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PLAYBOY INTERVIEW: MICHAEL KIRBY

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There is nothing typical about a day in the life of Michael Donald Kirby. It's simply a case of up in the morning, out on the job and work like a justice for not insubstantial pay. Had Michael Kirby decided to stay at the bar, he would certainly be making more money up there among the \$2000-a-day silks, but then he made a personal commitment to destiny at the age of nine and he is not a man to break his bond.

At nine, intellectual comet of the Summer Hill opportunity class of '48, he cross-examined his 150 IQ-powered purpose and decided he would be either a bishop or a judge. By the time the comet had blazed that familiar path through Fort Street High School — Sydney's one-time working class launch pad to military, political, ecclesiastical and judicial power — to Sydney University, his ardor to become a Lord of the Church had cooled.

Arts, economic and law degrees pointed the Kirby star unerringly on a course for that second childhood option, the bench. At 35, under the patronage of the Whitlam government, he was elected to the judicial peerage and deputy presidency of the Conciliation and Arbitration Commission. A few months later, he was given a brand new quasi-jurisdiction as chairman of Australia's first Law Reform Commission.

This day he has been wearing his other wig as a judge of the Federal Court, an appointment he recently accepted to ease his way out of the domain of law reform and back into the mainstream of the courts. The day

started typically early and after a full court shift on the bench of the Federal Court, he has winged his way back to Sydney.

The aircraft is delayed and Mr Justice Kirby is late for his long-standing appointment with PLAYBOY to discuss the order of the law. He apologises. By his book, unpunctuality is one of the deadly sins. When there are so few hours in the day, punctuality is one of life's courtesies. And Mr Justice Kirby is very particular about the common courtesies. You are not ushered into his seventh floor office which doubles as his chambers and, in a sense, his court above Sydney's Elizabeth Street, by secretary or sheriff. He greets every visitor in the Commission's reception area and when the allotted interview time has run its course, he accompanies the visitor to the elevator and bids farewell with a handshake.

It is a comfort to learn that judges can come down from on high. But then Mr Justice Kirby has some very modern ideas about the judiciary and its relationship with the people. It is one of those quirks about the duality of this uncommon man that he should zealously defend the privacy of his personal life, yet have been a controversial judge in seeking to take the public behind the legal curtain and into the inner circle of the law, its trappings and its reform.

By the time he has stepped down (or up) from the chairmanship within the next year or so, he will have raised that curtain a notch or two higher. Mr Justice Kirby has been invited to deliver this year's ABC Boyer Lectures

and not surprisingly he has chosen to lecture on the judges. He has great admiration for his fellow judges, their intellect and their dedication. He also recognises their faults and their frailties. The word is that, as far as convention allows, his lectures will seek to humanise the judiciary — not to curry favor with the headline writers, but to demystify the role of the judge and to reinforce Australians' confidence in the judiciary. As the interview moves into a second session and another day in the life of Justice Kirby, however, one suspects that the lectures will rekindle that controversy which has stalked him since he got the Commission off and running almost nine years ago.

Apart from the feeling among his brother judges and lawyers that he has been too public, Kirby and the Commission have been accused of avoiding the fundamentals of law reform to concentrate on what some critics have seen as the soft issues of bio-ethics and setting up privacy defences against the infiltration of our lives by computers and data banks. Mr Justice Kirby pleads not guilty as charged — and with apparently convincing cause.

The truth of the matter is that neither he nor his commissioners choose the questions of law which they examine in the name of reform. All matters into which the Commission inquires are referred to it by the Attorney-General of the day.

So dynamic are Australian politics of the day that Mr Justice Kirby has taken his directions from seven Attorneys-General since

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"We felt the price Australians were paying for the suppression of marijuana was, on balance, too high."



"Attempts to pigeon-hole me as a radical crumble on the altar of my double-breasted suits and devotion to monarchy."



"Mr Hawke has shown that people can come to politics at a later age. He, however, is a phenomenon."

PLAYBOY: 1975. Their references have resulted in 14 substantive reports and accompanying draft bills to the federal government, and several more will soon go to the printer for tabling in Parliament.

A lesser man might have been disappointed that so few have thus far been enacted. He believes, however, that if an idea has been thoroughly researched and tempered in that furnace of community opinion which the Commission tends on behalf of politicians, it becomes only a matter of time and attitude before it is accepted. He is confident that most of his Commission's reports will eventually be used as the basis of reform of Australian law.

That confidence has grown since Senator Gareth Evans ascended to the office of the Attorney-General. Senator Evans is a former Commission staffer, and, although he once accused the judge of being over-qualified in quantity of degrees rather than quality (Michael Kirby has four degrees from Sydney University; Senator Evans has two from Melbourne and one from Oxford), an obvious bond of mutual respect exists between the two men whose master and servant relationships have now been reversed.

Above all, Mr Justice Kirby is a pragmatist. Conservative defender that he is of the monarchy, pin-striped suits and the concept of *laurea*, he is also a dedicated democrat and disciple of the democratic process. He believes such process can only revive if the bulwark of law on which it depends is radically altered to meet the demands and pressures of modern society.

For this cause he has been willing to sacrifice his innate shyness on the altar of public debate in order to generate the discussion which will change societal attitudes and give politicians the opportunity and courage to reform the law to meet those needs.

As Mr Justice Kirby's term as chairman of the Law Reform Commission draws to a close PLAYBOY sent Russell Deiley into his chambers to discuss the complexities of the role. Deiley reports: "Time alone will tell if Michael Kirby achieves his basic brief to reform the law. But in the process, he has developed an institution which not only examines the need for reform, but tests the water for politicians. Whether it was originally intended or not, the Commission has become, and will become, an increasingly valuable political tool for creating the climate for change. I cannot comment on the man as a jurist, but because he has been willing to run block for politicians who are more preoccupied with votes than the needs of society, then Australians already owe much to Mr Justice Kirby."

PLAYBOY: Why is reform of the law such a tortuous, protracted business?

KIRBY: The law is complicated. The lobby interests against reform are powerful and the politicians, who have the power to enact reform, are often more distracted by more vote-catching concerns. The judges are also retreating from creativity. The net result is that, in a world of rapid change, we are not

attending to the renewal of the legal system. PLAYBOY: You say the judges are retreating. Shouldn't they be taking a lead from their American brothers who initiate a great deal of the reform of US law?

KIRBY: In some ways I regret their lack of adventurism in not attending to injustices. On the other hand, I am a democrat and if our society was faced with the choice of judges solving problems by creativity or Parliament solving problems with the help of a body such as the Law Reform Commission, I would choose the latter. It is better for the politicians, who represent the whole body of the people, to make the law than judges. Of course it is better that judges should make the law if it remains unreformed and injustices persist.

PLAYBOY: You have often said that you want the community to be consulted and to contribute to reform. But, given the complexity, even mystique, of the law, is it possible for the layman to comprehend the law as it affects him, let alone contribute to its reform?

KIRBY: Through the use of the media,

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public hearings and the widespread distribution of discussion documents which set out the problems and need for reform, we spare no effort to get lay participation. Community contribution has led to the concretisation of many problems and suggestions for the improvement of the law. People have come to us and personalised issues which, until then, have simply been abstract concerns. Lay people often draw attention to issues which, despite the most painstaking analytical examination, have not really been addressed.

PLAYBOY: Do you believe — if you'll forgive the term — your humble background gives you greater understanding of what changes in the law will most benefit the people?

KIRBY: Don't apologise — I'm neither proud nor ashamed of my background. It was a typical Australian background of a person of Sydney's western suburbs who went to public schools and who mixed with the children of people from all walks of life. I do feel that I can appreciate more than many lawyers the attitudes and concerns of citizens. Statistics support the fact that lawyers are mainly drawn from professional families. They are often children of lawyers and tend to be of English-speaking stock. In a sense, they do not fully represent the

community. Because my background was typical of the Australia of the '40s and '50s, I feel I am more sensitive to the concerns of the community than other lawyers.

PLAYBOY: What is your philosophy of the law?

KIRBY: It is a philosophy, basically, of modernisation and of bringing the law into tune with a society which is more tolerant, more sensitive and kindly and more willing to allow people to be themselves. The Australia in which I grew up was a rather intolerant society—censorious, moralistic, and, in some ways, unkindly. Happily, that situation has changed under successive governments over the last 20 years.

PLAYBOY: Is it over-simplifying the Commission's charge to suggest that your fundamental duty is to achieve equal justice for all?

KIRBY: It is difficult to identify the fundamental values of law reform. Everybody can agree with a motherhood statement of "justice for all". The problem is to translate that pious statement into actuality. You face much more concrete questions when you look at reform of the law of tissue transplantation, or the law of evidence or the law of privacy retention. Should the box statement be abolished? Should there be a system of compulsory reporting of child abuse? These are the sort of practical problems we have to face. The solutions are not found in general statements such as "justice for all".

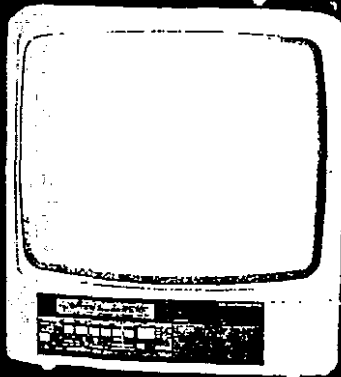
PLAYBOY: To Australianise one observer: Australian courts are free to all — like the Regent Hotel. Considering the exorbitant costs of litigation, is it possible to have a system under which every Australian has equal access to justice?

KIRBY: Although we are doing many things to improve the situation, the fact remains that our system of justice is very much geared to representation of parties before the courts. The history of this traces back to the development of the jury system. When you have a jury trying questions of fact, people require to be represented by lawyers. In Europe, the judge or magistrate is obliged to investigate the case. Some of the finest minds this century have suggested that we should graft on to our legal system aspects of the European approach so that our judges would have a greater obligation to call witnesses, to summon documents and otherwise make sure that justice is done. Our adversary system is very costly.

PLAYBOY: Is the cost of Australian justice too high?

KIRBY: Yes. I think all observers would agree with that. The federal Attorney-General, Senator Gareth Evans, told the legal convention that we simply cannot afford the funding of legal aid. One German judge came here recently and said: "Your system of justice, inherited from Britain, is a Rolls-Royce system. Our German system of justice is a Volkswagen system. How many can afford a Rolls-Royce and how many can afford a Volkswagen?" That is a very

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get work. It just doesn't follow that a person is old, he or she opposes. Many of the judges with whom I daily see and administer the injustice exist in the system and that has had it on them. They believe there should be changes and reform in the law.

PLAYBOY: Critics of the Commission say that you spend too much time on the issues of bio-ethics and the social implications of computer technology at the expense of coming to grips with the fundamental ineffectual function of the courts and their remoteness from the people. How do you respond to that criticism?

KIRBY: I read that and I don't quit what it means. Perhaps it can be attributed to a sweet phrase over which some joy has labored to damn with faint praise which has worked hard, with resources, to improve the legal system. The fact of the matter is that the Commission does not choose its own program. We are on tasks given us by the federal Attorney General.

I must say that I thought Attorney General Ellicott had taken leave of his senses when he asked us to examine the issues relating to human tissue transplants that a journalist sees as "soft". I must acknowledge that he was right in the question to us. He was essentially saying: "This is a species of a new problem which is going to face the law. You are the body that can help the democratic process grapple with this difficult question. He was referring us and Australia to the problems associated with *in vitro* fertilisation, cloning of the human embryo, euthanasia and the right to die. The law based on our reform is now in force in all Australian states and Tasmania. That is quite a significant achievement in a country which knows few uniform laws.

PLAYBOY: Do you see the need for a separate commission made up of lawyers and doctors to keep pace with the legal and ethical ramifications of high biological engineering?

KIRBY: When we tackled the problem of human tissue transplants, we didn't just ask a group of lawyers. That would have been foolish. We gathered together lawyers, doctors, philosophers, theologians and we exposed the issue to our community representatives. The problems for the makers are tumbling out of the minds of scientists as ever-increasing speed of democracy is going to work, we are going to make do with solutions made on the hop, as is already being done by judges in difficult cases. We are going to have to develop institutions which can be put before Parliament. Perhaps your suggestion is a sensible one.

PLAYBOY: Are you confident that proper safeguards can be built into the law to protect individual rights from the threats posed by the development of computer data banks?

pertinent observation. An English judge, Lord Devlin, said that in our system, only powerful corporations, powerful trade unions, people who are supported by legal aid or criminal defendants get before the courts. Ordinary citizens can't face the prospect — it is just too expensive. The courts have gone beyond their means. The solution lies in an improvement in the procedures, the changes in the functions of the judge which I have already outlined and changes in the substantive law so that fewer matters have to go to court.

Solutions to accident compensation claims, for example, should be administrative, not judicial.

PLAYBOY: Until then, is one of the short-term answers to the problem to regulate barristers' fees?

KIRBY: They are trying to regulate the fees in Victoria. It will be interesting to see how successful the experiment is. The fact is you are dealing with a very small market of highly talented people. It is not like hiring a cab driver. You have a person of exquisite talent, which is a mixture of intellectual ability and dramatic finesse.

The real answer to the high costs lies in substantial changes in the administration of the law so that we divert as many cases as possible: from the courts and by encouraging other forms of solution such as arbitration. We are now seeing in NSW a scheme where experienced lawyers are being appointed arbitrators. We are working toward solutions, but many people will be unable to get to the umpire before we solve institutional difficulties.

PLAYBOY: Could costs be reduced by abolishing some of the trappings of the law, by doing away with the elitist division of Queen's Counsel or the anachronism of the junior counsel?

KIRBY: I don't think the existence of the QC creates a higher market. There may be some QCs who don't warrant special fees, but by the time most barristers have taken silk they are at the top of their profession and command high fees. There are, however, some anti-competitive elements in the role — the rule, for example that the QC has to have a junior. I think that rule will be abolished within 20 years. That may sound a long time, but in a legal system that is 800 years old, it is just a blink of the eye. In the meantime, though the requirement that a litigant be represented by two counsel might be justified in large, complicated cases, let the market decide. Let it not be a rule of ethics or legal practice or even a courtesy to senior counsel. Another cost-inflating rule which must be examined is the one that you have to have a solicitor in order to get to a barrister. Some solicitors do very little work on a case yet charge a standard fee.

PLAYBOY: Does the public's more jaundiced view of the profession stem from what it perceives as a fees rip-off or because more lawyers are being seen to be in breach of once-sacred trusts?

KIRBY: It is more complicated than that. I think it reflects a general disillusionment with institutions, with authority. When you raise the general education level you have a more questioning community, which is disinclined simply to accept the status of even venerable institutions such as the legal profession. As well as that, of course, there have been examples of dishonesty on the part of lawyers — examples which the new technology brings to a very wide audience. You also have the perception that because lawyers are taking increasing amounts of legal aid, they should be willing to submit to a due amount of government regulation. Because the profession takes a substantial amount from the public purse, it is proper that the public's representative should lay down rules on the way money should be spent.

PLAYBOY: Should the profession retain the right to wash its own dirty linen behind closed doors?

KIRBY: Well, the professions can be particularly hard on their own — sometimes even harder than if laymen were looking at the problem. There should, however, be a more open and accountable system of complaints against members of the professions. That is coming in most states. There are procedures for lay representatives to participate in the consideration of complaints by the citizen about members of the professions. Generally, the professional associations are first-rate at rooting out the dishonest, criminal members. They are less sensitive to the problem of dealing with, say, the incompetent, indifferent professional who doesn't return phone calls, who hasn't kept up with the latest law or who hasn't taken the necessary care with a client. That is an area in which lay participation and an open hearing could help.

PLAYBOY: Are you a radical?

KIRBY: In some respects, yes; in others, no. I refuse to be neatly stereotyped. My whole philosophy is that people are individuals. People's attempts to pigeonhole me as a radical crumble on the altar of my double-breasted suits and my devotion to the monarchy. Reform means taking what is good from the past and re-forming it. There is undoubtedly much that is good in the legal system we have inherited from Britain. The task is to adapt it, modernise it to meet changing social attitudes.

PLAYBOY: Much opposition to reform comes from the legal profession. Is there a tendency among the older lawyers to oppose change and for the young breed to support reform?

KIRBY: Again, you cannot stereotype lawyers into the old who are conservative and the young who are red-hot radicals. Interestingly, when the NSW Bar had a vote for the abolition of wigs and robes, it was the old who voted for abolition and the young who voted to retain the symbols. A lot of young lawyers, of course, feel anxious about their profession. A lot of them can't

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KIRBY: We are going to try. The LRC will be reporting to Parliament later this year on new protections to privacy. The expertise involved is so great that the law, which tends to move at a snail's pace, finds it difficult to keep pace with the most dynamic technology of our time. But we just can't rend our clothes and gnash our teeth and say this is too difficult. We have got to find the solutions.

PLAYBOY: Isn't there a conflict between what is seen as the protection of privacy and national security?

KIRBY: In our inquiry into privacy we were excluded from matters of national security. Obviously, however, there is a conflict between the desire for individual privacy and the desire to protect the national security. Generally our inquiries have no specific reference to national security.

PLAYBOY: It seems that few broadly-based inquiries, say, into environmental issues, can be divorced from national security.

KIRBY: Obviously you have to weigh competing interests. You touch on a very important issue: the question of cost benefit analyses in law reform. We used to say that justice is beyond price. Nowadays there is a growing appreciation that justice *does* have a price; that you have got to weigh the cost of delivering the product of justice against the benefits that are going to be procured. In hard times, law reformers must be much more conscious of those factors.

PLAYBOY: As a vocal supporter of the anti-smoking lobby, how do you stand on the individual smokers' rights?

KIRBY: My stance is entirely consistent with my personal philosophy, which is basically in tune with the philosophy of John Stuart Mill. If a smoker wants to smoke cigarettes at home — indeed if he wants to smoke marijuana at home — then I take the view that the State should not intervene. However, if he enters my space and intrudes into my world by smoking, then his action is no longer a self-regarding activity because it becomes my concern.

PLAYBOY: You couple marijuana with cigarette smoking — surely there is a difference between the two in law.

KIRBY: I was a member of an expert party which looked at the problem of marijuana. Although most of us were against introducing a further drug into an Australian society already heavily involved in other drugs such as tea, coffee, cigarettes, alcohol, barbiturates and so on, we felt the price Australians were paying for the suppression of marijuana was, on balance, very high. We put forward a discussion paper in the hope that we could get the community to weigh, on the one hand, the disadvantages of extending yet another drug against the corruption of our officials, the infiltration of the Mafia, the diversion of our law-enforcing efforts against hard drugs of proven danger and the loss of respect for the law which many young see as hypocritical. We came to the conclusion there was a need for reform and put forward the proposition

for serious discussion. The result was banner shock headlines which, in effect, destroyed the possibility of a meaningful debate. The politicians fled the discussion stage.

PLAYBOY: Is the time now opportune to try and revive that debate?

KIRBY: It may be more opportune. The federal Health Minister, Dr Blewett, has indicated his general inclination for the reform of the law on marijuana. I think if you spoke privately to many politicians on all sides, you would find that they, like me, are not enthusiastic about introducing another drug but are concerned for the damage that attention to marijuana is causing to our institutions.

PLAYBOY: You appear to consider the law relating to homosexuality as an ass. Are you suggesting that there should be no laws referring specifically to homosexuality or, for that matter, any sexual preference?

KIRBY: No. There must be laws on the expression of human sexuality but they should be neutral to the sex of the person and neutral to the sexual preference of the

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person. The young and the mentally incompetent must be protected. But in my conception of criminal law, it is wrong to enforce on adults a morality which is not universally shared and which leads only to cases of plain injustice against people who have no choice over their sexual preference. It also leads to the unacceptable and ridiculous situation, as we have in NSW, where you have the anti-discrimination law prohibiting discrimination against homosexuals and you have the criminal law denouncing a homosexual act as that unnatural and abominable offence.

We also now have reforms to the rape law which make consensual sex with an adult homosexual a greater offence with higher penalties than carried by non-consensual rape of a homosexual. The law is in a terrible mess and the time has come to face the issue squarely and not to be diverted by a minority opinion which would try to stamp its perception of morality on a community which does not share that view.

PLAYBOY: Earlier this year, you advocated that day to day law and order issues involving Aborigines should be dealt with according to their tribal law. Do you regard the recent case involving Aborigines placing themselves outside the NSW fishing laws as the beginning of an organised Aboriginal

movement to distance themselves from all Australian law?

KIRBY: I'm sure that will be the claim of some Aborigines but not by the majority of their community. From our inquiry into customary law, we believe the majority of Aborigines have a clear distinction in their own minds between what they call big law and little law. They regard the big law covering murder and serious criminal and civil offences as properly in the domain of the Australian legal system.

Many of the matters they are prepared to leave in the domain of Australian law are those on which the Aboriginal law was silent — offences involving motor cars, for example. Similarly, our legal system is silent on traditional Aboriginal law as it relates to saying names of the dead or telling secrets of a religious kind. Sometimes we try and squeeze the things, which are terribly important to them and their society, into our legal system and to apply our roles to a society which is very different. But I think a fear of legal apartheid is an unreasonable fear.

PLAYBOY: It is claimed — and I fancy with some justification — that the law is more interested in a person's property than his body. Do you agree that the law is often seen as being harsher in its treatment of the embezzler than the murderer or rapist?

KIRBY: I don't know that that is always so. Indeed, one of the problems in our criminal legal system is getting to try people guilty of so-called white collar crimes. While our police can cope with the petty shoplifters — people in the minor league of crime — they won't, unless they can secure the adequate expertise of computer skills and so on, catch the really big anti-social characters. Thus, I am not sure that we always punish the white collar criminal more than we punish the violent criminal. Certainly there is a problem in terms of getting consistency in punishment in Australia.

PLAYBOY: In what way?

KIRBY: In our inquiry into this problem we found tremendous disparities in the punishment of offenders in different parts of Australia. The imprisonment rate per 100,000 of population is 32 in the ACT, 43 in Victoria, 67 in NSW, 110 in Western Australia and 220 in the Northern Territory. We have put forward proposals to introduce a system by which greater consistency can be brought into the painful task of sentencing. We don't suggest that sentencing be turned over to a heartless computer which has none of the attributes of human justice, but there should be an element of science in the business of sentencing.

PLAYBOY: One has only to listen to talkback radio in Sydney to gauge the depth of public belief that people who commit serious crimes of violence are treated too leniently — if not by the courts than certainly by the prison authorities. Do you see this as a backlash against the enlightened treatment of the modern criminal?

KIRBY: I am sure that would be a view held by many in the community, possibly by a majority. But it doesn't necessarily mean it is the right view. Unfortunately, the community doesn't have a very informed view of what really goes on in our criminal justice system because what happens in prison is not revealed. People don't appreciate the special deprivations that exist in Australian prisons, many of which are forgotten memorials to the penological theories of unknown criminologists of the 19th century. By the same token, there are people who commit very serious, anti-social conduct and there is no appropriate punishment other than to send them to prison. But the Australian imprisonment rates are not only variable, they are high by world standards and without any noticeable increase in law-abiding conduct.

The average rate of Western European imprisonment ranges from about 23 in The Netherlands to about 40 in France. Therefore, even our national average of 67 per 100,000, which is the same as the NSW figure, is high in the world league. Most commentators nowadays think that the direction of penal reform lies down two tracks. Firstly, that the use of imprisonment is a last resort, taking into account the fact that deprivation of liberty in itself is more significant than the length of the prison term. Secondly, they believe that our system of punishment should be more imaginative. In the past it has been a fine, bond or prison.

Many other penalties could be introduced ranging from community service through weekend detention to criminal bankruptcy — tracing the assets of criminals. Introduction of these and other penalties into the system would give a wider range of punishments which could be applied in accordance with the seriousness of the offence.

PLAYBOY: Given the present climate of public opinion, do you think you could sell that kind of proposal to the community?

KIRBY: I don't think we will ever convince the Australian community of the merits of what I have just said, but I think the road to convincing them lies down the track of economics. It costs about \$23,000 a year to keep a person behind bars. The taxpayer foots that bill. Reform of our criminal justice system will not stem from the support of the bleeding hearts. It will rely on an understanding of the social and individual costs and, especially, the financial costs.

PLAYBOY: Does it discomfort you to be seen to be sitting in judgement on your fellow judges?

KIRBY: Initially it did. I was very young when I was first appointed and had nothing like their experience. Over the eight and a half years, however, I think it is true to say that there has been a growing realisation in the judiciary of the importance of reform and of the need for an LRC and a commissioner who is a judge. It is

interesting that when we carried out our inquiry into sentencing, we did something quite original for law reformers. We sent a survey round all the judges in Australia to get their perception of sentencing. Although some said we would get, at best, a 10 percent response, we got an 80 percent return from the 600 judges. Although judges are often painted as conservative people — and by and large they are, because the law has a conservatising role — I think that was a reassuring sign of the Australian judiciary's attitude to reform.

PLAYBOY: You have been a constant defender of a free press and have been quoted as saying that the judiciary itself has been guilty of eroding that freedom. Is that erosion taking place because of a flaw in the law or through misinterpretation?

KIRBY: Judges must apply the law as it is and in some parts of Australia the law is not well tuned to the protection of a free press and free speech. I refer particularly to the law which requires the total closure of courts such as the family court. I wouldn't go back to a completely open family court of

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the old *Truth* days, but there could be value in the reportage of cases without naming people or cruelly parading people's private lives. Judges, too, would then be under constant scrutiny and that is a terribly important aspect of our society. Secondly there are laws which permit suppression orders and there have been a number of examples of that recently. Indeed, I have seen a suggestion that the South Australian precedent in this regard be extended to other states. Thirdly, we have seen the efforts to reform the law of defamation. It's like the curate's egg — there are some good and some bad things in the package. The good things are those which they have taken from the LRC report. The bad things are those in which they have decided to stray from the straight and narrow which the Commission suggested. But it is a step generally in the right direction to try and get a uniform law.

PLAYBOY: Of the Commission's 14 tabled substantive and pending reports, which do you consider the most important?

KIRBY: I regard our institutional achievement — helping Parliament cope with the pressures of a changing society — as most important. But if I had to put store on one particular report, it would be the one on criminal investigation. That was largely the

work of Gareth Evans, then a commissioner and now the federal Attorney-General. It is important because it seeks to do what no other English-speaking country has ever done. It seeks to articulate in a single statute the basic laws which will govern the rights and duties of citizens and police in a moment critical for freedom — the time when a person is under suspicion. It is very easy to be in favor of rights and freedoms when everything is going well and there is no controversy. When rights matter most is when you have somebody under suspicion being interrogated. The report introduced many reforms, including sound-recording of confessions to police, and I believe pride of authorship will ensure that Senator Evans will do something about bringing it into law.

PLAYBOY: If the law and the citizenry can be separated, which of the reports do you consider will have the greatest impact on society?

KIRBY: If any report will have relevance to the society of the future, it is the report soon to be delivered on privacy protection. It deals with future problems — telephonic interception, bugging, optical devices which can intrude into areas thought to be private and, above all, the computerisation of personal information. That information will be the basis on which all decisions are going to be made about all of us in the 21st century, from the cradle to the grave — not on a personal encounter, but on what your computer profile says about you.

PLAYBOY: You have said that no recommendations have stirred greater reaction than those dealing with the privacy of young people. Has this been because the recommendations touched on the sexual behavior of the young or because they were seen to erode traditional parental roles?

KIRBY: It was because of both those matters. Sex is a constant fascination, indeed obsession, with English-speaking people. It may go even beyond that. But there are parents who believe they have an Old Testament right over their children, even to the point of treating their children as chattels. We had people writing to us asserting: "While the child remains under my roof, eating at my table, being supported by me, he or she will do as I say." That attitude didn't seem to us to be motivated by love; it was an assertion of rights. Many of the people who wrote, of course, were very well motivated. They saw children as immature people who had need of parental guidance. Because the report caused a lot of anxiety and because the response alerted us to a political and real concern, we re-examined the matter. I believe our final proposals will be more acceptable.

PLAYBOY: In referring to your proposals, the Prime Minister was recently accused by one Sydney mother of lowering the age of puberty. Was that typical of the gut response of parents?

(continued on page 130)

KIRBY (continued from page 38)

Mr Hawke may think he can make the rains come but I don't think that even he can lower the age of puberty.

KIRBY: Don't let's stereotype parents. A lot wrote in supporting what we said. They said their children had doors on their bedrooms and they respected their right to privacy. That privacy normally accompanies puberty because it is about that time of self-discovery that young people begin to realise their individuality and to desire a degree of privacy.

However, Mr Hawke may think he can make the rains come and perhaps, like Mr Whitlam, he thinks he can walk on Lake Burley Griffin, but I don't think that even he can lower the age of puberty.

PLAYBOY: Is there a move towards internationalism in the law?

KIRBY: Yes. Technology is forcing the pace in a number of areas. With computers chattering away to one another across the world, moves are on to develop international conventions and rules to protect privacy, to protect the vulnerability of the community from disruption if the computer is interrupted and from computer crime. Similarly, I believe we are going to see the equivalent in the bio-tech area because the human body is the same all over the world. After so many millennia, our generation must face up to the issues of whether we should divorce conception from natural procreation and develop people in test tubes, whether we should develop cloning for the human species and whether we should permit the development of a foetus by a process of cloning and *in vitro* fertilisation in order to grow an organ needed by an adult. The international developments are happening slowly. We are roughly at the stage they were in England in 1260. The institutions of the kings' courts were there, the central actors in the development of the Common Law were there. Many barons were still making their own laws, but the process was about to happen. One can only hope that it won't take 700 years to occur in the international framework.

PLAYBOY: The frustrations of Vietnam War veterans to have their day in court has focussed attention on whether class actions should be heard in Australian courts. Do you believe there is a place for class actions in our legal system?

KIRBY: Certainly I believe there is a need for a representative action of some kind. It is needed to permit the aggregation of similar claims so that they can be brought to court in one claim in which you equalise the battle, say, between a large chemical manufacturer and the government on one hand and a group of Vietnam veterans on the other.

Otherwise you have a very unequal battle

between one veteran and the government allied with the great corporations.

The Commission, however, is grappling with a number of questions. Do you take the US class action as the model? Do you introduce class actions only in federal courts? Given the cost rules which govern the legal profession, would class actions work without changing those rules to compensate lawyers for the greater work load involved? Do you permit lawyers to take a share of the action as happens in the US through contingency fees? The answers depend on whom you go to. If you go to Ralph Nader, he says the class actions will be the panacea for the activist society asserting its rights in court and upholding the rule of the law. If you go to the Chamber of Manufactures, it says class actions will be the final nightmare of Australian business. Somewhere between the two assertions lies the truth.

PLAYBOY: You have described the Constitution as haunting facets of modern society "like Banquo's ghost". Given Australians' demonstrated reluctance to tamper with the Constitution, how can it be modified to meet present social needs?

KIRBY: We can do it frankly by referenda, but, as you have said, the people have shown a disinclination to agree to frank amendment. An alternative is to do it by reinterpretation in the courts of the vague language of the Constitution. We have seen a bit of that lately in the decision of the High Court clarifying the external affairs power which was very relevant to the Tasmanian dam case.

Or we can do it by the executive government of the day stretching the language and hoping that nobody will test the proposition. My own preference is the frank approach.

I refuse to constantly denigrate the community, to make the paternalistic, condescending approach and say we'll leave amendment to the experts. Far better that we take the community into our confidence through governments and law-makers informing the people of the problems posed by the authors of the Constitution. As the Governor-General has pointed out, the Constitution is a charter enacted in 1901 by gentlemen who developed it in the 1890s and whose own political philosophy was forged in the 1870s. We are captives of an instrument of government that is 100 years old.

PLAYBOY: And what is your solution?

KIRBY: After the apparent failure of the Constitutional Convention in Adelaide, I suggested there ought to be a constitutional commission to help a convention of

politicians reform the Constitution much in the same way as the LRC helps Parliament. The only two countries which have achieved significant constitutional reform in the last decade have been Canada and Sweden. Both have achieved the reform through a process of independent commissions. Politicians should be involved, but a commission can lay the groundwork by exhausting the public debate through radio and television discussion, by calling in the experts. By taking such an approach, constitutional change wouldn't be such a big thing. It would be simply a matter of adapting one law — admittedly a very important law — to the needs of 1983. I think there is evidence that Australians are more willing to change the Constitution.

PLAYBOY: You are now nearing the end of your term, which you don't intend to extend, as chairman of the Law Reform Commission. What do you wish your successor?

KIRBY: I simply seek to hand over an institution which is running in good form with highly dedicated, talented colleagues on the staff. The Commission is much more important than any individual. That is the great lesson that the British offer the world: individuals, with all their strengths and weaknesses, come and go, but institutions remain. I believe the Commission has now cut itself a permanent place in the Australian political and legal setting. I am certain the Commission will be increasingly valued by all politicians of all political persuasions. They will see the Commission as the vehicle for mobilising expert and community opinion to tackle the tremendous pressures for change. I don't think I'll give my successor any more advice than a Lord Chancellor once gave a judge: Remember to wear a dinner jacket at all official functions and don't get drunk in public.

PLAYBOY: You have occupied the influential territory between the judiciary and the executive. Coupled with your earlier close association with Neville Wran, has your experience in the last eight years fired any political ambition?

KIRBY: No, I've put that aside. You have to be very young to go into politics these days. Malcolm Fraser started the vogue at 23, Mr Keating at a similar age. I might have had a political ambition at one stage, but a very hard-bitten member of the Canberra press gallery dampened that when he said: "Oh, put it out of your mind — you are far too old."

I was 37 at the time. Since then, of course, Mr Hawke has shown that people can come to politics at a later age. He, however, is a phenomenon. His whole life was a preparation for political office and, as well as that, he can bring the rains. Despite all my skills, that is something I have not yet been able to manage.

