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Précis Paper

The Response of the Law to Challenges Faced by the LGBT Community

A discussion of the law as it relates both domestically and internationally to issues of marriage equality, gender identity, sexual orientation, and HIV

Discussion Includes

- HIV and the law
- Criminalisation of consensual adult gay sexual conduct
- The Yogyakarta Principles
- The fight for marriage equality in Australia
- Original intent versus living tree

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The Response of the Law to Challenges Faced by the LGBT Community

1. In this edition of BenchTV, The Hon Michael Kirby AC CMG (Former Justice of the High Court of Australia) and David Buchanan SC (Barrister, Forbes Chambers, Sydney) discuss how the law, both domestically and internationally, has responded to issues of marriage equality, gender identity, sexual orientation, and HIV.

HIV and the law

2. The Report by the Global Commission on HIV and the Law, *Risks, Rights & Health*, was delivered in July 2017, and is just the beginning of the work to be done in the area. The UN Development Program has been most commendable in the following up of the recommendations of the Global Commission Report.

3. The Report had a number of provisions concerning minorities who were exposed to HIV, including sex workers, injecting drug users, sexually active gay men, prisoners, refugees, transgender persons, and even children and women. All of these categories of minorities were identified.

4. Essentially the Global Commission on HIV and the Law made recommendations that were very similar to the policies that we adopted in Australia in the very earliest days of the HIV epidemic (late 1980s, early 1990s).

5. Agreement was reached in Australia to take steps to reach out to the vulnerable groups, believing that their protection would reduce the impact of the epidemic, and thereby protect the whole of society – which is exactly what happened – there has been a significant drop in the number of HIV infections in Australia.

6. So Australia's good legal strategies started back in the 1908s and 1990s, and continued to do good work, by reaching out to people and making sure they were protecting themselves – and by protecting themselves, they were protecting others. This was the message that the Global Commission sought to sell to the rest of the world.

7. It was difficult in Australia, but it has proved *very* difficult in a number of countries, particularly in countries where religious groups are powerful, and very hostile to the groups identified as most at risk. These hostile groups do not seem to pay heed to the fact that they too are exposed to the virus, and unless it is dealt with, the epidemic will grow within their society.

Criminalisation of consensual adult gay sexual conduct

8. In most of the poorer countries of the world, HIV has never been a specifically gay disease; it has affected the general population right from the start. The Global Commission Report was addressed to that, and recommended that the UN should step up the efforts to remove the criminal laws against gay people in the 70 or so countries where they still exist, and to remove certain criminal laws against sex workers, and injecting drug users. These recommendations were urged by UNDP, UNAIDS, and WHO, in recognition of the fact that that disincentives to behaviour change, and looking after oneself, are posed by a punitive approach by the law.

9. The punitive approach, which is the instinctual approach of human beings, is not an effective approach on the experience of the world. A much more effective approach is outreach, engagement, involvement, persuasion, education, and the facilities for change.

10. In July 2017, five years after the 2012 Report was delivered, the UNDP organised a five-year anniversary catch-up on what had happened following the 2012 Report. Very systematically and carefully, UNDP went through the results of the countries that have changed their criminal laws.

11. A number of countries have changed them – some by legislation, some by Court decisions.

12. In a decision in Belize (the former British Honduras), the Court upheld the challenge based on its human rights provisions in its Constitution, and struck down the old colonial criminal laws against consensual adult gay sexual conduct. That decision has been the subject of an appeal in Belize, but it was a definite step forward. Similar steps have occurred in the Seychelles, Nauru, the Cook Islands, and in other smaller jurisdictions. But in the big jurisdictions, like Nigeria, Kenya, and other countries of Asia, the changes have not been happening, at least not at the right pace.

13. There was a particularly disappointing decision in India, where the High Court of Delhi, in a landmark opinion of that Court, decided that the provisions in the Indian Penal Code, inherited from British times, which criminalised consensual adult gay sexual conduct, were inconsistent with the human rights provisions in the Indian Constitution, and therefore struck those provisions down. (The relevant section is s 377 of the Indian Penal Code 1860.)

14. Sadly, that decision was then appealed to the Supreme Court of India. The Supreme Court, in 2013, revived the decision of the validity of the Indian Penal Code. So millions of gay Indians were immediately restored to criminal status.

15. Within the last weeks, an important decision has been handed down by a large constitutional bench of the Supreme Court of India (comprising nine Justices of the Court) – *Justice K S Puttaswamy (Retd) & Anor v Union of India & Ors*, Writ Petition (Civil) No 494 of 2012 – in which the Court was unanimous in upholding the claim to privacy.

16. Unanimously, that decision upheld a right to privacy as being inherent in the right to life that exists in the Indian Constitution. The leading opinion in the decision was written by Justice Chandrachud. In an important section of his reasons, Justice Chandrachud:
    - Recounted the relevance of what they were deciding for the gay population in India for s 377 of the Indian Penal Code
    - Recited the decision of the Delhi High Court in *Naz Foundation v Government of NCT of Delhi and Others* WP(C) No.7455/2001
    - Recited the overriding decision of the Indian Supreme Court in *Suresh Kumar Koushal and another v NAZ Foundation and others*, Civil Appeal No. 10972 of 2013

17. The Supreme Court last year agreed to review the decision of *Koushal* – indeed, there is pending in the Indian Supreme Court a corrective petition to look at it again. It is difficult to see that the decision of *Koushal* will stand, especially in light of this recent decision in *Justice K S Puttaswamy (Retd) & Anor v Union of India & Ors.* So we may be facing a change in India on the criminalisation of same-sex sexual activity – and if it happens, not only will it be good for universal human rights, but it will also be good for the strategies of India in tackling the HIV epidemic. It will also have an impact beyond India for the countries that still have the very same provisions of the old British Penal Code criminalising homosexual sex.

18. The Penal Codes of Malaysia and Singapore have virtually identical provisions – they are, s 377A of the Singaporean Penal Code, and s 377A of the Malaysian Penal Code. The recent privacy case in India will be a very important weapon for civil society to use in challenging those same provisions in other countries. Indeed, there is such a challenge before the courts in Kenya at the moment, which would be assisted by the reasoning of Justice Chandrachud and his colleagues.

<u>The Yogyakarta Principles</u>

19. In 2016, Professor Vitit Muntarbhorn was appointed by the Human Rights Council to the position of *Independent Expert on sexual orientation and gender identity*.

20. In April 2017, there was a review of the *Yogyakarta Principles* in April 2017 in Bangkok. Some of the deepest concerns were expressed in respect of developments that are happening in Indonesia itself, where Yogyakarta is, and where the Principles were adopted. There was a representative from the Human Rights Commission in Indonesia at the review in Bangkok. He explained one of the unusual developments to be that the city of Yogyakarta had indicated it was very embarrassed to have its name associated with the *Yogyakarta Principles*. This is a sign that things, in at least some parts of Indonesia, are not moving in a good and human-rights-respecting direction.

21. Meanwhile, the *Yogyakarta Principles* are being advanced. There is another meeting taking place in November of this year in Bangkok, to look at this issue from the point of view of Asia.

22. There is a logjam in the world generally (in the Commonwealth of Nations in particular, and in Asia especially) for action on the recommendations of the *Yogyakarta Principles* and of the Global Commission on HIV and the Law. It is difficult when a country says it will not change, especially for religious reasons. The challenge is how to, whilst remaining respectful of cultural and religious norms, secure changes that recognise the lessons of science – those lessons being that sexual orientation is merely a small variation in the human and other animal species; it is not pernicious, it is not deliberately chosen, and it is not able to be changed successfully.

23. So people have to adjust their thinking, and adjust their reading of ancient religious texts against the facts that are now demonstrated by science, and therefore adjust their beliefs and laws to reflect this.

24. We have basically gotten to that point in Australia. But in many countries of our world, and in particular our region, that point has not been reached, and that is why the challenge before Professor Vitit Muntarbhorn is a very substantial one. It is not an easy task at all, but it has to be dealt with, because it is a matter of universal human rights.

<u>The fight for marriage equality in Australia</u>

25. There is currently a challenge sitting in the High Court in Melbourne to the postal survey of opinion in Australia as to whether or not Parliament should consider introducing marriage equality in terms of same-sex marriage.

26. In 2013, the important decision in *The Commonwealth v Australian Capital Territory* [2013] HCA 55 was handed down by the High Court on the question as to whether marriage, as a

topic on which Parliament can legislate, could include, constitutionally, same-sex marriage. This decision had an important history.

27. In 2004, the Howard Government introduced into the *Marriage Act 1961* (Cth) a specific provision forbidding any Court in Australia from recognising same-sex marriage, or one that occurred overseas (in a jurisdiction that permitted same-sex marriage).

28. Then the ACT introduced legislation for civil unions, which was subject to a requirement that it lie on the table of the Federal Parliament where the Federal Parliament, even though self-government had been granted to the ACT, could disallow it. But the Federal Parliament had almost never done so. It was however done in respect of civil unions. The disallowance of the civil unions by the ACT legislature meant that those civil unions disappeared.

29. Not deterred, the ACT Legislative Assembly then changed the language of their Act to 'civil partnership', because one of the complaints that had been voiced in the Federal Parliament was that a 'civil union' is simply mimicking, or copying, 'marriage'. The ACT's solution was to use the word 'partnership' instead of 'union'.

30. So civil partnerships were enacted, and came before the Federal Parliament again, soon after the arrival of Mr Rudd as Prime Minister. Mr Rudd had given an undertaking that no legislation for same-sex marriage would be introduced during the first term of his government, and he therefore felt obliged to move for the disallowance of the civil partnership law. All of this formed part of the so-called DOMA legislation (Defence of Marriage Act), which was being copied from the US.

31. Not deterred again, the ACT Legislative Assembly then enacted a same-sex marriage Act, in which they endeavoured overcome the problems presented by the 2004 legislation by saying that it referred to same-sex marriage, which is a special ACT marriage, and is not the same as Federal marriage. This was challenged in the High Court soon after the return of the Abbott Government.

32. The question arose: is the federal law on marriage, based on the constitutional provision with respect to marriage, restricted to opposite-sex marriage? Serious law review articles have been written on this question, one of which was by Justice Santamaria, in which he argued that because in 1901 (back at the time of Federation) the word 'marriage' meant only marriage between a man and a woman to the exclusion of all others for life, that understanding stamped that meaning on the word 'marriage', and the Federal Parliament therefore did not have a power to enact same-sex marriage.

33. So this argument had already been advanced – but it was not advanced by any party in the 2013 case. In the 2013 case, the High Court held that the federal power:

- Did embrace, and extend to, same-sex marriage
- Was not limited to marriage between a man and a woman in the *Hyde v Hyde* decision of the common law in England
- Was a jurisprudential concept that could adapt to changing times as it had done so before

It held therefore that the *Marriage Act 1961* (Cth), in providing for a federal marriage, excluded the enactment by the ACT of a same-sex marriage Act, because providing in the federal *Marriage Act* for non-recognition of same-sex marriage meant that the constitutional field was occupied, and excluded action by any state to provide for a same-sex marriage Act.

In the case of a territory, the Court held that it was not consistent with the federal law for the ACT to try to move into the marriage power interpreted in the way the High Court did.

34. The Federal Parliament has not proved desperately anxious to move into the field of marriage. Mr Abbott promised that some form of popular consultation would take place, and this proved intolerable to the Senate, so the majority of the Senators disallowed the provisions for a compulsory national plebiscite.

35. The pale image of the plebiscite in the form of the voluntary voting postal survey is what resulted. And this is the matter that is currently before the High Court.

<u>Original intent versus living tree</u>

36. Challenges are thrown up by original intent and reading a provision of the Constitution so as to apply to modern day conditions.

37. In the *Commonwealth v Australian Capital Territory [2013] HCA 55; 250 CLR 441* at [19], the High Court reasoned that:

> *Because the status, the rights and obligations which attach to the status and the social institution reflected in the status are not, and never have been, immutable, there is no warrant for reading the legislative power given by s 51(xxi) as tied to the state of the law with respect to marriage at federation.*

At [14] it held that:

> *Debates cast in terms like "originalism" or "original intent" (evidently intended to stand in opposition to "contemporary meaning") with their echoes of very different debates in*

other jurisdictions are not to the point and serve only to obscure much more than they illuminate.

38. These excerpts from the judgment appear to be a discouragement of the attempt to import into Australia the broad debate, which certainly exists in the US, concerning original intent.

39. In the US, the Justices have to sit with their dictionaries that bear a date of either 1776 or 1790, and solemnly look them up to find out what words meant in the time when the Constitution was negotiated and adopted. So there is a very live debate in the US about original intent.

40. There is a view, which was expounded by Justice Scalia, that the only safe foundation for an immutable meaning to the Constitution is to go back to what those who wrote it intended it to mean. Justice Scalia expounded this view as a ready-made doctrine suitable for Australia. The problem is that in Australia we have always had an alternative view which has been available to be followed - the 'living tree' view.

41. The living tree doctrine was expounded right from the very beginning by one of the principal authors of the Australian Constitution, Andrew Inglis Clark. Clark said that the authors of the Constitution did not have any authority to impose their views, and that it was the duty of succeeding generations to give meaning to words in the Constitution.

42. Essentially, this is what has happened in Australia. If there is a battle in Australia between original intent and living tree, the views of Andrew Inglis Clark have won.

43. There are few true consistent original intent Justices of the High Court. Most Justices take a 'functional view', acknowledging that the very nature of a Constitution is that it has to speak to succeeding generations. Just the understanding of the reality of sexual orientation and gender identity was something that was not really known back when the Constitution was being drafted.

44. So the view that we adopt in Australia, and which generally applies, is much more suitable to the nature of the task, which is constitutional decision-making. What the High Court Justices were saying in the unanimous opinion in *The Commonwealth v Australian Capital Territory* [2013] was that they were not going to get into this general issue of original intent and living tree, saying instead that the word 'marriage' alone did not even in 1901 have a fix immutable meaning. They held that it was a juristic construct – it had a meaning in 1901, and has a different meaning now, which is not locked into a particular definition, and which can adapt.

45. It is therefore within in the federal power to make laws for the peace, order, and good government of the Commonwealth of Australia with respect to marriage, and it is within that power to enact a same-sex marriage law. That is the power that resides, and only resides, in the Federal Parliament; and the Federal Parliament has not yet exercised that power.

BIOGRAPHY

The Hon Michael Kirby AC CMG

Former Justice of the High Court of Australia

Michael Kirby is an international jurist, educator and former Justice of the High Court of Australia. In addition, he has served as Deputy President of the Australian Conciliation and Arbitration Commission, Chairman of the Australian Law Reform Commission, President of the NSW Court of Appeal, Judge of the Federal Court of Australia and President of the Court of Appeal of the Solomon Islands. He has also undertaken many international activities, serving as Commissioner of the UNDP Global Commission on HIV and the Law and leading the UN Commission of Inquiry into human rights abuses in North Korea. He was also a Member of the UN Secretary General's High Level Panel on Access to Medicines and the UNAIDS/OHCHR's panel on Overreach of Criminal Law.

David Buchanan SC

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David Buchanan SC was admitted to practice in 1975, called to the Bar in 1977 and appointed Senior Counsel in 1997. His areas of expertise include criminal law, administrative law, public law and dealing with OH&S, environmental and other regulatory offences. He has been involved for many years in the community response to HIV/AIDS both in Australia and overseas. He has a particular interest in the role of the criminal law and of public health interventions in the HIV/AIDS epidemic.

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