



# The Equal Rights Trust

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26 November 2009

Dear Mr Sharma

**Re: Laws criminalising homosexuality in Commonwealth Nations**

I write on behalf of the Equal Rights Trust, an independent international organisation whose purpose is to combat discrimination and promote equality as a fundamental human right and a basic principle of social justice, in order to express our concern at the continuing and widespread legal discrimination against homosexuals across the Commonwealth of Nations. This situation is brought into sharp focus by the recent introduction of an Anti-Homosexuality Bill 2009 before the parliament of Uganda. It is our firm view that these laws are contrary to international law and that states are in breach of their human rights treaty obligations.

Laws which criminalise homosexuality a) breach international treaties which Commonwealth states are bound by; and b) are contrary to the declarations made by all Commonwealth members. In this letter, we make a series of recommendations to the Heads of Government in advance of their meeting on 27 November. We also address the specific situation in Uganda and make recommendation to the government of Uganda and to other Heads of Government on this matter.

We would be extremely grateful if you could ensure that this submission is circulated to all Heads of Government at the meeting, in order that it may inform an urgent debate on both the situation in Uganda and the wider problem of legal discrimination against homosexuals across the Commonwealth.

Homosexual conduct is currently prohibited in 43 of the 53 countries which are members of the Commonwealth of Nations<sup>1</sup>. In 13 of these cases, the prohibition applies only to same sex relations between men, while in the remaining 28 all forms of same-sex activity are illegal<sup>2</sup>. In a significant number of the countries where homosexuality is illegal, it is prohibited under colonial laws established over a century ago, before the countries in question gained independence.

### **International law**

Laws which criminalise homosexuality contravene international law and directly contradict the express aims of the Commonwealth and its Heads of Government to “foster human equality and dignity everywhere” by perpetuating systematic discrimination and inequality on grounds of sexual orientation and gender identity. Current interpretations of the rights to non-discrimination and equality include sexual orientation and gender identity as prohibited grounds of discrimination: interpretations by the UN Human Rights Committee, the Committee on Economic, Social and Cultural Rights and the Committee on the Rights of the Child and by international experts are in consensus on the need to include these as prohibited grounds.

At present, of the 43 states where homosexual conduct is a criminal offence, only 9 are not party to either the International Covenant on Civil and Political Rights (ICCPR) or the International Covenant on Economic, Social and Cultural Rights (CESCR)<sup>3</sup>; an additional 3 are only party to the ICCPR<sup>4</sup> and 1 is party only to the CESCR<sup>5</sup>. All of the 43 states concerned have ratified the Convention on the Rights of the Child, though one state, Malaysia, has entered a reservation on the application of article 2 (non-discrimination). It is the firm view of ERT that states which are party to these conventions and which criminalise

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<sup>1</sup> Laws governing homosexual conduct vary across the Commonwealth, with different definitions and terminology employed in different states. Examples of terms used include: “unnatural offences” (Bangladesh), “indecent acts” (Antigua and Barbuda), “buggery” (Trinidad and Tobago) and “homosexuality” (Cameroon). The term “homosexual conduct” is used throughout this letter to describe all cases where homosexual acts or behaviour are illegal, irrespective of the precise terminology used.

<sup>2</sup> Figures are taken from the International Lesbian and Gay Association report *State Sponsored Homophobia*, 2009, at: [http://www.ilga.org/statehomophobia/ILGA\\_State\\_Sponsored\\_Homophobia\\_2009.pdf](http://www.ilga.org/statehomophobia/ILGA_State_Sponsored_Homophobia_2009.pdf)

<sup>3</sup> Antigua & Barbuda, Brunei, Kiribati, Malaysia, Singapore, St. Kitts and Nevis, St. Lucia, Tonga, Tuvalu

<sup>4</sup> Botswana, Nauru and Samoa

<sup>5</sup> Solomon Islands

homosexuality are in breach of their binding obligations under these instruments.

### ***International Covenant on Civil and Political Rights***

Article 2(1) (non-discrimination) and article 26 (equal protection of the law) of the ICCPR require that states provide protection from discriminatory laws, policies and practices across an “open list” of grounds: that is to say, both articles state that discrimination is prohibited on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or “other status”. While sexual orientation is not explicitly mentioned within article 2(1) or article 26 the UN Human Rights Committee, the treaty body which has authority to interpret the ICCPR, has stated in its communications that discrimination on grounds of sexual orientation is prohibited under the ICCPR<sup>6</sup>. On several occasions the Human Rights Committee has also expressed concern about the criminalisation of homosexuality and discrimination on the grounds of sexual orientation in its concluding observations<sup>7</sup>.

### ***International Covenant on Economic, Social and Cultural Rights***

The right to non-discrimination is also contained within article 2(2) of the CESCR. As with the non-discrimination protections within the ICCPR, article 2(2) of CESCR does not explicitly prohibit discrimination on the grounds of sexual orientation. However, the UN Committee on Economic, Social and Cultural Rights has, through its general comments<sup>8</sup> and its concluding observations<sup>9</sup>, expressed concern over discrimination on grounds of sexual orientation. More significantly, the Committee has recently

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<sup>6</sup> See for example, Communication No. 488/1992: Australia, CCPR/C/50/D/488/1992, Nicholas

Toonen v. Australia, April 4, 1994; or Communication No. 941/2000: Australia, CCPR/C/78/D/941/2000, Mr. Edward Young v. Australia, September 18, 2003.

<sup>7</sup> See for example, Concluding observations: Greece, CCPR/CO/83/GRC, March 31, 2005, para. 19; Concluding observations: Kenya, CCPR/CO/83/KEN, March 28, 2005, para. 27; Concluding observations: Poland CCPR/CO/82/POL, December 2, 2004, para. 18; Concluding Observations: Egypt, CCPR/CO/76/EGY, November 28, 2002, para. 19; Concluding Observations: Lesotho, CCPR/C/79/Add.106, April 8, 1999, para. 13; Concluding Observations: Zimbabwe, CCPR/C/79/Add.89, April 6, 1998, para 24; Concluding Observations: Sudan, C/79/Add.85, July 29, 1997, para. 8.

<sup>8</sup> See for example, General Comment No. 18: The Right to Work (art. 6), E/C.12/GC/18, February 6, 2006, para. 12; General Comment No. 15: The Right to Water (arts. 11 and 12), E/C.12/2002/11, January 20, 2002, para. 13; General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), E/C.12/2000/4, August 11, 2000: “Special Topics of Broad Application”, para. 18.

<sup>9</sup> See for example, Concluding Observations, Trinidad and Tobago, E/C.12/1/Add.80, June 5, 2002, para. 14; Concluding Observations: (Hong Kong) China, E/C.12/1/Add.58, May 21, 2001, para 15 (c); Concluding Observations: Kyrgyzstan, E/C.12/1/Add.49, September 1, 2000, para. 17.

provided an authoritative interpretation of the article 2(2) in General Comment No. 20<sup>10</sup> where it has explicitly stated that discrimination on the grounds of sexual orientation is prohibited by the “other status” classification of article 2(2). The General Comment sets out:

“Sexual orientation and gender identity. “Other status” as recognized in article 2(2) includes sexual orientation...In addition, gender identity is recognized as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the work place.”<sup>11</sup>

### ***International Convention on the Rights of the Child***

Article 2 of International Convention on the Rights of the Child (CRC) also requires that state parties ensure that children and adolescents enjoy the rights set out in the Convention without discrimination. As with the ICCPR and CESCR, the Committee on the Rights of the Child has – in its General Comment No 4<sup>12</sup> on health and development – interpreted article 2 as covering sexual orientation and health status. The General Comment sets out:

“State parties have the obligation to ensure that all human beings below 18 enjoy all the rights set forth in the Convention without discrimination (art.2) including with regard to ‘race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. These grounds also cover adolescents’ sexual orientation and health status (including HIV/AIDS and mental health).”<sup>13</sup>

### ***1971 Declaration of Commonwealth Principles***

Since its inception, the Commonwealth of Nations has held respect for human rights, equality and non-discrimination as core principles. The **1971 Declaration of Principles** states that members “believe in the liberty of the individual, in equal rights for all citizens” and contains a commitment to “foster human

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<sup>10</sup> Committee on Economic, Social and Cultural Rights, “General Comment No. 20 (Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2))”, E/C.12/GC/20, 10 June 2009.

<sup>11</sup> Ibid, para. 32.

<sup>12</sup> Committee on the Rights of the Child, “General Comment No. 4 (Adolescent health and development in the context of the Convention on the Rights of the Child)”, CRC/GC/2003/4, 1 July 2003.

<sup>13</sup> Ibid, para. 32.

equality and dignity everywhere”<sup>14</sup>. These commitments were reinforced and strengthened in the **2007 Final Communiqué of the Heads of Government**, where Heads of Government “reaffirmed their commitment to promote respect for and protection of fundamental human rights and freedoms in the Commonwealth without distinction of any kind”<sup>15</sup>.

Yet these commitments are undermined by continuing discrimination against and criminalisation of homosexuals throughout the Commonwealth. Two sets of recently adopted legal principles underline the comprehensive nature of the right to equality and the fact that non-discrimination on grounds of sexual orientation and gender identity is integral to the right to non-discrimination.

### ***Yogyakarta Principles***

The *Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity*<sup>16</sup> affirm existing binding legal standards which apply to states in respect of rights for Lesbian, Gay, Bisexual and Transgender people. Drafted by a committee of respected international experts, the *Yogyakarta Principles* reflect the existing state of international human rights law in relation to issues of sexual orientation and gender identity.

The *Yogyakarta Principles* were used as the basis for the 2008 UN Declaration on Sexual Orientation and Gender Identity which was supported by 67 member states. Furthermore, the Principles have been cited by a number of states, including members of the Commonwealth, as useful interpretative principles. The New Zealand Human Rights Commission referred to the Principles in its November, 2007, report ***To Be Who I Am***, on transgender rights<sup>17</sup>. The High Court of Delhi, referred to the Principles in its judgement in the case ***Naz Foundation v. Government of NCT of Delhi and Others*** striking down section 377 of the Indian Penal Code, which criminalises homosexuality, as unconstitutional<sup>18</sup>.

### ***Declaration of Principles on Equality***

The Equal Rights Trust launched the *Declaration of Principles on Equality*<sup>19</sup> in October 2008. The

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<sup>14</sup> The Declaration of Commonwealth Principles, 1971, Issued at the Singapore Heads of Government Meeting, paragraphs 6 and 8.

<sup>15</sup> 2007 Commonwealth Heads of Government Meeting: final communiqué, paragraph 38.

<sup>16</sup> To see the full text of the principles, visit: [http://www.yogyakartaprinciples.org/principles\\_en.pdf](http://www.yogyakartaprinciples.org/principles_en.pdf)

<sup>17</sup> For more information, visit:

<http://www.hrc.co.nz/home/hrc/humanrightsenvironment/actiononthetransgenderinquiry/resources/resources.php>

<sup>18</sup> *Naz Foundation v. Government of NCT of Delhi and Others*, WP(C) No.7455/2001.

<sup>19</sup> To read the Declaration of Principles on Equality, visit: <http://www.equalrightstrust.org/endorse/index.htm>

*Declaration* was drafted and signed by 128 human rights experts from 44 different countries and is the first international attempt to define the right to equality and the basic principles which should be followed in order to give effect to it..

The *Declaration* has been useful in codifying and interpreting the right to equality by a range of international actors, including the UN Committee on Economic, Social and Cultural Rights<sup>20</sup> and the European Council Commissioner for Human Rights<sup>21</sup>. Furthermore, like the *Yogyakarta Principles*, the *Declaration* has been used as a basis for the formulation of domestic law and policy in a number of Commonwealth states<sup>22</sup>.

Both the *Yogyakarta Principles* and the *Declaration of Principles on Equality* represent the modern consensus among international human rights and equality experts about the application of international law in this area. Both sets of principles set out a universal right to equality which is applicable to all human beings<sup>23</sup>; both contain a strong prohibition of discrimination on grounds of sexual orientation and gender identity<sup>24</sup>; and both contain a requirement for states to repeal laws which violate these principles<sup>25</sup>.

### ***Recommendations***

Commonwealth states which are party to the ICCPR, CESCR or CRC have a clear obligation to protect the human rights of all people, including LGBT people, in a non discriminatory manner and to address any legal measures which seek to criminalise or discriminate against persons on the basis of their sexual

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<sup>20</sup> <http://www.equalrightstrust.org/newsstory290509/index.htm>

<sup>21</sup> [http://www.coe.int/t/commissioner/Viewpoints/default\\_en.asp](http://www.coe.int/t/commissioner/Viewpoints/default_en.asp)

<sup>22</sup> The High Court of Delhi relied *inter alia* on the Declaration of Principles on Equality as “the current international understanding on the principle of equality” in *Naz Foundation v. Government of NCT of Delhi and Others*, WP(C) No.7455/2001. The Declaration was also used by the Human Rights Council of Australia in its submission 2009 national consultation on strengthening the protection of human rights.

<sup>23</sup> *Yogyakarta Principles*, Principle 1; *Declaration of Principles on Equality*, Principle 1: the right to equality “...is the right of all human beings to be equal in dignity, to be treated with respect and consideration and to participate on an equal basis with others in any area of economic, social, political, cultural or civil life”.

<sup>24</sup> *Yogyakarta Principles*, Principle 2; *Declaration of Principles on Equality*, Principle 5

<sup>25</sup> *Yogyakarta Principles*, Principle 2(b): “States shall...Repeal criminal and other legal provisions that prohibit or are, in effect, employed to prohibit consensual sexual activity among people of the same sex who are over the age of consent, and ensure that an equal age of consent applies to both same-sex and different-sex sexual activity”; ; *Declaration of Principles on Equality*, Principle 11(b)

orientation. What is more, parties to these covenants are not only bound by international law to their provisions, they are also obliged to implement law and policies to ensure their provisions are applicable in domestic law. By retaining laws which prohibit homosexual conduct, these states are acting contrary to their international obligations.

In addition, all Commonwealth states are bound by the commitments – freely entered into – in the 1971 Declaration of Commonwealth Principles. The findings of the UN Treaty bodies, together with the principles established in the *Yogyakarta Principles* and the *Declaration of Principles on Equality* provide a clear guide as to the correct interpretation of the commitment to “foster human equality and dignity everywhere” made in the 1971 Declaration. By retaining laws which prohibit homosexuality, members of the Commonwealth are violating their commitments under the 1971 Declaration by selectively denying equality to certain groups.

**We urge all Heads of Government representing states where homosexuality is prohibited to take immediate steps to repeal such legislation.**

### **Situation in Uganda**

ERT is deeply concerned about the proposed ***Anti-Homosexuality Bill*** which was introduced before the Ugandan parliament on 14 October 2009. If adopted, the Bill would legitimise, institutionalise and perpetuate the profound discrimination and gross inequality suffered by LGBT people in Uganda today. The Bill’s express purpose is to punish not only those who engage in same sex conduct but also those who take action or who may be perceived to be taking action to protect and promote the rights of LGBT people.

The Bill creates several new offences within Ugandan law. Among the most concerning of these offences are “The offence of homosexuality” (article 2), which criminalises same sex sexual conduct (including touching with the intention to commit the act of homosexuality) and carries a penalty of life imprisonment; “Aggravated homosexuality” (article 3) which imposes the death penalty on persons who are found guilty of committing “homosexuality” in a range of “aggravated” circumstances; and “Same sex marriage” (article 12) which provides that people who contract a marriage with a person of the same sex are liable on conviction to life imprisonment. In addition, article 13 (Promotion of Sexuality) makes it an offence to publish material or “promote” homosexuality.

These offences would systematically oppress people on grounds of their sexual orientation, violating the fundamental human rights to equality and non-discrimination and to privacy; in addition, article 13 violates the rights of freedom of speech and freedom of association. In so doing, the Bill violates both

articles 21 (Right to Non-discrimination) and 27 (Right to Privacy) of the Constitution of Uganda, Uganda's international legal obligations under the ICCPR and CESCR and contradicts the commitments it made under the 1971 Declaration and in subsequent communiqués.

**We urge the government of Uganda to reject the draft Bill and to take steps to review the constitutional legitimacy of section 145 of the Penal Code and remove this provision from Uganda's legislative framework. We urge President Museveni to take such steps as are necessary to promote this outcome.**

## **Conclusion**

The Commonwealth is founded on principles of human rights, equality and non-discrimination, something which you reaffirmed in your recent statement to the Forum of National Human Rights Institutions on 24 November. ERT believes that this commitment is undermined by the continuation in force of laws which aggressively discriminate against and criminalise individuals on the basis of their sexual orientation or gender identity. The commitment to “foster human equality and dignity everywhere” cannot be realised while these laws remain in force.

We appreciate your stated belief that it is better for the Commonwealth to offer a “helping hand, than in raising a wagging finger”. In this spirit, we would urge the Heads of Government to take coordinated action to support states which retain laws which criminalise homosexuality to repeal them.

In respect of the situation in Uganda however, we do not believe that the Commonwealth can proceed on the basis of quiet diplomacy. The draft Anti-Homosexuality Bill represents an attempt to criminalise activities associated with homosexuality and to outlaw organisations which seek to ensure basic human rights for LGBT people. The Bill contravenes the very spirit of the Commonwealth.

Finally, we would urge the Heads of Government to consider the steps they can take to promote the abolition of laws which criminalise homosexuality. As stated elsewhere, the Commonwealth has a proud history of promoting human rights and equality: we would urge that any step which entrenches discrimination against one identity group undermines the strength of the right to equality itself.

As such, we call on the Commonwealth Heads of Government to:

- **Take steps to establish a Ministerial Action Group to address the issue of laws criminalising homosexuality and advise states on the legal implications of retaining such laws.**

- **Condemn the Ugandan Anti-Homosexuality Bill in the strongest terms and to outline sanctions which would follow from adoption of the Bill.**
- **Include a commitment to tackling homophobic laws in the final communiqué of this meeting.**

I extend the expertise of the ERT if you require any assistance in these endeavours.

Yours sincerely

**Dimitrina Petrova**  
Executive Director  
The Equal Rights Trust