William & Lonsdale - Lives in The Law
Ep 63 The Hon. Elizabeth Hollingworth

Voiceover [00:00:08] This is William and Lonsdale, a podcast about the legal ecosystem and the fascinating people who make it tick. Today, your host, Michael Green, speaks with recently retired Supreme Court Justice, the Honourable Elizabeth Hollingworth. At school, Liz excelled academically, athletically, creatively, and in leadership. She went back and forth between medicine and law, but happily for us, law won out in the end. At university, Liz continued to reach high levels in a variety of disciplines, which made her the perfect candidate for the Rhodes Scholarship. And after a slightly torturous selection process, she was successful and headed off to the UK in 1985 to study for a Bachelor of Civil Law. And true to form, she also rode for Oxford in the famous Blue Boat while she was there. Jumping forward, despite a long legal career, it wasn't until Liz came to the Supreme Court of Victoria that she found her true legal passion in the criminal division, presiding over many dynamic and high -profile cases which she absolutely loved. But interestingly, back at the bar, Liz had primarily worked in commercial law and as she discusses frankly in this episode, she didn't find this type of work particularly engaging or challenging. But there were exceptions as there always are and in 2000 Liz acted for the Commonwealth government on one of the first stolen generation litigations, a case which sticks in her mind for a number of reasons.

Elizabeth Hollingworth [00:01:37] An absolutely fascinating case, it involved looking at a part of Australian history and going and speaking to a lot of witnesses, many of whom were now in their 80s and 90s, about the events of 40 or 50 years ago and in many ways it was fascinating. But it was one of those cases where when I was offered the brief I thought, oh fantastic brief, pity I've been offered the wrong side. My personal sympathies were for the applicants, but one of the important things about the bar is the so -called cab rank principle, which is that you take the brief if it's in your area. for whichever side offers it to you and you're not meant, you're not there to be the judge or to decide who should win, you're there to do the best job for your client. And I have absolutely no qualms about having worked on that brief or what I did, but what was interesting to me was that many of my colleagues would say to me, I can't believe you're doing that case or would regard me as an apologist for John Howard or the federal government's policies or things of that sort. So it was both. the best of cases and the worst of cases, to quote from Dickens.

Michael Green [00:03:05] Our guest this morning in Lives in the Law is the Honourable Elizabeth Hollingworth, formerly of the Supreme Court of Victoria. Good morning, Liz. Morning, Michael. Liz, we might start on your life in the law by going into the medical profession. I found it amazing, the medical lineage in your family. I think it'd be unique, actually. So could you tell us what that lineage is?

Elizabeth Hollingworth [00:03:25] My father was a seventh generation doctor on his side, and although my mother was a teacher, both her father and grandfather had been doctors. So there was kind of an expectation that somebody, and that was probably going to be me, in the next generation was going to be a doctor as well. But it didn't happen? No. I did toy with it for many years, and then somewhere in my mid -school years, I had what seemed like a big rebellion, and I decided not to do medicine and to do law instead. and fairly tame rebellion but not an uncommon one. I've actually spoken to many people both in the medical and legal professions who at that time had their options presented in a fairly binary way. If you had the marks, you'd do one or other of them.

Michael Green [00:04:04] As well as the medical profession being very important in your family, another important element of your family life, your mother and father and your siblings, was sport. You're a big sporting family as well.

Elizabeth Hollingworth [00:04:14] Yes, in fact my parents met at university, they were both at an intervarsity swimming and water polo competition in England and that's how they met. And swimming and water polo were big family pursuits and that then led to a whole lot of other sports but we were all expected to play sport from a very young age and play sort of competitive sport.

Michael Green [00:04:34] Do you subscribe to the view that playing competitive sport, maybe particularly team sports, is beneficial?

Elizabeth Hollingworth [00:04:39] I mean, beyond the obvious benefits of being healthy and learning new skills, you learn to, in a team sport in particular, you learn to interact with other people and work together for a common goal. Sometimes there are people you don't have much in common with, sometimes there are people you don't particularly like, or even really don't like, but you still have to get on and work together for a same goal. All sports, whether individual or team, also teach you what I think are invaluable life lessons about resilience and persistence. You know, it doesn't matter if you're tired. or sore, or bored, or frustrated, you just have to keep going. And I think those are invaluable lessons. I think the other thing that I reflected on, and it may not be as true now with social media, but when I was at school and university, most of my friends played sport as well. And it meant that, particularly as women, we were more interested in what our bodies could do, how much weight we could lift, how fast we could run, et cetera, than in the sort of social pressures of appearance. Now, that may not be the case these days. I suspect that. Even elite athletes these days have to both look good and be able to perform. But I think it was a bit of a blessing back in the day.

Michael Green [00:05:46] I assume it's still a blessing. It's always been a, maybe it's a bit of a chestnut, but the team sports in particular helped develop good traits in people. Your mum and dad come out from England when you're, I think, primary school age. That's right. And shift to Canberra, and you go to school at Canberra, primary school, then secondary school. That's right. But for the last two years of your schooling, you went to boarding school. That's right. Why, at that critical time in your schooling, did your parents decide to send you to boarding school?

Elizabeth Hollingworth [00:06:14] Well, we were living in Canberra. We moved out from England to Canberra for the sole reason that the only people my parents knew in Australia at the time lived in Canberra. And it was a great place to go to school for the most part. But when I was in year 10, the ACT announced that it was going to do away with external examinations, the high school certificate it was called then. And then I was still flipping backwards and forwards about whether I'd do medicine or law, but both of them would have involved going to university in Melbourne or Sydney. because the ANU in the 70s was still primarily a research institute and certainly didn't have a medical faculty. And the competitive universities in Melbourne and Sydney basically said to the ACT, well, good luck with moving to internal assessment, but we won't be taking people into competitive courses if they haven't done some sort of measurable external exam. So my parents decided to send me to school in either Melbourne or Sydney, and thankfully they chose what was a boarding school. I'd been at a girls' school in Canberra where day kids with majority and boarders were border bugs and were very much second class citizens. So to

go to a boarding school where borders rocked and where day kids were day bugs was actually really refreshing and a good culture to be in.

Michael Green [00:07:22] Now, you said you had that mini rebellion in year 11, I'm not gonna do medicine and follow the family tradition, but then you get to year 12 and you get the wobbles, you sort of hedge your bets.

Elizabeth Hollingworth [00:07:31] Yes, I wasn't entirely sure and I decided by year 12, oh, maybe I should do a few science subjects to make sure that if I do want to do medicine, I can get into medical school. But because I hadn't done enough pure science subjects in year 11, I had to pick up pure and applied mathematics. And I ended up just missing out on getting into medicine by, you know, a fraction of a mark.

Michael Green [00:07:54] And you do your law, but you don't do your law in Melbourne or Sydney?

Elizabeth Hollingworth [00:07:57] No, that's because my parents in the meantime, perhaps a bit slow in coming to the realisation, they had four kids who were spread over six years of school and I think they suddenly came to the realisation we were probably all going to head off to Melbourne or Sydney to uni. So my father decided to take a job in Perth. I don't think they were ready at that stage of their lives to move to a city as big as Melbourne or Sydney themselves. And they knew some people, some other English expats who lived in Perth. and they thought we could all go to university and do whatever we wanted to. So my family actually moved across to Perth in my final year of school, and that's why I ended up going to university over at UWA.

Michael Green [00:08:33] So you do your law at the University of Western Australia, you don't go straight into law.

Elizabeth Hollingworth [00:08:39] No - in those days to do law at UWA you had to do a year in another faculty and your admission into the law school was based solely on your marks in first year of another faculty and then in those days you couldn't do a combined law degree so having done a year in another faculty and I did a year of arts you then did four years of pure law and your pros and cons with that one of the great attractions was that you were a small cohort we started off with perhaps 120 and it was the same group who went through the whole way so you had a of knowing people and having a cohort. And it did surprise me when I moved across to Melbourne, eventually, how many people would be talking to each other professionally, and they'd realise they'd be at the same university at the same time, and had never come across each other because the intakes were just so large and so fluid. I mean, the downside of a pure law course was that you didn't get the benefits of the breadth of doing a combined degree of some sort. Did you enjoy studying law? I did, yeah. I enjoyed the intellectual challenges. I mean, obviously, some subjects were more interesting than others. know, as a sort of young and idealistic person, these ideas of sort of truth and justice and fairness and fair trial and all these naive and fairly unsophisticated beliefs that you have in a university age did appeal. Obviously, there were some subjects that were less interesting than others, but I've overall enjoyed the intellectual challenges of learning about the different subjects. But what became clear to me fairly quickly, because I had summer holiday jobs every single some holiday was that. The subjects that you found interesting to study weren't necessarily ones that one wanted to practise in. So I was fortunate to be at university and then starting off my career at a time when there was a real shortage of lawyers. And so there were lots of

opportunities that I don't think are quite as available now to go and have holiday jobs, to go and check out firms and try different options before you had to make a decision.

Michael Green [00:10:28] As well as studying, did you participate? University can be a very rich life if you want to partake of it, did you?

Elizabeth Hollingworth [00:10:35] I did - I mean, I'd played sport and been in leadership roles and done debating and drama and all sorts of things at school. And I continued that at university. So I continued to play a lot of sport. I was involved in student politics, both in the sports clubs, the law faculty and the Guild of Undergraduates. I did mooting, which is a particular type of mock trial practise. I had a number of part -time jobs. So no, in those days, we were very fortunate, I think, that we were able to have very and fulfilling university lives. And to a large extent, that was assisted by the fact we weren't paying university fees. And I know from my own teaching over the past 20, 30 years that the introduction of university fees has significantly altered the average university experience, unfortunately, and for the worse.

Michael Green [00:11:22] Very few students can participate in university life, because they need to work. Interestingly, in your final year at the university, you apply for a Rhodes Scholarship. What prompted you to apply for a scholarship?

Elizabeth Hollingworth [00:11:39] I mean the Rhodes was the one I most wanted for reasons I'll explain in a moment, but I decided by the end of that I didn't want to go into full -time practise yet, that I still wanted to do more study and to have the opportunity to study overseas. So I applied for a number of scholarships. The Rhodes Scholarship was the most attractive. To be perfectly frank, it probably had the highest status of the ones I was applying for. It was to go to Oxford. It was a scholarship for sort of a whole series of different all -around qualities that I thought. CV probably fitted better into than a purely academic one. Some of the scholarships were purely academic and although I had good marks, I had at times spent far too much time doing other extracurricular activities, so I didn't have an unblemished academic record. So the Rhodes was likely to be more forgiving about that because the things that I'd spent my time doing were sort of categories that they rewarded, like leadership and sport and those sorts of things.

Michael Green [00:12:33] You and Bob Hawke, he was the other Western Australian.

Elizabeth Hollingworth [00:12:35] I can't drink a yard of beer in as much speed, I'm afraid he has skills that I didn't.

Michael Green [00:12:40] You also had to undergo a trial, you called it trial by dinner.

Michael Green [00:12:44] Yes, the selection process that involved, as well as an interview, a dinner, a black tie dinner the night before at Government House, where a dazzling array of cutlery was spread out and you were meant to sit and make small talk and not spill your peas and your red wine all over the table. I'm sure it wasn't in the mind of the selection committee meant to be intimidating, but as a university student who hadn't really been to that many black tie dinners and had that sort of thing, it was a bit of an ordeal.

Michael Green [00:13:16] So you pass the trial by dinner and you go over to Oxford. Am I right in thinking it took six months or 12 months?

Elizabeth Hollingworth [00:13:23] It was a two -year scholarship, and I did a two -year degree called the Bachelor of Civil Law, which in a typical Oxford way is a complete misnomer, it should probably be called a Master of Common Law, but it's been called a Bachelor of Civil Law for hundreds of years and Oxford's not into changing things just for the sake of modernity. But it was a fabulous degree because it was, although it was a master's subject, I did a mixture of subjects and a thesis, and the subjects were taught in small classes and end. one -on -one or one -on -two tutorials. Now, it was fantastic because it was very rigorous. It was a little intimidating because whereas I'd been in tutorials of 10 or 15 people at UWA, and if you hadn't done the reading, you'd ask a few questions or make a few comments and then the tutor would move on to someone else. when it's just one -on -one or one -on -two and you haven't done all the reading or haven't given it as much thought as you should, there are some fairly deafening silences as I learned fairly early on. The good thing though about being a two -year degree was the exams were all at the end of the two years. So I still got to, I rode in the blue boat against Cambridge and I played border polo and did lots of travel and so on. So I actually got to enjoy the Oxford experience as well as the academic rigour, but I fairly quickly learned to make sure I'd done the reading before a tutor.

Michael Green [00:14:38] You say about the blue boat, in my mind, the boat race, I think it's called. That's right. Is a long race, just between two boats, Oxford and Canberra along the Thames.

Elizabeth Hollingworth [00:14:46] So when I did it, the heavyweight men's boat race was along the Thames and it was a very long race. And back in, this was in the 80s, the women's heavyweight and lightweight and the men's lightweight was rowed at Henley on the Henley course in reverse. So that was a shorter duration. Nowadays, I understand both the men and the women, heavyweights and lightweights, row the Thames course. But one of the interesting things in England is that they do a lot of long distance so it's part of our training. we would do long -distance races on the Thames that could be sort of 10, 15 kilometres. The good thing was that in Perth, in UWA, we used to have a race that rode all the way from Perth down to Fremantle. So I did have some experience of spending a long period of time going backwards and forwards.

Michael Green [00:15:32] As someone who's had a peripheral interest in rowing, with a son rowing, what seat did you row in?

Elizabeth Hollingworth [00:15:38] In the blue boat I rowed in five. Which as you'd know is called the engine room. It's not so much skill not necessarily the finest skill, but a lot of heft

Michael Green [00:15:47] It is the engine room, as you say. So I think it's a position of respect within a crew.

Elizabeth Hollingworth [00:15:54] One of the interesting things with rowing is that everybody matters. It's the ultimate team sport in the sense that if the boat's going well, it's like nothing else. If all of you, whether it's a four or an eight or even a pair, if you're completely in harmony, the boat absolutely flies. But if anybody's even a tiny bit out, you can't carry them. So unlike most team sports where the rest of you can cover for a weaker player, as that experience, people remember that poor woman named Leda and Sally from the Olympics a few He is back. you can only go as fast as your weakest person. So actually everybody in a boat matters.

Michael Green [00:16:31] So Liz, you have two years in Oxford, and then you come back to Perth.

Elizabeth Hollingworth [00:16:35] Yeah, first of all I went backpacking around Europe for about six months and then I came back to Perth. I started my articles of clerkship before I went away but I hadn't finished them. So in order to be admitted to practise I needed to come back and finish my articles and in those days in Perth you also did what was called a restricted practise year. So, I came back for 18 months before I moved across to Melbourne.

Michael Green [00:16:57] You were working in a large commercial firm doing commercial work.

Elizabeth Hollingworth [00:17:03] Yes, commercial litigation.

Michael Green [00:17:05] And the same when you came to Melbourne?

Voiceover [00:17:06] Yes, so I transferred to the Melbourne office of the firm. I'd never intended to do commercial work, but that's how things turned out for a variety of reasons. And I moved across to the Melbourne office, and I always intended to go to the bar, but I thought I should get a few years' experience as a solicitor first before I actually went to the bar.

Michael Green [00:17:26] But it was always going to be the bar. So you come to the bar in Melbourne with that background of commercial litigation at a large firm, I think Mallesons. Was it an easy transition?

Elizabeth Hollingworth [00:17:37] Yes it was in the sense that Malison's had the reputation of being a firm that supported their former staff who'd gone to the bar, as long as you'd left on good terms. And if you'd been a, I'd been a litigator in some fairly high profile matters, I had good relationships. So I was fortunate because probably for the first few years, probably 60 % plus of my work came from Malison. So that was very fortunate. The downside was that I'd never intended to become a commercial lawyer. It had happened because I'd... wasn't sure what else I wanted to do and I thought a large commercial firm was going to give me good training, which they did. And then when I moved to Melbourne, I had the good fortune to be in some fairly high profile litigation, which meant that other people around town knew that I was a commercial lawyer. So when I came to the bar and said, actually, I'm prepared to do anything, people said, no, no, no, you're a commercial lawyer. So it was, you know, it was good because I was busy and I had a fantastic practise from the word go, but it was bad because I was pigeonholed. already by people's expectations and in some ways the easiest course is well if the work's being offered and you've got it and it's interesting and well paid, I continued on that path.

Michael Green [00:18:43] Being a commercial junior and having a lot of your work come from a large commercial firm, I'm assuming you are often the junior barrister with being led by a silk and maybe someone else.

Elizabeth Hollingworth [00:18:55] Yes, in the early days I was. what you call the second junior. And the funny thing was that I'd be doing, often not dissimilar to work to what I'd done at Malisons, drafting affidavits, taking witness statements, things of that sort, but at a fraction of the cost that Malisons used to charge me out at. So it was very good value for the client.

Michael Green [00:19:09] Did you get much opportunity to get on your feet and actually practise as a barrister?

Elizabeth Hollingworth [00:19:13] No, not in those early days. And that was the downside. I was very busy and in my first year, my practise was mostly Supreme and Federal Court. I went to the High Court a couple of times, but it was very much in what I called the handmaiden role. You do all the work and the preparation and then you hand it up to the leader who's on their feet. So after a period of time, after a few years, I tried to do some admin and FOI work, freedom of information work, to try to get some work where I'd be on my feet. and of course in due course. you start being on your feet more. You move up from the second junior to the first junior and then to running things. But it was always a frustration in commercial law that you weren't on your feet often enough and you certainly weren't running trials. Most of my clients were big blue chip companies. My instructors were mostly sensible commercial firms. And if you are commercial and you're opposed to someone who's commercial, it comes a point in any commercial litigation where you work out what your risks are. and benefits are, and your opponent does the same, and you come to a settlement. And that's obviously in the client's best interests, but it's very frustrating if you want to be on your feet, cross -examining witnesses and so on, because you spend your life doing paperwork and preparing documents for trials that are never going to run.

Michael Green [00:20:29] The matter you're involved in, which doesn't fit within that paradigm, was the Stolen Generations litigation. What was your role in that?

Elizabeth Hollingworth [00:20:37] I was lucky to be offered the senior junior brief for the Commonwealth in the test case of Gunner and Kabilo against the Commonwealth. This involved two Indigenous people who'd been removed from their families in the 40s and 50s in the Northern Territory and gone to institutions. It was a bit of a test case. It was only a few years after Ronald Wilson's bringing them home, report and so on. So it was an absolutely fascinating case. It involved looking at a part of Australian history and going and speaking to a lot of witnesses, many of whom were now in their 80s and 90s about the events of 40 or 50 years ago. And in many ways, it was fascinating. But it was one of those cases where when I was offered the brief, I thought, oh, fantastic brief, pity I've been offered the wrong side. My personal sympathies were for the applicants. But one of the important things about the bar is so -called cab rank principle, which is that you take the brief if it's in your area. for whichever side offers it to you and you're not meant, you're not there to be the judge or to decide who should win, you're there to do the best job for your client. And I have absolutely no qualms about having worked on that brief or what I did. But what was interesting to me was that many of my colleagues who should have understood and appreciated the cab rank principle would say to me, I can't believe you're doing that case or would regard me as an apologist for John Howard or the federal government's policies or things of that sort. So it was both. the best of cases and the worst of cases, to quote from Dickens.

Michael Green [00:22:07] That's interesting, of course, because I have wondered over the years whether the cab -rank principle is adhered to when it suits people, and when it doesn't suit them they can find a reason not to.

Elizabeth Hollingworth [00:22:18] That's right. And I think a lot of people, whilst adhering to it, will just say no to a brief that they don't want to do. The thing is, I'm not party political. I've been briefed by state and federal governments of both, or all persuasions, I should

say. And I always took the view when I was doing a government brief that it was better for the government to be represented by someone who's not a zealot. Indeed, it's not just governments. I think all clients should be represented by advocates, not activists, because if you're too emotionally involved and too personally involved in the case. I think it can cloud your judgement, it can cloud your ability to give the client news they don't want to hear, to make professional judgments that are in the overall interest of the case. So that was the philosophy I'd always applied, but I think you're probably right, Michael, for all the espousing of it. There are some people who stick to it more rigidly than others, and it was certainly because the case went on over a number of years, it was really interesting to work out who really believed in it and who was probably more of a lip service pair.

Michael Green [00:23:15] And can you remind us what the outcome of the case was?

Elizabeth Hollingworth [00:23:18] Well, the interesting thing was that what the case actually was in the first instance was an application for an extension of time. Obviously the statute of limitations for suing the Commonwealth had expired decades ago. So in order to get an extension of time, one of the things that the court had to consider was whether it would be possible to have a fair trial, having regard to all the witnesses who had since died, all the documents that had been destroyed, people's memories impaired and so on. In the case of both of the applicants. The Commonwealth's case was that their mothers had consented to them going away to school and had consented to what happened. Both of the mothers were dead. Many of the contemporaneous witnesses were dead. Government officers were dead, et cetera. I personally suspect that the judge always knew that the likely outcome was going to be that he wouldn't grant an extension of time. But the judge, Maurice O 'Loughlin, who's now deceased but who was an absolutely decent and compassionate federal court judge decided that he would hear the application for an extension of time, and in doing so, allow the applicants an opportunity to call evidence and to be heard. I suspect, I never discussed this with him, he'd never said this, I suspect many judges would have looked at the affidavits and said, far too many people have died, far too much has been destroyed, there can't be a fair trial after all this time. But I think to his great credit, he allowed the application an extension of time to run. But it was ultimately, as I think it was always fated to be unsuccessful, and that went through the full court and then the high court, and that was upheld. But that was what the actual process was. The interesting thing was that in theory it was just about these two particular cases, but it was my first exposure to realising that people on both sides or from multiple different angles saw it as representing some ultimate truth or some greater picture. And so, inevitably... hopes are dashed or people get disappointed or things are taken as more or less than they actually are. But that's often the case with so -called test litigation is people want it to be bigger sometimes and to represent more than it perhaps it actually does.

Michael Green [00:25:26] But actually it was an application for an extension of time.

Elizabeth Hollingworth [00:25:29] Yes, had they been successful in that, it would have then rolled into the trial itself. But that's technically what it was.

Michael Green [00:25:40] Listen, you surprised me when you said you'd never really wanted to do commercial law because you've got the sort of background that normally naturally leads to commercial law. Why didn't you? Why wasn't it? What appealed to you? What did appeal to you?

Elizabeth Hollingworth [00:25:53] Back in my teenage years when I was rebelling against doing medicine, I was actually very interested in criminal law. I didn't know much about it,

but older listeners will remember the American show Perry Mason, where a rather colourful American attorney whose clients were always fortunately innocent people wrongfully framed by corrupt police, he'd managed to get them off the charges in about 50 minutes just through the sheer brilliance eloquence of his advocacy, and that struck me as someone who enjoyed debating. arguing and so on and had a teenage interest in justice and fair trials and those sorts of things, that struck me as a fabulous thing to do. Unfortunately, early on in my university holidays, I had a job with a criminal law firm. And much to my naive 18 -year -old surprise, most of the clients were not innocent people wrongfully framed by a corrupt system. They had probably done this crime and if they hadn't done this, they'd probably done another one and I... I didn't have a framework for dealing with it. There was a part of me that thought probably the only way to help these people would be to become a social worker or intervene in their lives much earlier on so they don't end up here. But it shattered my very naive assumptions about criminal law. And because I didn't know any lawyers, my parents, friends were all in the medical profession, I didn't have anyone to talk to. I didn't have a framework to understand that as a criminal advocate, it's not your role to decide whether your client's innocent or guilty. Like any advocacy your role is to. defend your client's rights or to prosecute, and to let the judge or the jury decide guilt. So that turned me off criminal law as an area of practise. That said, I remained interested in criminal law. So I did my honours thesis on a criminal law subject. I did my master's thesis at Oxford on a criminal law subject, but I had just put to one side thinking that I'd actually practise it. I'd also been interested at university in family law because I went to university only a few years after the Whitlam government completely changed the nature of family law. So we went from having to prove fault and from private eyes sneaking around hotel rooms looking for proof of infidelity and so on, to the idea that people could separate and divide their property and work out what was happening with the children on a no fault basis. So as an academic subject, family law was fascinating. Once again though, I had a summer holiday job in a family law firm and within a month I decided I did not have the temperament to deal with this. when two people who once loved each other more than anything in the world now wanted to kill each other, I wasn't sure that I was the right person to resolve their problems. So there'd been various instances like that where I'd been intellectually interested in something at law school, but wasn't really sure that I wanted to practise in the area. So as I mentioned earlier, I think my last summer holiday job was at a large commercial firm. And what became clear to me was that they'd give me an excellent training. So whilst I hadn't really done commercial law subjects, and I wasn't particularly interested in it, because there was a shortage of lawyers in those days, the big firms sort of wooed the bright young honours students and promised you the world, and it seemed like it would be a good training for whatever I ultimately wanted to do. So that's sort of the route by which I ended up doing commercial law. The problem at the bar was that, as I've already touched upon, if you are commercial and your clients are commercial, most of your cases are going to settle, so you're not in court. on your feet, which was the primary reason I'd become a barrister. The other thing was that ultimately most commercial cases are just about money. I don't mean that glibly, there's nothing wrong with that, but it's not why I became a lawyer and it wasn't what particularly fired me up. So that combination meant that I was, after only a few years probably at the bar, fairly bored and fairly quickly thinking about whether I'd made the right decision. And that led me in my 30s to explore a number of other sort of possibilities isn't. to think about what else I might do.

Michael Green [00:29:40] Outside the law, was one of those possibilities, or did it lead to the Vincent Fairfax Ethics in Leadership Award? Did that come about because of an outside interest?

Elizabeth Hollingworth [00:29:50] In part it did. So one of the things I did in my mid -30s was I went to Monash and started studying for a Masters of Human Bioethics because I was very interested in philosophy and ethics and hadn't really had much chance to study it at university. And in those days Peter Singer was heavily involved and there were other fantastic teachers out there. So I'd started studying human bioethics and that then led me to a broader interest in ethical pursuits. Then the family of the late Vincent Fairfax set up a fellowship award. which was really quite visionary at the time. They took, I forget now whether it was 12 or 15 young leaders in a whole range of areas, very disparate areas from around Australia and brought them together over a two -year period for a wide range of activities. So there were some weeks where we would spend a week engaged in philosophical discussion. We'd have done lots of readings and we'd have various speakers and so on.

Michael Green [00:30:42] You did your reading.

Elizabeth Hollingworth [00:30:43] Yeah, I did my reading this time. I was a good girl by then. And we would have sort of interesting debates. But it was also a heavy experiential element. So we started off the first week, I think we gave up two January holidays, plus a couple of weeks in the middle of the year. So the first week of the January holidays, we did an outward bound course on a boat, a sort of a bonding experience. Then we went off in groups of three to remote locations, to remote mining sites in the middle of nowhere in Australia. to experience issues of remoteness and to engage with local people and indigenous communities and so on. Then we had another week of listening to speakers. We went to Canberra and had speakers from a wide variety of topics. And then the following year, we sort of replicated that in various ways in Southeast Asia and met with young leaders and worked on projects. So I spent a couple of weeks looking at child prostitution in Thailand and speaking to people working in the area and trying to grapple with the issues. So it was a very visionary programme in terms of. taking people who were seen to be future leaders and encouraging them to develop across a broad range of areas, but with the overarching framework of becoming more ethical leaders.

Michael Green [00:31:53] And so you were maintaining these interests outside your practise. Yes. Because in some ways your practise wasn't really providing you with the stimulation you'd hoped for.

Elizabeth Hollingworth [00:32:04] That's right. And indeed at one stage in my 30s, I went back and contemplated maybe the problem was that I should have done medicine and so I went back and revisited that in the sense of I got hold of the syllabuses and worked out what would be involved in going back and studying medicine. I came to the realisation that I didn't want to do that, in part because by this stage I was senior enough that I had quite a lot of control over my time and I managed to get a work -life balance in some ways. So the idea of going back to being a junior doctor doing 20 hour shifts. in a hospital. I'd done that in my 20s as a young lawyer. I wasn't prepared to do that again. But I had to go through a number of options to work out what I wanted to do and to put to bed, I think once and for all, the thought that maybe I was bored in the law because I always should have done medicine. I came to the realisation that no, that wasn't the issue, but I had to bed it down. Were you teaching at this time as well? Yeah, so I started teaching at Melbourne Uni in probably in my mid -30s. I'd always done coaching. When I'd been playing sport at school and university, I'd always coached other teams as well as playing myself. So I suppose the idea of helping other people and hopefully inspiring other people and bringing them on had always been an activity that I enjoyed doing. So when the opportunity to do some teaching. at Melbourne Uni arose. I did that and I've continued doing that now for more

than 25 years. I tended to teach more practical subjects rather than academic subjects because my sense was that was where I was adding most value and the students quite frankly wanted to hear from real practitioners about subjects like civil disputes or negotiation or advocacy, things of that sort. So I continued doing that.

Michael Green [00:33:40] And was it because of you're not being fully engaged maybe by the legal work you were doing that you took an appointment to the Supreme Court at what's a pretty young age of 42?

Elizabeth Hollingworth [00:33:52] That's precisely why I did it. I mean, if I'd been in crime running murder trials, there's no way I would have taken an appointment at 42. I'd taken silk only about 18 months before that. I'd become a senior counsel only about 18 months before. So I'd gone from being the top of the junior pile to being the bottom of the senior pile. And the realisation I'd have to go back to working probably ridiculously long hours to compete with people more senior but at work that still wasn't particularly satisfying led me to being open to the possibility of being a judge. I wasn't sure when I took it whether I'd enjoy it or not, but I was bored enough that I thought, I'll give it a go, and if I don't enjoy it, I can always do something else. It won't have been a bad thing.

Michael Green [00:34:32] Surely in going on to the Supreme Court, with your commercial background, they would have said, oh, here we go, we've got another commercial barrister here, we'll put her into the commercial list.

Elizabeth Hollingworth [00:34:43] One of the reasons I went to the Supreme Court rather than the Federal Court was because of the breadth of the cases that they did. When I agreed to take it, I said I wanted to do crime and brought a common law and that whilst of course I would do commercial, I wanted to do the full range of things. So whilst I was technically put in the commercial division and the first term as a judge was in commercial, by the second term I was doing a term in crime. And I then tried, except for a two -year period where I had to sit full -time in commercial. I sort of progressively increased the amount of crime I did until after about 10 years I was full -time in crime. But the diversity of the work at the Supreme Court had always been very much a greater attraction for me, say, than the federal court. I think if I'd been passionate about commercial law at the time, the federal court would probably have been a more obvious mix, but I particularly wanted the diversity that the Supreme Court offered.

Michael Green [00:35:33] And would it be fair to say that after being exposed to crime as a judge, you loved crime?

Elizabeth Hollingworth [00:35:40] Absolutely - I mean, it satisfied the things that had interested me about crime as a student came back to fruition. You know, things came full circle. In fact, it was funny because my honest thesis had been about something called cumulative provocation, which what it meant was looking at what we would now call domestic homicides, a situation where someone who has been subject, usually a woman who's been subject to years and years of abuse, finally turns and kills the perpetrator of the violence. Now, back in those days. people in those situations had to fall under the old concept of provocation and provocation was one of those principles that arose historically when two gentlemen would be walking down the street and one of them would pull a sword and insult the other and that would prompt the other to immediately respond. It was very much a sense of an immediate response to an outrageous provocation and of course that sort of framework just didn't fit with the lived experience of people who'd been subject to often years of abuse and one day the worm finally turns. and the person, often in

response to a fairly minor slight or a minor provocation, turns around and kills their partner. So I'd done my honest thesis on that back in the 80s and it was interesting, fairly early on as a judge, I was sitting at a conference about defensive homicide as it had become core by then and I sort of remember sitting there thinking the circle has fully turned. I'm actually back to what had really passionately fired me as a student

Michael Green [00:37:01] But as a judge, you're not protecting the rights of this, your innocent client who's been framed by the police. You're sitting up there independently and impartially. It's a different role. It is obviously a different role, but requires different skills.

Elizabeth Hollingworth [00:37:15] Yes - and it's one that I realised suited me far better than being a barrister. A lot of people love being a barrister and arguing whatever their client's case is. I would often be sitting there thinking, actually I think my opponent's got a better case and I'm not sure that my client deserves to win. Of course I've got to do the best job I can for them, but I wasn't one of those people who was just, you know, happy to be arguing whatever my client's position was. One of the things I loved as a judge is initially sitting in commercial, you're the person making the decision. When you sit in crime, you're helping the jury make the decision. But in each case, I realised there's a purity about being a judge in this sense. You're not there to argue for anyone's, for anyone's side. Your role is to cut through all the rubbish and the games and sift through the facts and work out what actually happened and to work out what the law is and to work out how the law applies to the facts to come to a just decision. And I realised that that actually suited me far more as a role or a process than being sort of a gun for hire for whoever wanted me to argue their case. When you talk about being a judge in relation to a criminal trial with a jury, your role is slightly different. It's to make sure you're really the referee, the umpire, to make sure that there's a fair trial, that the jury understand what their role is, that they have the necessary law, explain to them to understand it, it. only admissible evidence gets in and you're there basically as the referee to make sure it's a fair trial and to assist the jury to do their job. But with both of them, I just found that task was to me more satisfying than advocacy. So I wasn't one of those barristers who upon becoming a judge thought, oh, I've made a mistake, I should have stayed at the bar. And that was fortunate.

Michael Green [00:38:56] Because there are those and I think, would people say some of those barristers have become judges and realise it's not for them, they are maybe too interventionist as a judge?

Elizabeth Hollingworth [00:39:07] If you can't work, if you can't get to the point of working out that this isn't your case, that can be a problem. That said, it's one of those interesting things, depending on which side of the fence you're on, whether someone's being interventionist or just putting you to your test, you know, that are very different sides of the same coin. But yes, I think if you passionately identify yourself with one side or another at the bar, it can be harder to go into the role of being the neutral referee.

Michael Green [00:39:34] Can we move on to some of the interesting cases that came before you, to the extent that you're able to comment on them? And one of them was a very high profile case involving a man convicted of terrorism, Abdul Benbrika. It was about extending his...

Elizabeth Hollingworth [00:39:48] No, so what happened was he was convicted of some terrorist offences. He was sentenced to a term of imprisonment by another judge. He served his sentence. Although a no -parole period had been set, he wasn't granted parole. When it was coming towards the end of his sentence, the government introduced,

probably for him and a few other terrorist offenders, introduced some legislation, which was designed, it's a post -sentence regime, which is designed to keep you imprisoned or keep you monitored. beyond the term of your sentence. State or federal government? This was federal government. Now, in fact, this sort of legislation, this sort of post -sentence legislation has been brought in in a number of states in the area initially of sex offenders and then of violent offenders. But it's very much an exception to our usual legal system. Our legal system generally punishes people for what they've done. It doesn't detain them. to prevent them from committing some offence that they may or may not commit in the future. The decision of whether to introduce this sort of legislation is a political decision and governments, both at state and federal level, have brought it in, but the terrorist legislation was quite novel because unlike in the area of sex and violent offenders, where there's decades of research and development of risk assessment tools and they're becoming much better at predicting. given these events and your background and these factors, they're becoming better at predicting what your risk of re -offending is. This was very much a novel area in the case of terrorism. And what was particularly interesting and high profile about this case more recently is that the government in seeking one of these continuing detention orders for Mr. Ben Breaker relied on a risk assessment tool, the abbreviation for which is Vera2R. They went before the initial judge and called their expert evidence and said, using this particular tool, he's a high risk of reoffending. And so another judge ordered that he be detained beyond the expiry of his sentence. And the Court of Appeal upheld that. Then it came back for a review before me the following year. And then after that, through fortuitous means, Mr. Benbrika lawyers became aware that the Commonwealth had actually commissioned an expert report from Two Air New Academics. assessing the validity of Vera 2R. And these, their own experts had said basically it's no better than tossing a coin. It has no empirical validity. It is no better than chance at predicting the risk of offending. And one of the important safeguards when governments introduce draconian legislation like these protective regimes is that they have to make full disclosure. If they're aware of information which would suggest that the person shouldn't to ongoing detention, they're required to disclose that. And this expert report was clearly required to be disclosed. And Mr. Ben Breaker's only learned of it by chance because this independent national security legislation monitor became aware of it and raised questions about it. And during the course of the subsequent proceedings before me, it became apparent that not only had Home Affairs sat on this report that they themselves had commissioned. They had four other expert reports which basically cast serious doubts about the validity of Vera 2R, and this had all been withheld from Mr Ben Breaker and the court. And that was a very serious matter, and even when required to explain, Home Affairs put forward somebody with no personal knowledge of anything, who didn't speak to anyone with any personal knowledge of anything, who did some keyword searches, pulled up some documents, speculated about what he thought had happened and offered a purported apology. to the court. It was an absolutely outrageous situation. It wasn't contempt? No, because it was a side issue. The non -provision of the report was a side issue in the ultimate proceeding. Because by this stage, both the government and Mr Ben Breaker's experts agree that he no longer needed to be detained in a prison, that he could be in the community under strict supervision. But it was interesting because as in my final years, in my later years on the court, I had a number of... serious and fairly high profile cases where this sort of thing happened, where government agencies, whether it be Home Affairs or it be the police or the Crime Commission and so on, abused enormous powers that they were given. And it became an important issue for me because the system only works if those people who are given great power don't abuse them. And unfortunately, I had a number of instances where the police cheated, the Crime Commission cheated or people like home affairs cheated. And like many judges, I take a fairly dim view of that because it just undermines the whole system. Are there any

consequences for the police withholding evidence or something like that? Well, in some cases, for instance, there was another case I had that a woman called Katia Piliotis that some viewers may be familiar with. Nick McKenzie, the investigative journalist at the age, did a fabulous podcast series called The Confession about her case. But very briefly, this was a case where the police did what was probably. botched investigation back at the time. Later events meant that Ms Piliotis's DNA came up on some items that were found at the deceased house. They swooped on her as a suspect. They ignored another very credible suspect and then went about basically, some of them, I'm not suggesting all of them, but some of them went about basically changing their story, making up versions of events, trying to discount this other credible suspect. Miss Piliotis went through four trials, and then the matter finally came to me on a stay application. And there was a consequence in the sense that it became apparent during the course of the stay application, I allowed Miss Piliotis's lawyers to cross -examine all the police he'd been involved. And what became apparent was that some of them were blatantly lying, others had perhaps selective amnesia, and others perhaps didn't know but had a loyalty to the crew. And at the end of it, The end of the day, the prosecution dropped the charge, which was, I think, the only fair outcome. I mean, if they hadn't, I'd have had to go on rule as to whether there should have been a permanent stay of proceedings on the basis that the police cheating had made it impossible to get a fair trial, which is precisely what I did in the foreign bribery case involving Securancy and Note Printing Australia. They were the reserve bank subsidiaries who were involved in bribing foreign officials to get bank note contracts. and through a series of events, the once again, investigative journalists were about to blow a story about the payment of bribes. This was after Australia, like many countries, had brought in legislation to make it an offence in Australia for an Australian to pay bribes overseas. So it had an extra jurisdictional aspect to it. And the media had found out about this because of some whistleblowers and were going to publish an article. So that led to the AFP to decide they'd better quickly have an investigation. They got the Crime Commission in. and they basically use the Crime Commission, who has compulsory examination powers, as a private hearing room, and they breached a whole load of ethical obligations and illegal obligations, and I ended up permanently staying the prosecution, and that went right through to the High Court, and the majority five -two upheld my decision to permanently stay the proceedings. So in a long -winded answer to your question, sometimes if people find out about the cheating, it can have consequences, and the consequences can include You can't go ahead and proceed on this tainted evidence, or you can't be rewarded for having cheated by being allowed to prosecute this person.

Michael Green [00:47:24] I was thinking more about disciplinary proceedings against the people who've cheated within the police force.

Elizabeth Hollingworth [00:47:32] What the police force do is a matter for them. Certainly in the case of the Piliotis case, I'm aware that the police force had a look into the worst offender, the main investigator, who I found had been a blatantly dishonest witness. Whether anything will happen, I don't know.

Voiceover [00:48:01] William and Lonsdale is brought to you by Greens List, one of the leading multidisciplinary barristers lists in Australia. Greens List believe in promoting conversation around the ideas and issues that shape not only our legal system, but our wider community.

Michael Green [00:48:21] Liz, you were judge in charge of the criminal division of the Supreme Court between 2018 and 2022. It's the time of the COVID lockdowns. Did they

have a big effect upon the court and upon how the criminal justice system operates? And I'm going and

Elizabeth Hollingworth [00:48:38] They had an immediate effect, obviously, and one of the most immediate ones was that we weren't allowed to conduct in -person hearings. Now, for people like commercial judges and commercial cases, once they got the technology up and running, they were able to do virtual hearings, but in the Supreme and County Court with a jury trial, we couldn't conduct jury trials, and that meant that our trial work had to grind to a halt for quite a period of time. And then when we were allowed to start it up again, because of social distancing, we had to be very creative. So, for instance, in the early recovery period, we turned trials on their head. We put the practitioners up in the jury box, 1 .5 metres apart, and we put the jury down in the body of the court, 1 .5 metres apart. And the jury couldn't obviously meet together in the jury room, so they were far too small. so their jury room. they'd spend time together would be another courtroom. And that was one instance of how when we were able to start running trials, we had to flip things on their head. It did lead to a lot of creativity and ingenuity, which personally I liked. I mean, never waste a good disruption or a good catastrophe. I'm not meaning to trivialise the fact that COVID had a lot of very negative effects on a lot of people. But what it did do was force criminal practitioners and judges to be prepared to think outside the box and As you would know yourself, Michael, the legal profession is notoriously conservative as an organisation. When I was on bar council, a number of times I would hear people say that ain't broke, don't fix it. And it seemed that people could never actually agree when something was broken. So there's a natural resistance to change. Something like the pandemic whereby if you want to be able to practise at all, if your client wants to be able to move their case on, if you the prosecution want the victims and the families and the witnesses to be able to move on, you're going to have to be flexible. Thanks for watching! going to have to do things differently. So when we were able to reintroduce jury trials, we could only use a certain number of courtrooms because they had to have a minimum square footage. So we couldn't run our usual number of trials, even with this new model of people sitting in different places. So we introduced much heavier case management and triaging of cases so that estimates were more accurate. Before the pandemic, somebody might say, oh, it would be four to five week trial. and that might mean it was over in three weeks, it might mean it ran for seven, and we would just deal with it. Because we were only gonna be able to run a small number of cases, we case managed, dealt with all the preliminary evidentiary arguments and the legal arguments well in advance. We got people to sit down and estimate exactly how long various witnesses would be and to give more accurate estimates with the result that when we were able to start trials again, we were able to move them through more quickly because they were more efficient. A four -week estimate meant a four -week trial. Another few innovations involved introducing something called the Fast Track, which was brought about because the Magistrates Court was suffering far more than we were through the volume of cases, the lack of IT, the sheer number of magistrates and so on. So they weren't going to be able to run committal hearings. And at the time, before any trial, criminal trial could come to the Supreme or County Courts, they had to go through something called Committal Process. and that's a process before a magistrate. where there's some testing of the evidence, some disclosure of evidence, and the magistrate makes a decision that there's enough evidence to commit the person for trial or not. But overwhelmingly, people are committed for trial. It's very rare to be discharged entirely at a committal. When the magistrate's court was unable to do committals and it was clear that they were going to take years to clear their backlog, we instituted something called a fast track whereby an accused person could elect to forego their committal right and to come immediately to the Supreme Court to stand trial. Can I just clarify something there, please, Liz? Has that right always existed? It has, in the sense

that there's always been something in the legislation that allows you to waive your right to a committal and to elect to stand trial. But until we agreed that if you exercise that right, we would then conduct all the examination of witnesses and the disclosure that would have happened in the committal, nobody thought to use it because you would have foregone your rights to disclosure and committal. come up to the Supreme Court and they'd have said, oh, okay, you're ready for trial. So what we had to do was say, if you elect to come up, we've got all these judges sitting around not conducting trials, we've got the technology up and running, we will conduct all the preliminary examinations, we'll supervise the disclosure of documents and the disclosure of information, we'll rule on the legal professional privilege and public interest immunity claims, and we will get the cases ready for trial so that when we're able to start trials again, you'll be in the queue already, ready to go. So we were able to offer as an attractive package, come straight up here, but it was always voluntary. And the smart practitioners, I think, worked out fairly quickly. It was a smart thing to do, unless your client had a realistic prospect of not being committed to stand trial, which is fairly rare, because it's a very low threshold to be committed to stand trial. Far smarter, come up to the Supreme Court, get on with your case, get yourself in the queue. so that you'll be ready for a trial when you can. And it suited the prosecutors too, because they were getting their cases on. Another innovation that we brought in, and this involved cooperation between the courts and the government, was we became more creative about trying to resolve cases. There'll be a certain number of cases where the criminal case is capable of resolution, either by the prosecution reducing the charge to something less serious than the original charge, or the accused deciding that they might as well plead and get a sentencing discount. Prior to the pandemic, you could get something called a sentence indication, but they were a fairly limited utility. A sentence indication is where an accused person and the prosecution go along to a judge in a confidential process and say, if I plead guilty to this charge today, what sentence would you give me? And that allows an accused to know where they stand and to work out best and worst cases. If they go to trial and they go they know they'll get a much heavier sentence, and to make a decision. Prior to the pandemic though, the only sentence indication you were able to give was the type of sentence that the person would serve, i .e. imprisonment, community correction order, a fine, et cetera. Now, in the magistrates' court and the county court, that could still be a useful thing to know. If you're on a driving charge or you're on some sort of drugs charge, knowing whether you'll go to jail or whether you might get a community -based order. is important to you deciding whether to plead or not. But in the Supreme Court, where most of our trials are homicides, if you're convicted, you're going to jail. There's no question that you're not. So it was fairly limited. And one of the things we were able to do was to persuade the government to allow us to give real and valuable sentence indications. That is to say, I would give you, if you pleaded guilty to murder or manslaughter tomorrow, I would give you a sentence of no more than X years. And that actually, combined with our increased capacity to be managing interlocutory processes, to be managing the disclosure of material and witnesses and so on, allowed everybody to be far more informed and for us to be able to get more settlements and so on. So when the, thanks to a sort of a series of initiatives like that, when we were finally able to go back to running trials, we had within less than a year, completely cleared our COVID backlog. So it was a time. sort of a great innovation and goodwill. I think the practitioners realised that we were trying to keep things moving and trying to keep the criminal bar and criminal solicitor suffered far more than any other section of the legal profession during the pandemic. And I think people's gratitude that we were trying to keep things moving and keep people gainfully occupied and so on, meant that people were willing to suspend their usual conservativism or inertia and try new things. Unfortunately, after the pandemic, there's been a certain. winding back in some people's attitudes and a certain, among some people, are wanting to go back to the old ways. But some of the

reforms have stayed and in particular the fast track has stayed. And I think it's still the case that about 50 % of people with matters that are going to go to trial in the Supreme Court elect to come via the fast track and forego the committal process altogether.

Michael Green [00:56:48] What about social media? I mean, it's brought about a huge revolution in our community, the way we live our lives. None of us can exist without a phone in our hand anymore. What has that done to criminal justice and particularly, I guess, to juries?

Elizabeth Hollingworth [00:57:00] There are several aspects to the question of social media. One is the use of devices, which is the question of people having phones and iPads and access to the internet, which I'll deal with in a moment. And the second is social media as a source of information as part of the broader media. Dealing with the devices and so on, one of the challenges is that, and I'm as guilty as anyone, we all walk around with a phone and if we've got a question about something, we go and ask Dr. Google or whoever your search engine is. Thanks for watching! and it's a way that many of us interact with the world. The problem is that, as most of us know intellectually, but we don't give enough weight to, an enormous amount of what's on the internet is utter and absolute rubbish. And in particular, if people go online, for instance, and look up the accused or look up allegations in the case or check out about a witness or so on, they might find accurate material, but they might find absolute rubbish. And... they go and do their own research, they're having regard to material that nobody else knows about, that nobody's in a position to explain. So it is a bit of a running battle of judges trying to, and we direct people in very strong terms, you can't go and look up anything about this case. You can't go and look up anything about the law. You know, I had one case where the jury got hung and subsequently, and got hung on a very weird question and couldn't come to a verdict, and I couldn't understand why they were stuck on it. And when one of my associates was hiding out the jury room afterwards. they found that one of the idiots had done a Wikipedia search, had actually found American law on a subject, which was completely different to ours. They'd obviously shared it with some of their colleagues. And the trial had been aborted, basically, because some idiot couldn't listen to a judge saying, don't do your own research. If you need to know something about the law, I'll tell you about it. So it is a bit of a running battle and it worries me because it's probably not the standing hour. strong directions. It probably happens more than we think, but there's just such woefully and accurate material out there. It really is concerning. The second aspect of your question, which is about what I was calling social media in the context of media generally, I think it is a bit disconcerting that the old ideas of subduedacy of not discussing a case whilst it's before the court seem to have been thrown out the window quite a bit. And I think unfortunately the mainstream media I have to respond now. to the pressures of social media and citizen journalists and people doing their own investigations. And it's really reached a stage where I think in the not too distant future courts may have to grapple with it and it may affect whether we have jury trials. I'll give you an example of this. Many years ago, I heard the retrial of Peter Dupas, who's a serial killer. I heard the retrial for the murder of Messina Helvagus, the young woman who was at the Faulkner Cemetery. By the time I heard the retrial... He'd already been convicted of the murder of two other women, he was under suspicion for the murders of a number of other women. He sought a permanent stay of the trial before me on the grounds that there'd been so much publicity about him in relation both to Messina Helvagus and the other women and suspected victims, that he couldn't get a fair trial. And in order to decide that application, I had to read about 13 years' worth of newspaper clippings about him, look at some Tv programmes, there'd been a couple of books, to form an assessment as to whether the hypothetical juror, assuming they'd read all this material, could still give him a fair trial. And I decided,

this was all pre -social media, this was before us all having Facebook and looking things up on mobile phones and so on, so this was pretty much mainstream media. and books and television programmes. And I came to the conclusion that he could still have a fair trial. And that went through to the High Court who ended up upholding it and saying he could. Interestingly, though, fast forward probably only a decade, and we have Jool Ma's murder, for which Adrian Bailey ultimately plead guilty. I think within the first three to four weeks of that murder, I had seen and heard more. And I'm not on Facebook and Instagram and many of the social media things. I had seen and heard more in probably four weeks than 13 years worth of reporting and coverage of Peter Dupas. Things had just escalated and mushroomed. And there probably wasn't a person in Melbourne who didn't have a view about Adrian Bailey's guilt. Now, in fact, he pleaded guilty and spared everybody having a trial, but... I do think that the saturation level of both mainstream and social media is such that we'll probably get to the stage in the not too distant future where we'll have to have some judge alone trials or possibly even there won't be a trial. If it's a Commonwealth offence, for instance, you can't have a judge alone trial. So unless there's some change to that, they have to have a jury trial. We may be reaching a situation where you just can't find people who haven't come to an opinion and who can, notwithstanding their oath, actually. give somebody a fair trial. Are you in favour of judge -alone trials? Not generally. That's because having initially, before I dealt with juries, I was, to be perfectly frank, a bit skeptical about them. I thought, how can 12 ordinary people, perhaps not my peers, said with a degree of snobbiness, but they come from a broad range of opinion. You don't expect to be a jury of your peers, but they're not the peers of many of the lawyers they're appealing before. How can they sort of work through the complexities? Having then sat on criminal trials, I actually became a firm supporter of juries. I think they generally get it right. I think they probably get it right in spite of what we say sometimes. I think they often do it for fairly robust and practical reasons, not necessarily spending ages dwelling on the finer legal points that we've raised with them. But I think generally they do get it right. But I have become concerned in my last few years as a judge, and speaking to a few other colleagues, I think it's a bit of a trend we're going to have to watch. I'll explain what I mean. I had a jury not long before I retired that just imploded. And by that I mean… they became so dysfunctional that they were unable to, I had to discharge them before they came to a verdict. And they were dysfunctional in a number of ways. This is post the pandemic. And I think one of the problems, particularly in a place like Melbourne, is for a couple of years, most of us weren't forced to go into a workplace and sit around a table for perhaps hours, perhaps days with colleagues or people we weren't necessarily friends with and nut things out and work through issues. We got used to doing things remotely, pepsi. zoning out, switching out, et cetera. So a jury have to sit usually in a Supreme Court matter for weeks at a time together and work through what may be challenging issues. And I think a lot of juries have lost that ability. The second thing is that we've become very black and white, very polarised and very personalising in our opinions. So whereas previously, I might have been, you and I might have been able to agree to disagree about something and not take it personally. These days, everything's aligned with... the personality. So instead of saying, Michael, I don't agree with what you think about that piece of evidence, I go, what sort of idiot are you, Michael? How could you possibly think such and such? And my particular jury imploded in a way that a number of them were sending notes to me as they're allowed to, which I then share with the barristers. I don't keep them private. Basically, dobbing on each other. Don't tell the others I said this, but some of them are being bullies and some are being mean and some are being reasonable and some people aren't listening. you know, 10 of us have come to a reasonable position and there are others who are playing amateur detective and they'd started turning on each other and they were no longer able to separate the personality from the issues. And this wasn't just my case, I had a couple of colleagues who in the same year also had juries

implode. So I do wonder whether a combination of social media and people knowing too much about a case or being unwilling not to do their own research combined with people losing the skill to sit down for weeks at a time with strangers who they may or may not like or have anything in common with and work through hard issues, combined with people personalising everything, perhaps a Trumpist factor whereby you can't separate out the idea from the person. I do wonder whether juries are going to continue to serve in quite the same way into the future. But judges aren't perfect. Judges, funnily enough, are more likely to acquit than to convict because as judges we're trained to find the fault in any argument. Most of us came as barristers and the whole point of your training as a barrister is to find fault in somebody else's argument. So we can always find it out. And by definition, most of us think that our sense is common sense and our doubt is reasonable doubt. So when we did have judge alone trials at various stages during the pandemic, there was a higher acquittal rate than when we had jurors. So I'm not necessarily sure it would be such a great innovation. I would also take judges off sitting on trials for long periods of time because a jury don't need to give reasons. A jury just decide guilty or not guilty. A judge has to give reasons. And so if you had a six week trial, you might then need several months out of court. writing the judgement instead of hearing another two or three trials in those months. So it's a fairly long -winded answer. I suspect we're going to have to see some changes because I don't know that juries will continue in their existing form, but I'm not necessarily advocating judge -alone trial.

Michael Green [01:05:55] So it's really watch this.

Elizabeth Hollingworth [01:05:56] I suspect so.

Voiceover [01:06:00] Lives in the Law is proudly sponsored by City Maps Illustrated. Their recent publication, The Melbourne Map, is a celebration of our wonderful city. This stunning hand -drawn illustration, which took more than three years to create, is available as an art print, jigsaw puzzle and calendar. The perfect acquisition for your home, office or corporate gifting.

Michael Green [01:06:27] Liz, in the middle of this year you retired from the bench. You're far too young to completely retire. Have you thought about what you'll do in the future?

Elizabeth Hollingworth [01:06:37] What I want to do is for a year or two not take on any major commitments. I've spent most of my life, if not my entire life, juggling lots of balls in the air and running around doing things. And I've enjoyed it and it's been fantastic. But I actually want to just sit back for a couple of years and just be rather than do. There are things I obviously want to do, more travel, start making inroads into the enormous pile of books that I've kept optimistically buying, even though. while I've been practising and a judge, I do so much reading that I don't end up reading. But I just want to spend a couple of years stripping things back and working out what I want to do. I'm sure I will do some other things in the future, but I don't know whether they'll be in the legal space or some other space. And I'm in the fortunate position with a judicial pension that I don't have to choose to do something to support myself. So there are a whole range of projects or organisations that I might get involved with, but I actually want to deliberately try to keep things open for a couple of years. and see what bubbles up.

Michael Green [01:07:37] You did teach judgement writing throughout your time on the bench? Yes, yeah. May you continue to do that?

Elizabeth Hollingworth [01:07:44] Possibly, although I've taught... it now for nearly 20 years, and sometimes it's nice to move on to new areas. The thing I loved about the judgement writing was that lawyers and judges, like all professions, end up adopting jargon and a fairly long -winded sort of secret code way of writing things to seem impenetrable and very clever. And most judgments, when I was at law school and in my early years of practise, reading them was sort of like wading through wet concrete. It was not an enjoyable prospect and it was very hard work. About 20, 30 years ago, a movement started to teach sort of plain English writing and that's through programmes run by the Judicial College here in Victoria and at the national level. And so for many years I got involved in teaching. It makes things more enjoyable to read, it makes things clearer to read, and it makes them more enjoyable to write. And I'd always taken the view that was sort of an access to justice issue. We're setting down what the law is and what the consequences are of people's actions. But if we don't do it in a way in which ordinary people can understand, we've failed in the task. And just as newspapers are sort of aiming to write for a reasonably intelligent teenager, I actually have always been of the view that there's no concept in the law that are so complicated that it shouldn't be capable of being explained to a reasonably intelligent teenager. So that's something I felt passionately about and that's why I taught it. for so many years. And one of the fun things about teaching it is that we've always done it with programmes involving actual writers, so people like Helen Garner and Gideon Haig and Chris Wallace -Crabb and a whole host of other writers. So we've always had the pleasure of actually learning from people who write for a living and write beautifully and write in a way that people want to read. I may keep doing that, but having done it now for so many years, I'm actually in a space where I think I want to do some new things.

Michael Green [01:09:33] Liz, we've come to the end of your long and very interesting life in the law. The medical profession may have suffered a great loss in you not taking it up, but we in the legal profession, it's been a great benefit to us and so interesting and for us to look forward and see what the future might hold in the judicial space. Thanks for coming and telling us. It's really been interesting to listen to.

Elizabeth Hollingworth [01:09:54] Thanks very much for having me, Michael.