2343

The Global Arc: Sexual Orientation Law Around the World

Australia's Final Court and Sexual Orientation Law

University of California at Los Angeles
Faculty of Law
The Williams Institute

Los Angeles, California
March 14, 2009.

The Hon. Michael Kirby AC CMB

UNIVERSITY OF CALIFORNIA AT LOS ANGELES

FACULTY OF LAW

THE WILLIAMS INSTITUTE

THE GLOBAL ARC OF JUSTICE: SEXUAL ORIENTATION LAW AROUND THE WORLD

LOS ANGELES CALIFORNIA, MARCH 14, 2009.

AUSTRALIA'S FINAL COURT AND SEXUAL ORIENTATION LAW

The Hon. Michael Kirby AC CMG*

IN EXCLUSIVE COMPANY

In February 1996, I was appointed a Justice of the High Court of Australia. This is the highest court in Australia. Strangely enough, the modern nation of Australia is a direct consequence of the American Revolution and the loss to the British Crown of the North American settlements to which it could send prisoners convicted of crimes under the harsh law and order rules of the eighteenth century in the British Isles.

Within a decade of 1776, British officials began planning the First Fleet, which took their prisoners to Botany Bay, that had been described by the great navigator, James Cook. From their errors in the American settlements, the British learned lessons in their treatment of settlers (and even prisoners) in the

*Justice of the High Court of Australia (1996-2009). President of the International Commission of Jurists (1995-8); Laureate of the UNESCO Prize for Human Rights Education (1998).

new land. Independent courts were quickly established. Democratic legislatures were created by the 1850s. A new federal nation was inaugurated in 1901. It decided to copy many features of the American Constitution: but not to accept a Bill of Rights.

The theory in the new land was that Parliament, as in Britain, would protect basic rights. Generally it did so, except for marginalised minorities. Those minorities included the indigenous people, adherents to minority religious beliefs, Asian and other racial minorities and homosexuals. For such minorities, there were no fundamental rights to protect them from the tyranny of the majority.

In 1996, after already 20 years' judicial service in federal and State bodies, I reached the High Court of Australia. I thereupon joined an exclusive company as a member of a final national court. Judges of such courts, as I was to discover, share much in common. By their service, they tend to be required to face similar questions, involving like challenges to the legal order arising in different countries at roughly the same time.

One of my greatest privileges, over the past decade, has been to attend, in September of each year, the annual seminar on global constitutionalism, conducted at the Yale Law School. Participants in the seminar include Justices from final courts throughout the world. In recent years, Justices Kennedy and Breyer have attended from the Supreme Court of the United States. Other participants have included Lord Chief Justice Harry Woolf and Baroness Brenda Hale of the House of Lords in the United Kingdom. Judges come from from the Supreme Courts of Canada, New Zealand, Japan, India, Chile, and the Final Court of Appeal of Hong Kong, as well as Constitutional Courts or tribunals of France, Germany and Hungary. Also participating have been judges from the European Court of Justice and the European Court of Human Rights. This annual seminar, extending over four days, has been a unique opportunity to

compare notes and to observe the similarity of the problems and the occasional utility of learning about the way that others have responded to those problems. Of necessity, in recent years, the issue of the law's response to diverse sexual orientation has arisen for occasional consideration. Given the fact of my own sexual orientation, that subject has always, naturally, attracted close attention on my part.

A GRADUAL EMERGENCE

After I was first appointed a judge in Australia in 1975, such interest as I had in the law and sexual orientation had normally had to be covert, or at least expressed elliptically. The United States of America is not the only country that has upheld the principle 'don't ask, don't tell'. In Australia too, by the 1970s, it was generally acceptable to be gay, so long as one did not 'flaunt' it and did not confront others with the unpleasant necessity to acknowledge a departure from the universal hypothesis of a binary division of humanity, along heterosexual lines, between men and women.

Like virtually everyone else, I went along with the expectations of those times. However, even before I was appointed a judge, in 1969, I had met my partner, Johan van Vloten. In the small world of the Australian suburbs, it was difficult, or impossible, to disguise the reality of our relationship which endures to this day, 40 years later. But so long as our reality was not forced upon people, the principle of 'live and let live' was generally observed. Johan did not come to official functions. He too knew the rules of that time. However, he was aware that in the land of his birth, The Netherlands, the rules were changing, rather more quickly than in Australia.

By the 1970s, the old sodomy laws, inherited in Australia from the United Kingdom, brought out to the Great South Land with the boat loads of convicts and settlers, were gradually being repealed by the State and Territory legislatures, In Australia, as in the United States, criminal law was generally their responsibility. As this progress was being made, however, a terrible

burden fell upon the gay community in the form of the HIV/AIDS epidemic. Just as events appeared hopeful, the devastation of loss and suffering was everywhere to be seen.

The epidemic called forth a strong reaction from the Australian gay community. After a visit to Australia by Jonathan Mann (the first director of the Global Program on AIDS of the World Health Organisation), I was invited to take part in various local and international AIDS initiatives. The invitation arose out of work that I had performed in the 1970s in the Australian Law Reform Commission. I accepted the invitation. My involvement in these activities became further public evidence of my own sexual orientation. But everyone was concerned about AIDS so the participation of a professional law reformer was not specially surprising or notable.

By 1984, I had been appointed to be the President of the New South Wales Court of Appeal, the busiest appellate court in Australia. Soon after that appointment, a number of the judges of that Court saw me in my chambers and suggested that it would be preferable if I were to withdraw from my activities with AIDS organisations. They hinted that it was inappropriate for a judge to be associating with men who had sex with men, commercial sex workers, injecting drug users and others in the front line of the epidemic. I declined to take this advice. I explained the tremendous challenge of the epidemic and the desirability of legal and judicial engagement with it. My own continuing engagement made my sexual orientation clear for anyone who was watching. But I did not allow that to deflect me. For gay people, participation was a moral obligation. Or so it seemed to me.

In 1995, soon after Australia had adhered to the First Optional Protocol to the *International Covenant on Civil and Political Rights* (which gives individuals a right of communication to the United Nations Human Rights Committee in Geneva where they allege that national law does not comply with the obligations of the Covenant), two gay activists from Tasmania approached me.

I was then still on the Court of Appeal. They asked whether they should complain to the Human Rights Committee about the refusal of the Tasmanian Parliament to repeal that State's anti-sodomy laws. In fact, Tasmania was, by this stage, the last remaining Australian jurisdiction to retain those laws.

I cautioned the two activists (Nicholas Toonen and Rodney Croome) not to waste their time complaining to Geneva. I told them that there was no way that a United Nations committee, operating for the entire world, would uphold a complaint on this ground. I warned them that such a complaint was premature. It could set back the cause of sexual orientation law reform by entrenching an antagonistic precedent. I pointed out that they were not being persecuted, prosecuted or even physically disadvantaged by the Tasmanian law, which was substantially a dead letter. They thanked me politely for my advice. But they proceeded immediately to lodge their complaint.

The complaint, *Toonen v. Australia*[1], was upheld by the Human Rights Committee. The majority upheld it on the ground that the Tasmanian law breached the requirements of the *Covenant* for the protection of individual privacy. One member concluded that other requirements were infringed, dealing with discrimination on the ground of sex and equal treatment. The result demonstrated the importance of courage and principle in the fight for equality. The finding of the Human Rights Committee led on to a federal law in Australia, based on the power of the Federal Parliament to make laws on matters of international concern. By the time a challenge by the government of Tasmania to the validity of that federal law came to be heard by the High Court of Australia, I had been appointed a Justice of that Court.

Naturally, I recused myself from participating in the High Court case: *Croome v. The Commonwealth*[2]. My involvement with the parties and the issues, in my earlier life, obliged me to have no part in the resolution of the new

1 (1994) *Int.Human Rts.Reports* 97 (No.3).
2 (1997) 191 CLR 119.

proceedings. All of the other Justices were necessarily informed of my recusal and of the reasons for it. The beginning of my dialogue with them and the national community about sexuality had begun.

IN THE HIGH COURT OF AUSTRALIA

In the result, the High Court of Australia rejected the challenge of Tasmania to the standing of the claimants to seek a declaration of the invalidity of the Tasmanian law. Soon afterwards, the Tasmanian Parliament gave way. It adopted reforms of the State *Criminal Code* which abolished the sodomy offences in Tasmania. By 1997, those offences had no application anywhere in Australia, although unequal criminal provisions (especially on the age of consent) continued for a time to apply.

Because of the absence of a Bill of Rights in the Australian federal Constitution, or even of an implied right to equality of treatment before the courts: *Leeth v. The Commonwealth*[3], the judicial work of the High Court only rarely touched upon issues of sexual orientation and the unequal treatment of that subject in Australian law.

In 1998, however, the issue arose indirectly. In a criminal case, *Green v. The Queen*[4], the accused had claimed that the deceased had made a sexual advance towards him which triggered in his mind a memory of his father's sexually abusing his sisters. This had caused him to lose control and to kill the deceased. The trial judge had ruled the evidence of the father's sexual abuse of the sisters was inadmissible on the question of whether a defence of provocation could apply. The availability of that defence became the issue of principle, contested in the High Court of Australia. Chief Justice Brennan, and the majority, concluded that the evidence was admissible and its erroneous exclusion required a new trial. The Chief Justice said:

---

3 (1992) 175 CLR 455.

4 (1998) 191 CLR 334.

> "A reasonable jury might have come to the conclusion that an ordinary person who was provoked to the degree that [the accused] was provoked, could have formed an intent to kill or to inflict grievous bodily harm ... A juryman or woman would not be unreasonable because he or she might accept that the appellant found the deceased's conduct 'revolting' rather than 'amorous'".

I dissented, as did Justice Gummow, from this reasoning. In the course of my reasons I said:

> "For the law to accept that a non-violent sexual advance, without more, by a man to man could induce in an ordinary person such a reduction in self-control as to occasion the formation of an intent to kill, or to inflict grievous bodily harm, would sit ill with contemporary educative and policing efforts designed to remove such violent responses from society, grounded as they are in irrational hatred and fear.
>
> In my view, the 'ordinary person' in Australian society today is not so homophobic as to respond to a non-violent sexual advance by a homosexual person [by forming] an intent to kill or to inflict grievous bodily harm."

In some Australian jurisdictions, statutory law has been adopted since the *Green* decision to reflect the minority view. However, the so-called "homosexual advance defence" remains a source of argument in many criminal trials.

By 1998, my partner and I were less inclined to go along with the 'don't ask, don't tell' charade. It was Johan who insisted that we owed it to younger people to oblige the majority in society to face up to reality and to end the irrationality of pretence that variations in sexuality did not exist. At about this

time, I inserted Johan's name in Australian *Who's Who* as my partner. This was eventually noted by the media. A majority of the High Court judges voted for the Court to approach the Federal Attorney-General to secure the provision for my partner of the same entitlements in respect of travelling to Canberra as were enjoyed by the spouses and opposite sex partners of other Justices. In fact, by this time we were models of 'family values': Johan travelling to Canberra from our home in Sydney as much as, or in most cases more than, other partners. Eventually, the Attorney-General, in a conservative government, agreed to this request. He accepted that such an entitlement would now accord with changing rules elsewhere in the Federal service.

Nonetheless, sexuality continued to be an issue, when it arose. It still divided the opinions of the Justices. In 2003, a case arose concerning a claim by two gay Bangladeshi men for protection visas as refugees[5]. The Tribunal and Federal Court refused the claim. They did so on the basis that, if the men were to 'live discretely', they would have no basis for a "well-founded fear of persecution" in Bangladesh. The majority of the High Court of Australia held that this was to impose an incorrect legal test. There was nothing in the *Refugees Convention* and *Protocol* to oblige a victim of persecution to avoid the persecution by 'living discretely'. Such an approach would impose on the international law a kind of Anne Frank obligation of secrecy and disguise which was not required. The case was remitted for re-hearing. The recognition of entitlements to protection to refugees from oppression against gays in other countries, was an important step in the direction of humanity.

In 2005, copying developments that had occurred in the United States of America, the Federal Government in Australia introduced an amendment to the *Marriage Act*, a federal law, to ban same sex-marriages and to confine judicial recognition of marriage to opposite sex couples. Introduced on the eve of an election, the amendment was intended as a 'wedge issue'. It was passed by the Federal Parliament with support of the main opposition party. In the law of Australia, no federal law on gay marriage or even civil partnership or

[5] *Appellant s395/2002 v. Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473.

civil union has been enacted. On the contrary, an attempt by a Territory to introduce civil unions was overridden by Federal disallowance. To this day, such laws have not been enacted. There is no constitutional principle of equality to which an objection can be affixed.

ON A JOURNEY TO RATIONALITY

Despite the absence of legal recognition of our relationship, my partner and I continue to get by. Surveys of gay people in Australia have indicated that the desire for marriage of same-sex couples does not appear to be the priority issue that has emerged in other countries[6]. By the same token, the example of other countries has lately raised the debate about the issue in Australia. My own view now is that, whatever my partner and I might want in our relationship is irrelevant. Marriage is undoubtedly a civil status and to it civil entitlements, as well as obligations, attach. It seems likely to me that, in due course, Australian will follow Canada and other countries and make provision for same-sex partnerships and marriage.

In part, this development seems likely because of the principle of secularism in Australian public life. Churches may have rules for their own adherents. Generally speaking, such rules cannot be imposed on others of different beliefs or of no religious belief at all. Shortly before the end of my judicial service, in December 2008, the new federal Labor government of Australia secured the passage through the Australian Parliament of a raft of laws removing discriminatory provisions in federal legislation, disadvantageous to gay citizens in respect of taxation and pension provisions. Thus, the *Judicial Pensions Act* 1968 (Aust.), now applies equally to my partner, as it does to the spouses and opposite-sex *de facto* partners of federal judges. Like provisions have been adopted in the other Australian jurisdictions for State and Territory judges. Progress has thus been made on a practical (if not yet a symbolic) level.

---

[6] S. Sarantakos, "Legal recognition of same-sex relationships?" (1998) 23 *Alternative LJ* 22; Ibid, "Same-Sex Marriage: Which way to go?" (1994) 23 *Alternative LJ* 79.

Meantime, Johan and I continue our lives together. Anyone who would deny us our relationship is either ignorant or stupid, or certainly unkind. Gradually, most people are coming to accept this reality. My partner attends lunches with the Queen, on her visits to Australia; dinners with the Australian Governor-General; functions with the Prime Minister and other official engagements. Everyone is getting used to it. It is good for us all to face reality and acknowledge the truth. It is irrational to deny these things.

At the Yale seminar, I mentioned to several judicial participants how moved I was when I first read the concluding passage in Justice Kennedy's well-known opinion in *Lawrence v. Texas*[7]. The dimensions of liberty expand with each succeeding generation. This is just part of the human journey. It is inevitable and natural. Eventually, it will embrace the entire human family. But, in the meantime, there are things to be done by judges and lawyers to correct injustice and to confront irrational phobias wherever the law authorises them to do so. Gay people themselves have obligations of their own to help others on the path to understanding. It is fundamentally dishonourable for gay people in positions of judicial or other responsibility to be secretive and to deny their existence as such. It is the truth that sets us free – and that includes heterosexual people who may have had no reason to know the truth or to reflect upon it unless they are bought face to face with the reality of others.

At the beginning of our relationship, Johan and I would often come to Los Angeles. There was no way he would come on this occasion for a brief visit. So I will visit the diner in West Hollywood where we would have breakfast 30 years ago. I will go to Canters in Fairfax where we would have our meal and be chided with Jewish humour in the best American tradition. I will walk the walks we took together in decades now long gone. And reflect on the progress that has been made and the further progress that lies ahead.

[7] 539 US 558 at 578-9 (2003).

I honour the Williams Institute and this fine law school at UCLA for the parts they are playing in ensuring that progress. Even in disappointing moments, none of us should be in doubt that the future is assured for the legal equality of members of sexual minorities. It is part of our genetic endowment ultimately to demand rationality. Rationality, in the end, will trump ignorance, influence and dogma. Courts and lawyers will have an important role to play in ensuring that this happens without delay.

****