HOMOSEXUAL LAW REFORM - THE ROAD OF ENLIGHTENMENT*

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The journey to enlightenment.

This is the third time that I have addressed this Association. The first occurred in 1983. At that time consentual sexual conduct between adult males in New South Wales (and in most parts of Australia) was completely illegal. After a number of false starts, the New South Wales Parliament was at last moving towards decriminalisation.

We should pause and reflect upon the determination of the reformers who achieved an important, and belated, reform for the human rights of gay citizens. I think of Bob Ellicott who pioneered the reform in Federal Parliament and John Dowd and Neville Wran who successively introduced measures in the New South Wales Parliament. It is important to remember that the cause of homosexual law reform has always had champions who are not themselves gay. An important lesson of my life has been to derive from discrimination against particular groups, the general lesson of the need to avoid discrimination upon *any* irrational ground. To discriminate against people on such a basis (whether it be race, skin colour, gender, homosexual orientation,

handicap, age, or any other indelible feature of humanity is not only irrational. It is immoral. The law should provide protection from and redress against it.

In the past fifteen years, the progress that has been made in achieving, through legal reform, education and social movements, change in the attitude of Australians towards gay men, lesbians and bi-sexuals, has been remarkable, given the extremely unpromising start. Sadly, the journey of enlightenment has been accompanied by a less happy journey. At the moment of the achievement of important legal reforms, the homosexual community of Australia, in company with brothers and sisters around the world, was hit by a terrible endemic. So with the triumphs of legal reform, greater community understanding and moves towards legal enlightenment have come sad and painful times. Times of much suffering and of terrible anguish. The achievements and the suffering have had a symbiotic relationship. They have been interwoven through the lives of many people in this and other countries, over the past decade.

I defy anyone to read the book *Holding the Man* by Tim Conigrave, without feeling an appreciation of this mixed passage of passion, fulfilment and pain. It is a book to cause anger about unacceptable discrimination and intolerable suffering. But it is also a book of complete honesty and appreciation of self-worth of one human being, struggling for enlightenment of himself and enrichment of the spirit of others. I read the book when I was recently in Solomon Islands in my first session as President of the Court of Appeal of that country. It is a book for tears, I am afraid. Its last pages are completely arresting. Yet, out of the pain, comes a determination which everyone should feel to work for improvement. It is a book that tells the story of the times in Australia.

Winston Churchill, invited to visit his old school Harrow, was called upon in his advanced age to make a speech to the boys. He did so in three sentences. They were:

"Never give up. Never give up. Never give up."

This is the message for those who support the ongoing struggle for human rights of all and the particular struggle for homosexual law reform in Australia.

United Nations' initiatives.

One of my current appointments is as Special Representative of the Secretary General for Human Rights in Cambodia. In that work, I am able to call upon my experience in the W.H.O. Global Commission on AIDS. An important issue for human rights today is the protection of people in every land from the burden of HIV/AIDS. One of the few benefits which Cambodia derived from its isolation in the decades before U.N.T.A.C. was its substantial removal from immediate exposure to the HIV epidemic. But now it is on the front line, so close to Thailand and Burma. It is therefore important, for the protection of the right to life, the right to health and the other human rights which the United Nations' *Covenants* guarantee. My work should defend human rights in the context of HIV/AIDS.

Unfortunately, Cambodia has not so far been blessed with politicians who see the issues of AIDS with the clarity of Dr Neal Blewett and Dr Peter Baume. They helped Australia to achieve a bi-partisan, courageous and generally successful strategy to combat HIV/AIDS. In Cambodia, the Government and the Phnom Penh Municipality are closing brothels and taking down signs promoting the use of condoms. When I raise this basic issue of human rights in Cambodia, too many men smile and too many women avert their eyes. Fortunately, the King of Cambodia is an important ally in this particular struggle of human rights. King Sihanouk wisely and clearly sees clearly its human rights dimension.

On a broader front, the last couple of years have seen significant advances within the United Nations to put the issue of sexual orientation where

it should be - at the forefront of the issues of human rights in our world. The outcome of the Fourth World Conference on Women, held in Beijing in 1995, has been described as disappointing. This is because the final statement of the Conference did not include an expected reference to sexual orientation and to the rights of women to their sexuality, without discrimination.

But the issue was certainly on the agenda in Beijing. The demand for redress against discrimination was given voice. Interventions reported how lesbians had been expelled from villages and towns for lesbianism is illegal in most African countries. In some countries, it was reported, lesbians are burned, certified as insane, locked up or stoned. In other countries they do not even officially exist.[1]

According to news reports on the conference, the "battle lines" on this issue were unremarkable. The United States, Australia, New Zealand, the European Union, Jamaica, Chile, Slovenia and Macedonia, supported the call for action. So did Cuba. South Africa, whose new constitution bans discrimination on the grounds of sexual orientation [2], was a new ally, important because throughout Africa there is much discrimination on this ground. In opposition were the Vatican, Iran, Libya, Morocco, Honduras, Guatemala, Ecuador, Algeria and Argentina, the last now a hard-liner on this issue. It was only when the United Nations Secretariat intervened that the committee organising the N.G.O. forum outside Beijing permitted a lesbian tent on the site. I applaud the adherence of the United Nations Secretariat to basic principle and to defence of the principle of free expression and persuasion.

The basic principle at stake has been recognised by the United Nations Human Rights Committee. It was recognised in the decision given on a complaint of an Australian, Mr Nicholas Toonen, on the first day that the *First Optional Protocol* to the *International Covenant of Civil and Political Rights* became available for Australians [3].

I have to confess to being wrong so many times in my life. When Lionel Murphy talked to me about his intention to bring the case in the International Court of Justice against France concerning atmospheric nuclear testing, I urged caution. I was wrong. When Rodney Croome and Nick Toonen talked to me of their proposed action in the United Nations Human Rights Committee I also urged caution. I said that I feared that a failure to exhaust domestic remedies would prohibit success. I was wrong. Progress is so often made by people who take bold action. They risk defeat in the name of causes greater than themselves. I honour such people. We should all learn from them and emulate them.

The importance of the Toonen decision for the cause of the recognition of sexual orientation as a fundamental ground for protection of human rights [4] extends far beyond Tasmania, Australia, the occasion of the complaint. Ultimately, Tasmania and its democratic Parliament would have removed the irrational law which threatens to punish adult, consenting people for their conduct in fulfilment of their nature. The significance of the case will rather, one day be found in countries, such as Iran, where gay men and lesbians are still shot or stoned. The significance of the decision is that it speaks to the whole world. It represents an important ruling by a high body of the United Nations on a fundamental question of human rights. It draws on the earlier jurisprudence of the European Court of Human Rights [5]. It spreads the enlightenment, sharing the progress which has been made in countries such as Australia with other countries at an earlier stage on the journey of enlightenment. We must be grateful to Nick Toonen and Rodney Croome for their bold, imaginative and successful enterprise.

But we should also be grateful to the United Nations in its fiftieth year. With its many faults and limitations, it is yet a vehicle for the protection of the human rights of all humanity. Human rights were one of the three pillars upon which the organisation was built in 1945. The initial meetings were held at the

very moment when the first revelations of the awful horrors of Hitler's concentration camps were coming to the world's consciousness. We should never forget the many who died and suffered for their sexual orientation, along with the Jews, the Gypsies, the Communists, the Jehovah Witnesses and the other victims of the stereotyping intolerance of the Nazis. Although the pink triangles disappeared with Auschwitz, there remain many in our community who have not removed this badge of hatred from their minds. It must be the role of education to offer them the gift of understanding. It must be the function of the law to offer protection and redress to their potential victims. It should be the role of laws and constitutions and of the advancement of fundamental human rights to offer principled guidance to nations and to the world.

Canadian failure.

The initiative of Nick Toonen and Rodney Croome from Australia had to call upon an international statement of human rights. So far, the Australian *Constitution* has not been thought to include a general provision protective of gay men, lesbians and bi-sexuals from irrelevant discrimination. Interestingly, a provision appears in the *Constitution*, not yet fully explored, which may one day be found to provide a principled protection against unreasonable discrimination in all unjustifiable forms, including on the ground of sexual orientation. The section reads:

> *"117. A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State."*

Of late, the High Court of Australia has found many important implied guarantees in our *Constitution*[6]. The writing of Lionel Murphy, when a Justice of the High Court, suggests that there may be other implied rights to be discovered in the sparse text by those who are willing to read between the lines

of the *Constitution* and to draw from it the fundamental principle derived from the just nature of our form of society [7].

In other countries, not dissimilar to our own, express constitutional rights have, in recent years, lately been invoked to protect homosexual citizens against wrongful discrimination. Sometimes the cases have succeeded. Sometimes they have failed.

An example of failure, at least in the outcome of the case, was the appeal by James Egan and John Nesbitt against the decision of the Federal Court of Appeal in Canada [8]. The facts were simple. Mr Egan and Mr Nesbitt were gay men who had lived together since 1948. Their relationship was found by the courts to be marked by commitment and inter-dependence, similar to that found in a marriage. When Mr Egan became 65 in 1986 he received old age security. On reaching 60, Mr Nesbitt, his partner, applied for a spousal allowance. He would have been entitled to that allowance had he been a female spouse. The relevant provision in the *Old Age Security Act* defined a "spouse" to include:

> *"a person of the opposite sex who is living with that person, having lived with that person for at least one year, if the two persons have publicly represented themselves as husband and wife".*

The appellants brought an action in the Federal Court of Canada seeking a declaration that the definition of "spouse" contravened the Canadian *Charter of Rights and Freedoms*. It was argued that it discriminated unconstitutionally on the basis of sexual orientation. The couple sought a declaration that the definition should be extended to include "partners in same sex relationships otherwise akin to a conjugal relationship". The trial division of the Federal Court dismissed the action. The Federal Court of Appeal, in a majority decision, upheld that judgment. In the Supreme Court of Canada, by a majority of five judges to four, the further appeal was dismissed. It was held that the

definition of "spouse" in the Act, confined to opposite sex relationships, was constitutional.

The principal majority judgment was given by Justice La Forest (with whom Chief Justice Lamer and Justices Gonthier and Major agreed). Justice Sopinka took much the same approach. The majority agreed that there was discrimination. But they had to consider whether the distinction made by Parliament was relevant and permissible under the Canadian *Charter*. They held that it was. They held that the singling out of legally married and common law heterosexual couples as the recipients of benefits was permissible. In the opinion of the majority, marriage had "from time immemorial" been firmly grounded in Canada's legal traditions. It reflected long standing philosophical and religious traditions. The ultimate reason for it transcended all of these and was firmly anchored in the biological and social realities that heterosexual couples have the unique ability to procreate. Most children are the product of their relationships. Children are generally cared for, and nurtured by, those who live in such relationships. In that sense, the court held, marriage was by its nature heterosexual. Parliament had wisely extended the definition of "spouse" to common law relationships. But it was "wholly justified" in doing so, and in treating homosexual couples differently. Although their relationships could include a sexual aspect, it had nothing to do with the social objectives for which Parliament had afforded a measure of economic support to married couples who live in a common law relationship.

The four minority judges, Justices Cory, Iacobucci, Claire L'Heureux-Dubé and Beverly McLachlin, disagreed. They found a clear denial of equal benefit of the law. In addition to being denied an economic benefit, homosexual couples were denied the opportunity to make a choice as to whether they wished to be publicly recognised as a common law couple or not. Such denial deprived them of equal benefit of the law guaranteed by the Canadian *Charter*. Just as the *Charter* protected religious beliefs and

practices, so too it should be recognised that sexual orientation encompassed a "status" and "conduct" requiring protection. The definition of "spouse" as confined to opposite sex relationships re-enforced, in the view of the minority, the stereotype that homosexuals cannot and do not form lasting, caring, mutually supportive and loving relationships with economic interdependence in the same manner as heterosexual couples. In the view of the minority judges, the appellants' relationship - dating back to 1948 no less - vividly demonstrated the error of that approach. The discriminatory impact could not be treated as trivial when the legislation re-enforced prejudicial attitudes based upon such faulty stereotypes.

Justice L'Heureux-Dubé appealed for a return to the fundamental purpose of the *Charter*, namely, the protection of basic human dignity. Same sex couples were highly socially vulnerable in that they suffered considerable historical disadvantage, stereotyping, marginalisation and stigmatisation. Such attitudes derogated from the right of every Canadian to the personhood of each individual. That right extended not only to homosexuals, but also to the elderly and the poor. Such stereotyping should not be tolerated in the social security laws of Canada.

There you see, in the debates of the Supreme Court of Canada, a reflection of similar debates which we have had in Australia. Identical controversies exist in many other lands.

United States success.

Sometimes the Courts can uphold claims for basic sexual equality. In *Equality Foundation of Greater Cincinnati Inc et al v The City of Cincinnati* [9], the United States District Court in Ohio had to consider a challenge to a law adopted following a popular ballot known as "Issue 3". That law provided:

> *"The City of Cincinnati and its various Boards and Commissions may not enact ... any ordinance ... rule or policy which provided that homosexual, lesbian, or bisexual orientation, status, conduct,*

or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment."

The proposition was adopted by the people of the city following a bitter television, radio and other campaign. Sadly, the theme of homosexuals as paedophiles was, in the words of the judge, "far from absent from the campaign". We have seen a similar confusion, wilful or ignorant, in Australia in recent times. The voters of Cincinnati approved the measure by a vote of approximately 62% to 38%. The challengers objected that this measure was contrary to both the 1st and 14th Amendments to the United States *Constitution*. The 1st Amendment guarantees free speech. The 14th Amendment guarantees equal protection of the law to all persons in the United States.

The equal protection provision has lately come to be a source of redress against impermissible discrimination. The issue of whether sexual orientation is within the group of forbidden categories of discrimination has not yet been finally decided by the Supreme Court of the United States. But Judge Spiegel, in the Cincinnati case, had no doubt. He made the following factual findings in order to provide a foundation for his legal decision:

"1. Homosexuals comprise between 5 and 13% of the population.

2. Sexual orientation is a characteristic which exists separately and independently from sexual conduct or behaviour.

3. Sexual orientation is a deeply rooted, complex combination of factors including a predisposition towards affiliation, affection, or bonding with members of the opposite and or the same gender.

5. Sexual behaviour is not necessarily a good predictor of a person's sexual orientation.

6. Gender non-conformity such as cross-dressing is not indicative of homosexuality.

8. Sexual orientation is set in at a very early age - 3 to 5 years - and is not only involuntary, but is unamenable to change.

9. Sexual orientation bears no relation to an individual's ability to perform, contribute to, or participate in, society.

10. There is no meaningful difference between children raised by gays and lesbians and those raised by heterosexuals. Similarly, children raised by gay and lesbian parents are no more likely to be gay or lesbian than those children raised by heterosexuals.

11. There is no correlation between homosexuality and pedophilia. Homosexuality is not indicative of a tendency towards child molestation.

12. Homosexuality is not a mental illness.

13. Homosexuals have suffered a history of pervasive, irrational and invidious discrimination in government and private employment, in political organization and in all facets of society in general, based on their sexual orientation.

14. Pervasive private and institutional discrimination against gays, lesbians and bisexuals often has a profound negative psychological impact on gays, lesbians and bisexuals.

15. Gays, lesbians and bisexuals are an identifiable group based on their sexual orientation and their shared history of discrimination based on that characteristic.

16. Gays, lesbians and bisexuals are often the target of violence by heterosexuals due to their sexual orientation.

17. In at least certain crucial respects, gays, lesbians and bisexuals are relatively politically powerless.

18. Coalition building plays a crucial role in a group's ability to obtain legislation in its behalf. Gays, lesbians and bisexuals suffer a serious inability to form coalitions with other groups in pursuit of favourable legislation.

19. No Federal laws prohibit discrimination based on sexual orientation. Furthermore, voter back-lash around the country has lead to the repeal of numerous laws prohibiting discrimination against gays, lesbians and bisexuals. In 38 of the approximately 125 state and local communities where some sort of measure

prohibiting discrimination based on sexual orientation has been adopted, voter initiated referendums have been placed on the ballot to repeal those gains. 34 of the 38 were approved.

20. The amount of resources spent by the City on processing and investigating discrimination complaints by gays, lesbians and bisexuals is negligible. City resources spent on processing and investigating all sexual orientation discrimination complaints is negligible.

21. The inclusion of protection for homosexuals does not detract from the City's ability to continue its protection of other groups covered by the City's anti-discrimination provisions.

22. Amending the city charter is a far more onerous and resource-consuming task than is lobbying the City Council or city administration for legislation; it requires a city wide campaign and support of a majority of voters. City Council requires a bare majority to enact or adopt legislation.

23. ERNSR campaign materials were riddled with unreliable data, irrational misconceptions and insupportable misrepresentations about homosexuals."

On the footing of these findings, Judge Spiegel concluded:

"... that gays, lesbians and bisexuals have suffered a history of invidious discrimination based on their sexual orientation. This is not a unique conclusion. See High Tech Gays v Defense Indus. Sec. Clearance Office, 895 F.2d 563, 573 (9th Cir 1990)."

He held that gays, lesbians and bisexuals belonged to a category entitled to constitutional protection. He therefore held that "Issue 3" was unconstitutional and granted the order for a permanent injunction restraining the implementation and enforcement of any law based upon "Issue 3".

There have been many similar cases in the United States in recent times. The Supreme Court of Colorado upheld a permanent injunction banning enforcement of the state's anti-gay rights initiative in December 1994 [10].

Proceedings have been brought in Hawaii, along the lines of the Canadian case, objecting to the refusal to issue marriage licences to same sex

couples. It was suggested that such laws conflicted with the Hawaiian state constitutional protection against discrimination based on gender [11].

In February 1995, the Supreme Court of the United States agreed to review the Colorado case [12]. It has sinced dismissed the State's appeal in a decision of profound importance for equal treatment of homosexual and bi-sexual collegues underthe law of the United States [13].

The United States legal system appears to be moving inexorably to a recognition that sexual orientation is, like race and gender, skin colour and other aspects of nature, an immutable characteristic against which it is both irrational and wrong to discriminate. However, as the Canadian decision shows, certainty in the outcome of such litigation can never be assured.

Conclusion.

The point of these remarks is simple. Progress towards enlightenment on the removal of legal and social causes of discrimination against people on the grounds of their sexual orientation has been made. It has been achieved with a growing momentum in the decade past. Above all, there has been a shift in community opinion, at least in countries such as Australia. This is all the more remarkable because it has come about at the very time of HIV/AIDS. In a sense, the advent of the pandemic has mobilised communities and galvanised individuals into a clear-sighted perception of the need for resolute and determined action.

I do not intend to fall into the past error of believing that enough has been achieved and that we should leave well alone. Or that there is a need for the pause that refreshes or a time for consolidation. Injustices, and many of them, continue. They exist in the letter of laws which discriminate against people on the basis of sexual orientation. The Canadian *Old Age Security Act* is but an illustration of many such laws. Many of them exist in Australia. Many of them affect basic rights such as superannuation or insurance. In the

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struggle against such injustices and in the demand for equal treatment in the eye of the law, it is vital that citizens committed to human rights - gay and non-gay - should, in Churchill's words, "never give up".

No-one should ever accept utterances of discrimination or prejudice. I was taught this at a conference of judges in Canada where a notable judge (Justice Louise Arbor) said that she never accepted sexist comments - whether from witnesses, advocates or from her colleagues. Her lesson has instruction for all of us. Whenever we see discrimination show its ugly face, we should write to protest. We should raise our voices. It is only in this way that the unacceptable is revealed for what it is. This is the way by which progress is achieved and enlightenment eventually attained. Never give up.

* Text on which was based an address to the Sydney Gay and Lesbian Business Association, Sydney, 18 September 1995.

Footnotes

* Justice of the High Court of Australia and President of the International Commission of Jurists. At the tinme of the address, Justice Kirby was Chairman of the Executive Committee of the International Commission of Jurists (ICJ). The ICJ has added sexual orientation to the list of future issues for human rights on its agenda.

1. *Sydney Morning Herald*, 11 September 1995, 8.

2. E Cameron, "Sexual Orientation and the Constitution; A Test Case for Human Rights" (1993) 110 *South African* LJ 450. S Bronitt, "Legislation Comment: Protecting Sexual Privacy Under the Criminal Law - *Human Rights (Sexual Conduct) Act* 1994 (Cth)" (1995) 19 *Crim L J* 222.

3. *Nicholas Toonen and Australia*. Communication to the Human Rights Committee of the United Nations (Communication 488/1992). See (1994) 5 *Public L Rev* 72. See Note, A Funder, "The Toonen Case", See (1994) 5 *Public L Rev* 156; W Morgan, "Sexuality and Human Rights" (1992) *Aust Yearbook Intl. Law* 277.

4. E Heinze *Sexual Orientation: A Human Right - An Essay on International Human Rights Law*, Martinus Nijhoff, Dordrecht, 1995. See also J E Halley, "Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability" 46 *Stanford L Rev* 503 (1994); R Culverhouse and C Lewis, "Homosexuality as a Suspect Class" 34 *Sth Texas L Rev* 205 (1993).

5. *Dudgeon v United Kingdom* (1981) 4 EHRR 149 - *Norris v Republic of Ireland* (1988) 13 EHRR 186. See also *Modinos v Cyprus*, 1993 decision of the same Court.

6. See eg *Nationwide News Pty Limited v Wills* (1992) 177 CLR 1 (H Ct Aust) - implied constitutional right to free speech; *Dietrich v The Queen* (1992) 177 CLR 292 (H Ct Aust) - implied constitutional right to fair trial (per Deane J and Gaudron J).

7. *Sillery v The Queen* (1981) 180 CLR 353 (H Ct Aust) - implied limitation on cruel and unusual punishments (per Murphy J, 362).

8. *Egan & Nesbitt v The Queen*, Supreme Court of Canada, 124 D.L.R. (4th) 609.

9. 850F supp 417 (1994) (US D Ct).

10. See "Colorado Pushing Gay Rights to High Court", *ABA Journal*, December 1994, 34.

11. Reported *The Economist*, 1 July 1995, 46 - referring to *Baehr v Lewin* 852 P.2d 44 (Hawaii 1993).

12. *Evans v Romer*, 882 P. 2d 1335 (Colarado. 1994).

13. *Romer v Evans* 64 LW 4353 (1996) (US Supreme Court).