

Rob McLelland

[Start of recorded material]

[00:00:00 - 00:00:05 – Background conversation]

Interviewer: Well I'm with Robert McLelland at Parliament House this morning, and Robert McLelland, MP, welcome and thank you for the time to conduct this interview with you about this very controversial case.

Could I perhaps start by asking you why do you think this case that's 111 years old this year, the trial and the execution of Lieutenants Morant and Handcock, and [00:00:30] the sentencing to life imprisonment of George Witton, why do you think it's remained controversial today?

Respondent: I think a number of factors. In my... look, in my opinion this case is controversial for a number of reasons. Firstly, of course, it was the British exercising jurisdiction, or criminal jurisdiction over Australians, that is the background I suppose. But the second reason it's controversial is that I think there are unquestionably fundamental [00:01:00] flaws in the legal process that resulted in these convictions, and fundamental flaws in a serious criminal prosecution, albeit in the military context, are issues of concern then, and they remain issues of concern now.

Interviewer: Recently noted international jurist Geoffrey Robertson, QC, was interviewed, and I understand you've read the transcript [00:01:30] of the interview.

Respondent: Yes.

Interviewer: What do you think of Geoffrey's recommendations that there be an independent and transparent judicial inquiry into the circumstances behind this case?

Respondent: I think there is... I think there is cause for such an inquiry, an independent inquiry as recommended by Geoffrey Robertson. I've focused in particular on those flaws in the process, the fact that the court [unintelligible 00:01:59] inquiry [00:02:00] proceeded in some instances without... without the accused being in attendance, and the fact that there was a complete denial of procedural fairness before the court martial commenced. One day's notice, one defence counsel for five accused, that there were clearly fundamental failings in the court martial process and in particular the summing-up on issues such as onus, legal issues such as provocation, [00:02:30] other legal issues such as acting on orders, and then finally, and this perhaps is one area where unquestionably there needs to be an inquiry, is why these men who were accused and executed within, I think, ten days of the decision were denied access to judicial review or an appeal, why additional time wasn't allowed, [00:03:00] why it seems correspondence seeking such a review was interfered with, and why Kitchener

and/or his delegate wasn't available to receive... to receive that. What were the motives, in other words, for those who seemed, I think on the evidence, to specifically shut down that option for that for the accused.

Interviewer: In 2009 this case came before a public hearing of the House of Representatives Petitions [00:03:30] Committee...

Respondent: Yes.

Interviewer: ...at which I appeared at, and the Committee later deliberated and said that the case for review was strong and compelling. Have you got any views about the Committee's findings?

Respondent: Well, yes, after I received those findings I actually wrote to the British Ministry of Defence in my capacity as Attorney General, and asking the Ministry of Defence to revisit the matter. I must say no specific case was presented on behalf of myself as [00:04:00] Attorney General, the Attorney General's Department, or the Parliament of Australia, but rather saying that there were grounds for review. And perhaps in retrospect we should have been more precise in those areas that we wanted them to target. And subsequently, as a result of representations that I received from you and others, and having looked at the matters that were raised including those I've gone through earlier, I made further representations [00:04:30] to my department who, in fact, were in the process of actually doing just what I'd described, preparing arguments as to why there needed to be a review. And I made that request in, I think, November 2011 before I ceased to be Attorney General.

Interviewer: Now in 2011, after having studied the matter and receiving recommendations from your department, you made a decision that you were going to write and make representation to the British [00:05:00] government.

Respondent: Yes.

Interviewer: Unfortunately that didn't happen, you were replaced as Attorney General. What's your view about what you want to do about the matter now?

Respondent: Well I've been reluctant, I must say, as a mere backbencher in the government to act contrary to the wishes of the succeeding Attorneys General, there've now been two. But I must say that that will only be until the 12th of August of this year and I'll certainly revisit the matter then. I'm still firmly of the view, particularly when there are people who [00:05:30] volunteer to place themselves at risk, and go necessarily into remote locations, issues regarding flawed... a flawed judicial process, albeit in the military context, are just as significant for them, and just as significant today I think as they were then. We need to look at what happened then, and not only in so far as redress is possible, but also in terms of ensuring that [00:06:00] similar circumstances don't arise today.

Interviewer: Yeah. During your tenure as Attorney General you also received some submissions from the descendants of these men. Did you form any views about how they can be assisted to bring this case to resolution?

Respondent: Well, again, it's... the descendants, I think, according to administrative law principles I think are entitled to be regarded as an interested party, or an aggrieved party, [00:06:30] and I would like to see very various legal aid, or very various legal assistance funds have regard to that fact that I think they do have standing for the purposes of an administrative or judicial review, and to consider that this matter, for the reasons I've advanced, does raise issues of public interest.

Interviewer: Finally, Robert, [00:07:00] the next government that takes office, whether it be Liberal or Labour, have you got a message to send to either side of politics about resolving this case?

Respondent: Well this is unresolved business. Going back I think it was considered by the Federal parliament in 2004. The Federal parliament would have been sitting, in those days, in Melbourne, but it's been unfinished business. It was certainly of real concern to the Australian parliament then, it was of real concern to the Australian [00:07:30] people I think as a result of that concern, in fact it was Witton, I think, wasn't it, who was returned to Australia. In other words, implicitly I think, in that occurring recognising that things had gone astray and not been properly dealt with.

We have never had an accounting in respect to those who are executed, and I think it's a legitimate matter [00:08:00] that the Australian people are entitled to seek closure on, and not simply those descendants of those who were executed.

Interviewer: In 1902 the noted jurist as he then was, an MP, Isaac Isaacs, who eventually became Chief Justice to the High Court and Australia's first Australian-born Governor General made representations through a petition to the British King in support of George Witton, and that petition worked, and it was [00:08:30] signed by eighty thousand Australians, and George Witton was eventually released a couple of years later. What does that say about the significance of this case, that a jurist of his eminence would have been involved and worked studiously on behalf of George Witton?

Respondent: I think the fact that a man of the stature of Sir Isaac Isaacs, the Chief Justice of the High Court of Australia, being prepared to make representations [00:09:00] on behalf of Witton, which representations were successful, indicates two things – one, the issue was of substance or a man of that stature wouldn't have taken the action; two, it was action that was supported by a very substantial portion of the Australian people; and three, and significantly, the representations were successful implicitly indicating that there was recognitions there had been flaws in the process.

Interviewer: Robert, thanks for your time [00:09:30] this morning, and I look forward to your continued interest and support.

Respondent: It's my pleasure.

[00:09:36 – 00:09:57 - Background conversation]

Interviewer: Yeah, Robert, in mid-2011, [00:10:00] I... you kindly invited myself and David Denton, [SL - 00:10:05 SC] to visit you in your Sydney office. At that stage you'd received a lot of materials from me, and Mr Denton had also written a legal opinion based on the materials that I'd accumulated. Do you recall the meeting?

Respondent: I do recall a meeting in mid-2011 with yourself and David Denton, and that was significant. [00:10:30]. The letter... the meeting was in response to correspondence that I had sent in turn communicating the response of the British Ministry of Defence indicating they regarded the matter as being closed.

I recall allocating about half an hour for that meeting, but on being taken through the various issues I think we had a discussion of about two hours which I found, obviously, to be very [00:11:00] interesting. But I think the issues raised and drawn to my attention certainly indicated that there were fundamental flaws in this criminal process, this military criminal process.

Interviewer: So that meeting was a turning point for you?

Respondent: That meeting was a turning point. I was convinced, as a result of those representations, that there were unquestionably failings, and subsequent to that I asked my department to prepare representations [00:11:30] again supplementing the information I'd received with their expertise in arguing why the failings in the criminal process resulted in a miscarriage of justice.

Interviewer: If this matter finally resolved would you have a message that you'd like to send to the British government?

Respondent: From the British government's point that it was clearly... it was clearly a very, very difficult time in their history that... and from [00:12:00] all round we will be inevitably looking at conduct that occurred over a hundred years ago through our values of today. We're not being... we're not seeking to be judgmental on the British government as it exists today or the British people as they exist today, but the facts of the matter are there were fundamental flaws in the criminal process that resulted in these people being executed, and when that injustice [00:12:30] occurs I think it needs to be revisited, and certainly it is a matter of public interest that that occur.

Interviewer: Thanks for your time.

Respondent: My pleasure.

[00:12:42 – 00:14:52 - Background conversation]

[End of recorded material]