

THE PRESIDENT

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INTERVIEW WITH KIRBY P BY PAUL VOUT, KASEY PEARCE AND

CHRIS CONNOLLY

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The Honourable Justice MICHAEL D. KIRBY CMG is President of the NSW Court of Appeal, and a Commissioner of the International Commission of Jurists and of the Global Commission on AIDS. He was also the Chairman of the Australian Law Reform Commission from 1975-1984. CHRIS CONNOLLY, KASEY PEARCE and PAUL VOUT spoke to His Honour about the profession, AIDS and legal ethics.

What do you feel are the shortcomings of lawyers and law students today?

In the 15 years since I was first appointed a judge I detect a certain loss of idealism in our profession. In a sense it reflects a loss of idealism in our country. I see a tendency from the judiciary down to be very concerned with money, rewards, and place in the social pecking order. Whereas, in a funny old fashioned way, I've always seen our profession as offering rewards that are beyond price and as offering people an opportunity of service to their community. Justice Brennan once said that lawyers are ministers of justice. From the youngest clerk who is given leave to appear before a court, to the highest judge, we are participating in the government of our country — the judicial branch of government — and that is a rare privilege.

Do you see those weaknesses manifesting themselves in the individual lawyers, or the universities?

I think we need a balance of talents and experience to make us good lawyers. Certainly things have progressed a great deal, even at the Sydney Law School. It's a question of

"Nothing is so mischievous as a lawyer who has strong passions but who hasn't looked up the relevant law"

maintaining all of our legal professional skills and our basic knowledge of certain core areas of the law, but at the same time keeping our eyes focussed on the operation of the law in practice in the way in which it affects ordinary citizens who are often less well educated and less articulate than we are. This imposes on us a moral responsibility.

Do you feel that the sort of lawyers who are coming out of our law schools at the moment are sufficiently equipped to deal with the legal issues raised by something like AIDS?

Well the first point to make is that it's not good enough to have deep feelings and to be a concerned person. To be of use as a lawyer you also have to have high professional skills. Virtually every day judges have to make choices in response to lawyers' arguments. That is the lawyer's great opportunity to influence the decision, but all too often one sees that the best talent gravitates to the greatest financial rewards and the young lawyers of the greatest talent tend to work in commercial areas. I always thought that to be natural until one day I realised that many such disputes are simply debt collection in a highly sophisticated form. Once you realise that that is all that is involved in such disputes, the glamour recedes from them. Whereas, to fight a public law case about the interpretation of prison regulations which affect when a person will actually be released from prison, or to deal with a case of contempt which raises the fundamental conflict between a fair trial and free expression, are more fruitful areas for lawyerly concern. Sadly, one often sees in those areas that disputes have to be fought out by lawyers who are inexperienced or willing to perform their service for nothing. I've expressed the view to some of the best talent at our Bar that it ought to be part of the professionalism of the law to do work in good causes. My answer to your specific question is that we see some very good young lawyers in the public law areas, the criminal law area and so on. But I would like the best of talent to perform work of a public service character, and not to think that earning a bigger salary or performing debt recovery is what it is to be a lawyer.

Do you feel that the law is at all relevant in the fight against AIDS? Are you disillusioned?

I don't think I'm disillusioned, but I am trying to be realistic. We have known for 20 years how damaging to health



smoking is and we have conducted enormous public education programs that try to dissuade people from smoking, and yet very large numbers of people still smoke. You can't simply pass a law and expect that law to affect people's behaviour in matters of intense pleasure or self identification such as sexual activity or drug-using. And therefore passing a law which penalises with a mere \$5000 the passing or the potential passing to another person of a life threatening virus is not going to be a very important factor in the thinking of people that will stem the spread of this epidemic.

So how do you suggest we could best protect these people?

Well I think anti-discrimination laws are one way. That is the paradox of law on AIDS. Part of the package of legal measures to prevent the spread of the virus must be the provision of legal protection for people whose conduct puts them most at risk - risk to themselves and, by the spread of the virus, risk to the whole of society.

Has the education campaign targeted the right people?

Well, first of all, AIDS is not a nasty little virus that only affects gays; AIDS is a human virus. In Africa, the Caribbean and in Latin America, AIDS has never been a homosexual/bisexual condition. Vaginal intercourse is a perfectly efficient mode of transmitting the AIDS virus and, accordingly, there are dangers of stereotyping in advertising campaigns. We saw in the advertisement put to air of couples in bed, that the television stations would not put to air pictures of two males in bed, because they said it was contrary to their ethical code. So to some extent the messages have been controlled by the standards of the networks. It was the same in New Zealand, where a book on a Girl's Guide To Safe Sex was impounded last year by customs officials as indecent. Even in Washington DC the

local transport authority refused to allow advertisements for condoms in public. I believe we have to target those who are in most need of the messages. The point of the international global epidemic of AIDS is that we've got to target everybody so that everybody is alert. The latest figures coming from the United States suggest that the homosexual community, doubtless from attending funerals, has come to get the message about the spread of the AIDS virus in its midst. The second wave which is now coming is of IV drug users who mirror the sexual orientation of the whole community. For example, AIDS is now the biggest killer of women under 30 in New York. I think that in Australia, at this stage of the epidemic, money could be better spent in proportion targeting the communities that need most urgently to be reached.

Would you think that perhaps a Bill of Rights would be a more effective way of protecting HIV positive people?

A Bill of Rights does provide the judiciary with a handle with which to deal with novel problems. In the United States it has provided the solution to a number of problems which the Congress was avoiding, such as equal boundaries of electorates, fair pre-trial conduct by police in respect of persons accused of criminal offences and, above all, desegregation and the removal of discrimination against people on the grounds of their colour or racial origin.

But are you hesitant about the establishment of a Bill of Rights in Australia?

I don't think it is politically feasible. I don't believe it will happen in my lifetime, therefore I turn my attention to other machinery to protect basic rights, and the common law is a marvellous instrument. As *Balog* and many other recent cases demonstrate, the common law is a great treasure house of basic principles and of liberty. Although

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we don't have a Bill of Rights which can stand up against clear legislation (as this court held in the *BLF Case*) we nonetheless do have principles with which lawyers should be familiar and to which they can appeal. The High Court decision in *Jago* upheld the view that there is a right to complain about the unfairness that can arise from undue delay in prosecutions. There may be emphasis on the fact that the right to a speedy trial, as such, was denied by the High Court. That decision was based on the history of the common law. Yet there is a great principle which is affirmed in *Jago* and that is the right to a fair trial, and speed of resolution is one, but only one attribute to the fairness. Justice McHugh, however, wouldn't necessarily agree with me.

You have a great deal of respect for the common law — what do you think of codification? Sir Harry Gibbs, for example, is supervising the codification of the commonwealth criminal law.

Well, he is a Queenslander. They love codes of criminal law or defamation in Queensland. It would be my pre-condition for the codification of criminal law that we would rethink in a fundamental way what the purpose of the criminal law is and what we should now leave out as being examples of the overreach of the criminal law. For example, I think we will see — partly as a result of the AIDS epidemic — a fundamental rethink of our laws on drugs. About 70% of criminal cases that are now coming before the court are either directly or indirectly related to drug use. My personal opinion is that this is an area which is more suitable for public health measures than for the criminal law. Certainly experience teaches that the criminal law has only an imperfect and scattered effect on solving the problem.

In our lead article Paul Redmond argues that the whole concept of fiduciary duties with regards to company directors is almost forgotten. Would you agree with that?

Well it's not forgotten in the letter of the law. It's a matter of applying the law to particular cases. I've expressed what I have to say about it in cases such as the *Advance Bank Case*, *Darval*, and *North Sydney Bricks*. These were decisions where it seemed to me the code or the statute should be

given effective operation, but I think in at least two of these cases I was in dissent.

Do you support the public interest component in defences against defamation?

The Australian Law Reform Commission prepared a report on defamation, long forgotten and now gathering dust on the shelves of ministers. It was prepared for the Federal Government and it went to the Standing Committee of Attorneys General. Over the portal of the Standing Committee is the inscription 'Abandon Hope All Ye Who Enter Here'. The report was not picked up, partly because of the tension between those States which had a 'truth only' defence of justification and those States and Territories which had a 'truth and public interest' element. What the Law Reform Commission suggested, and what I still think is right, is that we should have a defence of truth but we should define an area of unfair publication which constituted undue in-

vasion into privacy. That was one of the purposes of the public interest component of the defence of justification in this State. I hope that some of the Attorneys General will remember that report and look at it now, so we may yet see it pass into law in whole or in part. One of the fundamental problems of defamation law is that it's based upon money compensation which can be paid in secret, years later. The public's interest in knowing the correct facts is completely neglected by the process. We therefore suggested radical changes

to put an emphasis on court ordered corrections and rights of reply which protect not only the rights of the person who is defamed, but also the community's interest in having correct information put before it. So there is a lot of very good sense in the Law Reform Commission's report. However, the experience of law reform is that you shouldn't hold your breath; it often takes a long time in Australia.

On the issue of Justice Staples you've mentioned that Justice Maddern might in fact have been committing a fraud on his power as President of the Arbitration Commission. How would you have dealt with that situation yourself? I would have applied myself to my legal obligations. The thought that because I had a personal difference with a judge of the Court of Appeal, I could roster that judge off



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completely would never cross my mind. If anyone had ever tried to do that to me, I would have taken action in the courts in a very short time. I fear that a lot of the actors in the Staples drama come out rather poorly. Justice Staples himself was not entirely immune from criticism. But it is essential to the integrity of judicial appointment that once appointed to the Bench, the people who have the commission should have the power to exercise it. The power given to presiding officers to organise the work of a court does not extend to organising a judge entirely out of the exercise of his or her commission. So in terms of handling it, I don't think I should presume to say what Justice Maddern or Sir John Moore should have done - what they have done is history. The matter of concern is the very bad precedent it has now established. A person who was promised judicial rank, status, salary, designation, title and was promised that he would not be removed from office except by the process equivalent to that of a Federal Court judge has had all of those promises put at naught. It's a very shabby tale. I regret to say that there is, in this State, an equally shabby tale relating to the magistrates who were not reappointed to the Local Court.

Do you think the legal profession's monopoly on conveyancing should continue?

I don't expect the monopoly over land title conveyancing to survive long, and that has important ramifications because it has been the staple of the legal profession. It has tended to provide the basic income of lawyers in suburbs and country towns. It will be a problem if we are to furnish a legal profession which is not confined merely to the tower blocks of capital cities.

Do you think the profession will survive in its current form?

If we have a social utility we will survive. I have no doubt that lawyers do have a social utility. It's simply a matter of matching economic equity of reward with that utility. But at the same time we must infuse in the next generation

"Earning a bigger salary or performing debt recovery is not what it is to be a lawyer"

of lawyers the reminder that the rewards will not be economic only. The opportunity to serve your fellow citizens and to take part in the government of your country in an indirect or direct way is one of the privileges of the legal profession. And it brings a reward all of its own. ■

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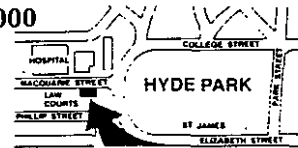
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