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SEXUALITY AND THE STATE

BEYOND THE HOMOSEXUAL LAW REFORM ACT 1986

LLM Research Paper
Constitutional Law (LAWS 509)

Law Faculty
Victoria University of Wellington

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> "This could be the first funny revolution," Lou said. "Aren't these guys great, Bunny? Lily Law should never have messed with us on the day *Judy* died. Look they've turned the parking meter into a battering ram."*

INTRODUCTION

In 1986 the Parliament of New Zealand passed into law the Homosexual Law Reform Act. That Act decriminalised (among other things)[1] sex between consenting adult men. In 1990 the Human Rights Commission Amendment Bill was introduced into Parliament. It proposed to amend the Human Rights Commission Act by adding to the prohibited grounds of discrimination the following: age, pregnancy, political opinion, trade union involvement, employment status, family status, identity of partner or relative, health status and sexual orientation. This bill remains before the Justice and Law Reform Select Committee. However, the Minister of Justice has announced[2] that the Amendment Bill is to be superseded by a bill which consolidates the Race Relations Act 1971 and the Human Rights Commission Act 1977. This paper argues that the inclusion of sexual orientation as a prohibited ground of discrimination in an anti-discrimination statute like the Human Rights Commission Act 1977 is important and necessary. If the current Amendment Act is to be abandoned any replacement ought to include sexual orientation as a prohibited ground of discrimination.[3]

The process described above needs to be seen in the wider context of a description of the law as it relates to gays. This paper therefore describes the development of New Zealand law in this area, as well as possible future developments. It puts the New Zealand developments in context by comparing them with changes that have occurred in other similar

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* Edmund White, *The Beautiful Room is Empty*, 183. The passage is taken from a description of the Stonewall riots in New York on 28 June 1969, around the time Judy Garland died.

1 The Act decriminalised sodomy and indecency between men. Sodomy includes man to man sex, sex between men and women, and arguably some woman to woman sexual behaviour.

2 Press Release dated 31 May 1991.

3 The other grounds in the Amendment Act may also be important. Health Status is also important from a gay perspective because of the current HIV/AIDS crisis and its disproportionate impact on the gay community in New Zealand.

jurisdictions. And, it places the law in its theoretical context.

The theoretical part of the discussion will be based on the work of Michel Foucault, a French philosopher and historian. The work of Foucault has been very influential in for scholars working in various disciplines concerned with the study of society. The impact of his thinking is also beginning to be felt in the discipline of the law.[4] Though he himself would eschew all labels, his work is clearly influenced by Marxism and by Nietzsche's theories about knowledge.[5] In addition to its philosophical antecedents, Foucault's method relies heavily on writing histories so can therefore also been seen as part of the tradition of writing "history from below" - that is histories of social organisation and the concerns of ordinary people (as opposed to political history - the history of the concerns of the powerful elite) - though he is also writing intellectual history.

Foucault's last work was a multi-volume history of sexuality.[6] In this work he investigates how societies understand and deal with issues concerning sex and sexuality, how knowledge about sex and sexuality is formed in societies, what impact this knowledge has on the society. This work has a number of important insights about man-to-man sex, homosexuality and gays throughout history and will be the major theoretical basis of this paper.

In discussing the relationship between gays and the law parallels with arguments made by feminist theorists will be important. The concept in common is sexuality. As a leading feminist theorist, Catherine MacKinnon has said: "Sexuality is to feminism what work is to Marxism: that which is most one's own, yet most taken away."[7] Sexuality is obviously of vital interest to gay theorists. Gays are a minority which is formed on the basis of and defined by sexuality - gay theorists are faced with describing the consequences of this definition for gays and for society.

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4 See Rubenfeld "The Right to Privacy" (1989) 102 Harv LR 737, discussed extensively below n 46 and accompanying text.

5 Turkel, *Michel Foucault: Law, Power and Knowledge* (1990) 17 J Law & Soc 170, 170 - 172. This article contains a useful summary of Foucault's work, and sets it in context well.

6 Foucault, *The History of Sexuality: Volume I, An Introduction* (1976) *Volume II, The Use of Pleasure* (1984) *Volume III, The Care of the Self* (1984) [hereafter Foucault I, II & III]. There was also to be a fourth volume on the sins of the flesh, and early christian theories of sex and desire but Foucault died before completing it.

7 MacKinnon, "Feminism, Marxism, Method and the State: An Addenda for Theory" (1982) 7 Signs 515.

In many ways the concerns of feminists and gay theorists are interlinked and similar, and the obvious parallels will be drawn in the course of this paper. However, it should be made clear that this paper is not an attempt to address the similarities and differences between feminism and gay theory or the similarity and difference between gays and feminists as political groups. That is an important and interesting topic, but complex and large, and beyond the scope of this paper. For this reason (among others) this paper does not directly address lesbian issues - except where this is made explicit. The concerns of lesbians are seen in the context of feminism, not in gay theory.

The link that this paper is concerned with is the link between legal theory and legal thought and gay theory. There has been a momentous growth in gay theoretical writings in recent times. This writing builds on the gay and lesbian histories which have appeared,[8] and the gay and lesbian literatures.[9] Even the discipline of the law is beginning to see writings from gay and lesbian perspectives.[10]

The purpose of the paper should be made clear from the outset. This paper assumes some basic values which will not be justified:

- That it is proper and desirable that gays should be able to participate in society fully on terms which do not deny our sexuality.
- That gays have the right to personal dignity.
- That gays and others should be free to express themselves sexually.

This paper does not seek, therefore, to provide an apologia for gay and lesbian existence. It does not ask why should the law further the aims set

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8 See Duberman, Vinicus and Chauncey, *Hidden From History: Reclaiming the Gay and Lesbian Past* (Penguin, London, 1991) for examples of gay and lesbian histories. The book's "Introduction" contains a brief history of the gay and lesbian history writing.

9 Gay authors include David Leavitt, Edmund White, Adam Mars-Jones.

10 "Symposium on Lesbian and Gay Legal Issues" (1991) 16 Queen's LJ 231 especially the interesting insights offered in Lahey, "Introduction".

out above. Other have done this effectively.[11] Rather it asks how can sexuality be made more free, and how can gays be more free. This paper describe the techniques of the law as it deals with sex between men and gays in everyday existence.

The paper is in two parts. The first part describes the work of Foucault and places it in the context of gay theory. The second part describes statutory law which has existed in New Zealand, Australia, Britain and the United States placing it in the context of the theory and arguing the importance and usefulness of law like the Human Rights Commission Amendment Bill for New Zealand.

PART ONE: THEORY

Foucault and the social construction of sexuality

Foucault argues that *sexuality* is a comparatively recent phenomenon. Sexuality, he explains, is the concept used by modern western societies to describe and explain the preferences and tastes of individuals for sexual pleasure. An individual's sexuality is, according to Foucault, thought of as being more than mere behaviour, rather it is inherent in an individual and part of that individuals identity. The sex of a person's sexual partner(s) (a person's sexual object) is thought to be especially important in describing the sexuality of a person. Therefore, there are homosexuals, and heterosexuals.[12]

Other societies and western societies in the past, however, have not thought about sex in terms of sexuality and have not always considered sexual object to be important. Sexual activity in Greece, as Foucault explains, was a matter of personal ascetic. It did not matter how a man (for the authors of the time spoke from an exclusively male perspective) sought sexual pleasure and whether he choose to have sex with a woman or a boy. The

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11 Mohr, *Gays/Justice a Study of Ethics, Society and Law* (Columbia University Press, New York, 1988); Wolfson, "Civil Rights, Human Rights, Gay Rights: Minorities and the Humanity of the Different" (1991) 14 Harv J Law & Public Policy 21. See also the insights provided by gay literature especially: E M Forster *Maurice* (written in 1914 but not published until after the authors death in 1970), Christopher Isherwood *Christopher and his Kind* (1977).

12 Foucault I, 53 - 73, 103 - 114.

concern was whether he was ruled by his desires or whether he was properly in control and behaving with moderation. Indeed, moderation was the primary value in matters of pleasure, desire and sex. Leading a life of balance and moderation was considered to be the most important problem of existence, and regimen were devised to aid the individual in devising his own ascetic of care for the self.[13]

This Greco-Roman focus on the self and the individual can be contrasted with the prevailing intellectual attitudes of early Christians as Foucault describes them. Sexual activity was highly codified by the christians. A list of permissible and impermissible acts was compiled. Sin was the central concept and the problem of sex and desire was dealt with as a problem of the sins of the flesh.[14] Saint Augustine characterised all sexual activity for pleasure as sinful, and emphasised that only procreation was the proper purpose of sex - and that should be confined to the marriage relationship.[15]

The modern way of viewing sex differs markedly from both of the above modes. Sexuality is conceived of as being innate to the individual, immutable, important, and real. Where other cultures both present and historical conceive sexual behaviour as transitory and mutable, modern western society has reified sexual behaviour as an identity.

This reification of sexuality been deployed so as to allow, according to Foucault, the creation of a number of important identities.[16] One of these is the homosexual.

Foucault argues that the construction of sexuality in the eighteenth and nineteenth centuries depended on a scientific technique. Experts, especially psychologists, psychiatrists and doctors discovered truths about sexuality and took on the task of defining what sexualities existed and who fell into what category. The primary technique for finding the truth was a technique adapted from Christianity -the confession. Psychoanalysis forced patients to speak about sex, allowing doctor and experts to interpret those

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13 Foucault II, especially Part One.

14 Foucault I, 36 - 39.

15 Kahn, "The Hermeneutics of Sexual Order" (1990) 31 Santa Clara LR 47.

16 Foucault I p 104: listing the hysterical woman, the onanistic child, the procreative couple, and the perverse adult - one kind of which is the homosexual.

"confessions" and define their social significance.[17] A man confessing consuming desire for another man would be categorised as homosexual by these scientists (whereas the Greeks would have been concerned for his lack of personal control). This process also allowed the experts to correct perceived abnormalities, to treat the individual and have her or him conforming to society again.

Indeed, for Foucault there is a continuity from the Victorian era to our own era characterised, not by the repression of speech about sex, but by the proliferation of discourse about sex and sexuality. The scientific discourses about sex that emerged, the medicalisation of sexuality, and the rise of psychoanalysis all represent aspects of this proliferation. Foucault disputes the "Freudian" hypothesis that sex was hidden and repressed in the Victorian era and only now can speak. Rather he argues that speech about sex was enforced then and now, and this forced confession allows the positive moulding of sex into sexuality, this process constituting an oppressive force in society. Real freedom is not to be sought by allowing sex to speak - because that was already mandatory. Sex is made free by allowing sex to be silent.[18]

To summarise, Foucault argues first that sexuality is not universal but is a social constructed knowledge. And, second, that the construction of sexuality forces individuals, not to be silent about their sexual desires but to confess them - and in the process have their own individual experience of sex redefined in expert terms. Both these arguments will be returned to later in the paper.

It will not come as a surprise, given that modern western thinking is inculcated with the concept of sexuality, that the first of these arguments is not uncontroversial. Boswell,[19] a gay theorist and historian, has describes

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17 Foucault I, 65 - 69.

18 Foucault I, 17 - 49, 159.

19 Boswell, "Revolutions, Universals and Sexual Categories" in Duberman et al, above n 8, at 17 ff. Typical examples of writing on the "essentialist" side of the debate is Boswell himself in the cited article and in *Christianity, Social Tolerance, and Homosexuality* (University of Chicago Press, Chicago, 1980) and possibly Mohr, *Gays/Justice* above n 11; and on the social constructionist side are Weeks, *Coming Out: Homosexual Politics in Britain from the Nineteenth Century to the Present* (Quartet Books, London, 1977) and Padgug "Sexual Matters: Rethinking Sexuality in History" in Duberman et al, above n 8.

the controversy as a debate between the essentialists[20] and the social constructionists. Boswell links this debate to the wider philosophical debate which has gone on for centuries and does not look likely to be fully resolved, between the realists, who believe in the real existence of things, and the nominalists, who believe only in the existence of names.

In these terms the "debate" can be summarised in terms of views about the nature of homosexuality and being gay. There are basically two contrasting views - with variations possible within them.

1 *Behavioural option.* The social constructionists believe that homosexuality or any sexuality is just one behavioural option chosen by the individual from a menu of options. At its strongest this view holds that people are inherently sexually polymorphous with the capacity, and under the right circumstances the inclination, to indulge in a range of sexual behaviours in terms of sexual object and sexual practice. The society and the culture in which they find themselves may (or may not) attempt to influence those choices - and this affects the range of (culturally) possible behaviours available.

A weaker version of social constructionism might hold that individuals can and do have inherent sexual preferences for sexual objects and sexual practices, but society sees these preference though categories created by the prevailing knowledge. Thus a society that saw individuals sexuality as being mutable and polymorphous would not notice sexual preferences, and a society that saw sexuality as fixed would not notice variable preferences.

2 *Identity.* The realist/essentialist position is that individuals have a sexual identity. It can be fixed according to object choice or perhaps according to practice. A possible taxonomy is homosexual-bisexual-heterosexual, but there may be others. This view holds that sexuality is innate, and that being gay, in particular, is an innate and important part of

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20 Boswell, ibid, 35, notes that no gay theorist would label themselves as an essentialist - it has connotations of the arguments about the "naturalness" of behaviour. Rather the term is applied to someone as part of an argument against their work. As used here the term merely connote a position at one extreme of the argument, it is not used pejoratively.

a person's identity.

> Again a weaker version is possible. It is arguable that the preferences of an individual are real and fixed and that in studying different societies universals can be found, but that through time societies have described individual's sexuality according to different systems and categories. Thus men have existed in all societies who have preferred man-to-man sex but definitions of such men have changed from society to society and so has the level of repression of the lives of such men.

In relation to this debate Foucault's position is not clear. He is concerned primarily with the creation, destruction and deployment of knowledge about sex and desire - not the creation and destruction of physical practices and groups in society. He does not deny the existence as to sexual object, and he does not deny that there have always been people who prefer to have sex with people of the other sex as well as people who prefer to have sex with their own sex.[21] Moreover, argues that the knowledge modern society has constructed about sexuality is powerful and consequently real.

This paper takes the view that society has been successful in imbuing sexuality and homosexuality with reality. In our society there are homosexuals. The paper also takes the view that sexuality is not the only possible way of categorising the desire for sex in individuals, and that sexuality is a socially constructed phenomenon. As for the underlying reality of the situation in a universal (almost biological) sense, this paper does not take any view. It is the meaning and social implications of sex and sexuality that is important.

Power, knowledge, and the law

So far this paper has described Foucault's arguments about sex and sexuality. Some general points about his philosophy of power, knowledge and law need to be made before moving on.

Power

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21 Foucault II, 190.

Power is a central concept for Foucault, being the fundamental force holding societies together. Three fundamental attributes of power as he describes it may be enumerated: power is local, it is productive and it is positive.

Power is local

Foucault does not believe that power can be accounted for by structures in society. He argues that power is sourced in local relationships - like doctor and patient, priest and penitent, parent and child. Each relationship has inherent in it disequilibria and inequality. These inequalities built up from below to form "the basis for wide-ranging effect of cleavage which run through the social body as a whole".[22]

Foucault describes the role of doctor, psychologists and educators in the construction and deployment of sexuality.[23] Each relationship is important and may have different effects and inequalities. Nevertheless there are links between the deployments formed by the knowledge which underlies and informs the exercise of power.[24]

Power is productive

Power is productive because it forms knowledge.[25] Each of the relationships in which power is exercised generates knowledge about itself. Power and the exercise of power is justified by this knowledge which is formed within the power relationship. Psychologists, doctors and educators develop knowledge about sexuality according to which the concept of sexuality as a fundamental and important personality-affecting matter justifies the intervention of psychologists and others into the realm of sex. The concept of sexuality constitutes people with "abnormal" or "deviant" sexualities as "patients". Thus, power produces knowledge which can then be deployed.

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22 Foucault I, 94, 98.

23 Foucault I, 103 - 114.

24 Foucault I, 94 - 96.

25 Foucault I, 81 - 114 especially 98.

Power is positive

Power positively moulds lives. Foucault argues that power should not be thought about as negative commands in the form "thou shalt not" - power should not be thought of as **law**.[26] Rather it should be thought of as positive techniques for creating and moulding lives. When power as sexuality is deployed on children for example, those exercising the power are concerned that they grow up to be normal healthy adults and tries to mould their attitudes and existence around this aim.

When sexuality is deployed as homosexuality the aim is to mould heterosexual, productive, procreative existences. The existence of sexuality implies that a person must be either homosexual or heterosexual; and that heterosexuality is the norm. This in turn implies that a person who feels desire to have sex with someone of their own sex is forced either to deny that desire and retain their definition of themselves as heterosexual and normal; or to act on the desire and completely and irrevocably define themselves as homosexual and deviant. The first choice is the preferred option.[27]

Law and power

Foucault rejects the primacy of law as power because he sees law as a set of negative interdictions rather than positive encouragements.[28]

In this paper, however, the aim is to analyse law in Foucault's terms. Law can be considered as a power locus - a locus in which knowledge can be generated and power can be deployed. In doing this it needs to be borne in mind first that law is not the single, or even the main, source of knowledge about sex and sexuality (though this seems a fairly obvious point). Therefore the knowledge underlying the law needs to be put in the context of knowledge generated by other disciplines. Secondly, power is characterised by its positive and productive nature. Therefore the negative commands of the law are of secondary importance to the underlying knowledge it reflects and positive effects it encourages. The concern of this

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26 Foucault I, 81 - 114, especially 82.

27 See Dworkin below n 52 and accompanying text.

28 Foucault I, 81 - 114 especially 82.

paper then is with law as **policy**, not law as rules. The provisions of the law form a system of knowledge and policy. Policy underlying one area of the law can be transmitted to other areas of the law and applied. In the same way, knowledge formed by the law can be transmitted to areas outside the law.

In this way a sodomy statute which is interpreted as a condemnation of homosexuals can influence a Family Court Judge not to award child access rights to a gay man. And the notion that homosexuality is in some sense illegal (as well as or instead of immoral) may influence an employer not to employ a gay man. The policy of the law is therefore very important.

The primary question posed as this paper reviews the statutory law affecting gays will therefore be:

- What knowledge about sex and sexuality does the law reflect?
- How does this knowledge interrelate with knowledge and power from other sources?
- What impact does law and power have on gay men?
- How could the law reflect the concerns for participation, dignity, and freedom of sexual expression outlined in the introduction?

PART TWO: THE DEVELOPMENT OF THE LAW

Part two of this paper is a survey of the development of the law as it relates to man-to-man sex and to gays. The survey will cover law in Australia, Britain, the United States as well as New Zealand. As a broad proposition the law has moved from sodomy statutes, which among other things criminalise forms of man-to-man sex, to reform of the sodomy statutes decriminalising man-to-man sex (called in New Zealand Homosexual Law Reform), to anti-discrimination human rights legislation providing remedies

for gays who are discriminated against.[29] The movement is from a negative condemnatory legal view of gays, to a positive and affirming view. It is the argument of this paper that this movement can be seen as a single process, within the context of the law as it relates to gays as well as the way society views gays.

Sodomy Statutes

In many common law and other countries there have at various times been statutes which forbid sodomy. Though these statutes are characteristically thought of as having as their object the regulation of sexual activity between men, in fact they are normally expressed to encompass a much wider range of behaviour. Sodomy can be committed between men and men, women and men, and women and women - indeed exactly what behaviour constitute sodomy is not clear. Under differing definitions it may be confined to anal sex, or it may include oral sex - fellatio or cunnilingus - and it may even extend to vaginal sex in an "immoral" position.

The statutes therefore regulate both same-sex and different-sex sexual activity covering a range of behaviour. The earliest of the common law statutes in the secular sphere is recorded in Coke's Institutes. Buggery was statutorily banned during the reign of Henry VIII,by the statute 25 Henry 8 c 6, though it was an offence at common law too.[30] In New Zealand prior to 1986 the Crimes Act prohibited sodomy, which seems to have been anal penetrative sex and could be committed homosexually and heterosexually; and it prohibited indecency between men, which covers other man-to-man sexual behaviour. Both these provisions covered consensual sexual activity. Consensual sexual activity between women was not prohibited. The New Zealand pattern also appears in England[31] and the Australian jurisdictions[32].

In the United States the statutes are more varied. In Georgia sodomy is

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29 This process is normally seen in this order eg NSW, however there are counter examples, Wisconsin had anti-discrimination legislation a year before reform of sodomy laws, and the District of Columbia has anti-discrimination legislation but retain criminal penalties for sodomy.

30 Halsbury's Laws of England vol 11 para 1027.

31 Sexual Offences Act 1956.

32 For example, ss 208 - 211 Queensland Criminal Code - now reformed see below n 37.

defined as any "sexual act involving the sex organs of one of one person and the mouth or anus of another".[33] In Alabama prohibits similar acts but confines the prohibitions to non-married people.[34]

As noted above on their face the sodomy statutes regulate heterosexual conduct as well as homosexual and they date from relatively early times. In Foucault's scheme these statutes therefore relate to a period before the discovery of sexuality and the creation of the homosexual.[35] They are premised on a knowledge about sex the supposes that everyone may at various times desire sex with someone of their own sex. They attempt to regulate the sexual behaviour of all people. Pre-eighteenth century everyone was seen as having the capacity, if not the urge, to commit sodomy, sodomy was not confined to a certain group. Moreover, sexual object is not seen as of primary importance, sexual practice is. The statutes therefore are facially neutral between same-sex activity and different-sex activity.

These statutes can therefore be seen as a legacy of an older tradition which is pre-sexuality. Although it is customary to relate these statutes solely or principally to homosexuality, so that they have come to be seen as being inextricably linked to the outlawing of homosexuals, on their face they are not confined to this group. The law is written on the assumption that sodomy is possible for anyone. Knowledge about homosexuals and homosexuality was created in other disciplines. This knowledge is superimposed upon the law and subverts the idea that sodomy is a behavioural option open to anyone. The knowledge is imported into the law and cast the sodomy statutes in an entirely new light. Whereas before the statutes regulated behaviour, now they regulate a group of people.[36] The knowledge underlying the sodomy statute has therefore changed over time, so too has their nature and purpose in the legislative scheme.

The sodomy statutes are expressed in the form of negative commands regulating behaviour. This is unsurprising since they are part of the

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33 Goldstein, "History, Homosexuality and Political Values: Searching for the Hidden Determinants of *Bowers v Hardwick*" (1988) 97 Yale LJ 1073, note 1.

34 "Developments: Sexual Orientation and the Law" (1989) 102 Harv LR 1508, 1532 note 91.

35 Foucault I, 43; Padgug above n 19, 41.

36 Foucault I, 43; and see Dworkin below n 52 and accompanying text.

criminal law which is almost always expressed in this form. In Foucault's argument though power is seen not as negative commands but positive and productive policy formation. The sodomy statutes on their face do not deal in policy at all. However, the sodomy statutes are for the most part almost universally not enforced.[37] They do not therefore function as criminal law at all, except in so far as they regulate non-consensual activity (that is forms of man-to-man rape). Thus they are subverted in their purpose. The identification of the sodomy statutes with homosexuality allows them to become powerful expressions of legislative disapproval of homosexuality. In *Bowers* v *Hardwick*[38] this was in fact argued to be the major purpose of the statutes. In this way legislative commands in a negative form have become, in the context of prevailing views about sexuality and homosexuality, positive encouragement to be heterosexual.[39]

The final point to make about the statutes relates to the kind of law they are. They are criminal law regulating the relationship between the state and individuals. They represent therefore the idea that sexuality can be the subject of legitimate *public* interest. In that they relate to consensual behaviour, they expose the morality of sex to the public gaze. Thus homosexuality can be discussed as a public problem in which people have views. When reform of the laws is contemplated the issue becomes fraught with petitions and calls for referenda. Homosexuality, where there are sodomy statutes is a matter of public law.

The next stage - Reform

From the late sixties on many common law jurisdiction have reformed their sodomy laws to decriminalise homosexual sex (as well as the heterosexual

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37 The American case that most recently came close was *Bowers* v *Hardwick* 478 US 186 (1986). In that case the police visited Michael Hardwick's house for reason's unrelated to his sexuality, but happened to see him and his lover in bed together. The police arrested them both but later release them without charge. No prosecution was ever laid - Michael Hardwick used the arrest as the basis for standing to challenge the constitutionality of the sodomy statute in Georgia. The one exception to non-enforcement in recent times is Queensland which has since reformed is law as one of the results of the Fitzgerald Inquiry and its aftermath.

38 478 US 186 (1986). A United States case deciding the constitutionality of a sodomy statute.

39 See Rubenfeld "The Right of Privacy" (1989) 102 Harv LR 737, 799-801; below n 46 and accompanying text.

aspects of the statutes as well).[40] There are a number a ways they have done this. But in general they fall between two extremes. Some jurisdictions have decriminalised but attempt to retain a negative view of homosexuality and gays in their statutes, and some attempt to remove from their statutory law any view of the value or otherwise of homosexuality and gays. And, within that continuum there is a further refinement between those jurisdictions that provide specific defences and those that simply decriminalise.

Reform with negative policy statements

Western Australia

Western Australia decriminalised in 1989 with the Western Australia Law Reform (Decriminalisation of Sodomy) Act. The Act has three salient features.

First, it has a preamble which sets out a statement of the policy that the legislature had in mind in enacting the legislation:

> WHEREAS, the Parliament does not believe that sexual acts between consenting adults in private ought to be regulated by the Criminal Law;
>
> AND WHEREAS, the parliament disapproves of sexual relations between people of the same sex;
>
> AND WHEREAS, the parliament disapproves of the promotion or encouragement of homosexual behaviour;
>
> AND WHEREAS, the parliament does not by its action, in removing any criminal penalty for sexual acts in private between persons of the same sex, wish to create a change of community attitude to homosexual behaviour;
>
> AND WHEREAS, in particular the Parliament disapproves

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40 Great Britain in 1967, Canada in 1969, California in 1975, New Zealand in 1986, New South Wales in 1984, Western Australia in 1989, South Australia in 1976, Victoria in 1980, Northern Territory in 1983, Australian Capital territory in 1985, Queensland in 1990; Tasmania however failed to pass a law reform bill in 1991.

> of persons with the care, supervision or authority over young persons urging them to adopt homosexuality as a life-style and disapproves of the instrumentalities of the state so doing:
>
> be it therefore enacted...

The second feature echoes the first. In section 23 of the Act it is declared that:

> It shall be contrary to public policy to encourage or promote homosexual behaviour and the encouragement of homosexual behaviour shall not be capable of being a public purpose.

Similarly section 24:

> It is unlawful to promote or encourage homosexual behaviour as part of the teaching in any primary or secondary educational institution.

The final feature is the provision of special ages of consent to have same-sex sex (female 18; male 21), and to the provision of a special offence of having homosexual sex in public or procuring such sex in public.[41]

This Act represents the most comprehensive attempt to decriminalise sex between men and yet make clear legislative statements and create coherent public policy which condemns homosexuality. It attempts to confined homosexuality entirely to a private sphere. No longer can the law interfere in private consensual sex, but on the other hand the law cannot support gays or gay relationships, in particular the young must be insulated from knowledge about (positive) aspects of being gay. This act is profoundly problematic and has been criticised by gay groups, wondering if it is any advance on the previous law.[42]

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41 In the context of this statute there is an interpretation problem with respect to procuring sex in public. It is unclear whether it is an offence to do the procuring in public, or whether the sex (which is procured) has to be in public.

42 *Pink Triangle*, issue 82, March/April 1990, p 20.

Britain

The British legislation has similar messages to the Western Australian Act but is a less coherent statement. England decriminalised homosexuality in 1967 in the Sexual Offences Act 1967. The scheme of this Act is to provide a series of defences available to a man who is accused of buggery or indecency between men under ss 12 and 13 of the Sexual Offences Act 1956. Under the 1967 Act, a homosexual act committed between adults in private is not subject to criminal sanction. Adult is defined as over twenty-one. Sex is *deemed not* to be private if it is performed in a public lavatory, or where there are more than two people present.[43] And, the act does not apply to merchant ships (and the military which are covered by separate rules). However, the burden of proving that the act was otherwise than consensual adult and private is on the prosecution, no prosecution may be brought against any man for sex with another man where either were under twenty-one without the consent of the Director of Public Prosecutions, and no prosecution can be brought after twelve months for (consensual) indecency or buggery where no assault was involved and the parties were over sixteen. The Act also introduces distinctions between penetrator and penetrated, oral and anal sex, various ages and age differentials of the parties.

The scheme of the legislation sets up a series of exceptions to something which is prima facie criminal - namely buggery. The exceptions moreover do not take in all of the adult consensual sexual encounters a man might have with another man - because of the exceedingly narrow definitions of adult and private. Twenty-one is a very high age of consent which does not apply to either heterosexual or lesbian sex.[44] In addition, in England there have been repeated problems with overzealous policing of public lavatories.[45]

The legislative scheme is further complicated by the recent enactment of section 2A of the Local Government Act 1986 (as inserted by the Local Government Act 1988 s 28). This provision makes declares that:

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43 One wonders if this is to be taken as moral condemnation of multi-person sex, or just indicative of a profound lack of imagination.

44 See Helfer, "Finding a Consensus on Equality: The Homosexual Age of Consent and the European Convention on Human Rights" (1990) 65 NYULR 1044.

45 Jenkins, "Privates on Parade" *New Statesman Society* 9 November 1990, p 10.

(1) A local authority shall not -

(a) intentionally promote homosexuality or publish material with the intention of promoting homosexuality;

(b) promote the teaching in any maintained school of the acceptability of homosexuality as a pretended family relationship.

This section has a similar intent to the Western Australian statements of policy, though the scope may be more limited. The effect is to impede local authorities from providing funds to gay and lesbian groups or opportunities for gays and lesbians to have a public presence. It also intends to keep gays and lesbians out of the education system. Though the statements are more specifically targeted than the Western Australian provisions the intent is nevertheless just as clear - to force gays and lesbians into invisibility and confine gay and lesbian lives to a private sphere.

In these two jurisdictions an attempt has been made to remove the state from the regulation of consensual sex by removing the sanctions of the criminal law applying to man-to-man sex. However, there is also an attempt to prevent the state from supporting gays in any way. The statutory law makes it clear that homosexuals are not to be viewed by the law in anything other than a negative light. It is forbidden to promote homosexuality. The legislation attempts to enforce silence on gays. Under these schemes gays can have sex, but are discouraged from leading public lives as gays. In this way the legislation which makes homosexuality a private matter, is just as repressive as the previous law which brought homosexuality into the public sphere.

Reform: Neutral Statutes

Australian Capital Territory

In contrast to legislation with removes statutory punishment for same-sex sex but seeks to keep the concept there is legislation which seeks to remove the distinction between same-sex and different-sex sex. The best example for this is the Australian Capital Territory's Crimes (Amendment) Ordinance (No 5) 1985. This ordinance overhauls the law as it relates to sexual offences in the ACT. It creates a scheme of degrees of sexual

assault and indecency, which revolves primarily around a concept of sexual intercourse with violence or without consent. Sexual intercourse is defined to include penetration of the vagina or anus of any person with a part of the body of another, or penetration with any object; insertion of the penis into a persons mouth; or cunnilingus. The term includes the "standard" varieties of sex of all kinds of sexualities and the Ordinance does not seek to differentiate between them at all in its scheme. In this way the criminal law is completely neutral as between different types of sex and does not seek to regulate any consensual adult sex. The age of consent to all sex is 16.

California

California also has sexual offences legislation which does not differentiate between same-sex and different-sex activity though in a different form. § 286 of the California Penal code criminalises acts of Sodomy which is defined as non-consensual non-adult penis-anus sex, but is not defined by the sex of the penetrated party. Oral sex is also criminalised under § 288, and included non-adult, non-consensual oral sex of any kind fellatio or cunnilingus.

New Zealand

The legislation of New Zealand since the Homosexual Law Reform Act 1986 and the Crimes Amendment Act 1985 (which revamped the sexual offences parts of the Crimes Act) is partly neutral as to sexual object choice. Sexual violation is now the most serious crime and it incorporates a man who rapes a woman, as well as any person who penetrates the vagina or anus of another with a part of there body or with any object. Thus sexual violation can be committed by both men and women on men and women. However, the lessor offences of sexual assault and the offence involving sex with under age people are still defined with reference to the sex of the actors. Nevertheless, although the offences of sex with under age people do draw a distinction between man-woman sex, woman-woman-sex and man-man sex in that there is no age of consent for a man to have sex with a woman, otherwise the age for consenting to sex for all people is sixteen. New Zealand is therefore mixed in its approach to reform - though this is probably explained by the fact that reform was a single piece of legislation aimed at reforming the sodomy laws rather then a wholesale

reform of all sexual offences law (as for instance the ACT reform was).

Neutral Statutes: Evaluation

The neutral statutes effectively remove the criminal law from the regulation of consensual sexual activity and they do not attempt to replace it with legislative statements of public policy about the status of gays. Thus gay sex is taken out of the public sphere and considered a private matter without any attempt by the law to enforce gay silence.

In this kind of a regime the criminal law expresses no policy about the nature of consensual sexual activity and no view about gays and lesbians. If this is coupled with no other statutory statements then the (statutory) law can be considered neutral between sexual activity and can be considered not to know about sexuality as it has been constructed by society.

Rubenfeld[46] contends, using arguments he bases on Foucault's work, that this statutory silence on the subject of sodomy, homosexuality and gays is the best state for the law to be in. Rubenfeld's argument is made in the context of United States' constitutional law and suggests a unifying analysis of the line of privacy cases.[47] His analysis then is directed to a different objective that of to this paper,[48] but is apposite because of the uses it suggests for Foucault's argument and the limitation the arguments, as deployed by Rubenfeld, have for the scope of the law relating to gays.

His major argument is based on Foucault's notion of the positive nature of power. Power in general and law as a specific kind of power, is characterised by its productive force.

> In Foucault's conception, the significance of the law does not reside in the interdiction itself, but in the extent to which the law interjects us in a network of norms and practices that

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46 Rubenfeld, "The Right of Privacy" (1989) 102 Harv LR 737.

47 His analysis covers a wide range of cases unconnected with homosexuality. The privacy line of case in America include *Griswold* v *Conneticutt* 381 US 479 (1965) on the availability of contraception, *Eisenstadt* v *Baird* 405 US 438 (1972) also on contraception, *Roe* v *Wade* 410 US 113 (1973) on abortion, *Bowers* v *Hardwick* 478 US 186 (1986) on sodomy statutes.

48 I would not want to suggest that Rubenfeld would not support anti-discrimination rights for gays. However on the arguments raised in his paper he would be forced to treat the question of anti-discrimination as entirely separate to the sodomy statutes.

affirmatively shape our lives.[49]

Keeping this point in mind, the danger posed by positive productive law is that it will take over a person's life completely, so that the force inherent in the law for normalisation will come to define an individual's existence. Rubenfeld argues that the law should not do this, and that the right to privacy prevents this. Rubenfeld calls this idea the principle of anti-totalitarianism. The law should be prevented from

> taking over, or taking undue advantage of, those process by which individuals are defined in order to produce overly standard, functional citizens.[50]

He applies this principle to the sodomy statutes and to the case of *Bowers* v *Hardwick*. Sodomy statute he argues channel individual's sexual desire into reproductive outlets. They reinforce sex roles and they enforce heterosexuality in a positive way.

> In our time, the use of the heterosexual/homosexual axis has achieved a paramount normalising significance. The proscription is against homosexual sex; the products are lives forced into relations with the opposite sex that substantially direct individuals' roles in society and a large part of their everyday existence.[51]

Andrea Dworkin makes a similar point linking the indiction against sodomy with the dominance of men over women, illustrating the way that the sodomy statutes work to productively create heterosexual lives.

> The sodomy laws are important, perhaps essential, in maintaining for men a superiority of civil and sexual status over women. They protect men as a class from the violence of penetration; men's bodies have unbreachable boundaries.... The power of the gender system with men on top depends on keeping men distinct from women precisely

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49 Above n 46, 783

50 Above n 46, 794.

51 Above n 46, 800, note the use of opposite sex in this quote. This phrase itself implies a heterosexual view of the world. Questions may be posed: in what sense in one sex opposite to the other, where does one sex end and the other begin,

> in this regard. In sodomy, men can be used as women are used; with real carnal pleasure for the one doing the fucking; and with real carnal pleasure for the one being fucked.[52]

Moreover, for Dworkin the sodomy laws prevent the feminisation of men - and men who do have sex with men are constituted as a race apart.

> The act of sodomy is not the crime against nature; the men themselves are the crime against nature. The law is internalised, a curse a what they *are*, a ubiquitous and inescapable social stigma.[53]

Thus, the sodomy statutes can be said to affirmatively direct a the shape of a person's life by enforcing exclusive heterosexuality. Rubenfeld argues that law which interferes in an individuals life to this extent is totalitarian and goes beyond the proper scope of law.[54]

Rubenfeld extends this argument and contends that the law should not try to reflect sexuality. He argues that the concept of sexuality itself is a construction which limits a person's freedom to choose their own forms of sexual expression. Any law, or any programme for reforming or changing the law which has as its base the concept of individual's having a defined sexuality is self-defeating. Sexuality itself is defined so as to limit and shape an individual's life.

Thus Rubenfeld relies on two of Foucault's arguments: that power is positive and productive in its nature, and that sexuality is socially constructed and of itself repressive. His conclusion is that the law should not regulate man-to-man sex (a conclusion this paper would not disagree with).

However, by relying on the right to privacy, and applying Foucault's argument in the way he does to deny the existence of sexuality, Rubenfeld would effectively consign gay lives to a private sphere of invisibility and perpetuate many of the problems gays face. The reasons for this are to be

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52 Dworkin, *Intercourse* (The Free Press, New York, 1987), 156

53 Ibid, 155 [emphasis original].

54 In the context of United States law, Rubenfeld argues that such law is unconstitutional. In the New Zealand context, it is more appropriate to argue that parliament should reform the law than that the courts should.

found in Foucault as well.[55] There are three.

First, one of Foucault's major concerns was to displace the primacy of law in the analysis of power and knowledge. Power comes from many sources and is to be found and studied in specific relationships. The law is merely one source of power. Therefore, if the law becomes silent on the issue of homosexuality and sodomy, this does not solve the problems created by homosexuality as a social construct and the moral condemnation of homosexuals. Homosexuality emerged from medical and psychological analyses not legal analyses. The attempt remove the concepts of sexuality and homosexuality from the law by arguing the privacy of sex in a legal sense does not destroy the concepts.

This argument is made by MacKinnon in respect of the case of *Roe* v *Wade*, a case in which the United States Supreme Court dealt with the constitutionality of a statute outlawing abortion. In that decision the court held that the right to privacy precludes state interdiction of abortion. MacKinnon argues that this does not reinforce a woman's right to choose how she expresses her sexuality. Rather it simply forces women's experience of sexuality into the private sphere where it has been and is defined and controlled by men. Thus legal privacy does not increase freedom. It simply makes women sexuality invisible.

Similarly forcing gay sexuality into a sphere of privacy does not give more freedom, but it does prevent gays from having legally recognised concerns. This exactly what the Western Australian statute is aimed at in a more coherent way.

Secondly, Rubenfeld's argument also fails to deal satisfactorily with the productive nature of power. The law as a source of power creates or reinforces, in the form of sodomy statutes prevailing knowledge/prejudice against homosexuals. Repealing the statue is a negative act. By repealing the statutes new knowledge about homosexuality is not necessarily created. It merely creates a void. In order for that void not to be filled by the familiar concept of homosexuality and the familiar prejudice there must be an alternative cast in positive terms.

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55 There may be evidence to suggest that Foucault would have agreed with Rubenfeld's analysis (Bell "Beyond the 'Thorny Question': Feminism, Foucault and the Desexualisation of Rape" (1991) 119 Intl J Sociology of Law 83) but this is unclear and I would argue inconsistent with his own arguments.

These two counter-arguments basically say that landlords and employers still know that homosexuals exist, whether sodomy laws are on the books or not, and can still discriminate if they so desire. The real power affecting gays adversely has always come not from the public law, but from private discrimination. Mere repeal of sodomy laws then is a small advance.

Thirdly, though Foucault does argue for the social construction of sexuality he does not deny the reality or relevance to peoples lives of the knowledge so created. In fact quite the opposite. A major consequence of the deployment of power in the form of sexuality is the technique by which sexuality is applied by the individual to her or his own life. Individuals analyse their own lives in terms of sexuality. Thus sexuality is deployed by the self on the self. The concept of sexuality gets its strength from this process - mere change in the law will not affect they way people define themselves. Moreover the consequences of such a self-definition will continue to be felt. If the identity of homosexual continues to be seen in a negative light, homosexual people will continue to be confined to silence and self-denigration.

This last argument overstates the effect negative effects of self-definition as a homosexual/gay. As argued above the law is not the only or even the main source of knowledge by which people define their lives. The gay community gives an alternative and positive view of the lives of those homosexuals who define themselves as gay. Indeed, the concept of being gay itself is an attempt to provide a positive alternative to the medicalised concept of the homosexual. Gays are different from homosexuals precisely in who defines our lives. Gays are self-defined and the consequences and implications of being gay are defined by gays. Homosexuals are (as Foucault argues) self-defined - but the implications of being homosexual are settled by others.

The concept off being gay does utilise the concept of sexuality. Being gay is an identity not a random set of behaviour. However, it is both positively valued, self-imposed and self-defined. It recognises the reality of sexuality in this society, but it also allows for freedom of sexual expression in that it does not presuppose a morality or personal ascetic imposed from outside oneself. Moreover, it provides a positive alternative to the concept of the homosexual, so there is no void left. And it allows for the proclamation of values and knowledge not based on outside concepts, but generated within the gay community.

It is the thesis of this paper that dignity, participation and freedom of sexual expression is facilitated by the creation and recognition of "the gay" as an identity in place of "the homosexual".

It follows from the arguments above that being gay is not a matter to be confined to the arena of personal and private choice. Given the prevailing knowledge about sexuality, and the negative view of homosexuals which the creation of sexuality has allowed, public affirmation of the gay identity and of gay lives is necessary in order for gays not to be discriminated against in the most basic of ways. The law is one possible forum for the publicisation of gays. It is not enough for the law to say nothing about gays, or homosexuality. Unless the law positively affirms the interests of gays then it is participating in the injustice of discrimination, and contributing to the problems of gays.

It cannot be said that if gays are discriminated against, albeit by private people acting in a private capacity, in employment, housing or the provision of goods and services that gays can fully and freely participate in society, or that gays are treated with dignity. If the sanctions of discrimination are applied it cannot be said that gays have sexual freedom. Neither is it an argument to say that men can have sex with men so long as they do it in private and do not advertise the fact. This effectively stops people from freely expressing sexuality.

Human rights and discrimination

The use of human rights anti-discrimination statutes is obvious beginning. By providing that sexual orientation cannot be used to base a decision relating to employment or provision of accommodation or goods and services, gives gays and lesbians a remedy if discriminated against and proclaims that gays and lesbians have the right to be treated as equal nongays and non-lesbians.[56]

These statutes normally set up a Commission or board which deals with complaints about discrimination on impermissible grounds, and may also have policy or educative functions. Impermissible grounds of

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56 I am not here concerned to deconstruct the use of the term "equal" and its implications for justice. I am simply concerned about power and lack of power, and strategies for empowering disadvantaged groups.

discrimination are traditionally at least sex, race and religion. Some jurisdictions have added sexual orientation, or a similar phrase to the list, including New South Wales and South Australia in Australia; and, in the United States, Wisconsin, Massechusetts, Conneticutt, Hawaii, the District of Columbia and many cities and counties (including New York city, San Francisco, and Chicago).[57] And, the Victorian Law Reform Commission recommended that sexuality be added to the list of prohibited ground under the Victorian Equal Opportunity Act.[58]

As was mentioned in the introduction there is at present before the Parliament of New Zealand the Human Rights Commission Amendment Bill which proposes to add "sexual orientation" to the list of prohibited grounds of discrimination under the New Zealand anti-discrimination/human rights legislation. The bill on in its present form is useful for gays and lesbians. Examining it more closely it provides (in conjunction with the principal Act, the Human Rights Commission Act 1977) protection against discrimination on in the area of employment and training, access to public places, provision of goods and services, housing and accommodation. It adds a number of prohibited grounds to the present Act's list.[59] Relevant to this paper are the grounds sexual orientation and health status. Sexual orientation is defined as a homosexual, heterosexual or bisexual orientation, it expressly includes the condition of being transsexual, transvestite and hermaphroditic, and expressly excludes paedophilic orientations. Some problems with this definition exist in that paedophilia (whatever it means) is clearly considered dangerous and therefore the subject of valid discrimination. It is linked traditionally with arguments made by people who are anti-gay that gays molest children.[60] It is problematic to have such an argument reflected in a statute designed to prevent discrimination against gays and anyway, the definition is clear without this express disclaimer.

Apart from the definition there substantive provisions are good. There are only three permissible exceptions to a blanket rule of no discrimination on

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57 "Developments: Sexual orientation and the Law" (1989) 102 Harv LR 1508, 1667 - 1668 nn 49 & 51; Cicchino, Deming & Nicholson "Sex, Lies and Civil Rights: A Critical History of the Massechusetts Gay Civil Rights Bill" (1991) 26 Harv Civil Rights - Civil Liberties LR 549,556 - 558.

58 Law Reform Commission of Victoria, *Review of the Equal Opportunity Act* (Report 36, 1990), 24 - 26.

59 cl 14F,

60 See Criminal Justice Commission of Queensland, *Reforms in the Law Relating to Homosexuality* (1990), 6 - 12 for a discussion of the arguments.

the grounds of sexual orientation. They are:

- In employment,[61] where the position requires a married couple (though this presumes that married couple exclude gay and lesbian couples) - this must surely be rare if an objective test of the requirement is imposed.

- In employment,[62] if the job is domestic. This applies to all discrimination except racial and is unobjectionable.

- in share residential accommodation,[63] again this seems unobjectionable.

On the negative side, the scheme of the act means that the provision of gay- and/or lesbian-only space - for example gay and lesbian coffee houses, or nightclubs - may be contrary to the Bill and this may not be desirable. It may be possible to bring these sorts of facilities under cl 29 which provides an exception for positive measures designed to promote equality for a disadvantaged group.

On the subject of health status the act is also useful. AIDS has provoked an enormous amount of worry in New Zealand. There is a lot of disinformation about how it is caught and what it means to have Aids or to be HIV positive. HIV/AIDS has hit the gay community in this country disproportionately. Having health status as a prohibited ground of discrimination not only helps with the problem of discrimination against people with specific mental or physical disabilities, but also has a spin off effect for gays.

The bill is drafted in neutral terms in that it would be illegal to discriminate against homosexual and heterosexual people. However, set against a background in which discrimination is most likely to happen against gays and lesbians, it provide gays and lesbians with a specific remedy if employment is denied on the basis of sexuality. This is a powerful legislative statement of approval of gays and lesbians lives.

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61 cl 15C.

62 cl 15I.

63 cl 25A.

The bill in providing such remedies allows gays and lesbians to be publicly visible by providing a weapon against any discrimination which might arise. Though the remedy is not perfect and may be difficult to apply in many cases, nevertheless it is there. This is especially important at the present time. The AIDS crisis threatens not just the public lives of gays but our physical lives as well. By providing increased opportunities for gays to participate in the public life of the community as gays, means that men who have sex with men are more susceptible to safe sex propaganda and therefore better informed about ways of self-protection, and have a higher self-esteem and are consequently less willing to take life-threatening risks.[64]

However, It should be recognised that the Amendment Bill provides only limited remedies in a narrow area. Massechusetts in passing a similar bill attached to its provisions policy statements like the statements found in the Western Australia Law Reform (Decriminalisation of Sodomy) Act though less strong.[65] It was seen as an attempt to provide minimum rights to gays - to employment, housing etc - without providing full scale social recognition and approval. In this way courts in deciding issue involving gays and lesbians but not directly related to the anti-discrimination law may not be able or choose to taken account of the positive view of gays and lesbians that it embodies.

Clearly the New Zealand bill has not taken this narrow view. But the provisions of the bill are limited to providing a narrow range of rights. In New Zealand it is open and highly desirable, to expand on the positive view of gays and lesbians implicit in the Amendment Act through legislation, administrative policy and common law.

Developments

Already in New Zealand immigration policy recognises long standing gay relationships (of two years or more) and allows partners of gay and lesbian New Zealanders residence.[66] Housing Corporation policy may recognise the

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64 National Council on AIDS (New Zealand), *The New Zealand Strategy on HIV/AIDS* (1990), 40 - 41.

65 Cicchino, Deming & Nicholson "Sex, Lies and Civil: A Critical History of the Massechusetts Gay Civil Rights Bill" (1991) 26 Harv Civil Rights - Civil Liberties LR 549.

66 Pink Triangle issue 74 November/December 1988 p 10.

special housing needs of gay and lesbian groups.[67]

The recently circulated draft Censorship Bill also participates in this process.[68] It includes as a specific factor in making a censorship decision the fact that material

> treats as inherently unequal any particular class of persons, or members of the class,by reference to ... sexual orientation...(cl 28(5)(d))

Thus censorship decision-making has to be aware of the effect that material has on the dignity of gays and lesbians. In a regime governed by a clause such as clause 28 it would also be difficult for a censor to treat material which is aimed at gay and lesbian groups as subject to higher standards than other material.

Children have always been a difficult area for gays and lesbians. It seems a key part of the agenda of people who are anti-gay to limit gays and lesbians access to children. Certainly many of the statutory statements of disapproval in the Western Australian Act are directed at children and education. The fear must be the if you get to them early enough you might "convert" them from right-thinking heterosexuality. The obvious counter-argument to that is that if you get to the gay and lesbian children early enough with positive images and role models of gays and lesbians you prevent possible later self-abuse and self-hatred.

Some gays and lesbians have children conceived by previous heterosexual relationships.[69] When these relationships have broken up and the gays and lesbians may have problems with custody and access.[70] *Y* v *Y*[71] was looked upon as a landmark decision when it was made. It was the first time a

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67 Pink Triangle issue 75 January/February 1989 p 8.

68 Minister of Justice, *Censorship and Pornography: Proposals for Legislation* (1990) cl 28(5)(d).

69 Some also have children while in gay and lesbian relationships - this is a different issue.

70 See generally *Butterworth's Family Law Service* volume 2, 6028 - 6028/1, 6039; acknowledgment is made of an unpublished LLM seminar paper presented to the 1990 Family Law seminar at Victoria University by Robb Newberry "Homophobia and the Welfare of the Child - a New Zealand Perspective".

71 Noted at [1981] NZ Recent Law 302, properly *B* v *B* (High Court, Rotorua, 18 June 1981, M145/80, Barker J).

lesbian mother was awarded custody of her daughter. However the Judge in the case made commented to the effect that he would not approve if the mother fell under the influence of "aggressive lesbians". In a more recent decision on access,[72] though the Judge made comments that homosexuality in itself was not relevant, a gay man was denied access to his children on the grounds that the mother and her new (male) partner could not cope with the father's being gay, and this was distressing the children. This is in conflict with the general position when the custodial parent is upset by non-custodial parent access.[73]

It is argued that gays and lesbians in the family court are yet treated with full equality to non-gay and non-lesbian people. The proper remedy for this situation is the development of a common law which recognises that gays and lesbians do not have adverse affects on children, rather gay and lesbian parents have an important role in bringing up children. The development of human rights law may contribute to this process, because the courts can guide the common law by reference to legislative policy laid down in statutes like the Human Right Commission Act.

In family law in general gay and lesbian relationships are less publicly recognised. There are many strategies for dealing with this. Some suggest that gay and lesbian marriage should be made possible.[74] Or, it may be possible to extent the recognition given to non-married heterosexual couples. The objection to either of these options that marriage and marriage substitutes are key parts of the structure of (hetero)sexism might be made by some. Indeed, imposing marriage on gay and lesbian relationships may be worse than not recognising them at all (if only for the reason of the implications of this for tax and social welfare benefits).

These ways that law in society may affirm and recognise gay and lesbian lives present important challenges for the future.

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72 *G* v *R*, Family Court, Napier, 21 February 1989, FP 041 190 87, Judge B D Inglis QC.

73 See *Butterworth's Family Law Service* volume 2, 6035-6.

74 "Developments: Sexual Orientation and the Law" (1989) 102 Harv LR 1508, 1605 ff.

CONCLUSION

This paper has dealt with the impact the law can have on sexuality. As Foucault has argued freedom to define one's own sexuality is constrained by the concept of sexuality itself. However, freedom to define one's own sexuality in an imperfect society may be consonant with legal recognition of sexuality, where sexuality is recognised and deployed by sources of power outside the law. In this case the law attempts to correct a power imbalance, and in fact become a form of resistance to the prevailing power. Though at first sight Foucault's analysis of sexuality suggests that the law should not recognise sexuality as Rubenfeld suggests, this should not be the ultimate conclusion. The law certainly should not contain regulation of consensual sexual activity this forces people to define their own sexuality in ways consistent with the law. However, the law can positively affirm sexualities which would otherwise be the subject of prejudice and discrimination. If the law does not positively affirm sexualities in this category then it participates passively in the prejudice and discrimination.

This paper has argued the case for a public and social recognition of gays. This recognition is important in order to fully recognise the dignity of gays and gay's rights to participate in society and fully express ourselves sexually. This aim is partly, but only partly, facilitated by the repeal of the sodomy laws. It needs to be carried further though into anti-discrimination Human Rights law, and beyond.

McKnight, Paul William
Sexuality and the state