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NEW SOUTH WALES COUNCIL FOR CIVIL LIBERTIES

JOHN MARSDEN 10TH ANNIVERSARY MEMORIAL LECTURE
SYDNEY MASONIC CENTRE, 1 DECEMBER 2016

JOHN MARSDEN, LGBTIQ RIGHTS TODAY: THE ONGOING
CHALLENGE FOR EQUALITY

The Hon. Michael Kirby AC CMG

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JOHN MARSDEN REMEMBERED

When John Marsden died on 18 May 2006, a Memorial Lecture was established to make sure that his restless, courageous, extraordinary personality would be remembered. Those of us who had known him (and sometimes suffered from his impatient criticisms and castigation) recognised him as a “change agent”. His occasional excesses and errors were far outweighed by his service to the cause of civil liberties in Australia.¹ That was why Rights Australia, the then new national human rights advocacy group incorporated in 2004, established the lecture series. The task of hosting the lecture substantially fell on the New South Wales Council for Civil Liberties (NSWCCL), of which John

* Text on which was based the 10th Anniversary John Marsden Memorial Lecture, 2016. The lecture was delivered at the Masonic Centre, Sydney on 1 December 2016. It was sponsored by the New South Wales Council for Civil Liberties and by Mardens Lawyers.

** Justice of the High Court of Australia (1996-2009); Honorary Life Member, New South Wales CCL; Gruber Justice Prize 2010.

¹ John Marsden admitted to his own occasional excesses. See J. Marsden, *I Am What I Am: My Life and Curious Times* (Penguin, Melbourne, 2004), 325, where he said, “I have been described as tough, noisy, arrogant and outrageous; but as a courageous fighter for what I think is right”.

Marsden had been President and of which he was later to become a Life Member.

This is the fifth lecture in the series. It has settled into a biennial tradition. The first lecture in October 2008 was given by me on the theme “The Uncomfortable Demand for Civil Equality”. Later contributions were by Anand Grover, a Senior Advocate from India who in 2009 described “overturning India’s anti-sodomy law”; by Jenni Milbank in 2010, “Surrogacy Reproduction and Exploitation”; by Nicholas Cowdrey in 2012, “The Times they are a Changing: Where to for Criminal Law?”.

On World AIDS Day 2016, it is appropriate that I should revert to the theme of the first lecture. HIV and AIDS continue to take a disproportionate toll on the community of lesbian, gay, bisexual, transgender and intersex people worldwide (LGBTIQ).² It is therefore appropriate to revert to the theme of 2008 and to consider the progress, or lack of progress, we have made in achieving liberty and equality for LGBTIQ people in Australia and internationally. In doing this, it is right to remember that the liberties that John Marsden espoused were not confined to LGBTIQ issues. They ranged far beyond, a matter to which I will return. John Marsden was a great proponent of Campbelltown and a generous benefactor of Western Sydney University. His gifts have helped to fund students at the University.

Much of my lecture in 2008 was addressed to the progress attained by that time in the struggle for relationship recognition (marriage equality)

² M.D. Kirby, “The Uncomfortable Demand for Civil Equality”, 15 October 2008. The lecture was later published by the *University of Western Sydney Law Review*.

for LGBTIQ people worldwide. In the intervening years much progress has been made on that issue, and on others. However, in Australia, the progress on relationship recognition has been sketchy. I therefore wish to outline the good developments that have occurred; the not so good developments; and developments that represent breaking news for the attainment of justice and true equality for LGBTIQ people worldwide. The outcome of this analysis will be an explanation of why the impatience always expressed by John Marsden remains a necessary stimulus for us in the world of today. And why citizens, LGBTIQ and otherwise, must accept the challenge to demand, and contribute, to change.

LGBTIQ: GOOD NEWS

The biggest impediment to making progress towards equality for the rights of LGBTIQ people worldwide lies ultimately not in the law as such, but in social prejudice, religious hostility, educational inertia and individual human distaste.³ Nevertheless, law plays an undoubted part in reinforcing such elements of antipathy and prejudice. Particularly is this so when the law imposes on LGBTIQ people criminal sanctions as a result of adult, consensual, private sexual activity. In doing this, criminal law reinforces the hostility and appears to give it the sanction of community approbation.

It follows that reforming and repealing such criminal laws has become an important primary objective of those who are seeking to attain civic equality for LGBTIQ citizens. John Marsden contributed to this reform in

³ M.D. Kirby, “Kinsey Empiricism and Homo/Trans-Phobia”, forthcoming, *Griffith University Journal of Law and Human Dignity*, 2017.

1984 which finally removed the anti-gay provisions of the New South Wales *Crimes Act*.⁴ Similar reforming statutes were enacted throughout Australia beginning with Don Dunstan's South Australia in 1975 and finally concluding with reform of the *Tasmanian Criminal Code* in 1998,⁵ the latter with a little help from a federal statute⁶ based on the principled ruling by the United Nations Human Rights Committee in *Toonen v Australia*.⁷ That ruling enshrined, for the whole, world the principle that the mediaeval criminal offences imposed on LGBTIQ victims were contrary to the prescription of universal human rights law.

Notwithstanding this declaration of a universal principle, criminal statutes (mostly inherited from colonial times) continued to sanction the consensual, adult sexual activities of LGBTIQ people in two major groupings of the world: the former colonies of the British Empire and additional countries of the Arab/Islamic world. To this day, in 41 of the 54 countries of the Commonwealth of Nations, which succeeded to the British Commonwealth and Empire, the old sodomy laws continue to apply. Nevertheless, in recent years progress has been made, including in Australia's own region. Thus, within the area of Oceania, in addition to Australia and New Zealand, the sodomy laws have more recently been abolished by Fiji,⁸ the Cook Islands, Palau and Nauru.

Wider afield, enlightened judicial decisions have struck down the sodomy law as incompatible with constitutional provisions governing

⁴ *Crimes Act* 1900 (NSW), s 79 ("Buggery and Bestiality") in a part called "Unnatural Offences". Amended 1984.

⁵ *Criminal Law Consolidation Act* 1935 (SA). Amended 1975 by the *Criminal Law (Sexual Offences) Act* 1975 (SA) s.8. See also *Criminal Code* (Tas) 1924, s.122 (repealed) .

⁶ *Human Rights (Sexual Conduct) Act* 1994 (Cth).

⁷ *Toonen v Australia* (1994) 1 *Int Hum Rts Reports* 97 (no. 3).

⁸ *McCaskar v State* (2005) FJHC 500.

human rights in the Delhi High Court of India⁹ and the courts of Belize.¹⁰ The gratification with these decisions is diminished by the appeals that were lodged against them. Nevertheless the initial decisions appeared to indicate that the tide of informed decision was turning.

Many other areas of the law affecting the legal rights of LGBTIQ people have been changed in recent years. Within Australia, the state of the criminal law, affording protection for so-called “gay panic attack” was necessary after a majority decision of the High Court of Australia in *Green v The Queen*.¹¹ That was a case in which Justice Gummow and I each dissented. In several Australian jurisdictions, and overseas, laws have been enacted to modify the previous statements of the criminal law to remove the suggestion that violent and even lethal responses to a non-violent sexual advance by LGBTIQ persons can be justified as proportionate and a defence to a murder charge.

Another area in which progress has been made in recent years has been adoption of children. Although traditionally adoption was restricted to married couples in a heterosexual marriage, more recently, the law has extended rights in adoption to de facto couples and in some jurisdictions (New South Wales, Tasmania, Victoria, Western Australia and the Australian Capital Territory) this has been opened up to same-sex couples because of their inclusion in the statutory definition of “de facto” relationships.

⁹ *Naz Foundation v Union of India* [2009] 4 LRC 828, (2009) DLT 277 (DelHC).

¹⁰ *Orozco v Attorney-General of Belize* 5 EHRLR 2016.

¹¹ (1998) 191 CLR 334.

In Queensland¹² an applicant for adoption must still show that they have a spouse who “is not the same gender as the [applicant]”. Similarly, in South Australia,¹³ the *Adoption Act 1988* requires that the adopting couples must cohabit in a “marriage relationship” of at least 5 years, which relationship is defined as involving a “husband and wife or de facto husband and wife”, suggesting only a heterosexual couple. In the Northern Territory¹⁴ an order for adoption can only be made where the “man and woman are married to each other and have been so married for no less than 2 years”. These are the ways in which subnational law in Australia continues to discriminate against LGBTIQ couples, despite the fact the much scientific evidence demonstrates the centrality of love and the provision of a supporting environment for adopted children, rather than the sexual orientation or gender identity of the parental figures concerned. Unless reformed, such subnational laws would probably prolong discrimination, even if Australia were to move towards marriage equality under federal law.

However, it is in relationship recognition that the greatest changes have occurred in the past decade. They represent nothing short of a legal revolution that few would have envisaged at the beginning of the present century.

The first nation to enact the “opening up” of marriage to LGBTIQ persons was the Netherlands in 2000. This was quickly followed by Belgium (2003), Canada and Spain (2005); South Africa (2006); Norway and Sweden (2007); and there the position rested at the time of the inaugural lecture in this series.

¹² *Adoption Act 2009* (Qld) ss76(1)(g)(ii); 89(7)(v)(v)(a); 92(1)(h).

¹³ *Adoption Act 1988* (SA) s12(1).

¹⁴ *Adoption of Children Act* (NT) s13(1)(a).

However, since that time, marriage has been opened up in many of the jurisdictions of Portugal, Iceland and Argentina (2010), parts of the United States of America and in the Netherlands Caribbean (2012), in France, Brazil, the United Kingdom and New Zealand (2013), in Luxemburg, Puerto Rico and Ireland (2015). During that last year decisions of the Supreme Court of the United States of America struck down as unconstitutional the *Defence of Marriage Acts* (DOMA) and effectively mandated marriage equality throughout that country. In 2016 Colombia enacted the law as did Finland with effect from 2017. Now 23 countries in all have opened marriage to same-sex couples. But still the Australian Government and Parliament hold out against this development.

Notwithstanding the resistance to marriage equality at a federal level, two important further developments have occurred that indicate the way the issue is developing.

In 2013, the High Court of Australia struck down, as unconstitutional a law of the Australian Capital Territory legislative assembly which sought to make a form of marriage available to LGBTIQ couples in that Territory. Whilst disappointing, that outcome had a silver lining. The High Court unanimously insisted that the *Australian Constitution* in s.51 (xxi) where it empowers the making of a law with respect to “marriage” is not to be construed as confined to notions of “marriage” that may have existed in 1900 when the Constitution was adopted.¹⁵ The court swiftly and unanimously concluded that “marriage” in the *Australian*

¹⁵ *The Commonwealth v ACT* (2013) 250 CLR 441 at 467 [56]. See M.D. Kirby, “Marriage Equality: Losing the Battle but Winning the Constitutional War?”, Whincop Lecture 2015.

Constitution included same-sex marriage. It would therefore be open to the Federal Parliament to so provide in law, if the political will were there to do so.

This holding resulted in a tactic by opponents of marriage equality in the Parliament to superimpose a legislative requirement for a plebiscite before the Federal Parliament would consider any such opening up of marriage in Australia. A Bill to this effect was introduced and passed by the House of Representatives. However, on 22 November 2016, the Australian Senate, by a vote of 33-29, rejected the proposed plebiscite. No such procedural impediment had earlier been adopted in the path of earlier steps by the Parliament to enlarge the civil rights of Aboriginals, women, non- Caucasian persons when 'White Australia' was abolished, disabled persons or other vulnerable groups. The defeat of the plebiscite proposal was therefore an important victory for equality and liberty in Australia, even if a consequence was the temporary delay in action on same-sex marriage.

If the above record is weighed, it appears to indicate that the tide is moving in the direction of LGBTIQ equality. However, before so concluding, it is necessary to evaluate the bad news on this front. There has been more than a little.

LGBTIQ: THE BAD NEWS

Although in many parts of the world efforts have been pursued to amend legislation to remove the sodomy and other anti-gay criminal laws, in some jurisdictions amending laws have been enacted which have actually increased the burdens upon LGBTIQ people in this regard.

Thus in Brunei Darussalam, a decree was adopted in 2015 to increase the punishments imposed by the criminal law for homosexual activity to revive earlier colonial penalties of death in certain cases. Similar provisions were proposed in Uganda, Nigeria and other jurisdictions of Africa. In Russia laws were enacted by the Duma introducing restrictions on “propaganda” promoting so-called “non-traditional” relationships. These laws have enjoyed had support from the Russian Orthodox Church. They have since been copied in a number of nations of the Commonwealth of Independent States.

In a number of countries, disappointing decisions have been handed down by final national courts, rejecting challenges to penal and other laws against LGBTIQ citizens based on constitutional provisions for equality, privacy and other basic values. Thus, the highest court of Zimbabwe declined to follow a South African ruling invalidating the anti-sodomy law.¹⁶ In Singapore a challenge to the local criminal law was rejected by the Court of Appeal.¹⁷ In India, the Supreme Court of India reversed the enlightened decision of the Delhi High Court in the *Naz Foundation* case (which had been the subject of the second lecture in this series.¹⁸ That decision has since been challenged in a ‘curative petition’ which is still awaiting hearing. In Malaysia, an enlightened decision of the Sabah Court of Appeal was reversed in 2014 by a ruling of the Federal Court of Malaysia, adverse to the rights of transgender persons in that country.¹⁹ That decision can be contrasted with the enlightened judgment of the Court of Final Appeal of Hong Kong,

¹⁶ *Banana v State* [2000] 4LRC 621 (ZimSC). See also [1999] 1 LRC 120 (ZimSC) .

¹⁷ *Lim Meng Suang v A-G Singapore* [2013] 3SLR 118 and following cases.

¹⁸ *Koushal v Naz Foundation* [2014] 1SCC 1.

¹⁹ [Malaysia]

effectively requiring that the legislature in Hong Kong should make provision for the marriage of transgender persons in that territory.²⁰

In addition to the disappointing and disturbing developments in the law affecting LGBTIQ minorities in many countries, countless media reports describe the violence, hostility and cruelty exhibited towards this minority. The news reports range from shocking brutality in Jamaica, the cruelty of public executions photographed in Iran; and brutal violence in Bangladesh. In Dhaka, two young gay activists, Xulhaz Mannan and Nahibob Tonoy established the first gay newsletter in that country. In retaliation, their home was invaded by 6 brutal opponents who hacked them to death. Government responses to these violent acts are often muted. Indonesia did not inherit from colonial times an anti-gay criminal offence.²¹ However, in 2016, an application was heard by the Constitutional Court of Indonesia appealing for the insertion of a criminal offence into the Penal Code which, until now, the legislature has not enacted. The decision in that application is still pending.

In countries of the kind mentioned here, the issue is not the enactment of relationship recognition or same-sex marriage. It is either resistance to efforts to enlarge the criminal sanctions or positive efforts to overcome the hostility that has resulted in an unmoving log-jam that stands in the way of repealing the criminal laws that have now been repeatedly held to be contrary to universal human rights.

²⁰ Court of Final Appeal (Hong Kong).

²¹ The Netherlands abolished the sodomy offence in 1803 under the influence of amendments to the French criminal law in 1793. In Indonesia, as in the Netherlands East Indies, the penal code did not include such an offence. A special Shari'a law offence was later adopted in Aceh as part of the constitutional settlement. It was not adopted more generally.

Weighing the good news and the not so good news recounted here requires a sombre conclusion that progress is slow. In some places it is non-existent or even moving in an adverse direction.

LGBTIQ RIGHTS: BREAKING NEWS

It is against this background that it is appropriate, to consider the issues in this lecture from a global perspective, as expressed by a recent decision of the General Assembly of the United Nations. That body, provided for in the *Charter* of the United Nations,²² comprises all of the nations that have joined the Organisation which, by its *Charter* is established in the name of all the people in our world.

Resolutions of the General Assembly can themselves contribute to a development of the universal law of human rights. Thus, the *Universal Declaration of Human Rights* (UDHR),²³ adopted on 10 December 1948, with Dr H.V. Evatt of Australia presiding as President, represents a recognised part of international law. It is an influential statement of the universal human rights that belonged to all people everywhere. Article 1 of the UDHR declares that, everyone is born equal in dignity and rights. This is an important legal and symbolic statement. It is crucial to the claims for equality to LGBTIQ people in all countries. It is the foundation of many statements that have been made by Ban Ki-moon during his distinguished term as Secretary-General of the United Nations, now drawing to a close. It is on this basis that he has insisted on respect for universal human rights, including for LGBTIQ people everywhere.²⁴

²² UN *Charter*, Chapter IV, art. 9.

²³ The UDHR was adopted (1948) 217A (iii) of 10 December 1948.

²⁴ See e.g. statement by Ban Ki-moon, remarks to special event on Leadership in the Fight against Homophobia, 11 December 2012 available [http://www.un.org/sg/statement/index .asp?nid-6504](http://www.un.org/sg/statement/index.asp?nid-6504).

Encouraged and heartened by the leadership given by Ban Ki-moon and also by Helen Clark (Administrator of UNDP), Michel Sidibé (Executive Director of UNAIDS) and other UN leaders, the UN Human Rights Council in 2016 established the office of the Independent Expert on Sexual Orientation and Gender Identity (SOGI).²⁵ That mandate was then advertised. A selection process followed and Professor Vinit Muntarbhorn of Thailand, an experienced international lawyer and UN mandate-holder, was appointed by the Human Rights Council to be the first mandate-holder of the SOGI mandate.

It was at this point that the African Group in the General Assembly of the United Nations moved in the Third Committee of the General Assembly to impose a “no action” order on the Human Rights Council’s resolution. That motion was initiated, in the name of the African Group, by Botswana. This was itself something of a surprise because of the previously enlightened administration of Botswana, particularly concerning the HIV epidemic and reflecting insistence by its former President (Festus Mogae) of equality for LGBTIQ persons everywhere.²⁶

The Africa Group’s resolution purported to propose a delay in the implementation of the resolution of the Human Rights Council whilst more consideration was given to the elements of SOGI rights alongside United Nations statements of human rights and the views taken in countries concerning the inapplicability of international human rights law to SOGI rights. In response to the resolution proposed by Botswana, a

²⁵ The resolution on the SOGI mandate of the UNHRC is found in [A/HRC/28/Res.10](#).

²⁶ President Festus Mogae of Botswana was a member (as was the author) of the UNDP Global Commission on HIV and the Law. That Commission recommended removal of criminal laws against homosexuals. A similar recommendation was made earlier by the Eminent Persons Group of the Commonwealth of Nations. See Commonwealth Secretariat, EPG, *A Commonwealth for All* (2011).

substantial effort was mounted by international and national civil society organisations to defend the SOGI mandate and to resist the “no action” resolution.

In the end, after a short but furious effort by both sides to win success, a vote was taken in the Third Committee of the General Assembly on 21 November 2016. The outcome was extremely close.²⁷ Eighty four countries voted in favour of the continuation of the mandate. Seventy seven countries voted against. Seventeen countries abstained. No vote was recorded on the part of several countries which, deliberately or accidentally, were absent when the vote was taken.

This is not the place to analyse all of the features of this vote.²⁸ Given the origin of much of the hostility of LGBTIQ equality deriving from the former British Empire, it is useful to record the votes of the countries of the Commonwealth of Nations. Those which voted in favour of the mandate were Australia, Bahamas, Belize, Canada, Cyprus, Fiji, Kiribati, Malta, New Zealand, Samoa, Seychelles, South Africa, Sri Lanka, United Kingdom and Vanuatu. Of the Commonwealth countries that voted against the mandate, the predominance in Africa, the Caribbean and Islamic countries stands out: Antigua, Bangladesh, Botswana, Brunei, Cameroon, [Gambia], Ghana, Guyana, Jamaica, Kenya, Lesotho, Malawi, Malaysia, Maldives, Mauritius, Namibia, Nauru, Nigeria, Pakistan, St Kits, St Lucia, St Vincent, Singapore, Uganda, and [Zimbabwe].

²⁷ UN General Assembly (Third Committee) A/C3/71/L.46.

²⁸ M.D. Kirby, “A Curious UN Vote Upholds a New Mandate on Sexual Orientation and Gender Identity”, forthcoming *European Journal of Human Rights*. The countries shown in brackets have presently resigned from membership of the Commonwealth or have been suspended.

Amongst the countries that abstained on the Africa Group resolution or did not vote, a number are members of the Commonwealth: Barbados, Granada, India, Mozambique, Papua New Guinea, Rwanda, Solomon Islands and South Sudan.

The Russian Federation and its allies, including China, voted against the mandate, although there were surprises in this category including Cambodia, Georgia, Mongolia, Venezuela and Vietnam (normally of like mind) which voted in favour of the mandate. All of the members of the Organisation of Islamic Cooperation voted against the mandate. The only substantive Islamic country to vote for the mandate was Albania. Indonesia voted against the mandate.

These voting patterns indicate the persisting hostility towards LGBTIQ people worldwide. It is sobering to think that if some or most of the Commonwealth countries that abstained or were absent from the vote had attended and had voted in support of the “no action” resolution moved by Botswana, the mandate would have been terminated. The forces for equality and progress would have triumphed. The forces for enlightenment, a scientific approach, equality and justice for all persons would have been defeated.

The vote is recorded in the Third Committee as an indication of the fragility of the moves in our world to defend the vulnerable minority representing LGBTIQ people. That fragility is all the more surprising given that the focus of the mandate of the Independent Expert is on the *violence* suffered by this minority. When does violence against people fall outside the ambit of human rights concerns? The cruelty to the young gay activists in Bangladesh shows the need for this mandate. But

is not confined to developing and poor countries. The brutal shootings at the Pulse Nightclub in Orlando in the United States on 12 June 2016 shows that this is a worldwide phenomenon. Which is why the initiatives of the Human Rights Council are so timely. And why the initiative of the African Group, which nearly succeeded, is so retrogressive and contrary to the principles of international human rights law since the adoption of the UN *Charter* in 1945 and the acceptance of the UDHR in 1948. Suggestions are now beginning to emerge that the African Group will persist with its opposition to the SOGI mandates either in the Fifth committee of the General Assembly or in a plenary vote. This struggle is not over. It will not be finished in our lifetimes.

BEYOND LGBTIQ RIGHTS AND EQUALITY

It would be a mistake to see John Marsden as solely a gay activist. He was that; but much else besides. He never accepted what he saw as injustices, in the world or in Australia. When in 2005 he was honoured by appointment as a life member of the NSWCCCL he gave a powerful address containing a clarion call for liberty.²⁹ That address listed the causes which, he felt, needed the urgent attention of the Australian community. They included the civil liberties of asylum seekers and detainees; the civil liberties of persons detained under anti-terrorism laws; and the disproportionate imprisonment of indigenous Australians. They also extended to the ever increasing rise in the use of custodial punishment in Australia; the interference by governments and legislatures in judicial sentencing discretions; the effective reductions of legal aid; the enlargement of administrative and bureaucratic intrusions

²⁹ John Marsden, “Speech to the Council for Civil Liberties”, unpublished, NSWCCCL, February 2005, on the occasion of his life membership.

into the judicial process; the failure of Australia to adopt even the modest proposal for a human rights charter or statute as recommended by the Brennan committee; the growing disillusionment with the electoral democratic process; the ever smaller participation of citizens in political parties; and decline of civic egalitarianism in Australia; and the increasing intolerance of protestors and citizens espousing views different from one's own.

Concern about these and other issues for human rights and civil liberties demonstrate the ongoing relevance of these issues for all those who struggle to uphold and extend liberty in Australia and the world. The recent vote in the United Nations on the SOGI mandate is an indication that the global struggle for universal human rights and liberties is by no means over. Indeed, it has only just begun. The challenge before us is enormous. However, we all know that the journey of a thousand miles begins with a single step. At least some of us are on the journey

I pay tribute to the many valiant people who have worked to defend and advance civil liberties in Australia. A large number of those, who in the 1960s and 70s participated with me in the NSWCCCL went on to become political leaders and judges. Although there were many failures, there were successes too. It is a healthy society that chooses leaders and judges from a pool who are committed to civil liberties. I hope that traditions will continue. Beyond that, I hope that civil liberties will continue to produce restless, sometimes angry, always dissatisfied change agents like John Marsden to help shake us from our complacency. And to advance the cause of civil liberties in Australia and the world.