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AUSTRALIAN BROADCASTING CORPORATION
SUNDAY 16 NOVEMBER 2003
RECORD OF INTERVIEW OF JUSTICE MICHAEL KIRBY
by
MONICA ATTARD ON *SUNDAY PROFILE*

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INTRODUCTION

Hello, Monica Attard here, and you're listening to *Sunday Profile*. Tonight Justice Michael Kirby, a radical legal figure who often finds himself at odds with his fellow High Court judges and, of course, the Government.

Well it's been a hundred years since Australia's High Court was formed. In that time it's seen its fair share of controversy with judges like Lionel Murphy who refused to be shackled by legal precedent. At the other end of the political spectrum, Sir Garfield Barwick who gave Sir John Kerr the legal nod to sack the then Labor Prime Minister Gough Whitlam. Well, today Justice Michael Kirby is filling Lionel Murphy's shoes; in fact he's gone beyond Justice Murphy. Justice Kirby has the highest strike rate for dissenting

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Minor textual amendments have been incorporated for clarity.

judgments which of course puts him at odds with what is largely a conservative High Court Bench.

INTERVIEW

Attard: Justice Kirby is the odd man out also because of his openly declared homosexuality which seems to have attracted a lot of attention, particularly in political circles. The judge can presumably bury whatever woes he has in that respect in the mountain of public interest issues with which he's involved. Indeed it's hard to imagine that a human being can have enough time in the day to do what this man does. His judgments are notoriously long and detailed. His reputation is that of a compassionate man who won't allow precedent to trample the rights of ordinary people. It's a huge responsibility he's assumed. After seven years on the Bench, how's he coping?

Kirby: Well it's nearly eight years. And it's an awful long time before that. It is a big responsibility to be a judge, no doubt about that. When I came to the High Court one thing really struck me that I hadn't known as an outsider: as a judge who had been subject to the High Court. This was how seriously everyone takes the final appeal. We hear special leave applications and I'd been subject to that for thirteen years when I was President of the Court of Appeal of New South Wales. I didn't know how the High Court did it internally. But it really isn't a secret. The cases are assigned and

shared up between us. We meet with very careful discussion beforehand, before we go into Court. No final decision is made, of course. But it's been very thoroughly examined and I was rather pleased, I must admit, to come into the Court and see how seriously everybody took the responsibility of considering the cases.

Attard: Judge, on the question of responsibility though, it's an interesting point because I mean a lot of people do look up to High Court judges, as they obviously ought to, but they do see them as people who have the final say on issues that are oftentimes of enormous importance to them. Do you ever lose sleep over the sort of cases you've had to decide? Has that ever happened to you? Have you really angsted over a case?

Kirby: I know it does happen to some judges. I have to say, perhaps fortunately, it doesn't happen to me. I work very hard. Therefore, when I go to sleep, I go to sleep. There's no problem with sleeping.

Attard: So you can maintain a professional distance?

Kirby: Yes. I think that is required by the nature of the job. Once you've decided, you've got to move to the next case. If you agonised and worried about whether you'd done it the right way or the wrong way, well you'd be like the centipede, not knowing which leg to put first. You wouldn't get your work done.

Attard: What's the best thing about being a High Court judge?

Kirby: The fact that it is the natural aim of any lawyer to reach a position at the top of their profession. The natural aim of any professional to do the best that they can. The fact is that the Court does have very important constitutional responsibilities. Therefore, you have a part, in a sense, for a short time, in the history of your country. The fact that you have opportunities to do justice according to law. Justice is always there hovering over me. I can never just regard my job as a mechanical one. It is not for me a formal activity, in the sense of purely concerned with words. I never forget that there are people, on both sides of the record, who are looking anxiously to the Court to do the right thing and to reach a just and lawful conclusion.

Attard: Of course since the departure of Mary Gaudron from the Bench we have no women there. I take it, because you were very close to her, you would miss her presence?

Kirby: I do indeed. It has to be said (and I've said it publicly) that the High Court is a more blokey place since Mary Gaudron left. She brought a different value added. She brought her perspective of the law and her great experience. She also did brought a woman's perspective. That, after all, is half the population. I think her capacity to see things in a slightly different way was a great benefit

to the High Court and you can see it in many cases. One of them was a case of *U v U* which was decided just before she left. That was a case of relocation of children overseas. Mary Gaudron and I dissented in the case. It concerned whether the children and the ex-wife had to stay with the child in Australia. Or whether she could go ahead with her career in India and take her child there. It's actually interesting to read those judgments, all of them, because all of them reflect different perspectives. However, it was important, I think, symbolically and substantively to have the point of view of a woman.

Attard: And what was the point of view of both you and Justice Gaudron?

Kirby: Well we thought in the case, as we saw it, that the suggestion that the woman had to abandon her life after the marriage had broken down and abandon the career that she *had* in India, but *couldn't have* in a country town in Australia, was an unreasonable imposition upon her. That arrangements could have been made for contact with her husband and the child, school visits, a flexible regime that would have protected the interests of both. It's a complicated matter. The wonderful thing in the case was this was truly a father who loved the child. He has his rights too. Those rights, in the view of the majority, predominated in discovering the child's best interests. Now it's all set out there in the decision. But it's typical of that sort of case - we don't get easy cases. Going

back to King Solomon, these have been the truly difficult cases. However, a woman's life experience is not that of a man. It's a different life experience, a different perspective. So I miss Mary Gaudron. I'm sure that the next Justice of the Court, or perhaps the one after that, when I go, will be a woman. I certainly hope so.

Attard: What makes you so confident in that?

Kirby: I think that the view that it is desirable to have a woman on the Court is one that governments of all persuasions share. Take Mr Ruddock the new Attorney-General. His wife is herself a distinguished woman lawyer. I'm hoping that there'll be lots of points of view expressed to him both from outsiders and also from within the home.

Attard: Because your own Chief Justice has made a number of statements recently which I imagine would rankle with a lot of people, a lot of women in the legal profession, that the lack of women on the Bench now and historically is the result of the present gender compositions of senior echelons of the law. Well, no doubt that's true. But I suppose the question is do you think that there's a case for active discrimination, purposive appointments of a woman to the Bench?

Kirby: I don't accept the idea, which is the idea that's often trotted out in these debates, that "merit" is confined to senior

commercial lawyers. An amazing thing happened recently in England. The first English woman Law Lord (it's actually not called a Law Lady) was appointed. Dame Brenda Hale was appointed from the Court of Appeal. I mean it's been hundreds and hundreds of years but they've now got a Law Lady in England. In the law we don't like to rush things. Governments all over the world are under appropriate political pressure to appoint women to a final court. In Canada, they have three on the Supreme Court; two in the United States. So I would be surprised if we don't have a woman Justice before long because there's no doubt that if you take away "merit" as defined in terms of leading silks in commercial cases, there are plenty of very experienced women lawyers in Australia in the judiciary, in the academic world and at leading sections of the Bar. I just don't accept that "merit" excludes women.

Attard: Is it something you hope to be able to convince the Chief Justice of in your position?

Kirby: I don't think I have to. The Chief Justice's daughter is a lawyer. He has seen, through her experience, the need to ensure that women have practical help. Part of that practical help has to come, I should say, from their partners. You've got to be very lucky in life, if you are a lawyer living under great intensity, to have a partner who supports you. A lot of males are now finding that they're not getting the support at home that once they did. Similarly with women. But a woman often has to do the extras. She's got to

both be a top professional but she must also go home and cook the meals; which very few of the male lawyers of my acquaintance do.

Attard: Chief Justice Gleeson also said the High Court requires the confidence of the legal profession over and above that of the public. Now that would seem logical, but is it true?

Kirby: I wouldn't myself put it that way. I think it's more important to have the confidence of the public, of the community whom we serve. However, it's true that it has to enjoy the support and confidence of the legal profession. That goes without saying. The question is how we make sure that we also are perceived by the whole community in all of its variety.

Attard: How do you do that? How do you make it more accessible?

Kirby: Well, we have appointed a Public Information Officer in recent years, an initiative of the Court and supported by Chief Justice Gleeson. Summaries of the cases are now going out. Our decisions are on the world wide web within minutes of their delivery. If you are actually a High Court groupie you can sit there and read every word that we say.

Attard: It's wonderful.

Kirby: Well that's one way to describe it. So we are reaching out in a much more effective way than we did in the past. Maybe next will come a televised channel which shows the Court in action.

Attard: Is this something you'd really like to see?

Kirby: I would support it. Some of my colleagues are a little worried that some barristers would play up to the camera. I think, perhaps, they even think some judges might play up to the camera.

Attard: I think they might too.

Kirby: The answer to that is, the whole work is so intensive. You're concentrating so much. It's an absolute necessity of judicial life. You've got to have very good concentration. A good bladder and good concentration, over very long hours. If you do that you just don't really have time tending to your own ego. You're just working on a case.

Attard: Can we look at some of your judgments. Now you've noted in the past that Lionel Murphy's dissenting judgments, controversial decisions at the time, are now accepted as legal orthodoxy. Do you imagine that the same might be true of your own judgments in years to come? Because you do dissent rather a lot.

Kirby: Well that's one way to put it. I think I *agree* rather a lot. It's a question of whether the glass is half empty or half full.

Attard: Indeed. But I think your dissenting strike rate, according to Monash University, is something like 37%, is that correct?

Kirby: I think it's more like a third. It's about 33%. It's true, if I had been appointed to the High Court in the time of Chief Justice Mason, in that period, I would think my dissent rate would be very low. I look back on that time and see the decisions that came through and I don't believe I would have disagreed so much. You get different moods in an institution, including courts. Because of the view that I hold concerning the right of governments to appoint judges, and that that is part of our constitutional arrangements, and that judges themselves should play no part in the appointment of judges, I have to accept that you have different attitudes on the Bench over different periods of time.

Attard: Are you saying that the result of that in this particular period of time, when you are on the Bench, that the Bench is largely a conservative Bench?

Kirby: The Bench is more conservative. I doubt that anyone would deny it. Other judges and observers have said so. That is just part of the different moods that come and go with time. Therefore, if a time comes when they look back on this era, there

will no doubt be some of my decisions which will be appealing to a different and future time. For example, for me the issue of international human rights norms is a very important idea. It's an idea that I have embraced since 1988. I have done so since long before I came on the High Court. I have no doubt that, in the future, that will be a tremendously powerful force in Australia, as it is virtually everywhere else in the world. We can't cut ourselves off completely from intellectual movements. Therefore when that time comes, my decisions, which have been influenced by these developments, will undoubtedly be looked to.

Attard: And you're listening to *Sunday Profile* on ABC local radio. This is Monica Attard and I'm talking to Justice Michael Kirby of the High Court. Do the conservatives on the Bench tolerate you?

Kirby: It's a question of whether I tolerate them. Certainly, they tolerate me.

Attard: Do you?

Kirby: Of course we do. We get on with the professional equanimity that is required. We have perfectly agreeable occasions; even occasional social occasions. We don't scream at each other and shout at each other as Justice Starke did in the 1930s. There are differences. That's an entirely healthy thing in a free society, that you have different philosophies, different points of view. If I

expect respect for mine I must accord respect to those of a different view. And I do.

Attard: Because I imagine you all come from - you would come from a vastly different background to many of your fellow judges. You come from a working class background yourself, you were educated in the public system, there wouldn't be too many people in the legal profession and certainly none I imagine on the Bench who have come to the Bench from your particular background? That is from the public school system?

Kirby: Well it's true that I'm the only Justice who came through the public school system. That itself is a rather worrying thing I think, because 67% of our population is educated in the public schools. I do believe that that gives me a slightly different perspective of life.

Attard: Would that explain your sympathy for minority groups and the underdog?

Kirby; The fact that I've sat in the local public school with children from all religions and all points of view and all social categories is one reason for a differences. Yes I do think that is so. But I wouldn't exaggerate that. When I sound off about public education many people say well, after all, you did go to a selective primary school. You were channelled to an opportunity class in New

South Wales which has a special IQ chosen system. And you then went to Fort Street which is the oldest public school in the nation and has produced five of the 43 High Court Justices. So that it was hardly a deprived education. My family came from very educated people in Ireland so that I wasn't really - I wouldn't like to be saying I'm dusting off the cobwebs and the dust from the factory. That would not be true. However, I do believe that my life and my education being slightly different, do give me a slightly different perspective. That's a good thing. You should have different perspectives on a final court.

Attard: I believe at one time you toyed with the idea of entering the church?

Kirby: Well not really. That was part of a joke. I said that I couldn't become a doctor because I didn't like the idea of cutting up rats. I didn't want to become a priest, because I wasn't pious enough. So I ended up becoming a lawyer, by default. That was partly a jest. If I had my life over again I'd be a professor of history. If I ever have any spare time I'm not sitting there on a beach reading the *Commonwealth Law Reports*. I'm reading history. That's what I would really like to do.

Attard: Are you a religious person?

Kirby: I would say I am yes. I was brought up in a Christian belief and as an Anglican. I have not let that go. I will never let it go. I believe in the values that I learned as a child. They were good values and loving values. They're important in my makeup.

Attard: How does that sit though with this legal mind that operates with a basis of rationality, of supreme rationality. How does that sit with a religious perspective?

Kirby: Many highly intelligent and rational people are religious. The fact is that many people are searching for a reason for existence, for consciousness. After all, the whole thing is a miracle: that out of this little bit of life, of living matter, has come humanity. And out of humanity has come consciousness of existence and concern about why we are here. That leads one naturally to a spiritual quest. That's an important aspect of humanity: to seek spiritual explanations of why we are here and what we are here to do. In recent years the failures of churches have been filled, in Western communities, not by doctrinaire fanaticism but by the human rights movement. It's trying to provide some deep values of human dignity and human rights that explain how we are to live in harmony and respect with each other. Ultimately, all of the religions of the world are founded on the precepts of loving God and loving one another. That is what I was brought up on. It's a sort of a core organisational mindset and I'll never let it go.

Attard: As an Anglican and as a person who outed himself as a gay person, are you disappointed with the Church's stand on the issue of homosexuality?

Kirby: Of course I am. I don't just sit quietly. I've written to the Bishops in Sydney and others and I've expressed my point of view as a private citizen and as an Anglican Christian. They always reply. They're always courteous. They protest that there is no desire to hurt homosexuals and that they are welcome in churches. But it has to be said that, in recent times, some of the things that have been said are a terrible put down to people, especially young people who are struggling with their sexual identity. The fact is that 4% of males or thereabouts, in every community are gay. That's something which most people have now come to understand.

Attard: And accept?

Kirby: There is still a certain percentage who don't accept it. Therefore, somehow or other, we're going to have to get through this rather dark period. We're going to have to get through it, I hope, without hurting a lot of young people who are torn between their love of their religion, which they associate with their parents and their upbringing and their family, and the need to be true to themselves which is terribly important.

Attard: Do you also believe that the Evangelical Anglicans of Sydney in particular do in fact welcome homosexuals into the Church?

Kirby: I hope they do. They say they do. I have to say to you I was brought up in the Sydney diocese. I am therefore a very Protestant Anglican. I was brought up in the simplicities of a Protestant view of the Christian faith. At the heart of that Protestant view, as I understood it, was a rational idea. The idea of human rationality that you were not ultimately accountable to an authority of a church, but to your own conscience and to a rational examination of scripture. Now, a modern rational examination of Scripture will take account of scientific knowledge about the nature of human sexuality. It will therefore not assume that 4% have somehow been cast out of God's kingdom. It cannot be. You cannot have people who, by their nature, given by God or by Nature, are homosexual being outside the love of God. That, therefore, is something that the Church is going to have to come to terms with. Not only the Church but all religions. This is not confined to the Sydney diocese of the Anglican Church. This is a major world issue. Yet at least the issue has come. It's come because of science. It will have to be resolved. As with the past, it will ultimately be resolved and science will not lose.

Attard: Do you believe that in your lifetime you'll see a point in time where society generally and politicians in particular accept gay

marriage? The Prime Minister for example says that gay marriage is unacceptable because it fractures the bedrock of human society, that being the family. The Treasurer, Peter Costello, appears to agree with him on that point. Do you believe that the time will ever come when we have that as an accepted norm?

Kirby: I don't know about that. It's actually interesting to see that in Australia you have polls of gay people that say that something like 87% of them are not interested in marriage. It's not a major issue. Perhaps that's connected with the less religious nature of Australian society and the fact that many churches have been very unfriendly to homosexual people over a very long time. I will not say much about this because the question may ultimately, or one day, come before the High Court. I wouldn't want to say anything that disqualified me from sitting. It would have to be determined according to the arguments and according to law. However, the truth is that you can, in homosexual life, as in heterosexual life, have very loving relationships which last a very long time and *not* be married. That is my position. I've lived with my partner for 34 years. It's a great blessing in my life. He now comes to functions at the High Court. He comes to functions with other Supreme Courts and their judges. I have to say I'm very proud of the way he deals with the situation, which is something entirely new. It's new for others too. We have to understand that we've had a long time in our lives to sort it out in our brains. Some others

haven't had such a long time. Therefore, you have to respect the fact that we're all on a journey on this issue.

Attard: One of the issues that you have spoken about has been the detention of children of asylum seekers, the rights of Australia's prisoners at Guantanamo Bay, ending your speech marking the Centenary of the Court you criticised those who favour the death penalty for terrorists. Where do you draw the line on what you can comment on and where you should refrain?

Kirby: Well, I do try to avoid any partisan political debate because I sincerely believe in keeping out of any issue that might be connected with party politics. I don't regard myself to be aligned with any of the political movements. I disagree with all of them from time to time. I suppose, in that respect, I'm not really different from most thinking Australians. Avoiding that. Avoiding issues in cases that might come before the Court. But dealing with some issues in a way that is a contribution to the public debate. We don't have all that many people in Australia who do this. Everything now is infotainment. Everything is the game - divided into exclusive teams. It's really pathetic. That doesn't interest me at all. I'm not involved in that game. I regard it with distaste. Therefore, my contributions to public discourse since in my days in the Law Reform Commission, are an endeavour to get people to think about issues: especially issues about the law and the judiciary.

Attard: But do you ever look back at some of your statements and think Yep, that was beyond my brief, I shouldn't have said that?

Kirby: Occasionally I've felt that way. But not too often. After all keep in mind I've been at it since 1974. That's a long time. If you look at all those speeches, thousands of them, all those poor unfortunate audiences having to put up with me, I don't think many times I consider that I've put a foot wrong. Now, of course, there are some control types who would differ from that view. That's their right. But I disagree.

Attard: Would the comment that you made about the Government's policy on public education funding, which caused you of course the censure of the Government, at the time I recall it because I think I spoke to you not long after it. You copped a fair bit of criticism for those comments. I mean - and the criticism was that you didn't have the specialist knowledge to comment on those things. I mean is that something that you accept?

Kirby: Well I don't accept that. I spoke at a graduation ceremony in South Australia where the University of South Australia gave me a honorary degree. It was a graduation in the Faculty of Education. It wasn't a legal graduation. To talk at that graduation about the statute of limitations or the *Judiciary Act* would not have been a very good career move. They would not have been interested. They were teachers. And so I spoke of my teachers and

in that context I spoke about the importance of public education. I think that was appropriate to the occasion. My observations merely drew to notice the issues of the shift in funding in respect of public education. It was, I think, an appropriate comment. We should in Australia be more lively. We should have more discussion. We should have more of our leaders actually speaking out about issues and ideas. We are really a slightly anti-intellectual country. I'm against that. I'm for the world of ideas. I live in the world of ideas. I'm interested in the world of ideas. I want to share it with my fellow citizens.

Attard: And on that note I'll ask you a final question. Do you believe that Australia in the year 2003 is a tolerance place? Is it a tolerant country?

Kirby: We're still basically a fair society. Our attitudes to big issues change over time. Of course, there are elements of intolerance in our makeup. Every island people tends to be a bit xenophobic. We haven't really changed in that respect. Like England and maybe Japan we are a little xenophobic. We are frightened of those who come from across the seas, despite our national anthem. Yet if we look back on the Australia in which I grew up, look back at the position of the Aboriginal people, we've improved. If we look back at the position of women, we've improved. If we look back at the position of Asian Australians, we've certainly improved. If we look back at the position of gays

and lesbians we've improved. So we are a tolerant society; but there's still plenty of work for us to do. That will require everybody to give a help. That includes broadcasters. It also includes judges. We're all in this together on this island. And we're all part of a bigger world.

Attard: And that was Justice Michael Kirby of the High Court of Australia. Thanks for listening to us. Thanks also to the producer of *Sunday Profile* Jennifer Fellowes and Tikiri Phillips. I'm Monica Attard.