

"Tasmanian Homosexual Law Reform - An Appeal to Reason and Justice"

Devonport Community Legal Centre Inc,
Information Forum, Devonport, Tasmania,

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TASMANIAN HOMOSEXUAL LAW REFORM - AN APPEAL TO REASON
& JUSTICE

The Hon Justice M D Kirby AC CMG *

OUT OF AFRICA

I have just returned from South Africa. I attended the inauguration of President Nelson Mandela and the new Government of National Unity. Things are still rather fragile in South Africa. But there is a great determination amongst the leaders of all the races to rebuild the country in a new image as a just and tolerant society.

I attended the inauguration of President Mandela in my capacity of Chairman of the Executive Committee of the International Commission of Jurists. This is an international body of judges and lawyers committed to the rule of law and to the human rights for all people throughout the world. It is in that capacity that I have come to this meeting of citizens in Devonport.

One of the items now on the agenda of the International Commission of Jurists is the protection of the human rights of homosexuals. This subject has been much

neglected until recently. But it has now seized the world's attention in part, because of the decision of the Human Rights Committee of the United Nations affecting the laws of this beautiful State of Australia, Tasmania.

In South Africa, the new Constitution contains express provisions committing that country to the elimination of discrimination not only on the ground of race and skin colour but also on the grounds of gender and sexual orientation. It is not surprising that it should be so. The first Deputy President of South Africa, Mr Thabo Mbeki, sworn into office at the same time as President Mandela, explained, when he was Director of Information of the African National Congress, why sexual orientation had been included in the South African *Freedom Charter*:

*"The ANC is very firmly committed to removing all forms of discrimination and oppression in a liberated South Africa ... That commitment must surely extend to the protection of gay rights."*¹

The noted fighter for freedom in South Africa, Professor Albie Sachs, who lost an arm to a terrorist attack, explained how this commitment to change the earlier oppression of homosexuals in South Africa came about:

*"What has happened to lesbian and gay people is the essence of apartheid - it tried to tell people who they were, how they should behave, what their rights were. The essence of democracy is that people should be free to be what they are. We want people to be and feel free."*²

Mbeki, a black South African, and Sachs, a white Jewish South African, had felt discrimination for being what they were. I was impressed by the strong commitment of these leaders, and of President Mandela himself, to remove discrimination on every ground which concerns indelible attributes of people which they are born with and cannot change. In his speech to the multitude in the park below the Union Buildings in Pretoria soon after his inauguration, President Mandela

expressly referred to the commitment of the new South Africa to an end to discrimination against people on the grounds of their sexual orientation. Perhaps those who have felt the pain of discrimination on the basis of their race and skin colour (which they cannot change) understand more readily than many Australians the pain and wrong headedness of criminalising people on the grounds of their sexual orientation (which likewise they cannot change).

We in Australia can learn from these developments in South Africa. A man who spent 27 years in prison and emerged with charity, forgiveness and the commitment to reconciliation and to the rights of others provides worthy lessons to us. If it is possible for a 72 year old President of South Africa to see these truths, it should be possible for all of us.

EXPLODING THE MYTHS

I understand the anxieties of parents and other citizens where changes to the law are proposed which affect matters of sexuality. But it is important to explode a number of myths about homosexuals and homosexuality:

1. Homosexuality is not the same as paedophilia. There is no higher incidence of a sexual desire for children amongst homosexuals than amongst heterosexuals. The overwhelming majority of such cases coming before the courts of Australia involve the fathers and stepfathers of young girls not boys;
2. Removal of criminal sanctions against consenting private adult sexual conduct by homosexuals would leave plenty of laws in place to protect young people from sexual interference (and also other people, regardless of age, from unwanted sexual advances and assaults);
3. People do not *choose* to be homosexual. There is now powerful evidence that homosexuality is almost certainly genetically caused or, in some cases, develops in earliest infancy. It is therefore as wicked to discriminate against or denigrate homosexuals as it is to do so on the grounds of race, skin colour or

gender. It is as irrational to discriminate on this ground as to discriminate against a person on the grounds of their height, colour-blindness or left-handedness;

4 Homosexuality cannot be "cured". A very small number of people can learn completely to suppress their sexual feelings. But even prolonged chemical and electroconvulsive therapy and other severe treatments are overwhelmingly ineffective in turning homosexuals into heterosexuals. It is cruel and futile to try to force people to change their genetics in this way. We should not try. It is truly to seek to alter nature;

5 Homosexual Australians are not seeking a privileged position. They suffer many disadvantages in life. It is easier to change a statute than to alter fear and hatred. But what is sought in Tasmania is simply the removal of criminal stigmatisation which contributes to such fear and hatred;

6 It is true that the Tasmanian *Criminal Code* does not punish people for homosexuality as such. But it is completely unrealistic to expect homosexual people to adopt a lifelong celibacy. It is wrong and futile to forbid them fulfilment of their human needs for sexual and personal relationships. One has only to think calmly about the strength of the desire of virtually every human being for such fulfilment to realise how completely unrealistic the demand for lifetime celibacy is when all that is being asked is the removal of laws that prohibit private consensual sexual activity between adults;

7 AIDS is not a homosexual condition. It is a human virus. Throughout Africa it is, as I was reminded last week in Johannesburg, overwhelmingly, a heterosexual problem. Far from helping to prevent the spread of HIV/AIDS, the current Tasmanian laws impede the strategies we have generally adopted in Australia, designed to reduce the spread of AIDS. Those strategies involve winning the confidence and attention of all people, particularly young people - whatever their sexual orientation. We will not get the messages of safe sex through to the next generation of young Australians if a sector of them, facing

significant risk, is cut off, alienated, denigrated and criminalised. Are these people just to be written off as not worth saving? I cannot believe that this is what Australians, including in Tasmania, would wish.

In Australia we need our own Nelson Mandelas to speak up for basic principles. Sadly, too many of our politicians on this and like issues descend to name-calling and pandering to populist politics or to the politics of fear. They reject principle and justice to a minority for expediency. The oppression of homosexuals is as morally wrong as the oppression of blacks. It is morally wrong to punish people for being themselves. It is as wicked as apartheid to apply to them criminal laws for consensual adult conduct in private.

A CALL TO ACTION

I realise that these arguments will not convince those who believe literally the instruction in the Book of *Leviticus* in the *Old Testament* of the Bible. But there is a lot in the *Old Testament* that we no longer take literally. Few Australians, including believing Christians, now accept that the earth was literally made by God in seven days. Few accept that the first woman came out of the rib of the first man created. Few accept that the progenitors to all the world's animals climbed onto Noah's Ark. Or that Jonah lived in a whale. We have ended capital punishment. We do not now take an eye for an eye. A lot of us now eat pork. Whatever the rights and wrongs of the teachings of *Leviticus* for a desert society five thousand years ago, we should not allow them to inflict cruel burdens on our fellow citizens today in Australia, approaching the new millennium. We can learn a new approach from other Biblical injunctions to love and reconciliation. Homosexuals are the brothers and sisters, children and cousins, uncles and aunts and friends of all of us. They demand, and are entitled to, our respect. Outdated criminal laws against them should be repealed.

It would be preferable, politically and morally, for the people of Tasmania to take the step of reform for themselves and of their own will. Tasmania is now the

only jurisdiction in our continental country to criminalise a group of citizens for just being themselves. We must not accept it any longer for Australian homosexuals. Tasmania and its leaders should reflect upon this appeal to moral principle.

It will be a terrible indictment of the moral sense of this part of Australia if the land be beautiful but the hearts of the people cold and full of injustice. We in Australia have come a long way in the perception of human rights, even in my lifetime. Respect for the basic human rights of homosexuals in Tasmania is a further step which must now be taken. The political leaders of Tasmania should take this step. Not so much because of a decision in Geneva. Nor out of fear of Canberra's actions. But because reflection upon their moral obligation to a minority of their fellow citizens demands it. Justice requires it.

If, however, Tasmania's political leaders and its people are blind to the requirements of fundamental human rights, they cannot really expect that the rest of their fellow citizens of Australia will just accept the deprivation of fundamental human rights in this country indefinitely. We would not do so if one State persisted in denigrating and criminalising Australian Aboriginals, Australian Chinese or Australian women. We would then look to our national Parliament to ensure that the blight of the criminal law of Tasmania was lifted. So it must be with Australia homosexuals.

Mine is an appeal to reason in Tasmania. That is why I have come to Tasmania tonight. Remove the myths and misunderstandings. Take the State out of the bedrooms of adult Tasmanians. End, at last, the embarrassing charade of an unenforced and largely unenforceable law which nonetheless humiliates and alienates good citizens and renders them subject to blackmail, hatred and even violence. Do it not because Geneva or Canberra say so. Do it because it is right and conforms to Australian notions of fairness to all.

ENDNOTES.

Chairman of the Executive Committee of the International Commission of Jurists. President of the Australian Section of the International Commission of Jurists. Past Commissioner of the World Health Organisation Global Commission on AIDS. Special Representative of the Secretary-General of the United Nations on Human Rights in Cambodia.

1. T Mbeki in *Capital Gay* (London) 4 December 1987 cited D Fine and J Nicol in M Gevisser and E Cameron (eds) *Defiant Desire*, Ravan, Johannesburg, 1994, 269 at 271.
2. A Sachs cited *South*, 17 May 1990 in D Fine and J Nicol *op cit*.