Transcript of the Interview with Justice Michael Kirby

Tuesday, 24.07.2007

Sydney Chambers

Justice Michael Kirby (MK): This is a recording of an interview with Justice Michael Kirby of the High Court of Australia taking place in Sydney on Tuesday the 24th of July 2007. I have been asked whether I am agreeable to the interview being recorded. I am so agreeable. If the interview is to be used I would like to have a copy of it so that I can edit it slightly to make sure that full stops are incorporated and that it reads logically and rationally.

Constantin Lauterwein (CL): I would like to ask you eleven questions, all concerning the limits of criminal law. First of all, a broad question: What do you personally understand by "the limits of criminal law"?

MK: It's good thing that you are asking this question in July 2007. It is exactly 50 years ago since the report of the Wolfenden Committee – an inquiry on homosexual offences and prostitution – was published in the United Kingdom. That committee had to address exactly this question: "What are the limits of the criminal law?" The report of the committee recommended the abolition of the criminal offences directed at homosexual men who are adults, occurring in private. This became extremely influential throughout the Commonwealth of Nations. It led, ten years later, to the enactment of reforms of the law of the United Kingdom. That led, in due course, in the manner of those times, to changes throughout the Commonwealth of Nations, including ultimately in Australia where, eventually by a long and tortuous process, all of the old criminal laws were abolished.

I received word this morning that the Court of Final Appeal in Hong Kong this month held that the anti sodomy laws of Hong Kong in their application to a semi public place unconstitutional in Hong Kong. So the process of reform continues. It is a process of defining the limits of criminal law.

As a result of the Wolfenden Committee report there was a major debate about this subject in Britain. The debate was led on the side of the abolitionists by Professor HLA Hart. It was led on the side of the retentionists by Lord Devlin. Lord Devlin asserted that it was every society's right to express criminal law as dealing with matters which society found repulsive and unacceptable for its own wellbeing. HLA Hart (who it later emerged was bisexual) was in favour of abolition on the ground that there are some things which, as the Wolfenden report stated: "putting it quite bluntly, are not the proper business of the law". I align myself with Wolfenden and with HLA Hart. I believe that most informed people nowadays do. I was reading a book on the aftermath of the Wolfenden report when I was in England last week. It showed that, ultimately, Lord Devlin voted for the abolition of the offences. So he apparently, ultimately, came round, ten years later, to the belief that the law should be changed.

All of this is generality. And it does not really describe with precision where the limits lie. But essentially, the view that was advanced long ago in the English legal tradition, by Bentham and Mill, appears to have gained ascendency: activities which are 'self-regarding' are not legitimately the law's business. Activities which are 'other-regarding' and affect other people are the law's legitimate business. Matters do not become 'other-regarding' simply because some people feel very upset by the activities of others in society. If we were to adopt that principle, we would allow our law to punish and stigmatise vulnerable minorities simply because some people get upset with their behaviour, although not personally affected by it.

So, that is my broad answer to your general question.

CL: You mentioned John Stuart Mill. I am sure you are familiar with the harm principle. What do you think is or are the valid principle(s) for determining legitimate invasions of liberty, so that no conduct that fails to meet its or their terms can properly be made criminal?

MK: As I have grown older I have become more and more sympathetic to the Millsian principle and less and less sympathetic to the notion we can use the criminal law to punish and stigmatise people because of perceived notions of 'harm' which are very broad. Of course it is easy to speak in such generalities. It is more difficult to apply the principle to a particular case.

For example, if you say, sexual activity between a father and a daughter at a very young age is consensual, neither wishes to complain about it, is it none the less the law's business to say that the sexual activity is forbidden and will be criminally punished with very severe sentences, simply because the law says it must protect all young people. Is 'consent' a complete answer in such a case? Is our current approach to extremely severe punishments of those who access internet websites which provide pornographic images of sexual activities with under-aged persons correct, so that such conduct requires very strong sanctions? Given that those websites are out there and available, is it objectively true, as often asserted, that accessing them encourages, stimulates and motivates the provision of such websites? Or would they be provided anyway? Is the present approach an attempt to revive the previous and now generally abandoned approach to censorship of sexual stimulation by erotic images, which was certainly part of the law in Australia when I was growing up?

Is it appropriate to punish people very severely for drug importations or other activities which are entirely for that person's own use or

pleasure? Is this an other-regarding activity or is it a self-regarding activity?

One can have such general principles. It is when you get down to applying those principles in particular cases that you will have difficult choices to make. When you participate, as I do, in a final national court or if you participate, as I did for eleven years, in an intermediate final court, you realise that law is all about drawing lines. Such lines are rarely or never permanent. They change from age to age in accordance with perceptions, education, scientific knowledge, fashions, international pressure and so on.

However, the basic schema is I think clear. If activity is truly to be categorised as self-regarding it is, as Wolfenden said, putting it bluntly, not the law's business. And it does not become the law's business simply because there are people in society who feel very upset about such activity. The range of things about which people get upset changes over time. Blasphemy is a good example. In medieval England it was a most grave offence. In some parts of the Islamic world today it is a very serious offence. But in most modern western societies it would not be regarded as an offence at all, and certainly not one calling for strong punishments. So these things change. It is a mistake to think they are set in stone. This illustrates the fact that you can have broad principles; but applying them will lead to different outcomes in different people and over different intervals of time.

CL: In Germany, the limits of criminal law are deduced from its general purpose. Do you think that this kind of limiting principle(s) we were just talking about could be deduced from a general purpose of criminal law (for example "the prevention of harm")?

MK: The problem is that the German theory appears to me, without knowing it in any detail, to be no more than a verbal formula. It

really states the problem rather than providing the solution. It states the problem in terms of harm, as distinct from a test such as self-regarding or other-regarding. Perhaps these too are verbal formulae. But what is 'harm'? Some people would say it is 'harm' to society to have homosexual adults having consensual sexual behaviour. They would say that because they would reason that human societies have had criminal offences against this type of behaviour for thousands, or at least hundreds, of years. The Bible says that it is not permissible and this is a society based fundamentally on Judeo-Christian religious principles. It is upsetting to peace of minds that people are doing things with their genital organs which, as they would assert, they were those organs intended to do. Therefore it is 'harmful' to society. As well as that, many young people, especially young men, may be inclined to bisexuality. If you legitimise such conduct and make it lawful, then instead of settling down in the suburbs with a wife and having children and being 'normal' and not upsetting our peace of mind, they might go off to saunas and to other venues and have sexual activity which gives them intense pleasure and then become diverted into a life as homosexuals.

It follows that it is all very well to talk about the 'harm' but whether it is in terms of sexual activity, pornographic activity or drug activity different people will answer the question of 'harm' in different ways. And anyway, even if you think there is some 'harm', as in most drug activity there probably is, the question still remains, is prohibition proportional? Is it sufficient to warrant the rather heavy hand and blunt instrument of the criminal law?

CL: If there is more than one limiting principle of criminalisation, are they all of equal weight? Is any of them sufficient reason for criminalisation?

MK: One of the donations of German law to Australian law has been the principle of proportionality. It is not a principle which finds its roots in the English common law. However, in recent years it has had a growing affect on our thinking about connection.

For example, in the sphere of Australian constitutional law we largely follow the reasoning of the United States Supreme Court on the question of connection of a particular law with federal power in the Constitution. And in *McCulloch v. Maryland* the US Supreme Court expressed the permissible connection in terms of whether a piece of legislation was appropriate and adapted to the grant of federal power. "Appropriate and adapted" has always seemed to me to be a mysterious expression. It was probably just jotted down by Chief Justice Marshall on a sunny afternoon when he was writing his opinion. Yet it has been used in hundreds or possibly thousands of decisions, not only in the United States and in Australia but in other federations, ever since. I find it a most unintelligible and unhelpful expression. On the other hand, I think the German law notion of 'proportionality' is a much more helpful expression because it requires you to look at whether there is a just and appropriate balance between the object of the law and this or that way of achieving that object.

Now, if we then turn that answer to the issue in hand, namely the permissibility of having laws on issues concerning private adult sexual behaviour, pornographic images, drug use and so on, a question arises, even if there is some 'harm', as to whether the harm is such as to be proportional to the provision of a criminal sanction and, if so, what sort of sanction. One could take a view, in the case of access to under-aged sexual images that already exist, and that are not affected by the user on the internet, that there is no 'harm' unless those internet services are used. If most of them are subscription services, as I understand many are, then it may be that the abuse of children somewhere in the world would not occur, if there were not a usage of such internet services. There is then a

market and, it is often said that the justification for these very strong laws is that a person who uses the market creates the market. On the other hand, if people have these sexual fantasies, then, any person knowing of the power of sexual fantasies to every human being, including every 'normal' human being, could argue that such access to such images is, on the whole, less harmful to society than access to actual activity. There is, then, a question as to whether access to the images causes the actual activity. Or whether it is a substitute for the actual activity with under-aged persons. My decade in the Australian Law Reform Commission taught me to search for empirical, evidence-based responses to these questions – not simply intuitive or dogmatic ones.

If one asked, is it better that people have these fantasies in their mind and masturbate than to go out and actually do things to children then undoubtedly, in my mind, it would be a better thing that they do so. Their activity is in that sense self-regarding. But the moral of this story is that there are different notions of 'harm' and there are elements of 'harm'. However, then you have to ensure that in the provision of criminal offences, the terms of offences and the punishments available and the punishments imposed are all kept in proportion with the antisocial character of the offence in the first place. It is not just, therefore, simply a matter of establishing that there is a 'harm' of some kind, certainly not the 'harm' that only involves some people getting upset. Getting upset is something that varies in accordance with people's personality; their blood pressure; their religious beliefs; their philosophical outlook; their parental upbringing; and all sorts of other factors. We could not organise society on the basis that we try to prevent upset to everybody. If we did that nothing would ever be done. Certainly nothing new would ever be done. So keeping proportion is a very important responsibility of society and its lawmakers. And of course this is especially so in the criminal law because the criminal law impinges

on individual liberty and personal dignity and fundamental human rights. Its development must therefore reserved to serious cases.

On the way back to Australia I read that in most of Europe there are something at the order of 60 or 70 people per 100,000 in prison. In the United States of America, there is something at the order of 683 people per 100,000 of the population in prison. Building prisons is one of the biggest industries in the United States of America. Prison falls disproportionally on vulnerable minorities – "les exclus". Therefore, we have to keep a sense of proportion. I think we do that somewhat better in Germany and Australia than they do in the United States of America. And I think you probably do it even better in Germany than we do it in the common law world, where there is a bit of an inclination to "lock them up and throw away the key". This has especially been evident in recent legislative moves in Australia, which survive because there is no fundamental Bill of Rights that they have to be measured against. In this respect things are different in Germany and indeed in most of Europe.

CL: What role do academics, judges and law reform commissions play in the discussion on the limits of criminal law in Australia?

MK: We have followed the English system of jurisprudence. We have discursive judicial reasoning. This discursive reasoning includes dissenting opinions, which the Bundesverfassungsgericht permits, too, though rarely exercises, but which most German courts do not permit. In Australia, the use that is made of law reform reports and of academic legal and of philosophic writing depends on the personality, background, education and interests of the particular judge.

Some judges never or rarely refer to such matters. I think it is fair to say that in the High Court of Australia, the final court of this country, most judges do refer to, and use, such material from time to time.

The extent to which they do so varies as between one to another. When such material is cited no one ever suggests that it is irrelevant, or will not be entertained. However, it would be true to say that there are two streams. One stream thinks it is basically the business of courts to look at what other judges have said. So that can become a self-fulfilling prophecy. The other stream thinks that problems cannot be solved in words alone, such as "harm to society". You have to go beyond verbalism – you have to look at context as well as text – and in doing so you can be helped by law reform reports and academic writing.

I am unabashedly of the latter school. But some judges and lawyers, such as the Chief Justice of Australia (Gleeson CJ), are of the former school. Both schools are legitimate. The former is a school with a longer history in the English legal tradition. Yet the latter is a school which is gaining respectability and will ultimately gain ascendency. It will be encouraged by the discursive mode of reasoning of the English tradition which – as a child of that tradition – I think is much more transparent and honest and reveals the thinking and reasoning of the judge in a much more honest way than occurs in most civil law countries. Our way is suitable to a modern, accountable democracy, where everybody is accountable, including the judges.

I would not want to over emphasise, however, the impact of such writing on judicial reasoning, because most criminal laws in a country like Australia are now made by Parliament or under the authority of Parliament. The courts have said that, generally speaking, the common law is past the age of producing new criminal offences. If there are to be new criminal offences (or if old criminal offences are to be stretched and applied in new circumstances), that is normally now a decision for Parliament. Parliament does not usually tarry for a long time over academic writing or even over law reform reports where there is a strong will to do something nasty to people whom political parties do not like. They tend to get very

inclined to feelings of nastiness at the time of elections. The Director of Public Prosecutions for New South Wales has recently criticised very severely what he calls the 'auction' that occurs during election periods designed to reveal which party is the strongest on 'law and order'. I do not know if this happens in Germany. It certainly is a feature of public life not only in Australia but in the United Kingdom and other countries of the common law tradition.

CL: Australian criminal law textbooks as well as judgments and law reform documents almost do not deal with this question at all. Why do Australian academics, judges and law reformers not seem to be interested in establishing such normative theories?

MK: I do not think your impression is entirely accurate. In Australia the States are divided between the "code states" and the "common law States". In the code States, and in the new Federal Criminal Code, there are general provisions at the beginning of the text which are at a level of abstraction, which you do not see in such legislation as exists in the common law States. The codes derived from Sir James Fitzjames Stephen's attempt in England in the 19th century to express, for the United Kingdom (or at least for England and Wales), the basic principles of the criminal law. That code for England was never accepted in England. (They have continued through the Law Commissions' endeavours to get some general principles but it is usually proved too difficult, too controversial and it has basically not succeeded.) However, the Fitzjames Stephen code was exported to the British Empire. It was adopted and is still in operation in the Penal Code of India and in the penal laws of most of the countries of the British Empire, including Malaysia, Singapore, many of the countries of Africa, Nigeria for example, and through the Griffith Code in Queensland and, copied from there, in many of the States of Australia.

It is true that these codes do not go into purely philosophical questions. That is not the nature of drafting legislation in our legal tradition.

Now why does the common law not deal with such philosophical issues? The answer is simple. It is because the common law is made by the judges. The judges of the English tradition (including in Australia) tend to feel very uncomfortable about conceptual issues of broad generality. This may be because judges are generally former barristers. Retired barristers are people who, for 20 or so years, have spent their time fighting cases in court – real cases, affecting real people with real legal questions. Generally speaking, they have not got the time, inclination, energy or interest to sit there and ponder about conceptual questions: about what it is all about, and why are we doing this? They simply go from precedent to precedent, solving problems.

This system is a very practical system. It is why, where so much else of the British Empire has faded and disappeared, the common law still flourishes. The Commonwealth comprises a quarter of the world – or perhaps a third of the world. The Queen's recent massage suggested it comprised a third of humanity. So a lot of people are still practising law following judgements and decisions of courts in this high tradition. It is a very practical system.

I was myself a child of that system. I have felt very comfortable in it. Still, basically, I suppose do. But my ten years in the Australian Law Reform Commission and my exposure there to very clever academic lawyers taught me that the problem with the common law system is that you can get a lot of inconsistencies, because you are solving one problem but not necessarily considering how that solution fits into the mosaic of the whole of the law. Therefore, I became much more interested in conceptualising the law. Final courts have to play a part, from time to time, in reconciling the numerous little instances with a grand theory. That leads to judges like myself always keeping an eye on what the theory of the case is and trying to find it and

express it, so as to guide individual decisions including on future problems. Necessarily many such problems did not exist at the time when the earlier specific instances were raised and decided.

The difference from the approach of civil law countries is therefore very deep and fundamental. It is always there in discussions between lawyers of the civil law tradition and lawyers of the common law. The common law has a weakness in its failure to conceptualise legal problems. But, as we perceive it, the civil law has a weakness in its secretiveness, its authoritarian character, its promoted career judiciary and the comparative lack of power and respect of most judges in society. This is still not the case in most common law countries, because of the fact that the people who serve in judicial office never see themselves as public servants. They see themselves as lawyers who are giving part of their life to performing the business of legal decision making after the common law tradition.

Each way of approaching law is, of course, legitimate. Naturally, a person who was brought up in the civil law thinks that the common law is a hopeless mess, which it is not. It generally works well in the end. And common lawyers think that the civil law tradition is untransparent and often very theoretical and not really practical in the manner which is congenial to English speaking people. That too is a stereotype. But there may be grains of truth in both perceptions.

CL: Do the offences of sexual intercourse between consenting adult relatives (which is punishable as incest) and bestiality meet the terms of the principle(s) so that this conduct is legitimately criminalised?

MK: As far is bestiality is concerned, I think that is easier. I myself whilst finding it personally repulsive, would not criminalise it, because, if 'bestiality' is to be dealt with it should be dealt with under cruelty to

animals type legislation. I am a patron of the RSPCA Australia so I am not in favour of cruelty to animals, including sexual cruelty. Animals are sentient beings. They are deserving of our respect. But it is not enough in my judgement that, because I get upset or find things repulsive, that one should criminalise it. Therefore I would not do so in that case.

As to incest I think it is generally important to maintain an incest taboo in society. Certainly a lot of the cases we see in the courts nowadays involve offences which are called 'incest'. Typically, they are not truly incest. They are cases of stepfathers or effective stepfathers having sexual intercourse with young girls living with mothers in serial relationships that now exist in our society more frequently than they did in the past. Such offences are very seriously punished in Australia. That punishment is usually justified by the need to protect young and vulnerable children, particularly from offenders in positions of trust. So far as that object of the law is concerned that is certainly an other-regarding activity. Therefore I am in favour of the availability of the criminal law in such cases. However, if it got to the point that the person was 18 years or more then the mere fact that there was an 'incest' act would not, in my opinion, attract justifiable criminal punishment. If people are adults, or of full age of consent and understanding and have a sexual relationship by consent with each other in private, I do not think, in the words of the Wolfenden report, that it is the law's business to intrude into such cases. I believe that, in Australia, generally, such conduct would not be the subject of a criminal prosecution even if, within the words of a statute, an offence exists. I do not think that accused would be prosecuted if the persons were adults of full understanding and capacity and were consenting to private sexual activity. Nevertheless, clearly the law has a purpose to protect the under aged. Therefore, whether it is in a true 'incest' situation or a fictional incest situation of serial relationships and a person involved is underage, that needs protection.

However, a question then arises, what age you fix. That age varies very greatly from one society to another. I believe that in Portugal and, I think, in Canada the age of consent is fixed at 12. In Australia, it tends to be fixed at 16, and in some State and Federal legislation at 18. So it is a matter for debate as to where you draw the line. Still, protecting young people is undoubtedly a legitimate role of the law in society. Yet sometimes you have to ask whether the full panoply of the criminal law is, in practice, a very effective protection for young people.

I have sometimes seen cases where young people get dragged into the courts, and you wonder whether the law has done them a favour. We had a case where a young Aboriginal boy was put in a caravan with his cousin to 'sleep over'. They were both, I think about 16. During the night he took the girl's hand and touched his erect penis and various other sexual activity was involved. He was then prosecuted. One wonders whether that was a sensible prosecutorial decision, given the experimental nature of most young people, especially today. He happened also to be an Aboriginal boy. Throwing the book of the law in such a circumstance, and trying the case not in a children's court but in a higher court before a jury, is not always a good thing to do. Yet that possibly does not affect the decision on the legality of the case. Of course, the case will have to be decided according to the evidence and the law. Once brought, it is in the legal system.

CL: Which principle(s) can justify the criminalisation of the self administration of illicit drugs?

MK: In most of the cases, at least in those that come before the courts, the situation is not easy because the factual evidence tends to indicate that the persons involved are not only securing drugs for their own use but are trading in drugs, sometimes to fund their own

drug use. Therefore, if you adopt an 'other-regarding' test and even one of proportionality, there is no doubt that there is usually an effect non other people; if only in sustaining a market in such drugs.

The benign approach to drugs such as cannabis has run into a problem because we now know that long-term cannabis use has, in certain people who are vulnerable to this, serious implications for schizophrenia and other medical conditions. So, prohibited drugs, hallucinatory and other drugs, are generally not good for people.

Now, there are, of course, a lot of things that are not good for you. You could probably construct a good argument that driving a car is not good for you. Lots of people die as a result of it. But we do not criminalise that activity. So it is just a question of deciding upon prohibitions in each case. I have sometimes asked myself why it was, when I was a member of the Council of Civil Liberties in the 1960s, nobody talked about homosexual offences. What are the things that we do not talk about now, that we do not see now, but which our successors will talk about in 40 years time and then look back and wonder why we did not see with sharp clarity the unfairness and wrongness of our approaches? It has sometimes occurred to me, for example, that our approach to drug use as a criminal law issue (as distinct from as a public health issue) may, in years to come, be seen as just such an instance. That possibility therefore leads on to the prospect that drugs constitute one issue we will need to reconsider.

After all, the prohibitionist model effectively began in the State of Maine in the United States in the 1830s. It then eventually spread to other States of the United States and ultimately to their great national experiment with Prohibition which was then abandoned. This was the progenitor for the international approach, strongly supported by the United States of America in international agencies of the United Nations and in treaties, for a prohibitionist model binding on the whole world. What they abandoned in their own country is now their gift to the rest of the world. The United States

insist upon it and so do many other countries, including my own. There is, no doubt, a very great need to deal with the issues of the use of prohibited drugs and dependence by young and vulnerable people. If you love them you, will seek to protect them. However, the question still remaining is: is the criminal law the right methodology? Is it pussyfooting and weak to say, that we should only use public health measures? Do you have to take these strong measures of the criminal law because of the large markets that exist? Do those large markets exist because there are very many decent citizens who are using these drugs, which obviously give them some pleasure and satisfaction? Is it the law's business to stop them from using them, if they can perform their ordinary lives as citizens with the use of these drugs? These are very complicated issues.

There have been major inquiries in Canada and elsewhere, including in Australia, on these subjects. It is simply a matter of trying to work out where the balance of harm lies and whether our current strategies are justifiable, effective and proportionate. There are arguments that we do not have a correct balance. However, the law is as it is. Of course my duty as a judge is to obey the law and to apply it. This I do, but generally with a lighter touch than some judges who apply drug laws with great enthusiasm. I do so without enthusiasm; but because it is the law.

CL: The offence of sexual assault is considered to protect against harm. How does consent affect that notion – both in an objective and a subjective way?

MK: These issues arose in the European Court of Human Rights in the *Lustig-Prean* litigation and the other cases there concerning group sexual activity and sadomasochism. For myself, being of a weak heart and rather sybaritic disposition, I have never understood

sadomasochism. However, if adult people consent, including as a group of people, to such activity, generally speaking I think, in the words of Wolfenden, it is just not the law's business to intrude. I believe that is the direction in which, at least in common law countries, the approach of the courts has gone in recent years.

The argument to the contrary is that the people who consent may be overborne. They cannot consent to being killed or to having gross grievous bodily harm inflicted upon them. Such consent is not proportional. The sexual pleasure may not then be proportional to the harm that is done to them and to others. That is a somewhat paternalistic approach. It smacks of "nanny knows best". The state may say to people, "well you say you are getting pleasure out of this activity, we say you are not really giving true consent because this activity is not consentable." I find that a difficult argument to swallow. And I believe that was the ultimate outcome of the decisions of the European Court of Human Rights on the subject.

As usual, the European Court of Human Rights seems to come to pretty sensible solutions, in my opinion. You are very fortunate in Europe to have such a distinguished court. I had the privilege of knowing the last two Presidents of the court, Professor Luzius Wildhaber and Judge Rolv Ryssdal. I have great respect for them and for their colleagues. The effect of the jurisprudence of that court on Australia is increasing. In fact I wrote an essay on that subject for the Festschrift for Professor Wildhaber.

CL: Are there any (other) existing offences, which in your opinion do not meet the terms of the principle(s)?

MK: Of course there are others. There are the issues of consensual adult access to pornography. There is also the issue of commercial sex work and whether the law has a place in regulating that. Does the criminal law have a place in dealing with that or is it basically a

matter of environmental and planning laws, the laws of public nuisance and so on?

I know a bit about these things because of my involvement in issues of HIV/AIDS. I go this morning to the International AIDS Society Conference in Sydney to deliver a paper on issues of mandatory testing in the field of AIDS. For the last two decades I have been involved in aspects of AIDS policy. Of course, successful strategies to combat the spread of HIV/AIDS have involved us in confronting many of the questions that you have been dealing with in your interrogation. It was a good thing in Australia that we took a series of very important steps: decriminalising the remaining homosexual offences; reforming the law on commercial sex work (prostitution); providing facilities for needle exchange, which on one view was inconsistent with the so called war against drugs; promoting knowledge of condoms and other protective measures in schools, even though on one view that diminished the naivety which was a child's right; and generally promoting a frank and candid and honest discussion about issues of sexuality and drugs. To some extend the HIV/AIDS epidemic has made us face these questions.

The strategies that Australia took have been successful in reducing the impact of the epidemic in this country, including on gay men. The failure of the United States of America to take these strategies has meant that the level of their epidemic per capita is about ten times that of Australia. Therefore, the issues that you are investigating are not entirely theoretical. In the current context of the HIV/AIDS pandemic they are very practical questions of great importance. Generally speaking, most countries of Western Europe and of the civilised western tradition have been willing to take the measures of decriminalisation. However, that is not the case in many developing countries, including those of the Commonwealth of Nations which follow the common law tradition. The initiatives of the Commonwealth of Nations on decriminalising homosexual offences have been a story of failure, except in the developed countries. The

"Wolfenden wisdom" was gradually accepted in the developed countries of the common law and in most parts of the United States and ultimately in *Lawrence v. Texas* in the decision of the Supreme Court of that country. Also, as I have told you, in the recent decision in Hong Kong. There are not steps that have been taken in most parts of Africa, Latin America and in Asia. The reasons for that are complex. They are partly cultural, religious and so on. But they remain very serious impediments to the adoption of successful strategies against the HIV/AIDS epidemic.

It is right that we should get our proportionality and principles clear: That is necessary because it is practically useful in the struggle against HIV/AIDS. However, it is also necessary because it is respectful of fundamental human dignity and human rights.

CL: Are you familiar with Joel Feinberg's work on the limits of criminal law? And if that is the case, what do you think of his theory?

MK: I have heard of Feinberg but I have not studied his work. We still tend to be children of the British Empire and we follow more what happens in the United Kingdom and countries of the Commonwealth. In constitutional matters we follow what happens in the United States because of the fact that our Constitution was very greatly influenced by that of the United States. We look a lot to American jurisprudence and probably more so in recent years. But I have not studied Feinberg's writing. That is probably because no barrister has put it up. That is probably because barristers would have a healthy contempt for a mere Professor. With some notable exceptions in Australia, they tend to regard the genius of the Justices of the High Court as far outweighing anything that a mere academic could add to their enlightenment – astonishing as that my seem!

CL: Justice Kirby, thank you very much for the interview.