

Foreword

*Tribunal on Homosexuals and Discrimination, A Re-Examination of the 1976
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TRIBUNAL ON HOMOSEXUALS AND DISCRIMINATION

A RE-EXAMINATION OF THE 1976 TRIBUNAL ON HOMOSEXUALS AND DISCRIMINATION

FOREWORD

The Hon Justice M D Kirby AC CMG *

1976 seems long ago. Yet objectively it is but the blinking of the eye of time.

Over a weekend in 1976 a group of prominent citizens constituted a Tribunal in Sydney to hear evidence and argument and to make recommendations about homosexuals and discrimination. This book re-publishes the original report. It adds up to date editorial comment of a working group. The working group has tried to examine the extent to which progress on discrimination on the ground of sexual orientation has been made in Australia. Sadly, it has collected not inconsiderable evidence of the persistence of discrimination and the pain and injustice which it continues to cause.

The model of the Tribunal was the body launched by Bertrand Russell to bring to the bar of international world opinion the terrible wrong-doings of the combatants in the Vietnam War. That model was so successful in mobilising the leaders of moral opinion in the world - and presenting their evidence and opinions through the global media - that it played an undoubted part, including in Australia, in the turnaround of opinion as to the rights and wrongs of the Vietnam War.

The Vietnam Tribunals of Lord Russell spawned numerous other international and national bodies to examine similar moral and human rights questions in a public setting: enlisting the educative activities of the free media. That is what the 1976

Sydney Tribunal on Homosexuals and Discrimination aimed to do. It started its work in a most unpromising setting. An opinion poll a decade earlier had shown that only about a quarter of Australians believed that homosexual conduct between consenting male adults should no longer be a criminal offence. It is interesting to observe that another opinion poll, only three years before the Tribunal was convened, showed that 75% of respondents considered that it was "none of their business" if two men began living together in a homosexual relationship in their neighbourhood. Yet 8% believed that it would be their duty to report such a fact to the police or other authorities. In truth, those people were simply faithful to the criminal law as it stood at that time. Such law forbade sexual relations between men, even if they were adults and even in private.

The contrast between the two polls reflects a contrast seen throughout the testimony to the 1976 inquiry. It is the contrast between the private opinions of decent, ordinary individuals and what they believe to be expected of them when confronted, in public, by assertions of homosexuality. Privately, the Anglican priest or the employer of a gay teacher in a Catholic school was, in 1976, sympathetic and even supportive of a homosexual colleague. But when that colleague asserted his homosexuality in the public media, the support melted away. He had to go.

Here, then, is a paradox. Toleration of private behaviour is understandable and laudable. It is part of the Australian sense of a fair-go. Yet as the pages of this book demonstrate - both for 1976 and 1994 - prejudice, vilification, shame and low self-esteem are the constant companions of homosexuals. The only way this will be changed is by public ventilation of the irrationality of past attitudes. It is as irrational (and morally wicked) to hate a person for his or her homosexual orientation as it is for skin colour or left-handedness. The overwhelming scientific evidence now available suggests that homosexuality is either imprinted in the genetic messages of the newborn child or, in some cases, develops in very early childhood. If this is so, it removes one of the fears of society that homosexuals will try to seduce heterosexuals from the easier path of their sexual orientation. But it also makes it clear that to hate and vilify

others for their very nature - or to demand that they should not give expression to that nature as a price of acceptance - is just not on. Gradually, and thankfully, this message has percolated to the Australian community. But it has only happened because the paradox was shattered. People began to refuse to accept the comfortable world of silence. They came out of the closet. They confronted their fellow citizens with the injustice of irrational discrimination. They demanded change. They were supported by enlightened political leaders - of both major political parties. They secured important reforms of the law. Criminal offences (except in Tasmania) directed expressly at the conduct of adult consenting homosexual men were reformed. But the reforms were not entirely devoid of discrimination, as the differing ages of consent in some Australian jurisdictions demonstrate. Anti-discrimination laws forbidding discrimination on the grounds of homosexuality were passed in some jurisdictions, but not others. In New South Wales, from March 2 1994, the law now forbids vilification of homosexuals.¹ Equivalent reforms have yet to be achieved in other Australian jurisdictions. And as this book demonstrates, there are important exclusions from anti-discrimination law which remain to be repaired.

A reflection on the achievements of the eighteen years since the Tribunal of 1976 permits the impartial observer to accept that important advances have been won. The law of trusts has been adapted to reflect changing patterns of human relationships and property ownership.² The reform of criminal laws. The enactment of anti-discrimination statutes. Federal rules against discrimination in employment. The termination of discrimination in the Australian defence forces. Different media attitudes. New approaches by the police, whose current leadership generally insists upon good relations with the gay and lesbian community. At least this is true in New South Wales. It is evident most notably at the time of the Sydney Mardi Gras - itself a significant contributor to changing attitudes.

Yet for all that, this book displays the many areas where discrimination against Australian homosexuals persists. In employment benefits. In superannuation statutes. In adoption of children. In the lack of a status akin to marriage for those who seek it.

An important point made in the commentary is the change in the religious makeup of the Australian community. If in 1976 the Christian churches appeared resistant to changes in respect of homosexuals and homosexuality, in today's growing Islamic community in Australia the resistance may be even more uncompromising and difficult to change.

Most importantly there is a continuing need to reinforce changes in community attitudes of acceptance of human difference. Anyone in doubt about the extent of bias-related violence against homosexual men and women in Australia should study the investigations of the Australian Institute of Criminology.³ In the International Year of the Family there are still many, including in the courts, who would deny to homosexuals the recognition of "family status". Thus the Supreme Court of Canada has upheld, as outside the redress of the law of that country, the refusal of a government employer to provide a day's bereavement leave to a man who wished to attend the funeral of the father of his long-time male companion.⁴ Ironically, the couple had lived together since 1976, the year of the Tribunal. The dismissal of the claim shows that the journey to eradicate legal discrimination, even in enlightened countries, has only really begun.

The journey has been complicated by the intervention of HIV/AIDS in the years since 1976. Although the virus which causes AIDS attacks human beings irrespective of their sexual orientation, its early targets in Australia, the United States, Canada, Britain and elsewhere were homosexual men. AIDS became an easy, available justification for further, new discrimination. Research suggests that AIDS has sometimes resulted in lower levels of self-esteem.⁵ On the other hand, it has presented an urgent necessity to spread the educational messages in order to reduce the tragic explosion of the epidemic. In Australia, at least, this has mobilised many people. It has resulted in a remarkable programme of initiatives which would have seemed impossible in 1976.

As 1994 provided the opportunity to review the 1976 Tribunal, it also presented the decision of a new Tribunal - this time one of global authority: the United Nations

Human Rights Committee. That Committee unanimously upheld the complaint of Mr Nick Toonen that the Tasmanian *Criminal Code* provisions on homosexual conduct breached his human right to privacy as a homosexual man. The Committee held that Australia was in breach of its obligations under the *International Covenant on Civil and Political Rights*. This decision, and the necessity it presents to reform Tasmania's criminal laws, shows how far we have come. But there still remains a long way to go.

This, then is the lesson of this book of retrospectives. It is useful to look back. It is instructive to reflect upon the wrongs that remain to be righted. It is imperative to look forward. As a community, we in Australia must ensure that the process of legal reform and public education continue until, in a future time, this form of discrimination is looked upon with astonishment and grief.

ENDNOTES

- * President of the New South Wales Court of Appeal; Chairman of the Executive Committee, International Commission of Jurists (ICJ), Geneva. The ICJ has added discrimination on the ground of sexual orientation to its future Global Programme on Human Rights.
- 1. See New South Wales, Anti-Discrimination Board, *Equal Time*, No 19, 1994, 4.
- 2. See eg *Hartigan v Widdup*, Supreme Court of the ACT, Master Hogan, unreported, 23 March 1992; cf *Bryson v Bryant* (1993) 29 NSWLR 188 (CA), 202.
- 3. G Mason, *Violence Against Lesbians and Gay Men*, Australian Institute of Criminology, Violence Project, No 2.
- 4. *Canada (Attorney-General) v Mossop* (1993) 93 CLLC 17, 006 (SCC). Lower court see *Canada (Attorney-General) v Mossop* 71 DLR (4th) 661.
- 5. G Lima & Ors "The Relationship Between Homophobia and Self-Esteem in Gay Males with AIDS", 25(4) *Journal of Homosexuality* 69 (1993).