2662

WHY JEWISH LAWYERS SHOULD SUPPORT MARRIAGE EQULAITY

WESTERN AUSTRALIAN SOCIETY OF JEWISH JURISTS AND LAWYERS
PERTH, WESTERN AUSTRALIA
25 FEBRUARY 2013

The Hon. Michael Kirby AC CMG

WESTERN AUSTRALIAN SOCIETY OF JEWISH JURISTS AND LAWYERS

PERTH, WESTERN AUSTRLAIA
25 FEBRUARY 2013

WHY JEWISH LAWYERS SHOULD SUPPORT MARRIAGE EQUALITY*

THE HON. MICHAEL KIRBY AC CMG**

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 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

* Based on the author's Dame Roma Mitchell Memorial Address, Melbourne Victoria, 2 March 2012

** President of the International Commission of Jurists (1995-98); Laureate of the UNESCO Prize for Human Rights Education (1998); Australian Human Rights Medal (1991); Justice of the High Court of Australia (1996-2009).

1 Allen & Unwin Ltd, Sydney 2011.

2 ibid ix.

3 ibid, 65ff.

and in the lives of my family. Anyone who would deny another human being who wants 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 cohort 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, the Federal Parliament, in 2004, during the Howard Government, 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. The first round of attempts to change the *Marriage Act* 1961 (Cth) in 2012 failed in both houses of the Federal Parliament. A state measure in Tasmania, although passing

[4] M.D. Kirby, *Through the World's Eye,* Federation Press, Sydney, 2000.

[5] *Marriage (Amendment) Act* 2004 (Cth) inserting the definition of 'marriage' in s4 and inserting s88EA.

the lower house, was defeated in the upper house of that Parliament. An enquiry is now underway in the Parliament of New South Wales. Recent moves in the United Kingdom, France and New Zealand suggest that the issue will not go away.

So it is timely to consider this issue in a lecture that honours Jewish lawyers. 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. The reason why Jewish citizens, and especially lawyers, should support marriage equality in Australia can be stated quite simply. Jewish people have suffered more than most, or any, others from discrimination, including in the law. They have suffered for their ethnicity and race – something they did not choose and cannot, easily or at all, change. They have suffered because of irrational fear and stereotypes. They have a natural interest in secularism, living in a society where the majority of people practise different religions. They know the dangers of religious intrusions into the state and the law. They also know that, in the matter of marriage, s47 of the *Marriage Act* protects religious Jews from the intrusion of the state into Orthodox synagogues and temples to prevent enforced participation in marriages that they feel are contrary to religious beliefs. Jewish congregations worldwide – and leading Jewish citizens – have understandably supported equality of all citizens – whatever their sexuality – in the secular civil rights of the legal status of marriage of marriage, provided by the law.

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 decision of the English judiciary in *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].

---

[6] (1866) *Hyde v Hyde and Woodmansee* (1866) L.R. 1 P & D 130; [1866] All ER Rep 175 at 177 per Wilde, J.O.

[7] Commonwealth Secretariat, Eminent Persons Group, *A Commonwealth of the People: Time for Urgent Reform*, London 2011. See note (2012) 86 ALJ 79.

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 people in the 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 many religious institutions and some 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 member 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. The claim was denied by a district marriage registrar. This resulted in proceedings before the courts of New Zealand, ultimately in the Court of Appeal: *Quilter v The Attorney General (NZ)*[10].

The proceedings raised two questions. The first was whether, by the process of interpretation of the law, in a non-discriminatory way, the gender neutral language of the *Marriage Act* 1955 (NZ) could be interpreted so as to be 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. 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 Australia, notably the *Victorian Charter of Rights*

[8] These moves arose following the Wolfenden Report. See A *Private Life,* above n1, 25ff.

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

[10] [1998] 3 LRC 119 (NZCA).

and Responsibilities Act 2006 (VIC) [11]. Under such legislation, it remained for the Court to decide whether, in denying marriage to a same sex couple, the legislation 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 to deny legislative equality in marriage to heterosexuals and same-sex couples. 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 s19 of the Bill of Rights. They are denied the right to marry the person of their choice in accordance with their sexual orientation."

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 30th 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 his analysis. My own was probably just another instance of my paradoxical legal conservatism, which is always a professional hazard for lawyers[12].

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 1990's 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, countries of Scandinavia, Canada, Spain, Portugal, South Africa, nine states of the United States, the federal district in Mexico and Nepal.

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

---

[11] Victorian *Charter of Rights and Responsibilities Act* 2006 (Vic).

[12] A.J. Brown, *Michael Kirby, Paradoxes and Principles,* Federation Press, Sydney, 2011.

other once the new concept is propounded: presenting its rational arguments to the evaluation of unprejudiced minds.

THE ARC BENDS TO JUSTICE

The story of the remarkable achievements of law reform in this regard, over little more than a decade, is told in another new book, published by the International Commission of Jurists (ICJ) in Geneva. The book: *Sexual Orientation, Gender Identity and Justice: a Comparative Law Case Book*[13] is the more surprising to me because in the 1980's, 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 recent 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. None the less, the ICJ agreed to my proposal. The new book is a product of ongoing research by the ICJ and by other international human rights bodies. 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 (ch14) on "Marriage". The chapter draws attention to Article 16 of the *Universal Declaration of Human Rights* which provides that "men and women .... have the right to marry and to found a family". A similar provision appears in Article 23 of the *International Covenant on Civil and Political Rights*. Differentiation in the texts between the rights of "persons" and the rights of "men and women" has been used to justify confining marriage to heterosexual unions[14]. 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 for opposite sex and same sex couples.

---

[13] ICJ, Geneva, 2012.

[14] United Nations, Human Rights Committee, *Joslin v New Zealand,* Communication 902/1999 (17.7.2002), para 8.2). See also *Schalk and Kopf v Austria* (European Court of Human Rights, Application 3014/04, para 56-63.

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, 2003);

(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);

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

(4) *Iowa, USA*: *Varnum v Brien,* Supreme Court of Iowa, 3 April 2009. (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);

(5) *Portugal*: *Acordio No. 359/2009:* Constitutional Tribunal of Portugal (2009 and 2010);

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

(7) *California, USA*: *Terry v Schwarzenegger*, United States District Court, 4 August 2010. 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 equal protection clause under the 14th amendment of the United States Constitution. In February 2012, on appeal to the US Court of Appeals for the 9th Circuit it ruled, by majority, upholding the decision at first instance. This may now go either to the Court of Appeal *In Banc* or to the Supreme Court of the United States of America; and

(8) *Mexico*: Federal District: *Accion 2/2010, 10 August 2010.* This decision rejected a challenge to marriage equality as adopted in the Federal District Court, concluding that it was

compatible with the constitutional provisions that protected marriage and the family in Mexico[15].

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,* 14 December 2004, High Court. 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 Article 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 is pending;

(2) *Russia*: In the *Marriage Case No. 331-1252*, Moscow City Court, 21 January 2010. 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): 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 said that the wider availability of marriage had not been contemplated when the enacted law was adopted. Although it must be accepted, in these and other cases,[16] that differing judicial opinions have been offered in the past decade, the substantial tendency, evident in the foregoing cases, is in favour in the principle of marriage equality.

---

[15] The foregoing cases are described, ICJ, above n13, 346-377.

[16] Such as the important decision of the Massachusetts Supreme Judicial Court in *Goodridge v Department of Public Health* (2003).

To the argument that "marriage" has traditionally been reserved to heterosexual unions, the courts have pointed out that many "traditions" need reconsideration in changing times, such as the tradition (and in some jurisdictions law) forbidding or discouraging inter-racial marriages[17]. 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.[18] And 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 citizens full franchise equality[19].

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 Alva, 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 such a union 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.

To the feeling that same sex marriage is unaesthetic, the answer is that it depends on the eye of the beholder. To the argument that marriage is a "special" privileged status, the answer is that this is why it should be available to all citizens without discrimination. Jews know only too well the pain and injustice of discriminatory laws and the prejudice they breed. They also know that anti-Semitism in non-Jewish societies was also justified by the appeal of religious people to their interpretations of

---

[17] See eg *Loving v Virgina,* 388 US1 (1967).

[18] See eg *re Goodell* (1875) 39 Wisc 232, per Ryan CJ. Cf. Daphne Kok, *Women Lawyers in Australia*, Lawana, Sydney, 1975, 4.

[19] *Australian Constitution,* s30 which provided the basis for the right of women to vote in Australian federal Elections.

Holy Scripture – specifically the view that ch27 verse 25 of *St Matthew's Gospel* in the Christian Bible invited God's wrath (and discrimination) on the Jewish people ("Let His blood be on us, and on our children").

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

> "American Medical Association:
>
> (1) recognises that denying civil marriage based on sexual orientation is discriminatory and imposes harmful stigma on gay and lesbian individuals and couples and their families;
>
> (2) recognises that exclusions from civil marriage contributes to healthcare disparities affecting same-sex households;
>
> (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"[20]

There have been similar resolutions by the American Psychiatric Association (2005); the American Academy of Paediatrics (2006); the American College of Obstetricians and Gynaecologists (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:

[20] American Medical Association, 2011, H-65.973 ("Healthcare Disparities in Same-sex Households").

> "This study corroborates international findings in 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"[21].

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 on the basis of 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. As I have said, such an exemption already exists in the Australian *Marriage Act (s47).*

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" ought not to be accepted by the Federal Parliament. If it is not actually unconstitutional, as so defined, it is certainly difficult to reconcile with the underlying premise that motivated the inclusion of Section 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, its removal from availability to couples on the grounds of their gender or sexual orientation can any longer be justified.

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 citizens and that equality for

[21] Chakraborty, *British Journal of Psychiatry,* 2011.

them is not really appropriate or, as I was told in the matter of my 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.

CONCLUSIONS

To a substantial extent, reforms, such as have been achieved concerning women's equality in Australia have happened because of bipartisan political support. Governments formed from both major political groupings in our country have been resolute in the appointment of women judges and the statutory removal of specific 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 over 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, Mr David Cameron, at the Conservative Party Conference in England in 2011. Relevantly, he said that his party was "consulting on legalising gay marriage". And he explained:

> *"....* [T]o 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 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*."*

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.

Of all people in the Australian Commonwealth, Jewish citizens should see, and understand, the injustice of discriminating inequality[22].

****

[22] See e.g. the Hon. Stephen Rothman, "Marriage Rites – Rights for All", published *Australian Jewish News*, November 2012. See also the resolution of the Decalogue Society of Lawyers, Illinois Jewish Bar Association, 21 December 2012.