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Q&A

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The Hon. Michael Kirby AC CMG

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INVOLVEMENT IN HIV

What we now know as the HIV/AIDS epidemic is a horrible devastation for our species. In the 30 years since it was first detected and described by the National Institute of Health in the United States, the virus has infected 65 million human bodies. Thirty million human beings have died as a result – men, women and children. More than 30 million people are living with HIV or AIDS (PLWHA) – although many are unaware of their status. No country is immune. Many countries have responded effectively to HIV. But most have failed to do so.

At the beginning of the epidemic in the mid-1980s, I became involved both personally and institutionally. As a gay man, I began to lose friends, dropping to infection at a time when there were few useful medical interventions. Because my sexuality was already an 'open secret', I was invited to take part in national AIDS conferences, the work of the AIDS Trust and, eventually, the Global Commission on AIDS of the World Health Organisation (WHO). I had the privilege of working with those great international civil servants and epidemiologists, Jonathan Mann and Peter Piot who led the global struggle against AIDS.

More recently, I have been appointed to the UNAIDS Reference Panel on HIV and Human Rights (2002) and the new UNDP Global Commission on HIV and the Law (2010). As well, my work in the Eminent Persons Group, looking at the future of the Commonwealth of Nations, has required me, and the Group, to examine the special problem of HIV/AIDS for Commonwealth countries where the laws are often an impediment to prevention strategies. Our report has been completed. It will be considered at the Perth CHOGM meeting 28-30 October 2011. It recommends new initiatives to tackle HIV in Commonwealth countries.

We have made many mistakes in the past 30 years. But we have also revolutionised the strategies for a global pandemic. And we have changed forever the relationship between law and medicine in fighting an epidemic. Suddenly, social science has become critical to this endeavour and lawyers and doctors now recognise this. In Australia, we were braver than most, thanks to the leadership of two influential and enlightened politicians: Neal Blewett (ALP Minister for Health in the Hawke Government) and Peter Baume (Coalition Spokesman). How lucky we were to have them when AIDS came along.

PUBLIC POLICY RESPONSE

1. On the whole, I believe that the policy response of Australian governments, federal, territory and state, were pretty well integrated in an astonishingly

short time. Compare this with the usual difficulty we have in securing legal and social integration on any topic in Australia, even the time of day (Queenslanders please take note).

Even very sensitive subjects, such as sterile needle exchange and the establishment of the injecting centre at Kings Cross in Sydney, were accomplished against huge political odds and significant opposition from powerful interest groups. Of course, in retrospect, we could have done some things better. But the "Grim Reaper" campaign in the mid 1980s informed everyone about the dangers. Use of condoms became standard in the gay community. The injecting community embraced sterile needle exchange. Sex workers became condom educators. Laws were reformed. If only we could have the same responses in Africa, the Caribbean and parts of Asia. This is the challenge we face in the Eminent Persons Group and in the UNDP Global Commission.

2. On the whole, I believe that HIV prevention campaigns were highly successful in the early days of the epidemic. Correctly, for Australia, they targeted specially the gay community and groups specially at risk. Ironically, this engagement, and the dramatic challenges of the time, enlivened courage and demands for respect and equality amongst gay Australians. Sadly, it took so much death and suffering to bring people out of the closet. And that includes me.

In recent times, we have seen variations in STI rates in different states of Australia. The reasons are complex. But it does appear to vary with expenditures by state governments on AIDS councils and targeting at risk populations. Generally speaking, New South Wales has done better than most states because its successive governments have worked closely with ACON (AIDS Council of New South Wales). In other states, the degree of co-operation has been variable. And in the early days, Queensland was rather prudish or even hostile about involvement of the gay community. Even to this day, there are provisions of the *Criminal Code of Queensland* that discriminate against homosexual citizens in the state. Experience teaches that the best strategy for prevention is a non-discriminatory engagement with the at-risk groups. Helping them to face the crisis, we help ourselves – all of us. In this, we, in Australia and New Zealand, have a lot to teach the world.

ROLE OF THE CHURCH

3. The role of the churches in Australia has varied between different denominations. Let us start with the religion that we can all blame for some of the ambiguous passages in scripture that have been used as the source for shocking and unscientific discrimination against homosexual citizens. I refer to the passages in *Leviticus*, the book of the Jewish religion. This is the foundation of much discrimination in Judaism, Christianity and Islam. Modern theologians point to the errors of interpretation, the availability of alternative reading of the texts and the need for change in the light of modern scientific knowledge. Yet, the Jewish religion has made a lot of progress and reformed Judaism, including in Australia, offers blessings and even weddings for same-sex Jewish couples. The turnaround has been remarkable.

Less so in Christianity. But it varies. We must never forget that it was the Sisters of Mercy of the Roman Catholic Church who took charge of the medical epicentre of the Australian epidemic around Paddington. From the start, St. Vincent's Hospital in Sydney has been a world leader in HIV care and treatment. And in non-discrimination. The same order of nuns was a leader in the efforts to establish the safe injecting centre in Kings Cross, in Sydney. But the Cardinal was a strong opponent. So was the Salvation Army. So were many other churches.

Even my own denomination, Anglicanism (which, globally, is making progress on women's rights and gay rights), has had a big problem in the Sydney diocese. The unstable position has been reached in many denominations of Christianity that there must be no discrimination against gays on the basis of their sexual orientation but that they must do absolutely nothing to fulfil their sexual needs. Celibacy is the rule for them. This is such a ridiculous position has only to refer to the widespread reports of failings on the part of celibate priests in many lands to see how irrational it is to demand celibacy of most ordinary human beings. Freud said that celibacy was the one unnatural classification. Eventually, the Christian churches will see the untenable position they have reached. This will lead them to re-examine scripture, just as Darwin's discoveries did in the nineteenth century.

Meantime, however, there is an urgent epidemic. The instructions on condom use by the Roman Catholic Church are foolish and life-threatening. Fortunately, many Catholics in the field know this and politely ignore the Vatican's stance. Sadly, the Holy See is one of the major opponents of every step on the path to equality if respect for and non-discrimination against gay people worldwide. And in developing countries, the evangelical Christian missions and churches have been major impediments to condom use, relationship recognition, anti-discrimination moves and simple kindness to gay fellow citizens. One has only to reflect on the distance of this stance from the essential messages of Christianity in the *Gospels* to realise what a mess the churches have got themselves into and what mischief the prelates do in the global response to HIV.

As for Islam, in practice, in many countries, such as Indonesia, there is widespread tolerance and acceptance of the essential measures. However, senior clerics and the International Islamic Conference are forces for resistance to many of the steps (including reform of laws on women and sex work) that are essential to effective strategies against HIV and AIDS. Even in Buddhism, such enlightened teachers as the Dali Lama sometimes say they feel constrained by ancient holy texts written in long-forgotten times. This gulf between reality and kindness, on the one hand, and religious practice and instruction, on the other, will do a great mischief to faith and faith-based organisations until it is reversed. Reversed it will be. But meantime we have an extremely urgent epidemic on our hands with high incidence in countries of high religious influence.

IMPEDIMENTS TO LAW REFORM

4. There are many impediments to achieving law reform globally. The first of these is that criminal laws against consensual, adult sexual conduct by same-sex couples is a special feature of the British colonial experience. Such laws were not imposed by the French, Dutch, Spanish, German or other empires. They are a feature of Britannia and Islam. Getting a change in attitudes stated in the law and instilled by unthinking religious leaders is a major challenge. Trying to explain the homophobia that exists in most of Commonwealth Africa, Bishop Desmond Tutu declared that the only explanation was that everyone has to have someone to look down on. Progress is being made. But it is very slow and the ravages of the epidemic, the rates of infection and the costs of anti-retroviral drugs all demand urgent responses that are not forthcoming. Education, religious champions and global leadership are the keys to effecting a change.

5. Global leadership includes the expression of strong voices demanding changes in laws that impede successful prevention strategies. Fortunately, every leader of the United Nations has spoken in strong and clear terms on this issue in recent times. From the Secretary-General (Ban Ki-moon), to the Administrator of UNDP (Helen Clark) to the High Commissioner for Human Rights (Navi Pillay) and the new Director of UNAIDS (Michel Sidibé). All of them have insisted on the need for countries to update their criminal laws and social practices. The Commonwealth of Nations has been slower to react. And meantime, local politicians, especially in Africa and the Caribbean, play on fears and pander to homophobia. But also to generic discrimination against women and against adult consensual sexual conduct including sex work.

   It is time for the realities to be brought home to such people. Amongst the realities is the fact that each year, 2.6 million people are newly infected with HIV. The anti-retroviral drugs, although much cheaper now than originally, are still expensive in terms of the health budgets of developing countries. The gradual breakdown in the effectiveness of first line therapies is now being noted. This will lead to demand for more expensive second and third line therapies, for which there are no or few generic copies. The enormous cost of the epidemic will not be tolerated in the post-GFC world. This is why the UNDP Global Commission on HIV and the Law, as well as other global bodies, are seeking to persuade countries most at risk to take steps necessary towards law reform, non-discrimination, public education and true engagement with care and support. Gestures of solidarity are helpful. But action on the part of leaders in countries at risk is imperative. It is unlikely that developed countries will keep on paying the costs of the expanding expense of ARVs indefinitely. It is like trying to mop up the floor whilst the tap continues to run fully open.

6. Learned conferences and even Global Commissions are less likely to change social perceptions essential for HIV prevention than more down-to-earth endeavours. These might include television soap operas and use of the internet and social networks to reach out to young people so as to inform them of the realities of sex, injecting drug use, sex work and women's vulnerability. The experience in Australia has shown the importance and

utility of reaching out to the most at-risk populations, such as gays, sex workers, drug users, prisoners groups, refugee advocates and advocates for women's rights.

COMMON LAW DEVELOPMENTS

7. One of the greatest difficulties of securing reform in the area of HIV has been getting politicians to take the necessary steps. Recently, I visited Papua New Guinea to address a national consultation about HIV. Whilst all the usual groups turned up (gays, sex workers, trans-gender, women's rights groups and drug users), only two politicians appeared. The fact is that politicians are often afraid of churches and religious groups who preach that stigmatising people at risk with condemnation and moral judgments will turn the tide. Experience shows that these are puny weapons in the struggle against HIV. But the PNG case is typical of developing countries.

   In the absence of political responses, HIV advocates are increasingly turning to the courts. In many countries, post-independence constitutions provide Bills of Rights with strong language about rights to equality and rights to privacy. It was these rights that were invoked in India in the decision of the Delhi High Court in *Naz Foundation v Delhi*. That case upheld the objection of the Naz Foundation against section 377 of the *Indian Penal Code*. That Code, imposed on the Indian subjects by the British Raj, introduced into India (generally for the first time) criminal sanctions against adult consensual same-sex activity. The Delhi High Court held that this provision was contrary to the Indian Constitution and struck it down in so far as it related to adult, private, sexual conduct. The Government of India did not appeal against this decision. However, some religious groups have appealed to the Supreme Court of India which has the case pending. The importance of the decision in the *Naz* case is that the self-same penal code, which was introduced by the British colonial administration in India, applies in most of the countries of the former British Empire. The sun has set on the Empire. But it has not yet set on the countless versions of the *Indian Penal Code* which are found throughout the world. One version, developed by Chief Justice Sir Samuel Griffith of Queensland, is the version that still applies in Papua New Guinea, long after its provisions were repealed for Queensland and other parts of Australia. It is the *Griffith Code* provision which is still in force in Papua New Guinea and unlamented parts of it, in relation to anal sex, still apply in a discriminatory way in Queensland itself.

   The importance of the *Naz Foundation* decision extends far from India. Because of the commonality of the legal provisions, it can be hoped that lawyers and judges in other lands will follow the Indian case. The world of HIV holds its breath as we await the decision of the Supreme Court of India in the appeal from the Delhi High Court.

8. Because of the common features of the criminal codes in the English-speaking world, it should be easy for countries to follow the changes introduced elsewhere. Legislatures in all of the developed countries of the Commonwealth have followed the 1969 English reforms. And generally speaking, we have done this throughout Australia, the last state to change

being Tasmania in 1997. But parliaments in many common law countries have been very slow to change. In Europe, the changes were stimulated in Northern Ireland, the Irish Republic, Malta and Cyprus by the beneficial influence of the European Court of Human Rights. But that court has no impact in Africa, the Caribbean and Asia. Even in Singapore, now a highly developed country, a proposal by the Law Society that the local equivalent of section 377 of the *Singapore Penal Code* should be repealed was rebuffed in Parliament by opposition led by a "born again" Christian Conservative.

9. Within Australia, we still have laws that need to be changed. They include anti-discrimination laws which do not uniformly protect sexual minorities and sex workers and people living with HIV and AIDS. But there are still in place criminal laws affecting drug possession and use that are increasingly recognised as ineffective and counter-productive. It is past time for Australia and the global community to reconsider the prohibitionist model of dealing with drug use. In the context of HIV, that model can often serve as part of the problem, rather than of the solution.

The provision of relationship recognition (including possibly the availability of same-sex marriage as in so many other overseas jurisdictions today) is another step that will eventually be taken in Australia. Anything that encourages responsible, long-term, trusting human and sexual relationships is a contribution to prevention of the spread of HIV. The impact is not universal, nor is it necessarily immediate. But enhancing life partnerships is an affirmative contribution to reducing "sexual grazing" and increasing standards of physical and mental health.

Sadly, the chief opponents of these rational measures in Australia are found in churches, religious organisations and some political parties. Same-sex marriage has been opened up to homosexual parties as a legal status available to all, in many states of Europe, in Canada, South Africa and parts of the United States of America and in Argentina (by parliamentary law) and Brazil and even Colombia (by court decisions). In Australia, it is only a matter of time.

INTRAVENOUS DRUG USERS

10. The patterns of the HIV epidemic vary from one part of the world to another. In Europe and Australasia, the gay community has been a major focus of prevention strategies because of the early predominance of the epidemic amongst gay men. Similarly in Canada, the United States, Australia and New Zealand. However, in Russia and Eastern Europe, parts of China and South-East Asia, the major vector is through drug injecting practices. The rates of HIV infection in Australia and New Zealand amongst injecting drug users are very low (1%-2%), mainly because of the initiatives taken at the outset of the epidemic, including needle exchange and provision of safe injecting facilities. Similar strategies need to be followed in Eastern Europe and in Russia and in the other areas of the world where drug use is a major causative factor. However, there is deep resistance to this strategy (and even to methadone programmes) in many of the countries most affected. In several of them, particularly in Asia, so-called conversion centres for the virtual imprisonment

of drug users and drug dependent persons have inflicted shocking deprivations of universal human rights without making any significant impact on the spread of HIV.

Getting serious and sensible approaches to drug use is singularly difficult in a world where so many police and drug control agencies have a vested interest in the unthinking maintenance of current strategies. The recent report of the Global Commission on Drugs, headed by the former President of Brazil, Fernando Henrique Cardoso, recommended a new non-prohibitionist model. However, this model requires very brave and determined political champions. The Australian and New Zealand needle exchange system and its generally acknowledged success, can be placed before the world community to show what can be done by adopting a harm reduction strategy in the place of punitive criminal sanctions and long imprisonment terms that have not worked in preventing drug use and are counter-productive to preventing HIV spread.

ROLE OF THE UNITED NATIONS DEVELOMENT PROGRAMME

11. The United Nations Development Programme is playing an increasingly significant part in promoting legal changes, both through parliamentary law and through court decisions. In this respect, it is stimulating and supporting the work of UNAIDS, the joint United Nations programme to combat the spread of HIV. The establishment of the UNAIDS Commission on Prevention and the establishment by UNDP of the Global Commission on HIV and the Law indicate the consistency and commonality of the efforts of the United Nations to reduce the spread of HIV by embracing the 'AIDS paradox'. This teaches that, paradoxically, the most effective strategies for containing HIV involve reform of the law, education, encouraging voluntary counselling and testing, provision of anti-discrimination laws and reduction of stigma. Sadly, in the place of these strategies that actually work in reducing the spread of HIV, many countries adhere to their old punitive laws, moralistic instruction, homophobic politics and enactment of laws that increase penalties against gays, sex workers, drug users and others at risk and impose criminal sanctions for non-deliberate infection of others with HIV. The impact of the work of UNAIDS and UNDP may be patchy. But at least the United Nations is making a real effort and for this it deserves praise.

DONATION OF BLOOD

12. At the outset of the epidemic, the blood supply safety could not be guaranteed. Only with the development of effective testing procedures has a safe blood supply been re-established. The imposition of discriminatory provisions forbidding homosexual men, as a group, from donation of blood was probably well-intentioned. However, it is hardly effective and runs counter to the basic premise that all health care facilities that use or are exposed to body fluids must assume that they are infected. They must use the most up-to-date techniques to protect against infection.

Excluding all persons as a class from donation is unnecessary and disproportionate (for those in the class who are not at risk) and counter-productive (in so far as it promotes discrimination and encourages ill-

considered confidence in self-assessment). Science and education, not discrimination, are the best protectors of the safety of the blood supply.

GLOBAL PATENTS ON PHARMACEUTICALS

The issue of pharmaceutical patents is a hotly contested one which is under the study of the UNDP Global Commission on HIV and the Law. Obviously, patents which provide a time limited monopoly for those who share inventive secrets with the community can be justified to encourage the development of new drugs and vaccines to counteract HIV. The mistake which the international community and national governments have made has been to apply legal regimes that were developed in the age of steam engines to the rapidly changing technology of informatics, biotechnology and nuclear science. A different global regime was needed that also took into account universal human rights to the best available standards of health care. Most unfortunately, the United Nations failed to give proper leadership on this issue of balancing inventiveness and human rights. Instead, the development of new patent laws fell into the hands of the World Trade Organisation, which is not a United Nations agency at all. It is an organisation largely controlled by rich developing countries which, through WTO and the increasing network of free trade agreements, has stymied the development of a human rights respecting patent regime.

On top of these unfortunate developments has come the creation of a new push (developed in secret and propelled with force by pharmaceutical-rich countries) of a so-called *Anti-Counterfeiting Trade Agreement* (ACTA). Advanced as a means of preventing counterfeiting of patented goods, this agreement will heavily burden the legitimate use of exceptions under the current TRIPS agreement on intellectual property law. It will greatly enlarge the protections of developed countries at the potential cost of lives of millions of people in developing countries. Increasingly, they will have to depend upon second and third line therapies for which, at present, there are no generic drugs purchasable at affordable cost by developing countries or by donors or by the Global Fund Against AIDS, Malaria and Tuberculosis. We have therefore reached a tipping point in the world's consideration of intellectual property law as it impacts global health.

I expect that this issue will be one of the major elements in the report of the UNDP Global Commission on HIV and the Law. This fact was borne out in the recent second meeting of the Global Commission in Pretoria, South Africa. Everyone at that meeting recognised the urgent necessity of re-examining the international intellectual property regime. Even the leadership of the World Intellectual Property Organisation (WIPO) has acknowledged the need for reconsideration of the international law on this subject. This is an area where the United Nations, drawing on its universal human rights treaties, must give a lead. But there will be strong, powerful and well resourced opposition to a more rational and harmonious international regime on the subject. I would expect that the development of such a regime and the strong push of the global community to secure it, may be one of the major outcomes of the work of the UNDP Global Commission. I certainly hope so.

Nothing less is at stake than the lives of millions of people infected by HIV and at risk of infection. The shrinking budgets for support for the essential therapies to treat HIV demonstrate the urgency of this problem. I expect that that urgency will be felt throughout the United Nations as potentially millions of people presently entitled to life-giving affordable ARVs are faced by the obligation to secure unaffordable ACTA-protected drugs. So far, Australia has not taken a stand against the secret negotiation of ACTA. Only when, as a result of leaked documents, the draft of the ACTA Agreement became public, was the full potential to take its toll on human life made apparent. I do hope that Australia will take a leading role in resisting the spread of ACTA and support countries such as India which have set their face against this most unfortunate development.

13. Who will win in this struggle? Some say that the international pharmaceutical corporations are invincible. Certainly they have a big financial kitty to play with. It is important to recognise that universal human rights in the *Universal Declaration of Human Rights 1948*, expressly acknowledges the human right to protection of scientific inventiveness. But at the same time, universal human rights acknowledge the right to protection of life itself and to access to essential health care. Because the major impact of HIV/AIDS has fallen on poor developing countries and because the largest pharmaceutical corporations are in rich developed countries, the imbalance of power in the path of reform is plainly apparent. In the end, I believe, and certainly hope, that humanity will triumph. It would be a shocking indictment of current generations if the availability of essential life-saving drugs was closed off because of the unavailability of generic drugs and the operation of intellectual property law, including ACTA. We must make sure that this does not happen. But this will require not only recommendations in the report of a body such as the UNDP Global Commission. It will require strong action on the part of enlightened countries, and particularly countries like our own, Australia. In the three decades of HIV/AIDS, we have been a good exemplar of what can be done to reduce the epidemic at home. And what should be done to support prevention, care and treatment abroad. Australians have good credentials on HIV/AIDS. Not perfect, it is true. But good by the world's standards. We must lift our voices to maintain the energy necessary to challenge the cost crises that lie ahead in HIV/AIDS. And we must learn from the ways in which this epidemic has been faced for the challenges to public health in other fields where the global community has so far only scratched the surface of essential reforms.

These are the messages that the UNDP Global Commission on HIV and the Law is sharing with the world. But in a time of AIDS fatigue, of financial decline, of selfish policies, of moralistic religions, of timid politicians and global inaction, is the world really listening? We in Australia must play our part to awaken the slumbering world. The lives of millions of human beings remain at stake.

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