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INTERVIEW OF MICHAEL KIRBY

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Interview by Michael Short

The Hon. Michael Kirby AC CMG

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MICHAEL SHORT: Michael Kirby, it's a pleasure to welcome you to The Zone. Thank you for your time.

MICHAEL KIRBY: Thank you. It's a privilege to be in The Age building. It's something new.

MS: We'll have a wander later and I'll show you. We're going to try to get through a few issues today, so let's get cracking right away. First, the timing and substance of any future attempt to codify or otherwise enshrine human rights protection in our nation: what would you like to see and when would you like to see it?

MK: I'd like to see Australia join the world and I'd like to see it happen quickly. We were told last year when the Brennan Committee report was considered by the Rudd Government that it would be shelved and the idea of a national human rights charter not reconsidered until 2014. That would be on the brink of the centenary of ANZAC, and that might be a time when our country is really thinking about its core values, its history, the things it stands for, the things that are important to it.

So that might be an occasion to raise it again. But we've had now three attempts to have a national human rights statute. None of them has succeeded. It would be a good thing if we can get our act together and get it there next time. Fourth time lucky.

MS: Philosophically, or at a philosophical level, does a charter of rights face any risk from your point of view from the idea that that which is not permitted is forbidden, and that that idea is vastly inferior as a concept to that which is not forbidden is permitted?

MK: Well, of course there are always problems with anything that you do in life, not only in the law. But most countries have a charter. Not to say that unless you fit within it conduct is forbidden, but to say these are the basic rules by which we live together in society.

Two things came out to me in recent discussion about this that I hadn't really thought about. The first was a point made the by First Parliamentary Counsel of Victoria, Gemma Varley. She made the point that the importance of the Charter in Victoria was not in court cases – because there have been precious few, really.

It is in the ministerial offices. In the bureaucracy. In the office of parliamentary counsel when they're drafting legislation; so that it's internalising basic principles. Occasionally you get a point like the stop and frisk power and a minister is made to think about the fundamental values and the principles that have gathered around the international discourse. And if he or she wants to go ahead they can do so but it becomes then a point where that is on the record. They have to be accountable - and that's making democracy work.

The second point that's been made was made by Dr Paula Gerber of Monash University. She has studied the knowledge about basic rights amongst students - pupils at school in Massachusetts and in Victoria. She's found much higher levels of knowledge about issues of rights and duties and elements of the state and the entitlements of citizens to stand up in the U.S. than she found in Australia.

And that is a good thing; that you've got, as it were, a standard against which to teach the students. And so these are two ways in which having a Charter affects our society and not having it is a deprivation.

MS: When you say fourth time lucky, do you think we'll get there?

MK: One can't ever be sure of such matters in Australia. There does seem to be a certain hostility to it. And the hostility was really pioneered in the last debate by a number of very powerful interests, namely a particular publishing house and also politicians on both sides, who obviously have come up the greasy pole.

They don't very much like the idea of giving citizens a right to go to court and stimulate the parliamentary process. If you're a backroom person, if you're somebody who's battled your way into a position of influence in that backroom, then why would you want to have ordinary folk being able to go to a court and be reminded – have the parliamentary system be reminded – that you have not been addressing a basic principle?

MS: Because you might have climbed the greasy pole to participate in enlightened public policy development and be interested in making the world a better place.

MK: Well, you might. And you might often do that. But the fact is we can sometimes overlook the issues that are issues of fundamental rights. Take for example aboriginal land rights. We have one of the oldest democracies in the world in Australia – in the 1850s we developed parliamentary democracies. Nonetheless did not address the issue of recognition of aboriginal land rights.

We had 150 years of it and it didn't address it. In the end it was addressed by a court. It was addressed by the High Court in the *Mabo* case. So that when I hear people say 'leave it to parliament, those people who climb their way up the pole only have our best interest at heart', they have the best interest of the *majority* in mind. Because they're the people who deliver them power. Which is what they naturally want most.

But we also have in a modern democracy to respect the interests of minorities. That's where our parliamentary system sometimes doesn't operate or takes a long while to operate. The idea of the Charter is to start a more effective conversation between the citizens and their politicians and the parliamentary process.

MS: And deal with the failure of utilitarianism, or a weakness of utilitarianism?

MK: Failure of any of the principles, intuitive principles of what's good for society. The political parties often think they know best. But if you take for example the ban on gay marriage and the ban on any discussion of it and the fact that that is permitted in the public fora of Australia – that is something that just couldn't be ignored if you had an effective human rights mechanism. Then, at least, issues of equality, of citizenship, of principle would be

addressed in the courts. The last word under the Brennan proposal belongs to parliament. But at least you get the process stimulated, and I think that's where we've had a weakness in our parliamentary system.

Why is it disrespected now, at the moment, as it seems to be? I think the reason is because people are fed up with backroom people deciding the great issues of the day and deciding which issues will be advanced and which will not be discussed.

MS: Michael, do you think that Australian democracy is or has become too conservative?

MK: Oh well on some things I think it is too conservative. But, then again, I'm a liberal. No-one is in any doubt as to my philosophical persuasion. Therefore I would say that, wouldn't I?

MS: But historically there's been quite an overlap, too, at a sort of policy level and almost a philosophical level between conservatism and liberalism – they're not necessarily completely opposed, are they?

MK: Not at all. On some matters I'm really quite conservative. I believe in the rule of law, which is a highly conservative notion. I believe in the independence of judges and judges having the last say in constitutional matters.

I haven't been convinced that there's a better system than a constitutional monarchy. The Queen comes when she's invited. She doesn't come too often. And she keeps some pretty awful people out of that top job. So then, on some things, I'm really quite reassuringly conservative.

MS: So, at the level of democracy, and you've been mentioning our parliamentary process, do you think that has become a little bit too conservative, is that the right word, or compromised or...

MK: I don't think it's conservatism, I think it's that the number of players is actually quite small. The numbers of people you've got to get to stack a branch to get a seat is actually quite small. The number of people who actually take a part in the political process is small in Australia.

We vote every three years. And then we say, well, everything done by a government after that is done with authority of the people. Well, that's a fiction. That is something which no rational person would fully believe in. And therefore the idea is to try to make the democratic process work more effectively and that means giving it a stimulus.

And one way to give it stimulus is to give the courts the opportunity to respond to something over which the politicians can't wield control – that is, people who go to court and say 'steady on, you have ignored or you have breached a basic principle. It affects me and I believe you should be reminded of this and if possible that the law should be interpreted so that it conforms to the basic principle'.

MS: Without meaning to be frivolous – but, for a moment, did you enjoy *The Castle* as a film?

MK: Can I tell you a secret? I have it at home. I've had it for many years. But I've never watched it.

MS: It's marvellous...

MK: I'm told it's marvellous, but I was afraid it might have a corrupting influence on me. I might really think that it was in the vibe in that Number One Court that the answers to High Court cases arose. So I will see it one day.

I'm quite a young man still and therefore one of these days I'll sit down and watch it. But light comedy is not my idea – I'm a very serious person and the issues in the High Court were very serious, issues of principle usually.

MS: That is true, so I want to come back to your relative youth, energy and agenda when we get to the more personal part of the interview.

MK: Agenda is your word.

MS: I'm using it perhaps in a...

MK: I prefer contributions...

MS: ...In a French sense in terms of your diary, rather than your political...

MK: Oh, I see. Well that's a horror story, my diary.

MS: Two. Next up – you're involved with the United Nations Developments Program's Global Commission on HIV and the law. It was only set up a handful of months ago and you're due to report the findings by the end of 2011. What's the outlook for progress being made on the removing some of the legal barriers to responding to the epidemic, which has been running for 30 years, after all?

MK: Well, you'd have to say that getting progress in this area is really difficult. We had our first meeting Sao Paulo Brazil chaired by ex-president Fernando Cardoso of Brazil. He, of course, was a politician but he was a politician of an unusual kind. He was a sociologist, and he was an economist and he stabilised the Brazilian economy. He secured a democratic system and he was the victor in it. He's now witnessed not only the election and retirement of President Lula but also the election of the new President of Brazil. It's an amazing country with great resources. And the thing that's most impressive about it is it's very self-confident.

Cardoso in office dealt with the HIV issue in many strong ways. He has very original ideas on drugs. Of course, injecting drugs is a major method of spreading the virus. And he has very modern and enlightened views about them. And secondly, he also had very strong views about access to antiretroviral therapy. And, if necessary, to making generic drugs in Brazil, if he couldn't strike a deal with the big pharmaceutical companies.

So he's a very interesting principled politician. He's an agenda politician. And he was the chair. And so we were not just a group of theoreticians or judges. We were sitting there with the former President of Botswana and the former President of Brazil, a member of the United States Congress, as well as people who have been involved in the epidemic on the perimeters, as I have.

We were trying to work out how can we stimulate politicians in other countries to do what we have done in Australia – to get rid of the laws against same sex adult private sexual activity. To get rid

of the laws that criminalise the sex workers, the prostitutes. To provide for the access to antiretroviral drugs, to empower women, and so on.

So these were the challenges and they're big challenges but they have to be attacked and that's what this global commission is going to be doing.

MS: Optimistic?

MK: We will make some differences. But myself, I think it's most likely that we will make the differences not by harping on about human rights but by pointing to the economic costs of failing to address the epidemic effectively.

It's strange but true that in Cambodia, when I was the UN Special Representative there under Boutros Boutros-Ghali, when I tried to put AIDS on the agenda of human rights I had no success whatsoever. But when I pointed out to Hun Sen, the government and officials that if they didn't address the spread of the virus, it would have great impact on the population that works. It would not only cost them a lot of money, which they didn't have, for healthcare and hospitals and so on, but they would have a very important sector removed from the employable population.

That's when they began to see the issue and they did take steps in Cambodia. That's when the level of HIV infections plateaued. And that's what we've really got to try to do in the rest of the world.

MS: Enlightened self-interest can be compelling.

MK: It can, and unfortunately arguments of human rights, especially when addressed to some of the unlovely regimes that exist in the world, are not always compelling. In fairness, some people don't see human rights the same way – as, for example, on issues of gay rights and the like in Africa and the Caribbean.

MS: Well that is a nice, neat segue to topic number three. You're not long back from London from the second meeting of another group you're involved in, the Eminent Persons Group on the future of the Commonwealth of Nations.

You were appointed in July following the CHOGM (Commonwealth Heads of Government Meeting) in Trinidad and Tobago, and you've just mentioned the issue of gay rights. We have a Commonwealth of some 53 – or 54 if you count suspended Fiji, I think. Forty-one of our Commonwealth nations still have anti-homosexual laws – they make up about half of the 80 of our 200 or so nations in the world which do. Do you see that as an area where there's a lot of need for change?

MK: It's a very interesting thing really, that if you look at the world. The majority of countries that still have these laws are British countries, or countries that were formerly part of the British Empire, now parts of the Commonwealth of Nations. That has an historical explanation.

When Napoleon appointed his codifiers in 1806, the codifiers looked at the laws of royal France and they looked at the laws against homosexuals and they just got rid of them. They said: that's rubbish, it's religious and that's an overreach of the criminal law. So virtually no country of the civil law tradition – the French, the Netherlands, the Spanish, the Germans, the Russians – has that law in their system because their legal system is inherited from Napoleon's conquest.

But it's the British countries, the countries of the common law that *all* inherited these awful laws. And they're still in place, as you've said, in the majority. Now, how do you get that changed? You don't get it changed by hectoring people and saying you've *got* to do it. Again, enlightened self-interest is the tactic.

You've got to point to the fact that, if you put people out of the messages of self-respect and out of the messages of health – their health and well-being – and also out of the link to the healthcare supports, then you're going to have a bigger and bigger AIDS epidemic. The plain fact is that since the global financial crisis, the amount of money that the Western countries are willing to make available has fallen. And yet every year about 2.7 million people get infected.

So, the numbers are going up. The West is not giving the same money. The amount of support that is available is falling and all the while you're criminalising activity which you have to bring into the links of education, of information, of support, of self-respect and

that really is absolutely the process that we went through in Australia. And if we've had some success in struggling with the AIDS epidemic it's because we took those steps. We've got to try, amongst many other things in the Commonwealth inquiry, to get that message over. It won't be easy. Again, nothing's easy in life. Life wasn't meant to be easy, a famous Melbourne man once said.

MS: He's found some enlightenment in later years, too, one would argue.

MK: Well, in fact, I've asked Mr Fraser if I could come and have a word. I wrote to all the former Prime Ministers of Australia because of the fact that they are actually people who've been to CHOGM. They've actually been there. They know what it's like and they know how it operates.

The CHOGM leaders are quite happy to sign on to glorious statements – like the statement at the end of the Port of Spain meeting. But actually delivering. That's the difficult thing. And this is what the eminent persons group, so-called, is looking at. So I'll be speaking to Mr Fraser and to John Howard. They've all indicated they're happy to speak about it and to give their experience and their suggestions and advice.

MS: The Royal Commonwealth Society last year conducted a so-called Commonwealth Conversation, and there were two key criticisms that emerged from that, and, in parenthesis, isn't it good that they can have this robust conversation...

MK: And put it on the web. And were encouraged to do so by the Secretary-General, Kamallesh Sharma.

MS: That augers well. But the criticisms were: a/ the Commonwealth of Nations is a little too timid, and, related, b/ that it doesn't take human rights sufficiently seriously. Valid?

MK: Well, this is the very heart of what we're doing. In fact, at the end of our meeting last week in London, we authorised the release of a media statement, which, by the way, wasn't picked up by many media outlets. It said 'silence is not an option'.

The Commonwealth actually has been pretty good where a country had overthrown a democratically elected regime. When

that happens – whether it’s Musharraf in Pakistan or Rabuka in Fiji - they throw them out of the Commonwealth. They threatened to do that with Mugabe (in Zimbabwe) but he left before the axe fell. So, the Commonwealth’s been pretty good on that through the Commonwealth Ministerial Action Group (CMAG).

Although that group has jurisdiction to deal with ‘serious or persistent breaches of human rights’, it hasn’t ever once done anything about that. And there have been serious abuses of human rights in Commonwealth countries that have just been unaddressed. Therefore, by saying that silence is not an option, I think, the group has indicated where it’s heading.

This is not going to be a timid whitewash. If they wanted to have a timid whitewash, they didn’t choose the right people in choosing Graca Machel, Asma Juhangir, a human rights lawyer who’s just been appointed to the President of Supreme Court Bar of Pakistan but who went to prison in earlier days for fighting for human rights, and Sir Malcolm Rifkind, who was Foreign Secretary of the United Kingdom.

These are people are going to stand up for the basic principles of the Commonwealth and make sure that we can deliver implementation, not just more fine words.

MS: Well, Michael Kirby is obviously going to do that too. Now, you’re not slowing down...

MK: You sound shocked or curious. You should be rejoicing!

MS: Not at all, I’m neither; I’m interested to hear what drives you. The Zone is as much about thinkers as it is about their thoughts, and I’m keen to hear what is the genesis of your thinking? What makes you do what you do?

MK: Well, can I tell you, I don’t just sit there all day thinking why do I do this? I’m not a person who is so controlled by my own ego that I’m reflecting upon it and how it’s operating. That can be done by others, by analysts including yourself and The Zone.

But I am, like everyone, a product of genetics and experience. I am the result of a loving upbringing in a peaceful country, with wonderful parents and siblings, a very long-term relationship,

stability, support. But a feeling that life isn't always just and that there is injustice for people and that we should do something about it.

Maybe going to that Methodist Church early in my life - I mean the Methodists were basically rich Anglicans and they believed in rolling up their sleeves and getting things done and making a better world. Maybe that affected me. And maybe my wonderful education in public schools, sitting in classrooms with children from all backgrounds, all religions or no religion. And also growing up with my partner, who's a person of no religion. We have very constructive dialogues about spirituality and religion, he believing that it's a load of hogwash and is puzzled why I take any of it seriously.

MS: But nevertheless would share that profound ethic over which religion has no monopoly – do unto other, as you have them do unto you – is that..?

MK: Oh, yes definitely. In his case, he puts his effort where his beliefs are. He was an Ankali, which is something that we have in Sydney – it's a group that helps people who are living with HIV, many of whom just want somebody to talk to because they are sometimes abandoned by their family, their blood family, and sometimes by friends.

And so he would cook meals and clean the house and take me along as handbag. That was a wonderful experience. He's not doing that at the moment, but he did that for many years and that's really, I think, a spiritual thing. Isn't it a sad thing to reflect upon the fact that so many religions seem to be motivated by being nasty?

Even this week we saw that the letter bomb, which was sent from Yemen, was sent to a Jewish synagogue in Chicago of gay and lesbian Jews. I mean, it does show that it's not confined to Christianity – there are a lot of nasties in Christianity – it's seems to be something that is connected with people feeling superior because they have the 'real word'. What you learn in life is that all of us can see the truth only through a glass darkly. And that we all have to try and be kinder to each other and try to make the world a better place.

And where people are really sick, as they are with HIV, to make sure they get the best therapies and to make sure that they and others are helped to avoid getting infected in the first place.

MS: I'm struck that the theme that has come out of The Zone from many people that I've spoken to, or quite a number of people, is this notion of injustice and the randomness of fortune and that people who've achieved and received good fortune in life feel a moral duty to try to ameliorate the situation for those perhaps have not been so fortunate.

MK: Well, be a bit careful here because it's natural for people who have had success in life to spin the idea that what they've received they have to be willing to give and so on. That's a natural way of looking at themselves. You don't necessarily want to accept all of that. But what motivates people is very complex, I believe, in my own case, to me it's a great privilege to be in the company of President Cardoso, for example.

Just to see this man, who by his skills in economics really changed his country but didn't just look every day at the opinion polls. He wasn't controlled by what was being fed out of the spin office either in politics or the media. He was actually doing really important things – like standing up for the sick people of Brazil and saying 'we are going to make the anti-retrovirals'.

He did two interesting things at that time when he had this battle with the pharmaceutical companies. He put advertisements in the American newspapers and said 'This isn't about patents, this is about patients'. Very clever advertisement.

But secondly, he invited the pharmaceutical companies to send their chief executives down to Brazil, first class, all expenses paid, to see their pharmaceutical factories. To prove that they could do it. Because these pharmaceuticals were sceptical. And ashen-faced executives were seen getting on the planes going home: Brazil could do it and did do it. This is the sort of leadership which the developing countries need.

But how we're going to overcome, how we're going to get them to take the steps of decriminalising sex work when there's so much hypocrisy and moralism around? how we're going to get them to get rid of the silly, counterproductive laws against gays? And how

we're going to make sure the anti-retrovirals are available to everybody and injecting drug equipment is going to be available?

We were really lucky in those early days of HIV in Australia that we had Neal Blewett as the minister and Peter Baume as the shadow minister – they were princes amongst politicians. We don't often see that. We don't see it enough – that people who are not controlled by the spin or by the politics. They just did something really important because it was the right thing to do for human life.

MS: Michael, we're running out of time and you have an appointment, so my final question, as it is with every guest in The Zone is what is the hardest thing you've ever had to do?

MK: The hardest thing in one way was coming out as a gay man. It was comfortable there in the closet and the rules of the game were generally observed. The media, for example, never to my knowledge exposes people's sexuality unless there's some particular reason of hypocrisy or the like. That's why the recent event with Minister David Campbell in NSW was a somewhat shocking thing to see happen. It was channel 7 in Sydney. And channel 7, by the way, is a serial offender in this respect, having done similar things to John Marsden in his life.

But it was very comfortable in that secrecy. There are still lots of people, I can tell you, who are there in that comfortable little anonymous space, in the dark.

And it was basically my partner. Sometimes non-lawyers see things more clearly. Citizens see things more clearly. He said 'how long are we going to be around? We owe it to the younger generation to take a stand'. And I think it's been a good thing. I think it's a good thing for Australia to know that gay people are everywhere. They're everywhere. And this irrationality of pretending you're something other than you are is just ridiculous and irrational. But it wasn't an easy thing, and I paid a price.

I was attacked in parliament and there are still some nasties who would attack. But I think that was a good thing to do. I have to pay a tribute to Johan my partner for saying 'well get up there and stand up'. The Dutch people are very, very difficult people. They're not as hypocritical as Anglo-Celts are. We're quite comfortable

sailing along, but they stand up for principle. And that's what, in the end, we all should do, I think.

MS: I can't think of a better place to leave it. Michael, thank you so much for your time.
