

Civil Society Statement of Action on the Decriminalisation of Adult Same Sex Conduct in the Commonwealth

This Statement is endorsed by:



Commonwealth Human Rights Initiative



Gays and Lesbians of Zimbabwe



Coalition against homophobia In Ghana



Centre for Popular Education and Human Rights, Ghana





Malta **Gay** Rights Movement

Signed and supported by IEU Australia



LES ADOLESCENTS CONTRE LE SIDA



Out of the 54 states that make up the Commonwealth of Nations, 41 continue to criminalise consensual adult same-sex sexual activity. Laws that criminalise same-sex sexual conduct discriminate against and oppress lesbian, gay, bisexual, transgender and intersex (LGBTI) persons. The majority of the laws that criminalise same-sex sexual conduct originate in British Colonial laws criminalising 'sodomy'.

On the 15th of August 2011 at a conference facilitated by the Commonwealth Human Rights Initiative London, LGBTI Rights Activists working across the Commonwealth devised the following statement of action on the decriminalisation of same-sex sexual conduct across the Commonwealth. This is a statement of action that relates both to the Commonwealth Secretariat and to Commonwealth member states.

1. The incompatibility of the criminalisation of same-sex sexual conduct with Commonwealth values

1.1 Treating individuals in a discriminatory manner as a result of their sexual orientation is incompatible with Commonwealth values. Equality and non-discrimination on any grounds has been repeatedly affirmed as a core Commonwealth value, most recently by the Secretary General in his speech to the 2011 Law Ministers Meeting. The 2009 Port of Spain Affirmation of Commonwealth Values and Principles states in section 5 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." This reaffirms the commitments to formal equality, found in the 1979 Lusaka Declaration, and equality before the law, in the 1991 Harare Declaration.

1.2 The universal equal application of human rights to all without discrimination on any grounds is reinforced in the 2007 Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity. In 2008 seventeen Commonwealth States signed up to the European Union backed Statement on Human Rights, Sexual Orientation and Gender Identity at the United Nations General Assembly which affirmed the 'principle of non-discrimination which requires that human rights apply equally to every human being regardless of sexual orientation or gender identity'.

1.3 At the Port of Spain Commonwealth Heads of Government Meeting (CHOGM) reaffirmed the agreement that states had made at the 2007 Kampala CHOGM that all Commonwealth members should ratify core international human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR). In *Toonen v Australia* (1994) CCPR/C/50/D/488/1992 the Human Rights Committee held that the criminalisation of same - sex sexual conduct was incompatible with the right to privacy and the right to equality before the law, as guaranteed under the ICCPR. The implementation and ratification of the ICCPR by the vast majority of Commonwealth Countries means that states should take steps to ensure that laws criminalising same-sex sexual conduct are repealed and amended. Further states that have not yet signed up to international human rights agreements should be mindful of the commitments made at successive CHOGMs and implement international

human rights agreements so that all citizens of Commonwealth states enjoy human rights without discrimination on any grounds. The few states that have not yet ratified the ICCPR are reminded that it accords with the fundamental principles of the Commonwealth and they are bound to bring their laws into line with these instruments.

1.4 Whilst it is acknowledged that the laws that criminalise same-sex sexual conduct currently are part of a state's domestic criminal law and individual sovereign states are generally granted a margin of appreciation in respect to their own domestic criminal jurisdiction, the laws that criminalise same-sex sexual conduct constitute a systemic and ongoing human rights abuse and cannot in *any* meaningful sense be applicable within a framework of individual rights protection. The 1979 Lusaka Declaration commits the Commonwealth to the abolition of discriminatory laws and makes it a condition of membership that states should repeal discriminatory domestic laws. The laws that criminalise same-sex sexual conduct are akin to the laws used to segregate racial groups and exclude persons from the full benefit of citizenship in a manner that is directly analogous to practices that underpinned apartheid and white minority rule.

1.5 The Commonwealth prides itself on being a values based organisation. These values have an enforcement mechanism within the 1995 Millbrook Action programme and there a variety of different enforcement measures available. The Commonwealth, in order to enforce and realise its values, has taken action in the past. This is an issue where the Commonwealth now needs to take a clear lead.

2. The responsibility of individual member states of the commonwealth

2.1 All states must decriminalise private, same-sex sexual activity between consenting adults. Decriminalisation means the removal of any criminal or civil penalties that may be imposed on an adult who engages in private same-sex sexual activity. There should be no legal powers available to the authorities to arrest or investigate private, consensual same-sex sexual activity between adults. A commitment not to enforce laws that criminalise same-sex sexual conduct is too uncertain and still constitutes a human rights violation as the mere fact of 'black letter' criminalisation means that LGBTI individuals are marginalised in society. Decriminalisation can be achieved progressively, via either a constitutional reform or test cases that allow the courts to 'read down' criminal laws in line with international and domestic human rights provisions.

2.2 Legislation must be implemented to protect LGBTI individuals from direct discrimination and discriminatory practices. Decriminalisation does not in and of itself prevent private parties acting in a discriminatory manner towards LGBTI individuals and treating them in a discriminatory manner when it comes to matters of employment, inheritance of property and access to health care. This does not mean giving LGBTI individuals a special status but rather involves the creation of legal mechanisms that can give redress to LGBTI individuals who are the victim of discriminatory treatment of the sort that

would be not be afforded to an individual who was not lesbian, gay, bisexual, transgender or intersex.

2.3 States must enforce existing laws to protect LGBTI individuals against threats, harassment and violence. Laws that criminalise assault and harassment apply to all citizens but frequently they are not adequately enforced in the case of hate crimes against LGBTI individuals. Moreover, LGBTI individuals often feel unable to come forward and report these crimes, and often an enforcement gap emerges between hate crimes directed against LGBTI individuals and groups, and hate crimes that are directed at other individuals or groups. Again this does not mean giving LGBTI individuals and groups a special status but rather involves enforcing existing laws.

2.4 Consultation and dialogue must be arranged with local LGBTI groups and human rights organisations on the implementation of all of the above steps. Other groups including Civil Society Organisations and Non Governmental Organisations should also be consulted and the process should be as wide ranging as possible.

3. Steps the Secretariat and the Secretary General should take to facilitate decriminalisation

3.1 The Secretary General should follow up on his remarks to the 2011 Law Ministers meeting and issue a formal statement on the incompatibility of the criminalisation of same-sex sexual conduct with Commonwealth values. It should be noted that the criminalisation of same-sex sexual conduct is incompatible not only with the provisions of equality under the 2009 Port of Spain Declaration but also is incompatible with the respect for human rights, as guaranteed under the 1991 Harare Declaration, and the principle of equality before the law, as protected under 1979 Lusaka Declaration.

3.2 The Secretariat should facilitate the creation of an official independent working group tasked with making official biennial reports into the status of decriminalisation in the Commonwealth. This working group should be formulated in a manner similar to that of election observation groups. The group should be comprised of representatives of NGOs, CSOs and other experts, and have a broad remit to investigate the progress towards decriminalisation in Commonwealth countries. The group should be completely independent of the Secretariat and National Governments and should publish a report every two years in line with the CHOGM cycle.

3.3 Resources should be made available to the Human Rights Unit (HRU) at the Secretariat to engage in promotional and monitoring activities in this area. Research should also be carried out by the HRU in this area in conjunction with the ongoing projects of CSOs and NGOs. The Secretariat should also make resources available for the promotion of the social, political and economic benefits of decriminalisation from the thirteen Commonwealth states that have decriminalised same-sex sexual conduct.

4. Steps states that have decriminalised same-sex sexual conduct should take to facilitate decriminalisation

4.1 States that have decriminalised same-sex sexual conduct should provide effective international protection for LGBTI refugees from countries that criminalise same-sex sexual conduct. States that are signatories to the 1951 Refugee Convention have a duty to provide refuge to individuals that have a well-founded fear of persecution. States should ensure that their law enforcement and border agencies are equipped to handle asylum claims made by LGBTI individuals.

4.2 States that have decriminalised same-sex sexual conduct should be vocal in advocating for decriminalisation in Commonwealth and other international forums and should spearhead initiatives aimed at forging inter-state consensus on decriminalisation.

4.3 This also requires states to be active in monitoring the recommendations of international and regional organisations and being willing to scrutinise the human rights performance of other Commonwealth states both in Commonwealth forums and at other international forums, such as the UN Human Rights Council. States should also make an effort to showcase the economic, social and health benefits of decriminalisation from their own jurisdictions in international forums and this should form part of the case in favour of decriminalisation.

The Commonwealth's future as a values based organisation is dependent upon action on this issue and the different actors mentioned in this statement need, as a matter of urgency to implement these reforms. Since the declaration of the Commonwealth Principles adopted by Heads of Government in 1971, the organisation has defined itself by its values. The continued criminalisation of a minority for no other reason than their immutable characteristics is a form of discrimination and persecution that cannot continue amongst a community of nations that has committed itself to protecting human rights and equality before the law.