Laws: Yes, we've ceased perhaps to be as archaic as we were. Do you think it's desirable that there should be a no blame situation in a divorce?

Kirby: Well again this is a matter that's not before the Commission, personally I do. And I think again it's a matter of reflecting the changing moral values. It's really remarkable when you think about it how quickly moral values on such matters have changed in the past decade I'd say.

Laws: Yes, probably more rapidly in the past decade than maybe in the hundred years prior to that.

Kirby: Yes I think that's a fair statement.

Laws: I wonder what's brought that about?

Kirby: Well I think it's partly a growing education, especially growing education of women, I think it's the growing information of programs such as your own. I think it's the technology that distributes information throughout society. These are the factors I think.

Laws: Now you made mention earlier, one area in which you feel that you've made some progress, and I know you've made some progress and that concerns complaints against the Police Department. Now we often get calls here, complaints against police. What now should people do if they do want to complain against any treatment they receive in the police force?

Kirby: We made our report to the Federal Government but as in many of our reports the State Government has adopted our proposals and passed laws enacting them. The

position now is that if a citizen has a complaint, he can make a complaint in the orthodox way which is to the police, but if, for any reason, he prefers not to do that he can go to the ombudsman. And under the legislation in New South Wales the ombudsman has special additional responsibilities to make sure that an independent enquiry occurs.

Laws: Do you think the situation was inadequate prior to this move that you made?

Kirby: I think it was generally acknowledged to be inadequate. Sir Robert Mark, the Head of Scotland Yard for many years, said that the problem of policemen investigating policemen was one that you just couldn't overcome. It was a problem of the appearance of bias in the investigation and that's why he set up a special unit in Scotland Yard to root out the bad police, and it was very successful and we suggested it be copied and it has been.

Laws: So it's back to the old adage, not only must justice be done, it must be seen to be done.

Kirby: A very important principle of our legal system.

Laws: Yes, do you think it's maintained?

Kirby: I think in the courts it is. I think people can go to courts, not enough people do go to courts and sit in the back. I think it would be a good thing if more citizens went and saw the way the law is administered. I think most of them would come away with a good feeling of the impartiality and fairness of the trial system. Of course there are many faults and many defects, but basically it's a fair system.

Laws: Judge, do you think that people are frightened of the law?

Kirby: Yes I do. I think the geography of courtroom

that's to say the way they're designed, the height of the bench, the trappings of robes and so on. All these are important in the view of some to underline the dignity of the court and the importance of what's being done. But I think the net result is that it does frighten off many good citizens.

Laws: But you do believe, as I do believe, that the wig wearing and the rigmarole should continue, the tradition of the court should continue.

Kirby: Well, I don't know that I do agree with you there. I think wigs are really in declining use, they're not used in industrial tribunals, they're not used in the Family Court. It may be that in some ceremonial cases it's appropriate, but I'm not sure that it's appropriate in the ordinary business of resolving disputes in courtrooms.

Laws: Yes, I'm a great traditionalist and I tend to think that perhaps it encourages a respect that may not exist otherwise.

Kirby: Well I'm surprised to hear you're a traditionalist, but I think the respect ought to be based on the work of the courts and their independentants rather than on outward show. I think trappings of that kind are perhaps things that alienate courts from ordinary citizens and I'm not sure that that's a good thing. I think it may be appropriate for ceremonial use but I'm not at all convinced that it's a good thing in ordinary trial.

Laws: Well we've surprised each other.

Kirby: Yes, well there we are.

Laws: The next question obviously is why do you find yourself surprised that I'm a traditionalist?

Kirby: I've always thought of you as a person who puts forward views to the community, many of them perhaps

in advance of their time, and I think that's a thoroughly good thing. I think it's important to encourage the intellectual debate in Australia.

Laws: Other areas in which you've been closely concerned, there's been a lot of controversy a few months ago about having random tests for drinking drivers, and I think that that area has been submitted to the Law Reform Commission, has it not?

Kirby: Yes, we got that in connection with the Capital Territory because again I say we're a Federal body.

Laws: Yes.

Kirby: But we came to the view that it wasn't appropriate to introduce random tests. We took expert advice. If there were any evidence that it had a significant lasting impact on the road toll of course one would accept random tests, but there just is no evidence. And the best experts say it's simply a politician's hunch.

Laws: Do you think we overplay the civil liberties business?

Kirby: I think it's an important attribute of societies that inherit their system from Britain that we should always be alert to our civil liberties. Much easier to lose them than to get them back.

Laws: Sure.

Kirby: And I think it's important that there should be spokesmen and spokeswoman in the community who'll speak out loud where they fear that civil liberties are invaded. But of course it's always important to keep your balance and to make sure that you don't get carried away with a passion for civil liberties at the price of other values in society.

Laws: Yes, do you think that there is a section



of the community that does get carried away with the civil liberties question?

Kirby: I think there is and I think there's a section of the community that gets carried away with authoritarian views. It's important for good citizens to keep a balance between the two.

Laws: Did you see the random tests for drinking drivers as an invasion of our civil liberties?

Kirby: Well you see basically under our system a policeman can't go up to you unless he has reasonable cause to suspect an offence. And this would be a breach, one of the very few breaches, that our legal system allows in that fundamental rule. It's a very different rule to the rule on the continent, where police can require you to identify yourself and so on.

Laws: Do you find our rule more acceptable?

Kirby: I think it's more in keeping with the traditions of our society. It's been there for as long as Australia has inherited the English common law system, and I think it leads to a society in which you don't have policemen on every street corner, as you tend to see in the continent. Basically you're free to act without interference so long as you're acting lawfully.

Laws: Do you think there is any simple solution as far as the law is concerned to bringing down the road toll?

Kirby: I wish there were. They're experimenting with random tests, as you would know in Victoria at the moment, the Government of South Australia has said that it'll be introduced in that state. Perhaps we've just got to see how it works, if it does bring down the road toll. But the best advice we had from road traffic experts was you'd give away a very important civil liberty and you wouldn't get a diminution in the road toll in return.

Laws: Now the Defamation Laws are something that you've also had a close look at, and so have I off and on. What are the problems with the defamation law system as it stands in Australia at this time. And there are many it would appear.

Kirby: Yes, well the basic problem is that there isn't a single law, although broadcasting and television can take the same program throughout the country, there are eight different systems for the different states. I think the other main problem is that the remedy is often inappropriate. A verdict for a plaintiff two or three years later in a sum of money is really not a terribly appropriate way to solve the problem. The more appropriate way, as it seemed to us, was to tell the public, soon after the alleged defamation, what the true facts were.

Laws: And do you think that this system in that area is too slow?

Kirby: Too slow, too expensive and inapt for the complaint. The complaint is to the person's honour and reputation, have been damaged. A sum of money the community may not know about, it may just not get any publicity. Two or three years later isn't a terribly apt way to remedy it. In Europe the solution is a right of reply and a right of correction, and it seemed to us that we should endeavour to graft that system, giving people, who claim they've been defamed a right to put their point of view in the same manner as the manner in which they've been defamed.

Laws: How close are we to having that sort of system?

Kirby: Well Federal Attorney General Durack(?) has said that he's going to submit the report to the various states, it's not a Federal matter you see under the constitution. It requires the agreement of the various states, I understand it's coming before a meeting of the State ministers and the Federal minister. And I think we'll

probably see it. Basically the media was happy with our proposals on defamation and I think most commentators were, the suggestions we made for a limited protection for privacy was much more controversial.

Laws: Not only in the area of law, but it would appear to me, and you may not agree with this, that there seems to be a slight decline in the standing or the repute of professional people in Australia generally, do you agree with that?

Kirby: I think that's probably right, I think that comes about as a result of the growing numbers of professional people, growing access of ordinary people to professionals, the fact that they find they're not demigods after all, they're just humans. And I think the publicity on the front page about Medibank frauds and lawyers running off with trust accounts, although it's exceptional, doesn't help the standing of professional men and women.

Laws: Do you think perhaps there's an increase in the incidence of dishonest legal people or did we not hear about it before?

Kirby: I don't know that there is an increase, I think the more significant problem with professional people, lawyers and doctors and the rest, is not dishonesty, I think that is and always will be a very small proportion, very small. The real problem is indifference, not returning the phone call, not looking after the problem efficiently, not keeping up with the latest law, the latest medicine. And I think that's the area that should be tackled in the reform of the professions.

Laws: Do you think that the general public perhaps has become more vocal in its enquiry into these things. Once upon a time the standing of a lawyer or a barrister went without question, but these days, and probably partly because of programs such as this one, people are able to question the rights and wrongs of the professions. Whereas fifteen

years ago they were unable to do that. Do you think that that's like?

Kirby: Well I think it's a thoroughly good thing and I think again it's an example of the changes that will inevitably come about in a population that is much better educated and much better informed. You see, even in the last ten years, the numbers of girls going on to education beyond the age of sixteen has doubled, it's doubled in ten years. So that's a tremendous change and it's reflected in all other aspects of education in Australian society.

Laws: Yes you obviously don't think that there is a great deal of dishonesty within the profession of the law?

Kirby: I think there's an element of dishonesty in all professions, in all occupations, but I don't think we should overplay that, I think it's a relatively small percentage, it will be always there and there will always need to be rapid effective ways of dealing with it. I think the real problem is indifference, incompetence, getting out-of-date, things of this kind. They're the problems that affect the average client or can affect the average client. I think the misfortune of plain dishonesty is not such a common problem.

Laws: A question that I ask, at least myself often is it really honest or is it really moral for a man who is a barrister, acting for another man, to endeavour to convince a judge and or a jury that a man is innocent, when in fact the barrister who is performing this ritual, knows that the man is guilty, is that moral?

Kirby: Well I know this is a problem that does concern laymen and laywomen, but I don't see the problem myself, you see the alternative is that the barrister, in his chambers, makes up his mind and that's an end to it. The duty of the barrister is fearlessly to put the case before the court as the client would have if he had had the same education, ability and training. So I think it's

better people found guilty in courts than in barristers' offices.

Laws: But are you suggesting to me that every barrister who defends for example a criminal, he's convinced before he defends him that that man is innocent?

Kirby: No not at all and I'm sure what you say is right, that in many cases the barrister probably thinks that the criminal is guilty. But his duty is to ensure that the man is found guilty according to law and generally by a jury of his peers, that's pretty fundamental to our system, it goes back to Magna Carter.

Laws: Oh yes it does.

Kirby: And it's important that people should be tried in open court, by their fellow citizens or by judges, and not just by the legal profession.

Laws: Well then again we could ask ourselves the questions, conversely is it then correct for a barrister who knows a man to be innocent to endeavour in a court of law to make him look guilty?

Kirby: (Unintelligible) people in prison who oughtn't to be there.

Laws: And there are many out that ought not to be out.

Kirby: That's quite right and the problem for the law and for law reformers like me, is to get those who oughtn't to be in there out, and those who ought to be there in.

Laws: So those people who are out are in fact out because of the ability of a barrister?

Kirby: Well that, the principle that they must

be found guilty beyond reasonable doubt. The fact that they're entitled to a fair trial. It is more important so it is said that ten innocent people, that ten guilty people go free than that one innocent man go to jail, and I think that's a principle which the English system of law has steadfastly adopted and which we've inherited in Australia and I personally think it's the right principle.

Laws: But a devout moralist could see an area of immorality in the law.

Kirby: Yes, but I think a devout moralist would also ponder upon the problem of an innocent man languishing in jail. You see it has happened. And the notion of somebody sitting in there in jail or being hanged or otherwise being dealt with, is I think one which upsets the moralists more than the notion of guilty men going free. We've got to face squarely the fact that under our system some guilty men will go free.

Laws: Mr Justice Kirby, I thank you very much for your time because I know you're a busy man and you've done us a great service by allowing our listeners to be made aware of the fact that something is being done to update, what to many, appear to be archaic laws, and that the law just doesn't sit still, it doesn't does it?

Kirby: No, it's moving slowly, but it's moving.

Laws: Judge, thank you very much indeed for your time.

Kirby: Thank you Mr Laws.

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