Pride in Law 5th Annual Address - 5 November 2021

Some thoughts on love, work and the future

I propose to reflect on some changes in the law. The most visible are to marriage laws. I will also consider employment law. I want to explore the sources and meanings of these changes. I will use the leading decisions of the Supreme Court of the United States as a point of reference.

Finally, I want to go beyond the law, to consider the future.

Let's begin with marriage.

In June 2015, in the landmark case *Obergefell v Hodges*, Chief Justice John Roberts of the US Supreme Court addressed the question "what constitutes marriage?" Writing in dissent, his Honour would not "sweep away what has so long been settled" without showing great respect for all that preceded us.

The Chief Justice proceeded on the assumption that marriage had come to us largely intact from antiquity and in nature as described by Lord Penzance in 1866 – "the voluntary union for life of one man and one woman, to the exclusion of all others".

We know that is not so.

Such social arrangements were not universal even in classical times. It was not until 342 AD that same sex marriages were prohibited under Roman Law.

The history of marriage is one of continuity and of change. As our High Court explained in 2013:

> The status of marriage, the social institution which that status reflects, and the rights and obligations which attach to that status never have been, and are not now, immutable.

According to Edmund Burke change is "the most powerful law of nature, and the means perhaps of its conservation"; history or tradition, "mellow" by this means, and "over time, by slow reform in response to circumstantial exigencies, do societies develop more mature forms".

Michael Oakeshott noted the paradox:

> The idea of change is a holding together of two apparently opposed but in fact complementary ideas: that of alteration and that of sameness; that of difference and that of identity.

In a North American context, marriage, central to the kinship systems of the many First Nations communities could be monogamous or polygamous. It could also be between persons of the same sex.

Well into the 19th century, it was common in parts of North America for men of means to take multiple wives. Parliamentary statutes criminalising bigamy were not enacted and enforced in the US until 1882 and in Canada until 1890.

During the second half of the 19th century, men and women increasingly asserted a right to choose their life partners. Married women obtained the right to own property. From 1857, a judicial decree dissolving a marriage became available.

The 20th century brought further changes. Male headship, thought to be ordained by nature and sanctioned by scripture, made way for more equal married relationships. A husband's right of consortium was abolished and immunity from prosecution for rape of a wife was found no longer to be part of the common law. In Australia, the age at which a woman could be legally bound by a marriage, without court permission, was raised from 12 to 18; and for a man raised from 14 to 18.

These changes strengthened, rather than weakened, the institution of marriage.

Despite them, even thirty years ago, sociologists, and demographers were noting the decline in marriage rates; the increase in divorce, family break-down, single parenting and the number of children requiring state care and protection. Things were looking grimmer by the decade for the traditional institutions of marriage and the family.

Towards the end of that period, Andrew Sullivan wrote this in his now famous essay:

> Society has good reason to extend legal advantages to heterosexuals who choose the formal sanction of marriage over simply living together. They make a deeper commitment to one another and to society; in exchange, society extends certain benefits to them. Marriage provides an anchor, if an arbitrary and weak one, in the chaos of sex and relationships to which we are all prone. It provides a mechanism for emotional stability, economic security, and the healthy rearing of the next generation. We rig the law in its favor not because we disparage all forms of relationship other than the nuclear family, but because we recognize that not to promote marriage would be to ask too much of human virtue.

Sullivan went on to argue that expanding civil marriage to include those between two people of the same sex would offer "general social approval and specific legal advantages in exchange for a deeper and harder-to-extract-yourself from commitment to another human being." Specifically, Sullivan argued:

> ... it would foster social cohesion, emotional security, and economic prudence. ... its introduction would not be some sort of radical break with social custom. … A law institutionalizing gay marriage would merely reinforce a healthy social trend.

In 1989, when Sullivan wrote those words, "gay marriage" seemed ridiculous, even laughable. Sullivan noted the irony that it "should have the appearance of being so radical", given the "essentially conservative social goals" of gay marriage. His preferred descriptors were: "practical", "humane", and "conservative in the best sense of the word".

In his essay Sullivan asked:

> Given the fact that we already allow legal gay relationships, what possible social goal is advanced by framing the law to encourage these relationships to be unfaithful, undeveloped, and insecure?

Triggered by this powerful question, and against all prior indications, the debate about gay marriage made marriage a topic of conversation and increasingly a desired goal and a respected social practice across much of the World.

Writing of those who argued for a Constitutional right to marry a partner of the same sex, Justice Anthony Kennedy explained in *Obergefell*:

> It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfilment for themselves.

In Australia, the laws relating to marriage are in the power of the Commonwealth Parliament, not the courts. In 2017, our federal government made them the subject of a national survey, in which every voter could express a view.

The public debate showed it to be broadly agreed that the question, *"what is marriage?"* should be answered in a civic context, not a personal one.

Many years ago, the argument was that same-sex relationships should be discouraged for character reasons; that they had an inward quality, with partners lacking the courage to tangle with the challenge of a person of the other sex. As the sexual segregation of our communities has dissolved, we have acquired a sounder understanding of our fellow human beings.

We have been, to use T S Elliot's phrase, "formulated" by experts, "pinned and wriggling on the wall." After something approaching sixty years of increasingly attentive consideration, in all the ways that matter, those of us who are homosexual have proved to be remarkably like those of us who are heterosexual.

It is now clear that one's ability, suitability, or reliability – as a soldier, police officer, banker, carpenter, doctor, farmer, lawyer, swimmer, footballer, tennis player, child, or parent – does not turn on sexual orientation or gender identity. The most important moral virtues (courage, loyalty, honour, ambition, temperance, compassion, and generosity) are similarly dispersed. I think, it is heartening to know we human beings have so much in common.

As Arthur Koestler said of *Kepler's Laws*, some of the greatest discoveries are "mainly the clearing away of psychological roadblocks which obstruct the approach to reality; which is why, *post factum,* they appear so obvious."

The social change might seem recent and speedy. It is neither. It started with writers who invited us to look more closely at parts of society we had previously ignored, and even to re-imagine our society. It grew as film and television writers and producers did the same. In Christine Smallwood's phrase, "art has the power to make the unseen visible, to put form to experience, and to bring something new into the world."

In 1972, in a David Sale script, Joe Hasham, playing solicitor Don Finlayson on *Number 96,* explained to Abigail, playing Bev Houghton, that he was a "hom-o-sexual". Bev reacted with horror and disgust. But Don continued to be a character, eventually settling into happy domestic relations with Dudley Butterfield, played by Chard Hayward. In 1973, David Sale wrote a role for a transgender character played by

Sydney cabaret performer Carlotta. These things were intended to shock and attract attention. But they opened a window, if not a door.

In addition to soap operas like *Number 96*, crime dramas *Homicide, Division 4*, and *Cop Shop* featured lesbian, gay and bisexual characters. By the 1980's and 1990's, characters in *A Country Practice, Sons and Daughters, Blue Heelers, Home and Away, Neighbours,* and *Sea Change* had diverse sexualities.

But, things were not much advanced on the marriage front. In 1994, five years after Andrew Sullivan's essay, *Four Weddings and a Funeral* became the highest grossing British film ever. No one was surprised that the relevant ceremony for the only gay couple was the Funeral, not any of the weddings.

What changed?

We responded to these provocations, testing them by personal experience. This emboldened some to identify with the stories being told. Others to empathise. In a virtuous circle, empathy induced more open identification and *vice versa*. Before long, it became clear that in every country, in every town, in every workplace, in every school, in every family, were fellow human beings whose existence had been ignored. They were our family, our friends, our colleagues. We could no longer pretend they did not exist.

Political leaders could adopt or oppose this social response. But they did not initiate it. The power to transform originated in the realm of arts and culture. Like Cordelia accepting Lear's invitation, in singing, in living, in praying and in telling tales we have taken upon us a little more of the mystery of things. From there came the challenge to imagine a different, more inclusive world.

All but anarchists, instinctively acknowledge: the social importance of preferring long-term fulfilment to transitory pleasure; the significance of a public, ceremonial commitment to another person; and the voluntary acceptance of loyalties that bind for life. There is a critical distinction between two people in love, who respond to intentional desire with mutual promises, and two who see each other, as if through a pornographer's lens, as mere objects to be discarded after use.

There is no longer any respectable challenge to the "goodness" of marriage or to its ideal as a permanent commitment founded in mutual love and respect. The recovery of a traditional sense of the nature and importance of marriage is one of the most surprising and pleasing aspects of the public debate about same sex marriage. This is due, in no small part, to Andrew Sullivan, a gay, conservative Catholic. As Ross Douthat wrote:

> No intellectual that I can think of, writing on a fraught and controversial topic, has seen their once-crankish, outlandish-seeming idea become the conventional wisdom so quickly, and be instantiated so rapidly in law and custom.

The broadening of marriage availability in Australia boosted the total number of marriages by 6,539 in 2018 and 5,507 in 2019, making up 5.5% and 4.8% of all marriages in those years. The annual number of marriages has been rising since a low

in 2011 and the number and rate of divorces has been falling, so there are fewer now than at any time in the last 20 years.

Adding to the small battalions of the married in our communities gains surer allies against the dissolute and the barbarians, whether at the gate or in our midst.

The change in our marriage laws has not prompted social division or discontent. According to the latest Pew Research Centre survey (2019) 82% of Australians say homosexuality should be accepted by society and 14% say it should not.

As Andrew Sullivan foretold, these things have the potential to brighten lives, build commitment, encourage responsibility, fortify families and strengthen our society.

In the Netherlands, where marriage laws changed in 2001, it has "significantly ameliorated [the] mental health status [of sexual minorities]. Both depression and anxiety of sexual minorities declined and converged to those of heterosexual individuals." For anxiety, the gap was reduced by 87% within 12 months of the change to marriage laws. For depression, it reduced by 50%. These dramatic improvements were accompanied by a general reduction in depression and anxiety for different sex couples.

It is impossible to understate the significance of these outcomes. I hope similar improvements have and will continue to occur in Australia; and will flow on to reduce other social concerns, including intimate partner violence.

Could I move from marriage to employment?

In 2020, four years after *Obergefell* and three years after Australia's marriage laws changed, the US Supreme Court decided *Bostock v Clayton County, Georgia*.

Clayton County employed Gerald Bostock as a child welfare advocate in the juvenile court system for ten years. It dismissed him for conduct "unbecoming" a county employee shortly after he joined a gay softball league. Altitude Express fired skydiving instructor Donald Zarda days after he mentioned being gay. And Harris Funeral Homes fired Aimee Stephens six years into her employment when she informed her employer that, on return from an upcoming vacation, she planned to "live and work full-time as a woman." Aimee had presented as a male when she was hired.

These three decisions were challenged under Title VII of the *1964 Civil Rights Act*, which made it:

> unlawful . . . for an employer to … discharge any individual, or otherwise to discriminate against any individual with respect to … employment, because of such individual's race, color, religion, sex, or national origin.

Writing for the Court, Justice Neil Gorsuch observed that the statute's message for these three cases was simple and momentous:

> An individual's homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. Consider, for example,

> an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. … Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision.

Chief Justice Roberts joined in Justice Gorsuch's opinion, as did Associate Justices Ginsburg, Breyer, Sotomayor and Kagan.

His Honour's cool logic resonates with the approach of Justice Sandra Day O'Connor in a separate opinion in another landmark case, *Lawrence v Texas*, back in June 2003. In that decision, the Court struck down a Texas law, and similar laws in 13 other States, making private sexual conduct between two men a crime.

In a separate opinion, Justice O'Connor wrote she would strike down the law as violating the equal protection clause of the 14th amendment. That clause prohibits a State from denying to any person within its jurisdiction the equal protection of the laws. It strikes down laws that provide for irrational or unnecessary discrimination against people belonging to various groups. In an earlier decision quoted with approval by Justice O'Connor, the equal protection clause was described as "essentially a direction that all persons similarly situated should be treated alike". As Justice O'Connor observed:

> Texas treats the same conduct differently based solely on the participants. Those harmed by this law are people who have a same-sex sexual orientation and thus are more likely to engage in behavior prohibited by [the statute]. The Texas statute makes homosexuals unequal in the eyes of the law by making particular conduct — and only that conduct — subject to criminal sanction.

In this 2003 opinion, Justice O'Connor observed that a law limiting marriage to heterosexual couples would not pass the rational scrutiny required by the equal protection clause if it was based on "mere moral disapproval of an excluded group." There appears to be a direct line from her Honour's careful, conservative analysis of facts and law to the reasons of Justice Gorsuch in *Bostock*. Respectfully, there is evident good sense in each.

Now a few words about the future.

Research tells us that young adults from LGBTIQ+ backgrounds are from 5 to 11 times more likely to attempt self-harm or experience psychological distress from stigma, prejudice, discrimination, bullying or abuse. In 2017, Mitchell Institute research

showed low self-esteem, family disruption and severe peer victimisation are critical impediments for young people to complete their education.

As you know, an education can significantly change life for the better. It enriches us, empowers us, and enlarges our options. The expectations of others are the most important factor in educational and professional outcomes. When others expect us to perform well, we do better. When little is expected, our outcomes are poorer overall.

With this in mind, I joined with a motley crew of Benjamin Law, Bob Brown, Daniel Kowalski and a few more sensible characters, Georgie Stone, Jessica Strutt, Libby O'Donovan, Narelda Jacobs and Ro Allen, as an ambassador for the Pinnacle Foundation.

Pinnacle provides a combination of educational scholarships and mentoring for young LBGTIQ+ Australians aged between 18 and 26.

The genius of the Pinnacle program is the combination of multi-year scholarship awards with carefully matched mentors as a support and role model for each scholar. Every Pinnacle scholar is matched with a mentor.

As Michael Kirby has pointed out, Pinnacle builds confidence in each scholar, and restores their trust in the essential goodness of the society in which they live. 89% of Pinnacle scholars achieve their academic goals; 93% feel more valued as a person, 95% say it improved their confidence and they feel academically supported.

Relying solely on donations and the work of volunteers, the Pinnacle Foundation demonstrates how as a community we can care about each other and help others to realise their full potential, uphold their dignity, overcome challenges that can arise from their identity, become self-reliant, and be able to contribute to a world with more empathy and more hope.

Since 2010, Pinnacle has supported more than 180 scholars, 25 of them in Law. The need and the demand have been particularly strong in Queensland. In 2021, 51 scholarships were awarded across Australia; on my count about 20 to scholars connected to this State.

Finally, an anecdote.

Soon after my appointment to this court, Matthew and I were invited to lunch at Gray's Inn in London. Our host was the Treasurer of the Inn. The other guests were members of the High Court of England and Wales. Amongst them was the then Master of Rolls, Sir Terrence Etherton.

In 2001, Sir Terrence had become the first openly gay senior judge in the United Kingdom. In December 2014, he married Andrew Stone at West London Synagogue, where he was senior warden. Most of his colleagues in the Chancery Division attended the wedding ceremony. He regarded it, he said, as an unexpected kindness.

In 2016, he became Master of the Rolls. In November that year, Sir Terrence featured on the front page of the UK *Daily Mail* as one of the three "ENEMIES OF THE PEOPLE". In a joint decision, the court had ruled that parliamentary consent was required for the United Kingdom to withdraw from the European Union.

In the *Daily Mail* article, Sir Terrence was not described as the second highest ranked civil judge in the country. Instead, he was an "openly-gay ex-Olympic fencer".

I suppose it is surprising the tabloid editor did not call his Lordship a "gay swordsman". Neither his sexual preference nor his sporting background was relevant to him joining with two senior colleagues in the decision. This tells us that, even in countries ahead of us in legal changes, work remains to be done.

One cannot legislate courtesy. The legal enforcement of good manners may be the surest path to their demise. In a way, the resounding "Yes" vote in the Australian equal marriage survey, sent the message that a little less of telling people what they *cannot* do is in order. It showed the goal of social stability can be achieved without greater State control over individual lives. It was a reminder of the distinction between society and the state and the need to respect the primacy of the former.

Perhaps, it also showed that, as for General Kutuzov in *War and Peace*, "patience and time" are our warriors, our champions; and, in time, even the greenest looking of apples "will fall of itself when ripe".

In the long lens of history, Australians have been keen to be thought friendly and open. We should aspire to that reputation. It requires us to respect individuals, tolerate differences, to admit failures and offences, observe nuance, embrace complexity, and to seek comity. We should conduct ourselves with charity; listen with polite attention; correct opponents gently; and, as St Paul advised Timothy, avoid foolish and stupid arguments that are only productive of quarrels.

In such a future, there is reason to be confident that careful consideration and cool logic will likely produce a just result.

Justice Thomas Bradley, 5 November 2021