Letters

Dear Editor

I currently work in a voluntary capacity in disability advocacy, and it is my intention to commence law studies next year. I must say that I read the article by Simone Brookes (Immunity From Suit, (1999) 24(4) *Alt.LJ* 175) with something close to horror. It was shocking to learn that, if I undertake law studies, I will be establishing myself in a career that is not duty bound to avoid negligence.

Indeed, why should lawyers remain exempt from laws that are established to remind us all that we are responsible for our actions? As an advocate, my first loyalty must be to my clients — above all else, I must value his/her rights, hopes and needs. If I am negligent in the pursuance of my duty, should I too be immune from suit?

Although we 'lesser' advocates do not undertake some of the 'high pressure' courtroom duties of lawyers, barristers and judges, we are often faced with decisions that are equally as equivocal.

Insurance is not the complete answer, and even unfounded allegations of negligence are costly to defend. However, this will not deter us from our duty. Nor will making lawyers take responsibility for their actions deter me from study.

Gay M. Green

Mackay, Queensland

Dear Editor,

In his letter dated 22 July 1999, David Buchanan argued that the Commonwealth's marriage power (s.51(xxi) of the Constitution) would be construed to mean 'a union between opposite sex partners' and thus to exclude same-sex marriage (see (1999) 24 *Alt.LJ* 206). I beg to differ.

There have been recent indications that the High Court would take a more enlightened and expansive view of same-sex marriage. In particular, I refer to the comments of McHugh J in *Re Wakim; Ex parte McNally* [1999] HCA 27 (17 June 1999), para 45:

> [I]n 1901 'marriage' was seen as meaning a voluntary union for life between one man and one woman to the exclusion of all others. If that level of abstraction were now accepted, it would deny the Parliament of the Commonwealth the power to legislate for same sex marriages, although arguably 'marriage' now means, or in the near future may mean, a voluntary union for life between two people to the exclusion of others.

Kirby J is likely to support such an approach to same-sex marriage, given his history of support for gay rights, and Gaudron J might also be expected to take an expansive view. Of the remaining Justices, several are more conservative — Gleeson J would probably take a restrictive view, and Callinan J certainly would. Gummow J, however, has proved to be a more progressive justice than might have been expected at the time of his appointment, and might support an expansive reading. Hayne J is difficult to assess because he is so recently appointed. The approach the court would take if it were confronted by the question of federal legislation recognising same-sex marriage is by no means clear, but I suggest that we should not rule out an expansive approach to marriage by the High Court.

The greater limitation on seeking same-sex marriage is the sheer unlikelihood that the federal government will ever pass such legislation — at least in the foreseeable future. The Howard government — or any future Liberal government — would clearly not put forward such legislation; and the previous Labour government showed no interest in championing same-sex marriage. It is far easier to pursue same-sex relationship recognition at the local level than at the federal level, as the New South Wales and ACT experiences demonstrate. However, the States probably cannot provide for same-sex marriage because marriage is regulated by the Commonwealth *Marriage Act* 1961, which would probably be interpreted to 'cover the field' on the topic of marriage, thus rendering any State legislation in that area invalid under s.109 of the Constitution.

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Legal Centres column continued from p.249

Over the next two weeks, people with disabilities and DCLS were interviewed for the main Territory newspaper, ABC radio and ABC's *Stateline*. This publicity was more than we could have anticipated and is an example of the interest that is present at the moment. We have also received calls from all over the Territory about the campaign. Our challenge is now to maintain the level of interest. Although DCLS is still actively involved in the campaign, much of the work is being done by community members.

The whole focus on access has highlighted for us the need to be creative in how we approach our community development. Using individual cases to create an atmosphere of change is a very powerful tool. The typical community legal centre is so overworked with individual cases and needs, that it is difficult to take a step back to look at how cases can be woven into the community development strategy.

For a campaign such as this to be successful, there needs to be support from the community to see the campaign as 'theirs' rather than DCLS's. A result of the campaign has been that people with disabilities are more aware of their rights and more willing to make complaints. In each step of the campaign people with disabilities were leading us in the direction they wanted us to follow.

Wendy Morton

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