

DR GEORGE IAN DUNCAN REMEMBERED

I HORRORS AND INDIGNITIES

Dr George Ian Ogilvie Duncan died on 10 May 1972.¹ He was drowned in the Torrens River when, at about 11pm, he was pushed from an embankment, reportedly by a well-dressed young man. His assailant had approached him and asked ‘how would you like a swim?’ We know that his death occurred at exactly 11:07 pm because that was the time that his watch stopped, inferentially by sudden immersion in three metres of water. Another victim was thrown into the river at the same time by another assailant in a group of three. He injured his ankle, but could swim to safety. Dr Duncan was unable to swim. One of the assailants stripped off his upper garments and plunged into the river in search of the victim, but without success. Later Dr Duncan’s body was retrieved from the river, his long arms already outstretched, fixed by rigor mortis, protesting his fate.

Dr Duncan was born in 1931 in England of New Zealand parents — a late child to his father by a second marriage. The little family came to Australia from New Zealand when he was a boy. He attended Melbourne Grammar School where he immediately displayed high academic talent. He then commenced university studies in law at the University of Melbourne. However, at about this time he contracted tuberculosis, inferentially from his father who had earlier been committed to a sanatorium. The family moved back to England. Eventually, he was encouraged by a friend to apply for admission to Cambridge University. There too he displayed stellar academic ability. His special interest was legal history. He wrote a well reviewed, if somewhat esoteric, book on the High Court of Delegates: a medieval tribunal whose origins were lost in history.²

* Justice of the High Court of Australia (1996–2009); President of the International Commission of Jurists, Geneva (1995–1998); Member of the Global LGBT Forum, Berlin (2015–present). Patron of the Pinnacle Foundation (2012–present) and of the Kaleidoscope Foundation (2013–present). (Speech delivered at the Adelaide Law School on the unveiling of a photographic portrait to commemorate Dr Duncan, 11 September 2015.)

¹ The history of Dr Duncan is told in many places. See, eg, Tim Reeves, ‘The 1972 debate on Male Homosexuality in South Australia’ in R Aldrich (ed), *Gay Perspectives II: More Essays in Australian Gay Culture* (Department of Economic History, University of Sydney, 1994) 149–92; Dino Hodge, *Don Dunstan, Intimacy and Liberty: A Political Biography* (Wakefield Press, 2014) 285–6, 307; Tim Reeves, ‘Duncan, George Ian Ogilvie (1930–1972)’ in *Australian Dictionary of Biography* (Melbourne University Press, 1996) vol 14, 50–1.

² G I O Duncan, *The High Court of Delegates* (Cambridge University Press, 1971).

After graduation, Dr Duncan was appointed to teach law part-time at the University of Bristol. However, he must not have enjoyed the provinces of England. He soon noticed an advertisement for a post at the University of Adelaide School of Law. This attracted him to the possibility of returning to the warmer climate of the antipodes. By this time nothing held him to England. His parents had died: first the younger mother and then his father. Even his half-sister was soon to die. He had no surviving relatives.

Intriguingly, just before he was due to set out on the boat journey to Adelaide in 1971, Dr Duncan must have had second thoughts. An urgent telegram was sent to Dr Horst Lücke, Head of the Department of Law in Adelaide, stating: 'Regret unable to accept/writing/Duncan'.³ Had he adhered to his revised intention and survived, Dr Duncan would now be aged 84. He would probably be a venerable professor of law in England, remembered for his peculiar interests in medieval history and disconnected from the robust earthiness of his brief youthful sojourn in Australasia.

However, something caused him to change his mind again. He wrote to ask whether he could be reconsidered for the position in Adelaide. He was told that it was still his. Dr Lücke presented at the foot of the gangplank on his arrival in South Australia to help him with his baggage. He observed that Dr Duncan seemed somewhat frail and breathless, surprising for his age — possibly lingering remnants of tuberculosis. Photographs and contemporary descriptions of Dr Duncan suggested that he fitted the stereotype of the academic that the Australian public often expects. As Tim Reeves describes it, his photo at the time displayed a 'cocked head, high forehead, greying, receding hair, thick framed glasses, straight mouth and almost vacant stare.'⁴ Unfortunately, he was to be subjected to many indignities in the short time between his arrival in Adelaide and his death a few months later. Tim Reeves has no doubt that Dr Duncan would have disliked intensely ('deplored' is the word he uses) his elevation into a 'cause' for law reform.⁵ This is because he was an intensely private man, specially private about things sexual. He was not to be blamed for these attitudes. They were very common in the English-speaking countries in which he grew up. They were certainly very common in Australia. I know because I was raised in the same environment, although almost a decade later. We were both children of the 1930s: he born in 1931, I in 1939. For gay men and boys, 'don't ask; don't tell' was the rule of those days.

The word picture of Dr Duncan, painted by quoted comments in *Adelaide News* and *The Advertiser* at the time of his death, also pandered to the stereotype of a gay man — a non-swimmer (it was even suggested that the assailants had perhaps given him a swimming lesson to teach him that gays needed to learn to swim). Portraying him as a weak, one-lunged weed of a man fitted neatly into comfortable preconceptions. So did the description of him as a 'loner'; someone 'extremely timid', 'aloof',

³ Tim Reeves, 'Dr Duncan Revisited' (unpublished, copy on file with author) 11.

⁴ Ibid.

⁵ Ibid 10.

with ‘ingrained insecurity’.⁶ However, thanks to a little further detective work by Tim Reeves, it appears that this was far from the full story of the real Dr Duncan. A Mrs Richards from England, on reading of his death, was moved to write to the Registrar of the University of Adelaide, stating ‘[i]n this little Essex village, we were shocked beyond measure when we read of the tragic death of Dr George Ian Duncan. It was here that he had spent all his vacations, even in his Cambridge days and he had a large circle of friends’.⁷

Still, he had to run the gauntlet of attitudes of hostility that existed in those days towards sexual minorities generally, and gay men in particular. Like Chief Justice John Bray (as we have recently learned from John Emerson’s splendid biography)⁸ Dr Duncan received proposals for marriage, pressed upon him by a woman in England with a persistence to which he could not respond.

When, as appears from a letter found amongst his meagre possessions brought to Australia, he explained the reason of his sexual orientation that made her proposal impossible, she replied that she was aware but pressed on. His response was a cruel one:

Your letter ... implies that you feel that all you have done is to ‘hurt my feelings’ as you put it. You must be very unperceptive if you imagine that that is all your wanton behaviour has done. Disgust and revulsion are words by no means too strong to describe my reaction to your improprieties and, but for my firm conviction that you are not in your right mind, I would express myself in language much more emphatic ... [Y]ou are ill (perhaps seriously ill) and ... you should be in the hands of a doctor.⁹

Still greater horrors were heaped on Dr Duncan in death. When his body was ultimately recovered and dragged from the Torrens with arms awry, it was unceremoniously thrown back into the river when television cameras arrived late, demanding graphic film to screen in the nightly news. At the coroner’s inquest, held soon after his death, a ‘medical expert’ was permitted to describe the rectum of a ‘practising homosexual’, stating that ‘the anus was generally funnel-shaped and had the appearance of that of a passive homosexual [who engages in receptive anal intercourse]’.¹⁰

This type of evidence also served the stereotypes held widely in the heterosexual community at that time, and perhaps even now. So-called ‘passive’ homosexuals

⁶ Ibid 9.

⁷ Ibid 9, quoting Letter from M Richards to the Registrar of the University of Adelaide, 29 May 1972.

⁸ John Emerson, *John Jefferson Bray: A Vigilant Life* (Monash University Publishing, 2015) 247–8.

⁹ Reeves, ‘Dr Duncan Revisited’, above n 3, 10, quoting Letter from Ian Duncan to Dorothy Glover, 10 May 1966.

¹⁰ Reeves, ‘Dr Duncan Revisited’, above n 3, 4, quoting Autopsy Report of Colin Manoch.

allegedly had buttocks of a ‘feminine’ shape and ‘funnel-shaped anuses’, but ‘active homosexuals’ allegedly had a ‘dog-like or club shaped penis’. Their mouths were ‘crooked’ with ‘sharp teeth and thick lips’ suited for oral intercourse. Tim Reeves comments that ‘this archaic thinking ... equated homosexuality with deformed physiology’. It was rarely questioned. It became the accepted wisdom about people like Dr Duncan.

Many gay people to the present time cannot understand the obsessive speculation of heterosexual commentators about the physiognomy and sexual acts of gays. Given the variety of heterosexual conduct described in the *Kama Sutra*, on the Ajanta Caves and in Alfred Kinsey’s research,¹¹ it is intriguing why there should be so much titillation in the speculation fuelled by hatred. But Dr Duncan knew that, whereas in the United Kingdom, where he had lived during his studies at Cambridge and work in Bristol, the law was on a path to repealing the worst of its criminal prohibitions against gay men,¹² Australia was still largely a barren continent. No state had reformed its criminal laws. In South Australia, only belatedly in the year before his arrival had a few brave souls had come together to demand repeal.

Dr Duncan, in death, has even lost the given name that he preferred. Tim Reeves tells us that although George was his first baptismal name, as a child his mother had insisted — for reasons unknown — that he be called ‘Ian’. This was reported in Australian newspapers after his death.¹³ However, reporting soon reverted to calling him ‘George Duncan’. Dr Horst Lücke, in the contemporary correspondence demanding further and better investigation by the police,¹⁴ simply calls him ‘Dr G I O Duncan’. If Ian Duncan is how he described himself, it is usual in countries of the law derived from England to respect that wish. But, by now, it is probably too late to try to turn things around, least of all to respect his own wishes.

II THE POLICE AND LAW REFORM

The feature of the homicide involving Dr Duncan that elevated the case to special public significance was the fact that it soon became known that police had been operating in the vicinity where the victim was sent for his swim. Three of them were from the South Australian Police Vice Squad. They were, inferentially, performing their usual rounds as *agents provocateurs* for gay men seeking sex and love: to trap

¹¹ Alfred C Kinsey, Wardell B Pomeroy and Clyde E Martin, *Sexual Behaviour in the Human Male* (W B Saunders, 1948); Alfred C Kinsey et al, *Sexual Behaviour in the Human Female* (Saunders, 1953).

¹² *Sexual Offences Act 1967* (UK) c 60; The Committee on Homosexual Offences and Prostitution, *Report of the Committee on Homosexual Offences and Prostitution*, Cmnd 247 (1957) (*‘Wolfenden Report’*).

¹³ *The Australian* (Sydney), 30 May 1972, 3.

¹⁴ Letter from Horst Lücke to the Police Commissioner of South Australia, 28 May 1972, reported in *The Advertiser*, 2 June 1972, 8.

them in a criminal proposition. No one suggests that Dr Duncan fell for their line; he was simply singled out by one of them.

Two of the police who had been at or near the scene declined to join a line-up for identifying the offender guilty of pushing Dr Duncan into the Torrens River. One, on legal advice, refused to answer police questions. Soon after, these three officers were suspended and later resigned from the police force. The Police Commissioner of the day declared that there was no reason ‘at the moment’ to implicate police in a homicide. The other victim, who had swum to safety, a direct witness to the crime, hurriedly left South Australia for the anonymity of New South Wales. To his great credit, Dr Lücke wrote a strong letter to the Commissioner. He pointed to the fact that Dr Duncan did not appear to have any close relations. Accordingly, he felt that it was incumbent on him, as Head of the School of Law, to ensure ‘as far as it is within my power to do so, that those responsible for his violent death are brought to justice’. In the manner of those times, his full letter was reproduced in *The Advertiser*.¹⁵

Eventually a new Police Commissioner from England, Harold Salisbury, called in detectives from New Scotland Yard in London to add an external scrutiny to the investigation. Their report was quickly provided but kept under wraps until released years later in 2002.¹⁶ According to the text of the report, the English detectives concluded that Dr Duncan was killed after what was ‘merely a high spirited frolic that went wrong’. Apparently, it was judged a ‘mere frolic’ to throw a quiet citizen, fully clothed, walking in a public space, into a river from which he might not be able to extricate himself. Frolic or not, we now know that the British detectives believed that the local police officers were guilty of the homicide and recommended charges.¹⁷ Eventually, even the local prosecuting authorities concluded in 1985 that the case should be reopened. In 1987, two of the police were put on trial. However, on 30 September 1988, the accused were acquitted. By that time, Dr Duncan, like the criminal case, was cold — he in his grave at Centennial Park for 16 years under a headstone that read: ‘endowed with modesty and scholarship’.

III UTTER HORROR

I wondered how the community of the Adelaide Law School at that time reacted to this trauma in its midst. Were they simply embarrassed that a side of their new, quiet colleague (that they had not known or merely suspected) came into sharp light? Were they distressed that this reserved and obviously very clever man had a secret life that he had not shared with them? One of the leaders of the Law School of that time, the late Professor Alex Castles (my colleague later at the Australian Law Reform Commission) was called to identify the body of his deceased colleague. Another academic of that time, Professor John Keeler, recalls that Dr Duncan was ‘shy and a

¹⁵ Ibid.

¹⁶ R J McGowan, ‘Report to Commissioner of Police, Adelaide, on Enquiries into the Death of Dr George Ian Ogilvie Duncan’ (Report, New Scotland Yard, 1972).

¹⁷ Ibid.

bit abrupt'.¹⁸ Mr David St L Kelly (later also a Professor and colleague of mine in the Australian Law Reform Commission) wrote to me that he remembered Dr Duncan well:

[A] very reclusive, private man; scholarly and very shy. Never at ease, at least with me. Shortly before his death I gave him comments on a draft article he had submitted to the *Adelaide Law Review*. It was a difficult interview. He was 'twitchy'... [T]he reaction in the Law School [to his death] was to leave everything to the 'leaders' — who were Alex [Castles] and Horst [Lücke]. They had my full trust in the matter and, I believe, all others. They were very active in pursuing the tragedy. They were no doubt constrained in what they could say to us, but they kept us as well informed as they could. There was no culture of embarrassed silence at the Law School or in the wider University. It was a dreadful event, and recognised as such. The fact that he was slight, and obviously vulnerable, emphasised the utter horror of what had happened.¹⁹

That feeling of 'utter horror' inevitably spread into the public domain. Dr Duncan was only nine weeks in his grave when the first steps were taken to repeal the laws of South Australia that criminalised adult private homosexual conduct.

Don Dunstan, later Premier of South Australia, as a young ambitious member of the South Australian Parliament had pushed the idea of gay law reform in the 1960s. However, this was blocked by the Caucus of the Australian Labor Party. In 1970, Dunstan had urged again, this time in government, the removal of the 'outdated' criminal laws. He promised the establishment of a criminal law and penal methods reform committee under the already redoubtable Justice Roma Mitchell. However, in 1971 his Attorney-General, Len King (later a gifted Chief Justice), demonstrated the difficult road that lay before Dunstan. King described homosexual acts, in the language of the catechism of the Roman Catholic Church to which he belonged, as 'intrinsically evil'.²⁰ Still, by December 1971, Len King was relying on the investigation into law reform by then being undertaken by the Mitchell committee. By that time, Dr Duncan was already living in South Australia.²¹

Such was the outcry and horror at the circumstances of the death of Dr Duncan that Mr Murray Hill, a member of the Liberal Party, could wait no longer. On 6 July 1972, he took the first steps to introduce a Bill to achieve reform into the Legislative Council of South Australia. It was strongly attacked by the Anglican Archbishop. Later that churchman recanted a little and accepted that 'these unfortunate people' needed to be pitied, not criminalised. Similar approaches were uttered by churchmen of the Roman Catholic and evangelical denominations of Christianity. Gay people were either unfortunate victims of a mental illness, or they needed medical help in order

¹⁸ Letter from John Keeler to Michael Kirby, 15 August 2015.

¹⁹ Letter from David St L Kelly to Michael Kirby, 16 August 2015.

²⁰ South Australia, *Parliamentary Debates*, House of Assembly, 18 October 1972, 2213 (Len King, Attorney-General).

²¹ Reeves, 'The 1972 debate on Male Homosexuality in South Australia', above n 1, 153.

to be cured. But the spell of silence was at last being broken. Supporters of reform were ambivalent about Murray Hill's proposed legislation. It did not decriminalise male homosexual acts, but it did provide a defence against a prosecution if it were proved that the sex involved was private, adult and consensual. A differentiated age of consent was proposed for homosexuals, higher than for heterosexual activity.

Meanwhile, the movement for more substantive reform continued to gather pace in South Australia. No doubt it was greatly helped by the support of Don Dunstan, first as Attorney-General and then as Premier of the State. In due course, a majority for change was growing on both sides of politics. Change had to come. On 31 October 1972, the Deputy Leader of the Opposition in South Australia called for a Royal Commission into the Duncan case. In July 1973, a Gay Activists' Alliance was established to breathe more vigour into the sometimes apologetic endeavours of the Campaign Against Moral Persecution ('CAMP') that had first called for reform in South Australia. On 17 June 1974 the Australian Labor Party in South Australia at last formally declared its support for reform of the criminal laws against gays. On 27 August 1975, Mr Peter Duncan, Attorney-General, introduced a third attempt to secure full reform of the criminal laws. The legislation was piloted to success by the Honourable Anne Levy MLC in the Legislative Council. On 17 September 1975 South Australia became the first State in Australia to decriminalise male homosexual acts.²²

Unfortunately, this reform did not end the saga of police hostility towards gay men in South Australia (the criminal laws in Australia, as in England, had never targeted women). Many gay and bisexual men suspected that they were still the subject of police surveillance. This surveillance, as we now know, targeted the highest citizens of the State and included Chief Justice John Bray, one of the most distinguished jurists Australia has produced.²³ It was a shabby period in the legal history of South Australia, but by no means was it confined to this State. It was a period many have now forgotten, but those who lived through it, like me, remember.

Three decades after the death of Dr Duncan, 'In Memoriam' notices were published in *The Advertiser*:

Duncan, George Ian Ogilvie. Martyred May 10, 1972. Remembered by the members of the Campaign Against Moral Persecution.

Duncan — In memory of George Duncan. He taught justice and died without it.

Duncan, George Ian Ogilvie — suffered and died because of his homosexuality. How many more Duncans?²⁴

²² *Criminal Law (Sexual Offences) Amendment Act 1975 (SA)*.

²³ Emerson, above n 8.

²⁴ Reeves, 'The 1972 debate on Male Homosexuality in South Australia', above n 1, 149.

Now in 2015, the Law School to which Dr Duncan had come remembers him. At last it reflects upon the terror of his end and the unexpected, undesired yet salutary consequences of his death: the leadership that South Australia gave to the effort to change the criminal laws that oppressed gay men throughout Australia.

It took another 27 years after Duncan's drowning before the last of those laws, in Tasmania,²⁵ was amended so that nowhere in the nation did the criminal laws remain to oppress people for adult, private and consensual acts arising from their sexual orientation or gender identity and expression. However, the same laws remain and are proving as difficult as Paterson's Curse to eradicate from the lands that were painted red in the school atlas of my youth. Throughout the former British Empire, save in the United Kingdom and little more than the former settler colonies, reform has reached a log-jam.²⁶ In countries where the legislature has failed, the courts have refused to act.²⁷ In countries where a lower court has invoked equality provisions of the local constitution, higher courts have restored the old laws to oppress the minority.²⁸ Although there are exceptions,²⁹ in most countries nothing is done.³⁰ It is a bleak tale. It shows how hard it is to change the law when reform provokes visceral hatred on matters such as Aboriginality, race, gender or sexuality in combination with lethargy and indifference.

IV FIVE LESSONS

What lessons can we derive from this sad story of George Ian Duncan and his brief encounter with South Australia and its laws and attitudes 43 years ago? There are, I suggest, five:

First, law gives its instruction mainly through constitutional texts, enacted legislation and case decisions. The constitution and the legislation spring to life when they affect

²⁵ *Criminal Code Act 1924* (Tas) s 122. See also *Croome v Tasmania* (1997) 191 CLR 119, 123.

²⁶ Michael Kirby, 'Homosexuality — A Commonwealth Blind Spot on Human Rights' (2007) 14(4) *Commonwealth Human Rights Initiative Newsletter* 6; Michael Kirby 'Breaking the Commonwealth Log-Jam Over Sexuality Issues' (2011) 18(3) *Commonwealth Human Rights Initiative Newsletter* 8; Michael Kirby 'The Commonwealth of Nations Today: Historical Anachronism or Focus for Universal Values?' (2011) 37 *Commonwealth Law Bulletin* 39; Michael Kirby, 'The Commonwealth of Nations and its Values — Bound to Disappoint?' (2015) 3 *European Human Rights Law Review* 223.

²⁷ *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 (Singapore Court of Appeal).

²⁸ See *Naz Foundation v Government of NCT of Delhi* (2009) 4 LRC 828, revd *Suresh Kumar Koushal v Naz Foundation* (2014) 1 SCC 1; Michael D Kirby, *Sexual Orientation & Gender Identity — A New Province of Law for India* (Tagore Law Lectures) (Universal Law Publishing, 2013) 1–4.

²⁹ *Nadan and McCoskar v State* [2005] FJHC 500 (Fiji).

³⁰ Kirby, above n 25, 149.

a person in a case, or when the events of a life illustrate the harsh impact of the law. In this way, the law is full of parables. The operation of the law commonly reveals unexpected and sometimes unlikely or reluctant heroes. The slave who was set free by his arrival in England in *Somerset's case*.³¹ Mrs Donoghue, who became sick on finding a snail in a bottle of ginger beer.³² Eddie Mabo, who could not understand why his rights to traditional lands were not respected in Australian courts of justice.³³ Geoffrey Dudgeon,³⁴ and Senator David Norris,³⁵ who successively challenged Irish laws — of North and South — that oppressed them as gay men. Vicki Roach, the prisoner, who contested her disenfranchisement in a federal election.³⁶

The story of George Ian Duncan came before a court — the Coroner's Court of South Australia — only after his death. We, bystanders in his tragedy, look at his end in order to derive lessons for the living. Fortunately, one important lesson was quickly learned: the need to reform the criminal laws against gay men in South Australia and then in other jurisdictions of this country. Tragically, it took the death of this most private man to help propel reluctant Australian legislators into effective action. But it also required a courageous, innovative and sympathetic political leader to get things moving against the forces of opposition and inertia. It took leadership in South Australia to stimulate change elsewhere in the nation. The journey to law reform in Australia is often long and hazardous. People suffer in their lives whilst decision makers overcome their stereotypes and move to a higher level of knowledge and human empathy. We should strive to expedite this process. The Law Reform Institute of South Australia has delivered a report in 2015 that points the still remaining way ahead,³⁷ and when these are addressed there are still more awaiting attention.³⁸

Secondly, the Duncan story teaches the importance of vigilance in respect of those who are trusted with the enforcement of the law. Instead of wise and prudent leadership, the successive Commissioners of the South Australian Police, in the time

³¹ *Somerset v Stewart* (1772) Lofft 1; 98 ER 499.

³² *Donoghue v Stevenson* [1932] AC 562.

³³ See *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

³⁴ *Dudgeon v United Kingdom* (1981) 45 Eur Court HR (Ser A).

³⁵ *Norris v Ireland* (1988) 142 Eur Court HR (Ser A).

³⁶ *Roach v Electoral Commissioner* (2007) 233 CLR 162. See also *Rowe v Electoral Commissioner* (2011) 244 CLR 97.

³⁷ South Australian Law Reform Institute, 'Discrimination on the Grounds of Sexual Orientation, Gender, Gender Identity and Intersex Status in South Australian Legislation' (Audit Paper, September 2015).

³⁸ See, eg, the obstacles faced by a gay tourist who came to Adelaide in 2016 with his spouse whom he had married under English law. When his spouse died in an accident he had to face the indignity of flying out his father-in-law from London as he was not allowed to identify the body and arrange its return, and he received a death certificate inscribed 'never married'; Elle Hunt, 'Briton who Died on Honeymoon in Australia to Have Same-Sex Marriage Recognised', *The Guardian* (online), 21 January 2016 <<http://www.theguardian.com/australia-news/2016/jan/21/briton-who-died-on-honeymoon-in-australia-to-have-same-sex-marriage-recognised>>.

that Dr Duncan lived and worked under their protection, were largely unquestioning of Police conduct. They turned a blind eye to the regular harassment of a vulnerable minority. Even after the repeal of criminal laws, far from promoting overdue law reform, they spied on good citizens. They monitored their private lives. They abused their official powers. Oppressive and unlawful conduct was excused as merely a ‘high spirited frolic’.

We should not think that this risk of abuse is a happening confined to the past. The recent initiative of the Australian Border Protection Service in Melbourne to stop people in the streets of that city, demanding identity papers at random in the hope of finding a few visa over-stayers, was apparently undertaken without legal authority. The event illustrates the wisdom of the rejection in Australia of the Hawke Government’s 1985 proposal for a universal identity card: the ‘Australia Card’. If compulsory identity papers are introduced, officials will be unable to resist the temptation to demand their production, and our legislatures will all too often surrender to the demand on the flimsiest of excuses. The relationship of authority to the citizen — ordinarily limiting official intervention to the presence of a provable ‘reasonable cause’ — would be changed forever.

The peril of abuse of public power was illustrated by the so-called ‘high spirited frolic’ of police officers on Dr Duncan’s last night. The police officers involved thought that, in pushing him into the river, they were beyond scrutiny. In the necessary enhancement of official powers to respond to dangers of lawlessness and terrorism, we must always remember the lesson of the Duncan case, and of the *Communist Party Case*³⁹ in Australia. History, and not just ancient history, teaches the risks of abuse of official power.⁴⁰ Leadership of officials in the public space, scrutiny by the courts and attention in the legislatures are required to prevent the misuse of official power. When abuse happens, it should not be soon forgotten. The stories of abuse teach the need for eternal vigilance.

Thirdly, equality in respect of legal rights is a normal aspiration of civilised societies. Under the law, human beings should be treated equally, unless for very good reason, and then any exceptions must be justified and provided by law. In many countries, the constitutional text itself contains a specific promise of equality. This permits courts to safeguard equality against the ever-present risk in an electoral democracy that the majority in parliament will forget, or override, the rights of minorities — especially if they are unpopular minorities, as homosexuals in Dr Duncan’s time were, or as Aboriginals in Eddie Mabo’s time, or women in Caroline Chisolm’s time, or even refugees and prisoners in just about any time. The *Australian Constitution* contains no such basic equality right. A referendum is currently being proposed, suggesting special recognition of Aboriginals in a preamble. This may be welcome, but it would be better, in my view, if the idea of recognition were expressed substantively in generic terms: to protect legal equality for all people — and especially citizens — unless some strong and convincing reason exists to deny it.

³⁹ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

⁴⁰ Cf *Thomas v Mowbray* (2007) 233 CLR 307, 442 [386].

Fourthly, the private religious beliefs of some people — even in a majority — should not stand in the way of equality for all, including minorities. The secular state is one of the greatest gifts of the British to global constitutionalism. We should be more vigilant in protecting secularism, defending it and upholding it in Australia. Experience has shown that unequal treatment under the law is sometimes the product of undue caution because of supposed religious instruction (as Murray Hill's first attempt at reform was). Sometimes it is the outcome of private religious beliefs (as Len King's initial reaction to gay law reform was). Sometimes, it is just plain wrong-headed and based on a reluctance to changing oppression that has continued for a long period. The right to insist upon observance of one's own religious beliefs is like the right to swing one's arm. It finishes when it comes into contact with my fundamental right to equality as a citizen.

A gift of seeing over the horizon and perceiving the direction in which the law is moving is a special gift. We need more leaders in Australia — political, judicial and in civil society — who enjoy that capacity and share it with us all. Foresight combined with courage constitutes a marvellous legal coincidence. The prize belongs to those who see the future most clearly, who have the courage to pursue it and who enjoy the skill and persuasiveness to take others with them on the journey.

Fifthly, the final lesson from Dr Duncan's ordeal is the need to look beyond the single issue of its contribution to gay law reform to the lessons it teaches on broader issues. After a series of fitful efforts (now almost completed), Australia's legislatures have repealed the inherited colonial criminal laws against gay men. No longer are people required to deny or suppress their nature, disguise their identity, or suffer humiliations, deprivations and injustices as a result of their sexual orientation, gender identity or gender expression. At least, in Australia, they are not forced to such consequences by a risk of criminal prosecution and punishment.

Other laws still in place, however, serve only to oppress a minority in Australia on the grounds of their sexual orientation and gender identity or expression. Lesbians, gays, bisexual, transgender, intersex and other queer people are denied rights that are accorded without hesitation to other Australians. I refer not only to equality in relationship recognition and the facility of marriage, if that is their wish. For example, in every jurisdiction of Australia (except in the Australian Capital Territory) transgender citizens who wish to alter their birth certificate — to replace what they perceive as a serious misassignment of their gender identity or expression affecting them first and foremost — can only do this if they undergo extremely radical, costly and sometimes risky gender reassignment surgery. All for a bit of paper. In death Dr Duncan was to suffer, mercifully unknown to him, from the obsession of some people about his private parts and sexual acts. Australians must grow up from the ignorance of insisting on a binary division of humanity and face the reality of the existence of sexual differences and diversity.

The diversity that we must accept is not confined to the issues of sexual orientation and gender identity and expression. It extends to Aboriginality, race, gender, disability and other like indelible causes. It also extends to religious beliefs and differing cultural values. If Dr Duncan's tragedy teaches anything, it is the need

to accept and celebrate diversity, not to regard it as a reason for criminalisation, denial of equality, imposition of humiliation and insistence on compliance with an unnatural stereotype. Plenty of other issues face us in the law. They include global issues of climate change, refugee movements, nuclear non-proliferation and searing global poverty. But to honour Dr Duncan we can certainly add the law and sexuality to our list.

V CONCLUSION

The haunting question left to us by Dr Duncan's death is: what are the issues of injustice in Australian law and society today that are neglected and upon which our politicians, judges, lawyers and civil society are reluctant, reticent or silent? Today we look back on Dr Duncan's tragedy, not as a 'high spirited frolic that went wrong', but as a product of ignorance, cruelty and a failure of law and of legal institutions. Lawyers need to be in the vanguard of questioning stereotypes and questioning the assumptions of the law. Doing this is not inconsistent with observance of the rule of law and the defence of legalism. On the contrary, it is an essential ingredient in a legal system that endures for the benefit of all of the people living under it.

I congratulate the Adelaide Law School and Professor John Williams for the initiative of providing a photographic portrait of George Ian Ogilvie Duncan to be placed at the entrance of the School. A scholarship fund in Dr Duncan's name will also be established to provide recurrent support for a law student in need, however identifying in sexuality, who is committed to equal rights for all people irrespective of their sexual orientation, gender identity, gender and intersex status.

I hope that Dr Duncan's presence again, in this way, amongst the law students of today will remind them that law is sometimes unjust. Public officials are sometimes oppressive. But good lawyers are committed to vigilance for universal human rights and constant law reform. As Chief Justice John Bray once said: 'diversity is the protectress of freedom'.⁴¹ This lesson should always be held in our minds, especially as we meditate on the short life and violent death of Dr George Ian Duncan, onetime lecturer in law at the Adelaide Law School.

⁴¹ See generally JJ Bray, 'The Juristic Basis of the Law Relating to Offences Against Public Morality and Decency' (1972) 46 *Australian Law Journal* 100.