This is George Lewkowicz for the Don Dunstan Foundation interviewing the Honourable Michael Kirby AC, CMG. Would you mind if I call you ‘Michael’ after that first introduction?

No, not at all.

The date today is the 28th February 2012 and the location of the interview is in Sydney. Mr Kirby, thanks very much for doing this interview for the Don Dunstan Foundation Oral History Project. I understand you did meet Don Dunstan a few times and had chats with him, but before we get into some of those details can you just talk briefly about yourself so we have a snapshot of your background?

I was a Justice of the High Court of Australia between 1996 and 2009, when I retired. Before that, I was President of the New South Wales Court of Appeal, I always had a long association with universities and with law reform. My original appointment in 1975 was as a deputy president of the Australian Conciliation and Arbitration Commission. Shortly after that, I was appointed to be Chairman of the Australian Law Reform Commission. I took an active part in university governance. I was a member of the Council of the University of Newcastle, and Deputy Chancellor, in the late 1970s, later becoming Chancellor of Macquarie University in Sydney. It was when I was Deputy Chancellor of the University of Newcastle that I first met Don Dunstan. Thereafter, we had a small number of meetings; I wouldn’t want to suggest that I had a close friendship with him. But I admired him and I was always happy to see him and I regard him as a very important figure in Australian history, especially parliamentary history and law reform.

Good. Thank you. What did you know about Don Dunstan before you actually met him? Was there talk in the Eastern States about what this chap was doing in his state, particularly when he was Premier, but maybe as Attorney-General slightly before that?

Not only talk, but he was the subject of a lot of news coverage in New South Wales and indeed throughout Australia. This covered his period in government and opposition, and the apparently energetic law reform program that he implemented as Premier in South Australia. At about that time – that’s to say in the 1960s and ’70s – I formed a professional friendship with Neville Wran. Neville was, at that stage, a barrister in daily practice. He was beginning to become involved in the activities of
the Australian Labor Party in New South Wales. Subsequently, he became a member of the Legislative Council of New South Wales, and later a member of the Legislative Assembly. He was elected leader of the Labor Party and led that party into government in 1976. During my time with Neville as his junior, I would occasionally suggest, and help him on, ideas of law reform that he was advancing in his political life. I would therefore talk to him about Don Dunstan, whom he knew through the Australian Labor Party. I got an impression that there was a slight professional – ‘antagonism’ might put it too high, but there was competition between Neville Wran and Don Dunstan. He would sometimes be just a little dismissive of Don Dunstan’s achievements, whereas I was praising them to the skies. Maybe Neville got a bit envious and felt that I shouldn’t be so full of praise for Don Dunstan. Maybe it was easier to deliver reform in South Australia than it was in New South Wales. Anyway, I was interested that he knew Don Dunstan. He was not quite as enthusiastic for him as I was.

Yes.

But I had seen Don Dunstan on television; I had heard his magnificent voice; I knew a little about the reform measures he was introducing. He seemed to me to be the image of a model Labor premier – reformist, and impatient for change. Neville Wran perhaps was a bit more cautious and was certainly a very successful Labor Premier of New South Wales. So they were really figures in competition for an idea of what it was to be a Labor leader and a Labor premier of a state of Australia.

Yes. It might have been that federal background of the sense of – well, Whitlam was in power for a short time, but people were talking about Don Dunstan going into Federal Parliament – and Neville Wran, for that matter, at one stage – – –.

Yes. That’s why I think there was an element of competition. But I was full of admiration for Don Dunstan and I saw him as, in a sense, with Neville Wran and Whitlam, examples of Labor leaders after what I conceive to be the Evatt mould. That’s to say, high-achieving, professional people who dedicated their lives to reforms that would be beneficial to ordinary citizens across the board, including minorities, and who saw political life not as a mere game for transitory power but to achieve change in the law and in society and in politics. And I think those three
men were leaders of that kind. But Don Dunstan and Neville Wran, of course, had different priorities and different talents and different skills. But Don Dunstan was before Neville Wran. He had already achieved success before Neville Wran won office in 1976 in New South Wales. Neville, however, wasn’t inclined to think of him as his role model.

Oh, right. Yes.

I think Neville’s dreams were grander.

Right. You, I think, have said you met Don Dunstan or spoke to him about five times. Perhaps we could go through some of those recollections. There was one particular time when you were in a car coming back, I think, from Newcastle, if I’ve got it right, and Mike Rann was in the car as well; and the reason I’m asking this question is having interviewed Mike Rann he said it was a most illuminating conversation. Can you remember or recall any of that conversation?

I recall that when I was Deputy Chancellor of the University of Newcastle. The Chancellor, Sir Bede Callaghan, past Chairman of the Commonwealth Bank, was unable to chair the Newcastle Lecture. This was – and perhaps still is – an annual lecture at the university. I stood in for the Chancellor, as Deputy Chancellor, to chair the event. Don Dunstan was due to come as the lecturer, having been invited, and he came to Newcastle. I remember being very impressed by his drawing power. The lecture was held in the Great Hall of the University, which was packed to the rafters. There wouldn’t have been many politicians in New South Wales who could secure such a big audience as Don Dunstan did. He gave a lecture whose content I don’t remember but whose delivery I thought was masterful. He had a wonderful voice, a magnificent voice. He was like a Pavarotti of politicians. He had beautiful cadences in his voice. I’ve got a pretty good voice, but he outdid me. Maybe that was because he had had, as I now read, elocution lessons. I never refined my voice, such as it was. But he had a beautiful voice, and he obviously enraptured the audience at Newcastle. I too remember meeting Mike Rann. I remember thinking at the time that he was a very good-looker – – –. (laughter)

I’ll tell him that, yes.

I think I might have told him that, too, but he brushed it aside, being robustly heterosexual. However, Don Dunstan was there and Mike Rann was there. I assume
that Mike Rann may have written the speech for Don Dunstan. But I was very impressed with Don Dunstan, and I let him know that. And most people in public life don’t stop you when you tell them how impressed you are with them. I think it may be that I spoke in praise of Don Dunstan that attracted the recollections of Mike Rann, because I at that time was Chairman of the Australian Law Reform Commission and myself had attracted some media interest. Therefore my adulation, I suppose you could call it, was music to their ears. That’s probably why it’s remembered, so long afterwards. I’m not sure of the year, but I think it would have been in about 1979, but I may be wrong.

Right. Yes, that’s quite late. Can you remember any of that – the subject of the conversation?

Not really, but it would have been about the subjects I’ve just disclosed: the difficulty of getting law reform in Australia. I had written an essay, which is published in the Federal Law Review of the Australian National University, called ‘Whitlam as law reformer.’ In it I’d analysed the achievements of the Whitlam Government in law reform and the difficulty of getting law reform actually on the statute books and into implementation. So I was interested in the resistance of Australia to achieving law reform, which seemed to me, often, to be so manifestly necessary and, indeed, urgent – especially in a state like South Australia, after the very long period of the Playford Government. There was a lot to be done and Don Dunstan was doing it, and apparently doing it successfully. I was fascinated by that capacity. And by the stage I was conversing with him, the Whitlam Government had been dismissed and the Fraser Government had been elected.

Peter Durack, Senator Peter Durack, was the Federal Attorney-General. He was not very much in favour of law reform. Malcolm Fraser actually was a very significant law reformer. He pioneered the big changes in administrative law in the federal sphere. So the government was not necessary antagonistic to law reform; but the Attorney-General wasn’t very favourable to the work in that direction of the Australian Law Reform Commission, which I was heading. So this was the moment when I was meeting Don Dunstan, who had been something of a hero for me. It came at a period when I was feeling some frustration at the difficulty of getting a wind behind the sails of my proposals in the ALRC for reform of federal law.
Yes. How did that actually work? I know there were a number of references you had, but were you also working off what, say, was happening in South Australia?

No. No, no. I was purely in the federal sphere.

Federal.

I was working on references from the Federal Attorney-General, with a pretty distinguished Commission, if I can say so. It had included people of very great talent, such as Gerard Brennan of Queensland – he was a QC then, but he went on to become a judge of the Federal Court and a Justice and later Chief Justice of the High Court; Gareth Evans, who was no mean slouch, who was later a QC and Federal Attorney-General and Minister for Foreign Affairs; John Cain, who later became the Premier of Victoria, and I think gave Don Dunstan the opportunity in the tourism industry in Victoria; Sir Zelman Cowan was a commissioner; Maurice Byers was a commissioner, Sir Maurice Byers. So it was a distinguished Commission. But the Attorney-General seemed to have the view that there was altogether too much law reform and that there was no great urgency for most of it. So I saw Don Dunstan as a vision splendid, an alternative model of governance. I was just relieved and interested to converse with him. That’s probably why it had an edge of enthusiasm in our conversation which led to Mike Rann remembering it. Perhaps I was also showing off in front of Mike Rann, because I thought he was a good-looker.

From those sort of conversations and your thinking, you’ve said you’ve written about the Whitlam period as well. What sort of principles or framework is required for law reform in the federal scene, let alone the state scene?

Well, I suggest you get a copy of that article, because the Whitlam Government was a great-achieving government in law reform, and Attorney-General Murphy was a great-achieving law reformer. And I knew that Don Dunstan was doing a lot of things that fell into the state sphere of law that were innovative. He was effectively tackling subjects for the first time in the Australian statute books, such as consumer protection law, environment protection law, reform of the criminal law to remove offences against homosexuals, and the like. So he was a very significant law reformer and led a law-reforming government. And I think for a time he was also Attorney-General –
Yes.  

Peter Duncan was also the Attorney-General and a significant ally and colleague of Don Dunstan in that government in getting things done.

Yes.  

But it was a marked contrast between that attitude and period and the attitude of Attorney-General Durack and the attention given to the processes of law reform by the Fraser Government.  

**So you need a supportive leader, if you like, to start with?**  

Somebody who’s interested in the topic. If a person’s background is in, say, foreign affairs – I’m thinking of Mr Rudd – they are not going to be so interested in law reform. They will tend to find law reform as the province of lawyers and therefore a bit of a mystery and not very interesting. Whereas Whitlam, Wran and Dunstan were all lawyers, and good lawyers. They knew how important the symbolism and effects of law can be for change in society. I’ve mentioned three areas for Don Dunstan, but in my time I’ve given speeches in which I’ve referred to his achievements as a law reformer. They were in a whole multitude of areas of activity. That was because he was a lawyer and was interested and knew of the importance of reform of the law. So I didn’t have much to do with him before that meeting. I had nothing to do with him personally. But the meeting in Newcastle was an opportunity to familiarise myself with him as a person and to try to understand, in my mind, what it was that led to such a person being delivered by the Australian political scene and how one can perhaps encourage, or hope for, that in the federal and state spheres.

**And what sort of observations did you come to in that? Was he just out of the blue?**  

Well, I wouldn’t exaggerate any of my meetings with Don Dunstan, because they were generally brief and rather superficial. I mean, what can you say in a three-quarter-hour car journey except that you admire the man and admire his achievements, thought he made a good speech, and learn about how he goes about things and what his prognosis is in the federal sphere? Matters of that kind would
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have been discussed. But it wasn’t an intense or prolonged conversation. He knew that I was interested in reform and I knew he was interested in reform.

**Did you have any talks with Roma Mitchell? She was chair of one of the South Australian law reform committees?**

Yes, I certainly did; and with Howard Zelling and with Sam Jacobs and Len King, all of whom were involved in law reform, Len as Attorney-General at a later stage and then as the Chief Justice: a very fine lawyer. I also met John Bray, who was appointed Chief Justice. So all of these people in the South Australian Establishment were taking their cue, in a sense, from the reformist attitude of the government. Roma Mitchell, in whose name I’m giving a lecture in Melbourne this Friday, was a very formidable lady. She, I thought, was more conservative than, say, Howard Zelling, Sam Jacobs, John Bray and others. But she also was strongly in favour of reform of the criminal law. She was Chair of the Criminal Law Reform Committee. Howard Zelling was chair of the committee that looked into civil law reforms. They were both very, very bright lawyers. I think there is a symbiosis between law reform bodies and political leadership. If the political leadership is empathetic and supporting, the law reform body and its commissioners, though independent of government, pick up the enthusiasm and will be more bold.

Howard Zelling was a very sharp intellect. He could have graced the High Court. Any of those I’ve mentioned could have been Justices of the High Court. But we still await the South Australian Justice.

Yes.

Although Chief Justice Way was offered a seat on the High Court, but declined.

**Many years ago.**

That was in the beginning of the twentieth century. He declined.

**I was interested in law reform. You mentioned preferably there’s a positive signal from either the leader of the government or the government as a whole, or a minister for that matter.**

Well, an interest to follow up proposals. Otherwise, they’re just academic publications that go on a library shelf. That wasn’t of great interest to me. I was hoping that the work we were doing was of a strong intellectual character, such as
would attract the good opinion of academics, but getting it into the statute book was the challenge, and especially because in the federal sphere. I had a somewhat antagonistic attorney-general who was not very enthusiastic about law reform; nor very enthusiastic about the fact that I was attracting a lot of media – more media than he did. That meant that I was in a bit of a doldrums. Therefore, I would look to a person like Don Dunstan as a kind of image of what might have been and what one day might be.

Just from reading the biography about you by A. J. Brown, there’s this, it seems to me, law reform through the interpretation of the law, if you like; but that, from your point of view, should be based on a set of high principles, if I’m getting this right, whereas somebody like John Bray’s view about interpreting the law was, ‘Well, here’s a piece of legislation; we’re interpreting it, but if something is awry with the law and it needs to be changed, well, that’s the role of the Parliament rather than the interpretation of a judge.’

That isn’t quite right. My job in the period we’re talking about at the moment was as Chairman of the Law Reform Commission. The Law Reform Commission’s task was to prepare reports on references given to it by the Federal Attorney-General. Therefore, there was a political and parliamentary element in the work of the Law Reform Commission and the work I was doing at that time. It had to secure the political acceptance to get the reference in the first place. Then it had to have the political support to get the reference translated into a report, in turn, translated into legislation. So in my law reform period I was entirely dedicated to preparation of legislation. I was not involved in the interpretation of law because my task was proposing legislation. Basically that is what the Law Reform Commission did. My complaint was that there then wasn’t a great deal of attention to the proposals. They had to await, really, the election of the Hawke Government, when a large number of the proposals, which had been made during the Fraser/Durack period, were translated quite quickly into federal statutes, and very successful and still-operating federal statutes. So that the Commission was definitely an adjunct of Parliament.

When I became an appellate judge, I was involved in the elucidation, declaration and interpretation of the law. Anyone who thinks that appellate judges are on automatic pilot and don’t have any effect on the outcomes of the cases has a very naïve view about the way the appellate process works in a common-law country,
including Australia. Judges’ values definitely affect the way the judge interprets the law. That being the case, during my period as an appellate judge, which went on for 25 years from 1984 to 2009, I was giving effect to my understanding of the law; but necessarily with a liberal attitude. If it was remarkable, it was because relatively few judges in Australia come from that angle. Most of them are quite conservative people, including judges appointed by Labor governments. I believe that Don Dunstan understood this, because he appointed a few judges who were not conservatives. However, most Labor governments are profoundly cautious in their judicial appointments. They seem to be terrified that they’ll appoint somebody who might rock the boat a bit. But sometimes a bit of boat-rocking is needed in our legal system.

Yes. There was another area I would like to explore – I think Don Dunstan wrote a letter questioning the value of symbolic initiatives such as Global Cooperation for a Better World in seeking changes to the interpretation of the law – Mr Brown refers to it in his book on page 226– you were, in some of your interpretations said to be working off some very high-level human rights principles and Don wrote a letter about that, which I think you didn’t necessarily agree with.

Well, he was a politician and he was a parliamentarian. He wanted to keep his hands on the whole body of the law. The trouble, though, is that experience teaches, and certainly my experience taught me, that unless a matter of law reform is sexy and popular it tends to get ignored. Injustices continue and they cause quite great wrongs to ordinary citizens. The genius of the English common law system which we’ve inherited is that, in such cases, the judges have, at the margins, opportunities to do things that the politicians neglect or refuse to do. Therefore, it’s like a symphony: there’s a role for Parliament, and that’s the major role – that’s the violins and the trumpets. But there’s also a role for the judiciary, and that’s the double basses and the cellos. And the whole thing, hopefully, comes together in harmony. However, those who play the violin tend to want to soar and dominate the symphony. Still, there’s also a role for double basses.

Yes. Interesting.

It’s natural for a politician to want to keep their grubby hands on the whole enterprise. That’s the usual approach of politicians. But you can take it from me
that parliaments neglect very important matters of reform. Don Dunstan less than others. But still, unless there’s a party political or other motivation behind it, reform tends to get overlooked and ignored.

**Yes. When John Bray was appointed, what were your views about that appointment?**

I didn’t know much about John Bray. Subsequently got to know him, and in fact I contributed a chapter to a book celebrating the life of John Bray. That was a chapter on his legal contributions. There’s no doubt that he was an outstanding lawyer and judge. He was also a very strong personality. I remember being told, when I was first appointed a judge back in 1974, that thereafter I must never, never go into a pub. Because of my Protestant upbringing, I never went into pubs anyway, or almost never.

**Really?**

I met my partner in a pub, but generally speaking pubs were not my scene. However, John Bray refused to give up pubs. Nowadays that is not a rule that’s binding on the judges, so they can go to pubs too. It was a very classist rule. You would meet the working classes and the commoners and criminals in pubs, whereas you wouldn’t meet them in clubs and other places that judges frequented. Well, we now know that there are probably more crooks in the clubs than there are in the pubs. However, John Bray had great interests as a poet and as a civilised man and as a university man. He was a remarkable person – though I think he had the attention of the Special Branch –

**He did, yes.**

A book is being written on his life at the moment by a scholar in the University of Adelaide.

**Is that John Williams, or is that another – – –?**

No.

**No. I think John’s doing one on the High Court.**

He’s forever writing on the High Court.
Yes, right. Well, given that background, the Special Branch background, Don Dunstan was seen to be pretty courageous or maybe foolhardy in a lot of the conservatives’ views. That didn’t resonate over here, the courage or the foolhardiness?

I think it had an effect over here, because the Special Branch over here was also – though not quite as dramatically – put in its place by the civilian government. Don Dunstan’s initiated inquiries. I think there was a commission of inquiry by Justice White, if I’m not mistaken –

That’s right, yes.

He was a very fine man, who served with us in the Law Reform Commission as a consultant. He revealed how the Special Branch of police concentrated solely on so-called ‘left-wingers’. I believe that I also had a Special Branch file – at least, I infer that from the fact that I attended a lecture recently given by the Honourable Meredith Burgmann, who was the President of the Legislative Council of New South Wales in the Labor interest. She not only revealed that she had a Special Branch file but she obtained a copy of it under freedom of information legislation. It showed photographs of her as a student politician demonstrating against apartheid and in thoroughly innocuous and admirable causes. Because I did much the same, I’ve made an application for my Special Branch file. I believe I will shortly get it. I have received my ASIO file, which showed that I came under attention because I was a student leader in the Sydney University students’ representative council and the National Union of Australian University Students. This showed that I was monitored, which seems to me to be extraordinary, but they were the ways of that time. It was Don Dunstan who pricked that bubble, in a way. Whether he went about it in quite the right way I don’t know. But he certainly asserted the power of the civilian government over the protective forces of society. We need an ASIO and we need a Special Branch. But it has to be under the civilian power for our larger protection.

Well, that’s the end of my line of questioning. Was there anything else you wanted to say before we wrap up, by way of a general statement about Don Dunstan?
I met Don Dunstan on a couple of occasions subsequently. I had interaction with him. When I was appointed to the High Court of Australia, he gave an interview to a journal – I think it might have been the *Adelaide Review* or some journal in Adelaide – praising my appointment as being one which would be very good for the gay community. Because at that time I was not totally ‘out’, as it’s put, that was a bold statement. But I was not ‘in’. Therefore, it was really facing up to the realities.

My interactions with him after that were at occasions when I would go over to Adelaide and a luncheon or a dinner would be arranged. That occurred about four times. He was very strongly for the republic. He couldn’t understand that I wasn’t quite so enthusiastic for that cause. So we would have agreeable but disagreeing lunches. It was entirely civilised. He had his point of view and I had mine. Interestingly, I was left with the distinct impression that Chief Justice Bray was much more inclined to my point of view.

**Oh, really?**

But that’s a minor detail. But I would have met Don Dunstan on about four or five occasions subsequently. I didn’t have a close relationship, personal relationship, with him. But I admired him and I still admire him. I think he was one of the four or five most impressive politicians that I ever met. He certainly was an achiever in the field of law reform. He has left a gold standard that is there for reforming governments. Reforming governments don’t have to be of the Australian Labor Party. As I say, Mr Fraser’s government didn’t do much about the reports of the Law Reform Commission but it did achieve a lot of reforms in the field of administrative law. But Don Dunstan achieved reforms right across the board, and they were notable. I can’t think of any other state premier who was in the same league as he. He was an outstanding Australian, an outstanding human being, and a courageous one. And I think, as a bisexual or gay man, he was also an example of courage in a time when it was much more difficult.

**Yes. Mr Kirby, thanks very much for that interview.**

It’s a pleasure.

END OF INTERVIEW