GAY BUSINESS ASSOCIATION OF NEW SOUTH WALES

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Chairman of the Australian Law Reform Commission

OF MOSES AND REFORM

A few weeks ago in the Bulletin, a cartoon depicted Moses coming down from the Mountain, carrying carrying the Tablets. Looking at the uncertain people gathered before him, Moses was reported as saying he brought both good news and bad news:

* The good news is that I got Him down to Ten
* The bad news is that adultery stays.

I read this cartoon with a wry smile. The fact is that our modern day Moseses: the wise legislators of the Australian Parliaments, enact every year more than a thousand statutes. Each of these contains numerous clauses, many with detailed obligations. In addition, there are countless by-laws, ordinances and statutory rules. We live in a much regulated society. Our Parliaments are busy and they bring down many laws from the modern Mountain.

Adapting the Bulletin jest, one might say that despite this proliferation of lawmaking, 'homosexuality stays' - or at least it stays as part of the legal proscription, in different ways in different parts of Australia. The law's endeavour to regulate people's sexual orientation, in the name of upholding perceptions of morality held by some members of society, stays, at least in New South Wales. The attempt in the New South Wales Parliament to tackle the issue of reform of the law in this area failed in 1982. As if by an effort to compensate for the failure to repeal criminal laws penalising homosexual conduct, certain amendments to the Anti Discrimination Act of New South Wales were passed. These seek to forbid, in some circumstances at least, discrimination against people on the grounds of sexual preference.

The result of this mixture of success and failure in homosexual law reform is, to say the very least, odd:

* It is a criminal offence for a male person to perform certain homosexual acts.
* Yet it is not and never has been an offence for a female person to perform homosexual acts.
* A person can be sent to prison and be criminally stigmatised for pursuing his sexual orientation.
* Yet despite this enunciation in the criminal law, other persons, including most employers may not discriminate on the grounds of a person's sexual preference.
* Because of reform of rape laws, it is in some cases more serious to perform consensual indecent acts with a male person than it is to perform an act of rape itself.

Putting it quite bluntly, the law on this subject has now got itself into a mess. Any thoughtful observer must admit that this is the case. The question is whether there is a modern legislative Moses who will lead the State to the promised land of coherent and acceptable homosexual law reform.

I agreed to give this talk long before it was known that a Federal Election would be held later this week. You will understand that as a judicial officer I must tread warily because of the circumstance of the Election, not least because of a reported statement threatening homosexual voter retaliation unless the New South Wales Government promises reform of New South Wales criminal laws penalising homosexual conduct.

The recent, repeated raids by police on a gay club in Sydney have highlighted the difficulty of leaving the law in its present state. It will be no surprise to you that there are many thoughtful people including people of strong religious persuasion, who say that their fear of decriminalising homosexual conduct is that it will remove the moral, social and cultural sanctions that prevent vulnerable youth from experimenting with homosexual conduct and becoming confirmed homosexuals. Such opponents of reform frequently deny any desire to stigmatise or punish confirmed adult homosexuals for their orientation. They simply want to keep the criminal law 'in place' (a fashionable expression just now) in order to discourage young people from what they may regard as a hard and unfulfilling life. Quite often they point to the well established existence, at least in metropolitan areas, of gay venues for adults who choose to frequent them.

The repeated raids on one of these venues in Sydney in the past month have been justified by police. In today's edition of the Sydney Morning Herald, a police officer is reported as complaining that the police are in a 'no win' situation. When they receive a complaint, if they act, they face protests from homosexuals and their supporters. If they fail to act, they receive complaints that they are not faithfully upholding the law of the land.

In the Bill of Rights of 1688, it was promised that the laws would not be unequally applied but would be equally applied to all affected by them. The difficulty of leaving laws unreformed, and just doing nothing, is that the legal system is then left in an ambivalent state. If the laws are enforced, where social attitudes have moved on, people will resist the enforcement of the law and regard as unjust the efforts of the authorities. If the law is partly enforced, people who are prosecuted will rightly regard themselves as the unfair, chance victims of a differential implementation of the law, contrary to the Bill of Rights. If the law is not enforced at all, those who seek to uphold the rule of law will object. Furthermore, in the difference between the letter of the law and its enforcement, there will be plenty of room for corruption of officials, disrespect for the law generally, opportunities for blackmail and oppression and the idiosyncratic, arbitrary operation of legal process.

IMPEDIMENTS TO LAW REFORM

I cannot, as a Federal officer, examine the reasons why the efforts to reform the criminal laws against homosexual conduct did not succeed in New South Wales. But I have been in a position, in the Federal sphere, to observe the process of law reform in the past eight years. It may be helpful to list a few of the factors that tend, generally, to stand in the way of reform. In the Federal sphere, there are seven main impediments, the seven deadly sins:

* First, the inappropriateness of some constitutional provisions. The fact is that we continue today to get by with a constitution drawn in the last decade of the 19th Century. It fails to address many of today's most urgent problems at all (as in the case of regulation of problems arising from computer technology, bioethics or nuclear fission) or is fails to deal with the problem adequately (as in the case of industrial relations laws). Unlike the Canadian federation, where the criminal law was assigned to the Federal Parliament, in Australia this basic area of the law has been left to be the responsibility of State Parliaments. This has resulted in significant differences in the criminal law, despite the general homogeneity of the social and moral attitudes of the people of Australia.

* Secondly, most law reform organisations - whether they are official law reform agencies like the Australian Law Reform Commission or voluntary citizens groups - are inadequately funded. They must work with small resources and small manpower. In the case of bodies such as the Australian Law Reform Commission they are limited to working on projects specifically assigned to them by the Attorney-General. Sometimes (though not always) the Attorney-General may wish to avoid precisely the controversies that are the greatest cause of injustice in the community because he perceives that 'there are no votes' in them.

* Thirdly, there is the limitation imposed in the preparation of reform proposals by the need to consult widely and to consider the divergent opinions that exist in a multicultural society such as Australia's. Achieving change is much easier in an authoritarian society than in a democratic one, where politicians must be responsive to strongly held social attitudes. The benefits of democracy I need not identify. With the benefits go the disadvantage that minority groups, with loud voices, can sometimes enjoy disproportionate power and influence over the law reform process.

* Fourthly, there is, in Australia, no institutional system to ensure prompt and regular parliamentary attention to law reform proposals - whether they are made in official law reform reports, Royal Commission recommendations or citizen complaints and Private Members' Bills. In the modern Parliament, the legislature is very much in the control of the Cabinet and the Government of the day. Whilst this makes for orderly legislation, it diminishes the effectiveness of a legislature as a law reforming body. Law reforms, generally, are only achieved where there is corporate determination in favour of them by the Government that sits in the Treasury Benches.

* Fifthly, there is the tardy process of bureaucratic committees to which proposals for reform are frequently assigned. Reformers, even when they exist in the Parliament or the Ministry must usually wait for the filtering process of the Public Service to consider reform proposals and how they would affect Government administration. It is in response to this growing power of the permanent bureaucracy that important changes have been introduced in the law both at a Federal and State level in Australia. These changes have been designed to open up the processes of the administration. The influence of backroom administrators over the course of law reform in Australia cannot be over-emphasised. Anyone having doubts should take the short course in civics provided by the A.B.C. program 'Yes, Minister'. Australian administrators have learned from experts at Westminster. And in Australia the Federal system is usually a further reason for delay and inaction.

* Sixthly, there is very little systematic scrutiny of reformed laws once they have been passed. There is very little endeavour to ensure that they achieve the objectives of the reformers. The interaction between the criminal laws penalising and stigmatizing homosexual acts and the anti-discrimination law prohibiting discrimination against homosexuals has not been examined. Other major reforms which have achieved changes in personal relationships, such as the Family Law Act are frequently passed without any really clear idea of all of the implications for society, once the new laws are in force.

* Finally, there is the impediment of cost. Very little cost/benefit analysis has been done on proposals for law reform in Australia. Yet, justice does have a price. Changes in the law will normally have cost implications. In hard times, this provides a further impediment to law reform. In the area of reform of criminal laws against homosexuals, it can be assumed that there would be little if any short term cost implications of removing criminal laws and equating them to the laws against non-consensual criminal conduct governing heterosexuals. Indeed, the diversion of police from vice squad activity involving the investigation, arrest and prosecution of consensual homosexual conduct to the investigation, arrest and prosecution of non-consensual criminal activity would be seen by many as a better use of the scarce resources of law enforcement officers.

Because the general criminal law in Australia has not been assigned to the Commonwealth Parliament, the Federal responsibility for homosexual law reform, outside the Territories, is limited. The general issue has not been referred to the Australian Law Reform Commission for examination and report. Therefore any views I may have on the subject are those of a citizen only. However, in the course of one enquiry into reform of evidence law, one aspect of the law affecting homosexuals has been raised for consideration. It is an issue upon which differences of view have been expressed within the Law Reform Commission. I want to close with a short reference to this controversy.

EVIDENCE LAW REFORM: SPOUSAL IMMUNITY

It may seem an unlikely subject for homosexual reform: the Australian Law Reform Commission's enquiry into reform of evidence law. The relevant evidence law is the law that governs the reception and presentation of testimony in Federal and Territory courts throughout Australia. The Commission is in the midst of a major enquiry into this subject. In the course of the enquiry, one feature that has to be studied is the competence and compellability of witnesses, i.e. the extent to which the Crown in a criminal prosecution can insist upon calling as witnesses persons who have a close relationship with the accused.

This is not the time to go into the rule in detail. But generally speaking, at common law, the law ful spouse of an accused is not competent or compellable to give evidence against him or her. There were exceptions. And in Australia, various statutory reforms have been effected, particularly in Victoria.

A research paper prepared by the Australian Law Reform Commission proposes that the rule protecting spouses should be extended to protect parents and children and de facto spouses of the accused person. However, the same research paper (ALRC Evidence RP5 Competence and Compellability of Witnesses 1982) contains an alternative approach, advanced by me. This approach criticises the extension of historical spousal immunity, to the particular classes of parents, children and de facto spouses as 'too narrow and inflexible'. It suggests that once it is decided to venture beyond the historical exception of the lawful spouse, the extended class must be determined by reference to principle and not simply by adding a few categories of additional exception.

> 'When it is decided to extend relief against compellability beyond spouses to de facto spouses and parents and children, it is necessary to determine and define the new genus to be created. It might be suggested that the genus is the nuclear family. However, the recommendation...does not embrace the whole of that family; nor does it take into account the variety of personal relationships which may constitute the "family" of particular persons in Australian society today. An aunt or a step parent or even a very close friend and guardian may be the "family" for the particular accused.'

An additional reason given by me for objecting to extending the category of exemption solely to parents, children and de facto spouses was that it was discriminatory It was discriminatory against relationships akin to 'marriage' both between Aboriginals and in stable homosexual relationships. Many heterosexual Aboriginal relationships are not legal 'marriages' nor would they would fall within 'de facto' definitions. Furthermore, the category approach (spouse, parent, child or de facto) would exclude stable homosexual relationships where the burden of having to give evidence in court against a loved one - could be just as painful as for a family member or a partner to a de facto heterosexual marriage.

The solution that was proposed was by me to permit the court to have regard in every case to:

* the nature of the relationship between the parties; and
* the likely effect whether emotional, social or economic that having to give evidence against a party would have to the relationship.

Giving due weight to these factors against the interest of the community in obtaining evidence would be the duty of the court in the particular circumstances of the case.

Although this proposal advanced by me would lead to an element of uncertainty as to whether the evidence of this or that person in a particular relationship of blood or affection with the accused could be summoned, it would more clearly recognise, as it seems to me, the competing issue that is at stake in any extension of spousal immunity to other close personal relationships beyond the heterosexual marriage.

In short, if we stick to the historical exemption of spouses in heterosexual marriages, we can rely on the fact that this is an historical anomoly; to be preserved simply because it has been the law for many centuries and because of the central position in society of the heterosexual marriage. But once law reformers go beyond history and seek, by the light of principle, to propose reforms, they must find a coherent and lasting principle. Reform, if it to be worthy of that name, must avoid band-aid temporary expedients. Otherwise reform gets itself into the muddle that we now see in New South Wales with conflicting principles being asserted by the criminal and anti-discrimination laws.

TOWARDS PURER LAWS?

I realise that in the aftermath of the failure of the New South Wales criminal reform legislation and the more recent raids on a gay establishment in Sydney, the concern about harrassment, the taking of names and criminal prosecutions against individuals, these issues may seem remote from your immediate areas of attention. But I mention the work of the Australian Law Reform Commission on evidence law reform to show how reform of laws affecting the sexual orientation of citizens permeates many unlikely corners of legal regulation. Although on the subject of the immunity of people in a stable homosexual relationship has not yet been agreed to by the Australian Law Reform Commission - and indeed may not be agreed to by the majority when the final proposal is made - I can assure you that the issue will be thoroughly ventilated. The Commission has sought the opinions of gay activist groups - as well as the views of those who are opposed to homosexual law reform.

Law reform in Australia is not achieved by wishful thinking. It is the product of much effort and a great deal of political and public persuasion. Law reform bodies in Australia have not been involved in the central question of homosexual law reform. But I can assure you that the Australian Law Reform Commission is alert to this issue of reform. Within the matters specifically referred to it by the Federal Attorney-General, it will listen most closely to those who urge the cause of reform.

In difficult times, facing natural and man-made disasters, the law reformer today can take as his text Lord Tennyson's poem In Memoriam. It is often quoted at the turn of the year or at other times of significant change. In invoking the wild bells to ring out to the wild sky, to ring out the old and ring in the new, Tennyson calls on them:

'Ring out a slowly dying cause,
And ancient forms of party strife;
Ring in the nobler modes of life;
With sweeter manners purer laws.'