Seven Lessons of Hobart

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Look up my people,
The dawn is breaking,
The world is waking
  To a new bright day,
Where none defame us,
No restriction tame us,
Nor colour shame us,
  Nor sneer dismay.

So long we waited
Bound and frustrated,
Till hate be hated
  And caste deposed;
Now light shall guide us,
No goal denied us,
And all doors open
  That long were closed.

See plain the promise,
Dark freedom-lover!
Night's nearly over,
  And though long the climb,
New rights will greet us,
New mateship meet us,
And joy complete us
  In our new Dream Time.

Oodgeroo Noonuccal, 'A Song of Hope'.

* Justice of the High Court of Australia. President of the International Commission of Jurists. Address delivered at the Tasmanian Gay and Lesbian Rights Group, Gay Law Reform Celebration Dinner, 28 June 1997.

Introduction

As a citizen of a free country, I am glad to participate in this dinner. It celebrates the working of democracy.

Recently I was confronted with a rude question: are you now the longest serving judicial officer in Australia? I had never thought of myself as an old fogey—merely a young fogey. But, the harsh reality is that, with the exception of a handful of judges, I have served in judicial office longer than almost anyone else in Australia. So I have seen a lot of changes in the law during my career. I have seen how law reform can be achieved. I have seen how, sometimes, it fails. I have observed the way in which the parliaments, the governments and the courts of Australia have played their respective parts in removing many injustices. Tonight celebrates the closing of one chapter. But I want to suggest that our minds should focus on the opening of the new chapter which follows. That is why I have tried to collect the lessons which I derive from the passage through the Tasmanian Parliament of the law repealing the criminalisation of adult consensual homosexual conduct.[1]

When I was first appointed to judicial office in 1974, most of the Australian jurisdictions criminalised and punished homosexual conduct. The laws were often unenforced. But their existence reinforced prejudice. It sustained stigma. The passage of the Tasmanian reform is truly historic. Now, the punishment, or threat of punishment, of adults for their private conduct in their own bedrooms has been lifted. With this step, our continental country—from Hobart to Darwin, from Brisbane to Perth—has been freed from laws which criminalised people for being how God, or nature, made them.

I want to suggest seven lessons that can be learned from the journey to this moment. I will call them the 'Seven Lessons of Hobart'.

The Power Of One

When, decades ago, I was a student politician—along with Daryl Williams, Garry Evans (as he then was), Rob Holmes a Court, John Bannon, Peter Wilenski and others—I learned the power of one. The Tasmanian University representatives at that time were Pierre Slicer and Dennis Altman. The former became a lawyer who, in the courts, championed the causes of the disadvantaged. Eventually, as these things happen, he became a Judge of the Supreme Court of Tasma-

1 *Criminal Code (Amendment) Act* 1997 (Tas).

nia. I am glad that he is here for this occasion. The latter became a brave and outspoken advocate of homosexual law reform. He helped to put the cause in a larger intellectual setting. We should remember him tonight.

I first met Rodney Croome and Nick Toonen in Hobart, a decade ago. It was at a National Conference on AIDS. It was at that moment, as our country faced a terrible challenge which had fallen so heavily upon homosexual men, that they (and others) 'came out'. They were there when Mr Wilson Tuckey, then Shadow Spokesman on Health, suggested that gay men had brought AIDS on themselves by defying nature. It fell to me to follow this address. The hall was in turmoil. Those who were there will never forget the rebuke administered by a Tasmanian mother who had just lost her son to AIDS. But that conference became an event which empowered Rodney Croome and Nick Toonen. It gave them and their supporters the momentum that carried through for a decade until gay law reform was eventually achieved. We should pause and think of Rodney and Nicholas.

We should think of the many who stood with them. We should also think of courageous politicians of all parties who, regardless of their own sexuality, saw the issue of homosexual law reform as one concerning the basic dignity of their fellow citizens. Up there in the Pantheon are Don Dunstan who achieved the first reform in South Australia, Bob Ellicott who piloted reform through the Federal Parliament, John Dowd and Neville Wran in New South Wales and many others, including in Tasmania. Liberal, Labor, Green, Democrat and Independents ultimately took the journey of enlightenment. But it would never have happened without determined change-agents who refused to give up. They showed the power that the individual can achieve in our democratic country.

Democracy Works

The second lesson is that, in our country, for all its many faults, democracy usually, ultimately, works. In my humble opinion, it was better by far that the reform was achieved in Tasmania on the votes of the elected representatives of the citizens of this State of Australia than that it should be achieved through the courts. It is usually a sign of a weak society that it leaves the hard issues to the courts.[2] Happily, homosexual law reform in Australia has been achieved in parliaments

2 Justice Kennedy of the United States Supreme Court, as cited in J Rosen, 'The Agoniser', *New Yorker* (11 November 1996) p 90.

around this nation. Slowly, sometimes reluctantly but ultimately with clear resolution, parliaments have repealed the provisions on the 'abominable crime'.

We see many criticisms of our parliaments and of our politicians. Take such criticism away from the media and they would have insufficient to do. Yet on this issue, in less than a quarter of a century, Australians have achieved national reform. It has still not been achieved in many of the other countries which inherited the criminalisation of homosexual acts from English law. It has not been achieved in much of Africa. It has not been secured in most of the Pacific nations nor in Asia. It remains on the books in India. Even in the United States of America, with its boasts of democracy and the Bill of Rights, many States continue the legislative stigma. We in Australia have achieved reform through our democratic parliaments. It has sometimes been controversial. The disputes have often been bitter. But the system of government has worked. We should remind ourselves of this when we next hear attacks on our basic institutions. As we approach the centenary of our Commonwealth we would do well, occasionally, to reflect upon our constitutional blessings.

The Help of International Rights

The third lesson is that the Tasmanian reforms illustrate the growing integration of human rights. The Tasmanian Parliament would, I am sure, ultimately have enacted reform of law. But there is no doubt that the passage of the *Human Rights (Sexual Conduct) Act* 1994 (Cth) gave significant stimulus to the pace of reform. That Act was, in turn, the outcome of the case brought by Nick Toonen to the Human Rights Committee of the United Nations based upon the allegation that Australia was in breach of the *International Covenant on Civil and Political Rights*.[3]

Nick Toonen was cautioned about the poor prospects of his complaint. Would 'privacy' cover sexual conduct? Would such criminal laws, so common throughout the world, be viewed as being within a nation's 'margin of appreciation'? Would the Australian federal arrangements intrude? Had he exhausted his domestic remedies? Was his concern sufficiently real and concrete to interest the committee or was it purely hypothetical? Fortunately, he ignored all of these cau-

3 *Toonen and Australia*, Communication to the Human Rights Committee of the United Nations (Communication 488/1992). See (1994) 5 *Public Law Review* 72.

tionary words. The international human rights machinery considered and upheld his complaint.

There are some in our country who see external scrutiny of Australia's record in human rights as a challenge to our national sovereignty. Others see it as a natural development of international law in an age of growing global integration. Sometimes we can learn about ourselves through the perceptions of others. We should pause and reflect upon the brave people who established the United Nations human rights instruments in the aftermath of the suffering of the Second World War. In this case we have seen how, without armies or gunboats, the influence of international law has played a part in reform of Australian law. This is a natural development which will probably gather momentum in the coming millennium.

Reach Out to Critics

The fourth lesson is illustrated by the process of law reform in this instance. As the successive Tasmanian opinion polls show, the winning over of public opinion involves education and persuasion of fellow citizens in all their diversity. Whatever the issue, we should respect those who hold a view different to our own. Some of the people who opposed homosexual reform were not evil or bigoted. Many relied on their religious understanding. Some on the lessons from their upbringing. Some were fearful of change, concerned about young people and social breakdown. Of course, these are concerns that are held by Australian citizens regardless of their sexuality.

One way to bring home to opponents the justice of reform was to transpose into their lives the denial, rejection and criminalisation which the old laws inflicted on homosexual Australians. The part which a number of enlightened religious leaders played in the reform movement, including in Tasmania, must be acknowledged. This is a time when all those who have been engaged in the struggle for law reform should reach out to their opponents in civic friendship. Their fears must be understood, their anxieties answered. The lesson of reform in other parts of Australia must be patiently explained. The notion that something so deep, and probably genetic, as a person's sexuality could be changed by a law or by mere talk about different 'lifestyles', needs to be knocked on the head. This is a time for reconciliation and reassurance. It will require gestures from all sections of the community to heal the wounds which have been caused by the conflicts of the past decade. Those conflicts can now be put behind us. As the laws were hardly ever enforced, it seems unlikely that a great deal will suddenly change. But what should change is the notion

that the members of one section of the community are second class or 'abominable' because of their nature.

Alert to New Changes

The fifth lesson is that those who have been involved in the reform process should keep their minds alert to new challenges to human rights. It is often disappointing to see the insularity of people committed to a particular cause: women concerned only with gender discrimination; indigenous people and their supporters attentive only to discrimination on the ground of race; homosexuals concerned only with gay law reform. It is important always to see these and other grounds of discrimination in a larger context: disadvantaging people upon preconceived notions without regard to their individual qualities.

The removal of criminal sanctions is an important first step on the path to civic enlightenment about homosexuals. It knocks away one of the props to discrimination and irrational attitudes. But, as has been recognised in most of the jurisdictions in Australia, more is needed. Anti-discrimination laws can often be a useful stimulus to promoting equal opportunity and public understanding. It is not a time to rest on the laurels of criminal law reform. Irrational attitudes which belittle people for something over which they have no control are as objectionable when they are based on sexuality as on gender, race or any other indelible imprint of nature. Most Australians now understand this. The process of reform does not stop at a little change to the Criminal Code. That is simply the key that unlocks the door to the path of enlightenment.

Adopting a Broader Focus

The sixth lesson is that achievements in one area should encourage us all to be concerned about other needs for law reform to which we have given little attention. When I was at university and young in legal practice you rarely heard a word about gender discrimination in Australia. You hardly ever heard anyone talking about homosexual law reform. This makes me pause and think of the injustices which I do not see clearly now but which will be plain to those who are around in 20 or 30 years. What will be the human rights issues then? Will they include a deeper concern for the human rights of drug users and drug-dependent persons? Will they involve a concern about the impact of technology on our human rights? Will they include concern about the human rights of future generations? With the maintenance of a diverse gene pool, especially now that we stand on

the brink of being able to create designer human beings—perhaps with the 'gay gene' excluded at parental wish? The challenges of the future are much more complex than those which have recently been overcome. This is not a time for complacency.

An International Dimension

The seventh lesson is that the reform achieved in Tasmania should be considered as a prototype for similar reforms in other countries. When, in the International Commission of Jurists (ICJ), I persuaded my colleagues to add to the list of future human rights concerns the issues of the human rights of people living with HIV/AIDS and human rights of sexual orientation, one distinguished jurist pulled me to one side. He would agree to technology and the genome. He would even agree to drug dependence. If pressed, he would include the impact of HIV/AIDS on human rights. But he begged me to exclude sexual orientation. This is a prejudice that lies deep. His was a plea not from a redneck, ignorant of the history of human rights and the fundamental idea of human dignity that lies at its heart. This was the demand of a distinguished jurist who had himself tasted the pain of discrimination on bases which he could not change—his race and his colour. With the support of my colleagues, discrimination on the grounds of HIV/AIDS and sexuality were added to the list of the ICJ's international concerns. But in many parts of the world, voices are extremely muted on these topics. In many places not only do the criminal offences remain on the books but they are rigorously enforced. In countries such as Iran, homosexuals are still gravely punished. Reportedly, some are even executed for acts which we have now removed from the Australian statute books. This should be of concern to all those who see the struggle for human rights as one involving all humanity.

When I went to the Centre for Human Rights in Geneva recently, I took part in a review of a manual which will be used to train judges around the world in the fundamental notions of human rights. The chapter on discrimination against minorities contained not a word about discrimination on the ground of sexuality, This was despite the decision in the *Toonen Case* by the UN Human Rights Committee.[4] It was despite the decisions of the European Court of Human Rights in cases involving Northern Ireland,[5] Ireland,[6] and Cyprus.[7] The man-

4 *Toonen and Australia*, note 3 above.

5 *Dudgeon v United Kingdom* (1981) 4 EHRR 149.

ual will be changed. But will the attitude of neglect, indifference, ignorance and resistance be altered? Only if those who have learned the lessons of Hobart take the achievements made here to the larger assemblies of the United Nations. There should be a UN Special Rapporteur on Human Rights and Sexual Orientation. The case study of law reform in Tasmania should be taken as an illustration of what can be achieved by the symbiosis of international legal principles, fundamental rights and democratic parliaments working under the stimulus of a citizen movement and of individuals dedicated to reform.

What I have said tonight, in the Seven Lessons of Hobart, is not revolutionary. On the contrary, it is a reflection on the operation of the most basic democratic institutions in Australia. We have seen the power of citizens demanding respect for basic human dignity. We have seen our parliaments at work to achieve reform. We have seen the way international human rights law can stimulate reform, including in our country.

Reformers should now reach out for reconciliation and civic friendship. But they should not rest on their laurels. Reform of the criminal law is but the first step in the process of the achievement of full equality for all citizens regardless of their sexuality. Everyone should be alert to the new challenges to human rights. Australians should take the message of Hobart to the far reaches of our world where injustice and prejudice still prevail. If this is done, the achievements that have been made here in Tasmania may become a model for similar reforms in lands far from this beautiful island in our much blessed country. And when, far away and long into the future, they hear of the struggle for homosexual law reform in Tasmania and Australia, of how it was resisted and how it was achieved by citizens—heterosexual, homosexual, bisexual and transgender—working together, those who helped to attain this moment will be honoured, as I honour them tonight. It is a moment for celebration. But the largest challenges for human rights still lie ahead.[8]

6 *Norris v Republic of Ireland* (1988) 13 EHRR 186.

7 *Modinos v Cyprus* (1993) 16 EHRR 485.

8 See MD Kirby, 'Homosexual Law Reform: The Road of Enlightenment' (1997) 6 *Australasian Gay and Lesbian Law Journal* 1; A Nicholson, 'The Changing Concept of Family: The Significance of Recognition and Protection' (1997) 6 *Australasian Gay and Lesbian Law Journal* 13.