• Dr Paul Simpson of the Kirby Institute and Ms Bree Gardoll, UNSW Medicine, interview the Hon Michael Kirby about HIV, prisons and the law. • This interview forms part of data collected for a pilot research project on HIV care and prevention policies in Australian Prisons (Project Investigators: Professor Tony Butler, Dr Paul Simpson and Ms Bree Gardoll) • Interview date: 14 August 2019	
PS	**Even though the project is looking at specific [HIV] care and prevention practices in prison we also want to couch the local context within the larger context of HIV, human rights, and the law. And particularly we are interested in your work with the Global Commission on HIV and the Law. Can you first Michael just outline your involvement in that Global Commission, I believe started back in 2010 if I am correct?**
MK	When HIV/AIDS came along, I was appointed on the suggestion of Jonathan Mann, to the Global Commission on HIV. It was actually called the Global Commission on AIDS, and that was 1989 to '93, or thereabouts. Subsequently, I became a member of the reference group of UNAIDS on HIV and human rights, and I am still a member of that group, and I am going to Geneva in late November for the latest meeting of that reference group. Subsequently, UNDP, which is a participant in the Joint Program that is UNAIDS, invited me to become a member of the Global Commission on HIV and the Law. That was in 2011 and it reported in 2012. Subsequently, it prepared a supplementary report, which was delivered at the Amsterdam AIDS conference last year in 2018, and it looked at vulnerable groups that were affected by the HIV epidemic, and the way the law was a problem for those vulnerable groups. And it also looked at another area of the law, where the law was a problem, namely, Intellectual Property Law, and the way that impedes the ready access to healthcare. A matter that is now very relevant to the sustainable development goals, goal number three – access to essential medicines for everybody by 2030. So that's a rough sketch of my background in UN bodies relevant to HIV and AIDS.
PS	**And, just looking at that Global Commission of HIV and Law, what was significant at the time or new about the Commission and its report? Because I understand there had been previously recommendations around the law dating back some time before there. But what do you see as significant about the global commission?**
MK	This was significant because it was carrying on the initiatives of Jonathan Mann and of the Global Commission on AIDS in the very earliest days of the international response to the AIDS epidemic. But it was updating them, and looking at the extent to which the recommendations that had been made by the Global Program on AIDS, GPA in the earliest days of the epidemic, the extent to which the recommendations of GPA had been actually implemented, and it came to the conclusion that it had been implemented in some countries, including basically in Australia, but not implemented in many countries, especially countries in the developing world where the epidemic was in its worst condition. So, the object was essentially to pick up and scrutinise the data that was available on the impact, in countries, of accepting the HIV paradox. That paradoxically the best way to tackle AIDS was not in punitive measure, but in measures that engaged with

	people who were at risk of infection with HIV and how could it be demonstrated to the world community, particularly those who were not taking these steps, that it was in their interest and the interests of their citizens to take these steps. For example in the report of the Global Commission on HIV and the Law, there is a very telling graph in the Chapter on men who have sex with men, demonstrating the levels of HIV in the countries of the British Caribbean, and the countries of the non-British Caribbean, countries whose legal tradition was French, Spanish, Netherlands. In the latter countries, there were no criminal laws against HIV, there was social stigma, there were religious impediments, there was family resistance, but there were no criminal laws. In the British Caribbean, every country had criminal laws, and it was a very telling statistic, I mean it was about, my recollection is, that it was about one third the level of HIV penetration in countries that had the criminal laws in comparison to those countries that didn't. And so that was the objective, to get more data and to get a more empirical foundation for the recommendations that had been made in the very earliest days of the epidemic on intuitive basis by Jonathan Mann and GPA.
PS	**And I see with collecting that data, I see you were one of the Commissioners but also on the technical advisory group, I guess that was more of the interface**
MK	Correct, I was the co-chair of the technical advisory group.
PS	**Yep, okay. And look, can you speak to some of those specific key issues that the report highlighted, or the data highlighted?**
MK	Well the report can be divided into two parts. The first part dealt with the vulnerable groups and the second part dealt with Intellectual Property Law. On the first part, the vulnerable groups, it dealt with the key populations, men who have sex with men, sex workers, injecting drug users, transgender persons, women, children, refugees, detainees, and prisoners. So, dealing with all of those, it tried to identify what was their vulnerability, what was being done, what appeared to be working, and what should be recommended and recommendations were made reinforcing the early recommendations of GPA and the Global Commission on AIDS. The second category was relating to Intellectual Property Law, it recommended that the Secretary General should set up a high level group, that would bring together the agencies of the United Nations and interested relevant bodies in order to re-examine the global law on Intellectual Property, and the way in which in the area of pharmaceuticals and medical therapies, that was part of the problem. And the extent to which global Intellectual Property Law, which is itself, part of human rights, needed to be re-examined. Now subsequently, the Secretary General Ban Ki-Moon, just before he demitted office, did establish the Secretary Generals high level panel on access to health technologies and I was appointed to be a member of that panel. So that was done, and that panel reported, and that report is available, and it followed up the need for change in the area of Intellectual Property Law. But I think your main interest is in the first category, the categories of vulnerable groups and vulnerable populations and on that, the Global Commission on HIV and the Law, looked at the way it could convincingly demonstrate the value of the HIV paradox, so far as strategies were concerned, and that was what the Global Commission attempted to do.

PS	**So great. So that gives a global perspective, can I just bring your reflections maybe of going through that review or Commission, over that time, on reflecting on maybe the Australian context historically in terms of could you, you said, maybe a lot of these issues aren't relevant to Australia anymore, but perhaps there was a time there could've been. I'm just wondering if you could reflect on the Australian context in terms of how the law and HIV intersected with each other?**
MK	This is a global epidemic, and therefore there is no country in the world that is isolated, maybe North Korea, was ironically to some extent isolated, because it is a very difficult country to get into or out of. But overwhelmingly, the global free transport and movement of people has meant that there are very few corners of this planet where you can be isolated from the risks of exposure to HIV. Australia, and more particularly New Zealand, were amongst the first countries to take the AIDS paradox seriously and to pursue strategies which involved a non-punitive approach and engagement with the vulnerable populations. In Australia, that is largely thanks to the good fortune of having leaders in the political sphere who saw the merit of doing that, Dr Neil Bluard, who was the Minister for Health in the Hawke Labor Federal Government, and Professor Peter Baume, a former Professor of Law at the University of NSW, and an expert in Public Health Strategies, who was the Shadow Minister for Health and who agreed with Neil Bluard on the overall strategies. So, we took a lot of the measures that were being recommended from the United Nations GPA, Global Commission on AIDS, to deal with the AIDS epidemic. We worked on a strategy to get rid of the remaining jurisdictions in Australia that had criminal laws against gays, in particular Western Australia, Queensland, and eventually Tasmania. We examined the issue of drug use, and despite opposition from some politicians and police commissioners, strategies for the adoption of syringe exchange throughout Australia were developed and came into force. Sex worker legislation was changed throughout Australia, to decriminalise the law on sex work and to reduce the intrusion of criminal law into that area, at least to some extent. And, so in those main target areas, basically we took the steps that were essential, so did they in New Zealand, and so with a little less enthusiasm, they did in the United Kingdom. And the result of all that was that today in the area of injecting drug use, for example, the adoption of the needle exchange, and other strategies, has meant that the levels of HIV in the injecting population, people who use drugs, is extremely low in New Zealand, it's very low in Australia, and it's low in the United Kingdom, at least in those parts of the United Kingdom where they had needle exchange. There is, in the United Kingdom, a way that you can examine the differential impact of adopting and not adopting that approach. In Edinburgh and Glasgow, they adopted different approaches, I think it is Glasgow that did not adopt Needle Exchange, Edinburg they did. And therefore, in the population of a single country, Scotland in the United Kingdom, with very similar cultural and other features, there was a very significant difference in the levels of HIV in that part of Scotland where they adopted needle exchange. So, in the parts of the world where they don't have that strategy, particularly, in the Russian Federation, and elsewhere, they have very high levels of infection in the people who use drugs. And increasingly high. So, we all know what works now and there is no excuse for public health officials or others who have any say about the

	matter, and therefore it's essential that the strategies which basically have been taught by the United Nations since the very earliest days of the epidemic, originally by intuition, subsequently with empirical evidence, that needs to be developed globally. But basically in Australia, with a few gaps, we have done what the UN said should be done, and we have to thank for that a few outstanding politicians, who were on to the issue and dealt with it, with courage and with some political risk, but they dealt with it.
BG	***Michael, I actually studied under Professor Baume, during my second year of medical school which is when my interest in HIV first started, he was one of the facilitators for a small group I belonged to. And he had highlighted at the time, that although we adopted needle and syringe programs quite early during the community, they still aren't available to prisons. What do you think? Do you think that the HIV paradox that you spoke about could be applied to that circumstance, and taking the opportunity to potentially establish needle and syringe programs instead of squashing down the issue might be potential to tackle HIV in prisons? Or do you have any insights into that?***
PS	Given what we now know about the strategies that work and the strategies that don't work, there are arguments which suggest that the obligation to bring the strategies that work to the advantage of prisoners are even greater than they are to non-prisoners. Non-prisoners after all are free agents, they can be exposed to a lot of information and they can take steps to protect themselves and they can be helped by governmental initiatives to protect themselves because they have freedom and access to information. Prisoners are confined, they are in conditions which often are rather unfriendly to people living with HIV, and they have, on one view an even greater obligation of care to those who are in their responsibility and who cant get alternative sources of information and alternative sources of medical therapy. There is a particular problem in prisons, and it's a problem which is a practical one and also a problem of optics. The problem arose very early in the AIDS epidemic when a prisoner with a used syringe, stabbed a prison officer, that prison officer became infected with HIV and subsequently in the state of the medical art that then existed, he died. And that was a horrible and shocking crime and it was also a very cruel human thing to do. And naturally enough it alarmed prison officers, throughout Australia, the event happened in New South Wales. Had it happened later there would have been available the anti-retroviral therapies, but even with the anti-retroviral therapies, getting stabbed with a needle and getting infected with HIV is a very serious health development for any human being. And it is understandable that prison officers and politicians and others, will be very anxious about any suggestions that involve the free access to needles in prison, in a prison environment. However, whilst acknowledging that problem which arose and which is particular to Australia in dealing with the issue of access in prisons, it doesn't take away the obligation of government which has the care of the prisoners to ensure that they have maximum support and maximum healthcare and therefore getting that healthcare to them is both a moral and a legal obligation. And how one translates that into a program within prisons, is something that has to be sorted out quickly, one would think, in consultation with informed prison officials, and with trade unions representing the custodial services and with representatives of prisoners themselves because this is a serious matter that involves life and death and it therefore has to be taken very seriously. But the incident that happened in NSW, so

	long ago, can't be forgotten when examining the optics of how this problem is being dealt with, and can be dealt with in Australian prisons.
PS	**Yes it has, in speaking to stakeholders we can see this particular case has rippled effects throughout time, it's on the forefront of peoples minds even today, this particular case, and it's always cited as a way that shows it's difficult to move forward, it's like we need a circuit breaker that can move away from this case and have a forum that can look at the new data and new evidence around these things. Another issue with HIV prevention is the availability of condoms in prison. We have a speckled variable picture in the Australian jurisdictions with some jurisdictions perhaps NSW with the best practice having condom vending machines available for free, however we've got other jurisdictions like the Northern Territory and Queensland where there's an absolute ban, Queensland you can't ask or even access a condom through the clinic, the prison clinic staff or nurse.** **I guess one of our questions is, and again I go back to the global commission report where it makes reference to the UN standard minimum rules for the treatment of prisons, the Mandela rules as they call them now, the idea of the principle of equivalence of care and prevention. I guess our last area of wanting to discuss with you, is how can the law, civil society, even academics like us, how can we overcome those types of challenges when implementing the, to be able to implement the principle of equivalence in prison in relation to HIV and prevention. What is the way forward? Can the law help, can civil society help?**
MK	Well the law can help by bringing on test cases that establish what the legal obligation of the Crown, in its various manifestations is, in respect of prisoners who are in the care of public officials, and I think the way forward is a mixture of social science research but also legal initiatives that are taken on the basis of, stimulated by, the outcomes of social science research. The problem starts early in the life of a prisoner that if it could be established on admission that a prisoner is HIV negative or HCV negative then the fact that subsequently, whilst in custody, the prisoner becomes HIV positive or HCV positive, then it is established authoritatively, that that happened whilst the prisoner was in the care of the state, and that might be a reason why some custodial offices are not sympathetic to the idea of ready or even semi-universal testing within the prison environment. Any invasion of the body of a human being requires their informed consent, unless the law overrides that, and the law does sometimes override informed consent in taking steps that are deemed by the law to be essential for example, with DNA evidence that is sometimes essential for the detection, prosecution and punishment of crime. There are cases where the law has provided compulsory provision of body samples for the purpose of DNA testing, so it does happen and it is rare out of respect for the integrity of each individual, prisoner or not, but it can be provided if it is demonstrated that it has high ethical and treatment value or the high possibility of demonstrating the circumstances in which a person has become infected. But I suspect that the resistance that exists in custodial services is not as nuanced as I have been describing it. I think it just goes back to a basic feeling by many of the people who serve in custodial services, first of all, that syringes in particular, but other means of healthcare, can be a nuisance and a danger to the custodial service providers but also that prisoners are not in prison for a holiday. They are in there for punishment or as punishment, and therefore, that we shouldn't be facilitating the

	provision of condoms for sex in prison because they are not there to have sex, they are there for custody, and likewise, they are not there to receive drugs, they are there, many of them, because of their use and possession of drugs. And therefore, many custodial officers would see a complete conflict between the objects of custodial punishment and this tender concern for condoms and needles which is not part of the object of punishment. One sometimes finds that people who are attracted to a job in a position of authority and control of others, are not particularly sympathetic to talk about the human right to health and the human right to access to essential medicines. They are there for the human right of good citizens to be protected from those who commit crimes. So, the answer to your question, what is the way forward, is I think a mixture of strategies that appeal to ministers and shadow ministers who have the foresight that Neil Bluard and Peter Baume demonstrated in respect of HIV in the early days of the epidemic. How do we get, particularly in State politics, which tends to be fairly rustic, how do we get attitudes that are looking at the big picture as Neil Bluard and Peter Baume did? I think that would repay discussion with politicians and with ex-politicians to see how one can go about getting an attitude which can convince others that protection and reaching out is often the best way to defend society and that in the long run, that's a much better strategy than trying just to enforce punishment because experience demonstrates that the punitive approach isn't universally successful, and sometimes is positively an impediment to getting a beneficial approach that is defensive of the human right to health of the prisoners but also of the human right to health of their families, their sexual partners, when they are released from prison, and of society generally when prisoners are released. As you have said, most prisoners are not in jail for life, most of them are in prison for relatively short terms. This was a factor in the decision of the high court, in the case that decided that prisoners enjoyed, in certain circumstances, the right and the obligation to vote because that case Roach Against the Electoral Commissioners, pointed out that within three years, most prisoners were back in society and were voting and were affected by the government that was elected, and therefore should have, on democratic theory under the constitution, they should have rights to participate in a vote, and that was awarded by the high court and prisoners now not only have right to vote, if they are there for I think it's two years or less, maybe three years or less, they not only have the right to vote but they have the duty , like any other citizen, to vote. But that was done by a combination of an initiative by a prisoner, Ms Roach, a case in the high court, and orders of the high court based on the constitution. You don't have any ready means to find a similar analogous way of getting orders for healthcare. And therefore, it depends really on changes in the attitudes of ministers, changes in the attitudes of leaders of custodial services, and changes in the knowledge about what can be done and the empirical data about what is happening to prisoners and how they are getting infected. My understanding is that in many prisons even though syringes are not available, legally, bleach is left available for the purpose of cleaning equipment. And I don't know if that is still being done, but that was a sort of partial attempt to respond to the problem without using syringes. But I understand in those countries of the world, like Spain, where in prison needle facilities have been made available, its done rather like the injecting room at Kings Cross and now in Melbourne, under strict supervision, and that is done on the basis that even if you are against needle injecting of drugs, its better that it be available, better for the prisoner, better for their safety and better for society. And that is something that has been accepted in at least two jurisdictions but on a very limited

	and trial basis. So, we are moving very slowly in this, and in the meantime, people are getting infected, and they are then going on to infect others. One of the problems with people who use drugs is that they are not a cohort of people like LGBT people, or gay men, or men who have sex with men, they replicate the whole cross-section of society and therefore that is why people who use drugs are much more efficient way of spreading HIV and HCV in the general population than MSM or other vulnerable groups, that's one of the problems with the situation in the Russian Federation, and once the virus gets into injecting drug populations it just goes right through the whole population and their sex partners and injecting partners and is therefore much more likely to infect many people than MSM, who will normally confine the spread to a gay or semi-gay population.
PS	**Can I just, I know we are just going overtime Michael, but I would love to draw your thoughts on the idea of political risk, you spoke about attitudes of politicians and having to cultivate or maybe look for, or cultivate an attitude that is more conducive to this principle of equivalence between what's happening in the community and prison. One project we were involved in we conducted what's called citizens juries, where we randomly selected 14 community members in Sydney, Canberra, and Perth, we got them together, we spent a whole day having experts present to them, having a Q and A around data, around the causes of crime and we posed the question: how should we be treating people who commit crime? Should we be treating them in the community or incarceration? Surprisingly once their attitudes shifted from a hard tough on crime approach to a more empathetic, we should really be investing in preventative measures to address the causes of social determinants of crime. Then we took the findings to key commissioners and ministers to interview them on what they thought of an informed public's view, some of them were quite surprised and some of them weren't, but it seemed to me a lot of them, a lot of them spoke about if they were to introduce a measure that wasn't popular to the public it's very politically risky, it could be electoral suicide.** **Is it, I guess my question is, how feasible is it to culture that political attitude that you spoke about today, given we are in quite a, an environment where perhaps those in power are managing risk or political risk and the role of the media, because this was another thing that came up, was that often policy was dictated on media responses and therefore political authorities were responding to the media climate rather than an informed public.**
MK	Well the fact is that you have drawn attention to are all the factors that lead one almost to despair. That initiatives can be started, I mean, and it's in the face of media hostility, front page stories, and also the general negative attitude at the moment to issues of change in areas such as this. And the minimalisation of matters for electoral purposes which means that matters of this kind will almost never be raised except in a negative sense. They won't be raised as part of a program for human rights or for healthcare or the sustainable development goals, they simply won't be raised, because there are no votes to be gained in them. Therefore, nothing gets done. That's why one's attention does tend to get diverted, not to experimental dialogue with citizen juries but to cases brought in courts of law where courts can make orders and impose judgements and impose verdicts involving the levying of damages against those who do not take care of the health of those who are in their custody. If it were a hospital, then there would be no question that there would be an imposition of duty

	of care and a verdict for damages if there was a knowing failure to attend to health risks which were plainly demonstrated. So, my own feeling, perhaps because I am a judge and a lawyer, is it would be better if some strategies maybe with the initiative of PIAC, which took part in the seminar at the Kirby Institute, or other like bodies, to bring cases that were ripe for decision, and that clearly presented facts that gave the opportunity for orders that I either directly, by the terms of the order, or indirectly, because of the cost of the order becoming more common, forced public officials to take steps. It is a tragedy that a prison officer was stabbed with a needle by a prisoner, but it is a monumental mistake for that single case to be allowed to divert the strategy of prison officers and those who are politically and legally accountable for their conduct, into not looking after thousands and thousands of subsequent prisoners. The marginal cost of the one case is greatly outweighed by the margin of utility of dealing with the other cases, which involve very large number of prisoners and their health. So that's the sort of argument you can put to a judge, I despair of putting arguments to citizens juries and things like that because generally that would be dismissed by hardnosed politicians and custodial authorities as dreamworld. That is not the real world in which policy development is made, which is made by how will this play out on the streets? How will this be seen on the front page of the Daily Telegraph in Sydney? And it could be worthwhile speaking to Greg Smith QC who was the Attorney General in the Coalition Government and John Hatzistergos who later became Attorney General in a Labor Government and is now a judge at the District Court. They had a semi-agreement between them that they wouldn't race to the bottom and compete with each other, that the most punitive form of punishment that could be imposed in the criminal justice system. And so, for a very short time we avoided that spectacle and it would be interesting to know what led them to do that. Greg Smith was a barrister who was a top prosecutor and he saw the hard end of prisoners and their problems for society. And he was able to work out a strategy, and that was basically what Neil Bluard and Peter Baume did, they worked out a strategy that said HIV is too important to try to score points, and therefore we are going to put this to one side and we're going to try to find a cooperative solution. It was not easy to get Police Commissioners to agree to any strategies that were designed to permit needles and they said this is just completely incompatible with the war on drugs. And they may have been right in that respect, but it was done, because essentially the political masters came to the conclusion that the numbers of lives that would be lost by continuing solely with the punitive approach was much greater than the numbers of lives that would be lost if there was an outreach approach. And the same is true of drug use in prisons and that is the same lesson that has to be taught and it could be worthwhile speaking to Professor Baume and Neil Bluard and to Judge Hatzistergos and Greg Smith QC to work out what motivated them to take their steps and how can we use that approach. But on top of that, I think there have to be test cases, and they've got to be carefully chosen, they have got to be cases where a person came in without HCV and were tested soon after they came in and then were found to be HCV later, which means they are getting it in prisons and that nothing is being done to protect them from that.
PS	**I know when Canada, this year, or maybe the end of last year, they had someone, a litigant.**

MK	Yes, but Canada has a Charter of Rights and Responsibilities and that has been used in Canada to defend the needle injecting room in Vancouver. Essentially the Supreme Court of Canada, with nine Justices, unanimously decided that the right to life provided in the charter required that the ministers approve of the needle facility. And when I read that decision I wept, because to think of the High Court of Australia A) being able to do that with a Charter and B) doing it, that was not my experience. And we are just so backward in Australia on these things, and so we are very reliant on outstanding political leaders with courage and determination who do the sums. I mean they were not starry eyed dreamers or academics, Peter Baume was an academic and Neil Bluard was an academic, so maybe we need more academics in politics, but they were courageous and they got the support of the leaders of their political teams and they saved many lives. They saved lives by taking the strategy.
PS	**Very interesting history to learn, I think we might leave it there. Thank you, Michael for your time.**
BG	***Yes, thank you very much …***