

2864

CURTIN UNIVERSITY  
CENTRE FOR HUMAN RIGHTS EDUCATION  
PERTH, WESTERN AUSTRALIA  
FRIDAY 26 AUGUST 2016

KINSEY, EMPIRICISM AND HOMO/TRANS-PHOBIA

The Hon. Michael Kirby AC CMG

*CURTIN UNIVERSITY*  
*CENTRE FOR HUMAN RIGHTS EDUCATION*  
*PERTH, WESTERN AUSTRALIA*  
*FRIDAY 26 AUGUST 2016*

*KINSEY, EMPIRICISM AND HOMO/TRANS-PHOBIA\**

The Hon. Michael Kirby AC CMG\*\*

*KINSEY AND HIS LEGACY*

Alfred Kinsey died exactly 60 years ago. He was an important scientist and one of the most influential biologists of the 20<sup>th</sup> century.

Kinsey was born in New Jersey in June 1894. After studies, including at Harvard University, he became Professor of Zoology at Indiana University and the world's leading expert on gall wasps. In the 1930s he turned his research to an investigation of human sexuality. In 1948, he and colleagues produced the first product of their research into the sexual behaviour of the human male.<sup>1</sup> In 1953 they produced their

---

\* Derived from a lecture at Curtin University, Centre for Human Rights Education, "From Alfred Kinsey to Orlando and beyond: The role of research in confronting homophobia", delivered on 26 August 2016 in Perth, Western Australia.

\*\* Justice of the High Court of Australia (1996-2009); Member the Board of the Kinsey Institute, Indiana University, USA; Laureate of the UNESCO Prize for Human Rights Education (1998) and Patron of the Centre for Human Rights and Education of Curtin University (2016).

<sup>1</sup> Kinsey et al, *Sexual Behaviour in the Human Male* (1948) 639: "Males to do not represent two discrete populations, heterosexual and homosexual. The world is not to be divided into sheep and goats... It is fundamental of taxonomy that nature rarely deals with discrete categories. Only the human mind invents categories and tries to force facts into separate pigeon holes. The living world is a continuum in each and every one of its aspects. The sooner we learn this concerning human sexual behaviour, the sooner we will reach a sound understanding of the realities of sex."

report on the human female.<sup>2</sup> These reports showed that human beings were not neatly divided into males and females or homosexual and heterosexual along binary lines. They exhibited a continuum of sexual desires, identities and behaviours.

Kinsey's skill was taxonomy. His methodology was empirical. He and his team conducted thousands of interviews which were anonymised, analysed, reported and classified. The resulting reports created a sensation. They undermined cultural, religious and sometimes intuitive assumptions that people within the sexual minorities were sick, psychologically disturbed or wilfully antisocial, defying the 'order of nature'. On the contrary, Kinsey and his colleagues showed that they were *part* of 'order of nature'.

Kinsey died in August 1956. Of course, his research and methodology were attacked in his lifetime and thereafter. However, later research lends support to Kinsey's overall findings and conclusions. One of the consequences of his reports was the removal of homosexuality from the World Health Organisation's classification of diseases. Another was the initiation of moves for law reform, to abolish criminal offences that existed in many countries targeted at LGBTIQ (Lesbian, Gay, Bisexual, Transgender, Intersex and otherwise Queer persons) in respect of their sexual behaviour. Such crimes applied even where the behaviour was private and confined to consenting adults. Sometimes the law reforms were the outcome of official reports.<sup>3</sup> Sometimes they were the result of

---

<sup>2</sup> Alfred C. Kinsey et al, *Sexual Behaviour in the Human Female* (1953). See also Evelyn Hooker, "The Adjustment of the Overt Male Homosexual", 21 *J. Projective Techniques* 18 (1957). Cf William N. Eskridge and Nan D. Hunter, *Sexuality, Gender and the Law* (Westbury, Foundation Press, NY, 1997) 145-148.

<sup>3</sup> Royal Commission on Homosexual Offences and Prostitution, Command Paper 247, HMSO, 1957 (Wolfenden Report).

parliamentary changes to the law.<sup>4</sup> Sometimes they came about as a consequence of judicial decisions, applying to previous laws broad constitutional guarantees of equality, privacy or non-discrimination.<sup>5</sup> In Australia, the last of the relevant criminal laws (in Tasmania) were repealed in 1997.<sup>6</sup> However, some remnants of the old hostility remains in respect of relationship recognition (same-sex marriage);<sup>7</sup> legal rights of adoption of children; and the application of anti-discrimination laws, particularly in religious settings.

In celebrating the life and work of Alfred Kinsey, I want to explore the reasons that may lie behind the animosity that LGBTIQ people have suffered, in Australia and elsewhere. That animosity did not disappear with the publication of the research of Kinsey, and those that have followed him. On the contrary, despite some progress,<sup>8</sup> shocking violence against LGBTIQ people continues. It is still a serious problem in Australia. However, even more serious instances involving violence have occurred overseas. These include the murder of two LGBTIQ activists in Bangladesh on 25 April 2016<sup>9</sup> and the shooting of 49 young LGBTIQ people, killed at the Pulse gay nightclub in Orlando in the United States on 11 June 2016.

---

<sup>4</sup> *Sexual Offences Act 1967* (UK).

<sup>5</sup> *Lawrence v Texas* 539 US 558 (2003). The US Supreme Court declared that the sodomy law in Texas was unconstitutional, reversing *Bowers v Hardwick* 478 US 186 (1986).

<sup>6</sup> Following *Croome v Tasmania* (1998) 191 CLR 119. And *Human Rights (Sexual Conduct) Act 1994* (Cth).

<sup>7</sup> *The Commonwealth v Australian Capital Territory* (2013) 250 CLR 441; [2013] HCA 55. Cf. *Registrar Births, Deaths and Marriages (NSW) v Norrie* (2014) 250 CLR 490; [2014] HCA 11, a case involving a transgender person.

<sup>8</sup> *Naz Foundation v Union of India* [2009] 4 LRC 829; (2009) DLT 477 (DelHC), reversed by the Supreme Court of India in *Suresh Koushal v Naz Foundation* (2014) 1SCC 1 (SCI). See also *Caleb Orozco v Attorney General of Belize*, unreported, Supreme Court of Belize 15 August 2016.

<sup>9</sup> Two gay activists, Xulhaz Mannan and Rabbi Tonoy, were murdered in Dhaka on 25 April 2016. See *The Economist* 27 April 2016 and *Wall Street Journal* 26 April 2016.

It is therefore appropriate to pause and reflect on the possible reasons for this enduring hostility, discrimination and violence. Changing the law can sometimes help, as an educative tool, in the improvement of social attitudes. However, it does not resolve the underlying causes for the animosity and the instances, large and small, where such causes manifest themselves in violence and discriminatory conduct. What, then, are some of the causes of homophobia and transphobia? These are questions that should engage the Curtin University Centre for Human Rights Education. Specifically, they should be explored by the LGBTIQ Collaborative Research Network of the Centre that I launch today.

#### *SOME CAUSES OF HOMO/TRANS PHOBIA:*

##### *1. Conservative disposition and power*

Imposing labels on people is often unhelpful to achieving harmony in relationships with them and acceptance of diverse opinions and attitudes that promote progress. LGBTIQ people should know this for they have long suffered from verbal abuse, stereotyped labelling and name calling. In saying that some people of a conservative social disposition resist changes affecting LGBTIQ people, I do not mean to insult them or to object to those who defend laws and attitudes that have long appeared to be settled. In some matters, as befits a lawyer, I am myself quite conservative. Defending the rule of law and upholding long-standing features of our Constitution is quite a conservative posture. Yet it is one to which I adhere. However, like most people, I remain open to persuasion that things sometimes need to change.

However, on laws and policies concerning the unequal treatment of LGBTIQ fellow citizens, because of their sexual orientation and gender identity and expression, the minds of a significant number of citizens resist the very idea. They do not see why long-standing arrangements should be altered. Least of all for the provision of benefits to a relatively small minority, whose conduct (and sometimes mere existence) they regard with distaste. If things have been ordered in a certain way for decades or even centuries, they ask, why they should now change? If gays have been frowned upon and discouraged, might that not be for good reason? In the past, most people knew of the existence of gays. But the laws and policies that required them to hide their sexuality, and pretend to be 'normal', amounted to an arrangement that quite a large cohort of citizens thought should be preserved. The control was part of their power in society. They did not want that to change.

This attitude is specially true of many older people who grew up in the age of "Don't ask; don't tell". What was so wrong with that arrangement, its proponents ask? It was basically 'tolerant' i.e. so long as LGBTIQ people pretended to be heterosexual they would be left alone. The problem with the continuation of this attitude is that it is fundamentally dishonest and unscientific. It does not necessarily dispute what science now teaches. But it demands that everyone should continue to pretend that reality is different than it is. Increasing numbers of LGBTIQ people, and their families and allies now regard preservation of the old order, unchanged, as fundamentally irrational. Building attitudes and policies on a principle of personal and social truthfulness is just as important in the case of LGBTIQ people as it was earlier, following Charles Darwin's scientific revelations about evolution of the species, in the place of

instantaneous creationism in the education curriculum. But power does not typically surrender early.<sup>10</sup>

## 2. *Experiential limitations*

It is simpler to maintain laws and policies reflecting prejudice and discrimination if those who support that approach have little or no contact with those who thereby suffer. In a sense, LGBTIQ people, who for centuries went along with the requirement to pretend that their desires and conduct was different from reality, conspired in their own invisibility.

Heterosexual people, who never met LGBTIQ people, could then not be blamed for nurturing attitudes of hostility. After all, they were certainly the large majority of society, whose traditions, laws and arrangements were built around their experiences and needs. If LGBTIQ people maintained silence, they did not confront the majority with the pain and pretence that dissimulation occasioned, especially in relations with family and close friends.

Thus, it was easier in the era of 'White Australia', which prevailed under Australian laws before 1966 when reform began to occur, to hold ignorant, prejudiced and sometimes shockingly uninformed attitudes about racial minorities. This was simply because members of those minorities were not part of the ordinary experience of the majority. White Australia, like apartheid in South Africa, immured the majority of its population in a false belief that the world was comprised overwhelmingly (or totally) of people like themselves. When the reality changes and the

---

<sup>10</sup> See Darwin, *On the Origin of Species* (John Murray, London, 1859).

diversity of society is experienced, opportunities are presented to adjust the thinking of those who might otherwise resist change. When a minority (whether LGBTIQ persons, Jews, Aboriginals or Muslims) became neighbours, work friends, acquaintances, it is much more difficult to maintain hostility. This is how Australia, since 1966, has adjusted reasonably well to the advent of a multi-racial and multi-cultural society. For those who were raised in the prejudice of 'White Australia', the evolution has been remarkable. It is continuing. It is now irreversible.

### *3. Religious beliefs*

There are not many passages in the scriptures shared by the Jewish, Christian and Islamic 'People of the Book' that exhibit specific hostility against LGBTIQ people.

Modern translations of the Bible have sometimes substituted the word "homosexual", in the list of disapproved groups, despite the fact that the word did not come into the English language until the late 19<sup>th</sup> century. The passages of scripture that have been construed to disapprove of consensual, adult homosexual (and like) conduct were written in much earlier times and in societies that had no knowledge of the scientific data gathered by Kinsey and his successors. A number of theologians are now questioning the proper interpretation of the impugned passages.

Particularly is this so in the case of Christian theologians, conscious of the assertion by Jesus that He had brought to the world "a new



Covenant”.<sup>11</sup> There are other passages of scripture that have been interpreted to disapprove of left handedness. A prohibition on racial miscegenation was taught as ordained by scripture, in apartheid South Africa. Some passages of scripture also appear to condone slavery. Certainly many passages appear to uphold a seriously unequal status for women. Not all religious people today are hostile to the reality of the lives of LGBTIQ persons. To the extent that they ‘tolerate’ them, but demand of them a totally celibate sexual life that they could not demand of themselves, they adopt an unreasonable stance and offer reasons for maintaining hostility and violence.

#### 4. *Cultural values*

Some cultures of our world are more accepting of sexual diversity than others. However, the two global cultures that are probably most hostile towards LGBTIQ people are the Anglo/Commonwealth and Islamic/Arabic cultures.

If any country was at any time ruled by Britain, its criminal law imported the traditions the English common law hostile towards LGBTIQ behaviour. Criminal offences, often expressed a ‘sodomy’, a word of Biblical origin, can be found in the criminal codes imposed by rulers of the British crown throughout the world. This was done whatever may have been the preceding state of the law on the topic, if any. In most cases, the indigenous law had previously been silent. However, criminal law is normally confined to anti-social conduct where there are victims complaining against the acts concerned. The sodomy and other like

---

<sup>11</sup> See eg N. Wright (ed) *Five Uneasy Pieces – Essays on Scripture and Sexuality* (ATF Press, Adelaide, 2011). Cf M.D. Kirby, *Sexual Orientation & Gender Identity – A New Province of Law of India* (Tagore Law Lectures), (Universal, New Delhi, 2015) 47 ff.

offences applied to adult conduct and consent was no defence. Such offences carried serious punishments, including originally, the death penalty. Such criminal offences still remain in force in 42 of the 54 members countries of the Commonwealth of Nations.

The United Kingdom and settler dominions of the British crown repealed these offences decades ago. However, neither appeals to the legislature nor invocations of the jurisdiction of the courts under constitutional human rights provisions, have proved fruitful in removing these laws.

A kind of log-jam has set in,<sup>12</sup> sixty years after Kinsey. This is neither just to the people affected nor wise, given the consequences for successful strategies in dealing with the HIV epidemic.<sup>13</sup> In many of the former British colonies today, an excuse that is often given for inaction in the reform of the criminal provisions is that they are not vigorously enforced.<sup>14</sup> In most Islamic countries, the opposite is the case. The offence, if discovered, is strongly enforced. In some such jurisdictions, the death penalty is available, upon conviction, such is the hostility said to be required by religious adherence.<sup>15</sup> So long as the law remains hostile to the adult, consenting, private sexual conduct of LGBTIQ people (whether vigorously enforced or not) attitudes will often take their content from such laws. Securing change by education, media and

---

<sup>12</sup> (2011) *CHRI Newsletter*, Vol. 18(3), 8.

<sup>13</sup> Commonwealth, Report of the Eminent Persons Group to CHOGM, *A Commonwealth of the People – Time for Urgent Reform* (Commonwealth, Perth, October 2011), 98-101; United Nations Development Programme, Global Commission on HIV and the Law, *Risks, Rights & Health* (UNDP, NY, July 2012), Ch 3.1 (“Men Who Have Sex With Men”), 44 ff.

<sup>14</sup> *Lim Meng Suang v Attorney General of Singapore* [2013] 3 SLR 118 (CA). In Tagore Lectures above n. 10, 127-134.

<sup>15</sup> The death penalty is provided in a number of countries including Iran, Mauritania and states of Nigeria. It was recently added to the Criminal Code of Brunei Darussalam.

scientific instruction will face severe hurdles. Hostile laws typically occasion hostile attitudes.

### 5. *Natural law complementarity*

Because of the steadily declining numbers of people who align themselves with a specific religious viewpoint in countries like Australia, attempts are now being made by some whose basic approach is shaped by their religious upbringing and beliefs, to provide a secular explanation as to why they persist with a demand for legal and attitudinal inequality affecting the LGBTIQ fellow citizens. After all, if discrimination is to be justified (and even perhaps some violence) there needs to be a reason. If scriptural texts do not now afford sufficient justification for many people, something more persuasive needs to be advanced. This is where some advocates of legal and attitudinal differentiation reach for natural law explanations to justify the maintenance of the distinctions.

A common argument along these lines is derived from the suggested ‘complementarity’ of male and female sexual organs. Because, as it is said, the male reproductive organ was intended by nature to complement and integrate with the female reproductive organ, sexual activity that is contemplated and permitted by nature must be respectful of that complementarity. Arguments along these lines are sometimes advanced to explain, and justify, the remaining discriminatory provisions in the law.<sup>16</sup>

---

<sup>16</sup> See e.g. J. Santamaria, “The Primacy of the Family and the Subsidiary Role of the State” (2006) 27 *Australian Family*, 12 [“Although the spouses’ complementarity goes beyond mere biology, the biological substratum provides an essential bond between family members. By their marital acts, the couple expresses in a profound and special way their whole married life together: they are truly two-in-one-flesh. When their marital acts bear the fruit of children, these children (literally) issue from the marriage; they are the embodiment and thereby the extension into space and time of the parents’ union”].

The difficulty with this line of argument arises when one goes beyond linguistic analysis into the kind of empirical research into sexual behaviour in humans that Alfred Kinsey undertook. When that is done (or even when much older sex manuals are remembered) it will be realised that sexual conduct, in search of pleasure and sexual fulfilment, does not confine itself to complementary body part interaction. The variety is enormous. This is so in heterosexual people as well as LGBTIQ. Engagement in sexual activity is undertaken, including by heterosexual people, not only for reproduction. It is done for pleasure, physical and mental well-being and affirmation of love and affection.

Moreover, enjoying a healthy sexual life is beneficial to the psyche and emotions of the participants. As long as what they do is carried out in private and with consenting participants who are of an age and competence to agree, it is now generally accepted that enforcement of strictures demanded by the religious or philosophical theories of what outsiders to the activity expect or assume cannot be justified in a liberal democratic society. Thus, in a country like Australia, where the majority of marriages now take place outside traditional church venues and in parks, hotels and vineyards, the demands that they must comply with rules accepted by particular religious or philosophical viewpoints no longer carry the persuasion that once they did.

## 6. *Social imagery*

A further explanation of hostility to LGBTIQ sexuality may arise from the aesthetic sense of some of a different sexuality. Even today, the overwhelmingly approved social indicators of human relationships

revolve around heterosexual experience: dating, hand-holding, engagement, weddings, christening ceremonies, divorce, remarriage and so forth. Such imagery is found in every shape and form in popular media, whether print, movies, television digital in and women's or men's magazines. This imagery not only portrays a substantially exclusive pathway to human happiness. It also raises expectations amongst families, particularly parents and grandparents, that deny different pathways. Whilst this may be understandable, on a personal level, it should not be a reason for oppression of those for whom the usual pathways are not congenial or possible.

To demand that LGBTIQ people should get married in order to fulfil the expectations of their parents or others is a ritual that still occurs, although less commonly in Australia today than in earlier generations. For many, including some LGBTIQ people themselves, the imagery of same-sex relationships is awkward and uncomfortable, simply because it is unusual and still relatively uncommon. Changing the imagery, and supplementing it with new aesthetics is beginning to occur; but slowly.

The *New York Times* has long carried articles on recent weddings and engagements. Now that these life events can legally extend to LGBTIQ couples, their stories are also beginning to be told. Exploring such stories in popular culture is not only appropriate to the variety of actual human experience. Carrying some such stories in print media, television and soap operas can contribute to community understanding and acceptance of the reality of diversity. The popular Australian television series of the 1970s, *Number 96*, portrayed the leading character as gay and congenial. The sympathetic and factual elements of his life played an important role in promoting acceptance of sexual diversity in a large

popular audience. In the same way, television soap operas have been used in Latin America to illustrate the challenges of the daily lives of LGBTIQ citizens and also those living with HIV, in a way much more effective than didactic coverage would do. Portrayals of transgender lives as they are experienced are much less common. Yet, despite this, the number of young people identifying as transgender in identity or experience appears to be increasing. When people meet those involved, the unthreatening character of the minority is appreciated.

### *7. Superiority instincts*

In seeking to explain why there was such hostility towards LGBTIQ people, particularly throughout Africa, Bishop Desmond Tutu once declared that: 'Everybody must have someone to look down on.' If, as is now generally accepted, people do not choose and cannot change their sexual orientation or gender identity, it can be easy for the majority who identify as heterosexual to feel satisfied and superior in a posture that condemns others whose feelings and conduct are different. If one is heterosexual without choosing or working on it, it may be easy to believe that everyone should feel and behave in the same way. However, to demand of others what one would never demand of oneself is self-evidently unreasonable and even irrational.

Homosexuals should no more be obliged to feel sexual attraction to a person of the opposite sex than it would be reasonable to demand of a heterosexual person that they feel sexually aroused by the person of the same sex. It just will not happen. The moral principle at stake is an application of the Golden Rule. These are deep wired feelings of the individual insusceptible to orders or demands. The earlier attempts of

conversion therapy have now been abandoned as unscientific, unsuccessful and oppressive. Yet such attempts were not uncommon in earlier decades. Even radical brain surgery (lobotomy) was advocated to rid LGBTIQ people from their 'objective inclination to evil'.<sup>17</sup> In a number of jurisdictions, the practice of conversion therapy has now been pronounced unlawful.

One advantage of the empirical research of Alfred Kinsey was that it demonstrated the likely futility of attempting to stamp out the range of diverse sexual orientations and gender identities that exist in the world. If they exist, they constitute part of the natural order. Attempts to eliminate or render invisible that natural order are as impermissible in the case of sexual orientation and gender identity as they are in the cases of gender, race, indigenous ethnicity and inherited physical and mental characteristics or disabilities.

## 8. *Revulsion feelings*

Connected with some of the foregoing considerations, particularly built upon the common imagery of heterosexuality in society, is a feeling of revulsion that some people have for what appears to them to be 'perverse' sexualities. In some cases those who are displaying diversity may do so with exaggeration in order to be sure that they achieve an impact by their display. Cabaret artists, 'drag queens', 'muscle Mary's' and other exaggerated portrayals of LGBTIQ stereotypes often allow LGBTIQ people themselves to laugh at the stereotypes or to cry over shared indignities. Holding up a mirror to nature and seeking to convey a message is a traditional role of theatre, literature and media generally.

---

<sup>17</sup> The language of the catechism of the Roman Catholic Church.

On the other hand, what is displayed is often quite distant from the reality of the lives of most LGBTIQ people.

When I was a child, a neighbouring family, living in our street, had a daughter with Down syndrome. Her appearance produced mixed feelings of mortification and sympathy for the parents of the child and occasional hostility to the child, simply because she looked and behaved differently from other children of the same age. The feeling of sympathy for the parents of gay children was part of the horror story that frightened LGBTIQ children and their parents such. Fear of such condescension can lead those affected into hiding or disguising their reality. Pity and sympathy are not attitudes one wishes to inflict on loved ones, at least for simply being one's self.

People of heterosexual orientation can be reassured that most LGBTIQ fellow citizens live lives as quiet, orderly and (for the most part) boring as their own. The vulgar, cacophonous appearances of 'drag queens' in sequins are not typical of the daily lives of most transgender people, still less others in the LGBTIQ minority. To some extent, the exaggerated imagery survives for a purpose. The use of words like 'gay' and 'queer' have come into the English language in order to disempower their use to insult LGBTIQ people. By taking control of stereotypes and the language and imagery of hostility, the objective has been to defang the cruelty and to leave those who delight in it without the same weapons of verbal and visual oppression.



## 9. *Understanding individual experiences*

Of course, in particular cases, individuals can experience unwanted intrusions into their privacy and sexual integrity, including by LGBTIQ perpetrators. It is no more acceptable for an LGBTIQ person to seek to force his or her sexuality on someone whose sexuality is different than for the reverse to occur. After polite rebuffs, it is expected in a civilised society that the intruder will retreat, out of deference to the space and integrity of the other. Questions can arise as to the extent of a tolerable intrusion before it becomes offensive and even criminal.

In a case that came before the High Court of Australia during my service, the issue was presented as to whether a non-violent sexual advance by a gay friend of the accused could, in law, amount to conduct that justified the killing of the individual as a legal provocation.<sup>18</sup> A majority of the Court concluded that the question was one apt to be determined by a jury. However, on the suggestion that a non-threatening sexual advance or sexual overture amounted, in law, to provocation causing the accused to lose self-control, and to inflict ten fatal stab wounds in the deceased's chest in the shape of a butterfly, I said,

“If every woman who was a subject of a ‘gentle’, ‘non-aggressive’ although persistent sexual advance, in a comparable situation to that described in the evidence in this case could respond with brutal violence arising to an intention to kill or inflict grievous bodily harm on the male importuning her, and then claim provocation after a homicide, the law of provocation would be sorely tested and

---

<sup>18</sup> *Green v The Queen* (1997) 191 CLR 334.

undesirably extended ... Any unwanted sexual advance, heterosexual or homosexual, can be offensive. It may intrude on sexual integrity in an objectionable way. But this court should not send the message that, in Australia today, such conduct is objectively capable of being found by a jury to be sufficient to provoke the intent to kill or inflict grievous bodily harm. Such a message unacceptably condones serious violence by people who take the law into their own hands.”<sup>19</sup>

After this majority decision was announced, law reform reports recommended abolition or alteration of the law of provocation in Australia. Reforms have been adopted in most States and Territories (and in many jurisdictions overseas) to amend the law of provocation so as to reduce the ambit of the so-called ‘gay panic’ defence.<sup>20</sup> Obviously, society needs to draw a line that marks its disapproval of unconsensual sexual intrusions. However, the line needs to be drawn well clear of the response of homicide if it is to operate in a way consonant with proper enforcement of the criminal law; not self-help.

#### 10. *Unresolved of personal conflicts*

Finally, there is a feature that accords with the experience of many members of the LGBTIQ minorities and doubtless others. This is that most heterosexual people are not specially homophobic or transphobic. They may not fully understand variation of people’s feelings and behaviour. They know enough of the importance of sexuality to their

---

<sup>19</sup> (1997) 191 CLR 334 at 415-416. Cf at 387 per Gummow J (dissenting). Contrast Brennan CJ at 345-6, Toohey J at 357 and McHugh J at 371.

<sup>20</sup> Kent Blore, “The Homosexual Advance Defence and the Campaign to Abolish it in Queensland – The Activists Dilemma and the Politician’s Paradox” (2012) 12 *Queensland University of Technology Journal*, 489

own lives to realise that demands for life-long celibacy or denial of sexual orientation and gender identity are doomed to fail. Accordingly, a more realistic policy must be adopted. It needs to be reflected both within the law and in social practice. It is this turn around in social awareness that has brought about major changes in attitudes towards sexual minorities in countries like Australia.

The biggest change that has occurred has been in relation to gay and lesbian people, possibly because they have been more visible and assertive in explaining their experiences and demonstrating how, overwhelmingly, their lives are similar to the heterosexual majority. There is less well understanding about bisexuals, transgender and intersex persons because there is less knowledge about them. Hostility towards such persons is still significant because these minorities are more invisible and less understood. Only these considerations could probably explain the harsh provisions of current laws required of transgender people who wish to change their passport or identity papers that they first undergo surgical reconstruction of their sexual organs.<sup>21</sup> This is extremely radical and sometimes risky surgery. However, for some, it is strongly desired. For others it imposes a seriously disproportionate legal requirement. I applaud the special attention that is given to transgender issues in the work of the Curtin Centre and in the new Collaborative Research Network by Associate Professor Sam Winter and his colleagues. This is a field in which more empirical research is essential to turn around the fears and hostility towards a most vulnerable and tiny minority.

---

<sup>21</sup> *AB v Western Australia* (2011) 244 CLR 390; [2011] HCA 42 (human rights construction of legislation on transgender persons) and *Registrar of Births, Deaths and Marriages (NSW) v Norrie* (2014) 250 CLR 490; [2014] HCA 11, with reference to *Births, Deaths and Marriages Registration Act 1995* (NSW), s32 DA (permitting registration as “non-specific” sex).

Deep in the minds of some people who feel hostility and a right to discriminate against those who are LGBTIQ is sometimes an unresolved conflict about their own existence. Perhaps the conflict is one that they have not been able to express to their family or those close to them. Or even possibly to acknowledge to themselves because of the stress and denial occasioned by that step of owning up to their own feelings and desires.

The official inquiry into the shooting of 49 young LGBTIQ people at the Pulse gay nightclub in Orlando on 11 June 2016 has not yet concluded. Why Omar Mir Seddiq Mateen, a 29 year old United States citizen, born in New York of Afghan parents, would act in such cruel and brutal way towards strangers is not yet fully known. Indeed, it may never be known.<sup>22</sup>

However, several indications exist that suggest that Mateen had visited the club previously, used gay websites; and engaged in gay sex. Something fundamental caused him to commit the deadliest event involving a single shooter in the history of the United States and the worst terrorist event in that history (if that is what it was) apart from the attack on 11 September 2001.

Either way, the killings showed where phobias targeted on sexual minorities can sometimes lead. They cannot, of their nature, be brushed aside. They cannot be excused as just another outcome of a religious faith. They cannot be minimised as an incident of general violence or

---

<sup>22</sup> *The Washington Post* 13 June 2016 (“Gunman who killed 49 in Orlando nightclub had pledged allegiance to ISIS”).

the oversupply of hand guns. The violence was specific to the LGBTIQ minority. It is necessary to build defences against such violence. That means doing so in the entire community, including in schools, colleges and universities, by print, film, digital and other media.

### *DEFENCES IN THE MINDS OF HUMAN BEINGS*

So this is where work of the Centre for Human Rights Education at Curtin University is directly relevant. It is where the research of the Collaborative Research Network is vital. Identifying causes of the hostility that sometimes lead to violence and often to discrimination and disadvantage, should be a purpose and a priority of the Centre and the Network.

I have offered ten possible explanations for the hatred, violence and discrimination that continue to exist towards the LGBTIQ minority. However, my list is not comprehensive; neither is it exhaustive. It is based on my own experience and my exposure (mostly verbal and behavioural) to violence and discrimination over a long life.

The lesson that Alfred Kinsey left for us is that analysis of this kind is useful; but it is not sufficient. Theories and postulates are helpful. But they must be grounded in experience and measured against scientific research. That research must involve social and behavioural scientists as well as biological scientists. Kinsey helped to bring the physical and social sciences together.

It would be useful if the Curtin Centre and Network were to undertake interviews, using the most up to date contemporary techniques of

sampling, to ascertain the reasons for the violence and discrimination that continue to exist in society, targeted against LGBTIQ persons. Conducting such research would have its own intellectual merits and justification. However, it would also have a practical dimension. Only if we can understand the precise reasons for the deep seated, long lasting and still enduring attitudes of violence and discrimination, will it be possible to design effectively the responses that are necessary to overcome and eliminate such endemic features of human society. And to build the defences of human rights in the minds of human beings everywhere.

The hopes that Dr Kinsey's research would quickly expel homophobia and transphobia from human society have not been realised in the past 70 years. Nor have the reforms of the law, the repeal of discriminatory legal provisions and the introduction of media and educative repair of the ignorant beliefs of the past been accomplished. Progress has been made. Further progress is likely to come from further research. That research will take place in institutions divided by great distances but united by common goals: the Curtin Centre and Network in Perth, Western Australia and the Kinsey Institute in Bloomington, Indiana in the United States.

The further research should, as Kinsey taught us, be based on the scientific method. On a neutral examination of empirical data, pursuing it wherever it may lead. On transparency and full publication of its outcomes. On vigorous analysis of the findings. And on publicity and engagement with society, including by those who still harbour feelings of distaste, animosity and discrimination.

The work of Alfred Kinsey shows that taxonomy and empiricism can contribute to change and improvements in beliefs and attitudes. The challenge of Kinsey remains before us. Future generations will embrace the challenge. They will advance the enlightenment.