

Justice Michael Kirby

MIAT Lecture 14-5-09

Thankyou very much Martin, if I hadn't been called Michael by my beloved parents I would have liked to have been called Martin. Martin, a strong man who stood up for his beliefs against the whole world. So I am a great admirer of Martin, although I've found he is a bit of a control freak. And so I thought I'd sort of change the format, oh he seemed to be very upset about that, but look I've been waiting for years to come to Beecroft. Why haven't I been invited before this? When I was a little boy going to Fort St High School, the very best, the cream of our students came from Beecroft, they came from up here, and then they chained, yes Epping and Eastwood, really the very best. Mind you they were a little bit toffee, you know, I had to say that I came from Concord, but I used to say it was Strathfield, because Strathfield is so much posher. I used to say 26 Sydney St Strathfield, and there's no such place, there is 26 Sydney St Concord, but anyway I've been waiting all these years to come up here, the days have been long, I've been sitting there thinking what have I done to Beecroft that they would not have me? And then I see that I'm actually speaking on Thursday April the 2nd 2009. Now am I going mad or something? I wonder is there a time machine? I'm lost. I was in the United States on the 2nd of April, is this something going on with my brain? Is it XXX ? Well don't answer that question.

And I began this morning in Melbourne in the Windsor Hotel, a beautiful room, that the ballroom there, which is where I had to speak this morning, is one of the most beautiful public rooms in Australia. With wonderful domes and sort of circular things over the doorway, and rose windows, and very very beautiful. It sort of shows you what tremendous confidence they had in the 1870s /1880s in building rooms and buildings of that kind. But why was I there? I was there because I had been named "Communicator of the Year". So you have not just tired old Michael Kirby, ex High Court Justice, you've got the communicator of the year! And the fee is going up!

Now I'm sorry I'm here on my own tonight, because I didn't ask my partner of 40 years, Johan, to come but he heard, and maybe this was a misunderstanding, that you were all Baptists. Now there's nothing wrong with Baptists, I'm a Sydney Diocese Anglican, which lets face that's almost a Baptist. That's why I like Martin. Martin it's a great name. But my partner is from the Netherlands, he came to Australia, it's a shame you didn't meet him you know, many people Justices of the High Court down can't stand me, but everyone loves my partner,

because he is very intelligent. But one thing he lacks is he has no hypocrisy. I've got oodles of hypocrisy. I've had to have oodles of hypocrisy in my life. But he thought this was all a big meeting of religious people, and he and I have, shall we say, a very constructive dialogue about this subject. He says religious people and this includes Islamic people, the people of the book have not been nice to women, to gays, and to people of colour. And he therefore doesn't really want to go to their functions. And that's his point of view. Whereas I don't believe, I don't go along with that at all, because I'm myself still an Anglican and a Christian and a believer in a god that is kind and loving to us all, but I think Johan is watching the television with the Holy Father in the Middle East, and I don't think that was a good look for the last few days. So he didn't want to come. So anyway, he sends his greetings. I was threatened with a bottle of Grange Hermitage if Johan came, and I said, 'well look, just come for the bottle of Grange'. I mean judges don't get pressies, its very unfair, and he said "No I'm not going, a crate maybe!". So I said "the argument is not about the principle it's about the quantity".

Anyway there it is a shame you're not meeting him because, you know, our attitude in Australia, in Beecroft, and in Concord, to Asian Australians and to the white Australia Policy began to crumble and change when we began to meet Asian Australians. We had a family from Macau move next door, and it's when you don't know people that you can hate them, its when you happen to actually sort of meet them, if you meet Islamic Australians, or if you meet gay Australians, or if you meet African Australians, or Asian Australians, or anybody else, then the stereotypes start to break down and you get over it.

Anyway, now I've got so many things I just don't even know where to start. Where do we start? Because I've got so many things to tell you, for example we could have a very constructive dialogue about my time on the High Court of Australia. What a marvellous privilege it was for me to serve in the highest court of our country. To be in a court of very, very intelligent people, deciding cases independently, not subject to a phone call from the minister telling them how to reach their decision, deciding the cases free of the pressure of each other, that's a very important thing about judicial independence, and leaving a space so that everybody can reach their own conclusion on the case. Now the most interesting case I had in my last year in the high court was the prisoners voting case. Have you heard about this? This was a case in which the question was: is it constitutionally permissible for the federal parliament to enact a law that says anybody in prison can't vote? Because that is what was done in 2006. An amendment to the Commonwealth Electoral Act was enacted through the senate, erhh the house, which changed the Electoral Act. The Electoral Act virtually from the beginning of the Federation had disqualified people who were in prison for three years or more, but it didn't disqualify all prisoners. And this Act was enacted and an aboriginal prisoner who was actually studying for a PHD brought an application to challenge the amendment Act of 2006, and the case was decided by four Justices to two. Justice Cullinan didn't sit because he was about to retire, so six of us sat, and Chief Justice Gleeson, Justice Gummo, Justice

Crennan, and I held that the law disqualifying all prisoners from voting was unconstitutional. Justices Hayne and Hayden held that it was within the power of parliament to exclude prisoners from voting.

It was an interesting case because it raised an issue which took me to the United States about three weeks ago. On the issue of whether a final court, the highest constitutional court can have regard to the decisions of other countries in interpreting their own constitution. This is a big deal in the United States, because they're a bit insular there, I don't like to tell tales on them, but they do tend to like to live in their own little American world. Whereas us who are from the British Empire our tradition has been comparative; we've shared knowledge, and our jurors prudence has always looked outside our own borders, it's not a big deal. Anyway in this case we looked to the council of the court of European Human rights, to a Canadian decision which said prisoners are human beings, they are citizens in most cases, they are in prison as punishment, not for extra punishment, they are still entitled to have their civil rights, and that it was disproportional to take away the rights of prisoners of less than three years, because many people who are in prison are there because they can't afford to pay a fine. Quite a big cohort, I had no idea when they brought the figures before us. It's a lot of people are in prison for quite short periods, and therefore they are sort of being deprived of one of the most fundamental things in a democracy, the right to vote. Anyway it's a long winded case and it's too boring to go into all the details, though if you've got a very curly question I can go on for hours about this. But anyway, the court held that the law was invalid and it was struck down. End of question. And no-one questions that, that's the way our system works. The High Court of Australia is the last word, the politicians have to obey it, and so in the last election prisoners who were there for fewer than three years not only had the right to vote but under our commonwealth Electoral Act they were obliged to vote.

And something that causes a lot of puzzle overseas, but I don't know about you, but I think it is actually a good thing that we have to vote, because then no-one can say I'm not responsible for George W, or I'm not responsible for Galldon Brown, because everyone of us has to take a civic responsibility, I think it's quite a good system myself and Australians have got used to it. And it's a wonderful thing actually to go the local church hall or wherever you go and see everyone there, you only do it every few years, but it's a beautiful thing to live in a democracy, and to have worked out this trick that most countries in the world don't have of peacefully changing the government. It has happened ten times in my life in the federal government and it has happened a similar number of times in the state government, maybe not quite so much. Where's Greg tonight? Greg Smith there is an empty seat there, this is Banquo's ghost! I have to tell you he used to appear often before us in the high court, and he would be here to me, and he would be trying to persuade me, he was a very good barrister, tough as nails, he was a crown prosecutor, and he argued the cases very well, so I want you all to tell him that I said that. But I'm also very very cross, I feel very hurt,

don't you feel hurt for me? That he's got an empty chair, I want to know his excuse. Anyway so that is the high court in a nutshell, and the best thing whenever we get judges from Indonesia or Turkey or anywhere else, I say the best thing I can tell you about being a judge in Australia is I've never had a phone call from a minister, I've never had pressure from a bank, I've never had the police, or a trade union, or anybody else trying to put pressure on me. I've occasionally had a little bit of help from Mr Murdoch and his spear throwers, but you can ignore that. And that is how it is and that is how we should keep it because it's one of the strengths of our society that we ultimately submit things to a group of independent people. And though, as Martin has said, I have differences with my colleagues on the high court, you'd expect that. I mean the cases don't go to the high court unless they are at the cusp, unless there has been a dissent in the court below, or unless there has been a difference in the approach in Western Australia, and the Northern Territory, and New South Wales you don't get into the high court. So the issue of dissent which is a very precious feature of our tradition is really not something we should be concerned about. We should rejoice in the fact that we live in a transparent society where the judges, you can disagree or agree with them, but at least you know you are getting their honest opinions. And I don't think you as citizens would want to have judges just towing the party line, or joining in because it's convenient or it's easy, and certainly that was the view that I took and I believe my colleagues also take.

Now this morning, I as communicator of the year, I've got to get used to this, I told them about my effort last week. I believe there was an item in the Australian about it, I went to Indiana USA to give a commencement address, in the United States they call it commencement, we call it graduation, but Americans have to be different, so they think that graduation is an ending but commencement is a beginning. Actually it's not a bad thought really. So they are beginning their new life and I went into this commencement to get an honorary doctorate of laws from the University of Indiana. And in my address I talked of Alfred Kinsey because I've been serving on the Kinsey Board. Now people as old, or even people a bit younger than I, will remember Alfred Kinsey. Well Kinsey, you probably didn't know this, he was a big expert in bees, gall wasps, he catalogued 7 million gall wasps, can you imagine? And they're still there in the Indiana University with his very fine little writing 'this is gall wasp 6 million 7 hundred and' anyway Dr Kinsey was one of those people, he was a bit of a control freak like Martin, he had to have everything, he was a taxonomist, he loved to have everything categorised and catalogued. So he kept all these details on every feature of gall wasp, was the wing 5cm well I suppose it would be inches or 4.777? Very very strange mind, but you need these people in science, and he did this. And then in 1947 or so he had a leap of the mind. This is the sort of noble laureate type leap. And the leap of the mind was he began to get interested in human beings, and in categorising human beings, and in classifying and studying human sexuality, and analysing the different patterns of human sexual response. And he wrote those two books the *sexual behaviour in the human male* and *sexual behaviour in the*

human female in 1947 and 53. And at the time in Indiana, it is after all the Midwest, it's like Beecroft! It's very conservative! Very conservative. And in that area, Joan McCarthy was just up the road, and tremendous pressure was put on Kinsey, and when that failed on the Indiana University to cut the funds and pull the plug and stop him doing it. But they had one of these wonderful, this is quite an American story really, because it is sort of like a first amendment story. They had this president of Indiana University, a man named Herman Wells, and he said, he dug his feet in and he said "if Dr Kinsey's research is a proper subject of scientific enquiry it will be done at the Indiana University". And so I, I walked into the ceremony, I've spoken to many very big audiences but this was amazing, it's not the biggest I've spoken to but it was 20,000 people times two. Because it was in the morning ceremony, they get every faculty together, you know how we tend to do it when I was chancellor at Macquarie you do a faculty or a school. But they do everyone together, but they have got too many to do in one so they've got 40,000 people to get through with the parents and with the graduates. And as I walked in, you know you could look up, it was a huge stadium, it's actually their basketball stadium, because they are big in basketball, and there were 20,000 people you know waiting. So I walked in, and I told them how back here in Australia, I wanted to relate what I was saying to Indiana University, you know they'd be looking at me and 'what the hell has this Australian Judge got to do, what could he say?'. And so I told them about how I admired Kinsey's work and the work, the decision of Herman Wells, and that they should admire it. And that in far away Australia, back there in the 1950s in Concord as I must own up, fess up, fess up I was Concord, Sydney Street Concord. I had been alerted, it was all over the papers at the time to the fact that as a young gay boy I was not alone. I mean it was a big dark secret in those days, don't ask don't tell, you couldn't even mention it. But Kinsey's research showed that I was not alone. That was a very important discovery for me back there in 1953/54. And so I told them that people they would never know would be indebted to this university and Kinsey.

Well then I got back to Australia, it was very interesting to do the same speech twice, I've never done it before, in fact weirdly enough they conferred and agreed twice! I told them I wanted to get a doctorate of science in the afternoon, not just another law degree! I might have settled for medicine and let myself loose on the medical profession, but they wouldn't do that, but I just had to go this charade of getting the degree. In the morning, there was, there were bursts of applause during my speech and a strong applause at the end. It was quite polite, but not sort of over the top. In the afternoon I heard word of weeping, of people really being emotionally affected, and at the end of it, it was a standing ovation. I mean it's a rather unusual experience for anybody to have 20,000 people standing up all in awe. Well I suppose it wouldn't have been the whole lot but it was thousands and thousands of people standing up and applauding. I was told it had only happened once before 8 years ago, so it was a rare thing. So I felt I'd done my duty there. I got my degree, twice, and I came back to Australia after a day and a half in North America and then I got a few emails. Many of them said:

thankyou for coming, we understand things better, we're grateful, and we're proud of our university, and this and that. But I got two, two letters, one was from a person who said 'we didn't want to know all this about you, you should have kept that to yourself'. And another said 'you are a pompous bore, I didn't want to have my daughter's graduation ruined by you coming over there and it's probably the worst speech that's ever been made in American commencement history!' So when I was named and crowned this morning at the Windsor Hotel as Communicator of the Year I told them that I had got this letter calling me a pompous bore, but that actually I was quite pleased to get that letter because I've been giving graduation speeches in Australia for many many years, and I've never got a letter like that. We Australians are too polite. The Americans are much more likely to engage. I mean it's not many to..., the guy who called me a pompous bore has an email which is headed Sherlock Holmes. Now I didn't know if he was actually at my ceremony or was just some sort of angry correspondent writing from Baker Street with Dr Watson pacing backwards and forwards and dictating "this pompous, call him a pompous bore Holmes". Anyway it's important to have people who disagree because then you sharpen and improve your own mind and sometimes you come to the view that you are wrong. I mean I quite often come to the view of some earlier decision. Some judges worry endlessly about that, any inconsistency with what they've said before. But its human life to find as life goes on, you see problems in a different light, and therefore I don't worry about that at all; if I've changed my mind, I've changed my mind.

So I could talk to you about issues of sexuality and so on, but Harry told me you were not into drugs or sex, so I don't think we'll go there. I see in the program they've mentioned the constitutional monarchy. Now my position on that, some people say you know he's a very devoted constitutional monarchist and all that, well I don't think I could say that about myself. I could say that before you change anything you've got to be very careful and sure that you're going to be changing it for something better. And the good thing about our system is that we have an absentee head of state, who's always done her duty. She comes when she's invited, she doesn't come when she's not invited, she doesn't come too often. Once when I was a boy, I used to collect them, there were so many stamps with the queen on it, now once a year, once a year, which is on her actual birthday the 21st of April there's a stamp. So it's a very unusual system, if your inventing a system you wouldn't invent it, but it's a system that keeps a lot of grubby people out of the top slot. So I suppose you could say on that issue I'm a sort of rational anarchist. I'm not devoted and all that sort of business as some people try to paint me, I just think it's a very unusual system. And actually if you think of the countries of the world which are most temperate, where you could possibly live if you had to, they tend to be Canada, New Zealand, Australia, the United Kingdom maybe, then there's the Netherlands, Belgium, Spain, the Scandinavian countries, and all these are constitutional monarchies. Now there must be something rather funny about their system, it sort of does tend to, it keeps politicians from getting too grandiose. I think it's sort of an accidental

system, but we've really got to talk about it before we just demolish it, and certainly not just demolish it with a slight of the hand or do it subtly and by subterfuge which has tended to happen really, every little bit is taken away without any vote of the people. I'm for the people, if the people change the constitution; fine. But before they do so it shouldn't be a matter of what model, it should be a matter of do we get a better system? So we could talk about that. I'm an intellectual republican, I believe that all power comes from the people, I don't believe in lords and ladies, and I don't believe in chariots and all that sort of stuff. I believe power belongs to us, the people of Australia. But that's who we've got really, and I don't think our current constitutional system denies that. And having an absentee head of state when you look around the world and see some of the heads of state and the mischief they've got to, it may not be such a bad system. At the moment in America there is such excitement, I've been there three times this year, such excitement to have a president who is highly intelligent, obviously focussed, very hard working, witty in his recent speech to the media in the white house, and good looking, I mean he's got lots of things going for him but it isn't always thus. I mean we have had some presidents that well we could have done without.

So anyway that's just a little thing, we should maybe talk about that. So what else could we talk about? Well I don't know, I've been waiting all these years to be invited to Beecroft and now I'm getting tongue tied, the communicator of the year is running out of thoughts! Oh I know one other one, I had to launch a book, just before I went to Indiana, on animal welfare law. I don't know if you saw this in the paper, and when I read the book I was reminded of things I said about fifteen years ago about the fact that even though, even if you are not a vegetarian I think most people love animals, and love and know that they are sentient creatures. And when you actually read of the corporatisation and mass production of the slaughter of animals and the conditions in which they are kept, I didn't know this until I read this book but chicken are kept on an A4 size piece of paper their whole life. A chicken fowl is a naturally gregarious animal, it is used to running around and interacting with other animals, and the battery hens can't do that, and sows are kept in a stall and can't even turn around, that's where they spend their whole life. As Martin said to me it's a question of whether or not you see animals as simply things for the benefit of humans, or whether you see animals as a reflection, certainly in the higher forms, as a reflection of ourselves and of a living creature which feels pain, and has fear, and even if you are going to have a society that eats animals that it ought to be done in a way that is not needlessly cruel to them. So that, I think that's a thing I think is going to become a bigger issue in the future I believe, and its certainly something which has affected me just launching that book and reading about what happens, because I don't think most people in this room would know. And in a way, as a carnivore, most of my life I've been a meat eater, and the fact is that the human brain developed because at a certain point our ancestors had flint for the purpose of cutting, and then they found when they hit the flint on another piece of rock a spark came, the spark gave rise to fire, and the fire gave rise to cooking, and the

cooking gave rise to cooking meat, and allowing for the consumption of meat. And that had two consequences, first the communal eating of meat, cooked meat around a hearth, which was very important to the social development of the human species. But second, the development of our brain, because the human species then developed through the eating of meat to a much larger brain, and that lead to the advancement of the human species via process of evolution. So it's a very complicated question but I suggest to you that we're going to see much more of it, and if you have domestic pets you know that they feel and therefore they're god's creatures. And therefore we really have to reflect upon the way in which they are just corporatized and the way they are prepared for the market.

So there's a few topics have I given you enough? Do you want some more? Well you can't have anymore! And we are now going to have, I mean Martin the control freak is getting up now, I don't need you Martin, you can, yes well alright you can wander around if you like. We're now going to have questions and I believe I've got to go to every table in some democratic sort of fashion, something we don't normally do in the courts. So we're going to have questions, now if you want to get up and go outside that's fine, don't worry about that, and if you want your pudding and you're getting bored and sick of it go into the kitchen they'll probably serve it up to you. Maybe Martin you can tell them they can serve the pud, I think they can bring in the pudding. But we'll now have some questions, and every table has got to have some good questions, and preferably humorous questions. Yes?

Q: Compulsory retirement of judges (can't hear the rest of the question due to audience noise)?

A: Well, a bill of rights, most countries have a bill of rights of course of some kind, and we are one of the very few that doesn't have a bill of rights. When I was at law school you were taught we didn't need a bill of rights because parliament would always fix things up and therefore a bill of rights would only involve judges getting involved in matters that should be left to parliament. But the fact of the matter is, since my law school days that I've come to realise that parliaments are very good in dealing with the issues that concern the majority. But parliaments in Australia weren't very good in dealing with aboriginal land rights. I mean the fact of the matter is that was not a matter that parliament had addressed. And it was the High Court of Australia in the Mabo decision, before I came onto the court, I can't take any credit or accept any blame, but it was the Mabo decision which held that aboriginal people were entitled to their traditional rights. And that the premise on which the denial of that entitlement had been based, namely that the aboriginal people were nomads who were not concerned with land was factually incorrect. I mean the anthropologists who've studied the Australian aboriginal have said if ever there was a community for whom land is central to their spiritual and practical social lives, it's the aboriginals of Australia.

So we weren't so good on aboriginals, we weren't so good on white Australia, we weren't so good on gays, we weren't so good on women's rights. And the model which is on the table for a bill of rights in Australia is what I'd call a very soft model. It is not to allow judges to strike down laws, as the high court can under the constitution if there is a constitutional point. It is simply to allow a judge to look at a law made by parliament and to see whether it can be interpreted, if possible, in a way consistent with the fundamental rights. And if it can't then to draw that to the notice of parliament, so that if it chooses it can bring the law into conformity with the bill of rights, and that gives the last word to the politicians. So it isn't a law that would be giving the last word to judges as the American Bill of Rights does or the Canadian Charter of Rights does. It would be something which on the contrary, as I understand it, would stimulate the parliamentary process. Parliament might in the end say, well we're just not going to change, we think white Australia is a good policy and we are not going to change it, assume that had been up there in those days. So I think there's a lot in the proposal and it maybe that it's a way of stimulating the political process, and helping parliament to do what is sometimes a problem, I mean looking after the minorities as well as the majority.

Okay next question. Good question that one. Yes?

Q: I'm still not very clear about the difference between charter of rights and bill of rights. Do you think you could finally enlighten me considering you are the communicator of the year?

A: This is praise indeed from you Alice. Communicator, it's beginning to sink in this title. Well, the answer to the question is that it doesn't matter much whether you call it a bill of rights, it's what the content of the bore is. The Canadians called their bill of rights a charter of rights, and the Americans call it a bill of rights. So it's not really what it's called, it's what it empowers the courts to do.

But the fact is that the model which is under consideration in Australia is being called a charter, probably to get away from the American title to the bill of rights. Because the government has made it quite clear that it does not agree with a bill of rights, a strong bill of rights that would allow judges to strike down laws, it merely allows judges to try to interpret laws and if they can't to then go and draw that to the notice of parliament and parliament has the last word. It's a charter, that's the proposal. I mean Father Brennan's committee hasn't reported yet, so we don't know what they are going to say. But most people who support an initiative, support an initiative which is modelled on something that's been done in New Zealand and in Britain. And in both of those countries they have a provision that merely instructs judges to interpret laws consistently, if they can, with the charter. And if they can't to draw the inconsistency with the charter to the notice of parliament so if parliament chooses, parliament can fix it up. It's quite a soft sort of option, it's not a striker down like that law on Christmas riots, it's simply drawing it to the notice of parliament. Now many members of parliament don't

like it, but if you had power to have the last word and somebody is saying well we're going to allow these pesky judges to come in and call to your attention something which doesn't seem to be consistent with fundamental universal human rights, which goes back to Elenore Roosevelt's universal declaration of human rights in 1948, if this is the proposal, well of course if you've got the power you don't want anybody else muscling in on your territory. Similarly the editorials in the newspapers, they don't want judges coming in and saying citizens have rights to privacy for example, because they can just publish what they want, they've got the power, they've got no law in the way, and they're very opinionated, and they know what sells papers. But maybe if there is an inconsistency it's not doing much to draw that inconsistency to the notice of parliament, and then if that will stimulate, the idea is, that will stimulate a public debate. And in the end parliament might say 'well hang it, we don't care, we're not going to change the law', and if that's so, that's the end of that, for the time being at least.

But the idea of the so called charter model is to have something that will stimulate the process of thinking and testing our laws. And if we'd been a perfect country then you wouldn't need anything like this, but we were not a perfect country, we were not perfect to aboriginal people, and we were certainly not perfect to Asian people, and we were not perfect to gays, and we were not perfect to women, and we're not being perfect to refugees, and not perfect to Islamic people. And so the idea is to have some general principles that can stimulate our debate about equality of citizenship, but in the end under the model parliament has the last word, so it's a pretty soft sort of option.

You got it now? I'm so glad, as the communicator of the year I thought I might fail my first test!

Q: Hi Michael, I would like you to know that I have an appointment with Greg Smith at 2 o'clock on Monday, and I will pass on your concerns about this inability to be here.

[Michael Kirby]: well he might be in parliament.

No, No I've been told I have this appointment because there's been a parliament of two weeks, and he should be in Epping office on Monday.

[Michael Kirby]: I'm sure he's got a very good excuse, he's a very dutiful person. And he was a very, I didn't say beautiful I said dutiful, and I tell you what he was a very good advocate, he put up a fight for the crown, sometimes crown prosecutors say to court 'Oh its for your honour, or your honours....' But Greg Smith used to come and help the court reach a decision by sharpening the arguments which is very important in court.

Q: Well my question is, as you've been talking about people not having rights, I have worked in the prison system in NSW as an official visitor, and I'm concerned that our prisoners don't have rights, and at the moment our official visitors who are supposed to be independent are actually being managed and trained by the department that they are supposed to be supervising, and that's what I'm going to speak to Greg Smith about. I wonder how you feel and what your thoughts are about the lack of independent people going into our gaols and having a voice for everybody associated with our corrective services?

A: Well isn't that a wonderful thing, that's the second time tonight I have heard somebody, somebody at the top table said something about prisoners. Normally a lot of people never give a second thought to prisoners, they just say throw away the key, but prisoners are human beings and if you treat them like dogs then when come out they are going to act in that way. So it's in our interests, as well as being our model and civic duty to respect their dignity and to try so far as we can to make sure they are treated fairly in our name.

There is a model, and the model is in WA and it arose out of a report of Professor Richard Harding mind you, and it provides for a prison inspector inspectorate, and it's done in a professional way but I think it's the only state in Australia, the only jurisdiction in Australia that has an inspectorate. And that might be something that you could ask Greg Smith to get his staff to research and see whether that could be done at an economical cost. Because I agree with you, it's not really, it's not really obviously fair that the very people who are supposed to be under supervision are affecting, and influencing, and training the people who are supposed to be their guardian, the guardians of the prisoners. So I agree that there is a need to deal with this.

In the old days judges used to do what was called gaol delivery, and the judge would go. I used to go a few times when I was in the Supreme Court of NSW and visit prisons, but not I have to confess often because I was so busy as president of the court of appeal, so that system hasn't really worked that the judges should deliver the prison, and it doesn't work, so we've got to find something. The other thing that used to happen was that judges would play a part in the prisoners, what was it called, the prisoners aid system, to help prisoners in that very critical period when they come out of prison to find work. And I found when I was on the High Court that no judges were doing that. So I then wrote around to try and get judges interested and I joined its called the Community Restorative Centre, yes, and Allison Churchill is the PA, and she's terrific, so I've become a bit involved in this and there's a lot of work to be done. Of course it won't be made easier by the economic downturn because that will be harder still for prisoners to get work, but is in our interest as citizens to help people over the barrier, to become good citizens afterwards.

Q: Good evening, thank you, good evening. I wonder if you could say a few words about some of your thoughts on people defending themselves in your court.

A: Well it is a person's entitlement both in human rights and in the law to represent themselves before the court. But the fact of the matter is the law is very complicated and people are at a big disadvantage in court if they are representing themselves. My own view was always that you're tested as a judge in the way in which you treat the people who come before you. But I was an appellate judge. My brother David is a judge of the Supreme Court of NSW, and he conducts big murder trials, wall to wall he has a very very difficult job. And in a way in an appellate court you can guide people and get them to the point and hear what they have to say about the point, but in the midst of a big trial which is a huge drama unfolding without a script everyday, it is a very difficult thing for a person to defend themselves.

And it was for that reason, and a great decision of the High Court called Dittree against the Queen, that the court held that if a prisoner can't afford a lawyer in a big criminal trial through no fault of their own, then the state has to provide a lawyer. And that has meant that in all big criminal trials, in Australia, you have somebody, you are entitled to have a lawyer provided by the state or the court will then stay the proceedings until a lawyer is provided.

It's just too difficult really in most big trials for a person to do it on their own; it's a very difficult thing. A German Judge came out here and he said 'you in Australia have the British system, it's a Rolls Royce system, it is wonderful, but we in Germany we've just got a Volkswagen system'. But how many people can afford a Rolls Royce and how many people can afford a Volkswagen and that's the fundamental problem. Our system is terrific if you've got two very able lawyers, but it is no good if you have inequality in the ability of the lawyers, and it is even worse if you have one with a good lawyer and one who has no lawyer. And I just have to acknowledge that is a weakness of our system.

[Audience member – maybe Martin?]: Thank you. I've just been reliably informed

[Michael Kirby]: The pudding, we want the pudding. Hands up all those who want their pudding. There's a revolution brewing here.

[Audience member – maybe Martin?]: Isn't democracy wonderful? Now I've been reliably informed that we can stop bagging Greg Smith, and that he is actually in the House. The House sits on Thursdays and goes probably through to 10 O'clock usually, and that would explain his absence.

[Michael Kirby]: That's wonderful. I think we should give a big round of applause to Greg Smith. He's doing his duty. Yes?

Q: Michael, I was very pleased to hear that you've been able to carry out your business without political or external interference. One of the questions that I have, the question that I have is, the actual appointment of judges to the High Court, where it would seem to me that's where political interference can and does occur from time to time, particularly where you have government of long standing changing the judges and changing the complexion of the High Court. Have you got any comments on the way that judges are appointed to the high court, is there a better system than the one we currently have?

A: Well this is a question which is in the air now, because there is a lot of pressure on governments to setup a judicial commission and to appoint judges through that sort of process. My own view is again, slightly old fashioned, and it is a bit like my view on the constitutional monarchy, it is that before you change things you've got to be sure that you've got something better. And let's face it, the system that we've got which is really the British system which has lasted for eight hundred years, has delivered on the whole a very beautiful and law faithful judiciary.

Now anyone in this room who thinks that judges simply decide a case in a scientific manner without any import of values is very naive. Because every decision that you make, especially in the high court which is it has been in the trial court in an appeal court and in the high court, most of them could go either way. Take for example in the constitution there's a section 80 that says if you're tried on indictment for a serious vehicle crime you are entitled to a trial by jury. Now what does jury mean? Does it mean a jury of twelve men? Which is what it was in 1901. Or can you have women on a jury? Does it mean a jury of ten? Could you have ten? Could you have ten if two got sick or died or somebody couldn't take anymore? Does it mean the jury have to be kept together, as used to be the case in 1901 when the constitution was adopted? Or can the jury go home at night as juries tend to go home tonight? And can you have substitute jurors?

See all these questions come up, and the way you answer them depends a bit on your notion of jury trial, on the notion of the value of juries, on the notion of what the judge thinks is the right way to interpret that word in the constitution. The point that I'm making is that under our system, values inevitably affect outcomes. And the advantage of the British system, which is the one we have, is that is the one moment when governments have a chance to put people into courts who they hope will reflect the general values of the government. And in that sense, without electing judges, which is what they do in most jurisdictions in the United States, it does introduce an element of democracy and demographic changes and values in the court.

And so my own view is that that system is part of the genius of the constitution, that over time you get judges that tend to be conservative and judges who tend to be liberal. Now I'm a liberal judge, and anybody who's read any of my

opinions would know that. Governments can make terrible mistakes because Sir William Dean was appointed by the Fraser Government, and he was quite a liberal judge. And Justice McQuew was appointed by the labour government and he was quite a conservative judge. So once you are there you are completely independent and you don't go to functions of politicians and you don't have anything to do with them, but I don't think it's such a bad system myself. Now it's changing, and it probably will continue to change and I don't think to just get people because they are politically partisan, that would be terrible, but the fact that you get a variation on the liberal/conservative spectrum is not a bad thing in the courts because those differences on value can affect the decisions that are made. And otherwise if it's judges choosing judges, everyone is going to be conservative, and that's not necessarily a good thing. It's important to have a dialogue. It's like in a family it's important to have differences, and different values, and different opinions, because out of that you learn from each other and you reach different points of view. So I'm a bit of a defender, I should really be living up here in Beecroft, I'm actually, I'm actually quite a conservative sort of a chap in fundamentals.

Q: Michael, following on from your question, but along a different tact. If you read the newspapers and popular press, you listen to talk back radio, there is great dissatisfaction with many of the judgements that judges bring down. So there is a big dichotomy between general public opinion and judges' judgements, I don't know whether that public opinion is reasonable, but what's going to happen to bring the two closer together in their goals?

A: Well sometimes I'm afraid that judges have to stand for a longer perspective, and to not necessarily reflect the opinion of the populous at the time. For example back in the 1950s when there was an attempt to ban the communist party. Most Australians at the start were in favour of doing that and they elected the Menzies family government in 1949, I remember it well I was nine at the time, and they elected it on a platform to ban the communists. So that sometimes, the high court as you know struck that down, saying well if they do things which are wrong, or if they do things that are violent, then they can be dealt with for that, but they can't be dealt with for what they think however stupid what they think might be. And a lot of people who opposed that at the time were protestant ministers of religion, because they said what will be the next thing that they will do to on people's conscience? And people are entitled to have their conscience even though it may lead them to crazy views about society and so on. So sometimes it's a good thing to have a branch of government that isn't falling in the wind of popular opinion or of editorial opinions in the daily terror. I mean it sometimes, you know it's a judge, because you have to read these cases and the detail in them, why the trial judge did this or that, and you don't get all that detail in the media.

The media thrives on conflict and on shock horror outrage. When have you last seen a good news story in the paper? Few and far between, occasionally you

get it babies and nice stories like that but not all that often, they love to have conflict, outrage, and shock. I don't know about you, but one thing I don't like is the way they are now mixing up fact and opinion; the disgraced so and so, or they tell you in advance how you should be thinking of a person instead of allowing you to form your own views on the basis of the facts. So I'm not, you know I believe in the freedom of the press and their right to criticise judges and the judges' decisions, but just take it sometimes with a grain of salt. Because the judge would have had a whole lot more data and you don't judges who are just going to be weather vanes who are just going to go this way or that because of popular. Because sometimes what is popular is very temporary and is later seen to be have been very short term in its perspective.

Yes?

Q: Mr Kirby, may I ask you a question? In XXX law and I acknowledge your position in connection with the World Council of AIDS prevention. I recently returned form New Guinea and Port Moresby in particular, and I have to tell you that I'm somewhat distressed with the incidence of HIV/AIDS and the attendant dichotomy that prevails between the faiths, the religious, the government, and a body of medico, medico assistance setup by the Commonwealth Government, which I would hope/think that is rather commendable the work that they are doing. However, that's not the opinion within the population of Port Moresby. And it is somewhat distressing vis-à-vis the population of Papua New Guinea when related to the various countries within the African continent. And I came away quite distressed, particularly in the view that Papua New Guinea is a launch strip away from our northern most point. We have a history and a connection with Kokoda, Mill Bay, Dewna, and the like and I'm just wondering and I hope that you're passionate association with such a body could give us some insight as to how we could alleviate the very very big problem on our doorstep?

A: That's a very good question, and you are absolutely spot on in pointing to its importance not only for us but for the people of Papua New Guinea. The body I'm, I used to be on the global commission on AIDs at the World Health Organisation, and now serve on a body of UN AIDS. And in fact I have to go to New York in two weeks time, again for a day and a half meeting about the future of UN AIDS. And everyone in UN AIDS and everyone in AusAid which is the Australian aid authority is aware of the problem of incidence of HIV in Papua New Guinea, it's a very big problem, very big problem. And to some extent it's a problem because of the nature of communities there, and their sort of their distance from the health messages. But to some extent it's because of the resistance in some of the churches to the safer sex messages which are essential for the purpose of taking precautions.

Now we were very lucky in Australia back in 1985 with the minister for health Neil Blewitt and the shadow minister Peter Bone. They were two really wonderful politicians, I mean we don't always get wonderful politicians, but those two were

really wonderful and they took the view that we had to take some very brave steps like needle exchange, and distribution of condoms, and education about sexual transmission of HIV. Now in some of these more traditional societies in the Pacific Islands and in Papua New Guinea there's a lot of cultural resistance to getting these instructions. But the only countries that have succeeded in bringing down the graph are the countries that do what we did in 1985 to 1995, and that's what has to be done in Papua New Guinea.

And recently I was appointed to a new body called the Pacific Friends of the Global Fund, which is the global fund on HIV, malaria, and tuberculosis. And two of the members of that group are from Papua New Guinea. So it's very much on the mind of people who are involved in HIV. And the ministers there say the right things but whether that's getting into the often isolated communities, I mean they have more languages in Papua New Guinea I think than in the rest of the whole world, distinct languages, very isolated mountainous communities and therefore to some extent isolated from the messages that are necessary to cut down on the rapid transmission of the virus. But you are right to be concerned about it, not just for our sakes, but because of the sakes for the people in Papua New Guinea.

Yes?

Q: Michael, I'd just like to stray from the serious questions that are coming out from the conservative community of Beecroft, and ask you about your title of Communicator of the Year. I think

[Michael Kirby]: I'd like to know more about this title. I want to know if this tie pin goes with it!

I've been a communicator for forty five, forty years and I've never heard of it!

[Michael Kirby]: I've never been so hurt in all my life! I thought the fame of this title, you would have known, you would have heard about it! Well it might be a Melbourne thing; you know what they are like in Melbourne. Anyway it seemed to be a big thing down south of the border. I'm going to make it a big thing up here!

Q: My question is perhaps somewhat

[Michael Kirby]: You have to hold the mic at sort of right angles, it's odd, but that's how it works.

My question is perhaps somewhat controversial

[Michael Kirby]: Oh don't let that worry us.

On your viewpoint on capital punishment with regard to some abhorred crimes that have been committed, such as the death of XXX, whilst I know that the judgement has been brought down, why would you want them in the gene pool?

[Michael Kirby]: Why what?

Why would you want them in the gene pool? And I just...

A: Well the question is why would you want some criminals in the gene pool? Why wouldn't you just get rid of them? Well the answer to that is first of all we have abolished capital punishment everywhere in Australia, and it doesn't exist under any of our laws, so the question would be not should you abolish it but should you reinstate it?

Secondly we are a party to an international incident, where the second option or protocol to the international calendar on civil political rights binds us not to restore it, and therefore you'd have to overcome that hurdle.

And thirdly, the one thing you learn as a judge is that the system, although it's very careful, and though everybody tries to make it work, makes mistakes. It makes mistakes. And I was a party to a mistake involving a man named Mallard, Mr Mallard in Western Australia. He was charged with murdering a jeweller in her shop in Perth. And he was convicted before the jury, and the appeal court refused to interfere and he came up to the High Court and he asked for special leave. And three justices of the court said no. And I was one of those three justices. And then a group of people; his family, some friends, and a politician always believed that he was innocent. And they came back 10 years later with a new case and they persuaded a unanimous High Court that not only had the case not been proved against Mr Mallard, but that he was probably innocent. And there has since been an inquiry which held that he was innocent.

And I then went back to the record of the case where I had refused the special leave 10 years earlier and I saw that his argument at that point was that the trial judge had excluded a polygraph, that's a lie detector, and that wouldn't run, that argument. When they came back the second time, because of very good pro bono 'lawyering' they simply put together the mosaic of the evidence of where he was objectively seen at a certain moment in the afternoon at the Watchhouse in north Perth, and where he was next objectively seen near one of the beaches at a later hour in the afternoon, and where the murder happened in another part. And you just couldn't have got between the two and have committed the murder in the time. So, very careful examination of the evidence showed that he was innocent. And if you had had capital punishment, then in the old days he would have been hanged. And so you have to be, the system is a human system, its very careful but it's imperfect. And you can't have an appeal if the person is already dead.

And therefore I understand your feeling about this but the other argument is even a criminal who has committed a heinous crime is a human being and two wrongs don't make a right. By killing that person you are involving society in the carefully planned murder of another human being, which is the very kind of impersonal cruelty which you are trying to stamp out in society by the laws we have against crime. So I don't think you are going to see that back.

Yes?

Q: Hi, I was just wondering if you could comment about the gender bias of the law. I've read a lot of judgements, and judges when speaking to women using male examples or they'll use a neutral term and then qualify that with a male example. Tell me just why they would talk to a female and using a male example?

A: Well in the old days you always said he. Though generally speaking, on the High Court all of the justices are pretty careful about that. After all now there are three female justices on the high court and therefore people are careful about the language they choose. But you do get people of the older generation who sort of were brought up in the he male personal pronoun, they tend to use that, and I don't think they mean any harm, but it is important and I was always very careful in expressing things in a way that was gender neutral.

But the more important question is not how judges express things, but whether or not in actuality the law is equal to women. And that's a much more important question than verbal issues. And as I pointed out in many cases, including a case called Garcia against the National Bank, there are laws we inherited from earlier times which are not only expressed in sexist language but reflect the disadvantaged position of women in society which isn't part of the society we live in now.

We now have a society in which, in Australia, women hold some of the most important responsibilities in the nation. After all the Queen is the head of state, the Governor General is the Queen's representative and the commander in chief. And the governor of the state is a woman. We've got three of the seven justices of the high court that are women. So I think progress has been made. And I think progress has been made, so I think that it is important that not only women speak up for this but that men speak up for it. I've always been in favour of the advancement of the equality of women. And I think women are often much more insightful on issues such as gays for example because they faced a discrimination. If you taste discrimination, you don't like it. If you don't like it and you don't like inequality then you're not only going to not like it not only for yourself but for other groups.

Q: So, do you have any opinion on football or rugby league?

A: Ohhhhh. The communicator of the year when coming back from Melbourne to the airport, Sydney airport to my office, the waves, thousands of these emails and so on, I don't think I'm going to add to the sum total of human knowledge. I mean I would only say what you would expect to say, and I just don't think, don't think I can add anything to what the pundits have said and in fact I'm just getting a bit sick of it all.

Q: It's a small world because the XXX we referred to is a long term family friend. And I have a prison question for you as well. It relates to rehabilitation in prison, because we've got a fairly poor record especially in regards to literacy, and I wonder what you think about the possible privatisation of prisons given that profit and rehabilitation probably aren't good partners given the model from the USA as an example?

A: Yes, I shouldn't have answered that last question quite as readily. And it is a serious matter and, but I think it will take its course, and I think there are a lot of people who don't know the full facts who are jumping on band wagons and saying things. And err, I just err, I think a lot of, a lot of people on anything like that, there are a lot of hypocrisies centred. People say what they think they have to say instead of what they should be informed about and professed upon, and I don't want to go into it because I don't know enough about the facts of the case. In fact I don't think anybody knows much about the facts. Seven years after the event, everybody is hauling these people over the coals and I've learnt to be a bit suspicious of events that are alleged years and years later because sometimes they can be quite false.

As to the questions of prisoners and privatisation, I've got my new chambers just opposite parliament house and I saw a huge demonstration just outside parliament house protesting against the proposal for privatisation. There is a problem with private prisons and that is there is a commercial interest in having a more and bigger of prisons. And in fact we have a quite a high level of prison population in Australia by world standards, certainly the average European state has about 34 per 1000 people are in prison, whereas in NSW I think it is something up about 100 or maybe more. So we are quite a high imprisoning, we are not up in the American level or the Chinese level, but we are not like the Europeans. So the problem with privatised prisons, building prisons is one of the most active industries in the United States of America, and the prisons tend to be filled with African Americans and Hispanic Americans and disadvantaged groups and they've got some very funny laws over there and I'm just not sure that we should be doing a lot of privatisation myself. But again that's an old fashion view that a person who's committed an offence will be passed into the hands of the crown and will be dealt with in one of Her Majesty's prisons and that will be handled by public officers who are accountable to the law, and are not there to be making profit out of locking people up.

Q: Yes, I'm Peter Stanford. Two short questions, should there be a compulsory retirement age for High Court judges and if so what is the optimum age?

A: Well my answer to that is first I do think there should be a retirement age. Because the High Court is part of the institutions of government of the country and you have retirement effectively by the vote of the people in the other branches, and in the executive government, the bureaucracy you have a retirement age. The problem with having, you see the thing is if you have people who are as brilliant as I am, well they can go on forever, but not everybody is like that, some are shall we say a bit slow! And it is better that they be given a decent exit. And you can't have a different rule for different people or subject people to medical tests to see if they are still fit. So I think it's a fair crack of the whip, and I think its seventy, which is what we have in Australia is about right. Because the difficulty is if you allow people to stay on then the tendency is for people to not always have knowledge about or sympathy for the values of younger people. And look at our world today, look at Facebook, look at the internet, look at the way in which so many , look at the fact that I will have done 4 visits to the United States of America in about 12 weeks for meetings of a day and a half, I mean that is just a different world. And the world in which young people today walk around with their mobile phones and texting and twittering and tweaking, I mean it's just a different world. And old fogies don't always sort of keep up with that, and they don't always cherish it and value it and understand it and understand the changes that are happening and that they're going to happen and that they're probably for the best and that's just the new world. So a lot of people, especially a lot of retired judges aren't in favour but I happen to be in favour. And I think if you're put out to pasture at seventy then there is still a chance you can still do some useful things. After all today I've been made, I don't wish to harp on it, communicator of the year! I'm going to get a photo, we'll put Martin to work, he's such a control freak, that we'll get him to take a photo of me with this lovely audience. Come on Martin do your stuff, so go up there and get everyone, okay? There's another question there.

Q: Thankyou Michael, I heard you about 25 years ago at a

[Michael Kirby]: have I got better?

Yes well, yes 25 years ago

[Michael Kirby]: I'm just saying the same things!

At the annual conference at Newcastle Uni you eloquently sensibly spoke but more so tonight, thankyou for that. You have spoken about things we are not too good at, aboriginals, land rights, animal activism, what do you think that we Australians including Beecroft Australians are good at; for example refugee resettlement, power of the people, treating people wherever they are including prisoners as people?

A: Well I think this audience is not, lets face it, a cross section of Australia today. It is not. And this audience is like the community I grew up in and what are we good at? I think people are basically kind, I think this is an audience of kind people. I thought it was very good that we have on our desk and that you talked about the situation in Gaza, and that you are concerned about the situation in the Middle East, and that you are concerned about the inequalities and the unfairness that exists in that part of the world. And you're concerned because until we sort that out we will never have peace in the world. And that is something which for children and children's children we have all got to be concerned about for our own sake and also for the people in that, all the communities in that part of the world. The fact of the matter is that the if Arab community, and the Jewish community, and the Palestinian the Palestinian Arab community, and the Jewish community, and the Christian community in that part of the world could get their act together they would run the show. They are such able people. They are really wonderful and able people. And the three great religions of the Balkan region in that part of the world; very spiritual people.

So you ask what are we good at? Well I think we do learn. And I've seen it in my lifetime, seen that we have become more understanding that until we treat the aboriginal people and ensure they get good housing, good education, and good health care, we will continue to have second class citizens in our midst. And none of us wants that. And I think governments of different political persuasions have tried to answer that but I don't know that we've succeeded. But at least we know that we've got to address that, and I've seen in my lifetime, indeed in the last ten to fifteen years, that in dealing with issues of gay people it isn't perfect but it definitely has got a whole lot better. And to some extent I think it has got a bit better because people like me, I mean who in the past would have kept it a big dark secret have just said well this is just a variation of nature, as Alfred Kinsey said it's not a big deal, if you think it's a big deal have a cup of tea and a bex you'll feel better in the morning, get over it, its really just something we shouldn't all get so excited about. So I've seen that, I've also seen the position of women improve. I think we are an intelligent, generally hard working, generally compassionate, and willing to understand and acknowledge where we have been wrong. And we have bee wrong. And if every country in the world would have that attitude, well we'd probably have a much better world much more quickly.

So, we also have uncorrupted institutions. That's a wonderful thing. We've got elected parliaments; we change our governments quite regularly. That's a wonderful thing. The Commonwealth powers change overnight, no one questions it. I mean it's just, it's just the way our system works. Our judges aren't under pressure from powerful influences, that is not true in most parts of the world. So they're the things we are good at. We have wonderful educational institutions. We are good at, we're very innovative, and we've got a spacer, we've got to ensure good educational opportunities. So there is a lot that's really wonderful in Australia. But one of the best things about Australia is we are now

very varied, we've got many races. And I think we've done that reasonably well, don't you think? I mean on the whole considering the change, now this isn't in a sense the best audience to ask about it, but in a way it's like my second speech in Indiana. I can ask you, do you think on a whole our country is a better and more interesting place because of the variety of populations, of different cultures, and different religions, I think most of us would say definitely. And I think we've done it reasonably peacefully, I mean it's amazing the change that has happened in my lifetime, and that is something I think we can be proud of. So there is a lot we can be proud of but not to the point of complacency or humorous self congratulations, I think we've got to be like that guy that said to me and sent me that email 'you are a pompous bore'. Well if you think that then you can say it, you are a pompous bore, you may be the communicator of the year, but we've had quite enough of you sit down and shut up! That's what I want to hear!

Q: Michael, may I ask you one last question before you sit down, is that permitted? We've got two for you here. A very simple question, we've been trying for some years to actually get a speaker from the international criminal court to come out to here and talk to Beecroft for us. Some of the XXX institutions is that it's a wonderful defence against tyranny, that means we don't have to have coalitions that are willing, other people see it as a XXX against sovereignty. Have you got a view on that court and its benefits for humanity?

A: Well I think it's like everything; it's a sort of step. It's a step and it won't be perfect at the beginning. After all our liberty began in our legal tradition, that means the carter when King John was surrounded by the Barons and they extracted from him the carter. That was in the 11th century, and it took another nine centuries for us to make a lot of progress. But the international criminal court is not perfect, and it's just a beginning, but it is a beginning. It's the beginning of rendering tyrants accountable to the law and to their people. So I think it's a great idea to get somebody from the international criminal court. And there was a judge, recently Judge Richard Galstone in South Africa who was a prosecutor before the court, he was out in Australia. You want to keep your eyes open. I'll keep my eyes open for visits by people who are associated with the court. And it will be an expensive thing of course to bring somebody out here the whole way but maybe that's something we can talk about for the future. But tis not the answer, but its not the full answer, but it's the beginning of the answer.

[Martin]: Well whether or not NSW knows about that award, we know now why you got it. Thankyou very much!