



Précis Paper

International Legal and Political Developments Concerning LGBTIQ Human Rights

In the last decade there has been a steady growth of activity worldwide in the field of sexual orientation and gender identity. This presentation considers the developments in international law and policy, particularly within the United Nations.

Discussion Includes

- The Office of the Independent Expert on Sexual Orientation and Gender Identity Issues
- Reaction to the recognition of LGBTIQ rights in the international community
- Countries opposing the international mandate
- Priorities for the Independent Expert
- The overreach of the criminal law
- The work of the Global Commission on HIV and the Law
- The Yogyakarta Principles

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International Legal and Political Developments Concerning LGBTIQ Human Rights

1. In this edition of BenchTV, the Hon. Michael Kirby AM CMG (Former Justice of the High Court of Australia, Sydney) and David Buchanan SC (Forbes Chambers, Sydney) discuss recent developments in the international sphere concerning LGBTIQ rights.

The Office of the Independent Expert on Sexual Orientation and Gender Identity Issues

2. Ban Ki-Moon, former Secretary-General of the United Nations, was a great proponent of equality for LGBTIQ people. The *Universal Declaration of Human Rights* states in Article 1 that "All human beings are born free and equal in dignity and rights". No-where are the rights of all people, including LGBTIQ people, more plainly expressed.
3. The international arena has seen a growing recognition of sexual orientation and gender identity as human attributes in need of both understanding and protection in municipal and in international law. In 2016, the Human Rights Council of the United Nations established the Office of the Independent Expert on Sexual Orientation and Gender Identity issues ("the Office"), with Professor Vitit Muntarnbhorn appointed as the first Independent Expert.
4. However, all did not go smoothly, and there was prolonged and repeated hostility to the establishment of the Office. Mr Kirby noted that the UN stood at the cusp of recognising that the issue of sexual orientation and gender identity was a matter of fundamental human rights, yet the mandate of the Office was fought vehemently by many countries and involved a highly antagonistic debate.
5. One of the difficulties in this area has been the way in which LGBTIQ people disguise their reality, allowing straight people to overlook their existence. However when people can identify friends, family and workmates as LGBTIQ, it becomes much harder to perpetuate the hatred, and so the use of inclusive language in speeches by Professor Muntarnbhorn ("what we want", "the rights we are fighting for") is an important step.
6. The Human Rights Council deals with politically sensitive issues on a regular basis, yet there was particularly hard-fought opposition to the creation of the Office. After the opposition to the creation of the mandate failed within the Human Rights Council, the opponents to the establishment of the Office took the battle to the General Assembly. In the Third Committee (the Political Committee), a motion was moved to delete the reference to the adoption of the mandate in the Human Rights Council. The motion was defeated,

with around 84 countries (including Australia) voting to keep the mandate, 76 voting to delete it, and 16 abstaining.

7. The issue was then taken to the plenary of the General Assembly, and the outcome was similar to the vote in the Third Committee. The matter was then taken to the Fifth Committee (the Budget Committee), where a proposal was put forward to delete the budget item for the Office's mandate. Both in the Fifth Committee, and subsequently in the General Assembly where the matter was taken up once again, the opponents were unsuccessful in preventing the establishment of the Office.
8. The opponents to the creation of the Office were largely Commonwealth countries with criminal law provisions inherited from colonial times and members of the International Islamic Conference. The Commonwealth countries in this group had maintained anti-sodomy laws from the colonial era, which had been sustained by religious doctrines. Of the 54 countries of the Commonwealth, 42 countries still maintain laws against gay people. The second group of opponents included Arab and Islamic states.
9. The mandate of the Independent Expert specifically addresses the issues of violence and discrimination against LGBTIQ people around the world. There are still far too many instances of laws and practices that fall within these two categories, particularly against transgender people, and an interesting challenge for Mr Muntarbhorn, the Independent Expert, will be how to determine the priorities within these categories.

The Overreach of the Criminal Law

10. UNAIDS is the UN body that was set up to combat the HIV/AIDS epidemic in the international sphere. Along with the Office of the High Commissioner for Human Rights, UNAIDS recently established an expert group to examine the overreach of criminal law when measured against universal human rights. The expert group is examining the features of criminal law in municipal jurisdictions where there has been an overreach of the criminal law amounting to an oppression or unjust interference in the life of people in the relevant State.
11. In common law countries, traditionally, the role of the criminal law is to protect society where there is a complaining victim. To go beyond that is to enforce laws that do not result in actual harm. However the competing argument is that the role of criminal law is to bind the unifying features of the majority and enforce the generally accepted morality. The first argument has been the one that has predominantly won out in common law jurisdictions.

12. However, although this is accepted in principle, in some countries, it has not been accepted in practice. For example, the laws against consensual homosexual behaviour, sex work and drug use all start to venture into territory where there is no identifiable harm to the greater community. Drug laws in the US imprison around 2 million people, in a way that is disproportionate to the value of the laws and deal with people for private conduct.
13. Many of these areas of criminal law, such as sex work and drug use, are relevant to the spread of HIV/AIDS. Australia's experience suggests that the way to reduce the spread of the virus is to reduce the criminalisation of such conduct, which only drives the conduct into back streets and makes it difficult to reach out to those involved in a way to ensure that they protect themselves, and therefore the entire society.
14. The Global Commission on HIV and the Law produced its report, *Risks, Rights and Health*, in July 2012. Much of the Report focused on the principles that should guide the criminal law and how overreach should be discouraged, in order to pinpoint where the law was interfering with successful strategies against HIV. The Report recognised that where there is overreach of the criminal law and intrusions into consensual activity, there is the risk that people will not hear the messages of disease prevention. The Report recommended that steps should be taken to reduce the criminalisation of consensual adult private sex work; consensual adult homosexual activity; and consensual adult drug injection.
15. The lessons of countries like Australia and New Zealand are instructive: in New Zealand, only 1 percent of injecting drug users have HIV, and in Australia, only 2 percent. However this number rises dramatically to 20 percent in the United States, and even higher to 55 percent in Russia, which has a highly punitive approach to drug use. These statistics show clearly that criminalisation of drugs will lead to an increase in infection rates.
16. The Report also made the following five recommendations specific to sexual orientation and gender identity issues:
 - Repeal all laws that criminalise consensual sex between adults of the same sex and/or laws that punish homosexual identity (recommendation 3.3.1).
 - Respect existing civil and religious laws and guarantees relating to privacy (recommendation 3.3.2).
 - Remove legal, regulatory and administrative barriers to the formation of community organisations by or for gay men, lesbians and/or bisexual people (recommendation 3.3.3).
 - Amend anti-discrimination laws expressly to prohibit discrimination based on sexual orientation (as well as gender identity) (recommendation 3.3.4).

- Promote effective measures to prevent violence against men who have sex with me (recommendation 3.3.5).

17. Mr Kirby hoped that these recommendations will begin the process of reducing stigma and discrimination for LGBTIQ people, and will be increasingly influential. The value of the UN in areas like this is to show leadership, and provide knowledge based upon science and research.

The Yogyakarta Principles

18. The Yogyakarta Principles were developed at a meeting of the International Commission of Jurists, the International Service for Human Rights and human rights experts from around the world in Yogyakarta, Indonesia, in 2006. The Yogyakarta meeting was working on the human rights aspects of sexual orientation gender identity and the concluding document contains 29 principles adopted unanimously by the experts, along with recommendations to governments, regional intergovernmental institutions, civil society, and the UN itself.

19. The Principles were the first attempt to set out a charter of rights for LGBTIQ people and were developed in response to patterns of abuse reported from around the world. Those patterns include:

- Sexual assault and rape;
- Torture and ill-treatment;
- Extrajudicial executions;
- Honour killing;
- Invasion of privacy;
- Arbitrary arrest and imprisonment;
- Medical abuse;
- Denial of free speech and assembly; and
- Discrimination, prejudice and stigmatisation in work, health, education, housing, family law, and in access to justice and immigration.

20. Mr Kirby explained that declarations of principles set out important human rights principles, such as the Yogyakarta Principles, are often subsequently adopted into treaties and are important in building recognition and common understanding throughout the world.

21. The issues that the Principles aim to redress are estimated to affect millions of people who are, or have been, targeted on the basis of perceived or actual sexual orientation or gender identity. The Independent Expert, Prof Muntarnbhorn, will lead the exercise of

concentrating on these issues. Mr Kirby emphasised that the issues of violence and cruelty are the most pressing issues for LGBTIQ persons around the world.

BIOGRAPHY

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Former Justice of the High Court of Australia

The Hon. Michael Kirby AC CMG is a former Justice of the High Court of Australia. He has served as Commissioner on the Global Commission on HIV and the Law and led a Commission of Inquiry into human rights abuses in North Korea. He is a Member of the Secretary General's High Level Panel on Access to Medicine and Chair of the Technical Advisory Group within the Panel.

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David Buchanan SC was admitted to practice in 1975. He was called to the Bar in 1977 and appointed Senior Counsel in 1997. His area of practice is criminal law. 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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