

# An Interview on Faith and Sexuality with Michael Kirby

*In June 2024, the Hon. Michael Kirby, AC CMG, was interviewed by the editors of the Australian Journal of Law and Religion. The following transcript has been edited for length and clarity.*

## Interview

**AJLR:** Thank you very much for joining us. We thought we might start with what religion meant to you growing up in Sydney. Was your religious upbringing fairly conventional for the time period?

**Kirby:** I think it was conventional. At least it was conventional in the somewhat selected community in which I lived in the 1940s, in my first ten years of life. I lived in Concord, an outlying suburb of Sydney. And I went to the local public school. On Sundays I attended the local Anglican church for Sunday school at first, and then subsequently as a member of the church choir for the Sunday services.

The rector was the Reverend Cecil Dillon. And he had been a Padre in the Second World War. He wore his cassock and surplice and a bar showing the theaters of war in which he had served. This was not uncommon, immediately after the Second World War. Mr Dillon was a Sydney Anglican and the church followed the tradition of the Sydney Anglicans. It was very Protestant. There was never any symbol of Christ on the cross on the altar. There was no incense. No genuflection. No references (beyond the absolutely necessary) to Mary as the mother of God. Therefore, it was really a typical Sydney Anglican church. That was my tradition. Simple. Clean. Direct. And loving.

The Minister was a person who had been adversely affected by his experiences in the war. He devoted some time to telling us of the dangers and horrors of war. And he never, so far as I remember, ever referred to issues of sexual activity or sexual beliefs. On one occasion he invited, as a speaker on a Sunday, Pastor Martin Niemöller, who had been a leading figure of resistance in the German Lutheran Church during the Third Reich and the Second World War. He had suffered for his beliefs. So that was Mr Dillon's approach to religion. It was a loving, Christ-centred belief. His concern was love for fellow human beings and a realisation of the horrors of war, including the horrors of the then recent nuclear explosions over Japan. That was therefore the belief in which I was very comfortable. And still am comfortable. I wouldn't say I'm now *very* comfortable. But I'm comfortable in the Protestant tradition. I have with me my *Book of Common Prayer*, which I see has a stamp, 'Saint Andrew's Church, Strathfield'. So, I must have stolen this *Book of Common Prayer*! But it has been my constant companion for virtually my whole life of 85 years. It's just next to me. It has always been just next to me, behind my desk. To people who say I should give my religion away, I say I will not do so because, when I want peace and quiet in my spirit, I go to the *Book of Common Prayer*. It is very beautiful English. Loving thoughts in great language.

My parents were not obsessive religionists. My mother never — that I can remember — went to church. She was too busy getting things ready for Sunday lunch. My father did go to church. My

father attended Anglican churches for most of his life, though intermittently. He died at 95 in 2011. He brought us up — my siblings and me — in this same simple Protestant variety of Anglicanism. Which is where I still basically am.

**AJLR:** And when you started law and started advancing in your legal career in the 1960s and 1970s, that was a very turbulent time period in the world. Did you notice the changing relationship between religion and government and politics during these years?

**Kirby:** I've observed religion in society and have noticed changes throughout my life. But they didn't really greatly impact on me. I was comfortable in the Christian Anglican tradition. I was rather censorious of Roman Catholics, whom I saw as having got carried away with the ceremonies and having missed out on the essence. In fact, as I later discovered, my views were rather similar to the views of Reinhold Niebuhr, who was an American theologian and who had a Christ-centred view of Christianity. That really was where I was and where fundamentally I have remained: a belief that my religion taught love. And that that was a good thing for people to learn. It became a specially comforting thing for me to learn.

I was in need of comfort when, in puberty, I found that I had an attraction to people of my own sex. I never heard anything against that from Mr Dillon. And I didn't hear anything against it at school in the public school system of New South Wales. Neither from my teachers nor from our scripture teacher, who was Canon Stuart Barton Babbage. As a public school in New South Wales, it provided one period a week for a minister of religion to come and speak to the students. Rev'd Babbage spoke with a rather plummy English accent. But he was a very loving and kind person. Later in my life, he invited me and my partner, Johan to his home. He was not himself homosexual. But he was welcoming. And kind. And that was my view about my religion and still is: that it is antithetical to a Christian belief, really in its essence, to hate people for something they don't choose and can't change. It was Dean Barton Babbage who presented me to Bishop Hilliard, who was one of the Anglican Bishops in Sydney at Saint Andrew's Cathedral. That is where I was confirmed. It would have been in 1954. Somewhere here, I've still got my confirmation certificate, in case I ever get afraid that I've strayed from my path 'like a lost sheep'.

**AJLR:** You've described yourself recently elsewhere as an 'Anglican rationalist'. What does that that phrase mean to you?

**Kirby:** It involves being comfortable with developments and discoveries in science. This was of course, a big controversy in the Anglican church and became very powerful in England in the 19<sup>th</sup> Century when Charles Darwin wrote *On the Origin of Species*. This book (and others) created a great division in the organised Church of England. But I myself felt that, on the issue of human sexuality, many adherents to the church, and particularly the religious, had really lost their way. Because of the growing research into human sexuality, it is somewhat surprising that the topic was so delayed, in the sense that people were embarrassed or ashamed to talk about it. I suppose that can be traced back ultimately to the power of sexual desire and sexual expression. Whatever the reason, a lot of people, including very intelligent people, found it very uncomfortable to talk about it and certainly to research it. Or to change traditional long-standing religious beliefs, because of human science.

Alfred Kinsey, whose background had been that of a zoologist and was a Professor of Zoology at Indiana University in Bloomington, Indiana, was, in the 1930s, the world's leading expert on gall wasps. However, he became bored with gall wasps. He turned his attention from them to studying the objective facts of human sexual expression. That was sensational at the time. It was in all the media, including in Australia. That coincided with my reaching sexuality. So it greatly influenced me. It was a source of great interest to me because of the fact that I had this sexual inclination. I knew enough about how the world worked to know that it was something that I was supposed to be ashamed of. But that according to Doctor Kinsey, I *shouldn't* be ashamed of it. And because I was a smart little student, that was a very good thing to happen to me. And so, I had to reconcile the new science with my Christian, Anglican, Protestant views. And I didn't have much difficulty doing that. I still don't, really.

Recently I had lunch with Brother Bob Wallace, an old friend who is a Roman Catholic Brother. We had been in student politics together. He became a big figure in the Roman Catholic education system in New South Wales. He told me something which rather surprised me, yet I begin to understand it. He said that he thought there were probably many Catholic priests who were gay. But he surmised that it was the Protestant stream of Christianity which caused the most problems for gays in that it was very Bible-centred. Therefore, texts could be taken from the Bible which would make people feel uncomfortable with themselves.<sup>1</sup> That was less so, he thought, in the Catholic tradition, where they recognise the obvious fact that some of the instruction in the Old Testament of the Bible was simply not correct as part of the New Covenant. And, therefore, that you had to adapt scriptural text to scientific reality. And that's what I endeavored to do. I came to quite a comfortable internal conviction: that I could remain a Christian, retain my links to my Anglican tradition, and not feel particularly uncomfortable in my inner spirit. All because of the fact that I had discovered that I was homosexual. And that I was not alone in the village. There were plenty of gay people. Though at first, I didn't have much to do with that group, I just kept working hard at my studies and trying always to come top in the class. Which I often did.

**AJLR:** Over the past few years, you've become a patron of the Rationalist Society of Australia. You've also written the foreword for Equality Australia's recent report 'Dismissed, Denied and Demeaned'.<sup>2</sup> As the name of the report indicates, there has been a high profile controversy over the past couple of years in Australia over faith based schools and whether they should be able to — depending on how you word it, either 'select', 'preference' or 'discriminate' — against LGBTIQ+ students or staff. What's your position on this issue?

**Kirby:** Well, my position is influenced by everything that went before in my life: my growing up in a Christian belief; my comfort in that tradition; my discovery of my sexuality, but also at about the same time my discovery of the research that was being done into that topic; and my beliefs that, if objective facts were being discovered about the commonality and variety of sexual

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<sup>1</sup> See Chris Cheers, 'Despite Having a Loving Partner, Mark Feels Unlovable: He Grew Up in a World That Shamed Him for Who He Is.' *The Guardian* (online, 14 October 2024). The impact of causing shame to young LGBTIQ people at school and in society on the grounds of *sexuality* is compared with shame on the grounds of *race*. It can cause those affected to feel they are unlovable with dire consequences.

<sup>2</sup> Equality Australia, 'Dismissed, Denied and Demeaned: A National Report on LGBTQ+ Discrimination in Faith-based Schools and Organisations' (Report, Equality Australia, March 2024) <<https://equalityaustralia.org.au/resources/dissmissed-denied-and-demeaned-a-national-report-on-lgbtq-discrimination-in-faith-based-schools-and-organisations/>>.

expression, then attempts to prohibit it were basically irrational. They would not, ultimately, work. People would not ultimately depart from their humanness to express their feelings of love and attraction. And that meant that I should be comfortable with myself. This was a feeling that was reinforced when I met my partner Johan van Vloten in 1969. He had migrated to Australia from the Netherlands. He had grown up, basically, in a non-religious environment. He regarded the churches with which he grew up as a menace and very bad for peoples' peace of mind and comfort. Essentially, he told me that I should give away my religious beliefs because that would make the religious people happy. And it would make him happy. And eventually it would make me happy. But making other people happy was never my main motivation. Seeking truth and seeking moral judgments based upon observable scientific research was important to me. I thought that that was more comfortable with the Protestant tradition of Christianity because it had stood up against the Church and its organisation in the Reformation. It had shown courage, even to the risk of death, to adhere to what was believed to be the message of the Bible and the love of the Lord. So my partner and I have different views on this subject. That has led to a constructive dialogue over 55 years, which is still going on. As I've got older I can understand better my partner's view. I sometimes pause in my daily life to go back to the Nicene Creed and to ask myself: 'how much of this do I still really believe'?<sup>3</sup> And if you go through each of the paragraphs, there's quite a lot of it of which I am now either doubtful or do not truly believe. My belief is a Christ-centred belief. It is very much founded in the basic principles of Christ's instruction to love God and to love one another. So that's where I am and it's where I'm comfortable.

Nevertheless, I can see the cruelty that is caused by some religious people. And that cruelty was evident in recent weeks in Sydney in the context of a Protestant school where a young woman who was working as a music teacher was dismissed when a school parent discovered that she was gay.<sup>4</sup> I think she may have had to sign a document saying that she understood that she had to observe the religious traditions of the school. She, like most people who turn out to be in a sexual minority, didn't conform to that requirement. She tried to go along with it while having doubts about its rationality and justice. She loved being a teacher. She loved teaching music. She was very popular with her students. She loved her students. But she realised that the price of this was essentially dishonesty to herself. And that ultimately led to her feeling free to form a relationship with another young woman and to mentioning that in a post on social media, which somehow was seen by a parent who reported it to the Principal. The Principal then sent an immediate e-mail to the teacher. It told her that she would not be accepted in the school and she would be dismissed. And she was. She was not willing to play by the game. The game was 'we will leave you alone if you pretend that you are heterosexual'. And that has become much harder for young people to do nowadays. It wasn't so hard when I was young because I didn't know any young people who were gay. It was never discussed. But nowadays, it's widely discussed. I would say probably in schools it's ferociously discussed. And that led this young woman to engage with her social and sexual life. That led to the post on Facebook. And that led to the e-mail from the Principal and her dismissal.

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<sup>3</sup> See Michael D Kirby, 'Foreword' in Shane St Reynolds (ed), *Revitalizing Christianity: The Theology of Peter Lewis* (Shane St Reynolds, 2024) xvii-xviii.

<sup>4</sup> See Natassia Chrysanthos, 'A School Parent Discovered Charlotte was Gay on Facebook: Days Later, She was Sacked' *Sydney Morning Herald* (online, 13 June 2024) <<https://www.smh.com.au/politics/federal/a-school-parent-discovered-charlotte-was-gay-on-facebook-days-later-she-was-sacked-20240605-p5jjgp.html>>.

Looking at it from my viewpoint, it was very heartless and very unkind. And therefore, in my view, antithetical to the central message of the Christian belief. So this is the controversy. How do you ensure that those who want people to be dishonest to themselves reconcile that with a religion based on love and truth? In my opinion, it can really only be reconciled by confining the freedom of religion, which is expressed in the *Universal Declaration of Human Rights* ('UDHR'),<sup>5</sup> to an entitlement to propound these beliefs *in the temple*. But once they come into the *public space*, and particularly nowadays in Australia, a public space which receives an awful lot of money from government, unrestricted freedom to be seriously discriminatory must stop.

**AJLR:** The religious schools say: 'We have these sets of beliefs, we know they may not be popular or shared by the majority of Australians. What makes us special as religious schools is we have this ethos — and if we're not allowed to carry out our religious views, then we're losing that distinctive character that was the reason for us forming in the first place'. How do you respond to that sort of counterargument?

**Kirby:** I would respond to it by asking the advocates of that viewpoint to, first of all, acknowledge that what they are doing is extremely unkind. Also upon one view, irrational, because it's asking people to be silent about something which is objectively very important in the lives of every human being. And, indeed, as we know from studies in other animal species, also there. It is something that is especially important to young people. They should not be required to *pretend* about it and should not be forbidden to mention and discuss it with their family and with their closest friends. It is sad, but it is often the case, that people of a religious persuasion are strongest on demanding silence and pretense, are often, at some stage in their lives, the subject of scandal because they've been discovered to have had 'inappropriate' sexual activity. Even this week in the United States, a close friend and spiritual adviser of Mr Trump was discovered to have had a sexual relationship, which I gather he didn't deny, with an underage female student.<sup>6</sup>

So how do I react? I react by saying: 'If you take federal gold, you must comply with social norms'. Social norms have dropped the requirement that young (or not so young) gay people must pretend that they are straight. And it is in society's interests, and will be in the interests of religion too, to permit people to be truthful and not to discourage them. If that leads to a period of adjustment between what exists in prayer and what exists as we know from science, then that is just something that religions have to adjust to and allow for. So I am prepared, myself, to draw a line between the temple, where people can propound different views and the public space, where there's a need for a reconciliation of their religious belief with the rights to human dignity, privacy, and the other rights that exist in the *UDHR* and any other statement of moral principle. So that's where I am in this quandary. I realise that others say, well, it's central to our beliefs that we should be able to teach them. And there is a reference in the *UDHR* to the right of religious belief and teaching. But that, I think, is not teaching in school. That's teaching in the religious context. Which, at least in

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<sup>5</sup> *Universal Declaration of Human Rights*, GA Res 217A(III), UN GAOR, Un Doc A/810 (10 December 1948) ('UDHR').

<sup>6</sup> See Erum Salam, 'Megachurch Pastor and ex-Trump Adviser Admits Child Sexual Abuse', *The Guardian* (online, 18 June 2024) <<https://www.theguardian.com/us-news/article/2024/jun/17/pastor-robert-morris-sexual-abuse-trump-adviser>>.

most circumstances, is not based upon an adherence to a religious belief that cannot be reconciled with scientific knowledge.<sup>7</sup>

**AJLR:** On the points you made about religious schools and public funding, it seems to be important to you to draw this distinction between schools that receive government funding and therefore should adhere to social norms, as contrasted to schools that may not receive public funding. There may not be any schools in the latter category right now. But it may come to that. What do you think the rights of such schools should be if they decide: ‘Well, faced between the money and our doctrines, we’re going to give to God rather than Caesar. And not accept public funding so that we can continue teaching and practising our doctrines.’ How do you think the balance between freedom of religion and equality falls out in that kind of situation?

**Kirby:** If it means that, in religious schools, people continue to get training and instruction that is based upon a pre-20<sup>th</sup> Century view of human sexuality then a question would arise. At a certain point, is that something where you will oblige any school to provide another point of view? I have to say at my schools, neither my infant school, nor my primary school, nor my secondary school, did I receive any indoctrination on these subjects. That was because they were schools formed in accordance with the *Public Instruction Act*<sup>8</sup> and they had to be secular. So I never felt at my schools that I was second rate, second class, or in some way damaged goods because of my different sexual orientation. Speaking about what is in their long-term interests, religious schools, so far as I know, are not instructing people that they mustn’t eat shellfish. Or that they mustn’t combine meat and milk. Or wear garments made of particular fabrics. But it’s certainly based from religious views about sexuality that a lot of angst is born.

If you go to New Zealand, there is very little public funding, I believe, for religious schools. The process of funding them changed in Australia, which had been similar to New Zealand, in 1961. Mr RG Menzies, the Prime Minister, introduced a special federal subvention for private and religious, mostly Catholic, schools to provide science laboratories, in which they were deficient. And that tiny investment of a specialised kind for a specialised purpose has expanded now to a funding of private and religious schools that is disproportionately greater than per capita funding for public schools. Yet they have to do the heavy lifting of teaching everybody who comes to their door. And so we’ve started along a path that has really got out of control. Australia is now the member country of the OECD association of wealthy, democratic countries with the highest level of government funding for religious schools in the world. I, myself, support the *Gonski* view that there should be a shift back towards equity. I do think that we’ve got out of control in the funding of private and religious schools. I’m not against any religious domination or religious school. But they have to live and operate in Australian society. They have to produce students who become citizens of Australian society. That is a society which, by law, has generally dedicated itself to not requiring of young students what was required of me: that I should pretend that I was other than myself. Pretend to my parents; pretend to my siblings; pretend to my grandmother; pretend to my

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<sup>7</sup> Guy Baldwin, ‘Freedom of Religion Under the *Australian Constitution*: Is Proportionality the Answer?’ (2023) 3 *Australian Journal of Law and Religion* 20, 26; Cf Alex Deagon, ‘Reconciling Freedom and Equality for Peaceful Co-existence: On the Need to Reframe the Religious Exemptions in the Sex Discrimination Act’ (2023) 2 *Australian Journal of Law and Religion* 20, 34–5.

<sup>8</sup> *Public Instruction Act 1880* (NSW) s 7.

school mates; pretend to my fellow university students and at work right up to when I was appointed to the Court of Appeal and the High Court of Australia.

**AJLR:** You have mentioned your tenure as a Judge. Could you explain how or if at all your religious background has influenced your decision making on the High Court and whether you think any of your colleagues were influenced by their religious (or non-religious) backgrounds in writing their judgements?

**Kirby:** Well, there's a very good decision about this. It's *Commissioner of Taxation v Word Investments Ltd* ('*Word Investments*')<sup>9</sup> which was decided by the High Court of Australia in 2008. It related to a Protestant religious tradition that ran funeral parlors. They sought to do this while claiming a tax benefit for that business. And in my dissenting reasons, I acknowledge that the tradition that this particular organisation observed was very similar to the tradition in which I was raised. But I took the view that if they were using money, purportedly raised in order to promote their religious beliefs, but doing so in the course of a private business in competition with others who didn't have a similar source of tax relief, then that was not equality before the law. I think all my colleagues other than myself took the view that this was fine. Still, I believe that within months, the Federal Parliament had enacted a change to the *Income Tax Assessment Act*<sup>10</sup> in order to give effect to a view similar to that which I had expressed. You get a deduction if you are promoting your core religious beliefs. But you don't get it as against other businesses that you're in competition with. People should have a look at *Word Investments* and see what they think about it. Essentially, I'm a secularist and I believe that people should not derive tax and income advantages from their religious beliefs.

**AJLR:** You've mentioned the term 'secular' quite a few times throughout this interview, and we would like to bring your understanding of the term into conversation with s 116 of the *Australian Constitution*. To our knowledge, when you were on the High Court, you never actually decided a case involving s 116. Could you explain what you mean by the term 'secular' and then talk about whether you think s 116 and its interpretation by the High Court adheres to your understanding of the term?

**Kirby:** Well, s 116 was largely copied from the text of the United States Constitution. However, in the 1960s, the High Court led by Sir Garfield Barwick and others, didn't follow the approach taken by the Supreme Court of the United States. That has been quite strong (though not entirely successful) in dividing church and state and keeping the church out of politics. But, unfortunately, a highly literalistic approach was taken in the High Court of Australia to s 116 of the Australian Constitution. Instead of interpreting the prohibition on the 'establishment of any religion' as existing for the purpose of defending the secular state, it was interpreted as meaning Parliament cannot establish a religion, established like the Church of England in England. Yet this was never a possibility in Australia. It had been rejected by Governor Bourke in New South Wales in the 1830s. It was abandoned by the Anglican Church. It wasn't really a credible claim or interpretation.

Now, it's not quite true to say that I've never had a case involving s 116. You may remember the World Youth Day in 2008 in which Pope Benedict XVI came out to Australia? The Roman

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<sup>9</sup> *Commissioner of Taxation v Word Investments Limited* (2008) 236 CLR 204, 252 [124] (Kirby J).

<sup>10</sup> *Income Tax Assessment Act 1997* (Cth).

Catholic Church sought government financial support to pay for the police and other security arrangements, in order to fund a large religious celebration, which was effectively celebrating an important event of the Roman Catholic Church. That was challenged in the High Court of Australia. It was referred to a single judge, Justice Crennan. She rejected the application to issue proceedings to challenge the subvention on the basis of the cases on s 116.<sup>11</sup> An application to challenge that decision was referred to a Full Bench and came before three Justices, Gummow, Heydon, and myself,<sup>12</sup> to determine whether it was a sufficiently important matter to grant leave to refer it to a Full Court. The argument was advanced by the applicant that it was time to reexamine the *Defence of Government Schools* ('DOGS')<sup>13</sup> case. I gave reasons why it was indeed time to do so. But the other two Justices said 'no, this is settled doctrine. We're not going to intrude'. What is settled doctrine and what will be reexamined are dependent very much on the values and attitudes of the judges concerned. For some reason, the editor of the *Australian Law Journal* and the editor of the *Commonwealth Law Reports* decided not to publish the reasons of the Justices. That's why distinguished academics like yourselves think there's never been a case to challenge it! Not so.

**AJLR:** As a thought experiment, if you were given the ability to draft a new provision of the Australian Constitution with respect to, say, religious freedom and equality, how would you do it? Or would you draft anything different to what currently exists?

**Kirby:** Well, if special leave were not granted to challenge the current line of interpretation of s 116, I would not leave it unattended. I would try to introduce a provision that, in effect, repeats what the *UDHR* says; that there is a right to free expression and belief. This, after all, was one of the 'four great freedoms' which was propounded by President Roosevelt in the *Atlantic Charter*. That, in turn, became the foundation for the United Nations *Charter*. That, in turn, became the foundation for the *UDHR*. So that involves the postulate of a freedom of religious belief but along with other freedoms, including the principle of human dignity. The opening words of the *UDHR* are '[a]ll persons are born free and equal in dignity and rights'.<sup>14</sup> All persons have dignity and rights. If you take that as the foundation that postulates that the list of specific freedoms has to be reconciled with it, the reconciliation does not involve a reconciliation that excludes some people from enjoying the benefits of human dignity and their rights as human beings in the society. And that is where we are at the moment. So this is not an innocent matter we are debating. This is not a matter that is without its cost in human happiness and advancement of human dignity. That's why I feel I should speak up. And in doing so, I feel I'm doing a very Christian and Protestant thing. Essentially, I was and I am like Reinhold Niebuhr. I believe mine is a Christ-based religion. And that is something I can observe in the prison cell or in the desert. I can be with that belief wherever I am. And I don't need a church to be an intermediary for it. I can just go and resort to it, to the *Book of Common Prayer* and the beauty of Archbishop Cranmer's language. And that reminds me of a time before hatred or sexuality visited my life. I was at peace and comfortable in the knowledge of the love of the Lord. That is where all people of religion should be. And all people of no religion like my partner Johan should be. Equally.

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<sup>11</sup> Transcript of Proceedings, *Application by Carmelo Michael Vescio for leave to issue a proceeding* [2008] HCATrans 222 (Crennan J).

<sup>12</sup> Transcript of Proceedings, *Application by Carmelo Michael Vescio for leave to issue a proceeding* [2008] HCATrans 256.

<sup>13</sup> *Attorney-General (Vic) ex rel Black v Commonwealth* (1981) 146 CLR 559 ('DOGS').

<sup>14</sup> *UDHR* (n 5) art 1.



**AJLR:** Well, we certainly appreciate your sharing all of that with us, Michael. You've been generous with your time. So thank you for your profound thoughts and answers to our questions.