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Abstract
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Keywords
Parlimentary democracy, human rights, anti-discrimination

HOW FAR HAVE WE REALLY COME? CIVIL AND POLITICAL RIGHTS IN QUEENSLAND

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ABSTRACT

The 2012 state election landslide for the Liberal National Party has had significant consequences for minority groups in Queensland. The Premier's election night declaration that his government would make the State a better place to live for all Queenslanders has been pushed to one side, as the Attorney General has set about 'levelling the playing field so that the laws suit the majority and not the minority'.. This article takes a critical look at the government's legislative agenda, placing its reforms in a historical context to illustrate that each reform is a step backward that unravels centuries of gradually calculated reform aimed at protecting human rights.

I INTRODUCTION

Civil and political rights were in a fairly dire state in the Middle Ages.[1] Sex workers faced stigma and discrimination, being confined to certain districts, required to wear clothing to identify their status, and evicted or forcibly removed from their premises on the objection of neighbours.[2] Same-sex unions, despite their prevalence in Ancient Greece, Rome and China, were outlawed in most Western countries for the greater part of the Christian era until their recognition gained momentum in the late 20th century, reaching Queensland by 2011.[3] Sexual intercourse between consenting males was a criminal offence until 1967 in the United Kingdom, but by the turn of the 21st

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1 So, incidentally, was the state of the adult criminal law, juvenile justice, governmental institutions, and deference to the monarchy: for a similar discussion of recent regressive reforms in Queensland in those areas, see Andrew Trotter and Harry Hobbs, 'The Great Leap Backward: Criminal Law Reform with the Hon Jarrod Bleijie' (2014) 36 *Sydney Law Review* 1; Andrew Trotter and Harry Hobbs 'A Historical Perspective on Juvenile Justice Reform in Queensland' (2014) 38 *Criminal Law Journal* 77; Andrew Trotter and Harry Hobbs, 'Under the Oak Tree: Institutional Reform in the Deep North' (2014) 88(5) *Australian Law Journal* 335; Harry Hobbs, 'Putting the "Queen" back in Queensland' (2014) 39 *Alternative Law Journal* 9.

2 See text below at Part II D.

3 See text below at Part II B 1.

century most Western nations had legislated that homosexual and heterosexual persons could consent to sex at the same age.[4] Violence against homosexuals was common throughout the 20th century, and a defence of provocation rooted in homophobia was developed in 1992 and cemented by the High Court in 1997—but abolished in five Australian jurisdictions in the years that followed.[5] Since 1770, Indigenous Australians have suffered extensive discrimination, but recognition, stemming from the 1991 Royal Commission, that the criminal law was incarcerating First Australians at a grossly disproportionate rate stimulated culturally appropriate diversionary court programs across Australia.[6] Queensland's Murri Court, introduced in 2002, has improved court attendance and reduced Indigenous over-representation in prison. Nevertheless, to Australia's shame, Indigenous incarceration rates across the country continue to rise.[7] As the principle of the freedom of association necessarily recognises pluralistic sources of power and organisations additional and apart from the central government, it has often been a central target for repression. Yet in Australia, at least since the High Court's decision in the Communist Party Case,[8] the freedom to associate with whomever one desires as long as no criminal offences are committed, has been considered politically, though perhaps not legally, sacrosanct.[9]

Since coming to office on 3 April 2012, the Attorney General and Minister for Justice Mr Jarrod Bleijie has, with somewhat remarkable efficiency, undone the better part of these developments. In other respects, Mr Bleijie has declined to bring Queensland into line with other jurisdictions. In one of the first acts of the new government, on 20 June 2012, Mr Bleijie introduced legislation abolishing civil unions for homosexual couples. One month later he confirmed that he had no plans to eradicate the homosexual advance defence. In May 2013, Mr Bleijie also confirmed that he had no plans to amend Queensland's age of consent laws for gay men. In September 2012, he cut all funding to the Murri Court program. On 1 November 2012, Mr Bleijie announced reforms allowing accommodation providers to evict sex workers on a discriminatory basis. On 16 October 2013, he rushed through three Acts that significantly curtail freedom of association, which, though apparently designed with bikies in mind, are drafted in broad terms. The Premier, Campbell Newman, is

4 See text below as Part II B 2.

5 See text below as Part II B 3.

6 See e.g. Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 3, Part E: 'The first strategy to reducing the number of deaths in custody is to reduce the number of Aboriginal people coming into custody in the first place'.

7 See text below at Part II C.

8 See *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

9 See text below as Part II A.

unapologetic, declaring that 'this is not the Wild West, this is Queensland in 2013'.[10] In light of these changes, one could be forgiven for having asked. There are, no doubt, more reforms to come.

Reconciling the civil and political rights of minority groups with those of the majority is a task fraught with difficulty. While Rawls' examination of reasonable pluralism and overlapping liberal consensus as the essence of liberal democracy sparked a heated exchange between communitarian and liberal thought in the late 20th century,[11] the challenge is an historic one.[12] This paper will examine that history as it is relevant to each of the reforms proposed, implemented or negatived by Mr Bleijie.

Writing in the 1890s, Andrew Inglis Clark warned that 'power wielded by a majority may be used as oppressively as if [it] were exercised by a despot or an oligarchy'.[13] The 2012 Queensland election was a landslide victory for the Liberal National Party (LNP), returning 78 members to Labor's seven. Perhaps conscious of Clark's warnings, in his maiden speech to Parliament, the incoming-Premier Campbell Newman reassured Queenslanders 'that we will work hard every day to make our state a better place to live'.[14] However, an examination of reforms initiated and rejected by the Attorney-General suggests this extends only to majoritarian concerns, for the reforms that have been implemented have too often come at the expense of the civil and political rights of groups who are a minority, vulnerable, or unpopular. That intention is tolerably clear from Mr Bleijie's statement, that '[i]t is about levelling

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10 Remeikis A, 'Premier warns bikies that Queensland is not the "Wild West"', *Brisbane Times*, 1 October 2013.

11 See, eg, John Rawls, *A Theory of Justice* (Oxford University Press, 1971); Ronald Dworkin, *Taking Rights Seriously* (Duckworth, 1977); Amy Gutmann, 'Communitarian critics of liberalism' (1985) 14 *Philosophy and Public Affairs* 308; cf Joseph Raz, *The Morality of Freedom* (Clarendon Press, 1986).

12 Aristotle argued that justice demands the equal treatment of those equal before the law, 'but that it remains for each political order to determine whom to treat as equal or otherwise': See Wolfgang Friedmann, *Legal Theory* (Columbia University Press, 4th ed, 1960), 18; Cited in Geoffrey Lindell, 'Constitutional issues regarding same-sex marriage: A comparative survey—North America and Australasia' (2008) 30 *Sydney Law Review* 27, 59.

13 Andrew Inglis Clark 'Why I am a Democrat' with an introduction by Richard Ely in Richard Ely, Marcus Haward and James Warden (eds), *A Living Force: Andrew Inglis Clark and the Ideal of Commonwealth*, (Centre for Tasmanian Historical Studies, 2001) 27, 32.

14 Queensland, *Parliamentary Debates*, Legislative Assembly 17 May 2012, 26 (Campbell Newman).

the playing field so the laws suit the majority not the minority'.[15] History, in general, 'has not been kind to minorities',[16] and the position of the marginalised has often been precarious.[17] It has thus been repeatedly observed that the civil and political rights of the minority are the best measure of freedom.[18] As Sir Gerard Brennan has said:

> The self interests of the majority, if not restrained, can be destructive of the interests of the minority. … The civilized standards of a society are to be judged by the way in which the society deals with its minorities and its misfits.[19]

On this measure, Queensland may be failing.

II SECURING CIVIL AND POLITICAL RIGHTS IN A PARLIAMENTARY DEMOCRACY

The abolition of the Legislative Council in 1921 and the continuing absence of a Bill of Rights have left Queensland without two important mechanisms designed to limit majoritarian influences in government. These twin failures have had important negative consequences on the hard won rights of minority and unpopular groups, particularly in the last two years.

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15 These comments were made in relation to the removal of the anti-discrimination protection for sex workers, but the statement is reflected in other policies discussed in this article: see Jarrod Bleijie, *Hotel and motel owners can refuse sex workers under proposed laws*, Media Release, 1 November 2012.

16 *Quilter v Attorney-General (New Zealand)* [1998] 1 NZLR 523, 549 (Thomas J). Thomas J continued, 'People who, because of their religious beliefs, ethnic background, nationality, colour, race, sex, or sexual orientation, could be described as "different" have not fared well'.

17 See, eg, Christine Timmerman, 'Preface' in Christine Timmerman et al (eds), *In-between Spaces: Christian and Muslim Minorities in Transition in Europe and the Middle East* (Peter Lang, 2009) 11, 19.

18 See, eg, Lord Acton, 'The most certain test by which we judge whether a country is really free is the amount of security enjoyed by minorities' in 'The history of freedom in antiquity' (Address delivered to the Members of the Bridgnorth Institute, 26 February 1877); See also Queensland, *Parliamentary Debates*, Legislative Assembly, 17 October 2013, 3523 (Anna Palaszczuk): 'Protection of the community is one of the foremost responsibilities of government'.

19 Sir Gerard Brennan, 'Mandatory Sentencing: Rights and Wrongs' (2001) 7(2) *Australian Journal of Human Rights* 3, 5.

Any understanding of 'democracy' will invariably emphasise popular consent—that is, the consent of the people being governed.[20] Indeed, the term itself originates from the Greek *dēmokratía*, or 'rule of the people', itself a portmanteau of *demos* (people) and *kratos* (power).[21] As an antonym to *aristokratia*, 'rule of the elite', majority rule is a central characteristic of democracy.

> Now the foundation of a democratical state is liberty … But one part of liberty is to govern and be governed alternately; for, according to democratical justice, equality is measured by numbers, and not by worth: and this being just, it is necessary that the supreme power should be vested in the people at large; and that what the majority determine should be final.[22]

Winston Churchill famously remarked that 'democracy is the worst form of Government except all those other forms that have been tried from time to time.'[23] Certainly, this view commands support.

However problems arise when (an overwhelming) majority consistently makes decisions that harm a minority.[24] Where this occurs, 'successful democracies tend to qualify the central principle of majority rule'.[25] This safeguard exists throughout many Western States in the guise of a Bill of Rights, either constitutionally or statutorily entrenched,[26] and at the Commonwealth level in the form of federalism.[27] In many of the Australian States the presence of an Upper House of Parliament,

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20 See, eg, Arthur Monahan, *Consent, Coercion, and Limit: The Medieval Origins of Parliamentary Democracy* (Brill, 1987), ix.

21 See generally Ruth Collier, 'demos' in Paul Barry Clarke and Joe Foweraker (eds), *Encyclopedia of Democratic Thought* (Routledge, 2001); Anthony Arblaster, *Democracy* (Open University Press, 3rd ed, 2002), 15.

22 Aristotle, *Politics* (William Ellis trans, J M Dent & Sons Ltd. 1912), Book 6, Chapter 2.

23 United Kingdom, *Parliamentary Debates,* House of Commons, 11 November 1947, vol 444, col 207 (Winston Churchill); See also Robert Rhodes James (ed), *Winston S. Churchill: His Complete Speeches, 1897-1963* (Chelsea House Publishers, 1974) vol 7, 7566.

24 Described by John Adams as 'tyranny of the majority': John Adams, *A Defence of the Constitutions of Government of the United States of America* (1788) vol 3, 291.

25 Philippe Schmitter and Terry Karl, 'What democracy is ... and is not' (1991) 25 *Journal of Democracy* 114, 116.

26 See, eg, *United States Constitution* arts I – X; *Canada Act 1982* (UK) c 11, sch B pt I ('*Canadian Charter of Rights and Freedoms*'); *New Zealand Bill of Rights Act 1990* (NZ).

27 Equal representation in the Senate was intended to protect the interests of the small States. For an example of the tension that federalism engendered in relation to the triple-majority safeguard in the referenda provision, see *Official Record of the Debates of the Australasian Federal Convention*, Sydney 8 April 1891, 885 (Duncan Gillies).

elected by proportional representation,[28] serves a similar function—though, historically as members of the Upper House were appointed by the Governor-General rather than directly elected by the people (or a more limited subset of the people), Upper Houses tended to act as conservative checks on the people's houses.[29]

The experience in Queensland was no different. When TJ Ryan was elected Premier of the first majority ALP government in Queensland in 1915 the state of the parties was illustrative: 45 to 27 in the Legislative Assembly; but 3 to 33 in the Legislative Council. During Ryan's four years in government 800 Bills proposing reforms were drastically amended or rejected by the Upper House.[30] Six years, two rejected Bills and one failed referendum later, Labor Premier Ted Theodore succeeded in abolishing the Council.[31] Opposition councillor Patrick Leahy voted against abolition, presciently warning that: 'If we abolish this Chamber, and we have only a single Chamber, that other Chamber will be able to do what it thinks fit'.[32]

Since its abolition 'there have been no serious suggestions to restore the Council',[33] though the idea has been floated in response to both the Fitzgerald Inquiry,[34] and

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28 *Constitutional and Electoral Acts Amendment Act 1973* (SA), amending the *Constitution Act 1934*(SA) and the *Electoral Act 1929* (SA); *Constitution and Parliamentary Electorates and Elections (Amendment) Act* 1978 (NSW), amending the *Constitution Act 1902* (NSW), Sch 6; *Acts Amendment (Electoral Reform) Act 1987* (WA), amending the *Constitution Act 1889* (WA).

29 For a discussion of the development of Upper Houses in the Australian context, see Bruce Stone, 'Bicameralism and democracy: The transformation of Australian State Upper Houses' (2002) 37 *Australian Journal of Political Science* 267-281.

30 Tony Moore, 'The ups and downs of the Legislative Council', *Brisbane Times*, 12 October 2011.

31 *The Constitution Act Amendment Act 1921* (Qld), s 2. For more information on the political manoeuvrings, see Justin Harding, 'Ideology or expediency? The abolition of the Queensland Legislative Council 1915-22' (2000) 79 *Labour History* 162-178.

32 For the debates see in particular Queensland, *Parliamentary Debates*, Legislative Council, 27 October 1921, 1770. See further pp1774, 1799, 1804, 1810-1811, 1827, 1857. For some consequences, see Peter Coaldrake, 'Party and Government dominance of Parliament in Queensland' (1980) 15 *Politics* 110-123.

33 Denis Murphy, 'Abolition of the Legislative Council' in Denis Murphy, Roger Joyce and Colin Hughes (eds), *Labor in Power: The Labor Party and Governments in Queensland 1915-1957* (University of Queensland Press, 1980) 95, 116.

34 See statements to this effect in Queensland Parliament, 'The abolition of the Upper House in Queensland' (Community Engagement, 27 March 2001) 6 <https://www.parliament.qld.gov.au/documents/explore/education/factsheets/papers/paper01_abolitionOfTheUpperHouse.pdf.

more recent events.[35] Significantly, a 1992 review by the Electoral and Administrative Review Commission found that although the absence of an Upper House, 'has had a profound effect on the ability of the Queensland Parliament to carry out its functions under the Constitution and conventions which require it to act responsibly and review the activities of the executive arm of government', a parliamentary committee system could, to some extent, substitute.[36] The *Parliamentary Committees Act 1995* (Qld) was subsequently enacted, establishing six statutory committees.[37]

However, Parliamentary Committees cannot completely substitute for the functions of an Upper House. This is all the more clear when the current Government's attitude towards Parliamentary Committees is at issue. Bills have frequently been declared 'urgent' and rushed through Parliament with Standing and Sessional Orders suspended.[38] The bipartisan committee system recommended by the Fitzgerald Inquiry,[39] and designed to scrutinise proposed legislation, has been frequently bypassed.[40] When they are consulted, committees are often required to review and report within an impracticably short timeframe,[41] and only 51 per cent of

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35 Amy Remeikis, 'Queensland needs an upper house: Independent MPs', *Brisbane Times*, 23 November 2013; Fidelis Rego, 'No Upper House needed for Qld Parliament, Premier Campbell Newman says', *ABC News*, 25 November 2013.

36 Electoral and Administrative Review Commission, *Report on a Review of Parliamentary Committees* (1992) [2.148]-[2.150].

37 For more discussion on the rule of law in Queensland see Kate Galloway and Allan Ardill, 'Queensland: A return to the Moonlight State?' (2014) 39 *Alternative Law Journal* 3-8.

38 For example, during the week of 14 October 2013 the government declared 5 Bills 'urgent'. They were the Criminal Law (Criminal Organisations Disruption) Amendment Bill 2013; the Criminal Law Amendment (Public Interest Declarations) Amendment Bill 2013; the Workers' Compensation and Rehabilitation and Other Legislation Amendment Bill 2013; the Vicious Lawless Association Disestablishment Bill 2013; and, the Tattoo Parlours Bill 2013.

39 Fitzgerald GE, (Chairman), *Report of a Commission of Inquiry Pursuant to Orders in Council* (Brisbane, 1989), 371, Recommendation No A.10 (i). The current bipartisan committee system was introduced in August 2011: *Parliament of Queensland (Reform and Modernisation) Amendment Act 2011* (Qld).

40 Of the 118 bills introduced by the Newman government, 16 have not been considered by the Committee: M. Howells, "KAP calls to abolish Qld parliamentary committees", *ABC News*, 28 October 2013.

41 See, eg, Queensland, *Parliamentary Debates*, Legislative Assembly, 19 November 2013, 3989 (Jarrod Bleijie): J Bleijie moving that the Legal Affairs and Constitutional Safety Committee report to the House on the Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill within 36 hours.

recommended legislative amendments have been adopted.[42] This 'indecent haste'[43] has not only created drafting errors affecting the operation of the laws,[44] but also prevents proper scrutiny of laws, an essential part of the democratic process. The same attitude is clear in the approach of this government towards legislation effecting minority and unpopular groups.

A Freedom of association—bikie legislation

The freedom to associate with others has, historically, been a principal target for repression.[45] For example, in France, the Revolution of 1789 abolished all existing organisations for professional or charitable purposes, and legislation which followed in 1791 prohibited clubs, associations or societies, for fear by the majority that the 'power in this freedom could be used against them'.[46]

Under the common law, the doctrine of restraint of trade outlawed any 'combination' of workmen designed to protect its members' interests by increasing wages as an interference with free trade.[47] This was reaffirmed by a series of statutes commencing with the *Ordinance of Labourers 1349*, which capped wages in response to the shortage of labour supply caused by the Black Death,[48] and continuing to the *Combination of*

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42 Howells, above n 40.

43 T. Sweetman, 'The Newman Government's indecent haste is reminiscent of the Joh Bjelke-Petersen years', *The Courier Mail*, 22 November 2013.

44 The Industrial Relations (Fair Work Act Harmonisation No 2) and Other Legislation Amendment Bill 2013 was introduced on 17 October 2013. The *Industrial Relations (Transparency and Accountability of Industrial Organisations) and Other Legislation Amendment Act 2013* (Qld) was assented on 20 June 2013.

45 And remains so. See, eg, recent legislative enactments in Nigeria and Uganda criminalising homosexuality and homosexual associations, clubs and organisations: Michelle Faul, 'New law in Nigeria bans gay meetings', *ABC News*, 13 January 2014; David Smith 'Uganda bans 38 organisations accused of "promoting homosexuality"', *The Guardian*, 21 June 2012; *Anti-Homosexuality Act 2014* (Uganda); *Same-Sex Marriage (Prohibition) Act 2014* (Nigeria).

46 Council of Europe, *Freedom of Association* (Martinus Nijhoff Publishers, 1994) 86.

47 See generally John Dyson Heydon, *The Restraint of Trade Doctrine* (Butterworths, 3rd ed, 2008) Ch 1. Although membership of a trade union was not in itself an offence—the common law simply declined to recognise their validity: *Williams v Hursey* (1959) 103 CLR 30, 61-62 (Fullagar J), citing Bowen LJ in *Hilton v Eckersley* (1855) 119 ER 781.

48 The Ordinance was reinforced two years later by the *Statute of Labourers 1351* and although ineffective, they were not repealed until the *Statute Law Revision Act 1863* and *Statute Law (Ireland) Revision Act 1872*.

Workmen Act 1825.[49] It was not until 1871 that trade unions were legalised in England.[50] In 1881, the New South Wales Parliament passed an Act in identical language.[51]

By the 20th century, the mandatory disbanding of organisations in abrogation of the freedom of association was largely limited to times of war, and against political groups with aims perceived to be antithetical to the national interest. The International Workers of the World (IWW) faced significant government suppression following its vocal opposition to World War I. In September 1917, the US Government simultaneously raided IWW premises around the United States, in some instances seizing more than five tonnes of records from a single office.[52] Two months later, 12 members who were convicted in Oklahoma of not owning a war bond, as well as five witnesses who testified in their defence, were delivered by the police after sentencing to the Knights of Liberty, a faction of the Ku Klux Klan, who drove them at gunpoint to a deserted location where they were tied to a tree, whipped, tarred and feathered.[53] In Australia, the IWW was instrumental in the failure of conscription in the referenda of 1916 and 1917.[54] In response to protests against the prosecution of members under the *Treason Felony Act 1848*,[55] the government rushed through legislation which declared the IWW an 'unlawful association'[56] and made membership of, or assistance to, the organisation punishable by six months' imprisonment,[57] or deportation for non-citizens.[58] Over eighty people were sentenced under the Act.[59] In introducing the Bill, Prime Minister Billy Hughes declared:

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49 6 Geo. IV, c. 129; See also the *Combination Act 1799* (39 Geo. III, c. 81); *Combination of Workmen Act 1824* (5 Geo. IV, c. 95).

50 *Trade Union Act 1871* (34 & 35 Vict c. 31), see in particular ss 2-3.

51 *Trade Union Act 1881* (NSW).

52 Melvyn Dubofsky, *We Shall Be All: A History of the IWW* (New York Times Books, 1973) 406.

53 The incident is referred to as the 'Tulsa Outrage': Nigel Anthony Sellars, *Oil, Wheat & Wobblies: The Industrial Workers of the World in Oklahoma, 1905-1930* (University of Oklahoma Press, 1998) 3.

54 Jude McCulloch, *Blue Army: Paramilitary Policing in Australia* (Melbourne University Publish, 2001) 43.

55 PJ Rushton, 'The trial of the Sydney Twelve: The original charge.' (1973) 25 *Labour History* 53-57.

56 *Unlawful Associations Act 1916* (Cth), s 3(a).

57 Ibid s 5.

58 Ibid s 6.

59 See generally Ian Turner, *Sydney's Burning (An Australian Political Conspiracy)* (Alpha Books, 1969).

> I say deliberately that this organisation holds a dagger at the heart of society, and we should be recreant to the social order if we did not accept the challenge it holds out to us. As it seeks to destroy us, we must in self-defence destroy it.[60]

A similar fear prevailed in and shortly after World War II. In 1941, acting under the *National Security (Subversive Organisations) Regulations* 1940, the Commonwealth government declared Jehovah's Witnesses 'prejudicial to the defence of the Commonwealth' and to the 'efficient prosecution of the war', and allowed police to seize their property.[61] The High Court held the regulations unconstitutional as they exceeded the scope of the defence power. In particular, Starke J said the regulations were 'arbitrary, capricious and oppressive' as associations 'are put out of existence and divested of their rights and their property on the mere declaration of the Executive Government'.[62]

In 1950, an attempt to dissolve the Australian Communist Party was found to be unconstitutional. The *Communist Party Dissolution Act 1950* (Cth) declared the party unlawful and empowered the Executive to declare affiliated bodies unlawful, confiscated its property without compensation, and exposed members to an offence punishable by 5 years' imprisonment. The Act was declared invalid by the High Court, finding that the courts, not the legislature, determined the limits of legislative power.[63] Dixon J noted that one key feature of the Act which placed it beyond legislative power was that it

> proceed[ed] against the bodies and persons to be affected, not by forbidding a particular course of conduct or creating particular offences depending on facts [but] by direct enactment and … empowering the Executive to act directly in a parallel manner.[64]

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60 Commonwealth, *Parliamentary Debates*, House of Representatives, 18 December 1916, 10100 (William Hughes, Prime Minister). See further Verity Burgmann, *Revolutionary Industrial Unionism: The Industrial Workers of the World in Australia* (Cambridge University Press, 1995), 215.

61 *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 118.

62 Ibid 154 [2]. Though the Court also found that the regulations did not infringe s 116 of the Constitution.

63 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 262 (Fullagar J). See also 193 (Dixon J): 'The Act would have the effect of making the conclusion of the legislature final and so the measure of the operation of its own power'.

64 Ibid, 183 (Dixon J).

The principle of freedom of association recognises that non-governmental organisations must be permitted to exist and is inherent to a free society.[65] As Alexander de Tocqueville observed in 1835, the freedom is a 'necessary guarantee against the tyranny of the majority'.[66] Today the right to freedom of association is enshrined in the provision of many significant international human rights instruments.[67] It can only be limited or derogated from in extreme circumstances, which 'threaten the life [and existence] of the nation'.[68] It is 'one of the most fundamental rights in a free society'.[69]

Although a majority of justices have never accepted such a right in the Australian Constitution, there has been some judicial support for its characterising as deriving from the implied freedom of political communication on political and governmental issues.[70] As Deane and Toohey JJ said in *Nationwide News v Willis*, 'the people of the Commonwealth would be unable responsibly to discharge and exercise the powers of government control which the Constitution reserves to them if each person was an island unable to communicate with any other person'.[71] By the late 20th century, the importance of the right to associate freely had been broadly recognised and accepted

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65 See for example John Stuart Mill, *On Liberty* (Longmans, Green and Co, 1865), 7: 'freedom to unite, for any purpose not involving harm to others'.

66 Alexander de Tocqueville, *Democracy in America* (Henry Reeve trans, George Adlard 1839), 188 [trans of *De la démocratie en Amérique*, (first published 1835)].

67 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 17(1) *('ICCPR')*. art 22; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 November 1976), art 8; *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) ('*UDHR*'), art 20; *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969), art 5; *The Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), art 15; *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008), art 29.

68 *ICCPR*, art 4(1).

69 *Re Public Service Employee Relations Act* [1987] 1 SCR 313, 393; cited by Toohey J in *Kruger v Commonwealth* (1997) 190 CLR 1, 91.

70 *Australian Capital Television Pty Ltd v Commonwealth (No 2)* (1992) 177 CLR 106, 139 (Mason CJ); 212 (Gaudron J); 231-232 (McHugh J); *Nationwide News v Willis* (1992) 177 CLR 1, 72 (Deane and Toohey JJ); *Kruger v Commonwealth* (1997) 190 CLR 1, 91 (Toohey J); 115 (Gaudron J).

71 *Nationwide News v Willis* (1992) 177 CLR 1, 72.

in international law and policy, and to some degree as a constitutional principle in Australia.

On 15 October 2013, Mr Bleijie introduced three pieces of legislation,[72] 'designed to destroy' bikies,[73] following two brawls on the Gold Coast the previous month that had led to a number of arrests.[74] The passage of the bills, once declared urgent,[75] was delayed only because not enough copies had been made for it to be provided to the opposition for its urgent debate.[76] They were debated and passed in that same sitting at 2.48 am.[77]

Legislation targeting bikies has been struck down in South Australia and New South Wales as impermissibly impairing the institutional integrity of State Courts.[78] Two other pieces of legislation have been interpreted in a way that would preserve their validity.[79] In Queensland, the validity of the *Criminal Organisation Act 2009* (Qld) was upheld in early 2013.[80] It is likely that a High Court challenge to the three Queensland Acts will be forthcoming.[81]

The *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld) declares 26 motorcycle organisations as 'criminal organisations'.[82] It then creates a raft of new offences and increases penalties for a range of existing offences,[83] for

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72 Vicious Lawless Association Disestablishment Act 2013 (Qld); Tattoo Parlours Act 2013 (Qld); Criminal Law (Criminal Organisations Disruption) Amendment Act 2013 (Qld).

79 Outlaw motorcycle gang members to be sent to bikie-only prison at Woodford Correctional Centre as part of Newman Government's push against bikies', Courier Mail, 15 October 2013.

74 'Queensland Police declare crackdown on bikies after massive Gold Coast brawl', *ABC News*, 29 September 2013; Marissa Calligeros, 'Furniture thrown in another suspected bikie brawl on the Gold Coast', *Brisbane Times*, 1 October 2013.

75 Queensland, *Parliamentary Debates*, 15 October 2013, 3158 (Jarrod Bleijie).

76 Ibid, 316 (Peter Wellington).

77 Ibid, 3269.

78 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319; *South Australia v Totani* (2010) 242 CLR 1; *Wainohu v New South Wales* (2011) 243 CLR 181.

79 *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501.

80 *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* (2013) 87 ALJR 458.

81 Chris Calcino, 'High Court challenge expected for new bikie laws', *The Chronicle*, 22 October 2013.

82 *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld), Schedule 2, item 2.

83 Ibid ss 40-49.

members of those associations.[84] It is an offence for participants in those organisations to enter or attempt to enter their clubhouses or any other 'prescribed place', to recruit or attempt to recruit a person into the organisation, or even to be together in public in groups of three.[85] The only defence is to show that it is not one of the 26 'criminal organisations' declared by the Act or does not otherwise 'represent an unacceptable risk to the safety, welfare or order of the community'.[86] That onus is borne by the defendant. If they fail to do so, they face mandatory imprisonment without parole for 6 months, and up to 3 years.[87] Their vehicle is also forfeited on conviction of that or any other offence.[88]

A 'participant' includes anyone who 'seeks to … be associated with' the organisation, or 'who attends more than one … gathering of persons who participate in the affairs of the association in any way'.[89] That is, it prohibits not only three members meeting each other, but two members meeting *any person* more than once.[90] If a police officer 'reasonably suspects' that a person is a 'participant' in a criminal organisation the officer can detain and search the person without a warrant.[91] The Crime and Misconduct Commission is given additional powers to conduct hearings and gather intelligence,[92] and a 'participant' in a criminal organisation cannot rely on a threat to their physical safety to refuse to answer questions.[93] The penalties for failing to attend or take the oath, or refusing to answer a question are increased from 1 to 5

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84 Ibid s 41.

85 Ibid s 42, inserting ss60A(1), 60B(1) and 60C(1) into the *Criminal Code* (Qld).

86 *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld), s 42, inserting ss60A(2), 60B(3) and 60C(2) into the *Criminal Code* (Qld).

87 *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld), s 42, inserting ss60A-60C into the *Criminal Code* (Qld).

88 *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld), s 60, amending the *Police Powers and Responsibilities Act 2000* (Qld), by inserting Chapter 4A, see in particular ss 123G-H.

89 *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld), s 42, inserting ss 60A(3) into the *Criminal Code* (Qld);

90 *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld), s 42, inserting ss60A-60C into the *Criminal Code* (Qld).

91 *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld), s 54, amending s 29 of the *Police Powers and Responsibilities Act 2000* (Qld), by inserting s (1A)(a)-(b).

92 Ibid s 11, amending the *Crime and Misconduct Act 2001* (Qld) by inserting ss 55A-55F.

93 Ibid s 24, amending the *Crime and Misconduct Act 2001* (Qld) by inserting s 190(4).

years' imprisonment.[94] There is mandatory imprisonment for contempt, at the discretion for a first offence and 2½ and 5 years for a second and third, respectively.[95]

Once charged with that or any other offence, their vehicle or motorbike can be impounded,[96] the presumption of bail is revoked, and they are forced to surrender their passport.[97] This measure is justified on the basis that '[i]f an individual chooses to be part of a criminal organisation then it is reasonable for the legislature to deem that individual an on-going risk to the community in lieu of evidence to the contrary'.[98] That justification rather ignores the fact that the 'criminal organisations' are also so deemed by the legislature.

The extraordinary breadth of this legislation has been repeatedly justified by reference to the goal of dissolving bikie gangs in Queensland. However, within a month of the legislation's passage, Mr Bleijie had announced that he would close two key 'loopholes' which lie beyond that justification—the legislation would be used for bikies who commit crimes outside Queensland,[99] and extended to apply to people who are no longer bikies.[100] It also applies, it seems, to premises that are no longer clubhouses. On 8 December 2013, an alleged bikie was arrested after attending the launch of a clothing shop at the defunct premises of his former clubhouse. The

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94 *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Act2013* (Qld), ss 31-36.

95 *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld), s 30, amending the *Crime and Misconduct Act 2001* (Qld) by inserting s 199(8B).

96 Ibid s 60, amending the *Police Powers and Responsibilities Act 2000* (Qld), by inserting Chapter 4A, see in particular ss 123G-H.

97 Ibid s 4, amending s 16(1) of the *Bail Act 1980* (Qld), by inserting ss (3A)-(3D). This is so even for simple or regulatory offences which do not call for imprisonment.

98 Queensland, *Parliamentary Debates*, 19 November 2013, 3987 (Jarrod Bleijie): Jarrod Bleijie on the Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill 2013 (Qld).

99 Matt Wordsworth, 'Recreational motorcycle enthusiasts targeted under Qld's bikie laws', *Lateline*, 30 October 2013.

100 *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Act 2013* (Qld), s 7, amending s 16(3A) of the *Bail Act 1980* (Qld) (from "is" to "is, or has at any time been"). This amendment followed the decision in *In the matter of an application for bail by Michael Kenneth Spence* (Supreme Court of Queensland No. 10279 of 2013) (Margaret Wilson J) where the show cause bail provisions were held not to apply to a person who had since quit the motorcycle club: see Explanatory Note, Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill, 4.

clothing shop remained a 'prescribed place'—an offence which carries 6 months' mandatory imprisonment without parole.[101]

The *Tattoo Parlours Act 2013* (Qld) bans members of 'criminal organisations', and their associates, from owning, operating or working in tattoo parlours.[102] It is also an offence to display the insignia or any other associated writing or acronym of such an organisation in a licenced tattoo parlour.[103] A second phase of amendments pushed through parliament in November 2013 extends that de facto ban to prevent those people from working in the electrician, nightclub, building, racing, pawn-broking, security, tow-truck and used car industries.[104]

The *Vicious Lawless Association Disestablishment Act 2013* (Qld) applies more broadly than declared bikie gangs, to anyone who commits a declared offence while a participant in an association.[105] An 'association' is any group of three people, 'associated formally or informally' and 'legal or illegal'.[106] The individual must prove that the association does not have the purpose of engaging in, or conspiring to engage in, declared offences.[107] A 'participant' is anyone who, by word, conduct or any other way, they 'assert, declare, or advertise' their membership, seek to be a member, or seek to associate with the association, or attend or take part in more than one meeting or gathering of persons who participate in the organisation.[108] The 'declared offences' include offences typical of criminal organisation such as intimidation of jurors or judicial officers,[109] child exploitation offences,[110] murder,[111] bomb hoaxes,[112] money laundering,[113] and drugs and weapons offences.[114] However,

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101 'Alleged bikie arrested at clothing shop launch', *Brisbane Times*, 8 December 2013.

102 *Tattoo Parlours Act 2013* (Qld), ss 7-8 (tattooists must be licenced); s 11(4)(c) ('controlled person' cannot apply). See also ss 11-12 (applicants must provide list indicating all 'close associates'); s 13 (applicants must consent to fingerprints and palm prints).

103 Ibid s 75, amending *Liquor Act 1992* (Qld) by inserting ss 173EA-173ED.

104 *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Act 2013* (Qld), Pts 8, 11, 14, 15, 16, 17, 20; Motor Dealers and Chattel Auctioneers Bill 2013 (Qld).

105 *Vicious Lawless Association Disestablishment Act 2013* (Qld), s 5(1)(a)-(c).

106 Ibid s 3(d).

107 Ibid s 5(2).

108 Ibid s 4(a)-(d).

109 Ibid Schedule 1, *Criminal Code*, s 119B.

110 Ibid Schedule 1, *Criminal Code*, ss 228-229L.

111 Ibid Schedule 1, *Criminal Code*, s 302.

112 Ibid Schedule 1, *Criminal Code*, s 321A.

113 Ibid Schedule 1, *Criminal Proceeds Confiscation Act 2002* (Qld), s 250.

114 Ibid Schedule 1, *Drugs Misuse Act 1986* (Qld), ss 5-9; *Weapons Act 1990* (Qld), ss 50(1), 50B(1), 65(1).

it also includes such offences as 'unlawful sodomy'.[115] The inclusion of this offence creates the curious and discriminatory[116] outcome that a group of three 17-year-old gay juveniles who engage in consensual anal sex could be declared 'vicious lawless associates'. As a result, in addition to the 14 years' imprisonment, the court must impose 15 years 'served wholly in a corrective services facility'. If one of the three held a 'position of authority of any kind', they must receive a further 10 years.[117] Although mandatory penalties are ordinarily and with good reason ousted for juveniles,[118] these additional terms are not and must be served cumulatively.[119] The result would be between 25 and 39 years for consensual anal sex, without parole,[120] and served in an adult prison despite being 17 years of age. The Minister will review its operation—as soon as reasonably practicable 3 years after its commencement.[121]

In addition, those falling afoul of these broad-reaching pieces of legislation will be kept in a 'super jail'.[122] They will be constantly monitored, restricted to their cells up to 23 hours per day, faced with 'frequent, proactive' cell searches, given only one hour of non-contact visits with family per week, and deprived of fitness facilities.[123] They may be required to wear fluorescent pink jumpsuits.[124]

It is some time since governments have declared, or have been permitted to declare, organisations illegal and prohibit them or their friends from meeting on pain of mandatory imprisonment. The Acts plainly apply more broadly than 'bikie gangs' in law, and they have the chilling effect in fact of conferring dangerous powers upon police that are susceptible to misuse—in one instance, police accosted a man before discovering that the insignia on his shirt was of a fictitious gang in a television series.[125] In another, three bikies waiting to testify in a trial in the Maroochydore Magistrates Court were ordered to disperse or risk arrest.[126] In any event, it is

115 Ibid Schedule 1, *Criminal Code* (Qld), s 208.

116 The Government's legislative reforms targeting the Lesbian, Gay Bisexual, Transgender and Intersex community are addressed further at Part 0, below.

117 *Vicious Lawless Association Disestablishment Act 2013* (Qld), s 7(1)(a)-(c).

118 *Youth Justice Act 1992* (Qld), s 155.

119 *Vicious Lawless Association Disestablishment Act 2013* (Qld), s 7(2)(a)-(b).

120 Ibid s 8(1).

121 Ibid s 11(1).

122 Campbell Newman and Jarrod Bleijie, '"Super jail" for criminal bikie gangs', *Media Statements*, 15 October 2013.

123 Ibid.

124 Adam Davies, 'Jailed bikies may be dressed in fluoro pink jumpsuits', 22 October 2013.

125 'Sons of Anarchy shirt confuses Queensland cops', *Brisbane Times*, 21 October 2013.

126 Richard Bruinsma, 'Three bikies walk into court and told to leave immediately', *Sunshine Coast Daily*, 14 November 2013.

questionable wisdom to group together in prison all of those who are prohibited from associating with each other in public. These measures also create unprecedented incentives to avoid arrest. Since the passage of the laws, some bikies have reportedly sought automatic firearms and confirmed their preparedness to kill police to avoid arrest.[127] In particular, it is difficult to identify a legitimate aim or historical precedent for their humiliation by feminine dress more recently than the tarring and feathering by a derivative group of the Ku Klux Klan nearly a century ago.[128]

B Sexual tolerance

A number of reforms led by Mr Bleijie have curtailed the rights of the Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) community in Queensland. In addition to the reforms discussed in detail below,[129] Mr Bleijie has also announced to Parliament his intentions to 'repeal[] the provisions in the Surrogacy Act that deal with same-sex couples'.[130] When questioned about the compatibility of such a proposal with an election promise directly to the contrary, Mr Bleijie said that the Premier had not been 'fully briefed'.[131] Public outcry was sufficient to see Mr Bleijie's plans for such discriminatory amendments dismissed by his colleagues as a 'mistake'[132] and a 'brain snap',[133] and quietly shelved.[134] However, opposition to other policies has not experienced such success.

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127 See Marissa Calligeros 'Mongols would kill cops before jail, police warned', *Brisbane Times*, 1 November 2013.

128 See above, text at n 53.

129 Further to the major legislative reforms, the State's only health organisation for LGBTI Queenslanders, the Queensland Association for Healthy Communities, was defunded because it focused too much on 'political issues': see Marissa Calligeros, 'Gay rights advocates question LNP's motives', *Brisbane Times*, 21 May 2012.

130 Queensland, *Parliamentary Debates*, Legislative Assembly, 21 June 2012, 994 (J Bleijie). The repeal was also to extend to de factos of less than two years and singles. See Malcolm Smith et al, 'Back to the future: Prohibiting surrogacy for singles, same-sex and shorter-term heterosexual couples in Queensland' (2013) 20 *Journal of Law and Medicine* 638.

131 Bridie Jabour, 'Newman "not fully briefed" on LNP surrogacy policy: Bleijie', *Brisbane Times*, 22 June 2012.

132 Daniel Hurst, 'Surrogacy promise a "mistake": Newman', *Brisbane Times*, 3 July 2012.

133 Bridie Jabour, 'Government shelves surrogacy ban plans', *Brisbane Times*, 27 March 2013.

134 Ibid.

1 Removal of Civil Partnerships

Many and varied types of same-sex unions existed across the ancient world.[135] In Egypt, a tomb for two male courtiers dating from 2600 BC includes bas-reliefs of the 'two men in intimate poses, holding hands, embracing, noses touching'.[136] Plato's *Symposium* is replete with same-sex relationships and 'reflects the ambivalent but accepting attitudes toward same-sex relationships prevailing in at least some of the Greek city-states'.[137] In Rome, the Emperor Nero is reported to have married two men 'both in public ceremonies with the ritual appropriate to legal marriage'.[138] In China, literary sources from the Zhou Dynasty (1122-256 BC) 'contain examples of open affection between men' and during the Yuan and Ming Dynasties (1264-1644 BC) evidence of 'institutionalised same-sex marriages' is clear.[139]

The Christian era was not so kind to homosexual relationships.[140] The story of the destruction of the city of Sodom, recounted at various places in the Old and New Testaments,[141] was believed for a very long time to show the evil of homosexuality, and was at least the etymological source of the crime that came to be recognised by the law.[142]

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135 *Quilter v Attorney-General of New Zealand* [1998] 1 NZLR 523, 549 (Thomas J): 'In ancient Greece, Mesopotamia, Rome and even Christian states, same-sex unions were accepted and even celebrated'.

136 David Greenberg, *The Construction of Homosexuality* (University of Chicago Press, 1988), 130.

137 William Eskridge Jr., 'A history of same sex marriage' (1993) 79 *Virginia Law Review* 1419, 1444. For a more recent examination of Plato's views on homosexuality see the exchanges between Martha Nussbaum and John Finnis in the Colorado District Court case *Evans v Romer*, 854 P 2d 1270 (Colo, 1993); see also Randall Clark, 'Platonic Love in a Colorado Courtroom: Martha Nussbaum, John Finnis, and Plato's *Laws* in *Evans v. Romer*' (2000) 12 *Yale Journal of Law & the Humanities* 1.

138 John Boswell, *Christianity, Social Tolerance, and Homosexuality* (University of Chicago Press, 1980), 82.

139 Eskridge Jr, above n 137, 1464-1465.

140 See, eg, Modestinus' definition of marriage: 'Marriage is the union of a man and a woman, a partnership for life involving human and divine law': as cited in Caesar Flavius Justinian, *The Digest of Justinian* (Alan Watson, University of Pennsylvania Press, 1985) vol II, Lib. XXIII, Tit. 2, 199 [trans of *Institutiones Justiniani* (first published 533)].

141 *The Bible* (King James Version), Genesis 13:13, 19:24, Jeremiah 4:6, Peter 2:6, Jude 1:7, Isaiah 1:9, 3:9.

142 See generally Arthur Frederick Ide, *The city of Sodom and Homosexuality in Western Religious Thought to 630 CE* (Monument Press, 1985).

In England, from the 12th century and up until around the 19th century, marriage was regulated largely by the ecclesiastical courts and, same sex unions were void *ab initio*.[143] In 1680 Arabella Hunt, the celebrated vocalist and lutenist of the Royal court, married James Howard at St Marylebone Parish church where they lived 'as Man and Wife at Bed and Board'. Just two years later, however, Arabella sought for the marriage to be annulled on the basis that James Howard was actually Amy Poulter, 'a perfect woman in all her parts'.[144] In *Hyde v Hyde and Woodmansee*, a case concerning Mormon polygamous marriages, Lord Penzance began his judgment by noting that 'Marriage as understood in Christendom is the voluntary union for life of one man and one woman, to the exclusion of all others'.[145] This prohibition was codified in England and Wales in 1971,[146] and only removed in 2013.[147]

The scope for public homosexual relationship was rare and a luxury that only the socially elite such as Phillipe I, Duke of Orléans, could afford in the 17th century, although even he married two women under the pressure to keep up appearances.[148] The euphemistic term 'Boston marriage' was used in New England throughout the

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143 *The Queen v L* (1991) 174 CLR 379, 391 (Brennan J). See also Frederick Pollock and Frederic Maitland, *The History of English Law Before the Time of Edward I*, (Cambridge University Press, 2nd ed, 1898, 1968 reissue), 367-368. Jurisdiction was not transferred to the secular courts until 1857, *Matrimonial Causes Act 1857* 20 & 21 Vict., c 85: See further John Baker, *An Introduction to English Legal History* (Oxford University Press, 4th ed, 2002), 132.

144 See Alan Bray, *The Friend* (The University of Chicago Press, 2003), 219-221, 342; See also Patricia Crawford and Sara Mendelson, 'Sexual identities in early modern England: The marriage of two women in 1680' (1995) 7 *Gender & History* 363.

145 *Hyde v Hyde and Woodmansee* (1866) [LR] 1 P & D 130, 130; See *Bellinger v Bellinger (Lord Chancellor Intervening)* [2003] 2 AC 467, 480 [46] (Lord Nicholls of Birkenhead) for a modern reaffirmation of this common law rule. Note that Lord Penzance's definition has been followed in Australia: *Calverely v Green* (1984) 155 CLR 242, 259-260; *R v L* (1991) 174 CLR 379, 392 (Brennan J) though cf *Attorney-General (Vic) v Commonwealth* (1962) 107 CLR 529, 567-577 (Windeyer J). Note also that the prohibition on same-sex marriage was extended to post-operative transsexuals in *Corbett v Corbett (otherwise Ashley)* (1971) 1 P & D 83, 107 (Ormerod J): 'marriage is a relationship that depends on sex, not on gender'. This is not the position in Australia: see *Attorney-General (Cth) v Kevin* (2003) 30 Fam LR 1; *Re Kevin: Validity of Marriage of Transsexual* (2001) 28 Fam LR 158 (Chisholm J).

146 *Nullity of Marriage Act 1971*, s 1(b); See further the *Matrimonial Causes Act 1973* (c 18), s 11(c); *Marriage Act (Scotland) 1977* (c 15), s 5(4)(e); *The Marriage (Northern Ireland) Order 2003*, No 413 (NI 3), s 6(6)(e).

147 *Marriage (Same Sex Couples) Act 2013* (c 30).

148 See generally Nancy Barker, *Brother to the Sun King: Philippe, Duke of Orleans* (JHU Press, 1998).

19th century for cohabiting women, although such arrangements were by practical necessity reserved for those who could afford it.[149]

The laws against homosexual sex were first codified in England and Wales by Henry VIII in 1533,[150] and had made those convicted of sodomy liable to punishment of death. Although the *Buggery Act 1533* was repealed by Mary I,[151] it was restored ten years later in 1563 by Elizabeth I.[152] The prohibition on anal intercourse was restated in 1828,[153] and extended to Ireland in 1829.[154] It remained a capital offence until 1861, when the penalty was reduced to penal servitude for life with a mandatory minimum of 10 years' imprisonment.[155] Legislation passed in 1885 further proscribed 'gross indecency' between male persons and made offenders liable for two years hard labour.[156] Although the Act did not define 'gross indecency', it was generally understood as meaning any homosexual activity where anal intercourse could not be proven. Most famously, this legislation was used to prosecute Oscar Wilde. The sentencing judge described the maximum two-year sentence as 'totally inadequate for a case such as this'.[157] By the end of 1954, there were more than a thousand men in jail for homosexuality in the United Kingdom alone.[158]

In 1957, the Wolfenden Report was commissioned in response to the incarceration of a number of high-profile men for such crimes. After 32 days of interviewing

149 See generally Katherine Davis, *Factors in the sex life of twenty-two hundred women* (Harper Brothers, 1929).

150 *An Acte for the Punysshement of the Vice of Buggerie 1533* (25 Hen. VIII c. 6).

151 1553 (1 Mar. c. 1); Michael Kirby notes that this was likely done so as to restore the traditional jurisdiction of the Church over this subject matter: Michael Kirby, 'The sodomy offence: England's least lovely criminal law export?' (2011) 1 *Journal of Commonwealth Criminal Law* 1, 3.

152 5 Eliz. I, c. 17; See Phil Chan, 'Shared values of Singapore: Sexual minority rights as Singaporean values' In Phil Chan (ed), *Protection of Sexual Minorities since Stonewall: Progress and Stalemate in Developed and Developing Countries* (Routledge, 2010), 147, 167.

153 *Offences against the Person Act 1828* (9 Geo. 4 c. 31) s 15.

154 *Offences against the Person Act 1829* (10 Geo 4. c 34).

155 *Offences against the Person Act 1861* (24 & 25 Vict. c 100), s 61. Under s 62, attempt to commit anal intercourse was a misdemeanour, with offenders liable for a period between three and ten years hard labour, or any term of imprisonment not exceeding two years with or without hard labour.

156 *Criminal Law Amendment Act 1885* (48 & 49 Vict. c. 69), s 11.

157 Michael Foldy, *The Trials of Oscar Wilde Deviance, Morality and Late-Victorian Society* (Yale University Press, 1997) 47.

158 Patrick Higgins, *Heterosexual Dictatorship: Male Homosexuality in Postwar Britain* (London, 1996) 56.

witnesses, it recommended for the first time and contrary to the public sentiments of the time that homosexuality should be decriminalised and found that it 'cannot legitimately be regarded as a disease, because in many cases it is the only symptom and is compatible with full mental health in other respects'.[159]

It was still ten years before homosexual sex was legalised in England and Wales in 1967.[160] Legislation criminalising homosexuality in the United States was also progressively repealed throughout the 20th century. Those statutes that remained were ruled unconstitutional insofar as they purported to prohibit consensual, non-remunerative sexual conduct between adults by the US Supreme Court in 2003.[161] In Australia, the first move towards decriminalisation was the introduction of a 'consenting adults in private' defence in South Australia in 1972,[162] followed by decriminalisation in that State three years later,[163] and in the other States in the decades that followed.[164] Pressure mounted against the last laws outlawing homosexuality, in Tasmania, in 1994 when a United Nations Human Rights Committee (UNHRC) decision determined the prohibition was violation of the right to privacy, recommended their repeal and requested a response from the Federal government within 90 days.[165] The Commonwealth passed legislation to overrule it,[166] and the High Court refused to strike out an inconsistency claim for want of jurisdiction.[167] The laws were repealed in Tasmania in 1997.[168]

In 1989, Denmark became the first nation to legally recognise same-sex partnerships.[169] Twelve years later the Netherlands became the first state to permit

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159 See Robert Wallace Winslow, *The Emergence of Deviant Minorities: Social Problems and Social Change* (Transaction Publishers, 1972) 148.

160 *Sexual Offences Act 1967* (c. 60), s 1(1). This Act applied only to England and Wales, homosexuality was only decriminalised in Scotland through the *Criminal Justice (Scotland) Act 1980*, and Northern Ireland by the *Homosexual Offences (Northern Ireland) Order 1982*.

161 *Lawrence v Texas* 539 US 558 (2003); cf *Bowers v Hardwick* 478 US 186 (1986).

162 *Criminal Law Consolidation Act Amendment Act 1972* (SA).

163 *Criminal Law (Sexual Offences) Act 1975* (SA).

164 *Law Reform (Sexual Behaviour) Ordinance 1976* (ACT); *Crimes (Sexual Offences) Act 1980* (Vic); *Crimes (Amendment) Act 1984* (NSW); *Criminal Code and Another Act Amendment Act 1990* (Qld); *Law Reform (Decriminalisation of Sodomy) Act 1989* (WA); *Criminal Code 1983* (NT).

165 *Toonen v. Australia*, CCPR/C/50/D/488/1992, UN Human Rights Committee (HRC), 4 April 1994.

166 *Human Rights (Sexual Conduct) Act 1994* (Cth) s 4.

167 *Croome v Tasmania* (1997) 191 CLR 119.

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

169 Sheila Rule, 'Rights for gay couples in Denmark', *The New York Times*, 2 October 1989.

same-sex marriages, over 15 other countries and a number of US States have followed suit.[170] In Australia, attempts to legalise same-sex marriage have occurred in the Commonwealth Parliament,[171] Tasmania,[172] New South Wales,[173] and Western Australia.[174] Same-sex marriage was legislated in the Australian Capital Territory,[175] although it was found to have no effect as inconsistent with the Commonwealth *Marriage Act 1961* on 12 December 2013.[176] Alongside this trend towards recognition of same-sex couples, there have been a number of further decisions of the UNHRC,[177]

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170 As of May 2014, Argentina, Belgium, Brazil, Canada, Denmark, England, France, Iceland, Mexico, the Netherlands, New Zealand, Norway, Portugal, Scotland, South Africa, Spain, Sweden, nine States of the United States (California, Connecticut, Delaware, Iowa, Massachusetts, Maryland, Maine, Minnesota, New Hampshire, eight counties within New Mexico and the District of Columbia), Uruguay and Wales have legalised same-sex marriage..

171 See, eg, the Same-Sex Marriages Bill 2006 (Stott Despoja/Bartlett); Marriage (Relationships Equality) Amendment Bill 2007 (Nettle); Marriage Equality Amendment Bill 2009 (Hanson-Young); Marriage Equality Amendment Bill 2010 (Hanson-Young); Marriage Equality Amendment Bill 2010 (Bandt/Wilkie); Marriage Amendment Bill 2012 (Jones); Marriage Equality Amendment Bill 2013 (Hanson-Young). Note that same-sex marriage was not prohibited under statute until 2004. See *Marriage Amendment Act 2004* (Cth) Schedule 1, amending *Marriage Act 1961* (Cth) by inserting s 5(1): '*marriage* means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life'.

172 See, eg the Same-Sex Marriage Bill 2005 (McKim); Same-Sex Marriage Bill 2008 (McKim); Same-Sex Marriage Bill 2012 (Giddings/McKim). The last of these three Bills was the only one to reach a vote, passing the Lower House by 13 votes to 11 but failing in the Upper House by 6-8.

173 Same-Sex Marriage Bill 2013, introduced by the Hon. Penny Sharpe MP on 31 October 2013, passed in the Legislative Assembly but defeated in the Legislative Council by 21-19 on 14 November 2013.

174 Same-Sex Marriage Bill 2013 (MacLaren).

175 *Marriage Equality Act 2013* (ACT).

176 *The Commonwealth of Australia v The Australian Capital Territory* [2013] HCA 55.

177 See, eg *Fedotova v Russian Federation*, Comm.1932/2010, U.N. Doc. CCPR/C/106/D/1932/2010, (HRC 2012), [10.5]; *Young v Australia*, Comm. 941/2000, U.N. Doc. A/58/40, Vol. II, at 231 (HRC 2003), [10.4] (denial of the extension of a veteran's pension benefit); *X v Colombia*, Comm. 1361/2005, U.N. Doc. A/62/40, Vol. II, at 293 (HRC 2007), [7.2] (discriminatory distinction between same-sex partners and unmarried heterosexual de facto partners in pension benefits).

and national courts,[178] reaffirming that the right to equality prohibits different treatment based on sexual orientation. Certainly 'the arc bends to justice'.[179]

In Queensland, the first legislative action aimed at ending discrimination against same-sex couples occurred in 2002 and created a non-discriminatory definition of 'de facto partner'.[180] Same-sex couples were thereby recognised in over 60 pieces of legislation including workers compensation, superannuation entitlements, property distribution in the event of separation, and carer's, parental, family and bereavement leave, amongst many others.[181] In 2011, Queensland allowed same-sex couples to enter into a civil partnership.[182] Mr Bleijie opposed that legislation—not on any ideological basis, but rather because civil partnerships were not a priority in economically challenging times:

> Queenslanders want us to debate the significant issues of importance to them, … civil partnerships are not on the priority list in the minds of Queenslanders. The passing of this bill will not save Queenslanders money [or] get our treasured AAA credit rating back. The member for Mount Coot-tha will go down in history as one of the most arrogant members in this place—the worst Treasurer in Australia's history who will stop at nothing to put spin and stunts before helping the majority of Queenslanders.[183]

However, the Bill, which the then Premier described as 'fundamentally about the human rights of Queensland's citizens',[184] passed. Naturally, there remained an extra step to be taken. As put by Laforme J of the Ontario Superior Court of Justice, 'any "alternative" to marriage … simply offers the insult of formal equivalency without the promise of substantive equality'.[185] However, the long road of progress had seen

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

179 Michael Kirby, 'Marriage equality: What sexual minorities can learn from gender equality' (2013) 34 *Adelaide Law Review* 141, 147.

180 *Discrimination Law Amendment Act 2002* (Qld), s 4 amended the *Acts Interpretation Act 1954* (Qld) by inserting s 32DA which provided a non-discriminatory meaning of 'de facto' partner that includes same-sex couples.

181 See e.g. *WorkCover Queensland Act 1996* (Qld) s 31 ('meaning of "spouse"'); *Succession Act 1981* (Qld), s 5AA ('Who is a person's *spouse*'); See also the *Property Law Amendment Act 1999* (Qld) s 7, inserting Part 19 into the *Property Law Act 1974* (Qld).

182 *Civil Partnerships Act 2011* (Qld).

183 Queensland, *Parliamentary Debates*, Legislative Assembly, 30 November 2011, 3977 (Jarrod Bleijie).

184 Ibid, 3978 (Anna Bligh).

185 *Halpern v Canada (Attorney General)* (2002) 60 OR (3d) 321, [282].

same-sex couples afforded a sound equality of rights and an important symbology of official recognition.

Then, on 20 June 2012, Mr Bleijie presented a Bill to remove that symbology.[186] Queensland's credit rating had not, and still has not, regained the 'treasured AAA' status. However, the legislation was given some priority: it was just the third Bill Mr Bleijie had presented to Parliament, and within 3 months of his swearing in. No consultation was undertaken,[187] and it was passed with some urgency in Parliament at 12.21am less than two days later.[188]

The Bill effected symbolic change only. It renamed the *Civil Partnerships Act 2011* as the more expressionless *Registered Relationships Act 2011* and omitted any and all references in that Act, and all other Acts,[189] to 'civil partnerships' in favour of 'registered relationships'. This change in terminology operated retrospectively,[190] transforming all 'civil partners' in Queensland into 'registered partners'. Most critically, it repealed the provisions which provided for the holding of a declaration ceremony to enable the participants to express their desire and intention to enter into a civil partnership.[191] The basis for the repeal was that such ceremonies 'could be perceived as mimicking a marriage ceremony'.[192] The Act also amended the procedure for dissolving civil partnerships, removing the requirement for couples to apply to the District Court and instead allowing termination by lodging an application with the registry of the Births, Deaths and Marriages.[193] This amendment was also calculated to cure the problem that such processes 'could be seen to equate to the legal procedure to dissolve a marriage'.[194] Incredibly, the move was claimed to draw some support from the homosexual community itself, a former LNP leader claiming, 'my best friend, who is gay' does not support civil unions.[195]

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186 See *Civil Partnerships and Other Legislation Amendment Act 2012* (Qld).

187 Explanatory Notes, Civil Partnerships and Other Legislation Amendment Bill 2012, 4.

188 Queensland, *Parliamentary Debates*, Legislative Assembly, 21 June 2012, 1009.

189 *Civil Partnerships and Other Legislation Amendment Act 2012* (Qld), s 24; inserting s 46 into the *Registered Relationships Act 2011* (Qld).

190 Ibid s 24; inserting ss 38-42 into the *Registered Relationships Act 2011* (Qld).

191 Ibid s 13, repealing *Civil Partnerships Act 2011* (Qld) ss 10 and 11.

192 Explanatory Notes, Civil Partnerships and Other Legislation Amendment Bill 201, 2.

193 *Civil Partnerships and Other Legislation Amendment Act 2012* (Qld), s 16; replacing ss 15-19 of the *Registered Relationships Act 2011* (Qld); see now *Registered Relationships Act 2011* (Qld), s 15(1).

194 Queensland, *Parliamentary Debates*, Legislative Assembly, 20 June 2012, 859 (Jarrod Bleijie).

195 Ibid, 21 June 2012, 973 (Laurence Springborg).

A wave of outrage flowed across social media in response to the needlessly capricious amendments, including the astute observation that 'I marry (or wed) my beloved. I register my dog'.[196] Criticisms that such laws involve 'rolling back, winding back, people's basic fundamental human rights',[197] that should be important to all Queenslanders, fell on deaf ears.

2 Refusal to amend consent laws

A statutory age of consent was recognised as early as 1275. Under Edward I, the offence of 'ravish[ing]' a 'maiden within age' (under 12 years old) with or without her consent was punishable by two years' imprisonment and fine at the King's pleasure.[198] Under Elizabeth I, the age of consent had been lowered to 10, and the 'abominable wickedness' of carnally knowing and abusing a child under that age was made a felony.[199] In 1861, the age of consent was raised back to 12,[200] and statutory amendment raised this further to 13 in 1875,[201] and in 1885 to 16,[202] where it remains today in most Australian jurisdictions for heterosexual statutory rape.

When homosexual sex was legalised in England and Wales in 1967, the first age of consent was set at 21 years.[203] This was lowered to 18 years in 1994,[204] and 16 in 2000.[205] Legislation passed in 2003 removes any legal distinction between homosexual and heterosexual activity, and sets 16 years of age as a uniform age of consent for heterosexual and homosexual men and women.[206]

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196 'Civil union changes rushed through in Qld', *The Sydney Morning Herald*, 21 June 2012.

197 Queensland, *Parliamentary Debates*, Legislative Assembly, 21 June 2012, 970 (Anna Palaszczuk).

198 1275 (3 Edw. 1 c. 13); See also *R v J* [2004] UKHL 42 (14 October 2004) [72] (Baroness Hale of Richmond).

199 1576 (18 Eliz. I) Cap 7; *R v J* [2004] UKHL 42 (14 October 2004) [72] (Baroness Hale of Richmond); William Blackstone, *Commentaries on the Laws of England* (1765-1769), 212; See also Frances Bernat, 'Age of consent' in William Chambliss (ed), *Crime and Criminal Behaviour* (Sage Publications, 2011), 3.

200 *Offences against the Person Act 1861* (24 & 25 Vict. c. 100), s 51.

201 *Offences against the Person Act 1875* (38 & 39 Vict. c. 94), s 4.

202 *Criminal Law Amendment Act 1885* (48 & 49 Vict. c. 69), s 5(1).

203 *Sexual Offences Act 1967* (c. 60), s 1(1). This Act applied only to England and Wales, homosexuality was only decriminalised in Scotland through the *Criminal Justice (Scotland) Act 1980*, and Northern Ireland by the *Homosexual Offences (Northern Ireland) Order 1982*.

204 *Criminal Justice and Public Order Act 1994* (c. 33), s 145.

205 *Sexual Offences (Amendment) Act 2000* (c. 44), s 1(5).

206 *Sexual Offences Act 2003* (c. 42).

In Australia, the first defence for consensual homosexual intercourse, introduced in South Australia in 1972, was available only to those over 21, whereas the heterosexual age of consent was then 17.[207] When South Australia became the first State to legalise homosexual intercourse in 1975, it brought the age of consent into line with heterosexuals: 17 for intercourse and 16 for other sexual acts.[208] When the ACT, New South Wales and the Northern Territory legalised homosexual intercourse the ages were different—18 for homosexuals and 16 for heterosexuals.[209] That discrepancy was remedied in 1985,[210] 2003,[211] and 2004,[212] respectively. In Western Australia, the discrepancy between 21 and 16 at legalisation in 1990,[213] was remedied in 2002.[214] Victoria and Tasmania have long had uniform ages, although Victoria preserved different ages according to different ages of partners and sexual acts,[215] until 1991,[216] and Tasmania did not legalise homosexual intercourse until 1997.[217]

As the Australian Law Reform Commission (ALRC) has noted, 'historically, there were significant inconsistencies within and across jurisdictions with respect to the age of consent … based on gender, sexuality and other factors'.[218] The net result of these developments is that, by 17 March 2004, the age of consent was the same for heterosexual and homosexual couples in every State except Queensland.[219]

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207 *Criminal Law Consolidation Act Amendment Act 1972* (SA); *Criminal Law Consolidation Act 1935* (SA).

208 *Criminal Law (Sexual Offences) Act 1975* (SA); see *Criminal Law Consolidation Act 1935* (SA), s 49(3).

209 *Law Reform (Sexual Behaviour) Ordinance 1976* (ACT); *Criminal Code 1983* (NT); *Crimes (Amendment) Act 1984* (NSW).

210 *Crimes (Amendment) Ordinance (No.5) 1985* (ACT); see *Crimes Act 1900* (ACT), s 55(2).

211 *Crimes Amendment (Sexual Offences) Act 2003* (NSW); see also *Crimes Act 1900* (NSW), s 66C.

212 *Law Reform (Gender, Sexuality and De Facto Relationships) Act 2003* (NT); see also *Criminal Code Act 1983* (NT), s 127(1).

213 *Law Reform (Decriminalisation of Sodomy) Act 1989* (WA).

214 *Acts Amendment (Lesbian and Gay Law Reform) Act 2002* (WA); see also *Criminal Code Act 1913* (WA), s 321.

215 *Crimes (Sexual Offences) Act 1980* (Vic); *Crimes Act 1958* (Vic).

216 *Crimes (Sexual Offences) Act 1991* (Vic); see *Crimes Act 1958* (Vic), s 45.

217 Also see *Criminal Code Act 1924* (Tas), s 124(1).

218 Australian Law Reform Commission, *Family Violence – A National Legal Response*, Report No 114 (2010), 1137 [25.35].

219 See *Criminal Code* (Cth), s 272.8.

There is no overt discrimination in Queensland, either, although the different age of consent for anal sex plainly has that discriminatory effect.[220] While s 215 of the *Criminal Code Act 1899* (Qld) prohibits 'unlawful carnal knowledge' with a person less than 16 years old, s 208(1) provides that a person who either does, or attempts to, (a) sodomise a person under 18 years, or (b) permits a male person under 18 years to sodomise him or her, is liable to 14 years imprisonment. Consent is not available as a defence. Although neutral on its face, it is clear that in practice it 'particularly affects young gay men'.[221] As the Model Criminal Code Officers Committee have noted:

> The inference that might be drawn from an older age of consent for homosexual conduct is that homosexuality is an undesirable activity from which males should be both protected and deterred until adulthood. It is questionable whether this is an appropriate aim of the criminal law.[222]

In 2005, Susan Booth, the Queensland Anti-Discrimination Commissioner wrote to the then Attorney-General, the Hon Rod Welford MP, arguing that Queensland's age of consent laws were 'inconsistent with the objects of the *Anti-Discrimination Act*'.[223] It appears to breach Article 26 of the International Covenant on Civil and Political Rights, which prohibits discrimination on the basis of sexual orientation.[224] In addition, it creates a health risk, because same-sex attracted young people are 'more likely to be sexually active earlier than their heterosexual peers',[225] and 'five times more likely to have been diagnosed with an STI'.[226] Education campaigns are critical but cannot sensibly take place in respect of conduct that remains illegal: 'any law that

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220 *Criminal Code Act 1899* (Qld) s 208(1), cf *Criminal Code Act 1899* (Qld) s 215(1).

221 Australian Federation of AIDS Organisations Inc., 'Age of consent laws in Australia', *Fact Sheet*, November 2011, 2. This discriminatory effect is perhaps made even clearer by the name of the offence: 'sodomy'. The *Criminal Law Amendment Act 1997* (Qld) s 22 amended s 208 of the *Criminal Code Act 1899* (Qld) by deleting 'anal intercourse' and replacing it with 'sodomy'. No other state or territory uses this term.

222 Model Criminal Code Officers Committee – Standing Committee of Attorneys-General, *Discussion Paper: Chapter 5 Sexual Offences Against the Person* (Model Criminal Code Officers Committee of SCAG 1996), 103.

223 Letter from Susan Booth to Rod Welford, 15 July 2005. http://www.afao.org.au/library/topic/youth/AFAO_Fact_sheet_Age_of_Consent_Laws_in_Australia.pdf.

224 *ICCPR*, art 26; See also *Toonen v Australia* CCPR/C/50/D/488/1992, UN Human Rights Committee (HRC), 4 April 1994.

225 Lynne Hillier, Alina Turner and Anne Mitchell, *Writing themselves in again: 6 years on – The 2nd National Report on the Sexuality, Health & Well-being of Same Sex Attracted Young People in Australia* (Australian Research Centre in Sex, Health & Society, Monograph Series No 50), vii - viii.

226 Ibid, 34.

may contribute to an unwillingness to disclose that they are members of this high risk group should be repealed on health grounds alone'.[227]

When Queensland decriminalised homosexual activity in 1990, it did so based on a report by the Queensland Criminal Justice Commission.[228] That report also recommended a uniform age of consent,[229] noting that opposition to such reform often centred on such irrational fears as that younger people are especially vulnerable and 'subject to external influences that they may regret later', that 'people might be lured into becoming homosexuals'.[230] Since then there have been several recommendations to implement a uniform age of consent, including by the Model Criminal Code Officers Committee,[231] and twice by the ALRC, noting that the 'age of consent should the same for heterosexual and homosexual sex',[232] and that 'no distinction be made based on gender, sexuality or any other factor'.[233] Mr Bleijie has made clear, however, that this issue is not on his agenda.[234]

3 Refusal to implement changes to the homosexual advance defence

In Adelaide on 10 May 1972, three senior police officers decided to spend the evening on a 'high spirited frolic'.[235] Their frivolity involved, principally, throwing homosexual men into the River Torrens. One of the men, Dr George Duncan, a London-born lecturer at the University of Adelaide, drowned. Though no police officers were ever charged with Duncan's murder, his death had a significant impact, leading to South Australia becoming the first state to decriminalise homosexuality.[236]

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227 Booth, above n 223.

228 Criminal Justice Commission, *Reforms in Laws Relating to Homosexuality: An Information Paper* (Research and Co-ordination Division, May 1990).

229 Ibid, 60.

230 Ibid, 7.

231 Model Criminal Code Officers Committee – Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5: Sexual Offences Against the Person* (1999), 119–123.

232 Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997), 251 [18.27], Recommendation 197.

233 Australian Law Reform Commission, *Family Violence – A National Legal Response*, Report No 114 (2010), 1141 [25.49].

234 Bridie Jabour, 'Queensland out of step on age of consent laws', *Brisbane Times*, 16 May 2013.

235 As described by the Scotland Yard police investigation: Cited in AAP, 'No conspiracies in 30-year mystery', *The Age*, 16 July 2002; See also Susan Magarey and Kerrie Round, *Roma the First: A Biography of Dame Roma Mitchell* (Wakefield Press, 2007), 207.

236 See generally Gordon Combe, Robert Martin, *Responsible Government in South Australia* (Wakefield Press, 2009) vol 2, 79. See further text above at nn 162-163, 207-208.

Violence against the homosexual community is not a new phenomenon.[237] Approximately 100,000 homosexual men were arrested by the Nazi Party between 1933 and 1945, with up to 15,000 being incarcerated in concentration camps.[238] In Australia, a long 'unsolved and unacknowledged crime wave' consisting of at least 50 murders in Sydney between 1985 and 1999 is increasingly recognised as fitting 'a pattern of gay-hate murder'.[239] Today, homosexuality remains criminalised in over 80 countries, including almost 80 per cent of the 54 Commonwealth countries: criminalisation of homosexuality is England's 'least lovely export'.[240]

Although homosexuality is no longer a crime in Australia, a non-violent, homosexual advance remains in some jurisdictions as a basis for a defence of provocation or self-defence. A person accused of violent crime against a homosexual person may defend the charges by asserting that they were so disgusted or revolted by the prospect of an unwelcome, non-violent sexual advance that they lost control and brutally beat the victim to death. The first reported use of the defence in Australia was in the Victorian case of *R v Murley*,[241] but a series of at least 13 cases in New South Wales between 1993 and 1995 entrenched it in the legal literature.[242] In 1997, the High Court cemented the defence, finding that there had been a miscarriage of justice, because the trial judge had failed to direct the jury to consider provocation in *Green v The Queen*.[243] The editor of the *Criminal Law Journal* said, 'this is the most disappointing High Court judgment I have read'.[244]

Malcolm Green was Donald Gillies' best friend. Gillies invited Green to dinner, but when Gillies touched him 'gently' on the side,[245] the situation turned for the worse.

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237 Melissa Bull, Susan Pinto and Paul Wilson, 'Homosexual law reform in Australia', *Australian Institute of Criminology: Trends and Issues in Criminal Justice* (January 1991), 6.

238 Florence Tamagne, *A History of Homosexuality in Europe: Berlin, London, Paris 1919-1939* (Algora, 2006) vol II, 397.

239 Paul Sheehan, 'Gay hate: The shameful crime wave', *The Sydney Morning Herald*, 4 March 2013; See also Stephen Tomsen, 'Hatred, murder and male honour: Anti-homosexual homicides in New South Wales, 1980-2000', *Australian Institute of Criminology* (Research and Public Policy Series No 43, 2002).

240 Kirby, 'The sodomy offence', above n 151, 1.

241 (Unreported, Supreme Court of Victoria, Teague J, 28 May 1992).

242 See Kent Blore 'The homosexual advance defence and the campaign to abolish it in Queensland: The activist's dilemma and the politician's paradox' (2012) 12 *Queensland University of Technology Law and Justice Journal* 36, 38.

243 (1997) 191 CLR 334.

244 Graeme Coss, 'Revisiting lethal violence by men' (1998) 22 *Criminal Law Journal* 5, 8.

245 *Green v The Queen* (1997) 191 CLR 334, 360 (McHugh J), quoting the accused's own testimony.

Green punched the victim 'about thirty-five times'[246] repeatedly rammed his head into a wall and then stabbed him with a pair of scissors 'up to half a dozen times', 'as he rolled off the bed'.[247] In upholding Green's appeal, Brennan CJ adopted the dissent of Smart J in the New South Wales Court of Appeal:

> The provocation was of a very grave kind. It must have been a terrifying experience for the appellant when the deceased persisted. The grabbing and persistence are critical. Some ordinary men would feel great revulsion at the homosexual advances being persisted with in the circumstances and could be induced to so far lose their self-control as to form the intention to and inflict grievous bodily harm. They would regard it as a serious and gross violation of their body and person.[248]

The decision turned largely on the construction of 'ordinary person' and was plainly out of line with the standards and expectations of the day. As Kirby J said in dissent, 'the ordinary person in Australian society today is not so homophobic as to respond to a non-violent sexual advance by a homosexual person as to form an intent to kill or to inflict grievous bodily harm.'[249] Since *Green*, Tasmania,[250] Victoria,[251] Western Australia,[252] the Australian Capital Territory,[253] the Northern Territory,[254] and most recently New South Wales,[255] have either abolished provocation entirely or the homosexual advance defence, and in South Australia a Bill has been introduced to

246 *Green v The Queen* (1997) 191 CLR 334, 390 (Kirby J).

247 Ibid.

248 Ibid, 345-346 (Brennan CJ).

249 Ibid, 408-409 (Kirby J).

250 *Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003* (Tas).

251 *Crimes Act 1958* (Vic) s 3B; *Crimes (Homicide) Act 2005* (Vic) s 3.

252 *Criminal Law Amendment (Homicide) Act 2008* (WA) s 12.

253 *Sexuality Discrimination Legislation Amendment Act 2004* (ACT) sch 2, pt 2.1; *Crimes Act 1900* (ACT) s 13(3).

254 *Criminal Code Act (NT)* s 158(5).

255 *Crimes Amendment (Provocation) Act 2014* (NSW) Schedule 1, amending s 23(3)(a) and (b) of the *Crimes Act 1900* (NSW). This amendment followed a 2013 NSW parliamentary inquiry that recommended it be scrapped: Select Committee on the Partial Defence of Provocation, Parliament of New South Wales, *The Partial Defence of Provocation* (2013), Recommendation 6: 'That the NSW Government introduce an amendment to section 23 of the *Crimes Act 1900* to ensure that the partial defence is not available to defendants who: incite a response to provide an excuse to respond with violence; or respond to a non-violent sexual advance by the victim'.

remove it.[256] Queensland is the only jurisdiction in Australia which has not removed or taken any steps towards abolishing the defence.[257]

On 3 July 2008, Jason Pearce and Richard Meerdink bashed Wayne Ruks to death in Maryborough, Queensland. Pearce claimed that Ruks had grabbed his crotch and 'started all this poofter shit', and because Pearce had been sexually abused as a child, he 'snapped'.[258] About ten minutes later, after what the sentencing judge described as a 'prolonged and cowardly attack',[259] they propped him up, used his jacket as a pillow for his head and left him to die of his injuries.[260] Both relied on the gay panic defence and both were found not guilty of murder, but of manslaughter.[261]

On 4 August 2008, John Petersen and Seamus Smith were driving near Curra, Queensland, when they offered a lift to the hitchhiking Stephen Ward. After eating, drinking and smoking marijuana together at Smith's house they dropped Ward off a truck stop where he would continue hitchhiking. At some point on this drive Ward made a 'homosexual pass'[262] at Petersen. Petersen said he 'freaked out' because he had 'had people like that treat me real bad', and 'just snapped and started hitting him'.[263] After a frenzied assault that consisted of twenty to thirty punches, Petersen and Smith left the scene briefly before returning and putting the 'unconscious and helpless, but alive' Stephen Ward, who was 'covered in blood' and 'moaning or gurgling', in the back of the ute and dumping him in a shallow ditch in the Bauple State Forest.[264]

Clearly people like Pearce and Petersen who have suffered sexual assault as children, are victims in their own right. However, that does not ameliorate the injustice to

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256 Criminal Law Consolidation (Provocation) Amendment Bill 2013 (SA), cl 3, inserting s 11A into the *Criminal Law Consolidation Act 1935* (SA): 'For the purposes of proceedings in which the defence of provocation may be raised, conduct of a sexual nature by a person does not constitute provocation merely because the person was the same sex as the defendant'.

257 Rae Wilson, 'No changes for "gay panic": Bleijie', *Queensland Times*, 17 July 2012.

258 *R v Meerdink* [2010] QSA 273 (12 October 2010) , [9]: Conversation between Pearce and an undercover police officer stationed in Pearce's cell.

259 Ibid [12].

260 Ibid [12]-[13].

261 Ibid [2].

262 Clementine Norton, 'Gay advance led to death: court', *Fraser Coast Chronicle*, 5 October 2011.

263 '10 years for hitch-hiker death', *Fraser Coast Chronicle*, 14 October 2011.

264 Clementine Norton, 'Men found not guilty of murder', *Fraser Coast Chronicle*, 13 October 2011.

which homosexual Queenslanders and their families are exposed to by an archaic defence based on homophobic masculinity.[265] As Father Paul Kelly, who has been campaigning against the law since Wayne Ruks was bashed to death outside his Maryborough Church notes, the law 'encourages a culture of hate'.[266] An expert committee appointed and headed by a former Court of Appeal judge recommended in 2011, and the government accepted in 2012, that the defence should be statutorily abolished.[267] When Mr Bleijie was elected he abandoned those plans.[268]

The defence of provocation was altered in Queensland in 2011 to exclude provocation 'based on words alone, other than in circumstances of a most extreme and exceptional character'.[269] Of course, that amendment would not have changed the fate of Malcolm Green, Jason Pearce, Richard Meerdink or any number of others who invoke the defence in respect of mild homosexual touching. However, Mr Bleijie has relied on them in ruling out any action to abolish the defence, saying that he 'remains tough on crime' but that 'these laws are yet to be tested' and so he 'does not intend to make any further amendments to the provocation defence at this time'.[270] Unlike the abolition of civil unions, it is 'not a priority'.[271]

C. Indigenous welfare and reconciliation—the Murri Court

In 1991 the Royal Commission into Aboriginal Deaths in Custody referred to the 'grossly disproportionate rate' of incarceration of Indigenous people as Australia's 'great challenge'.[272] Today, Indigenous people represent around 2.5 per cent of the total Australian population,[273] but 27 per cent of prisoners.[274] In Queensland,

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265 Ben Goulder, 'The homosexual advance defence and the law/body nexus: Towards a poetics of law reform' (2004) 11 *Murdoch University Electronic Journal of Law* [5].

266 Monique Ross, 'Priest ramps up fight against "gay panic" defence', *ABC News*, 25 July 2012.

267 Paul Lucas (Attorney-General), 'State Government to change "gay panic" defence', *Media Statements*, 25 January 2012.

268 Patrick Caruana, "Qld scraps 'gay panic" defence changes', *The Australian*, 2 August 2012.

269 *Criminal Code* (Qld), s 304(2), amended by the *Criminal Code and Other Legislation Amendment Act 2011* (Qld), s 5.

270 Wilson, above n 257.

271 Drew Sheldrick, 'Gay panic to stay', *Star Observer*, 3 July 2012.

272 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *Regional report of inquiry in NSW, Victoria and Tasmania* (1991), foreword.

273 Australian Bureau of Statistics, *Census of population and housing: Counts of Aboriginal and Torres Strait Islander Australians, 2011,* (2012)

274 Australian Bureau of Statistics, *Prisoners in Australia, 2012*, (2011) 'Aboriginal and Torres Strait Islander Prisoner Characteristics: Imprisonment rates'.

Aboriginal and Torres Strait Islanders are 11.3 times more likely than non-Indigenous Australians to be in jail.[275] The incarceration rate of Indigenous Australians remains a 'national shame' and a 'social policy disaster'.[276]

Research indicates that the high incarceration rate is not caused by institutionalised or systemic bias in the criminal justice process,[277] or by an increase in the number of Indigenous people brought to court.[278] Rather, it is due 'mainly to changes in the criminal justice system's response to offending'.[279] That is, for repeat offenders, bail is more likely to be refused and custodial sentences are likely to be lengthier.[280] Significantly, because Indigenous offenders have a higher rate of recidivism than non-Indigenous offenders,[281] this shift disproportionately impacts on Indigenous people. The High Court has confirmed that there is no discount on sentence for aboriginality.[282] However, the high incarceration rates are symptomatic of other societal problems, including the failure of the criminal justice system to deal with

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275 Queensland Treasury and Trade, Government Statistician, Prisoners in Queensland 2012, <http://www.oesr.qld.gov.au/products/briefs/prisoners-aus/prisoners-aus-2012.pdf>.

276 Paul Simpson and Michael Doyle, 'Indigenous prison rates are a national shame' (*UNSW News*, 29 May 2013).

277 See, eg, Lucy Snowball and Don Weatherburn, 'Indigenous over-representation in prison: The role of offender characteristics' (Crime and Justice Bulletin No 99, NSW Bureau of Crime Statistics and Research, September 2006) 14; Cf Harry Blagg et al, 'Systemic racism as a factor in the overrepresentation of Aboriginal people in the Victorian criminal justice system' (Report to the Equal Opportunity Commission and Aboriginal Justice Forum, 2005).

278 Jacqueline Fitzgerald, 'Why are Indigenous imprisonment rates rising?' (Crime and Justice Statistics Bureau Brief, Issue No 41, NSW Bureau of Crime Statistics and Research, August 2009), 3.

279 Ibid 6.

280 Ibid; see also Snowball and Weatherburn, above n 277, 15; for various examples of Campbell Newman and Jarrod Bleijie's 'tough on crime' approach see Trotter and Hobbs, above n 1.

281 74 per cent of Aboriginal and Torres Strait Islander prisoners have been imprisoned before, compared with only 48 per cent of non-Indigenous prisoners: ABS, above n 274. See also Don Weatherburn et al, 'Prison populations and correctional outlays: The effect of reducing re-imprisonment' (Crime and Justice Bulletin No 138, NSW Bureau of Crime Statistics and Research, December 2009), 6.

282 See *Bugmy v The Queen* [2013] HCA 37; *Munda v Western Australia* [2013] HCA 38; Note that Canadian courts do treat Aboriginal offenders differently based on a different statutory context: *R v Gladue* [1999] 1 SCR 688 and Criminal Code, RSC 1985, c C-46, s 718(2)(e).

Indigenous offenders in a manner best calculated to prevent reoffending.[283] Indigenous offenders may experience a range of problems with traditional justice systems, for example they often require court interpreters that simply do not exist.[284] Considering that the Commonwealth Government has defunded the National peak body for Aboriginal and Torres Strait Islander Legal Services, the problem is only likely to be aggravated.[285]

These considerations have led to the adoption throughout the world of dedicated courts or court procedures for Indigenous persons. Village Courts began operating in Papua New Guinea in 1975 and have authority to exercise both civil and criminal jurisdiction.[286] In the United States, courts for Indian Offences date back to 1883.[287] Those courts include 'customary' or 'traditional' courts outside the general legal system, courts operating under the authority of a particular tribe, and 'Courts for Indian Offences', which are under the control of the Secretary of the Interior and the Bureau of Indian Affairs.[288] In New Zealand, the Māori Land Court (Te Kooti Whenua Māori) and the Māori Appellate Court (Te Kooti Pira Māori) have been in existence since 1862 and 1894 respectively,[289] and have jurisdiction to hear matters relating to Māori land including successions, title improvements, land sales, and administration of land trusts and corporations.[290] In the last two decades, Aboriginal

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283 The NSW Bureau of Crime Statistics and Research estimates that a 'ten per cent reduction in the rate of Indigenous recidivism would reduce the number of Indigenous court appearances by 2,558 per annum – more than 30 per cent': See Boris Beranger, Don Weatherburn and Steve Moffat, 'Reducing Indigenous contact with the court system' (Crime and Justice Statistics Bureau Brief, Issue No 54, NSW Bureau of Crime Statistics and Research, December 2010), 3.

284 See Michael Cooke, 'Indigenous interpreting issues for courts' (Paper presented at the Annual Conference of the Australian Institute of Judicial Administration, Hobart, 21-23 September 2001).

285 ABC News, 'Funding cuts to cripple Indigenous legal services', PM, 17 December 2013 (Shane Duffy, Chairman, National Aboriginal and Torres Strait Islander Legal Services) <http://www.abc.net.au/pm/content/2013/s3913355.htm>.

286 *Village Courts Act 1989* (PNG), s 36.

287 Joseph Myers and Elbridge Coochise, 'Development of tribal courts: Past, present, and future' (1995) 79 *Judicature* 147, 147; see also Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, Report No 31 (1986), [780].

288 Myers J, and Coochise E, above n 287, 147.

289 *Native Title Lands Act 1862* (NZ); *Te Ture Whenua Māori Act 1993* (NZ), ss 6 and 50 respectively.

290 *Māori Fisheries Act 2004*; *Māori Commercial Aquaculture Claims Settlement Act 2004*.

courts have developed in Canada, and now exist in four provinces.[291] The Australian Institute of Criminology notes that this development of Indigenous courts reflects a 'growing recognition that traditional adversarial system has proven ineffective in dealing with disproportionate rates of contact with the criminal justice system among people from Indigenous backgrounds'.[292]

This development has been mirrored in Australia, though it is limited to sentencing for offences at the Magistrates' level. The South Australian Nunga Court, introduced in 1999, was the first Indigenous sentencing Court in Australia. All States and Territories, including Queensland but excluding Tasmania, subsequently developed their own specialised courts.[293] In NSW, 'Circle Sentencing', based on the Canadian model and underpinned by principles of restorative justice, allows sentencing to take place amongst the offender's community rather than in the formal court environment.[294] It includes Indigenous communities in the process and promotes confidence in the system. Despite initial criticism as to its effectiveness,[295] circle sentencing has been found to 'help break the cycle of recidivism'[296] and Aboriginal communities are generally supportive.[297] The Queensland Murri Court is based on South Australia's Nunga Court, and is used to sentence Indigenous offenders who

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291 These courts are called the Tsuu T'ina Peacemaking Court (Alberta, 2000); the Gladue (Aboriginal Persons) Court (Ontario, 2001) the Cree-speaking Circuit Court (Saskatchewan, 2001), and Dene-speaking Circuit Court (Saskatchewan, 2006); and the First Nations Court (British Columbia, 2006).

292 Anthony Morgan and Erin Louis, *Evaluation of the Queensland Murri Court: Final Report* (Australian Institute of Criminology Reports Technical and Background Paper No 39, 2010), 9.

293 Ibid, 11. These courts are called the Circle Sentencing Courts (NSW, January 2002); Koori Courts (Victoria, October 2002); Murri Courts (Queensland, 2002); Ngambra Circle Sentencing Courts (ACT, May 2004) – renamed the Galambany Circle Sentencing Court in 2010; Darwin Community Court (NT, April 2005); Aboriginal Community Court (WA, February 2006);See also Elena Marchetti and Kathleen Daly, 'Indigenous sentencing courts: Towards a theoretical and jurisprudential model' (2007) 29 *Sydney Law Review* 415-443.

294 Robert Tumeth, 'Is Circle Sentencing in the NSW criminal justice system a failure?' (Aboriginal Legal Service, June 2011) 2.

295 See, eg, Jacqueline Fitzgerald, 'Does circle sentencing reduce Aboriginal offending?' (Crime and Justice Bulletin No 115, NSW Bureau of Crime Statistics and Research, May 2008).

296 Ivan Potas et al, 'Circle sentencing in New South Wales: A review and evaluation' (Monograph 22, Judicial Commission of New South Wales, 2003) iv, 1, 52.

297 See, eg, Elena Marchetti and Kathleen Daly, 'Indigenous courts and justice practices in Australia' (Trends & Issues in crime and criminal justice No 277, Australian Institute of Criminology, May 2004), 5; For a more recent example of the support of Aboriginal communities, see AAP 'Circle sentencing expanded in NSW', *The Sydney Morning Herald*, 30 September 2012.

plead guilty to Magistrates' Court offences, by agreements between local Elders and Magistrates. In an informal setting without robes, and seeks 'input' in lieu of submissions from offenders, legal representatives, prosecutors and Elders.[298] Significantly, these programs conform to emerging global Indigenous-rights norms.[299]

Perhaps more significantly, empirical studies on the effectiveness of these culturally appropriate court programs are positive. In a study of the period between 2007 and 2009, Christine Bond and Samantha Jeffries found that compared to similarly positioned Indigenous defendants in conventional courts, Nunga Court defendants were significantly less likely to receive sentences 'that have problematic impacts for Indigenous offenders (namely imprisonment, monetary penalties, [and] disqualification of drivers' licence[s]).[300] In 2010, the Australian Institute of Criminology found that Indigenous offenders in the Murri Court program are more likely than those in mainstream Magistrates or Children's Courts to attend court voluntarily.[301] In turn, this reduces the likelihood that Indigenous offenders will be remanded in custody. It suggested that the 'findings with respect to the frequency of offending, particularly in regional court locations, are promising'.[302] Ultimately, the report recommended that 'adequate resources need to be available to support the continued operation of the program'.[303]

Mr Bleijie disagreed. In September 2012 the Attorney-General announced the Government's decision to abolish the Murri Court program, as well as two other diversionary programs—the Special Circumstances Court and the Drug Court. The Attorney-General specifically cited the AIC Report, arguing that it demonstrated that 'the program was not reducing imprisonment rates for indigenous offenders and has

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298 Mary Westcott, 'Murri Courts', (Queensland Parliamentary Library Research Brief No 2006/14, 2006), 1. In this way the Murri Courts tie into the principles codified in the *Penalties and Sentences Act 1992* (Qld), 9(2)(p) and *Youth Justices Act 1992* (Qld), s 150.

299 See, eg, *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007); See also Chris Cunneen and David McDonald, 'Diversion and best practice for Indigenous people: A non-Indigenous view' (Paper presented at the Best Practice Interventions in Corrections for Indigenous People Conference, Adelaide, 13-15 October 1999).

300 Christine Bond and Samantha Jeffries, 'Indigenous sentencing outcomes: A comparative analysis of the Nunga and Magistrates Courts in South Australia' (2012) 14 *Flinders Law Journal* 358, 381.

301 Morgan and Louis, above n 292, 142.

302 Ibid 145.

303 Ibid 49, Recommendation No 5.

not stopped recidivism in the short term.'[304] Ending funding for these programs is expected to save $35.7 million over four years—that is, $8.85 million per year. Queensland Law Society President Dr John de Groot noted that the apparent saving was 'based on a false economy' and would 'end up costing Queenslanders far more than the government's expected savings'.[305] A spokesperson of an Ipswich-based Indigenous group noted that 'the cost to run the Murri Court bail program is a quarter of the cost of sending an offender to prison'.[306] The Drug Court, also abolished, by diverting 115 people from incarceration, has saved 588 years imprisonment time,[307] and 'on a conservative estimate', in excess of $41 million.[308]

In any event, the purpose of the criminal law is not to save money but to reduce offending. Such diversionary programmes 'reduc[e] the rate of crime and creating considerable long-term cost savings for the community'.[309] As Bond and Jeffries note,

> scholars working in this area have argued that Indigenous courts have improved court responsiveness to Indigenous people, empowered Indigenous communities through increased participation in the criminal justice process, and more broadly – albeit in a small way – may have positive reconciliatory outcomes by improving Indigenous/non-Indigenous community relations.[310]

This process takes 'time, perseverance, innovation and political will'.[311] Queensland is the only mainland State or Territory to have lost that will.

D Right to be free of discrimination—sex workers

As early as the 18th century BC, female prostitutes were accorded rights in ancient Mesopotamia in the *Code of Hammurabi*.[312] However, that is not to say that the world's oldest profession was not the subject of considerable stigma and discrimination over the centuries that followed. The first major recorded instance of

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304 Tony Moore, 'Diversionary courts fall victim to funding cuts', *Brisbane Times*, 13 September 2012.

305 Queensland Law Society, 'The vulnerable vetoed in court cuts' (*Media Release*, 14 September 2012).

306 Kate Lemmon, 'Murri court axed to save millions', *Queensland Times*, 15 September 2012.

307 Queensland Courts, 'Magistrates Court of Queensland Annual Report 2010-2011' (Department of Justice and Attorney-General, 28 October 2011), 31.

308 Queensland Law Society, above n 305.

309 Ibid.

310 Bond and Jeffries, above n 300, 381-382.

311 Queensland Law Society, above n 305.

312 See generally Daniel Luckenbill, 'The Temple Women of the Code of Hammurabi' (1917) 34 *American Journal of Semitic Languages and Literatures* 1.

the expulsion of prostitutes from their premises by sovereign decree was the abolition of 'sacred prostitution' by Emperor Constantine, who destroyed the goddess temples at the advent of Christianity.[313] Although prostitution was seen in the early Middle Ages as fulfilling a valuable function by distracting predatory men from innocent and marriageable women, by the 13th century sex workers were confined to certain districts,[314] and required to wear a knot on their shoulder, usually in the colour of shame of the local culture, so that they might easily be distinguished from respectable women.[315] Sex workers were also forbidden to have lovers other than their clients.[316] In 1305, a holy prior at Aldgate, incensed at his neighbour's failure to evict prostitutes from his house, gathered the neighbours and removed all of the doors and windows. Not only did he successfully defend an action in trespass, but some time afterwards the prostitutes, 'who apparently had remained there doorless', were legally ejected.[317] From such cases a charge of keeping a brothel 'to the nuisance of her neighbours' was developed, although there was not yet a clear distinction between conducting a morally objectionable business and actually causing nuisance.[318]

With the rise of sexually transmitted diseases, a harder approach to prostitution was taken throughout the 15th to 18th centuries, including provision in 1864 (also applicable in the Australian colonies),[319] for women who failed mandatory medical assessments to be incarcerated for periods up to one year.[320] Prostitution was made illegal throughout the United States between 1910 and 1915 and various offences relating to prostitution were introduced the United Kingdom and the Australian States around the same time.[321] However, in more recent times prostitution has been

313 Eusebius of Caeserea, *The Life of the Blessed Emperor Constantine* ([translator not named] Samuel Bagster & Sons, 1845) Book III, Chapter 55, 160; Book III, Chapter 58, 163-164 [trans of: *Vita Constantini* (first published 4th century AD)].

314 William Sanger, *History of Prostitution: Its extent, causes and effects throughout the world* (Amazon Digital Services, 1939) 97.

315 Elfriede Knauer, (2002). 'Portrait of a Lady? Some Reflections on Images of Prostitutes from the Later Fifteenth Century' (2002) 47 *Memoirs of the American Academy in Rome* 95.

316 Ruth Karras, *Common Women: Prostitution and Sexuality in Medieval England* (Oxford University Press, New York, 1996) 106.

317 Ibid, 96.

318 Ibid, 100.

319 See, eg, *Act for the Suppression of Contagious Diseases 1868* (31 & 32 Vict, c 40).

320 See *Contagious Diseases Prevention Act 1864* (27 & 28 Vict, c 85); *Contagious Diseases Act 1869* (32 & 33 Vict, c 96).

321 Belinda Carpenter and Sharon Hayes, 'Crimes Against Morality', in Hennessey Hayes and Tim Prenzler (eds) *Introduction to Crime and Criminology* (Pearson Australia, 2011); see

decriminalised. In 1999, the Queensland government legalised sex work by licenced individuals or in a licensed brothel.[322] It considered that doing so was in the best interests of the safety of sex workers, a healthy society and avoiding corruption and organised crime.[323] Prostitution is now a legal commercial pursuit subject to regulation in a similar way to any other business.

Anti-discrimination legislation was enacted in 1991 in Queensland 'to promote equality of opportunity for everyone by protecting them from unfair discrimination in certain areas of activity, including work, education and accommodation'.[324] That Act now prohibits discrimination on certain grounds, including 'lawful sexual activity';[325] that is, 'a person's status as a lawfully employed sex worker, whether or not self-employed'.[326] It is prohibited to give less favourable treatment,[327] including, specifically, in relation to accommodation.[328]

Then, in June 2010, a self-employed sex worker known as GK checked out of The Drover's Rest (Boranbah, Central Queensland) after a night's work. When they told her she would not be welcome again, she sued the owners and lost.[329] On an internal appeal, however, QCAT held that she 'was the subject of direct discrimination, and to the extent that she suffered hurt, humiliation, stress, anxiety and/or economic loss, it was open to the Tribunal to determine that she ought to receive consequential compensation'.[330]

In a reaction to that decision on 1 November 2012, Mr Bleijie announced reforms would ensure that 'motel owners' rights to evict sex workers will be strengthened under proposed changes to the *Anti-Discrimination Act* introduced today in Parliament'.[331] The Act introduced an exception to the prohibition on

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Sexual Offences Act 1956 (UK); See especially *Criminal Code 1899* (Qld) (as originally enacted), s 231.

322 *Prostitution Act 1999* (Qld).

323 Queensland, *Parliamentary Debates*, Second Reading Speech to the Prostitution Bill 1999, 10 November 1999, 4826 (TA Barton).

324 *Anti-Discrimination Act 1991* (Qld), s 6.

325 Ibid s 7(f).

326 Ibid Schedule.

327 Ibid s 10(1).

328 Ibid ss 81-83.

329 *GK v Dovedeen Pty Ltd & Anor (No 3)* [2011] QCAT 509, [79].

330 *GK v Dovedeen Pty Ltd & Anor* [2012] QCATA 128, [36].

331 Jarrod Bleijie, 'Hotel and motel owners can refuse sex workers under proposed laws' (Media Statement, 1 November 2012):

discrimination,[332] allowing an accommodation provider to refuse, evict or offer less favourable terms to anyone they reasonably believe to intend to use it in connection with prostitution.[333] He said, in support of that change, that 'if someone is running a business out of a hotel or motel room and the operator or manager receives complaints from other patrons they should be able to do something'.[334]

Naturally, there is scope in existing law to remove a sex worker who actually causes a nuisance. The *Liquor Act* authorises the removal of persons who are disorderly or who create a disturbance from licensed premises.[335] Although sex work no longer falls within the prohibition on the use of rental properties 'for an illegal purpose',[336] it is grounds for eviction,[337] to use the property in a way that 'cause[s] a nuisance'[338] or 'interfere[s] with the reasonable peace, comfort or privacy of a neighbour of the tenant'.[339] The *Prostitution Act* also specifically criminalises nuisances connected with prostitution.[340]

When stakeholders suggested that existing laws were sufficient, Mr Bleijie's Department bluntly responded that the new exception 'is not about strengthening nuisance laws'.[341] It acknowledges that '[i]t is designed to overcome constraints in the ADA which provide special anti-discrimination protection for sex workers using accommodation for sex work'—that is, to allow discrimination against sex workers at work.[342] However, its operation is broader still. Requiring as it does only a 'reasonable belief' that a person 'intends to' engage in activities 'in connection with' sex work, it forms a viable pretext for blanket refusal of admission to persons recognised as sex workers in nearly any circumstances. For example, it tends to put a

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http://statements.qld.gov.au/Statement/2012/11/1/hotel-and-motel-owners-can-refuse-sex-workers-under-proposed-laws.

332 *Youth Justice (Boot Camp Orders) And Other Legislation Amendment Act 2012* (Qld), s 50.

333 *Anti-Discrimination Act 1991* (Qld), s 106C.

334 Jarrod Bleijie, 'Hotel and motel owners can refuse sex workers under proposed laws' (*Media Release*, 1 November 2012).

335 *Liquor Act 1992* (Qld), s 165.

336 *Residential Tenancies and Rooming Accommodation Act 2008* (Qld), s 184(a).

337 Ibid s 52(1) read with procedures for recovery of possession in ss 280, 281, 337, 350, 352, 354.

338 Ibid s 184(b).

339 Ibid s 184(c).

340 *Prostitution Act 1999* (Cth), s 76.

341 Letter from the Department of Justice and Attorney-General, 13 November 2012, 23, cited in Legal Affairs and Community Safety Committee, *Youth Justice (Boot Camp Orders) and Other Legislation Amendment Bill 2012* (Report No 18) November 2012, 32.

342 Ibid.

humiliating onus on a person recognised as a sex worker who is on holidays with a partner. It extends to any accommodation at which a sex worker might receive texts or phone calls 'in connection with' a job. 'Accommodation' is not restricted to hotels—it includes a house, flat, or business premises.[343] Sex workers lawfully suffer not only eviction, but also discrimination from staff, who are free to 'treat the … person unfavourably in any way'.[344] It distorts the market by reducing the number of accommodating landlords and giving them a licence to charge higher rates. It also allows the eviction of anyone whom an hotelier or landlord reasonably believes to intend to engage a prostitute at some point during their stay.[345]

The Department furnished the reassurance that the legislation does 'not allow a person to refuse to provide accommodation to someone only because of their status as a sex worker'.[346] However, in substance, if not in form, it would appear to have very nearly that effect. Short of purchasing realty (which, unsurprisingly, few prostitutes are in a position to do), it is difficult to conceive how a person might feasibly conduct sex work without exposing themselves to homelessness.

On 17 May 2013, the Court of Appeal unanimously reversed the QCAT decision which prompted these reforms, confirming that the mischief to which they are apparently directed is dealt with by the current law.[347] Mr Bleijie was a party to that appeal, his representatives submitting that the existing laws had an effect the same as that his Department attributed to the reforms.[348] According to the Attorney's representatives, there was no reason for the reforms.

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343 *Anti-Discrimination Act 1991* (Qld), Schedule.

344 Ibid s 106C(c).

345 Ibid s 106C ('It is not unlawful … to discriminate against *another person* if the accommodation provider reasonably believes the other person is using, or intends to use, the accommodation in connection with that person's, *or another person's*, work as a sex worker' (emphasis added)).

346 Letter from the Department of Justice and Attorney-General, 5 November 2012, 3, cited in Legal Affairs and Community Safety Committee, above n 341, 21.

347 *Dovedeen Pty Ltd v GK* [2013] QCA 116.

348 See the submissions of the Attorney-General that the *Anti-Discrimination Act* should be given a construction which is materially identical to the construction attributed to the reforms by his own department: compare *Dovedeen Pty Ltd v GK* [2013] QCA 116, [20] ('As the meaning of 'status' … as was submitted for the Attorney-General, when the definition of 'lawful sexual activity' is taken into account, the proper construction of the Act is that it prohibits discrimination on the basis that a person is a lawfully employed sex worker') with the statements of the Department, above, text accompanying n 346.

III CONCLUSION

To place Mr Bleijie's civil and political reforms in the context of history is to illustrate the decades and centuries of work that they undo. The common law's slow and often circuitous development of civil and political rights, although not 'unduly fragile',[349] can, and in recent years increasingly have been abrogated by statutory reform.

Mr Bleijie's reforms have had a considerable impact on Queensland's minority groups in a discriminatory manner that is reminiscent of past centuries. In one of his first moves upon taking office, he introduced somewhat demeaning legislation to strip same-sex couples of anything that might be perceived to 'mimic' marriage, including their right to a public ceremony declaring their commitment. He has also refused to amend the age of consent laws for young gay men, and has halted reforms to eradicate the out-dated and dangerous homosexual advance defence, despite four men in five years relying on it to downgrade a murder charge to manslaughter.

Mr Bleijie has also led reforms to allow accommodation providers to evict sex workers on a discriminatory basis as the Prior of Aldgate did in 1305. His decision to abolish the Murri Court program, based upon the very report that recommended its continued operation, flies against both the emerging global norm of Indigenous-rights and a growing body of evidence that suggests that Indigenous diversionary sentencing programs provide positive outcomes for Indigenous Australians, as well as placing Queensland in the invidious position as the only mainland State or Territory without such a program.

Mr Bleijie's erosion of the right of all people to freely associate in peacetime is reminiscent of the Red Scare campaigns of the past century. He has declared groups to be criminal based on no particular offence and imposed mandatory terms of imprisonment for their association in public. Perhaps most extraordinarily, he has added a mandatory 15 or 25 years without parole for nearly any offence committed in a group.

If this historical context were not enough to illustrate the thorough undesirability of the civil and political reforms legislated, foreshadowed or rejected by the Attorney-General, there is no shortage of practical and policy objections to supplement it. Some of these have been mentioned in relation to each reform, but they only graze the surface of the criticisms that have been more fully aired by the various submissions on each Bill, the academic discussion and the public objections of civil libertarians. The rollback of human rights in Queensland, primarily instigated by the

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[349] *Momcilovic v The Queen* (2011) 245 CLR 1, 47 [45] (French CJ), referring to the presumption of innocence.

Attorney-General, must be noted in detail. In due course, steps must be taken to redress his great leap backward.