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GAY IN
AUSTRALIA —
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Article for DNA Magazine

DNA MAGAZINE

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The Hon. Michael Kirby AC CMG

Early awareness of sexuality

I would say that my first inkling of my sexuality was at about age 9. I was always precocious. In those days, it was not a good discovery. The afternoon tabloids were full of stories of entrapment and arrests of gay men in Sydney. This included some leading, visiting artists, like Claudio Arrau, the great concert pianist.

Homophobia in schools

There was very little discussion on homosexuality or sexuality generally in public schools in the 1940s and 50s. Australia was pretty prudish. I was not conscious of specific homophobia in my schools. It was just a non-issue. Since then, I have discovered that things have deteriorated. It depends largely on the leadership of the school. On this, I have met with young GLBT people to learn the truth and 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. But in private and religious schools, it is another story altogether. All children, gay and straight, have a fundamental human right to be informed about science and reality.

Christian faith

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. Probably from lack of breakfast. I would not want to exaggerate my religion. It was just there and, so far as we were concerned, it was just an aspect of love which always surrounded me in my family. Still does.

Christian faith today

I am still a follower of Jesus. But it is sometimes sorely tested by the fundamentalist views of some Christian leaders. My partner, Johan, is a non-believer. He says '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 which, in its fundamentals, is a good guide in life. Jesus was, after all, a revolutionary in terms of religion.

Sexuality and my mother

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 2 and 2 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 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 very sharp and witty. He wins them over.

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. It revealed a reality which the screaming tabloids seemed to deny. It was a comfort to me because I knew Australia would not be all that different from the United States. 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. It was very much a feature of the British Empire and its criminal laws. Napoleon's codifiers had got rid of those laws in France in 1804. Many of the countries of Europe and of the European Empires did not have anti-gay laws. It was left to religions and social attitudes, consequently, to stigmatise gays there. But in Australia we had the criminal law to back those attitudes up. It was not a good look.

Awareness of early pioneers

I am sure that many young people have never heard of Alfred Kinsey. Perhaps the recent Hollywood film brought him back to life and popular culture. But whether they have heard of him or not, his reports of 1948 and 1953 on sexuality in the human male and female provided the impetus for the Wolfenden enquiry in Britain in 1957. That, in turn, led to the change of the law in Britain in 1967. The Australian legal changes followed, State by State, in the ensuing decade.

Numbers and statistics

It is true that Kinsey's sampling techniques were not as advanced as such techniques are today. But that did not matter. The exact numbers were less important than the pattern he discovered and described. I do not know what the exact proportion of GLBT people that exists in society. I agree that it is a spectrum not yet another binary classification.

For gay men who are exclusively focused that way, I suspect it is probably around about 4% of the total population. Women are said to be a slightly smaller percentage. However, there are plenty of bi-sexuals and lots of experimenters ('curious'). Although some religions 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 or skin colour) is just plain wrong. Fortunately, in my lifetime, increased numbers of people everywhere have come to realise this.

First encounters

I encountered people who were probably gay in my teenage years but there was no intimacy. There were no GLBT groups or community organisations, at least so far as I was aware. The criminal laws saw to that. Police harassment was often reported. I just threw myself into countless university committee meetings. Looking back, it was a pretty lonely time. That is what some religious people would try to restore. No way!

Gay Sydney in the 1960s

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, Petersham Dance Hall (now a Centrelink office!) and *The Rex* hotel in King's Cross. I was not really worried about police raids. Such places, I discovered, had been going strong for years and, at *The Rex*, I even saw a judge I knew put in an occasional appearance.

Meeting Johan

In 1968, I had met Demo, a handsome Spaniard, at Petersham Dance Hall. We went to New Zealand in December 1968 and he then continued his travels in January 1969. Eleven days later, I met Johan at *The Rex* hotel. What a chance event that was. Demo still complains that I 'did not mourn long enough' for his departure. Johan and I have been together ever since 11 February 1969. It has been a great blessing in my life. It has also been a reinforcement for my public life and a strengthening of my values of acceptance, tolerance and realism. Anyone who would have denied me that relationship over more than 40 years is, frankly, in need of psychiatric help. Homophobia is a psychiatric condition and defies scientific reality. Whatever excuses there were for homophobia in earlier decades, there are none today. The religions have to go back to their books and re-read their scriptures as well as reflecting on the central messages of all great religions: to love one another.

Awareness of my 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. Especially in the legal profession which is fuelled by gossip, some of it malicious. I believe that most people who 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 pandemic. That was code language, signalling my sexuality to anyone who was watching. Some 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. Just the same, to some extent, Johan and I played by the 'don't ask, don't tell' rule expected of us. John

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

The early gay press

Basically, the gay press in the 1980s and 1990s, during the first AIDS crisis, also played along with 'don't ask, don't tell'. Generally speaking, it still does. It is rare for queer people to be 'outed' against their wishes. I became increasingly involved in HIV/AIDS and we went to a lot of funerals. This helped Johan and me put our sexuality into perspective. So 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, I became 'open' without being aggressively 'out'. But 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 to being silent and pretending to keep them happy. Openness challenges the binary illusion of the world in which these people want to live. But openness helps to destroy the foundation for prejudice and discrimination. Of course, I felt conflicted 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 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.

Royal Commissions and suicides

The Wood Royal Commission unfortunately did not stamp out the hysteria about paedophilia that broke loose in the mid-1990s. It adopted an artificial definition of the concept of paedophilia by reference to age 18. This helped promote a tabloid-led campaign that repeatedly confused homosexuality and paedophilia. Science shows that paedophilia is overwhelmingly an heterosexual phenomenon. There were members of parliament misusing their privilege. It was not a good time for GLBT people, 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. Truly closeted gays felt vindicated and hopped right back into the closet, locking the door from the inside. Not everyone is rational, scientific or kind. Some homophobes are struggling with their own demons. Some are truly weird as we have discovered in Australia.

Gay retaliation

I never felt anxious that GLBT people in influential positions might turn their knives on me. Such conflicted people are generally 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 looked after a succession of people living with HIV. I kept going to AIDS conferences. In our experience, many GLBT 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' GLBT people against their will, unless they were complete hypocrites. Just the same, if every gay person in Australia stood up, the whole shabby, pathetic charade caused by long-term gay invisibility would be dealt a mortal blow.

Secret and closet gays

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. But one judge who is not open cautioned me about going public. He said that we would pay a price for it. He felt vindicated by the attack on me in the Senate. He even said so.

Inclusion in *Who's Who*

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*. This was published in 1998 after I negotiated with them to use a sexuality neutral description of "p" for partner. However, this was really only confirming what had been widely known for more than a decade. True, it was going public, but it was not noticed for a year. Frankly, I did not care about that, one way or the other. When it was reported, the *Canberra Times*, in an editorial comment observed: 'The non-secret is out'.

The human face

I certainly agree that it is useful to have human face to sexual minorities. This is how Australians overcame our demons about Asian Australians

in the White Australia era. It is helpful to the mums and dads to know that GLBT people exist who have long-lasting relationships, mortgages, pets. In the language of *Zorba The Greek*, 'the full catastrophe'. Johan and I hope that our reality has helped the coming generations. It will get better. But we have to contribute. And straight people are the main actors in our drama. Yet we have to play our part.

The Gay Games

The Games 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 GLBT people several of governors 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 stands for all of us, not just the majority. It was ironic to think that just down the road from the opening ceremony was the *Purple Onion*, where Johan and I went to see David Williams perform in *Carmen* back in 1969. It showed vividly the progress we were making in Australia.

The Heffernan attack

The attack on me in the Australian Senate in March 2002 came without notice. It 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 is to be strongly discouraged always. I accepted Senator Heffernan's later apology. He comes up to us at parliamentary functions and wants to shake hands. I was taught as a child to forgive those who 'trespass against us'. Johan 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 public power.

John Howard and Kevin Rudd

Although I am now no longer a judge, I think it is best to steer clear of political comment on political personalities and their attitudes to sexuality. Mr. Howard 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 admits that he is a 'social conservative'. Mr. Rudd does not apparently favour even civil unions or civil partnerships for GLBT 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 is a positive step for which the government must have full credit. Included in the reform package was one law that protects Johan under the *Judges Pensions Act*.

Future law reform

I 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 relationship with Johan in any way affects (still less undermines) their heterosexual marriage. According to repeated opinion polls, most people younger than 45 in Australia today take that 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 science. The law reforms needed to deal with HIV 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 and 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 a positive status is a serious wrong. A very limited, defined crime for such rare cases of intentional transmission can be justified. But overall criminal law is not a useful strategy in the global struggle against AIDS.

Islam and the Vatican

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. Fundamentalist religions in all of its forms is pretty ugly. It is usually driven by old men who wear frocks. Young people, in particular, have to stand up against it. Science is the greatest weapon against irrational hatred.

Malawi and Solomon Islands

I have never participated in the enforcement of criminal law in Malawi or Solomon Islands against adult consenting gay men acting in private. Had such a case ever presented to me in the Court of Appeal of Solomon Islands, I would have recused by myself and taken no part. That is what I did in the High Court of Australia when the 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 so is part of a process of helping people to understand the irrationality and injustice of the present laws.

Marriage and homophobia

It is true that 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 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 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.

Homophobia and racism

If Australians are more homophobic than racist, this is because they have come to terms with racism by meeting and getting to know people of different races. Such people cannot usually 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 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 said: 'This is me. Get over it. It is no big deal!'.

United Nations leadership

The United Nations can be an instrument for justice and equality for GLBT 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.

There has never been such a global unanimity of leadership on such an issue. But the nation states are often still infected with antipathy, fear and homophobia. At the recent 9th ICAAP meeting in Bali, the President of Indonesia, Banbang Yodiyono, called for the removal of criminal laws and stigma against men who have sex with men. The tide is running in the right direction. Gay people have to note that the overwhelming majority of supporters for reform are and have been heterosexual. But many are helped along by gay family members coming out and giving a healthy dose of reality to everyone concerned.

Anglican leaders and dialogue

It is true that Archbishop Peter Jensen of the Sydney diocese of the Anglican Church has made alliances with Anglican leaders of countries which have poor records in dealing with minorities, including gays. From time to time, I write to my Archbishop and 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 Pell or any other church leader. Yet it is an undoubted consequence. In my humble opinion, these church leaders need to reflect upon the central messages of Jesus. Johan has just given them all away. 'Why don't you abandon the Church. 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 GLBT 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) who are truly universalist.

One of the great features of Christianity and Islam has been that they were truly universal churches, 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 do expect a continuation of this debate. Rome will not change until a Pope comes along and says that the old regime is over. In that last absolute monarchy, the Roman Catholic Church, when a pope eventually says this, the entire shabby and nasty attitudes to gay people will disappear overnight. And then, as with the apology to Gallileo, the apology for the 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. But it will certainly come.

Science will make all these predictions come to pass. Just as earlier the world's religions had to accept that the Universe was not literally created in 7 days. It would be sad if it were not so shocking that worldwide wrongs and violence continue to be done to people on the basis of codes of behaviour written in ignorance millennia before Alfred Kinsey and his successors revealed the scientific truth about sexual minorities.

The future?

As for my future, it will involve more international activities in human rights, HIV/AIDS and elsewhere. It will also involve lots of university

teaching. It will take in work for arbitration and mediation of disputes in Australia and maybe overseas. And lots of conferences and public speaking. Johan keeps suggesting that it might even go so far as to include an occasional holiday. I try to discourage this idea in him. But he is very insistent and usually gets his own way in the end.

Many people who can only take me in small doses really like Johan. He is my secret weapon. He comes to functions with the Queen, the Governor-General, Prime Ministers, and other leaders. He is a great ambassador for gay equality and reality. I am proud of him. Whoever would have thought we would come on this long journey after meeting ten minutes before closing time in *The Rex* hotel on Tuesday 11 February 1969? In the search for love, no-one should give up. And no-one should be denied love. And gay people should talk about love. It speaks in a universal language that all good people understand.
