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**thoughty street lecture**

# AIDS and the LAW

*Monday  
29 November  
6.00pm*

*St Martin-in-the-Fields  
St Martins Place  
Trafalgar Square  
London WC2*

**The Hon  
Justice  
Michael Kirby  
AC CMG**  
*President of the  
Court of Appeal,  
Supreme Court of  
New South Wales*

**New Challenge for Human Rights**

**DOUGHTY STREET LECTURE**

**ST MARTIN IN THE FIELDS, TRAFALGAR SQUARE**

**LONDON MONDAY 29 NOVEMBER 1993**

**AIDS AND THE LAW - A NEW CHALLENGE FOR HUMAN RIGHTS**

**The Hon Justice Michael Kirby AC CMG \*  
Australia**

**SIGNED WITH THEIR HONOUR**

Just before I left Sydney on the long journey to this occasion I attended a dinner with a dear friend. He has been in the forefront of the struggle against AIDS in Australia: both in scientific research and in community education. In fact, he is something of an inspiration. But he is now becoming very thin. From his face, luminous eyes of great wisdom shine forth. He is living with AIDS; but the race is almost run. Recently, he almost passed away. But his determined spirit fought back once again. He hosted the dinner - mainly doctors present - with grace and much laughter.

As I left the party, he thrust into my hand an envelope. A card of happy sunflowers carried a request which he felt too embarrassed, or too unwilling, to voice during this encounter. At his funeral, he wanted me to read a poem by Stephen Spender. It is the poem "I Think Continually of Those...". Its last verse reads:

*"Near the snow, near the sun, in the highest fields,  
See how these names are fêted by the waving grass  
And by the streamers of white cloud  
And whispers of wind in the listening sky.  
The names of those who in their lives fought for life,  
Who wore at their hearts the fire's centre  
Borne of the sun, they travelled a short while toward the sun  
And left the vivid air signed with their honour."*

I pray that it will be a long time before I next read that poem in a church. In the meantime I think of the names, and of the nameless millions, who in their lives fought - and are fighting - for life against HIV and AIDS. I think of those who are living with AIDS on every continent at this time. I offer these words in their honour.

#### **STATISTICS & THE HUMAN FACE OF AIDS**

It is vital for lawyer, judge and citizen, to think of HIV and AIDS in human terms. To see the many faces of AIDS. To recognise the terrible toll it takes in little households across the whole world which I have crossed to come to this lecture. The moments of shock and anguish. The uncomprehending pain. The courage and fortitude. AIDS has millions of manifestations.

Tonight I will speak about the legal aspects of HIV and AIDS. But it is vital to remember that this represents but a few facets of a complex condition of ordinary human beings. Their precious spark of life is threatened - for months or years - by exposure to a tiny virus, the smallest of the infectious agents known to nature. Recently, Mr Justice Aldous, in this city, had to describe a virus in a patent suit related to the Hepatitis C virus.<sup>1</sup> He pointed out that viruses rely upon the host cell for energy and material for the generation of new virus particles. They are infinitesimally small. They comprise an outer envelope surrounding an inner protein core which, in turn, surrounds the viral nucleic acid. They attack the host cell by penetrating the cell surface. Once inside, the virus uncoats its nucleic acid thereby producing cell replication within the host. It would be beautiful and fascinating if it were not so

terrifying. It is by this means that HIV has entered the human body and spread with terrible speed around the earth. Assisting in the spread have the common vectors of pleasure: in sexual activity and drug use. Accelerating the spread has been the modern means of travel which ensures that no part of the earth's surface is now safe from HIV and AIDS. Estimates vary but the most optimistic figure suggests that 40 million people will be infected with the HIV virus by the year 2000.<sup>2</sup> A worst case *scenario* ventures a prediction of 120 million infected. AIDS is thus a huge global problem in anyone's language.

It is easy, toying with such statistics, to be blinded to the individual instances. In confronting HIV and AIDS we must all keep the broad picture in mind. It helps to correct misapprehensions. Thus 71% of adult HIV infections notified to the World Health Organisation (WHO) arise from sexual activity amongst heterosexuals. Only 15% of the global figures concern homosexuals and bisexuals, whose special predicament features so predominantly in Western countries such as Britain, the United States and Australia. About 5% of the global figure can be attributed to infection through blood and blood products. About 7% can be attributed to injecting drug use. Contaminated blood products remain an issue in the developing world. Occasional breaches of proper standards also present alarm in developed countries. But by efficient screening it is now possible to reduce substantially the risks of transmission through blood products. That leaves sex and drug use as the principal vectors of HIV.

So here we have the threshold problem presented to us as lawyers and as citizens. A sudden, new pandemic of enormous size and frightening potential. A mysterious virus with a special challenge to the populous societies of poverty in Africa, Asia and Latin America. A global pandemic and therefore one not readily susceptible to control by local laws alone. A virus spread largely by sexual intercourse and injecting drug use. Blood, sex and drugs: a combination specially made to challenge rational policies and to impede dispassionate lawmaking. Homosexuals, bisexuals, drug-users and sex workers, people who engage in multiple

sexual contacts and prisoners are the natural targets of this virus. Yet they are also, often, the targets of laws which stigmatise them, isolate them and denigrate them in their own eyes and in the eyes of their fellow citizens.

Every lawyer knows - or should know - of the limitations of the law in controlling human behaviour in things so basic and pleasurable as sexual activity and drug use. Sex and drug use have been features of recorded history in every society from ancient times. Religious leaders, philosophers, social workers, do-gooders and others may declaim. Law-makers may pass their laws. Judges may seek to enforce them. But, defiantly, human beings seek out sexual experiences and experiment with mind-altering drugs. They do so even in the face of stern civil punishment. They do so even when they know that risks ensue which threaten their liberty or even their lives.

There is no cure for HIV/AIDS. The final report of the National Commission on AIDS of the United States concluded earlier this year that the very nature of HIV infection, in the way in which the virus becomes woven into the DNA of the cells of the host, makes a true cure difficult to imagine, once infection is established.<sup>3</sup> The fundamental problem is that this virus attacks the very cells which are important to the immune system. The most that can be hoped for, in the current state of knowledge, seems to be the development of anti-viral drugs and strategies and the more effective treatment of the many opportunistic infections which arise for the persons already infected with the virus. On the other hand, experiments with animal models suggest that a vaccine against HIV may be possible.<sup>4</sup> Nevertheless, the United States commissioners concluded:

*"Regardless of vaccine progress, however, it is imperative that behavioural and educational approaches to HIV prevention be maintained, since even an ideal vaccine would only serve as a supplement to the fundamental prevention strategies already at hand. It is important to reiterate this point, since fully tested vaccines of any sort for general use are certain to be five to ten years off. In the meantime, we already know what is needed to help people avoid HIV. It would also be highly unrealistic to*

*believe that the future availability of a technological prevention option would eliminate the necessity of behavioural prevention and care."*<sup>5</sup>

### **A CHALLENGE & OPPORTUNITY FOR THE LAW**

It is here that HIV/AIDS presents at once an enormous challenge and a great opportunity to the law. At this stage of the pandemic, the medical and scientific solutions are imperfect or still in the test tube. As is often said, the only real vaccine available to society right now is knowledge of the means of avoidance and reinforcement of behaviour modification to promote the avoidance strategies. The silver bullet cure may not be with us now, or ever. But the law can reduce the burden of injustice and discrimination which will otherwise afflict those who have acquired the AIDS virus. The law can help to prevent what is sometimes described as the "second epidemic" - the epidemic of prejudice, irrational fear and unfair treatment which have added unjustly to the burden of people living with AIDS, their families and carers.

In confronting this epidemic lawmakers, judges and other lawyers are forced to face up to a number of hard problems. They are obliged to contemplate seemingly inconsistent and ineffective strategies on the part of the law, exposed by the fresh consideration required by the advent of AIDS. I refer to such questions as the laws on sexual orientation; on drug use; on sex workers; on sex education; on personal relationships; on euthanasia and on many other topics. On all of these topics, and others, AIDS has at least forced us to look with fresh insight into the laws made in earlier, pre-AIDS times. It is difficult to see any good coming out of AIDS, save for the wonderful cases of personal dignity and courage and of selfless care, brave education and patient scientific research. But if, in the law, judges and other lawyers and lawmakers are encouraged to look again at old regulations governing drug use and sexual activity, that will be no bad thing. It may promote revision and reform of the law with a proper respect for the human rights of individuals living under the law, including in respect of self-regarding activity involving sex and drug use. At stake is

the very practical problem of securing an effective response to a highly threatening global epidemic. But also at stake are notions of basic human rights which derive from the respect due to every human being and the limits placed upon the intrusion of authority into consensual adult conduct.

### **BEHAVIOUR MODIFICATION - THE PUNITIVE APPROACH**

Law is local. The Australian legal system has been described as a gift of the common law of England. It is still profoundly, and beneficially, affected by law made here in this city. Necessarily, there are now many departures and variations by legislation and for centuries by the common law. The *Australian Constitution* contains no general Bill of Rights. Specified legislative powers are conferred by the Constitution on the Federal Parliament in Canberra. The remaining powers rest with the States.

Most of the laws in Australia relevant to the struggle against HIV/AIDS are State laws and decisions of State courts and tribunals. Nevertheless, from the first recognition of the epidemic in the early 1980s, there has been a great deal of Federal leadership about AIDS. To a very large extent, it has been bipartisan. It has focussed clear-sightedly upon the containment of the spread of the virus. Reform of the law has, from the start, been a major component of the strategy adopted. It would be tedious for me to recount to you all of the legal issues and how they have been solved in the several jurisdictions of Australia. But because our legal system is still so very similar to that of England, there may be some lessons in at least some of the legislation and court decisions of Australia - lessons to be learned and errors to be avoided.

With just the slightest touch of self-congratulation, the Federal Justice Minister (Mr Duncan Kerr) told a conference on HIV/AIDS law, policy and directions in Melbourne in October 1993:

*"Australia forged a largely cooperative response, based on the need to include all groups, no matter how stigmatised and*

*marginalised they had been from the political process. There were substantial revisions of policy - notably the decision to implement needle and syringe exchanges. This decision alone slowed the spread of the virus into the young drug using population and into the wider heterosexual community. So a decade later we see that depending on which cities and regions of the United States and Australia are being compared, the per capita rate of infection in Australia is between a half and a fifth that of the United States. That means many thousands of young Australians are not, in 1993, infected, dying or dead from HIV infection."*<sup>6</sup>

Confronted with the epidemic, the initial legal response in Australia, as in so many countries, was to follow the medical model. Some public health powers were enlarged. In New South Wales, the law was changed making it a requirement that any person with HIV inform a potential sex partner of that fact on penalty of a \$5,000 fine for the breach. A similar law was enacted in Victoria.<sup>7</sup> A modest penalty you might think. Needless to say, prosecutions under these laws have not flooded the courts; indeed I know of not a single one.

Provision is also made in every Australian jurisdiction for compulsory detention of a person suspected of knowingly or recklessly spreading a proclaimed disease. In Victoria, a stepped protocol for superintendence of such persons was introduced. Only if counselling was ineffective or other orders restricting a person's behaviour were shown to have failed, might an order for isolation and detention be made. By way of contrast, the New South Wales law, revised in 1991 in response to a media campaign about a particular individual, provides for a more immediate detention order without requirements of counselling or the consideration of other options.<sup>8</sup> The public health laws already contained a framework for dealing with an epidemic. In their apparent application, they produced absurd results in some instances. Thus, in Western Australia, a person with HIV was obliged to inform the driver of any public bus of his or her condition.<sup>9</sup> One can only imagine the robust response of a bus driver in Perth to the dutiful intimation of infection by a law-abiding PLWA.



## BEHAVIOUR MODIFICATION - THE AIDS PARADOX & SEXUALITY

It did not take long for those thinking seriously about the rôle of the law in relation to HIV to realise that the enforcement of public health laws and the weapon of criminal punishment would have precious little impact on the containment of this epidemic. Much more likely to stem the tide were strategies which would promote behaviour modification in ways apt to reduce the risks of viral infection. The realisation that this was the proper and useful target of the law soon brought lawmakers face to face with the AIDS paradox. This is that, to secure behaviour modification and thereby to reduce the risks of passage of the virus from a person infected to another not infected, steps have to be taken to protect the rights of the person infected. Only by this means would the law be able to reinforce the educational messages targeted at those who might otherwise spread or receive the virus.

This is a paradox because most people react punitively to the shocking thought that a person might spread a virus with deadly potential to another person. Laws have been proposed, and even enacted, in Australia which reflect this community anger and concern. Thus the *Crimes (HIV) Act 1993* of the State of Victoria, which commenced in May of this year, creates a new offence of intentionally causing a person to be infected with a very serious disease. Such a person is liable to a penalty, upon conviction, of imprisonment for 15 years. A person who, without lawful excuse, recklessly engages in conduct that places, or may place, another person in danger or death is guilty of a new indictable offence punishable, upon conviction, by imprisonment for 10 years. Power is given to the courts to order the taking of blood samples. The legislation is something of a throwback to the early strategies for dealing with HIV by punishment. The notion of imprisoning for such very long periods a person already infected with HIV is self-evidently farcical. The only explanation I can offer for the legislation is that it was enacted by a government out of

office for most of the 1980s which saved up this legislative gem and enacted it for political rather than for public health purposes.

For the most part, however, the legislation in Australia concerned with behaviour modification relevant to HIV/AIDS, has been more sensible. In those States of the country which still followed the criminal law inherited from Britain, and penalised homosexual conduct even between consenting adults, the statutes have been changed. In Western Australia the amending statute contained a preamble which softened the moral anxieties of many Honourable Members. It recited Parliament's belief that sexual acts between consenting adults in private ought not to be regulated by the criminal law but it also recited Parliamentary "disapproval of sexual relations between persons of the same sex" and of the promotion or encouragement of homosexual behaviour.<sup>10</sup> Unfortunately, the provisions which accompanied decriminalisation of homosexual acts and which forbade teaching about homosexual behaviour in primary or secondary institutions has tended to get in the way of effective HIV/AIDS education to the young - something with which, I gather, you are not unfamiliar in England.<sup>11</sup>

But, preamble and all, the legislation of all Australian jurisdictions punishing consensual adult homosexual conduct has been repealed, saved for Tasmania. In that State, the *Criminal Code* remains resolutely unreformed. It is now the subject of a complaint to the Human Rights Committee of the United Nations. Its provision has not been supported by the Australian Government as the international representative of Australia. Clearly, it impedes the struggle against HIV/AIDS in Tasmania. More fundamentally, it is an offence to basic human rights and represents the over-reach of the criminal law.

Removing the criminal sanctions is one thing. This has now been done in 7 of Australia's 8 principal jurisdictions. But discrimination, hatred and vilification of homosexual and bisexual men undermines the strategy of effectively targeting a key group at risk to AIDS in the Australian community whose minds must be reached if behaviour modification is to be successful. Accordingly, legal redress against

discrimination has now been provided to people in every jurisdiction of Australia except Tasmania. The legislation is complex. It is beyond my present purpose to describe it. The statutes prescribe procedures whereby people who experience HIV/AIDS related discrimination - or in many jurisdictions, on the grounds of sexual orientation - may lodge complaints with various bodies which attempt first to conciliate the matter in an informal way and then later to refer unresolved complaints to the appropriate tribunal or board having powers to deal with the complaint, including by an order of compensation.<sup>12</sup> The new *Disability Discrimination Act 1992* (Aust) applies throughout Australia. It makes it unlawful to discriminate on the grounds of disability or to harass another on the ground of disability. "Disability" is defined to include the presence in the body of organisms causing or capable of causing disease or illness and thus includes HIV.<sup>13</sup> There are numerous exceptions listed in the statute. Last week, in front page news, a man recovered an award of \$60,000 for discrimination on the grounds of his HIV status.

The most recent development has occurred in New South Wales in recent days. The *Anti-Discrimination Act* of that State already lists amongst the grounds of prohibited discrimination "physical impairment" and "homosexuality". The Anti-Discrimination Board recommended, amongst other things, that as part of the strategy of confronting HIV, the Act should be amended to prohibit the vilification of persons on the ground of homosexuality or assumed homosexuality and on the ground of HIV infection or assumed infection. Legislation already exists to redress vilification on the ground of race. One of the motive forces for the proposed reform was the increased incidence of bashings and murders of gay men in Sydney - often on the basis of imputed infection with AIDS. Hatred and fear and a search for scapegoats are by no means atypical responses to a sudden new threatening epidemic.

When the State Government in New South Wales backed away from an earlier promise to introduce anti-vilification legislation, a Private Member, with the support of the Opposition and a single Government Member who crossed the floor in the Upper House, secured passage of the legislation through the State Parliament.<sup>14</sup> There

are various exceptions provided by the new statute. But the signal has been sent by the Parliament of Australia's most populous State that vilification on the grounds of sexual orientation and HIV status are unlawful.<sup>15</sup> It is a timely signal. And it is all part of a package of enlightened laws aimed at winning and sustaining behaviour modification by promoting self-regard in an important group in the frontline of the epidemic in Australia as in Britain

To reinforce the effective operation of anti-discrimination laws, the Federal Justice Minister on 29 October 1993 announced a major grant to ensure adequate support for the advocacy of discrimination cases under the *Disability Discrimination Act*. Providing law is not enough. It is vital that the law should be made to work.

I do not pretend that the legislative reforms which I have mentioned have been achieved without a great deal of controversy in my country. Or that they are bound to ensure instant results in behaviour modification amongst men who have sex with men. Empirical research shows the difficulty of maintaining educational messages.<sup>16</sup> The best of intentions melt away under the heady influence of alcohol and drug use or sexual desire.<sup>17</sup> Pamphlets, even those dealing with the "nitty-gritty", may not always be an effective means of spreading the messages of AIDS protection. Nor do I wish to pretend that the Australian response has been uniform by idealistic, courageous and far-sighted. The preambles to the Western Australian and Queensland sodomy repeal legislation, the recent Victorian HIV crime legislation and the bitter opposition to the vilification legislation in New South Wales prove the contrary. Nevertheless, I have said enough to show that, in respect of one target group, basically homosexual men, much of the legislation that has been enacted in the wake of the AIDS epidemic in Australia has been supportive of self-respect and aimed at the reduction of alienation and low self-esteem. Such attitudes provide an undoubted barrier to the receipt of messages of AIDS education. They are obstacles to the effective protection of people at risk. By protecting them, we protect the whole of society.

There have been other targets of legislative reform conforming to the same harmony. Australia is still a migrant country. Testing of applicants for temporary

residence or tourist or short-term visas has been deemed unwarranted and impractical by the Australian government. But HIV tests are still required for applicants seeking permanent residence. A positive result does not automatically exclude applicants from approval of a visa. Scope is retained to approve applications where justified on compassionate or other grounds.<sup>18</sup> Provision is now made by Australian migration law and practice for permanent long term homosexual relationships to be treated in the same way as those between heterosexual couples. In this way too stigmatisation and alienation are reduced.

#### NEW APPROACHES TO THE SEX INDUSTRY

An energetic new attack on the widespread hypocrisy of Australian laws on prostitution was signalled when the Federal Health Minister (Senator Richardson) launched the programme for this year's World AIDS Awareness Week. The Minister proposed that prostitution should be legalised throughout Australia in order to promote the better monitoring and control of the sex practices of those in, and using, the industry. He said that governments of all major parties had "walked away from this for decades". He stated:

*"You can't hold onto the past when the past kills people, and I think all governments are going to understand that."*

Apparently fearful that moralising editorialists would respond unfavourably to this bold strategy, the Minister said, with typical Australian directness:

*"All I can say to those editorial writers is 'get your pens ready' because this fight is only just beginning and it will be fought and fought until we win. And win we shall."<sup>19</sup>*

The Churchillian rhetoric seemingly did the trick. Australia's senior newspaper, *The Sydney Morning Herald*, editorialised:<sup>20</sup>

*"Australia's response to AIDS has been relatively free of inhibitions, and as a result it has been very effective ... To slow the spread of the disease to heterosexuals, Senator Richardson proposes legalising prostitution to better monitor and control the sex practices of those in the industry. It is a sensible suggestion. It is quite likely to outrage armchair moralists who have no feasible alternative strategies to stop the disease and whose objections should therefore be ignored."*

Unfortunately, the laws on prostitution are not within the immediate power of the Federal Minister's fiat. The activities of sex workers in Australia are controlled, overwhelmingly, by State laws. Some reforms have been introduced in Victoria, the Northern Territory and the Australian Capital Territory in an attempt to regulate the sex industry and promote safe sex.<sup>21</sup> However, legislation in Queensland<sup>22</sup> criminalises all but single operator brothels. It has been much criticised.

So far, the strategies in relation to reform of laws on prostitution in Australia have been explained in pragmatic terms of AIDS containment. That is understandable and necessary. Clearly, it is justifiable to protect workers in the sex industry from exploitation by others, pressure to engage in non-safe sex and hire and use of minors. Certainly, there is a legitimate community interest in regulating, and in some places controlling and prohibiting, public solicitation to the offence of the neighbourhood. But these concerns apart, there is a real question as to what business it is for the law to be attempting to stamp out consensual adult sexual activity. Such laws will never succeed. In the attempt, they will arm police and a whole host of officials and others with powers of oppression, intimidation, blackmail, humiliation and harassment. They will tend to drive the sex industry underground. They will there promote oppression of sex workers. And they will impede the struggle against HIV.

Perhaps arising out of the new candour about sexuality which HIV/AIDS has forced upon Anglophone societies, we may all take a fresh look at our inherited laws on prostitution and get rid of a lot of them. What consenting adults do with consenting adult sex workers is, for the most part, entirely their own business. The state should keep its sticky nose out of people's bedrooms. The removal of the

constant peril of legal prosecution and harassment would help in the education and empowerment of sex workers, including in their insistence upon safe sex and the reduction of HIV spread. The world-wide infamy of Britain's popular press, with its hypocritical double standards on human sexuality and sexual morality, shames the proud tradition of free speech of this country. Perhaps AIDS will help you - like us in Australia - to become more honest and less judgmental about this topic. It is time we all grew up. AIDS may force us to lift the veil of titillation and to confront the world we actually live in with ruthless candour. Only such an approach will save the lives otherwise at risk.

#### NEW APPROACHES TO DRUG LAW REFORM

The report of the United States National Commission on AIDS listed amongst the neglected strategies in that country, requiring urgent attention, the adoption of an effective drug policy. It said:

*"The crucial variable represented by substance use in determining the scope of the future epidemic must be grappled with realistically. An approach that emphasises 'harm reduction', for example access to sterile injection equipment, is essential: this would not only prove more humane and effective in controlling drug use per se than the past 'war on drugs', but it would also yield dividends in reduced HIV and tuberculosis transmission. Resources should be shifted from interdiction and mandatory punishment towards drug treatment availability for all who seek it."<sup>23</sup>*

In Australia, there is now widespread community discussion about the strategies on illegal drug use control. We are beginning to see the same moves which earlier led to the decriminalisation and de-stigmatisation of male homosexual activity in the case of adult drug use. Injecting drug users, even where able to establish an addiction, are prosecuted with enthusiasm and subject to extremely high penalties required or mandated by Federal and State criminal laws. Such laws reflect a punitive rather than a public health/harm reduction philosophy.<sup>24</sup> Now, at last, the old

philosophy is being questioned and doubted, including by Law Societies, Bar Associations and former and current judges across Australia. They are amongst those who see, at first hand, the ineffectiveness and arbitrariness of much of the present law.<sup>25</sup> As small steps along the way towards a more rational drug policy in my country, personal use of small quantities of marijuana has been decriminalised in South Australia and the Australian Capital Territory. Yet for the most part the "war on drugs" continues.

This makes the more remarkable the adoption in all jurisdictions of Australia, except Tasmania, of the national scheme for needle and syringe exchanges. The extent of injecting drug practices in Australia can be gauged from the fact that, in New South Wales alone, the Department of Health estimates that some 2 million needles and syringes are being distributed annually through pharmacies for injecting drug users.<sup>26</sup> A problem was presented by the fact that, coinciding with the provision of sterile needles to combat AIDS, the criminal law uniformly rendered it an offence to possess drug use equipment. This inconsistency necessitated amendment to the laws to permit the needle exchange system to be implemented. And implemented it was across the continent.

By comparison to the experience in North America and in much of Europe, Australia has very low rates of HIV infection amongst injecting drug users. This has come about by reason of substantial cooperation between police, prosecutors, public health authorities and the representatives and spokesmen for the drug using communities. Some of the workers involved in the needle supply and exchange programmes are still fearful of prosecution for drug aiding and abetting offences which remain on the statute books. However, to a very large extent, the response to the risks of the spread of HIV through injecting drug use has been brought about without difficulty or official harassment. And it is one of the reasons which has occasioned a new look at the entire question of drug regulation. The hypocrisy of the present compromise has not escaped community attention. To punish drug users and suppliers with maximum sentences, rising even to life imprisonment, sits ill with a



community which facilitates and encourages the exchange of clean syringes which it knows will only be used for injecting illegal drugs.

The human rights of drug dependent persons, and of recreational drug users, is a subject which has been ignored until now by most serious lawyers and virtually all judges. We have all become caught up in the drug control prohibitionist model which is the leftover from the great social experiment of the 18th Amendment to the *United States Constitution*. That model has been promoted throughout the world by binding international conventions and by a huge bureaucracy of regulators and controllers. The advent of the AIDS pandemic requires a completely fresh consideration of this strategy both at a global and at a national level. The matter must be addressed both in pragmatic and human rights terms. Putting it quite bluntly, it is an uncivilised act to punish people, with long periods of imprisonment, who are addicted to particular drugs. The problem is, and should be treated as, one of public health concern not one of law and order. In our obligation to adopt new strategies to minimise drug use. Stimulated by the advent of HIV/AIDS, we may gain new insights into a more effective strategy of harm reduction in the use of drugs, particularly where they are absorbed by injection. Drug use, like sex, is here to stay. A sensible legal strategy will be targeted at harm minimisation. Not the elusive chimera of total legal prohibition. HIV/AIDS will eventually teach us this.

#### **OTHER LEGAL DEVELOPMENTS**

The law is such an all-embracing discipline that it would take many hours to list even the most important of the Australian statutes enacted and cases decided in the first decade of AIDS. It is, despite the discrimination laws, an illness which, for many, still carries a terrible social stigma - particularly in small towns and rural Australia. Many are the cases which have involved invasions of the privacy of persons infected and the attempts (only sometimes successful) to secure the protection of their confidences by court orders.<sup>27</sup> Many cases have come before the courts concerning the sentencing of persons infected with HIV. Put generally, this condition

has been held to be one which aggravates the seriousness of an unconsensual sexual attack<sup>28</sup> But equally it has been held to be one which, in other cases, calls for a shorter custodial sentence in recognition of the reduction of life expectation which generally accompanies seroconversion.<sup>29</sup>

Many problems have arisen in the field of insurance<sup>30</sup> and employment.<sup>31</sup> We have looked with depression at some of the English cases of complaints of discrimination in employment against HIV positive people - victims of the ignorance and prejudice of their workmates.<sup>32</sup> We have had our own share of disappointing decisions. Including in the Family Court of Australia where access to a child has been denied to a HIV positive father, not for any true risk to the child but to abate the irrational and ignorant fear of the mother and others.<sup>33</sup> We have had bad<sup>34</sup> and good<sup>35</sup> decisions on planning law in respect of establishments which spread the messages of AIDS prevention and look after people living with AIDS. We have made some headway in the laws on personal relationships. And on equating long-term partners suffering loss and bereavement to AIDS, whose pain and problems are no less than those suffered in equivalent circumstances in a stable marriage.<sup>36</sup> We have faced up to the practical problems of crisis housing;<sup>37</sup> the need for special health services; and the necessity for expedition of legal cases involving people living with AIDS.<sup>38</sup> We have begun thinking about the law on euthanasia<sup>39</sup> and what rules should govern the development, trialing and use of vaccines when, ultimately, they become available.<sup>40</sup>

### **CONCLUSIONS: A TIME FOR LAWYERS TO ACT**

HIV/AIDS thus presents many challenges for the lawyer. There are many issues for the legislator. There are not a few problems for the judge. But these difficulties pale into insignificance beside the acute daily problems faced by people living with AIDS, their families and carers and the urgent tasks of the educators and scientists who are responding to this pandemic. We, the lawyers and judges must, nevertheless, play our part. What is that part? It is to promote and secure reform of the law where it presents an obstacle to reaching out to the minds and changing the

behaviour of those who are at risk to HIV/AIDS. This means that we must think boldly and afresh in areas of the law where there has been a lot of hypocrisy, double-standards and legal inefficiency. I refer especially to laws concerning human sexuality and drug use. We, the lawyers, can play a constructive part in the struggle against HIV/AIDS if we cooperate in the moves which reduce the impediments to behaviour modification and promote the solution to the problems which people living with AIDS actually complain of.<sup>41</sup> Those problems concern large questions of self-image and self-regard. But they also concern the very practical and smaller issues with which practising lawyers are more familiar. Superannuation. Wills. Breaches of confidentiality. General insurance. The operation of the criminal law. Immigration rules. Employment discrimination. The provision of powers of attorney. Access to medical treatment. These were the major categories listed by the users of the AIDS legal project in Sydney.<sup>42</sup> They are ordinary lawyerly problems. But they will be better solved by lawyers and resolved by judges if we are informed about HIV/AIDS and the burdens carried by those who are involved.

Dr Jonathan Mann, until recently the Director of the Global Programme on AIDS of the World Health Organisation, stated this year that the greatest single insight which he had derived from being at the helm during the first decade of the epidemic was of the close inter-relationship between the containment of the epidemic and the respect for the human rights of those infected or at risk. It is this simple insight which should inform our legal strategies in the struggle against HIV and AIDS. Put simply, the punitive model will not work. There is not enough barbed wire nor funds enough for the model of quarantine. We are without a cure. No mass vaccine is immediately in prospect. We must therefore depend, very largely, upon behaviour modification to contain this epidemic. To win behaviour change, always so difficult as every lawyer will tell, we must gain the confidence and respect of those most at risk and those already infected. By protecting them we protect everyone. It is a simple message. But it cannot be said too often. It must be the message that goes forth in this week of AIDS awareness. From Australia to Britain and far beyond. The theme of World

AIDS Day this year is "A Time to Act". For lawyers, lawmakers and judges it has been a decade of action. Alas, the hardest years lie ahead.

This is a fitting place for such a message to be voiced. On the site of this old church, the monks of Westminster Abbey in the 11th Century built a chapel for prayer on their way to their convent garden nearby. In the chapel's successive buildings, Bacon, Hampden, King Charles II and many more were christened. The present edifice was built in 1726. It soon became the Royal Parish Church. It has had a global effect in more ways than one. From here, in 1924, the first broadcast church service was sent forth. The façade of the church has been copied throughout the old Empire and across the United States of America. Even adjacent to the Law Courts in Sydney is a model of it, built in the earliest days of the convict settlement. There the judges at the beginning of each law term process for prayer. It is a quiet place, handy for contemplation and reflection.

This church is named for St Martin of Tours. By legend, he gave half of his cloak to a beggar and was rewarded with a vision of Christ calling him from the Roman army to the religious life. His example of help to the needy has been the theme of this church during the whole of this century. We therefore do well to meet in this place and to reflect upon the needy - of England, of Australia and of the wider world. For once, the law is called to play a positive and supportive rôle for the needy - for those living with AIDS and those millions whom we must reach and protect from infection.

The jest is told of this church, in a journal written in 1842 about two parishioners, one divorced and one agnostic. The divorced man said "I was married in that Church". "Indeed!" said the agnostic. "And I was christened in it". "It is not a good shop" replied the other. Their work don't last!" I hope that our work today will last. And that we will leave this place for the bustling streets of London with a resolve to respond to the mighty challenge of AIDS. To do so with a lawyerly attention to basic human rights and effective law reform. In the face of this global enormity which threatens our species, we should be prepared to act boldly. We should do this because

it is the pragmatic thing to do. It is the best way to fight this particular epidemic. And ours is a most practical legal system. But we should do so as well because, in the words of the *Prayer Book*, it is meet and right so to do. It is our bounden duty to promote and respect human rights. In the struggle against AIDS, it is a happy coincidence that the protection of human rights is also the best strategy for containing the epidemic. A paradox, you say. But a lesson we must take with us and spread after the warm glow of this encounter together is but a faint memory.

*"I think continually of those who were truly great.  
Who, from the womb, remembered the soul's history  
Through corridors of light where the hours are suns,  
Endless and singing.*

...

*What is precious, is never to forget  
The essential delight of the blood drawn from ageless springs  
Breaking through rocks in worlds before our earth  
Never to deny its pleasure in the morning simple light  
Nor its grave evening demand for love.  
Never to allow gradually the traffic to smother  
With noise and fog, the flowering of the Spirit."*

*S Spender*

## FOOTNOTES

- \* President of the New South Wales Court of Appeal, Australia; Chairman, Executive Committee, International Commission of Jurists; former member of the World Health Organisation Global Commission on AIDS.
1. See *Chiron Corporation Ortho Diagnostic Systems Inc & Anor v Organon Teknika Limited & Ors*, Chancery Division, unreported, 5 October 1993; see also [1992] FSR 512 for earlier proceedings.
  2. See statistics and other information in M D Kirby, "AIDS and the Law" (1993) 19 *Commonwealth L Bulletin*, 350.
  3. United States, National Commission on AIDS, Final Report, *AIDS: An Expanding Tragedy*, Washington, 1993, 8.
  4. *Ibid.*
  5. *Id.*, 9.
  6. D Kerr "Address to National Conference on HIV/AIDS Law: Policy and Directions, Melbourne, 29 October 1993, 2.
  7. D Patterson "The Law" in E Timewell & Ors *AIDS in Australia*, Prentice Hall, Sydney, 366, 367.
  8. *Id.*, 368.
  9. *Id.*, 367 citing Western Australian, Department of Health, *Infectious Diseases Legislation in Western Australia - Legislative Proposals*, Perth, 1990.
  10. See *Law Reform (Decriminalisation of Sodomy) Act (WA)*, preamble. Cf *Criminal Code Amendment Act 1990 (Qld)*.
  11. See comment T Leach, (1993) 7 *National AIDS Bulletin (Aust)* π7, 47.
  12. J Godwin and Ors (eds) *Australian HIV/AIDS Legal Guide* (2nd ed), Federation Press, Sydney, 1993, 87ff.
  13. *Ibid.*, 92.

14. See *Anti Discrimination (Homosexual Vilification) Act 1993* (NSW).
15. T Leach, "The NSW Vilification Debacle" in (1993) 7 *National AIDS Bulletin* (Aust) #9, 43.
16. G W Dowsett "Sustaining Safe Sex: Sexual Practices, HIV and Social Context in *AIDS 1993* Vol 7 (Supp 1) 257.
17. See (1993) 7 *National AIDS Bulletin* (Aust) #9, 28.
18. Godwin (above n 12), 342.
19. G Richardson, "Launch of World AIDS Awareness Week", 4 November 1993, Sydney.
20. *Sydney Morning Herald*, 8 November 1993, 10.
21. Godwin, 251.
22. *Prostitution Laws Amendment Act 1992* (Qld).
23. US Report n 3, 10.
24. Paterson, 375f.
25. N Heather *et al* (eds) *Psychoactive Drugs and Harm Reduction: From Faith to Science*, Whurr, London, 1993.
26. Paterson, 371.
27. Godwin, 71.
28. See *R v Wright*, Tasmania SC, Cox J, unreported, 27 September 1990; Godwin, 305; Cf *R v Malcolm* [1988] Crim LR 189.
29. See *R v Smith* (1987) 44 SASR 587 (CCASA); *Bailey v DPP* (1988) 78 A Crim R 116 (NSWCCA); Godwin, 297, 304.
30. Godwin, 370; Paterson, 376.
31. Godwin, 479.
32. See eg *Cormack v TNT Scalion Ltd* (1987) *Local Govt Review* 923; Godwin 516.
33. *In the Marriage of B and C* (1989) FLC #92.043 (FCA).
34. See *Killeen v Sharp* [1988] VR 954 (SCV).

35. *Bodyline Spa & Sauna (Sydney) v South Sydney City Council* (1992) 77 LGRA 432 (LEC).
36. C Puplick, "Assessing Current Directions in Legislation", Paper to the National Conference on HIV/AIDS Law, Policy and Directions, 29 October 1993, Melbourne, 10.
37. *Ibid*, 6.
38. Paterson, 377.
39. (1993) 7 *National AIDS Bulletin* (Aust) #9, 17; Godwin 321; Paterson 378.
40. (1993) 7 *National AIDS Bulletin* (Aust) #9, 13.
41. M Alexander, "Provision of Legal Services to People with HIV and AIDS", Paper to the National Conference HIV/AIDS Law Policy and Directions, Melbourne, 29 October 1993, 2.
42. *Ibid*.