

This is a transcript of a telephone conversation held between His Honour Justice Michael Kirby of the High Court of Australia and Ms Pamela Schulz Doctoral Researcher University of South Australia conducted on 2<sup>nd</sup> December 2005 at 2-35 pm

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MK... I am quite happy for you to record this interview and to send me the transcript for any minor typographical and any other edits.

PS No problem at all judge thank you very much....What I am trying to do judge for my dissertation is I am looking at the issue of public confidence in the justice system and because you are a high profile judge I think it is important to speak with you because you have been the subject of many stories in the press and so on...I have been doing a media analysis as well of the press and how it has handled justice stories...mostly in particular in how they... how it has related to criminal justice. And basically suggesting that the community has a very skewed view of the justice system if you like... What I am asking you judge is what do you think the community perception of justice is...and how does it present to you as a judicial officer?

MK... In my time in the Law Reform Commission in 1970s and 80s I learned to be very suspicious of intuition. I learned in the Commission (indeed at the hands of an Adelaide lawyer Professor David Kelly, who was one of the original Law Reform Commissioners), to base opinions and judgements on matters such as you've asked me not on instinct or hunch but on empirical studies. Therefore, does it matter very much what I think is the case? The real issue is what the empirical surveys and investigations say to be the case. That will not necessarily be the same as what the media present to be public perceptions. The media will rather grandiloquently present itself as expressing the views of the public. That isn't necessarily so, any more than if the judges expressed the views of the public. My answer to your question is how would I know what the whole of the public in a continental country such as Australia thinks about the justice system or about criminal justice or anything else?

That's a matter that needs empirical investigation. Not just judicial hunches.

PS By empirical studies judge do you mean the notion of people doing quantitative surveys to see how many people feel they will get a fair go in the courts and that type of thing ?

MK That would be one way. I think if you asked the question as open ended as 'would you get a fair deal in the courts?', you would be likely to get an open ended answer. You would need to have much more specific surveys. You would have to have surveys address particular categories or sub categories of the public. This morning I spoke in Sydney at a conference of tribunals, on the subject of self represented litigants.

For that purpose, I read a recent English report on the subject of self represented litigants.

That report had adopted an entirely correct approach for that issue in the justice system. It had gone to courts. It had gone out to trials. It had looked to see where unrepresented or self represented litigants were and had found the statistics. It had gone out and spoken to the judges, to lawyers and to tribunal members. The Investigators also spoke to unrepresented litigants themselves.

Now, all of this is the scientific and modern way of investigating opinions and attitudes.

I am not really very much in favour of simply getting a few judges to think about such things, because they may be perfectly wrong.

For example, with unrepresented litigants, there is a common view in the legal profession that many of them are simply a nuisance; many of them are choosing to represent themselves because they want to be difficult; or many of them have no real basis in law or justice for their complaints.

The investigations in the United Kingdom showed that all of those hypotheses are wrong. I would think they would probably be wrong in Australia as well, at least stated as general prepositions.

Therefore, I think it is important for you in your research to base your research on something better than simply the opinions of a few judges. They might be wrong. It's better to found your research on a more scientific basis rather than just a few opinions of important people.

PS In actual fact I am doing a media analysis of courts as well and uhm....

MK Well, I'm pretty suspicious of that as the media self represent themselves as spokespeople for the whole community whereas often there is simply some junior journalist writing up a story without a great deal of knowledge and not a lot of background and not much experience in life. Yet they have a tremendous power in that way to influence public opinion and influence public debate.

The print media may not now have the same numbers of readers. Newspaper sales may have declined. Yet they do set the agenda for talkback radio. That, in turn, helps to set the agenda for party politics and for the day to day political debates that we have. That then being the case, I might be a little bit suspicious of media editorials and opinions. I would suggest that they do not necessarily reflect public opinion in all of its diversity.

PS Ah I do understand that judge....in fact I have discovered through my media analysis that there appears to be what I call a discourse of *disrespect* for the courts in general and there have been lot of judgments made in the media agenda setting role and that in turn has affected as you say talk back radio so like you I am a little suspicious of the media as well.

MK It is not that that I am suspicious of the media. It's more that I think that they don't always reflect the diversity of public opinion. It's true that some media outlets have taken it upon themselves to attack judges and the judiciary generally. If continued over time this may have the potentiality to reduce the public confidence in the judiciary.

In the old days these matters were dealt with by prosecutions for contempt of court. Nowadays such prosecutions are very rare indeed.

I have asked myself occasionally why these campaigns start? One theory might be that they start because of media frustration over their inability to control the judiciary.

The judiciary is probably the only branch of government that the media has only a small influence upon. The other branches the legislature and the executive often jump to the media tune because the media have that kind of effect on contemporary political debates. By way of contrast, the judiciary which is a little bit more removed from media and its influence, is not so susceptible to media power.

Those who have, or covet power, don't like to see other sources of governance that are not responsive to their influence.

I hope the judiciary is not responsive to media influence. But judges live in the real world. We read newspapers and watch television. However, jumping to the tune is not the role of the judiciary.

The tune we listen to is a tune played in another place. In courtrooms. .. In lawbooks.

PS Yes I am pleased to hear it too! One of the things that has shown quite strongly here in Adelaide is that I have been following a media agenda for about four years more than that now four years and about three months there has been an inch by inch modification of the courts which [appears] is set by media agenda...when you have headlines screaming "This is not justice" "This is not good enough" and so on and this constant discourse of disrespect or disapproval of the courts this is often followed by a politician who saying he will call an inquiry or some form Royal Commission and this then result in a modification of the court outcomes do you have a comment on that?

MK I don't know the cases you are referring to. I don't read the Adelaide [Advertiser] specifically. We do get a press clipping service which sometimes contains Adelaide material. But I don't follow the debates closely. Therefore, I wouldn't really want to comment specifically on what you say.

As well as that, we have to be careful about bundling everything into the one box. There is a legitimate role for the media to criticise courts, to criticise outcomes, to criticise decisions. In the Schapelle Corby controversy, for example, I think the media discussion of such questions, though sometimes driven by considerations of personality infotainment, nevertheless makes us all more conscious of the world we live in. Perhaps discussion makes us more critical of the laws and policies of countries about us.

The same might be said in relation to the laws of Singapore on capital punishment which came to the fore in the debates concerning the execution today of Mr Van Nguyen.

We live in the one world. Media now is broadcast and reticulated throughout the entire world. We are linked as a species and our minds are linked to the internet and in the global media.

All of this is a technological development. It's not going to go away. The Constitution of Australia protects a high measure of public and government discussion in the media and in the community. I support and apply that constitutional doctrine.

So it's important to beware of allowing irritation with particular articles or what seem to be particular campaigns to overshadow the legitimate and beneficial role of media in being critical of particular decisions or particular judicial outcomes. I wouldn't want to say anything that denied the important role and useful role that the media plays in a free and democratic society such as Australia.

PS You would be aware judge that courts around Australia have public information officers, courts media liaison officers and other nomenclature which describes a similar role I think in Adelaide they still call the role Public Relations Manager and the main role seems to be to form a bridge between the courts media. The judges appear to have a belief that the media should report the courts as accurately and responsively and responsibly as possible but yet it is clear from my last four and half years of study the media is not a neutral channel is predicated on profit and often will report the most sensational and most bizarre elements of any matter. To that end, it is almost impossible to expect the media liaison to work as well as perhaps judges would have hoped. Do you have any comment on that?

MK It depends on the type and level of the court.

The High Court of Australia, which deals with important constitutional and other general and legal questions, is the final legal court of the nation. Yet it is astonishing how little coverage there is of the decisions of the court.

The decisions are often very important and quite frequently very interesting. They typically raise important issues of legal policy. There are often dissenting opinions. There are highlighted differences between the justices. Yet precious little of this is covered in the media.

For example, the recent decision of *Combet vs. the Commonwealth* was an extremely important and very interesting case in which Justice Mc Hugh and I dissented from the majority view. We would have held that the appropriation by the Federal Parliament under the Constitution had not authorised the expenditure of large sums of money on the political advertising in which the government was engaged. Yet the media coverage of that decision was minuscule, if you look at it. I would think that your research would do a service if you examined whether the problems that you have mentioned have changed or increased over time? Whether they are specific to particular journalists? Whether they are particular to identified publishing houses? Whether there are any general trends in South Australia and other parts of the Commonwealth, and with the national media? Whether there is any difference between print or electronic media? The latter gives one an impression that it is a little bit more responsible, often because it works in very much tighter regulatory frameworks but also time constraints.

In the High Court we have noticed that, by issuing press statements on the cases that has increased marginally the accuracy of the reports on the High Court decisions. This is because those reports often pick up what the High Court summary says.

However, there is very little serious analytical journalism on the courts in Australia. This contrasts very noticeably with the coverage of the courts in the print media in the United Kingdom and the United States and Canada. We have nothing really like that. It's a sad commentary on the media in Australia that that is the attitude to the third branch of government. It just doesn't figure because it doesn't fit in to the political dynamics of the other two branches of government and the aggressive presentation of those dynamics by the media. The judiciary doesn't easily fit into the notion of infotainment which tends to attract contemporary journalists.

PS I would tend to agree with that actually. It seems to be a very common refrain with other judges that I have spoken to. Now do you any opinion on whether any judicial or other judicial officers such as magistrates and so on... should be in a position to educate the community in a different way rather than just relying on the media to report the courts more effectively and [absolutely] correctly?

MK The judicial officers of Australia play an educational role simply by performing their duties in public courts. By encouraging visits by community groups, including school children. That's quite frequent in Canberra. We get quite a lot of community groups and school groups, in particular, passing through the courts. So that's one thing. They can also take part in appropriate public discussions of the type of questions that you are raising. In the future, it may be possible in particular courts to have real time coverage on the internet or by cable television. That is what happens in North America. I was in South Africa recently, with the Chief Justice of the Massachusetts Supreme Judicial Court. On my return I looked at the internet website of that court. I saw that they had coverage in real time on the internet of the hearings before that court.

For myself, I think that would be a good thing, if courts in Australia had such outreach. However, many judicial officers in this country are very cautious about that because of what they see as a misuse of information of a distorted coverage of trials and legal proceedings by publishing separately only small, and sometimes unrepresentative, selections of proceedings before the courts.

PS Right apart from that there have been a few examples of judges giving interviews to the media in selected circumstances, over here former Supreme Court Justice Olsson, and of course Chief Justice John Doyle and various other Chiefs of Jurisdiction have given selected press interviews... and have occasionally appeared on talk back radio on such issues as everything you wanted to know about the courts but were too afraid to ask type of presentations; what do you think of that and would you like to see more of it?

MK I do think that's a good idea. In fact, when I was Chairman of the Law Reform Commission in the 1970s and eighties, I did so. Indeed, that was something I was doing all the time. At that time that was an innovation. But, nowadays it has become much more common.

Chief Justice Doyle is especially adept at that type of communication. However, not all judges and lawyers are good at it.

We have to face the fact that law is complicated. Ordinary lawyers' brains are hard wired to go into details and the complexity of problems. On the other hand, the media today thrives in a world of simplification, perhaps over-simplification. So somehow you have to get lawyers with the talent to express very succinctly the complexity of very difficult problems. If they don't, the viewer with the monitor will simply switch them off. They will simply turn the dial and get somebody else on the radio. The essential skills are not there simply because somebody is a top lawyer.

Chief Justice Doyle is an exception. I have listened to him, and read transcripts of his interviews. I think he is very gifted and if you have his gifts then this is a wonderful thing and good step to take. I say this because it shows the intelligent, sensitive and committed people who generally make up our courts.

PS Interestingly when we first started doing this in South Australia I was then working as the public relations manager one of the things we discovered was an absolutely thirst in people to understand the law, and to understand how it works and why it works in a certain way. And uh...it was Justice Duggan at the time he was on one morning on ABC radio and uh a chap rang up and uhm...said to him 'look uh... I don't know if you know but ten years ago I appeared before you and you gave me a second chance and also gave me a dressing down in the courts, and told me this was my last chance...I just wanted to let you know I didn't waste it, I'm happily employed in a job and I have received an education etc .etc.' There wasn't a dry eye in the house, but that was the first time I think the community understood why judges sometimes appear to make decisions that sometimes don't go with the retributive model if you like.

MK Justice Duggan's eyes would have been quite dry. He is a very experienced judicial officer. He would have known that you have successes and that, at times, you have failures. But your duty is to act on the law and the evidence made available. The more interesting question is not so much the one you have raised. That is water under the bridge as far as I am concerned. Judges going on the media occasionally or appearing on television or talkback radio, it's not that unusual nowadays. However, much more interesting is the question of whether we should develop our courts so that there is a judge designated to explain to the public in oralexposition, what a decision is. After all, the written judgment or reasons is simply the old way of explaining why the court has done what it has done. We have now moved from the quill pen and the written paper document to a new age in which communication is performed electronically by broadcasting. So the question is: To what extent will the courts move with that development? One way to do so is to enable a network to report the Supreme Court, such as Canada has introduced. Another way to do it is by real time on the internet. We do have the public transcripts of the High Court of Australia. They are published on the internet, on the same day or very shortly after the case was argued. Anyone with access to a computer can access the High Court's daily transcripts. You can look it up and the transcript is there. Sometimes there need to be small corrections. A word is misspelled or a word is misunderstood or a mistake is made.

Yet overwhelmingly the transcript is there. However, it is available to the whole world, because it goes on the internet.

It is for that reason for example, in refugee cases that the courts take great care not to identify the refugee applicant in case the applicant is sent back to the country of nationality. But generally, this is because the transcripts are available in the country of nationality. This is a way to inform the public and to do so in the print medium. But the question I am raising is whether we should have a judge communicator, who will inform the public of judicial reasons and decisions in an oral setting, doing so by some form of summary.

Why should courts alone, of all the communicating instruments of government, stick solely with the print media?

Part of the answer to that is it has been our tradition. Part of the answer is that traditionally judges don't elaborate their written reasons. That's also part of our tradition. But the real answer may be that judges don't feel comfortable expressing in short terms the complex details they've set out in writing. Yet logic would seem to suggest that when you move from print to electronic and to oral communication generally, courts should also do so.

And if that means that one of the judges, or a retired judge becomes a judge with special responsibility for doing so... perhaps for explaining orally the decisions of the courts, that is way we should move in the future.

PS interesting you should make that comment judge because at least two judges that I have interviewed around Australia have made exactly the same comment ...one retired judge from the Supreme Court of South Australia suggested that in the first year after retirement should offer their services as special explainers of the court along the lines that your were suggesting...and uhm it's a way of giving back to the profession if you like.

MK That sounds like something that might be explored. You'd have to be careful you didn't get judges who have been retired for ten years, or a long time. Such judges might by definition, be rather elderly. They might have different attitudes or values or not kept up to date with the law or the legal or factual problems in the case. It's not something to be done without experimentation. In Australia we should study what's been happening overseas.

Change is necessary. We should be open minded enough to consider where that change will lead us in Australia.

PS Well Judge that's been a marvellous interview, thank you so much for your time... before we end today's interview would you be kind enough to give me your name and the date so that I can place this on the bottom of the transcript<sup>1</sup>.

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<sup>1</sup> This is to ensure that all ethical considerations have taken place and the subject of the interview is aware that he has been recorded.

MK I am Justice Michael Kirby. I am a Justice of the High Court of Australia. The date today is the second of December 2005. This is a telephone conversation between my chambers in Sydney and Pamela Schulz speaking to me in Adelaide by telephone.

PS Thank you very much Judge I so appreciate your time...Sir, I will try to get the transcript to your chambers as soon as practicable...it may be shortly either before or after Christmas will that be all right with you?

MK Yes certainly, thank you very much.

*(Tape ends here)*

Pamela Schulz  
*Interviewer /transcriber*