

AIDS AND HUMAN RIGHTS

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### On the Road to Equal Opportunity

Article 1 of the Universal Declaration of Human Rights, crafted in the despair and hope of 1945 declares:

*"All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards each other in a spirit of brotherhood."*

Those words might be rewritten today in our new sensitivity to sexist language. Now we would say that we should act towards each other in a spirit of humanity — or of brotherhood and sisterhood. Even the Universal Declaration could not entirely escape the deep wells of attitudinal prejudice that lie hidden in every language. But of the dedication of the world to human freedom, equality and dignity we would not alter so much as a word. We would reaffirm its message and ask what lesson this pivotal assertion of human rights has for each succeeding generation in a world still troubled by war, poverty and injustice.

One of the great teachers of the century, Martin Luther King, gave us a text of hope when he said:

*"The 20th century is strewn with the victims of human cruelty, and it is also replete with examples of human triumph. The world-wide struggle against war, racism, poverty, colonialism and totalitarian repression all testify to the truth that while men may be oppressed by slavery, the urge for freedom will persist undiminished and while death may break men's bodies, it shall have no dominion over their souls."*

To Dr King's list of causes of human repression, others could be added including gender, disability and sexual orientation. Each generation requires teachers to lift the scales from the eyes of the people to see unjust discrimination wherever it exists. It is an unremarkable fact that, before such instruction, ordinary, decent people, who would never think of themselves as discriminatory or unjust, act out their prejudices doing great wrongs, without necessarily intending to.

Many good illustrations of this truth can be seen in the early decisions of the courts responding to claims of women to equal opportunity in society. How quaint, even weird, seem the judicial responses of the time. In 1873 — little more than a century ago — a Scottish judge rejected a claim of a woman, Sophia Jex Blake, who had applied to enrol in the Faculty of Medicine at the University of Edinburgh. The Scottish judge, learned in the law, said:

*"It is a belief, widely entertained, that there is a great difference in the mental constitution of the two sexes, just as there is in their physical conformation. The powers and susceptibilities of women are as noble as those of men; but they are thought to be different and, in particular, it is considered that they have not the same power of intense labour as men are endowed with. If this be so, it must form a serious objection to uniting them under the same*

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\* Delivered at the inaugural Tim Wilson Memorial Lecture at the University of New South Wales, 12th March 1991.

\*\* Immediate Past President of the Australian Academy of Forensic Sciences; President of the New South Wales Court of Appeal; Commissioner of the Global Commission on AIDS of the World Health Organisation; Trustee of the AIDS Trust of Australia.

*course of academical study. I confess that, to some extent, I share this view and should regret to see our young females subjected to the severe and incessant work which my own observation and experience have taught me to consider is indispensable to any high attainment in learning. A disregard of such inequality would be fatal to any scheme of public instruction or, as it is certain that the general mass of an army cannot move more rapidly than its weakest and slowest portion, so a general course of study must be toned and tempered down to suit the average of all the classes of students for whom it is intended; and that average will always be lowest by the existence of any considerable numbers who cannot keep pace with the rest. Add to this the special acquirements and accomplishment at which women must aim, but from which men may easily remain exempt. Much time must, or ought to be, given by women to the acquisition of a knowledge of household affairs and family duties as well as those ornamental parts of education which tend so much to social refinement and domestic happiness, and the study necessary for mastering these will always form a serious distraction from severe pursuits, while there is little doubt that in public estimation, the want of these feminine arts and attractions in a woman will be ill-supplied by such branches of knowledge as a university could bestow."*<sup>2</sup>

These words today ring in our ears not as the sound of an earlier century but as the thoughts of a distant planet. Yet they were not the eccentric musings of a misogynist Scottish judge. They were the opinions, sincerely held, of a highly educated man, presumably learned and well read, talented and generally just who reflected the attitudes of his time. If he was not born with blinkers, they were added as he grew to maturity, dignity and a position of power. That they were not confined to the United Kingdom but were reflected in our own country can be seen by the decision of judges in Australia when women applied, against male opposition, to be admitted as barristers. The statute of Western Australia said that "every person" might be admitted to the Bar provided certain qualifications were met. But Justice Burnside, in the Supreme Court of Western Australia, determined in rejecting an application by an intrepid woman applicant:

*"It is not a common law right (to be admitted a barrister). It is a privilege which has been conferred by the courts originally, and then regulated subsequently by statute from almost time immemorial, and which has been confined to the male sex. I agree with what has been said by my learned brothers and I am not prepared to start making law."*

Justice MacMillan, who concurred, was even more concerned that the prospect of women barristers meant the prospect, too awful to contemplate, of women judges.<sup>3</sup>

Now the world is turned on its head. Not only are there women judges and barristers. Women are everywhere. In our law schools, the majority of new entrants are women. It is, perhaps, just as well that Justice MacMillan passed away, safe in his male dominated world, without these changes — so unthinkable for him — to disturb his contemplation. The Lord Ordinary of Scotland did not live to hear of Madam Curie or the great band of women doctors at Edinburgh and elsewhere who made — and continue to make — a marvellous and equal contribution to society.

The point to be made is that the lessons of human rights and equal opportunity are constantly being taught. But to teach them, we need courageous and forthright pedagogues who see more clearly than others wrongs being done. And who have the courage to protest and the will to change society for the better, often in the face of determined opposition. In a decade or so, the instruction of these teachers will seem trite, even self-evident. It will even seem surprising that such instruction actually had to be given, just as now it seems surprising that educated men of our civilization, and in the recent past, could hold such prejudiced and wrong-headed attitudes towards equal opportunity for women. But at the time of changing social attitudes, the task of the teacher can be painful, both for the teacher and the family and loved ones who are affected.

Tim Wilson was one of many who sought, by speech and action, to change social attitudes. To the very end he did so. This lecture series remembers his life. It requires us also to reflect upon his death. Because mine is the first lecture in the series, it is appropriate to record something of his life and death in order to put the reflections which follow in their proper context.

#### Tim Wilson and Holy Water

Timothy Drummond Wilson was born on 23 August 1954. If he were still alive, he would be thirty-six years of age. After school, he went to Macquarie University where he took a degree of Bachelor of Arts. He then came to the University of New South Wales in 1976. He graduated in Law in 1979. He was homosexual but not ashamed of it. To the contrary, he was proud of his sexuality. In the words of John Marsden, in his funeral oration:

*"He didn't ask to be gay, but finding out he was, wasn't going to change his life. He wanted me to say the support he received from his mum and his brother on that issue was vital to him."*

Tim Wilson was a typical product of that generation that grew up in the 1960s with the flame of compassion for the disadvantaged and a determination to make the world a better place.

After his graduation, he applied for a job with John Marsden. His approach to his prospective employer was original, to say the least. According to the eulogy, he walked down the corridor of the Marsden, Campbelltown office "with all the conservative people there" screaming at John Marsden:

*"You're nothing but a bitchy, screaming, pretentious closet queen. But I wanted to work for a gay lawyer. I wanted to feel comfortable working. Can I work for you?"*

It is perhaps a tribute to John Marsden's sainted early Catholic teachers that he exhibited Christian charity in response to this novel approach. He employed Tim Wilson. They became friends. John Marsden allowed him a great deal of latitude.

Tim was never a conventional lawyer. He was, in fact, a social reformer. He gave a great amount of time to the Gay Counselling Service, was secretary to the Gay Business Association, was involved in the Mardi Gras and later, when HIV and AIDS arrived, he took an active part in the ACON legal group.

I first met him when, as Chairman of the Law Reform Commission, I went to the Gay Business Association to speak in 1978 on the need for reform of the criminal law on homosexual offences. He struck me then, as he did afterwards, as totally professional, serious about the reform movement and quite unrelenting in his determination to see things done that had too long been postponed.

I next met him when I was asked to open the new office of Marsdens in Paddington. It was a sunny afternoon in the early 1980s. Under a blue sky, the hopes of all seemed so high. Tim Wilson's future as a young professional man seemed assured. This was a new shopfront legal firm from which intimidating paraphernalia were banished. Sad it is to record that all too quickly it became a place of refuge and advice for people sick with HIV and AIDS. Tim Wilson became heavily engaged in helping people at St Vincent's Hospital to prepare their wills. Probate law, unexpectedly, became a major component of his practice. Necessarily, he became the confidante, supporter and adviser of clients, mostly young, ill and dying from the effects of a virus whose havoc ran in exact parallel with Tim Wilson's professional life.

When he learned that he was infected, he received great support from his employer and his

work colleagues. Not only did they support his even greater involvement in assisting his gay brothers and sisters with their legal problems, often without fee. They also provided him with a trip to Europe: a sweet solace tinged, some might say, only by the obligation to accompany John Marsden upon it. He became ill at one stage on the trip. According to John Marsden:

*"He suggested I was trying to give him the 'flu because I took him to so many Catholic churches and threw water on him. I pointed out that it was holy water and it might work."*

Tim Wilson was an agnostic. The holy water did not prevent the ravages of the disease.

The last time I saw him it was in the St Vincent's Hospice not long before his death. I was going to the Law Society dinner for the opening of the new Law Term. He had pulled through a number of hard-fought battles. But he was determined to get out of the hospice. He treated his black tied, lawyerly visitors with politeness and correctness. But his eyes lit up when his mother and his brother entered the room. The lawyers left for their dinner. The close family circle remained behind, stalwart in their courageous private battle together. It is a story that has been acted out in many places. Doubtless it is occurring at the same hospice and in hospitals and homes not far from here and on the other side of the world and at this very moment.

Tim Wilson was determined that the cause of his death should be known. To the end he was a fighter for reform and a more just and tolerant society. He saw no reason at all why a stigma should attach to the virus that killed him. It was, after all, just another human virus, but one momentarily resisting a cure. He sent a message which John Marsden spoke at his funeral:

*"He wanted me to say that he believes that there is still discrimination, an enormous discrimination, against gay men and women. Unless we all stand and fight it, then the right will never be won."*

Years ago I saw a moving Russian film: "A Russian Soldier". It was about a soldier in the Second World War who gained a leave pass of a few days from the Front. He set out to take a few precious humble gifts to his mother. On the way he found and lost love, he had many adventures. He ran into his mother's village. He had time only to embrace his mother. He went away. He died in a great battle that consumed millions most cruelly — mostly young. The laconic voice at the end declared "His life was ordinary. He was a soldier. A Russian soldier".

We could say of Tim Wilson's life that he found and lost love. He embraced his mother and his brother and all brothers and sisters. In some ways his life in the law was ordinary. He was a solicitor; an Australian solicitor in a comparatively unimportant country in a far corner of the world — a tiny speck in the universe. Yet we can take from his mortal life the lessons of honesty, of courage, of plain talking, of determination and of a reformer's zeal to make the world a better place. He was, in a sense, an evangelist of the cause of equal opportunity and human rights for all. That cause will only be achieved with the support and leadership of people like Tim Wilson. We do well to remember him. In remembering that he died of AIDS, we should dedicate ourselves afresh to application, in the context of HIV and AIDS, of respect for basic human rights. Human rights matter most when they are most in danger and when, for some, they are hardest to accord.

#### Lessons from Syphilis and The Bourbons

We live at a time of human rights anniversaries. 1988 was the 400th anniversary of the Bill of Rights in England which accompanied the Glorious Revolution. 1989 was the bicentenary of the Declaration of the Rights of Man and of the Citizen which emerged from the French Revolution. 1990 was the bicentenary of the Bill of Rights which constitutes the first ten

amendments to the United States Constitution. The crafting of the fundamental rights which so colour the law and life of that country had been postponed at the time of the American Revolution. James Madison had said: "Who will be so bold as to declare the rights of the people?". But declare them they did. Their incorporation in the constitution of the United States continues to influence the attitudes of that country and, thereby, the shape of the modern world.

We now approach the 50th anniversary of the agreement by F.D. Roosevelt and Winston Churchill of the Allied war aims in the Second World War. These later came to full flower in the United Nations Charter (1948), the Universal Declaration of Human Rights (1948), the International Covenants on Civil and Political Rights and Economic Social and Cultural Rights (1976) and the regional treaties which declare and protect human and other rights in Europe (1953), the Americas (1978) and Africa (1986). In addition, there are more than twenty treaties, regional and international, which cover particular rights in more detail.<sup>4</sup> Among the basic human rights stated in these instruments, to be enjoyed without distinction of any kind, such as on the grounds of race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth or other status are a number of fundamental rights of importance during the crisis presented by HIV and AIDS. They include:

- The right to life;
- The right to health;
- The right to liberty and security of the person;
- Freedom from inhuman or degrading treatment or punishment;
- The right to freedom of movement;
- The right to privacy;
- The right to marry and found a family;
- The right to work;
- The right to education; and
- The right to social security, assistance and welfare.<sup>5</sup>

The body of international law on human rights is not simply a series of statements of pious platitudes drafted by politicians and then forgotten. It is part of international law. It is binding on the community of nations in differing degrees, depending upon the ratification of international instruments, whether the rules stated in them have become part of customary international law and part of the law of the country concerned.

Developing around the regional and international instruments of human rights is a jurisprudence stated by the courts and other institutions established to give effect to such instruments and by national courts. The most influential of these bodies has probably been the European Court of Human Rights. Its pronouncements bind the twenty-one member States of Europe which have ratified the European Convention on Human Rights.

Unfortunately, neither Asia nor the Pacific have a regional convention stating basic human rights. Nor is there a court, commission or other body to investigate, report on and redress human rights violations in this part of the world. An important challenge for lawyers committed to human rights in Australia should be the preparation of a regional convention and a proposal for a regional institution which could attract countries of our region, including our own.

It has recently been suggested that the basic culture of societies still influenced by the Confucian ethic is fundamentally different from the culture of a country like Australia, which is sympathetic to the notion of human rights.<sup>6</sup> However that may be, it is undeniably desirable that we should have, in our region of the world, an inter-governmental institution to safeguard human rights and to spread the word of departures from internationally agreed norms. There is no obvious reason why it should be appropriate to have a convention and an inter-government

institution for Europe, the Americas and Africa but not for Asia and the Pacific. If it is thought that Asia presents special problems, we should at least venture upon an institution for Oceania. Recent events in this part of the world, quite apart from AIDS, demonstrate the urgent need for such a body. Human rights, by their definition, inhere in human beings. They are not confined to people in a particular culture. They are universal. They are part of the attribute of being human. They should be universal in their respect. Machinery should be provided to enquire into and redress alleged derogations.

Self-evidently, the great collection of human rights law which has been such a feature of world history in the past fifty years especially, transcends in importance even such a serious epidemic as HIV/AIDS. Human rights are accompanied by human duties. Obviously, human rights have limits. The limits were once expressed in terms of the fact that the right to swing your arm ceases when you hit me. Obviously, there is no human right to spread a life-threatening virus, such as HIV. On the contrary, there is a human obligation not to do so and a legitimate entitlement of the State, representing humans who are at risk of becoming infected, to take measures designed to limit that risk, if not to eliminate it.

All national and international statements of human rights allow for derogations from the human rights declared in them. Typically, such derogations are permitted if they conform to three requirements. They must be expressly provided by law so that the derogations do not depend upon arbitrary administrative power. This is a requirement of form. They must be derogations which are manifestly necessary in a democratic society to achieve a pressing social need. This is the limitation of necessity. And they must be strictly proportional to the need to tackle the defined object in hand when weighed in the balance against the adverse effects they may have upon people whose rights will be affected by them and by society itself which has its own interest in the exercise of human rights. This is the requirement of proportionality.

If we remember the basic human rights and the criteria for derogations from them, we are provided with a very useful system for measuring proposals designed to deal with the HIV/AIDS epidemic. Contrary to the opinion of some public health officials, many politicians and most lay citizens, the protection of public health does not provide a *carte blanche* to override fundamental human rights. There is a danger that public health and other laws will be drawn, in panic, and overlook basic human rights. Especially in the face of such a serious and dangerous virus as HIV, it is inevitable that there will be impatience with the talk of human rights and that this will invade popular, political and even medical thinking. It is important that lawyers, with long social memories, should remind those who have the responsibility for law-making of the mistakes that have been made in the past when, in panic, societies have departed from the foregoing basic rules.

A good illustration of the departures can be seen in the treatment of syphilis. There is quite a good historical analogy between HIV/AIDS and syphilis although syphilis is not spread by a virus. Syphilis first appeared in Europe about four hundred years ago. It took four hundred years for the discovery of a blood test for it and the development of specific curative drugs. Both syphilis and HIV/AIDS are mostly transmitted by sexual intercourse. Both conditions can be acquired neonatally and through the sharing of blood. Both conditions, untreated, produce a substantial period of severe suffering. Each has a high ultimate mortality. In both cases the person infected (especially in the case of syphilis in a female) may be unaware for many years of the infection. In both cases the person will be infectious to others during parts of that period. In both cases the condition is (or was in the case of syphilis) incurable. In both cases early treatment involved radical measures with severe side effects (such as the use of arsenic in the early treatment of syphilis). In both cases there are stages to the development of the infection although the intervals are longer in the case of syphilis than in the case of HIV/AIDS. Both conditions evoke public fear and condemnation. We should therefore strive to learn, in the case of HIV/AIDS from the earlier strategies used to deal with syphilis before it could be cured.

In the United States, many mistakes were made in the early legal regulation of syphilis. During the First World War, after the American entry into the War, naval regulations were changed to require the removal of door knobs on all United States vessels. This move was based upon the fear that syphilis would be spread by hand contact. We now know that such a fear was totally unfounded.<sup>7</sup> The case demonstrates the danger of basing public health strategies on fear rather than sound scientific data.

Also in the United States during the First War, the President authorised the rounding up of 30,000 prostitutes on the basis that they might be a risk to the war effort. Congress allocated huge sums for their detention. The case is one of the untold derogations from human rights which occurred during the United States in wartime. Another involves the detention of Japanese Americans under an order issued by President F.D. Roosevelt. That order was challenged in the courts by Mr Korimatsu, an American of Japanese origin. In time of war, the United States Supreme Court by a vote of 6 to 3 upheld the Constitutional validity of the President's action. One of the dissents was by Justice Roberts. He said that, if the law were upheld, there would be no telling where this kind of excess would go beyond what was needed to deal with a specific problem in hand. If, for example, the United States were hit by an epidemic, a President might see it within his power to round up all suspect groups and deprive them of their liberties as American citizens.<sup>8</sup>

In the United Kingdom between 1864 and 1869 three Contagious Diseases Acts were passed. They enabled suspected prostitutes in certain designated towns and ports to be detained, subject to a statutory medical examination and, whilst in detention, treated under compulsion. The scheme was, of course, very well intentioned. However, it evoked a great deal of opposition, including from the medical profession itself which had no desire to become "medical police". The Acts were repealed in 1886. However, procedures for compulsory report and contact tracing remained in place until, in 1916, the Royal Commission on Venereal Diseases recommended, instead, the establishment of special clinics offering free and confidential treatment. These clinics would operate on an entirely voluntary basis. They would guarantee complete anonymity and confidentiality. The Royal Commission set as its goal the uncompromising policy of minimising the spread of venereal disease. It asserted that this goal was more likely to be achieved by voluntary and confidential cooperation of the patients themselves than by Draconian measures based upon compulsion<sup>9</sup>. The United Kingdom experience was paralleled in Australia. The approach of the Royal Commission was vindicated. In the treatment of venereal diseases generally, it is still in operation in the United Kingdom, Australia and elsewhere. It is important that we should not forget the lessons from the earlier experience. Let us not be like the Bourbons — learning nothing from history: forever condemned to repeat its mistakes.

#### Quarantine, Earrings and Other Things

A report in the *Sydney Morning Herald* last month indicated that almost 50% of Australians surveyed supported the quarantine of "AIDS victims". The survey was conducted amongst 2,800 people around Australia by the George Patterson Advertising Group. It showed that support for quarantining persons with AIDS — by which I assume it meant with HIV — have risen by 10% in three years. When the survey was conducted in 1988, 30% favoured quarantine. In the recent survey, 55% of men and 43% of women (49% overall) supported quarantine. A like survey in the United States found that only 26% of people in that country surveyed supported quarantine for people with HIV/AIDS.

In the Australian survey the group most in favour of quarantine were those 55 years and over. Of them, 62% expressed their support. Of those in the 18 to 24 year age group, 34% favoured quarantine. The strongest votes for quarantine came from Tasmania and South Australia.<sup>10</sup>



The President of the New South Wales AIDS Council, Mr Rolf Petherbridge, responding to the survey, declared that it was "dramatic evidence of how appallingly (ill) educated the public is about AIDS". He said that "the views supported by this survey amount to ignorance and bigotry". Just as sombre was the comment of Mr Laurence Steadman of the Federal AIDS Policy & Strategy Branch within the Australian Department of Community Services and Health. He said that he found it "disturbing" that so many Australians advocated quarantine.<sup>11</sup>

We should not really be surprised about the response to the survey. Earlier generations of Australians were quite fierce in their strategies of quarantine whenever public health epidemics broke out. Usually it was Chinese or other immigrants who were put in hulks off the coast, in shocking conditions, with little advantage in the control of the epidemic. Out of fear are born extreme reactions. Quarantine has been a typical response to public health crises of the past. Why not with AIDS?

It is true that, if every person in Australia who had the HIV virus could be accurately found and isolated and the country thereafter hermetically sealed from the entry of any person with the HIV virus, this would amount to one way to reduce the spread of the virus in our society. Of course, we would have to be quite ruthless for those quarantined. They could never come out; not even for a day — not even for an hour. Barbed wire would be needed to lock in these fellow citizens. Because there is no cure, there could be no prospect of their release. They would be there for good. We would also have to be quite ruthless and rather rude at airports. It would not be good enough just to test young men with long hair, bright clothes or earrings. We would have to test everyone. The queues are quite bad at airports now. But we would have to add to them or require a HIV-free certificate before a visitor received a visa. But even this would not be good enough. The visitor might acquire the virus in Honolulu on the way. So there would be no alternative to testing everybody at every point of entry anywhere on the thousand miles of coast around Australia. We would become fortress Australia. Of course, if anyone were found HIV positive at the airport they would simply be turned away, unceremoniously. If they were Australians they would be straight behind the barbed wire.

But even that would not be enough. We would have to limit overseas travel for Australians because, thereafter, it would be overseas that that danger lurks. The cost of keeping 11,000 prisoners in Australian prisons would be nothing to the cost of keeping an estimated 50,000 quarantined patients with HIV and AIDS. We could not lump them into Victorian edifices. There is no chain of closed quarantine hospitals ready-built. So we would have to build them and provide staff 24 hours a day, 3 shifts, 366 days a year.

Most of the quarantined patients would be young. Most of them would be working and have 10 or more productive years in them. We would just have to forego that. The cost in emotional deprivation of their parents, friends, to say nothing of their own stress would be enormous. But just the withdrawal of such a valuable resource from the economy, in difficult economic times, might be all our hard-pressed economy needed to send it to the bottom of the ocean.

And then there would be the danger of people who had escaped the test. The only way we could safely quarantine people would be to subject our whole population to the test. You never could be quite sure as to whether anybody had the virus. We would probably need special policing teams to deal with escapees who tried to avoid the test. Certainly we would have to repeat the test many times over because of the "window period". A person might not be producing antibodies; yet be positive. The test might have produced a false positive or a false negative. And, naturally, there would have to be procedures for appeal, review and reconsideration. At least out of this, lawyers would find a bonanza contesting authority. The cost of all these tests and all these institutions, of the special police and of the units at every point of entry on our vast coastline would be enormous. After we had paid for it, our depleted economy would have little

over for other health problems, let alone the multitude of other needs, including education of the young and vulnerable.

It is necessary also to spell out the kind of world in which such a response to the HIV/AIDS epidemic would reduce other countries as well as our own. If one country adopted the fortress mentality, others would surely follow. International movement, which is such an important contribution to peace, would be sharply curtailed. And what of the families and friends who insisted upon sharing their lives with the infected? The horrors of the picture of strict quarantine have only to be painted to demonstrate how totally unrealistic is this response to the HIV crisis. Yet one in every two of our fellow citizens in Australia believes that it is the right thing to do with HIV and AIDS. Clearly, we have failed in an important aspect of public education. It is therefore necessary to go back to fundamentals.

#### Out of the Ghettos of Discrimination

Cuba alone has adopted a national solution of quarantine. It could more readily do so because of the authoritarian nature of its society, its relative isolation from its own region and the world, the virtual drying up of tourist travel and the comparatively small number infected when the regime of quarantine was adopted. A society like Australia with more than 10,000 reported cases of AIDS — and many more cases of people infected with the virus — has to ask itself whether a proposal such as quarantine would satisfy the tests necessary to warrant such a deprivation of basic human rights and freedoms.

A person who is infected does not, as such, present any risk of spreading the virus to others. It is the act of unprotected sexual relations, the sharing of needles or giving birth when infected which may spread the virus from one human being to another. Laws which are respectful of human rights must be addressed to relevant activity, not to individuals, still less groups. And in accordance with the basic rules which international law recognises, such laws, derogating from human rights, can only be tolerated to the extent that they are necessary in a democratic society. They must be required because of a pressing social need for them. The restrictions adopted by them must be strictly proportional to the needs of society when weighed against the adverse effects they necessarily have on persons whose rights are restricted and upon the community itself, with its own interest in the free exercise of the rights of all its members.

The World Health Organisation has expressed itself strongly in opposition to quarantine and isolation:

*There is no public health rationale to justify isolation or quarantine based solely on the fact that a person is suspected or known to be HIV infected. The modes of HIV transmission are limited (sex, blood, mother to child) and HIV spreads almost entirely through identifiable behaviours and specific actions which are subject to individual control. In most instances, the act of participation of two people is required for HIV transmission, such as sexual intercourse and in sharing contaminated needles or syringes ... HIV is not spread through casual contact, routine social contact in schools, the workplace or public places, nor through water or food, eating utensils, coughing or sneezing, insects, toilets or swimming pools. ... Persons suspected or known to be HIV infected should remain integrated within society to the maximum possible extent and be helped to assume responsibility for preventing HIV transmission to others. Exclusion of persons suspected or known to be HIV infected would be unjustified in public health terms and would seriously jeopardise educational and other efforts to prevent the spread of HIV."<sup>2</sup>*

The expenditure of millions of dollars in campaigns of public education in Australia appears to have had some good results. Many experts believe that the rate of infection with HIV has slowed. That is not a reason for dropping our vigilance. There is a particular need to address the

education of new generations of young homosexual men, of inexperienced intravenous drug users and of the growing number of heterosexual citizens who are contracting HIV through sexual activity. A report published a few days after the quarantine survey suggested that the number of people in this State who have contracted the HIV virus through heterosexual activity could now exceed the number of people who have been infected through intravenous drug use.<sup>13</sup> There is, of course, no reason to believe that the heterosexual majority of the community is immune in some miraculous way, from this human virus. In Africa, the Caribbean and Latin America HIV/AIDS has always been a problem of the general community spread principally by heterosexual intercourse. We should not believe that heterosexual people in Australia are immune from the fundamental features of the epidemic. A belief in immunity among young heterosexual people engaging in unprotected sex presents a serious danger, the true measure of which we have not yet seen.

Yet despite the expenditure of great sums in public education about risky activities, it seems that the efforts to educate the community in the proper response to HIV/AIDS has, in large part, fallen upon barren ground. Prejudice and ignorance, not rationality and effectiveness mark the response to HIV/AIDS which calls for quarantine even in a comparatively well educated and well informed society. If the appeals to the requirements of international human rights law and the proportionality of derogations from basic human rights did not convince, it is necessary for the appeals to be enforced in terms of cost effectiveness and cost to the community of the strategy which half our people are said to favour.

At the end of his life, according to John Marsden, Tim Wilson believed that there was "still discrimination and enormous discrimination against gay men and women". Unfortunately, attitudes of prejudice and fear have been fuelled by HIV/AIDS. Sadly, this may be seen by the many recent shocking incidents of violence upon homosexual people, even in some cases leading to death. Such instances are intolerable. They must be met with the full force of the law. But they betray a deep current of fear and loathing which a few stiff criminal punishments will not correct. Many people bashed will not know their assailants. Those that do may not report. Those who report may not press on. Those who do may not secure in a prosecution. Those which do may not result in a conviction.

Therefore, we must start much earlier in the process of education of our community in the error of discrimination. We must build a society which rests on a foundation that we do not hate people because they are different, still less because they have a virus and will become sick.

There is a need to reinforce our only partly effective efforts of public communication with legal principles which assert and uphold the standards of our society. If you think that in these enlightened times we do not need legislation to redress discrimination against people on the basis of their HIV status, listen to this small sample of cases contained in a report of the New South Wales Anti-Discrimination Board. It gives a clue to just how really civilized, educated and tolerant is the society we live in:

1. A homosexual man working in the finance industry told his supervisor that he was HIV positive. The supervisor then asked him to leave the office immediately whilst he consulted the man's doctor about his medical condition. The supervisor made it clear that whether the man would be allowed to return to work or not depended entirely on the outcome of his discussion with the doctor;
2. Two men booked a room in a country motel. When they checked in they were given a double room but shortly afterwards the proprietor burst in and asked them to leave. He claimed that he would have to burn the bedding because of the risk of AIDS and that he did not want to be seen as condoning homosexuality;
3. A homosexual man suffering from HIV encountered intense opposition from other people towards his continuing in an educational course. He discussed his medical

condition in confidence with the Deputy Head of the institution. The information was very quickly passed to other members of staff. He was finally asked to withdraw from the course allegedly because he posed a health risk to other people. The institution then obtained expert medical advice. The man was not a health risk to anyone in casual social contact. Eventually the institution allowed him to return. By this time he felt unable to resume his studies given that his medical condition had by then become known to virtually all staff and students;

4. An openly homosexual man was told by his employer that, if he wished to keep his job, he had to undergo antibody testing and produce an AIDS-free certificate;
5. A typist in a typing pool refused to touch any notes or do any typing coming from an openly homosexual member of the staff fearing that she would thereby catch AIDS;
6. The owner of a small restaurant dismissed a waiter who looked gay saying that regular customers told him they would not eat there unless the waiter were fired since he was a risk to their health;
7. Fellow employees in a workshop threatened a homosexual employee that if he used the toilet they would beat him up. They said they might catch AIDS if they shared the toilet with him;
8. Employees in a smaller office refused to answer the telephone used by a haemophilic saying that they were concerned about the risk of acquiring AIDS from this man;
9. A manager transferred a Melanesian worker from a front office saying he was concerned that customers might think the man was an African or a Haitian and fear that he would spread AIDS;
10. A dentist actually enquired of the Board whether he could put a "No Poofsters" sign in his waiting room and whether he could ask all clients whether they were homosexual; and
11. A homosexual man was admitted to a public hospital for emergency surgery. Before the operation the man was asked whether he was homosexual and would agree to an HIV antibody test. The result of the test, negative, was returned more than 17 hours later. After the operation and until results of the test were available, he was subjected to the following treatment: the hospital staff, both medical and cleaning, attended with gowns and gloves and on occasion with masks and goggles. He was isolated from other patients and identified with a yellow risk tag. He was served meals with utensils clearly marked "disposable". The cleaners discussed cleaning the ward in front of him.

#### The Need for Clear Legal Standards

The Anti-Discrimination Act 1977 (NSW) forbids discrimination on the ground of homosexuality. Discrimination on the basis of physical handicap is provided for under s 49A of the Act. The term "physical handicap" is defined by reference to having a physical impairment to the body, where (having regard to any community attitude relating to persons having the same physical impairment as that person) limits the person in his or her opportunities to enjoy a full and active life. The term "physical impairment" is defined to mean any defect or disturbance in the normal structure and function of a person's body whether arising from a condition subsisting at birth or from illness or injuries. There are many exceptions. One of them (s 54) relates to discriminatory acts necessary to comply with other legislation, eg public health legislation. The use of public health laws to provide a blanket exemption from human rights obligations without regard to necessity and proportionality is totally unacceptable.

The Australian National HIV/AIDS Strategy has recommended that anti-discrimination legislation should be extended or clarified in each Australian jurisdiction to provide redress for people living with HIV, those imputed with the infection and their family, associates or carers in basic areas such as employment, education and training, accommodation and the supply of goods and services. It has also recommended that anti-discrimination legislation cover the ground of sexual orientation or imputed sexual orientation in those jurisdictions where this is

not already provided. A major concern about the scope of the New South Wales anti-discrimination legislation is whether asymptomatic HIV infection is provided for by the statutory definitions of "impairment". The Victorian and South Australian legislation, on the other hand, appear to cover this case. It would seem curious that in the chief Australian jurisdiction affected by HIV and AIDS — where many good things have been done by people and governments — that clear laws to deal with unwarranted discrimination have not been enacted. And by unwarranted, I mean discrimination based on ignorance of scientific data about the modes of transmission of HIV.

In the United States, which was reached by this epidemic earlier than we, there have been numerous cases under anti-discrimination law on complaints by people who are HIV positive.<sup>14</sup>

Many legitimate questions arise concerning the shape of legislation designed to redress and discourage discrimination and vilification on the grounds of HIV status. But instances of the kind reported by the New South Wales Anti-Discrimination Board should convince most rational, intelligent and informed citizens of the need to provide an effective means of redress. A just and humane society should do no less. Standards must be set. The law has a role to play in setting those standards.<sup>15</sup>

Furthermore, it is the paradox of HIV/AIDS that the best way, at present, to deal with the epidemic would seem to be to gain the confidence and attention of those individuals who are most at risk from the spread of the virus. At the moment this includes mainly young people engaging (or at the risk of engaging) in unprotected sexual activity and young people exposed to intravenous drug use. Because such people are frequently in minorities stigmatized by society it is especially difficult for society to reach out to them with the educational messages that will have sufficient force to change their behaviour. Yet change their behaviour we must. By protecting them, we protect the whole of the society from the spread of the virus.

There being no vaccine and no magic bullet cure, changing behaviour is the most effective weapon we presently have for the containment of this virus. Changing behaviour is notoriously difficult to do and not least in respect of sexual and drug-taking activities which can be important to the identity of people and to moments of intense pleasure for them. That is why, in our present paradoxical situation, our society does well to gain the confidence of the people at risk, to secure their attention and to protect them from vilification and discrimination. It is vilification and discrimination which cuts them off from the social messages and casts them into ghettos of ignorance where HIV and AIDS lie waiting.

The recent result of the survey of Australian opinion shows how large is the ghetto of ignorance and prejudice in our community. If the survey is accurate, it suggests that the educators have a mighty task ahead of them. And every year brings young recruits to risky activities of which they must be warned and protected as best society can.

It is the paradox of HIV and AIDS that the protection of human rights is, at present, one of the chief weapons we have for the fight against the spread of the virus. That is why lawyers, at this moment in the history of the epidemic, have an important and useful role to play. It may change when a vaccine is developed. It may change if ever a magic bullet is provided to cure people of the virus or to control its progression. But at the moment, it is essential that lawyers speak out with a clear voice. And the message is simple. If we want to contain the HIV epidemic, we will protect the human rights of those who are infected and at risk. We will do so because it is right. But we will also do so because it is the most effective means of winning the confidence, improving the education and changing the behaviour of those whose lives are most in peril.

And whilst we are about changing the law to protect human rights in the fact of HIV and AIDS, may it not be an idea to protect people from the unwanted, morbid publicity about their health condition? The past weekend's press saw the public acknowledgment by our country's leading orchestral conductor of his own struggle with HIV.<sup>16</sup> His dignified and courageous declaration deserves our admiration and profound support for Stuart Challender. But the circumstances that stampeded him into a public statement were less than edifying. They bring no credit on our country or its laws. A Melbourne Sunday newspaper had got the story. Its editor was toying with the idea of running it. In his hands — rather than in Stuart Challender's hands — were the powers over the private realm of a significant human being. To try to control partly the manner of the public announcement, Mr Challender made his own statement. He had not even had the time to tell all members of his family. He had to hasten to Tasmania in the weekend to break the news to his 90 year old grandmother. One can only imagine the journey of that sensitive, gifted citizen who has given so much to the community.

The Australian Law Reform Commission in 1979 recommended statutory protection for individual privacy<sup>17</sup>, including in respect of the publication, without the consent of the subject or authority of law, of sensitive "private facts". Such "private facts" were defined to include "matters relating or purporting to relate to the health, private behaviour, home life or personal or family relationships of the individual in circumstances in which the publication is likely to cause distress, annoyance or embarrassment". A decade of indecisive politicians and an intransigent media has prevented the achievement of this reform. Sadly, HIV and AIDS have shown how necessary the reform is in a debased community where titillation has replaced news and images of destruction and human suffering are part of the amusement of a society that curiously likes to think it is better than barbarians who watched the lions devour the Christians.

The time will doubtless come when HIV/AIDS is but a footnote to human history. But for the moment it requires people of determination. People who will draw on their own experience, work for their fellow citizens and never accept discrimination and derogations from basic rights.

Tim Wilson was true to himself. He lived honestly. He died courageously. But between the living and the dying he gave us an example of determination and resolution. He lived with love and happiness. Then he lived with HIV. He died of AIDS. But his message is still with us. There is discrimination. All thinking citizens — heterosexual, bisexual and homosexual must stand and fight against it. And if they do, the fight will eventually be won.

#### Footnotes

1. Martin Luther King, quoted in M Einfeld, "One Lawyer's Musings on the Morality of Medicine". Address to the Australian Jewish Medical Federation, July, 1990, mimeo, 55.
2. Lord Neaves (Lord Ordinary) in *Jex-Blake v Senatus of the University of Edinburgh* (1873) 11 McPherson 784, 799.
3. Re Edith Haynes (1904) 6 WALR 209, 213.
4. P Sieghart, "AIDS and Human Rights: A UK Perspective". BMA Foundation for AIDS, 1989, London, 7. See also L J Moran, "HIV, AIDS and Human Rights", (1990) 12 Liverpool Law Review 3.
5. Sieghart, *Ibid.*, 8.
6. R Little and W Reed, *The Confucian Renaissance*, Federation, Sydney, 1989, 83.
7. AM Brandt, "AIDS — From Social History to Social Policy" 14 *Law Medicine and Health Care*, 233 (1986). See M D Kirby "AIDS and Law" in S Graubard, *Living with AIDS*, MIT Press, Cambridge, Mass, 1990, 387ff.
8. *Korematsu v The United States* 323 US 214 (1944).
9. Sieghart, *above*, n 4, 21.
10. Sydney Morning Herald, 21 February 1991, 7.
11. *Loc cit.*
12. Cited Sieghart, 44-45.
13. Sydney Morning Herald, 25 February 1991, 3.

- 14. See eg *Doe v Centinele Hospital*, 57 USLO 2032 (CD Cal 1988); *Doe v Attorney General of the United States*, 840 F 2d 701 (1988). There is a useful review of United States authority in H Watchirs, "AIDS — a Public Law Perspective", unpublished subthesis (ANU), 1990, 187ff.
- 15. See Rev R C O'Brien, "Discrimination: The Difference with AIDS", 6 J1 Contemp Health Law & Policy 93, 119 (1990).
- 16. "Why the conductor went on record", Sydney Morning Herald, 9 March 1991, 9.
- 17. See Australian Law Reform Commission, *Unfair Publication: Defamation & Privacy*, ARLR 11, 1979, AGPS, Canberra, 124, Draft Bill ss 19, 21 (p 214).