



# Meeting of Senior Officials of Commonwealth Law Ministries

Marlborough House, London, 18-20 October 2010

---

Provisional Agenda Item 5(c)

SOLM(10)26

## FOR THE INFORMATION OF DELEGATIONS

### THE COMMONWEALTH AND THE CRIMINALISATION OF HOMOSEXUALITY AN OVERVIEW

**Paper by Timothy Otty QC, Doughty Street Chambers  
Fraser Campbell and Marie Lucienne Lambert, Clifford Chance LLP  
on behalf of the Commonwealth Lawyers Association (CLA)**

#### Introduction

1. Homosexual conduct is illegal in approximately 80 countries around the world. The law in eight of those countries includes provision for imposition of the death penalty on conviction.<sup>1</sup> Often as a result of legislation rooted in colonial times, around half of the states that criminalise private consensual homosexual acts between adults are members of the Commonwealth.<sup>2</sup> There have, furthermore, been a number of domestic legislative proposals in recent times which, if enacted, would have led to a widening of criminalisation and the imposition of harsher sentences, including the death penalty, for acts of homosexuality.

2. These developments would, however, run counter to the clear jurisprudence and guidance of international treaty bodies, to which many Commonwealth states are party, regional courts and a number of leading domestic Courts. This jurisprudence and guidance is clear that the criminalisation of homosexuality is unacceptable as running counter to fundamental principles requiring respect for human dignity, privacy and non- discrimination.

#### Position in international law

3. The prevalence of anti-homosexual legislation within the Commonwealth states is at odds with international human rights law. Instruments including the International Covenant on Civil and Political Rights (ICCPR), the African Charter on Human and People's Rights (ACHPR) and the United Nations Declaration of Human Rights (UNDHR), enshrine a range of relevant rights aimed at protecting human dignity, privacy and equality.

---

1 See ILGA Report on State Sponsored Homophobia 2009 and 2008 at <http://ilga.org/ilga/en/article/1251> and <http://ilga.org/ilga/en/article/1165>. The death penalty exists in Iran, Mauritius, Saudi Arabia, Sudan, United Arab Emirates, Yemen and territorial provinces of Nigeria and Somalia.

2 Michael Kirby – 'Legal discrimination against homosexuals - a blind spot of the Commonwealth of Nations?' EHRLR 2009, 1, 21-36.

4. In *Toonen v. Australia*<sup>3</sup>, the UN Human Rights Committee held that the criminalisation of sexual conduct between men, including all forms of sexual contact between consenting adult men in private was incompatible with the right to privacy under Article 17 of the ICCPR.<sup>4</sup> It also confirmed that the prohibition of differential treatment enshrined in Article 2 of the ICCPR extended to discrimination on the grounds of sexual orientation.

5. The right to be free of discrimination is also enshrined in Article 2 of the African Charter, which provides that individuals are entitled to the rights under the Charter "without distinction of any kind" including sex.<sup>5</sup> Article 3 provides for equality and equal protection of each individual before the law. As the African Commission on Human Rights emphasised in *Legal Resources Foundation v. Zambia*<sup>6</sup>:

"The right to equality is very important. It means that citizens should expect to be treated fairly and justly within the legal system and be assured of equal treatment before the law and equal enjoyment of the rights available to all other citizens."

6. The case law emanating from the African Commission of Human Rights provides clear guidance on the primacy of international law to be afforded by its Member States. In *Media Rights Agenda and Others v. Nigeria*<sup>7</sup>, the Commission stated that governments should avoid restricting rights and should be mindful of rights protected by their national constitution as well as international human rights law. Later in the same judgment, the Commission specifically stated that international law and human rights should prevail over contradictory national law which seeks to set aside the rights of the Charter.

7. The jurisprudence under the European Convention on Human Rights and Fundamental Freedoms (ECHR) confirms the position suggested by case law under the ICCPR and the ACHPR. In *Dudgeon v. United Kingdom*<sup>8</sup>, the European Court of Human Rights held that legislation then in force in Northern Ireland, which criminalised certain homosexual activity between consenting males, breached Article 8 of the ECHR (the right to private life). The Court rejected the notion that the relaxation of laws in relation to consensual acts would be damaging to the moral fabric of society, finding that the possible offence such acts might cause could not warrant the interference to the applicant's private life.<sup>9</sup>

### **Trends in domestic case law**

8. Recent trends in the domestic law of Commonwealth states illustrate that the rights enshrined in international law are also recognised by national Courts in this area. In *National Coalition for Gay and Lesbian Equality*<sup>10</sup>, the Constitutional Court of South Africa found that statutory provisions and common law offences prohibiting sodomy were incompatible with section 8 (right of equality) and section 9 (prohibition of discrimination, including on grounds of sexual orientation) of the South African Constitution. Whilst acknowledging that the view that sexual expression should be limited to marriage between women and men with

---

3 Comm. No. 488/1992; 31 March 1994.

4 The Commission held that "it is undisputed that adult consensual activity in private is covered by the concept of privacy", *Toonen v. Australia*, para 8.6.

5 Every individual shall be entitled to the enjoyment of rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

6 Comm. No. 211/98 (2001) para. 63.

7 FN3 Comm. 105/93, 128/94, 130/94 and 152/96 (1998).

8 [1981] ECHR 7525/76

9 The European Court decision in *Dudgeon* has been followed and applied in similar challenges in other countries. See *Norris v. Ireland* [1998] ECHR 10581/83 and *Medinos v. Cyprus* [1993] ECHR 15070/89.

10 South African Constitutional Court 1999 (1) SA 6.

procreation as its dominant role could be held for "nuanced religious reasons", the Court found that no justification could be found to limit the right to homosexual activity. Sachs J, rendering a concurring opinion in the same judgment emphasised the signal importance of equality under the South African Constitution:

The present case shows well that equality should not be confused with uniformity; in fact, uniformity can be the enemy of equality. Equality means equal concern and respect across difference ... Equality therefore does not imply a levelling or homogenisation of behaviour but an acknowledgement and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation, stigma and punishment.<sup>11</sup>

9. More recently, in a judgement given in the Delhi High Court, the Court found that provisions within the Indian Penal Code that criminalised "unnatural offences" were incompatible with Articles 14 (equality), 15 (non-discrimination), 19 (freedom of expression) and 21 (life, personal liberty and dignity) of the Indian Constitution. Finding that a central tenet of the Indian Constitution was "inclusiveness", it held that those perceived by the majority as "deviants" or "different" should not be marginalised.<sup>12</sup> Similarly, the High Court of Fiji in 2005 found sodomy laws to be unconstitutional, on the grounds that criminal law should not be used to discriminate against private same-sex acts. Central to that analysis was an emphasis on the rights to privacy and equality. In this sense, the liberalising trend of decisions in the domestic courts of Commonwealth members is in accordance with that seen in both international tribunals and leading courts outside the Commonwealth (including the United States Supreme Court).<sup>13</sup>

### **Recent examples of draft legislation extending criminalisation**

10. There have, however, been a number of recent instances of attempts to introduce legislation in Commonwealth states with the effect of broadening the scope of existing criminalisation of homosexuality or imposing harsher sentences. The most prominent example is the Ugandan Anti-Homosexuality Bill currently being considered by the Ugandan Parliament<sup>14</sup>. Others include proposed amendments to the Penal Code of Rwanda, tabled in the Rwandan Parliament in November 2009 (which would have criminalised consensual same-sex acts and relationships as well as the work of LGBT human rights advocates) and the Same Sex Marriage (Prohibition) Bill currently being considered by the Nigerian Parliament (which would not only prohibit same sex marriages, but also impose criminal penalties on homosexual cohabiters together with anybody who aids or abets them).

### **Overall position**

11. The table below shows the current position on criminalisation in summary form. Further research is being undertaken to identify the last known dates of use of the legislation identified to bring prosecutions. In at least some cases (e.g. Sri Lanka) the legislation has not been used for many years.

Commonwealth Secretariat  
Marlborough House  
London SW1Y 5HX

---

<sup>11</sup> Id, para 132.

<sup>12</sup> See *Naz Foundation v Government of NCT of Delhi* – Delhi High Court No. 7455/2011.

<sup>13</sup> *Lawrence v. Texas*, United States Supreme Court 539 US 558 (2003) and *McCosker v. State* [2005] FJHC 500.

<sup>14</sup> A detailed legal opinion analysing the specific provisions of the Anti-Homosexuality Bill and their compatibility with international law has been provided to the Commonwealth Lawyers Association.

June 2010

**TABLE**

<b>Country</b>	<b>Party to the ICCPR</b>	<b>Criminalisation (including date of laws)</b>	<b>Penalty</b>
Antigua & Barbuda	No	Yes. Criminalisation of Sexual Offences Act 1995 (Articles 12 and 15)	Imprisonment for up to 15 years
Australia	Yes	No	
The Bahamas	Yes	No	
Bangladesh	Yes	Yes. Penal Code 1860 (Section 377)	Life imprisonment or 10 years and a fine
Barbados	Yes	Yes. Sexual Offences Act 1992 (Section 9)	Life imprisonment
Belize	Yes	Yes. Criminal Code, revised edition 2003 (Section 53)	Imprisonment for up to 10 years
Botswana	Yes	Yes. Penal Code 1962 (Section 164)	Imprisonment for up to 7 years
Brunei Darussalam	No	Yes. Penal Code of 1951 (Act No.16) as revised in 2001 (Section 377)	Imprisonment for up to 10 years, with a fine
Cameroon	Yes	Yes. Penal Code of 1965 and 1967, as amended in 1972 (Section 347)	Imprisonment of up to 5 years and a fine of between 20,000 and 200,000 francs
Canada	Yes	No	
Cyprus	Yes	No	
Dominica	Yes	Yes. Sexual Offences Act 1998 (Section 16)	Imprisonment for up to 10 years
Fiji Islands	No	No	
The Gambia	Yes	Yes. Criminal Code 1965, as amended in 2005 (Article 144)	Imprisonment for up to 14 years
Ghana	Yes	Yes. Criminal Code 1960, as amended in 2003, Chapter 6 (Article 104)	Imprisonment of between 5 and 20 years
Grenada	Yes	Yes. Criminal Code 1958 (as revised) (Article 431)	Imprisonment for up to 10 years
Guyana	Yes	Yes. Criminal Law (Offences) Act	Up to life imprisonment
India	Yes	Yes. Penal Code of 1860 (Act No 45) (Section 377)	Imprisonment for life or for up to 10 years with a fine. Decision of High Court of Delhi in <i>Naz Foundation (India) Trust v Government of NCT Delhi Fund</i> found this section to be unconstitutional

<b>Country</b>	<b>Party to the ICCPR</b>	<b>Criminalisation (including date of laws)</b>	<b>Penalty</b>
Jamaica	Yes	Yes. The Offences Against the Person Act (Article 76)	Up to 10 years imprisonment and hard labour
Kenya	Yes	Yes. Kenyan Penal Code 1962 (Section 162)	Imprisonment for up to 14 years
Kiribati	No	Yes. Penal Code, largely revised in 1977 (Sections 153, 154 and 155)	Imprisonment for up to 14 years
Lesotho	Yes	Yes. Sodomy is a common law offence	Imprisonment for up to 10 years
Malawi	Yes	Yes. Penal Code (Sections 153 and 156)	Up to 14 years imprisonment with or without corporal punishment
Malaysia	No	Yes. Criminal Code, as amended in 2002	Imprisonment for up to 20 years and whipping
Maldives	Yes	Yes. Penal Code of 1960 (Sections 377C, 377D)  The Penal Code of Conduct does not regulate sexual conduct. It is instead regulated by uncodified Muslim Sharia law, which criminalises homosexual acts.	Fine or up to 10 years imprisonment  Banishment for 9 months to 1 year or a whipping of 10 – 30 strokes and Sharia law
Malta	Yes	No	
Mauritius	Yes	Yes. Criminal Code (Section 250)	Imprisonment for a period not exceeding 5 years
Mozambique	Yes	Yes. Penal Code of 1886 (Article 70, 71)	Up to 3 years hard labour
Namibia	Yes	Sexual Offences Act of 1957 (as amended)	Unclear
Nauru	Yes	Yes. Criminal Code of 1899 (Sections 208, 209)	Imprisonment with hard labour for up to 14 years
New Zealand	Yes	No	
Nigeria	Yes	Yes. Criminal Code revised in 1990 (Sections 214-7, 235-3)	Up to 14 years imprisonment. Several northern states which have adopted Islamic Sharia law have adopted a maximum penalty of death
Pakistan	No*	Yes. Penal Code 1860 (Section 377)	Life imprisonment, or imprisonment from 2 to 10 years and a fine
Papua New Guinea	Yes	Yes. Criminal Code 1974, as amended in 2002 (Section 210)	Imprisonment for up to 14 years

<b>Country</b>	<b>Party to the ICCPR</b>	<b>Criminalisation (including date of laws)</b>	<b>Penalty</b>
Rwanda	Yes	No. Amendments to the penal code criminalising homosexuality have been proposed	N/A
Samoa	Yes	Yes. Crimes Ordinance 1961 (Section 58)	Imprisonment for up to 5 years
Seychelles	Yes	Yes. Criminal Code of 1955 (Section 151)	Imprisonment for 14 years
Sierra Leone	Yes	Yes. Offences against the Person Act 1861 (Section 61)	Life imprisonment
Singapore	No	Yes. Penal Code as amended in 2007 (Article 377)	Imprisonment for up to 2 years
Solomon Islands	No	Yes. Penal Code of 1968 (Revised edition) 1996 (Sections 160, 161)	Imprisonment for up to 14 years
South Africa	Yes	No	
St Kitts & Nevis	No	Yes. Laws of 1964 (as revised) (Sections 56,57)	Up to 10 years imprisonment, with or without hard labour
St Lucia	No	Yes. Criminal Code (No. 9st 2004) (Section 133)	Up to 10 years imprisonment, or mental rehabilitation
St Vincent & the Grenadines	Yes	Yes. Criminal Code of 1990 (Section 146)	Imprisonment for up to 10 years
Sri Lanka	Yes	Yes. Penal Code of 1883 (as amended) (Article 365)	Imprisonment for up to 10 years
Swaziland	Yes	Yes. Buggery is prohibited as a common law offence. Sexual Offences and Domestic Violence Bill (not yet in force), will prohibit all sexual acts between consenting adults of the same sex	Proposed penalties are imprisonment for a minimum of 2 years, or a minimum fine of £5000
Tonga	No	Yes. Criminal Offences Act 1988 Edition (as amended) (Section 136-9)	Imprisonment for up to 10 years
Trinidad & Tobago	Yes	Yes. Sexual Offences Act, No 27, as unified in the Sexual Offences (Amendment) Act (No. 31) of 2000	Imprisonment for up to 25 years
Tuvalu	No	Yes. Penal Code (Cap 8) Revised Edition 1978 (as amended) (Sections 153 – 155)	Imprisonment for up to 14 years
Uganda	Yes	Yes. The Penal Code of 1950, as amended in 1990 (Sections 153 – 154)	Up to life imprisonment
United Kingdom	Yes	No	N/A
United Republic of Tanzania	Yes	Yes. Penal Code of 1945, as amended by the Sexual Offences Special Provisions Act 1998 (Sections 154 and 155)	Up to life imprisonment

<b>Country</b>	<b>Party to the ICCPR</b>	<b>Criminalisation (including date of laws)</b>	<b>Penalty</b>
Vanuatu	Yes	No	N/A
Zambia	Yes	Yes. The Penal Code Act, 1955 Edition (Section 155)	Imprisonment for up to 17 years