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# Human Rights Insights: Homosexuality and Love

**The Hon Michael Kirby  
AC CMG  
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High Court of Australia**

## In the beginning

I received my first inkling of my own sexuality at about age 9. I was always precocious. In those days, it was not a very good discovery to find that one was homosexual. The afternoon tabloids were full of stories of entrapment and arrests of gay men in Sydney. They included some famous visiting artists, like Claudio Arrau, the great concert pianist.

In public schools in the 1940s and 1950s, there was very little discussion about homosexuality or sexuality generally. Australia was pretty prudish back then. I have to admit that I was not conscious of much specific homophobia in my schools. By and large, sex was just a non-issue. Since then, I have discovered that things have deteriorated and that there is a lot of bullying at schools. It depends largely on the leadership of the school. On this, I have met with young GLBTI<sup>1</sup> people in Sydney to learn the truth. After talking with them, I made representations on their behalf to the NSW Department of Education & Training. The subject is now being tackled in annual teachers' conferences and elsewhere.

In private and religious schools, it is sometimes another story altogether. All children, gay and straight, have a fundamental human right to be informed about science and reality so far as it concerns sexuality. They should be told that variations in sexual attraction is just a feature of nature. It is pretty stable and it may well be based on genetic variations. Whatever the cause, it is certainly an element of every society. Most estimates suggest that about 4-5 percent of boys (a slightly smaller proportion of girls) have a same-sex attraction that is exclusive throughout life. Higher proportions have feelings of that kind from time to time. It is neither effective nor just to deny this fact. Attempts to force people to deny their nature are as futile as trying to pretend to be a different gender or skin colour. It is very wrong to bully people on this subject.

I was brought up in Christian beliefs and attended Methodist and later Anglican Sunday school and church services. I sang in the church choir until I kept fainting and had to be carried out of church. (Probably the fainting came from lack of breakfast.) I would not want to exaggerate my devotion to religion. It was just there and, so far as we were concerned, it was just an aspect of the love which always surrounded me in my family. Still does.

I am still a follower of the religion of Jesus. I have always

regarded Christianity as a religion of love and reconciliation. But sometimes my beliefs are sorely tested by the fundamentalist views of some Christian leaders. My partner, Johan, is a non-believer. He says to me: 'I cannot understand how one of the most intelligent people in the country can take any of that stuff seriously'. But I stick with my religion. In its fundamentals, it is a good guide in life. Jesus was, after all, a revolutionary in terms of religion. We need some more revolutionaries today in the world's great religions. Part of the oppression of young gay people comes about because certain religious leaders are inclined to read their scriptural texts too literally and narrowly. In the light of modern scientific knowledge about human sexuality, they need to re-examine the texts and re-read them against the background of today's awareness of the scientific truth: GLBTI people exist.

I did not verbalise my sexuality to my mother until just prior to her death. I then felt it was important to both of us for me to do so. When I did, she answered: 'What do you take me for? You have been bringing Johan here for 30 years. Every Sunday night for dinner. Do you really think I did not put two and two together?' My mother loved Johan. In her lifetime, he found more time to talk to her than I did. Having such a life companion has helped me on many fronts. When people are confronted by the reality in real life terms, it helps many of them to get over their demons. Apart from everything else, Johan is intelligent, sharp and witty. He wins them over.

## Alfred Kinsey and his influence

I have very distinct memories of the coverage of the Kinsey Report on male and female sexuality in the 1940s and 1950s. Alfred Kinsey's research into sexual variations amongst human beings revealed a reality which the screaming Sydney tabloids seemed to deny. It was a comfort to me because I knew that Australia would not be all that different from the United States where Kinsey was working. It followed that a proportion of people were just like me. No big deal.

Keep in mind that it was not the whole world that was pathologised by homophobia. Intense dislike of gay people and their reality was very much a feature of the British Empire and its criminal laws. Napoleon's codifiers had got rid of those old laws in France in 1804. Accordingly, many of the countries of Europe and of the European Empires did not have anti-gay laws. In such countries, it was left to religions and to social attitudes to stigmatise gays. But in Australia we had the criminal law to back up those attitudes. It was not a good look. The criminal laws lasted until 1984 in my own State, New South Wales. The last remaining criminal laws of that kind in Australia were repealed in Tasmania in 1998.

I am sure that many young Australians have never heard of Alfred Kinsey. Perhaps the recent Hollywood film, *Kinsey*, brought him back to life and popular culture. But whether they have heard of him or not, Kinsey's reports of 1948 and 1953 on sexuality in the human male and female provided the impetus for a Royal Commission known as the Wolfenden enquiry in Britain in 1957. That report recommended the repeal of the criminal laws targeted on gays in Britain. In turn, this led to the change of the law in Britain in 1967. The Australian legal changes followed, State by State, in the ensuing decade.

It is true that Kinsey's sampling techniques were not as advanced as such techniques are today. But that did not really matter. The exact numbers were less important than the overall pattern that Kinsey discovered and described. I do not know the exact proportion of GLBTI people that exists in society. I agree that it is a spectrum not another classification into two fixed categories. For gay men who are exclusively focused that way, I suspect it is probably around about 4% of the total population, just as Kinsey estimated. However, there are plenty of bisexuals and lots of experimenters ('curious').

Although some religious people want to impose strict categories on human beings, the reality of nature is that it has many variations. To stigmatise and punish people for this (whether for sexuality, gender, skin colour or anything else) is just plain wrong. Fortunately, in my lifetime, increased numbers of people everywhere have come to realise this. This is the natural process of human enlightenment. It comes about, I believe, because we are genetically programmed to be rational and to be curious about scientific discoveries concerning the world as it is.

### First encounters

In my teenage years, I encountered people who were probably gay but there was no intimacy between us at all. There were no GLBTI groups or community organisations at that time in Australia, at least so far as I was aware. The criminal laws helped see to that. Police harassment was often reported. I just threw myself into countless school and university committee meetings. Looking back, it was a pretty lonely time in my life. That is what some religious people would try to restore. No way! Gay people have just as much need for, and right to, experience love as anyone else. Fortunately, most rational people realise this today. But some do not. Many of the hold-outs claim themselves to be religious devotees. In my view it is these people who really need such psychiatric therapy and a healthy dose of scientific instruction.

In the late 1960s, as I was getting close to 30, I started discovering the relatively few gay venues that had sprung up in Sydney, like *Chez Ivy* in Bondi Junction, Petersham Dance Hall (now a Centrelink office!) and *The Rex* hotel in King's Cross. I was not really worried about police raids at that time. Such places, I discovered, had actually been going strong for years and, at *The Rex*, I even saw a judge whom I knew put in an occasional appearance. This was an era of 'Don't ask. Don't tell.'

In 1968, as I was approaching old age at 29, I had met Demo, a handsome Spaniard, at Petersham Dance Hall. We went to New Zealand together in December 1968. He then continued his travels in January 1969. Two weeks after he left, I met Johan at *The Rex* hotel. What a chance event that was. Demo, who is still a friend, complains that I 'did not mourn long enough' over his departure. Johan and I have been together ever since 11 February 1969. This has been a great blessing in my life. It has also been a strong reinforcement for my public life and a strengthening of my values of acceptance, tolerance and realism.

Anyone who would have denied me my relationship with Johan over more than 40 years is, frankly, in need of serious psychiatric help. Homophobia is a psychiatric condition which defies scientific reality. Whatever excuses there were for homophobia in earlier times, there are none today. The

world's religions need to go back to their books and re-read their scriptures as well as reflecting on the central messages of all the great religions of the world: to love one another. Fortunately, this is starting to happen. In the Anglican denomination of Christianity, there is a global debate going on about this topic. An openly gay Bishop has been appointed in the United States. In South Africa, Bishop Desmond Tutu, a leader of the struggle against apartheid, is now a strong proponent of equality for all gay people.

### Awareness of sexuality

It is difficult to live in the suburbs of Sydney with a same-sex partner over an extended period and for that not to get known. This is especially so in the legal profession, which tends to be fuelled by gossip, some of it malicious. Most people who really knew me became aware of my sexuality by the 1970s. By the 1980s, when AIDS came along, I became closely involved in the Australian and international response to the AIDS epidemic. My involvement in HIV and AIDS was code language, signalling my sexuality to anyone who was watching. A few people later complained that they were completely unaware. All I can say is that they must have been so self-focused that they did not bother to look closely at me. Just the same, to some extent, Johan and I played by the 'Don't ask, Don't tell' rule expected of us.

The openly gay president of the NSW Law Society in the 1990s, John Marsden, would sometimes confront me and urge me to be 'out' in a more direct way. But if I had been 'out', at that time, it is pretty clear that I would not have been appointed to judicial office. Certainly, I would not have been appointed to the High Court. Australian society at that time might have been reluctantly willing to tolerate gay people through gritted teeth. But it was not happy about their reality. Some people are still in that time warp. They need to get over it.

In the 1980s and 1990s, during the first AIDS crisis, the media, including the gay press, also played along with 'Don't ask. Don't tell.' Generally speaking, it still does. It is rare for queer people to be 'outed' in Australia against their wishes. I became increasingly involved in HIV/AIDS and we went to a lot of funerals of people who had died of AIDS. This helped Johan and I put our sexuality into perspective.

By the mid-1990s we were much less circumspect. Placed beside millions of gay men dying or being infected with HIV, my own sexuality was pathetically insignificant. In this sense, we both became 'open' without being aggressively 'out'. When I was appointed to the High Court, I understand that Prime Minister Keating said to one of his staff, who was gay: 'There's one for you.' So everyone who mattered in government and public life knew the facts. What homophobes hate is that you reach a point where you are not willing to continue being silent and to pretend any more, in order to keep them happy. Openness challenges the illusion of the world divided into strictly categorised divisions, in which these people want to live.

Openness about sexuality helps to destroy the foundation for prejudice and discrimination. Of course, I sometimes felt conflicted in the early days by the lack of candour enforced on Johan and me. But that was the name of the game in those days. One day, there will be a big parliamentary apology in Australia to gay people for the oppression that was forced on them and the inequalities that were maintained in the law well beyond their use-by date. Just like the delayed 2008 apology to the Aboriginal people of our country.

The Wood Royal Commission in New South Wales in the 1990s, investigating police corruption and also paedophilia, unfortunately did not stamp out the hysteria about paedophilia that broke loose in those years. Instead, it adopted an artificial definition of the concept of 'paedophilia' by reference to the age of 18. This is not the natural meaning of paedophilia. It helped to promote a media-led campaign that repeatedly confused homosexuality and paedophilia. This was a big mistake.

Science shows that paedophilia is overwhelmingly an heterosexual phenomenon. There were members of parliament misusing their privilege. It was not a good time for GLBTI people in Australia, especially in Sydney. Hysteria is never a good scene. Anyone who wants to re-capture that time, straight or gay, should re-visit Henry Millers' *The Crucible*. Things got out of hand. Closeted gays felt vindicated and hid right back in the closet, locking the door from the inside. Not everyone in Australia is rational, scientific or kind on this subject. Some homophobes are struggling with their own demons. Some are truly weird, as we have discovered in Australia.

I never felt anxious that GLBTI people in influential positions might turn their knives on me. Such conflicted people are generally too deeply inside that closet, trembling in their boots. Johan and I just kept on living as we had increasingly done in recent years: more openly, more relaxed and supporting gay-type causes like the AIDS Trust, the Gay Business Association and organisations involved with the HIV epidemic.

Johan later became an Ankhali and he looked after a succession of people living with HIV. I kept going to AIDS conferences. In our experience, many GLBTI people who were 'closeted' would come up to us and thank us and explain why they did not feel they could be so open. We never presumed to decide what other people should do. I never favoured 'outing' GLBTI people against their will, unless they were complete hypocrites. Just the same, if every gay person in Australia suddenly stood up, the whole shabby, pathetic charade caused by long-term gay invisibility would be dealt a mortal blow. And by 'gay', I mean every male homosexual, lesbian, bisexual, intersex, transsexual or queer person in our rainbow nation.

There are still important public figures in Australia who are gay and not open about that fact. Many are known to me. It is fewer than existed in the past because more and more are now open about their sexuality today. But one judge who is not open cautioned me about 'going public'. He said that Johan and I would pay a price for it. He felt vindicated by the attack on me in the Senate by a senior Senator and junior Minister in the previous government, Senator Bill Heffernan. That was a very shabby incident in the life of the Australian Federal Parliament.

However, it was Johan who said to me in about 1996: 'How long do you expect to be in public life? We owe it to the younger generation to be more open so that they will not be oppressed as we have been'. We then agreed to include our relationship in Australian *Who's Who*. The entry was published in 1998 after I negotiated with the publisher to use a sexuality neutral description of "p" for partner. However, this was really only confirming what had been widely known by many for more than a decade. True, it was going public. Still, it was not noticed by the media for a year. Frankly, I did not care about that, one way or the other. And when it was

reported, the *Canberra Times*, in an editorial comment observed: 'The non-secret is out'.

## The human face for gays

It is useful, in my view, to have a human face to put to sexual minorities. This is how Australians earlier overcame our demons about Asian Australians in the White Australia era. It is helpful to the mums and dads to know that GLBTI people exist who have long-lasting relationships, mortgages and pets. In the language of *Zorba The Greek*, 'the full catastrophe'. Johan and I hope that being open about our reality has helped the coming generations, especially to young people discovering realities about themselves. Things will get better. But we all have to contribute. Straight people are the main actors in our drama. Yet gay people also have to play our part.

The Gay Games in 2002 in Sydney were a great occasion. It was an experience to be there at the opening ceremony with the Governor, as the Queen's representative. What terrific supporters of GLBTI people several governors and governors-general in Australia have been, when most of the politicians ducked for cover. There is a role for officials of such a calibre. I have always thought that the Crown in Australia stands for all of us, not just the electoral majority. It was ironic for me to think that just down the road from the opening ceremony of the Gay Games in Kensington was the *Purple Onion* cabaret, where Johan and I went to see David Williams perform in *Carmen* back in 1969. This showed us vividly the progress we are making in Australia.

## Politicians and gay equality

In the Australian Senate in March 2002, an attack was made on me without notice by Senator Bill Heffernan. In my view, this was a very serious abuse of parliamentary privilege. It was as much an attack on the independent courts, and the High Court in particular, as on me and on gay people generally. Using false documents in parliament, as the Senator did, is to be strongly discouraged always.

I accepted Senator Heffernan's apology which he made in Parliament a week later when the unreliability and falsity of his 'evidence' against me became clear. The Senator later repeatedly came up to Johan and me at parliamentary functions and offered to shake hands. I was taught as a child to forgive those who 'trespass against us'. Johan, who is not





religious at all, is not quite so enthusiastic about this response. The world contains all sorts of people. But abuse of due process in public office is not humorous. It is a serious misuse of a public position. However, one has to put such things in perspective. People make mistakes, even serious ones. The worst aspect of the false attack is that it remains on the internet. It will haunt my good name forever. This is a reason why those who enjoy great power must always use it prudently and responsibly.

Although I am now no longer a judge, I think it is best for me to steer clear of other political comment on political personalities and their attitudes to sexuality. Mr. Howard, as Prime Minister, was always correct in his dealings with Johan and me in public. He was at law school with me back in the 1950s. He consistently stated that he was a 'social conservative'. He did not propose laws to remove the discrimination against GLBTI citizens. He said this was 'not a priority'. Mr. Rudd does not apparently favour even civil unions or civil partnerships for GLBTI people. However, even Albania has now decided to enact gay marriage! Albania! Nevertheless, the removal of many discriminatory laws by the Rudd government in Federal Parliament was a positive step for which his government must be given full credit. Included in this reform package was one law that protects Johan under the *Judges Pensions Act*. I do not doubt that the laws of Australia affecting gay people will continue to be reformed.

## Future law reform

I also do not doubt that, in a comparatively short time, Australia will move towards same-sex civil unions and gay marriage. No-one has satisfactorily explained how my forty year loving relationship with my partner Johan in any way affects (still less undermines) their heterosexual marriage. According to repeated opinion polls, most people younger than 45 in Australia today, whatever their sexuality, take this view. It is just another adjustment of the mind that people have to make when the binary division of the world into straight men and women is overthrown by scientific investigation and research. Many older people find such mental adjustments harder to make.

Johan and I might not wish to be married, or even to have a civil union or partnership, if such laws existed in Australia. It is getting a bit late in our betrothal, after more than 40 years! When I asked Johan about it, he just said 'It is too early to tell'. But that is a personal decision by us in special circumstances. We both believe that civil unions and marriage should be available equally, and without discrimination, for all adult Australians who are prepared to accept the consequent privileges and the obligations. This is the case in The Netherlands, Johan's birthplace, in Belgium, in Spain, Scandinavia, Canada, South Africa and several States of the United States. It will eventually come to Australia.

The law reforms are also needed to deal with HIV. These mainly concern the repeal of old legislation. Such as the repeal of the criminal laws against gay sex still operating in 41 of the 53 countries of the (British) Commonwealth of Nations. These laws are a disgrace. They impede the effective strategies against AIDS, as the Secretary-General of the United Nations, Ban-ki Moon, has recently insisted. Yet instead of such repeals, the laws that are being enacted in many countries provide for the criminalisation of adult private transmission of HIV. Deliberate and intentional

passing of the HIV virus, by someone who knows his or her HIV positive status is, of course, a serious wrong. A very limited, defined crime for such rare cases of intentional transmission could be justified. But overall the criminal law is not a useful strategy in the global struggle against AIDS.

There is a lot of material that suggests that Islam, properly understood, does not penalise gay men. Unfortunately, in the United Nations, there is an unholy alliance between the World Islamic Conference and the Holy See (the Vatican – a State ruled by the Pope of the Roman Catholic Church). This alliance in late 2008 opposed even a resolution simply calling for the removal of criminal laws, discrimination and violence against GLBTI people. Sadly, fundamentalist religions appear in many forms and not only amongst Christians. Fundamentalism is pretty ugly. It is usually driven by old men who wear frocks. Young people, in particular, should stand up against it. Science is the greatest weapon against irrational hatred, racism, sexism and homophobia. Hatred of GLBTI people has many similarities to racism: hating people for something they do not choose and cannot change. As Bishop Desmond Tutu, Nobel Laureate, has said: homophobia is like apartheid.

I was never called to participate as a judge in the enforcement of the criminal law in Australia, Malawi, Solomon Islands or anywhere else against adult consenting gay people acting in private. Had such a case ever presented to me in the Court of Appeal of Solomon Islands or any other court, I would have recused myself and taken no part in the case. That is what I did in the High Court of Australia when a challenge came to the High Court against the Tasmanian criminal laws in *Croome v. Tasmania* (1996).

Everywhere I go, in Australia and overseas, I generally introduce my sexuality into public and private discourse. Doing this is part of a process of helping people to understand the irrationality and injustice of present laws, practices and attitudes.

If Australians are now more homophobic than racist, as some recent public opinion polls suggest, this is because Australians lacked good leadership on this issue. They have come to terms with racism by meeting and getting to know people of different races. Such racial variations cannot often hide their reality and do not now want to. Skin whiteners still exist; but Australians are getting over their phobias about Asian and even African immigrants. Gays, in the past, have had a kind of permanent skin whitener on. They just wanted to be invisible. The 'Don't ask. Don't tell' rule promoted and encouraged this attitude. We would all help overcome homophobia more quickly if every gay person were open and felt able to say without fear of violence and discrimination: 'This is me. Get over it. It is no big deal!'

## United Nations leadership against homophobia

The United Nations can be an instrument for justice and equality for GLBTI people. Within the last year, the Secretary-General of the United Nations, the head of the Global Fund on AIDS, Tuberculosis and Malaria, the head of UNAIDS, the head of UNDP and the High Commissioner for Human Rights have all come out strongly urging the removal of the criminal laws against gay sex. They have done so in the context of the HIV epidemic. But they have done so in clear and emphatic terms addressed to the nations and people of our world.

There has never been such a global unanimity of leadership on this issue. Yet the nation States are often still infected with antipathy, fear and homophobia. At a recent international meeting in Bali, the President of Indonesia, Bambang Yodiyono, called for the removal of criminal laws and stigma against men who have sex with men. Clearly, the tide is running in this direction. And GLBTI people have to note that the overwhelming majority of supporters for reform are, and have always been, heterosexual. Many of them are helped along by gay family members and friends coming out and giving a healthy dose of reality to everyone concerned.

## Church leaders and dialogue

It is true that my Archbishop, Dr. Peter Jensen, of the Sydney diocese of the Anglican Church, has made alliances with Anglican leaders of countries which have very poor records in dealing with minorities, including gays. From time to time, I write to my Archbishop. I tell him that statements against homosexuals promote feelings of inferiority and stigma. They create the culture for gay bashing and even youth suicide. I am sure that this is not his intention, or that of Cardinal George Pell, the Roman Catholic Archbishop of Sydney, or any other church leader. Yet it is an undoubted potential consequence of standing in the way of full equality for acceptance of GLBTI people in Australia, including the churches.

These church leaders need to reflect upon the central messages of Jesus. Johan has given them all away. 'Why don't you abandon the Church?', he asks me. 'They would be happier. You would be happier. Get over it', he says. But at least the Anglican Church is taking steps in the right direction. It has ordained women priests and consecrated women Bishops. It is having a global debate about GLBTI people within the Christian communion. It has always been a religion that compromised on inessentials. So I am sticking with my church and supporting those within it (and other religions including non-Christians) who are truly universalist.

One of the great features of Christianity and Islam has been that they are truly universal religions: not confined to people of any particular race or history. I do not really expect a global split in the Anglican Church. There is too much property involved, amongst other things. But I certainly expect a continuation of this debate. The Catholic Church will not change until a Pope comes along and says that the old mistaken beliefs are over. In that last absolute monarchy, when a Pope eventually says this, that substantial position of nasty attitudes to gay people will disappear in the church overnight. And then, as with the earlier apology to Gallileo, the apology for the Medieval Inquisition and the apology to abused children, we will see the Christian churches giving a whole-hearted apology to gay people. I hope I live to see it. It will certainly come in time.

Science will ensure that all my predictions will come to pass. Just as earlier the world's religions had to accept that the Universe was not literally created in a week, as a literal reading of the Bible in the *Book of Genesis* suggests. It would be sad if it were not so shocking that worldwide wrongs and violence continue to be inflicted on people, including young children, on the basis of codes of behaviour written in ignorance, millennia before Alfred Kinsey and his successors revealed the scientific truth about the normality and universality of sexual minorities.

## The future?

As for my own future, it will involve more international activities in human rights, HIV/AIDS and elsewhere. Some of those activities will be devoted to international efforts to counteract prejudice and discrimination against GLBTI minorities everywhere. Recently, I had a small success in helping to persuade the Human Rights Institute of the International Bar Association, in principle, to adopt sexuality and poverty as human rights issues of contemporary concern. This is the way progress is being made on human rights and sexuality and other topics: step by patient step.

In the search for love, no-one should give up. And no-one should be denied love on arbitrary and unscientific grounds. Love and companionship are good for us – good for our happiness and for our physical and mental health. We should all talk about love. Love speaks in a universal language that all good people understand. I have no doubt that love for one another constitutes the ultimate foundation on which is built the efforts to ensure respect for the human rights of all, in tomorrow's world: for all humans, for sentient animals as well and for the great biosphere itself.

## Reference

- 1 GLBTI is an acronym including gay, lesbian, bisexual, transgender and intersex ('queer') people.

### Investigate and think about...

- *What are the positions of the Catholic, Uniting and Anglican Churches regarding GLBTI? Do you agree with their views?*
- *Research Toonen v Australia (just Google it!!). What was the case about, and what was the effect of the case?*
- *What are your views about being open with sexuality? What do you think about Justice Kirby's view that openness is 'the only way to destroy the foundation of prejudice and discrimination'?*
- *Have you faced discrimination or prejudice in any aspect of your life? What was your response?*