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NORTHERN TERRITORY AIDS AND HEPATITIS  
COUNCIL

THIRD ASIA PACIFIC OUT GAMES

DARWIN, NORTHERN TERRITORY,  
14 MAY 2014

LGBTIQ: THE TEN COMMANDMENTS OF  
DARWIN

The Hon. Michael Kirby AC CMG

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HUMAN RIGHTS FORUM

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*DARWIN, SPORT AND ACTION*

I am proud to be here with the Administrator of the Northern Territory, Her Honour, the Honourable Sally Thomas AC. The Sixth Gay Games in Sydney in 2002, which I also addressed, were opened by another much loved vice-regal representative, Professor Marie Bashir AC, CVO. She, like the Hon. Sally Thomas, was not simply reading a speech by officials. Both have had a long term commitment to full equality of all citizens.

Years ago, when I was a commissioner of the International Commission of Jurists, I made contact with the Administrator when she established a local branch of the ICJ here in Darwin. Her commitment to equality for LGBTIQ citizens is demonstrated by her attendance at several events of the Out Games. She also invited me to stay at Government House.

And in the Queen's room! A sense of humour is a prerequisite to high office in Australia.

The Out Games evolved as a result of a dispute within the Gay Games movement in 2003. It is relevant to this Forum. The Gay Games contested the need for non-sporting activities. However, the Out Games were created to combine with sporting events, a member of events celebrating LGBTIQ contributions to culture and human rights. This engagement has been followed up at the international Out Games in Montreal (2006), Copenhagen (2009), Antwerp (2013) and will be so in Miami (2017). It is to be hoped that the Out Games discover that there are more continents far away from the old civilizations.

I pay respects to the Larakia People of this region of Australia. I am delighted to be involved in this opening with Kerrie Tim, who will speak from out of their experience.

These Out Games in Darwin (2014) reflect the relaxed and friendly mood of this part of Australia. I followed earlier Out Games in the Asia/Pacific Region in Melbourne (2008) and Wellington, New Zealand (2011). I praise the NT AIDS and Hepatitis Council for the support they have given to the Out Games. Also local community activists who have arranged this forum, including Jacqui Pearce and Craig Cooper.

New issues are arising for human rights, affecting LGBTIQ people everywhere. They include the issues of gays in sport. Gradually, in Australia, leading sportspeople are being open about their sexuality, including Ian Roberts (NRL); Matthew Ball (NFL) and Matthew Mitcham (diving/Olympic gold medallist). It is good to witness the energy provided by leading international sporting champions such as Thomas Hitzlsperger (soccer) and the agreement in Australia of all the football associations to promote zero tolerance for homophobia in sport.

But there are other major issues affecting LGBTIQ citizens today. One of them, rarely expressed in the past, is the problem of poverty. Because LGBTIQ people are sometimes denied full acceptance in their employment, they often fail to reach their true earnings potential. This is why the initiatives in Australia of Pride in Diversity, acknowledging the best employers of sexual minorities, are so important. With poverty, all too often, comes infection, poor health and suffering. In the United States, 14% of lesbian couples and 7.7% of gay male couples receive food stamps, compared with 6.5% of married heterosexual couples. Poverty is an issue we must address<sup>1</sup>.

Another issue is the mental health of LGBTIQ citizens. This is a well-known problem and understandable if one reflects upon the stigma and hostility that LGBTIQ people often have to overcome. Recent reports in Britain and Australia have documented very similar levels of depression, stress and self-harm amongst young gay people<sup>2</sup>. In the Australian Federal Parliament, Warren Entsch MP has criticised this phenomenon

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<sup>1</sup> K. Wolfe, "I'm Coming Out: As Living Near Poverty Level", *Washington Blade*, January 17, 2014, 24.

<sup>2</sup> "British Youth Face 'Mental Health Crisis'", *Washington Post Blade*, January 17, 2014, 18.

as a kind of persecution. The Australian study by Young, Gay and Well has found that two thirds of young LGBTIQ Australians have suffered incidents of homophobia or transphobia in their lives.

Another issue that often confronts this minority is physical violence. The Sydney Gay and Lesbian Mardi Gras is an event of joy and celebration held each March. In 2013, a young gay man, Jamie Reid, aged 19, was brutalised by police. He was held to the ground with a police officer's boot on his face. A criminal charge against him was dismissed by a magistrate and the prosecution was ordered to pay \$39,000 in costs. One is entitled to ask how such demeaning hostility comes about? And how we can work together to remove it?

An important aspect of LGBTIQ rights in Australia in recent times has been the new attention to the rights of transsexuals<sup>3</sup>. Court decisions and public awareness have shown progress. But there is a long way to go.

In these remarks, I will review some of the developments that have recently occurred in the Asia/Pacific region. I will then mention some developments in Australia. I will conclude with a suggested list of Ten Commandments that we can take from this Forum to the region and the world.

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<sup>3</sup> See for example *AB v Western Australia* (2011) 230 CLR 500; [2011] HCA 42 and the decision of the High Court of Australia in *Max-Welby v New South Wales* (unreported, 2 April 2014).

## *LGBT RIGHTS IN ASIA/PACIFIC*

There have been a number of developments in the rights of LGBTIQ people in Asia and the Pacific in recent times. But on the whole, the achievements have been modest. On the criminalisation of this minority, there is a kind of lethargy, even a logjam, in removing the colonial laws that imposed criminal sanctions upon consensual, adult, private homosexual activity. Until the criminal laws are removed, progress in our region can only be modest:

- \* *Korea:* In the past year I have been conducting an inquiry for the United Nations on human rights violations in North Korea. I was glad to complete my task without any mention being made of sexuality. It was just a non-issue. However more recently, the media in DPRK (North Korea) have denounced the report, condemning it by reference to my openness about sexuality and my 45 year partnership with my partner Johan. At the same time, the distorted media of DPRK have condemned the President of South Korea, Park Geun-Hye as a “comfort woman” of Japan and the United States. They have also offensively described President Barack Obama as a “wicked black monkey”. Whilst there is no law against homosexual acts in North Korea (because of the derivation of their criminal law from continental Europe), this is absurdly explained as being because there are no homosexuals in that country. Really? Perhaps being open about such issues, in a

nation that suppresses diversity and difference, would be dangerous to life.

- \* *India*: In India, in 2009, many rejoiced in the decision of the High Court of Delhi in *Naz Foundation v Delhi*<sup>4</sup>. That decision held that the criminalisation provision of s377 of the *Indian Penal Code* was unconstitutional. It upheld the constitutional norms of equality, privacy and non-discrimination on the grounds of sex. However, in December 2013, the *Naz* decision was reversed by the Supreme Court of India in *Suresh Kumar Koushal v Naz Foundation*<sup>5</sup>. As we meet, a curative petition has been lodged and argued in the Supreme Court, urging the need to reverse the *Koushal* decision. In particular, it has been pointed out that decision cannot really stand with the more recent outcome in the Supreme Court of a challenge to the official treatment of transsexuals in *National Legal Services Authority v Union of India*<sup>6</sup>.
- \* *China*: Although there is no criminal law against gays, as such, in the PRC, police actions against LGBTIQ individuals are regularly reported. These reports involve a contrast with the progress being made in Taiwan, where a big Happy Family March for PFLAG was reported in March 2014. Likewise in Hong Kong, debates are proceeding concerning marriage equality and the status of transsexuals and their relationships.

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<sup>4</sup> [2009] 4 LRC 838, IndHC (Delhi).

<sup>5</sup> 2013 (15) Scale 55: (2014) 1 SCC 1 (11 December 2013).

<sup>6</sup> Supreme Court of India, unreported, 15 April 2014, the Apex court found that the right to self-identity of gender, including as a “third gender” was an important part of the constitutional right in India to live with dignity. It concluded that the State was required to take affirmative action in order to achieve equality for transgender people. Clearly, this would require removal of the criminalisation of consenting adult sexual acts outside the heterosexual norm.

- \* *Singapore:* The city state has a criminal provision derived from the *Indian Penal Code* (s377A). Although the former Prime Minister and Minister Mentor, Lee Kwan Yew, indicated his support for repeal of the provision, a Bill for this purpose was defeated in the Singapore legislature. The opposition to the Bill was led by a Member of Parliament who was a Christian fundamentalist. Challenges to the constitutional validity of the law are still proceeding in the Singapore Court of Appeal. These suggest that the ultimate outcome of the Indian judicial authority, based upon a similar text, is important far beyond India.
- \* *Sri Lanka:* Many reports tell of the harsh actions faced by the LGBTIQ organisation, Equal Ground. Extremist nationalist forces continue to bully its members and to threaten violence to sexual minorities.
- \* *Nepal:* A bright spot on the horizon is the situation in Nepal. A decision of the Supreme Court of Nepal has envisaged marriage equality, because of the provisions of the national constitution. The government has approved the provision to transsexual citizens of a passport and certificate classifying their sex as “other”. The respected LGBT activist, Sunil Pant, has been one of the persons for the region nominated for the Nobel Peace Prize.
- \* *Thailand and Vietnam:* Reports from these two Asian countries appear to indicate consideration of enactment of civil partnership for LGBTIQ citizens, to provide some recognition for a marriage-like status. The presence at this Forum of Professor Vitit Muntarbhorn from Thailand will offer practical lessons on law reform from the field by a most distinguished lawyer of our region.



- \* *Malaysia:* The Pink Dot organisation attempted to arrange a conference in Penang. However, this was cancelled by authorities, allegedly because of concerns about “security”. Meantime, the former Deputy Prime Minister and Opposition Leader, Anwar Ibrahim, had his acquittal on a second charge of sodomy, reversed by the Court of Appeal. That decision, substituting a conviction, sparked protests and is now under appeal to the Federal Court. Until the Malaysian equivalent of s377 is removed from the statutes, LGBT and other citizens will continue to be harassed and intermittently prosecuted.
- \* *New Zealand:* In New Zealand, marriage equality was achieved through the unicameral parliament in an emotional vote in 2013. The leadership and success, of Louisa Wall MP and the importance of “precise timing” in achieving legislative reform, will be explored at this Forum.
- \* *Russia:* The Russian Federation has a presence in Asia Pacific. Its record on LGBTIQ rights in recent years has been depressing. Laws have enacted prohibitions on free speech by sexual minorities and their supporters: even those merely seeking law reform. Demonstrations and marches continue to be banned. Although LGBTIQ contestants were promised safety during the Sochi Winter Olympics in February 2014, local activists were arrested and harassed. The International Olympic Committee has a clear obligation to make its stance against homophobia and transphobia clearer, and effectively enforced. Partly because of the negative moves on the legal rights of LGBTIQ people in Russia, the President and Vice-President of the United States did not attend the Olympics. Nonetheless, the United States team

included prominent LGBTIQ Olympians, such as Billie-Jean King (tennis), Brian Bositano (figure skating) and Caitlin Kahon (hockey). The subsequent annexation of Crimea has had the consequence of setting back the rights of LGBTIQ people and also people living with HIV and AIDS (because substitute therapy for people who use drugs is prohibited in the Russian Federation although allowed in Ukraine).

## *CHANGES IN AUSTRALIA*

The Australian moves for reform began in earnest in 1974 when the government of South Australia secured legislation to repeal the colonial anti-gay criminal laws. At the time, the State government was led by Premier Don Dunstan. His biography, launched at this Forum, reveals his own bisexuality and his strong support for LGBTIQ people everywhere<sup>7</sup>.

The South Australian reforming legislation was gradually copied in other States of Australia, culminating in the removal of the hostile provisions of the *Criminal Code* of Tasmania. This followed a successful communication by Nick Toonen and Rodney Croome to the United Nations Human Rights Committee. At the time, I had cautioned against that initiative. But its success demonstrated the importance of determination and persistence on the part of individuals and civil society.

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<sup>7</sup> Dino Hodge, *Don Dunstan- Liberty and Intimacy* (Wakefield Press, Adelaide, 2014).

Debates in Australia at this moment on LGBTIQ issues relate to other legal issues. These include the expungement of old convictions from the past era, relating to consensual adult homosexual acts (under consideration in Victoria and New South Wales); attempts to secure sub-national forms of marriage equality (Australian Capital Territory, New South Wales and South Australia); attempts to revive marriage equality in the Federal Parliament (December 2013); consideration of the legal rights of LGBTIQ refugee applicants in Australia (February 2013) and improvements in the legal rights of transgender citizens. The last mentioned developments extended to the participation of the Sydney Gay and Lesbian Mardi Gras of transgender serving officers of the Australian Defence Force and an important decision of the High Court of Australia. Consideration is also being given in the ACT to modification of birth certificates provided to transgender and intersex people with new classification systems to recognise their true status.

Although the High Court of Australia in December 2013 held that the earlier Australian Capital Territory (ACT) attempt to provide for marriage equality in that Territory could not stand alongside the restriction of the recognition of 'marriage' in the *Federal Marriage Act* 1961 to heterosexual couples, the actual reasoning of the Court was very important<sup>8</sup>. It rejected any notion that the provision of the power to the Federal Parliament to enact laws on "marriage", (as expressed in the Australian Constitution) was limited to heterosexual marriage<sup>9</sup>. In this sense, although the proponents of marriage equality lost the battle over

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<sup>8</sup> Australian Constitution, s51(xxi).

<sup>9</sup> *Commonwealth v Australian Capital Territory* (2013) 88 ALJR 118 (HCA).

the legislation for the ACT, they won the constitutional war concerning the powers of the Australian Federal Parliament.

### *THE TEN COMANDMENTS OF DARWIN 2014*

Drawing on the past 40 years experience in effective engagement with reform of the law and social attitudes on human sexuality It is appropriate, to consider the basic principles that should guide us in this endeavour. They can constitute the Ten Commandments of Darwin. They are not written on tablets of stone; but on our hearts as we strive for a better, more rational and kinder country and world.

#### *I. You shall show courage in the struggle for equality*

Courage is an essential element in the effort to rid the world of the irrational attitudes and laws against LGBTIQ people. This was borne out in the conduct of the two Australians who took the stalled Tasmanian obstacles to the United Nations Human Rights Committee and won. I, and doubtless others, warned them at the time that doing so would be difficult and probably futile; and winning, problematic. But they had the courage to follow their convictions. Sometimes, it is best to venture and lose than never to venture at all.

II. *You shall seek out and find common cause with straight allies.*

No significant reform of the law and social attitudes to advance the rights of LGBTIQ people was ever secured by gays alone. In parliaments, businesses, courts and trade unions, gays are never in the majority. For lasting reform, they need allies. Increasingly, allies can be found because LGBT people are now speaking up and identifying themselves. Automatically, in most cases today, that wins for them significant family support, mostly straight. Work colleagues and school friends are now part of the network, just as earlier parents' organisations were.

III. *You shall pursue principle; but be ready to compromise the details.*

The struggle for equality, recognition and non-discrimination is one of principle. There are several precedents: the earlier struggle of the women's movement; the movement against racism; the movement against disability discrimination and religious discrimination. LGBTIQ people can learn from these earlier struggles. It can sometimes be appropriate to compromise on matters of detail: as proved necessary in Queensland and Western Australia, to accept unpleasant preambles legislation reforming criminal law, in order to get the main principle through parliament. Of course, views will differ over what is 'core' and

what is 'non-core'. What is essential and what is a detail, warranting compromise.

IV. *You will use universal human rights as a touchstone for equality.*

Australians do not have a constitutional bill of rights or even a comprehensive federal statute of rights. However, Australia supported the *Universal Declaration of Human Rights* and ratified many treaties which give it effect. It was the *International Covenant on Civil and Political Rights* (1966) which the UN Human Rights Committee invoked in the *Toonen* case. More recently the *Yogyakarta Principles* have been propounded to apply international human rights law to the case of sexuality. Seeking a foundation in well-known international principles gives strength and legitimacy to the struggle for LGBTIQ equality. The right to enjoy universal attributes without distinction; the right to life; the right to equality and non-discrimination; the right to privacy and the right to be free of discrimination on the grounds of sex are just some of the universal rights that are invoked.

V. *You will seek to share solidarity with the global struggle for equality.*

The endeavour to secure and defend, full equality for LGBTIQ people is now a global struggle. On every inhabited continent, people are working for the elimination of oppressive laws, policies and attitudes. They should make common cause. Through international civil society

organisations such as Amnesty International, Human Rights Watch, the International Commission of Jurists and International Bar Association. Local civil society organisations should also be engaged, such as the local Council for Civil Liberties or its equivalent or the local Bar Association and Law Society. Communities should be brought into the struggle, including LGBTIQ organisations and related bodies such as AIDS councils. But a chief obligation is to keep attention on the developments in the rest of the world. And to be concerned about and to prioritise, the process of reform in neighbouring countries, including countries in the Asia/Pacific region.

VI. *You will seek solidarity with other groups discriminated against because of their nature.*

Common ground will often be found with civil society organisations that stand up for the rights of women. For indigenous people and their rights. Against racial discrimination (upon which Australia has a less than perfect record). Strategies and tactics can be learned from groups who have embarked on the journey of reform earlier in time. Because the UN Human Rights Committee has expressed a view that discrimination against LGBTIQ people is a form of sex discrimination, there is a great deal to be learned by the proponents of reform on the ground of sexuality from the earlier struggles of the women's movement. Gays and women have a natural cause for solidarity. Each has been oppressed by patriarchal attitudes. Each has been the subject of

discrimination taught mainly by men, from scriptures written by men, often reflecting the viewpoints of men<sup>10</sup>.

VII. *You will acknowledge and respect the needs of some for time to absorb and accept change.*

It is natural that LGBTIQ people should be impatient for change. It is right that all people should insist that equality be achieved promptly and discrimination halted, before it causes more injustice, violence, hurtful discrimination, depression, suicide, injuries and even death to victims. On the other hand, LGBTIQ people have a lot of time to think about, and reflect upon, their injustices, and to work out the causes, policies and attitudes that occasion them. Most straight people do not have the time or inclination to do this, unless confronted with the necessity, as by the situation of a family member or work colleague or advocate whom they respect. In today's world, at least in most countries, exposure to argument about the injustice of criminalisation of sexual minorities and hostility and discrimination against LGBTIQ people is difficult to avoid. Therefore, the reasonable time gap for reflection and the opportunity to accept what science, rationality and growing experience teach, is narrowing. Nonetheless, LGBTIQ people must understand that, if straight people have no acquaintance with sexual minorities, in part this has been because members of those minorities disguise and deny their identity. The pace of change will change when all people are open about their sexuality.

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<sup>10</sup> M.D. Kirby, "Marriage Equality: What Sexual Minorities Can Learn from Gender Equality" (2013) 34 *Adelaide Law Review*, 1.



VIII. *You shall reach out to opponents and enemies.*

Some people will never change their point of view about consenting LGBT equality and rights. Occasionally, they will ascribe their hard line opinions to the word of God; to understanding of the natural law; to instruction of the scriptures; to their traditional beliefs, culture and social values. In a free society, it is impossible to insist that everyone should agree with each other. Freedom implies the freedom to differ. But it does not imply freedom to cause violence, serious hostility or hatred towards minorities. It is important for LGBTIQ people, and their friends, to claim the high moral ground in arguing their case. They can easily do this because that case is so strongly supported by the evidence of science; by the shared experience of many who have suffered wrongs; by the growing willingness of LGBTIQ to speak out and to identify themselves; and by the demand for equality. By reaching out to those who are hostile, the proponents of LGBTIQ rights will not only exhibit forgiveness, understanding and attempted reconciliation. They will cause extreme irritation to those who are on the receiving end of this treatment. For each of these reasons, it is a course of conduct that is much to be recommended.

IX. *You will consider the issues to which you and your community are blind today, just as others were earlier blind to sexuality equality.*

One of the great puzzles of the ongoing struggle for equality and justice for LGBTIQ people is how belated it has been; how quickly it has

become global; and how substantial have been the gains in a relatively short time. Half a century ago, most countries in the world criminalised and punished sexual minorities for acts of sodomy, acts “against the order of nature”, “unnatural crimes” and other offences so “abominable” that were considered unspeakable and best left unspoken. Yet today, the number of countries with such crimes has been reduced to 80. There is a need to rapidly reduce this number, particularly in countries that inherited the crimes in colonial times from the common law of England.

Help is available to assist those who wish to change. When one contemplates the racist attitudes that prevailed, including in Australia, just 50 years ago, the sexist attitudes under which women laboured at that time; the indifference to the needs and rights of disabled people; and the oppression of LGBT people, it should be remembered that it was voices of advocates of change that began the process of reform. At first those voices were few and reticent. Most people did not immediately see the need for change. Reflecting on moral blindness that made so many generations indifferent to the oppression of LGBTIQ people in their midst, a significant question is posed that demands an answer, including by LGBTIQ people themselves. It is this: What are the issues to which today’s generation is blind? What are the oppressions and injustices that happen today that, in 50 years’ time, will be regarded as self-evident and, if still operating, in need of urgent reform? Each generation is critical of the past. But each must hold up a mirror to itself and consider the image that it sees.

X. *You shall be advocates for all who suffer: not just gays.*

It is easy, in fundamental human rights, for advocacy groups to live in their own silos. To be concerned with their own cause and relatively indifferent to the causes of others. Aboriginal advocates only concerned about indigenous injustice. Feminists only concerned with women's inequality. Racial community only attentive to racism. LGBT communities only concerned about gay rights. To adopt this stance is to persist in moral blindness. Each individual, and each group, that has suffered discrimination must be aware of it and able to extrapolate from their own experience to appreciate the suffering of others. This means more than solidarity in activism. It means empathy, engagement, support and understanding. If one can suffer discrimination over simply being oneself, the whole world is perpetrating a disharmony. This is why LBGTIQ people should be in the vanguard of empathy and activism to rid the world of ignorant stereotypes. And especially those that deny respect to people simply for being themselves. As I declared at the 6<sup>th</sup> Gay Games in Sydney, in words that remain true today, those who advocate gay rights must do so:

*Non seulement pour les gaies. Pour tous.*

We must not be champions only for the equality of gays. We must all be champions for equal rights and dignity for all.