MONASH UNIVERSITY

THE CENTRE FOR REPRODUCTIVE BIOLOGY

ROBERT BLACKWOOD HALL, 30 MARCH 1988

INAUGURAL OCCASIONAL ADDRESS

"SCIENCE, SEX AND SOCIETY"

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The Hon Justice Michael Kirby CMG*

THE EXPENSE OF SPIRIT

"The expense of spirit in a waste of shame
Is lust in action; and till action, lust
Is perjur'd, murderous, bloody, full of blame,
Savage, extreme, rude, cruel, not to trust;
Enjoy'd no sooner, but despised straight;
Past reason hunted; and no sooner had,
Past reason hated, as a swallow'd bait,
On purpose laid to make the taker mad:
Mad in pursuit, and in possession so;
Had, having, and in quest to have, extreme;
A bliss in proof, - and prov'd, a very woe;
Before, a joy propos'd; behind, a dream."

Human sexuality is an endlessly fascinating topic. It permeates private conversation and much personal reverie. The sex instinct has been described as "one of the three or four prime movers of all that we do and are and dream"[1]. Many

poets and other writers, in different ways, have described sexuality as the means by which ordinary people can be lifted to demi-gods. Thus Charles Baudelaire declared that "sexuality is the lyricism of the masses". More down to earth, David Cort described it as "the great amateur art": declaring that "the professional, male or female, is frowned upon" as he or she "misses the whole point and spoils the show".

So persistent is the need, and urgent the desire of its fulfilment, that it should not surprise us that misfortune can attend some of the manifestations of sexuality. Sadly, it is in the courts that the most brutal, unfortunate and violent appearances of human sexuality are frequently recounted - murder out of jealousy; rape or its modern equivalents[2]; sexual harassment and stereotyping based on gender, to name but a few. And when things depart from the norm of sexual relations between a married heterosexual couple (providing fulfilment of themselves in their relationship and the delivery of children, the result has been to give a great deal of work to the legal and medical professions - and to scientists.

Some of that work has been ill-directed; and some positively misguided, as I shall attempt to show. Lately, with significant developments in reproductive biology, a whole range of important new challenges has been presented to society. Dilemmas are raised which have to be resolved. The attendant controversies are not always easily resolved. This is so because our starting points on the road to the solutions depend very much upon our own experiences - personal and

professional. One of the problems of increasing importance is the demonstrated inadequacy of our political and lawmaking institutions to cope satisfactorily with the social and legal problems presented by reproductive biology. Perhaps out of recognition of this fact, the Federal Government announced earlier this month the establishment of a new broadly based National Committee on Bio-ethics. Its task will be to advise State and Federal governments in Australia with a single voice on issues such as surrogacy, in vitro-fertilisation (IVF), genetic engineering and euthanasia[3]. Included in the announced remit of the committee is the consideration of the question of government spending on costly medical procedures, of which IVF is a notable case. Recent articles have suggested that women undergoing an IVF treatment cycle have only a 7.9% chance of having a healthy baby[4]. Upon this basis, the morality of large expenditures on a still experimental and imperfect procedure have been questioned. The question has been especially raised because of the alternative, heavy demands upon the medical budget, not least from the growing demands for the patients with human immuno deficiency virus[5].

I deliberately chose for this lecture a topic as broad as it was provocative. It is an old advocate's technique to keep all options open in an address such as this. Then it is possible, when the evil day arrives and the writing of the essay can be postponed no longer, to concentrate attention on items of current topicality, dismissing the rest with words of

condescending generality or with a plea addressed to the clock. But even if I were to confine my remarks to the subjects of reproductive biology, leaving aside the many other topics raised by the advertised theme, there would be enough to fill a course of lectures. The patience, even of a long suffering Melbourne audience, renowned for its endurance, might be tested too sorely were I to extend beyond midnight.

In recent weeks the popular press and learned journals have been full of items, any one of which would deserve reflective consideration, both for their scientific potentiality and for their implications for society. For example, it was recently announced, in the one news report, that Chinese scientists had produced an oral medicine with a 96.4% success rate in curing impotency and a male contraceptive injection which is 99% effective in obstructing the path of sperm[6]. The readers of the "Peoples' Daily" were told that the latter treatment would cost $A4.00 and would, in a stroke, solve the world's birth control problem.

From Britain came the report that a prisoner was convicted of rape following the matching of a blood sample taken from him with semen found on the victim's clothes. Fragments of DNA, unique to the individual, were compared and accepted as identical[7]. What a potential forsensic weapon is there. At the same time came reports from both England and the United States of new techniques for the removal of embryos at a very early stage for the purpose of analysis for genetic defects[8]. The discovery of the utility of transplanting

foetal material into the brain of subjects of Parkinson's disease has lead to reactions strongly critical of this form of medical experimentation. Anti-abortion groups are fearful of the development of a market for the sale of such body tissue[9]. The Roman Catholic Archbishop of Melbourne has criticised experiments on early human embryos as an "attack on the primal elements of our humanness"[10]. The same views were reflected in a letter addressed by the Anglican Archbishop of Melbourne to all members of the Legislative Assembly of Victoria, saying that the Church was "strongly opposed to any form of live human embryo experiment for any purpose"[11]. Meanwhile, supporters of the experiments urged that they provide a "window for the use of [a procedure] in treating other neurological disorders, such as Alzheimer's disease and epilepsy"[12].

At about the time that these experiments were proceeding in the United States, a judge in England held that a foetus of 18 weeks was incapable of maintaining an action in the courts, through the father as next friend, to seek an injunction against the mother to prevent the termination of her pregnancy[13]. And in Canada, the Supreme Court in a recent five to two decision, struck down as unconstitutional the Canadian federal criminal statute, so far as it prohibited abortion except when a woman's life or health was endangered. Chief Justice Dickson said that, in this respect, the Canadian Criminal Code had clearly interfered with "a woman's physical and bodily integrity" and infringed rights guaranteed to her

under the Canadian Charter of Rights and Freedoms[14]. The difficulty of fixing a time which is not unpersuasively arbitrary (other than the instant of conception or of birth) to which the law will attach consequences and provide its protection to an embryo or foetus is one which has agitated judges, academic writers and moral philosophers, and not just recently[15].

But this is not all. Both in England[16] and Australia[17] various interest groups have begun to criticise the procedure of super ovulation which has been used as an adjunct to IVF. It is now being claimed that there is a significantly higher incidence of genetic defects in children born as a result of IVF than in the average population. Thus, in the 1700 live IVF births in Australia and New Zealand between 1979 and 1986 there was five times the incidence of spina bifida and 6.7 times the rate of major heart defects. These figures have added fuel to the arguments of the critics of IVF. The potential of IVF to present novel legal problems was illustrated most vividly by the decision of the Victorian Minister for Health to permit the embryos produced by Mrs Mario Rios, a wealthy Argentinian woman living in the United States who had been admitted to the Melbourne IVF program. Mr and Mrs Rios were killed in a plane crash. After their death, the embryos no longer able to be used by Mrs Rios had been held in frozen storage in Melbourne pending a decision on what to do. Following advice from the United States that the embryos could not be considered "heirs" to the extensive Rios estate (which

had in any case been disbursed to Mrs Rios' mother), the Minister agreed to their use in an infertile married woman. The chances of survival through the thawing process, implantation and development was estimated at "not more than 1%". But, if it were to succeed it is open to question that the genetic child of Mrs Rios would not feel entitled to be treated as an heir to the mother's personality and fortune. It is a tragic footnote to this story that Mr and Mrs Rios were killed in a light plane crash on a mission to adopt a baby. Such was their determination to secure a child.

These developments have proved a gold mine for medical, legal and philosophical speculation. But now Parliaments - representing community interests - are beginning to flex their legislative muscles. In November 1987 it was announced in Britain that laws would be introduced to control various aspects of experiments involving human biology. These would make it a criminal offence to "create" human beings "artificially" in laboratories, to assemble hybrids between animals and people or to clone human beings. Artificial insemination will also be strictly controlled. The storage of embryos will need to be licensed by a statutory authority. Licenses will be limited to storing embryos for no more than five years. Ova and sperm, on the other hand, may be stored for up to 10 years.

In Queensland, as recently as last week, it was announced that the law of that State would be altered to ban surrogate parenting by attaching penal sanctions to surrogacy

negotiations, services and advertising. The Minister for Family Services was reported as saying "we feel very strongly that babies shouldn't be for sale and that's the whole purpose of the legislation". Penalties of a $5,000 fine and/or three years imprisonment were proposed to deter people from making such contracts.

The increasing interest of politicians and bureaucrats in the regulation of aspects of artificial conception has now resulted in strongly expressed opinions from those who contest the proposition of the groups in the community who believe that an embryo and a foetus are "human beings in potential" and therefore entitled to the full panoply of the law's protection. It seems tolerably clear that this view of the moral status of the embryo is not held by the great majority of the people of Australia. For instance, a recent opinion poll showed the continuance of the shift in Australian community opinion about abortion. A poll conducted in March 1971 had found that the Australian community was at that time significantly split on the issue. Thirty eight percent regarded abortions as "wrong and dangerous" in any circumstances. Forty percent considered that they were sometimes "right or harmless". Since that poll there has been a growing drift of opinion such that a poll conducted at the end of 1987 produced the following results:-

To the question "do you approve of abortion?" the aggregate answers given were:-

Yes	19%
In some circumstances	66%
No	14%
Don't know	2%

To the question "do you approve of abortion if the child is seriously deformed?", 82% said yes, 9% said no and 9% did no know.

A similar response was given to the question about approval if the mother had been raped.

But to the question "do people have a right to abort if unhappy with the sex of a child?" 7% said yes, 89% said no and only 4% were undecided.[20]

Although this series of recent polls reveals a core of about 7 or 8% who would not approve of abortion in any circumstances, it also shows that the great majority of Australians are perfectly willing to contemplate abortion sometimes and, by inference, therefore do not hold the view that a foetus - still less the early embryo - is entitled to the full protections which the law would accord to human beings, including the protection against deliberate killing.

Opinion polls on approval for IVF procedures reflect similar shifts in public opinion. They show the transiency of Australian public opinion on moral questions of this kind - providing a flimsy rock on which to ground prohibiting

legislation which would appear to command no clear community support.

More fundamentally, questions are now being asked concerning the role of legislators in dealing with the issues of artificial conception. Associate Professor John Funder has taken to the conference podium and even the airwaves to castigate lawyers and legislators for entering the field of IVF[21]. He thinks the subject should be left to self regulation by the scientists. So far as he is concerned, IVF should be "untrammelled by the law". He suggests that this is so because young people should be entitled to opt for an IVF child, just as they can for a boat or a new car. The defect in this consumerist argument is that great public costs go behind supporting the IVF program. This fact gives the community a legitimate interest in IVF, if only on economic grounds.

Secondly, Dr Funder argues that there is no difference in principle between in vitro and in vivo conception. However, there are significant differences for the purposes of law. Once procreation is separated from ordinary sexual intercourse, a multitude of issues are presented which simply have to be solved. They include what is to be done to the unused embryo conceived in vitro (such as those of Mrs Rios)? May the spare embryos be used for experiments? If so, for how long may they be kept and so used? Is there to be (as Queensland now proposes) a limit on surrogacy arrangements? If not, may costs be charged for donations and for surrogacy expenses? Does it offend principle to contemplate the commercialisation of such important human activities?

The problem for Dr Funder and others of his opinion is that the law is already in there. It already has relevant rules which may be extended by analagous reasoning to deal with the consequences of IVF. In the common law system there is ultimately no vacuum. If necessary, the judge will derive relevant laws by reasoning from judicial precedents in earlier quite different situations.

One can readily sympathise with Dr Funder's objection that those who shape the applicable legislation should be as knowledegable as the scientists and technologists - and as sensitive to the predicament of the people whom the scientists and technologists are seeking to help. But the appeal for lawyers and legislators to pack up their bags and go away is likely to fall on deaf ears. The community has opinions about the subjects of bio-ethics. Those opinions may at present be ill formed and even ill informed. They are constantly shifting, as the change in opinion about abortion reveals. It is obviously desirable that before laws are made by Parliament or by judges, the decision makers should have the best possible information and arguments with which to inform their choice of law. But that this is a legitimate territory for the law's operation is really beyond doubt. The question is not whether law is needed and whether it will come. It is whether, in the design of our laws, we ensure that they are not knee jerk reactions, grounded in ignorance, unaware of relevant scientific knowledge and indifferent to personal utility

resting on nothing more than prejudice or moral notions developed in quite different times. Or whether, by appropriate institutional arrangements of law reform we can do better? You will not need to guess my preference. I hope that the new National Committee will give a well informed lead on these subjects. It should form a legal and legislative subcommittee. It should use the techniques of public and expert consultation developed by the Law Reform Commission, in the advice it gives Governments and Parliaments on these questions.

HOMSEXUALITY

It is impossible to leave the topic of science, law and society at the present time without a reference to the position of homosexuality. It is not relevant, as such, to reproductive technology at least at present. But it is a question made freshly relevant for the Australian community by the advent of the AIDS epidemic (most of those affected being male homosexuals or bisexuals) and by recent news reports from Queensland.

In last Saturday's Sydney Morning Herald there was a report suggesting that, in reaction to the commission of enquiry into alleged police corruption by Mr Fitzgerald QC, police in Brisbane had prosecuted a concerted attack on homosexual men in that city[22]. It was reported that approximately $1 million would be spent prosecuting up to 70 men in what was described as an "unprecedented crackdown on Queensland's homosexuals and bisexuals". Most of the men were

reportedly arrested by police in plain clothes patrolling public toilets and parks. Many are reported to be fathers and husbands. Few had previous convictions. The descriptions of the apparent entrapment of men by young plain clothes policemen who ask them if they were "looking for company" may strike the reader, if true, as reminiscent of earlier times in other places. The record of alleged violence, indignities and so called "poofter bashing" is, if true, as serious an example of police wrong-doing and oppression as the taking of bribes. And it has its source in the same basic problem: the overreach of the criminal law and its intrusion into areas where there are usually no complaining victims. Such overreach of the law seeds a ready ground for oppression, blackmail, corruption, organised crime and human misery.

Perhaps the most disturbing of the cases reported is that of two persons who were charged with allegedly committing sodomy and indecent acts upon each other, although the acts referred to were said to have been committed in the privacy of their own home. They have each been charged under section 208 of the Queensland Criminal Code. They are liable, if convicted, to be jailed for 14 years. It is said that this is the first time in 35 years that persons have been prosecuted in Queensland for such sexual activities committed by adults in private. But what must be realised is that whilst the law on this subject remains unreformed, its occasional use merely demonstrates the unsatisfactory state of the law. Rarity of prosecution cannot be used of itself to justify the law's

continuance. Such laws set the standard of liberty in society. They symbolise the perceived role of the state in respect of private behaviour. They lie in wait for random, unexpected use. They reinforce prejudice based on community stereotypes.

I do not, of course, comment on whether the accused are guilty. That is a question which will be determined, according to law, by Queensland courts. But whether in a community such as Australia in 1988 such a law should be accepted poses starkly a question legitimately asked by all thinking and civilised people in our country. This is: what is the role of the law in the enforcement of perceptions of morality in respect of private sexual behaviour between consenting adults?

Such questions have lately been before the courts of the United States and other countries and international organisations. In 1986, the Supreme Court of the United States, by a majority of 5 to 4 decided that the due process clause of the 14th Amendment to the United States Constitution did not confer on homosexual adults in that country any fundamental right to engage in consensual sodomy even in the privacy of home[23]. A Georgia statute made it a criminal offence, punishable by up to 20 years imprisonment, to commit sodomy. A person was charged with violating the statute by committing the act with a consenting male adult in the bedroom of his home. The District Attorney decided not to prosecute. But the accused brought a suit in the Federal District Court challenging the constitutionality of the statute insofar as it

criminalised consensual adult sodomy. The District Court dismissed the suit.

The Eleventh Circuit of the United States Court of Appeals reversed and remanded the case for trial, holding that the Georgia statute violated the accused's fundamental right to privacy. The Supreme Court of the United States granted review. It in turn, by majority, reversed the judgment of the Court of Appeals. The majority judgment was written by Justice White[24]. He was of the opinion that the claim failed because of the limited role of the courts and the limited protection offered by the Constitution against such statutes. The then Chief Justice Burger joined in the opinion. So did the previous Chief Justice Rehnquist and the one woman member of the Court, Justice Sandra Day O'Connor. But in a separate judgment Justice Burger stressed his view that there was "no such thing as a fundamental right to commit homosexual sodomy"[25]. He pointed out that homosexual sodomy was a capital crime under Roman law and had been denounced by Blackstone as an offence of "deeper malignity than rape" and an act "the very mention of which is a disgrace to human nature" and "a crime not fit to be named". It was from this Roman and English view of the offence that it came into the law of Georgia.

The leading dissenting opinion was written by Justice Blackmun. He began with a quote from Justice Oliver Wendell Holmes:-

> "It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since and the rule simply persists from blind imitation of the past".[26]

The minority affirmed the view that there were certain private spheres of individual liberty which were, in the United States, "kept largely beyond the reach of government"[27]. Referring to sexual activity, the minority said:-

> "Only the most wilful blindness could obscure the fact that sexual intimacy is 'a sensitive, key relationship of human existence, central to family life, community welfare and the development of human personality'...The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many 'right ways' of conducting those relationships and that much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds."

Stressing that the behaviour for which the accused, Mr Hardwick, faced prosecution occurred in his own home, the minority could find no justification for the statute from the fact that "traditional Judeo/Christian values proscribed" the conduct involved. They considered that this was simply irrelevant to the proper limit of the coercive power of a secular and diverse state[28].

Justice Stevens pointed to the inequality of the treatment of sodomy amongst heterosexuals and homosexuals, each being equally proscribed by religious texts but not by the prosecution practice of the majority's opinion[29].

> "From the standpoint of the individual, the homosexual and heterosexual have the same interest in deciding how he will live his own life, and, more narrowly, how he will conduct himself in his personal and voluntary associations with his companions. State intrusion into the private conduct of either is equally burdensome[30]."

The Georgia case has now been considered, more recently, in another case in the United States concerning the law discriminating against homosexuals as such. The case concerns Sergeant Perry Watkins of the United States Army. On his enlistment into the Army at the age of 19 in 1967, Sgt Watkins candidly marked "yes" in response to a question whether he had homosexual tendencies. He nevertheless served with distinction in the Army and, according to his commanding officer became "one of our most respected and trusted soldiers". Following a new regulation promulgated in 1981 requiring the disqualification of all homosexuals from the United States Army, without regard to the length or quality of their military service, Sgt Watkins was discharged and denied reenlistment. This was not done on the ground of any conduct (for none was proved) but simply because he had admitted to homosexual tendencies. He appealed to the United States District Court on the ground that the Army regulation was unconstitutional. The Army relied upon the decision of the Supreme Court of the United States in the case of the Georgia statute. A majority of the United States Court of Appeals for the Ninth Circuit held, on appeal, on 10 February 1988 that the Army regulation was unconstitutional, being in violation of the requirement of the Fifth Amendment of the United States Constitution which guarantees equal protection of the laws to persons subject to the laws of the United States.

One judge (Justice Reinhardt) dissented. However, he did so only because he felt bound by what had been said in the Georgia case to uphold the validity of the Army regulation or, more precisely, not to deny its validity. However, Justice Reinhardt made his personal opinion clear:-

> "I must add that as I understand our Constitution, a State simply has no business treating any group of persons as the State of Georgia or other states with sodomy statutes treat homosexuals. In my opinion invidious discrimination against a group of persons with immutable characteristics can never be justified on the ground of society's moral disapproval. No lesson regarding the meaning of our Constitution could be more important for us as a nation to learn. I believe that the Supreme Court egregiously misinterpreted the Constitution in Hardwick. In my view Hardwick improperly condones official bias and prejudice against homosexuals, and authorises the criminalisation of conduct that is an essential part of the intimate sexual life of our many homosexual citizens, a group that has historically been the victim of unfair and irrational treatment. I believe that history will view Hardwick, as much as it views Plessy v Ferguson [a case of discrimination against blacks on public transport in 1896]. And I am confident that in the long run, Hardwick, like Plessy will be overruled by a wiser and more enlightened court. The decision in Hardwick has not affected my firm belief that the Constitution, properly interpreted, does afford homosexuals the same protections it affords other groups that are historic victims of invidious discrimination. Nevertheless, for the reasons I have already stated, it is my obligation to follow Hardwick as long as it has precedential force... and for now it does."[31]

The majority in the Court of Appeals (Justices Norris and Cansby) held to the contrary. Dismissing various other grounds of constitutional challenge, they declined to apply the Georgia case, holding that it was confined (and should be strictly confined) to cases of actual conduct - as distinct from tendency or feelings. They pointed to many decisions of the United States Supreme Court which applied the guarantee of equal protection to classes or people with "immutable traits".

They acknowledged that a small minority of homosexual people may be "cured" by psychotherapy, electroconvulsive therapy, radical neurosurgery, drug administration and the like. But they determined that homosexuality was sufficiently "immutable" to attract the protection of the Constitution just as it did for other immutable traits such as race, national origin, illegitimacy and gender:-

> "The [Supreme] Court has never meant strict immutability in the sense that members of the class must be physically unable to change or mask the trait defining their class. People can have operations to change their sex. Aliens can ordinarily become naturalised citizens. The status of illegitimate children can be changed. People can frequently hide their national origin by changing their customs, their names and their associations. Lighter skinned blacks can sometimes 'pass' for white as can Latinos for Anglos and some people can even change their racial appearance with pigment injections. At a minimum then, the Supreme Court is willing to treat a trait as effectively immutable if changing it would involve great difficulty, such as requiring a major physical change or a traumatic change of identity... 'Immutability' may be described as those traits that are so central to a person's identity that it would be abhorrent for government to penalise a person for refusing to change them, regardless of how easy that change might be physically. Racial discrimination, for example, would not suddenly become constitutional if medical science developed an easy, cheap and painless method of changing one's skin pigment...[W]e have no trouble concluding that sexual orientation is immutable for the purposes of the equal protection doctrine. Although the causes of homosexuality are not fully understood, scientific research indicates that we have little control over our sexual orientation and that, once acquired, our sexual orientation is largely impervious to change...Scientific proof aside, it seems appropriate to ask whether heterosexuals feel capable of changing their sexual orientation. Would heterosexuals living in a city that passed an ordinance banning those who engaged in or desired to engage in sex with persons of the opposite sex find it easy not only to abstain from heterosexual activity but also to shift the object of their sexual desires to persons of the same sex? It may be that some heterosexuals and homosexuals can change their sexual orientation through extensive therapy, neurosurgery or

> shock treatment...But the possibility of such a difficult and traumatic change does not make sexual orientation "mutable" for equal protection purposes. To express the same idea under the alternative formulation, we conclude that allowing the government to penalise the failure to change such a central aspect of individual and group identity would be abhorrent to the values animating the constitutional idea of equal protection of the laws"[32]."

The majority therefore entered an injunction requiring the Army to consider Sgt Watkins' reenlistment application without any regard to his sexual orientation. The Army has sought review in the Supreme Court of the United States. Since the Georgia case was heard, that Court now has two new members whose opinions will obviously influence the outcome for Sgt Watkins.

Apart from the cases in the United States' courts a number of decisions have also been given elsewhere. The Irish Supreme Court has rejected a challenge to the constitutionality of laws penalising homosexual conduct. The European Court of Human Rights has also delivered judgments on the subject of the acceptability of laws governing private consensual activity between people of the same sex. For example, in Dudgeon v The United Kingdom[33] that Court held, by 15 votes to 4, that the persistence in Northern Ireland of the criminal offence of "buggery" (after its repeal elsewhere in the United Kingdom) was, in its application to men over the age of 21, a breach of article 8 of the European Convention of Human Rights. That article provides that everyone has the right to respect for his private and family life and that there should be no interference by a public authority with the exercise of that

right, except in accordance with law and to the extent necessary in a democratic society in the interest (relevantly) for the prevention of disorder and crime or the protection of health or morals or the protection of the rights and freedoms of others. The Court concluded:-

> "To sum up, the restriction imposed on Mr Dudgeon under Northern Ireland law, by reason of its breadth and absolute character, is, quite apart from the severity of the possible penalties provided for, disproportionate to the aims to be achieved...the Court has already acknowledged the legitimate necessity in a democratic society for some degree of control over homosexual conduct notably in order to provide safeguards against the exploitation and corruption of those especially vulnerable by reason, for example, of their youth... However, it falls in the first instance to the national authorities to decide on the appropriate standards of this kind required for the defence of morals in their society and, in particular, to fix the age under which young people should have protection of the criminal law. Mr Dudgeon has suffered and continues to suffer an unjustified interference with his right to respect for his private life.[34]"

Following this decision steps have been taken by a homosexual man in Ireland to challenge the legislation on the subject of the Irish Republic and the court decision upholding it. It is the obligation of Britain and Ireland to comply with the European Convention. Following decisions of the European Court such countries as are held to be in breach of the Convention normally act with speed to bring their law into harmony with it. The Irish government has now asked the European Court for reargument of Dudgeon, apparently relying upon the decision of the Supreme Court of the United States in the Georgia case. It seems unlikely that the Irish government would agree with the majority view of the California circuit

concerning Sergeant Watkins. Ireland, apparently, wishes to retain its laws proscribing and punishing even consensual and adult homosexual activity. In this regard (as in others) Ireland and Queensland have much in common.

The advent of HIV infection will probably set back the attempts of enlightened people to limit the intrusion of the state into consensual adult sexual activity. It will probably help to reinforce stereotypes and community fear based on ignorance. In strictly practical terms, self protection of society will be advanced, in the case of persons of homosexual or bisexual orientation, if the policy of the law is to encourage stable relationships and not to drive people in their quest for sexual satisfaction and fulfilment into risky circumstances and anonymous and loveless activity. But rationality has not been the hallmark of the law in this connection, as recent developments overseas and in this country clearly show.

We have no Bill of Rights in Australia to guarantee equal protection under the laws to homosexual, bisexual and heterosexual people. The laws in some parts of our country still stigmatise and even punish people for something over which they have little or no control. To do so in respect of the consensual conduct of adults in private is manifestly intolerable in a community pretending to respect the diversity of its citizens and the limited role of the law in governing them.

To punish people for being what they are is no more tolerable in the case of homosexual people than it is in the case of Jews, or blacks, or women, or intellectually or physically handicapped people. It makes no more sense than to punish a person for being tall or for having red hair. That is what the American judges mean by "immutable" characteristics. Nor is it an excuse that people, even a majority of people, feel strong repulsion or revulsion at their characteristics. The majority of Germans in the late 1930's, as a result of intensive public propaganda and education, felt disgusted by Jewishness - but that did not make their discriminatory laws justifiable or condone punishing people for just being themselves and for fulfilling that being, particularly in private. It is barbaric in this day and age to use the criminal law to oppress adult people in private for their intimate personal activity. On such matters the state should have no intrusive laws. Indeed, we should put limits on the state, defensive of the freedoms of all of us - lest any be in the next group chosen for singling out in this way. It would be so whether or not science could offer a simple radical conversion - to make the black, white; an Asian into a Caucasion; a Jew, a Gentile; a woman instantly a man; or a homosexual overnight into an uncomplicated heterosexual. But as no such scientific "cures" are available - no easy injection or ready pill - it must be clearly understood that to punish or diminish people for their immutable characteristics is the grossest form of oppression of human dignity and rights. No self respecting society should tolerate it. Yet it is

tolerated in our land. It is tolerated in democratic Australia. It is supported out of ignorance by many good citizens who are in this respect, I am afraid to say, no more morally justified than the German people of the thirties who condoned oppression against Jews, Gypsies, Slavs and other minorities whom they despised.

Unable to appeal to a constitutional limitation, it is necessary in Australia to rely primarily on the democratic process for reform. Where stigmatised minorities are concerned, the sad record of this century - including in our country - has been that it is courts and individuals (at least in the first instance) rather than democratic Parliaments which have stood up for the rights of minorities. Yet human rights matter most when they are concerned with stigmatised minorities and when they appear hardest to accord. I hope that the Human Rights and Equal Opportunity Commission, which has a mandate to consider Australia's compliance with the International Convenant on Civil and Political Rights, will attend to the reported developments in Queensland and scrutinise them for their compatibility with our treaty obligations.

CONCLUSIONS

There is no satisfying conclusion to this lecture. Like the remarkable developments of biotechnology, the law on sexuality continues on its meandering path. But this much can be said of the law in relationship to reproductive technology and homosexuality. The best answers to the questions posed will be found in a thorough understanding of scientific

knowledge, as it is continually progressing. It will not be found in prejudice or in knee jerk reactions based upon suggested "absolutes" which do not bear patient scientific scrutiny. In regulating such intimate personal activities as the intense desire of infertile couples to overcome the impediment of infertility or the wish of homosexuals and bisexuals, without stigma or punishment, to secure harmony with deep internal feelings, we do well to adopt a principle of legal restraint. Otherwise, the regulators may move in with insensitivity for the very important emotions of people who are, after all, fellow citizens and who generally wish nothing more than to have the fulfilment that comes to most citizens without the same effort and struggle, the pain and the sense of discrimination that they may suffer.

Sexuality, in all of its many manifestations, appears likely to continue to present humanity with problems. The problems will continue to be as intense as the pleasures that beckon each one of us to fulfilment.

How did the Bard finish his Sonnet in which he had declaimed against the sometimes savagery, extremity, and cruelty of sex? You will remember the last two lines:-

> "All this the world well knows; yet none knows well:
> To shun the heaven that leads men to this hell."[35]

FOOTNOTES

* President of the New South Wales Court of Appeal. Former Chairman of the Australian Law Reform Commission. The views stated are personal views only.

1. P Wylie, Generation of Vipers, 1942, 6.

2. Law Reform Commission of Victoria, discussion paper number 9, Rape and Allied Offences, January 1988, Melbourne.

3. The Age, 19 March 1988, 3.

4. D Bartells in Medical Journal of Australia, 16 November 1987; reported The Australian, 16 November 1987.

5. See the report that IVF births cost an average of $48,500 each. The Age, 12 November 1987.

6. The Age, 25 January 1988.

7. Sun Herald, 15 November 1987.

8. Sun Herald, 31 January 1988.

9. The Age, 12 January 1988.

10. The Age, 10 January 1988.

11. Ibid.

12. Dr I Madrazo, University of Mexico, quoted The Australian, 12 January 1988.

13. C v S [1987] 2 WLR 1108 (Heilbron J and English Court of Appeal).

14. Reported, Sydney Morning Herald, 30 January 1988.

15. See eg K Dawson, "Fertilisation and Moral Status: A Scientific Perspective" (1987) Journal of Medical Ethics 13, 173.

16. See report Sun Herald, 18 November 1987.

17. See The Age, 8 January 1988.

18. Reported Sydney Morning Herald, 4 December 1987, p 3.

19. Reported The Australian, 28 November 1987.

20. Saulwick Age Poll, The Age, 7 December 1987.

21. J W Funder, "In vitro Fertilisation: The Case for Self Regulation", Proceedings of the conference "IVF: The Current Debate", Monash University Centre for Human Bioethics, 28 July 1987, mimeo. Professor Funder's views were repeated in a talk given on the ABC "Occham's Razor" program, 14 February 1988.

22. Sydney Morning Herald, 26 March 1988, p 13.

23. The Georgia Code Ann ¶16-6-2 (1984) defines the offence of sodomy as occurring where a person performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. A heterosexual couple "John and Mary Doe" challenged the Georgia statute on the ground that they had been "chilled and deterred" from engaging in such activity by both the existence of the statute and by the arrest of Mr Hardwick, the homosexual who was charged. However, the District Court held that because they had not sustained and were not in any immediate danger of sustaining direct injury, they did not have proper standing to maintain the action which was then dismissed. Accordingly, the only claim properly before the Supreme Court was Mr Hardwick's challenge to the Georgia statute as it applied to consensual homosexual sodomy. The majority expressed no opinion on the constitutionality of the Georgia statute as it applied to other acts of sodomy. See Bowers v Hardwick 92 LEd 2d 140 (1986), ibid, 144.

24. White J, loc cit.

25. Ibid, 149.

26. O W Holmes, "The Path of the Law" 10 Harv L Rev 457, 469, (1897).

27. Thornburg H v American College of Obst. & Gyn 90 L Ed 2d 779 (1986) cited Bowers v Hardwick ibid 154 (Blackmun J dissenting). See also Note: The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification 98 Harv L Rev 1285 (1985) and D A J Richards (ed) Sex Drugs Death and the Law - An Essay in Human Rights and Overcriminalisation, Rothman and Littlefield, Totawa, New Jersey, 1982, 39ff.

28. Loc cit, p 159.

29. Ibid, 161.

30. Ibid, 164.

31. Watkins v United States Army et al, unreported, 1988 US App Lexis 1758, (Judgment, 10 February 1988 per Reinhardt J).

32. Norris J ibid.

33. (1981) 4 E H R R 149.

34. Ibid, 168. See also X v United Kingdom (1978) 3 E H R R 63.

35. Shakespeare, The Sonnets, Number 129.