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Recorded interview with
Kirby, M. D. (Michael Donald)
1939-

Interviewer: McGrath, Amy, 1921-

Date of interview: 23 October 1980

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Kirby, M. D. (Michael Donald)
Interviewed by McGrath, Amy, 1921-

Amy McGrath: This is Dr Amy McGrath, interviewing Mr Justice Michael Kirby b-, ah BA, pardon, back ah ...

[Interview Paused]

Amy McGrath: This is Amy McGrath at ADC House, 99 Elizabeth Street, on 23 October 1980, interviewing Mr Justice Kirby for the oral history program of the National Library of Australia. Mr Justice Kirby, would you be kind enough to give me a short resume of your achievements?

M. D. (Michael Donald) Kirby: Well, I don't know if you'd call them 'achievements', but I'll give you my public posts. I'm chairman of the Law Reform Commission—that's the federal, Australian Law Reform Commission. I'm a deputy president of the Australian Conciliation and Arbitration Commission. Ah I have just recently been appointed to the Australian National Commission for UNESCO as a member. I'm deputy chancellor at the University of Newcastle. A member of the Library Council of New South Wales. I'm chairman of an international committee formed by the OECD for the study of the ah movement of data between countries from computers in different countries and I've just been um elected as president of the National Book Council. I think that's enough to go on with.

Amy McGrath: And you, you hold ah degrees from Sydney University?

M. D. (Michael Donald) Kirby: Yes, ah degree, Bachelor of Arts, Bachelor of Laws, Bachelor of Economics and Master of Laws. Master of Laws with first class honours. Ah all from Sydney University. One of my former colleagues, Senator Gareth Evans, has said that I concentrated on quantity rather than quality but I don't know that that's quite right.

Amy McGrath: Mr Justice Kirby, ah are you aware that you share the copyright with the National Library of Australia?

M. D. (Michael Donald) Kirby: Well, you've just told me I do—yes.

Amy McGrath: And do you mind if we make a ah transcription from the tape?

M. D. (Michael Donald) Kirby: Not at all. I hope it's worth it.

Amy McGrath: Well, it's ah a remarkable career that you've had in law for a man still so young.

M. D. (Michael Donald) Kirby: Well, I'm glad to hear you thin I'm still young, you know I turned forty last year and I definitely thought that was the, that was definitely the beginning of the end. I was on the road down after forty. But ah, ah sometimes I feel young. At the end of the year I tend to feel rather ancient.

Amy McGrath: Well, they say you're a workaholic—ah do you get many holidays?

M. D. (Michael Donald) Kirby: No, I was only thinking of that today. You know, I was thinking I should put in an application to the Attorney-General for a holiday but it would probably give him a shock ah unless we have a change of Attorney-General, in which event he would think it would just a matter of routine. I have been ah going over to Paris for this OECD expert group and that's taken me out of Australia eight times in the last ah two years and that's been in the nature of a break. Ah it hasn't really been a holiday. I don't regularly take holidays—I snatch a week or two here when I can but I have, I think, one of the most fascinating jobs in the country and therefore I don't feel that need for a break.

Amy McGrath: As, as the daughter of a man who had a meteoric career in the Commonwealth public service, I'm always interested in anyone else who does um i-, i-, as to whether this is a sor-, one-off situation—your family?

M. D. (Michael Donald) Kirby: Well, I have ah two brothers in the law. One of them is a barrister in Sydney who is himself, at this moment, conducting an enquiry for the New South

Wales um government ah in respect of road transport systems. My other brother became a partner in a large English firm of solicitors and has recently come back to Australia and is now partner in a Sydney firm. My sister is ah, was a very skilled operations sister, nursing sister. Um I think it depends a lot, you know, on chance. I, I don't share the view—which I think a person like Sir Garfield Barwick would hold—that ah it, that ability will come through. I think you have to have a combination of ability and fortune, good fortune. And I count myself as having had ah good fortune and having, through my ancestors, been blessed with some ability.

M. D. (Michael Donald) Kirby: Ah the good fortune that came to me was the offer of an appointment ah at ah an early age—let us be frank—as chairman of ah the National Law Reform Commission. And ah it was that opportunity, without which I would have just continued to be a barrister doing the ordinary routine work of the law.

Amy McGrath: There's an old saying: 'Opportunity comes to those who are ready for it.'

M. D. (Michael Donald) Kirby: Ah yes, but I don't accept that. I think opportunity comes to people who are fortunate enough to get it and ah I think ah but for the chance factor of the government being elected of a particular persuasion—an Attorney-General who wanted me in a particular post. I tried to dissuade him, I said ah when Lionel Murphy offered me this job, I said: 'That's ridiculous, you should get a man who's a sufficient maturity and age who will know ah all the problems and ah have ah the wisdom that age tends to attract.' But he said: 'No, I want somebody who's young and vigorous and who'll have a fresh approach to this.' And ultimately ah I was persuaded to take the job.

Amy McGrath: It's interesting that um, ah the man who was behind it in the sense that Whitlam was there, ah had a father who was in law for the legal preaments,* that his father was in public service.

M. D. (Michael Donald) Kirby: Well, Mr Whitlam was himself ah keenly interested in the reform of the law and I've written an article in the *Federal Law Review,* which ah I wrote after a, a very lavish luncheon with Mr Whitlam about ah two, two years ago. Um, ah in which I tapped his remembrance of the things he'd done in the law and he was always a lawyer. He was through and through a lawyer and he'd been brought up in the Canberra

establishment, his father was crown solicitor, he married the daughter of a distinguished judge—so that he was ah always interested in the law.

M. D. (Michael Donald) Kirby: The other day I had to speak to a group of ANU law students and Mr Whitlam turned up because he's visiting fellow at the Australian National University. And I said, introducing him to the law students, I said: 'Here's Mr Whitlam, through his career, like the thread of Ariadne, has been spun an interest in the law and in its improvement and reform.' He wasn't going to be put down by me in a classical illusion. His response to the students assembled in the class was as follows, he said: 'What the learned judge failed to say was that that thread of Ariadne was leading me to be consumed by the minotaur.'

[Laughs]

M. D. (Michael Donald) Kirby: Ah so they ah, the students ah thought that was very amusing. He's a witty, amusing man, but he's a lawyer through and through and as you say, comes from a background of the law and is interested in it.

Amy McGrath: I was wondering whether ah his, his very ah source, um at the source was ah, ah an additional reason why he thought the Law Reform Commission was necessary?

M. D. (Michael Donald) Kirby: Well, um I think that might have motivated him. I don't know him well enough to say whether that was a factor. But I think in fairness one has to say that the prime force behind the establishment of the Federal Law Reform Commission was Mr Justice Murphy, then Senator Murphy, who was then federal attorney-general. Ah I mean, it's a matter of common knowledge that there was then a degree of tension between the two men. They were both prima donna assoluta and they were both very able ah lawyers and they were both seeking to make their mark on our country and both of them did.

M. D. (Michael Donald) Kirby: Ah and ah in the case of Mr Justice Murphy, his mark continued in the High Court. But um I think the prime force behind the establishment of the Law Reform Commission was probably Murphy rather than Whitlam. Murphy, it was who had the ministerial responsibility for introducing the legislation and setting up the show and then appointing its first members including me.

Amy McGrath: Go back to your family origins—to an earlier time—um what about your forebears?

M. D. (Michael Donald) Kirby: Well, um my father's side comes from a, ah the south of Ireland and they were overwhelmingly Catholic—certainly on his father's side. My mother's side come from the north of Ireland—from Ballymena, ah outside of ah Belfast. And they are overwhelmingly and rigorously Protestant, from Anglican. And they ah were ah I think a very disciplined, talented and educated family.

M. D. (Michael Donald) Kirby: Ah I know less about my father's side for the reason that my father was the product of a marriage ah in early age of a Catholic father and a Protestant daughter ah who were um I think ah came together in a time when there was much more bigotry and so on than there is today. And for that reason ah the, his father was under pressure of his family ah to ah divorce ah my grandmother and ultimately he did and I'd never met my grandfather. I've never met my father's father. Although I believe he's still alive. I have no great desire to meet him because he was not a good father to my father.

M. D. (Michael Donald) Kirby: But ah the fact is that that was the product of the times and of ah religious bigotry and so on and I imagine in fairness I have to say that I was brought up with a, an attitude that ah Catholics were some sort of second-rate citizens. That's an attitude which I'm, I've shaken off but um I'm glad to say that today, I think, there's less of that bigotry around then there was ah in earlier times. But ah that's the background. Irish, Irish North, Irish South, principally Irish North.

Amy McGrath: You've probably suffered all your life about people immediately assuming that you're Irish Catholic.

M. D. (Michael Donald) Kirby: Well, suffered would be a wrong verb, I think. Ah sometimes it's been an advantage but ah, ah in fact people do assume that with the name Michael Kirby that I'm Catholic. Um but I went over to St Patrick's College at Manly the other day and I spoke to the assembled ah priests there. There weren't all that many of them because there's a falling off of people going into holy orders. And I talked to them about the

problems which the law and religious orders were going to face and some of the moral difficulties that were presented alone by biological sciences.

M. D. (Michael Donald) Kirby: But I also told them of my background from Northern Ireland and of the prejudices that still exist over there at this time and that it was a good thing and I think a thing to which we have to pay thanks principally to Pope John XXIII that ah people can get together now and emphasise the points that they have in common rather than the points they have in difference. Looking back on it it was a, a very strange thing but ah it existed into my childhood so it's not long gone.

Amy McGrath: When did they migrate then ah to Australia?

M. D. (Michael Donald) Kirby: Well, in the case of my mother, her parents migrated. Ah my mother was born in ah Victoria but her parents, her father was a journalist, his grandfather was an archaeologist of some distinction with sister who were painters with paintings ah in the museum in Dublin. Ah and ah they were skilful ah, ah talented, educated ah people. On my father's side, um I really know much less because of the ah, I suppose, I say the background that occurred there. But um I ah, I gather they came in about the 1850s. I'm afraid I can't boast that any of my people were convicts or of convict origin, though I imagine some of my critics might sometimes suspect it.

Amy McGrath: So actually there weren't any professional ah lawyers or people involved with politics at all?

M. D. (Michael Donald) Kirby: I've been shown clippings of ah, from Irish newspapers at the turn of century which I think suggest that there were some lawyers in my mother's father's family. But um he was, as I say, a journalist. Ah they were professional, educated people from Ireland, the north of Ireland. I gather they were part of the Anglican ah established Church of Ireland order. But um I was told that ah one of them was ah blessed for having hidden a priest during some uprising. He was blessed for eight generations and I think I just make it. I think I'm the eighth generation.

M. D. (Michael Donald) Kirby: But ah that's something, ah a little bit of ah law that's been handed down within the, the Knowles family ah over the years. But ah there we are. It's a

Northern Ir-, I'm rather proud of my Northern Irish origins. I suppose because I think of Northern Ireland as being, the Northern Irish people as being ah hardworking, disciplined, ah rather um devoted, ah, ah loyal to the crown, all of these things which—at least when I was a boy—were attributes of a good life. That were considered appropriate ah for young people to be taught as good qualities of service and discipline and order and so on.

Amy McGrath: It was probably just as well you feel orientated in one direction rather than the other or you'd be a fairly divided personality.

M. D. (Michael Donald) Kirby: Well, in other respects I might well still be a s-, bit schizophrenic. They say Pisceans—and I'm a Piscean—are schizophrenic people. Torn in one way—romantic and yet practical. And I definitely feel that way. I, I mean ah, in my public office and so on, of course, I emphasise the discipline and order and the like but I have my private personality which ah has other values and I can certainly see that discipline, ah the disciplined life and ah work and so on are not the be all and end all of existence.

Amy McGrath: Perhaps this is the Celtic blood?

M. D. (Michael Donald) Kirby: Well, I ...

Amy McGrath: Will out?

M. D. (Michael Donald) Kirby: Yes, it will out, I suppose. Yes, the Celts, really, people like me, are probably by their blood inclined to be rather uproarious in disciplined and ah, ah pleasure-seeking and yet ah having been grafted on to an Anglo-Saxon community. Ah those of them who move into positions of responsibility take on the English qualities and it probably leaves them to be very mixed up people.

Amy McGrath: Well, it does. Ah it's, it's an interesting thing though that um at the same time ah it would dilute a tendency one does notice amongst the people of pure Irish—Southern Irish—origin to be um fairly critical of our institutions um more strongly [indecipherable]* critical.

M. D. (Michael Donald) Kirby: Yes, I think some people from the south of Ireland receive ah—from their ancestors—a feeling that they've got to attack ah anything th-, that's British, for example. And I, I sometimes get irritated by that—people who feel that they've got to attack ah the Queen and ah the like. But ah no doubt they've been programmed just as I've been programmed. I think I've got sufficient self or introspection, self-perception, to realise that I was influenced. I, I can remember as a school boy at the North Strathfield Public School, sitting on the ah, on the curb of the street when the governor-general went past and waving my little flag. It was a Union Jack in those days—not a ah, an Australian Flag.

M. D. (Michael Donald) Kirby: And then I went Fort Street and on the wall ah I recall every Thursday at school assembly, we would turn: 'I honour my God, I serve the King, I salute my flag.' And then you turn to the flag and there was the Union Jack. And we'd sing 'God Save the Queen,' and you'd get Empire Day medals and Empire Day was an important and ah a happy event and ah, ah this is inevitably going to have a, an impact on, on you that's inevitably going to affect the way in which you see the world and the good qualities and important things in the world.

M. D. (Michael Donald) Kirby: When I was at St Patrick's College the other night, I saw a statue there and I immediately thought: 'Oh, that's Queen Victoria, isn't this wonderful to see the good old Queen Victoria!' Because I've seen p-, statues of her in the midst of India and, in fact, when I was travelling around India I used to get out old guide books and sometimes even look for the memorabilia of British Rule. But then ah I came closer to the statue and it was St Patrick. Of course, I mentioned this to the ah, the principal there and he, he thought it was very amusing that I should expect a statue of Queen Victoria at St Patrick's College.

Amy McGrath: It's ah, your loyalty to the Queen's ah rather interesting considering it's considered unfashionable by many reformers?

M. D. (Michael Donald) Kirby: M'mm. Well, ah I know many of my colleagues don't agree with it but ah I am sure that it's the result of the way I was brought up. I was brought up, as I say, in this fashion of ah, of ah honouring the sovereign and ah my father was always very interested in history and he inculcated in me a, an interest in history. I remember there was a marvellous radio program when I was a boy called *The Royal Crowns of England* and it was

on 2CH, I remember. And it was c-, it came on every week and ah we would listen to it avidly and it went through the kings and queens of England.

M. D. (Michael Donald) Kirby: And this ah influence is bound to sink very deep and to affect you and I think it affected me in the sense that it made me appreciate a certain mystery about monarchy. And maybe this is my Celtic origin coming out. I, I was speaking at the OECD the other day to the Irish representative and we chucked about this and he said: 'Yes, the funny thing is that in Ireland there's a, still an amused interest in the monarchy. Um I think Celts are by nature a romantic, ah poetical sort of people and the monarchy is an utterly illogical institution today. But ah in the midst of tremendous changes in the world, I think the monarchy ah provides ah, a ah certain element of stability and certainty. Links with the past, links above all, with history.

M. D. (Michael Donald) Kirby: And I was always very interested in history. I came first in the state in the Leaving Certificate in history. It's a subject that's always fascinated me and ah I think ah that's probably why I, I think it's a, a useful institution. We also happened to have a Queen who is, I think, a very dutiful, hardworking, good family person and brings a touch of glamour and interest to an otherwise scientific and rather dull world.

Amy McGrath: Ah what um, ah speaking of this, you must have a good memory if you're interested in history and good at it. It usually ...

M. D. (Michael Donald) Kirby: I don't think good historians are only people who have good memories or are good with facts, marshalling facts. I think good historians are people who are looking into causes and effects and analysing ah why things happened and I, I again recall, when I was at school, my teacher in German—Ron Horan—who's now still at Fort Street. He was the deputy principal there.

M. D. (Michael Donald) Kirby: He wrote a, a comment on my term report which said: 'Michael is a good student but will need to become more analytic in thought.' He was then, I imagine, talking of my emotional, Irish—Southern Irish—approach to the world which he was seeking to suppress and cultivate the Northern Germanic approach that he would like to see in his students. But um I think I was quite analytical and ah I certainly enjoyed history because it made me think about ah the influence which individuals still can have on events, as

I believe. And um I suppose that fires an interest in what one can do in the short span of existence to ah make a contribution to ah the world and to one's country and fellow man.

Amy McGrath: What subjects were you actually good at then?

M. D. (Michael Donald) Kirby: Well, I was pretty good at everything to be truthful except mathematics. Um I read the other day that one of the problems is in Australia, we're, we're producing too many people who are good in the social sciences—history and so on—and not enough in mathematics and ah technology. Ah but ah I was good at history, I was good at English, I was ah good at poetry. I still enjoy poetry very much. Ah there is no pleasure I like more—few pleasures I like more—than going to the Aldwych, in London, and sitting there whilst a performance of Shakespeare's being put out by the Royal Shakespeare Company.

M. D. (Michael Donald) Kirby: I find that quite magical. Again, my father had a tremendous influence on me. When I was ah fourteen or so, I was doing for the Leaving Certificate, *Julius Caesar,* and he purchased a record which was the record of the John Gielgud, Marlon Brandon, ah James Mason film of *Julius Caesar.* So that I learned Caesar from a record as a dramatic play and not just as the cold print of a textbook. And most students learnt it. And I can still quote reams of Shakespeare and I often am able to work in expressions and even antique expressions into, into ah observations and addresses and so on. And it, it has a magical effect, it just gives me a little thrill to hear Shakespeare and ah I think, I suppose, this is again the, the ah poetic element of my Celtic origin coming up.

Amy McGrath: But you weren't drawn to theatre ah, ah in any form?

M. D. (Michael Donald) Kirby: Oh, I played in the plays at school—I was generally a villain. They generally gave me a part as a villain. I read in a recent publication that the teacher um asserted that this was because I had a lot of character in my face. But, whatever the reason, I was always cast as a villain and I remember in one play the audience was invited—it was called *A Fruity Melodrama* —and the audience was invited to hiss and um for months afterwards, wherever I went in the school, I was hissed by the other students.

M. D. (Michael Donald) Kirby: In good humour but hiss nonetheless. I think that fellow, John Singleton, whose now a television personality, he was ah one of the ring leaders of the

hissing movement. But there it is, he's gone on to make a million, he's a millionaire today. Perhaps ah there's something in being a, a critic of established order—hissing at it.

Amy McGrath: He could do mathematics?

[Laughs]

M. D. (Michael Donald) Kirby: Yes, well, he could do his sums. But he was an imaginative person. He, he mobilised his imagination in advertising and so on and ah he's ah been a great success.

Amy McGrath: And, did any teachers have a particular influence on you at school?

M. D. (Michael Donald) Kirby: Yes. Many of my teachers had a great influence. I, I often think of school days. My um, in primary school I had a teacher—Mr Casma,* his name was—in fourth class. And he had a ah very strong view about smoking and drinking. Now neither of my parents smoked and ah my, my mother had never drunk any alcoholic ah drink and my father had very little. And this fellow, Casma,* used to spend ah every afternoon virtually telling us all of the evils of drinking and smoking and I didn't ah touch alcohol until I was ah twenty-eight—and I still don't drink very much. And I'm a, a vigorous anti-smoker. I'm one of those types that writes to TAA and complains about people smoking in aircraft.

M. D. (Michael Donald) Kirby: But um, ah so he was an influence. And then I went to Summer Hill Opportunity School where I had ah some very interesting teachers who were aiming at tapping your interest in um drama and poetry and so on. Ah that's where I became weak in mathematics because the teachers were concentrating on other things. At Fort Street I had excellent teachers. George Bowman,* who's now dead. Horan, whom I've just mentioned. An excellent German teacher. My German is still pretty strong because he used to concentrate on oral communication is German. And he was a dramatic, impressive, imaginative teacher.

M. D. (Michael Donald) Kirby: But in those days of course, Fort Street was a highly selective school, picking up the cream of the ah children of poorer parents in Sydney, taking them to the school, educating them in quite as good an education as the best private school

and then planting them in positions of ah influence through the universities in our country. It, it ah, I think was a, a democratising influence on society in that it meant that people from poorer backgrounds could ah move quite rapidly and naturally to ah the positions of power and responsibility.

Amy McGrath: Would you regard yourself as, as from a poorer background?

M. D. (Michael Donald) Kirby: Yes, oh undoubtedly. Ah not to the extent that we ever missed a meal. I mean, ah my parents always ensured that the four of us were well fed. My mother went to work as soon as ah we were of school age. My sister was of school age—she being the youngest. But ah certainly we were never wealthy. We never had a car. We never, we only once went on a holiday—we went on a holiday to Katoomba. And I remember that my poor mother had to work ah terribly hard during that holiday. It wasn't a holiday for her but it was our holiday of our childhood and ah we were not ah down in the boot. I mean, we, we had proper clothes and so on but we never had enough for luxuries.

Amy McGrath: It was a holiday in a hotel?

M. D. (Michael Donald) Kirby: No, they'd hired a house in the valley at Katoomba. It's now quite fashionable again, Katoomba, but in those days it was beginning to be a bit seedy. And it was reasonably cheap and it wasn't far. But it was a great adventure—1951.

Amy McGrath: You weren't campers in any sense?

M. D. (Michael Donald) Kirby: Oh no, no. We weren't ah the outdoor types and I was ...

Amy McGrath: 'Cause that was one way of getting a cheap holiday.

M. D. (Michael Donald) Kirby: Yes, I don't, can't, somehow can't see my ah father—interested in history and all that—ah camping. It's just not his scene. And um he was always the leader of the family and my mother ah was also not the type that would camp—definitely not. We were not camping types. I must confess—though I regret it—that I'm really not environmentally-sensitive. When I was a barrister, the barrister next door used to always go and complain about jack hammers and ask me to sign the ah affidavits to take action against

ah building projects in the vicinity but I, I was perfectly impervious to them. I couldn't hear them and I wasn't going to sign the affidavit because I wasn't disturbed by them. I just get on with my work ah in a sort of single-minded fashion ah quite ah indifferent to the environment.

M. D. (Michael Donald) Kirby: And so it is with ah, with ah the world. I'm really ... I like flowers. My mother always had flowers in the house and I'm very fond of flowers and I become rather partial to natives lately 'cause I have a ah, a friend who ah brings them down from her garden in the, in the Blue Mountains and she brings me um, various Australian native flowers which are particularly beautiful. Especially flannel flower—which is a very sad sort of a flower. But um I'm not really one of those environmentalists, I'm afraid.

Amy McGrath: Does that mean you don't bushwalk?

M. D. (Michael Donald) Kirby: Definitely not. I couldn't think of anything more boring than wandering around the bush. I'm, I'd get lost and I'm afraid I'll probably fall off a preth-, precipice. 'Judge falls off precipice. Famous judge dead.' I can just see the headlines. No, not interested.

Amy McGrath: Were, were you in debating society at school?

M. D. (Michael Donald) Kirby: Yes, I took part in debates. I wasn't a terribly good debater, I don't think because um I ah, I would often get very agitated before the ah performances. This was something quite out of mind with my family who had been ... they were a very close family. We still are a very close family indeed. We were not a sort of a public type of people. We were very private. Ah very northern Irish in that respect. But um, ah ultimately ah ... but I always wanted to be a lawyer, from the very earliest time. I, it was just assumed that I would be a lawyer. I can't imagine why but there was just never any doubt that that was what I was going to be.

Amy McGrath: But it must have shown itself in your ability to argue or ...

M. D. (Michael Donald) Kirby: Yes, I suppose so. I think it was more the expected thing to do if you were good at school and if you weren't good at sport—and I was always, I always

regarded sport as a crashing bore and wasn't the slightest bit interested in any of it—then ah it was a natural thing to, to be in the debating team. And we, we won one of the competitions—ah a team of four of us. And ah so I can't have been too bad but I never thought much of myself as a debater. I don't think even now that I'm all that good in spontaneous talk about irrelevant or trivial or witty or amusing things. I, I suppose I've got too much of a serious mind, a northern Irish ah, um relentless remorselessness about life.

Amy McGrath: Did you argue much at home?

M. D. (Michael Donald) Kirby: Yes—oh yes, we were a most disputatious ah family. But ah always, of course, in a, a loving and friendly fashion. Um and ah but even there I would, ah I sometimes feel I don't really know my family all that well, as well as one should, because I would get off into my room. Alone, locked up there with my books. And ah that began a life which was in the nature of a monastic life of being on your own with ideas, with books and so on and ah so it has been really all my life. Ah I think the law ah encourages that mode of life. It's a life in which you are, in a sense, an extension of ah, of eight centuries of knowledge and ah you then, I think, get to a point where your personal relationships are not, are affected.

M. D. (Michael Donald) Kirby: I think they're affected and ah though I had quite strong ties with my brothers—both of whom became lawyers, I think, partly because of my influence—ah I've often reproached myself that I've never been as close as I should be to my sister who is a wonderful, loving and charitable and understanding person. But um that's just as it's worked out. She was the youngest and she didn't want to become a lawyer. She was mercifully released from that thrall.

Amy McGrath: Have you ever had any doubts since that it was the right choice?

M. D. (Michael Donald) Kirby: No. I can't think of anything else that I would have done. Um I have doubts—I have had doubts—that a disciplined life is the right choice. And um on two occasions I've moated* through central Asia, driving from ah India to England. And that was a time, they were times when I could spend time thinking and reading and listening to tapes and music and reading poetry again and so on.

M. D. (Michael Donald) Kirby: And I was a sort of high-class drop-out. Ah a high-class hippie because I always had my profession to return to and so on. But I was sharing a life with people who had deliberately opted to get off the world. And when people who have never done that criticise those people I'm afraid I always leap to their defence because I am sure that there is much to be said for the life of adventure, interest, movement. Perhaps a relative poverty. But ah the opportunity to read what you want, to not be disciplined by telephones and having to come to work and so on. But in the back of my mind I always knew I was to return to my profession and so I did.

Amy McGrath: Wouldn't a person like that be detribalised in the end and that have some effect on them?

M. D. (Michael Donald) Kirby: I suppose it would have an effect on them. Perhaps they would seek that effect. Several occasions on that trip when I was in Peshawar, for example, I was approached by people who wanted to sell me drugs, illicit drugs, to put into my combie—'cause I was driving a combie. To take it across the border and to give addresses in Europe. And they said: 'All you've got to do is take it to this person in Germany and you'll get this money and we'll hide it in your radio and nobody will look. It's as safe as anything. It'll make all the money. Pay off your trip. It'll be wonderful.' And I, as a non-, anti-smoker, as a non-smoker, an anti-smoker and as a person who was not interested and who had money and so on, wasn't tempted really ah even for a moment.

M. D. (Michael Donald) Kirby: But I often think how young people on that trip could very easily fall victim if they were, had been less wealthy, less self-assured than myself so that I can't get terribly self-righteous about young kids who get into problems in these circumstances because I can see how temptation can be placed. May I say that the first thing I did when I crossed the Afghan-Iranian border, they looked at my radio. If that was the first thing they did—they took it apart. Ah and I was told that quite a number of young Australians were in the prison at Mashhad ah and um I often think that people with criminal, people can commit criminal acts as a result of temptation or greed or just chance and I, I'm afraid that for many criminal acts I can't get self-righteous as many members of the legal profession can.

M. D. (Michael Donald) Kirby: I think it was a good thing that I did this. I lived very much as an o-, very much more, very much more closely to the life of an ordinary young person on

those two trips. One made in 1970 and one made in 1974. In a sense, it's really the only original thing I've done in my life. I don't know of any other lawyer who's done the same thing—taken a year off from practice, done that. Of course with young children and families and so on it wouldn't be possible.

[Interview Paused]

Amy McGrath: When you finished your school course, what subjects did you ah finish up with that led you to do arts?

M. D. (Michael Donald) Kirby: Well, I, I ah was awarded a maximum pass in the Leaving. I got first class honours in history and first class honours in economics. I came first in the state in history, I think I was 20th in the state in economics and I was 23rd in the state overall for the Leaving Certificate as it was then. And um that gave me a Commonwealth Scholarship and what was then called the University bursary which was awarded to people of, who had ah, ah limited means. In other words ah it was something more than, it gave a living allowance of some kind.

M. D. (Michael Donald) Kirby: Ah and ah then I went to the university and did arts. I came first in English One, I remember that. I was always very interested in poetry and one of the regrets I have is that in this job there's not too much poetry and there's not too much time to read poetry. But ah that's why whenever I get to London I always take the opportunity of searching out Shakespeare, which because of these records, *Julius Caesar* was one. My father also bought a set of *Richard III,* ah which is a wonderful play with Laurence Olivier and others and I can spout long, long um passages of that, too.

M. D. (Michael Donald) Kirby: So that um I always try to get to Shakespeare. But um anyway, in the Leaving Certificate I did pretty well. Went to ah, I came second at Fort Street, ah second in the, in the school. And ah then I went and did arts. Ah finished two years of arts, didn't do as well in arts as my, my Leaving Certificate would have suggested. I think I was trying too hard. I was a young, I was younger than most, I came to the university at the age of sixteen. Ah and ah I think I was younger than most of the, I think I might have come at the age of fifteen. Anyway, ah I was younger than most of them and I was perhaps less mature.

M. D. (Michael Donald) Kirby: I didn't enjoy the university, really. I was trying so hard to succeed. Ah and ah so I was always trying to come first and coming first in English One was a sort of prize that I was seeking. When I look back on it, it's really rather ridiculous. Why would one constantly seek to come first? It's just part of a program, I fear. My brothers, both of them, enjoyed university immensely. But ah they weren't seeking the ah, the prize of coming first. They were having a balanced, mixed sort of existence. But ah there we are.

Amy McGrath: Well, it's very young ah to be at a university. It's um an age which hasn't got the maturity ah for the university experience—particularly a large ah anonymous faculty.

M. D. (Michael Donald) Kirby: It shows how immature I was. The first day I went to university I turned up in my prefects ah blazer from Fort Street. I was very proud of being a prefect and I remember a the time—I, I, I haven't thought of this for years—I um, I really was quite upset leaving Fort Street. I'd been ah, I think, successful, popular, ah effective, I'd been on the school magazine, ah I'd been in debating, I'd been in refereeing football which was my one contribution sport. Ah and I was, as it were, a big fish in a small pool and the idea of coming to the university, I looked around that ah place—which was rather different in those days. Looked all very spacious and large and old and very GPS, if you know what I mean.

M. D. (Michael Donald) Kirby: Coming from a public school background, I felt completely lost and I really remember being very upset about it. But it was a sign of my maturity—immaturity as I—that I turned up in the first day with my school blazer. I look back on that now, that is definitely non-U. You definitely don't wear your school blazer to the university. But I was, I suppose, asserting, 'Well, I was a prefect and I want you all to know and I went to Fort School and I was very proud of that. And ah to be frank with you all I'd rather be back there.'

[Laughs]

M. D. (Michael Donald) Kirby: But ah anyway, I went on, at the university, to ah various things and I, I suppose boastfully I thought later—when I was president of the SRC and a fellow of the senate of the university, I, I, I stood in the same spot as I'd stood when I arrived and I thought—'Well, it didn't turn out to be quite as bad as you thought.'

Amy McGrath: 'I came first really in, in a way.'

M. D. (Michael Donald) Kirby: I suppose that's right, yeah. Although I didn't ever do, in academic terms, perhaps as well as I sought to do. Um in the sense that though I got a Master of Laws with first class honours, in the Bachelor of Laws course, I ah got second class honours for the ah, ah on, on graduation. And that was because that is a course that's awarded on the basis of your performance over the whole of the law s-, law course and I dipped in one or two of the little, of the subjects and ah that cost me first class honours. But um, ah in terms of enjoying the university, really I, I suppose it wasn't till the very end when I was president of the SRC and so on that I came to enjoy it. And I think, as you say, that may have been only because by that time I was feeling safe and ah comfortable and effective in the institution.

Amy McGrath: I couldn't help wondering the effect of the opportunity class on this because ah you were in an opportunity school and um there has been criticism sometimes that ah, ah it has this effect on students later on.

M. D. (Michael Donald) Kirby: Well, I, I haven't heard of that criticism. Of course, one tends to think that anything that produced you ... that's to say, anything produced one must be wonderful because look what it produced—me. Ah and I must say that I know that there's a view around that one must dismantle the elitist ah selective school but the question I constantly ask myself is: 'What chance does the little boy or girl at Rooty Hill in Sydney now have to be plucked from their environment and channelled into a school which will in turn channel and stream them into positions of power and responsibility?'

M. D. (Michael Donald) Kirby: Ah and in my day, that was the system of the opportunity school taking you out of your local school and then planting you in your selective high school and moving you on. Now, admittedly that was very unfair for those who missed. Neither of my brothers or my sister got to an opportunity school ah and I don't know if they felt a deprivation. One of my brothers got to Fort Street and another didn't and I know he did feel a deprivation because there was no lateral entry and so on. But for those who made it, the system was a means of picking up kids from the poorer background and giving them quite as good an opportunity as the rich children.

Amy McGrath: But it was said to enhance this desire that they had to be top or high ...

M. D. (Michael Donald) Kirby: Yes. Well, I suppose McFarlane, Burnett would say that that's a thoroughly good desire, that it's the desire that by genetics we, and by opportunity and chance and so on we, we push society forward. But certainly if the choice in Australia is between men and women from the ah, the richer parents in private schools or cases where mothers have been able to go to work to send children to private schools—as I think is increasingly happening. Ah if, if our future leaders are to come only from that class, I think that will be a distinct step away from the democratising from ...

M. D. (Michael Donald) Kirby: Look at the, look at the people who've come from just my school, from Fort Street. Barwick who's chief justice. Ah they're talking now of Ellicott being the next chief justice. He was from Fort Street. Wran the premier of New South Wales from Fort Street. Sir John Kerr, the former governor-general from Fort Street. Um Spender, Evatt, ah all people who took a great role in the ah, the affairs of Australia. And I think it was because they were from less prosperous backgrounds and had a will to win that they became rather pushy, um success-oriented people and those people—if they had the native ability—tended to succeed.

Amy McGrath: Of course one could probably argue that competitive people would out anyway, anywhere.

M. D. (Michael Donald) Kirby: I don't agree with that, I've already said to you that I think that ability is not enough. I think it has to be ability with opportunity. If the little child at Rooty Hill has all the ability in the world—a genius mentality by a freak of genetic development—and doesn't get that chance, that child will end up ah just another ah person in the ordinary workforce.

Amy McGrath: W-, when did you start ah the move towards um the SRC and the senate?

M. D. (Michael Donald) Kirby: Well, it started one day when I was ah away from a law class and one of my friends in the law class who's now a QC—Murray Gleeson—um was a-, ah the class was asked to nominate a year representative for the law school law society and he stood up and nominated me and um I was elected. If I'd been there , modesty and so on would have led me to incline the invitation or rather a fear that I was going to be defeated. But I

wasn't there so that I was ah elected. He often says to, to me in private conversation, he says: 'Look at the monster I unleashed upon the world by my, by my action in nominating you for this ah position.' Because once I was in the enterprise, ah I suppose I ah, I was able to impress other people in various ways and I've got an organisational ability and ah, ah I've got ah some capacity persuasion and ah so on.

M. D. (Michael Donald) Kirby: And ah that would all generally lead on to my moving up to the positions of responsibility in the show and so it was with the law society, I became president and then with the ah SRC I became president twice. I think I'm the only person who was ever twice president of Sydney SRC. I became president of the union and I became fellow of the senate representing undergraduates. I've sometimes wondered why this all happened to me because personally I don't think myself that I'm all that impressive and I know in myself I'm sometimes very nervous and anxious. But somehow or other it always seemed to ah, to happen that way and ah I suppose it's because I was president of the SRC and took on Eric Bone who was a radio commentator at the time, that I got to the notice of people like Neville Wran and Lionel Murphy and that in turn didn't do my career ah elsewhere any harm.

Amy McGrath: Well, it was the era of controversy. Um ...

M. D. (Michael Donald) Kirby: Well, as one looks back ah it seems very tame and mild ah controversy as compared to some of the very bitter battles that occurred later in the late sixties and '68 when the French republic, I think, was shattered by student ah unrest and when Australia was ah similarly affected by anti-Vietnam war protests and so on. But I can't really quite recollect what the con-, controversies of the time were about but I know um there was student unrest and it revolved around the American consulate in Wynyard park, as it was then, down there. And I know there were 30 arrests in one occasion that I was honorary solicitor for the SRC and I don't think we lost a case. We won most without too much merit on the basis of lack of identification by the police.

M. D. (Michael Donald) Kirby: But um there was controversy and, but it was tame by comparison to what came later in the sixties. But it was perhaps the insipient phase, the beginning of, of student activism. Of course students today, in the late seventies and eighty ah, have ah sunk back to a ah, a very deep conservatism as I understand it. Ah no doubt a

response to the, the difficult economic times when their main concentration is to succeed and to hopefully get a job.

Amy McGrath: That seemed to be a, an era of political, political agitation in the universities then.

M. D. (Michael Donald) Kirby: Ah less so when I was president. I must say that it really was after I had moved off the scene in the later sixties that that became more active. It was beginning when I was around. Don't forget, I came to it late. See, Gleeson had nominated me I think in my fourth year and um, ah I came to the, the position quite late for a student. Most of them got in ... well, at the time when I was bitterly seeking to become first in English too. Ah but um I was a fairly mature student politician. But having got into it I set to, to succeed in it and ...

Amy McGrath: Maybe that's the answer to the reason why you became president. You're somewhat older than [some on the council.]

M. D. (Michael Donald) Kirby: I think that ... yes, I think that had a, I think that did have an effect. Ah I mean an older, more mature, ah somewhat pompous ah lawyer is always very impressive to young, impressionable ah engineering students who tend to think: 'Oh, isn't he pompous? He's just like Mr Menzies.'

[Laughs]

M. D. (Michael Donald) Kirby: And um I suppose that did have effect on, on ah my career in student politics.

Amy McGrath: There were demands for reforming the SRC subsequently to that, weren't there—in its ah role with the university administration?

M. D. (Michael Donald) Kirby: Well, I remember when I was there, the main battle was to try and get the president of the SRC on to the ah, on to the university senate. And at that time, Mr R. P. Meagher, who's now QC ...

[Interview Paused]

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M. D. (Michael Donald) Kirby: ... getting off the senate, mainly I rather fear to get me on. Ah but um the um, I stood for an election against Peter Wilenski who later became personal private secretary to Mr Whitlam when he was prime minister. And Wilenski beat me in the election and ah, ah he went on to the senate instead of myself and it was only later that I, I was elected to the senate when Wilenski went to Oxford.

M. D. (Michael Donald) Kirby: But um the agitation of the time for reform of administration was mainly directed at sort of structural breaking down of the secrecy of the senate in its dealings with ah or-, organisations of the university such as the SRC. I remember we used to go before senate meetings to see vice chancellor Roberts and we'd sit in his office and the ash would drop down from his cigar or cigarette on to his ah, on to his sh-, pants and ah he would sit there and have in his hand the agenda of the senate meeting. And I can see in my mind's eye the group of us gathered around anxiously waiting. Of course, when I later got on to the senate, I realised what a lot of trivia there was in the senate agenda. But there it was being guarded as if it were the cabinet's secrets or the state secrets of a country. That was a time when it was more accepted to be secretive in administration and government and university government was just one aspect of it.

M. D. (Michael Donald) Kirby: But later we broke that down and I bought come to the SRC meetings as immediate past president and student senator and I would report to them and answer questions about ah the affairs of the university and it became ah to be a little bit more open and ah less secretive.

Amy McGrath: Did you develop any ah opinions about the later demands for students for participation in, in ah development of syllabus and ... w-, administration.

M. D. (Michael Donald) Kirby: That came after my time really. I, I don't think anybody of my time was demanding that. What they were mainly demanding at that stage was the first step. That's to say getting on to the government body and being involved in the general

policy. The second wave came later and that was the wave for syllabus and staff selection and promotion and so on.

Amy McGrath: But do you have any views about that?

M. D. (Michael Donald) Kirby: Well, ah in my position at Newcastle, I had to think about these things. I must say that um I think students have a legitimate voice ah in matters such as the ability of, of ah people as teachers ah of university students. I'm not so sure about curricula because I don't think, looking back, that I would have been terribly well able to decide what was an appropriate curriculum. I think that's a matter, if not for experts, at least for detail study and reflection and, and so on.

M. D. (Michael Donald) Kirby: Perhaps it wouldn't hurt to hear what students have to say but to actually be part of the determining body, maybe I'm getting old, but I, I'm not sure that I would think that would be appropriate.

Amy McGrath: They even sought to abolish exams, too! Th-, that's been modified, hasn't it, in law?

M. D. (Michael Donald) Kirby: Yes, I don't know too much about what's happened there.

Amy McGrath: Textbooks into exams and so on ...

M. D. (Michael Donald) Kirby: Oh, I'm not against taking textbooks into s-, exams because I think one of the problems with the law is ah the fact that law courses I that you, you were s-, they sought to make you a, a rote-learning machine. That you would have to learn vast masses of the law off by heart whereas in fact, in practice, that is not the lawyers skill. The lawyers skill is knowing where to go to find the law and then knowing how to find precisely what was relevant and then applying it to the fact situation. Whereas we were, they tried to inculcate in us tremendous masses of facts which automatically left your mind instead of inculcating in you a skill of how to find ah material and how to apply it.

M. D. (Michael Donald) Kirby: I think an analytical skill is much more important than a rote-learning which almost inevitably is going to disappear. I mean, the new technology of

computers and the like is going to make rote-learning far less important because the mechanical task of retrieving relevant information is going to disappear and the problem will be one of analysis, application, ah judgement.

Amy McGrath: So it requires a complete reappraisal of education still?

M. D. (Michael Donald) Kirby: Well, certainly in the law, I think, ah learning great masses of information is not the way to train effective lawyers. I'm sure I was not really terribly well-trained by having to learn masses of the provisions of the New South Wales Conveyancing Act, which ah if you paid me a million dollars I couldn't retrieve today when ah I would know how to go immediately to find the conveyancing act and look it up.

Amy McGrath: M'mm.

M. D. (Michael Donald) Kirby: Find any amendments and so on. I think ah s-, ... I, I must confess, I, I never really learned at law school how to use a law library and yet that is a terribly important ah aspect. I, I think I, I never worked in the law library. I used to work up in the public library in the corner there which is devoted to law books. And I never really learned how to ah work the ah, the ah, the *Australian Legal Monthly Digest,* which is the basic digest of legal information.

M. D. (Michael Donald) Kirby: It was only when I was a barrister, ah that I learned how to use that. And that's a shameful and disgraceful thing when one thinks of it. I, I think more concentration should be put on preparing people for ah analysis and thinking about problems and so on than rote learning.

Amy McGrath: Ah, ah you became a solicitor when you graduated?

M. D. (Michael Donald) Kirby: Yes.

Amy McGrath: Not a barrister of any ...

M. D. (Michael Donald) Kirby: No, no, I, I was a solicitor for five years from '62 to '67. And I became a barrister in '67, August '67. I sometimes think that that five years was too

long and that I learned everything I had to learn as a solicitor in about two, two years or so. But ah there it is, that's what I did. I stayed a solicitor for some time. I suppose again that was hesitation to take the jump. Ah to take a jump from the comfortable, certain world in which I was ostensibly a partner in a large and prosperous firm—Hickson, Lakeman and Holcombe—ah which was then very prosperous because it was involved in land conveyancing and I was the con-, I was the litigious solicitor there.

M. D. (Michael Donald) Kirby: So that I had a whole range of very interesting and difficult work and gradually um had the, the um satisfaction of seeing, built up a practice which was ah interesting and different to that of the rest of the firm and profitable. And my partner, Holcombe, I was not a capital partner—I was on the letterhead but not in truth, sharing. He was a generous man and he paid me well and ah in the end he asked me to join the partnership as a capital partner but I decided to go to the Bar and ah so I did in August '67.

Amy McGrath: Do you think that five years has stood you in good stead with the Law Reform Commission?

M. D. (Michael Donald) Kirby: Well, I, I think I would have done better had I gone to the Bar earlier. I think if I had gone to the Bar in '64 or so, I would have possibly had a more varied career at the Bar but ah I didn't and ah I think perhaps the, the thing that occurred ah when I was solicitor was I, I developed certain organisational abilities or a I developed them, I built on them. And that I think is important in this job. Part of my work here is administration. And um I think that barristers don't have to worry too much about administration because they're a one-man band. But ah I, I did learn ah administration perhaps to some extent anyway, and that hasn't hurt me. But if I had my life over again, I would not be a solicitor for five years. I think I would have gone to the Bar earlier.

[Interview Paused]

Amy McGrath: Um after you went to the Bar, you ah, was, that was the period when you actually went overseas twice which w-, in normal terms would be a dreadful risk, a total loss of practise.

M. D. (Michael Donald) Kirby: Oh yes, everybody said that. All the timid spirits came around and said: 'Oh, you must be mad, you're making very good money'—and I was a very big earner at the Bar—'ah you must be crazy to this! Ah you'll come back and there'll be no work for you.' Well, first of all I didn't believe that. And secondly, I thought even if it did happen, well, too bad—I was going to do this because I'd had such a stodgy and ah a predictable sort of a life. And I was going to ah do something a little bit unusual ah and eccentric—ah at least mildly eccentric. Wasn't terribly eccentric because I was, I had all the best of comforts and ah I lived very well.

M. D. (Michael Donald) Kirby: But um so that I went ahead and ah in fact, when I went overseas, it allowed me to do what many barristers can't do, ah it allowed me to change the course of my practice. From '67 to '70 when I went overseas the first time for a period of a year, I did a lot of workers' compensation work. I made a tremendous amount of money but I wasn't getting a lot of variety of work and I thought if I was to succeed ah generally in the profession it would be important for me to get out of just doing the one area of work and try do a variety.

M. D. (Michael Donald) Kirby: But it's very difficult if somebody rings you up and says: 'Well, look, I want to book you for 15 cases in the next week,' to say no on the off chance that perhaps something will come up. So what you've really got to do is ah to turn a page and say: 'Well, I'm going to, I've done this so far and I'm now going to ah pursue other things.' And it turned out that way, when I came back from the first trip, ah I didn't have the slightest difficulty getting work. I still did workers' compensation cases but I did those which were interesting or difficult and I was able to diversify my practice into doing cases in industrial matters and commercial matters and a range of other things which kept me ah intellectually on the ball and gave me new areas of discipline—some of which I hadn't ah had before.

M. D. (Michael Donald) Kirby: And I enjoyed the industrial litigation because that was rather like an SRC meeting, it was a question of power. You were dealing with the um, not with strictly legal issues, but with the determination of ah how long a strike would last and how long people could hold out and what the principles at stake were and who the personalities were and factors of that kind.

M. D. (Michael Donald) Kirby: So on both occasions, and when I came, when I went the second time, I was able, when I came back, to switch into ah very important commercial work and even some constitutional work which was given to me in the High Court. So that I again switched my practice. But ah within six months of coming back after the second trip, I was appointed to the bench. When one looks at my career from '67 to '74, you can take two years out of it. And I went to the Bar at the end of '67, so we've really got only '68, '69 ... '70 was out of it, '71, '72, half of '73 and then half of ah, ah the end of '74.

Amy McGrath: Though someone I think that that period of attachment and ah in other cultures might have been extraordinarily valuable for the sort of work you're doing now.

M. D. (Michael Donald) Kirby: Certainly for the work I'm doing now. And ah I would hope for work to come because I think one of the problems with modern man is that he doesn't get time to just sit back and think and reflect upon the purpose of life and in fact, you know, it was really only on this trip—ah on the first trip and repeated on the second—that I began to look at leaves falling from trees and look at ah poppies growing in the fields of Turkey and ah listen to the BBC programs in the far wastes of Afghanistan and ah inspect ah old, historical ruins in India and ah travel through Eastern Europe and see the different culture there with its ah many weaknesses but some strengths.

M. D. (Michael Donald) Kirby: And so it really gave me a time to think. One of the problems with my job at the moment is I'm under such pressure. I often think I don't have enough time to just stare out the window and reflect and think. But they were two very good years for me and I will never regret having done them and indeed my quandary is how consistent with my present position I'll ever get another chance to do such a thing.

Amy McGrath: M'mm. Ah well, it must have come as a, a tremendous surprise to ah be offered such a astonishing challenge as the Law Reform Commission.

M. D. (Michael Donald) Kirby: Yes, it came in a very funny way. First of all, I was asked to be a judge at the Arbitration Commission. Mr Justice Sweeney who had led me in a number of industrial cases during my second segment of the Bar, he was a very distinguished ah, ah elderly ah judge. He called me to his chambers and said: 'Oh look, I'm, want to offer you

something, I don't know whether it's a, a wonderful gift or a life sentence.' He said um: 'I want to ask whether you'd be interested in being appointed to the Arbitration Commission?'

M. D. (Michael Donald) Kirby: And so I thought about it and ultimately I let him know that I would and I was appointed. And I expected that that would be my career, that I would be getting on with deciding these industrial cases. And I sat for about a ah, a month. But in the meantime I'd been appointed a part-time commissioner of the Law Reform Commission when they were looking around for the chairman. And the one day I came into Temple Court which is ah in Phillip Street—in ah Elizabeth Street. And Lionel Murphy had his chambers as attorney-general in the same building. My chambers were there too because the Arbitration Commission was then there.

M. D. (Michael Donald) Kirby: And we came up in the lift and he said: 'Oh ah, come up to my chambers, I'd like to talk to you about it. I want to ask you if you'd be chairman of the Law Reform Commission.' And by the sheerest coincidence, I had visiting me then, a young barrister who had been president of the SRC in Sydney and who was then living, as he still is, in England—Geoff Robertson. And ah he's been a very successful barrister over there, in England. He's been a lot of big obscenity trials and so on.

M. D. (Michael Donald) Kirby: Anyway, he said ah, I said: 'Well, what do you think about that, Geoffrey? I rather like this job I've got. It's influential, it's decision-making and so on. This'd be a very ... I don't know what that would involve—chairman of the Law Reform Commission.' And he told me something about the English Law Commission, which had been established in '65 and was there for, had been going for about eight years or so. And he said: 'Oh, I think you ought to take it. This'd be a tremendous opportunity—just up your alley.'

M. D. (Michael Donald) Kirby: So I said: 'Oh well, I'll think about it.' And I'd told Murphy that he should get somebody old and wise and grey 'cause I had a rather stereotypes image of judges and chairmen of law commissions. But ah in the end I accepted it. Many people think I was appointed to the Arbitration Commission to pick up the handle of Mr Justice Kirby in order that I could then move rapidly, as I did, into the Law Reform Commission. But it didn't happen that way. Too ah separate and I was appointed to the Arbitration Commission to be a

part-time member of the Law Reform Commission. But ah then ah I was asked to do the full-time job as well.

Amy McGrath: Did it create a furore at the time?

M. D. (Michael Donald) Kirby: Not much. Ah Mr Cameron, ah when he appointed me to the Arbitration Commission, pointed out that there were um, I think he said something like 70 per cent of Australians were under thirty-five. Well, I was then thirty-five. Ah and then ah when I was appointed to the Law Reform Commission, it didn't get much of a ah, of a coverage. Within the legal profession, I imagine, that it was, it was met with a mixture of bewilderment, astonishment and amazement ah for those who knew but indifference for the great majority who would regard a Law Reform Commission as an irrelevant appendage ah for then the institution was virtually unknown.

M. D. (Michael Donald) Kirby: But I'm sure that many of the older judges would have regarded the appointment as ah improper. And looking back on it, I'm inclined to agree with them. I think it, it was a very strange thing to do. I hope that though I've done the job in a way that many of them wouldn't oh entirely agree with and many would have done the job differently. I hope that most of them would at least say: 'Well, we may not agree with the way Kirby's done things and he's a bit of a, a buccaneer and he's ah, he's always in the newspapers and so on. But at least we will admit for him that he's a very hard worker and he's earnest and ah very disciplined and so on. And ah I like to think that most of my colleagues in the judiciary, if they don't agree with me, at least acknowledge that ah this has been a very busy institution.

Amy McGrath: In other words, you feel you've lived it down if there was anything to live?

M. D. (Michael Donald) Kirby: Yes, I, I think that that's probably a good way to say it. I look at my brother, David, now, who is older than thirty-five and I, I think: 'Well, gee, if you had been appointed to the Law Reform Commission as chairman, I would really have been shocked.' My brother's a very able barrister but the notion of a young person being appointed is really a, a very ah unusual one.

Amy McGrath: Except that you were in that wave of the Whitlam era when it was being done more.

M. D. (Michael Donald) Kirby: Yes, it wasn't done all that much. It was done ah, let's face it, ah who was, there was Mary Gaudron, who was younger than I was and myself. I, I can't think of others who were ...

Amy McGrath: Perhaps Elizabeth Evatt?

M. D. (Michael Donald) Kirby: Yes. Well, Elizabeth was, is a few years older than me. Ah gentlemanly behaviour will restrain me from saying how many years older! But ah it, it wasn't, it h-, I think 'a wave' would be putting it too high.

Amy McGrath: I didn't mean exact-, only in the law—I meant in other areas as well.

M. D. (Michael Donald) Kirby: Yes. Well, of course, as you say, Spigelman was appointed head of a department at thirty-one. But it was more the exception than the rule.

Amy McGrath: Uh-huh.

M. D. (Michael Donald) Kirby: Ah and rightly so. I, I don't think people should be appointed because they're young. I think what you've got to do in government in to look around for the right person for the right job. That's infinitely more important than the provision of a statute. What the statute says the power of a body is is far less important than who the people are that, that are appointed. Personalities can really mould and develop institutions far beyond the letter of the statute or the resources of the body.

Amy McGrath: Was the motivation for establishing the Reform Commission here the same here as, as in England?

M. D. (Michael Donald) Kirby: Well, you better ask Mr Justice Murphy that but ah the statutory provisions are very similar—they're to modernise and simplify the law. We have the additional problem of the federal nature of our Constitution that they don't have in England. Um at least to the same extent so that ah the, it was basically, I think, to, to modernise the

law, to consider codification, to consider the improvement of the administration of justice, the delivery of justice, new methods of running courts, ah bringing the law up-to-date.

Amy McGrath: Well, this would be different in one sense in that ah because it's a federation, you don't have the range of ah activity that they do in England.

M. D. (Michael Donald) Kirby: That's partly true. Of course, we have responsibility in the Capital Territory and in a number of our tasks. We have, we have pursued a, a matter in the context of the Capital Territory knowing that de facto it will be available as a model for adoption by the states and that has in fact happened.

M. D. (Michael Donald) Kirby: Our proposals on complaints against police have been adopted for the biggest police force of them all—the New South Wales police. Our proposals on human tissue transplants have been adopted in the Northern Territory and in Queensland and they're under consideration actively in Victoria, they were recommended for adoption there recently and in New South Wales. So that w-, by the use of the plenary powers of the Commonwealth in the Territories, we um are in a position to ah have an influence on the state's legal system.

Amy McGrath: Are, are you involved in um things that have been referred to you by the states?

M. D. (Michael Donald) Kirby: Not directly. Ah as I understand it, some of the tasks ah have been referred to the Commission on the request of or on the suggestion of state attorney-general. But ah under the statute, we can't proceed to work on a project until we have the reference from the attorney-general of the Commonwealth. And so what goes behind his getting, ah his making the decision that we should get the reference is a matter for him. Sometimes we suggest matters for reference ourselves. Sometimes ah they come from within the party mechanism of the party in power. Sometimes they are no doubt influenced by community groups and sometimes by state governments.

Amy McGrath: Well, you speak of initiating in the sense that ah the ACT's a pilot, ah can be a pilot. Um is ah this role detracting at all from the role of Parliament itself on the past or of its appendages in the public service, the solicitor-general, the attorney-general's departments?

M. D. (Michael Donald) Kirby: If the question is whether the role of the Law Reform Commission detracts from Parliament, I would answer: 'Certainly not'. Ah the function of the Commission is to help Parliament and help the executive government to deal with the 'too hard' basket. All of the tasks we've been given have been tasks of either very considerable magnitude—such as our project on the reform of sentencing of federal offenders or project to develop a whole law of evidence for federal courts. Or matters of great controversy such as the reform of criminal investigation or the reform of ah the ah human tissue transplants or whether we should recognise Aboriginal tribal laws. Or matters of, requiring very close consultation with groups throughout the community ah which may not readily be performed or not so easily be performed by departments of state or other public officers such as our task on the reform of debt recovery laws which requires us to go to ah the finance industry as well as to debtors' organisations. Our task on insurance laws ah similarly requires us to go to all sides of industry.

M. D. (Michael Donald) Kirby: Class actions which requires us to go to business and industry as well as to consumer organisations and representatives. So that whether because of the size of the project or because of the controversial nature of the project or because of the need for widespread consultation, I think the Law Reform Commission can do these things rather better than departments of state which have their own traditions or parliamentary committees which tend to be often very hurried affairs.

M. D. (Michael Donald) Kirby: But the aim of the exercise is to provide reports which will mobilise the best talent in the country which will put the ideas for reform through a whole filter of public debate and ultimately present Parliament with a, with, if not the, all the answers to the 'too hard' basket, at least the issues which Parliament can analyse. And our suggestion of the answers, which they can accept or reject, and if they reject they can find their own answers. But the aim is to help lawmakers who are distracted by the political process, to face up to some of the most difficult questions which ah society is facing today and which it has to face.

Amy McGrath: Well, it is, in some aspects, a research organisation. But it, it, does it have, pre-, hearing procedures as well?

M. D. (Michael Donald) Kirby: Yes, ah these p-, this is a distinctive feature of the, l-, Australian Federal Commission. Most Law Reform Commissions don't have a hearing procedure but ah when I was first appointed it, a couple of things came to me. The first was put to me by Sir Laurence Street—the chief justice of New South Wales—he said: 'Don't think everybody likes law reform, that everybody's going to be interested in law reform.' And I knew that was right because a few weeks before I'd been a barrister who hadn't the slightest ah active interest in Law Reform. I had a general philosophical interest but I was distracted and flat out with my cases and no time to consider these things at any length.

M. D. (Michael Donald) Kirby: So Street said to me: 'You've got to realise that people are busy, they've got their own lives, they're not all that interested in law reform, so you've got to help them.' And he said: 'Why don't you try to produce shorter documents, more interesting documents so that it isn't the great hefty tome that hits the lawyer's desk and the judge's desk and he just doesn't have time to read it. So that's why we've produced these very short discussion papers which ah I'll show you and which are in very abbreviated form.

M. D. (Michael Donald) Kirby: We then produce a pamphlet which is in turn a summary of the discussion paper. So instead of great hefty tomes, we produced 30 pages of discussion paper and then a four-page pamphlet with the absolute quintessence of the ah issues involved and of our suggestions. Now of course, that tends to oversimplify problems but at least there's a chance that busy people will look at them, read them and respond to them and so it's been.

M. D. (Michael Donald) Kirby: But the second innovation was that we, I came to the view—possibly because of my own personal originals—that things oughtn't too just be left to the established order of the judges and a few lawyers because I realised that they are really not a terribly representative group of the whole community. They tend to be intensely conservative—ah by and large, with many notable exceptions—but they tend to be a rather cautious, conservative class who don't really keep touch with the lives of ordinary people.

M. D. (Michael Donald) Kirby: So I thought what we ought to do is to try to tap the lobby groups, the ah interest groups, the ah organisations, the powerful ah business and other people involved and as well ordinary people, allowing ordinary people to come forward. So we've had public hearings which are conducting in all parts of the country. We use the media, the broadcasting and television to tell people about the public hearings. We've had quite a

deal of cooperation from the media. I think because they're slightly amazed that here is a judge who will actually appear on the television or on radio and talk about the problems facing the law.

M. D. (Michael Donald) Kirby: By and large, judges have, by tradition, been a diffident lot who haven't communicated about the problems of the law. Ah and ah because of the fact that I've reversed that, I've had a pretty fair trot with public exposure and that's meant we can explain the issues. And we get thousands of betters, we get people turning up at public hearings giving their problems—in the particular area of law we're dealing with—and personalising the problems. There's nothing like anecdotal material to understand what you're seeking to really grapple with.

M. D. (Michael Donald) Kirby: So the, they're the two major innovations. Simplified documentation. Abbreviation of the issues for busy people. And public hearings, use of the media, exposing the issues of the law to the whole community. Ah after all said and done, the law is going to bind the whole community, it's going to have to go to the representatives of the whole community normally to be implemented and it's partly a politically-wise act because it insulates the politician against the shock that so often with Royal Commission or reports comes. When suddenly on to the table of the politicians comes a final report, they've never had a clue as to what was coming, they haven't had these discussion papers—and other documents. The debate is cold, ah and then the judge will normally not sit there and answer questions and explain what he has said—Mr Justice Fox in the uranium enquiry, wouldn't answer questions when he delivered his report. And I think that might have been do with the recent ah report on drugs.

M. D. (Michael Donald) Kirby: My own view is that in matter of high public policy, if judges aren't willing to answer and explain and answer criticism and ah take people with them, then they shouldn't be doing these policy issues—they should stick to the court room.

Amy McGrath: It's a, a very interesting innovation because um the initiative for legislation always used to come via the representative of the people—the elected representative people—and the parliament itself, didn't it?

M. D. (Michael Donald) Kirby: Ah well, not always. I think it, it very often came from the bureaucrats who were keeping the country going whilst the politicians played their game. I think ah that one of the problems today—partly as a result of short parliaments is ah, and often shorter than three years, I think our national average like two years and two months for federal parliaments—is that politicians today are more interested in the game ah and in the sport of electioneering than they are in the determination of issues which have to be solved.

M. D. (Michael Donald) Kirby: Ah Gordon Reed put it well in a recent article in *Quadrant,* he said: 'Parliament is a weak and weakening institution. It's weakening because it's controlled by party whips, it's run by bells which ring the politicians into a sort of boarding school ah life.' Ah and ah it is an institution which is always conducting a rather superficial election campaign. Instead of really coming to grips with the decisions that have to be made on very difficult moral and social issues, there's a tendency to trivialise and su-, oversimplify issues and to render them into today's media headline ah of controversy and ah, and dispute. And I must say I have a lot of sympathy for what Reed says. I think we really need to put a vacuum cleaner through our parliamentary procedures ah because—as you'll have gathered from what I've said to date—I am a believer in the wisdom of the common man.

M. D. (Michael Donald) Kirby: I am from those origins myself. I believe in the ultimate wisdom of common people, ordinary people, laymen. And I'm suspicious of ah the expert and I think that ah Parliament ought to be the organisation of the ordinary man and woman of Australia but ah unfortunately it's ah, it's, I believe, a weaken-, weakening institution. As Reed says, it's lost power to the executive. The executive in turn has lost power to the prime minister and the prime minister is very much dependent upon bureaucrats.' And um I think this is a serious ah development which weakens the democ-, democratic forces at work in our country and strengthens the elitist forces that are at work.

[Interview Paused]

Amy McGrath: Um I was taught there were three arms—the judicial, the executive and ah the Parliament. Which, which arm would you belong to now?

M. D. (Michael Donald) Kirby: Well, on any account, I'm a member of the executive arm because as a deputy president of the Arbitration Commission, I'm not strictly a judicial

officer, I'm a um, um member of a body which is not judicial—the Arbitration Commission. Though I'm given the handle of 'Mr Justice' under the act. Ah and this Commission, it's part of the executive government, it's an advisory body but I like to look on myself as um being advisory also to Parliament because our reports under the act have to be tabled in Parliament.

M. D. (Michael Donald) Kirby: The attorney-general can't just keep them to himself, and we have many supporters—ah on both sides of Parliament, oh ah, in all parties—ah and I like to think that this body is, as it were, planting in Parliament good ideas which can be taken up by ah interested members on both sides of the political spectrum who can then harass the executive government and its bureaucrats helping it ah into doing ah things which we will be ah, ah reformist so that we have, as it were, our secret allies in Parliament and our open allies in Parliament because our reports are not just the ah, the plaything of the executive government. They must, under the act, be tabled in Parliament and then they become a public document.

M. D. (Michael Donald) Kirby: I also like to think that I uphold the traditions of the judiciary, ah traditions which I generally accord with. I ah try not to speak out on matters that have got nothing to do with law reform or with the work of the Law Reform Commission. Ah I limit my public observations to those things which are relevant to what I'm doing. Ah and um I am conscious of the need of most judges to be the hard workers working anonymously and quietly and without fanfares of trumpets. Ah I don't know that I would agree that a judge should get on the television and explain why he convicted ah this or that offender or gave this offender ah so many years gaol or um why he awarded so much money in compensation.

M. D. (Michael Donald) Kirby: I, I'm not sure that I think that is appropriate. I think that might not be an appropriate function for judges. But um I try whilst using this office to raise public discussion in the matters that are assigned to me, ah as far as I can, to uphold the judicial status because I realise it'd been built up by hard work of hundreds of earners to diligent honest and honourable people over centuries and I ought to be rather careful that I don't do anything in my public activities which will ah diminish that office.

Amy McGrath: In these hearings, are you the only one conducting them—is anybody sitting with you in the form of experts? I noticed that you recommend this for certain judicial

procedures in the future—that experts sit with the judge. Do you have them for your hearings?

M. D. (Michael Donald) Kirby: Well, in our hearings, we have other um commissioners sitting with us. And lately we've taken to having state colleagues who are enquiring into similar matters. We invite them to come along and sit with us too. But it's really only the commissioners who are sitting. We don't sit on the bench. We sit down at the Bar table ah so that laymen and ah people who are not used to this sort of ah circumstance, won't be too intimidated by it. We want to get it so that they will feel ah able to come forward and give their point of view.

M. D. (Michael Donald) Kirby: Obviously we don't grow, we don't ah have ah any formalities. It's still a somewhat frightening thing for an ordinary citizen. I think many lawyers don't appreciate the fear that exists in ordinary people going to court. When I was a barrister, I always used to take time explaining to people where the judge would be sitting, what the court would look like. Um what they should do when they take the oath and so on. And I think many lawyers don't really realise the, the um fright and fear that it exists in the mind of ordinary laypeople coming into a formal setting—they're not used to it.

M. D. (Michael Donald) Kirby: But um we don't have experts sitting with us in the sense that ah we, we have on occasions had some of our consultants come along. One of the good things we've done is to assemble in every one of our references a team of about 20 or 30 consultants. These are the, the top talent in the country of the discipline that is relevant. In human tissue transplants, for example, we had some of the top kidney transplanters, top anaesthetists, a professor of anatomy ah and a moral theologian, a professor of moral philosophy, a Catholic theologian, a Protestant theologian. And we would get this team of consultants sitting with us and occasionally a consultant would come to the public hearings and sit, generally for his own interest. But normally it's just the commissioners and we try not to make it too intimidating. We try to make it a small, low-key thing that isn't too frightening to the people who come along.

Amy McGrath: Well, obviously they'd have to be voluntary on the part of the consultants because they ah wouldn't be subpoenaed in any way.

M. D. (Michael Donald) Kirby: No, in fact, it's been one of the good things that ah the consultants ah have been willing to serve, as we've found, for no fee. We originally had a budget of $30,000 a year for consultants but that was cut back to, I think, $3,000 a year—it's now six. And that is obviously nothing when one thinks of the top, talented people that I've just mentioned. So that we've had to invited people, generally, to come along as consultants. We will pay the airfare if they come from other parts of Australia and we'll give them a brown bread sandwich and a glass of orange juice at lunchtime. But ah that's all.

M. D. (Michael Donald) Kirby: But the good thing is that in, I think, hundreds of Australians of the top rung of the various disciplines of our nation, have been invited to come along and with one exception only, a judge, they've all agreed to come along and ah serve for nothing. So the spirit of national service isn't dead if people know that they're sitting down with colleagues in a practical endeavour to improve the laws and that it will probably lead on to the improvement of the legal system and thereby of society.

Amy McGrath: Is, does the um English Law Reform Commission have similar procedures to yourself?

M. D. (Michael Donald) Kirby: No, but I was over in, I was invited to turn up a week ago when I was over at Paris for the OECD at a seminar which was held at Sunningdale ah in, in England for the purpose of speaking to the, the secretaries and undersecretaries of various English departments about the question of processing law reform. It was mainly organised by Lord Scarman for the English Law Commission, the Scottish Law Commission and we talked about our procedures. Ah and there was a close questioning of our procedures—of public consultation and so on.

M. D. (Michael Donald) Kirby: They don't have it in England. I think they're a less democratic country. I think they're really less concerned about what ordinary people think and they're much more used to everything, all power coming from London. We're a more decentralised country with ah the established capitals of the states and so on. And therefore perhaps it's more use usually in our country to do a thing like this. But anyway, they were interested in the notion of a public consultation process and ah I think they may experiment with it in the future.

M. D. (Michael Donald) Kirby: Lord Gardiner urged Lord Scarman to do it and Lord Scarman has said that. But his fear was that people wouldn't turn up. And if you simply put a minor advertisement in the classified ads, people won't turn up. You've got to be willing to go out on to the media and explain what's about and what's happening and say that this public hearing is occurring and it won't be in a formal way and in, to some extent, you've got to orchestrate and we, we don't hesitate to do that, we write to the people who write submissions when they read about it or see it and we invite them to come along. We say: 'The public hearing will be hear, would you come along?' And the press come along and they hear what the lobby groups have to say about our proposals.

M. D. (Michael Donald) Kirby: Ah the television comes in and I always give them permission to film the proceedings for a period so that they'll inform citizens that this is the way in which we're consulting. In the United States, this is a common place. It's done by c-, congressional committees. And I think if our parliamentary committees had had the same initiative in Australia, they would have done it long since. They do meet but they don't meet in the same public way. They meet ah rather um privately, they tend to be much more formal. They're very conscious of their dignity as I've sometimes seen. Ah I think ah we have taken initiatives which in America are taken by the congressional committees but which ah in Australia haven't really been taken. Our parliamentary committees—in their enquiries—tend to be very low-key.

Amy McGrath: In, in that sense, I think you might have made a rather important point. That ah you have ah a political function, function that's implicit in the sense that ah, in this era of the last 25 years, the Marxists in this country have often attacked ah the judicial system as being antiquated and biased in favour of the establishment. You may actually have created a body that, that ah answers that argument.

M. D. (Michael Donald) Kirby: Well, don't forget that I'm not really here as part of the judicial system. I'm, I'm really on the sidelines and I think basically as part of the executive government advising the cabinet and the, and the Parliament. But ...

Amy McGrath: Well, I think the fact that it's ah, it's exist-, in existence and working um reassures people that ah the whole thing's not static.

M. D. (Michael Donald) Kirby: Yes, you've got to be a bit careful here that we don't get into the business of cosmetics. That I'm not put forward as the token radical judge to assuage those who think that the judiciary is the um, the protector of the establishment. I think ah recent tax avoidance cases demonstrate to my satisfaction that many ah members of the judiciary could be said to be protectors of ah an establishment. And in fact, of course, the law is a very establishment sort of a, a discipline. There's no getting away from the fact that, with many exceptions, the law is a conservatising force. It is that which protects and upholds the rights of the status quo and often speaks to this generation in the language of the rules and attitudes of the previous generation 'cause it takes time for the law to be changed.

M. D. (Michael Donald) Kirby: But um I, I think—if I can say so—that many judges have come to think I play a useful role, partly because of this cosmetics argument. They think: 'Well, there's that fellow, Kirby, he makes a great fuss and he's always in the newspapers and he's had a dream run with the media and they think he's wonderful. But ah maybe it's not too bad to have one of us doing that, ah standing out into the media, ah talkback programmes and so on. We wouldn't want all of them to do it but perhaps one of them can be afforded and perhaps it's even a good thing because it makes people think that ah we're moving with the times.'

M. D. (Michael Donald) Kirby: I think there would be some people in the more conservative groups in the law who would believe that. I like to think there would be others who perhaps have even been brought a bit along by my activities. Who would think: 'Well, ah it wouldn't be appropriate for a judge sitting in court to do what he's doing, but it is appropriate for him to do it. And whereas at the first we thought it was a bit astonishing that he should turn up on the Caroline Jones talkback programme, now we can see that the nature of the things he's doing and the controversies he's engaged in, that it's important to involve the community and to talk about the problems of the law and to raise the expectations of reform.'

M. D. (Michael Donald) Kirby: Because I think, part of this public activity is a political activity. It is one of raising the temperature of the water. Making it more difficult for politicians to ignore the problems. Making it more difficult for the lawmakers to ignore the reports when they're produced. Building up the expectations that society and its laws will be

changed so that ah I'm not ah blind to the political aspects of what I'm doing. It's not party politics but it's just part of the political process of lawmaking, law improvement.

Amy McGrath: Yes, I was taking—for another point of view—I was taking point, not from the point of view of the legal profession about the political implications but the, the public ah who ah I think, think the fact you are a public performer um is the very thing that um is so valuable. That the, the um, the creative aspect of what you're doing—'cause it's been shrewd.

M. D. (Michael Donald) Kirby: M'mm. Well, it's nice of you to say that and I hope that there's a grain of truth in it but I don't deceive myself that in the end, what matters, is partly how many laws I get reformed. And you can have all the cosmetics and all the public appearances and people feeling better but if you haven't succeeded in persuading the bureaucracy and the lawmakers to change the laws, then to a s-, in a sense, it's all a shimmerer and things have remained very much as they were. And there is that danger and has to be frankly acknowledged and I think faced up to and that's why I've been trying to concentrate—with the help of some colleagues and friends in Parliament upon trying to find institutional arrangements in Parliament that will receive our reports and will process them in a routine way.

M. D. (Michael Donald) Kirby: But apart from that, other people have said to me—including ah some rather discerning people—that even the public performance, even raising the professional expectation of reform. Even raising the respectability, if you like, of law reform and the fact that it is part of the lawyer's concern to be concerned about—ah as part of his professionalism—to be concerned about the state of the law. That this in itself has an educative function. That the coming generation, especially, is of the view that it is not just the lawyer's function to blindly administer the law as it is and not to question how it arose or whether it's apt for today.

M. D. (Michael Donald) Kirby: That it is part of the lawyer's function to be concerned with the state of the law he administers. Because sure as eggs, the lawyer is blamed for the law when it's wrong or hard or out-of-date or unfair and ah, ah it's been said to me—and I, I do hope this is right and I hope that people in the future will feel that this is right—that ah one has rai-, that I've, I've had some influence in raising the respectability of law reform and the

acceptability of ah the, the duty of the profession and of the Parliament and of us all to improve the legal system.

Amy McGrath: There actually have been a number of new laws enacted though, haven't there?

M. D. (Michael Donald) Kirby: Oh yes, we've had our successes and when one looks at the lamentable history of action on royal commissions and committees of enquiry in other countries, we haven't done too badly. Ah in fact, in a number of very controversial matters, we've had Parliamentary action taken on our reports. But um I won't be content if I leave here without some routine mechanism established. Lord Scarman says: 'The genius of English-speaking people is their ability to reduce controversy to a routine, normally a committee.' Ah and in a sense that's what the Law Reform Commission is, it's reducing all these areas of controversy and conflict into a routine institution which will feed reports and proposals and draft legislation to Parliament.

M. D. (Michael Donald) Kirby: But it seems to me the problem with our act is that is silent on what happens after the report goes to Parliament. It's then over to the bureaucrats and the law makers. And one of the tendencies I've noted is that once we've gone through the most agonising painful, lengthy process of consultation with all aspects of the community and all aspects of business and industry and bureau-, bureaucracy affected, our report then goes to the minister who refers it to his department, who then refers it to what is called interdepartmental committee—an IDC—often of people who are of the lower ranks of the department because the busy people can't sit on them. People who don't have a sense of urgency and often have no motivation for reform. People are often only too content to let things be. People whose principle obsession is frequently the protection of their bureaucratic em-, ...

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Amy McGrath: ... Amy McGrath, interviewing Mr Justice Michael Kirby.

[Interview Paused]

M. D. (Michael Donald) Kirby: But only the interest groups of the officials, the official point of view and ah all of these factors conspired to make for a more conservative, cautious, ah and ah even obstructionist approach to law reform. Ah the chairman of the English Law Commission—Sir Michael Carr—said recently that a key person in a key department can hold up indefinitely a proposal for reform. Just because he disagrees with and you could have ah gone through the whole process of consultation and talked to everybody and yet the whole thing can be held up.

M. D. (Michael Donald) Kirby: And now recently we delivered a report on insurance contracts. We pointed to the large numbers of brokers in Australia who were going ah, going bankrupt and ah not paying their debts to the insurers. Some of them escaping the country. Ah going into liquidation. Ah and we suggested that there should be a limited form of regulation. Ah we did that after we had a team of consultants from all branches of the insurance industry. Thirty of them in all and from consumer groups after we had a discussion paper and a pamphlet distributed. After we considered hundreds of submissions. After we'd sat in all parts of the country. After we'd held seminars in all parts of the country. Ah after we'd consulted here and overseas, the very best talent, we formed a view and we put that in our report with draft legislation. A statement of the treasurer was: 'This will now be sent to ah the insurance industry, to the department to consult with the insurance industry and to ask the treasury to put forward options for action.'

M. D. (Michael Donald) Kirby: Now it just seems to me that if one—ah though I, I must acknowledge, of course, the right of ministers to be independently advised—the repetition, often to lower level, of the process of consultation and often with people, I would think, of lesser intellect ah to consider these difficult problems. Certainly often neglecting points of view in the community which we seek to ah, to find you and to balance ah against ah the

orthodox or official or governmental point of view. Ah this spells the potential for inaction and inertia.

M. D. (Michael Donald) Kirby: And I just detect that this is a growing problem and I, I think the only solution to the problem is to harness the interest of those members of Parliament on both sides. Good members of Parliament who see it is as necessary for the Parliament to be staved up and that bodies like the Law Reform Commission can provide help to Parliament to grapple some of the difficult issues and ought not to be frustrated by a rerun at a lower and lesser level by ah people who have often a somewhat biased point of view.

Amy McGrath: Is that what you mean by parliaments being not well-geared to deal with the development of the law?

M. D. (Michael Donald) Kirby: Well, it's partly that. I think the problem with parliament is the tremendous complexity of the legal developments, the great forces for change, the fact that things are happening so fast. The fact that the time cushion for change is not there—especially with technological developments, not only in the computer area but in the biomedical area. Things are just happening too fast. Our parliaments are, are busy institutions dealing with vote-catching issues and many of these are issues that won't catch votes. They may even lose votes. And yet they're not going to go away.

M. D. (Michael Donald) Kirby: Women are now carrying surrogate babies. The potential of human cloning is with us. Ah artificial insemination is now widespread. The legal problems are not being addressed. And, and all of these are things upon which Parliament is not really ah, ah well-geared both because it lacks the expertise, it lacks the time, our federal Parliament in particular rushes in and rushes out of Canberra in busy planes and ah what is needed is an institution that can help them. But that institution can in turn by frustrated and negative if the reports that ah emanate from it are then turned over to people who don't have a sense of urgency of reform facing up to the hard troubles and who on the contrary have a tendency to think that the best way of the bureaucrat's life is to avoid ripples. By all means ah avoid causing any trouble and the best way not to cause trouble is to nothing.

M. D. (Michael Donald) Kirby: Parkinson said this very well. He said: 'There is a science of, of commentology and the persistent procrastinator can always resist the, the would-be reform.' And his first question is always: What is the life? How old is the reformer? How old will he last? How long will he last? Because a persistent procrastinator by the use of commentology can always defeat according to Professor Parkinson the, ah will be reformer. Unless the reformer mobilises the ah modern means of communication to put ideas into key people's minds and to ah marshal the ah, the community and its representatives in an effective way. And that's the business I've been in.

Amy McGrath: You say the challenges are unprecedented at the present time, um is this theory you mean or something else—the, the technological change?

M. D. (Michael Donald) Kirby: Well, ah I, I think there are at least four major forces for change in society. The first is the ah growth of government. The size of government, the importance of decisions within the bureaucracy. Ah the complexity and ah their, their significance at all times in your life. This is something that's really come since the Second World War but ah it's a feature of all western communities. Efforts are made to cut down on quangos and to cut back on government service and so on. But basically, this is a phenomenon of the interdependent community. So that's the first force. The second force is the growth of business and the complexity of business today. The modern cred-, credit community. Ah the modern insurance c-, industry is, for example, a consumer insurance industry. It's not the old industry of insurance between equals.

M. D. (Michael Donald) Kirby: Ah mass production has changed the relationship of manufacturer to the individual. You mass produce a car with a defect, you're going to mass produce problems for the law and yet the law insists on dealing with each case individually and that's why we've been asked to advise on whether we should have class actions or representative actions. The third force is the force of changing moral attitudes and social and ah, ah attitudes. The question of the family, the Family Law Act is a reflection. The issue of so-called victimless crime. The question of pornography, people's attitudes to ah prostitution and homosexuality and so on.

M. D. (Michael Donald) Kirby: These are things that have changed radically in the last 10 years in Australia. And the law remains often very much as it was 10 years ago. Society has

changed, attitudes have changed. And in the distance between attitudes and the law, there is a chance for cynicism about the law, there's a chance for its intermittent, unjust effect on particular individuals and there's a chance, to be frank, of corruption on the part of law enforcement officers. So that's the third force. And the fourth force is this impact of science and technology. It's the one that interests me most of all. Ah we see it in just about all of our tasks here in the Law Reform Commission, the impact of computerisation. Computers speaking to computers in different countries via satellite is the matter that took me to the OECD in Paris.

M. D. (Michael Donald) Kirby: Ah the impact of ah biological ah sciences can be seen in our task on human tissue transplants. The ah changes in ah, ah human biology ah are going to create tremendous problems to law. When I was at St Patrick's College I told them there. I said: 'Never has there been a time when society needs churchmen and theologians and moral philosophers to give us guidance and to talk out clearly about ah what ah the issues are at stake and that this is an exciting time to be in that business. But ah I only hope that the excitement spreads to Parliament because there are very many legal problems that are being laid down and in respect of which our laws are either irrelevant or are silent.'

Amy McGrath: Does, is there more law ah involving the individual than there used to be as a result of socialism, ah socialist proclivities?

M. D. (Michael Donald) Kirby: Well, I think ah whether a government is called socialist or not socialist, the fact is that the making of laws increases the pace. I think last year—1979—was the first year in which ah the lawmaking passed the magic one thousand. More than a thousand acts of Parliament were created ah by the parliaments of Australia. That says nothing of the subordinate laws, the regulations and ordinances and by-laws and so on. So that's a lot of lawmaking and whether it's a Liberal, National Country Party or Labor Government doesn't seem to matter all that much. There is still a lot of law being made. It affects many people, precious little is done to teach people in school or elsewhere about the law and yet we're all deemed to know the law and to abide by it. So ah lawmaking doesn't seem to be a function only of socialist or Labor governments, it's just a feature of the modern community.

Amy McGrath: You um have a point of view about law of, the law of evidence and court proceedings which is fairly um drastic in terms of the British practice.

M. D. (Michael Donald) Kirby: Well, we have a reference which is the last one we've received to design a law of evidence for federal courts in Australia. Um and in the course of that, we've had to look at what we have a law of evidence for. Why is there a law of evidence ah in courts? That is in turn very much tied up with a history of the English trial procedure, the adversary system, ah as against the judicial inquiry systems they have on the continent.

M. D. (Michael Donald) Kirby: Lord Devlin—who's a very famous English judge—recently published a book called *The Judge,* in which he says: well, the adversary trial system is terrific if you can afford it. If you can have a good, skilled barrister fighting for you, then it's a very good way of bringing out, in a rather labour-intensive fashion, the evidence and material for the decision-maker. Whereas on the continent and in more countries than follow the adversary system, there is the so-called inquisitorial system, the judicial enquiry system, whereby the judicial officer makes, ah secures much more of the evidence than do the parties. And the advantage of that is that ah the skill of the particular barrister on, on the different side or whether you have a barrister or not becomes less important because the, of the duty on the judicial officer to be ah the finder, discoverer of information and facts. Under our tradition, the judicial officer sits there as a silent umpire generally. There are, of course, exceptions and personalities of judges ah vary but um ...

Amy McGrath: Is it less expensive under the European method?

M. D. (Michael Donald) Kirby: I think it probably is. In fact, Lord Devlin says it's considerable less expensive.

Amy McGrath: Well, how do you protect yourself against bad judges being appointed in your ...

M. D. (Michael Donald) Kirby: Well, of course, ah that is a chance of human justice. You have bad judged appointed under our system who can, who are the ultimate decision-maker. They can sit there sphinx-like and silent and yet still be a bad judge a the end of the day. Um I agree that the, the, the problem with the, the inquisitorial system is that a person may

formulate in his mind too early a decision instead of listening quietly to what ah different parties bring up before him.

M. D. (Michael Donald) Kirby: But the fact is that many people can't afford barristers and ah our system is terrific if you can afford to get to court but ah Lord Devlin's thesis—with which I've got some sympathy—is that if the choice is between a system which gets a few people to court and gives them exquisite justice and a system which gets many more people to court because it's more efficient, more time-con-, ah time-efficient, ah and less time-consuming, less manpower consuming, gets many people to court than ah perhaps a social choice can validly be made for the latter. The continental system depends very much more on documents, on a dossier, ah rather than on oral evidence.

M. D. (Michael Donald) Kirby: We have a tremendous faith in the continuous oral trial in the English-speaking world. We have a faith in the ability of the judge to discern whether a person is telling the truth or not. Ah psychological evidence tends to cast doubt on that faith but ah it's a faith that's well-established, it's been there for hundreds of years and it will be very hard to shift it. I doubt if our evidence project will be able to change those fundamentals. I think the adversary system will last as long as I last and much longer. But ah Lord Devlin's thesis is that we should try to graft on to the adversary system some of the elements of the judicial enquiry for truth so that the judge has his own separate duties apart from being the umpire of the parties to lay down the, ah to, to get evidence, to get documents, to make sure he gets at the truth of the matter.

Amy McGrath: And do you think you might try this in the ACT?

M. D. (Michael Donald) Kirby: Well, it's a bit early to answer that. We all, we, we're just at the beginning of our evidence reference and ah I think it's ah really a, a very fundamental project. In the United States, they started a project for the reform of federal rules variance in 19-, in the 1930s and it's only within the last ah five years or so that it's been accepted so that it took a long time in that federation. I hope we can do it rather more quickly here.

Amy McGrath: And how do bodies like consumer affairs tribunal ah inform judicial processes like that—relate to what you're talking about?

M. D. (Michael Donald) Kirby: Well, of course, they're much more informal, they ah, they forbid lawyers. I think in most of the, the, the consumer claims tribunal, lawyers may not attend. Ah and ah they just sit down in an informal way and ah they, they don't require the strict proof of things, they look at documents. After all said and done, most laymen make decision on document-, documentation. Ah and um the hearsay rule is not a rule we impose upon decision-making everyday life. The rule that things must be proved from their original source. That you must be able to cross-examine to test propositions is not a rule we apply in everyday life. It adds greatly to expense and it can lead to results which laymen consider bizarre, un-, unusual.

M. D. (Michael Donald) Kirby: I remember every time, every time I went to court with a client, I would have to say: 'Now you can't say what so-and-so said.' Or: 'You must give it in the actual language. You must say: "He said such-and-such," you can't summarise it.' There's on ah Australian judge—a very distinguished judge—Sir Richard Eggleston who says that: 'The road to reform evidence will require two things. First that a person ought to be able, at the beginning of a case, to have an uninterrupted period in which he can just say what he wants to say. Put his case as a layman and after that you can test and so on.

M. D. (Michael Donald) Kirby: 'Ah and secondly that ah people who he sees, by the turn of the century, be limited in the amount of time they have for determination of a criminal trial or a civil trial.' He says: 'For example, that the skill of the lawyer at the turn of the century will be in being required—within a given space of time, of, of allotted of a judicial officer—to have the issues for trial so presented that the matter can be determined within that time. And that the long spun-out cases will be a thing of the past because the pressure at work will be so great.

M. D. (Michael Donald) Kirby: 'If we open the doors of court to the resolving the disputes of ordinary people, then we will have to find a more efficient way of organising our judicial manpower and of ah organising the presentation of material so that that scarce judicial manpower can determine the disputes of society.'

Amy McGrath: What was the, is there also an argument that all lawyers should spend some time in other vocations as well? They're a very isolated breed.

M. D. (Michael Donald) Kirby: By and large I agree with that. Ah of course, many of them—as in my case—worked in their Christmas holidays, I worked in the parcels office ah at the GPO and I worked in Anthony Hordern's ... ah standing there largely as decoration, I'm afraid, over the Christmas vacation. Ah so many of them have done that but the, the statistics tend to show, overwhelmingly from the wealthy background. Ah I think ah statistics have shown that something like 15 per cent of law students come from parents in the top 1 per cent of the income-earning levels of society and ah the figures tend to indicate that the percentage is increasing. In other words that far from the movement towards egalitarianism, there's a, a movement towards increasing numbers from the wealthy members of the community.

Amy McGrath: Unfortunately this is reverse effect of the um Wyndham Scheme—it's doing the opposite of what it was supposed to do.

M. D. (Michael Donald) Kirby: Well, I don't know what the reason. I think ah the wind down of selective high schools such as Fort Street may have some, may be a factor. But then I'm getting back to my obsessions. But ah whatever the reason, the fact is that statistics taken in, I think, '65 and '75 showed in '65, 23 per cent from the top 1 percentile. And in '75, 25 per cent. Gold ring* statistics are the ones that I'm thinking of.

Amy McGrath: And what about your ah involvement with the OECD, which stands for ...

M. D. (Michael Donald) Kirby: It's the Organisation for Economic Cooperation and Development. It's ah at the moment a c-, an organisation which is based in Paris. It has 24 members. They are the rich countries of the world. Ah they're, they represent the countries of Western Europe, Canada, the United States, Australia, New Zealand and Japan. So they're the developed Western democracies. Ah it's an organisation ah which looks at rather practical economic matters. I'm chairman of a group of experts which is trying to design the guidelines which will govern domestic laws to strike the right balance between free flows of information between computers in different nations and the um protection of individual privacy of material in computers which is um private or personal material. So that we have, in fact, finished our task. We've prepared our guidelines, the guidelines have been adopted by the council but embarrassingly enough Australia is one of the three countries which abstained.

Amy McGrath: The council of what?

M. D. (Michael Donald) Kirby: The council of the OECD. It's an international body which ah there is a representative of each of the 24 councils.

Amy McGrath: Yours is the committee on privacy?

M. D. (Michael Donald) Kirby: Yes. Our is the committee working to ah the council and the report has been adopted by the council and ah the majority of the countries of the OECD have agreed that they will bring their domestic laws on this matter into line with the OECD guidelines. Of course, this is an international, universal technology. Computers are sending vast amounts of information at this very minute between continents and between countries and between provinces and ...

Amy McGrath: What would they be sending the information for apart from Interpol?

M. D. (Michael Donald) Kirby: Oh no! Interpol is a tiny, tiny part of a half of 1 per cent of the information. Overwhelmingly it's business information. Information about goods and products and so on. Ah some part of it is persona information—that's the same information which has a personal identifier. For example, ah Qantas booking has the bookings of airlines—the hotel bookings. Ah the ah information on insurance claims moves by these international method. Banking ah is automatically transmitted. Ah information on many transactions of this kind are, are churned out in vast amounts all over the world and it's a revolution which has come upon us and I don't think most laymen understand the exponential growth of the movement of data between computers.

M. D. (Michael Donald) Kirby: I went this morning over to North Sydney to look at a um, a computer set-up and to have explained to me the tremendous developments within Australia of computing. Ah one of the figures that was given to, to me was related to the whole exports and imports of Australia which totalled $23 million and that was the amount ah in one year of the um exports of IBM America. So that they are a very big enterprise. They're doing work, they were employing the equivalent ah—directly or indirectly—of the whole of the population of this country. And that's in an industry which has come upon us in 15 years. So it's ah an industry with great social and legal implications. Implications for the privacy of individuals and the liberties of individuals. Implications for the vulnerability of society, a

wide society in which you can store the critical data relevant for the economy or defence of the country on a little tape.

M. D. (Michael Donald) Kirby: It's much more vulnerable than where you have the information all over the place. It's relevant for the law of intellectual property, of copyright and ah patenting of products. It's relevant for the criminal law that many of the ah anti-social acts against computers would have an international flavour. It's relevant for the storage of legal and other information, the retrieve of it. Ah it's going to bring great revolutions in our community and I just wonder if Parliament, if institutions are apt to cope. Alvin Toffler in his recent book— *The Third Wave* says the institutions of Western democracies just can't cope with these tremendous changes. They just won't cope. They will break down before the end of the century. I hope he's wrong.

Amy McGrath: The, his proper term ... the ah, the issue of privacy in these transactions relates, what, to the possibility of criminals operating on the information?

M. D. (Michael Donald) Kirby: Ah not entirely. Ah in Europe they are very sensitive to the misuse of personal information. They have been through the problem in the Second World War of the absolutely critical nature of information on a file. If you happened innocently, in the 19-, early 1930s to have answered the census that you were a Jew, then that was quite literally a matter of life and death seven years later. And um therefore, having gone through that, they are very sensitive to this. I had to deliver a paper to an international conference in Paris last year and in the midst of the conference somebody stood up and said: 'The latest proposal in France is to require us to keep a little, computerised identified, identification pass.'

M. D. (Michael Donald) Kirby: Ah he said: 'During the Second World War, why did so many Dutch Jews escape and why did so ma-, rather, why did so many French Jews escape and why did so many j-, Dutch Jews die?' The answer: 'Because the French identification pass was easy to forge, the Dutch identification pass with typical Dutch efficiency was impossible to forge.' He said: 'If we had had identifiers of this kind back in the war, all the Dutch Jews would have been dead.' He said: 'Thank you very much. I'd rather have a little bit of inefficiency and a protection for my liberties.' And that's essentially the quandary that's at stake. Balancing the efficiency—which the computer brings—and the tremendous and

undoubted benefits on the one hand as against the ah necessity of keeping the relaxed, ah liberal democracy that ah we have in which the individual has certain protections against the autocratic state. It's a matter of striking the right balance.

Amy McGrath: Perhaps it gets p-, ...

[Interview Paused]

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Amy McGrath: ... we're in the University of Newcastle. If the faculties are split up in the way they are today—without looking to the future—you get lawyers who know nothing about electronics, you get engineers who know nothing about law. Um is there an argument from the complexity of what you're doing in Australia—no man touches more professions than you do today—for ah, um more cross-fertilisation in terms of late 20th Century between professions.

M. D. (Michael Donald) Kirby: I'm sure there are many who touch more issues than I do. I think the prime minister, members of cabinet, vice chancellors and others would, would ah deal with many more disciplines. I work in the areas that are referred to me. At any one time there are eight and true it is they cut across a whole range of subjects but ah I don't deceive myself that I am the jack of all trades dealing with all problems of society. We deal with many and many topical* ones.

M. D. (Michael Donald) Kirby: But um as to the question of overspecialisation, I'm sure what you're driving at is right. And in fact, the Myers Committee Report recently said that one of the problems of preparing for the computer age is that computer causes unemployment, that leads to a demand for immediate production of people with special skills to fill the vacancies. That leads to a demand for a highly vocational, in, education system. And yet, the source of the problem of technology and computerisation and so on is a tremendous technological innovation.

M. D. (Michael Donald) Kirby: Jobs which were thought long-established all suddenly disappear. The watch-making industry of Europe, for example, which was a highly-talented, highly-skilled ah group of tradesmen disappeared with com-, with a computerised production unit. Ah and so it will be if we are too specialised then I don't think we'll be able to cope with the pace of change and I think there is much to be said for generalised education. Education will allow computerists to speak to social scientists and will make computerists alert to what they're doing and for those that come after computerists, alert to the social impacts of what they're doing.

M. D. (Michael Donald) Kirby: Lawyers tend to be like me. Those who are not too strong at mathematics at school, who were streamed off into the social sciences and to, and into ah English and ah Literature and so on. Ah and who therefore find it hard to understand, really, the way in which the new technology works but who perhaps can see more clearly than the scientist some of the social implications.

M. D. (Michael Donald) Kirby: I mean, if we ask many members of the community, they'd all be in favour of, of perhaps of ah limitless police access to ah data and so on. And yet they wouldn't pause to think that's been the history of English-speaking people to put controls on authority. Of course you can have less crime if you have a country in which everybody's phone is being tapped, in which ah the last masses of information are store on everybody. In which their every purchase is traced, the hooks they buy is traced and so on. And all of that will theoretically be possible with the cashless society and computerised information, information from the store going straight on to the computer ah of the person ah tracing his every, ah his every purchase. He's credit trail will give a very clear picture of where a person has been, what his purchases are, what is interests are, what books he reads and so on.

M. D. (Michael Donald) Kirby: So technologically, the end of privacy is possible. But if we don't want a society like that, it might be a safer society for some but it would be a society in which the right of the individual just to have his own world, to have his own seclusion as a human being would be greatly diminished. And I think what we have to face up to is that we must accept a level of disorganisation, of inefficiency and even of criminality in society in order that we don't just become a number in a computer which somebody somewhere can look us and say: 'Oh yes, Kirby's reading such-and-such a book. That is unreliable material. He oughtn't to be reading that. He ought to be reading *Richard III* and I want to know why he's not reading *Richard III* and we're going to make sure he has correctional lessons. I mean, that's the peril of it all and I think it's for people like myself and others working in the social implications of technology to point that out to the more starry-eyed technologists who think: 'Let us just go where technology will take us.'

[Interview Paused]

Amy McGrath: Um the, the whole question of the um legal profession policing itself to get on to another topic. Um have you been involved in that at all?

M. D. (Michael Donald) Kirby: No—the New South Wales Law Reform Commission is inquiring at the moment into the whole question of the government and organisation and discipline of the legal profession in New South Wales. It's not a matter that ah we've looked at specifically but as I mention we've recently produced a report on insurance brokers which raised many analogist problems. And it was urged on us by some, including some in government circles, that we should um, ah leave it to the brokers to regulate themselves. We came to the conclusion that that wasn't appropriate—that we should ah put down a s-, statutory scheme ah which included regulation by authority and compulsory insurance and so on.

Amy McGrath: They're not licensed like they are for the workers' compensation ...

M. D. (Michael Donald) Kirby: No, they're not. They are, at the moment, completely unregulated and the ironical fact we found in our enquiry was that 40 per cent of them don't have profession indemnity insurance against ah the risk that they'll give the wrong advice. Seems a curious thing that brokers who were in the business of selling insurance aren't themselves insured. But 40 per cent of them aren't.

M. D. (Michael Donald) Kirby: But um as to the legal profession, we haven't looked at the question of the government of the legal profession. Personally I'm sure that the future there lies ah in a greater lay involvement both in the disciplinary processes and in the government of the legal profession as more and more money of the public purse is pumped into the legal profession, I think it's legitimate that ah laymen should have some say in the way in which that money is spent.

Amy McGrath: Do they not have a, a disciplinary tribunal of their own?

M. D. (Michael Donald) Kirby: Ah at the moment they're in a state of transition. They do have a ah disciplinary tribunal and they've recently appointed a lay um observer, a lay inquirer, ah Mr Porter who receives complaints and who can look at whether or not the inquiry within the legal profession appears to have been adequate and fair. And he's just

produced his first annual report but um I think we'll probably see a move to greater lay participation and um, ah less ah of the dichotomy of the legal profession having its organisation both ah a trade union for the advancement of the position of the legal profession as a whole. Ah and as a disciplinary body ah dealing with those who go wrong or who are alleged to have gone wrong. It's a slightly incompatible function and I think that will be recognised.

Amy McGrath: Well, thank you very much, Mr Justice Kirby, for the time you've given. Um I feel that the work you're doing will certainly help to contribute to the fact, in some ways, I thin the law, legal profession has a better public relations at the present time than the medical profession has.

M. D. (Michael Donald) Kirby: Well, I, I don't think I'm really one of the public relations officers of the legal profession though I suppose what you said earlier is right—and that is that in part the fact that I'm engaged in these activities trying to modernise and improve the law no doubt looked upon by some as doing it in an earnest fashion and consulting the community, ah does renown to the ah benefit of the legal profession.

M. D. (Michael Donald) Kirby: I hope that occasionally that's so and I hope that the ah consequence of it will be—especially amongst younger members of the legal profession—that they will ah consider that they have their obligation in response to be truly sensitive to making the law which often was developed in an early time and often for the property classes who were the only ones who could afford to use the law ah and often with attitudes to morality and ah society which are different today. Ah I hope that the lawyers of the future will recognise that it's part of their responsibility to modernise and simplify the law. I hope that my educational functions are successful. But I hope that my reform functions are successful too.

Amy McGrath: Well, thank you very much on behalf of the National Library of Australia.

[End of Interview]