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THE FIRE WITHIN: JOHN BUTTON AND AN OPTIMISTIC SPIRIT OF REFORM IN AUSTRALIA

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John Button Oration 2011

Melbourne, Victoria
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The Hon. Michael Kirby AC CMG

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Jacques Beaumont and Richard Townsend, photos Sara Krulwich, *New York Times*

REMEMBERING JOHN BUTTON

I cannot abide memorial lecturers who are so obsessed with their own message that they forget the person whose name inspires a memorial lecture. Death and its shadows are so long lasting and quickly embracing that we do not need to hasten the process. And John Button

* One-time Justice of the High Court of Australia (1996-2009). Inaugural Chairman of the Australian Law Reform Commission (1975-1984). President of the International Commission of Jurists (1995-8). Member of the Eminent Persons Group on the Future of the Commonwealth of Nations (2010-11).

is one of those characters, who walked the stage of Australian politics and public life for a time and who is not so easily forgotten.

The basic facts of his life are well remembered. He was born in Ballarat in 1933. He qualified in law and became an accomplished advocate, mainly in industrial relations cases. He joined the Australian Labor Party in the late 1950s when things were looking grim because of "the Great Split" over communism and the influence of church-led anti-communism (especially in Victoria). With John Cain, Barry Jones, Frank Costigan and others, he established the independent group of social democrats known as "the Participants". They forged a vote-winning alliance with Gough Whitlam and Bob Hawke that changed the landscape of Australian politics.

John Button was elected to the Senate in 1974. A tribute to his impact, he became a shadow minister two years later in 1976 and leader in the Senate from 1980-83. When Bob Hawke, that year, won government, John Button was conflicted over loyalty to Bill Heydon. But the bottom line was the need to win the Treasury benches. So he switched to Bob Hawke. And then he made a notable impact as Minister for Industry and Commerce, a post he held until 1993. It was Button who shepherded this country out of the protectionist philosophy that had nurtured the Labor Party and the union movement from the time of federation. With Bob Hawke and Paul Keating, he laid the ground for major economic changes that were mainly continued during the Howard government. They continue today; but tempered by the traditional Australian devotion to a fair go in matters of employment conditions.

In retirement, John Button served in academe. He won honorary degrees, as befitted his special skills in business (RMIT), letters (UTS) and law (Boston). But for ordinary Australians, it was his common sense, his reason and no nonsense progressivism that they admired. He appealed to rationality and international developments from which Australia could not be immune. Speaking with my father this week (he is 95 and has been following the Australian political scene all his life), the word that kept recurring in the case of John Button was “admiration”. He declared that it was the irregular past participle of the verb “to button”.

I remember the first time I met him. It was in about 1974, just before beginning a case in front of the old Arbitration Commission, to which I was later to be appointed by the Whitlam Government. We were fighting the case for different unions in the shabby pseudo-elegance of Temple Court in Sydney. Our opponent was Neil Brown, later to be Queen’s Counsel, a Minister in the Frazer Government and still another good friend. In came this small, pugnacious, sharp-minded union representative. He did not seem to have much time either for Neil Brown or for me. And the fact that I was in a common interest with him did not seem to matter a jot. He had much more experience in the field and was the genuine article: not just a paid mouthpiece for a union, but someone who was waging a political and social struggle, temporarily dressed in the constitutional raiments of an inter-state industrial dispute. I was a bit hurt by his brusque attitude. But I was also impressed at how he settled the case. And that emotion was later to turn into admiration as he grasped and grappled with truly difficult problems that had to be addressed (whatever the politics) for the long-term benefit of our country.

At his end, John Button was still a notable communicator of ideas. His final illness was painful for himself, his family and friends. But he was surrounded with love and with the admiration of many fellow citizens. That is why we are here tonight. To continue the exploration of ideas central to the future of Australia. And not to shirk them because the spin merchants in politics and the media would prefer a comfortable life and an easy passage. Ideas sparked off John Button like the elements of a catherine wheel at the Empire Day fireworks of my youth. We honour him. But more importantly, we honour his kind of politician. Progressivist, reformist, courageous, no-nonsense.

OF WRITERS

I am specially glad to do the honours at this Writers' Festival in Melbourne. All my life I have been writing, ever since Miss Pontifex taught me the alphabet at the North Strathfield Public School in Sydney in 1944.

What a debt I owe to public schools. I will never cease to honour public education and teachers in public schools. I do not dislike private and religious schools. I am just glad that I had my education in the democratic, egalitarian and secular atmosphere of the great system of public education that we uniquely established in colonial times in the 1870s for our continental country. I was criticised by Prime Minister Howard for speaking up for public education on an occasion in Adelaide when I received an honorary degree. For most of my service on the High Court of Australia, I was the only Justice whose entire schooling had been in public schools which strikes me as odd. Those who received the benefits of such schooling surely have a moral obligation to

speaking on behalf of the 65% of Australians who still receive their education in our public schools.

Because of politics and wedge tactics, private and religious schools have done much better under successive governments in funding and support. Not content with diverting large funding to private schools, federal law now funds a phalanx of school chaplains, many of them amateurs, with huge subventions ($430 million in six years, no less). This undermines the secular principle that serves us all. I hope, following the current Gonski Enquiry, that this will change and that true equity in funding will be restored. Putting it quite bluntly, there should be more funding by governments for public schools and less for private and religious education. If parents opt for private education, they should be expected (as previously they long were) to pay most of the costs themselves. Somehow, we must restore and strengthen our public schools as the vital cradle of democracy, excellence and egalitarianism they were intended to be.

Now, when I wrote my alphabet neatly, back in wartime 1944, Miss Pontifex rewarded me with a red crown. When I presented a good essay in 1948, Mr. Casimir would sometimes affix the red crown not only to the page of my green departmental exercise book, but also to my hand so that I could show my parents. My father told me this week that this was notably my undoing. I have spent the rest of my life, he says, striving to get those crowns.

Since I left the High Court of Australia in February 2009, writers have not left me alone. That year, Ian Freckelton SC of the Victorian Bar and colleagues wrote a door stopper *Appealing to the Future* (Thomson

Reuter, 2009), which analyses my judicial decisions. In 2010, Daryl Dellora, a documentary film maker of Melbourne, produced the video *Don't Forget the Justice Bit*, screened on the ABC *Compass* programme and currently on every Qantas jet. Perhaps it contributed to last week's decline in profits of the international arm of Qantas, as passengers opt for Virgin to get away from me. And in 2011, Federation Press published Professor A.J. Brown's biography, *Michael Kirby: Paradoxes/Principles*. At least two further biographies are in the pipeline. But most of my own writing, hidden away in the law reports, remains unread by the general populous who are blissfully unaware of my magnificent gift as a writer. All of this is about to change.

In late September 2011, my old friend Richard Walsh, at Allen & Unwin, is publishing nine essays of mine titled *A Private Life* (Allen & Unwin, 2011). So, just when you thought you had had enough of Michael Kirby, comes my own voice. The book begins with a loving description of my teachers. It ends with some reluctant reflections on old age: something, you will understand, that I am postponing as long as I possibly can. In between are essays on my life. But not of my public, judicial or international life. Just my inner life. Those who think I am slightly mad will be confirmed in that belief by an essay that tells of a youthful, lonely obsession with James Dean, whose film *East of Eden*, I saw no fewer than 28 times as it went the rounds of the suburban cinemas of Sydney in the 1950s. By one of those strange coincidences of life, I was later appointed to serve on the Board of the Kinsey Institute at Indiana University in Bloomington, USA. The essay describes my visit in the snow to Fairmount, Indiana where, in 2000, I met James Dean's cousin and visited his grave, so closing a youthful circle.

Every one of us has an inner story. As I get older (but not yet old) I have come to believe that character matters more than biodata. Achievements in life can reflect our motivations and values. Inner thoughts and private experiences tell stories with which we can ordinarily empathise more closely. So it is that, in *A Private Life*, I describe how I came to meet my partner Johan van Vloten, two weeks after being abandoned and left on the shelf at 29 by his handsome Spanish predecessor, Demo. Most of us have such stories.

John Button had an intense personal life with family, children and friends. To be human is to have an inner life. This new book will give a glimpse at mine. I cannot say more or the ruthless Allen & Unwin publicity machine will sue me for breach of contract. Just the same, I hope you all buy the book when it is launched on 28 September 2011. I noticed that Justice Sotomayor of the US Supreme Court secured a financial advance from her publishers of $US2 million. I told Richard Walsh that I expected nothing less. Despite my tears and protestations, you would be astonished to hear how little Australian writers of great distinction are paid for the masterpieces they write for greedy conglomerates.

I pay my respects to the writers present at this Festival. It is a precious gift to be able to put the invisible brain signals representing ideas into words and thus into permanent form. It is a gift to our species, unique, so far as we know, throughout the universe. It gives permanency to thought. It allows progress and evolution. Exceptional gifts in writing are probably genetic. In my own case, I have always tried (even in the High Court) to write as I speak. The English language, as spoken in the kitchen, is a Germanic language of great force and simplicity. But many

of us write English in a form, and with words, brought over from France by William the Conqueror and his officials. Our mixed up language is a double treasury of images and word pictures. The most powerful flowing language, however, is the language of our Saxon forebears: blunt, short, direct, forceful words, a tongue of action. And action there must be. This is the importance of progress and reform in our society.

OF RIGHTS

I would have been very happy to speak of my newfound role as a writer of books. But the organisers of the Button Oration, remembering John Button's no-nonsense approach, demanded something different. Something in his reform or progressive mould. Certainly, that has become the tradition of the orations to date. Bill Kelty spoke of the "Romantic in Politics" and, in doing so, paid a warm and personal tribute to John Button[1]. In the second oration, Noel Pearson spoke on the issue of justice for Australia's indigenous peoples and on the need for self-responsibility on their part if social justice were truly to be attained[2].

Earlier today, at this Festival, I had the privilege to launch a new book, written by Bryan Keon-Cohen, *Mabo in the Courts: Islander Tradition to Native Title, A Memoir* (Australian Scholarly Publishing, 2011). It tells the remarkable story of how the *Mabo* case revolutionised our legal wonderland about native title to land and water in our huge country. The story is written by an advocate who, over more than a decade, worked with that great Victorian reformist, Ron Castan QC in assembling the

[1] Bill Kelty, "Romance in Politics – The Public Good", Inaugural John Button Oration, Melbourne, 28 August 2009 (unpublished).

[2] Noel Pearson, "Nights When I Dream of a Better World – Moving From the Centre-Left to the Radical Centre of Australian Politics", Second John Button Oration, Melbourne, 7 September 2010 (unpublished).

building blocks by which the High Court would help Australia to re-imagine its relationship with its unique indigenous people.

I commend this new book as an antidote to the pessimism that often descends to block the path of reformists and progressivists in Australia. Things can change. Yet John Button's life, and that of Ron Castan, show that, usually, to get change, it needs a bit of help from our friends.

Having had my say earlier today about *Mabo*, and the formalists and conservatives who castigated the High Court for daring to bring basic notions of equal justice into the law on native title, I will leave that subject to other places, other times. Instead, I intend, in the John Button spirit of progressive and reformist opinions, to say a few things about the Bill of Rights debate in Australia. And about the issue of same-sex marriage. Each of them is a lively topic of current controversy. Each is therefore a subject likely to engage the attention of this audience.

On the Bill of Rights, Australia is now one of the few (if not the only) civilised nation of the Western world to deny its citizens access to the courts where they contend that their government, and others, are acting contrary to the universal principles of human rights. Those universal principles have a long history. But for modern times, they substantially emerged in the *Universal Declaration of Human Rights*. This was a charter adopted by the General Assembly of the United Nations on 10 December 1948, with Dr. H.V. Evatt, Australia's Minister for External Affairs and President of the General Assembly, in the chair. Forever afterwards, 10 December has been celebrated as Universal Human Rights Day. Eleanor Roosevelt's UDHR has been celebrated as the foundation of the international law of human rights.

In 1949, at my public school in Sydney, I received a copy of this document, unusually for the times printed on air mail paper. Its concepts and aspirations have been in my mind and in my heart ever since. They represent the alternative to a world of brute power, mere money, influence and unquestioning formalism.

Over the past 40 years, Australia has made three attempts, at a national level, to adopt a federal law of basic rights, following substantially the UDHR. Bills were introduced into the Federal Parliament by Lionel Murphy in 1974 and Gareth Evans in 1983. Neither was enacted. In 2009, Professor Frank Brennan and his committee of enquiry, to the surprise of opponents and the satisfaction of proponents recommended again the adoption of a federal charter of rights. But in 2010, the Rudd Government postponed action along these lines for later consideration in 2014.

The immediate issue and practical challenge in Australia is not whether that timetable should be abbreviated and federal legislation adopted. The immediate challenge is to the very survival of the Victorian *Charter of Human Rights and Responsibilities Act* 2006 (Vic) ("the Charter"). Following the change of government in Victoria, the Scrutiny of Acts and Regulations Committee ("the Committee") commenced an enquiry into the Charter. Anxiety about this move was expressed in some quarters because of reported statements, criticising the Charter, attributed to members of the new government and of the Committee.

I have joined many legal professional bodies and individuals in offering a respectful submission urging that the Charter should be retained; that it

should not be altered in any substantial way; in particular that the role of the judiciary under the Charter should not be removed or modified; and that any substantive review should be postponed to allow the Charter (which has only been in operation for five years) a longer interval before any substantive changes are contemplated.

In my role as a judge, I believe that I was always respectful towards the powers, functions and responsibilities of elected legislatures, both federal and State[3]. I have always upheld and respected the privileges of the Parliaments, and Members of Parliament, both federal[4] and State[5]. I have acknowledged the primary role that elected legislatures, and their members, play in the democracy of our country. Although judges have, according to the common law tradition, a law-making role, this is subordinate, interstitial and (save in matters concerned with the federal Constitution) subject to reversal or amendment by valid laws enacted by the Parliaments, which the courts are obliged to uphold.

Any decision by the Committee to recommend repeal or substantial amendment of the Charter would necessarily have to be viewed in the context of the contemporary developments of international human rights law. Following the *Universal Declaration of Human Rights* 1948[6], international human rights law has been expanded by many treaties and other international instruments to which Australia is a party, including the *International Covenant on Civil and Political Rights* and the *International*

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[3] *Building Construction Employees and Builders' Labourers Federation of NSW v Minister for Industrial Relations* (1986) 7 NSWLR 372 at 395. See also S. Churches, "The Courts and Parliament" in I. Freckelton and H. Selby (Eds), *Appealing to the Future: Michael Kirby and his Legacy* (Lawbook Co., 2009) 265 at 267ff and G. Orr and G. Dale, "The Political System", *ibid*, 661 at 669. See also *Durham Holdings Pty Ltd v. New South Wales* (2001) 205 CLR 399 at 427-429 [60]-[66].

[4] *Sue v Hill* (1999) 199 CLR 462 at 557 [247] ff.

[5] *Egan v Willis* (1999) 195 CLR 424 at 500 [149]ff.

[6] Adopted and proclaimed by the General Assembly Resolution 217A(III) of 10 December 1948.

Covenant on Economic Social and Cultural Rights. Occasionally, Australian legislators, judges and lawyers have been unfamiliar with the development of international human rights law. To some extent, this unfamiliarity has been occasioned by the absence in Australia of general domestic legislation, reflecting the concepts and values expressed in international human rights law. So far, only two Australian jurisdictions have enacted domestic charters, namely the Australian Capital Territory and Victoria. The Territory enacted a *Human Rights Act* 2004 (ACT) and the Parliament of Victoria enacted the Charter in 2006.

By taking this initiative, Victoria reflected a common feature of its particular parliamentary history. Victoria has frequently been in the forefront of Australian legislative thinking and action. It was the Victorian Parliament and its members that took the leading part in the Australian federal movement and in supporting and securing the adoption of the Constitution of the Commonwealth. Such innovations have happily occurred under successive governments of different political persuasions.

It would be a serious misfortune now, I believe, if Victoria were to repeal or modify the Charter or to reduce the beneficial role played in its implementation by the judiciary of Victoria. Any proposal to that effect should be rejected or at least postponed. To do otherwise would damage the reputation of Victoria as an innovative intellectual leader in the law in Australia and as an Australian State jurisdiction fully engaged with an important and widespread global development. A repeal or a major modification of the Charter would send a particularly unfortunate signal to the world community. In effect, it would be more serious and negative, in the case of Victoria, than in respect of the other Australian

jurisdictions that have so far failed to enact a charter or equivalent statute. It would be seen as involving disengagement by the State of Victoria from an important contemporary global development in the law.

A distinctive and beneficial feature of the federal system of government, as it operates in Australia, lies in the possibility that it allows for experimentation and progress concerning (amongst other things) the boundaries of justice and the accessibility of the rule of law[7]. The several Parliaments in Australia, and specifically the Victorian Parliament, should cherish the possibility of legislative innovations that lead the way for other Australian jurisdictions. It was in this manner that, in the past, we achieved in Australia important advances in the laws on consumer protection, environmental protection, and the provision of legal equality to sexual minorities. The last mentioned reforms were pioneered as a result of initiatives begun, in part, by the Australian Labor Party government in South Australia in 1974 (the Hon. Don Dunstan MP) and in part by the initiative of the Coalition government in respect of the Australia Capital Territory (the Hon. Robert Ellicott MP). Both sides of politics in Australia can take pride in significant innovations that have expanded the concepts of freedom and equality in this country. Historically, it has been rare for important legislative reforms of this character, once achieved, to be reversed following a change of government.

Like most Australian lawyers educated in the legal profession before the 1980s, I was raised in a tradition that was hostile to the concept of formal legislative guarantees of fundamental rights. Initially, I accepted,

[7] *New South Wales v The Commonwealth* (Work Choices Case) (2006) 229 CLR 1 at 229 [557] ff.

and shared, that hostility. The foundations of the hostility can be explained by reference to historical and doctrinal causes[8].

The actual provisions of in the Victorian Charter are substantially based on the *New Zealand Bill of Rights Act* 1990 (NZ) and the *Human Rights Act* 1993 (NZ). They, in turn, were substantially copied in the *Human Rights Act* 1998 (UK). In this respect, the Charter is based on a model deliberately developed to ensure the continuance of the traditional respect observed in English-speaking democracies for the 'sovereignty of Parliament', whilst affording a limited but appropriate role to a formal guarantee of rights and duties, justiciable before the courts.

It cannot be seriously argued that, in the five years since the Charter was enacted in Victoria in 2006, decisions or actions based on the Charter have caused any harm to the State of Victoria or its Parliament, courts or citizens. Indeed, the Victorian Government's submission to the Committee sets out fairly the considerable benefits that have occurred so far. Some of the complaints voiced in the media (which is intensely self-interested in this regard) have related to the suggested failure of the Charter to afford more substantial protections of freedom of expression or freedom of the press advocated by the media. If there are indeed defects of omission, the proper approach of writers to any such established defects, would be to consider amendments and elaborations to overcome the defects if proved. It would not be to abandon or substantially to alter an initiative which has placed Victoria in the lead of Australian State jurisdictions and in closer harmony with developments that have occurred globally since 1948, and especially since 1990.

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[8] M.D. Kirby, "Protecting Human Rights in Australia Without a Charter" (2011) 37 *Commonwealth Law Bulletin 253.*

I have many reasons for urging the preservation of the Charter as an important provision for the good government of the people of Victoria are as follows:

1 *Parliament's final say*: Far from affording excessive powers to the judiciary, at the expense of the prerogatives and powers of Parliament, the Charter fully preserves the right of Parliament to have the final say in matters concerned with suggested breaches of the Charter brought before the courts. Whilst allowing access to the courts for those alleging a breach of Charter provisions, the Charter withholds from the judiciary any power to annul or invalidate legislation enacted by Parliament. This approach strikes what has been judged in the United Kingdom, New Zealand and the Australian Capital Territory as the appropriate means by which to preserve the 'sovereignty of parliament'. It involves a cautious and limited approach which would render any repeal or substantial diminution in the effectiveness of the Charter the more surprising because of the strictly limited powers that the Victorian Charter affords to the courts.

2 *Enlivening Parliament*: The Charter is actually a useful adjunct to the functions of Parliament. It is designed to enliven and support the parliamentary process; not to diminish or endanger it. I have seen no evidence whatever that the Charter has diminished or endangered the Parliament of Victoria. Indeed, the Victorian Government's own submission to the Committee points out parliamentary review of legislation has been informed by principle and strengthened as a consequence. Further, the evidence, not least in the decision of the Victoria Court of Appeal in the case of

Momcilovic, supports the impression of a cautious and parliament-respecting approach by the courts in their applications of the Charter in individual cases[9].

3 *Avoiding litigation*: The Charter is so worded as to avoid unnecessary litigation, with its potential features of cost and delay. The operation of the Charter is designed, on the contrary, to internalise within the administration, conformity with Charter requirements so as to obviate the necessity of any proceedings in a court. The Charter gives guidance to parliamentary counsel and officials concerning proposed new legislation so as to ensure that it is Charter compliant. This, in turn, encourages appropriate conceptual thinking about universal rights, so that they are not eroded or overridden accidentally or by oversight.

4 *Merits of court access*: The foregoing procedure would not be so well secured if a complaint lay not to the independent judicial branch of government but to a parliamentary committee. Necessarily, such a committee would lack the expertise in the developing international and national jurisprudence of universal human rights. Inevitably, and properly, a parliamentary committee would be affected by political considerations and this before any opportunity was afforded for independent review of matters of contention by members of the judiciary. The existence of the potential of scrutiny by the judicial branch is a healthy assurance to the administration, officials and members of Parliament alike that decisions on Charter compliance of Victorian laws will be

[9] *R v Momcilovic* (2010) 25 VR 436; 200 A Crim R 453; cf *WMB v Chief Commissioner of Police (Vic)* (2010) 203 A Crim R 167 esp at 175 [32].

conducted with impartiality, whilst reserving to the elected government and Parliament the last say in all such matters.

5 *Limits of law reform*: Long experience in institutional law reform in the 1970s and 80s, taught me that members of Parliament are often too busy with major issues of government and political priorities to attend to particular or limited complaints by citizens concerning suggested defects of enacted law, measured against the standards of universal human rights. The realities of party government, party whips and of the role of the Executive in Parliament, can sometimes present serious dangers that considerations of injustice and departures from basic rights will be neglected or ignored. The existence of an avenue to seek a beneficial construction of legislation or judicial redress where departure from Charter rights is proved is an assurance that parliamentary attention will be given to such matters, with the benefit of any judicial conclusions that have been expressed.

6 *Operation in New Zealand*: In New Zealand, the present Attorney-General, the Hon. Christopher Finlayson MP, has made numerous reports in compliance with the *New Zealand Bill of Rights Act* (which is the model for the Victorian Charter). It is my understanding that there is widespread satisfaction in New Zealand, on both sides of politics, with the operation of the New Zealand Act, and no suggestion of its repeal or amendment in that country.

7 *Democracy and minorities*: An honest reflection on the difficulties that are sometimes experienced in securing parliamentary

attention to suggested departures from basic rights, particularly in the case of minorities, will indicate the value which the Victorian Charter affords to minorities. Democracy, as practised in Australia, should not be concerned only with the will of the shifting opinions of the majority. Where important considerations affecting a minority are raised, it is desirable that, before considering any step to override or deny such rights, Parliament should at least be alerted to any serious departure from universal human rights which that decision may involve. Parliament might ignore or discount that advice. But that will enliven the parliamentary process, not damage it in any way.

8 *Australian treatment of minorities*: It cannot be said that the Australian record, or indeed that of Victoria, in relation to minorities (and particularly unpopular minorities) is so unblemished that the stimulus of any judicial conclusion on departures from fundamental rights will not, at least sometimes, be useful to Parliament itself and to the wider community. Illustrations involving the invocation of fundamental rights by courts (sometimes as expressed in binding treaties and sometimes in universal principles of human rights) can be found in numerous judicial decisions affecting:

- Aboriginals and Torres Strait Islanders in respect of land rights[10];
- Short-term prisoners in respect of voting rights[11];
- Homosexuals in respect of rights under the Refugees Convention[12];

[10] *Mabo v Queensland [No.2]* (1992) 175 CLR 1 at 43.

[11] *Roach v Electoral Commission* (2007) 233 CLR 162 at 178-9 [16]-[18] and *ibid* at 203-4 [100], *citing Hirst v United Kingdom* [No.2] (2005) 42 EHRR 41 and *Sauvé v The Queen* [2002] 3 SCR 519 at 585 [119]

[12] *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473.

* Refugees who are stateless persons[13].

9 *Education in basic rights*: The Charter also affords a valuable and practical means for the education of the community, particularly school children, in fundamental rights of citizenship. Research conducted by Dr. Paula Gerber (Monash University) explored the knowledge of the rights and duties of citizenship amongst school children in Massachusetts in the United States and in Victoria. According to Dr. Gerber's study, the Massachusetts students were much more aware of the foundations of their citizenship because these were taught to them at school and derived in part from the state and federal bills of rights[14]. An important feature of the Charter which, I suggest, will emerge over time, is the impact it has upon instruction of younger Victorians living in a fast changing society, about the mutual respect that is needed for the basic rights of all. This is another way in which the Charter will contribute to strengthening civil society in Victoria and reinforcing community awareness about rights and responsibilities that have previously been substantially unknown and untaught.

10 *Global engagement*: In discharging their duties with or without a Charter, Australian courts have available to them many precedents in which the growing body of the international law of human rights may be invoked, absent any inconsistent law made by parliament[15]. Already, such sources have been used by the courts, including the High Court of Australia, in reaching

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13 *Al-Kateb v Godwin* (2004) 219 CLR 562.

14 Paula Gerber, *From Convention to Classroom: The Long Road to Human Rights Education* (2008) VDM Publishers, Germany. Reviewed by the author, "Three Books on Human Rights" (2009) *Australian Law Journal* 849.

15 *Mabo* (above n7).

> conclusions about the current state of the common law in Australia[16], or the meaning that should be given to enacted or constitutional provisions[17]. It is clearly preferable, as a matter of doctrine and principle, for such basic norms of universal human rights and responsibilities to be expressed in a readily accessible enactment of an Australian parliament, such as the Charter. The hostility of some media outlets to the Charter is closely related to the role of the judicial branch in decisions concerning the Charter. The judiciary is largely immune from the bullying and blandishments of media in Australia. This is a further reason why the judiciary should be retained for the independent review of cases concerned with Charter compliance. In the end, Parliament can reach contrary conclusions. However, access to the judiciary is an important protection for citizens in Victoria and also a benefit to Parliament itself in reaching an informed conclusion with the aid of well-reasoned assessments about the application of Charter provisions.

I was re-assured two weeks ago to see in the Victorian Government's submission to the Parliamentary Committee, specific reference to the way the Charter actually prevents issues coming before the courts by appropriate and vigilant action to ensure Charter compliance on the part of legislative drafters and officials. This is the way it should be. And the Charter, with its judicial and legislative guardians, is the way that we can make cautious progress on this issue in Australia in the years ahead. I hope that all Victorian citizens of knowledge and good heart will bring their views on this subject to the attention of the Committee, the

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16 *Mabo* (above n7) at 42.

17 Roach (above n8), *ibid*.

Parliament and the Government. So that the Charter will be saved. It is by no means a panacea for all ills. But it is useful. And it shows the way for the rest of Australia.

OF SAME-SEX MARRIAGE

The organisers of this Oration suggested that I should express my views on same-sex marriage. I do this with trepidation. In the words of the song from the 1930s musical by Rogers and Hart, my father has warned me against becoming a "Johnny One Note". Even at the age of 72, I still take seriously a paternal injunction, delivered from age 95! He is not to be messed with.

In any case, I feel I can approach the issue of same-sex marriage with a measure of dispassion. My partner, Johan van Vloten, and I might not avail ourselves of the right to marry, at least immediately, if it were to become available in law. After all, we have had to get by these past 42 years without benefit of the civil and legal status of marriage. And our elopement and engagement back in February 1969 has gone on perfectly well without that facility. In the magical circumstances of personal relationships, one naturally hesitates before altering the integers.

Last week, I prepared a foreword to a new book that will shortly appear: Victor Marsh (Ed), *Speak Now. Australian Perspectives of Same-Sex Marriage* (Clouds of Magellan Press, Melbourne, 2011). The book canvasses the issue of same-sex marriages with essays written by nearly 40 authors. Some are wildly enthusiastic. Some are sceptical and hesitant. Some have real reservations. So it makes for a good read.

The arrangement of the contributions to Victor Marsh's book, according to the alphabetical order of the authors' surnames, assures the reader a kind of chaotic stimulus: moving from one view to another by alphabetical accident and eventually being left with the decision that now faces our politicians and community. So I ask myself, what would John Button, the no-nonsense progressivist of the 1980s and 1990s have done with this issue of the twenty-first century? I entertain little doubt as to what side he would have come down on.

One essay in the collection, by Tim Wilson, urges respect for the hesitations and opposition of religious groups. They are struggling with an adjustment to an old religious tradition which, not so long ago, often included a bride price and inter-family financial arrangements. Like it or not, some religious people regard marriage as a 'sacrament'. They cannot be ignored because they continue to claim, and enjoy, the right to freedom of religion in Australia. An essay by Tim Wright seeks to explain how religious and other opponents of same-sex marriage feel that they are adversely affected by the attempt of outsiders to re-define what 'marriage' means under Australian law. This re-definition, they see, as diminishing the rights of heterosexual couples in which society has a special interest because of their common biological capacity to bear children for the future of society, as they have done exclusively in the past.

I cannot be too critical of these points of view. In the 1990s, when a challenge was brought to the New Zealand Court of Appeal under their *Bill of Rights Act* by two women, contending that an interpretation of the *Marriage Act* discriminated against them impermissibly on the ground of

their sexual orientation, by denying them access to marriage, I reacted dubiously to the dissenting view of Justice Thomas[18]. He held that the women had suffered discrimination and that the New Zealand Parliament should address the issue. In due course, the Parliament of New Zealand did this, enacting civil unions. However, even this was a bridge too far for the Howard and the Rudd Governments in Australia. The fact that, at the time, I did not see the issues as Justice Thomas did shows that in such matters, the minds of everyone, heterosexual as well as homosexual, are on a journey. When new ideas are presented, they sometimes take time for absorption.

I will not recount the views of the supporters of same-sex marriage contained in Victor Marsh's book. They include ministers of religion. They include gay and straight writers. They rely on all the usual arguments: Australia is a secular country. This is a specific legal right. No-one is talking about religious ceremonies which could remain as they are. Citizens should not be treated unequally. No-one has been able to prove actual damage to straight marriages by opening it up to gay couples. Many heterosexual marriages have no promise or expectation of children. Yet no-one denies marriage to them. And, in any case, scientific and legal advances have now made it possible, through *in vitro* fertilisation and adoption, to afford children to non-heterosexual marriages, often genetically related to one of the participants. This week, the Duchess of Alba in Spain announced her intended marriage at the tender age of 85. A precedent perhaps for my father at 95. But not, it seems, for me.

[18] *Quilter v Attorney-General of New Zealand* [1993] 3 LRC 119; [1998] 1 NZLR 523 (NZCA). See also *Naz Foundation v Union of India* [2000] 4 LRC 292.

The more interesting group of essays, for me, are written by marriage sceptics, such as Dennis Altman and Peter Tatchell. These are reluctant about the embrace of an institution, founded as they see it in patriarchy and fear of being different rather than love. And realism about sex in society today. They question why gay people feel uneasy about non-marriage and anxious to embrace an institution that promises life-long exclusive fidelity: something that statistically, neither gay nor straight people necessarily practise in the twenty-first century.

It was in the ambivalent state, produced by these thoughtful essays, that Johan and I read a personal story on the subject about Mr. Beaumont and Mr Townsend, published in the *New York Times*[19] on 14 August 2011. Sometimes, as every writer knows, a personal story can make things seem somehow clearer and more concrete when all the theoretical meanderings of the mind and of words leave the resolution still up in the air.

After a number of places, including New Zealand, France, the United Kingdom, Germany and most of Western Europe, provided for civil unions or civil partnerships, other jurisdictions worldwide began to open the legal status of 'marriage' up to same-sex partners. This innovation commenced in the Netherlands; was quickly followed in Belgium; spread to Scandinavia; was copied in Catholic Spain, Portugal, parts of Mexico and this year in Argentina. The courts achieved the opening up in Massachusetts, Canada, South Africa, California and Iowa. The legislatures achieved it in Connecticut and New York. Plebiscites undid it (for the time being) in California and Iowa. Other American jurisdictions are now said to be on the brink. The long and short is,

[19] A. Hartocollis, "Jacques Beaumont and Richard Townsend" *Vows*, August 14 2011, 13.

therefore, that millions of people worldwide are now adjusting to the fact that “marriage” is a legal status of long-term human relationships available equally to homosexual and heterosexual couples alike.

Senator Barnaby Joyce may think the notion of same-sex marriage is an ‘oxymoron’, as he declared last week. But this is no longer true in many civilised parts of the world. In civil law countries, following the Napoleonic Code 200 years ago, it is in some ways easier to adjust the thinking. In such countries, a civil marriage is always performed in the town hall registry and has absolutely no religious connotations. Only then, in some cases, does a religious wedding follow in a church or temple. Whilst increasingly in countries like Australia, non religious marriages are celebrated by civil officials without any religious forms, churches in common law jurisdictions have long enjoyed a kind of delegated function, under law, of performing the legal union of marriage on behalf of the state. It is in such ways that some people have come to confuse, in their minds, the church and sacramental character of the event with its indisputable civil legal status change, effected in accordance with a law, made by a secular parliament, in a secular nation under a secular constitution.

But back now to New York and the story of Mr. Beaumont and Mr. Townsend. They are so described by their honorifics in the article in the *New York Times* in keeping with their age and preference. They met in 1974 when Mr. Beaumont was nominated for Mr. Townsend as a suitable guide to show him around New York City. Since that providential meeting, the couple have shared a home in Chelsea in New York City. They have shared their bed with each other. They have shared their table with their families, and affection with their friends.

They are a couple. They are 37 years into their relationship, five years shorter than Johan's and mine.

Unfortunately, Mr. Townsend, now 77, has been diagnosed as suffering from leukaemia. Mr. Beaumont, 86, is also very ill. The couple have become reclusive for some time. Last month, an ambulance took them both to the Beth Israel Medical Center on the East Side of Manhattan. At Mr. Beaumont's insistence, the hospital, administered after the reformed Jewish tradition, admitted them both to the same room.

When, a few weeks ago, the New York State legislature's same-sex marriage law was enacted and signed into law by the Governor, Mr. Townsend said: "When we got sick, it changed everything. We said we must get married. It's vitally important".

So what lay behind their decision? The story of their lives is described in the article. Before meeting his partner, Mr. Beaumont, a French citizen, had travelled the world working with refugees in various humanitarian organisations. He eventually drove large numbers of these people out of Salazar's Portugal, where they were under close surveillance, into Republican France, where they were granted asylum and eventual citizenship. Mr. Townsend, on the other hand, was a typical American. Like George W. Bush, he had not travelled overseas. The two of them complemented each other, as is often the case in loving relationships.

Mr. Beaumont wanted a religious element to the marriage ceremony. Mr. Townsend wanted none. Eventually they settled on a priest from the Episcopal Church who would do the honours. But he had to be from out of New York because the New York Diocese forbids this. The hospital

arranged special pristine white hospital robes. Mr. Beaumont's doctor was there, by chance also with his same-sex spouse. A friend invoked Edith Piaf with her rendition of "*Ne Me Quitte Pas*" ("Don't Leave Me"). The New York writer concludes:

> "With a dignity that defied the circumstances, the wedding couple clasped hands on the adjacent arm rests of their wheelchairs and said their vows, which Mr. Beaumont tailored slightly to his diplomatic consequences, ending "until we are parted by death, this I solemnly vow". Mr. Beaumont's niece, Anne Beaumont, a threater director, had bought a collection of family heirloom rings to the hospital in a box, so they could exchange two of them.
>
> Mr. Townsend got a gold ring set with a tiger's eye; Mr. Beaumont got a basket-weave ring set with a diamond.
>
> Mr. Beaumont's fingers were swollen, but Mr. Townsend managed to push the ring as far as the knuckle. "I can't get it on,", Mr. Townsend said smiling, "But I like the way it looks"".

Who are the fellow citizens who would deny marriage to Mr. Beaumont and Mr. Townsend, to Johan and me and to other citizens and human beings who may think it very important to take such a step and to take these vows? Surely they are not religious people, infused with the central spiritual message of love for one another. And if they are, should they not keep their religion to themselves and respect the equal rights of others of a different view, living with them in a secular, civil community? Not every homosexual person wants or feels the need for marriage. But if they do, as Mr. Beaumont and Mr. Townsend came urgently to do, it requires a pretty strong reason of principle to deny it and to withhold it and to refuse it. And to say that, somehow, they are unworthy. And their relationship is less worthy. And it is not deserving of the same legal status, rights and duties too. Or only something separate, lesser and different?

We will get through this marriage debate in Australia, like so many others before it. In the end, justice, equality and basic kindness to each other will prevail. But it will require fresh thinking; and leadership; and a reformist attitude: not one locked into the formalism and uncaring attitudes of the past.

The large coloured photograph of Jacques Beaumont and Richard Townsend in the *New York Times* shows them with the special wedding cake made by the hospital chef in their honour. Richard Townsend, in particular, looks very gaunt, thin and ravaged by his illness. Just as John Button also did at the end. And at that moment, the most precious thing for Mr. Beaumont and Mr. Townsend – and perhaps for John Button – was not what they had done in life, but for who they were – love for partners and family; a public declaration of it; and the kindness of families and other human beings, who were happy to share in the warmth of the miracle of two individuals who had found enough in common to agree to bind themselves together. Not everyone wants this. Not everyone finds it. But when it happens, it is good for the leading actors in the drama. And it is good for us, the audience and society that watch it played out.

We, who are writers and citizens in faraway Australia, can learn a lesson from the lives of Mr. Townsend and Mr. Beaumont in New York. But will our political leaders have the human empathy and moral courage to learn that lesson? Will they take a bold step in the face of traditions, politics, special interests and opposition? It was because John Button was willing to take such bold steps in his lifetime of leadership that he

came to be admired by his fellow citizens and honoured in life, and now, still, in death.

Leadership, true leadership, requires the gift of prophecy. To see the future and the way it goes. Mind and heart must be in harmony. Our world is not only about economics and votes. It is about justice. And mutual human respect. And love. And kindness. And the rights of others. Ask Mr. Beaumont and Mr. Townsend of Chelsea, New York. Ask their families, friends, doctors and nurses. Ask even the hard-bitten writers, the journalists and photographers, who gathered to witness their little marriage in that hospital on East Side Manhattan in New York two weeks ago.

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