Three Tasmanian Law Reformers*

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In the year of the celebrations of the bicentenary of British settlement in Tasmania, it is appropriate to reflect upon those who have contributed to good governance and the protection of human rights, such as are now enjoyed in Tasmania and in the wider Australian Commonwealth. Many names spring to mind. But I have selected three whose contributions to reform, together, have extended over more than a century. Their contributions bear witness to the fact that we can sometimes make society better through law reform. This is an obligation of all citizens, but particularly of judges and lawyers.

The three personalities that I have selected are Andrew Inglis Clark, Frank Neasey and Rodney Croome. They are three very different characters. Yet a thread of Ariadne binds their lives together in the history of Tasmania and the law of Australia.

ANDREW INGLIS CLARK

Tasmania has never had a Justice of the High Court. That is, unless one counts Sir Douglas Menzies, Justice between 1958 and 1974, as a Tasmanian. He was the son of a Congregational minister. Although born in Victoria, he was educated at the Clemes School (later The Friends' School) in Hobart and at Devonport High School. He returned to Melbourne at the age of 18 and became quientessentially Victorian. So I do not think he can pass as a Tasmanian Justice.

For all that, in the daily work of the High Court, over the century of its existence, the brooding spirit of Andrew Inglis Clark has never been far away. It was Clark who wrote the first draft of what became the Australian Constitution. Anyone in doubt can read his proposed Bill alongside our enduring constitutional document. The similarities are

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profound.[1] In a sense, Clark bears out V I Lenin's *dictum* that the person who writes the first draft rules the organisation. Clark put down the initial ideas for Australia's national governance. The end product never strays far from his inspiration.

The bare facts of Clarke's life are simple. He was born in February 1848 and educated at Hobart High School. He was admitted to legal practice in 1877. He served in the Tasmanian House of Assembly and became colonial Attorney-General in the 1890s. It was at that time that he came to represent Tasmania at the conference on federation held in Melbourne in 1890 and at the Sydney Convention in 1891.

It was in Sydney that Clark's memorandum and draft proved critical. We are thus the beneficiaries of his mind and its thoughts on our national governance. Without his mixture of practical wisdom in designing the achievable, the series of miracles necessary for the attainment of Australian federation might not have occurred. Clark was a great admirer of the American constitutional system, visiting that country three times. His mind was full of ideas designed to enhance a republican form of government, in the sense of one that acknowledged the ultimate sovereign powers of the people. In 1898, he became a judge of the Supreme Court of Tasmania.

As it happened, Clark opposed the federal Constitution in its final form for it did not, in his view, adequately protect the financial base of the smaller States but rendered them vulnerable to the power of the centre. His book on the Constitution, published in 1901,[2] repays reading even to this day. His views on constitutional interpretation have had a profound influence on the approaches of many Justices of the High Court, particularly Justice Deane[3] and myself.

Like John West before him, Clark was a convinced Australian nationalist. He never took a narrow or purely Tasmanian view. He saw strength for Tasmania in the unity of this continental nation. His admiration of the American constitutional system led to his unique synthesis of the British elements of our basic law with the American principles including the separation of powers, the creation of a strong Senate and the insistence on

1 See A I Clark's Memorandum and Draft Bill for a Constitution in F M Neasey and L J Neasey, *Andrew Inglis Clark* (2001) 236; J Williams, *The Australian Constitution:A Documentary History* (2005).

2 *Studies in Australian Constitutional Law* (first published 1901, 2nd ed 1905, 1st edition reprinted 1997). See Neasey and Neasey, 121.

3 See eg *Theophanous v Herald and Weekly Times Pty Ltd* (1994) 182 CLR 102 at 171.

the termination of appeals to the Privy Council.[4] Clark had travelled to England and watched the Privy Council at work. The sight of their Lordships asleep on the bench after lunch, so far from his home with its own unique society, convinced him that Australian cases should finish in Australia. It took eighty-five years after Federation for that end to be accomplished.[5] As in so many of his ideas, Clark was ahead of his time.

An estimate of Clark's impact appears in the recent book on his life:[6]

> 'Such was Clark's quality of intellect that his coming from the relative isolation of the island of Tasmania proved to be no social barrier. Indeed for someone with his restless and enquiring mind, his isolation proved the impetus to his looking beyond his own shores for further intellectual stimulation, enabling him to form and maintain friendships with intellectually celebrated thinkers, such as [Oliver Wendell] Holmes and [Moncure] Conway. In a sense Clark's mind was his passport to intellectual equality with such people which is somehow in keeping with his democratic ideals of the brotherhood of man'.

In many cases in the High Court, I have turned to Clark's vision of the Constitution as a living body of law to answer those who are inclined to confine its meaning by reference to what its words are taken to have meant in 1901. For me, as for Clark, such a view is alien to the nature of a national constitution. By its very purpose, a constitution must live from age to age.[7] It must speak to generations far distant from those who first wrote its text. There are, of course, 'originalists', both of a 'pure' and 'reluctant' kind who favour the opposite view. They see the 1901 meaning as the only anchor of certainty in the search for constitutional purposes. However, Clark took the same view as was later to be expressed by his friend Justice O W Holmes, in the Supreme Court of the United States, who said '[The Constitution] called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters'.[8]

4 Neasey and Neasey above n 1, 144 citing Clark's speech in the Tasmanian House of Assembly reported *The Mercury* 11 August 1897.

5 Successively abolished by *Privy Council (Limitation of Appeals) Act* 1968 (Cth); *Privy Council (Appeals from the High Court) Act* 1975 (Cth) and *Australia Act* 1986 (Cth), s 11. See *Kirmani v Captain Cook Cruises Pty Ltd [No 2]* (1985) 159 CLR 461 at 464-465.

6 Neasey and Neasey above n 1, 225.

7 M D Kirby, 'Constitutional Interpretation and Original Intent: A Form of Ancestor Worship' (2000) 24 *Melbourne University Law Review* 1 at 11.

8 *Missouri v Holland* 252 US 416 at 433 (1920).

This view of the Constitution has ensured that the living branch of legal doctrine can serve times fundamentally different from those of the 1890s when Clark first put his pen to a blank page. In case after case I have pointed this out.[9] Yet no one explains why it must be so as clearly as the Tasmanian A I Clark does.

Even recently this issue has arisen again before the High Court in *Singh v The Commonwealth*.[10] There, a young girl, born in Australia of parents of Indian nationality who had been rejected protection visas as refugees, failed in her bid to be accepted as a constitutionally protected Australian national by birth, incapable of removal from Australia as an 'alien'. If one took an originalist view (as Justice McHugh[11] and Justice Callinan[12] appeared to favour in that case), the word 'alien' was essentially fixed by its meaning in 1901. In that year there can be little doubt that a person born in the dominions of the British Crown was not an 'alien'; but owed allegiance as a British subject by birth. Yet if the word 'alien' is viewed as a constitutional word, capable of adaptation to modern notions of alienage, it was otherwise. Then, the Parliament could enact, as it has done, a provision requiring that such a child, to be a national of Australia, must be born of parents at least one of whom has Australian nationality or must live in Australia for ten years in order to be immune from removal as an 'alien'.[13]

The High Court in *Singh* did not approve, or disapprove, such a law. That was not its business. The majority simply held that it was open to the elected Federal Parliament, consistent with such a reading of the Constitution, to enact a law so providing. Many countries of the British dominions have enacted such laws since 1901 to reflect modern notions of nationality and alienage. A more vivid illustration of the power of A I Clark's vision of the Constitution as a 'living branch' of law could scarcely be imagined.

Clark's writing was referred to by Justice Dawson in *Allders International Pty Ltd v Commissioner of State Revenue (Vic)*[14] on the question of the history of the meaning of s 52(i) of the Constitution and

9 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 599 [186]; *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 523 [111]; *Eastman v The Queen* (2000) 203 CLR 1 at 80 [242].

10 (2004) 78 ALJR 1383.

11 (2004) 78 ALJR 1383 at 1404 [92] (McHugh J).

12 (2004) 78 ALJR 1398 at 1440 [288] (Callinan J).

13 *Australian Citizenship Act* 1948 (Cth), s 10(2) as amended by the *Australian Citizenship Amendment Act* 1986 (Cth).

14 (1996) 186 CLR 630 at 667.

by Justice Brennan on the interpretation of s 92 of the Constitution in *Nationwide News Pty Ltd v Wills*[15]. Again, Justice Deane devoted much time to the writing of Clark in his reasons in *Polyukhovich v The Commonwealth*,[16] this time in relation to the issue of retrospectivity of laws and the separation of powers. Justice McHugh referred to him in that case, in the same context.[17] Justice Murphy referred to Clark on the presumption of validity of federal legislation in *The Tasmanian Dam Case*.[18] Justice Stephen cited him in *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation*[19] on the powers of Royal Commissions, as did Justice Dixon in *McGuiness v Attorney-General (Victoria)*.[20] Justice Windeyer found his views on s 108 of the Constitution of help in *The Queen v Phillips*.[21] Chief Justice Dixon and Justices McTiernan, Fullagar and Kitto derived much assistance from him for their understanding of the separation of powers in the Constitution in *The Queen v Kirby; ex parte Boilermakers' Society of Australia*.[22] Doubtless there are other cases.

There were several proposals to appoint Clark to the early High Court. He missed out twice and was, by accounts, somewhat bitter about it.[23] Yet his spirit lives on in our highest Court and in our Constitution. He is the greatest of the Tasmanian constitutionalists. His influence on our national law is larger, overall, in my view, than that of any of the founders of the Australian Commonwealth except Barton, Griffith and Deakin.

FRANK MERVYN NEASEY

Whereas Inglis Clark died in 1907, thirty-two years before my birth, Frank Neasey's life overlapped mine and I had the privilege to know him as a colleague and friend. Although Clark is named in the *Centenary Companion to the High Court of Australia* as an appointment to the High Court that might have been,[24] and Neasey is not, there is no doubt that Frank Neasey is one of the jurists, not appointed, who would have graced

15 (1991) 177 CLR 1 at 58.

16 (1991) 172 CLR 501 at 618-619.

17 *Ibid*, at 720.

18 (1983) 158 CLR 1 at 163.

19 (1981) 152 CLR 25 at 64 and 69.

20 (1940) 63 CLR 73 at 100.

21 (1970) 125 CLR 93 at 117.

22 (1955) 94 CLR 254 at 276-277.

23 Neasey and Neasey (above) at 214, 219.

24 Tony Blackshield et al (eds) *Oxford Companion to the High Court of Australia* (2001) 23 ('Appointments that might have been').

the High Court and added to its distinction. As it was, for twenty-seven years prior to his retirement in 1990 he was to serve with great ability as a judge of the Supreme Court of Tasmania.

Frank Neasey was educated at the Burnie Convent School and Burnie High School before becoming a student teacher in 1939. He served in Papua New Guinea during the Second World War. On his return from war service to Australia, he was one of that distinguished group of ex-servicemen who took advantage of the Commonwealth Reconstruction Training Scheme to secure a degree in law. He won many prizes in his studies at the University of Tasmania. On graduation, he became a partner in the firm Murdoch, Cuthbert, Clarke and Neasey and part-time lecturer in law at the University.[25]

His life in legal practice was one of advocacy. He practised mainly on the civil side and was an excellent trial lawyer. According to those who observed him, he was a fine cross-examiner: meticulous in preparation and lucid in delivery.

One of Frank Neasey's judicial colleagues described to me Neasey's love of words and his reverence for the law. Another spoke of his independence, scholarship, intellectual integrity and articulate exposition of his reasons. In his early days, changing the law to accord with society was far from the mind of most legal practitioners. Frank Neasey loved to dress up ideas and to present them attractively. He knew the power of words and ideas in the courtroom and in society. He had a sweet personality; he was gentle and polite to all. Yet he had a strong temper and could occasionally get furious with colleagues and with advocates: an emotion he generally succeeded in hiding or (as one colleague put it) revealing it with great subtlety, in a form of 'arcane malevolence'. He had a fine voice; was devoted to classical music; played excellent tennis and table-tennis; and was devoted to his wife, Pat, who happily survives together with their children Helen, Lawrence, Catherine and Francis.

In 1980, Frank Neasey was appointed to the Australian Law Reform Commission which I then chaired. His merits were pressed upon me by Justice (later Sir Gerard) Brennan, a member of the Commission and subsequently Chief Justice of Australia.[26] Sir Gerard shared with Frank Neasey a devotion to the codification of the criminal law and a disdain for

[25] Tasmania, *Parliamentary Debates*, House of Assembly, 11 August 1993, 2891 (the Attorney-General). See also [1990] Tas R xii.

[26] F G Brennan, 'A Judge for our Time - The Hon F M Neasey, AO', (Speech delivered at the Bar Association of Tasmania, Hobart, 9 July 1994).

those Australian States, notably New South Wales and Victoria, that continued obdurately to resist the wisdom of the Griffith Criminal Code.[27]

Frank Neasey served on the Australian Law Reform Commission from 1980 until 1984. We both left that office at about the same time. Yet our service overlapped in work on one of the Commission's major projects, resulting in proposals for the reform of the law of evidence and the adoption of a new uniform evidence law.[28] In due course, our efforts were to prove fruitful. The law that we proposed has been adopted for application in all federal courts and in New South Wales, the Australian Capital Territory and Tasmania. Frank Neasey's wise, quiet, insistent contributions to the project on evidence law reform (and indeed other Commission projects) are reflected today especially in the important legislation that governs the law of evidence in Australia. In practical terms, there are few laws of such pervasive importance.

I can remember many debates in the Commission over the form of that law. The basic conflict was between those who wanted to simplify it - casting aside rules that had been created by English judges in a myriad of cases, to meet different problems - substituting a broad judicial discretion to admit evidence according to general guidelines anchored in fairness. I tended to favour that approach. But I was out-voted and out-gunned every time by Frank Neasey and by the Commissioner in charge of the project, now Justice Tim Smith of the Supreme Court of Victoria. They advocated, jointly and severally, the retention of *rules* governing the admissibility of evidence. They shared a deep suspicion of judicial discretion. They described it (ever so politely) as a form of legal tyranny. The accused facing trial and the civil litigant before a court had a right to know, and to predict with a fair degree of certainty, whether evidence would, or would not, be received. Only *rules*, numerous and detailed, would ensure this. The *Uniform Evidence Acts* reflect this approach with only a few concessions in favour of my broad judicial discretions.[29] I pay tribute to Frank Neasey's mastery of the detail of the law. I often felt that he had learned his skills as a tactician in the highlands of Papua New Guinea during the War. Against his doughty resistance, I soon ran out of ammunition.

27 *Criminal Code Act* 1899 (Qld), substantially adopted in Tasmania as the *Criminal Code Act* 1924 (Tas). The codifiers may yet enjoy the last laugh following the passage of the *Criminal Code Act* 1995 (Cth).

28 Australian Law Reform Commission, *Evidence*, Report No 26 (1985). See also ALRC 38, 1987.

29 *Evidence Act* 1995 (Cth); *Evidence Act* 1995 (NSW); *Evidence Act* 2001 (Tas). The federal Act provides for its extension to the Australian Capital Territory Act. See s 4.

That is not to say that Frank Neasey always opposed legal change. On the contrary, on his retirement he declared that we should 'burn the wigs!'.[30] At the same time, as earlier, he revealed a strong commitment to truth in sentencing - shorter prison sentences: but ones that would truly be served, not illusions built around parole. He became, as he described it, 'a bit of a computer buff'. He introduced technology to his court to record the proceedings from which accurate continuous transcripts could be secured.

He advocated video-taping of police evidence. This was a legal change that was to come to pass in Tasmania; but not without continuing controversies.[31] He resisted pre-trial procedures considering that they would divert judges from their essential task of deciding cases. Whilst respecting juries, he advocated the facility of criminal trials by judge alone, at the option of the defendant.[32] Many of his proposals are now an established part of our law. In civil proceedings in Tasmania (as in the High Court) the judges are now unwigged. But the horsehair has not been burned. It is worn in Tasmania in criminal trials and for ceremonies - a compromise Frank Neasey would probably have tolerated.

Like A I Clark, Frank Neasey admired American ideas in the law and was reportedly a republican. He was prudent and experienced and a devoted servant of good governance in this State. On his death, one member of Parliament pointed out that his strong advocacy of the necessity for legal aid, to ensure that no indigent person would ever face a serious criminal trial without a competent legal representative, provided (if necessary) by the State, had been taken up by the High Court.[33]

To this day, the High Court continues to draw upon Frank Neasey's judicial opinions. Recently, in an appeal concerned with the meaning of the new Northern Territory *Criminal Code* provisions governing the defence of honest and reasonable belief of consent in the law of rape,[34] the High Court was referred to his reasoning in *Ingram v The Queen*.[35] For me,[36] as for the Northern Territory Court of Appeal,[37] it was Frank

30 A Hunt, 'Neasey ends 27 years on the Supreme Court Bench', *The Advocate*, (Burnie), 15 September 1990, 19.

31 *Kelly v The Queen* (2004) 78 ALJR 538 considering *Criminal Law (Detention and Interrogation) Act* 1995 (Tas), s 8.

32 Hunt, above n 30, 19.

33 Tasmania, *Parliamentray Debates*, House of Assembly, 11 August 1993, 3892 (John White). See *Dietrich v The Queen* (1992) 177 CLR 292. Problems remain. See *Milat v The Queen* (2004) 78 ALJR 672; *Muir v The Queen* (2004) 78 ALJR 780.

34 *Director of Public Prosecutions (Northern Territory) v WJI* [2004] HCA 47.

35 [1972] Tas SR 250 at 259.

36 *WJI* [2004] HCA 47 at [95].

37 *Attorney-General's Reference No 1* (2002) 12 *NTLR* 176 at 193 [44] per Bailey J.

Neasey's invocation of the necessities 'of elementary justice'[38] that cut a path through the forest of conflicting judicial opinions and showed the applicable law with clarity.

Apart from this recent case, Frank Neasey has been referred to in many High Court decisions. I cited him in *Gould v Brown*[39] concerning the jurisdictional conflicts that were bound to emerge with the creation of the new federal courts in the 1970's. His extra-curial writings on criminal evidence have also been repeatedly referred to,[40] as have his judicial musings on the law of provocation.[41] In *Hawkins v The Queen,*[42] he was found to have correctly stated the meaning of 'voluntary and intentional'.

The citations of his opinions are by no means confined to the criminal field. In *O'Sullivan v Farrer*,[43] his discussion of the notion of 'in the public interest' in *In re Thompson*[44] was referred to approvingly, as was his discussion of taxation assessments in *F J Bloemen Pty Ltd v Federal Commissioner of Taxation.*[45]

Frank Neasey's dissenting opinion in the Court of Criminal Appeal of Tasmania was preferred by the Full High Court in *Carr v The Queen*,[46] and his decision at first instance was the preferred view of the High Court in *Boughey v The Queen.*[47] His views on the applicable law travelled less happily in *Williams v The Queen*[48] and in *Heatley v Tasmanian Racing and Gaming Commission.*[49] However, at this level of discourse, I know more than most that different minds can sometimes see the same legal problem from entirely different viewpoints.

38 [1972] Tas SR 250 at 263.

39 (1998) 193 CLR 346 at [261].

40 "Similar Fact Evidence and Propensity Reasoning" (1985) 9 *Criminal Law Journal* 232, cited by me in *BRS v The Queen* (1997) 191 CLR 275 at 322; "The Rights of the Accused and the Interests of the Community" (1969) 43 *ALJ* 482, cited in *Cleland v The Queen* (1982) 151 CLR 1 at 30, (Dawson J).

41 *McGhee v The Queen* (1994) 183 CLR 82 at 106, per Toohey and Gaudron JJ, citing *Haas v The Queen* [1964] Tas SR 1; *Stingel v The Queen* (1990) 171 CLR 312 at 328 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

42 (1994) 179 CLR 500 at 509 and 511, (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).

43 (1989) 168 CLR 210 at 216.

44 [1964] Tas SR 129 at 143-144.

45 (1980) 147 CLR 360 at 380, (Murphy J).

46 (1988) 165 CLR 314.

47 (1986) 161 CLR 10.

48 (1986) 161 CLR 278.

49 (1977) 137 CLR 487.

As counsel before the High Court, Frank Neasey was successful in three of his four reported appellate appearances.[50] Indeed, he was only unsuccessful as a junior in *Wright v Attorney-General for the State of Tasmania*.[51] This proportion of success is one that many leading counsel would envy.

There are more instances where Frank Neasey's great experience and deft expression have carried the day in Australia's highest court. This is the great privilege of a judge of our tradition. Ideas are laid down and stored up in the treasure-house of the law reports - now also present in cyberspace. They are used, years after the judge has gone. The trained legal mind of one generation still speaks to successors, decades or even centuries after. So it is, and will be, with Frank Neasey. However, for those, like me, who knew his reserved but firm *persona*, his words leap to life and it is as if he is still there speaking to me in his warm mellifluous voice.

It is no coincidence that, following his retirement from judicial office, Frank Neasey wrote the greater part of a biography of Andrew Inglis Clark who was for him, as for me, a special legal hero. When Frank Neasey died in August 1993, his book was incomplete. So it fell to his son, Lawrence Neasey, under guidance[52] from conversations with his father, to finish the biography. The book is written with great empathy for the subject, for Frank Neasey and A I Clark shared much more than their Tasmanian origins. I thank Lawrence Neasey for ensuring that this book is now available to us all as a means to remember both his father and his father's hero.

RODNEY CROOME

My third subject is Rodney Croome. He was born in 1964 on a dairy farm beneath Mt Roland, south of Devonport. He is still very much alive, with many contributions still to make to Tasmania, Australia and the wider world. I first met him a little more than a decade ago when he was still at the University of Tasmania where he later completed his studies in European History. Although not specifically a lawyer, he was to play an

[50] He appeared for the respondent in *Hall v Richards* (1961) 108 CLR 84, for the respondent in *Fysh v Page* (1956) 96 CLR 233 and as junior in *Hobart Bridge Co Ltd v FCT* (1951) 82 CLR 372.

[51] (1954) 94 CLR 409.

[52] Drawing upon F M Neasey's essay in M Hayward and J Warden (eds) *An Australian Democrat: The Life Work and Consequence of Andrew Inglis Clark* (1995).

important part in reform of the law, specifically the law of this State on homosexual offences.[53]

Following our meeting, after I had spoken in fraught circumstances at the National Conference on AIDS held in Hobart, Rodney Croome telephoned me in my chambers, then in the Court of Appeal of New South Wales in Sydney. He said that he and his then partner, Nicholas Toonen, also a Tasmanian, were thinking of taking Australia to the United Nations to complain of a breach of the *International Covenant on Civil and Political Rights*. They wished to assert that the repeated refusal of the Tasmanian Parliament, specifically the Council, to remove the last criminal laws in Australia against private consensual adult sexual relations between men,[54] was a breach of the *Covenant*. Did I think it a good idea?

I told Rodney Croome to forget it. Neither he nor his partner had been prosecuted; nor were they at real risk of being so. The law was generally treated as a dead letter although it was sometimes used to harass and stigmatise. The matter was, I pointed out, a State law responsibility in a federal country. The Human Rights Committee of the United Nations would never get involved in such an issue because of its implications for conservative religious societies that adhered to homophobic beliefs. The issue was therefore hypothetical. I urged Rodney Croome to continue his efforts to change the law in Tasmania. He said that this had reached a dead end.

Rodney Croome thanked me most politely for my response. He then proceeded to ignore it totally. The result, a decade ago, is the decision of the United Nations Human Rights Committee in *Toonen v Australia*.[55] Australia was found to be in breach of its commitment to protect the human rights of Rodney Croome and Nicholas Toonen. As a consequence, a law was enacted[56] with support from both sides of the Federal Parliament. The validity of that law was disputed in Tasmania. Rodney Croome, not daunted, took the matter to the High Court for a declaration affirming the constitutionality of the federal law.[57]

53 *Criminal Code Act* 1924 (Tas), s 122 (now repealed).

54 *Criminal Code* (Tas), ss 122, 123.

55 (1994) 1 *International Human Rights Reports* 97 [No 3] reprinted in H J Steiner and P Alston *International Human Rights in Context* (Clarendon, 1996), 545-548.

56 *Human Rights (Sexual Conduct) Act* 1994 (Cth). See M D Kirby, "Same-Sex Relationships: Some Australian Legal Developments" (1999) 19 *Australian Bar Review* 4.

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

In one of those unpredictable chances of life, I had by this time been appointed to the High Court. Of course, I took no part in the case. The contest to Rodney Croome's legal standing to bring the proceedings was rejected by the High Court. The resistance within Tasmania crumbled. The *Criminal Code* was amended. The law was reformed. Courage and persistence were rewarded. And then an astonishing thing happened.

Eventually with support from within both sides of the State Parliament, and from the bureaucracy, Tasmania changed from being the most resistant State to one of the most enlightened. Early leadership was given by the Tasmania Police. It was followed by the Health Department, concerned to respond strongly to HIV/AIDS. An education reference group was established to turn around earlier policy and to combat homophobia in Tasmanian schools. Soon a programme was instituted to remove sexuality discrimination entirely from Tasmanian law and official practice. Tourism Tasmania even dedicated resources to promoting the State as a place friendly to gay visitors. For those who knew the whole history, this was truly a story of amazing Tasmania.[58] Whereas in 1988, support for decriminalisation of homosexuality in this State had been 15% below the national average, by the time decriminalisation occurred in 1997, it was 15% above the average. Indeed, it was reportedly higher in Hobart than in Melbourne or Sydney.[59]

According to Rodney Croome, recent surveys have shown support for legal equality for same-sex couples in northern rural communities of Tasmania, such as Deloraine, La Trobe and Ulverstone is as high as 70%. It was not the laws that have changed Tasmania. It is knowledge, ideas, familiarity and experience that change people's attitudes. In some ways, the changes in this respect are similar to those that occurred earlier involving Asian Australians. Silence invites a conspiracy of self-denial and the invisibility of shame. Perception of the overwhelming commonalities of human beings and the inevitability of diversity is rational and true.

Rodney Croome perceived this. He fought for these ends with courage in his beliefs. It would not have been easy when he set out on his journey - either for him or for his family. However, by reason of leadership, patience, dialogue and persuasion much was achieved and the process continues in Australia with mutual respect and forbearance.

[58] R Croome, "Tasmanians Together". See http://www.rodneycroome.id.au/othermore/9 0 2 0 M2/

[59] R Croome, "From Worst to Best" [Spring 2004], *Refresh*.

Inevitably, homosexual people have a lot of time to think about these issues. Most others do not. Familiarity helps to cure many misperceptions. Enlightenment has been the way change has been achieved in Tasmania. It has been achieved democratically; but with help from circuit breakers provided by legal ingenuity and personal courage. It shows the direction for other places, far from Tasmania, and a lot of credit goes to Rodney Croome and to Nicholas Toonen, their legal supporters and politicians of all political parties for their initiatives for human rights - and to the thousands of Tasmanians who listened, learned and acted.

THE LESSONS?

What are the lessons from the lives of the three legal reformers whom I have singled out? Those I have named were in no way little islanders. Their imaginations, like today's internet, encompassed the whole world. They knew that ideas are the most powerful engine in existence - greater by far than weapons of mass destruction; more enduring than the challenges of hate, ignorance and terror.

Andrew Inglis Clark formed strong friendships with intellectual leaders in America. Frank Neasey drew on the riches of the global common law. Rodney Croome took his battle to a world forum in Geneva. His success laid down principles that now apply around the world as part of the international law of human rights. They bring hope to oppressed people in every corner of the planet. They bring the message that things will get better. In decades and centuries from now, people will still talk of *Toonen v Australia*. They will remember this special part played by Australia. If they enquire, they will come to understand that Tasmania is a place that has always had strong proponents of legal reform and able leaders willing to bring that reform to pass when the time is ripe.

The *Far Eastern Economic Review* recently contained an extended article on the acceptance of homosexual people in Asia.[60] The article described how things are changing. Even in Singapore, the Tourism Board has commissioned a study to assess the potential of attracting gay tourists. Tasmania was there earlier. Rigidities are crumbling under the pressure of shared ideas and knowledge. Prejudice is giving way to familiarity and understanding. One of the points made in the article invokes a book by the American academic, Richard Florida: *The Rise of the Creative Class*. It is a text frequently quoted in the pro-government newspaper of Singapore, *The Straits Times*.

[60] G Fairclough, "Gay Asia: Tolerance Pays", *Far Eastern Economic Review*, 28 October 2004, 53.

According to the writer, the openness of modern economies to minority communities, such as those for whom Rodney Croome speaks, is an accurate indicator of the receptivity of those communities to new ideas and thus to creativity itself. Slowly, it is dawning in places like Singapore, and certainly in Australia, that the accommodation of the wishes and dignity of citizens is essential to their human fulfilment and to the flow of new ideas that will create economic opportunities and new jobs in the century of service industries and new employment that lies ahead.

I do not know whether the *Rise of the Creative Class* has lessons for Tasmania and Australia. But I would be surprised if it did not. Respecting and protecting diversity seems to be a precondition to the greatest human creativity. We should all keep this in mind. And we should keep in mind as well the debt we owe to creative human intelligence and to the personal kindness and empathy of those who have gone before and been true leaders and led the way. Leadership in large issues requires a mixture of insight, persistence and courage. The three Tasmanian law reformers whom I have mentioned had these qualities in abundance.

We can be proud of Andrew Inglis Clark, Frank Neasey and Rodney Croome. Each one of them became an important figure in Tasmanian and national law reform. Each one of them worked for justice. Each displayed nationalist feelings; but was also a servant of a wider humanitarianism and a better world. Each believed in the rationality of fellow human beings. Each was loved by his family and admired by a large circle of friends. Each was a proponent of debate and argument and persuasion. Each knew his community and had faith in it. And each also knew the simple truth that there is no power greater in the world than an idea whose time has come.