*The Hon Michael Kirby AC CMG**

MARRIAGE EQUALITY: WHAT SEXUAL MINORITIES CAN LEARN FROM GENDER EQUALITY**

Abstract

Dame Roma Mitchell, graduate and later Chancellor of the University of Adelaide, achieved many firsts in her life. These are described in the opening biographical note which demonstrates how she became a potent symbol of gender equality in the law in Australia. The author examines the still evolving story of marriage equality in Australia and the world and the lessons that advocates of this change can draw from the earlier movement for equality of women. He describes the divided decision of the New Zealand Court of Appeal in *Quilter* (1998), and the challenge this presented to the traditional approach to 'marriage'. He then identifies a series of statutory and judicial moves which have resulted, in less than 20 years, in expanding the availability of marriage to non-heterosexual couples in many jurisdictions of differing legal traditions. This list also includes instances where courts have rejected the concept. The author proceeds to catalogue medical research that suggests significant health benefits deriving from access to marriage status. He addresses the supposed justifications for denying this civic right to sexual minorities. Among the lessons that they can learn from the earlier feminist movement for reform are the need for role models, theoreticians, political supporters, international principles, cultural and social change agents and bipartisan support in politics. The article concludes that marriage equality represents a further frontier of fundamental human rights and legal equality upon which Dame Roma Mitchell's life can inspire and guide the present generation.

I Roma Mitchell Remembered

We should remember, and take encouragement from, the life of Dame Roma Mitchell. She was a remarkable Australian and a leader in the cause for women's equality, including in the law.

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* Justice of the High Court of Australia (1996–2009); Australian Human Rights Medal (1991); President of the International Commission of Jurists (1995–98); Laureate of the UNESCO Prize for Human Rights Education (1998); Gruber Justice Prize (2010); Chair of the Commission of Inquiry of the United Nations Council on Human Rights on the Democratic People's Republic of Korea (2013–14).

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The Hon Dame Roma Mitchell AC DBE CVO QC
Dame Roma Mitchell 1998 by Jessica Hromas
Type C Photograph
Collection: National Portrait Gallery, Canberra
Gift of the Hammond Care Group 1999

She was born in 1913 and educated in Roman Catholic schools in Adelaide. She was admitted to the Bar in 1934. In 1962, she was appointed Queen's Counsel, the first woman to receive that commission in Australia. This was the beginning of a string of firsts.

In 1965, she was appointed a Judge of the Supreme Court of South Australia, another first. In the 1970s, she chaired the Criminal Law Reform Committee of South Australia. This was where I first met her in 1975, when I was appointed inaugural Chairman of the Australian Law Reform Commission.

In 1981 she was appointed chair of the Commonwealth Human Rights Commission, a post she held until 1987. By 1983 she had retired from judicial office. However, in 1985 she was elected Chancellor of the University of Adelaide, another first for women. In 1991 she was appointed by the Queen as Governor of South Australia, still another first. She held that post until 1996, long enough to welcome me to Adelaide as a Justice of the High Court of Australia.

Most contemporary Australian lawyers, female and male, will not have known Dame Roma personally. I had that privilege. She was strong and assertive, with a formidable mind and a heart sensitive to the rights of women and of minorities. She received all the civil honours then available, including creation as a Dame Commander of the Order of the British Empire in 1982, and Commander of the Royal Victorian Order, a personal gift from the Queen conferred on her in 2000 when she was mortally ill.

When I visited Adelaide on the circuits of the High Court, I always requested to be accommodated in the chambers in a building adjoining the old Supreme Court in Victoria Square, which had been occupied by Dame Roma in her lifetime. By then, they were the chambers of Justice Margaret Nyland. On the wall, in pride of place, were two striking black and white photographs of Dame Roma: as a barrister and a judge. I refused the more senior chambers in the inner sanctum of the courthouse, to be in the room that she had inhabited. Somehow, I felt that the 'vibes' (which everyone knows are so important in decision making in the High Court) would reach me in that room. And so they did.

When Dame Roma died, it was a great compliment to me that I received from her executor a photograph of us both taken in younger days, which he said she had kept on display at her home. It is therefore a special pleasure for me to be the first man to deliver this lecture. We must all learn from her life and works and try to emulate her practical contributions to building a more just and equal society, under the rule of law.

II Same-Sex Unions

I recently published a small book, *A Private Life*.[1] This provides a number of biographical sketches, although it stops short of deserving the title of an autobiography.[2] The

1 Michael Kirby (Allen & Unwin, 2011).

2 Ibid ix.

fourth chapter of the book is named for my partner of 43 years, Johan van Vloten.[3] It tells how we met and how we have stayed together ever since. The relationship was almost shipwrecked in the first minutes by my opening gambit (concerning the Nazi leader von Ribbentrop). It has never been formalised by marriage, or in any other way. But it is rock solid and a great blessing in my life, and in the lives of my family. Anyone who would deny or impede another human being having a loving, supportive, intimate companion on the journey through life is not a kind person.

In recent years, Johan and I have discussed whether, were marriage available to us, we would take the plunge.[4] Because our relationship has been tested in the furnace of life, including on a few nasty occasions, we have not hitherto felt the need for a formal ceremony to tell the world about our relationship. To that extent, I can approach the issue of marriage equality with a degree of dispassion. Both of us are strongly of the view that the legal status of marriage should be available to those men and women who qualify for it. As a legal status, established by federal legislation in Australia, it should not be denied or unavailable to a category of people because of their gender or sexual orientation.

As time goes on, we feel an increasing inclination to embrace the status of marriage ourselves when it becomes available, if only to express our recognition of those who have been struggling so hard to achieve that end. Most of the support is now found, as it should be, amongst heterosexual Australians. Increasingly, they feel uncomfortable living in a secular society where a legal status is denied to some of their fellow citizens because of a sexual orientation different from the majority. No reform on this topic can be achieved without the support of the heterosexual majority. Most homosexuals themselves derived, as I did, from a happy heterosexual marriage and family, with most of their acquaintances, colleagues and friends also in that category. I have found that straight friends are increasingly supportive of marriage equality in Australia.

Seemingly fearful of this trend, in 2004 during the Howard Government, the Federal Parliament enacted amendments to the *Marriage Act*, incorporating the express exclusion of marriage for same-sex couples and forbidding recognition in Australia of any such marriages occurring overseas.[5] Initially, these amendments were supported and upheld in this country, both by the Coalition parties and by the federal Labor governments led by Kevin Rudd and Julia Gillard. However, late in 2011 the federal platform of the Australian Labor Party was changed to include a commitment to marriage equality. Proposals to that end, and suggestions for a conscience vote, were quickly placed before the Federal Parliament. They have not yet been enacted; however the proponents are determined and have not given up. So it is timely to consider this issue in a context that honours an important champion of law reform, human rights and equality in Australia, Roma Mitchell.

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3 Ibid 65 ff.

4 M D Kirby, *Through the World's Eye* (Federation Press, 2000) ch 6.

5 *Marriage Act 1961* (Cth), as amended by the *Marriage (Amendment) Act 2004* (Cth), inserting the definition of 'marriage' in s 4 and inserting s 88EA.

Because this occasion is substantially one of lawyers, and not a political rally, it is appropriate to approach the subject from the standpoint of the legal and judicial developments that have occurred in recent years, relevant to the attainment of marriage equality around the world.

III Early Decisions

From a legal perspective, the belief that marriage was available only to men and women in an opposite sex union was simply assumed, at least in the countries of the common law. So much was held in 1866 in the English decision of *Hyde v Hyde*.[6] At that time, such a stance was unremarkable because the criminal law outlawed sexual relationships between two men. It did so in a heavily punitive way, a situation that still obtains in most of the countries that derived their legal systems from British colonial masters.[7]

With the advent of substantial scientific research revealing that variations in sexual orientation and gender identity are not wilful antisocial 'lifestyles' but an unremarkable variation in nature (probably in most cases genetic), moves arose in Britain, Australia, and other jurisdictions to repeal the criminal sanctions, and otherwise to delete the legal discrimination against same-sex attracted individuals.[8] Once it became evident that legal disadvantages against sexual minorities should be repealed, the question was starkly presented as to whether their stable sexual and personal relationships, akin to marriage, should receive official and legal recognition. Whatever objections might exist to legal equality in this regard, on the part of some religious institutions and religious believers, the question was posed whether a secular society could justify such a differentiation. Was it not also a form of discrimination that should be repealed and replaced by equality, as had happened in relation to the criminal law and other laws concerning the rights and obligations of members of the sexual minorities?[9]

It was in this spirit that, in 1996, a lesbian couple in New Zealand claimed an entitlement to be married. Their claim was denied by a district marriage registrar, resulting in proceedings before the courts of New Zealand, and ultimately in the Court of Appeal.[10]

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6 (1866) LR 1 P & D 130; [1866] All ER Rep 175, 177 (Wilde JO).

7 Commonwealth Secretariat, Eminent Persons Group, *A Commonwealth of the People: Time for Urgent Reform* (London, 2011). See the note in M D Kirby, 'Eminent Persons Group Reports to CHOGM' (2012) 86 *Australian Law Journal* 79.

8 These moves arose following the Wolfenden Report. See Kirby, above n 1, 25 ff.

9 See, eg, *Same Sex Relationships (Equal Treatment of Commonwealth Laws — General Law Reform) Act 2008* (Cth).

10 *Quilter v The Attorney General (NZ)* [1998] 1 NZLR 523 ('*Quilter*'). In 1993 in Hawaii, the State's highest court had held that limiting marriage to opposite sex couples violated the *Hawaii Constitution*: *Baehr v Lewin*, 852 P 2d 44 (Haw, 1993). However, this decision prompted a change to the *Hawaii Constitution* and enactment of the federal *Defense of Marriage Act*, 1 USC § 7, 28 USC § 1738C (1996).

The proceedings raised two questions. The first was whether, by interpreting the law in a non-discriminatory way, the gender neutral language of the *Marriage Act 1955* (NZ) could be read as applicable to the applicant couple. As in many of the following cases, the lead was taken by women. The applicants relied for their arguments upon principles and techniques developed earlier by the women's movement. They noted that, in many jurisdictions, the gender neutral word 'person' in legal profession statutes, had been interpreted as excluding women, so that female law graduates could not be admitted as legal practitioners.[11] Surely the law had learnt from its earlier errors. However, the Court of Appeal unanimously concluded that it was not possible, even using the *New Zealand Bill of Rights Act 1990* (NZ), to give a new interpretation to the *Marriage Act*, different from that which had previously assumed that marriage was limited to heterosexual (opposite-sex) couples.

The *New Zealand Bill of Rights Act* was the source of subsequent provisions of the *Human Rights Act 1998* (UK) and human rights legislation adopted in two jurisdictions of Australia, notably the Victorian *Charter of Human Rights and Responsibilities Act 2006*,[12] and the *Human Rights Act 2004* of the Australian Capital Territory.[13] Under such legislation, it remained for the Court to decide a second question, namely whether in denying marriage to a same-sex couple, the *Marriage Act* imposed impermissible discrimination on them. If so, the duty of the Court was to draw the discriminatory provision to the attention of Parliament, so as to afford it the opportunity to remedy the discrimination by modification of the law, if it so decided.

Upon this second question, the New Zealand Court of Appeal divided. The majority (Richardson P, Gault, Keith and Tipping JJ) held that there was no discrimination in denying legislative equality in marriage to same-sex couples as to heterosexuals. However, a powerful dissenting opinion on this question was written by Thomas J. He concluded that:

> as a matter of law the exclusion of gay and lesbian couples from the status of marriage is discriminatory and contrary to s 19 of the Bill of Rights. They are denied the right to marry the person of their choice in accordance with their sexual orientation.[14]

When I read *Quilter*, not long after its delivery, I confess to thinking that the majority of the Court of Appeal had reached the right conclusion. Transfixed by my past understanding of the legal definition of marriage that had previously prevailed, I did not ask the deeper questions explored by Thomas J. At that stage, I was nearing the thirtieth anniversary of my relationship with my partner. Yet the legal mental blinkers prevented my seeing what seemed to be clear to Justice Thomas. Time has vindicated

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11 *Re Goodell* 39 Wisc 232 (Wis, 1875) (Ryan CJ). For Australian cases, see Julian Disney et al, *Lawyers* (Lawbook, 1977) 185–6.

12 *Charter of Human Rights and Responsibilities Act 2006* (Vic).

13 *Human Rights Act 2004* (ACT).

14 [1998] 1 NZLR 523, 528.

his analysis. My own was probably just another instance of my paradoxical legal conservatism, which is always a professional hazard for lawyers.[15]

Quilter was an early case. Yet soon the law began to change in many jurisdictions in the matter of the availability of marriage to sexual minorities. In the 1990s the Netherlands became the first country to enact a law 'opening up' marriage for same-sex couples. This initiative was quickly followed by similar legislation in Belgium, all the countries of Scandinavia, Canada, Spain, Portugal, South Africa, Argentina, 11 states of the United States, and the federal district in Mexico.

The story of this legal change is an interesting illustration of the way in which, in the law, an idea whose time has come quite quickly propels the forces of reform into action. Legislators and judges learn from each other once the new concept is propounded: presenting its rational arguments to the evaluation of unprejudiced minds.

IV The Arc Bends to Justice

The story of the remarkable achievements of law reform in this regard, in little more than a decade, is told in another new book published by the International Commission of Jurists ('ICJ') in Geneva, *Sexual Orientation, Gender Identity and Justice: A Comparative Law Casebook*.[16] The book is the more surprising to me because in the 1980s, as a Commissioner of the ICJ and later as President, I served on the Executive Committee and sought to persuade my colleagues to include issues of HIV status and sexual orientation on the human rights agenda of the organisation.

As I disclose, in the foreword written to the ICJ's book, my attempts in this regard were resisted by a distinguished human rights lawyer from a developing country. He declared that his country had no homosexuals. Their conduct was condemned by lawyers and religious leaders alike and completely alien to the local culture. Nonetheless, the ICJ agreed to my proposal and added the human rights issues of sexual orientation and HIV status to the Commission's programme. The new book is a product of ongoing research by the ICJ and by other international human rights bodies in this area. It demonstrates how international human rights jurisprudence can beneficially affect the thinking of lawyers everywhere, on issues of race, gender, sexual orientation and other common grounds of legal discrimination.

The cases collected by the ICJ include a chapter on 'Marriage'. That chapter draws attention to art 16 of the *Universal Declaration of Human Rights* which provides that 'men and women … have the right to marry and to found a family'.[17] A similar

15 A J Brown, *Michael Kirby: Paradoxes and Principles* (Federation Press, 2011) 371 ff. In April 2013, a Bill to amend the *Marriage Act 1955* (NZ) was passed by a vote of 77 to 44 in the unicameral New Zealand Parliament, and became the *Marriage (Definition of Marriage) Act 2013* (NZ). It comes into effect on 19 August 2013.

16 International Commission of Jurists, *Sexual Orientation, Gender Identity and Justice: A Comparative Law Casebook* (2011).

17 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 16.

provision appears in art 23 of the *International Covenant on Civil and Political Rights*.[18] Differentiation in the texts between the rights of 'persons' and the rights of 'men and women' has been invoked to justify confining marriage to heterosexual unions.[19] However, over the past 10 years, closer analysis of the nature, purpose, incidents, benefits and essential legal characteristics of 'marriage' has produced many court decisions in many lands. Increasingly they have upheld the principle of marriage equality both for opposite sex and same-sex couples.

The decisions upholding this conclusion and explained in the ICJ collection include:

(1) Canada, Ontario: *Halpern et al v Attorney-General of Canada* (Court of Appeal, 10 June 2003);[20]

(2) South Africa: *Minister of Home Affairs v Fourie*; *Lesbian and Gay Equality Project v Minister of Home Affairs* (Constitutional Court of South Africa, 1 December 2005);[21]

(3) Israel: *Ben-Ari v Director of Population Administration* (Supreme Court of Israel, 21 November 2006);[22]

(4) Iowa, USA: *Varnum v Brien* (Supreme Court of Iowa, 3 April 2009).[23] After the announcement of this decision, the Chief Justice and two Judges of the Supreme Court of Iowa were removed from office by popular vote, inferentially as a punishment for their judicial decision;[24]

(5) Portugal: *Acordio No 359/2009* (Constitutional Tribunal of Portugal, 2009 and 2010);[25]

(6) Argentina: *Freyre Elejandro v GCVA* (Administrative Tribunal of the Federal Capital, November 2009).[26] Following this decision and whilst an appeal was before the Constitutional Court, the Parliament of Argentina enacted marriage equality;

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18 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 23.

19 United Nations, Human Rights Committee, *Views: Communication No 902/1999*, UN Doc A/57/40 (17 July 2002) [8.2] ('*Joslin v New Zealand*'). See also *Schalk v Austria* (European Court of Human Rights, Application No 30141/04, 24 June 2010) [56]–[63].

20 (2003) 65 OR (3d) 161.

21 2006 (1) SA 524 (Constitutional Court).

22 See International Commission of Jurists, above n 16, 354.

23 763 NW 2d 862 (Iowa, 2009).

24 M D Kirby, 'Judicial Independence: The United States Election Systems and Judicial Removals in Iowa' (2013) 36 *Australian Bar Review* 270.

25 See International Commission of Jurists, above n 16, 363.

26 Ibid 365.

(7) California, USA: *Perry v Schwarzenegger* (United States District Court, 4 August 2010).[27] This decision upheld a challenge to the validity of Proposition 8, a purported constitutional amendment of the State of California, which was held invalid as a violation of due process and the equal protection clause under the 14th Amendment to the United States Constitution. In February 2012, on appeal to the US Court of Appeals for the 9th Circuit, the first instance decision was upheld by the majority.[28] This decision has been appealed to the Supreme Court of the United States of America, and stands for judgment at the time of writing; and

(8) Mexico: *Accion de Inconstitucionalidad 2/2010* (Supreme Court of Justice, 10 August 2010).[29] This decision rejected a challenge to marriage equality as adopted in the Federal District Court, concluding that it was compatible with the constitutional provisions which protected marriage and the family in Mexico.

The collection assembled by the ICJ also includes a small number of cases where the judicial decision has gone against the arguments of equality, privacy and marriage rights, and rejected constitutional and other claims to same-sex marriage:

(1) Ireland: *Zappone and Gilligan v Revenue Commissioners* (High Court, 14 December 2006).[30] This case involved a refusal by the Irish revenue commissioners to allow tax allowances as a 'married couple' to a same-sex couple. The court relied on art 41 of the *Irish Constitution*, which mandated the State 'to guard with special care the institution of Marriage'. However, the court urged amelioration of the difficulties of same-sex couples by legislation. An appeal to the Supreme Court of Ireland was lodged, but in June 2012 the appellants withdrew the appeal and began a fresh challenge to the definition of 'marriage' in the High Court;

(2) Russia: In the *Marriage Case No 331-1252* (Moscow City Court, 21 January 2010).[31] The Court here upheld the refusal of the registration of a same-sex marriage under Russian legislation relating to marriage. It held that, although there was ambiguity in the *Family Code*, this did not provide grounds for concluding that same-sex couples were permitted to marry in the Russian Federation; and

(3) Italy: *Sentenza 28/2010* (Constitutional Court of Italy, 14 April 2010):[32] Although the Trento Court of Appeal in Italy had upheld the right of same-sex couples to be married, on the basis of the changes in society and social mores that showed that traditional family was no longer the only valid one, the Constitutional Court rejected this judicial reinterpretation. It held that the wider availability of marriage had not been contemplated when the enacted law was adopted.

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27 704 F Supp 2d 921 (ND Cal, 2010).

28 *Perry v Brown*, 671 F 3d 1052 (9th Cir, 2012).

29 See International Commission of Jurists, above n 16, 376.

30 [2008] 2 IR 417.

31 See International Commission of Jurists, above n 16, 369.

32 Ibid 370.

It must be accepted, in these and other cases,[33] that differing judicial opinions have been offered in the past decade. Nonetheless, the substantial tendency, evident in the foregoing cases, is in favour of the principle of marriage equality.

To the argument that 'marriage' has traditionally been reserved to heterosexual unions, many courts have pointed out that some 'traditions' need reconsideration in changing times, such as the earlier tradition (and in some jurisdictions law) forbidding or discouraging inter-racial marriages.[34] There have been many 'traditions' affecting women which have been changed by judicial and legislative decisions. These include the now shocking decisions that excluded women from classification as 'persons' who might be admitted to practise as lawyers,[35] as well as the strong and widespread resistance to demands of women to vote in parliamentary elections in respect of which New Zealand and Australia were foremost in reforming their laws and assuring all adult nationals full franchise equality.[36]

To the argument that marriage is limited to heterosexuals for the benefit of children, it is pointed out that many heterosexual marriages have no children. Some same-sex marriages today involve the nurturing of children by using scientific techniques available irrespective of sexuality. The Duchess of Alba, in Spain, recently re-married at the age of 85. No one questioned her right to do so because the blessing of children was unlikely to be fulfilled in her case.

To the contention that children must have a male and female parent, the plain fact is that this is no longer universally so. And no objective and accepted evidence has demonstrated that, if love and care are present, the children of same-sex unions are in any way harmed.

To the suggestion that a sexual minority is seeking to redefine 'marriage', the courts have pointed out that redefinition of legal rights are commonly a feature of changing times. The rights of Aboriginals, of Asian migrants, and of homosexuals themselves constitute Australian cases in point.

V The Physical and Mental Advantages of Marriage

To adapt the words of President Obama, the arc of the law bends towards justice. Marriage tends to be beneficial for the individuals who chose its status. It is an affirmation of relationships before society. Such relationships are generally to the advantage of their participants and of society itself. They involve very substantial health benefits; as well as civic benefits in terms of the mutual support and protection

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33 Such as the important decision of the Massachusetts Supreme Judicial Court in *Goodridge v Department of Public Health*, 798 N E 2d 941 (Mass, 2003).

34 See, eg, *Loving v Virgina*, 388 US 1 (1967).

35 See, eg, *Re Goodell*, 39 Wisc 232 (Wis, 1875) (Ryan CJ). Cf Daphne Kok, *Women Lawyers in Australia* (Lawasia, 1975) 4.

36 See, eg, the *Australian Constitution* s 30, which provided the basis for the right of women to vote in Australian federal elections as equal franchise spread to the States.

provided to individuals within marriage. This is why the American Medical Association, in a policy statement, updated in 2011, resolved:

> Our American Medical Association:
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> (1) recognizes that denying civil marriage based on sexual orientation is discriminatory and imposes harmful stigma on gay and lesbian individuals and couples and their families;
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> (2) recognizes that exclusions from civil marriage contributes to healthcare disparities affecting same-sex households;
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> (3) will work to reduce healthcare disparities amongst members of same-sex households including minor children; and
>
> (4) will support measures providing same-sex households with the same rights and privileges to healthcare, health insurance and survivor benefits, as afforded opposite-sex households.[37]

There have been similar resolutions by the American Psychiatric Association (2005); the American Academy of Pediatrics (2006); the American College of Obstetricians and Gynecologists (2009); the American Psychological Association (2011); the American Psychological Society (2011); and various state health associations and other bodies. In 2011, the *British Journal of Psychiatry* concluded:

> This study corroborates international findings that people of non-heterosexual orientation report elevated levels of mental health problems and service usage, and it lends further support to the suggestion that perceived discrimination may act as a social stressor in the genesis of mental health problems in this population.[38]

VI Marriage in a Secular Polity

Against such findings, repeatedly reaffirmed overseas and in Australia, the issue is starkly presented. A large part of the opposition to same-sex marriage is expressed by religious bodies and individuals, expressing their views by reference to their religious doctrines. However, in a secular society, such doctrines ought not to be imposed by the civilian laws. Religious bodies could be exempted from an obligation to perform weddings to which they object. Such an exemption already exists in s 47 of the Australian *Marriage Act 1961* (Cth). Given the steadily declining numbers of Australians who identify with religions and who regularly attend religious observance, and given the fact that only about one third of marriages today in Australia are solemnised in a religious ceremony, the imposition of such religious views about the meaning of 'marriage' upon everyone in society ought not

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37 American Medical Association, *Healthcare Disparities in Same-Sex Partner Households* (Policy No H-65.973, American Medical Association, 2011) <http://www.ama-assn.org/ama/pub/about-ama/our-people/member-groups-sections/glbt-advisory-committee/ama-policy-regarding-sexual-orientation.page>.

38 Apu Chakraborty et al, 'Mental Health of the Non-Heterosexual Population of England' (2011) 198(2) *British Journal of Psychiatry* 143, 143.

to be accepted by the Federal Parliament. If it is not actually unconstitutional, it is certainly difficult to reconcile with the underlying premise that motivated the inclusion of s 116 in the *Australian Constitution* reflecting its essentially secular character. In such circumstances, the central question is not whether same-sex couples have justified a 'redefinition' of marriage. It is whether, in the face of requests for equal access to a legal status provided by a law of the Federal Parliament, the denial of its availability to couples on the grounds of their gender or sexual orientation can be justified any longer.

As in the case of reforms to the laws sought by women, the longer one reflects upon the refusal of equality in the matter of marriage to same-sex couples, the more one is inclined to the opinion that opponents are simply prejudiced, discriminatory, formalistic, and unkind. They have realised that there are gays and lesbians out there, but they approach their claims to legal equality with misgiving, dogmatic reluctance, and distaste. They think that fellow citizens in the sexual minorities should be permanently treated as second class and that equality for them is not really appropriate or, as I was told by a Minister in the matter of my own pension rights at an earlier stage of the journey, 'not a priority'. Anyone with familiarity of the struggle for legal equality in relation to women's rights will be familiar with these attitudes. Many of them today are felt and voiced by the opponents of change.

VII Lessons from Gender Equality

So what are the lessons that we can draw for the proposal for marriage equality from the earlier moves in the law to repair the discrimination against women? Like members of the sexual minorities, women earlier challenged patriarchal, traditional, and sometimes religious prejudice. They have questioned the strictly binary classification of the human species. They confronted biological and social realities in a way that some people find threatening and unacceptable.

These questions were running through my mind when I was preparing a foreword to the fourth edition of yet another text, *Law in Context,*[39] written by Stephen Bottomley and Simon Bronitt. This text includes illuminating chapters on racial and gender discrimination.[40] The authors point out that among the early proponents in English law for the removal of discrimination against women was John Stuart Mill. It was Mill, following Jeremy Bentham, who questioned aspects of the English law that preserved injustice towards women in a way that could not be rationally justified.

Bentham was one of the very few writers of the early 19th century who raised serious doubts about the criminalisation of homosexuals. From these early critics arose first the move to secure the separate property rights of married women,[41] followed by female suffrage and reform of the law of marriage in the 19th century, and secondly

39 Stephen Bottomley and Simon Bronitt, *Law in Context* (Federation Press, 4th ed, 2012).

40 Ibid 68 ff.

41 See *Garcia v National Australia Bank* (1998) 194 CLR 395, 422–3 [66].

moves to remove the criminal sanctions on homosexuals. Both reform movements were based upon a liberal philosophy concerning the role of the state in relation to the individual. In the 20th century, the demands for the removal of the remaining discriminatory laws against women have given rise to feminist legal theory. This presents in various categories, including liberal feminism, radical feminism, cultural feminism, and socialist–Marxist feminism.[42] Nowadays, there is a similar growth of critical analysis of the law from the standpoint of sexual orientation, giving rise to so called 'queer' legal theory: a word deliberately chosen with the aim of disempowering opponents of change by assuming control of their insulting language.

Where are the avenues in which the demands for full equality on the part of sexual minorities can profit from the experience of the women's movement that went before? I would include the following:

- *Role models and examples*: Just as in the removal of gender discrimination, so in the case of sexual orientation it is essential to find those who will stand out, as Dame Roma Mitchell did. It needs those who will put their heads above the parapet and become the first in various categories of the law. Nowadays, it is much less remarkable to find leaders of the legal profession appointed to judicial office who are openly homosexual. So far, we have not had a transgender judge. However, New Zealand can boast a transgender member of parliament, which is the more surprising given the electoral necessities of democracy. Removing the stereotypes, including in the law, was essential for women's equality, dignity, and equal opportunity in the legal profession. The participation of women who demonstrated their full capacity to perform at the very highest level, as Dame Roma did, undermines the mythology of stereotypes. It makes it easier for those who follow.

- *Theoreticians*: Just as feminist legal theory can boast distinguished international and local theoreticians, who present telling critiques of many aspects of substantive law and its institutions, so it must be with sexuality. There are such writers in the law, however they are relatively few so far, at least in Australia. Necessarily, their writings will be controversial at first and, like Justice Thomas (a heterosexual man), often in advance of group thinking, even amongst those most affected. In Australia, one can mention the leadership of Dennis Altman of La Trobe University,[43] whom I knew in the 1960s when we were both participants in student politics. He has shown remarkable courage and insight in his writings and analysis. And in the law, important scholars such as Jenny Millbank and Chris Ronalds are undoubted leaders, equally at home on questions of gender and sexuality discrimination.[44] There are many others.

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42 Bottomley and Bronitt, above n 39, 70.

43 Dennis Altman, *Homosexual: Oppression and Liberation* (Angus & Robertson, 1972).

44 See Chris Ronalds, 'Discrimination' in Ian Freckleton and Hugh Selby (eds), *Appealing to the Future — Michael Kirby and His Legacy* (LawBook, 2009) 329 ff.

- *Political leaders*: There is also a need for political leaders to emerge so as to disempower opposition in the legislature, where it persists, and to confront discriminatory attitudes and discomfitures in the places where laws are made. Women in high political office are now much more common. At the time of writing women occupy the posts of Australia's Head of State, Governor-General, Prime Minister and Federal Ministers, State Premiers and many other leaders, three Justices of the High Court, a Federal Chief Justice, State Chief Justice and three State Presidents of the Court of Appeal.

  Nevertheless, openly gay political leaders in Australia are few and far between. Don Dunstan, the high achieving Premier of South Australia, was at least bisexual, but not openly so, essentially to the end of his life. Neal Blewett, whose outstanding work as Federal Minister for Health, when HIV/AIDS appeared, notched up one of the great political achievements of the 20th century. Bob Brown, as then leader of the Australian Greens Party, was and remains open and comfortable about his sexuality. So was Senator Brian Greig of the Australian Democrats, and so is Senator Penny Wong of the Australian Labor Party. Yet, so far, this has been a comparatively rare event in any of the major political groupings. The absence of a clearly visible representation of sexual minorities in our legislatures is of itself a curiosity. It suggests that elected members of parliament, like professional footballers, are usually unwilling to identify themselves openly, for fear of a professional, media, or popular backlash. The big reforms affecting gender and sexual orientation must come from elected parliaments, not the judiciary in Australia. This is why openness and identification on the part of the members of the legislature is especially important.

- *International moves*: The local developments to tackle discrimination on the grounds of sex were stimulated, supported, and underpinned by international movements for reform and ultimately treaties. Most especially, the *Convention for the Elimination of all Forms of Discrimination Against Women*,[45] when ratified by Australia, provided a strong criterion of law against which to measure Australian developments.[46]

  So far there is no equivalent international treaty that specifically and comprehensively addresses discrimination against, and the inequalities faced by, sexual minorities. The path towards such a treaty has been started, including by the ICJ itself. The ICJ was instrumental in promoting and advancing a global expression of sexuality rights in the form of the *Yogyakarta Principles*.[47] Although these

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45 *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

46 Bottomley and Bronitt, above n 39, 96. See also Peter Bailey, *The Human Rights Enterprise in Australia and Internationally* (Lexis Nexis, 2009); Margaret Thornton, 'The Public/Private Dichotomy' (1991) 18(4) *Journal of Law and Society* 448, cited in Bottomley and Bronitt, above n 39, 99.

47 International Commission of Jurists ('ICJ'), *Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (2007).

are a long way from translation into binding international law, they do provide a framework and state a series of immediate goals. The heads of several United Nations agencies, from the Secretary-General down, have spoken out strongly against discrimination against sexual minorities, stigma, and the laws of 80 countries that still criminalise sexual minorities. Sadly, the moves to secure international recognition of their basic rights are contested by religious leaders and representatives, including the Holy See and the International Islamic Conference. To the opponents I would recommend another book, also with a foreword by me, examining the scriptural bases of religious condemnation of homosexuals: Nigel Wright (ed), *Five Uneasy Pieces: Essays on Scripture and Sexuality*.[48] It is a book that reveals the same controversies of interpretation in theology as we know in the law, in relation to the interpretation of contested legal texts.

- *Cultural and social change agents*: As with the demand for full equality for women, there needs to be a popularisation of cultural change and understanding. It can begin in the humblest possible way, through soap operas on television and the provision of equal voices in the mass media. I have always thought that the inclusion in the 1970s television drama *Number 96* of the homosexual character Don Finlayson (portrayed by actor Joe Hasham, a heterosexual man) had a greater impact than hundreds of learned articles and lectures. As with life as lived by women, popular culture and social networks can bring images, insights and visions of injustice to a mass audience. There is a need for these messages, illustrating the injustices in the present boundaries of gender and sexuality.

- *Science and health*: As in the case of women's health, so also in the case of sexual minorities. There are serious deprivations and injustices which the law needs to address. My participation in the United Nations Development Programme's Global Commission on HIV and the Law taught me that that law can play a useful role in reducing the toll of HIV, including amongst sexual minorities. But it can also play a negative role in increasing stigma, diminishing the availability of essential drugs and impeding the reception of messages, essential to an effective response to the spread of HIV. The increasing evidence of violence against homosexuals and transsexuals demands a proper response from a just national and international legal order. So does the increasing realisation of the toll which the current state of the law inflicts upon young people, including in Australia, resulting in youth depression, drug dependence and suicide.[49]

- *Coming out*: In the case of gender, it is commonly impossible for a woman to successfully disguise her gender; although some cases do exist. Not so with sexual minorities. Many, even in relatively enlightened Australia, still do so. Many judges of my acquaintance fail, or refuse, to identify their sexual orientation or

48 N Wright (ed), *Five Uneasy Pieces: Essays on Scripture and Sexuality* (ATF Theology, 2012).

49 Global Commission on HIV and the Law, *HIV and the Law: Rights, Risks and Health* (2012) 44–53. See also National Centre in HIV Social Research, *Impact of Alcohol and Drug Use in Diagnosis and Management of Depression in Gay Men Attending General Practice* (2011).

to acknowledge it publicly, whilst being quite happy to do so in private. In my book, *A Private Life*, I recount the example of a judge who strongly cautioned me against being open about my sexual orientation and my relationship with Johan, although it had long been a 'non-secret', after AIDS came along and we became involved in responding to the epidemic then falling heavily in Australia upon gay men. The judge warned me that we would eventually pay a price if we were open about our sexuality. When Senator Bill Heffernan made his speech in the Senate, the judge said that he had 'told you so'. To this day, he is not open about his sexual orientation.[50] It is hard for me to believe that openness could now harm the judge personally or professionally. Why does he go on with his 'secret' life? Yet he is not alone. If only all the members of the sexual minorities in Australia stood up, the whole shabby enterprise of pretending would be over. One can hardly blame heterosexual people for holding discriminatory attitudes when secrecy is evident in the conduct of some of the highest and most respected public office holders, professionals, sports people, and business leaders in Australia who still go along with the policy of secrecy. This is where sexual orientation is different and special. Bound up in openness, and comfort within one's own skin, is acceptance and a perception of normality. But this will not happen until pretending is no more. Then honesty, scientific truth, and rationality will rule the world.

- *Bipartisanship*: To a substantial extent, reforms such as those achieved concerning women in Australia have happened because of bipartisan political support. Governments formed from both major political groupings in Australia have been resolute in the appointment of women judges, and the removal of specific statutory sources of legal discrimination. The issue of marriage availability to same-sex attracted couples ought to be one of those issues that are exempt from party political divisions. As the debates of the Australian Labor Party concerning the ALP national platform show, differences exist in most political parties, often based on religious affiliation and tradition or social attitudes and personal experience. There is no inherent reason why those who are politically conservative should necessarily oppose legislation for marriage equality. On the contrary, upon one view, encouraging couples in stable long-term relationships to marry may be seen as a proper modern policy objective of right of centre political groupings. It is harmonious with notions of social stability and individual inter-dependence. This point was made by the British Prime Minister, the Rt Hon David Cameron, at the Conservative Party Conference in England in 2011. Relevantly, he said that his party was 'consulting on legalising gay marriage'.[51] And he explained:

> to anyone who has reservations, I say: Yes, it's about equality, but it's also about something else: Commitment. Conservatives believe in the ties that bind us; that

50 Kirby, above n 1, 185 ff. For a description of the Heffernan events, see A J Brown, above n 15, 338 ff.

51 David Cameron, 'Conservative Party Conference (Leader's Speech)' (Speech delivered at the Conservative Party Conference, Manchester Central Convention Complex, 5 October 2011) <http://www.totalpolitics.com/speeches/conservative/conservative-party-conference-leaders-speeches/260902/david-camerons-speech-to-conservative-party-conference.thtml>.

> society is stronger when we make vows to each other and support each other. So I don't support gay marriage despite being a Conservative. I support gay marriage because I am a Conservative.[52]

One must hope that a similar attitude will eventually emerge in Australia. And that all parliamentarians will enjoy, and exercise, the freedom to give effect to that view if they truly hold it. Not to keep it closeted and secret, like some dark shameful error or moral blemish, to be hidden from the light of truth and rationality. There has been too much of that attitude, for too long. I know, because for years that was the place in which the earlier laws confined me.

VIII A Further Frontier of Equality

If Dame Roma Mitchell were alive today, with the knowledge and awareness of this generation, I believe that she would agree with these opinions. I hope that those who hear and read them will do so. I have addressed a further frontier of fundamental human rights and legal equality. There are, of course, powerful adversaries to change. Sadly, many of them are found in religious communities, unenlightened because of the present formalism of their leaders unwilling to let go old beliefs that cannot now stand with objective science, rationality, and lived experience. Change will come in Australia, including in the matter of marriage equality. And when it does, we will look back on the present state of the law that expressly enshrines inequality in the Australian federal statute book (as we now do on the old criminal laws against sexual minorities) with embarrassment, shame, and ultimately astonishment.

52 Ibid.