Homosexual Law Reform: The Road of Enlightenment[1]

Justice Michael Kirby AC CMG[2]
Justice of the High Court of Australia

THE JOURNEY TO ENLIGHTENMENT

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

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

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

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

is not only irrational. It is immoral. The law should provide protection from and redress against it.

In the past 15 years, the progress that has been made in achieving, through legal reform, education and social movements, change in the attitude of Australians towards gay men, lesbians and bi-sexuals has been remarkable, given the extremely unpromising start. Sadly, the journey of enlightenment has been accompanied by a less happy journey. At the moment of the achievement of important legal reforms, the homosexual community of Australia, in company with brothers and sisters around the world, was hit by a terrible endemic. So with the triumphs of legal reform, greater community understanding and moves towards legal enlightenment have come sad and painful times. Times of much suffering and of terrible anguish. The achievements and the suffering have had a symbiotic relationship. They have been interwoven through the lives of many people in this and other countries over the past decade.

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

Winston Churchill, invited to visit his old school Harrow, was called upon in his advanced age to make a speech to the boys. He did so in three sentences. They were: "Never give up. Never give up. Never give up."

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

UNITED NATIONS' INITIATIVES

One of my current appointments is as Special Representative of the Secretary General for Human Rights in Cambodia. In that work, I am able to call upon my

experience in the WHO Global Commission on AIDS. An important issue for human rights today is the protection of people in every land from the burden of HIV/AIDS. One of the few benefits which Cambodia derived from its isolation in the decades before UNTAC was its substantial removal from immediate exposure to the HIV epidemic. But now Cambodia, so close to Thailand and Burma, is on the front line. It is therefore important for the protection of the right to life, the right to health and the other human rights which the United Nations' *Covenants* guarantee, that my work should defend human rights in the context of HIV/AIDS.

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

On a broader front, the past couple of years have seen significant advances within the United Nations to put the issue of sexual orientation where it should be – at the forefront of the issues of human rights in our world. The outcome of the Fourth World Conference on Women, held in Beijing in 1995, has been described as disappointing. This is because the final statement of the Conference did not include an expected reference to sexual orientation and to the rights of women to their sexuality, without discrimination.

But the issue was certainly on the agenda in Beijing. The demand for redress against discrimination was given voice. Interventions reported how lesbians had been expelled from villages and towns, for lesbianism is illegal in most African countries. In some countries, it was reported, lesbians are burned, certified as insane, locked up or stoned. In other countries they do not even officially exist.[3]

According to news reports on the conference, the "battle lines" on this issue were unremarkable. The United States, Australia, New Zealand, the European Union, Jamaica, Chile, Slovenia and Macedonia, supported the call for action. So did Cuba. South Africa, whose new constitution bans discrimination on the grounds

3 *Sydney Morning Herald*, 11 September 1995, p 8.

of sexual orientation,[4] was a new ally, important because throughout Africa there is much discrimination on this ground. In opposition were the Vatican, Iran, Libya, Morocco, Honduras, Guatemala, Ecuador, Algeria and Argentina, the last now a hard-liner on this issue. It was only when the United Nations Secretariat intervened that the committee organising the Non-Government Organisation forum outside Beijing permitted a lesbian tent on the site. I applaud the adherence of the United Nations Secretariat to basic principle and to defence of the principle of free expression and persuasion.

The basic principle at stake has been recognised by the United Nations Human Rights Committee. It was recognised in the decision given on a complaint of an Australian, Mr Nicholas Toonen, on the first day that the *First Optional Protocol* to the *International Covenant of Civil and Political Rights* became available for Australians.[5]

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

The importance of the Toonen decision for the cause of the recognition of sexual orientation as a fundamental ground for protection of human rights[6] extends far beyond Tasmania, Australia, the occasion of the complaint. Ultimately, Tasmania and its democratic Parliament would have removed the irrational law which threatens to punish adult, consenting people for their conduct in fulfilment of

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

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

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

their nature. The significance of the case will, rather, one day be found in countries, such as Iran, where gay men and lesbians are still shot or stoned. The significance of the decision is that it speaks to the whole world. It represents an important ruling by a high body of the United Nations on a fundamental question of human rights. It draws on the earlier jurisprudence of the European Court of Human Rights.[7] It spreads the enlightenment, sharing the progress which has been made in countries such as Australia with other countries at an earlier stage on the journey of enlightenment. We must be grateful to Nick Toonen and Rodney Croome for their bold, imaginative and successful enterprise.

But we should also be grateful to the United Nations in its fiftieth year. With its many faults and limitations, it is yet a vehicle for the protection of the human rights of all humanity. Human rights were one of the three pillars upon which the organisation was built in 1945. The initial meetings were held at the very moment when the first revelations of the awful horrors of Hitler's concentration camps were coming to the world's consciousness. We should never forget the many who died and suffered for their sexual orientation, along with the Jews, the Gypsies, the Communists, the Jehovah Witnesses and the other victims of the stereotyping intolerance of the Nazis. Although the pink triangles disappeared with Auschwitz, there remain many in our community who have not removed this badge of hatred from their minds. It must be the role of education to offer them the gift of understanding. It must be the function of the law to offer protection and redress to their potential victims. It should be the role of laws and constitutions and of the advancement of fundamental human rights to offer principled guidance to nations and to the world.

CANADIAN FAILURE

The initiative of Nick Toonen and Rodney Croome from Australia had to call upon an international statement of human rights. So far, the Australian Constitution has not been thought to include a general provision protective of gay men, lesbians and bi-sexuals from irrelevant discrimination. Interestingly, a provision appears in the Constitution, not yet fully explored, which may one day be found to provide a

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

principled protection against unreasonable discrimination in all unjustifiable forms, including on the ground of sexual orientation. The section reads:

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

Of late, the High Court of Australia has found many important implied guarantees in our Constitution.[8] The writing of Lionel Murphy, when a Justice of the High Court, suggests that there may be other implied rights to be discovered in the sparse text by those who are willing to read between the lines of the Constitution and to draw from it the fundamental principle derived from the just nature of our form of society.[9]

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

An example of failure, at least in the outcome of the case, was the appeal by James Egan and John Nesbitt against the decision of the Federal Court of Appeal in Canada.[10] The facts were simple. Mr Egan and Mr Nesbitt were gay men who had lived together since 1948. Their relationship was found by the courts to be marked by commitment and interdependence, similar to that found in a marriage. When Mr Egan became 65 years of age, in 1986 he received old age security. On reaching 60 years of age, Mr Nesbitt, his partner, applied for a spousal allowance. He would have been entitled to that allowance had he been a female spouse. The relevant provision in the *Old Age Security Act* defined a "spouse" to include:

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

The appellants brought an action in the Federal Court of Canada seeking a declaration that the definition of "spouse" contravened the Canadian *Charter of Rights and Freedoms*. It was argued that it discriminated unconstitutionally on the basis of sexual orientation. The couple sought a declaration that the definition

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8 See, for example, *Nationwide News Pty Limited v Wills* (1992) 177 CLR 1 (HC Aust) – implied constitutional right to free speech; *Dietrich v The Queen* (1992) 177 CLR 292 (HC Aust) – implied constitutional right to fair trial (per Deane and Gaudron JJ).

9 *Sillery v The Queen* (1981) 180 CLR 353 (HC Aust) – implied limitation on cruel and unusual punishments (per Murphy J at 362).

10 *Egan & Nesbitt v The Queen*, Supreme Court of Canada, 124 DLR (4th) 609.

should be extended to include "partners in same-sex relationships otherwise akin to a conjugal relationship". The trial division of the Federal Court dismissed the action. The Federal Court of Appeal, in a majority decision, upheld that judgment. In the Supreme Court of Canada, by a majority of five judges to four, the further appeal was dismissed. It was held that the definition of "spouse" in the Act, confined to opposite-sex relationships, was constitutional.

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

The four minority judges, Justices Cory, Iacobucci, Claire L'Heureux-Dubé and Beverly McLachlin, disagreed. They found a clear denial of equal benefit of the law. In addition to being denied an economic benefit, homosexual couples were denied the opportunity to make a choice as to whether they wished to be publicly recognised as a common law couple or not. Such denial deprived them of equal benefit of the law guaranteed by the Canadian *Charter*. Just as the *Charter* protected religious beliefs and practices, so too it should be recognised that sexual orientation encompassed a "status" and "conduct" requiring protection. The definition of "spouse" as confined to opposite sex relationships reinforced, in the view of the minority, the stereotype that homosexuals cannot and do not form

lasting, caring, mutually supportive and loving relationships with economic interdependence in the same manner as heterosexual couples. In the view of the minority judges, the appellants' relationship, dating back to 1948 no less, vividly demonstrated the error of that approach. The discriminatory impact could not be treated as trivial when the legislation reinforced prejudicial attitudes based upon such faulty stereotypes.

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

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

UNITED STATES SUCCESS

Sometimes the Courts can uphold claims for basic sexual equality. In *Equality Foundation of Greater Cincinnati Inc v City of Cincinnati*[11] the United States District Court in Ohio had to consider a challenge to a law adopted following a popular ballot known as "Issue 3". That law provided:

> The City of Cincinnati and its various Boards and Commissions may not enact . . . any ordinance . . . rule or policy which provided that homosexual, lesbian, or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment.

The proposition was adopted by the people of the city following a bitter television, radio and other campaign. Sadly, the theme of homosexuals as paedophiles was, in the words of the judge, "far from absent from the campaign". We have seen a similar confusion, wilful or ignorant, in Australia in recent times. The voters of *Cincinnati* approved the measure by a vote of approximately 62

11 850 F Supp 417 (1994) (US D Ct).

percent to 38 percent. The challengers objected that this measure was contrary to both the 1st and 14th Amendments to the United States Constitution. The 1st Amendment guarantees free speech. The 14th Amendment guarantees equal protection of the law to all persons in the United States.

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

1. Homosexuals comprise between 5 and 13% of the population.
2. Sexual orientation is a characteristic which exists separately and independently from sexual conduct or behaviour.
3. Sexual orientation is a deeply rooted, complex combination of factors including a predisposition towards affiliation, affection, or bonding with members of the opposite and/or the same gender.
5. Sexual behaviour is not necessarily a good predictor of a person's sexual orientation.
6. Gender non-conformity such as cross-dressing is not indicative of homosexuality.
8. Sexual orientation is set in at a very early age – 3 to 5 years – and is not only involuntary, but is unamenable to change.
9. Sexual orientation bears no relation to an individual's ability to perform, contribute to, or participate in, society.
10. There is no meaningful difference between children raised by gays and lesbians and those raised by heterosexuals. Similarly, children raised by gay and lesbian parents are no more likely to be gay or lesbian than those children raised by heterosexuals.
11. There is no correlation between homosexuality and paedophilia. Homosexuality is not indicative of a tendency towards child molestation.
12. Homosexuality is not a mental illness.
13. Homosexuals have suffered a history of pervasive, irrational and invidious discrimination in government and private employment, in political organisation and in all facets of society in general, based on their sexual orientation.
14. Pervasive private and institutional discrimination against gays, lesbians and bisexuals often has a profound negative psychological impact on gays, lesbians and bisexuals.

15. Gays, lesbians and bisexuals are an identifiable group based on their sexual orientation and their shared history of discrimination based on that characteristic.
16. Gays, lesbians and bisexuals are often the target of violence by heterosexuals due to their sexual orientation.
17. In at least certain crucial respects, gays, lesbians and bisexuals are relatively politically powerless.
18. Coalition building plays a crucial role in a group's ability to obtain legislation in its behalf. Gays, lesbians and bisexuals suffer a serious inability to form coalitions with other groups in pursuit of favourable legislation.
19. No Federal laws prohibit discrimination based on sexual orientation. Furthermore, voter back-lash around the country has lead to the repeal of numerous laws prohibiting discrimination against gays, lesbians and bisexuals. In 38 of the approximately 125 state and local communities where some sort of measure prohibiting discrimination based on sexual orientation has been adopted, voter initiated referendums have been placed on the ballot to repeal those gains. 34 of the 38 were approved.
20. The amount of resources spent by the City on processing and investigating discrimination complaints by gays, lesbians and bisexuals is negligible. City resources spent on processing and investigating all sexual orientation discrimination complaints is negligible.
21. The inclusion of protection for homosexuals does not detract from the City's ability to continue its protection of other groups covered by the City's anti-discrimination provisions.
22. Amending the city charter is a far more onerous and resource-consuming task than is lobbying the City Council or city administration for legislation; it requires a city wide campaign and support of a majority of voters. City Council requires a bare majority to enact or adopt legislation.
23. ERNSR campaign materials were riddled with unreliable data, irrational misconceptions and insupportable misrepresentations about homosexuals.

On the footing of these findings, Judge Spiegel concluded:

> that gays, lesbians and bisexuals have suffered a history of invidious discrimination based on their sexual orientation. This is not a unique conclusion. See *High Tech Gays v Defense Indus Sec Clearance Office* 895 F2d 563, 573 (9th Cir 1990).

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

There have been many similar cases in the United States in recent times. The Supreme Court of Colorado upheld a permanent injunction banning enforcement of the State's anti-gay rights initiative in December 1994.[12]

Proceedings have been brought in Hawaii, along the lines of the Canadian case, objecting to the refusal to issue marriage licences to same-sex couples. It was suggested that such laws conflicted with the Hawaiian State constitutional protection against discrimination based on gender.[13]

In February 1995, the Supreme Court of the United States agreed to review the Colorado case.[14] It has since dismissed the State's appeal in a decision of profound importance for equal treatment of homosexual and bi-sexual colleagues under the law of the United States.[15]

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

CONCLUSION

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

I do not intend to fall into the past error of believing that enough has been achieved and that we should leave well alone. Or that there is a need for the pause that refreshes or a time for consolidation. Injustices, and many of them, continue.

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12 See "Colorado Pushing Gay Rights to High Court" (December 1994) *ABA Journal* 34.

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

14 *Evans v Romer* 882 P 2d 1335 (Colorado. 1994).

15 *Romer v Evans* 64 LW 4353 (1996) (US Sup Ct).

They exist in the letter of laws which discriminate against people on the basis of sexual orientation. The Canadian *Old Age Security Act* is but an illustration of many such laws. Many of them exist in Australia. Many of them affect basic rights such as superannuation and insurance. In the struggle against such injustices and in the demand for equal treatment in the eye of the law, it is vital that citizens committed to human rights – gay and non-gay – should, in Churchill's words, "never give up".

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

The Changing Concept of Family: The Significance of Recognition and Protection*

Justice Alastair Nicholson, AO RFD
Chief Justice, Family Court of Australia

INTRODUCTION

Laws outlawing discrimination should serve as more than a source of enforceable rights and protections; they should also provide a basis for shifting prejudicial community attitudes. These only change when a society truly recognises the humanity of the group who have been enduring discrimination and, to my mind, nothing can be more central to a definition of humanity than respect for the importance each of us places upon enduring relationships.

Equal opportunity law may and often does give a person access to important individual remedies for certain forms of discrimination. Its importance should not be understated. Irrespective of the number of complaints lodged, which may be small for reasons that I will discuss, such laws have both an educative function so far as the community at large is concerned and a deterrent function so far as potential discriminators are concerned. For these reasons I support the introduction of laws in this State prohibiting discrimination against persons on the ground of sexual preference.

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* A closing address to "Sexual Orientation and The Law", a seminar presented by the School of Law, Murdoch University and the Law Society of Western Australia, 3 August 1996, Perth.

However, it must also be recognised that such laws have limitations, as indeed does any legislative intervention into the sensitive area of human relationships.

All too often, the anti-discrimination laws contain unsatisfactory compromise provisions to appease the more conservative wings of the parties introducing them. The laying of a complaint under them exposes the complainant to a process that may be bewildering or embarrassing and, in some cases, expensive. In addition, such laws contain no acknowledgment that gay men and lesbians possess and express the most human of qualities – love and commitment through relationships.

I believe that, without the recognition of all family relationships, equality – the cornerstone of democratic society – is missing; public acknowledgment of private affections, commitments, interdependencies and identities is denied.

For this seminar to pay attention to both family and anti-discrimination law is also a sensible strategic choice. This is because arguments for the inclusion of sexual orientation as a prohibited ground of discrimination are likely to be met with confused claims that doing so is a dangerous domino: that it will lead to the demise of the so-called traditional family and the opening up of a Pandora's Box of unintended and undesirable consequences.[1]

One of the most politically potent but patently false ideas is that the recognition of lesbian and gay men's relationships will somehow encourage those who would otherwise be heterosexual to opt instead for a same-sex relationship. To the degree that sexuality is a fluid human characteristic, it strikes me as absurd to imagine that the achievement of limited legal protections would induce someone to reorient their sexuality. It seems to me that politicians take themselves far too seriously if they really believe that any legislation they pass will have any effect, one way or the other, upon this issue. All that such legislation will do, and this is reason enough for it, is to provide that people whose sexual orientation is towards a same-sex relationship will be treated equally with the rest of the community so far as the law is concerned.

The victimisation studies cited in Anna Chapman's paper[2] clearly show that the introduction of law reforms is no solution in itself to prejudice, hostility and violence against gay men and lesbians.

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1 See the discussion of the recent changes to Victoria's *Equal Opportunity Act* in Morgan, W "Still in the Closet: The Heterosexism of Equal Opportunity Law" (1996) 1:2 *Critical Inquiries* 119-146.

2 "Sexual Orientation and Australian Anti-Discrimination Law: Some Observations on Experiences in the Eastern States", Paper presented at the Murdoch University Seminar "Sexual Orientation and the Law", 3 August 1996.

The argument about encouragement is closely related to the equally misguided belief that homosexuals are prone to attempt to "corrupt" children. As noted by both June Williams[3] and Anna Chapman,[4] this myth is an unfortunate feature of the anti-discrimination statutes of some other States and appears particularly strongly in the preamble to the 1989 Western Australian Act, which decriminalised male homosexual acts between adults over a certain age.[5]

There is a tendency to confuse homosexuality with paedophilia. Such a stereotype reflects the inability or refusal of some people to understand that the exploitation, harassment and assault of children and young people is a harm related to sexuality as such, without regard to sexual preference and in most instances, but not all, to masculinity. The important point is that there is no evidence to support the proposition that it bears any relationship to homosexuality whatsoever: "Most perpetrators of child abuse identify as heterosexual men and their victims are predominantly female."[6] It is therefore plainly spurious to confuse calls for law reform with concern about the propensity of some to abuse their power and trust. This was an illogical and unsavoury feature of some of the opposition[7] to the recent "lawful sexual behaviour" amendment to Victoria's *Equal Opportunity Act*, and one which I hope will not be repeated by Western Australian parliamentarians or the media.

What must be properly understood is that the real effect of refusing to acknowledge and provide protections to same-sex relationships is to fail to recognise anything else but *relationships* and the meanings they give to an individual's life. This current state of the law smacks of society punishing otherwise law-abiding members for a sexual orientation that is, in and of itself, lawful.

And to what gain? Legal denial and intolerance achieve nothing but an insult to the dignity of recognition that every family treasures and has the right to expect in a

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3 "Western Australian Anti-Discrimination Law and Proposals for Change", Paper presented at the Murdoch University Seminar "Sexual Orientation and the Law", 3 August 1996.

4 See note 2.

5 See the preamble to the *Law Reform (Decriminalisation of Sodomy) Act* 1989 (WA) which includes "AND WHEREAS, in particular the Parliament disapproves of persons with care supervision or authority over young persons urging them to adopt homosexuality as a lifestyle and disapproves of instrumentalities of the State so doing. . ."

6 Morgan, W and Walker, K "Rejecting (In)tolerance: Tolerance and Homosex" (1995) 20:1 *Melbourne University Law Review* 214.

7 Morgan op cit; Stewart, M "Equal Opportunity Except for you. . . and you. . . and you" (1996) 20:4 *Alternative Law Journal* 196-197.

country which supposedly supports tolerance for peaceful differences among its members.

To continue to ignore the rights of same-sex individuals and their relationships is a pyrrhic achievement of which no government ought to be proud. Denying someone the right to be known as a committed partner to a relationship, simply on the basis of the gender of the partners, is no different to apartheid. Writing of the resistance to same-sex relationships in American society, Herma Hill Kay, Professor of Law at the University of California Berkeley made an observation that applies equally here:

> Just as the existence of racially mixed families once challenged the legitimacy of white supremacy in ways that strengthened the social fabric in the United States, so may the contemporary example of stable same-sex families ultimately lead to a richer and more diverse social and cultural life.[8]

I am in my position as the Chief Justice of the Family Court because I value positive consensual relationships. As a barrister, Supreme Court Judge and Chief Justice of the Family Court of Australia, the vast majority of harms seen in my work have arisen from violence, abuses of power and broken commitments and not to the fact that some people prefer same-sex relationships. To value and respect those who wish to stand connected to each other and accountable to each other in the face of intolerance, is a cause that deserves support.

I hold the position also because I value human rights and the principle of equal treatment. These are precious bulwarks against vulnerability and oppression, and it is almost axiomatic that the clearest perception of the need for these rights comes from those who lack them.

The catch cry that is often heard, as it is with Aboriginal and even feminist groups, that lesbians and gay men are seeking "special rights" has no foundation. It is simply a case of the law having failed to provide the equal protection to which they are entitled by virtue of their essential humanity. As I understand the proposals for change under consideration in this State, none bear any resemblance to the somewhat charged legal concept of affirmative action. The calls for law reform are to end the current harms caused by inequality and the refusal to acknowledge that gay men and lesbians have and do lead family lives that should not be denigrated by legal invisibility.

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8 Kay, HH "Private Choices and Public Policy" (1991) 5:1 *Australian Journal of Family Law* 84.

To my mind, anyone who stands by the values of commitment, relationships and equal protection should support legislative measures that outlaw discrimination and recognise same-sex relationships. Otherwise, they are shareholders in unwarranted fear and prejudice, a stock that, unfortunately, is held dear by too many in this country. Inevitably, some of our politicians reflect these feelings, but I find it hard to believe that a majority of them do so, when and if they are confronted with the overwhelming logic of the contrary position.

I have a little relevant experience in the controversy that attends these matters. In fact I suspect that the organisers thought to ask me because of comments I made on the value of recognising same-sex relationships, remarks which attracted substantial media attention in early 1995. I therefore thought that it might be of interest to briefly recall that episode because it contained some lessons which may be instructive.

My Address to St Mark's Theological College

Two years ago in Canberra in September 1994, I was invited to address the St Mark's Theological Centre on the topic of "Perceptions of the Australian Family".[9] In my address, I was critical of the "sterile debate" that had taken place in the International Year of the Family over what constituted a family and the lack of practical measures to aid those families most in need. In the course of my paper, I drew attention to the economic plight of mothers without partners and the increased suffering of a generation of children arising from what I see as the preoccupation of governments with economic rationalism.

On the night I delivered the speech, I had no reason to believe that it had been a particularly controversial address, let alone radical or revolutionary. I therefore found it surprising to receive a telephone call in late December from a journalist who, I assume, had seen of a copy of the printed speech when it appeared in the Theological Centre's journal.

I do not know what she thought might have occurred in the few months since making the speech, but she asked me whether I still stood by a particular sentence in that address – that our understanding of family, and I quote:

9 (1995) *St Mark's Review*, No 160, pp 11-16.

> may, in my belief, extend to people living in permanent homosexual as well as heterosexual relationships and I think it more than time that we and the law recognised this.[10]

Needless to say, I told her that I did stand by that view, and woke up on 3 January to find that the front page of the *Sydney Morning Herald* was ablaze with the headline "Judge: give gay couples equality".

Now, as many of you may know, the Christmas and New Year period is the slow time for news, and attention to my comments served both the interests of the media industry and those who opposed my view. What followed bore little resemblance to what I had said about the undesirability of setting rigid limits on what a family can be, and it was an interesting circus for a number of reasons.

THE MEDIA TREATMENT

First, it seems to me that the media were preoccupied with the sensation of a Chief Justice speaking about same-sex relationships despite the fact that it was not a central feature of my speech.[11] The media's agenda, I think, was to generate conflict which they could then report. Little room was left for me to describe the context of those remarks, which was my continuing concern that there are various types of deeply felt relationships which, despite their importance, still lack legal recognition.

The concerns that I addressed in that speech were not limited to same-sex couples. I also addressed the still unresolved problem of the fragmented laws relating to heterosexual couples living in de facto relationships. Also, shortly before giving the St Mark's address, I had just returned from visiting Torres Strait Islander communities as part of the court's on-going commitment to improve the relevance and accessibility of its services to remote areas. I was particularly interested during these community consultations by the traditional adoption practices of the Islander peoples, examples of this being brothers giving a child to a childless sister and both child and sister accepting full parent-child relationships.[12]

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10 (1995) *St Mark's Review*, No 160, p 12.

11 See the letter by Mr Len Glare, Chief Executive Officer of the Family Court of Australia in *Sydney Morning Herald,* 7 February 1995.

12 See Australian Law Reform Commission *The Recognition of Aboriginal Customary Laws, Report No 31,* Canberra, AGPS, 1986; Nicholson, A "Indigenous Customary Law and Australian Family Law" (1995) 42 *Family Matters* 24-29.

It was telling that in my subsequent interviews, when I tried to explain the problem of these relationships remaining unrecognised by law and that de facto heterosexual families still face unnecessary inequalities, journalists were more preoccupied with how I felt about the adverse reaction to my suggestion about recognising same-sex relationships. There was little interest in teasing out the significance of denying legal status, not only for the adults involved, but for the children in these families.

THE REACTION TO MY COMMENTS

The public reaction to my comments was also instructive. Both the Federal Labour and Liberal parties were rather quiet on the subject but interestingly, the Young Liberals appeared to adopt a supportive stance.[13] One of the most unusual responses from a politician was that my remarks reflected "narrow cast but very trendy beliefs"[14] – a rather unusual claim to fame for a Judge! They were also considered "an attack on the institution of the family" and a step towards a "non-reproductive society" which had to be fought "tooth and nail".[15]

Fortunately, the then Attorney-General and Minister for Health in the Australian Capital Territory was able to reassure the public that this fear was unfounded. Mr Terry Connolly said that the passing of the Territory's *Domestic Relationships Act*, according equivalent treatment of property settlement to same-sex couples, had not had any effect on birth rates in Canberra; "On the contrary", he said, "we recently opened our third Maternity unit".[16]

The *Australian* newspaper's editorial said that my suggestion was "unrealistic",[17] and its columnist, BA Santamaria, wrote that my remarks illustrated:

> the well-known phenomenon of the "slippery slope". Once one foundational principle [and by this Mr Santamaria meant "family"] is compromised, it becomes only too easy to compromise the next. No firm ground is left on which to stand.[18]

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13 "Young Libs in pro-gay move", *Sydney Morning Herald*, 6 January 1995;
14 National Party leader, Mr Tim Fischer, *Canberra Times*, 6 January 1995.
15 National Party leader, Mr Tim Fischer, *Australian*, 5 January 1995.
16 *Canberra Times*, 6 January 1995.
17 *Weekend Australian*, 7-8 January 1995.
18 *Weekend Australian*, 14-15 January 1995.

When I look back on the media treatment of the issue at the time I made my comments, it strikes me that the push down the "slippery slope" mentioned by Mr Santamaria was coming from opponents to law reform. The suggestion that relationships be recognised was transformed by some into a warning against the redefinition of marriage.[19] Such a connection was not mentioned in my remarks nor, as I recall, by those who spoke on behalf of the lesbian and gay community. The slope itself must be a fairly gentle one since the slide seems to have been well under way in Athens in 400 BC.

SAME-SEX MARRIAGE

I do not find the lack of comment on the question of marriage from lesbian and gay commentators surprising. First, despite the claims of those who would see the redefinition of marriage as the ultimate goal, I am conscious that there are wide-ranging views on this issue within the lesbian and gay community, including those who are staunchly opposed to extending the institution of marriage.

For example, at the First World Congress on Family Law and Children's Rights held in Sydney during 1993, Hayley Katzen delivered a paper on the legal recognition of lesbian and gay men's relationships which suggested to me that access to "marriage" was not a common goal, at least within the Sydney community.[20] Rather, the principal concern was recognition of their relationships and an end to the social, legal and economic disadvantages which accompany having a same-sex partner.

Secondly, I would venture to suggest that advocates for reform are conscious that to speak of same-sex marriages "ups" the symbolic ante. Those opposed to the concept of same-sex relationships are very aware of the currency of drawing the link with marriage and in some cases may do so as a deliberate tactic to stifle more modest law reform. Other opponents may be conscious that there have been recent attempts to redefine the meaning of marriage in other countries with a similar legal

19 *Mercury*, 6 January 1995.

20 Katzen, H "The Bride Wore Pink – Legal Recognition of Lesbian and Gay Relationships" (1993) 3 *Australasian Gay and Lesbian LJ* 67.

tradition to that of Australia, such as the United States,[21] Canada[22] and New Zealand,[23] and may assume that such an agenda is at play locally too.

It therefore seems to me that lobbyists for reform need to plan their approach with a recognition that these overseas challenges do impact upon the perceptions of Australians and that whatever the pros or cons of the issue, the concept of "marriage" carries a meaning which is powerfully infused with tradition, history and religion, even more so than the concept of "family".

I think that it must also be remembered that marriage carries with it strong religious connotations for many people and that the law of marriage itself is directly descended from concepts developed originally within the Eastern and Western branches of the ancient Catholic Church and latterly, so far as this country is concerned, by the Ecclesiastical Courts in England, applying the dogma of the Church of England.

It is true that as a matter of law it is now a secular institution, but it is rarely treated as such by the public or by legislators.

The recent Parliamentary Select Committee on Family Law, which recommended the legal recognition of de facto relationships, was careful to say that this should not be achieved by the simple recognition of such relationships in the *Family Law Act* 1975, but rather by enacting separate legislation which would not afford to de facto heterosexual partners the same recognition as would be given to parties to a marriage.

It is instructive to observe how far behind this country is on issues such as this when compared to Canada with its Charter. In this country, a Bill of Rights is anathema to most conservative lawyers and politicians and quite a few on the Labor side of politics.

It may therefore be helpful for law reform advocates to repeatedly make it clear that a change to the recognition of same-sex relationships in Western Australia will have no effect on the definition of marriage because this is a matter of

21 *Baehr v Lewin* (1993) 74 Haw 539.

22 *Layland v Ontario* (1993) 104 DLR (44th) 214.

23 *Quilter and Pearl v Attorney-General (sued in respect of) Registrar General of Births Deaths and Marriages* (unreported, HC NZ, Auckland, Kerr J, 28 May 1996).

Commonwealth law.[24] While this may seem obvious to this audience, I think that the issues can easily merge and blur for the public.

As my small experience in this matter has shown me, the media have an important role to play in keeping the issues clear and I think there is a good deal of benefit that comes from explaining to journalists and to politicians what is *not* within the ambit of the reforms they propose.

THE CORRESPONDENCE

The hostile correspondence after my comments hit the press were a troubling indication of the misunderstanding, fear and frank prejudice that lies in the community. Some of the letters to my chambers were rather vitriolic. Writers speculated on my underlying personal motives, quite often providing me with extensive quotations from the Scriptures.

Some who wrote to me called for my impeachment and this made for a touch of irony, because at least one newspaper columnist had suggested that my stance was part of a supposed bid to be appointed to fill a vacancy on the High Court.[25] The logical link escaped me then as it does now, when one considers the position of the government at that time on the Tasmanian criminal law against consenting sex between adult men.

In contrast, the letters from those who supported my stance were often very moving. What touched me particularly were the encouraging sentiments of the parents and friends of gay men and lesbians, people who are too often forgotten in the furore of debate. They explained the damaging consequences of a lack of societal respect for their children, and told of how social and legal blindness to their children's relationships placed stress upon the entire extended family. It left me wondering whether any of the protagonists had really stopped to think that lesbians and gay men were part of a wider family context and I, as a parent, was left

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24 See Lauw, I "Recognition of Same-Sex Marriage: Time for Change?" (1994) 1:3 *E Law – Murdoch University Electronic Journal of Law.* As to an attempt to reinterpret the meaning of the words "husband" and "wife" to incorporate same-sex partners see *Re Brown and Commissioner for Superannuation* (1995) 38 ALD 344 where the Administrative Appeals Tribunal said it gave them "no joy" to find that the surviving partner to a homosexual relationship was not entitled to a spouse benefit under the *Superannuation Act* 1976 (Cth).

25 McGuiness, PP "Justice Needs a Public Airing", *Sydney Morning Herald,* 27 January 1995.

wondering how I would feel if my grown-up children were talked about in the tones of derision that crossed my desk in the newspapers and letters.

One letter that I particularly recall came from an adult man brought up by his mother and her long-term female partner. His letter spoke of the sadness and frustration he had continually felt at society's refusal to acknowledge the legitimacy and the value of the parents he cherished. The parents he respected were being denied that same basic human right of respect by the laws of the community.

THE SIGNIFICANCE OF RESPECT

It is this concern for respect which unites human rights proponents and it is the denial of respect which underpins discrimination.

In a recent judgment, Madame Justice L'Heureux-Dube of the Supreme Court of Canada captured the essence of this issue when she wrote:

> inherent dignity is at the heart of individual rights in a free and democratic society...Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens, that demean them, that treat them as less than capable for no good reason, or that otherwise offend fundamental human dignity.[26]

Her comments were made in the landmark 1995 case of *Egan v Canada* brought by two men who had been living in a relationship for nearly 50 years by the time it was decided by the Supreme Court of Canada. It was a case under the Canadian Charter of Rights and Freedoms which enables federal and provincial legislation to be challenged as discriminatory on certain grounds.

In *Egan*, the partners submitted that it was discriminatory to deny them a social security supplement which would have been paid if they had been an opposite sex couple. Although they did not succeed in their specific claim, it was the first *unanimous* recognition by the highest court in Canada that sexual orientation is a recognised ground of discrimination under the Charter.

In considering why they did not succeed it is instructive to look to the joint judgment of four of the five Judges in *Egan's case* who found against the plaintiffs.[27]

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26 *Egan v Canada* (1995) 12 RFL (4th) 201 at 228.

27 La Forest J with whom Lamer CJC, Gonthier and Major JJ concurred.

DEFINING A FAMILY: CHILDREN OR INTERDEPENDENCE AND COMMITMENT?

Underlying their Honours' judgment is a view that the legal notion of "family" should be defined with reference to the functions of this social unit. In this regard, they elevated the procreation and raising of children to the point of being definitive of the meaning of "family" and considered the social and legal acceptance and support of de facto heterosexual families as somewhat of a concession to "the social reality that increasing numbers choose not to enter a legal marriage".[28] They said that extending support to unmarried families was warranted in order to avoid the poverty which is more often faced by sole parents' children and the greater "burdens" such children often place on society.[29]

Whatever one's view of how the state goes about it, society will always have and, in my view, should always have, an interest in recognising and protecting the family unit, because it is the natural environment for children to be nurtured and developed. To hold this view passionately does not, however, justify or logically lead to the withholding of recognition and protection to relationships which do not have the raising of children as their raison d'etre. Such relationships are by no means confined to same-sex relationships.

In my view, it is not procreation that defines a family relationship, it is the commitment and the financial and emotional interdependence of family members. To alienate families with these qualities but who are different to the so-called "traditional" form, is both unnecessary and counter-productive. It is reminiscent of the legal and social chauvinism that has been largely, but not entirely, dispelled in respect of so-called illegitimate children.

One of the fundamental misconceptions which plagues the issue is the failure to understand that heterosexual family life in no way gains stature, security and respect by the denigration or refusal to acknowledge same-sex families. The sum social good is in fact reduced, because when a community refuses to recognise and protect the genuine commitments made by its members, the state acts against everybody's interests. This is because it alienates ordinary people whose

28 *Egan's case* at 223.
29 *Egan's case* at 224.

commitments represent an investment in the shared social order and the values which are promoted by it.[30]

Madame Justice L'Heureux-Dube put it elegantly when she wrote:

> It is possible to be pro-family without rejecting less traditional family forms. It is not anti-family to support protection for non-traditional families. The traditional family is not the only family form, and non-traditional family forms may equally advance true family values.[31]

Those who would emphasise the difference between same-sex and heterosexual families either unwittingly or deliberately cast lesbian and gay men's relationships as fundamentally and uniformly different and foreign. Such an assumption is simply insupportable. Social science research and common experience consistently tell us that diversity is the norm and, to quote one eminent sociologist, Professor Margrit Eichler: "Overall, the differences among opposite-sex couples and among same-sex couples are greater than the differences between these two groups".[32]

FAMILY LAW AND DIVERSE FAMILIES

It is precisely this diversity of individuals and families and their circumstances which presents in family law matters every day. Sexual orientation is no basis upon which to make assumptions about the quality of an individual's relationships or the parenting capacities of a person. That is why sexual orientation, in and of itself, has been held to be an irrelevant matter in disputes about children under the *Family Law Act* unless it somehow impinges upon the best interests of the child.[33]

To the extent that such potential effects are relevant, Justice Wootten in the Supreme Court of New South Wales correctly observed that such matters are "equally applicable to [the] heterosexual relationships of parents".[34] In saying this, I am conscious that additional questions are seen to be posed when the courts evaluate lesbian and gay applicants and their proposals for the care of their

30 Sullivan, A, *Virtually Normal – An Argument About Homosexuality*, London: Picador, 1995.
31 L'Heureux-Dube J in *Canada (Attorney-General) v Mossop* [1993] 1 SCR 554 at 634.
32 Nevins Prov J in *Re K* (1995) 15 RFL (4th) 129 at 142 quoting Dr Margrit Eichler, Professor and Chair of Sociology at the Ontario Institute for Studies in Education and the University of Toronto.
33 See the discussion in the Australian case of *Re K* (1994) FLC ¶92-461 at 80,774.
34 *Jarman v Lloyd* (1982) 8 Fam LR 878 at 890, a case prior to the referral of powers in respect of ex nuptial children by the States.

children, that are not found in cases where a parent's sexual orientation or partner is heterosexual.

I am aware that there have been criticisms of the approach taken in some Family Court cases,[35] particularly the first instance 1983 decision *L and L*,[36] which suggested that a court faced with a homosexual applicant should consider a "checklist" of factors such as the following:

> Whether children raised by homosexual parents may themselves become homosexual, or whether such an event is likely.
>
> . . .
>
> Whether a homosexual parent would show the same love and responsibility as a heterosexual parent.
>
> . . .
>
> Whether homosexual parents will give a balanced sex education to their children and take a balanced approach to sexual matters.[37]

I can appreciate why it is said that these matters begin from an improper footing because such an a priori list of factors seems to presume that such differences may be expected when the applicant is a gay man or a lesbian as against a heterosexual parent.[38] Interestingly, the correctness of the *L and L* approach has not been the subject of challenge before a Full Court.

I cannot say what a Full Court would do with such an issue, but I would hope that the passage of years and the resulting change in community attitudes would be reflected in the court's consideration of the matter

Related issues did, however, arise in the Canadian adoption case of *Re K*,[39] which was discussed in Jenni Millbank's paper[40] as an illustration of a successful challenge to statutory definitions. This was a case brought by four lesbian couples under the Canadian Charter of Rights and Freedoms. In each of the couples, one

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35 Millbank, J "Lesbian Mothers, Gay Fathers: Sameness and Difference" (1992) 2 *Australian Gay and Lesbian LJ* 21; Bateman, M "Lesbians, Gays and Child Custody: An Australian Legal History" (1992) 1 *Australian Gay and Lesbian LJ* 47.

36 *L and L* (1983) FLC ¶91-353.

37 *L and L* (1983) FLC ¶91-353 applied in *Doyle and Doyle* (1992) FLC ¶92-286.

38 Similar concerns have been raised in respect of Canadian decisions: see Casey, S "Homosexual Parents and Canadian Child Custody Law" (1994) 32:3 *Family and Conciliation Courts Review* 379-396; Fowler, J "Homosexual Parents – Implications for Custody Cases" (1995) 33:3 *Family and Conciliation Courts Review* 361-376.

39 (1995) 15 RFL (4th) 129.

40 "'Which Then Would Be The 'Husband' And Which The 'Wife'?: Contesting 'the Family' in Court'", Paper presented at the Murdoch University Seminar "Sexual Orientation and the Law", 3 August 1996.

partner was the birth mother to the child or children under consideration. The Ontario law permitted an adoption application by "one individual" (without regard to sexual orientation) or "jointly by two individuals who are spouses of one another" (married or unmarried). Since the couples did not meet the definition of "spouse", the practical problem was that the non-birth mother could not apply as an individual without extinguishing the birth mother's legal connection to the child.[41]

In essence, the question which faced Judge Nevins was whether the couples should be permitted to apply to jointly adopt the children that each was already parenting. He found that the barrier to joint adoption was discriminatory and, to use the language of the Charter, not "demonstrably justified in a free and democratic society".[42] The substantive adoption applications went on to be determined according to the well-known basis of the "child's best interests" test.

I would particularly draw attention to the examination within *Re K* of social science research findings, because Judge Nevins had before him highly regarded expert evidence in the fields of sociology,[43] psychology,[44] and psychiatry,[45] "on the ability of homosexual persons to parent, individually or as couples".[46] It led his Honour to find that there is no rational basis for negative stereotypical beliefs about the mental health and relationship stability of such parents or the psychological profiles of their children, and I quote:

> there is no cogent evidence that homosexual couples are unable to provide the very type of family environment that the legislation attempts to foster, protect and encourage, at least to the same extent as "traditional" families parented by heterosexual couples.[47]

I would take a great deal of persuading that the same conclusion does not apply in Australia. Indeed, one of our longest serving Judges, Justice Lindenmayer, said in a very early Family Court case on the subject:

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41 For a discussion of how courts in the United States have dealt with such cases see: Bates, F "Child Law and the Homosexual Partner – Recent Developments in the United States" (1992) 1 *Australian Gay and Lesbian LJ* 21-46; and Connolly, C "An Analysis of Judicial Opinions in Same-Sex Visitation and Adoption Cases" (1996) 14 *Behavioural Sciences and the Law* 187-203.

42 Section 1, *Canadian Charter of Rights and Freedoms*.

43 Dr Margrit Eichler, Professor and Chair of Sociology at the Ontario Institute for Studies in Education and the University of Toronto.

44 Dr Rosemary Barnes, former Chief Psychologist at the Women's College Hospital, Toronto.

45 Dr Susan Bradley, Psychiatrist in Chief at the Hospital for Sick Children, Toronto.

46 *Re K* (1995) 15 RFL (4th) 129 at 141.

47 *Re K* (1995) 15 RFL (4th) 129 at 161 (emphasis in original).

> A court of law must act upon evidence, not upon assumption or theory . . . there is no basis upon which it could be suggested that the Court should judicially notice that a practising homosexual parent cannot provide as good and healthy an upbringing for his or her children as a heterosexual one.[48]

While the *Family Law Act* itself does not contain the same discriminatory premises that were challenged in *Re K*, I accept that any process of decision-making carries with it the risk that assumption will take the place of evidence. Indeed, a major educative theme within the court has been the promotion of greater awareness to issues of gender and race, and the risk of decisions containing unintentional biases based on stereotypes unsupported by evidence in a particular case.[49] To date, the court has not paid direct attention to issues of sexual orientation in these programs but there is scope for that to occur and, as pointed out in June Williams' paper,[50] stereotyped notions of male homosexuality and lesbianism are interwoven with concepts of gender roles, and what is thought to be appropriate conformity to them.

One of the most heartening features of the court's gender and Aboriginal and Torres Strait Islander Awareness programs, to me at least, has been the fact that it has led to an increased self-questioning by the participants of their approach to stereotypes and an enthusiasm to confront other areas, such as this one, where stereotypical thinking abounds.

CONCLUDING COMMENTS

By way of conclusion, I would like to take us back to a quote from a speech in another time on another issue. The words are from an Englishman speaking in 1833 on a matter which, like so many matters seen in a historical perspective, seems a little self-evident. It is the speech of Thomas Babington Macaulay advocating in favour of full political equality for Jews in England: Mr Macaulay said of his opponent:

> The plain truth is that my honourable friend is drawn in one direction by his opinions, and in a directly opposite direction by his excellent heart. He halts between two opinions. He tries to make a compromise between principles which

48 *Brook and Brook* (1977) FLC ¶90-325.

49 See for example, *B and R and the Separate Representative* (1995) FLC ¶92-636; *McMillan v Jackson* (1995) FLC ¶92-610; *Bartlett and Bartlett* (1994) FLC ¶92-455.

50 See note 3.

> admit of no compromise. He goes a certain way in intolerance. Then he stops, without being able to give a reason for stopping. But I know the reason. It is his humanity. Those who formerly dragged the Jew at a horse's tail and singed his beard with blazing furze-bushes, were much worse men than my honourable friend; but they were more consistent than he.[51]

Australia would do well to have more Honourable Members who could be described in these terms, as unable to give a reason for their opposition to human rights because of their "humanity". This does not seem to have been the case here so far on the subject of sexual orientation.

Hopefully, this seminar will make a difference. I hope it provides the necessary impetus for the legislators of this State to question any reluctance they may have to reform the law, and the assumptions which underlie it.

Most of all I hope this seminar leads them to rethink their humanity and to wonder what it must be like to be denied a pivotal feature of one's humanity for purposes which, I must say, seem to pander to irrational fear and prejudice.

I wish you well in the pursuit of your goals: recognition and respect for your human right, and that of your children, to laws that assure and deliver equal and fair treatment. As a judge, these are my lode stars and I hope that your legislators can lead as well as navigate towards this future for lesbians, gay men and their families.

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51 Sullivan, op cit p.94.

The Legal Recognition of Relationships between Couples of the Same Sex: A New Zealand Perspective[1]

Anita Jowitt
LLB(Hons)

Now that New Zealand has guaranteed freedom from discrimination on the grounds of sexual orientation, one is able to argue convincingly that legislative change must occur so that same-sex couples can be recognised. This article discusses the rights-based argument as to why the current position of the law in respect of same-sex couples is untenable before turning to consider what the best option for law reform might be.[2]

RIGHTS-BASED CHANGE

The current invisibility of same-sex couples appears to be justified on the ground that we live in a democracy in which the will of the majority, which does not endorse same-sex relationships, rules. This justification demonstrates a fundamental misunderstanding of New Zealand's political and legal system. Our democratic

1 A revised and shortened version of a paper submitted for the 1994 Auckland Lesbian and Gay Lawyers Group Prize.

2 Although alternative family forms may also require legal recognition, this article focuses exclusively upon the recognition of couples.

system has chosen to protect various fundamental human rights which cannot be curtailed at the mere whim of the majority.[3]

Is a Protected Human Right being Curtailed by Lack of Recognition?

Following the passing of the *Human Rights Act* in 1993, freedom from discrimination on the grounds of sexual orientation is clearly a protected human right.[4] The legal invisibility of same-sex couples breaches this right because many legal benefits and protections which are available to heterosexual couples are inaccessible to their same-sex counterparts simply because of a different sexual orientation.

The response that no discrimination is occurring because people are not being denied the opportunity to form relationships misses the point somewhat. The discriminatory behaviour highlighted is not in the area of forming relationships but in the area of legally recognising them.

The counterclaim that anyone can access these legal benefits if only they enter a relationship with someone of the opposite sex is also inadequate. Only a heterosexual choice of partner will be rewarded with legal recognition. A homosexual choice is not similarly rewarded. This is discriminatory.

Can the Non-recognition of Same-sex Couples be Demonstrably Justified as a "Reasonable Limit"?

Protected rights are not absolute but "may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".[5] The New Zealand Court of Appeal has provided some guidance to interpretation of this phrase, stating that rights "may be modified in the public interest to take account of the rights of others and of the interests of the whole community".[6] It appears that the entire issue will be treated as a balancing act. The legitimate public interest, arising out of the potential for empirically demonstrable impingements on other citizens' rights if the freedom in question is protected, will

3 The rights protected are to be found in the *New Zealand Bill of Rights Act* 1990, the *Human Rights Act* 1993 and various international treaties and covenants that New Zealand has ratified.
4 Section 21(1)(m).
5 Section 5 of the *New Zealand Bill of Rights Act* 1990.
6 *Noort v MOT* [1990-92] 1 NZBORR 97 at 159.

be weighed against the detriment to society caused by curtailing a fundamental freedom.

The alleged harms that most usually are suggested would arise if recognition were to occur are that:

- society will disintegrate,
- Christianity will be undermined,
- youth will be damaged or corrupted,
- the natural purpose of sex (procreation) will be undermined,
- AIDS will be spread, and/or
- the essential heterosexual nature of marriage will be destroyed.

However, these concerns are shown to be factually inaccurate or otherwise inadequate on closer examination.

Accepting that to recognise same-sex couples will cause significant alterations to the current ordering of society, the argument that harm will be caused because society will disintegrate presupposes that the society is worthy of being preserved. However, to alter or destroy a society may be a cogent desire.[7] It must first be shown that any restrictions the existing society imposes are not illegitimate curtailments on freedom before alteration to the status quo can justify curtailing protected human rights.

The suggestion that because New Zealand is a predominantly Christian society it is more important to maintain Christian standards than to recognise protected human rights has several flaws. Claims of religious homogeneity in New Zealand[8] or a united Christian view on homosexuality[9] are false. More importantly, to impose "Christian standards" on society impinges on citizens' right to freedom of religion by effectively creating a de facto State religion.[10] Further, New Zealand courts distinguish law and religion. Breaking an ecclesiastical duty is not "a violation of any duty. . . cognisable by a Court of law".[11] Rather, religious rules must be otherwise adopted by the legal system before breaking them will cause a

7 Professor Hart's reference to Nazi Germany demonstrates this point in *Law Liberty and Morality*, London: OUP, 1963, p 38.

8 See the 1991 census statistics, in Evans, J (ed), *New Zealand Official Yearbook 1994*, New Zealand: Statistics New Zealand, 1994.

9 Reference to some homosexual-supportive Christian organisations in New Zealand can be found in Brommell, Donnelley, Hein & Neave, *Love Unbounded*, Auckland: Colcom Press, 1992).

10 Section 13 of the *New Zealand Bill of Rights Act* 1990.

11 *Baldwin v Pascoe* 9 LRNZ 759 at 772.

cognisable legal harm. Offending against religious beliefs is not therefore sufficiently harmful to justify legal discrimination.

Claims that harm to children will occur because they "may be exposed or introduced to ways of life which. . . may lead to a severance from normal society, to psychological stress and unhappiness and possibly even to physical experience, which may scar them for life"[12] are simply not backed up by empirical evidence. Researchers have found that the parents' lifestyle does not influence a child's choice of friends or whether they bring these friends home. Nor are children raised in a same-sex family more likely to become homosexual. Stigmatisation amongst peers is rare and no more damaging than other forms of teasing.[13] As to fears of "physical experiences", it is heterosexuals who are more likely to molest children.[14]

Allegations of corruption simply because more young people may come out in a less homophobic environment are invalid. Establishing corruption requires empirically demonstrable evidence that homosexual practices are harmful, not merely that the number of homosexuals will increase.

As to undermining the "natural (procreative) purpose" of sex, undoubtedly fairly harmful effects would ensue if procreation ceased altogether. However, it is ridiculous to seriously contend that procreative sex will be abandoned if same-sex couples are recognised. The argument has two other major flaws. First, the primary purpose of relationships is not necessarily to have "sex" so, regardless of what the natural purpose of sex is, it is fairly irrelevant to the issue of whether relationships should be recognised. Secondly, it is naive to believe that the only reason that people indulge in sex is for procreative purposes. Its "natural purpose" is thus unclear.

The fear that AIDS will be spread if same-sex couples are recognised is based upon ignorance. AIDS is caused by a non-discriminating virus. AIDS is everybody's business. Ignoring the existence of homosexuals will not make it go away. No other disease has the effect of preventing a class in society who are statistically more likely to become infected from having their relationships recognised. AIDS should be no different. Indeed, as HIV may be less likely to be

12 Lord Wilberforce in *Re D* [1977] 1 All ER 145 at 153.

13 Research into all these areas is reported in Talbot, D, *Homosexual Women and Men in Australia and New Zealand*, Western Australia: Gay Counselling Service, 1985, p 40.

14 New South Wales Anti-Discrimination Board, *Discrimination and Homosexuality – Summary,* New South Wales: West, D Government Printer, 1982.