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FEDERAL ATTORNEY-GENERAL'S  
DEPARTMENT

CANBERRA, ACT

12 MAY 2014

AGD PRIDE IN DIVERSITY NETWORK LAUNCH

TRIUMPHS & TEARS: LBGTIQ RIGHTS IN  
AUSTRALIA & THE REGION

The Hon. Michael Kirby AC CMG

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*NEW AND OLD FRIENDS: NOW AND OLD CHALLENGES*

I am proud to be participating in the launch of the Pride in Diversity Network in the Attorney-General's Department. I congratulate the the Secretary and Deputy Secretary for facilitating this initiative. It is not only the morally and legally correct thing to do. As much evidence now shows, it is also good for business. People who do not have to leave half of their true natures at the door when they come to work are more likely to be happy, successful and fully contributing officers.

My links with AGD go back to my time at the Bar in the early 1970s when I started to receive briefs from the Commonwealth Crown Solicitors Office in Sydney (Jean Austin, Alan Neaves, Len McAuley). This led to big briefs with the then Solicitor-General [Sir] Maurice Byers<sup>1</sup>. This led to close contact with officers of the Department ([Sir] Clarence Harders (Sec.); Frank Mahony and Ewart Smith (Dep. Sec.) and many

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<sup>1</sup> E.g. *McCormack v Cope* (1974) 131 CLR 432..

FAS (including Trevor Bennett and Andrew Menzies). These links were extended when I was appointed chairman of the Australian Law Reform Commission in 1975. I then worked closely with Lindsay Curtis (FAS) and many officers of Parliamentary Counsel's office (including John Ewens [QC], Charles Comans QC and Geoffrey Kolts QC).

This was a wonderful time of high talent. But sexuality, including my own, was never mentioned. Even in whispers. Today we have made much progress. But more needs to be done. And in the meantime there are many new challenges, and some continuing old ones.

The challenges 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 recent 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>2</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>3</sup>. In the Australian Federal Parliament, Warren Entsch MP has criticised this phenomenon 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>4</sup>. Court decisions

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<sup>2</sup> K. Wolfe, "I'm Coming Out: As Living Near Poverty Level", *Washington Blade*, January 17, 2014, 24.

<sup>3</sup> "British Youth Face 'Mental Health Crisis'", *Washington Post Blade*, January 17, 2014, 18.

<sup>4</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).

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.

### *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>5</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>6</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>7</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

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<sup>5</sup> [2009] 4 LRC 838, IndHC (Delhi).

<sup>6</sup> 2013 (15) Scale 55: (2014) 1 SCC 1 (11 December 2013).

<sup>7</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.

proceeding concerning marriage equality and the status of transsexuals and their relationships.

- \* *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>8</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

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<sup>8</sup> Dino Hodge, *Don Dunstan- Liberty and Intimacy* (Wakefield Press, Adelaide, 2014).

that initiative. But its success demonstrated the importance of determination and persistence on the part of individuals and civil society.

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>9</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>10</sup>. In this

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<sup>9</sup> Australian Constitution, s51(xxi).

<sup>10</sup> *Commonwealth v Australian Capital Territory* (2013) 88 ALJR 118 (HCA).

sense, although the proponents of marriage equality lost the battle over the legislation for the ACT, they won the constitutional war concerning the powers of the Australian Federal Parliament.

### *THE PATH AHEAD*

From this brief story of triumphs and tears, it is clear there have been more tears and that much more needs to be done to secure true equality in Australia for LGBTIQ citizens. A good way to continue the effort is to promote full openness at home and at work – the two places where most people spend most of their lives. It is in this spirit that I welcome and encourage the creation of the new network in AGD. In my view, it needs to be expanded and enlarged. And to become an employment-wide network of the Australian Public Service.