ADDRESS TO THE JUSTICE AND THE LAW SOCIETY SOCIAL JUSTICE GALA

Speech given by the Honourable Justice Roslyn Atkinson AO at the Justice and the Law Social Justice Gala: Brisbane, 29 March 2018

Thank you for your kind invitation to speak tonight.

May I first acknowledge the traditional custodians of the land on which we meet and pay my respects to their elders, past, present and future. I am sure we are a part of a long tradition of people meeting here to discuss the law and its impact on our lives and social relationships.

The focus of my speech tonight is the ability to make change that you all possess as current or future legal practitioners.

As a point of inspiration, I would like to begin tonight's remarks by celebrating a group of people, who are not lawyers, who are acting now to seek law reform in their country. I am referring to the young people who, having survived the horrific school shooting in Florida, did not retreat into their own world of grief and misery but instead decided to do something about it. They organised the March for Our Lives rally held on 24 March 2018 in the United States and elsewhere to express their ardent desire for the world to be a better and safer place.

What I particularly admire is not only their commitment but also their idealism and optimism, which I believe are attributes that you should all seek to cultivate.

It is at the start of things that the end goal is the most obscure and seems the hardest to achieve.

It is with that in mind that I would like to encourage you all to articulate and advocate for your principles and not settle when there are disappointments or difficulties in achieving your goals. As prospective or current lawyers, all of you have the power to change the law, and therefore, the power to change people's lives. This change may happen slowly but it is important to attempt to make that change.

My own experience of the slow but eventually successful process of law reform, which I will share with you tonight, relates to the protections enjoyed by same sex couples in this country.

This story begins in September 1990, when the Queensland Law Reform Commission, a body of which I was a member, was asked by the Attorney-General to review the law governing de facto relationships in Queensland.

In October 1991, the Commission released a Discussion Paper on Shared Property. The Paper focused on legal difficulties which can arise where people, other than married couples, live together and share property.

The following year, the Commission released a Working Paper focused on de facto relationships. That Working Paper, and the reports which followed it, in 1993 and 1994, included in its definition of a de facto relationship, de facto relationships between people of the same gender. A 'de facto relationship' for the Commission's purposes was defined as a 'relationship between 2 persons (whether of a different or the same gender) who, although they are not legally married to each other, live in a relationship like the relationship between a married couple.'

That was significant as the only legislation addressing de facto couples at the time (the New South Wales *De Facto Relationships Act 1984*) only applied to de facto relationships between a man and a woman.

Furthermore, the Reports were official recognition of the fact that people in same sex relationships were disproportionately disadvantaged by their de facto status. Breakdowns of de facto relationships were resolved at the time via the operation of equitable principles, which were ill-suited to domestic relationships and caused injustice.

The Commission noted that for same sex couples, the injustice was worse, as they had no option of receiving the protections afforded by the *Family Law Act 1975* (Cth). The work of the Commission at the time took account also of the recent introduction of anti-discrimination legislation in Queensland and elsewhere in Australia.

The Working Paper suggested that legislation should be introduced in Queensland to facilitate the resolution of disputes between de facto couples. The Report, released by the Commission in June 1993, set out a draft *De Facto Relationships Act* which would overcome those common law deficiencies. This Act, like the Reports which had given rise to it, was inclusive of same sex relationships.

The Draft Act, however, was not immediately implemented by the Queensland Government. It appeared unlikely that the law would change.

However, the following year, the Draft Act was adopted in amended form as the *Domestic Relationships Act 1994* (ACT) in the Australian Capital Territory. Importantly, this ACT Act, based on the Commission's Report, retained its gender and sexuality-neutral approach to de facto relationships.

The success of the ACT Act soon spread to other states and territories: in 1999, both New South Wales and Queensland introduced amending legislation to provide same sex de facto couples to resolve their property disputes. In 2004, the Northern Territory amended legislation to include same sex de facto couples.

South Australia and Tasmania also introduced legislation during this time (in 1996 and 1999, respectively) but the definition of a *de facto* relationship used in those States' legislation was restricted to a relationship between a man and a woman.

Eventually, though, all states and territories in Australia enacted legislation allowing same sex couples to resolve property disputes arising out of the breakdown of a relationship and in 2008, following references from each State and Territory (except Western Australia), the *Family Law Act* was amended to confer jurisdiction on the Family Court of Australia for the resolution of property disputes in de facto relationships.

Through this circuitous route, the Queensland Law Reform Commission was able to make meaningful, national change.

The next major step in equality for same sex couples also saw the ACT playing an important role.

On 4 November 2013, the Australian Capital Territory Legislative Assembly enacted the *Marriage Equality (Same Sex) Act 2013* (ACT). This Act permitted same sex couples in the ACT to marry.

The Commonwealth Government lodged an immediate challenge to the validity of the Act. The case was heard on 3 December 2013 – less than a month later - and the ruling, striking down the Act, was handed down on 12 December 2013.[1] That ruling confirmed, however, that the Commonwealth had the power to amend the *Marriage Act 1961* (Cth) to

[1] *Commonwealth v Australian Capital Territory* [2013] HCA 55, (2013) 250 CLR 441.

allow same sex couples to marry. It did not need constitutional amendment but could be achieved by legislative amendment.

On 6 March 2016, the Attorney-General indicated that the Coalition Government, if re-elected, would hold a plebiscite on the issue of same sex marriage. A bill was introduced in 2016 to hold a plebiscite, but it was defeated in the Senate. In 2017, the Federal Government again attempted to pass legislation enabling a plebiscite, but was unsuccessful. It resorted instead to a voluntary survey by postal mail.

As you all know, the results of the survey were returned in late 2017 and granted victory to the "yes" campaign, which won 61.6% of the vote and passed in every State and Territory.

An Act was passed on 7 December 2017 and received royal assent on 8 December 2017, officially becoming law. The first legal same-sex weddings under Australian law were held on 16 December 2017.

The protection of same sex couples under the law had been completely transformed. From the beginnings of legal protections for same sex couples in the early 1990s to last year, a journey of almost 30 years, it was difficult at times to remain optimistic that the law would change.

But it did, and the lives of all of us, not merely those who are in or may be in same sex relationships, have changed for the better.

You have the same ability to change things for the better. You are tomorrow's leaders. Remember your ideals and your principles and you can, and will, change the world.

Justice Roslyn Atkinson AO

29 March 2018