



GRIFFITH JOURNAL OF  
LAW & HUMAN DIGNITY

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# JOHN MARSDEN'S IMPATIENCE AND LGBTIQ RIGHTS: THE ONGOING CHALLENGE FOR EQUALITY\*

THE HON MICHAEL KIRBY AC CMG\*\*

*A biennial lecture to commemorate a prominent lawyer and civil libertarian, John Marsden, takes as its theme his commitment to LGBTIQ equality. It collects some positive developments that have occurred in the world since John Marsden's death in 2006, including judicial decisions and legislative reforms. Most significantly, the advance in the availability of marriage to LGBTIQ persons has been remarkable, although delayed in Australia by parliamentary indecision and by a postal survey. Negative developments are also recorded, most especially the widespread persistence of criminal laws originating in colonial times and a log-jam preventing their reform. The year 2016 saw the establishment of the mandate of the UN Human Rights Council for an Independent Expert on Sexual Orientation and Gender Identity. That mandate narrowly survived attempts to terminate or defund it in the UN General Assembly in late 2016; but the strength of the negative vote suggests the difficulties that still lie ahead.*

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\* Text based on the 10<sup>th</sup> Anniversary John Marsden Memorial Lecture, 2016. The lecture was delivered at the Masonic Centre, Sydney, on 1 December 2016. It was sponsored by the New South Wales Council for Civil Liberties(CCL) and by Mardens Lawyers.

\*\* Justice of the High Court of Australia (1996-2009); Honorary Life Member, New South Wales CCL; Gruber Justice Prize 2010.

## I JOHN MARSDEN REMEMBERED

John Marsden was a well-known Law Society President, civil libertarian, and successful lawyer in New South Wales. He died on 18 May 2006. A Memorial Lecture was inaugurated to make sure that his restless, courageous, remarkable personality would be remembered. Those of us who had known him (and sometimes suffered from his criticisms and castigation) recognised him as a “change agent”. His occasional excesses and errors were far outweighed by his service to the cause of law reform and civil liberties in Australia.<sup>1</sup>

That was why Rights Australia, the then new national human rights advocacy group incorporated in 2004, established a lecture series in his honour. The task of hosting the lecture substantially fell to the New South Wales Council for Civil Liberties (NSWCCL), of which John Marsden had been President, and of which he was later to become an Honorary Life Member.

This is the fifth lecture in the series. It has settled into a biennial tradition. The first lecture in October 2008 was given by me on the theme ‘The Uncomfortable Demand for Civil Equality’. Later contributions were provided by Anand Grover, a Senior Advocate from India, who in 2009 described ‘Overturning India’s anti-sodomy law’; by Jenni Milbank in 2010, ‘Surrogacy Reproduction and Exploitation’; and by Nicholas Cowdery AM in 2012, ‘The Times they are a Changing: Where to for Criminal Law?’.

Given the recent postal survey, it is appropriate that I should revert to the theme of the first lecture. HIV and AIDS continue to take a disproportionate toll on lesbian, gay, bisexual, transgender, intersex and otherwise queer people worldwide (LGBTIQ).<sup>2</sup> It is therefore appropriate to return to the theme of 2008 and to consider the progress, or lack of progress, we have made in achieving liberty and equality for LGBTIQ people in Australia and internationally. In doing this, it is right to remember that the liberties that John Marsden espoused were not confined to LGBTIQ issues. They ranged far beyond, a matter to which I will return. John Marsden was a strong proponent of his home district, Campbelltown, and

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<sup>1</sup> John Marsden admitted to occasional excesses. See John Marsden, *I Am What I Am: My Life and Curious Times* (Penguin, Melbourne, 2004), 325, where he said, ‘I have been described as tough, noisy, arrogant and outrageous; but as a courageous fighter for what I think is right’.

<sup>2</sup> Michael Kirby, ‘The Uncomfortable Demand for Civil Equality’ (Speech delivered at the John Marsden Memorial Lecture, Masonic Centre Sydney, 15 October 2008). The lecture was later published by the *University of Western Sydney Law Review*.

a generous benefactor and supporter of Western Sydney University. His gifts have helped to fund scholarships for students at that University.

Much of my lecture in 2008 was addressed to the progress attained by that time in the struggle for relationship recognition (marriage equality) for LGBTIQ people worldwide. In the intervening years, much progress has been made on that issue, and on others. However, in Australia, the progress on relationship recognition has been patchy. I therefore wish to outline the positive developments that have occurred; the not so positive developments; and the developments that represent a danger for the attainment of justice and true equality for LGBTIQ people worldwide. The outcome of this analysis will afford an explanation of why the impatience always expressed by John Marsden remains a necessary stimulus for us in the world of today. And why citizens, LGBTIQ and otherwise, must accept the challenge to demand, and contribute to, change.

## II LGBTIQ REFORM: THE GOOD NEWS

The biggest impediment to making progress towards equality for the rights of LGBTIQ people worldwide lies ultimately not in the law as such, but in social prejudice, religious hostility, educational inertia, and individual human distaste.<sup>3</sup> Nevertheless, the law plays an undoubted part in reinforcing antipathy and prejudice as impediments to equality. Particularly is this so when the law imposes on LGBTIQ people criminal punishment as a sanction for adult, consensual, private sexual activity. In doing this, criminal law reinforces the hostility. It appears to give it the sanction of community disapprobation.

It follows that reforming and repealing such criminal laws has become an important primary objective of those who are seeking to attain civic equality for LGBTIQ people worldwide. John Marsden contributed to this reform in 1984 when a law was enacted that finally removed the anti-gay provisions of the New South Wales *Crimes Act*.<sup>4</sup> Similar reforming statutes had been enacted throughout Australia beginning with Don Dunstan's South Australia in 1975 and finally concluding with reform of the *Tasmanian Criminal Code*

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<sup>3</sup> Michael Kirby, 'Kinsey, Empiricism, and Homo/Trans-Phobia', (2016) 4(2), *Griffith Journal of Law & Human Dignity*, 121.

<sup>4</sup> *Crimes Act 1900* (NSW), s 79 ("Buggery and Bestiality") in a Part of the Act called "Unnatural Offences". Reformed 1984.

in 1998,<sup>5</sup> the latter with a little help from a federal statute<sup>6</sup> based on the ruling by the United Nations Human Rights Committee in *Toonen v Australia*.<sup>7</sup> That ruling enshrined, for the whole world, the principle that the mediaeval criminal offences imposed on LGBTIQ victims were contrary to the provisions of universal human rights law.

Notwithstanding this declaration of universal principles, criminal statutes (mostly inherited from colonial times) continued to punish the consensual, adult, and private sexual activities of LGBTIQ people in two major groupings of the world: the former colonies of the British Empire and additional countries of the Arab/Islamic world. To this day, in 41 of the 54 countries of the Commonwealth of Nations, which succeeded to the British Commonwealth and Empire, the old sodomy laws continue to apply. Nevertheless, in recent years some progress has been made, including in Australia's own region. Thus, within the area of Oceania, in addition to Australia and New Zealand, the sodomy laws have more recently been abolished by Fiji,<sup>8</sup> the Cook Islands, Palau, and Nauru.

Wider afield, enlightened judicial decisions have struck down the sodomy law as incompatible with constitutional provisions governing human rights in the Delhi High Court of India<sup>9</sup> and the courts of Belize.<sup>10</sup> The gratification with these decisions was diminished by the appeals that were lodged against them. Nevertheless, the initial decisions appeared to indicate that the tide of informed decision-making was turning. Subsequent decisions revive the hope of change.<sup>11</sup>

Many other areas of the law affecting the legal rights of LGBTIQ people have been changed in recent years. Within Australia, reform of the criminal law, affording protection for a so-called 'gay panic attack', was proposed after a majority decision of the High Court of Australia in *Green v The Queen*.<sup>12</sup> That was a case in which Justice Gummow and I dissented

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<sup>5</sup> *Criminal Law Consolidation Act 1935* (SA). Amended 1975 by the *Criminal Law (Sexual Offences) Act 1975* (SA) s 8. See also *Criminal Code* (Tas) 1924, s 122 (repealed).

<sup>6</sup> Human Rights (Sexual Conduct) Act 1994 (Cth).

<sup>7</sup> *Toonen v Australia* (1994) 1 Int Hum Rts Reports 97 (no. 3).

<sup>8</sup> *McCoskar v State* (2005) FJHC 500.

<sup>9</sup> *Naz Foundation v Union of India* [2009] 4 LRC 828, (2009) DLT 277 (DelHC).

<sup>10</sup> *Orozco v Attorney-General of Belize* 5 EHLR 2016.

<sup>11</sup> See *Puttaswamy v Union of India*, Supreme Court of India, unreported, (Writ Petition 494/2012) per D.Y. Chandrachud J. [126] ['Sexual orientation is an essential attribute of privacy. Discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. Equality demands that the sexual orientation of each individual in society must be protected on an even platform. The right to privacy and the protection of sexual orientation lie at the core at the fundamental rights guaranteed by Articles 14, 15 and 21 of the [Indian] Constitution.'].  
<sup>12</sup> (1998) 191 CLR 334.

in separate reasons. In several Australian jurisdictions, and overseas, laws have been enacted to modify the previous expression of the criminal law to remove the suggestion that violent and even lethal responses to a non-violent sexual advance by LGBTIQ persons could be justified in law as proportionate, amounting to a defence even to a murder charge.

Another area in which progress has been made in recent years has been the law on the adoption of children. Although, traditionally, adoption was restricted to married couples in a heterosexual marriage, more recently, the law has extended rights in adoption to de facto opposite sex couples and in some jurisdictions (all Australian jurisdictions other than the Northern Territory) this has been opened up to same-sex couples because of their inclusion in the statutory definition of 'de facto' relationships.

In the Northern Territory,<sup>13</sup> an order for adoption can only be made where the 'man and woman are married to each other and have been so married for no less than two years'. These are the ways in which subnational law in Australia continues to discriminate against LGBTIQ couples, despite the fact that much scientific evidence demonstrates the centrality of parental love and the provision of a supporting environment for adopted children, rather than the sexual orientation or gender identity of the parental figures concerned. Unless reformed, such subnational laws would probably prolong discrimination, even following Australia's move towards marriage equality under federal law in December 2017.

However, it is in relationship recognition itself that the most striking changes have occurred in foreign jurisdictions in the past decade. They represent nothing short of a legal revolution that few would have envisaged even at the beginning of the present century.

The first nation to enact the 'opening up' of marriage to LGBTIQ persons was the Netherlands in 2000.<sup>14</sup> This was quickly followed by Belgium (2003), Canada and Spain (2005); South Africa (2006); Norway and Sweden (2007); and there the position rested at the time of the inaugural lecture in this series.

However, since that time, marriage has been opened up in many other jurisdictions: Portugal, Iceland, and Argentina (2010), the United States of America and in the

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<sup>13</sup> *Adoption of Children Act* (NT) s 13(1)(a).

<sup>14</sup> Michael Kirby, 'The ACT Marriage Equality Case: Losing the Battle but Winning the Constitutional War?' (2015) *Queensland Legal Yearbook* 391, 392.



Netherlands Caribbean (2012), in France, Brazil, the United Kingdom, and New Zealand (2013), in Luxembourg, Puerto Rico, and Ireland (2015). During that last year, decisions of the Supreme Court of the United States of America struck down, as unconstitutional, the *Defense of Marriage Acts* (DOMA) and effectively mandated marriage equality throughout that country.<sup>15</sup> In 2016 Colombia enacted the law, as did Finland with effect from 2017. The German federal legislature adopted the reform in late 2017.<sup>16</sup> Slovakia followed soon after. Meantime, in the highest court of the Republic of China (Taiwan) on 24 May 2017, the Council of Grand Justices, held that withholding marriage from LGBTIQ couples violated the 'people's freedom of marriage' and 'the people's right to equality'.<sup>17</sup> Now 24 countries have opened marriage to same-sex couples. However, until late 2017, the Australian Government and Parliament continued to hold out against this development.

Notwithstanding the initial resistance to same-sex marriage at a federal level, two important further developments have occurred in Australia that suggested the way the issue was developing.

In 2013, the High Court of Australia struck down, as unconstitutional, a law of the Australian Capital Territory Legislative Assembly which sought to make a form of marriage available to LGBTIQ couples in that Territory. Whilst disappointing to many couples who had hastened to formalise their marriages under the law, that outcome had a silver lining. The High Court unanimously held that the *Australian Constitution* in s 51 (xxi), where it empowers the making of a law with respect to 'marriage', is not to be construed as confined to notions of 'marriage' that may have existed in 1900 when the Constitution was adopted.<sup>18</sup> The Court swiftly and clearly concluded that 'marriage' under the *Australian Constitution* could lawfully include same-sex marriage. It would therefore be open to the Federal Parliament to so provide, if the political will existed to enact such a measure.

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<sup>15</sup> *Obergefell v Hodges*, 576 US 138 SCt 2583; 192 LEd 2d 609 overruling *Bowers v Hardwick* 478 US 186 (1986). See Michael Kirby, 'Marriage Equality Law and the Tale of Three Cities: How the Unimaginable Became Inevitable and Even Desirable' (2016) 22 *Auckland University Law Review* 11.

<sup>16</sup> The German Bundestag passed a Bill allowing same-sex marriage on 30 June 2017. The Bill was also passed by the Bundesrat on 7 July 2017. It was signed into law by the German President on 20 July 2017. It came into force on 1 October 2017. Uruguay 2013 and Republic of China (Taiwan).

<sup>17</sup> Benjamin Haas, 'Taiwan's top court rules in favour of same-sex marriage', *The Guardian*, 24 May 2017. The ruling, unique in Asia, affords the Government the opportunity to modify the marriage law within 2 years. If not, the court's ruling will come into force on its own.

<sup>18</sup> *The Commonwealth v ACT* (2013) 250 CLR 441 at 467 [56].

This holding resulted in a novel tactic in the Federal Parliament by opponents of same-sex marriage. They moved to superimpose an exceptional legislative requirement for a plebiscite before the Federal Parliament would consider any such opening up of marriage in Australia. A Bill to this effect was introduced by the Federal Government and passed by the House of Representatives. However, on 22 November 2016, the Australian Senate, by a vote of 33–29, rejected the proposed plebiscite. No such procedural impediment had been adopted as a pre-condition for earlier steps by the Australian Parliament to enlarge the civil rights of Aboriginals, women, non-Caucasian persons when ‘White Australia’ was abolished, disabled persons, or other vulnerable groups. The defeat of the plebiscite proposal was therefore an important success for civic equality in Australia, even if a consequence was a temporary delay in the adoption of federal legislation on same-sex marriage.<sup>19</sup>

The later resubmission of the plebiscite proposal was again defeated in the Australian Senate on 9 August 2017. In the result, the Australian Government pressed forward with what was called a ‘postal survey’. This was to be conducted not by the Australian Electoral Commission, which has an established record of expertise and professionalism, but by the Australian Bureau of Statistics. That proposal was, in turn, challenged in the High Court of Australia on constitutional and statutory grounds. That challenge was heard with expedition but rejected by the High Court of Australia on 7 September 2017.<sup>20</sup>

The non-binding and non-determinative postal survey was concluded on 15 November 2017. The Australian Labor Party, the Greens and a significant group in the Liberal Party of Australia supplied a ‘Yes’ vote. However, a sizeable number of mostly Coalition supporters, together with most religious institutions and sections of the media supported the campaign to vote ‘No’ to same-sex marriage and sought to preserve ‘traditional’ marriage. Whilst denying that the opposition was based on homophobia and protesting concern about the risks to religious freedom, the tone of the debate was surprisingly unpleasant. However the

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<sup>19</sup> Michael Kirby, ‘The Centenary of Sir Harry Gibbs: Constitutional Methodology, Lawmaking and the Marriage Plebiscite’ (2016) 35 *University of Queensland Law Journal* 283.

<sup>20</sup> *Wilkie v The Commonwealth; Australian Marriage Equality Ltd v Cormann* (2017) 349 ALR 1; Melissa Davey, ‘Same-sex marriage postal survey is lawful high court finds’, *The Guardian* (online), 7 September 2017 <<https://www.theguardian.com/australia-news/2017/sep/07/same-sex-marriage-postal-survey-is-lawful-high-court-finds>>.

vote showed nearly 62 per cent in favour and amendments to the *Marriage Act 1961* (Cth) followed immediately

If the above record is weighed, it appears to indicate that the overall tide is generally moving in the direction of LGBTIQ equality, at least in jurisdictions similar to Australia. However, before so concluding, it is necessary to evaluate the negative news on this global issue. There has been more than a little bad news and it is vital to face up to it.

### III LGBTIQ: THE NEGATIVE NEWS

Although in many parts of the world efforts have been pursued to amend legislation to remove the sodomy and other anti-gay criminal laws, in some jurisdictions amending laws have been enacted which have actually increased the burdens upon LGBTIQ people. Thus in Brunei Darussalam, a decree was adopted in 2015 to increase the punishments imposed by the criminal law for homosexual activity to revive earlier colonial penalties of the sentence of death in certain cases. Death penalty provisions were earlier proposed in Uganda, in sub-national jurisdictions in Nigeria and in other jurisdictions of Africa. In Russia, laws were enacted by the Duma introducing restrictions on what was described as 'propaganda' promoting so-called 'non-traditional' relationships. Such laws have enjoyed support from the Russian Orthodox Church. They have since been copied in several nations of the Commonwealth of Independent States, with have historical, legal, religious, and cultural links to the Russian Federation.

In a number of countries, disappointing decisions have been handed down by final national courts, rejecting challenges to penal and other laws against LGBTIQ citizens based on local constitutional provisions for equality, privacy, and other basic values. Thus, the highest court of Zimbabwe declined to follow a South African ruling invalidating the anti-sodomy law.<sup>21</sup> In Singapore, a challenge to the local *Criminal Code* provision was rejected by the Court of Appeal.<sup>22</sup> In India, the Supreme Court of India, constituted as a two judge bench, in the *Koushal Case*, reversed the earlier enlightened decision of the Delhi High Court in the *Naz Foundation case*.<sup>23</sup> That decision was later challenged by a 'curative petition' which is still awaiting hearing in the Supreme Court of India. In Malaysia, a decision of the Sabah

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<sup>21</sup> *Banana v State* [2000] 4LRC 621 (ZimSC). See also [1999] 1 LRC 120 (ZimSC).

<sup>22</sup> *Lim Meng Suang v A-G Singapore* [2013] 3SLR 118 and following cases.

<sup>23</sup> *Koushal v Naz Foundation* [2014] 1SCC 1.

Court of Appeal was reversed in 2014 by a ruling of the Federal Court of Malaysia, adverse to the rights of transgender persons in that country.<sup>24</sup> The Malaysian decision can be contrasted with the enlightened judgment of the Court of Final Appeal of Hong Kong, effectively requiring that the legislature in Hong Kong make provision for the marriage of transgender persons in that territory.<sup>25</sup>

In addition to disappointing developments in the law affecting LGBTIQ minorities in many countries, countless media reports describe the violence, hostility, and cruelty exhibited towards this minority. The news reports range from cases of shocking brutality in Jamaica, the cruelty of public executions photographed in Iran; and brutal violence in Bangladesh. In Dhaka, Bangladesh, two young gay activists, Xulhaz Mannan and Nahibob Tonoy established the first gay newsletter in that country. In retaliation, their home was invaded by 6 opponents who hacked them to death.<sup>26</sup> Government responses to these violent acts are often extremely passive. Indonesia did not inherit an anti-gay criminal offence from colonial times.<sup>27</sup> However, in 2016, an application was heard by the Constitutional Court of Indonesia appealing for the insertion of a criminal offence into the Penal Code which the legislature has not so far enacted. It was only narrowly rejected in 2017. Meanwhile, in the province of Aceh, where Shari'a law is enforced, the conviction of a young medical student and his partner in 2017 of (consensual) same-sex activity resulted in the administration of 200 strokes of the cane, the number administered being actually increased by the court beyond that demanded by the prosecutor.

In countries of the kind mentioned above, the issue of law reform raised by these developments is not the enactment of relationship recognition, still less same-sex marriage. It is either resistance to efforts to enlarge the criminal sanctions presently ordained or reforming efforts to overcome the hostility that has resulted in a log-jam that presents an

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<sup>24</sup> State Government of Negeri Sembilan & Ors v Muhammad Juzaili Mohd Khamis & Ors [2015] CLJ JT 13.

<sup>25</sup> *W v Registrar of Marriages* [2003] HKCFA 39, Court of Final Appeal (Hong Kong).

<sup>26</sup> Saad Hammadi and Aisha Gani, 'Founder of Bangladesh's first and only LGBT magazine killed: Xulhaz Mannan hacked to death where several academics and bloggers have been brutally murdered', *The Guardian*, 24 April 2017, 1.

<sup>27</sup> The Netherlands abolished the sodomy offence in 1803 under the influence of amendments to the French Penal Code of 1793. In Indonesia, as in the Netherlands East Indies, the Penal Code did not include such an offence. A special Shari'a law offence was later adopted in the Province of Aceh as part of a constitutional settlement. It was not adopted more generally in Indonesia.

obstacle to repealing the criminal laws that have been repeatedly held to be contrary to universal human rights law.

Weighing the positive and the negative news recounted here demands a sombre conclusion that progress is very slow. In some places it is non-existent or even moving in an adverse direction.

#### IV LGBTIQ RIGHTS: PUSHBACK AT THE UN

It is against this background that it is appropriate, to consider the issues in this article from a global perspective, as reflected in recent decisions of the General Assembly of the United Nations. That body, provided for in the *Charter* of the United Nations,<sup>28</sup> comprises all of the nations that have joined the Organisation which, by its *Charter*, is established in the name of all the people of the world.

Resolutions of the General Assembly can themselves contribute to a development of the universal law of human rights. Thus, the *Universal Declaration of Human Rights* (UDHR),<sup>29</sup> adopted on 10 December 1948, with Dr H.V. Evatt of Australia presiding as President of the General Assembly, although not expressed in terms of binding treaty law, now represents a recognised source of international law. It is an influential statement of the universal human rights that belong to all people everywhere. Article 1 of the UDHR declares that, 'Everyone is born free and equal in dignity and rights'. This is an important legal and symbolic statement. It affirms the claims for equality by LGBTIQ people in all countries. It is the foundation of many statements that were made by Ban Ki-moon during his term as Secretary-General of the United Nations which concluded in December 2016. It is on the basis of this universal principle, amongst others, that Ban Ki-moon upheld the rights of LGBTIQ people everywhere.<sup>30</sup>

Encouraged by the leadership given by Ban Ki-moon and also by Helen Clark (then Administrator of UNDP), Michel Sidibé (Executive Director of UNAIDS) and other UN leaders, the UN Human Rights Council in 2016 established a mandate for an Independent

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<sup>28</sup> *Charter of the United Nations*, Chapter IV, art 9.

<sup>29</sup> The UDHR was adopted (1948) 217A (iii) on 10 December 1948.

<sup>30</sup> See eg statement by Ban Ki-moon, remarks to special event on Leadership in the Fight against Homophobia, 11 December 2012 available <<http://www.un.org/sg/statement/index.asp?nid-6504>>.

Expert on Sexual Orientation and Gender Identity (SOGI).<sup>31</sup> That mandate was then advertised. A selection process followed and Professor Vitit Muntarbhorn of Thailand, an experienced international lawyer and past UN mandate-holder, was appointed by the Human Rights Council to be the first mandate-holder of the SOGI mandate. Without delay, he set about the discharge of his duties and the organisation of his response to the world-wide challenges involving violence and discrimination, suffered by the SOGI minorities in many countries.

It was at this point that the 'African Group' in the General Assembly of the United Nations moved in the Third Committee of the General Assembly to impose a 'no action' order on the Human Rights Council's resolution establishing the mandate. Its motion was initiated, in the name of the African Group, by Botswana. This was itself a surprise because of the previously enlightened administration of Botswana, particularly in response to the HIV epidemic, reflecting the insistence by its former President (Festus Mogae) upon equality for LGBTIQ persons.<sup>32</sup>

The Africa Group's resolution proposed a delay in the implementation of the resolution of the Human Rights Council whilst further consideration was given by member states to the proposed elements of SOGI rights, alongside United Nations' statements of human rights, together with the views adopted in some member countries concerning the inapplicability of international human rights law to SOGI rights. To counter the resolution proposed by Botswana, a substantial effort was mounted by international and national civil society organisations to defend the SOGI mandate and to resist the 'no action' resolution.

After a short but furious effort by both sides, a vote was taken in the Third Committee of the General Assembly (the Political Affairs Committee) on 21 November 2016. The outcome

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<sup>31</sup> The resolution on the SOGI mandate of the UNHRC is found in UN Human Rights Council, Resolution 32/2. Protection against violence and discrimination based on sexual orientation and gender identity, 30 June 2017, UNDoc.A/HRC/RES/32/2, <[http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/32/L.2/REV.1](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/32/L.2/REV.1)> (accessed 26 January 2017). The mandate is occasionally described as dealing with 'SOGIE' issues and includes gender identity *or expression*. However, as this additional phrase does not appear in the UN resolutions the 'SOGI' appellation is retained.

<sup>32</sup> President Festus Mogae of Botswana was a member (as was the author) of the UNDP Global Commission on HIV and the Law. That Commission recommended removal of criminal laws against homosexuals. A similar recommendation was made earlier by the Eminent Persons Group of the Commonwealth of Nations. See Commonwealth Secretariat, EPG, *A Commonwealth for All* (2011).

was close.<sup>33</sup> Eighty-four countries voted in favour of the continuation of the mandate. Seventy-seven countries voted against. Seventeen countries abstained. No vote was recorded on the part of several countries which, deliberately or accidentally, were absent when the vote was taken. A subsequent further attempt to block the mandate in the Fifth Committee of the General Assembly (the Budget Committee) in December 2016 produced a like outcome. In each case the vote was very close. The opponents almost won. A final challenge that was advanced into the plenary session of the General Assembly resulted in substantially the same close vote. The mandate survived; but the vote showed the high level of opposition.

This is not the occasion to analyse all of the features of this vote.<sup>34</sup> Given that the origin of much of the opposition to LGBTIQ equality derives from the countries of the former British Empire, it is useful to record the votes of the countries of the Commonwealth of Nations on the SOGI mandate. Those which voted in favour of the mandate were Australia, Bahamas, Belize, Canada, Cyprus, Fiji, Kiribati, Malta, New Zealand, Samoa, Seychelles, South Africa, Sri Lanka, United Kingdom and Vanuatu. Of the Commonwealth countries that voted against the mandate, the predominance of opposition in Africa, the Caribbean and Islamic countries stand out: Antigua, Bangladesh, Botswana, Brunei, Cameroon, [Gambia], Ghana, Guyana, Jamaica, Kenya, Lesotho, Malawi, Malaysia, [Maldives], Mauritius, Namibia, Nauru, Nigeria, Pakistan, St Kitts, St Lucia, St Vincent, Singapore, Uganda, and [Zimbabwe].<sup>35</sup>

Amongst the countries that abstained on the Africa Group resolution, or which did not vote, a number are members of the Commonwealth: Barbados, Granada, India, Mozambique, Papua New Guinea, Rwanda, Solomon Islands and South Sudan.

The Russian Federation and its allies or cultural neighbours, including China, voted against the Human Rights Council's SOGI mandate. However, there were some surprises in this category including Cambodia, Georgia, Mongolia, Venezuela and Vietnam (normally of like mind to Russia), all of which voted in favour of the mandate. Almost all of the members of

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<sup>33</sup> UN General Assembly (Third Committee) A/C3/71/L.46.

<sup>34</sup> Michael Kirby, 'A Curious UN Vote Upholds a New Mandate on Sexual Orientation and Gender Identity' (2017) 1 *European Human Rights Law Review* 37. The countries shown in brackets, at the time of the votes, had resigned from membership of the Commonwealth or had been suspended.

<sup>35</sup> At the times of the successive votes in 2016 proposing the termination of the SOGI mandate by the General Assembly, Gambia, Maldives and Zimbabwe had either been suspended as members of the Commonwealth of Nations or had purportedly withdrawn from its association. They are counted here to demonstrate the historical considerations that appear to have influenced the voting patterns.

the Organisation of Islamic Cooperation voted against the mandate. The only substantive Islamic country to vote in favour of the mandate was Albania. Indonesia voted against the mandate.

The foregoing voting patterns in the United Nations indicate the persisting hostility towards LGBTIQ people worldwide. If some or most of the Commonwealth countries that abstained, or were absent from, the vote had attended and had voted in support of the 'no action' resolution moved by Botswana, the mandate would have been terminated.

The votes successively recorded in the Third Committee and Fifth Committee of the General Assembly are an indication of the fragility of the global moves to defend the vulnerable minority representing LGBTIQ people. That fragility was all the more surprising because the focus of the mandate of the Independent Expert was on the *violence* and discrimination suffered by this minority. The murder of the young gay activists in Bangladesh and elsewhere suggests the need for such a mandate. However, such violence is not confined to developing countries. The brutal shootings at the Pulse Nightclub in Orlando in the United States of America on 12 June 2016 showed that violence is a worldwide phenomenon.<sup>36</sup> That demonstrates why the initiatives of the Human Rights Council are so timely. And why the initiatives of those that sought to terminate the mandate were misguided, in terms of human rights priorities.

The struggle over the UN SOGI mandate is not over. It will not be concluded in our lifetimes. In September 2017, Professor Muntarhorn announced his retirement as Independent Expert after holding the mandate for a year. He explained the relinquishment of the office on medical grounds. He deserves appreciation for initiating the mandate and for defending it at a moment of intense hostility. He was succeeded by Victor Madrigal-Borloz (Costa Rica).

#### V BEYOND LGBTIQ RIGHTS AND EQUALITY

It would be a mistake to portray John Marsden as solely a gay rights activist. He was that; but he was much else besides. He never accepted what he saw as injustices in the world or

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<sup>36</sup> On 11 June 2016 at the Pulse Nightclub in Orlando Florida, 50 persons at the gay venue, including the perpetrator Omar Mateen, were killed by gunfire and an equal number were seriously injured.



in Australia. When in 2005 he was honoured by appointment as a life member of the NSWCCCL, he delivered a powerful address with a clarion call for civil liberties.<sup>37</sup> That address listed the causes that, he felt, needed the attention of the Australian community at that time. These included the civil liberties of asylum seekers and detainees; the civil liberties of persons detained under anti-terrorism laws; and the disproportionate incarceration of indigenous Australians. They also extended to the ever increasing rise in the use of custodial punishment in Australia; the interference by governments and legislatures in judicial sentencing discretions; the effective reduction of financial provisions for legal aid; the enlargement of administrative and bureaucratic intrusions into the judicial process; the failure of Australia to adopt even the modest proposal for a national human rights charter or statute as recommended by the Brennan committee;<sup>38</sup> the growing disillusionment with the democratic electoral process; the diminishing participation of citizens in the established political parties; the decline of civic egalitarianism in Australia; and the increasing intolerance of protestors and citizens espousing views different from one's own.

Concern about these and other issues for human rights and civil liberties demonstrate the ongoing relevance of these issues for those who struggle to uphold and extend liberty in Australia and the world. The 2016 votes in the United Nations on the SOGI mandate represent an indication that the global struggle for universal human rights and liberties is by no means over. Indeed, in historical terms, it has only just begun. The challenge before humanity is enormous. However, we all know that the journey of a thousand miles begins with a single step. At least some of us are have started the journey.

I pay tribute to the many valiant people who have worked to defend and advance civil liberties in Australia. A large number of those, who in the 1960s and 70s participated with me in the NSWCCCL, went on to become political leaders, judges, and other leading citizens. Although there have been many failures, as John Marsden asserted, there have been successes as well. It is a healthy society that chooses leaders and judges from a pool that includes individuals with a commitment to civil liberties. I hope that such traditions will

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<sup>37</sup> John Marsden, 'Speech to the Council for Civil Liberties', unpublished, NSWCCCL, February 2005, on the occasion of his life membership.

<sup>38</sup> See Justice Margaret McMurdo, 'A Human Rights Act for Queensland?' (2015) *Queensland Legal Yearbook* 403 referring to proposals for a human rights statute in Queensland in addition to the *Human Rights Act* 2004 (ACT) and the *Charter of Human Rights and Responsibilities Act* 2006 (Vic).

continue. Beyond that, I hope that civil liberties in Australia will continue to produce restless, sometimes angry, always dissatisfied change agents like John Marsden to help shake us from our complacency. And to advance the cause of civil liberties in Australia and the world.

Engagement with equality and law reform are essential attributes of the professionalism of a lawyer today. Engagement with the human rights of people in countries beyond Australia is the fulfilment of the aspirations expressed in the *Charter* of the United Nations and spelt out in the *Universal Declaration of Human Rights*.<sup>39</sup> Both at home and abroad Australians should contribute to the attainment of such aspirations. Like everyone, John Marsden was flawed, imperfect, and sometimes inconsistent. However, he knew the importance of having global aspirations. In his lifetime, he made important contributions to their attainment. We must all continue to contribute to making them a practical reality.

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<sup>39</sup> UDHR Art 1; All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood'. Art 2 'Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

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