



The Equal Rights Trust

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Mr. Kamalesh Sharma
Commonwealth Secretary General
Commonwealth Secretariat
Marlborough House, Pall Mall
London SW1Y 5HX, UK

By email to: secretary-general@commonwealth.int

13 October 2011

Dear Mr Sharma

Re: Laws criminalising same-sex sexual conduct in Commonwealth nations

I write on behalf of The Equal Rights Trust (ERT), 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. ERT is concerned at the widespread legal discrimination against lesbian, gay and bisexual persons across the Commonwealth of Nations. It is our firm view that the criminalisation of same-sex sexual conduct is contrary to international law and to Commonwealth Values and Principles. In light of the increasing numbers of homophobic campaigns, criminal cases and violent attacks against lesbian, gay and bisexual persons, we call for urgent action on this matter.

We should be grateful if you would ensure that this submission is circulated to all Heads of Government at the 2011 meeting, in order that it may inform an urgent debate on the problem of legal discrimination on the basis of sexual orientation across the Commonwealth.

The Impact of Criminalisation

Same-sex sexual conduct is currently prohibited in 42¹ of the 54² countries which are members of the Commonwealth of Nations.³ In 25 of these cases, the prohibition applies only to sexual conduct between men, while in the remaining 17 states sexual conduct between women is also illegal.⁴ These laws allow for the discriminatory punishment of persons on account of their sexual orientation. Furthermore, criminalisation has a broad impact on the enjoyment of all human rights by lesbian, gay and bisexual persons. It increases the level of stigmatisation and prejudice they face, and so feeds patterns of discrimination in all areas of life. Such legislation legitimises persecution and victimisation. This is reflected in recent events in several Commonwealth countries, which have attracted international attention. For example, in July 2011, Ghana's Western Region Minister, Paul Evans Aidoo, ordered the immediate arrest of all lesbian, gay and bisexual persons in the region and the Christian Council of Ghana issued a statement condemning same-sex sexual conduct.⁵ In Uganda, the press has incited hatred and violence and violated the right to privacy, including through the publication of names, photos and addresses, of 100 lesbian, gay and bisexual persons with the headline "Hang them!" in *Rolling Stone* in 2010.⁶ Violent homophobic attacks, including physical attacks, gang-rape, mob attacks and violent police raids on gay clubs, have also been reported in Jamaica, where these attacks have generally met with impunity.⁷

¹ This includes India as same-sex sexual conduct remains illegal in some states.

² This includes Fiji whose membership is currently suspended.

³ Laws governing same-sex sexual 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 "same-sex sexual conduct" is used throughout this letter to describe all cases where same-sex sexual acts or behaviour are illegal, irrespective of the precise terminology used. Figures are taken from Bruce-Jones, E. and Itaborahy, L.P., *State-sponsored Homophobia: A world survey of laws criminalising same-sex sexual acts between consenting adults*, International Lesbian, Gay, Bisexual, Trans and Intersex Association, May 2011, available at: <http://www.ilga.org/>.

⁴ Figures are taken from Bruce-Jones, E. and Itaborahy, L.P., above note 3.

⁵ International Lesbian, Gay, Bisexual, Trans and Intersex Association, *Ghana : Western Region Minister Orders Arrest of All LGBTI Persons*, available at: <http://ilga.org/ilga/en/article/n5FDbYV1YT>.

⁶ Karimi, F., "Uganda newspaper publishes 'gay list,' calls for their hanging", *CNN World*, 20 October 2010, available at: http://articles.cnn.com/2010-10-20/world/uganda.gay.list_1_anti-gay-measure-david-bahati-uganda-newspaper?s=PM:WORLD.

⁷ JFLAG, *Homophobic Discrimination & Violent Incidents as reported to J-FLAG (January - June 2011)*, available at: <http://www.jflag.org/wp-content/uploads/2011/07/JFLAG-Homophobic-Violence-Summary-Jan-June-2011-Sheet1.pdf>; Amnesty International, *Jamaica: Submission To The UN Human Rights Committee, For The 103rd Session Of The Human Rights Committee (17 October - 4 November 2011)*, available at: <http://www.amnesty.org/en/library/asset/AMR38/004/2011/en/0fb9e79e-366a-412b-95cf-4cae963d2951/amr380042011en.pdf>.

In restricting lesbian, gay and bisexual persons' ability to freely express themselves in this fundamental area of human experience such laws must also be seen as an attack on human dignity. As the Constitutional Court of South Africa has noted:

*Just as apartheid legislation rendered the lives of couples of different racial groups perpetually at risk, the sodomy offence builds insecurity and vulnerability into the lives of gay men. There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity [...]*⁸

International Law

The rights to equality and non-discrimination are protected under a number of international conventions which almost all Commonwealth nations have ratified. The International Covenant on Civil and Political Rights (ICCPR), in articles 2(1) and 26, requires states to refrain from discrimination, including through discriminatory laws, policies and practices, on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The Human Rights Committee has long recognised that sexual orientation is a prohibited ground of discrimination under the ICCPR.⁹

The International Covenant on Economic, Social and Cultural Rights (ICESCR), in article 2(2), also prohibits discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or "other status" in relation to the rights set out in the Covenant. The Committee on Economic, Social and Cultural Rights has recognised that "other status" includes sexual orientation.¹⁰

In addition to these treaties, further guidance can be drawn from two sets of principles. The Yogyakarta Principles elaborate on how existing binding legal standards apply to issues affecting lesbian, gay, bisexual, transgender and intersex people. The rights to equality and non-discrimination are discussed in Principle 2, which expressly calls on states to "repeal criminal and other legal provisions that prohibit or

⁸ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (CCT11/98) [1998] ZACC 15, 9 October 1998, Para 28.

⁹ See for example, Communication No. 488/1992: Australia, CCPR/C/50/D/488/1992, *Nicholas Toonen v Australia*, April 4, 1994; and Communication No. 941/2000: Australia, CCPR/C/78/D/941/2000, *Mr. Edward Young v Australia*, September 18, 2003.

¹⁰ Committee on Economic, Social and Cultural Rights, *General Comment No. 20 (Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2))*, UN Doc. E/C.12/GC/20, 2009, Para 32.

are, in effect, employed to prohibit consensual sexual activity among people of the same sex who are over the age of consent”.¹¹ The Declaration of Principles on Equality,¹² which was drafted and signed by 128 human rights experts from 44 different countries and launched by ERT in 2008, defines discrimination in Principle 5 and includes sexual orientation as a prohibited ground. The High Court of Delhi referred to the Declaration in declaring section 377 of the Indian Penal Code, which criminalises homosexuality, to be unconstitutional.¹³

Laws criminalising same-sex sexual conduct discriminate against persons on the basis of their sexual orientation in contravention of article 26 ICCPR. They also render gay, lesbian and bisexual persons particularly vulnerable to breaches of other civil and political rights in contravention of article 2 ICCPR. The Human Rights Committee has often expressed concern about such laws in its concluding observations.¹⁴ Criminalisation also impacts on the ability of gay, lesbian and bisexual persons to realise their economic, social and cultural rights, by, for example, creating barriers to access to health services, in contravention of article 2 ICESCR.

Commonwealth Values and Principles

Laws which criminalise same-sex sexual conduct also contravene Commonwealth Values and Principles. In particular, in 2009 members states affirmed Commonwealth Values and Principles, recalling their “belief that equality and respect for protection and promotion of civil, political, economic, social and cultural rights for all without discrimination on any grounds, including the right to development, are foundations of peaceful, just and stable societies”.¹⁵ Criminalisation of same-sex sexual conduct in so many Commonwealth nations runs clearly contrary to this stated Commonwealth value.

¹¹ *Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*, March 2007, available at: http://www.yogyakartaprinciples.org/principles_en.pdf.

¹² *Declaration of Principles on Equality*, published by The Equal Rights Trust, London 2008, available at: <http://www.equalrightstrust.org/endorse/index.htm>.

¹³ *Naz Foundation v Government of NCT of Delhi and Others*, WP(C) No.7455/2001 at Para 93. 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”.

¹⁴ See for example, *Concluding Observations on Greece*, UN Doc. CCPR/CO/83/GRC, 2005, Para 19; *Concluding Observations on Kenya*, UN Doc. CCPR/CO/83/KEN, 2005, Para 27; *Concluding Observations on Poland*, UN Doc. CCPR/CO/82/POL, 2004, Para 18; *Concluding Observations on Egypt*, UN Doc. CCPR/CO/76/EGY, 2002, Para 19; *Concluding Observations on Lesotho*, UN Doc. CCPR/C/79/Add.106, 1999, Para 13; *Concluding Observations on Zimbabwe*, UN Doc. CCPR/C/79/Add.89, 1998, Para 24; *Concluding Observations on Sudan*, UN Doc. C/79/Add.85, 1997, Para 8.

¹⁵ Commonwealth of Nations, *Affirmation of Commonwealth Values and Principles*, 29 November 2009, available at: http://www.thecommonwealth.org/document/181889/34293/35468/216908/commonwealth_values_and_principles.htm.

Recommendation

Commonwealth states, due to their obligations under the ICCPR and ICESCR, and to their commitment to the Commonwealth Values and Principles, must respect, protect and fulfil the human rights of all people, including lesbian, gay and bisexual persons, in a non discriminatory manner. In particular, they must repeal any legal measures which discriminate against persons on the basis of their sexual orientation, including those which criminalise same-sex sexual conduct.

We urge all Heads of Government representing states where same-sex sexual conduct is criminalised to take immediate steps to repeal such legislation.

While we appreciate that the Commonwealth operates through “encouragement not coercion”, in light of the serious human rights abuses to which lesbian, gay and bisexual people are subjected, we do not believe that the Commonwealth can proceed exclusively on the basis of quiet diplomacy. In this spirit, we would urge the Heads of Government to take coordinated action to support states in de-criminalising same-sex sexual conduct. We would also urge the Heads of Government to consider the steps they can take to promote the abolition of laws which criminalise same-sex sexual conduct. 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 same-sex sexual conduct and advise states on the legal implications of retaining such laws.**
- **Include a commitment to tackling laws which criminalise same-sex conduct in the final communiqué of the 2011 meeting.**

Conclusion

ERT welcomes your statement in May this year that the Commonwealth's commitment to human rights for all without discrimination on any grounds "includes discrimination on grounds of sexual orientation."¹⁶ ERT believes that this commitment is undermined by the continuation in force of laws prohibiting same sex sexual conduct which aggressively discriminate against individuals on the basis of their sexual orientation. Commonwealth Values and Principles cannot be realised while these laws remain in force. ERT therefore urges the repeal of such laws.

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

Yours sincerely

A handwritten signature in blue ink, appearing to read 'D Petrova', written in a cursive style.

Dimitrina Petrova
Executive Director
The Equal Rights Trust

¹⁶ Sharma, K., "Commonwealth Respects the Rights, Values of Homosexuals", *The Star*, 27 May 2011.