

In Conversation with the Honourable Michael Kirby AC, CMG

Christopher
Sexton

As most readers may know, Michael Kirby was the longest serving judicial officer in Australia when he retired in 2009, having then served for 34 years. He was the youngest man appointed to federal judicial office in 1974, at the relatively tender age of 35. His career highlights include his appointment in 1975 as the foundation chairman of the Australian Law Reform Commission, in 1984 as President of the New South Wales Court of Appeal, and then the judicial pinnacle, from 1996-2009, as a Justice of the High Court of Australia.

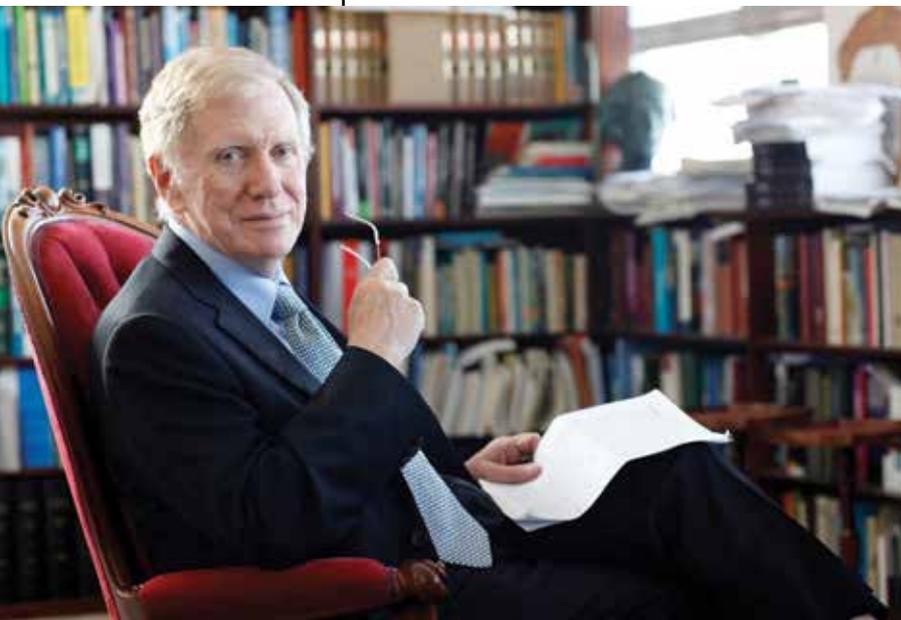


Photo by Marcus Mok

There is, however, much more to the man than his distinguished service to law reform and the legal community. When it is almost a religion in Australia to stop everything for the Melbourne Cup, Michael Kirby beavers away at his office in Sydney. Occasionally, heard to mutter: “Bah! Humbug!”.

As I met with him on that festive afternoon we traversed a broad range of issues – his current work for the UNDP Global Commission on HIV and the Law (which raises important intellectual property law-related issues), his inspiring efforts as Chair of the Human Rights Council’s Commission of Inquiry presently investigating human rights violations in the Democratic People’s Republic of Korea, his views on the proposed Trans-Pacific Partnership Agreement, and his opinion on the legal recognition of same-sex marriage.

At the age of 74, for one long-listed as one of the 100 Australian Living National Treasures, all this enduring achievement is breathtaking.

Notwithstanding, Michael Kirby ploughs on with his work on a daily (almost religious) basis, with the same sense of discipline, principle and pragmatic wisdom as he demonstrated while on the Bench.

I had the pleasure of meeting with him again, for a few hours in conversation, on the day that apparently does *not* stop a nation.

Q: May I start this conversation with the question of retirement?

A: (*laughs*): What is *that* word? Would you please repeat that word? (*laughs, again*).

Q: On the eve of your retirement from the Bench of the High Court of Australia in December 2008, you were interviewed by an ABC journalist during which you claimed that you may be rather “nervous” at the prospect of life after the Bench. I wonder whether that sense of nervousness was ever realised? Moreover, how have you found the transition after a life of 35 years’ judicial service?

A: Well, I have not been short of a thing or so to do. At the outset, after my so-called “retirement”, I became the President of the Institute of Arbitrators and Mediators of Australia. I expected that that might be where my life would take me. In fact, I have done a lot of mediations. I have been successful at it and enjoyed it. But, the opportunities for dispute resolution have become less favourable because of the fact that the United Nations keeps knocking on my door!

I have been engaged with a number of United Nations and other intergovernmental bodies. At present, I am working almost full time on the UN Commission of Inquiry on the Democratic People’s Republic of North Korea, which has not left much time for money-making

activities. My partner asks me, when I come home: “How much money did you make today?”. I have to admit that generally the answer is: “Nothing!”. But, certainly, I have had had a lot of interesting challenges in this work, and I hope that they continue to come, perhaps with a little bit of marmalade on the table, as they say in the TFM cases, as well! (*grins*).

Q: I would like to focus on two of those UN-led challenges – the North Korean mission, but first, your work for the United Nations Development Programme (UNDP), specifically for the UNDP Global Commission on HIV and the Law. I have read the Global Commission’s recommendations on access to HIV treatment,¹ in particular recommendation 6.1 which calls on the UN to establish a panel to review and assess proposals and recommend a new intellectual property regime for pharmaceutical products. That recommendation further stipulates that any such regime should be consistent with international human rights law and public health requirements, at the same time safeguarding the rights of the inventors of those products.

I understand that you were recently charged to write the draft terms of reference for that Panel. Would you care to share briefly the backdrop and the main issues and concerns that arose from those terms of reference?

A: The background is relatively clear. Intellectual property for the global community commenced in the 19th century. This was in a time of cogs and wheels, and not in an age of rapidly changing technologies such as infomatics and biotechnology. It is therefore not surprising that the global law on intellectual property and the national reflections on that global law have not really kept up to date with the rapidly changing technologies that have evolved. Generally speaking, where people get a stake in the law, they obtain an advantage, and they don’t want to surrender it.

Along comes 1945 and, at the end, of the Second World War, the Charter of the United Nations was negotiated by the successful Allies as the foundation for the new world legal order. That envisaged an organisation that could deal

with issues of international peace and security, but also issues of economic equity and universal human rights. Economic equity led eventually to the destruction of the old European and other empires. Universal human rights led to the Universal Declaration of Human Rights (UDHR) in 1948 and the great treaties that have followed, including relevantly the International Covenant on Economic Social and Cultural Rights of 1966 with its provisions reflecting the UDHR on the right to health, but also the right to the benefits of scientific discovery and invention.

As a result, we find these forces at work in the world. The challenge is to reconcile them. The problem is that, because global intellectual property law preceded the developments of universal human rights, the reconciliation has been most imperfect. This is why in the Report of the UNDP Global Commission on HIV and the Law recommendations were made to attempt a reconciliation between the great developments in the world of universal human rights and the very important developments in the field of intellectual property law (most especially the TRIPs Agreement of the World Trade Organisation). The World Trade Organisation (WTO) is not an agency of the United Nations – it is an inter-governmental body – but it is not accidental that it has not really reflected universal human rights in the way that it might have done had it been an agency of the United Nations.

Q: The growing body of international trade law and the over-reach of IP protections, it is alleged, are impeding the fair production and distribution of low-cost generic pharmaceutical drugs. One of the recommendations in the Report is that the WTO must suspend the application of TRIPs as it relates to pharmaceutical products for lower to middle income countries. How realistic and achievable is that?

A: I don’t think that the WTO is going to implement the recommendation of the UNDP Global Commission simply because the Global Commission had some very distinguished members such as the former

In Conversation with the Honourable Michael Kirby AC, CMG

President Fernando Henrique Cardoso of Brazil and my good self (*laughs*). It is therefore necessary to set in train the steps that will lead to the reconciliation process that has not yet taken place between trade law designed essentially by trading nations to protect their interests and human rights law designed to protect the people of the world, including the most vulnerable.

The Report of the UNDP Commission arose in the context of the HIV epidemic. That epidemic has affected upwards of 35 million people who have been infected with HIV. At the beginning of this millennium, only about one million of the people infected had access to the antiretroviral drugs which were essential to their survival, to their work capacity and to enjoying a decent human life.

As a consequence of the intervention of the United Nations, and the creation of the Global Fund outside the United Nations, and also of initiatives by the President of the United States, the number of people on antiretroviral drugs has increased to more than 10 million people. But there are many millions more who could benefit from access to the antiretroviral drugs. Moreover, there is a special and urgent problem – namely that the original antiretroviral triple combination therapy is beginning to show its age such that the original drugs are not always effective for people who have been receiving them for a long time. They need to step up to the so-called “second-line” and “third-line” therapies. However, whereas the “first-line” therapies are now substantially out of patent, or can be the subject of generic copies in countries of need, the “second-line” and “third-line” therapies are not so easily susceptible to legal generic drugs. This is a stark indication of the conflict between the TRIPs Agreement and global intellectual property law and the urgent need of people in poorer countries to have access to pharmaceutical therapies that are literally essential to their lives, dignity and survival.

Q: An alternative recommendation raised by the Global Commission in the Report was that, as a suspension of TRIPs in this area may be unrealistic or politically very difficult, at the least there should be an incorporation and use of the TRIPs

flexibilities consistent with national law. Do you think that that may be a possible avenue?

A: I don't think that the Global Commission considered its first recommendation of the enquiry at a high-level initiated by the Secretary-General as unrealistic. However, I think they took the realistic view that it might take some time to get that off the ground. In the meantime, the Global Commission recommended that steps be taken to protect the rights – especially of the least developed countries – to the flexibilities that the TRIPs Agreement already provides for. The problem here is that a number of the leading trading countries with big portfolios of intellectual property for essential pharmaceutical drugs (notably the US, EU and Japan), have been increasingly promoting and negotiating free trade agreements with developing countries which typically contain provisions requiring so-called “TRIPs plus” – that is to say, to get the benefits and economic advantages of a free trade agreement with one of these international groupings, the least developed countries have to give away the flexibilities that the TRIPs Agreement was designed to assure to them. Those flexibilities include the right, when faced with a national emergency involving urgent needs for healthcare, to take steps to ensure in their own jurisdictions the achievement of the universal human right to access to essential drugs. One of the complications which we have seen in the international community is that, on the whole, free trade agreements are negotiated by very powerful ministries – such as the Treasury, the Ministry of the Head of Government, the Ministry of Foreign Affairs. However, protecting the right to health of poor and vulnerable people tends to be a concern of the weaker ministries – such as the Ministry of Health and the Ministry of Justice. In the battle between weak ministries and strong ministries, normally the strong ministries win out and urge ratification of the free trade agreement in order to obtain overall economic and financial advantage for the country. The problem is that, in that negotiation and in the deal that is then struck, the human rights of the most vulnerable and the least

economically powerful in society can be overlooked or ignored.

That is why the Global Commission urged that steps be taken to protect and defend the TRIPs flexibilities. That recommendation was not only addressed to the developing countries themselves; it was also addressed to those who are promoting the free trade agreements and having them signed and ratified, often by countries that were not fully aware of the implications of what they were doing.

Q: In the chapter of the Report that deals with IP and the global fight for adequate treatment, I noted that, in the midst of the statistical gloom of the rise of the incidence of HIV, there appears to be a glimmer of hope. The term “the AIDS Paradox” is used. I am not sure whether you coined that phrase, but would you please explain it?

A: The “AIDS Paradox” was actually coined by a great international civil servant, Dr Jonathan Mann. He was the first director of the Global Programme on AIDS, when HIV was first detected in the mid-1980s. Tragically, he later lost his life in an aeroplane crash. The AIDS Paradox teaches that those who are most at risk with infection of HIV, being often the vulnerable people in society, need the protection of the law. It is a paradox because most people think that those who are at risk of HIV, and who get infected with HIV should be punished by the law because they are prone to spread the virus to other citizens.

Paradoxically, the best way to stop people from spreading HIV is to win their respect and attention, and to help them to understand the importance of behavioural modification so as to prevent others getting infected. This means reaching out to groups in societies which are often unpopular – sex workers, drug users, homosexuals, transgender people, prisoners and refugees. If we can reach out to them and educate them, the evidence of countries like Australia, New Zealand and Great Britain is that you can reduce the impact of HIV. However, most countries – especially in the developing world – will not do this. They continue with a punitive model that, combined with the impact of intellectual property law and the free trade agreements,

makes for an explosive combination of vulnerability.

That is why a good part of the Report by the Global Commission on HIV and the Law was addressed to the many laws in the developing countries which stigmatise and punish these vulnerable minorities. But, supplementary to that, an important, but possibly least read section, of the Report was concerned with intellectual property law. I say least read, because intellectual property law is a mystery to most people, even to some lawyers. It operates today in an environment which has a very important backdrop in universal human rights law. This was the provision in the Universal Declaration of Human Rights of 1948 for the access to the right of everybody to enjoy the highest attainable standard of physical and mental health [Article 25.1]. This is reflected now in the International Covenant on Economic Social and Cultural Rights [Article 12.1].

Interestingly, though, both of those instruments contain an express recognition (no doubt inserted at the time on the insistence of the United States of America), of the need to protect the rights of authors of scientific production which is original. That can be found in Article 27 of the Universal Declaration of Human Rights and in Article 15 of the International Covenant on Economic Social and Cultural Rights.

This is the background of the work that the Global Commission on HIV and the Law did. It is the backdrop to the recommendation that we now need to attempt a better reconciliation between the universal principles which are themselves recognised in the human rights instruments – the universal principle that everyone should have access to the highest attainable standard of physical and mental health, and not depend on the accident of where they were born. But, also, that there should be protection for scientific research and creative activity. Within the very texts of those two instruments there is a need to reconcile the tension between those two obligations. This is very poorly recognised in the current practical global arrangements for intellectual property law and the principles of universal human rights.

In Conversation with the Honourable Michael Kirby AC, CMG

Q: From one UN challenge to another, I would like to discuss your appointment earlier in March last year as Chair of the UN Human Rights Council Commission of Inquiry to investigate human rights violations in the Democratic People's Republic of Korea.²

In an interview aired on the ABC's *Lateline* programme, you recently described yourself – perhaps self-deprecatingly – as a bit of a “hard nut”, having served and observed a great deal on the Bench for some 34 years. However, at the same time, you freely admitted that the hearing of some of the testimonies in this enquiry had “moved you to tears”. Why were you so moved?

A: In describing myself as a “hard nut”, I was simply describing the truth of my judicial experience. I cannot recall ever feeling tears in a case in which I sat as a judge. Of course, substantially my judicial service was in appellate courts; I therefore was not exposed to the raw intensity of the testimony of people telling their stories of murder, violence, cruelty and fraud. I was looking at issues substantially through the prism of appeal books. That does tend to dull the sharp edges of the passions that wander across the stages of Australia's trial courts.

However, the intensity of the passions that have been described in the public hearings of the Commission of Inquiry into North Korea is such that, on a number of occasions, I have felt moved to tears, and I am not ashamed to say so.

One such case was of a woman whose husband had almost been picked up by the receding North Korean troops as they went through a district of Seoul, retreating back to the North after the turn of the tide of the Korean War 60 years ago. She thought that he had survived in safety by hiding in a crevice in the home. So he had, but the troops returned. They seized him, and he was taken away. Since that day, 60 years on, she has never heard from him. Constant attempts to find out what happened to him have been ignored. All that she wants to know is if he is alive. She said that losing a partner is like losing an arm – it is a hole in your life which is with you every day. All that she wanted to do was to see him again, throw herself onto his person and embrace him. Stories of ordinary people can be very

powerful. These are not nuclear scientists; these are ordinary citizens of North Korea, whose suffering has been great.

In another case, the parents of a young Japanese girl who was abducted by agents of North Korea gave evidence in Tokyo. They were very dignified, as they described how their daughter had gone to basketball practice. She did not come home. After their desperate attempts to find her, they ultimately formed the belief and realisation that she had been abducted. There was a DPRK state policy of abduction of Japanese nationals. It was admitted subsequently when the then Prime Minister of Japan went to Pyongyang and brought back a number of the abductees, but not the young girl who went to basketball practice.

Many of the cases and many of the witnesses tell of the special burden on women of attempts to leave North Korea, of their capture, of their return, and of the prejudice that existed against them if they were pregnant or if they had a child by a Chinese husband. In one case, one of our witnesses saw a woman drown her baby in a bucket of water in order to avoid the ignominy of bringing home a Chinese-fathered child. These are very sad stories that have affected many people. The duty of the Commission of Inquiry is to investigate, to make findings, to produce a report and to bring that report to the notice of the international community, in the hope that something will be done to improve the human rights record of North Korea.

Q: Not that it is particularly pertinent to the heart of the matter, but I wonder whether you have on occasion turned your mind as to what drives these brave witnesses and victims coming forward to the Inquiry with their testimonies? Is it a desire to set straight the historical record, is it a kind of payback against the old (even current) regime, or do they just want to remember and honour the memory of those lost?

A: All of the above. I agree that the witnesses we have seen have been very brave. None of them gave public evidence until the Secretariat of the Commission had satisfied itself that the conditions were such that they would not imperil the lives and safety of family members who were still in North

Korea. The testimony was filmed and is online, and can be viewed throughout the world, but not in North Korea where access to the internet is reserved to a very few members of the elite.

In this way, following essentially the common law rather than the civil law tradition, the Commission of Inquiry exposed itself to scrutiny and can be seen conducting its investigation, asking non-leading questions, ensuring that the people who came as witnesses could give their own version of events. The purpose of this methodology, which is not usual for UN inquiries, was to try to restore international interest in, and knowledge about, what is happening in North Korea. The strategy of non-engagement which has been followed by the Government of North Korea for 60 years has effectively meant that it has sailed under the radar. The object and purpose of having the public hearings was to ensure the light of United Nations human rights principles should shine into North Korea so that the world can be aware of, and respond to, what has been said.

It should be remembered that the universal principles of human rights followed the Second World War and the shocking discovery in 1945 of what had been going on in Nazi-occupied Europe. The object of the universal principles of human rights is to ensure that the errors of those times are not repeated, and where they are repeated, to make sure that there is accountability. That is what this Commission is striving to achieve.

Q: At the end of the day, then, the responsibility of any outcome of the findings of the Inquiry lies with the international community, but there is still virtually complete resistance by North Korea to cooperate with the Commission. I understand that the Government has even labelled the evidence so far adduced by the Inquiry as “fabricated and invented by forces hostile to North Korea”. In that context, do you think that there is any possibility that the recommendations made by the Commission might sway the North Korean regime to right and not repeat the wrongs of the past?

A: First, even if nothing else were achieved, simply collecting the testimony and putting

it before the international community as the story of the peninsula of Korea has its own value. When 20 years ago I served as Special Representative of an earlier Secretary-General of the United Nations, one of the important steps that was taken in Cambodia was to collect the stories and the documents, and that in itself was an important step that the United Nations was then pursuing.

Secondly, in Cambodia, one of the best assurances of progress was the establishment of a centre of human rights which was set up in Phnom Penh. One of the options open to us is to recommend that that be repeated in Pyongyang. If North Korea were to reject that possibility, it would be open to the United Nations to establish such a monitoring body in some other place close by. But the Commission is not angling for an indefinite term. We are not seeking an extension of our mandate, which will conclude when our report is delivered to the Human Rights Council and other human rights bodies in March 2014. There will, however, be the need for an institutional response so that the type of inquiry we have been conducting will go on and those who come forward for vindication, to honour those who have suffered and to assert their human rights, have a venue where they can express their grievances. It is then for the international community to see what else can be done. There are various options which will be explored with recommendations expressed in the report.

Q: I would like now to touch briefly on the foreshadowed Trans-Pacific Partnership Agreement (TPPA), if it ever sees the light of day. This proposed agreement has been described by some commentators as arguably the most important trade agreement in a generation. If implemented, it will cover two-fifths of the world's economy and one-third of interracial trade. As you are no doubt aware, its negotiation has already taken three years. It has been attacked on several grounds – in particular, for its lack of transparency and lack of public consultation and input. Do you have specific misgivings about the TPPA, particularly in that it appears to seek unprecedented access to the domestic markets of the 12 nation states, including

In Conversation with the Honourable Michael Kirby AC, CMG

their intellectual property rights? Further, as the TPPA is largely US driven, it does tend to attempt to imprint or impose US IP laws on the other nation states, which may well be a cause for some consternation. Is this a source of concern for you?

A: It is true that it is a controversial arrangement. It has been described by some of its critics as “NAFTA on Steroids” (that is, the “North American Free Trade Association on Steroids”), and as a corporate coup d’état which will undermine the sovereign laws of all the nations that are a party to it. I can see advantages in a free trade agreement that embraces such a range of countries in the Pacific. It is often said that the 21st century is going to be the century of the Pacific; and so, an early Trans-Pacific free trade agreement on proper terms would be beneficial. The fact that several of the countries around the Pacific are at different stages of economic development provides an opportunity for economic progress that would be positive.

The Economist newspaper recently strongly urged the leaders of the countries involved to endorse and ratify the TPPA. However, the lack of transparency is not just a procedural matter but is also a matter that affects the substance of the so-called partnership. It is the same flaw that existed in the Anti-Counterfeiting Trade Agreement attempted in 2011 but which came unstuck substantially because of suspicion and anxiety in the European Union about the secretive way that it had been negotiated. Where important arrangements are negotiated, it is completely legitimate that the citizens of the countries affected should be taken on the journey and not taken for a ride! They should be given the opportunity of understanding both the pluses and the minuses.

The story of free trade agreements has not been one of unalloyed advantage, including for countries such as Australia. The determination of the United States of America to defend its intellectual property is admirable on one level, but not necessarily in the best interests of the people of Australia. It may not be, for example, in the best interests of their national health schemes and the balances that are struck there between the universal human right

of access to essential healthcare and the universal human right of protection of inventions and promotion of inventiveness is potentially at risk in the TPPA.

I will be watching with interest as to how this plays out. I will also be watching which Departments of State are leading the negotiations. If, as I suspect, those departments will be the National Treasury and/or the Department of Foreign Affairs, they may not be familiar with, or sympathetic to, the universal human rights that can be put at risk by free trade agreements. This is important for Australia. But it is doubly important for some of the other countries around the edge of the Pacific that would be parties to the TPPA, if it were to be adopted. Indonesia, in particular, is one country that may not be fully protected in respect of its vulnerable population.

There may be overall advantages for a country, but if they surrender the TRIPs flexibilities that were hard fought for (and that have recently been extended to 2021 for the least developed countries), those overall advantages may mean that the universal human rights that are so necessary to human existence and, in the case of pharmaceuticals, to human survival and the right to life, are put at risk. Certainly, Australians should be fully informed of the negotiating compromises that have been reached and why they are advantageous to Australia and to other countries, specifically and relevantly in the matter of pharmaceutical pacts and the universal right to healthcare.

Q: Let’s change the tack of this conversation for a few moments. In late 2007, you apparently lamented to a journalist that, contrary to the widely held public perception of you as the “great dissenting judge”, you perhaps had not been as bold as you should or could have been as a jurist. I believe that, at the time, you were specifically referring to the issue of human rights and sexuality. As a case in point, I understand that you once advised the gay activists, Rodney Croome and Nick Toonen, that their proposed challenge to the United Nations against Tasmanian law then criminalising homosexuality would be futile. I would be interested whether, on your reflection, you regret giving that advice,

and more broadly, whether you consider that judges should take a more active role in preserving the human rights of *all* citizens.

A: The approach to me by Rodney Croome and Nick Toonen occurred in 1991, when I was serving in the New South Wales judiciary. Their challenge to the United Nations did not appear to me to be one that would ever come before me in a judicial capacity. I simply told them that they were wasting their time. How wrong I was! They thanked me for the advice I gave them. Notwithstanding, they went immediately to the Human Rights Committee in Geneva, and succeeded. The decision in *Toonen v Australia*³ by the UN Human Rights Committee, stands for important principles that extend far beyond Tasmania. It affects the universal human rights of the entire world.

This case shows how courage and determination are very important ingredients to legal progress. I often saw that in cases and lamented sometimes the obsequiousness of advocates and their unwillingness to pursue boldly points of view that, with greater ardour, might have been rewarded with greater success.

Soon afterwards, in 1996, I was elevated to the High Court when the case of *Croome v Tasmania*⁴ came before the Court challenging the Tasmanian criminal law as it then affected homosexuals. I, of course, disqualified myself from participating in that case. That was really the disadvantage of have spoken to Croome and Toonen, whom I had known partly as friends. I did not expect to be in the position where it could be embarrassing to me in my judicial capacity. I suppose that, if one wanted to be completely safe from any such risks, one would never do anything! (*smiles*) It is for others to judge whether my openness about my sexuality has been a good or a bad thing. It is not something that should be seen as remarkable.

What is, however, remarkable is that in my lifetime, indeed until quite recently, in parts of Australia, the sexual orientation of individual citizens was still the subject of criminal law and that even today there are serious inequalities that are imposed by law in a country that is supposed to be a secular democracy. However, I was usually pretty cautious about matters of controversy. I

don't think it should be controversial to be open about one's sexuality. Or, in favour of civic equality of all citizens.

When the HIV epidemic came along in the 1980s, I sat at the bedside of 12 close friends who died. That had a certain galvanising effect on me and on my perception of my priorities in life. I have been very lucky in my journey in life to have a partner, Johan van Vloten, who has been a tower of strength, a voice of encouragement, and sometimes a prudent counsellor for restraint. Everybody should have such advantages in life if they want them. On the whole, I think I have walked a difficult path with care and appropriate prudence. But, of course, there will be dissenters to that point of view, and like Voltaire, I would defend to the death their right to dissent and to express their opinions. On the issue of the constitutional protections of free opinion and expression in Australia, save possibly for former Justice Michael McHugh, I was always the strongest protector of those principles and always will be.

Q: Now away from the Bench, I would be interested to know how you rate the quality of substance and tenor of the recent same-sex marriage debate in Australia?

A: I think there has been a lot of progress made in Australia as there has been elsewhere in the world. I think there is even progress in some of the religious organisations which have been the traditional sources of hostility and of medieval hobgoblins that have pestered and oppressed gay people. In a democracy like Australia, you have to expect a few uncomfortable moments. But, on the whole, we continue to have our debates and to make progress.

Once Australia was, legally speaking, a very progressive country – we were amongst the first in the world to give women the right to vote, to introduce compulsory arbitration in industrial matters, to adopt testator's family maintenance legislation, and so forth. Lately, we have become very timid. It is an interesting question as to why that should be so. Whatever the reason, we normally muddle our way to reaching the right conclusion. In so far as your question has lurking within it a dark hint that you want me to say something imprudent about the legal debates and the

In Conversation with the Honourable Michael Kirby AC, CMG

issues that may come before my erstwhile colleagues in the High Court of Australia very shortly, I ask you to excuse me from embracing that opportunity. *(smiles)*.⁵

I have to say that over the last 20 years the leaders of the practising legal profession in Australia have been admirably strong and forthright in speaking up for the legal equality of GLBT fellow citizens. In the early days, there were people who thought that it was inappropriate for lawyers to speak up for women's equality. Likewise, there were many who thought it inappropriate to vent any disagreement with White Australia. The strong stance of the High Court in the *Mabo* case was vehemently attacked at the time, though I was not then a member of the Court. But, if you look at the record of the Australian legal profession it has been pretty good, and I pay tribute to the Australian Bar Association and the Law Council of Australia. They have, almost without exception, always been on the side of the angels. The judiciary perhaps does not have such a sterling record. But, in the long term, the judiciary and the parliament in Australia normally get things right. It just takes a lot of time.

Q: Well, indeed, you have gazumped me on what was to be my next question, however I am sure you will have a keen eye on the High Court's decision on same-sex marriage next week.

(smiles) I was always forward-looking!

Q: My next question is a little left of field. The former Federal Science Minister and President of the ALP, Barry Jones, often laments the paucity of public intellectual discourse and the almost devaluation of public intellectuals in Australia. You clearly fall comfortably within the purview of the latter category. I wonder whether you think Australia has come of age in appreciating the value of public intellectuals in our society, and that even after retirement, such persons still have a continuing, valuable contribution to make to our nation?

A: Well, I don't know whether I am a public intellectual. I am just a very hardworking person! *(smiles)*

Q: According to Barry Jones, you are.

A: Well, he certainly is and has been for a very long time. There is an element about our culture that continues to show some resistance to so-called tall poppies and people who spout on about this and that in the public domain. However, I believe that sometimes it is good for us to be irritated. I remember Lord Hailsham once gave the Robert Menzies Lecture at Sydney University (tragically he did so on the very day that his wife had been killed in a horse riding incident in Sydney). He made a point which I thought was very important – that democracy is about disagreement, it is *not* about agreement.

That was a politically controversial point at the time because the Hawke Government was then in power and was espousing the notion of a national consensus. This had been Bob Hawke's thesis in his time as a trade union official and in his Boyer Lectures. Hailsham, however, made the point that it is the right to disagree that is the essence of a democratic society; to have people who will speak up when it would be prudent and popular not to do so.

The more that I observe from outside the society of North Korea, the more I see the value of Lord Hailsham's point. It is not agreement that is the essence of freedom; it is the right to disagree and not to be shot at dawn because you have done so.

A: On a final note, I return to where we commenced on the notion of life in "retirement". In the last few years, away from the Bench, you and others have regaled us with a plethora of books on your life, work and philosophies – A J Brown's excellent biography, *Paradoxes and Principles* (2011), your own brief memoirs, *A Private Life – Fragments, Memoirs, Friends* (2011), and most recently, Daryl Dellora's *Law, Love and Life* (2013). I wonder whether, with the production of these three books in two years, that that process was at all cathartic for you? Did you learn anything about yourself that you did not already know?

Q: Not really. My so-called memoirs is a very slight volume with a dozen or so chapters on little stories of particular events or times in my growing up. Many of them would be very familiar with anybody of my age. They hardly merit the description of

“memoirs”. The other books have proved to be extremely popular. There is also another book written by academics, *Appealing to the Future*, which describes many of my judicial decisions, both in the New South Wales Court of Appeal and in the High Court of Australia, I am always surprised that there has not been more interest in the work of the High Court. In the old days, there used to be dedicated legal correspondents in the major media houses as there are in a number of the major newspapers in Britain and the United States. It is not a feature of media in Australia today and that is a pity.

People often ask me: “What was the most important, interesting decision that you ever sat in?”. My standard reply is that I have loved them all! It may be a comment on my impressionable personality, but every day was interesting. It was a great privilege to sit in the Court. There definitely should be much more coverage of Court business in the electronic and print media, and to the extent that it is necessary for judges to facilitate this, I believe that they should do so. The High Court renders some of the greatest decisions on the meaning of the Constitution and the interpretation of legislation, and citizens have a right to know about them. However, to the extent that a few rather cautious books have been written about my life, I think it is probably good for people to learn a little of the journey of a member of the highest Court, which entails a great responsibility.

I should add that, while I valued every day sitting on the Bench, I don't miss it. I am certainly not sitting here weeping for the power that has departed from me. I am getting on with other things and I will continue to do so! My father still had all his marbles at the ripe age of nearly 96, and I am hoping that I will as well. If not, I certainly will have made every day an interesting exercise in the search for principles and justice. That is something that I have been privileged to do for a very long time, and I intend to go on doing so. So – “watch this space”! (*smiles*)

After some hours of contemplation and consideration of the breadth of the issues covered in conversation with Michael Kirby, on returning to my apartment I celebrated privately with a glass of waiting Veuve Cliquot. I had missed

the great national race, but the time I had spent that afternoon had been far more enriching than watching 24 or so horses racing and being whipped.

Michael Kirby is not an intimidating person. In truth, he is highly personable and, perhaps to his own detriment, a tad too honest – with all his many paradoxes and principles – for his own good.

Set aside the signature charm, panache and wit, this former High Court Justice remains a formidable intellectual force. History will record him as a towering figure in the annals of Australian judicial history.

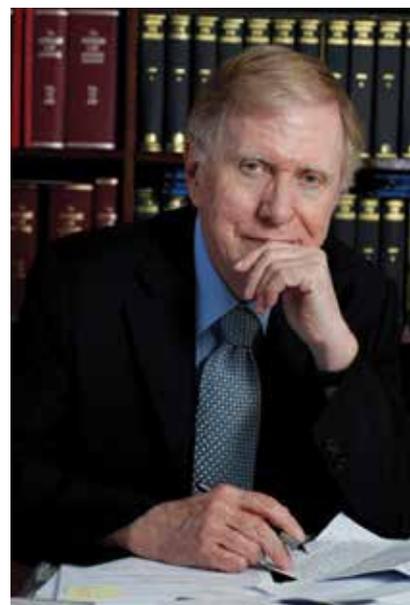


Photo by Marcus Mok

- 1 A copy of the UNDP Global Commission on HIV and the Law Report – Risks, Rights and Health (July 2012) is available at: <http://www.hivlawcommission.org/resources/report/FinalReport-Risks,Rights&Health-EN.pdf>. In particular, see Chapter 6: “Medicines for Whom? Intellectual Property Law and the Global Fight for Treatment”.
- 2 A copy of the Report of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea dated 7 February 2014 is available at: <http://www.ohchr.org/EN/HRBodies/HRC/CoIDPRK/Pages/ReportoftheCommissionofInquiryDPRK.aspx>.
- 3 *Toonen v Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).
- 4 *Croome v Tasmania* [1997] HCA 5; (1998) 191 CLR 119.
- 5 The High Court subsequently handed down its decision in *The Commonwealth of Australia v The Australian Capital Territory* [2013] HCA 55 on 12 December 2013, unanimously ruling that the Marriage Equality (Same Sex) Act 2013, enacted by the Legislative Assembly for the Australian Capital Territory, cannot operate concurrently with the federal Marriage Act 1961 (Cth).