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FOREWORD

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Edited by Paula Gerber and Adiva Sifris

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FOREWORD

The Hon. Michael Kirby AC CMG*

One of the foremost thinkers in the world of legal philosophy is Professor Martha Nussbaum of the University of Chicago. She has lately advanced a new taxonomy for consideration of the fundamental purposes of life, human life and society in particular. She calls her analysis the “capabilities approach”. Sometimes it is called the “human development approach”, although it is concerned with more than simply human development. It seeks to offer ten central “capabilities” which a society must achieve to be considered as basically just. Each capability has importance on its own. However, some capabilities take priority in an ever-expanding list of elements in life that demand, and deserve, protection by any community that calls itself civilised.

Thus, the capabilities approach begins with the need to protect *life* itself. And then to defend *bodily health*, including reproductive health; the entitlement to be adequately nourished; and to have adequate shelter. There is then *bodily integrity*, so that the individual can move freely and be protected from assault and have opportunities for sexual satisfaction and for choice in matters of reproduction. There follows defence of the

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senses, of imagination and thought. The human being has reason and cannot be “truly human” without adequate education and opportunities to experience, by choice, religious, literary, musical and other experiences.

The fifth capability identified by Nussbaum concerns *emotions*. This involves each human being enjoying the capability to have attachments to things, creatures and people outside themselves. To love those who love and care for them. To grieve at their absence. To experience longing, gratitude and also anger. Not to have emotional development unreasonably blighted by fear and anxiety. Nussbaum points out that supporting this capability means supporting forms of human association that can be shown to be crucial for human development.

There follow other capabilities ranked lower on Nussbaum’s scale: *practical reason*, including liberty of conscience and of religious observance. *Affiliation*, including being able to live with and towards others and to show concern for other human beings, enjoying self-respect without humiliation, protected from discrimination on the basis of race, sex, sexual orientation, ethnicity, caste, religion, national origin and like causes. The final three capabilities concern for and relations with *other species*: animals, plants and the world of nature. Being able to laugh and play and enjoy recreational activities that bring *happiness*. And securing control, to a proper degree, over one’s *environment*, both political and material.

Considering this cascading collection of essential human capabilities set me thinking about the subjects of this book. The more that I thought about the impediments that have been cast in the way of the fulfilment of the capabilities of human beings, including those based on their sexual

orientation and gender identity, the more disquieted I became. How dare other people (generally based on their religious or ethical views which are not universal) stand in the way of the fulfilment of the essential capabilities required for a full human existence by others?

In primitive societies of ancient times, in Pharaonic Egypt or Ur of the Chaldees, it might have been impossible to question the worship of living humans, cats and other deities. But in the modern world of aeroplanes, the internet, the human genome, interplanetary travel, antibiotics and other miracles, most societies have reached a point that they recognise the limits of the proper imposition on other human beings of religious and moral beliefs that are not universally accepted. This is the origin of the modern separation of church and state. It offers the compromise by which individuals are generally protected, so that they can worship in whatever way they choose, but without being able, through state machinery, to unreasonably force their beliefs on the human capabilities of those who do not share their convictions.

There is a certain irony in the fact that it was probably notions of natural law, taught by some of the world's leading religions, that stimulated the growth of the idea that human beings have human rights - because of their capabilities (sometimes described as their inherent dignity, being 'created' in the 'image of God'). At the end of the Second World War, with the flashpoint of the atomic blasts; the discoveries of genocide and the Holocaust; and the establishment of the United Nations Organisation; and the winding up of global empires, the world turned to assert and define the universal human rights respected by civilised nations: rights taken as inherent in human existence. Truly, this development began a process that is still changing the world.

What commenced in biblical texts, in *Magna Carta*, in the French Revolution's declaration of "liberty, equality and fraternity", and in the American Declaration of Independence, with its assertion of "life, liberty and the pursuit of happiness", all began to take on a global character. After the *Universal Declaration of Human Rights* of 1948, ordinary people everywhere came to know of, and to assert and demand, their fundamental rights.

This book is effectively about one particular element in that struggle. It concerns of minorities defined by their sexual orientation or gender identity. In the introductory chapter, the authors embrace a five-stage process that has followed homosexuals and bisexuals from criminal prosecution to full legal equality, as citizens and as human beings. The process is not complete by any means. In some countries, it has not even begun. Yet the reforms already secured over the past six decades are nothing short of astonishing when the duration of the preceding oppression is remembered. When, at law school, in 1958, I was taught about the criminal penalties imposed throughout Australia on so-called "unnatural acts", I could not even in my wildest dreams have imagined the reforms that would be secured, in our laws and our thinking, in following fifty years.

One of the essays in this book takes as the starting point of the change the Stonewall riot of gay men in New York in 1969. Certainly, that was an important moment in the culture shift in North America and, indeed, the English-speaking world. But as Kees Waldijk has pointed out elsewhere, it was the decision of Napoleon's codifiers to delete the criminal provisions against homosexuals in the French *Penal Code* two

hundred years ago, that led to the removal of that source of legal oppression in most of the world's legal systems.

Also, preceding Stonewall, and laying the foundation for what followed, was original, empirical research on human sexuality in the early twentieth century, including by Dr. Alfred Kinsey in the United States in the 1940s and 1950s. This research helped to initiate a culture shift in Britain. It led to the Wolfenden Report of 1957 and legal reforms in England in 1967. We in Australia were heirs to the persuasive force of these developments. Rational people became increasingly uncomfortable with the demands of religious and other advocates who insisted on the maintenance of the old attitudes, buttressed by old laws.

But getting rid of the criminal penalties was only the beginning of the process of change. Ahead still lay many challenges: the provision of equality in matters of civic rights and non-discrimination; equality in pension and monetary entitlements; equality in access to dying friends and partners; equal respect for various domestic and personal relationships; and an equal entitlement to raise and nurture children. When demands for equal dignity in the recognition of domestic relationships grew into claims for legal protection of civil partnerships and civil unions, these were treated as a bridge too far by both the main political parties in Australia. As in the United States of America, the issue was presented as a "wedge" in a society told that it was not then ready for change. A law was enacted by our Federal Parliament to enshrine the principle that 'marriage' was confined to a relationship between a man and a woman. In some ways, even civil partnership and civil union were declared a threat to hetero-normative notions of 'marriage'. Legislation to permit such unions and partnerships in the

Australian Capital Territory was disallowed by successive federal governments.

As this book explains, the caravan is moving on. In many nations across Europe, civil partnerships and civil unions were enacted by law. In a remarkably short time, courts and legislatures in diverse countries were upholding, on equality grounds, the principle of equal access by all citizens to marriage itself. This change happened not only in advanced countries of Western Europe and Scandinavia. It came about in Canada and South Africa by court decisions. In Spain, Portugal and Argentina the change was achieved by enacted legislation.

Speaking in the Cortes in support of the law to make marriage available to same-sex couples, the Spanish Prime Minister, Jose Luis Rodriguez Zapatero, declared:

“We are not legislating ... for people far away and not known to us. We are enlarging the opportunities for happiness to our neighbours, our co-workers, our friends and our families. At the same time, we are making a more decent society, because a decent society is one that does not humiliate its members.

Today, Spanish society answers to a group of people who, during many years, have been humiliated, whose rights have been ignored, whose dignity has been offended, their identity denied and their liberty oppressed. Today, Spanish society grants them the respect they deserve, recognises their rights, restores their dignity, affirms their identity and restores their liberty.

It is true that they are only a minority. But their triumph is everyone's triumph. It is also the triumph of those who oppose this law, even though they do not know this yet, because it is the triumph of liberty. ... This law enhances and respects marriage. ... Today we can offer [our children] a beautiful lesson: every right gained, each access to liberty has been the result of the struggle and sacrifice of many people that deserve our recognition and

praise. ... Societies can better themselves and can cross barriers and create tolerance by putting a stop to the unhappiness and humiliation of some of its citizens. Today, for many of our countrymen, comes the day predicted by [the Greek gay poet] Kavakis one century ago: 'Later 'twas said of the most perfect society/Someone else made like me/Certainly will come out and act freely'".

Will we in Australia live to hear a head of government make such a speech? Even a decade ago it would have seemed a fantasy. Yet as this book demonstrates, history is moving, and moving quickly.

This book is not only about adult human relationships, their recognition, dignity and equality. It is also about children. And in that case, there are other separate lives whose interests need to be considered. Even some who accept the legal recognition of adult relationships seek to draw a line and dispute the rights of same-sex couples to access to reproductive technology; to surrogacy; to foster care of children and to adoption of children.

On the day that I received the manuscript for this book, a comment was published in *The Australian* newspaper (5 January 2011, 12), critical of the highly publicised surrogate birth of Zachary, son of Sir Elton John and his long-time partner, David Furnish. The Government Whip in the Legislative Council of New South Wales (the Hon. Greg Donnelly) invoked the opinion of Professor Margaret Somerville, of McGill University, that children's human rights extend to knowing their natural biological origins. Genetic manipulation, it was declared, 'interferes with the intrinsic being of a person, with their very self'. Professor Somerville's research is cited as 'showing men and women parent differently. There is emerging evidence that certain genes in young

mammals are activated by parental behaviour, for example in epigenetics, which studies the interaction of genes and environment. ... Complementarity in parenting does matter for children's wellbeing in ways we have not understood'.

The essays in this book respond to these and other concerns that have been voiced in opposition to the raising of children in same-sex families. They record early judicial decisions which gave weight to perceived prejudice in society and amongst other children. They hint at the often unstated concern over the revivale of the incest taboo; the desirability of diverse role models; and the fear of parents who have an activist agenda, unusual to the lives of children.

The repeated research into the wellbeing of children such as Zachary appears to deny any disadvantage. Yet views, such as those expressed by Mr. Donnelly, necessarily influence the legislation enacted by Australian parliaments. 'Commercial surrogacy' is outlawed. The practice of citizens residing in Australia going overseas to enter into commercial surrogate arrangements to secure a child, is prohibited. This book seeks to afford the reader the most up-to-date empirical evidence of these types. It also points out that the law, sometimes, reflects outdated stereotypes and prejudices. It is when these begin to shift that larger changes become achievable.

In short, this book tracks a fast-moving field of law and social policy. It has not been a topic on which Australia has been a leader in law reform. If we want to know the probable contours of our law in the future, we must therefore look beyond our shores. Most of the chapters of this book do just that. They provide appropriate instruction. But the lingering

question is why Australia has been so slow to embrace reform? And why the political dynamics have fallen so far behind the repeated polls showing shifts in popular opinion? If reflections on these questions suggest a serious imperfection in Australian institutional arrangements for legal reform, action to repair that defect has an importance that transcends even the significant subject matters of this timely and well written book.

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