

# MSM: ACTION, NOT MORE WORDS

The 9<sup>th</sup> International Congress on AIDS in Asia and the Pacific  
(ICAAP)  
Bali, Indonesia.  
11 August 2009.

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The Hon. Michael Kirby AC CMG\*

### AN IMPORTANT MOMENT

This session of the ICAAP Congress is addressed to one of the most important issues for a successful strategy in tackling the spread of the HIV virus that causes AIDS. The strategy is the prevention of more infections. That strategy will not succeed without carefully targeted policies aimed at affecting the behaviour of individuals and groups especially at risk. Amongst these, MSM (or men who have sex with men) represent a key target<sup>1</sup>. Research shows, not only in developed countries, that this cohort of the most vulnerable populations at risk, is largely ignored in many nations where AIDS presents its greatest challenges. The result is that MSM are generally placed outside the essential messages both of prevention and of access to treatment. This is a predicament that needs to be changed quickly<sup>2</sup>.

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<sup>1</sup> F. van Griensven & Ors., "The Global Epidemic of HIV Infection Against Men Who Have Sex With Men", *Current Opinion in HIV and AIDS*, 2009, Kluwer, 4:300 at 302.

<sup>2</sup> cf. Caceres et. al, "Review of Legal Frameworks and the Situation of Human Rights Relating to Sexual Diversity in Low and Middle-Income Countries", UNAIDS, Geneva, 2008.

Until recently, it was rare to see leaders of the international community addressing this vulnerable group. Sadly, many of such leaders fell victim to the kind of feeling described by Nelson Mandela in the words of Maire Bopp Dupont at the opening plenary session today. President Mandela told her that, on his release from Robben Island, many leaders of the community in South Africa recoiled from addressing the people most in need of support. Nelson Mandela would become an important voice. But until recently, there were few heads of state and few heads of government who would lift their voices.

At this ICAAP Congress, the President of Indonesia, Susilo Bambang Yudhoyono, lifted his voice at the opening ceremony. So did his wife. Both of them referred to the crucial communities who have to be brought into the strategy if the struggle against HIV/AIDS is to succeed: MSM, IJUs (drug users) and CSWs (sex workers). It is difficult to overstate the importance of the President's willingness to refer to these groups and to acknowledge their human rights and dignity in addressing the AIDS pandemic. So many other leaders have been silent. In his first term as President of the United States of America, Ronald Reagan, a great communicator, could not bring himself to mention AIDS or MSM and other groups in the front line. How precious therefore it is to have the President of Indonesia acknowledge the importance of reaching out to vulnerable groups, and specifically MSM. One hopes that this gesture will give an example to political leaders in the Asia-Pacific region. The prospects of other leaders quickly following the initiatives taken up may seem remote. But a step has been taken in the right direction.

I acknowledge the work of the organisers of this Congress. I also acknowledge the crucial work that United Nations Development Programme (UNDP) has performed. Its publications, often jointly with UNAIDS, constitute an institutional recognition in the United Nations family of the importance of communicating with MSM both as a human rights strategy and as one that is central to the effective public health outreach to a crucial community at risk<sup>3</sup>. I acknowledge the important work performed by Mr. Jeffrey O'Malley, Director HIV/AIDS Practice within UNDP and by Dr. Mandeep Dhaliwal, UNDP leader on Human Rights, Gender and Sexual Diversities. They have been champions of the involvement of MSM in the forefront of the international effort to turn the epidemic around.

## **IN THE BEGINNING**

Of the thousands of participants in this ICAAP meeting, few will have been engaged in the HIV/AIDS pandemic longer than I. This is no boast; just a fact. My involvement began very soon after the World Health Organisation (WHO) recognised the significance of AIDS.

The first director of the Global Programme on AIDS, Dr. Jonathan Mann, secured my appointment to the Global Commission on AIDS in the mid-1980s. Other members of that Commission included Professors Luc Montagnier and Robert Gallo, the two scientists credited with isolating and describing the virus, HIV. At the time, the scientists told the Commission that the world would probably have a vaccine against HIV within ten years. Within twenty years, we would have a cure. Neither of these predictions has proved accurate. A vaccine remains elusive.

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<sup>3</sup> WHO, UNDP and UNAIDS, Health Sector Response to HIV/AIDS Among Men Who Have Sex With Men. Consultation, Hong Kong, February 2009 (WHO).

Although anti-retroviral drugs have been developed to give significant relief to persons infected with HIV, a cure to rid the body of the virus is not yet available.

We must therefore continue with the difficult strategies of education and behaviour modification. As one who served in the judiciary of my country for thirty-four years, I can attest to the fact that laws, and even education, are only partly successful in altering human behaviour. What is essential to achieve this end is a full realisation by those most at risk of the urgent necessity to change their conduct so as to protect themselves and thereby to protect others.

As I listened to the speeches at the opening plenary of this second day of the Congress, I reflected on the messages that were expressed and how similar many of them were to the lessons that Jonathan Mann taught in the earliest years of AIDS:

1. *AIDS is a women's issue*: Dr. Mann repeatedly taught this lesson. It was advocated today by Geeta Rao Gupta, whilst emphasising that men too must be reached.
2. *AIDS is a human rights issue*: This was the message given by Kyung-whu Kang, Deputy High Commissioner for Human Rights of the United Nations. Like Jonathan Mann, she emphasised that, in addressing this particular epidemic, we will learn not only strategies that work against a virus. We will also learn the urgent need to protect and respect of human rights of everyone at risk. Already, in the Office of the High Commissioner for Human Rights and elsewhere in the United Nations, HIV has forced even the most reluctant to address, and acknowledge, how universal

principles of human rights must be accorded respect for all persons at risk, including MSM, IJUs and CSWs.

3. *AIDS demands engagement with the vulnerable*: This was another insight that Jonathan Mann taught us twenty-five years ago. It was repeated today in our plenary. Dr. Michael Tan of The Philippines and Dr. Jon Yungphakom once again described the importance of outreach to vulnerable groups and of the impediments so often put in the path of such endeavours. We were witness to the fulfilment of one of the principles upon which Jonathan Mann always insisted, namely the participation and involvement of people living with HIV and AIDS. Maire Bopp Dupont spoke for positive people as a member of the Pacific Island AIDS Foundation from Cook Islands. Her tears, when she reflected on the children who suffer in the epidemic, were precious to this Congress. They brought home to us the human dimension. AIDS is not over. And it is not about mere statistics.

## **THE PAIN OF VULNERABILITY**

As I listened to these speeches, I also reflected on my own experience as a member of group vulnerable to HIV, namely MSM. I grew up in Australia when being a member of this community exposed one to illegality and criminality. It was a time of irrational denial, of isolation, of stigma, of vulnerability and of shame. MSM were forced to consider themselves second-class citizens. In most countries, they still are. Yet, fortunately, when AIDS came along in Australia, we had political leadership on both sides of politics that addressed the AIDS paradox. Paradoxically, the most effective strategies to contain and treat HIV/AIDS are those that involve the making of laws and the taking of other measures to protect those at risk. It is paradoxical because the

knee-jerk reaction is to punish, not support, the risk-bearers. But punishment alienates people from self-protective messages. Outreach and engagements is the only hope of influencing their minds and hence their behaviour.

Reform of the law on MSM has come very slowly. Sixty years after Dr. Alfred Kinsey published his trail-blazing research; fifty years after the Wolfenden report in Britain proposed reform; forty years after reform of the law was achieved in Britain, the fact remains that in eighty countries of our world, MSM are still exposed to severe criminal sanctions. Just as I was when I was a young man.

There are two paths to reform. One is the path of the legislature. This was the strategy that Wolfenden proposed in the United Kingdom. It was achieved forty years ago in Britain. It was also the strategy observed in Australia, New Zealand, Canada and many other countries. Yet eighty lands still remain with criminal sanctions. This says nothing about the other laws and policies that discriminate against people on the basis of their sexual orientation.

Forty-one of the fifty-three countries of the [British] Commonwealth of Nations retain the old criminal laws four decades after the United Kingdom repealed them<sup>4</sup>. In twenty countries of the Asia-Pacific region, these relics of colonial rule remain in place<sup>5</sup>. At the end of 2008, many of the countries in our region opposed the endeavour of France and Brazil and other lands to secure from the General Assembly a statement

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<sup>4</sup> M.D. Kirby, "Homosexual Law Reform, An Ongoing Blind Spot of the Commonwealth of Nations", unpublished address to the 16<sup>th</sup> Commonwealth Law Conference, Hong Kong, 8 April 2009. See also *ibid*, "Legal Discrimination Against Homosexuals" [2009] EHRLR Issue 1, at 21.

<sup>5</sup> Human Rights Watch, *This Alien Legacy. The Origins of "Sodomy" and British Colonialism*, Washington DC (2008), 9.

calling for the repeal of criminal laws against MSM. This level of inactivity and opposition from countries that know the burden of unjust discrimination is a sad reflection on the past failures of leadership in the Asia-Pacific region that we must turn around.

In the face of such unyielding opposition, it is natural that proponents of reform should seek alternative redress in the courts. Thus, proceedings were successfully brought in the European Court of Human Rights in the cases of Northern Ireland, the Irish Republic and Cyprus. They were brought before the Human Rights Committee of the United Nations, in the case of Tasmania, Australia, the last jurisdiction of my own country to resist reform<sup>6</sup>. All of these proceedings succeeded. So did proceedings in South Africa, in the Supreme Court of the United States of America, and most recently in the Delhi High Court in the NAZ Foundation Case. I pay a tribute to Anand Grover, a member of this panel at the Congress. His work as senior advocate before the Delhi High Court convinced that court, led by Chief Justice A.P. Shah, of the merits of the legal arguments to demonstrate that such laws, targeting MSM, offend basic principles of equality and respect for privacy now found in many national constitutions, including that of India.

We should pause and reflect upon the courage and insight of the Indian and other judges. Their decisions will, we must hope, influence the many other lands that inherited the colonial criminal codes that have imposed such a sad and unjust blight upon members of sexual minorities. It is part of the rationality of our species to recognise such discrimination and injustice for what it is. We must be grateful to the

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<sup>6</sup> *Toonen v Australia* (1994) 1 *Int.Hum.Rts Reports* 97 (No.3).



judges and advocates who have the insight and the wisdom and courage to say: ‘Enough is enough’<sup>7</sup>.

## **REFORM IN THE ASIA-PACIFIC**

In the Asia-Pacific region there has been bad news in recent times. Bad news that none of the many lands with the equivalents to s377 of the *Indian Penal Code* have seen fit to repeal such provisions. Bad news in Singapore. There, although a committee of the Law Society of that State had recommended repeal of the local s377, the measure was opposed by an appointed member of the Singapore parliament who is a professor of law in Singapore, no less. Her association with an opposing Christian denomination led her to denounce legislative reform with talk of “Sodom and Gomorrah”. In Singapore! It is a tragedy that her opposition succeeded on this occasion. And this in the face of statements by the original Prime Minister of Singapore, Lee Kwan Yew, suggesting that the time was ripe for reform.

In other states of the region, notably Cambodia, steps have been taken to turn back the clock on the measures adopted to help prevent the spread of HIV, specifically to empower sex workers and other vulnerable groups in the community. There seems to be an element of inaction, moralising and hypocrisy abroad that impedes successful strategies for legal policy.

As against this bad news, there is good news. A number of decisions of the Hong Kong courts have asserted the right to equality of MSM<sup>8</sup>. Likewise, a decision of the Supreme Court of Nepal has insisted on

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<sup>7</sup> International Commission of Jurists, *Sexual Orientation, Gender Identity and International Human Rights Law*, (Practitioners Guide No.4), Geneva, 2009.

<sup>8</sup> See e.g. *Leung T.C. William Roy v Secretary of Justice (HK)* [2006] HKCA 106 at [48].

equal rights to sexual minorities. A recent decision of the courts in Pakistan has upheld the right of transgender citizens to be recognised as a special category. The decision of the Delhi High Court is a shining example of what can be achieved through legal process where national courts are independent and strong and open to persuasive arguments that draw on international wisdom. And in China and other lands, UNDP has taken initiatives to study MSM communities and to draw inferences on the need for legal and policy changes. It has done so partly for a successful strategy against HIV/AIDS and partly because this is warranted by universal principles of human rights.

On the whole, in the balance of good and bad news, it must be acknowledged that, for the moment, the balance favours the bad. Endless conferences, countless speeches and persuasive logic, good precedents from courts and fine examples of reforming legislation mean nothing to those who are locked in their ignorance of science and who blindly repeat the errors of an uninformed reading of religious and scriptural texts. The victims of this ignorance include MSM throughout our region. It has been estimated that only ten percent of MSM in the region have access to treatment of HIV and to effective measures for protection and prevention of the spread of the virus. This is why the issue of MSM is at one of the most pressing issues in the epidemic as well as an issue of fundamental human rights.

### **THE THIRD PHASE OF AIDS**

The injustice to MSM in our region takes on a special urgency in the current phase of the global response to the AIDS pandemic. The first phase, under Dr. Jonathan Mann, concerned the alert he gave to the existence of HIV and the need of the global community to respond. The

second phase, under UNAIDS, led by Dr. Peter Piot, involved an urgent strategy to provide access to treatment, including to MSM infected with HIV. The creation of the Global Fund has brought life and hope to millions, including many in the MSM community.

But now we face the third phase. It is a phase when prevention will be the central strategy of the global community. The world cannot afford to continue to fund the costs of an ever-increasing cohort of persons infected with HIV. At present, this group increases by 2.7 million persons every year. Particularly in the context of the global financial crisis, the world will not pay the great costs of providing for the expanding needs for the anti-retroviral drugs. This is why prevention is now at the top of the agenda of UNAIDS led by Michel Sidibé and the Global Fund, led by Michel Kazatchkine. So long as MSM and other vulnerable groups are criminalised, marginalised and excluded from their societies, effective strategies of prevention are unlikely to be devised. It is not only irrational, it is unjust and harmful. Sadly, the laws that many countries now seek to *enact* are those that criminalise consensual adult transmission of HIV. What is needed most is *repeal* of oppressive laws; the adoption of protective policies; and the stepping up of education to assure respect for all those in the front line of this epidemic.

## **NEVER SUCH AN OPPORTUNITY**

In one of the publications supported by UNDP, Dr. Neal Blewett, who was the Health Minister in Australia who led my country to supportive strategies that respected the rights of vulnerable groups, urged that the most effective measures would be those that spoke softly to leaders of

the world and did not try to crash through with reforms that were culturally difficult for them to accept<sup>9</sup>.

I entirely agree with the need for strategies that are respectful to the cultural, social and religious *mores* of the many diverse countries of our region. On the other hand, there has been quiet speaking now for a quarter of a century as this pandemic has continued to ravage millions of vulnerable human beings, including millions of MSM. In the face of inactivity and indifference, a time must be reached where new and older strategies must be devised<sup>10</sup>. Quiet talking will not convince those who have shut their ears, their eyes and their hearts to the predicament of MSM.

Fortunately, the leadership of the world community on the HIV/AIDS epidemic is now speaking with a single voice. The Secretary-General of the United Nations, Ban Ki-moon has said, in memorable words<sup>11</sup>:

“In countries without laws to protect sex workers, drug users and men who have sex with men, only a fraction of the population has access to prevention. Conversely, in countries with legal protection and the protection of human rights for these people, many more have access to services. As a result, there are fewer infections, less demand for anti-retroviral treatment and fewer deaths. Not only is it unethical not to protect these groups; it makes no sense from a health perspective. *It hurts all of us.*”

These words, spoken in August 2008, resonate in this Congress. They resonate with the words of UNAIDS, of the Global Fund, of UNDP, of the

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<sup>9</sup> UNAIDS, Policy Brief, *HIV and Sex Between Men*, August 2006, p.4.

<sup>10</sup> Commission on AIDS in Asia, *Re-defining AIDS in Asia: Crafting An Effective Response* (OUP, 2008, New Delhi) 48.

<sup>11</sup> Extract from the speech of the Secretary-General of the United Nations in August 2008. Preface, *UNAIDS Action Framework: Universal Access for Men Who Have Sex With Men and Transgender People*, UNAIDS, Geneva, May 2009. (Doc.09.xxE-JC1720E) (emphasis added).

High Commissioner for Human Rights<sup>12</sup> and of the President of Indonesia. Never has there been such a unanimity of leaders embracing the previously unmentionable and acknowledging the necessity to respect and uphold the fundamental human rights of all human beings as a strategy to help contain HIV/AIDS. We will never have another moment like this in history to tackle the issues of MSM and of other vulnerable groups. These groups include prisoners, refugees, detainees, and women disempowered by reason of their gender.

It behoves us all to make sure that words are turned into action, and that action springs to the help of the vulnerable. That is why this session on MSM is so important for the successful strategy against the further spread of HIV. And why we must all embrace the wisdom of the Secretary-General of the United Nations and the courage shown by the President of Indonesia at the opening of the 9<sup>th</sup> ICAAP Congress in Bali.

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<sup>12</sup> N. Pillay, "Human Rights in the United Nations, Norms, Institutions and Leadership" [2009] EHRLR, Issue 1, at 7.