



THE ROYAL COMMONWEALTH SOCIETY

Kaleidoscope Trust

# **COLLABORATION AND CONSENSUS: BUILDING A CONSTRUCTIVE COMMONWEALTH APPROACH TO LGBT RIGHTS**



**MARCH 2015**

## **ABOUT THIS REPORT**

This report brings together the first phase of research carried out by the Royal Commonwealth Society and the Kaleidoscope Trust which maps LGBT rights in the Commonwealth as well as views expressed by a broad range of Commonwealth diplomats in an ongoing series of discussions. The report presents challenges and positive developments in law, Commonwealth actions and national processes. The aim is to show how the strengths of the Commonwealth can be used to move away from the perceived polarisation within the Commonwealth on this issue and towards a Commonwealth consensus.

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The Royal Commonwealth Society and the Kaleidoscope Trust welcome comments on this report. Please use the contact details shown on the back cover.

## **ABOUT THE ROYAL COMMONWEALTH SOCIETY**

The Royal Commonwealth Society (RCS) is an international network of individuals and organisations committed to improving the lives and prospects of Commonwealth citizens across the world. The RCS engages with its educational, civil society, business and governmental networks, championing human rights and democracy and promoting youth education and empowerment.

Founded in 1868, the Society is constituted by Royal Charter and as a charity. It is non-partisan, is independent of governments and is supported by public generosity.

## **ABOUT THE KALEIDOSCOPE TRUST**

The Kaleidoscope Trust works to uphold the human rights of lesbian, gay, bisexual and trans people internationally by listening to, amplifying and communicating their voices to a wider audience, and by standing with them in persuading public and political opinion of the need for an end to all discrimination based on sexual orientation and gender identity.

We work with activists and organisations around the world to advance the belief that the rights of all people should be respected equally, regardless of their sexual orientation or gender identity.

# COLLABORATION AND CONSENSUS: BUILDING A CONSTRUCTIVE COMMONWEALTH APPROACH TO LGBT RIGHTS

Over the past ten years calls to improve the rights and opportunities of lesbian, gay, bisexual and trans (LGBT) people have increased globally.<sup>1</sup> Commonwealth member states have come under particular scrutiny for their treatment of LGBT people. This criticism has often taken as its starting point the fact that 41 of the 53 members of the Commonwealth criminalise same-sex activity in some way. Much of this legislation is based upon colonial-era anti-sodomy laws promulgated by the British Empire, presenting a particular challenge for the modern Commonwealth given its colonial heritage. In a number of cases these laws have expanded beyond a focus on sodomy to prohibit same-sex activity between women. Furthermore, very few Commonwealth countries have laws that recognise the gender identity of trans people or protect their rights. Numerous activists and several national leaders have used Commonwealth events to draw attention to this problem and condemn specific countries with poor records on LGBT rights.<sup>2</sup> The debate has become polarised between ‘pro-LGBT’ nations, largely seen as coming from the West, and ‘anti-LGBT’ nations, largely seen as coming from the non-West, obscuring the reality of a variety of progressive developments within the Commonwealth.

## BOX 1: LGBT, LGBTI, SOGI

*The language used to capture non-heterosexual and non-gender conforming identities and practices is constantly evolving. This paper uses the term LGBT, standing for Lesbian, Bisexual, Gay and Trans. However in some cases the term LGBTI is used, particularly in reference to organisations, events and research that incorporate the rights of intersex people. Sexual Orientation and Gender Identity (sometimes shortened to SOGI) is also used in LGBT rights discussions and is often mentioned in the context of grounds for non-discrimination. These three terms are most frequently used in the English language and in international activism, diplomacy and development. Others prefer the term ‘sexual minorities’. However, there exists a range of sexual orientations, gender identities and terms which do not necessarily fit the ‘LGBT’ label but face common problems and issues as those who identify as LGBT people. For an example see Box 3: Third Gender rights.*

Concerns about LGBT rights in Commonwealth countries necessitate a particular Commonwealth approach. The goal of such an approach should be to contribute to the ending of discrimination against LGBT people in a way that seeks, where possible, to replace polarised discussion with international consensus. Within the Commonwealth the basis for such a Commonwealth consensus already exists. The Commonwealth Charter provides a framework for addressing discrimination and supporting shared values. At a national and international level a range of actors and institutions can be found to be working to address discrimination. The Commonwealth can support and build on these developments using its existing strengths of promoting respect and understanding, sharing technical expertise and good practice and facilitating sensitive dialogue. The objective of this paper is to draw attention to the potential for a Commonwealth consensus on LGBT rights. It begins with an overview of the main problems concerning LGBT rights in the Commonwealth followed by an introduction to positive steps taken under Commonwealth auspices on LGBT rights. It then outlines a range of national developments on LGBT rights within Commonwealth member states. The final sections outline the potential for a Commonwealth consensus and five principles which could be used to form a consensus on which actors from across the Commonwealth can agree. This paper does not seek to give a comprehensive analysis of every development regarding LGBT rights in the Commonwealth nor does it offer a concrete set of policy recommendations. Instead, it offers an introductory overview of this sensitive issue and suggests existing actions and acknowledged principles which all actors within the Commonwealth can build upon.

## A Commonwealth Problem with LGBT Rights

The prevalence of legal and social persecution and discrimination against LGBT citizens of the Commonwealth undermines the Commonwealth’s potential to constructively work to improve the lives of its people and constitutes a ‘Commonwealth Problem’. The legal legacy of the British Empire, which permeates the legal systems of much of the Commonwealth, includes legislation that criminalises consenting adults engaging in same-sex activities. Colonial-era anti-sodomy laws have been accompanied by new discriminatory laws and have often entrenched discrimination based on sexual orientation and gender identity, leading to violence against LGBT people.<sup>3</sup>

1 There are a variety of terms used to try to capture non-heterosexual and non-gender conforming identities and practices. See Box 1: LGBT, LGBTI, SOGI.

2 The term ‘LGBT rights’ here is used as shorthand to refer to the accepted mainstream civil, political, social, economic and cultural rights that LGBT people have difficulty accessing due to criminalisation, prejudice and exclusion.

3 See: UN Human Rights Council, 2011. Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity: Report of the United Nations High Commissioner for Human Rights. 17<sup>th</sup> November 2011. Available at: [http://www2.ohchr.org/english/bodies/hrcouncil/docs/19session/A.HRC.19.41\\_English.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/19session/A.HRC.19.41_English.pdf)

The way in which global discussions on sexual orientation have become polarised also constitutes a problem for an organisation such as the Commonwealth, which prides itself on consensus and constructive dialogue. By understanding both elements of this 'Commonwealth Problem', all actors within the broader Commonwealth can begin to move towards addressing the threats to LGBT people in a more constructive way.

Within the Commonwealth, 41 of the 53 member states criminalise consensual same-sex activity in some way. Some 92% of Commonwealth citizens live in jurisdictions where same-sex activity is a criminal offence.<sup>4</sup> The majority of these countries draw upon colonial-era anti-sodomy laws promulgated throughout the British Empire. The most notorious was the colonial-era Indian Penal Code (still in force today) which states, 'Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment ... for a term which may extend to 10 years, and shall be liable to fine'.<sup>5</sup> The Queensland Penal Code had similar provisions and both were exported across the British Empire. Most of these penal codes make no mention of consent or age and seek to criminalise relations between men even where they are consenting adults. Other colonial laws went beyond relationships, such as the Belize Penal Code which prohibits entry to homosexuals along with 'any idiot or any person who is insane or mentally deficient or any person who is deaf and dumb or deaf and blind, or dumb and blind'.<sup>6</sup> While discrimination against LGBT people is a global problem, the colonial origin of these laws represents a unique problem for the Commonwealth, as an organisation which evolved from the British Empire and which celebrates its 'shared inheritance... in the rule of law'.<sup>7</sup>

The enforcement of discriminatory laws by governments and state authorities varies massively across countries that criminalise same-sex activity. At one end of the spectrum are countries such as Malawi which have left colonial-era laws on the statute books but publicly decided on a moratorium on their enforcement.<sup>8</sup> At the other end of the scale are countries which aggressively enforce colonial-era laws and seek to update these laws with tougher sentences or a broader array of crimes which target people on the basis of their sexual orientation and/or gender identity. One trend in legislative developments seeks to restrict freedom of expression by criminalising the advocacy of the rights of LGBT people, which targets not only the LGBT

community but supportive families, religious leaders, civil society and human rights defenders. Non-governmental organisations and activists have also reported that criminalising laws are often used to blackmail and extort money from LGBT people. The mere existence of discriminatory laws creates an enabling environment for violence and persecution of LGBT people by state and non state actors. However, while non-enforcement of discriminatory laws is not a de facto argument against decriminalisation it does represent a welcome step forward in improving state relations with LGBT people.

Across the Commonwealth LGBT people face discrimination, harassment and violence in their everyday lives that goes far beyond legal criminalisation. As with the enforcement of laws, the experiences of Commonwealth LGBT citizens vary massively from country to country. This discrimination can take the form of violence, threats, homophobic and transphobic bullying, the denial of employment, access to services or the provision of goods. This can be particularly true of the experience of lesbians and trans people, who may not be subject to the same levels of legal censure as men who have sex with men, but often face heightened levels of persecution. Although some may look to identify correlations between legal arrangements, socio-economic status or political system and discrimination, it is worth noting that reports of discrimination come from all corners of the Commonwealth, regardless of the legislative context. LGBT rights organisation, Stonewall reports that ten per cent of lesbian, gay and bisexual people in the UK, who experienced a homophobic hate crime or incident in the last three years, were physically assaulted, which equates to two per cent of all lesbian, gay and bisexual people in the country.<sup>9</sup> The myriad of ways in which LGBT citizens face discrimination and persecution is one part of a much wider problem within the Commonwealth concerning the protection of human rights and the inclusion of citizens in economic, social and cultural life. The Commonwealth Charter commits the Commonwealth 'to equality and respect for the protection and promotion of civil, political, economic, social and cultural rights, including the right to development, for all without discrimination on any grounds'.<sup>10</sup> All governments must ensure that turning this commitment into reality for all their citizens including LGBT people, is a continuing priority.

While legal and social discrimination in the Commonwealth remains widespread, the treatment of this issue in international fora has become increasingly polarised,

4 Royal Commonwealth Society, 2013. 'India Recriminalises Homosexuality', Published on 11<sup>th</sup> December 2013. Accessed on 12<sup>th</sup> February 2015. Available at: <https://thercs.org/news/news-and-blog/india-re-criminalises-homosexuality/>

5 Human Rights Watch, 2008. *This Alien Legacy: The Origins of 'Sodomy' Laws in British Colonialism*. New York, p. 18.

6 Belize Immigration Act, Chapter 156. Revised edition 2000. Section 5. (1). Available at: <http://www.belizeaw.org/web/lawadmin/index2.html>

7 Charter of the Commonwealth, 2012, p. 1.

8 76 Crimes, 2014. 'It's Official: No more Malawi arrests under anti-gay laws', Posted 14<sup>th</sup> July 2014, Accessed 20<sup>th</sup> January 2015. Available at: <http://76crimes.com/2014/07/14/its-official-no-more-malawi-arrests-under-anti-gay-laws/>

9 April Guasp, Anne Gammon & Gavin Ellison, 2013. Homophobic Hate Crime: The Gay British Crimes Survey 2013. Stonewall, p. 10. Available at: [http://www.stonewall.org.uk/documents/hate\\_crime.pdf](http://www.stonewall.org.uk/documents/hate_crime.pdf)

10 Charter of the Commonwealth, 2012, Article II.

obscuring attempts to find constructive solutions. The global debate on LGBT rights has increasingly become perceived as split between 'Western' and 'non-Western' countries.<sup>11</sup> Recent attempts to pass an 'anti-homosexuality bill' in Uganda have illuminated this divide. Western states lined-up to condemn the bill, bringing threats of sanctions and diverting aid while the Ugandan President Yoweri Museveni has cited 'Western arrogance' as a reason for signing the bill into law.<sup>12</sup> While the use of diplomatic pressure between states is not necessarily problematic in and of itself, public condemnation, particularly by Western countries, can increase tension between Commonwealth states and reinforce perceived neo-colonial divisions. As such, headline-grabbing divisions risk overshadowing more positive and constructive actions within the Commonwealth. At the 2009 CHOGM, media coverage was dominated by the UK and Canadian Prime Ministers' public criticism of the Ugandan anti-homosexuality bill,<sup>13</sup> while similar pronouncements on LGBT rights caught headlines in Perth in 2011.<sup>14</sup> In 2011 a chorus of African politicians also gained media attention for their backlash against Prime Minister Cameron's comments.<sup>15</sup> This pitting of Western versus African leaders has obscured other Commonwealth discussions on the subject. Two years before the 2009 Heads of Commonwealth Meeting, Commonwealth civil society successfully debated sexual orientation on the fringes of the Kampala CHOGM (although not without incident), urging Commonwealth Heads to include it on their agenda.<sup>16</sup> What is more the broad spectrum of national progress, from court cases to government policy and social advocacy, within the Commonwealth member states destroys any idea that the Commonwealth is split into two distinct camps based on 'the West' and the 'non-West'.

The Commonwealth prides itself on its shared values from the rule of law to respect for human rights as well as a political approach that emphasises diplomacy, consensus building and formal equality in state membership. The legal, social and economic stigmatisation of the Commonwealth's LGBT citizens is clearly contrary to the shared values the organisation holds dear. However, direct and open lecturing by some members to others, particularly when done without consultation with stakeholders, risks damaging the diplomatic approach and can act to distract from positive developments and the potential of the Commonwealth. At the same time as the Commonwealth attempts to articulate a role in the 21<sup>st</sup> century it is under increasing pressure to more forcibly insist on adherence to its values. The current treatment

of LGBT people therefore presents a twofold Commonwealth problem which requires an innovative Commonwealth solution to address it.

## The Commonwealth and LGBT rights

The scale of the Commonwealth's problem with LGBT rights demands a response from the multiple overlapping actors and institutions that together form the Commonwealth. The Commonwealth is made up of a collection of 53 states capable of taking multilateral action, a Secretariat which can facilitate and implement multilateral decisions, inter-governmental agencies specialising in education and civil society promotion and numerous civil society organisations and networks which use or can use the Commonwealth for building consensus and action to improve LGBT rights. It is important to note that the conversation on LGBT rights in the Commonwealth is not new. While public discussions may have become increasingly polarised over the last five years, across the Commonwealth various actors have seen the benefits of using Commonwealth channels to engage in this topic in a respectful way. Sadly it is often governments in the Commonwealth that have failed to show true leadership in building consensus on this issue.

Despite this lack of leadership, there are numerous statements endorsed by Commonwealth governments which commit them and the Commonwealth as a whole to protecting the rights of all citizens. Principles of respect for human rights, non-discrimination and participation in shaping one's society have evolved into central Commonwealth values. The 1971 Singapore Declaration endorsed by Commonwealth Heads of Government acknowledged that democratic participation and equal rights based on race, colour, creed or political rights are core values. The 1991 Harare Declaration included gender in its commitment for equal rights and added a commitment to extend 'the benefits of development within a framework for human rights'. The Port of Spain Affirmation of Commonwealth Values in 2009 and the Commonwealth Charter, which commits all members to the Universal Declaration of Human Rights, go the furthest in providing a stated Commonwealth basis for the recognition of LGBT rights. The Port of Spain Affirmation declares that a core Commonwealth value is the, 'promotion of civil, political, economic, social and cultural rights for all without discrimination on any grounds' and that 'rights are universal...and cannot be implemented selectively.' While these statements

11 While the split is characterised as being between the West and the non-West, or the global north and the global south, or the developed and developing economies, the division between those who support and oppose LGBT rights is not as clear cut.

12 At the time of writing the Anti-Homosexuality Act was repealed by the Ugandan Supreme Court. A new 'Prohibition of Promotion of Unnatural Sexual Practices Bill' has been proposed by Ugandan legislators.

13 Geoffry York, 2009. 'Uganda's anti-gay bill causes Commonwealth uproar', *Globe and Mail*, 25<sup>th</sup> November 2009.

14 BBC, 2011. 'Cameron threat to dock some UK aid to anti-gay nations', BBC News website, 30<sup>th</sup> October 2011. Accessed 11<sup>th</sup> March 2015. Available here: <http://www.bbc.co.uk/news/uk-15511081>

15 See for example: BBC, 2011. 'Uganda fury at David Cameron aid threat over gay rights', BBC. Published 31<sup>st</sup> October 2011. Accessed 12<sup>th</sup> February 2015. Available at: <http://www.bbc.co.uk/news/world-africa-15524013>? & Daily Monitor, 2011. 'East Africa dares UK on homosexuality'. Published 5<sup>th</sup> November 2011. Accessed 12<sup>th</sup> February 2015. Available at: <http://www.monitor.co.ug/News/National/-/688334/1267382/-/bhdag0z/-/index.html>

16 Final Communique of the Commonwealth Youth Forum, 2007. Section 4.2.3 & KAMPALA CIVIL SOCIETY STATEMENT TO THE 2007 COMMONWEALTH HEADS OF GOVERNMENT MEETING. 21 November 2007. Para 97 e.

do not refer to sexual orientation and gender identity directly, which is a disappointment given the particular legal and social persecution that LGBT citizens face in the Commonwealth, by placing an emphasis on human rights and non-discrimination on 'any' or 'other grounds' these statements of Commonwealth values provide a basis for demanding that governments honour their promises to protect and include all their citizens.

This interpretation of 'other grounds' as a basis for non-discrimination against LGBT citizens is given strong credence by the statements of the current Commonwealth Secretary-General, HE Kamallesh Sharma. Following his reaction to the 2011 murder of Ugandan activist, David Kato, the Secretary-General's pronouncements on LGBT rights have grown steadily stronger. Since his 2012 address to the UN Human Rights Council, the Secretary-General has consistently articulated that the Commonwealth Secretariat's, "position continues to be that we oppose discrimination or stigmatisation on any grounds, including those of sexual orientation".<sup>17</sup> This position is a welcome clarification, that equal treatment of sexual minorities does form part of Commonwealth values. Since his 2013 address to the UN Human Rights Council a specific reference to non discrimination on the basis of gender identity has also been included. In addition the Secretary-General has also argued powerfully that on this issue, "the responsibility for mutually respectful and constructive national debate is one shared by all. This includes parliaments, governments, defenders."<sup>18</sup> In his 2015 address the Secretary-General highlighted the role the Commonwealth could play in encouraging member states to meet pre-existing international obligations regarding the rights of LGBT individuals.<sup>19</sup> Across the Commonwealth, it is civil society and human rights defenders who have led this debate while governments have lagged behind.

The formal discussion mechanisms of the Commonwealth have already provided young people and civil society with the opportunity to discuss sexuality, sexual orientation and gender identity over the last decade. Young people have led the way in addressing anti-discrimination with their statement from the Commonwealth Youth Forum in Malta in 2005 that, 'effective education on rights and responsibilities allows space for young people to arrive at their own informed view and to participate in the governance process without discrimination on the

following factors, not limited to: age; gender; ethnicity; culture; religion; disability; sexual orientation; political beliefs, etc'.<sup>20</sup> Representatives of Commonwealth civil society followed suit in 2007 at the Commonwealth People's Forum in Kampala recommending that minority issues, such as those of gay and lesbian people, be placed on the Commonwealth agenda.<sup>21</sup> Several African rights organisations including Sexual Minorities Uganda, Gay and Lesbian Coalition of Kenya and Horizon Community Association (from Rwanda) lobbied the People's Forum for inclusion despite intimidation.<sup>22</sup> The recommendations from both these fora to Commonwealth governments have grown to include improving access to healthcare, decriminalising same-sex activity and securing education with explicit mentions to non-discrimination on the grounds of sexuality and, since the 2009 People's Forum statement, gender identity. On three occasions these debates have been undertaken in countries that criminalise same-sex relations, demonstrating that representatives of the people of the Commonwealth, including young people, have been more courageous in broaching this sensitive issue using established Commonwealth structures, than many Commonwealth governments. The Senior Officials of Commonwealth Law Ministries meeting and Commonwealth Women's Affairs Meeting, both in 2010, are rare examples of multi-lateral government discussions on LGBT rights in the Commonwealth.<sup>23</sup>

## BOX 2: The Commonwealth Equality Network

*The Commonwealth Equality Network is an emerging network of Commonwealth civil society organisations working to promote equality in the Commonwealth, regardless of sexual orientation and gender identity. The Network includes some 33 existing LGBTI and human rights organisations drawn from 30 Commonwealth countries and has members in every Commonwealth region. Much like the Commonwealth itself, the membership is dominated by organisations outside of the West, in particular Africa. The spread of organisations – many of them in existence for more than ten years – shows how widespread and longstanding support for LGBTI rights is within the Commonwealth and demonstrates the importance of civil society in leading the way on this issue.*

17 Kamallesh Sharma, Commonwealth Secretary-General Speech to UN Human Rights Council – High Level Segment, 2012. Geneva, Switzerland. Available at <http://thecommonwealth.org/sites/default/files/news-items/documents/2012-02-29.pdf>

18 Commonwealth Secretary-General Kamallesh Sharma High Level Segment of the UN Human Rights Council 25<sup>th</sup> Regular Session, 2014. Geneva, 6 March 2014. Available at: [http://thecommonwealth.org/sites/default/files/news-items/documents/140306%20SG%20UNHRC\\_2.pdf](http://thecommonwealth.org/sites/default/files/news-items/documents/140306%20SG%20UNHRC_2.pdf)

19 Secretary-General addresses UN Human Rights Council, 2015. Geneva. Available at <http://thecommonwealth.org/media/news/secretary-general-un-human-rights-council>

20 Commonwealth Youth Forum, 2005. Final Communiqué. CYEC 2006. (para 2.1.4). Available at: <http://www.cyec.org.uk/sites/default/files/CYF5%20Final%20Communique.pdf>

21 Commonwealth Peoples' Forum, 2007. Kampala Civil Society Statement to the 2007 Commonwealth Heads of Government Meeting. Commonwealth Foundation, 2007. (para 97e). Available at: [http://www.ituc-csi.org/IMG/pdf/CPF\\_Summary\\_Report\\_Final\\_Version.pdf](http://www.ituc-csi.org/IMG/pdf/CPF_Summary_Report_Final_Version.pdf)

22 Sexual Minorities Uganda (2007) Commonwealth Peoples' Space 2007 Report, available at <http://gayuganda.blogspot.com/2007/11/sexual-minoritiesuganda-smug.html> (accessed 7 Dec. 2012).

23 Frederick Cowell, 2013. 'LGBT rights in Commonwealth forums: politics, pitfalls and progress?' in Corrine Lennox and Matthew Waites. *Human Rights, Sexual Orientation and Gender Identity in The Commonwealth: Struggles for Decriminalisation and Change*. London: Institute of Commonwealth Studies. P. 137.

Beyond the formal Commonwealth structures Commonwealth citizens have used Commonwealth networks to share experiences, exchange good practice and lobby governments on this issue. Veteran human rights activist Peter Tatchell has publicly lobbied the Commonwealth Secretariat over the Commonwealth's poor record on LGBT rights. New organisations committed to supporting LGBT rights internationally including the Kaleidoscope Trust and the Human Dignity Trust have focused on the Commonwealth in order to develop trans-national advocacy strategies with activists abroad. Two collections of work have collated articles and opinions from those working on LGBT rights from across the Commonwealth. *Human Rights, Sexual Orientation and Gender Identity in The Commonwealth: Struggles for Decriminalisation and Change*<sup>24</sup> provides a series of articles from activists, rights practitioners and scholars on experiences of advocacy and analysis of the Commonwealth and the discriminatory laws promulgated by the British Empire. The Kaleidoscope Trust publication, *Speaking Out: The rights of LGBTI citizens from across the Commonwealth* gives a country-by-country overview of LGBTI rights in every Commonwealth country with input from activists from across the Commonwealth.<sup>25</sup> In 2011 the Commonwealth Human Rights Initiative and Institute of Commonwealth Studies hosted a conference of mainly UK researchers on decriminalisation.<sup>26</sup> More recently the Glasgow Commonwealth Games were used as an opportunity to draw attention to sexual orientation and gender identity in the Commonwealth including an international conference on the human rights of LGBTI people, a permanent 'Pride House' for LGBT competitors, spectators and their allies and the pointed inclusion of a same-sex kiss at the opening ceremony. The recent emergence of the Commonwealth Equality Network, a network of Commonwealth-based organisations seeking to collaborate to promote equal rights across the Commonwealth, demonstrates the appetite of civil society in the wider Commonwealth to address the issue of discrimination based on sexual orientation and gender identity.

In terms of multilateral action in the Commonwealth it is governments that have lagged behind in seeking Commonwealth consensus on this sensitive issue. The Secretary-General has provided welcome clarification to the need for including sexual orientation and gender identity in the Commonwealth's drive to achieve equality for all its citizens. Meanwhile, civil society and young people have led the way in using Commonwealth avenues for discussing the health, education, moral and social implications for excluding LGBT citizens from national life. It is clear that

### BOX 3: Third Gender Rights

*In Southern Asia the specific cultural role of a particular group of people, that do not identify as male or female, has led, through decisions in the courts and from the government, to the recognition of their constitutional rights. In April 2014, the Indian Supreme Court found that transgendered persons, eunuchs and Hijra (including intersex people) constituted a third gender which should be granted full constitutional rights and that the central and state governments should take steps to protect.<sup>27</sup> The Supreme Court of Pakistan had previously made a similar ruling, focusing on the right of eunuchs to inherit property and also instructing various authorities to provide protection from harassment and ensure access to health and employment.<sup>28</sup> In Bangladesh the government rather than the courts has taken action. The cabinet of Prime Minister Sheikh Hasina issued a decision that Hijras were to be given legal recognition and given priority for education and other rights. The government was keen to stress that, "they will be referred as Hijras in both English and Bangla language. Any other translations in English is misleading"<sup>29</sup>, emphasising the importance of local understandings of gender identity. In addition to the Hijras, the fa'afafine in Samoa, Leitis in Tonga and other local groups that do not accept a binary male or female identity can face many similar issues to trans people across the Commonwealth.*

LGBT rights is not a new issue for the Commonwealth nor a new conversation topic in Commonwealth fora. The declarations of Commonwealth civil society, young people and the Secretary-General should be seen as a mandate for governments to use the networks of the Commonwealth as a greater tool for achieving consensus.

### National Processes in the Commonwealth

The Commonwealth's gradual shift to a greater appreciation of the need to address the rights of LGBT people, mirrors the greater prominence of LGBT rights debates in its member countries. Many governments have carried out legal reforms to colonial-era legislation; national organisations have emerged to advocate for equal rights and national conversations have been instigated. In all countries there are specific national processes that are developing using a multitude of approaches to

24 Corrine Lennox and Matthew Waites (eds.), 2013. *Human Rights, Sexual Orientation and Gender Identity in The Commonwealth: Struggles for Decriminalisation and Change*. London: Institute of Commonwealth Studies.

25 'Speaking Out: The rights of LGBTI citizens from across the Commonwealth'. Available from: <http://kaleidoscopetrust.com/speaking-out>

26 Human Rights Consortium. *LGBTI Human Rights*. School of Advanced Studies website. Accessed: 12<sup>th</sup> February 2015. Available at: <http://www.sas.ac.uk/hrc/projects/lgbti-rights>

27 Supreme Court of India, 2014. *Judgement in National Legal Services Authority vs Union of India and others*, New Delhi, 15<sup>th</sup> April 2014. Available at: <http://supremecourtindia.nic.in/outtoday/wc40012.pdf>

28 Supreme Court of Pakistan, 2009. *Mohammad Aslam Khaki v. SSP (Operations) Rawalpindi* Constitution Petition No 43 of 2009.

29 Mohosinul Karim, 2013. 'Hijras now a separate gender', *Dhaka Tribune*, published 11<sup>th</sup> November 2013, accessed 13<sup>th</sup> February 2015. Available at: <http://www.dhakatribune.com/bangladesh/2013/nov/11/hijras-now-separate-gender>

broach this subject with often sceptical populations. While progressive developments are to be applauded, it should be acknowledged that improvements for LGBT rights often occur over the long-term.

The process of legislative repeal of colonial-era laws is the most direct approach for modern states in the Commonwealth to update their approach to LGBT rights. Some countries have done this with the modernisation of penal codes and other legislation. Mozambique has done this most recently, repealing the Portuguese aspects of the penal code which could have been used to penalise homosexuality. Anti-discrimination and equality legislation is another way in which countries can help to protect LGBT citizens. Malta, South Africa and Fiji have explicitly enshrined equality on the basis of sexual orientation in their constitutions with Fiji and Malta including gender identity for specific constitutional guarantees. Gender identity has seen particular state activism in Pakistan, India and Bangladesh. Pakistan and India's Supreme Courts have recognised the constitutional rights of those citizens of a third gender while the government of Prime Minister Sheikh Hasina in Bangladesh issued a declaration also recognising the rights of a third gender. Other countries have moved toward strengthening anti-discrimination legislation without pushing decriminalisation; such approaches have been common in Southern Africa and also pursued in the Seychelles. Proactive legislatures are a welcome recent development compared to countries including the UK, Cyprus and Australia which introduced legislation following court decisions on the invalidity of the criminalisation of same-sex relationships.

Beyond government action, human rights defenders and specific organisations campaigning for equality for LGBT people are becoming more established in Commonwealth countries. These organisations range from support organisations offering health and legal advice to those seeking political or social reform. These organisations are also becoming increasingly engaged by other non-governmental organisations and governments across the Commonwealth seeking to gain the perspective of LGBT people in forming government policy or delivering services. A particular legal hurdle for many of these groups is acquiring government recognition. However, even countries that criminalise same-sex activity and persecute LGBT people are allowing the registration of specific LGBT rights groups. In 2014 the High Courts of Kenya and Botswana ordered their governments to register Transgender Education and Advocacy (TEA)<sup>30</sup> and Lesbians, Gays and Bisexuals of Botswana (LEGABIBO),<sup>31</sup> respectively as non-government organisations. This recognition can assist groups in their ability to contribute to national conversations and processes which develop equal rights, and provide a potential asset for member

states. Across the Commonwealth national processes and struggles are slowly improving the lives of LGBT rights. While backlashes against LGBT rights have dominated media attention many countries are slowly making legal and social progress on equality. Although the speed of these processes and how they unfold is not uniform, the characterisation of the divide between Western countries and non-Western countries is inaccurate when national developments are examined.

### **The Potential for a Commonwealth Solution on LGBT Rights**

The Commonwealth has a problem with the treatment of LGBT people, as well as the way government leaders have discussed it in Commonwealth fora. However, civil society, young people and government officials have repeatedly used Commonwealth mechanisms to debate LGBT rights. It is also important to highlight that although there is a backlash against LGBT people in some countries, a number of other countries are making slow but steady progress on LGBT rights through a range of activities. These international discussions and national processes are not static but constantly evolving. The Commonwealth has a number of strengths and opportunities which allow for the continued discussion of this issue and support for national progress on LGBT rights.

While there are divisions on how to address LGBT rights in the Commonwealth, the organisation's horizontal membership structure offers a forum for states to engage on this issue on an equal footing. At a government level all members are formally equal with the same access to Commonwealth ministerial meetings and programmes run by the Secretariat. This translates into a sense that the Commonwealth acts as a 'family of nations', working together. All countries have a chance to raise issues that are a priority for their countries and feed differences of culture, development, religious belief or political systems into processes and conversations.

This manifests itself in what has been called the 'Commonwealth Approach'. The Commonwealth Commission on Respect and Understanding chaired by Nobel Laureate Amartya Sen noted that the Commonwealth had great strength in using continued dialogue, acceptance of diversity and consensus-building. The Commission noted that this approach has great potential to build cross-cultural respect and understanding as well as to deal with international challenges.<sup>32</sup> This international approach is mirrored by the values set out in the Charter which emphasises, 'the need to promote tolerance, respect, understanding, moderation and religious freedom which are essential to the development of free and democratic societies, and recall that respect

30 High Court of Kenya, 2014. *Judgement in Republic vs Non-Governmental Organizations Co-ordinations Board & another ex-parte Transgender Education and Advocacy & 3 others*, 23<sup>rd</sup> July 2014.

31 High Court of Botswana, 2014. *Judgement in Thuto Rammoge & 19 others vs the Attorney General of Botswana*. 14<sup>th</sup> November 2014.

32 The Commonwealth Commission on Respect and Understanding, 2007. *Civil Paths to Peace: Report of the Commonwealth Commission on Respect and Understanding*. London: Commonwealth Secretariat.

33 Charter of the Commonwealth, 2012, Article IV.

for the dignity of all human beings is critical to promoting peace and prosperity' as well as acknowledging 'that diversity and understanding the richness of our multiple identities are fundamental to the Commonwealth's principles and approach'.<sup>33</sup> The promotion of respect and understanding through dialogue is of huge benefit both to governments, which clash publicly in international fora, and LGBT citizens, who deserve the same respect their governments seek within the Commonwealth.

In addition to building equality and respect, the Commonwealth has the potential to assist in sharing good practice and shared experience to help those actors seeking to improve the lives of LGBT people. The Head of the Commonwealth, Her Majesty the Queen Elizabeth II emphasised this when stating, "The Commonwealth is not an organisation with a mission. It is rather an opportunity for its people to work together to achieve practical solutions to problems".<sup>34</sup> The Commonwealth has multiple advantages which provide a basis for such practical collaboration, which include a common language in English, similar legal systems and comparable political systems, often based on parliamentary democracy. These similarities form the basis of technical exchange on issues as diverse as health, law, finance and education. The mechanisms for this technical exchange within the Commonwealth already exist.

The Commonwealth Heads of Government Meeting (CHOGM), with its associated People's Forum and Youth Forum are the most high profile occasions on which governments and civil society actors have the chance to address areas of concern and opportunity in the Commonwealth. They are also joined every two years by the Commonwealth Business Forum and for the first time in 2015 a Women's Forum. Between these high profile events there exist many more opportunities for collaboration. At a governmental level Foreign Ministers, Finance Ministers, Health Ministers, Womens Affairs Ministers, Law Ministers, Education Ministers and Youth Affairs Ministers have specific meetings on a regular basis. Multi-laterally the Commonwealth has specific agencies dedicated to education, civil society promotion and local government. The Commonwealth Secretariat acts as an umbrella agency for providing 'guidance on policy making, technical assistance and advisory services' on issues including, 'democracy, rule of law, human rights, good governance and social and economic development'.<sup>35</sup> This indicates a role for the Secretariat in assisting members to comply with existing regional and international agreements regarding the rights of LGBT individuals. The Commonwealth Parliamentary Association and Commonwealth Youth Council create opportunities for swapping of legislative experiences and those of young people respectively. Beyond government opportunities there are numerous Commonwealth-oriented professional associations covering professions such as lawyers,

magistrates, judges, nurses, students and journalists. The Commonwealth Human Rights Initiative, Ramphal Institute, Institute of Commonwealth Studies and the Royal Commonwealth Society are further examples of groups capable of discussing controversial issues and sharing good practice and experience across civil society, governments and individuals. These formal opportunities already exist and build upon the commonalities within the Commonwealth which allow for the sharing of good practice on a range of diverse policy areas.

The informal advantages of the Commonwealth, of shared language and similar political and legal systems, give concrete advantages which manifest themselves in the formal associations, summits and agencies of the Commonwealth. This provides dual potential for the Commonwealth to address the LGBT rights debate with respect and understanding for differences of approach and opinion, through a range of discussion and knowledge sharing mechanisms.

### Building a Commonwealth Approach to LGBT Rights

There is a particular problem within the Commonwealth regarding LGBT rights. This problem has been twofold: there exists significant social and legal discrimination against citizens based on their sexual orientation and/or gender identity, much of which stems from colonial-era legislation; at the same time, there are differing approaches among Commonwealth members about how to address LGBT rights. Yet the Commonwealth has proved capable of discussing this politically, culturally and diplomatically sensitive issue in a range of contexts. What is more, while some countries do seem to be exhibiting growing anti-LGBT sentiment, others are undergoing a range of national processes which are moving them closer to improving the lives of all their citizens, regardless of sexual orientation or gender identity. Building on these emerging trends it seems plausible that a degree of Commonwealth consensus on LGBT rights is possible. What follows are not concrete recommendations which specific actors should take but general recommendations for building consensus within the Commonwealth amongst all actors, governments, multilateral agencies, Commonwealth organisations, broader civil society and citizens.

1. In addition to opposing discrimination on the basis of gender, race, colour, creed and political belief, sexual orientation and gender identity should not be justifiable grounds for discrimination in any freedom, service or area of development within Commonwealth societies.
2. The Commonwealth is a network of multiple actors including governments, civil society organisations and

34 Her Majesty The Queen, Christmas Broadcast 2009. Available <http://www.royal.gov.uk/ImagesandBroadcasts/TheQueensChristmasBroadcasts/ChristmasBroadcasts/ChristmasBroadcast2009.aspx>

35 The Commonwealth Secretariat, 2015. 'About us'. Accessed 30/01/2015. Available at: <http://thecommonwealth.org/organisation/commonwealth-secretariat>

citizens. While the responsibility to support the rights of minorities and the vulnerable lies with all of these groups, it is with national leaders that the responsibility to protect minority groups principally lies.

- 3.** There is a variety of ways of improving LGBT rights which have been exhibited in national contexts within the Commonwealth. It should be acknowledged that improvements for LGBT rights are often long-term developments. The Commonwealth as a network of multiple actors should work where appropriate to support national efforts to improve the rights of LGBT people by supporting national process.
- 4.** Commonwealth strengths of facilitating sensitive dialogue, sharing good practice and technical advice and promoting tolerance and understanding should guide what the Commonwealth can contribute to this issue.
- 5.** Any actor seeking to support LGBT rights in the Commonwealth should do so with appropriate consultation with stakeholders including governments, national human rights institutions and local civil society and, in particular, local and international LGBT organisations and communities. Many of these groups have longstanding and wide-ranging experience and should be seen as valuable partners and a unique resource for governments and other actors seeking to make political, cultural and social progress on LGBT rights.

# GLOSSARY

**Bisexual:** A person romantically and/or sexually attracted to men and women.

**Cisgender:** Someone whose deeply held sense of gender identity is the same as their biological sex assigned at birth.

**Gay:** A man romantically and/or sexually attracted to men.

**Gender Identity:** A person's conception of oneself as male or female or both or neither.

**Homosexual:** A person attracted to the same sex.

**Intersex:** A condition in which a person is born with a reproductive or sexual anatomy that does not seem to fit the typical definitions of female or male, or a person who may be born with genitals that seem to be in between male and female.

**Lesbian:** A woman romantically and/or sexually attracted to women.

**LGBT:** Lesbian, Gay, Bisexual, and trans.

**LGBTI:** Lesbian, Gay, Bisexual, trans and intersex.

**Sex:** The genitals; the physical distinction between male and female.

**Sexual Orientation:** A person's romantic and sexual attractions to individuals of a different gender or the same gender or more than one gender.

**SOGI:** Sexual Orientation and Gender Identity.

**Trans:** Someone whose deeply held sense of gender identity is different from their sex assigned at birth.

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