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KINSEY, EMPIRICISM, AND HOMO/TRANSPHOBIA*

THE HON MICHAEL KIRBY AC CMG**

The struggle of the LGBTIQ community is well documented. In the not so distant past, spurred by prejudice and misinformation, LGBTIQ people were labelled mentally ill and faced criminal prosecution for their identities. Despite the gradual progression of understanding and empathy of the past century, members of the community still face daily hostility and discrimination rising from the remnants of that bygone era. In the spirit of great scientists such as Alfred Kinsey, who promoted understanding through evidence based conclusions, this article seeks to identify several basic reasons behind the hostility and apathy towards the LGBTIQ community in Australia and overseas.

*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. The author acknowledges, and has taken into account, comments from anonymous reviewers. The author would also like to acknowledge the assistance of Myles Bayliss in preparing the manuscript for publication.

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I 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 20th century. The impact of his work is ongoing, helping us to understand and correct the basic causes of hostility to minority sexual orientation and gender diversity and experience, which it is the purpose of this article to identify and analyse.

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 report on their research into the sexual behaviour in the human male.¹ In 1953 they produced their report on

¹ Kinsey et al, *Sexual Behaviour in the Human Male* (Indiana University Press, 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

sexual behaviour in the human female.² 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, behaviours, and identities.

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 found 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 have been 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.³ 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 or Questioning persons') in respect of their sexual behaviour and identity. Such crimes applied even where the behaviour was conducted in private and confined to consenting adults. Sometimes the law reforms were the outcome of official reports.⁴ Sometimes they were the result of parliamentary changes to the law.⁵ Sometimes they came about as a consequence of judicial decisions, applying to previous laws broad constitutional guarantees of equality, privacy, or non-discrimination.⁶ In Australia, the last of the relevant criminal laws (in Tasmania) was

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.'

² Alfred C Kinsey et al, *Sexual Behaviour in the Human Female* (Indiana University Press, 1953); see also Evelyn Hooker, 'The Adjustment of the Overt Male Homosexual' (1957) 21 *Journal of Projective Techniques* 18; Cf William N Eskridge and Nan D Hunter, *Sexuality, Gender and the Law* (Westbury, Foundation Press, 1997) 145.

³ Jack Drescher, 'Queer Diagnoses: Parallels and Contrasts in the History of Homosexuality, Gender Variance, and the Diagnostic and Statistical Manual' (2010) 39(2) *Archives of Sexual Behaviour* 427.

⁴ Such as the Committee on Homosexual Offences and Prostitution, *United Kingdom Royal Commission on Homosexual Offences and Prostitution*, Cmd 247 (1957).

⁵ Such as *Sexual Offences Act 1967* (UK).

⁶ Such as *Lawrence v Texas* 539 U.S. 558 (2003). The US Supreme Court declared that the sodomy law in Texas was unconstitutional, reversing *Bowers v Hardwick* 478 U.S. 186 (1986).

repealed in 1997.⁷ However, some remnants of the old hostility remain in respect to relationship recognition (same-sex marriage);⁸ legal rights of adoption of children;⁹ and the application of anti-discrimination laws, particularly in religious settings.¹⁰

In celebrating the life and work of Alfred Kinsey, I want to explore the reasons that may lie behind the animosity that the LGBTIQ people have suffered, in Australia and worldwide. That animosity did not disappear with the publication of the research of Kinsey, and those who have followed him. On the contrary, despite some progress,¹¹ shocking violence against LGBTIQ people continues. It is still a serious problem in Australia. However, even more serious instances involving violence have occurred elsewhere. These include the murder of two LGBTIQ activists in Bangladesh on 25 April 2016,¹² and the shooting of 49 young LGBTIQ people, killed at the Pulse gay nightclub in Orlando in the United States on 11 June 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

⁷ Following *Croome v Tasmania* (1998) 191 CLR 119. And *Human Rights (Sexual Conduct) Act 1994* (Cth).

⁸ *The Commonwealth v Australian Capital Territory* (2013) 250 CLR 441. See also *New South Wales Registrar of Births, Deaths and Marriages v Norrie* (2014) 250 CLR 490, a case involving a transgender person.

⁹ At the time of publication, joint adoption by same-sex couples was already possible in New South Wales, Tasmania, Victoria, the ACT and Western Australia with reform likely in Queensland, South Australia, and the Northern Territory. However if these jurisdictions do not reform their laws, federal marriage equality would not necessarily allow same-sex couples in those jurisdictions to adopt as their legislation is expressed in gender-specific terms. In the *Adoption Act 2009* (Qld) an applicant for adoption must have a spouse who 'is not the same gender as the [applicant]', see ss 76(1)(g)(ii); 89(7)(b)(v)(A); 92(1)(h)). The *Adoption Act 1988* (SA) s12(1) requires applicants to have cohabitated together in a 'marriage relationship' for at least five years. 'Marriage relationship' is defined as a 'relationship between two persons cohabiting as husband and wife or de facto husband and wife' and the *Adoption of Children Act 1994* (NT) s13(1)(a) restricts adoption to where 'the man and woman are married to each other and have been so married for no less than 2 years'.

¹⁰ This refers to the exemption of religious groups from anti-discrimination laws present in most (if not all) Australian anti-discrimination legislation. For example, s37 of the *Sex Discrimination Act 1984* (Cth) exempts an act or practice of a body established for religious purposes that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion. For further reading see David Kinley *Human Rights in Australian Law* (Federation Press, 1998).

¹¹ For example, *Naz Foundation v Union of India* (2009) 160 Delhi Law Times 277, 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.

¹² Two gay activists, Xulhaz Mannan and Rabbi Tonoy, were murdered in Dhaka on 25 April 2016. See 'Campaign of terror against Bangladesh's liberal voices', *The Economist* (online), 27 April 2016, <<http://www.economist.com/news/asia/21697811-recent-murders-have-cut-quick-countrys-civil-society-campaign-terror-against>> and Syed Zain al-Mahmod 'Extremist Group Claims Responsibility for Killing Bangladeshi Gay-Rights Activists' *The Wall Street Journal* (online) 26 April 2016 <<http://www.wsj.com/articles/extremist-group-claims-responsibility-for-killing-bangladeshi-gay-rights-activists-1461685288>>.

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 Australia's universities and research institutions.

II SOME CAUSES OF HOMO/TRANSPHOBIA

A Conservative Disposition and Power

Imposing labels on people is often unhelpful to achieving harmony in relationships with them and the embrace of diverse opinions and attitudes that promote progress. LGBTIQ people generally 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 disrespect those who defend laws and attitudes that have long appeared to be settled. As befits a lawyer, in some matters, I am myself quite conservative. Defending the rule of law and upholding long-standing features of our Constitution and law 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 benefit of 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 especially 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 basically be left alone. The problem with the continuation of this attitude is that it is fundamentally dishonest and essentially 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 unacceptable to their sense of honesty and self-worth. 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 acceptance of creationism in the education curriculum. But power does not typically surrender easily.¹³

B 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 suffer in consequences. 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. They did so to avoid hostility, violence, contempt, bringing shame to their families, career and social disadvantage, or to avoid unpleasant disclosures. Of course, many did not contribute to this invisibility and stood up for change, however this is a more recent occurrence, for decades after Kinsey, and still in present times, pretence and dishonesty is the safer path in many places both in Australia and internationally.¹⁴

Heterosexual people, who never met self-identifying 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 dishonesty that dissimulation occasioned, especially in relations with family and close friends.

¹³ Charles Darwin, *On the Origin of Species* (John Murray, 1859).

¹⁴ Location is important to the kinds of pressures to disguise sexuality: there are fewer pressures in Australia, but when one moves to regional and rural areas, the pressures go up. Likewise, there is more pressure in Bangladesh. And intense pressure in Iran.

These hostile attitudes are similar to the ignorant, prejudiced, and sometimes shockingly uninformed attitudes towards racial minorities prevalent in the “White Australia” era, which prevailed under Australian laws before 1966 when reform began to occur. These attitudes were easy to hold simply because members of those minorities were not part of the ordinary experience of the majority. White Australia, like apartheid in South Africa, protected the majority of its population, living in a false belief that the world was comprised overwhelmingly (or totally) of people like themselves. When that reality changes and the 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 and acquaintances, it is much more difficult to maintain hostility. This is how Australia, since 1966, has adjusted reasonably well to acceptance 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.

C 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 this word did not come into the English language (via German) until the late 19th 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 later 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”.¹⁵ There are other passages of scripture that have been interpreted to disapprove of left-handedness. In apartheid South Africa and Southern States of the United States a prohibition on racial

¹⁵ See, eg, N Wright (ed) *Five Uneasy Pieces – Essays on Scripture and Sexuality* (ATF Press, 2011); Cf M D Kirby, *Sexual Orientation & Gender Identity — A New Province of Law of India* (Universal Law Publishing Co. Private Limited, 2015), 47ff.

miscegenation was taught as ordained by scripture. Some passages of scripture also appear to condone slavery. Certainly many passages appear to uphold a seriously unequal status for women. Misogyny sometimes spills over to, and explains, hostility to homosexuals and the challenge they present to patriarchal features of society. 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 evidence unnatural attitudes of maintaining hostility and violence that need to change.

D Cultural Values

Some cultures in 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 that was at any time ruled by Britain, the criminal law imported the traditions of English common law hostile towards LGBTIQ behaviour. Criminal offences, often expressed as “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 on the subject. Criminal law is normally confined to anti-social conduct where there are victims who have been injured by, and complain against, the acts concerned. The sodomy and other similar offences exceptionally 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 member 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 very fruitful in removing these laws.

Sixty years after Kinsey, a kind of log-jam has set in that is neither just to the people affected nor wise,¹⁶ given the adverse consequences for successful strategies in dealing with the HIV epidemic.¹⁷ 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.¹⁸ 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.¹⁹ 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, and be reinforced by, such laws. Securing change by education, media, and scientific instruction will face severe hurdles. Hostile laws tend to occasion hostile attitudes.

E Natural Law Complementarity

Because of the steadily declining numbers of people who align themselves with a hostile 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 citizens. After all, if discrimination (and even perhaps some violence) is to be justified 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. Reasons that appeal as logical and persuasive. This is where some advocates of differentiation reach for natural law explanations to justify the maintenance of attitudinal and legal 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

¹⁶ M D Kirby, ‘Breaking the Commonwealth Logjam Over Sexuality Issues’ (2011) 18(3) *CHRI Newsletter* 8.

¹⁷ Commonwealth of Nations, 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.

¹⁸ *Lim Meng Suang v Attorney General of Singapore* [2013] 3 SLR 118 (CA); in above n 10, 127-134.

¹⁹ 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.

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 maintenance of discriminatory provisions in the law.²⁰

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 by legal philosophers that enforcement of strictures demanded by religious or supposed natural law rules cannot be justified as proportional in a liberal democratic society. Thus, in a country like Australia, where the majority of marriages now take place outside traditional venues in churches or temples 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 persuasive force that once they did.

F 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 sexual 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, and in women's or men's magazines.

²⁰ See, eg, J Santamaria, 'The Primacy of the Family and the Subsidiary Role of the State' (2006) 27(3) *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'.

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 the 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 involves 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 appear. 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, attractive, 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 of 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 increasingly appreciated.

G Superiority Instincts

In seeking to explain why there was such hostility towards LGBTIQ people, particularly throughout Africa, Bishop Desmond Tutu once attributed homophobia to the need many

people feel to have someone to look down on.²¹ 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 actually 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.

Homosexual people should no more be made to feel obliged to experience 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 earlier advocated to rid LGBTIQ people from their 'objective inclination to evil'.²² In a number of jurisdictions, the former practice of conversion therapy has now been pronounced unlawful.²³

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.

²¹ Yasmine Hafiz, Desmond 'Archbishop Tutu would prefer Hell over a Homophobic Heaven', *Huffington Post* (online), 20 July 2013 <http://www.huffingtonpost.com.au/entry/desmond-tutu-hell-homophobia_n_3661120>.

²² The language of the catechism of the Roman Catholic Church. On lobotomy, see J W Friedlander and R S Banay, 'Psychosis following lobotomy in a case of sexual psychopathy: Report of a Case' (1948) 59(3) *Archives of Neurology and Psychiatry* 302.

²³ American Medical Association, *American Medical Association Policy on Sexual Orientation* (2007).

H Revulsion Feelings

Connected with some of the foregoing considerations, particularly built upon the common imagery of heterosexuality in society, is the emotional feeling of revulsion that some people have for what appear 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 sometimes 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. 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 alike. 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 oneself.

People of heterosexual orientation can be reassured that most LGBTIQ fellow citizens live lives as quiet, orderly and (for the most part) unexciting 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 increasingly come into use in the English language to disempower their use as a means of insulting 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 insult and oppression.

I 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 their sexuality on someone whose sexuality is different or otherwise finds it unwelcome than for the reverse to occur. After polite rebuffs, it is expected in a civilised society that the intruder will retreat, in deference to the space and integrity of the other. Questions can arise as to the extent of a tolerable intrusion before it becomes offensive or 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.²⁴ 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 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.²⁵

After the majority decision in this case 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)

²⁴ *Green v The Queen* (1997) 191 CLR 334.

²⁵ *Green v The Queen* (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.

to amend the law of provocation so as to reduce the ambit of the so-called 'gay panic' defence.²⁶ Obviously, society needs to draw a line that marks its disapproval of non-consensual 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 crude self-help.

J *Unresolved 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 especially homophobic or transphobic. They may not fully understand variation of people's feelings and behaviour. However, they know enough of the importance of sexuality to their 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 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 obligations that require transgender people who wish to change their identity papers to prove they have undergone or are undergoing surgical reconstruction of their sexual organs.²⁷ This is extremely radical, expensive, and sometimes risky surgery. For some, it is strongly desired. For others, it imposes a seriously disproportionate legal

²⁶ 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(2) *Queensland University of Technology Law Review* 489.

²⁷ *AB v Western Australia* (2011) 244 CLR 390 (human rights construction of legislation on transgender persons) and *New South Wales Registrar of Births, Deaths and Marriages v Norrie* (2014) 250 CLR 490, with reference to *Births, Deaths and Marriages Registration Act 1995* (NSW) s32 DA (permitting registration as "non-specific" sex).

requirement.²⁸ I applaud the special attention that is given to transgender issues in several Australian universities and research institutes. 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.²⁹

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 desires.³⁰ 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 the 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 been concluded. Why Omar Mir Seddique 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.³¹

However, several indications exist that suggest that Omar Mateen had visited the club previously, used gay websites, and engaged in gay sex. Something existential caused him to occasion 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

²⁸ Following the adoption of the *Australian Government Guidelines on the Recognition of Sex and Gender*, several policies have become more empathetic towards trans people, eg the introduction sex-X on Australian passports. However, many regimes such as the State-based BDM Registers still impose harsh requirements on those wishing to change their legal sex, such as requiring an applicant to supply a statement from a medical or psychological practitioner specifying their gender.

²⁹ S. Winter, *Lost in Transition, Transgender People, Rights and HIV Vulnerability in Asia-Pacific Region* (UNDP-APTN, 2012).

³⁰ Terry Stein and Carol Cohen (eds), *Contemporary Perspectives on Psychotherapy with Gay Men and Lesbians* (Springer, 2013), 133; Netta Weinstein et al, 'Parental Autonomy Support and Discrepancies Between Implicit and Explicit Sexual Identities: Dynamics of Self-Acceptance and Defense' (2012) 102(4) *Journal of Personality and Social Psychology* 815.

³¹ Hayley Tsukuyama, Mark Berman and Jerry Markon, 'Gunman who killed 49 in Orlando nightclub had pledged allegiance to ISIS', *The Washington Post* (online) 13 June 2016 <https://www.washingtonpost.com/news/post-nation/wp/2016/06/12/orlando-nightclub-shooting-about-20-dead-in-domestic-terror-incident-at-gay-club/?utm_term=.ffa417f7c5a9>.

as just another permissible if unfortunate outcome of the practice of a religious faith. They cannot be minimised as an incident of general violence or the oversupply of firearms. The violence in Orlando was specific to the LGBTIQ community. It is necessary to build defences and effective responses against such violence. That means doing so in the entire community, including in schools, colleges and universities, by print, film, digital, and other media.

III DEFENCES IN THE MINDS OF HUMAN BEINGS

So this is where work of Australia's universities and research institutions is directly relevant. Identifying the causes of the hostility that sometimes lead to violence, and often to discrimination and disadvantage, should be a purpose and a priority of research and empirical investigation.

I have offered ten possible explanations for the hatred, violence, and discrimination that continue to exist towards the LGBTIQ minority. 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 Kinsey's successors, including in Australia, 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 better the 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 the outcomes of Dr Kinsey's research would quickly expel homophobia and transphobia from human society have not been realised over 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 Kinsey Institute in Bloomington, Indiana in the United States, and universities and other bodies in Australia.

The further research should, as Kinsey taught, 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.

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