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Q&A WEEKEND AUSTRALIAN

Q&A for Weekend Australian Magazine
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Between Hon. M.D. Kirby and Greg Callaghan,
Deputy Editor

The Hon. Michael Kirby AC CMG

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Q&A BETWEEN HON. MICHAEL KIRBY AC CMG AND GREG CALLAGHAN, DEPUTY EDITOR, THE WEEKEND AUSTRALIAN MAGAZINE

Q1. It is two years since you retired from the High Court and you seem to be as active as ever. What do you see as your mission or priorities now?

A1. I don't like that word 'mission'. It makes me seem a little messianic. I have suffered from such people and I don't want to repeat their mistakes. Since I left the High Court of Australia, I have been busy in a number of fields. Mediation (where I have a perfect record of achieving settlements in every case attempted); university lectures (where I have honorary professorial rank at 12 universities); public speaking (where I have to beat them off. You have no idea how many conferences are now held in Australia); and international committees (I am on five busy UN and other bodies). I try to juggle all these things and to remember that I have a family and partner. But I have found that outsiders are very intolerant of their demands.

Q2. Even your fiercest critics pay respect to your prodigious work ethic, dating back to your days at Fort Street High and the University of Sydney, where you did four degrees. And Paradoxes and Principles reveals how you struggled in your studies – and later in your career, working six or seven days a week to achieve the results you wanted. Where did this work ethic come from?

A2. As Gareth Evans once said that my four degrees (unlike his) were largely "quantity rather than quality". In part, I undertook them to stay in student politics, which I was enjoying as an antidote to loneliness at that time. The work ethic came from ambition, derived from highly competitive schooling in the NSW public school system. A physiologist might say that it derives from excessive testosterone!

- Q3. Your biographer, A.J Brown, has said you would have chosen politics over law as a career, but feared your progress would have stalled quickly in less accepting times. If you were starting out now, would that be the road you would be taking?
- A3. It is hard to guess what would've happened if I were starting out now and the world were different. It was depressing to come back to Australia on Air Canada recently and to receive a copy of *The Australian* from Thursday, 3 March 2011. And to learn not only that I am still a second-class citizen in my own country (so far as access to marriage is concerned, when compared to heterosexual citizens). But that your newspaper actually supports this. And regards the issue of equality for citizens and democracy for those representative assemblies that choose to elect for inequality, as a “non-priority”, as stated in the editorial of 3 March 2011. Pretty depressing. But then I reached for glass of champagne and felt better.
- Q4. You were among the founders of Australians for a Constitutional Monarchy, which played a prominent role in the republic referendum back in 1999. What do you think the monarchy offers Australia in the 21st century?
- A4. The constitutional monarchy is a core principle in the Australian Constitution. Only the people of Australia can change that feature at referendum. They may do so at some stage in the future. But when offered a chance in 1999, they refused. The countries of the world that tend to be the most liberal, secular and tolerant happen to be constitutional monarchies: UK, Canada, New Zealand, Scandinavia, Netherlands, Belgium, Spain. That may be just an accident; but I doubt it. The system puts in place a person whose life must be one of service. That reminds everyone who holds public office that they too serve. Not a bad principle in a very selfish age. As well, it avoids the head of state problem: leaders who get carried away with their own importance. Colonel Gaddafi for instance. It reduces the risk of dictatorship. It keeps out of the top jobs rather un-lovely

characters. In the Queen, we have had a model of service beyond self. She comes to Australia when invited. Not too often; not too rarely. She will probably come again in October 2011 for CHOGM. Prince William has made very popular visits. It is difficult to change the constitution. It is pretty clear that the people of Australia will not agree to an appointed president. Yet an elected president would create a double headed polity. As I support Parliament, I do not support this. Because I fully expect the present system to outlast me, I do not waste too much time thinking about change. There are more important changes to effect in Australia.

Q5. You've said that judges do more than apply law – they have a role in making it. As someone who has become a symbol of law reform in Australia, how much do judges have to listen to community attitudes as opposed perhaps to following the letter of the law?

A5. It is very ignorant to suggest, or believe, that judges only apply the law: especially judges of a final national court. Where else does the common law come from except from the judges? It is wrong to suggest a dichotomy between following the letter of the law and proper performance of judicial duty. Of course judges must follow the letter of the law. But what the letter says is very often a matter of controversy and uncertainty. Otherwise, there would not be so many cases on appeal and before final national courts. Professor Julius Stone taught me this in 1959. It is really amazing to see the ignorance about the judicial function in this day and age. Maybe it is because judges prefer to keep quiet about their role so as not to upset angry editorialists and conservative bloggers.

Q6. You have accused the Anglican and Catholic archbishops of Sydney, Peter Jensen and George Pell, of thwarting the acceptance of gay people in Australia. How are they still doing this?

A6. I have always been respectful of the archbishops. It may be a presumption, but I like to think that Archbishop Peter

Jensen is a friend. He is a great scholar of Anglican church history. In that history lies an explanation of why it is the Anglican Church, of all the Christian denominations, that is leading the way on matters such as women's ordination as priests, consecration as bishops and the role of gays in the church and the clergy. Nothing much will happen in the Roman Catholic Church until a change of direction is decided in Rome. It is the last absolute monarchy in our world. But when the decision is made (as it certainly will be) that particular church will change overnight. Respectfully, Archbishop Jensen is simply following his conception of biblical instruction which is a core feature of Protestantism. I also am a Protestant. So I understand this. I simply disagree with his textual interpretations and with their selectivity. I would not presume to comment on Cardinal Pell's position within the Roman Catholic Church. As it appears to me, he is simply following the line taught for many years by Cardinal Ratzinger, now the Pope. A bigger challenge, by far, is the position of radical Islamists. In the end, every Christian knows the central message of Jesus which is to love one another. That gives us a strong common ground as Christians to work from.

Q7. You're an Anglican. How important is faith to your life?

A7. In February 2011, I attended a service at St Matthew's Church Albury, where I was for another purpose. In the presence of the Bishop, I was invited to address the congregation and the church was packed. I spoke on HIV/AIDS and the difficulties that some religious people cause to the successful strategies to prevent the spread of the virus, reduce stigma and suffering and increase access to essential healthcare. I was very moved by the occasion. I regarded it as typical that an Anglican church invited me to speak when I was in their town. From the beginning of the Elizabethan settlement, the Anglican Church has had to accommodate different strands: Protestant and Anglo-Catholic; traditional and modern; strict and accommodating. Some people see that as a weakness of Anglicanism. I see it as its greatest strength. It is why the Anglican Communion is currently engaging in the debates that are ultimately needed by Roman Catholic and Orthodox and Coptic

Christianity. I like Anglicanism. I always feel there is a space for me. My Archbishop always encourages me to continue with the dialogue. This is what I do and intend to go on doing.

Q8. You didn't move out of home until you were 28 and met your partner Johan van Vloten when you were 30. The biography speaks of your loneliness and "monastic" workaholicism in your youth. How did Johan's arrival in your life change some of your priorities?

A8. Johan has had an enormous and wholly beneficial effect on my life. He is loving and giving, just as the members of my blood family are. He constantly pulls me down a peg or two. That has been very good to me. Even people who dislike me intensely, like and admire him. I am very proud of him. Who would have thought that our chance meeting on the 11th February 1969 in a pub in Sydney would have imposed such burdens on him and that he would have carried them with such dignity, intelligence and strength. I imagine that Crown Prince Frederick of Denmark, Zara Phillips and many others sometimes think the same thing: Sydney pubs occasionally work miracles in human relationships. The one area in which Johan has not altogether succeeded is in making me achieve a better work/life balance. But he is a very tolerant and actually persuaded me to take a short beach holiday with him and his sister in late March 2011 on my way back from London and the final meeting of the Eminent Persons Group on the future of the Commonwealth. We both agree on the need to spend more time in relaxation. And that it is later than either of us thinks. He has always been much more sensible about this. And about most things. But, as you know, it is hard to change A-type personalities, especially once they reach their 70s.

Q9. You came out as gay in 1999, by naming Johan van Vloten as your partner in Who's Who. Despite the rush of publicity at the time, I gather it was a carefully considered decision, as you "sounded out" other members of the High Court first?

A9. There was not really a rush of publicity at the time. The *Canberra Times* declared that the "non-secret is out". After HIV AIDS came on the scene in the mid-1980s I was actively involved in many connected national and international activities. At the time this was code language, for anyone who was watching, about my own sexuality. It is not true that I "sounded out" other members of the High Court. Such a personal matter had to be decided by Johan and me alone. In any case, it was not a moment in time but an evolution. The idea of having a personal discussion with judicial colleagues on such a matter was unthinkable because potentially embarrassing to them. One thing you learn in a small collegiate institution is to try avoiding embarrassing one's colleagues needlessly. In any case, I would've had a pretty fair idea about what the different justices would have thought. Some, a minority, were always a bit uncomfortable with my sexuality. I understood this. They were not alone, in this respect, in the Australian community. A majority had no problem. In retrospect, I believe that my openness was a good thing for us, for my family, for the court and for the Australian community. It was one further nail in the coffin of the pretence that everyone is heterosexual and that those who are not have to be thoroughly ashamed of themselves. That is the pretence that inequality in the law seeks to force on gay people. That particular gig is up.

Q10. Up until then, you had been extremely cautious talking about your sexuality, even with colleagues you had known for 30 years. Suddenly, you were Australia's most powerful orator on gay issues. Was this a time of personal liberation for you?

A10. This is not quite true. In the 1960s, as a young barrister, I gave opinions for CAMP. From the 1980s I had been constantly talking about sexuality in the context of the HIV AIDS epidemic. I had attended functions of the Gay Business Association and other gay and HIV occasions. The speeches are all there, neatly collected, in my website. It shows that this was a gradual process, not an event. Nevertheless, being open about sexuality is definitely liberating. My being open may also have helped others. I have received thousands of letters, from Australia and overseas, saying this. Many of them have been from

heterosexual people, some with gay children, many just kind folks. The biggest reforms achieved in gay liberation have been achieved by good 'straight' people. They think of their own lives and the utter unreasonableness of denying a sexual component to life, not to say companionship, loyalty, domestic support, kindness and regular doses of the home truths of life. I know gay judges who keep their little secret to themselves. Everyone must make their own decisions on such things. But I can tell you, if every gay person in Australia suddenly stood up, the whole shabby charade would be over. Yet that is the position currently demanded by major Christian nominations, who ignorantly peddle the untruths that human sexuality is a 'lifestyle choice' and that God demands that gay people should do nothing physical about the sexual orientation they have. It only requires a moment's thought to realise how stupid and irrational this demand is.

Q11. In 2002, Liberal Senator Bill Heffernan used parliamentary privilege to accuse you of misusing government resources to solicit under-age male prostitutes. The evidence was a forgery and Heffernan was censured by the Senate. How upset by this were you at the time?

A11. The good Senator suffered a serious political price for his conduct. He apologised. I accepted the apology, partly because that was the way I was brought up and partly because it concluded the episode so far as the High Court was concerned. I decline to allow myself to be defined by that attack. As I said at the time, it shows the lengths to which hatred of gays can lead some people. Naturally, my partner and family and I were upset at the time. I still get upset when the issue is dragged up. It is there in my entry in Wikipedia. Sadly, I will never get away from it. But I don't lose any sleep about it. Maybe in the big picture it helped those who are watching to see the difference between people like Senator Heffernan and people like me. Over a long life, I have found that many people who are obsessed about gay sexuality have some demon in their own mind about their own feelings. I am not saying that about the Senator. But it is a remarkably common truth, in my experience. Most straight people of my acquaintance do not

necessarily understand gay sexuality. But they sure do understand their own. And they know how important it is to them. And how to ask a person to live a sexless life is, overwhelmingly futile, unnatural and against the best interests of their physical and mental health. I should say that I have followed some of the interventions of Senator Heffernan on rural matters, land and water use. When he sticks to these matters, he makes sense. That is what he should be advised to do.

Q12. Does it anger you that some people persist in confusing homosexuality with paedophilia?

A12. I don't think that many informed people confuse homosexuality and paedophilia. Everyone with any knowledge and experience knows that there is a very small proportion of people amongst homosexuals and heterosexuals who are attracted sexually to under aged persons. Because of the proportions in society, this means that the overwhelming majority of paedophiles are heterosexual. That is certainly the experience of the courts. The biggest practical problem of paedophilia in Australia, evident in the courts, is that presented by sexual relations between serial male partners of mothers with early teenage daughters. I don't get angry about ignorance on this topic. Frankly, I don't think it is now widespread. Just about everybody has now met gay adults and discovered that, like everyone else, they are a mixed bag: some are boring and some are beautiful. Very few are paedophiles.

Q13. You've been with Johan now for over 40 years. What is the secret to an enduring relationship?

A13. In the recent *Compass* television programme, Johan attributed our long relationship to the fact that I was a little hard of hearing and given to frequent absences. There is probably truth in that. It is a miracle when two human beings can get on as well as we do. It means that there is probably an element of mutual dependence, which I am certainly happy to acknowledge. Like any other couple, we occasionally have differences. There is a *big* difference

between us over religion. Johan regards it as astonishing that I pay any attention whatever to the subject. We have a healthy dialogue about this that has been continuing for 42 years, without progress being made on either side. So far. But as I get older I begin to see, in the ignorance and unkindness and cruelty of many religious people, more reason for appreciating Johan's point of view. I should say that he is also working away on members of my family, including my father aged 95 who is very sharp and engages on this topic at most Sunday night dinners. When we have a difference, on this or any other topic, I generally give in and move on. A lot of relationships we have seen break down over pride. On the brink of family marriages, I always tell young couples to give in, even if they are in the right. Vital to keep one's eyes on the big picture. That is what Johan and I have always done.

Q14. It looks like gay marriage will again be stymied by the federal government. Do you think the Australian community is ready for it yet?

A14. It is natural that you should think that gay marriage will be stymied by the federal government. Your newspaper has implacably urged this position through at least a decade. But you must be mixing in the wrong circles. You need to get out into the big world. There you will find, as repeated public opinion polls have shown, that most Australian citizens, and the overwhelming majority of young citizens, support same-sex marriage. Why would it not be so? Increasingly they are meeting gay couples. It is like White Australia. That broke down when we started to meet Asian Australians. If Catholic Spain and Catholic Argentina can open up marriage, and do so through enacted legislation, we should be able to do the same in Australia, which is supposedly a land dedicated to the fair go for all citizens. If this does not prove to be so, it will be a serious indication of the decline in the secular spirit of the Australian Commonwealth that we have to recapture and strengthen. Too much money has been poured into separate religious education of Australians, instead of educating them (as was the case when I was young) mostly in public schools, together. It is astonishing to me that so much money is being given to religious chaplains in public

schools which, since the 1870s in Australia, have been secular spaces. This, and the overfunding of private education, should be reversed. I hope that the Gonski enquiry will make strong recommendations to this effect. So, of course, the Australian community is ready to same-sex marriage. Johan and I are not sure that we are ready; but that is a private choice. It should certainly be there for those that want it and feel the need for it. To deny it to some citizens because of the religious sensibilities of some others (and the campaigning against it of some powerful people) is not acceptable. It is a serious departure from our strong tradition of secularism that separates the State from the Churches.

Q15. Do you have any regrets in your life? Would you have liked to have had children, for example, as many gay people today do?

A15. Every life is full of regrets. But I have been very lucky in my life. It seems ungracious of me even to think of my regrets. When I was younger, I regretted not having children. But as I've grown older, and watched my marvellous and selfless parents, I have got over that feeling. Anyway, from the point of view of biology, my brothers and sister have produced children (who have produced, and are on the way to producing, their own children). The same is true of Johan's family. This being the case, the genes have been passed on. The world needs fewer are not more children. I am sure that the future will get by quite nicely without the children of Michael Kirby. And in the meantime, my ideas have been expressed and are working away in the minds of thousands of people who may adopt some (and reject others). Ideas will be my children. Ideas about reality in the law; the choices faced by judges and how they should be resolved; the link between national and international law; truth about human relationships and sexuality; the importance of secularism and its defence; the need for courage and kindness to one another; the need to consider more actively animal welfare and the biosphere; the obligation to search for spiritual meanings to existence and to make the most of every day.
