

THE SPECIAL RESPONSIBILITY OF LAWYERS FOR LGBTI  
REFORM

The Hon. Michael Kirby AC CMG

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Thanks to the research of Sigmund Freud, Alfred Kinsey, Evelyn Hooker and other scientists, we now know that a small proportion of human beings do not experience sexual attraction to the 'opposite sex'. Contrary to many traditional beliefs, human (and other) mammalian species are not neatly divided into binary categories: male and female.

Although a big majority experience opposite sex desires, particular minorities exhibit same sex attractions (lesbians, gays, bisexuals) whilst others feel identification with a sex opposite to the one to which they were assigned soon after birth, generally on the basis of the appearance of their genitalia or parental decisions. Some people experience fluid sexual attractions and feelings. Others simply deny the legitimacy of a legally imposed classification, demanding that the law should mind its own business and keep out of the bedrooms of consenting adult citizens acting in private.

Until recently the law in many countries took a strong stand against such ambivalence. Harsh criminal laws punished people for sexual conduct (even if adult, consensual and performed in private) where it was outside the binary categories of opposite sex relations. In part, such laws derived from Scriptural texts like the passage in the Hebrew Book of

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*Leviticus* calling for those who had sex across the binary divide to be put to death for their 'abomination'. Early natural law philosophers considered that the binary rule should be enforced because it was 'natural'. The genital organs were 'complimentary' and exclusively designed to create children. Any other feelings had to be suppressed. Punishment was justified to save the souls and the progeny of those who were 'same sex attracted' or inclined.

In the English law (from which the laws of about a third of humanity derive) the early influence of the Christian religion ensured that, from medieval times, these rules became part of the enforceable law of the land. It was much the same in most other European states. But in 1793, during the French Revolution, that country repealed such criminal laws. Because, through Napoleon, French criminal law came to influence the legal codes that spread to the majority of the world, most countries did not continue to penalise same sex activity. But the British Empire did. The resulting laws remain in place to this day in 42 of the 54 member countries of the Commonwealth of Nations.<sup>1</sup>

Attempts to abolish or redefine these laws have proved extremely difficult, especially throughout Asia/Pacific, Africa and the Caribbean where we have struck a logjam. Basically, Britain and its settler dominions repealed the old criminal laws in the 1960s-1980s. However, the rest of the Commonwealth of Nations clung to a punitive approach. In part, this adherence has been ascribed to religious convictions. In part, to 'social conservatism'. In part, to powerful lobby interests. Sometimes there was the consoling support (as in Singapore) that the

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<sup>1</sup> The number of recalcitrant Commonwealth states would be increased if the criminal laws were considered of Myanmar/Burma (rejected); Zimbabwe (suspended and Gambia (withdrew); and South Sudan (new sodomy law proposed).

old laws would not be enforced in the modern enlightened age; just left 'on the books'.

Given the scientific knowledge that we now have that non-majority sexual orientation and gender identity or experience are normal to a minority of the human (and other) species; that they are not chosen and cannot be changed; and that attempts to suppress private adult, consensual sexual feelings constitutes an overreach of the law into private activity, changes have been occurring in several countries to adjust to the reality of contemporary scientific knowledge.

However, where they continue to apply, the old criminal laws and common religious beliefs impose on LGBTIQ citizens an obligation to pretend to be other than they feel and, effectively to observe the rule: 'don't ask, don't tell'. Still, as science, rationality and law reform have encouraged greater honesty and openness, the oppressive pack of legal cards began to collapse. Criminal laws were repealed in many countries. Discriminatory civil laws were changed. Citizens began to demand equality in the legal recognition of their relationships. Celebrities 'came out'. The families and friends of LGBTIQ people spoke out for change in law and in social attitudes. The old teaching that the LGBTIQ minority were 'inclined to evil'; 'mentally sick' or an 'abomination' came increasingly under sceptical scrutiny, at least amongst those knowledgeable.

Still the slow and winding path of law reform in many countries has impeded progress. Asia and the Pacific remain amongst the most backward parts of the world, clinging on to the old laws and ignoring the lessons of science. I am not talking here of the recognition of marriage

equality for LGBTIQ citizens. I am talking of criminal laws that try to enforce an illusory binary classification of sexuality on human beings. So long as harsh criminal laws remain in place, it is effectively impossible to secure a more rational foundation for the legal rights of this minority. If our societies had continued to treat people on the basis of their race with such discrimination, it would be an outrage. Yet some of the worst discrimination against sexual minorities in our world happens in countries that have only just emerged from colonialism and racial discrimination. Some people are slow learners.

Lawyers have a special responsibility to help get rid of the criminal laws and to do so quickly. Law is their discipline. They are called upon to help enforce these irrational laws. They see close up the injustice and oppression that is involved. They witness the corrupt conduct that such laws evoke. They are educated members of their communities. With their privileges come duties of leadership and enlightenment. But in many countries of Asia and the Pacific, lawyers are silent. The time has come to call them to action.

In Asia and the Pacific, the countries divide roughly into four categories:

1. Unreformed;
2. Slow reformers;
3. Faster reforms; and
4. Substantially reformed.

A table sets out the full picture. But the main categories can be simplified somewhat as follows:

*Unreformed*

1. Afghanistan: no same sex legal; transgender unrecognised; no anti-discrimination laws in effect;
2. Brunei: same sex sexual activity is illegal; no change for transgender; no anti-discrimination laws in effect and the *Syariah Penal Code Order Penal Code Order* enacted to introduce the death penalty for same sex activity from 2016;
3. Bhutan: same sex illegal; no transgender recognition; no anti-discrimination laws;
4. Myanmar/Burma: same sex sexual activity illegal; no transgender change; no anti-discrimination laws;
5. Kiribati: no same sex activity legal; no transgender recognition; no anti-discrimination laws;
6. Maldives: the same;
7. Nauru: the same;
8. Papua New Guinea: the same;
9. Samoa: the same but sexual orientation protection available in employment. *Crimes Act 2013* removed criminalisation of 'male impersonating a woman';
10. Solomon Islands: the same;
11. Sri Lanka: the same;

12. Tonga: the same; and
13. Tuvalu: the same.

### *Partly Reformed*

1. China: same sex sexual activity legal and transgender reassignment permitted but on condition of surgery. No anti-discrimination laws. Social disapproval;
2. Macau: the same;
3. Singapore: same sex sexual activity illegal. In October 2014 Supreme Court of Singapore found s.377A of the Penal Code constitutional. Affirmed by Court of Appeal. Gender reassignment permitted for TGP but surgery required;
4. Timor-Leste: same sex activity legal but no TGP reassignment and no anti-discrimination laws. Since 2009 the Penal Code of Timor-Leste treats sexual orientation bias to be an aggravating factor in crimes;
5. Bangladesh: same sex activity illegal but recognition of third gender from November 2013 following government announcement;

6. Niue: same sex legal but no TGP recognition and no anti-discrimination laws;
7. Palau: same sex activity legal. 2015, senate enacts a law punishing hate crimes on the basis of sexual orientation and gender identity;
8. Indonesia: same sex activity legal in most districts and TGP reassignment possible following surgery but no anti-discrimination law;
9. Aceh Provenance: in September 2014 enacted law prohibiting sexual relations between persons of the same sex whether Muslim or non-Muslim;
10. Malaysia: same sex activity illegal. TGP allowed reassignment following surgery and barriers to genital surgery. November 2014 in *Khamis v State Government of Negeri Sembilan* strikes down State Sharia law criminalising men “posing” as women; and
11. Laos: same sex activity legal but no recognition of TGP and no anti-discrimination law.
12. Vanuatu: same sex activity not criminalised. TGP unable to change ID documents and no anti-discrimination laws in effect.

*Faster Reformers:*

1. Mongolia: same sex activity legal. TGP recognised following surgery. No anti-discrimination laws. But draft labour law reform

2014 proposes criminalisation of discrimination of sexual orientation and of hate crimes;

2. Republic of Korea: no same sex criminalisation. TGP permitted reassignment following surgery. No anti-discrimination laws. Same sex relations criminalised within the military;
3. Thailand: same sex activity legal. No TGP reassignment. Sexual orientation and gender identity are protected by law in all areas of public life. *Gender Equality Act 2015* prohibits unfair discrimination;
4. Vietnam: no criminalisation of same sex activity. No provision for TGP. Surgery permitted only for intersex. Decree which imposed administrative fines for holding same sex weddings has been repealed;
5. Marshal Islands: no ban on same sex activity. No recognition of TGP and no anti-discrimination laws;
6. Micronesia, Federated States: the same;
7. India: same sex activity illegal as a result of Supreme Court decision in *Koushal* overruling *Naz Foundation* decision of Delhi High Court. Supreme Court decision in April 2014 in *National Legal Services Authority v Union of India* requires recognition of third gender category and provides affirmative action in education and government employment. TGP laws before legislatures;
8. Nepal: no ban on same sex activity. Recognition of third gender identity in documents based on self-determination not surgery.

Third gender option recognised in national census and on identity cards; and

9. Pakistan: same sex activity criminal. Recognition of TGP on identity documents pursuant to 2009 Supreme Court decision. 2011 Supreme Court decision rules that TGP must be granted the right to vote and 2012 decision upholds TGP right to inheritance and employment opportunities.

### *Substantially Reformed*

1. Australia: criminal laws against same sex activity repealed in all States. Common age of consent in all jurisdictions except Queensland. Most federal discriminatory laws repealed. Changes in social attitudes and visibility. Legislation for de facto relations and in some jurisdictions for civil partnership recognition. Proposed Bills for marriage equality in Federal Parliament not yet enacted. TGP self-determination in passports. Change of birth certificate for TGP requires surgery;
2. New Zealand: same-sex activity criminalisation repealed for consenting adults in private. TGP gender on passports based on self-determination. Changes of birth certificate require treatment (not necessarily surgery) sexual orientation and gender identity protected in public life. Same sex marriage and adoption recognised since August 2013;
3. Taiwan: same sex activity legal. TGP identity change approved by committee, surgery not required. Protection against sexual

orientation discrimination. City of Kaohsiung and City of Taipei permit same sex couples to register. Marriage not yet available;

4. Japan: same sex activity legal. TGP reassignment permitted subject to surgery. No national anti-discrimination laws but local governments adopt ordinances to prohibit discrimination. In April 2015 Shibuya Ward in Tokyo becomes first jurisdiction on Asian mainland to recognise same sex partnerships based on ordinance. Same law followed in Setagaya Ward July 2015.

An analysis of the laws in place in Asia and the Pacific affecting LGBTIQ citizens shows that some countries have made quite good progress towards full equality in the past 30 years. They include Australia, China/Taiwan, Fiji, Japan and New Zealand. Some countries are still extremely oppressive to their LGBTIQ minority with harsh criminal laws and policies that penalise adult consensual private conduct and have no provisions permitting alteration of a gender identity contested by the citizen. This is specially a sorry state in the Oceania/Pacific region embracing Kiribati, Nauru, Papua New Guinea, Samoa, Solomon Islands, Tonga and Tuvalu. But it also includes a number of countries in Asia itself such as Afghanistan, Bhutan, Brunei, Myanmar/Burma, Malaysia, Maldives and Sri Lanka. Some slow progress has been made, on the Asian mainland in relation to transgender persons whose community has been recognised in traditional societies: India, Pakistan, Singapore and Bangladesh. But all of these countries, paradoxically, continue to enforce colonial criminal laws against consensual LGB adult same sex activity.

Some countries in Asia have actually gone backwards in recognition and protection of LGBTIQ minorities. Brunei, has introduced a new law that proposes the death penalty for defined same sex activities. India, witnessed a disappointing decision of the Supreme Court of *Koushal v Naz Foundation* in 2013 that reversed the earlier ruling of the Delhi High Court that had held that same sex criminalisation was contrary to Indian constitutional norms. The unsatisfactory nature of the decision in *Koushal* was revealed a few weeks after it was delivered when the same court, in a different panel, in *National Legal Services Authority v Union of India*, upheld the entitlement to legal recognition of transgender people.

If a prize had to be awarded in Asia for the most disappointing performer, it would be a close run thing between *Brunei*, introducing the death penalty for same sex activity; *India* where the Supreme Court unexpectedly re-criminalised millions of LGBT citizens; and *Singapore* which could not find a path to change, despite its economic modernity and attempts that failed, both in the legislature and the judiciary. In Malaysia, the Federal court reversed an enlightened decision on TGP rights in October 2015.

Singapore is a case of special disappointment because reform had the support of the founding Prime Minister of the island state, Lee Kwan Yew. The supposed justification (that the law was not being enforced) constitutes a defiance of the rule of law. It also undermines the national strategy of anti-corruption which is such a hallmark of Singapore's public ethos. The best performer in the Asia/Pacific region is New Zealand. Lawyers there have always taken a leading part in achieving reform wherever it has been adopted.

Stimulating reform in Asia and beyond have been the successive officeholders of the High Commissioner for Human Rights of the United Nations; the leadership of several agencies of the United Nations (especially UNDP, UNAIDS and the Human Rights Council); and the clarion voice of the Secretary-General, Ban Ki-moon, himself a son of South Korea and a product of Asia. He has led the way:<sup>2</sup>

“To those who are lesbian, gay, bisexual or transgender, let me say: you are not alone. Your struggle for an end to violence and discrimination is a shared struggle. Any attack on you is an attack on the universal values that the United Nations and I have sworn to defend and uphold. Today I stand with you... and I call upon all countries and people to stand with you too.”

Secretary-General Ban has described LGBT rights as one of the ‘great neglected human rights of our time’. He has also said that ‘no religion, culture or tradition can ever justify the denial of the basic rights that are contained in the *Universal Declaration of Human Rights* and United Nations treaty law.’ Lawyers, who are the primary guardians and enforcers of these principles should show more leadership in explaining the needs for reform. Lawyers must help break the logjam of law reform. LawAsia and national Bar Associations should show the way.

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<sup>2</sup> UNSG Ban Ki-moon, Statement to the Human Rights Council of the United Nations, 7 March 2012, reproduced in UNDP, Global Commission on HIV and the Law, *Risks, Rights & Health*, New York, July 2012, 48. See also UN General Assembly, “Discrimination and Violence Against Individuals Based on their Sexual Orientation and Gender Identity – Report of the Office of the United Nations High Commissioner for Human Rights” (A/HRC/29/23, 4 May 2015).