There is an urgent need to scrutinise by-law 103 both in the Courts and in our community as a whole to determine whether by-law 103 is, in *any* sense, legitimate.

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North Australian Aboriginal Legal Aid Service is currently looking at cases with a view to challenging the validity of the by-law.

References

1. The full provision is as follows:
   (1) A person who —
   (a) camps;
   (b) parks a motor vehicle or erects a tent or other shelter or places gear or equipment for the purposes of camping or sleeping; or
   (c) being an adult, sleeps at anytime between sunset and sunrise, in a public place otherwise than —
   (d) in a caravan park or camping area within the meaning of the *Caravan Parks Act*; or
   (e) in accordance with a permit, commits an offence.
   (2) An offence under clause (1) is a regulatory offence.
   (3) An authorised person may direct a person who is or who has contravened clause (1) to do one or both of the following:
   (a) leave the public place; or
   (b) remove any motor vehicle, tent, shelter, gear or equipment to a place specified by the authorised person, and the person shall comply with the direction forthwith.
   (4) a person who fails to comply with the directions of an authorised person under clause (3) commits an offence.
   (5) a person who, whether alone or together with others, obstructs or by his or her or their presence intimidates another member of the public from using a public shelter, ablution facility, water supply, barbecue or fireplace commits an offence.
2. Tyler, Jablonka and Flick, 'Making Space: A Report to the Darwin City Council on Young People, Anti-Social Behaviour and Community Response', Centre for Social Research, Northern Territory University, 1998; p.2.
3. A good summary of these cases appears in Douglas and Jones, *Administrative Law Commentary and Materials,* Federation Press, 3rd edn, chapter 8 'Delegated Legislation'.

SAME-SEX RELATIONSHIPS

Law reform happens

NSW Attorney-General JEFF SHAW QC gave this Opening Address to a Young Lawyers Seminar on the Property (Relationships) Legislation Amendment Act 1999, on 25 August 1999.

The *Property (Relationships) Legislation Amendment Act 1999* (NSW) is a significant development towards a non-discriminatory regime of property relationships.

Part of the background to this legislation lies in Australia's international human rights commitments, in particular, the International Covenant on Civil and Political Rights (the ICCPR).

The Gay and Lesbian Rights Lobby has been instrumental in drawing the attention of the general community and the government to the manifestly unfair ways in which the legal system has treated gays and lesbians in New south Wales.

A publication of the Gay and Lesbian Legal Rights Service, *The Bride Wore Pink*, in 1992, which described in systematic detail the discrimination suffered at the hands of the law by gays and lesbians, brought the issues addressed in the *Property (Relationships) Legislation Amendment Act* fully to public attention. Work by the Anti-Discrimination Board and the AIDS Council of NSW helped to keep these issues before the attention of the public and government.

Developments in the Australian Capital Territory were a further influence in the creation of the legislation. In 1994, following a Discussion Paper concerning the rights of people living in domestic relationships, the ACT government enacted a *Domestic Relationships Act* which provided for property redistribution on the breakdown of a number of domestic relationships. It defined 'domestic relationship' to mean 'a personal relationship (other than a legal marriage) between two adults in which one provides personal or financial commitment and support of a domestic nature for the material benefit of the other, and includes a de facto marriage'. This definition incorporated a range of intimate relationships not then covered by the NSW *De Facto Relationships Act 1984* including relationships of a caring nature between relatives and same-sex couples.

Meanwhile, a number of cases were coming before the courts which reflected the facts of life for many gay and lesbian couples. Notable cases included those pursuant to the *Family Provisions Act* where gay couples were required to leap through the hoop of proving dependency to get relief from the court where other de facto couples would only be required to establish the relationship existed. In another, a gay couple and the child of one of them had to make out a claim of discrimination before their health fund was prepared to concede that they could constitute a family for the purpose of health insurance.

These issues were acknowledged by the Premier, whilst in Opposition, in correspondence with the AIDS Council of NSW, when he made the commitment reflected in the *Property (Relationships) Act* that if elected to government the Labor Party would move to end discrimination against gays and lesbians in areas relating to the death of a partner and the incapacity or hospitalisation of a partner.

In accordance with the government's general policy commitment to the ending of discriminatory laws, legislation was drafted, which comprehensively extended the rights and obligations of couples in heterosexual de facto relationships to other domestic relationships between adult persons. However, the vagaries of politics at that time, manifested in the composition of the Upper House, stymied attempts to introduce a Bill in Parliament during the government's first term.

After the 1999 election, the political climate was such as to make this important law reform viable.

This new law is at the vanguard of rights for gays and lesbians in this country and has been recognised as such by social and legal commentators. I accept that its scope may need to be expanded, and this is a topic being explored by the Legislative Council's standing committee on Law and Justice.

Justice Michael Kirby, AC, CMG, in a recent address to the London Conference on Legal Recognition of Same-Sex Partnerships organised by the Law School of King's College, London, reflected on the pressures for reform in this area and the impact of the NSW *Property (Relationships) Legislation Amendment Act.*

His Honour said:

> People are not fools. Once they recognise the overwhelming commonalities of shared human experience, the alienation and demand for adherence to shame crumbles. Once they reflect upon the utter unreasonableness of insisting that homosexuals change their sexual orientation, or suppress and hide their emotions (something they could not demand of themselves), the irrational insistence and demand for legal sanctions, tends to fade away. Once they know friends and family, children, sisters or uncles, who are gay, the hatred tends to melt. In the wake of the changing social attitudes inevitably come changing laws: both statutes made by Parliaments and the common law made by judges.
>
> Virtually every jurisdiction of the common law is now facing diverse demands for the reconsideration of legal rules as they are invoked by homosexual litigants and other citizens who object to legal discrimination.

His Honour went on to reflect that, to some extent, this has happened in NSW. He says, with reference to the *Property (Relationships) Legislation Amendment Act*:

> So far no other Australian State or Territory Government has indicated its intention to follow the lead of the New South Wales Government and Parliament ... On a national level, the importance of the recent New South Wales development should not be exaggerated. However, it is significant and symbolic. [emphasis added]

Other commentators have also recognised the NSW Act as an important development — a reflection of moral commitment to the human rights of all citizens. An editorial published in the Melbourne *Age* on 15 July 1999, noted the passing of this 'historic gay rights legislation':

> Recognising the financial and emotional realities of gay relationships is not an attack on marriage, as some have claimed. Such recognition is based on traditional ethical principles: it requires a mature understanding of the complexities of human attachment and a moral commitment to the human rights of citizens. This kind of change will strengthen society, not weaken it.

What constitutes a close personal relationship for the purposes of the Act? 'A close personal relationship (other than a marriage or a de facto relationship) between two adult persons, whether or not related, who are living together, one or each of whom provides the other with domestic support and personal care'. In my second reading speech in the Legislative Council, I said:

> Such support will commonly be of a frequent, ongoing and intense nature. Domestic support services will usually consist of attending to the household shopping, cleaning, laundry and like activities. Personal care services may commonly consist of assistance with mobility, personal hygiene and generally ensuring the physical and emotional comfort of one or both parties for the other.
>
> Taking into account factors such as I have just outlined it is easy to see that there is no intention to create rights and obligations between persons who are merely sharing accommodation as a matter of convenience, in the way that flatmates might.

Similar comments are contained in the Explanatory Note to the Bill. It should also be noted that the Act makes it clear that where the care is given for fee or reward no claim can arise.

The types of relationship which would be covered under the definition are the same as those anticipated in the context of the ACT legislation and specified in the Discussion Paper which preceded it, namely: relationships such as those which might exist between a daughter and elderly parent where they reside together for the purpose of obtaining and giving domestic support or personal care. It is not hard to imagine that the provision of such care may limit employment opportunities on the part of the daughter. Other sorts of intense domestic care arrangements that are potentially being caught within the ambit of the Act are those between siblings where one with a disability is supported by the other thus imposing limitations on the carer's ability to earn income.

This is innovatory legislation. It may need fine tuning. But its fundamental, non-discriminatory principle is unassailable.

Jeff Shaw QC is the Attorney-General in the New South Wales government.

UPDATE

HOI TRINH revisits the plight of stateless Vietnamese Boat People in Hong Kong and the Philippines.

In this Journal published in April 1996, I wrote:

> ... despite the Vietnamese government's consistent policy not to accept the repatriation of non-nationals, the Hong Kong Government continued to arbitrarily detain these (stateless) people until the Privy Council's ruling ordered their release on the basis that it was unlawful to detain them indefinitely.

These stateless people still do not have a home to go to, and neither do they have any credible assurance from the international community that they will be resettled ... As sad as it is, the above statement still rings true now — more than three years after the article was published. At present there are approximately 30 stateless Vietnamese families residing in Hong Kong who have sponsoring relatives living in Australia. A similar number of families currently residing in the Philippines also have parents, sisters and brothers living in Australia who are willing and able to sponsor their stateless relatives. Yet, despite this relatively small number of stateless Vietnamese left in the region, our immigration policy continues to ignore this stateless dilemma.

Over the years, Refugee Concern Hong Kong and other NGOs including Human Rights Watch, Refugees International, Human Rights Monitor, and Jesuit Refugee Services, among others, have made continuing efforts to convince the Australian Government to reunite these stateless families with their relatives in Australia. In particular they note that these people satisfy the criteria as set out in the now defunct Special Assistance Category (SAC) Program for Vietnamese returnees.

The humanitarian work that the SAC was designed to assist with is, they suggest, not yet completed. As a result, they recommend that the SAC be reinstituted and its terms be expanded to include stateless persons currently stranded in Hong Kong and the Philippines who have sponsoring relatives living in Australia. With initiative and a great deal of goodwill, they argue that Australia can, in the burden-sharing humanitarian spirit with which it has approached the boat people crisis, make one final effort by resolving the statelessness of these few families and in so doing provide leadership for other resettlement countries to follow suit.

Given the unique circumstances of the stateless Vietnamese in Hong Kong and the Philippines as described above, it is hoped that Australia, as a resettlement country, will assist in bringing about the plight of the remaining stateless Vietnamese boat people to a constructive, fair and humanitarian conclusion.

Hoi Trinh is a Melbourne lawyer who has recently returned from the Philippines and Hong Kong where he spent three years assisting stateless Vietnamese boat people with refugee status determination and resettlement.