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FIRST IRIS LECTURE

THE SEYMOUR CENTRE, UNIVERSITY OF SYDNEY

18 AUGUST 2006

SEXUALITY, DISCRIMINATION & SOME HOME TRUTHS

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IN THE EYE OF THE CULTURE WARS

When we think of the way in which issues about homosexuality were whispered fifty years ago, we can certainly say that things have changed. No longer can minority sexual orientation be described as "the love that dares not speak its name". On the contrary, it speaks, and shouts, and roars around the world. There may still be a few nooks and crannies of our planet where no one knows, thinks or talks about the issue. But the internet, satellite television, global media and the advent of gay liberation make sure that the zones of silence are few and far between. Growing up in the Australia of the 1950s, thinking that you were the only homosexual you would probably ever know, is a thing of the past. The nameless love is now 'out' for all to see.

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The silence of the past grew out of religious denunciation, criminal sanctions, official harassment and the shame and self-loathing that these forces unleashed. There are some who would like to restore the former condition of things. They lament the 'coming out' of out. But when the science of Havelock Ellis, Freud, Kinsey, Evelyn Hooker and all the rest successively laid bare the relatively common reality of variations in human sexual orientation, the insistence that all human beings were really heterosexual and should be so, became fundamentally untenable. In the end, science, rationality and truth trump human approximations about religion, political and social agendas and even personal or intuitive feelings of hatred and denigration.

Unaided intuition, when it comes up against scientific proof, eventually melts away. This happened to earlier beliefs that the world was flat and 5000 years old; that the planets circled the earth and that everything that exists was created in a single week. It happened with intuitive beliefs in the inherent flaws of women as the "weaker vessel". It happened to the beliefs (which even Dalton and Darwin held) that some races were inherently inferior to others. It arose in the imperial intuitions that native people (especially Australian Aboriginals) were inferior specimens of humanity. Astonishingly enough, the White Australia in which I grew up firmly believed that the Chinese were inferior people - somehow forgetting the civilisation they had nurtured for 30,000 years, at a time when

the Anglo-Celts were living in caves in rain-swept islands off the coast of Northern Europe.

So this is the way of the culture wars. Just as earlier the mighty ideas of equality concerning women, ethnicity, religions and economic potential swept the world and wrought great changes in notions about humanity, so today the previous ideas about sexual orientation are coming under the microscope. That scrutiny will not go away until the last vestiges of ignorance, prejudice and discrimination on the ground of sexual orientation have been removed from the beliefs of human beings.

The ultimate victory of rationality will not happen in my lifetime or perhaps for decades or, in some places, maybe centuries. But it will happen, for, as Victor Hugo observed¹, there is no force so powerful as an idea whose time has come. That idea is the objective frequency and moral neutrality of non-heterosexual orientation. And the importance of that discovery both for those immediately affected, for their families and friends and for the societies in which they live, work, desire and love one another.

Having said these simple things (which represent little more than a statement of the obvious) it might be thought that this was a

¹ V Hugo, *Histoire d'un Crime*, La Chute, x.

time for a little triumphalism and self-congratulations. Far from it. My main purpose is to state a series of home truths that will encourage realism in the next phrase of the social responses to the existence of people outside the majority sexual orientation. I take that majority sexual orientation to be an exclusive sexual attraction to a person of the opposite sex. As Alfred Kinsey taught (and many before and since have shown) that is the inner core of most people's sexual experience, fantasy, desires, life and sexual satisfaction. Yet as the scientists have now shown, there are also variations. And, as civilised countries have accepted (and human rights treaties have upheld)², punishing or disadvantaging people for a variation in their sexual orientation that is natural to them (so far as their activities with consenting adults are concerned) is neither just nor justifiable.

Progress, beyond the primary need (still urgent in many countries), to remove criminal sanctions against consenting adult homosexual conduct, and to punish the violence and hatred it spawns, constitute only the first steps in readjusting society's laws and policies to the new reality that proclaims itself and demands changes. Such changes require both of the majority in society (heterosexuals) and the many minorities that gather within the broad tent of homosexuality (gays) a scrupulous attention to the realities of

² *Dudgeon v United Kingdom* (1981) 4 EHRR 149; *Norris v Republic of Ireland* (1988) 13 EHRR 186; *Modinos v Cyprus* (1993) 16 EHRR 485.

the situation that has now been reached, at least in most Western countries.

SOME HOME TRUTHS

It is these realities that I wish to catalogue. Further progress will not be made in the public discourse between heterosexuals and gays unless they each acknowledge these realities. These are the 'home truths' that I want to collect and address to both communities. We must all face up to such home truths. Doing so is not a formula for inaction, acceptance of injustice or complacency about wrongs. It is simply an insistence that realism will help to make the road ahead clearer.

1. *Straight friends:*

The first home truth is that gays have not achieved the changes in the law, in social attitudes and in turning around centuries of prejudice, on their own. It has not been done only by the gay community, by Stonewall, by gay icons, public demonstrations or dance parties. Nothing much would have happened without heterosexual friends. They are the majority. They predominate in Parliament, the Executive Government and the judiciary. They are legion in the media. Even in the arts. Even in acting. Even in hairdressing. We just have to get used to it. Without their support we would still be suffering under the so-called

'unnatural offences', police entrapment and the grossest discrimination. So this is the first reality. To effect change, it is not enough for gays to talk to each other, important as that is. It is necessary to talk to, and persuade and make friends with, the mass of the people about what it is like to be on the receiving end of unequal treatment in your own country - in Australia, the land of a 'fair go' for all.

When 'straight' people do good and kind and brave things for equality and justice, we must thank them and remember them. We should remember Bob Ellicott, then a federal Liberal Party member and later minister, and a leading Methodist, who moved for the removal of anti-gay laws in the Australian Capital Territory. We should remember Neville Wran of the Australian Labor Party, who, as Premier, sponsored the first successful repeal of the criminal sanctions in New South Wales. We should remember John Dowd, a Liberal Member of the State Parliament who added to the pressure - and consciousness - for change. We should think of Clover Moore who has a consistent record on gay-related issues and is now the Lord Mayor of this emerald city. We should recall Democrats and Greens in and out of Parliament who have spoken up against unequal treatment of gays. Big Brother finalist, David Graham, says he will step up his involvement with the Nationals. We should remember Warren Entsch, a Liberal Party federal MP, who has spoken up for gay rights. He describes himself as 'fiercely heterosexual'. Well, such people are specially important because that is the way many

Australians would like to see themselves. Their support for reform, and a change of culture and attitudes, is essential for the removal of the remaining vestiges of prejudice and injustice to gay fellow citizens. Such friends exist in all of the political parties. They exist in all churches; indeed everywhere. All that is good is not found in one place.

Some recent events have been discouraging to gay people in Australia. But we must never forget that without 'straight' friends - a process that generally begins in our families - no big changes would be achieved. So gay people must look outwards. We must be inclusive. We must be respectful of people at different stages of their understanding. We must reach out. The ghetto is a dangerous, lonely and ultimately destructive place.

2. *Low priority:*

There is a counterpart to this first home truth. It is natural that, for gay people, perceived injustices in the law, and in society seem intolerable. When such injustices are experienced, they tend to be felt deeply. Gay people naturally have plenty of time to think about their situation. They have the motivation and the opportunity to reflect on their injustices. It is natural for them to do so. However, they have to realise that for the mass of people (and especially heterosexuals who have had no known contact with gays) the issues of injustice, inequality and discrimination that still exist do

not loom large. They do not impact on their lives on an hour by hour, day by day basis.

It is important for gay people to remind themselves that, objectively, there are many other issues that bombard society beyond the one that sometimes seems most pressing and urgent to them. Objectively, it cannot be said that human rights demands, based on sexuality, are the most important cause in the whole world. They are significant. But there are others at least of equal significance, and in some circumstances of even greater urgency.

For example, demands for the human rights of gays must compete for acceptance and action, with the millennium development goals of the United Nations. These goals include the eradication of extreme poverty and hunger³ and the achievement of universal primary and basic education, which will itself be a force for truth and rationality on the subject of sexual orientation⁴. The promotion of gender equality and the empowerment of women is another goal⁵. The reduction of child mortality is yet another of the

³ *Universal Declaration of Human Rights* (UDHR), Art 25(1); *International Covenant on Economic, Social and Cultural Rights* (ICESCR), Art 11.

⁴ UDHR, Art 25(1); ICESCR, Arts 13 and 14; *Convention on the Rights of the Child* (CRC), Art 28(1)(a); *Convention for the Elimination of All Forms of Discrimination Against Women* (CEDAW), Art 10; *Convention for the Elimination of Racial Discrimination* (CERD), Art 5(e)(v).

⁵ UDHR, Art 2; CEDAW; ICESCR, Art 3; CRC, Art 2.

greatest urgency⁶. The improvement of maternal health is a desperate need in most parts of the world⁷. The necessity to combat HIV/AIDS, malaria, tuberculosis and other diseases is frighteningly urgent in most places⁸. The need to ensure environmental sustainability and to develop a global partnership for development are human rights goals of the greatest priority⁹.

If human beings die because of a lack of the basic necessities of existence or live in fear, superstition and ignorance because of lack of basic education, it will be next to impossible to interest their minds in the truths about sexual orientation. If you have desperate people, living on the edge of starvation and helplessness, you have the breeding ground of religious and other fundamentalism in which intuitive, but ignorant, beliefs about sexual orientation can flourish and be inflamed. Gay people are therefore right to see the importance of their issue and the priority it should have on the world and national stage. But a healthy dose of realism requires them to acknowledge that their issue competes for attention, and action, with many other very urgent goals - some of them inter-related with

⁶ UDHR, Art 25; CRC, Arts 6, 24(2)(a); ICESCR, Art 12(2)(a).

⁷ UDHR, Art 25; CEDAW, Arts 10(h), 11(f), 12, 14(b); ICESCR, Art 12; CRC, Art 24(2)(d); CERD, Art 5(e)(iv).

⁸ UDHR, Art 25; ICESCR, Art 12; CRC, Art 25; CERD, Art 5(e)(iv).

⁹ UDHR, Art 25(1); ICESCR, Arts 11(1), 12; CEDAW, Art 14(2)(h); CRC, Art 24; CERD, Art 5(e)(iii).

the causes of hatred against those who challenge simplistic assumptions about human sexual orientation that have existed since long before the current era.

3. *Separate but equal*

The third home truth for gays is that, even amongst comparatively enlightened people, who accept that violence and the worst forms of discrimination against gays should be removed, there remains a strong seam of impatience over demands for full equality. Realising this should not be too difficult. There are many analogies in the way that other sources of discrimination have been addressed, over time, in successive stages.

In the United States, before the Supreme Court in *Brown v Board of Education*¹⁰ embraced a constitutional principle of enforceable equality in the civil rights of individuals regardless of their race, skin colour and ethnicity, the notion that it was acceptable to treat people separately and differently according to their race prevailed in the law. It did so for more than fifty years following the Civil War and the end of slavery¹¹. A similar stage is now being reached in respect of sexual orientation. Separate but

¹⁰ 347 US 483 (1954).

¹¹ *Plessy v Ferguson* 163 US 537 (1896).

equal is a hard idea to eradicate, even from the minds of those who would count themselves as informed about, even tolerant of, gays. It clearly lies behind some of the present thinking of those who feel that the worst forms of injustice (criminal sanctions, discrimination in jobs and denial of access for partners in hospitals and other public places) should be removed. For people of the "separate but equal" persuasion, that should be enough.

As Americans from the deep South earlier, so others today view demands by gays for full legal equality as excessive, even intolerable. Why cannot they be satisfied with formal equality? Why do they demand full equality?

For some gays the answer to these questions is that they seek full equality because they are citizens. To deprive them of full equality suggests that they are less than full human beings and inferior participants in civil society. It diminishes the value of their relationships and denies them basic attributes of human dignity. Yet to some heterosexuals, the gay demand to be treated with full equality, in law and in attitudes, represents too much too soon. According to this approach, gays should be satisfied with the progress they have made. Going further, according to this opinion, is pushing their luck. It involves affronting established institutions, asking people to think in different and bigger terms than they can fairly be demanded, or expected, to do.

In the 1990s, before all the current debates about gay marriage and civil unions came to the fore in Western countries, Australian gays were asked about their attitude to such things. The polling indicated a relative lack of interest¹². This was not an issue on the agenda for most gays. Some, doubtless thought that formal recognition of their relationships was unattainable. It was dream talk and therefore not high on an agenda that had other more immediate, practical, urgent goals. Other gays were opposed to mimicking institutions that had grown up around the perceived needs of heterosexual society. Some saw gay attitudes to adult sexual relations as more open, more honest, less exclusive and definitely not obsessed with virginity.

When in 1998 in *Quilter v Attorney-General (NZ)*¹³, the New Zealand Court of Appeal, by majority, rejected a challenge by gay litigants to the exclusively heterosexual availability of marriage under New Zealand law, the majority decision rejecting the claim seemed pretty unsurprising. The dissenting view of Justice E W Thomas seemed to some (even gay) observers at the time as a trifle over the top. Now, we can see that Justice Thomas was simply a few years ahead of legal developments that would quickly occur in other

¹² S Sarantakos, "Legal Recognition of Same-Sex Relationships" (1998) 23 *Alternative Law Journal* 222.

¹³ [1998] 1 NZLR 523.

jurisdictions in a remarkably short interval¹⁴. He was not way out at all, at least in global terms. His point was that "weddings" are legitimately the business of churches and religions but that "marriage" is a civil legal status to which the legal rights and duties of citizenship attach.

Marriage could not be denied to some citizens (on Justice Thomas's view) on religious, moral or historical grounds. Nor could gay citizens be commanded, irrationally and futilely, to change their sexual orientation to fit in to the majority, heterosexual paradigm of marriage in the past. One can agree or disagree with this reasoning. My point is that the passage of further time and later developments have made the notion of gay marriage, and certainly civil unions, far less unorthodox and threatening than it seemed when first advanced. Indeed, such marriage is now a legal right in perfectly civilised countries such as the Netherlands, Belgium, Spain, Massachusetts and Canada and will shortly be so in South Africa and, doubtless, elsewhere.

¹⁴ See *Reference re Same-Sex Marriage* (2004) 3 SCR 698 (Canada); Opinion of the Justices to the Senate 802 NE 2d 565 (2004) (Massachusetts); *Minister for Home Affairs and Anor v Fourie and Anor* [2005] ZACC 7 (2005) (South Africa).

It is obvious, from legislative¹⁵ and executive developments in Australia¹⁶, in the federal sphere, that some, perhaps many, heterosexual people across the political spectrum are not viewed as ready for such a change. It may come with further time. Or something less than full equality may come in the first instance. Something separate but substantially equal; or at least not so unequal. This, in turn, may later be seen as a staging post to full equality.

My point is that gay people must realise that, at least in the early stages, when new ideas struggle for popular acceptance, the notion of treatment that is "separate but equal" constitutes an emotional staging post. This will be frustrating for those impatient

¹⁵ *Marriage Amendment Act 2004 (Cth)* (Act No 126 of 2004) s 5, schedule 1, amending the *Marriage Act 1961 (Cth)*, to insert in the 1961 Act, s 88EA ("Certain unions are not marriages"): "A union solemnised in a foreign country between (a) a man and another man; or (b) a woman and another woman; must not be recognised as a marriage in Australia". The amending Act also inserted in s 5 of the principal Act a definition of marriage as meaning "the union of a man and a woman to the exclusion of all others, voluntarily entered into for life".

¹⁶ See *Civil Union Act 2006 (ACT)*. This Act was disallowed by the Governor-General by instrument made on 13 June 2006 under s 35(2) of the *Australian Capital Territory (Self-Government) Act 1988 (Cth)* on the basis of a decision by the federal government in Australia. A motion in the Senate of the Australian Parliament, providing that such instrument be disallowed was debated in the Parliament. See *Commonwealth Parliamentary Debates (Senate)*, 15 June 2006, 8. The motion for disallowance was lost 30:32 with 14 Senators paired and not voting. See also L Tingle, "Federal Ban on Aiding Same-Sex Rights Inquiry" *Australian Financial Review*, 22 June 2006, 5.

for immediate full equality. But gays must recognise that it is a not an unusual, or even unnatural, human inclination. Great leaps of the imagination are commonly resisted. When they are pressed, they often result in resentment.

Many people who might regard themselves as free of prejudice against gays, as such, may be ready to go along with notions of "civil unions" but demand that "marriage" be reserved to heterosexuals¹⁷. Their view might be confusing "marriage" and "weddings". They might be wrong in their predictions that, in some way, the extension of marriage beyond heterosexuals would damage that institution or children in it. They might be acting on the basis of prejudice or stereotypes about marriage and about gays. But the existence of this attitude is not uncommon or specially surprising. Indeed, it has been the source of political efforts that sometimes amount to thinly veiled expressions of homophobia, sometimes even likening gay sexual relations to sex with animals¹⁸.

¹⁷ See eg J Albrechtsen, "The Love We Dare not Let Wed", *The Australian*, 14 June 2006, 9; contra A Stafford, "Same-Sex Unions a Matter of Human Rights, Not Just of Politics", *The Age* (Melbourne), 12 June 2006, 12; "Commonwealth quashes A.C.T civil union law", *The Age* (Melbourne), 14 June 2006, 4; J-A Davies, "Gay but not Happy, John", *The Bulletin*, 4 July 2006, 28.

¹⁸ For example the reported comment of P Ackerman on *The Insiders* television programme in which "he said that you cannot call a relationship between a man and a man, a woman and a woman or a man and his dog, his cat or his goat a marriage". See Senator Bartlett, *Commonwealth Parliamentary Debates, (Senate)*, 15 June 2006, 17 at 19.

4. *Nurtured discrimination*

The fourth home truth is that discrimination against gays is deep-seated and still comparatively widespread in Australia. It is constantly reinforced by forces that are not going to disappear any time soon. Such forces include the childish desire to erase variations in humanity and to stamp similarity and identity on everyone around us.

It was this desire that lay at the heart of the former White Australia policy and of apartheid in South Africa. It is fuelled by attitudes that are prevalent in infants' schools. Immature children do not like to be different from their peers. They tend to scorn those who are different. They still need to discover the prevalence and benefits of difference. That discovery takes time. Some never make it. Reinforcements of prejudice include at least some organised religions and occasionally perceived political advantage - the so-called 'dog whistle' which some enlightened people cannot hear but which those with prejudices (and their victims) can recognise instantly.

There has been a lot of evidence of the 'dog whistle' in United States politics in recent times. Ex-President Clinton recently

described the gay marriage question as a political Milchcow that had been milked to exhaustion in his country¹⁹. Bishop Tutu has remarked that everyone needs someone else that they can look down on. This telling comment is specially apt to the ferocious attitudes of homophobia that exist in much of Africa. It seems to have a special place in the leadership of some African Christian churches, whose central message should be love and reconciliation - a world view so alien to hating people because of who they are and because of their indelible human characteristics²⁰.

The repeated religious attacks on gay people, their dignity and their legal rights as citizens, constitute a sad reflection on the debasement of spirituality in the present age. They illustrate the inflexibility of many (mostly male) minds when it comes to reading ancient religious texts in the light of contemporary scientific knowledge. The same rigid, literalist interpretation was applied to a passage in St Matthew's *Gospel*, in which a crowd of Jews in Jerusalem declared to Pontius Pilate that the blood of Jesus' crucifixion should be on them and on their children. It was this

¹⁹ Former President Clinton, 10 July 2006, quoted *Washington Blade*, 14 July 2006, 13.

²⁰ A Sullivan, "The Vatican's New Stereotype" in *Time*, 12 December 2005, 92.

declaration that underpinned, and helped to sustain, anti-semitism amongst Christians in recent, and not so recent, history²¹.

Of course, there are religious scholars who have found paths to interpretation of the religious texts that reconcile them with the human needs of gay people for love, truth and companionship²². Overwhelmingly, they are heterosexual - just not consumed by prejudice against minority sexualities. But, for the most part, religious leaders still cling to literalism. They insist on the unwavering model of human sexuality which science now denies. All too often they pander to prejudice on the part of ignorant and uninformed people. It is a sad condemnation of the current state of religion in many faiths. In the long term, it ensures the increasing irrelevance of organised religion to the lives of many people, not only gays. An ever increasing number of people realise that gay people do not choose their sexual orientation any more than heterosexuals do; that they cannot change it; and that they should not be asked to try. Moreover, in many countries now, increasing numbers of people have family members who are openly gay, or work colleagues or people whom they know are gay and cannot believe to be "intrinsically evil".

²¹ M D Kirby, "Judicial Activism. Power Without Responsibility? " (2006) 30 *Melbourne University Law Review* 1 at 7-8.

²² A A Brash, *Facing our Differences: The Churches and Their Gay and Lesbian Members* (WCC Publications, Geneva, 1995). Rev Alan Brash, a New Zealand Presbyterian minister of religion, was Deputy Secretary-General of the World Council of Churches.

The intermediate position assumed by some Christian churches - that it is all right to be gay so long as there is never, ever, any physical expression of that sexual orientation - is doomed to fail. It was Freud who declared that celibacy was the one clearly unnatural sexual practice. Saints and reverend fathers may find it possible, although even they often lapse. But most mortals cannot, and should not be asked. Truly, this intermediate pretence is an unnatural compromise. Most human beings, when they think about it, realising the importance of sexuality to their own definition and well being, recognise that this is so. Rightly, they reject the call of the churches' to lifelong celibacy as a formula bound to occasion conflicting drives and great distress and doomed, for the most part, to fail.

It seems hardly necessary to insist that a distinction be observed between homosexuality and paedophilia or bestiality. Yet there are still those who wilfully deny such distinctions. Despite the overwhelming evidence that paedophilic attraction is no more common proportionately amongst gays than amongst heterosexuals, the homophobes deliberately confuse the issues. They play on fear. By far the greatest number of cases involving unlawful assaults on children coming before Australian courts concern heterosexuals,

many of them within families, frequently involving stepfathers²³. This is another instance where unpalatable objective truth is brushed aside because it challenges prejudice that reinforces stereotypes, stigma, unequal laws and cruel attitudes.

5. *Few stand up*

The fifth home truth is that the prejudices and dislike will, ultimately, only recede when gay people themselves break the spell of silence and stand up to be counted. This was the way that, earlier, Australian prejudice against non-"white" people was eroded, even if it is not yet completely eliminated. When growing numbers of Asian Australians, Arab Australians, Aboriginals and "reffos" came to be known on a personal level, it was impossible to sustain the previous feelings of hate, discrimination and superiority.

The same is happening with gays. Yet many of them can, if they choose, continue to live their secret lives. They can enter a conspiracy with everyone around them. Eventually, everyone will know or suspect. They will talk behind their backs. But the pretence will be sustained. In return for this tryst, and the charade

²³ See eg *Gipp v The Queen* (1998) 194 CLR 106; *KBT v The Queen* (1997) 191 CLR 417; *KRM v The Queen* (2001) 206 CLR 221; *Crofts v The Queen* (1996) 186 CLR 427.

of being heterosexual, gays will be assured (for the most part) of acceptance until, for some reason, that assurance is withdrawn.

I know that world; as most gays do. It is where we all start. In some countries, where being 'out' is still dangerous, operating from within that secret space may be the only option. At least it may be so for the moment, until the idea of equality catches on and is finally accepted²⁴. One writer, describing recent official oppression in Egypt, recommends that course to gay people in that country. He declares that they²⁵:

"will be in a better position by returning to the closet. They should do so not in surrender or in defeat, but as a form of soft vindictiveness to hide their gay identities strategically, only to produce them within the closet - unconfined, ever-expanding to allow others to learn to accept gay rights and gay identity - the approach known as activism from the closet".

Where disclosure occasions violence and death, no other strategy may be consistent with survival. But in modern, pluralistic societies, the advance of the acceptance of gay equality and of laws that protect gay people from violence, discrimination and injustice, are more likely to be promoted by the openness of gay people. If all

²⁴ Hassan el Menyawi, "Activism from the Closet: Gay Rights Strategising in Egypt" (2006) 7 *Melbourne Journal of International Law* 28.

²⁵ *Ibid*, 51.

gays in society suddenly stood up and confronted their fellow citizens with the truth it would be much harder to maintain the hatred, the prejudice and the discrimination. It would be astonishing to those homosexuals who still declare that they have never known a gay person.

A recent *60 Minutes* programme on Australian television described, to a mass audience, the marriage in Canada of two stable, responsible, serious Australians. Even more powerful than the stories of the two men at the centre of the drama was the interview with the mother of one of them. She just loved her son. She wanted the best for him and his partner of a decade. She was there with her husband and their close family to celebrate publicly their relationship. It was a powerful statement, expressed in the homely talk of a good Australian mother. In the culture wars, such heterosexual people are now in the vanguard of change because they are fed up with nastiness and small-mindedness. They are impatient with prejudice and legal discrimination. They have come to see, and to express, the need for change. Their voices will become powerful and eventually they will be heard. They are many and their number increases every day. I know this from my own family. Denial of a 'fair go' eventually offends most Australians when it is explained, and when they think about it.

So why do more gay people not be done with it and take their stand for openness? Obviously, it is because of fear of harm or

embarrassment to themselves, their families, their careers, their other relationships. Sadly, that fear is not wholly misplaced. In a recent, thoughtful, comment on the 'coming out' of the popular singer, Darren Hayes, following the celebration of his civil union with his partner in London, Cathy McCabe wrote in the mass circulation *Daily Telegraph* in Sydney²⁶:

"... I know for a fact, thanks to plenty of historical evidence, that 'coming out' can damage your career.

Why? Because [some fans] are homophobic, narrow-minded twits who remain determinedly bigoted despite the fact it is 2006 and we all should just be able to live and let live by now ...

Hayes has simply chosen to tell the world what they already knew and should be celebrated for his bravery and congratulated for his happiness".

Whilst this kind of coverage in the mass media, like the earlier programme on *60 Minutes*, is affirmative and reflects growing contemporary values - especially in the younger generation - the fact remains that damage can be suffered. The compact demanded by some in society is still denial, silence, dishonesty and hypocrisy. That leaves everyone in a supposed state of grace in which the binary model of human sexuality is not publicly challenged so that its apparent universality can continue to oppress those, now and in the future, who do not, and cannot, conform to it.

²⁶ 20 July 2006, 22.

Adhering to a fairytale is comfortable for some authority figures. But people, and nations, eventually grow up. Once the truth of diverse sexuality is common knowledge, it is impossible to put the genie back in the bottle. It is impossible to put the gay issue back in the closet. Diversity in sexual orientation is simply a fact of life. More and more people recognise and accept this fact. We all have to get used to it. Yet in their ambivalent way, some people hanker for the 'good old days' of silence, shame and pretence. A minority reinforce that attitude by doing damage to those, whether prominent or modest, who dare to question and, by their lives, to challenge the past illusions. I myself have paid a price for my openness²⁷. It is little wonder that others, watching and observing, draw their inferences.

Nonetheless, things are clearly changing²⁸. The change will continue to gather momentum in any countries, certainly countries like Australia. In history, nothing is inevitable. But confronted by facts, and the increasing discoveries of science, the long-term future

²⁷ E Campbell and M Groves, "Attacks on judges under parliamentary privilege - a sorry Australian episode" [2002] *Public Law* 626.

²⁸ As for example the rise in the number of census returns to the Australian Bureau of Statistics evidencing same-sex couples in Australia. See Senator Siewert, *Commonwealth Parliamentary Debates* (Senate) 15 June 2006, 21. Between the previous census and the census of 2004, the number of such couples reportedly rose from 20,000 to 40,000 people.

of discrimination against gays in Australia, looks limited. Yet there will be a lot of pain, hurt, sacrifice and injustice before the struggle is concluded. In the law, at least in the States and Territories of Australia, the trend is unmistakable²⁹. One knowledgeable Australian author, writing earlier this year, described it thus:

"In the space of six years, Australia has gone from having virtually no recognition of same-sex partnerships to broad-ranging recognition across almost all state and territory law. In all jurisdictions except South Australia, same-sex and heterosexual couples are now on an equal footing, under legislation in areas such as inheritance of a partner's property, victims', workers' and accident compensation, consent to a partner's medical treatment and (until the Federal regime for heterosexual couples comes into operation) property division.

This process has been achieved through a combination of 'testing the water' and 'leap-frog' reforms. Early limited steps taken by the ACT, NSW and Queensland tested public reaction and political resistance and found that, apart from vocal disapproval by some religious groups, there was little genuine or widespread public opposition to change. This 'testing the water' approach led to broad omnibus reform some years later ... [This] accords with the general global trend in same-sex relationship recognition described ... as 'the law of small change'".

Those who demand big changes, all at once, seem bound to be disappointed, at least in the short run. But others who hope for a return to the past are doomed to be frustrated. Not only gays, but

²⁹ Jenni Millbank, "Recognition of Lesbian and Gay Families in Australian Law - Part I: Couples" (2006) 34 *Federal Law Review* 1 at 41.

most heterosexuals now know that it is just not going to happen. Cannot and should not.

6. *Extrapolation and generalisation*

The sixth home truth is that advocates for gay reform must avoid single-minded concern with their own injustices. They need to make common cause with all those who suffer from discrimination and inequality on other grounds. There is a tendency for the marginalised to be entirely focussed on their own concerns. Women with feminist issues. Aboriginals with indigenous issues. Ethnic groups with racial discrimination. Religious minorities with their gripes. Gays with sexuality prejudice and injustice. Most do not see the linkages. They do not perceive that discrimination against minorities often has, as its root cause, a common fear of the other and stereotyping.

Some groups even resist links with others. Once, at a Jewish function, I mentioned the other victims of the Nazi death camps. When I referred to gays, I was hissed. People can get obsessed with their own injustices which extinguish their attention to the like injustices to others. In the matter of basic human rights, the proper approach is a universal one. It involves extrapolation and generalisation. Essentially, it demands of all of us that we try to see the world through the eyes of others, so as to understand the pain that others feel and thus to move towards redress.

This is why gays who suffer the injustice of discrimination should associate themselves with others who suffer likewise. They should commit themselves to working for the attainment of fundamental human rights for all. They should not do so simply because this may be a good strategy but because it is right. It will also afford insights into their own concerns and allies in the struggle to address them.

7. *A global issue*

The seventh home truth is that the proponents of gay legal and social change, need to recognise the realities of gays in the world. They must accept that the struggle is a global, not just a local one. Moreover, it lies on the cultural fault line that divides civilisations in the world over a bundle of associated issues about which people and nations tend to feel deeply. I refer to attitudes towards such issues as secularism in government; divorce and women's roles in society; gender equality; and gay rights.

In 1993, Samuel Huntington famously propounded a thesis that there was a cultural division between "Western Christianity" and "Orthodox Christianity and Islam"³⁰. This view of our planet

³⁰ Samuel Huntington, *Clash of Civilisations* (1993).

was echoed by other writers. Thus, Polly Tynynbee, writing in *The Guardian*³¹, in the aftermath of the events of 11 September 2001, declared that: "What binds together the globalised force of some extremists from many continents is a united hatred of Western values that seems to them to spring from Judeo-Christianity". The attacks upon Christian churches by some Islamists' groups, from Iraq to Indonesia, appears to reinforce this conclusion and to confirm the contours of such an international fault line.

However, I agree with Ronald Inglehart and Pippa Norris, writing in 2002, that the true 'clash of civilisations' is different. The clash is not, as such, between the Muslim world and the West. It turns not so much on political and religious organisations and notions of democracy and individual rights as upon questions concerned with sex and the essential purpose and meaning of human existence and governance.

The emergence in most Western democracies of a separation of religious and governmental authority, of social pluralism, of the rule of law and parliamentary institutions, the protection of individual rights and civil liberties, including protection against the state, constitutes a dramatic, but relatively recent, change in law and society. It shifts authority. It reduces the power of religion and the

³¹ November 2002. See R Inglehart and P Norris, "The True Clash of Civilisations", *Foreign Policy* (March/April 2003), 63.

patriarchy. It promotes and protects individual human dignity. It advances that vivid but apt goal of human society, felicitously expressed in Thomas Jefferson's *American Declaration of Independence*, which declares the goals of organised society to be the protection of "life, liberty and the pursuit of happiness"³². Happiness does not mean the instant gratification of every pleasure of the flesh. But it does recognise the basic entitlement of each individual to live as a free person in harmony with an immediate circle of family, friends and neighbours, in a community that is ordered justly and in a planet that recognises the necessary interrelationship of nations and peoples and all life forms.

The research by Inglehart and Norris into attitudes in a large array of countries suggests the coalescence of opinions on issues concerning gender, divorce, abortion and homosexuality. These are questions that relate to the control by human beings of their own bodies and inner lives. To the issues mentioned by Inglehart and Norris, it seems likely that one could now add issues such as assisted suicide³³ and (embryonic) stem cell research³⁴, the latter

³² United States of America, *Declaration of Independence*.

³³ See the rights of the *Terminally Ill Act* 1995 (NT) was overturned by the *Euthanasia Laws Act* 1997 (Cth).

³⁴ Report of the *Committee of Inquiry into Stem Cells* (The Hon J Lockhart, Chairman), 2005.

having recently attracted controversy in Australian politics³⁵ after the very first veto of Congressional legislation by President George W Bush³⁶. Stem cell research is, in a sense, no more than a new catalyst in a sharp divide between secularism and a religious view of society; between a 'revealed' set of beliefs taught by religious leaders and a broader morality of scientifically compatible humanism.

Pursuing this theme, Inglehart and Norris remark³⁷:

"The way a society views homosexuality constitutes [a] litmus test of its commitment to equality. Tolerance of well-liked groups is never a problem. But if someone wants to engage how tolerant a nation really is, find out which group is the most disliked, and then ask whether members of that group should be allowed to hold public meetings, teach in schools, and work in government. Today, relatively few people express overt hostility towards other classes, races or religions. But rejection of homosexuals is widespread. In response to a [polling] question about whether homosexuality is justifiable, about half of the world's population say 'never'. But, as is the case with gender equality, this attitude is directly proportional to a country's level of democracy. Among authoritarian and quasi-democratic states, rejection of

³⁵ The Australian Government has announced its rejection of the recommendations of the Lockhart Review. See B Carr, "Age-Old Objections Must Not be Allowed to Delay this Revolution", *Sydney Morning Herald*, 25 July 2006, 13. Gay rights have been named together with abortion, assisted suicide, stem cells and cloning as amongst the "five non-negotiables" of Christian conservatives in the United States. See R Magnusson, "Law, Religion and Biomedicine: Consensus or Conflict" (2006) *Macquarie Law, Law, Religion and Medical Science* 59 at 63.

³⁶ M Gawenda, "Bush Set to Veto Stem Cell Laws", *The Age* (Melbourne), 20 July 2006, 12.

³⁷ Inglehart and Norris, above n 31, 68.

homosexuality is deeply entrenched: 99% in both Egypt and Bangladesh, 94% in Iran, 92% in China, and 71% in India. By contrast, these figures are much lower among respondents in stable democracies: 32% in the United States, 26% in Canada, 25% in Britain, and 19% in Germany".

Facts such as these oblige "policy supporters" to spread their concerns from engagement with perceived *local* injustices so as to address the wrongs suffered in *other* countries where there are still high levels of disapproval, often violently expressed. It is not enough to attend to the wrongs in one's own backyard. All who accept the universal principles of fundamental human rights should do what they can to confront injustices in other societies that are at an earlier stage of development.

The pervasive internet, conditional foreign aid, work of international agencies and support from non-governmental organisations are some of the ways by which improvements in the state of things can be stimulated. The countries of Eastern Europe that resisted changes to their laws and policies about homosexuals were bluntly told by the Council of Europe that such reforms were required. If they did not comply, the economic benefits of membership of the European Union were not going to be available to them. If countries want the keys to the kingdom of economic wealth they can now be expected to meet basic standards of civilisation, including in respect for the sexuality of their own people.

Of course, in other continents, and against autocratic regimes, there are no immediate institutions or pressures to expedite the process of change. Attempts to do so in the matter of gay rights are sometimes resisted by reference to supposed local cultural values and to the comparatively recent oppression of gays in Western democracies themselves. Unsurprisingly perhaps, Anwar Ibrahim, the former Deputy Prime Minister of Malaysia, ultimately acquitted of sodomy, recently told a packed audience at Parliament House, Canberra, that human rights are indeed universal. There are no so-called Asian exceptions. The United Nations High Commissioner on Human Rights (Mme Louise Arbour) told a recent international conference in Montreal³⁸:

"Neither the existence of national laws, nor the prevalence of custom can ever justify the abuse, attacks, torture and indeed killings that gay, lesbian, bisexual, and transgender persons are subjected to because of who they are or are perceived to be. Because of the stigma attached to issues surrounding sexual orientation and gender identity, violence against LGBT persons is frequently unreported, undocumented and goes ultimately unpunished. Rarely does it provoke public debate and outrage. This shameful silence is the ultimate rejection of the fundamental principle of the universality of rights".

There is a tendency for some gays in Australia to retreat into local or national concerns and to forget the wider world in which truly horrible, deadly and violent things are happening to gays. If we

³⁸ Speech by the High Commissioner to the International Conference on LGBTs, Montreal, 26 July 2006, p 5.

are concerned about our own injustices, we should spare a thought for the even greater injustices of others.

In Australia, under successive governments, an important target of foreign aid has been the promotion of effective strategies to combat the spread of HIV/AIDS. Sometimes this has stimulated the adoption of policies in relation to human sexual behaviour that have appeared to challenge earlier cultural norms and the conventions of silence about sexual matters. Where violence against, and oppression of, gay people is proved, it may be hoped that a feeling of shared involvement will promote an outlook, and strategies, on such issues that extend beyond our national borders. Clearly, the matter is one of universal concern. It attracts the principles of universal human rights to which all nation states are now rendered accountable, including our own country. At the Montreal conference where Mme Arbour spoke, the participants were told by Professor Li Yinhe, a Chinese researcher on homosexuality in the Chinese Academy of Social Sciences, that her website receives approximately a million hits daily. Truly, that is a figure to conjure with.

HISTORY IS WATCHING US

Not so long ago, laws and policies on gender, race, Aboriginality, disability and other grounds of disadvantage were discriminatory and seriously oppressive. When reforms were first

proposed, they were often resisted, indeed sometimes fought tooth and nail. Thus, the *Mabo* decision³⁹ of the High Court of Australia, reversing more than a century of law and upholding the entitlement of indigenous people to claim interests in their traditional lands, was attacked at the time it was delivered, as it has been since⁴⁰. But the advance was made. Once made, such advances towards equal treatment are rarely wholly reversed⁴¹.

Some authors have claimed that the days of optimism and confidence have passed, and the conviction that rational thought, science and empirical evidence will always overcome dogma, mythology, prejudice and ignorance, is now less sure than it was ten, twenty and thirty years ago. According to this view, irrational practices, fundamentalist religion and 'dog whistle' politics flourish now and challenge the health and well being of civilised society. I am much less pessimistic. In my view, human beings are genetically programmed to evolve, including socially. Often we stumble; but the long-term trajectory of human society is towards democracy,

³⁹ *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 44.

⁴⁰ J D Heydon, "Judicial Activism and the Death of the Rule of Law" (2003) 23 *Australian Bar Review* 110. See M D Kirby, *Judicial Activism*, Hamlyn Lectures, 2004, 49.

⁴¹ D Taverne, *The March of Unreason: Science, Democracy and New Fundamentalism* (OUP, 2005), 36 ff (From optimism to pessimism).

economic equity, the rule of law and respect for the fundamental rights of all.

Most of us now look back on the religious inquisition, and the enforced observance of rules ordained by the Christian Church, with astonishment. We look back on many misogynist rules of law with embarrassment. We remember, with amazement, the statesmen and leaders, famous in their day, who opposed the legal moves to abolish racial discrimination, and who even defended the slavery of black people. We see earlier laws and policies against gays as an unjust oppression. Blindness to great wrongs, and resistance to their correction, is a common fault of those who do not see the need for change and are indifferent to injustice to their fellows. History judges such people harshly. History expects leaders to understand its tides. It is by history's talisman that we are all judged.

In recent debates, over the legal treatment of gays in Australia, if the word homosexual were deleted, and the word 'Jew', or 'Aboriginal', or 'women', or 'Muslim' inserted, I believe it would be a scandal. The Australian community would rise up to denounce such discrimination. It would demand its correction. So the last home truth is that we never attain complete enlightenment. It is the fate of human beings constantly to be on a journey towards that goal. There are injustices that we cannot see today that will be obvious in twenty, fifty and a hundred years time. We will not in our lifetimes witness the correction of all discrimination and injustice affecting

gays in Australia, still less in the wider world. But that does not excuse us, heterosexual or gay, from our obligation to try. And, as individuals and citizens, we need to engage in a civil discussion with fellow Australians, addressed to that objective.

A NEW BEGINNING

If we consider the last fifty years, since the Kinsey reports were published⁴², and the Wolfenden reforms were enacted in Britain⁴³ and then in our own country, we can take pride in the new beginning that we have achieved in what historically is a very short time. We can be glad that it happened in our lifetimes to lessen the sense of isolation and oppression. We can be grateful for the achievements, in Australia at least, including the dismantlement of many features of the legal fabric of discrimination. We gays can remember our many heterosexual friends who looked into themselves and were big enough in heart and perception to see a great wrongs done to a vulnerable minority - and to help doing something to change things.

⁴² A Kinsey *et al*, *Sexual Behaviour in the Human Male* (1948); *ibid*, *Sexual Behaviour in the Human Female* (1953).

⁴³ Great Britain, *Report of the Committee on Homosexual Offences and Prostitution* (Cmnd 247, HMSO, 1957) (Sir John Wolfenden, Chairman).

So, in 2006, we can celebrate the achievements of gay people and their heterosexual friends - achievements of people of justice and rationality. Righteous people. But so long as elements of discrimination remain, there is no room for complacency. And beyond Australia is a big world, largely untouched by Kinsey and Wolfenden and all that has followed. Where there is injustice, it is a human and moral duty to identify and explain it; to persuade others; and to demand, and achieve, its repair.

The journey to enlightenment in Australia is by no means complete. But on the issue of sexuality, it has certainly commenced. As the United Nations High Commissioner for Human Rights told the recent conference in Montreal it is a matter of fundamental human rights and basic human dignity. In the end, it is not only about gays. It is about *all* people and the quality of freedom and mutual respect in the society that we all want to live in. The momentum of change is unstoppable.

"I'll be your dream
I'll be your wish, I'll be your fantasy
I'll be your hope, I'll be your love
Be everything that you need

I'll love you more with every breath
Truly madly deeply do
I will be strong, I will be faithful
'Cause I'm counting on

A new beginning
A reason for living
A deeper meaning⁴⁴ . "

⁴⁴ Darren Hayes and Daniel Jones (Savage Garden), *Truly, Madly Deeply* (April 1997).

