TRANSCRIPT OF FILMED CONVERSATION BETWEEN DARYL DELLORA AND HON. MICHAEL KIRBY – “DON’T FORGET THE JUSTICE BIT”
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AND HON. MICHAEL KIRBY*

DON'T FORGET THE JUSTICE BIT

The Hon. Michael Kirby AC CMG

CHILDHOOD

00.00.00  Q  We'll work the questions in a pretty much chronological fashion, and I
just wanted to start with your family background.

00:00:19  Q  What sort of a childhood did you have?

A  I had a very happy childhood, a very loving family. I grew up in the
suburbs of Sydney. What used to be called the western suburbs, but
now it's getting a bit more central because of the spread of the city. I
gone to the local public school. I had wonderful siblings, two brothers
and a sister, and it was all in all a pretty lucky childhood. Indeed it's
pretty been a pretty lucky life really. So I had a good grounding. I've
often thought that growing up in those suburbs and going to the local
public school has given me an appreciation of the valueS of the
ordinary Australian. Because my beginnings were very typical of
Australia, just after the Second World War.

00:01:16  Q  So was it a would you say a middle class background or?

A  It was a?

00:01:20  Q  Would you say it was a middle class background or?

A  I said at one stage that it was a, a lower class, working class and I
was ticked off for that by my mother whose family had certainly not
been working class. Our aspirations were middle class. But we never
had a lot of money. We never had a car. We only once, in my
childhood, went on a holiday: the great holiday to Katoomba. The
furthest I'd gone in a ship was to Manly. That meant that we were
a typical sort of closed family unit of those times. We lived together.
We ate together. We talked together. We reinforced our bonds with
each other. That is still the case. We are still a close family. All of us

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2010.
have survived, except my mother and we are still very close. We get together just about every Sunday.

00:02:27 Q And your father is an incredible figure isn't he 93?

A Yes he’s 93, still driving and he cooks the Sunday dinner. He’s a good cook too, concentrating on vegetables. We should all be eating more vegetables, and he’s still teaching me that, at the grand old age of 70 in my case.

00:02:49 Q And was it those early years where, because you had a phenomenal work ethic, was that instilled in you from a young age do you think in your family life?

A I don’t really know what the cause of my work dedication. To some extent it was probably developed early as an excuse for not engaging on a personal level. Because, in the nature of my life, that was something I had to postpone really. But the schooling, the wonderful teachers, the opportunity school for gifted children, the selective high school, All of that encouraged a quest for excellence. We were told that we had to do our best because we had the opportunity to do really well and we were constantly told at Fort Street High School, where I went, that we would be leaders of the Australian community in the future. We were repeatedly told about the famous old boys, because it was an all boys' school at that time, that we should aspire to be the next generation after next and be the leaders of the Australian community as Barton had been, as Evatt had been and as so many others, Sir Douglas Mawson and all the other famous old boys of the school.

RELIGION

00:04:21 Q Was religion a deep part of your life in those early years?

A It was a part. I don't, wouldn't want to exaggerate it as, as a central part. I, as most people did in those days, was sent to Sunday school and I graduated from the Sunday school into the big church at St Andrew's in Strathfield which is still there on the corner of Concord and Parramatta Roads. I loved the liturgy. The Anglican liturgy is most beautiful. The Book of Common Prayer of Cranmer is most beautiful language in the English language. It's mystical. I could partly understand how Catholics really resented the loss of the Latin Mass, because if you've grown up with it, it's an important part of your spiritual life. Similarly with me with the old Book of Common Prayer. Now that's not so much used in Australian Anglican churches and some people think it's hopelessly old fashioned. But it's the
Shakespearean language which is so beautiful. You can understand it, but it's just a little old fashioned and therefore, in a sense, lifts your mind up into a different plane. So it was a part, and a weekly part in my life. I went to church every week.

00:05:53 Q And you remember the church that you went to there, do you still go there or?

A I don't still go there because I've shifted my residence and I am now on the other side of Sydney. But I still go to church from time to time. I often go to church when I am overseas. I was overseas in Boston the other day and I went to St Paul's Cathedral, which is the Episcopal Cathedral in Boston. I often do that. It was strange as I walked into the church it had the very familiar smell of an Anglican church, I suppose it's the old woodwork ... They must have some universal franchise on the polishing wax which is purchased at Lambeth Palace and shipped to the colonies all around the world, because they all smell the same. When you go into an Anglican church you can smell the old prayer books. You can smell the seats and it's comforting. It's a familiar place and after a long travel (as it was in that case) it was nice to be in that company, singing the old hymns and hearing the old scriptures.

00:07:08 Q So you were talking about the liturgy before, is that, is there a certain kind of theatrical element to that or do you think or?

A Well it's ceremony. Churches have ceremony. In a sense I was conflicted because the Sydney diocese of the Anglican church is very, very low church. You don't get lower in the world. It's basic. They're a very Protestant branch of the Anglican church. And that branch is the one I was brought up in. It is very scripture based. It is very texturally based. It doesn't believe in bells and smells, as it's put. It's very simple. And that is my conception of Christianity: that Christ was a revolutionary, born in a manger, dying on a cross, a very revolutionary person and so that was the element of Christianity that I grew up in. To be honest I always feel a little bit uncomfortable with too much ceremony, because that seems to be the antitheses of the message of a very simply living person. But on the other hand whenever I've gone to churches with a lot of that [ceremony], I do realise that it's there for a purpose, which is to lift you out of the everyday life and to take you beyond the here and now.

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**ARTS LAW AND HIP HOP**

00:15:34 Q So has that interest in performance, if you like, stayed with you, I mean I’m thinking for example of your relatively recent outing with Elf Transzporter the hip hop empresario, that’s a fairly unusual thing for a High Court Judge to do?

A It wouldn’t be unusual for a High Court Judge to be invited to launch the Arts Law Week. I have been involved in The Arts Law Centre which gives advice to artists and people in the entertainment arts and so on. And there is an interface between copyright law and the intellectual property law generally and the arts. So that wasn’t unusual. What was unusual was that I was introduced to a hip hop artist. Now, I’d had to have explained to me what hip hop was; and in particular I had to have explained to me the difference between rap and hip hop. These are absolutely different things and my ignorance about them was all too clear. But when I came down [to Melbourne] I had a sort of set piece speech. I was ready to give that. And suddenly I realised how absolutely inappropriate this would be and that Elf Transzporter was going to do his hip hop act and that I was somehow expected to inter-relate to it. So all I could think of was to say one of WB Yeats’ poems. So I said to him: will we try this? And he said I’ve never heard of that poem. So he got up and he was doing his hip hop, hip hop and rap, rap, tap, tap and I had to do my poem. But you know, it was absolutely brilliant. I think I have a lost career. I could well have got an Oscar for my performance on that night. Anyway, all the kids loved it. I did say to them that I somehow couldn’t see Sir Wilfred Fulagar or Sir Frank Kitto doing this with Elf Transzporter. But it was fun. And it got the crowds in. And it made them realise that the arts have a lot of legal implications and therefore it was something we should all be interested in.

Q I’m looking forward to seeing the video footage of it, I’ll track it down.

A [laughs]

00:18:12 Q But what, can you tell me what’s been the significance of the yellow jacket for you?

A The yellow jacket is just something that I have worn from time to time. My partner Johan says I’ve worn it too often. It has to be pensioned off. But I’ve been careful not to wear it too often in the one city. So you’ve got to keep your eye on where you have done this. It’s to show that all lawyers are, in a sense, double personalities. That you have your own inner soul, and your inner being, and your personal life and your loves and friendships. But you have to play a role in the administration of justice. So this is a very
physical and dramatic way of demonstrating that underneath everyone’s dark suits is a bright golden outfit which they’re just waiting to get into. In the case of the hip hop artist, it was a way to take me out of the sombre circumstances of the High Court and to show that inside me was a hip hop artist just waiting to burst forth. It was an enjoyable evening. I think everyone that was there enjoyed it. What was shocking was that The Age newspaper then put it on the front of the page of The Age. I think that really wasn’t the image of a High Court Justice that most people expected. But it maybe made my point that High Court Judges are human beings too.

Q Might have lifted their image in some corners.

A Yes, I’m sure some it did.

UNIVERSITY DAYS

00:20:14 Q So is the yellow jacket likely to come out again?

A I’m afraid that’s not going to see many more appearance. Maybe overseas. I haven’t thrown it out and it’ll probably make cameo appearances somewhere else. But I think it’s done it’s dash in Australia.

00:20:34 Q If we go back to when you entered Sydney Uni for the first time. <inaudible> 20:40 can you remember the first time you went to Sydney Uni and the sorts of identities you saw there?

A I arrived at Sydney University in February 1956. The day is very well described in Clive James’ book Unreliable Memoirs because he arrived on the same day. Robert Hughes, the considerable Australian art critic and commentator, arrived on the same day. Clive James went off to the Student Christian Movement and wore his Students’ Christian Badge. Robert Hughes decided that he would become a sort of dramatic figure around the campus. He was wandering around in a heavy thick jumper and a long Oxford scarf, which did look a bit eccentric given that it was in the middle of a heat wave. I turned up in my Fort Street prefect’ blazer, because it was a particularly elegant maroon blazer. I thought it looked pretty good. I was rather proud of it. It was extremely gauche of course to turn up at university wearing your school blazer. When I look back on it I just feel so, so ashamed of my naivety. But it didn’t get worn the next day. We then all settled down into corduroy and the usual innocuous student gear. But it was an exciting time at Sydney University. Germaine Greer was there shortly afterwards. Bob Ellis
shortly after that. And as I moved into student politics and into the Students' Representative Council and met people interstate who were in student affairs, like Gareth Evans, John Bannon, Darryl Williams and Rob Holmes a Court. All of these people were big figures in my life. The university was not just the lecture hall. It was also the student activities. Strangely enough my grades got better as I got deeper into those activities.

00:23:04 Q You've had a very successful career as a student politician didn't you?

A I certainly did. [laughs] I was elected the President of the Law Society of the University and then the President of the Students' Representative Council; President of the Union; Fellow of the Senate representing undergraduates; life member of the National Union of University Students. So I, I did a lot of that. And I enjoyed it. But, in a sense, looking back on it, it was an endeavour on my part to postpone coming to grips with the reality of my life as a human being. As a human being with sexual feelings, and a person who needed to explore and discover love if, if I could. All of that was postponed whilst I was spending my life either in studies or in committee meetings. I was the king of the committees. I learned there the skills of running a committee, and chairing meetings, and getting things done and doing it in a congenial and efficient way.

00:24:21 Q Presumably that's the reverse of most students' lives, isn't it: putting their social lives above everything else almost?

A Well my brothers and my sister didn't follow me down the path of student affairs. They had full lives and adventures. But that seemed to me at the time to be cut off for me. So I had to find other things to do. And I devoted myself to these student meetings and I did some good things in there. I don't really regret it on one level. I did learn interpersonal relationships, skills in communicating and working in institutions. I believe I am an institutional person and I enjoyed the company. But, on the other hand, looking back on it, it was a really a sort of anaesthesia. An endeavour to cut myself off from the really difficult challenge which was, in the situation of my sexuality, to discover somebody whom I could love and share my life with. Really it's a miracle that I did at the grand old age of 29. I did, and that has been a great blessing in my life. But the twenties, my twenties, well they were, they were another pursuit. That was just what I felt I had to do at the time.

So there was a lot of pluses in it and it was a great, great experience for somebody who didn't have an immediate family connection with university life. So I don't regret it on the whole. But looking back it, it
probably would have been more normal and certainly would be the case today that I should have had more adventures and specifically more sexual adventures and more exploration. But that was all just, that was a door that was marked 'Shut, don't open.'

File 2

00:00:03 Q We were just talking about that young period of your life, when do you think you first realised that you were homosexual?

A Well when I came to puberty so that was about the age of 10 or 11, no later. I knew that at the time, see we're talking about 1951, that was not a good look. That was not a good trip. It was one that I was supposed to keep a big dark secret. About once a week the front page of the Daily Mirror or the Daily Sun were filled with stories of people, often distinguished people who were being humiliated and shamed because of their arrest on the basis of their sexuality. So I knew this was a very dangerous and shameful thing that I should be thoroughly ashamed of myself. Yet I didn't really feel that ashamed of myself. But I knew that, that was how I was expected to react to it. Therefore to keep it quiet including from those who were closest to me my family. This is the real mischief that is done by such laws and attitudes and teaching: that at a critical moment in a young person's life they have to hide their reality from those who are their greatest source of love and strength. But that was what you were supposed to do. 'Don't ask, don't tell' lasted a long while in Australia. I just went along with it. That was just part of the reality of those days.

00:01:54 Q So I threw myself with energy into my studies and then with ferocious energy and to university committee meetings, and I even ended up enjoying the university committee meetings. I had good friends amongst the participants, all non-sexual. I was a non-sexual being at the time of my peak hormonal development. That was just what you were expected to do. In most countries in the world, certainly most countries of the Commonwealth of Nations, that what young people are still expected to do. It's getting better in Australia.

00:03:38 Q Was it difficult to reconcile who you were and who you were sexually involved with, with the church and their attitude?

A Not particularly because I can't ever remember Mr Dillon, the Reverend Mr Dillon (who was the minister of the church) ever reading the passage from Leviticus or ever getting up there and denouncing gays. My father told me that subsequently at the church, near his
home, a minister started doing this. In the end he left that church, as did others. But it wasn’t a big thing, and The Anglican church, you know, because of its history, because it came from the Elizabethan settlement, because it arose out of the Reformation with the need to respect the Catholic members of the English community, was always a big compromise. It has always a space for different people and I believe there still is. If you look at the one big church in the world that has tried to grapple with sexuality it’s the Anglican church. That, I think, goes very deeply into the roots of Anglicanism: of compromise, of space of a place of many mansions, and of mutual respect and willingness to live and let live and to dialogue. So I can’t blame my church at the time for giving me a hard time. I knew, sort of generally, what the church taught on this, I knew a little bit more than generally from my law school days what the law taught on this. But I didn’t hate either of them for that. I just thought well they are plain wrong. This is a mistake. I never was conflicted in thinking well your feelings which are entirely natural to you are somehow wicked or hated by God. I just couldn’t go along with that. So, in my soul, I was at peace. But in my daily activities I was postponing reality.

00:05:50 Q 00:08:10 Q Bob Ellis has written a story, which he describes how you represented him in Court, do you remember much about those?

A I remember his story. I remember that, like a lot of other things that Bob Ellis has written, it is full of historical allusions that are more likely to be referring to King Richard the Third than to real live modern Australian characters. But I believe I did appear for him. I appeared for an enormous number of students. Many of them on fare evasion charges. I got a lot of them off. Some of them are very distinguished judges nowadays and QCs. But I don’t remember the details of Bob Ellis’ case, it was something, I think, about crawling up a wall or climbing into his girlfriend’s bedroom, or something of that kind. I’m sure he’s become very respectable since then.

00:09:14 Q And you also had played a role in the freedom rides as well at that time, do you remember that?

A My role wasn’t as direct as Jim Spigelman’s role, now the Chief Justice of New South Wales. He actually took part in the ride to Moree. My role was subsequent to one such event. It related to Walgett, which is a far west town in New South Wales. Walgett had the rule that Aboriginal Australians were not allowed upstairs in the cinema. They could go downstairs. But they weren’t allowed into the posher seats upstairs. Some students went up there, one of them was a son of a judge, and he was trying to force the issue. They were arrested, and they were charged. My job as the solicitor, the honorary
solicitor for the Students' Representative Council, was to go up and take barristers up there to try to put a case that they had an implied right, or in some way had not been breaching the law by going upstairs with the Aboriginal students. Naturally, I went for the top and I briefed Gordon Samuels QC, who was later my colleague in the Court of Appeal of New South Wales and subsequently the Governor of the State. So we went up there and we represented the students in the Walgett Court. There was a very wise magistrate and in the end he found the offences proved, but dismissed the charges on the grounds of their past good character. This was probably a lawful and certainly a wise outcome. (I received a letter only the other day after my retirement from the High Court from a person who was the Court Clerk on that occasion. He told me of how, within a week of the conclusion of the matter, the rule was dropped. The upstairs was available. In fact, that race relations in Walgett improved and became quite good. Because, of course, there are many Aboriginal Australians in the vicinity of Walgett.

**LAW REFORM AND THE ALRC**

00:11:33 Q I want to go back to your student days. So did those sorts of experiences that you had in the 1960s with Aboriginal affairs and also discrimination against homosexuals, did that tend to give you a, push you towards law reform do you think?

A Push me towards?

00:11:57 Q Law reform, you seeking law reform?.

A Certainly the activities with the Students' Council led to my being elected unopposed as the honorary solicitor. There weren’t too many volunteers who wanted to be the honorary solicitor for the students. That led me into activities defending students. That led me into the Council for Civil Liberties. And that led me into representing a lot of people in minority positions. No one talked about gay issues in those days. You would occasionally get the Council for Civil Liberties appearing for a gay person who had been arrested. But it wasn’t talked of as a generic topic needing reform. But there were some wonderful people in student politics one of the leaders of whom was Peter Wilenski. He saw the importance of the Aboriginal questions, of White Australia and of women’s rights. And so I became involved in the borders and boundaries of those issues. And that gave me a perception of the fact that law, which I was at night learning in my law course or which I was practising as a young solicitor, was not always just in the way it fell upon those members of minorities and that got
me interested in law reform. But the catalyst was my appointment as the chairman of the Australian Law Reform Commission, inaugural chairman, and that was something that was politically decided. It was something over which I had no say. When it was first offered to me I was very reluctant to accept it because I was quite happy, at that stage, in being a judge in the Arbitration Commission. But, in a sense, I think the reasons that the politicians had seen me was because I had been jumping up and down and being denounced by conservative columnists in the media for standing up for the underdog. That, I think, planted the idea in Lionel Murphy’s mind that this young chap might be a good person to get into heading the Law Reform Commission which parliament had just set up.

00:14:26 Q Did anyone persuade you to accept the appointment?

Geoffrey Robertson was influential in persuading me to take the post. Because he was over in England as a Rhodes scholar, and he was able to tell me about it and I started to get interested. Then Lionel worked his wiles. He was, of course, a very charming and very intelligent, super intelligent man. I said well you really should get somebody older because the profession won't like this young person, and he said 'No I don't want any of those old fuddy duddies. I want you. I want a young person with new ideas'. So ultimately I gave way. After 40 days and 40 nights in the Arbitration Commission I was moved to the anteroom to the Bankruptcy Judge’s chambers. That’s where we started the Australian Law Reform Commission, which is still going strong.

MEETING JOHAN VAN VLOTEN

00:16:00 Q What do you think it was Lionel saw in you that prompted him to make the appointment?

He was a very gregarious person, whereas I was a sort of dour, committee attending, university focussed type of person. But whatever it was he, he saw something and it might have been that I was constantly being attacked by, by Eric Baume who was a very famous person in Sydney radio at the time. He was sort of the then equivalent to Piers Ackerman, I suppose, and he was attacking me constantly. So nothing much changes. But that caught Lionel's eye, I suspect. And that's what lead to the offer of the appointment. Which I ultimately accepted.

00:17:08 Q If we could just go back a little bit to the late sixties again, can you remember meeting your partner at that, that time?
Absolutely, and we still celebrate it, it's the 11th of February 1969. I had gone to what I had by then discovered was one of the two or three gay bars in Sydney. This was before I was appointed a judge, because judges in those days (and possibly still today I don't know) were not expected to go to bars. Bars were where common people went. Judges would go to clubs where the wealthy and the big end of town would go. In common people you might meet a few criminals. Of course, now we know in clubs you sometimes meet a few criminals as well. However, I went to the bar and there was this very handsome young man. I thought he was a German. I'd learned German at school. So I thought that I would ask him what he thought about von Ribbentrop. I know now that he thought why do I always meet some ratbag in these places? He had just turned down a Qantas pilot. He's often said to me that he thought he might have a better bet, certainly more frequent flyer points if he'd stuck with the first offer. But, ultimately, I promised him a cup of coffee. I took him out and the coffee shop which I knew and he knew had disappeared. So there was nothing to it but to ask him to come to my apartment in Kirribilli. He took one look at the apartment and out the window and thought 'this is a person with a future bank balance'. So, from that moment on, we've been together. Strange isn't it? Just a matter of luck. But most heterosexual, bisexual people tell similar stories. It's just being in a place and your life changes instantly. What if I had had a long case that day? What if I'd been too tired? What if I had been working back? What if I had not gone? My life would have been so different. I'm really a very lucky person that I met Johan.

And you then did those remarkable trips with him, can you tell us something about that?

Johan had seen the reports by the end of the first year we were together [1969]. He'd seen the reports of the overland race. There was a race, it was like the Redex Trial, which was the round Australia race. This was the next step. This was the London to Bombay race. He saw that and he thought we should do that. At first he proposed doing it in a station wagon and I thought that would be a bit confined. Ultimately, he made the decision to buy a Kombi Van. It was really all his initiative. He wanted it. He's an adventurer and I thought I'm not sure this is a good career move. But then I thought, well, why not. Everyone around me at the Bar said this is the end of civilisation. You will never get your practice back. You're so busy. Stay here. Keep working. Slave away. Never, never have any fun. But don't forget during my twenties I'd really not had a lot of fun. So this seemed to be a perfect idea. He was a good driver. And so we got the Kombi and we drove overland. We did it twice, 1970 and 1974. We both agree it was a wonderful time in our lives. We saw the world. We saw the commonalities of our world and of how in the middle of central
Asia human beings are still human beings. But it was a wonderful eye opener and great experience. And if you can live for a year in a small confines of a Kombi van with another person, I think you can live for life with that person because it puts lots of stresses on your relationship. Apart from a certain section of Afghanistan where he wasn’t talking to me (and I had to give way) it was a great, great time in our life.

00:22:07 Q What about your move into law reform?

A If going into the Arbitration Commission was a sort of no man's land, then going into the Law Reform Commission was terra incognita. There had never been a Law Reform Commission, certainly not at the national level. There were some State commissions. But it wasn’t a natural career path and Geoffrey Robertson had said that this would be a good step, or so he asserts now (I don’t actually remember him saying that). But it wasn’t a natural step in a progression of a glorious career). It was a sort of sideways step into a body which was mainly made up of striving people with academic advisers and officials.

When I started, the Australian Law Reform Commission was deeply suspected by some leading lawyers and judges. A very fine chief justice of Victoria said he was against it because these are people with a professional commitment to be critical of the law. Yet in my lifetime I saw the Law Reform Commission become part of the furniture. It is now part of the established institutions of the law. Its reports are cited without question in the High Court of Australia and other courts. Its research is always of an excellent standard. It states the law as it was at the time of the report. It’s a source of great knowledge for barristers and judges. It’s really, I think, found its mark. That is, in part, because of the way in which we put it on the map.

APPOINTMENT TO HIGH COURT

00:02:30 Q You have continued to be outspoken, haven’t you, even when you went to the Supreme Court and then the High Court later, you would still speak regularly, let’s say, in the media?

A The position in the courts when I went back into the courts, into the Court of Appeal in New South Wales and then to the High Court, was that I became much more selective of the topics. In the Law Reform Commission I would talk about issues that either were before the Commission or might in the future come before the Commission or were about law reform and legal developments generally. In the
courts, I was more cautious about the subjects that I would talk at. But every day I received, and still receive, invitations to come and speak to people about aspects of the law. There’s a great thirst for knowledge about the law. There is a problem that a lot of lawyers find it a bit difficult to explain things in simple terms. In a way the old jury advocates of the past, who had to simplify, are no more because juries in civil matters have virtually disappeared now in Australia. So my talent, for what it was worth, of explaining things simply and cutting away the exceptions and the qualifications, and the nuances and just explaining the issues as well as I could, made for an interesting engagement on the part of people. The law it doesn’t belong to lawyers. It’s not boring. The law is interesting. The thing that made me mad in the High Court was that we would have all these very interesting cases which were just at the cusp. And do you think journalists would follow them? Would they bother to read the controversies within the court? Differences? No. They were only interested in personalities and matters of entertainment, infotainment. Whereas the big issues of law are the big issues of life. It’s a useful thing for citizens to be involved in considering. We sometimes need people to be interlocutors and communicators about it. That’s certainly what I tried to do and I don’t regret it for a minute. I think it was a useful public service. Once or twice I might have put my foot wrong. Once or twice. But in 35 years of public life, I don’t think I did it very often.

00:05:09 Q 00:08:56 Q And do you remember the occasion when you were offered the position of the High Court of Justice, do you remember it being a call?

A The phone call to invite me to join the High Court came about in a curious way. I’d arrived in my chambers in the Court of Appeal in the morning and I had a meeting in the afternoon with the Users’ Committee of the Court. So that we had the consumers there. I was telephoned by somebody who gave his name and said ‘I am from the Department of Prime Minister and Cabinet and I want to know where you will be at six o’clock tonight’ I knew then that Sir William Deane had resigned to become the Governor General. I knew enough about the way things happened to know that something was happening. Something was up. So I said ‘well, I’ll be in the Users’ Committee serving the court users of the Court of Appeal’. He said ‘I don’t want to know that; I just want to know where you’ll be. And so at six ten that afternoon I was chairing the Users’ Committee. My brother Donald was actually there as a representative of the Law Society of New South Wales facing me. There was a knock on the door of the judges’ conference room, which was a very unusual thing. It was my associate, my clerk, who came in and a little postit sticker: A little yellow sticker was passed down the conference to me. It said
'Please phone Mr La Vache' and it gave a phone number. My brother describes the colour going from my face because I knew that, at that moment my life had changed. And that’s the way it happens. The judge has nothing to do with his or her own appointment. The appointment is made by politicians who are elected by the people. It’s the one moment of a democratic component coming into the judiciary. Once it happens, the politicians have to get out. They don’t influence anything after that. So, I went down [to make the phone call] and he said ‘I have the honour to invite’, and I said ‘I have the honour to accept’. I didn’t allow too much of the water to flow under Sydney Harbour Bridge.

00:11:23 Q At that point in your career did you expect to be given that offer?

A To be frank I thought, at that stage, that my moment had passed. I had seen Justice Gaudron, Justice McHugh and then Justice Gummow appointed. Given the nature of the High Court as a national court, given the number of Sydney people on it, given my age (I was then 56), I thought that I’d reached my used-by date. Always the bridesmaid, never the bride. But in life you can never say never. It wasn’t so. If I had stayed in the Court of Appeal I would have had a very happy and productive life. It was a very important office to be President of the Court of Appeal in New South Wales: an influential office in terms of the law. But there is no doubt that the final national court of any country is a special place. I have learned since, in contacts that I’ve had with judges of the Supreme Court of the United States and the House of Lords of England, and the Supreme Court of Canada and India and so on, that, that judges of final courts have to think a little bit differently because there’s no further appeal. They have to think about the long term directions. They march to a different drum, in a sense. They know that many of the things that they’re dealing with are the same thing as other final courts in other countries are dealing with at the same moment. If they think that they are just an ordinary judge, solving a problem, then they’re missing both their responsibility and their opportunity in the final court of a nation.

00:13:19 Q You had been outspoken, around that time, about the mooted move to the republic which was obviously quite close to Paul Keating’s, very close to his heart. Did it surprise you that he appointed you given that?

A It’s true that at that time before, shortly before I was appointed [to the High Court], I had taken a part in the foundation of Australian Constitutional Monarchy (ACM). This was the body established to contest the idea of a republic, or at least to make sure that there was a genuine debate about the subject. My position then, and still is,
that intellectually I am a republican, in the sense that I believe that all sovereignty flows from the people of Australia. But there are arguments for constitutional monarchy, and in particular with an absentee head of state, an absentee monarch. It’s a curious system. But it has arguments for it. So I’d taken part in that. I knew that the issue of the republic was very deep in the heart of Prime Minister Paul Keating and still is. I knew that he would feel very strongly about it. So that, the fact that I’d been involved in the ACM, was a further reason why I believed that my time had passed. That didn’t stop me from doing what I felt I should do. I had, after all, in my life, taken eight oaths of allegiance to the Queen. Therefore I took my part. But once I was appointed to the High Court I, I backed off. I had nothing further to do with that debate and I just saw the drama unfold and reach its resolution at that time. But, yes, you have to say about Paul Keating that he was definitely a big picture person. Because a little picture person, a person of mean spirit, a person who didn’t like those who crossed him, a person who hated people of different points of view, would have said ‘Oh Kirby? No, he’s a monarchist. We’ll cut him off the list.’ He didn’t do that. Now that is curious. But that is the fact. And in social values I was probably very similar to his values. But on this little matter, the Queen’s great matter, I had a different point of view.

Q 00:16:22 Do you think your position on the monarchy would change in the future, say when the Queen goes and is replaced by Charles which presumably is going to happen?

A Would my position change after the Queen? Well it might, yes it might. After all I, I stood there in the Queen Elizabeth Park as it’s now called. (It was then just called Concord Park) I saw the Queen go by in 1954. I’ve seen her through her whole life. She has been very dutiful. She’s come when she’s invited. She hasn’t come when she’s not invited. She has done her duty. Indeed, the criticism of Sir John Kerr in the dismissal of Mr Whitlam was often on the basis, including by people who believe in constitutional monarchy, that that was not the way the Queen would have acted. So whether that is so or not I do have a great respect for the Queen. I believe everybody, most people, have a respect for the Queen. But the institution also divorces power from politics. If you look around the world at the countries that tend to be the most temperate, they do tend to be constitutional monarchies.

ROACH CASE AND ELECTORAL RIGHTS

Q Can you tell me about the Roach case?
A  *Roach* was an important case because it really went to the heart of our constitutional democracy. It concerned whether a law made by Federal Parliament, amending the *Commonwealth Electoral Act* to deprive all prisoners, whatever their offence, however long they were in prison, from voting was a valid law under the Constitution of Australia. We don’t have a Bill of Rights in our Constitution as the Americans and others do. So the question was did it fit with the scheme of the Constitution for an electoral democracy. Upon that matter people of goodwill and high legal talent can differ. The High Court did differ. Two of the justices said it was perfectly valid. Four of the justices said no, it was not valid. It was important because it was brought *pro bono* voluntarily by very good lawyers. They pointed out that very large numbers of prisoners are in jail for quite short periods. Sometimes because they can’t afford to pay their fines. Many, most, such people will be out of prison and in society before the next election comes up. So they will be governed by the legislature that is elected. So the majority of the judges, with some reference to international human rights principles, and what had happened in other countries, found that the enactment by Federal Parliament in 2006, to deprive *all* prisoners, was unconstitutional and that at least in respect of prisoners who were there serving fewer than three years imprisonment (that being the electoral cycle) they had to be given the right to vote. They were given it in the 2007 election. They not only had the right to vote, they had the duty to vote, which is our Australian duty, and a very good thing in my opinion.

00:23:12 Q  So it was a sort of a David and Goliath case in a way wasn’t it? Because there you had this Aboriginal woman in jail, which is almost the lowest of the strata in Australia, taking a case to the Highest Court in the country and succeeding?

A  It sounds like David and Goliath. But the truth of the matter is that on the side of David, in this case (Ms Roach an Aboriginal prisoner serving a prison sentence for a crime of fraud) it wouldn’t have got off the ground except for the voluntary services of the Public Interest Clearing House and the voluntary members of the Victorian Bar. [Including] Mr Ron Merkel QC who gave his services *pro bono* in the case. So that it’s a story not only of Ms Roach’s determination. Also it’s the other side of the coin about the legal profession. It’s an indication which certainly fits with my own experience that there are plenty of lawyers who do plenty of things simply because it’s the right thing to do. And bring it to the court. We couldn’t have resolved it, we probably would never have seen it, but for the fact that lawyers took it up to the court and presented the issue for decision by the High Court of Australia.
You recently said that the most important moral question was deciding between the rules and actually delivering justice. What did you mean by that?

A Law is a schizophrenic type of activity, because on the one hand and it's symbolised by the judicial oaths really that you have to do justice, but you have to do it in accordance with the laws of the land. You're not just there under a palm tree, deciding what you think is just. So that you have to see whether you can reconcile the desire for a just outcome, as you see it, with the law which sometimes as we, we learned with our earlier laws (as on Aboriginals, White Australia, gays and so on) is behind the times. Reconciling those two is an important function of any system of law and justice. But particularly of our common law system. I believe other judges had the same quandaries to face. I was just more candid about the quandaries. That was partly because I had been taught by Professor Julius Stone, when I was at law school, to face squarely the leeways for choice, as he called it: the value decisions that judges have to make. Particularly judges on the ultimate court, the apex court of the nation. That is where the buck stops in the legal system. It is where the determination of the law is finally made, subject to parliament in any matter non constitutional. That was where the Mabo case was decided. Now if ever there's a good illustration of the quandary, Mabo concerned land law which stretched back for a hundred and fifty years in Australia. Yet it was plainly a discriminatory law which was founded on the basis of the race of the people involved. The High Court resolved that case in the way it did by reversing the previous law and recognising the right of Aboriginal people, in residual land, to their native title. That was a big quandary. It's a very, very good illustration of the types of choices that have to be made.

UNJUST OUTCOMES IN COURT

Has there been cases that you've been involved in where you felt very much that the law was applied correctly but the outcome was terribly unjust?

A In every judge's experience there are cases where you have to reach a decision because the law is clear and you can't find a way if that is your belief about the justice of the matter to reach a just outcome. I had many such instances. Many, many such instances in my life as a judge. One of them that springs to mind was a case in 2005, I think it was, concerning whether the Migration Act of Australia permitted young children to be locked up in detention centres. That was against the rules of the International Convention on the Rights of the
Child which said that detaining children, or imprisoning them, was to be a last resort. Under the interpretation of the Migration Act that had been adopted, it was the first resort. They were simply locked up immediately with their parents. So I looked at the statute. I looked to whether one could interpret the statute [to apply only to adults]. I looked to the history of legislation and the history of the legislation showed that this departure from the Convention had been specifically drawn to the notice of the Federal Parliament. There was also a specific provision in the statute which provided for the searching of children, which indicated that parliament had actually envisaged children being in detention. So my duty was clear. I had to uphold the law. And I did. But it didn’t seem a very just outcome. Nor a very kind outcome. It therefore was one which went against my grain. But a judge, in the end, has to give effect to the law. Not just to the judge’s perception of the justice of the case.

00:29:30 Q  Do you ever find that those sorts of decisions actually come close to being ones that contradict or cut across your religious beliefs for example?

A  Not my religious beliefs because I don’t want to pretend to be a big religious person. My religion is my religion. One of the good things about our tradition, I believe, is it’s in a private zone. I’m a believer in the secularism of Australian society. My religion is my business. I don’t let anybody dressed in bishop’s robes, try to take it from me. They can’t do it. So religion is not the problem. The problem is a deep sense of justice, often informed by fundamental human rights. Fundamental human rights are, in a sense, a statement of the essence of human dignity which, in turn, is probably connected with aspects of spirituality and one’s religious understandings. But as to whether I felt deeply conflicted? Well when I would reach a decision which put me in at that sort of situation, I had to come to a conclusion which seemed very, very unjust, I would feel distressed about it. But then I would go home. I would talk it over with Johan. After I’d made the decision I would let it pass out of my mind. I’d get on with the next case. You have just got to do that. Just imagine a neurosurgeon worrying about a case from last week. You can’t do that. You’ve just got to get on with it and do the very best you can. That’s professionalism. That’s what people expect. But you do make mistakes. And I’ve made mistakes as a judge. I made some mistakes that others have corrected. I’ve made mistakes that weren’t corrected but which I think were mistakes. And that’s just the human nature of the judicial institution. Anyone who thinks they’ve never made a mistake in life, well, I just don’t think they’ve thought deeply enough about their role and about their humanity.
00:33:36 Q Can you explain your adherence to the Queen your idea of the crowned republic?

00:33:22 A I think she’s an admirable person. As to the system of an absentee monarch, I’m basically a little bit of an anarchist. Having an absentee Head of State has a lot going for it. Heads of State can cause an awful lot of trouble.

00:33:36 Q It was certainly worrying with the idea of the elected president?

A Yes, well if we did that they’d all be sports people or television newscasters.

00:33:47 Q Eddie McGuire.

A I didn’t like to say that in case I upset the league of television newscasters or, the AFL.

File 5

MISCARRIAGES OF JUSTICE: MALLARD AND AL KATEB

0:00:29.5 Q Just talking about difficult cases there. One such case like that was the Mallard case. Can you tell us a bit about that one?

A Mallard plays on my mind because Mr Mallard came to the High Court in 1997, soon after I was appointed. He sought special leave to appeal against his conviction. He’d been convicted of murder in Perth. A murder, which it is now clear he did not commit. It came up before a bench comprising Justice Toohey and Justice McHugh and myself, which was a good bench, if I can say so, for Mr Mallard to get. Unfortunately, the arguments that were advanced, related to the refusal of the judge to admit a lie detector test. That wasn’t a particularly good argument to get into the High Court because they’re not really part of our justice system in Australia. So we refused special leave. Mr Mallard went on to serve another 12 years imprisonment. Subsequently, because of his family’s loyalty and those who stood by him, some politicians, [he] got the case back to the Court of Appeal of Western Australia. And again, they refused to interfere. But then it came up to the High Court and by dint of a new way of presenting the argument, and some new evidence, they demonstrated that Mr Mallard, objectively, had been at a certain point in Perth earlier in the day, objectively shown, and did a runner from a taxi a few hours later and that he could not have been in the third place where the murder took place and got to those points from the point the taxi had picked him up. So it demonstrated convincingly for the High Court, unanimously, that a miscarriage of justice had occurred. So I often ask myself, did I miss that? Did I miss the point
that this was an innocence point? If I'd been helped a bit more, if I'd read more carefully myself, would I have picked up a point that was not being urged on us. Of course, then you ask the ultimate question, what cases have been before me where I have made a mistake which I didn't see was a mistake, that the court wasn't helped to see the error. That is a judge's nightmare. To be responsible for somebody being in prison for a very long time or suffering other disadvantage, is a nightmare. But you have to just get on with the next case. You can't just sit there like a centipede, anxious to take the first step the next day. You've just to start again and do your very best. Generally speaking, Australia's judicial officers are wonderfully faithful. It's a stressful, pressured, responsible job. There aren't too many who will speak up and say how faithful and devoted they are. But I speak up. They are sometimes conservative, more conservative than I am. But they do a wonderful job. They protect citizens and the law. It's a heady responsibility. But you do make mistakes. As I did in the first Mallard case.

0:04:02.6 Q 0:05:56.7 Q One court case where you dissented was the Al-kateb case. Did you feel that that was a just outcome?

A Mr Al-Kateb was detained when he arrived in Australia without a visa and sent to the middle of South Australia in a detention camp. Under the scheme of the Migration Act, if he elected to be returned to his country of nationality, that was the duty of the minister. But the problem with Mr Al-Kateb was that his nationality was Palestinian. Israel would not allow him to move back into the Gaza strip. Kuwait, where he'd been born, would not take him back there. The nett result was that he was stuck. On the theory of the Act that was propounded by the Commonwealth, he was there forever. He could be kept detained indefinitely. Now that didn't seem to me or to Chief Justice Gleeson and Justice Gummow (the three members in the minority) to be the correct interpretation of the Act. We said so. But the majority held that it was and there was nothing they could do about it. Of course, I can't criticise the judges in the majority for expressing their opinion. But Justice Gummow and I both said that if that was the interpretation of the Act, then the Act was to that extent unconstitutional. This was because it involved parliament imposing indefinite imprisonment on a person without judicial intervention. So that was a subsidiary question that came up in the case. Was it a just outcome? Of course it wasn't a just outcome, to lock a person up indefinitely and to contemplate that they should be there indefinitely. One thing is clear, as Justice McHugh said in his reasons, it really does demonstrate the need for a stronger Bill of Rights in Australia, to ensure that, if that is what the statute of Parliament enacts, then the judges have an opportunity to say, "Well,
you don’t do that in a society like Australia. You don’t lock people up and throw away the key. You don’t keep them there indefinitely. You can do that only under judicial independent supervision and in accordance with the law.”

0:08:09.7 Q What is your view on a Bill of Rights for Australia?

A Well, the national consultation on whether we should have some form of chartered rights or a Bill of Rights in Australia is certainly timely. We are now, I think, the only advanced modern western democracy that doesn’t have such a measure. Now, we might be the only one in step. Australia may be so uniquely wonderful that we don’t need a stimulus to the political process or a criterion for judging the wisdom and justice of laws. Maybe we don’t need it. But if you look back on our history, the way we treated Aboriginals, the way we treated Asian-Australians during White Australia, the way we’ve treated women in many respects, the way we’ve treated prisoners in some respects, the way we’ve treated gays, they haven’t all been that wonderful. The idea of having some criteria by which judges can seek to bring laws into conformity with fundamental rights and, if they can’t, draw that to the notice of parliament, which will have the last say, I think that’s a stimulus to democracy. It’s not a derogation from democracy. And for the life of me, I can’t see how that – if anything, as I think Justice McHugh said, it’s too weak. It’s a very weak model. But it would be a step forward to joining the rest of the world and the 21st century. Maybe it’s time we did that. If you look at our history, it’s beyond time to do that.

0:12:05.8 Q Commentators like Janet Albrechtsen criticise you for a whole range of different things, but in particular being outspoken the media.

A Who was this commentator?

0:12:15.4 Q Janet Albrechtsen.

A Give me a break.

0:12:19.8 Q And she has mentioned the words 'activist judge'. What do you say to people who take that line?

A Well 'activist', that’s definitely code language. That’s code language of generally conservative people who don’t want anything to change or anything to be different. They – some of them didn’t want Mabo to be decided. Mabo was decided before I was on the High Court. I can’t claim credit or take blame. But I think it was a very great decision and a very important decision for the dignity and justice of our country. Similarly, the laws on Asian-Australians. They lasted till 1966. That is an amazing thing that that lasted well into my lifetime.
We had a policy which was frankly racist. Likewise with gays. I had personal experience of the fact that we had laws which were discriminatory. So to them, I would say, give me a break. For me, ‘activists’ are people who are active for keeping injustice in place and I am not that. I don’t believe that is the common law system. You take an oath to do justice to all manner of people according to the law. But you don’t forget the justice bit. That’s what our system is about: justice under law. Don’t forget the justice bit. I think of the history of the common law, all the books that the lawyers have, all the authority, is of activist judges if you like. Judges who have done something. They’ve solved cases. They’ve resolved them according to changing notions of justice. Justice doesn’t stand still. Look at my life: look at what I’ve seen. Look what Australia has seen of changing attitudes. And we haven’t reached the end of the journey yet. The really puzzling question is, what are the injustices that we don’t see today, that will be seen in 20 or 30 years time? What are we blind to that our future generation, children, will say, how could you possibly have had such an ignorant view of that?

CAMBODIA

0:14:42.4 Q Tell us about your experiences in Cambodia?

A I was invited after the peace settlement in Cambodia, to take part for the United Nations as the guardian on human rights and the reporter on human rights. So Secretary-General Boutros Boutros-Ghali appointed me to be his special representative. So I would go there. I was then in the Court of Appeal and I would go there and conduct missions. I surprised the United Nations officials because I insisted on writing my own reports. Apparently that was not what you were supposed to do. You were supposed to just put a little touch here and a touch there on the reports done by the secretary. But I found that a very interesting experience. Interesting because of the strength of the civil society organisations, the women’s groups, the groups dealing with the AIDS epidemic, which had just arrived. If in the end of my life, I look back and say, was there one thing you did that really helped humanity, it would probably be going to Cambodia and insisting that HIV/AIDS was a human rights issue and within the remit of the United Nations. Because insisting on that, against quite a lot of local opposition (nobody wanted to talk about sex, nobody wanted to talk about sex workers, nobody wanted to talk about condoms). It was all the fault of the prostitutes from overseas who’d come into Cambodia, they would say. But we insisted. I insisted. And ultimately with some support from King Sihanouk, interestingly enough, it was accepted to be a human rights issue. The consequence of that, in
part, and of all the efforts of the Cambodian people themselves, was to cut the rate of sero conversion, which was leaping up. That saved lives. People who have worked for good strategies on HIV and I’m thinking here of Neal Blewett and Peter Baume in Australia – those people are princes. They have saved human lives and also advanced human rights. That’s what we tried to do in Cambodia.

STEM CELLS AND TRANSPLANTS

0:18:51.6 Q You’ve of course done a lot of work on AIDS, but also stem cell research and the genome project. Is that – it puts you in direct conflict with the churches and the hierarchy of the churches?

A The questions about putting me into conflict with the churches seems to elevate my relationship with the churches to a significance which I don’t think the churches would accept and which I myself don’t accept. I mean, I did my duty. When we got a reference from Attorney-General Ellicott, who was in the Fraser government, on human tissue transplants, there was a great hubbub in some circles, including some religious or church circles. But we just went ahead and did our duty in a proper secular manner, reporting to the Australian government. Similarly in international bodies, like the Human Genome Organisation or the International Bioethics Committee of UNESCO. You couldn’t just use your particular religious views, or the expressions of them by your church or other Christian churches, because you’re sitting there at the table with people who are Buddhists, Islamic, Hindus, Confusian in ethics and no religion at all, none of the above. Finding common grounds in those circumstances is a challenge. But it’s the challenge of the world we live in. It’s the challenge of the age of internationalism and international law and above all, international technology. So it was interesting. It was challenging. But we got to results and some of those results have been influential. That is how international law develops, by give and take, by compromise, by trying to find a common ground. Not by just looking over the shoulder and saying, “Well what does my church say about that?” Your church might be very important to you. But it may not be so important in the whole world.

0:00:10.1 Q The churches, especially here in Sydney, the hierarchy of both the Anglican and Catholic churches have come in from criticism from you about their stand on homosexuality. What is it that you take issue with there?
A I don’t think I’ve been all that critical of the churches. You see the way we overcame White Australia in Australia, was when we started to meet Asian-Australians. When they started to become our neighbours, our work colleagues, our friends. Then we really got over our phobias. Or at least many of us did. Certainly, attitudes improved. I think the big problems with issues of sexuality is that gay people were encouraged, even sort of forced and required, to keep very, very quiet and be very, very ashamed of their sexuality. If you do that, then you are, in a sense, conspiring in your own invisibility. Therefore, views can be put abroad that there are very few of these people. That they are wilful people who are trying to force their ‘lifestyle’ (that horrible word) on the rest of society. Whereas, if people get to know gay people and find out they’re not just window dressers and hair dressers. They’re everywhere. They’re garbage collectors. They’re High Court judges. It's not a big deal. All I’ve endeavoured to do is to suggest the need of the churches to look again at the texts. Because texts can do an awful lot of trouble. Take the passage in St Matthew’s gospel, 37:25. When asked to release Barabbas, the rabble in Jerusalem said, “Let His blood [Christ’s blood] be on us and on our children.” Now, those six words were used as a foundation for the anti-Semitism that definitely existed in the church. The Christian church. It led to the prayers for the Perfidious Jews every Easter. And it was a source of oppression of Jews and ultimately, we have to say it played a part in the unfolding of the terrible events of the Holocaust. Now similarly, we’ve got to go back to texts about sexuality and look at them again in the light of the scientific knowledge we now have. Essentially, that’s what I’ve been urging on the churches. My own church, the Anglican church, is in the process of doing this. It’s a painful upheaval of settled thinking. But it’s happening. Other churches just don’t – some of them don’t. Most of them don’t. But not only churches, other religions don’t do so. You can’t ultimately buck scientific knowledge. We now have a lot of scientific knowledge about human sexuality. It’s not a choice. It’s not a lifestyle. It’s part of the individual concerned. The sooner the churches face that and face up to it and get over it and adjust their thinking and re-read their texts, the better it’ll be for everyone. And the kinder it will be and the more loving will be their religion. Which is in my understanding of the Christian religion.

0:03:34.5 Q Do you think somebody like Peter Jensen would ever change from his current thinking, his position?

A Well I don’t know about Archbishop Jensen. I think he might change. Archbishop Jensen is a highly intelligent man and a great teacher of church history. He’s more a church historian than a theologian, I would respectfully think. He’s always says to me, “Thank you for staying in the church, thank you for your dialogue.” He’s always
been open to dialogue. He’s a very intelligent man. I don’t badger him and he doesn’t badger me. It’s a respectful relationship. He has his responsibilities and he performs them, no doubt, as he thinks is right. But I have a life’s experience and an unusual one. I seek to explain that so that good people in the Christian church will come to understand that they’ve got to accommodate to the reality. My partner Johan says, “Why don’t you get over it? Why do you have anything to do with these people? Churches have always been enemies of women, of people of colour and of gays. So have nothing to do with them. Don’t pay any regard to what they’ve written in their turbans, in those centuries gone by. Forget about it. Get over it.” But I’m in there trying to help them to see, by personalising it in my terms of my life. If that helps some of them, well that’s a good thing. It’s good for them and it’s good for society. It’s definitely the way of the future. It’s irrational to have attitudes of hatred and contempt to gay people. It’s just irrational.

COMING OUT ON SEXUALITY

0:05:32.0 Q Why did you decide to publicly come out when you did at the time you did?

A In truth, I didn’t suddenly decide to come out. When AIDS came along, I began to go to funerals of people I had known. Very dear friends who died, were infected and very quickly died. I started to get involved at the invitation of a great international public servant, Jonathan Mann, in the global struggle against AIDS. So I would go to functions in Australia and elsewhere and I was very visibly involved. Anybody at that time who was going to funerals and very visibly involved was saying something. Everyone could see who wanted to see. But ultimately in 1998 or 97, I think, it was, my partner Johan, who said, “How long do you think you’re going to be in public life?” I said, “I’ve got another decade and there’ll be oodles of time after that.” He said, “Well we owe it to the younger generation to be open, honest and transparent.” He is from the Netherlands and they are very in your face people. That’s just their culture. (It’s taken 40 years for my family to get used to it, but we’re all getting adjusted to that.) But he said, we’ve got to do this for the younger generation. So we put it in Who’s Who and it was ultimately picked up and the Canberra Times said, “The biggest non-secret is out.” And that was what it was. It was not a big secret. But we passed the point of it being understated, to the point where, to help people get over their phobias, we were out and about. I think it’s been a good thing. Certainly lots of people, straight people, gay people, people with family members, they’ve said, “That was a good thing you did.” I think
it was a good thing. If people don’t like it, well they’ve just got to examine themselves and examine the science. But, overwhelmingly, I think it’s been a good thing. Good for us and I hope good for Australia.

0:07:58.7 Q Why did you decide to open the Gay and Lesbian Games in 2002?

A The Governor of New South Wales actually opened the Gay Games in 2002. But I was asked to speak at the opening ceremony and, by that stage, the biggest non-secret was certainly out. It seemed to me to be an appropriate way to show Australia is a different country. We are 'under different stars'. We have a capacity in our country to advance. We’ve advanced on so many issues. We’re not perfect. We still make mistakes. We are an imperfect society. But we have – we’ve made progress. In my lifetime we’ve made progress. I wanted, in the presence of all those people from foreign countries, to say we’re making progress here and it’s just part of the reality of life. It was a great occasion. Though as is often the case, the gays weren’t very well organised and they didn’t use the media to the full extent that they could’ve to bring the message to the Australian community and beyond.

0:09:21.7 Q What sort of feedback did you get from that?

A There was the usual adulation and criticism. Some people didn’t like it. I think it upset the usual suspects in some parts of the media. But I didn’t say anything terribly outrageous, did I? I don’t think so. I remember I insisted on speaking in a bit of French, because everything else was in English. I said in English and in French, that our duty as people who had suffered some injustice in our lives and seen its face was to be concerned not just with the human rights of gay people, but with the human rights of all people and especially minorities. And to have a celebration, not just for gays, but for everyone.

File 7

ATTACK IN THE SENATE

0:00:02.0 Q It was about that time in 2002 that Senator Heffernan made his allegations in the parliament. How did you feel when that happened? What were you doing at the time?

A Well I didn’t feel very happy about it, because there had been no notice that anything was about to happen. The High Court Justices had the dinner that night when he was speaking in parliament with the British High Commissioner and his wife. It was held at the court. Then, when I got in at about 6 o’clock in the morning, the phones
were ringing. That was the first I had heard about his allegations. So I didn’t feel that that was a good day in my life and it wasn’t a very good day in the relationship between the High Court of Australia and the parliament. But it was all over within the space of a week. I always knew the assertion about the use of Commonwealth cars was ridiculous and false. So I just got on with my work. I was sitting in a case and it was a case about effluent, effluent in the Brisbane Waters near Sydney and the effect it had on oysters. So I just concentrated on the oysters. That went on and on. The case lasted, I think, about four days. Meantime, the drama was unfolding. But it was all over in the space of a week, as I thought it would be.

0:01:35.8 Q Were you disappointed that the Prime Minister essentially seemed to jump straight on board with the allegations?

A Well, I knew that the Prime Minister and the Senator were quite close allies. I think, during Mr Howard’s down years, Senator Heffernan had been one of his supporters and had contributed to his ultimate rise to the return to the leadership. So you understand, on a human and political level, these arrangements. But you’ve got to think in terms of institutions. And this was not really a good way to go in the relationship between the institutions of the Highest Court and Parliament. Just to become the judge, jury and executioner and not to involve the police or the ordinary authorities of law, is really the definition of the way one should not go about things in serious matters of that kind. However, the Senator gave a handsome apology in the parliament and he suffered a political penalty. I accepted his apology and I just kept getting on with my cases, including cases about effluent and other such exciting matters.

0:03:00.5 Q Did Johan, your partner, feel the same way?

A Well, Johan, you see, he doesn’t subscribe to the Christian belief about turning the other cheek and forgiving your enemies and ‘forgive us our trespasses’ and all that. He just thought that was unforgivable. It was a very, very hard time in his life. He was in Canberra and he – I was trying to raise him at home. But he was sleeping because he drove down and it’s a tiring drive. He was impossible to contact. So I had to go into court knowing that he didn’t know about all this. So it wasn’t a good week in our life. But it was soon over and I don’t think about it really. I don’t allow it to affect my attitude to parliament or to the court. But I hope people have learnt from it about the right way of going about things and the wrong way about going about things.

0:04:12.1 Q Did the ordeal remind you of how Lionel Murphy had suffered, did that go through your mind when Heffernan made the allegations?
A I saw Lionel Murphy during the time that he was under a lot of stress. I saw the impact of the cancer on him. I saw him waste away and ultimately die. I was there in Canberra at that time. So I did see the impact of stress on him. But don’t forget, his ordeal went on for years, years of stress and pressure. You can’t tell me that stress and pressure, over a very long time, doesn’t either trigger cancers or accelerate them if they’re latent in the person, because I’ve seen it in a number of cases. That wasn’t to be my fate. The whole thing was really a storm in a teacup, because of the fact that I knew always. People ought to take a reality check. As though one would use Commonwealth cars in such circumstances. The real damage to me, it’s in the Wikipedia. It’s in the Google. It’ll follow me around. In the old days, you could get rid of all this. They’d be down in the big department stores with the Commonwealth archives. But not now. I will never escape this. That’s just something I can’t change and therefore I don’t worry about it too much.

0:07:11.1 Q So why is it that you recently suggested you would like to go to a dinner party with Janet Albrechtsen?

A I thought that most people reading of that suggestion – in Richard Ackland’s publication – would immediately leap to the conclusion that I was speaking with irony. But it does seem that people have got such faith in what I say, that they think everything I say is the honest truth. I had my tongue very firmly planted in my cheek about that. Just the same, I’ve met many of the commentators who – or some of them who – have been critical of me, at legal functions. We always have a polite exchange. They’re entitled to their point of view. I was there in the High Court to defend their right to have, and express, their point of view and I believe in that. Nobody, except maybe Justice McHugh on the High Court, was a greater friend to freedom of expression than I was.

0:08:15.4 Q During a life in the law, you see people, obviously, at their best and their worst. What have you taken out of that?

A Well the interesting thing about a life in the law, is that every day it was a drama. I didn’t read much prose, many novels, during my service in the Appellate Courts, because every day I would have appeal books before me. Every appeal book was a curious story of human greed or human anger or human mistakes or human suffering. So greed, anger, mistakes and suffering were my daily chores for 24 years in the Appellate Courts. That taught me the variety of human nature, the wonderful people: and the less wonderful people. But they’re all human beings. All part of the world. All part of our society. Judges have to try reach conclusions that are lawful and just. We’re not there in a popularity contest and nor are
we judges according to whether they're good or bad, but according to the law that applies to them. I had a great adventure in the law. It was a wonderful experience. I wouldn't have lost a day in the courts. I never had the problem of falling asleep. Some judges, I believe, had problems staying awake. My problem was hyperventilating. I found every day an interesting experience. Every case was an interesting one. People ask me what was the most important case? I would say the last one. It's the one I remember best. It's a very interesting job, very responsible and you worry about mistakes. But not too much because you're just moving on to the next case.

LOVE AND HUMAN RIGHTS

0:10:21.1 Q  It's very rare to get people in your position in the public light to talk about the importance of love, you have done that. Why did you?

A  About?

0:10:31.8 Q  The importance of love. You've come out and talked about that, why did you do that?

A  I have a view that the foundation of human rights, international human rights, is love. Why do we respect human dignity? Why do we uphold the right to civil and political rights or economic social and cultural rights? We do so because we can see enough in other people to understand and imagine that their lives are sufficiently similar to our own that we should do unto others as we would have them do unto us. The golden rule is actually through all the religions. It's the common feature of all the human belief systems and all the spiritual explanations. So if you think in those terms and you ask what is the absolute bedrock of human rights, of our legal system, of striving to have order? Why are we here today and tomorrow and what does our life mean? Well, love has a lot to do with it and we can't leave love out of it. If you've had a life like mine, with a loving family and loving parents, siblings, good friends and then a loving companion over such a long time, then you're very lucky. The foundation of so much of that is love and I've never been ashamed to say so. Some people would say, "Very Polly Anna-ish and why are you mentioning this, it's embarrassing. Don't go there." That has been hinted from time to time in my family. Well, I say give me a break. This is my belief and I'm going to say it. Often the young people think that that's what it's all about. Maybe it's because I was denied a loving experience during my 20's when most people are having their adventures and their loving experiences, their first ones. Maybe that was a reason. But whatever the reason, Anglo-Saxons
have got to get used to it. I never really kissed my father until I was well into my 50’s. But then I said to him, “Dad, I’m going to give you a kiss,” He looked very disconcerted about this. But ultimately, he’s got used to it. Now Johan kisses him. We all kiss him. He’s got used to it and I think he might even possibly like it.

TERRORISM AND PROPORTIONALITY

0:13:13.1 Q What is your view of the anti-terrorism laws?

A There are a number of new laws that personally, I would not myself think were useful or particularly effective. For example, Mr Thomas, in his control order, was under very strict instructions not to make any contact with Osama Bin Laden. Given that the whole world is searching for Osama Bin Laden, it seemed a slightly excessive term of the order and it was ultimately modified. But that’s the sort of – you can get out of touch with the realities. The world of security forces and sometimes the world of policing, indeed sometimes the world of the law, can get a little bit out of touch with reality. You’ve got to keep your feet on the ground. But we do need – we know we need new powers and we have to respond. You can’t be mollycoddling people who are bent on violence. Especially intolerant people who are doing it in the name of God. That is an amazing phenomenon. So we need the laws. But we’ve just got to keep our sense of proportion. And in fact, the greatest decision of the High Court of Australia, in my opinion, was the Communist Party decision. Not because my grandmother’s new husband was a communist affected by it, hiding the money of the Communist party I assume at the time. Not because it was just Communists. But because it stood up for the principle that in Australia, we punish people for what they actually do. We don’t punish them for their inner beliefs. We don’t take their civil liberties for their opinions, however bizarre we may think those opinions to be. That was done by five judges of the High Court in the majority, with horse-hair wigs, most of whom had a background in commercial law. They decided that case. That was a really wonderful thing when the United States Supreme Court, with the great Bill of Rights, reached the opposite conclusion. I think it was a great case. But in Thomas, there were Justices who suggested that the use-by-date of the Communist party case had been reached. The use-by-date of the Communist party case has not been reached. And we must never let it be reached. It’s important that it stands there as a symbol for Australians and as a warning and guide for the future judges of the High Court.
0:18:30.5 Q That’s just about it Michael. The only other thing I was going to ask is there’s a couple of places where you said things where the sound was interrupted.

A Yes, you go for it.

JOHAN’S VIEW ON RELIGION

0:18:42.2 Q We wondered if you’d do it again? One piece where you were talking of Johan’s view of the church.

A Yes.

0:18:52.4 Q If you could go through that again.

A Johan doesn’t have any religious belief and indeed he won’t come with me to religious functions. He doesn’t want to be a hypocrite. They’re very strange people these people from the Netherlands. They are in your face. They are direct. They don’t go around things as Anglo-Saxons tend to do. When I tried to get him to go around things earlier in our relationship, I gave up pretty quickly. He would say, “Well you’re all very polite you lot. But then you go and stab people in the back,” and there’s a little bit of truth in that. But he says to me, “Why do you take what was written by those old men in turbans, and they were all men, 4000, 3000 years ago. Why do you take it seriously? You’re one of the most intelligent people in the country. Why are you taking it seriously? Get over it. Don’t have anything to do with them. They’ve always been horrible to women. They’ve always been horrible to gays. They’ve always been horrible to people of colour. So leave them alone. They’ll be happier. You’ll be happier. Give it away. And I can see that there may be some rational argument in that. But I’m not going to let anybody part me from my spiritual life and my upbringing and my comfort. I just love the smell of an Anglican church. I just love the music. I love the beauty of the liturgy, the language, it lifts me to a different plain and I think about what life is about and why I’m here and human rights and what I’m on about. But my partner will have nothing to do with it. It gives rise to a very constructive dialogue.

FREEDOM RIDES

0:20:44.2 Q The other one that is difficult for sound was you just talking about the freedom rides, your involvement in that period and what was going on with it?
Jim Spigelman, the Chief Justice of New South Wales now, had a different engagement with the freedom rides in the 1960’s. He was actually on a bus and he actually went up to Moree in the liberation of Moree. My involvement was after events. A number of students from the University of Sydney had gone up to liberate the cinema at Walgett. The cinema at Walgett would not allow Aboriginal patrons to go upstairs. They had to be down in the downstairs part, which was cheaper, but they weren’t allowed upstairs. The students went with them and tried to force entry upstairs. They were then arrested for trespassing on property. The result of that was, they were prosecuted and I was asked, as the pro bono lawyer for the Students’ Representative Council, to get a barrister and to go up there and to defend them. Naturally, I went straight to the top and I went to Gordon Samuels, who was a leading barrister. He was later my colleague in the New South Wales Court of Appeal, a wonderful lawyer. Tremendous aplomb. He subsequently, of course, became the Governor of New South Wales. So we went up to Walgett. We fought the case. A very wise magistrate sat in the case and he found the offences proved but dismissed the offences on the basis of the good character of the accused. Very recently, after my retirement from the High Court, I got a letter because of the publicity of the retirement, from a person who had been the clerk to the magistrate. He told me how the magistrate had really worried about the case and reached his conclusion and what a good man he was and what a good judicial officer. It really taught the lesson, that at every level of the hierarchy in Australia, the judiciary, we have people who are not so good. But most are very serious, thoughtful, hardworking and diligent people. That magistrate certainly was.

OPTIMISM ABOUT THE FUTURE

Q2 Just one last thing, just about the future, are you optimistic about the future.

A Of course I’m optimistic. How could you be an Australian who’s seen a nation which was rather self satisfied, solve (or partly solve) issues of Aboriginal land rights, issues of gay rights, issues of White Australia, a country that has increasingly become a multi-cultural, multi-national society, a much more interesting and vibrant society. I’ve seen many things improve in Australia in my lifetime. If you’ve seen that, then you know it can be done. If you ask me am I optimistic about the world, well of course there are challenges. But that’s always been so. Now we are interconnected by the internet, by fast travel, by modern technology generally and I think that makes it harder to hate each other. I think that will be one of the hopes of the
future. So I have great hope, especially when I'm mixing with younger people, because they are a bit idealistic and optimistic, as I am. I always say to them, stay optimistic, stay idealistic, because I always have.

0:26:49.6 Q Okay well thank you very much for that.

A Okay.

File 8

0:00:00.0 Q <inaudible> 0:00:02.6

PHOTOGRAPHY AND PASSING TIME

A Do you want to ask another question?

0:00:06.9 Q I will. Yes I'm just curious because I know that you take many, many photographs. Where does that interest come from and what do you do with all the photos?

A Well what do I do with my photographs? In the past, I gave them to my slaves, the associates or clerks in the High Court. They would put them away. From now on, I'll just be sitting there putting them away myself and I have to do that. Why do I take them? Well I've met some of the most wonderful people, Nobel laureates and top geneticists. I've met a much more interesting cross section of people than most lawyers. I like to capture them and it's part of my life. I have the most detailed record of the early days of the AIDS epidemic. One day, that will be a very useful thing. In fact, the National Archives are talking about digitising this collection and having exhibitions of them because that will be useful. But why do I do it? Well maybe I'm trying to capture life before it all disappears. It's unfolding day by day and I'm trying to stop it for a moment and capture the moment and capture the people. It's probably my endeavour to rescue events from the inexorable race of time. If I look at my life, the biggest weakness I have to confess to is in the life/work balance. I really have never got that completely right. So if I have this little quirk, well you've just got to forgive me. It's one of my little interests taking photographs and capturing these wonderful people that I've shared my life with. And I'm glad I've done it. Maybe in the future, especially in the future of the High Court, internal photographs that were taken informally, [will constitute] a view of the court that has never before emerged. It'll be quite useful in the future. Probably very embarrassing to some of the Justices. But never to me because I'm behind the camera.
How has the work/life balance affected your partner?

You’d have to ask Johan how my work balance has affected his life. I think, looking as objectively as I can, that it hasn’t been an easy life. He’s sometimes said to me, “I believe I’m in a waiting room, just waiting for you to be there sometimes.” That is the truth of the matter. But he isn’t Robinson Crusoe. This is very common in most top members of the legal profession, and other professions. You’ve got to be very lucky to have a partner who will put up with you and put up with that and put up with the ego of it and of the obsessiveness of it. Not everybody will do that. But in my life, I’ve been really fortunate in my tolerant family and partner.

That’s it, it’s done.

END OF TRANSCRIPT