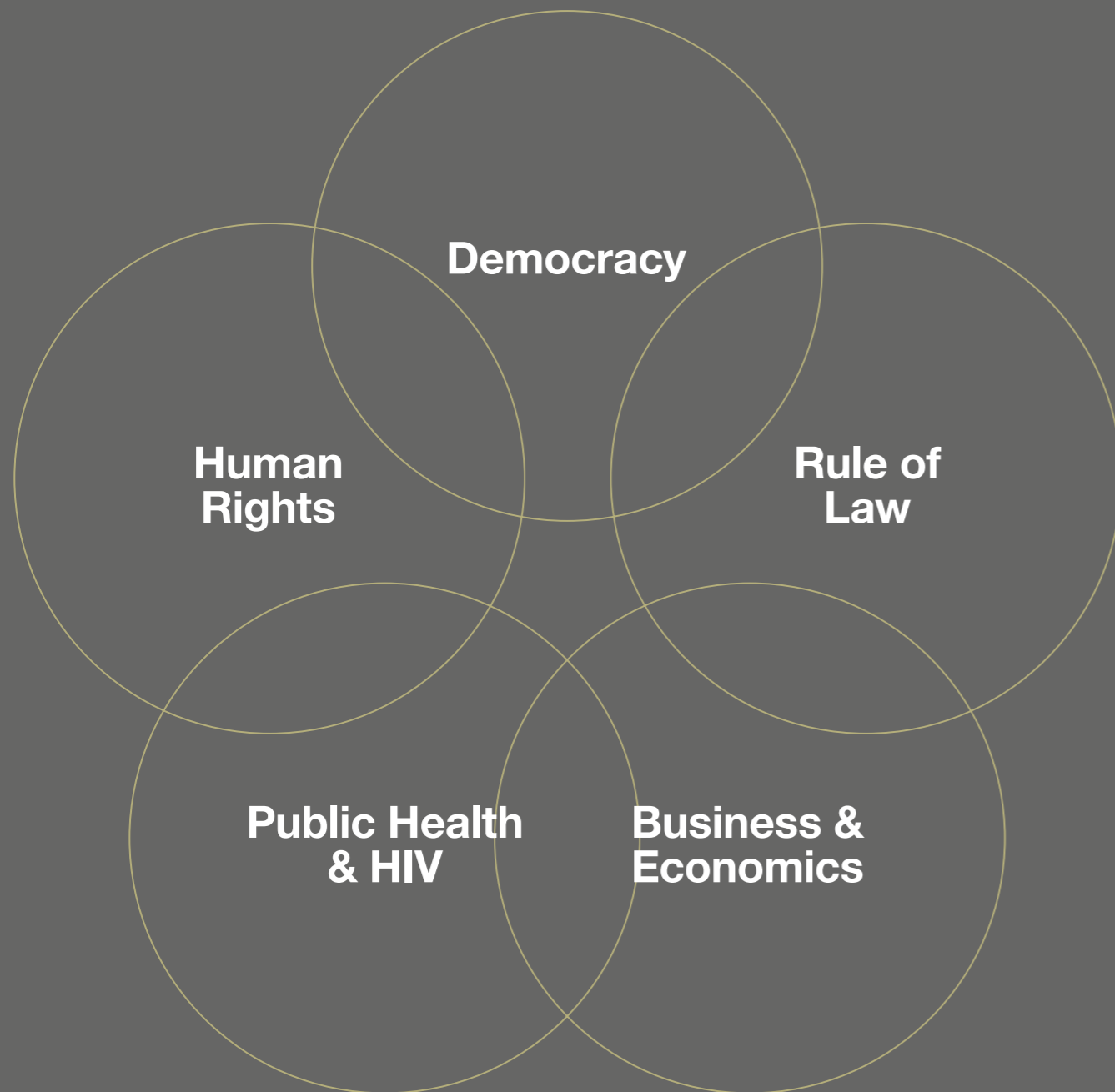


**Criminalising
Homosexuality:
Irreconcilable
with Good
Governance:
Synopsis and our
Recommendations**

Corrigendum, 09 September 2016: Errors in the original text of these notes relating to the scale and impact of criminalisation of lesbian and bisexual women have been corrected as follows:

- On p. 6 of "Criminalising Homosexuality: Irreconcilable with Good Governance: Synopsis and our Recommendations";
- On p. 4 of "Criminalising Homosexuality and International Human Rights Law";
- On p. 4 of "Criminalising Homosexuality and Working through International Organisations"

For more detailed information on the topic of criminalisation of women, please see our report [*Breaking the Silence: Criminalisation of Lesbian and Bisexual Women and its Impacts.*](#)



This is one in a series of notes produced for the Human Dignity Trust on the criminalisation of homosexuality and good governance. Each note in the series discusses a different aspect of policy that is engaged by the continued criminalisation of homosexuality across the globe.

The Human Dignity Trust is an organisation made up of international lawyers supporting local partners to uphold human rights and constitutional law in countries where private, consensual sexual conduct between adults of the same sex is criminalised. We are a registered charity no.1158093 in England & Wales. All our work, wherever it is, is strictly not-for-profit.

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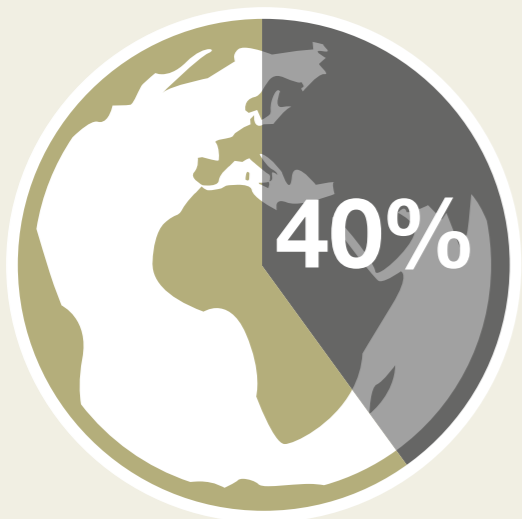
The scale of the problem

04. The criminalisation of homosexuality is a global problem that degrades millions of men and women. A snapshot is provided below:

Same-sex intimacy between consenting adults in private is a crime in 78 jurisdictions. Of these, at least 44 jurisdictions criminalise female same-sex intimacy as well as male.

In the 78 jurisdictions that criminalise men, approximately 94 to 145 million men are or will be 'un-apprehended felons' during the course of their lifetimes for having a same-sex sexual experience.¹

Likewise, in the 44 jurisdictions that criminalise women, approximately 22 to 66 million women are or will be 'un-apprehended felons'.²



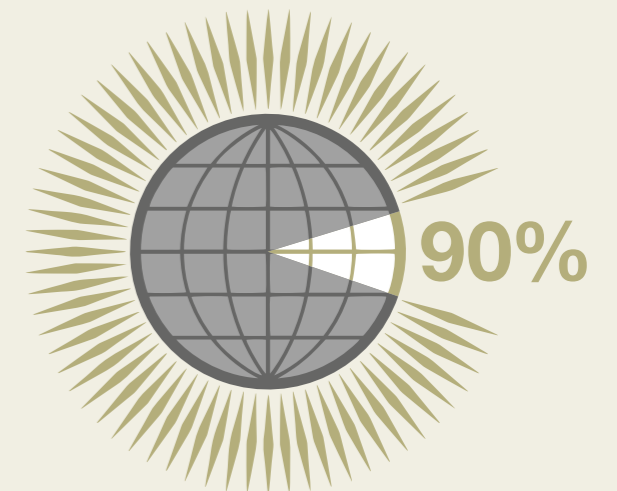
2.9 billion people live in these 78 jurisdictions (some 40% of the global population).

Of these 2.9 billion people, an estimated 58 to 174 million will identify as LGBT now or when they reach adulthood.³

Laws that criminalise same-sex intimacy do more than outlaw certain sexual acts. These laws criminalise the LGBT identity. The full force of the state is used against LGBT people. This leaves LGBT people vulnerable to violence, abuse and harassment from state actors and non-state actors alike. At any point in time, it is estimated that 175,000 LGBT people will be in peril, seriously harmed or threatened with harm.⁵ It also shuts LGBT people out from employment, healthcare and fulfilling other socio-economic rights.

These millions risk arrest, prosecution, imprisonment and, in some cases, execution.⁴

Criminalisation is largely a problem for the Commonwealth. Of the 2.9 billion who live where same-sex intimacy is a crime, 2.1 billion live in the Commonwealth (some three-quarters of the total). 90% of Commonwealth citizens live in a jurisdiction that criminalises. Criminalisation is a legacy of British colonial law.



¹ Based on estimates that between 6.5% and 10% of men will have a same-sex sexual experience in adulthood. The 6.5% figure is for adult males aged 25 to 44, taken from: Mosher, W.D., Chandra, A., Jones, J., *Sexual Behavior and Selected Health Measures: Men and Women 15–44 Years of Age, United States, 2002*, Advance Data from Vital and Health Statistics (362): 2. Available at: <http://www.cdc.gov/nchs/data/ad/ad362.pdf>. The 10% figure is taken from a re-analysis of *The Kinsey Data*, Gebhard, P.H. and Johnson, A.B (1979). Available at: <http://www.kinseyinstitute.org/resources/bib-homoprev.html>

² Based on estimates that between 3.7% and 11% of women will have a same-sex sexual experience in adulthood. Sources, at n. 1 above. Mosher estimates 11%; Gebhard estimates 3.7%. The total population of these 44 jurisdictions is 1.2 billion, with a female population of approximately 600 million.

³ Based on conservative to moderate estimates that 2% to 6% of the general adult population identifies as LGBT. In 2005, the UK Government estimated that 6% of the UK population is LG; in 2010, the UK Office of National Statistics found that 1.5% of UK adults openly identify as LGBT; in 2013, the *US National Health Statistic Reports* found that 2.3% of US adults openly identify as LGBT; in April 2011, the Williams Institute published estimates collated from multiple surveys finding that 3.5% of adults in the USA identify as LGB and 0.3% as transgender.

⁴ The death penalty is the maximum penalty in Iran, Mauritania, Saudi Arabia, Sudan and Yemen, and in some parts of Nigeria and Somalia. Additionally, Brunei Darussalam is phasing in its *Syariah Penal Code Order* (2013) between May 2014 and the end of 2016, which will apply the death penalty (stoning to death) for consensual same-sex sexual conduct.

⁵ Estimates from Organization for Refuge, Asylum & Migration (ORAM), *Opening Doors: A Global Survey of NGO Attitudes Towards LGBTI Refugees & Asylum Seekers*, June 2012. Available at: <http://www.oraminternational.org/images/stories/PDFs/oram-opening-doors.pdf>

Criminalising homosexuality and democratic values

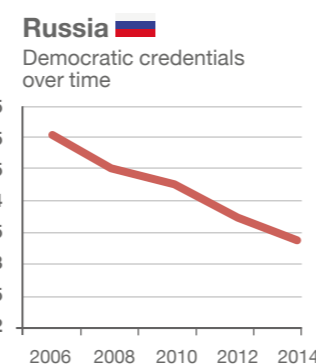
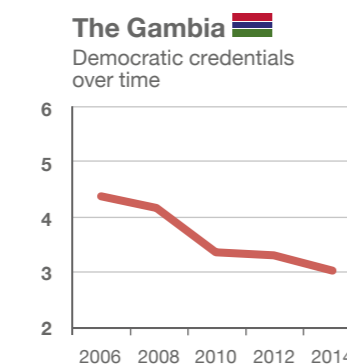
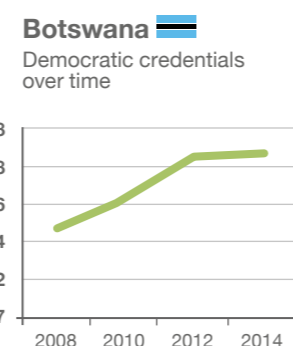
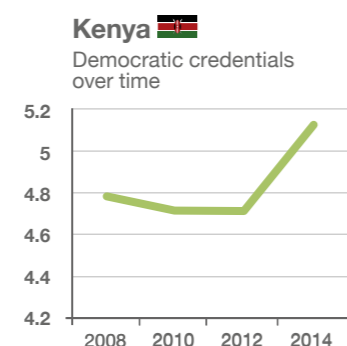
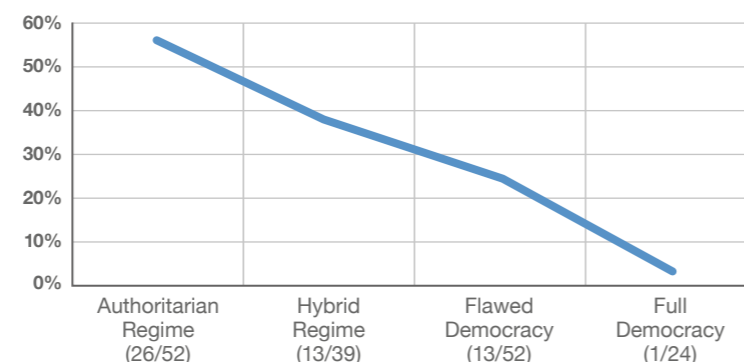
05. Criminalisation is a sign of poor democratic credentials. Excluding a segment of society on an arbitrary basis of identity in inherently undemocratic. It is no coincidence that the majority of authoritarian regimes criminalise.

We used the Economist Intelligence Unit's democracy rankings (2014) to test this correlation. There is a clear link. Of these 52 Authoritarian regimes 56% criminalise consensual same-sex intimacy.

Conversely, of the 24 Full Democracies identified, 4% criminalise. It is evident that properly functioning democracies do not criminalise homosexuality.

06. How states treat LGBT people is a litmus test for their credibility as democracies. For example, early signs show Botswana and Kenya are becoming more democratic, and simultaneously their treatment of LGBT people is improving. Whereas when democratic rights are withdrawn, LGBT rights are some of the first to be denied, as we see today in Russia and The Gambia. As LGBT rights have progressed or retreated, countries' democratic credentials have shifted in a parallel direction.

Propensity to criminalise consensual same-sex intimacy by regime type



Criminalising homosexuality and the rule of law

07. Criminalisation offends the rule of law. Where the rule of law is present, criminalisation should cease. Professor Sir Jeffrey Jowell, Director of the Bingham Centre for the Rule of Law, writes in the foreword to our note:

“ Making homosexuality a crime cuts against the grain of the rule of law as a pillar of a fair and accountable society. The briefing note therefore provides an intellectual framework for understanding why these laws are not only unjust to individuals but also an affront to a country's constitutional values.

The briefing note outlines a number of components (or 'ingredients' as Tom Bingham called them) of the rule of law and shows how criminalisation of homosexuality offends a number of them (such as inequality, arbitrariness, detention without reasonable justification, proportionality, and breach of international human rights standards).

08. Human rights, democratic credentials, the rule of law and LGBT rights are intrinsically linked. Democracy cannot flourish without being underpinned by the rule of law which protects human rights. This means LGBT rights must necessarily be a part of the dialogue. The rule of law cannot be present to a meaningful degree when people are criminalised on the basis of their identity and for their consensual sexual conduct.

Criminalising homosexuality and the impact on business, the economy and investment

09. In recent years, international business has become a major ally in upholding the human rights of LGBT people. This should come as no surprise. The Western consumer is now firmly pro-LGBT, businesses are more profitable when they are inclusive, and it has been demonstrated that laws that criminalise homosexuality hinder economic growth. There is a clear business and economic rationale for decriminalisation. For instance, a study commissioned by the World Bank concluded that **India's economy loses up to 1.7% of GDP due to the impact of criminalisation and homophobia.**⁶ This is equivalent to up to US\$30.8 billion.

10. Politicians in criminalising countries should be advised of the economic benefits of repealing their criminalising laws. Repeal can be expected to boost productivity and attract investment and tourism. The economic case for decriminalisation can be made completely separately from arguments grounded in human rights, democracy or the rule of law.

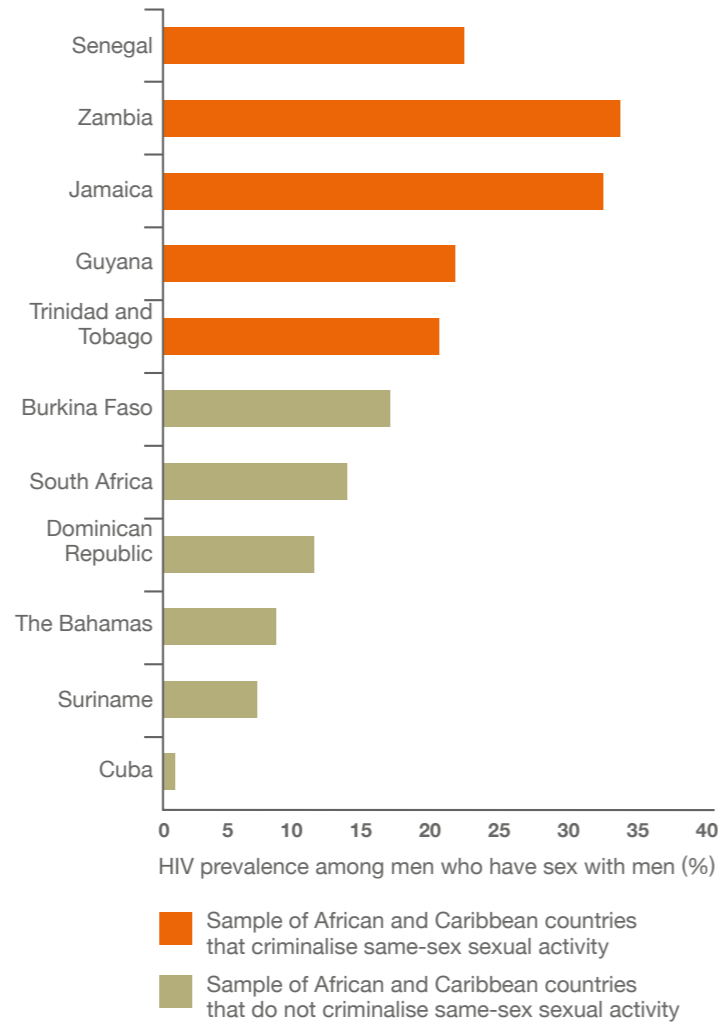
11. Businesses are in a unique position to advocate for decriminalisation and encourage governments that criminalise homosexuality to understand how they are inadvertently damaging their own economic prosperity.

6 Lee Badgett, M.V., *The Economic Cost of Homophobia & the Exclusion of LGBT People: A Case Study of India*. Available at: <http://www.worldbank.org/content/dam/Worldbank/document/SAR/economic-costs-homophobia-lgbt-exclusion-india.pdf>

Criminalising homosexuality and public health and HIV

12. Multiple studies have shown that criminalisation hinders efforts to curb HIV transmission. These laws reduce access to HIV testing and treatment and encourage riskier sexual practices. To cite just two studies from the many provided in our briefing note on this subject, UNAIDS found that **the HIV prevalence among men who have sex with men rose from 1 in 15 in Caribbean countries where homosexuality is not criminalised to 1 in 4 in Caribbean countries where it is criminalised**. Secondly, the UNAIDS-*Lancet* Commission compared HIV prevalence in criminalising countries (top graph opposite) with neighbouring non-criminalising countries (bottom graph).⁸ Again the correlation is clear.

13. The global HIV/AIDS crisis simply cannot be brought under control while criminalisation persists. Again, the public health rationale for decriminalisation can be made completely separately from arguments grounded in human rights, democracy and the rule of law. The international community, national governments and public health organisations must make it clear to governments that criminalise homosexuality that they are undermining public health initiatives.



7 UNAIDS, 'Report on the global AIDS epidemic', 2008; UNAIDS, 'Keeping Score II: A Progress Report towards Universal Access to HIV Prevention, Treatment, Care and Support in the Caribbean', 2008.

8 Piot, P., et al., 'UNAIDS-*Lancet* Commission on Defeating AIDS – Advancing Global Health', *The Lancet*, 11 July 2015, Vol. 386, No. 9989, pp. 1 71-218. Available at: [http://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736\(15\)60658-4.pdf](http://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736(15)60658-4.pdf)

International human rights law and international organisations

14. Laws that criminalise homosexuality violate universal human rights. Criminalising laws are simply incompatible with the rights to privacy, dignity and non-discrimination, and can amount to inhuman and degrading treatment. Domestic courts around the world have held as much, as have the courts and bodies that oversee international human rights instruments.
15. The United Nations (UN) has stated repeatedly that criminalisation breaches international law and offends the principles of the UN.
16. **National governments can work within international organisations, such as the UN, the EU, the Council of Europe, the Organisation of American States, the African Union, the OSCE and the Commonwealth**, to complement and amplify their bilateral and behind the scenes work on this issue. At the grassroots level, activists and individuals in many criminalising countries might access international courts and committees to hold their governments to account for breaching international human rights law.


Understanding the right to manifest religion

17. Most of today's laws that criminalise homosexuality were originally put in place under British colonial rule. The remainder of criminalising laws across the globe stem from Islamic Sharia law. However, there is no firm correlation between Islam being a society's dominant religion and laws that criminalise homosexuality; many Muslim-majority countries do not criminalise.
18. The right to freedom of religion and LGBT people's rights to equality, privacy and dignity are all protected under international human rights law. There is no bar under international law on individuals holding a particular belief about homosexuality or morality or generally. However, states do not have the right to impose the belief of some through the law if it conflicts with human rights, regardless of whether the majority of the population hold that belief. To believe that the religious or moral belief of some justifies states in upholding laws that criminalise the consensual conduct of others is to fundamentally misunderstand the meaning of one's right to manifest religion.
19. Religious leaders from around the world representing a variety of faiths have made multiple statements condemning the criminalisation of homosexuality and the persecution it engenders.

Conflict, violence and natural disasters

- 20.** LGBT people are vulnerable to violence, abuse and neglect at the best of times. In times of conflict and natural disasters when resources become scarcer and law and order breaks down, these vulnerabilities are exacerbated. Moreover, humanitarian law has not caught up with other areas of international law by expressly recognising LGBT people, which heightens the risk of deprivations in these unique circumstances. National governments must lead the way by including sexual orientation and gender identity in their military manuals and encouraging the International Committee of the Red Cross to update its interpretation of humanitarian law.
- 21.** Relief programmes in times of conflict and disaster often fail to acknowledge and address the heightened vulnerabilities of LGBT people, leaving them with decreased access to aid. International organisations and national governments must adjust their relief programmes to specifically include LGBT people, as they do already for other groups.

Foreign policy

- 22.** We appreciate that not all governments will voluntarily respond to the incentives and arguments that we have outlined above. As such, we have presented various means by which non-criminalising governments who see that criminalisation elsewhere is contrary to their foreign policy aims can pressurise criminalising countries into repealing these laws. These methods are listed below.
- 23. Political mechanisms:**  International organisations and national governments can use their diplomatic influence to:
- Convey the human rights grounds for decriminalisation and stress that it is necessary for governments to decriminalise in order to adhere to international human rights law.
 - Speak in the alternative voice of democracy and the rule of law when engaging with criminalising governments, which captures human rights albeit in a different tone.
 - Convey the business, economic and health arguments both as standalone reasons to decriminalise, or as part of the messages in a) and b) above.

- Vocalise the arguments for decriminalisation both publicly at international organisations and bilaterally using quiet diplomacy. For example, raise decriminalisation at Universal Periodic Review, in a constructive manner that encourages the reviewed country to engage with the matter rather than respond with a knee-jerk refusal to decriminalise.
- When acute abuses against LGBT people occur, place travel bans on politicians or other public figures who stoke homophobia or who sponsor laws that enhance criminalisation (such as has been seen in Uganda, Nigeria and The Gambia).
- Consider appointing a national Special Envoy (or similar title) to coordinate the response to global LGBT persecution.⁹

24. Financial mechanisms:

- National and supranational governments, like the EU, can use their economic influence to:
- After consultations with local stakeholders, consider redirecting aid.
 - Continue to fund and expand funding to grassroots LGBT activists in countries that criminalise homosexuality.
 - Build a binding commitment to LGBT rights and human rights more generally into bilateral and multilateral trade agreements.
 - The EU, in particular, can provide economic and financial incentives to decriminalise, in particular via the mechanisms in the Contonou Agreement.

25. Technical mechanisms:

International organisations and national governments can use their technical expertise to:

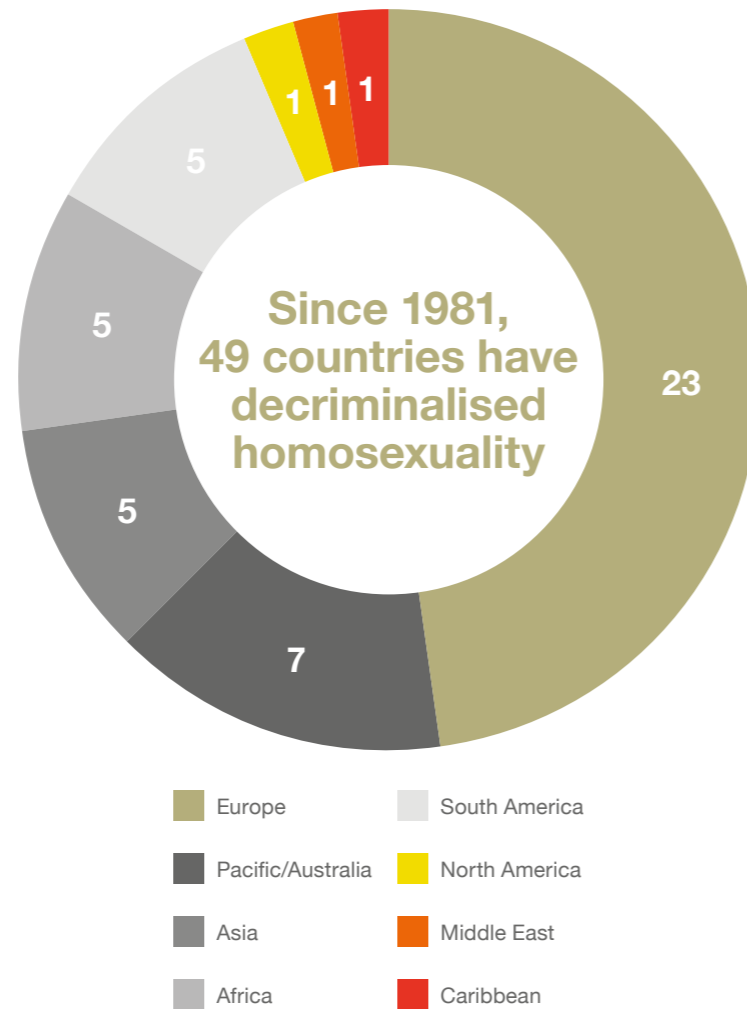
- Draft a model criminal code fit for the 21st century to replace the archaic colonial-era criminal laws which criminalise LGBT people. This model penal code should be non-gendered, victim-centric and based on understanding sexual relations vis-à-vis consent. This would have spill over benefits for other vulnerable groups like women and children, and would lessen the burden of legislative reform, particularly on small criminalising states with limited capacity. This could be done via the Commonwealth which has experience in such technical exchange or through another similar body.
- Work with businesses to help them vocalise that criminalisation hinders their profitability, affects their investment decisions and worsens the broader economic climate in which they operate.
- Work with public health authorities and agencies to articulate that criminalisation is detrimental to public health. For example, national governments, the World Health Organisation and UNAIDS could do this alone or collectively.

⁹ In the summer of 2015, the Human Dignity Trust consulted civil society in the UK and overseas on whether the UK Government should appoint a Special Envoy. Of the responses received during the consultation period, 69% supported the proposal, 23% were neutral, and 8% did not support.

The importance of external pressure

26. We strongly emphasise that the history of decriminalisation shows that external influence is crucial to bring about change. Since 1981, 49 countries have decriminalised. The majority did so due to the pressure of international organisations (in most instances being the Council of Europe), legal determinations under international law (at the European Court of Human Rights or the Human Rights Committee), or due to technical assistance from international organisations (such as guidance from UNAIDS and the WHO).

27. If the international community had remained silent in these instances, the current situation would be far graver. Most likely more than 78 jurisdictions would continue to criminalise today. History tells us that progress is possible, but only with ongoing, deliberate efforts from the international community.



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**HUMAN
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TRUST**

Criminalising Homosexuality and Democratic Values

Democracy is of course about votes and elections – but it is also about far more than that. What we in Europe have learned the hard way is that we need “deep democracy”: respect for the rule of law, freedom of speech, respect for human rights, an independent judiciary and impartial administration.

Catherine Ashton, EU High Representative for Foreign Affairs and Security Policy and Vice President of the European Commission, 11 May 2011¹

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¹ Available at: http://europa.eu/rapid/press-release_SPEECH-11-326_en.htm

Overview

01. Democracy and human rights are intrinsically linked. The former cannot exist in its true form without the latter, and vice versa. Where democracy is lacking human rights are violated; where human rights are violated democratic values are undermined. This note demonstrates, via data and case studies, the link between democracy and the treatment of lesbian, gay, bisexual and transgender (LGBT) people. These data and case studies show that LGBT people are most likely to be criminalised where democracy is weak, that LGBT rights and democracy take root together, and that society turning its back on LGBT rights is a signal that democracy is in retreat. These case studies also provide examples of how progressing LGBT rights assists democracy to take root, and vice versa. Wherever stakeholders are attempting to foster democracy, LGBT rights and in particular the decriminalisation of homosexuality must be an integral part of that programme.

The meaning of democracy

02. Democracy literally means 'rule by the people'. The constituent parts of democracy are somewhat open to debate. It is clear, however, that democracy requires more than universal suffrage. At a basic level, we can define democracy as a combination of political equality and popular control.

03. Democracy requires that there are some basic democratic and participatory rights that no government is entitled to remove, including:

- Protection from discrimination.
- Notions of privacy.
- The right to practise one's own religion.
- Freedom of expression.
- Freedom of association.
- Freedom of assembly.

04. There is a relationship between democracy and human rights, which, as the British social theorist David Beetham explained:

“ human rights constitute an intrinsic part of democracy, because the guarantee of basic freedoms is a necessary condition for the people's voice to be effective in public affairs.²

05. Yet, democracy and human rights are distinct, as majority rule does not necessarily protect human rights. As the US Supreme Court neatly captured:

“ [T]o withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. [Human rights] may not be submitted to vote; they depend on the outcome of no elections.³

06. This note will draw particular attention to the rights to freedom of expression and association, the exercise of which allow citizens to give and receive information, thus enabling a meaningful exercise of collective decision-making.

Evidencing the link between criminalisation and failed democracy

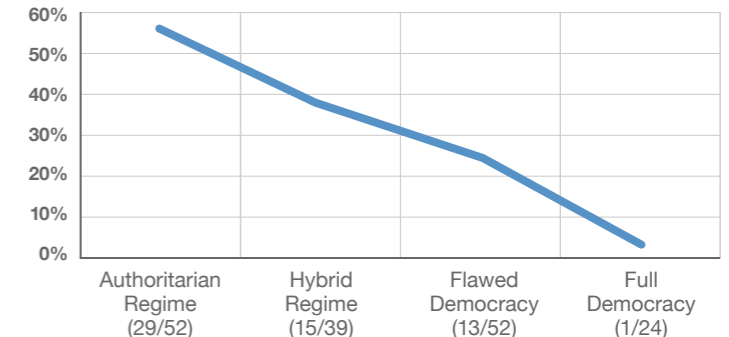
07. There are 78 jurisdictions that currently criminalise consensual same-sex intimacy. As demonstrated below, there is a direct correlation between the lack of democratic credentials and the propensity of a jurisdiction to criminalise. Appendix 1 to this note lists the criminalising jurisdictions in order of their democratic rating, as determined by the Economist Intelligence Unit in its 2014 survey of 167 independent states.⁴ The survey assessed democratic credentials against measures that capture many of the elements of democracy alluded to above: electoral process and pluralism, functioning of government, political participation, political culture and civil liberties. The survey classified countries into four regime types:

- Authoritarian Regime.
- Hybrid Regime.
- Flawed Democracy.
- Full Democracy.

08. 57 of the 78 criminalising countries were surveyed (the remaining 21 are mainly micro states). The link between criminalisation and an absence of democracy is striking. Of these 57 criminalising countries, over half (29) were classed as Authoritarian Regimes. Only one was deemed a Full Democracy (Mauritius, which scraped in towards the bottom of this top category).

09. Approaching this data another way, the survey identified 52 Authoritarian Regimes among the 167 states surveyed. Of these 52, 29 (56%) criminalise consensual same-sex intimacy. Of the 39 Hybrid Regimes identified, 15 (38%) criminalise. Of the 52 Flawed Democracies identified, 13 (25%) criminalise. Of the 24 Full Democracies identified, 1 (4%) criminalises. It is evident that properly functioning democracies do not criminalise consensual same-sex intimacy. As democracy improves, the propensity to criminalise falls. Further, criminalisation is a proxy indicator for a lack of democracy. These figures, and the direct correlation, are captured graphically below:

Propensity to criminalise consensual same-sex intimacy by regime type



² Beetham, D., 'Human Rights and Democracy', *Democracy and Human Rights*.

³ Justice Jackson of the United States Supreme Court in *West Virginia State Board of Education v. Barnette* 319 US (1943) 624, 638.

⁴ The Economist Intelligence Unit, *Democracy Index 2014*. Available at: http://www.eiu.com/public/topical_report.aspx?campaignid=Democracy0115

Democracy and LGBT rights flourish or fail together

10. The promotion of democracy is the promotion of LGBT rights, and vice versa. Where democracy is taking root, LGBT rights progress. Where democracy is stalling, LGBT rights are reduced. This sentiment was neatly captured by Freedom House, the New York-based democracy-focused NGO:

“Gay rights have flourished in the very places where the Third Wave has been most successful in establishing political freedoms, civil society, and the rule of law, as in Spain, South Africa, and much of Latin America. By contrast, gay rights have had a difficult time gaining any traction where the Third Wave made relatively few, if any, inroads, as in most parts of Africa and the Middle East, and in China... More telling, perhaps, are places where democratization has stalled, as in Russia. Gay rights got off to a promising start there in 1991, but faltered as progress toward democracy was reversed, and especially since Vladimir Putin’s return to the presidency in 2012, which ushered in severe new attacks on political and civil freedoms.”⁵

11. These example countries, and others, are explored in further detail below, and the ‘third wave’ is discussed in more detail at paragraph 23.

Where democracy instils, LGBT rights flourish: South Africa, Spain and the Council of Europe

12. When South Africa moved from apartheid to democracy, the position rapidly changed from gay men⁶ being ‘un-apprehended felons’ to full equality for LGBT people. This process arose largely due to the strong human rights protection in South Africa’s constitution, as interpreted by impartial courts. The timeline of the emergence of LGBT rights included the following events:

- 1994: South Africa’s first democratic election held.
- 1996: The Constitutional Court approved the Constitution of the Republic of South Africa.
- 1997: The Constitution took effect.
- 1998: The Constitutional Court struck down South Africa’s laws that criminalised consensual male same-sex intimacy.⁷
- 2002: Same-sex couples gained the ability jointly to adopt children, via the Constitutional Court striking down the statutory provision that limited joint adoption to married couples.⁸
- 2003: Parliament passed legislation that allows a person to change their publicly recorded sex.⁹

⁵ Encarnacion, O.G., Why Democracy Matters for Gay Rights, *Freedom House*, 22 September 2014. Available at: <https://freedomhouse.org/blog/why-democracy-matters-gay-rights#.VZ5w2-v4uFI>

⁶ Sex between women was never criminal, albeit where men, women or both are criminalised, all LGBT people face a persecutory environment. This is discussed in the other briefing notes in this series.

⁷ *National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others* (CCT11/98) [1998] ZACC 15.

⁸ *Du Toit and Another v. Minister for Welfare and Population Development and Others* (CCT40/01) [2002] ZACC 20.

⁹ *Alteration of Sex Description and Sex Status Act, 2003*, Act No. 49 of 2003.

2005: The Constitutional Court ruled that same-sex couples have the constitutional right to marry.¹⁰

2007: Parliament passed legislation to equalise the age of consent for heterosexual and homosexual sex (at 16 years old).¹¹

13. Similar events occurred after Spain transitioned from the dictatorship of General Francisco Franco to democracy:

- 1975: General Franco died.
- 1977: Spain joined the Council of Europe.
- 1978: The Spanish electorate voted in a referendum to adopt a new Spanish Constitution.
- 1979: Consensual same-sex sexual activity was legalised, and the age of consent was equalised.¹²
- 1986: Spain joined the European Union.
- 1996: A law prohibiting discrimination in employment based on sexual orientation was passed.¹³
- 2005: Same-sex marriage was legalised, and joint adoption permitted.¹⁴

14. The Republic of Ireland demonstrates a related pattern, albeit more nuanced:

1937: The Constitution of Ireland came into force after a national referendum. The Constitution is democratic, but recognised the ‘special position’ of the Catholic Church.

1949: Ireland joined the Council of Europe as a founding member.

1968: A free public secondary school service was introduced, breaking the Catholic Church’s near-monopoly on education.

1973: The Constitution’s provision on the ‘special position’ of the Catholic Church was removed.

1973: Ireland joined the European Union.

1977: Ireland’s laws that criminalise homosexuality were challenged in the domestic courts.¹⁵

1988: After domestic appeals were exhausted, the challenge was referred to the European Court of Human Rights in Strasbourg, which held that criminalising laws breach the right to privacy.¹⁶

1993: Ireland formally repealed its criminalising laws and equalised the age of consent.¹⁷

1999: A law prohibiting discrimination in employment based on sexual orientation was passed.¹⁸

2011: Civil partnership law came into force.¹⁹

2015: The Irish electorate voted in a referendum to amend the Constitution to allow same-sex marriage.

¹⁰ *Minister of Home Affairs and Another v. Fourie and Another* (CCT 60/04) [2005] ZACC 19.

¹¹ *The Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007* (Act No. 32 of 2007; also referred to as the Sexual Offences Act).

¹² International Lesbian and Gay Bisexual and Trans Association, *State-Sponsored Homophobia – A world survey of laws: Criminalisation, protection and recognition of same-sex love*, May 2013, 8th Edition, pp. 21 and 23, respectively. Available at: http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2013.pdf

¹³ *Ibid*, p. 25.

¹⁴ *Ibid*, pp. 30–32, respectively.

¹⁵ *Norris v. Attorney General* [1983] IESC 3.

¹⁶ *Norris v. Ireland* [1988] ECHR 22.

¹⁷ See n. 12, pp. 21–23.

¹⁸ *Ibid*, p. 25.

¹⁹ *Ibid*, p. 31.

15. The timelines above demonstrate that rapid change in LGBT rights occurs when genuine democracy takes hold in a state. Spain is perhaps the purest example of this, whereby democracy took root and quickly pervaded society, resulting not only in legal protection for LGBT people but also their ability to exercise that legal protection within an open and democratic civil society.
16. South Africa and Ireland provide more complex examples. South Africa's transition from apartheid to democracy allowed the swift incorporation of legal protection into South African law. These developments in South Africa are welcome and embraced. However, a number of challenges remain. LGBT people in South Africa still suffer egregious human rights violations, in particular lesbian women being subjected to so-called 'corrective rape'. These violations occur not due to the lack of legal protection or voting rights, but they are connected with poverty (an issue discussed in another briefing note in this series *Criminalising Homosexuality and LGBT rights in times of conflict, violence and natural disasters*). These continuing violations in post-apartheid South Africa show that democracy must pervade society for LGBT rights to be fully realised. Despite South Africa's enviable constitutional protection, it lags on the Economist Intelligence Unit's democracy rankings; in 2014 it was classed as a Flawed Democracy. For democracy and LGBT rights to be realised, more than black-letter legal protection is needed.
17. Whereas South Africa shows that a stratified society means unequal realisation of legal protection, Ireland demonstrates that majoritarian democracy does not necessarily result in freedoms for all. The vote of approval by the Irish people of the 1937 Constitution entrenched the influence of the Catholic Church into Irish politics, education and society. It was only after the link between church and state was broken that LGBT rights began to be recognised. For democracy and LGBT rights to be realised, more than majority consent is needed. Democracy is necessary for full enjoyment of LGBT rights, but it is not always sufficient. Change is multi-factorial. In Ireland democracy was in place, but it was only with the shedding of subservience to a homophobic faith tradition that the space for change created by democracy could be filled with LGBT rights.
18. Spain, South Africa and Ireland demonstrate, in different ways, that democracy is broader than one vote for each adult. Rather, democracy must be viewed as equal participation and equal recognition in ways that pervade state institutions and civil society more generally. US President, Barack Obama, recognised the importance of what he called 'inclusive democracy' during his 2015 annual address to the UN General Assembly.

As President Obama stated, an inclusive democracy includes LGBT rights:

“ I understand democracy is frustrating. ... But democracy – the constant struggle to extend rights to more of our people, to give more people a voice – is what allowed us to become the most powerful nation in the world. It's not simply a matter of principle; it's not an abstraction. Democracy – inclusive democracy – makes countries stronger. When opposition parties can seek power peacefully through the ballot, a country draws upon new ideas. When a free media can inform the public, corruption and abuse are exposed and can be rooted out...

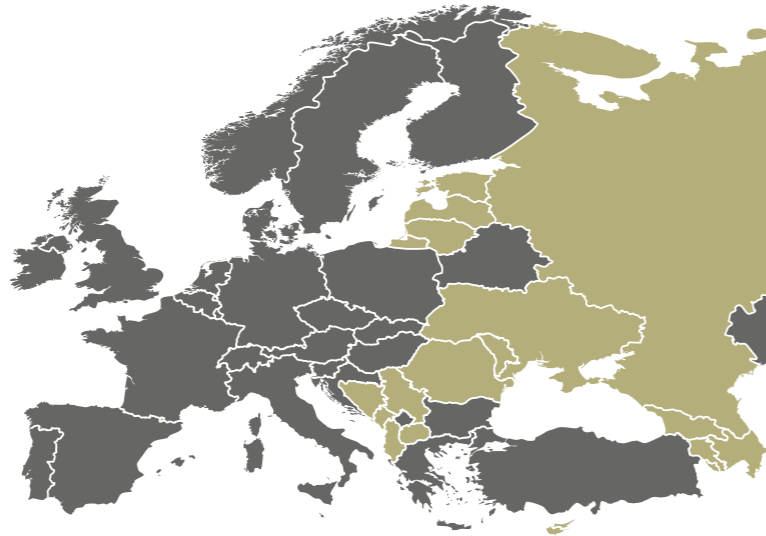
I believe that the fact that you can walk the streets of this city right now and pass churches and synagogues and temples and mosques, where people worship freely; the fact that our nation of immigrants mirrors the diversity of the world – you can find everybody from everywhere here in New York City – the fact that, in this country, everybody can contribute, everybody can participate no matter who they are, or what they look like, or who they love – that's what makes us strong.²⁰

19. It is within a genuine, one might say inclusive, democratic environment that LGBT rights take root. An early and crucial step in this journey is the decriminalisation of homosexuality.
20. The examples above looked at each country in isolation as if its journey to democracy and LGBT rights was self-contained. But this provides only part of the picture. The spread of democratic values by external actors has been crucial to the trend towards global decriminalisation, especially in Europe via the Council of Europe. The Council of Europe's values are: human rights, democracy, and the rule of law. It advocates '*freedom of expression and of the media, freedom of assembly, equality, and the protection of minorities*'.²¹ These are important values for the realisation of LGBT rights. All members must ratify the European Convention on Human Rights (ECHR), which is interpreted by the European Court of Human Rights in Strasbourg.²² Fundamental rights contained in the ECHR may, in certain circumstances, be curtailed if it is '*necessary in a democratic society*' and '*proportionate*' to do so. The case law of the Strasbourg Court and the work of the Council of Europe definitively show that it is not, and never can be, necessary in a democratic society to criminalise consensual same-sex intimacy.²³

²⁰ Barack Obama, *Remarks by President Obama to the United Nations General Assembly*, 28 September 2015. Available at: <https://www.whitehouse.gov/the-press-office/2015/09/28/remarks-president-obama-united-nations-general-assembly>

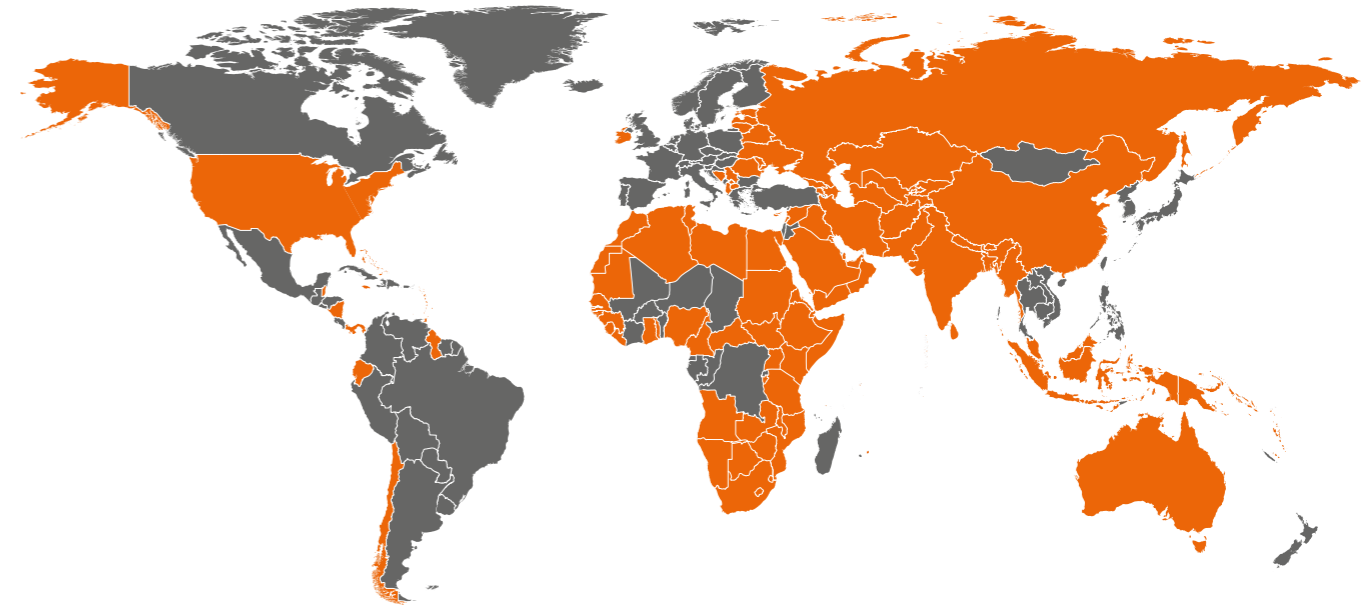
21. To join the Council of Europe, new member-states must undertake certain commitments, including conforming their criminal laws to the ECHR. As we know from the situation in Ireland described above, the ECHR right to privacy prohibits the criminalisation of homosexuality. By the time candidate states from Eastern Europe and the former Soviet bloc applied for membership of the Council of Europe, it was a condition of their accession to decriminalise.²⁴ By way of example, the following countries decriminalised at around the time they joined: Lithuania (joined the Council of Europe in 1993; decriminalised in 1993); Romania (1993; 1996), Ukraine (1995; 1991); Albania (1995; 1995), Macedonia FYROM (1995; 1996); Russia (1996; 1993), Bosnia and Herzegovina (2002; 1998-2001); Georgia (1999; 2000), Armenia (2001; 2003), Azerbaijan (2001; 2000).²⁵ The Council of Europe's efforts to spread democracy in Europe have resulted in Europe being the only criminalisation-free continent.

Council of Europe members to decriminalise since 1990

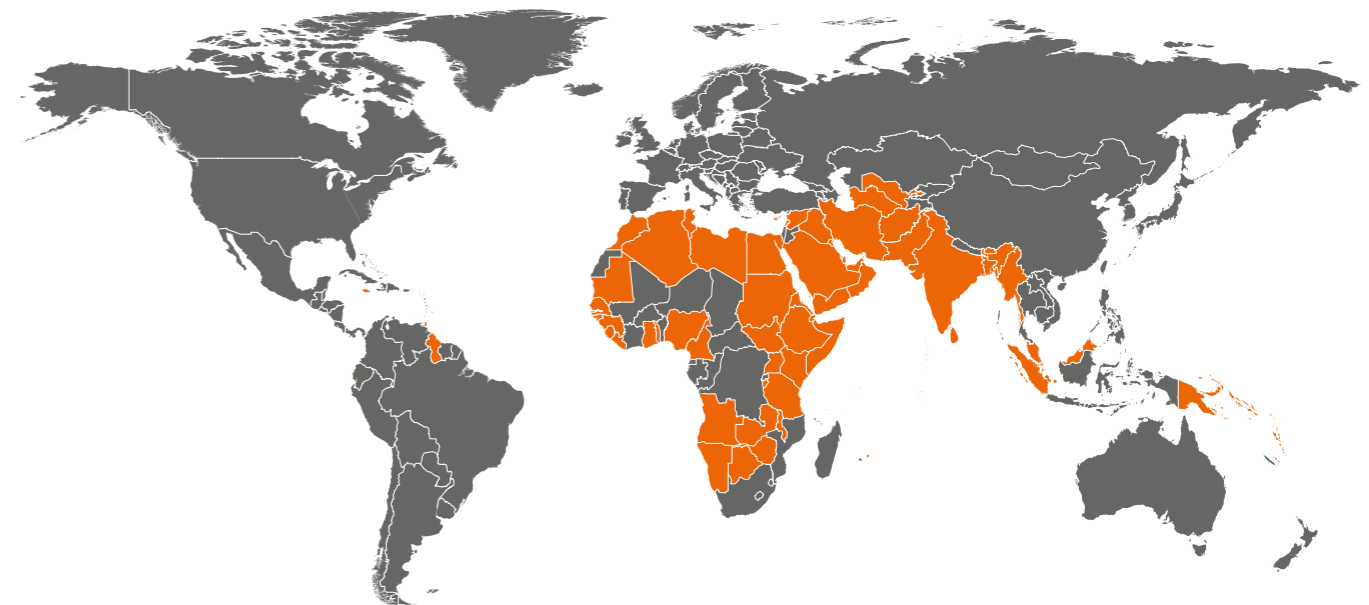


22. The link between the spread of democratic values and decriminalisation can be seen in the following two maps:

Criminalising countries in 1990



Criminalising countries in 2015



21 See: <http://www.coe.int/en/web/about-us/values>

22 See: <http://www.coe.int/en/web/about-us/who-we-are>

23 These issues, and related case law, are discussed in detail in other briefing notes in this series, *Criminalising Homosexuality and the Rule of Law* and *Criminalising Homosexuality and International Human Rights Law*.

24 Helfer, L.R., Voeten, E., *Do European Court of Human Rights Judgments Promote Legal and Policy Change?* 2011, p. 11. Available at SSRN: <http://ssrn.com/abstract=1850526> or doi:10.2139/ssrn.1850526, and *Opinion No. 176 (1993) on the Application by Romania for Membership of the Council of Europe*, para. 7.

25 For latter listed year, see ILGA at n. 12; for former listed year, see: <http://www.internationaldemocracywatch.org/index.php/council-of-europe->

23. The reference to the 'third wave' in the quote above at paragraph 10, is a reference to the so-called third wave of democracy that began in the mid-1980s as democracy spread first to the Philippines, South Korea and Taiwan, then to Eastern Europe and the ex-Soviet Union, and then to former dictatorships in Latin America. Countries that decriminalised since 1990 largely fall within the latter two of these groups in the third wave. It can be seen from the maps above, that as democracy spread to Eastern Europe, the ex-Soviet bloc and Latin America, the criminalisation of consensual same-sex intimacy came to an end in those regions. The two countries on continental America that continue to criminalise homosexuality are Belize and Guyana, both of which inherited Westminster-style democracy earlier than the third wave, but also inherited from Britain laws that criminalise homosexuality.

24. It is worth noting that in 1990 part of Australia (Tasmania), 24 States of the United States, and the Republic of Ireland still criminalised. The subsistence of these laws in developed democracies provides an important reminder that, although democracy is a crucial indicator of the treatment of LGBT people, the realisation of democratic values sometimes needs an external spark. In the case of each of these countries, the spark came from outside: for the United States it was a Federal Supreme Court decision that borrowed from the case law of the Strasbourg Court; for Australia it was a communication from the UN Human Rights Committee; and for Ireland it was a decision of the Strasbourg Court.²⁶

25. Additionally, it is worth noting that China decriminalised in this period. In 1997 China's 'hooliganism' laws were repealed, which are believed to have criminalised homosexuality.²⁷ Unlike in the countries discussed above, since 1997 there has been no furtherance in China of the legal protection granted to LGBT people.

26. The remainder of this note focuses on up-to-date examples of countries where LGBT rights have progressed or, conversely, slid backwards. In the last two years, seven countries have experienced legislative change or court judgments that have affected the most fundamental rights of LGBT people. These countries are: Kenya, Botswana, Uganda, Russia, The Gambia, Nigeria and Mozambique. The outcome for the LGBT community directly correlates with the health of democracy in these countries.

The green shoots of LGBT rights are a sign that democracy is succeeding: Kenya and Botswana

27. Both Kenya and Botswana continue to criminalise consensual same-sex intimacy, but recently their courts have upheld basic human rights for LGBT people.

28. In Kenya, the claim related to the refusal of the Non-Governmental Organisations Co-ordination Board (NGO Board) to register an organisation with the phrase '*Gay and Lesbian Human Rights*' as its proposed registered names. The NGO Board refused on the basis that applications lawfully can be rejected if '*such name is in the opinion of the director repugnant to or inconsistent with any law or is otherwise undesirable*'. As the Kenyan Penal Code outlaws same-sex intimacy, this criterion was, in the view of the NGO Board, engaged.

29. The NGO Board's decision was challenged in the High Court of Kenya, on the basis that LGBT people enjoy protection under the Kenyan Constitution to freedom of association and non-discrimination. In April 2015, the High Court held that LGBT people do indeed enjoy the constitutional right to free association. Encouragingly, the court also held that the Kenyan Constitution's non-discrimination clause implicitly protects against discrimination on the ground of 'sexual orientation'. This is a major step forward for LGBT rights in Kenya and the region in general. Like most constitutions and human rights treaties, 'sexual orientation' is not expressly listed in the Kenyan Constitution's non-discrimination clause. The absence of express protection has provided cover for many criminalising countries to claim that criminalisation is compatible with human rights law. However, the Kenyan High Court's decision falls into line with the approach of courts around the world by its conclusion that 'sexual orientation' is implicitly protected. The NGO Board's decision to refuse the registration was held to be unconstitutional.²⁸

²⁶ The role of international organisations is discussed in further detail in another note in this series, *Criminalising Homosexuality and Working Through International Organisations*.

²⁷ Kang, W., in *China in and Beyond the Headlines*, Weston, T.B. and Jensen, L.M., (eds), 2012, p. 230.

²⁸ *Eric Gitari v. NGO Board & 4 others*, [2015], Petition 440 of 2013, The High Court of Kenya at Nairobi.

30. Botswana's High Court reached a similar judgment in similar circumstances, where the Minister of Labour and Home Affairs refused to register as a society an organisation named Lesbians, Gays and Bisexuals of Botswana (LEGABIBO). Registration could lawfully be refused if the society 'is likely to be used for any unlawful purpose'. LEGABIBO has as one of its purposes 'political lobbying for equal rights and decriminalization of same sex relationships'. The judge held that:

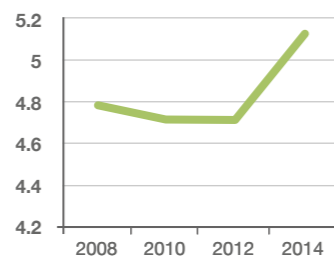
“ It is in fact common in many democratic countries that lobby groups for various courses operate freely and lawfully for causes, such as; decriminalisation of abortion in certain circumstances, decriminalisation of consumption of drugs (such as Marijuana) decriminalisation of prostitution. ... In a democratic society asking for a particular law to be changed is not a crime, neither is it incompatible with peace and welfare and good order.²⁹

31. The Botswanan High Court held that LGBT people enjoy the same fundamental rights as others under the Botswanan Constitution, and concluded that the refusal to register infringed the constitutional rights to freedom of expression, assembly and association.³⁰ These 'green shoots' of LGBT rights are greatly welcome. Free expression, assembly and association are absolutely necessary for activists to vocalise their rights, including the basic right not to be criminalised.

32. It is difficult to establish a direct link between these specific events in Kenya and Botswana and the health of democracy. However, Kenya and Botswana are two countries whose democratic credentials have improved in recent years according to the Economist Intelligence Unit's *Democracy Index*. Appendix 2 provides data on these countries, which are plotted in the charts below:

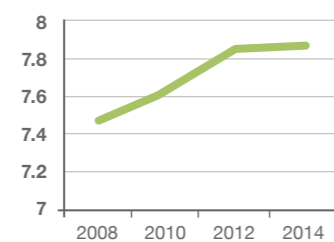
Kenya

Democratic credentials over time



Botswana

Democratic credentials over time



33. Between 2008 to 2014, Botswana steadily increased its ranking. It remained a Flawed Democracy throughout, yet it now ranks ahead of Italy and just four places short of being a Full Democracy.³¹ In the same period, Kenya climbed from rank 103 to rank 97, remaining in the Hybrid Regime category, but with steep progress being made between the surveys of 2012 and 2014.

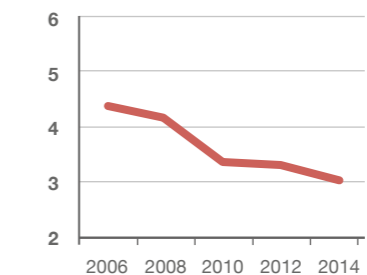
34. A more curious example is that of Uganda, whose democratic credentials have been tested by a series of legislative proposals that would operate to curtail severely the rights of LGBT people. Uganda's democracy score steadily improved between 2008 and 2012 from 5.03 to 5.22. At the same time, Uganda's legislature passed the *Anti-Homosexuality Act* in December 2013, which was signed into law by President Yoweri Museveni in February 2014. Among other new offences, the *Anti-Homosexuality Act* included an offence of 'aggravated homosexuality' and criminalised the 'promotion of homosexuality'.³² This Act was passed without the requisite quorum required under the Ugandan Constitution. The passage of the *Anti-Homosexuality Act* is a worrying anti-democratic trend, as is the fact that the Speaker allowed it to proceed without Parliament being quorate. But, Uganda's legal framework proved itself to be sufficiently robust for the Constitutional Court to annul the Act due to lack of quorum.

Retreating freedoms for LGBT people is a sign that democracy is failing: The Gambia and Russia

35. Conversely, where democracy retreats, the rights of LGBT people suffer. Our two example countries are The Gambia and Russia, both of which have passed new anti-gay laws within the last two years. These two countries have experienced a dramatic decline in their democratic credentials, according to the Economist Intelligence Unit's surveys, as plotted below (with full data in Appendix 2):

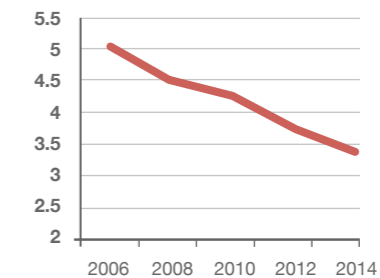
The Gambia

Democratic credentials over time



Russia

Democratic credentials over time



²⁹ *Thuto Rammogae & others v. the Attorney General of Botswana*, MAHGB-000175-13, paras. 21 and 23.

³⁰ *Ibid*, para. 34.

³¹ The Economist Intelligence Unit, *Democracy Index 2014*. Available at: http://www.eiu.com/public/topical_report.aspx?campaignid=Democracy0115 and, The Economist Intelligence Unit, *Democracy Index 2008*. Available at: <http://graphics.eiu.com/PDF/Democracy%20Index%202008.pdf>

³² More information is available on our website at: <http://www.humandignitytrust.org/pages/OUR%20WORK/Briefings>

36. In 2006, The Gambia was ranked number 108 by the Economist Intelligence Unit's survey and classed as a Hybrid Regime. Since that time, it has fallen down the rankings to position number 141 and is now classed as an Authoritarian Regime.³³ Likewise, Russia has fallen from rank 102 with Hybrid Regime status to 132 and Authoritarian Regime status. In the same period, the governments of The Gambia and Russia have taken active steps by passing legislation aimed at curtailing LGBT rights and the LGBT identity.
37. The Gambia, like many former British colonies, inherited anti-sodomy and gross indecency laws during its colonial history. The Gambia, however, has gone further when, on 9 October 2014, President Yahya Jammeh signed his assent to the *Criminal Code (Amendment) Act, 2014*. This Act introduces new offences described as 'aggravated homosexuality'. These offences attract a life sentence, up from the 14 years in the colonial-era laws. Aggravated homosexuality includes, *inter alia*, 'serial offenders' and when the 'offender is a person living with HIV Aids'.³⁴ These offences apply when the conduct is consensual.

38. This new law was passed at a time when President Jammeh publicly incited violence against LGBT people. In a speech on state television to mark the 49th anniversary of The Gambia's independence from Britain, he said:

“ We will fight these vermins called homosexuals or gays the same way we are fighting malaria-causing mosquitoes, if not more aggressively... As far as I am concerned, LGBT can only stand for Leprosy, Gonorrhoea, Bacteria and Tuberculosis; all of which are detrimental to human existence.³⁵

39. The Gambia is one of only two countries that has passed and retained enhanced criminalising laws. The other is Nigeria, with its *Same-Sex Marriage (Prohibition) Act, 2013*, which goes much further than its name suggests. This Act not only prohibits marriage, but also outlaws the registration of gay clubs, societies and organisations; the public showing of same-sex amorous relationships directly or indirectly; and same-sex couples living together.³⁶ This new legislation attempts to completely eradicate the LGBT identity. Perhaps unsurprisingly, it originates from a country that is consistently classed as an Authoritarian Regime (see Appendix 2).

40. Russia's slide to authoritarianism has also been accompanied by the passing of new laws to restrict the ability of LGBT people to exercise their rights. In Russia consensual same-sex intimacy is not a criminal offence; if it were Russia would lose its membership of the Council of Europe. President Vladimir Putin's regime, however, has passed a new administrative law to harass the LGBT community. On 29 June 2013, amendments to the federal law 'On the Protection of Children From Information Liabile to be Injurious to their Health and Development' were signed into force by President Putin. Russian federal law now prohibits any form of expression of homosexuality (referred to as 'non-traditional sexual values' and 'information promoting non-traditional sexual relations') to minors. Those who breach this legislation face a fine.
41. This new law severely restricts the freedom of expression and association of LGBT people. With this law in force, it is an administrative offence to live in Russia as an openly LGBT person. In theory, the law technically is not a criminal law and no custodial sentence is provided for, but non-payment of the administrative fine can result in a prison sentence. This legislation in effect re-criminalises homosexuality in Russia and represents a huge step backwards on the continent where democracy offers a bulwark against state-sponsored homophobia. Other countries

are considering passing similar laws, for example Ukraine, Moldova and Kyrgyzstan. There is hope that this development will be short-lived in Europe, as a similarly worded regional law is currently the subject of a claim at the Strasbourg Court against Russia for breaching its obligations to allow freedom of expression and to prohibit discrimination, and the court may have to determine whether this law amounts to re-criminalisation.³⁷ This decision will have repercussions in other Council of Europe member states, but not Central Asia.

42. Our final country to have experienced a change in LGBT rights via legislation or court judgment is Mozambique. Mozambique is the most recent country to decriminalise, which it did discreetly in June 2015 by its legislature passing a new penal code, thus erasing Mozambique's Portuguese-era law on 'vices against nature'. Mozambique's democratic credentials have been sliding backwards since 2006 (see Appendix 2). It remains to be seen whether decriminalisation is the first step towards Mozambique's reversing this backsliding or whether this is a one-off change.

³³ The Economist Intelligence Unit, *Democracy Index 2006*. Available at: http://www.economist.com/media/pdf/DEMOCRACY_TABLE_2007_v3.pdf

³⁴ *Criminal Code (Amendment) Act, 2014*, section 144A.

³⁵ 18 February 2014. Available at: <http://www.reuters.com/article/2014/02/18/us-gambia-homosexuality-idUSBREA1H1S820140218>

³⁶ *Same-Sex Marriage (Prohibition) Act, 2013*, sections 4(1) and (2).

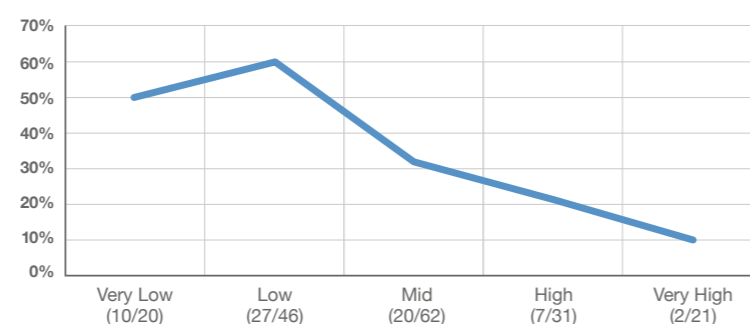
³⁷ *Bayev v. Russia*, Application no. 67667/09.

Freedom of the press and criminalisation

43. As referred to above, free expression, association and assembly are key ingredients in a democracy, which allow informed collective decision-making. A free press enables these rights and thus enables a vibrant democracy. As shown by the data below, there is a direct link between the freedom of the press and the propensity to criminalise consensual same-sex intimacy. The significance of this is two-fold: the lack of a free press indicates a lack of democracy, which in turn creates an oppressive environment for LGBT people, and a free and vibrant media is a key ingredient in nurturing basic rights including the decriminalisation of homosexuality.
44. Appendix 3 to this note lists the criminalising jurisdictions in order of their press freedom rankings determined by Reporters Without Borders' survey in 2015 of 180 states.³⁸ The survey colour-codes countries into five types, which we describe below as:
- Very Low Press Freedom.
 - Low Press Freedom.
 - Mid Press Freedom.
 - High Press Freedom.
 - Very High Press Freedom.

45. A total of 66 criminalising states were surveyed. The link between criminalisation and press freedom is, again, striking. Of these 66 criminalising states, over half (37) had Low Press Freedom or Very Low Press Freedom. Only two criminalising states (Namibia and Jamaica) were classed as having Very High Press Freedom.
46. Approaching this data another way, the survey identified 20 countries with Very Low Press Freedom among the 180 surveyed. Of these 20, 10 (50%) criminalise consensual same-sex intimacy. Of the 46 with Low Press Freedom, 27 (59%) criminalise. Of the 62 with Mid Press Freedom, 20 (32%) criminalise. Of the 31 with High Press Freedom, 7 (22%) criminalise. Of the 21 with Very High Press Freedom, only two (9.5%) criminalise. These figures, and a near direct correlation, are shown graphically below:

Propensity to criminalise consensual same-sex intimacy against freedom of the press



47. Botswana, Belize and Jamaica are among the best ranking countries among those that criminalise (Appendix 3). Botswana is discussed above. In May 2013, the Belizean Courts heard a constitutional challenge to Belize's laws that criminalise consensual same-sex intimacy. Judgment is pending. The free press played a vibrant role during the time of the litigation, sparking a public debate on the issue of criminalisation. Jamaica provides another example of the potential power of a free press to assist the pursuit of democratic aims. Jamaica's legislature has taken steps to lock-in its laws that criminalise homosexuality. In 2011, Jamaica's Parliament amended the Constitution to dis-apply constitutional human rights protection to Jamaica's sexual offences laws, including those that criminalise homosexuality. The effect of the amendment is to bar LGBT people from the same constitutional protection enjoyed by heterosexual people on matters of sexual intimacy.³⁹ This amendment has serious rule of law consequences, as discussed in more detail in another note in this series, *Criminalising Homosexuality and the Rule of Law*. However, Jamaica enjoys Very High Press Freedom (ranked 17th globally). The press has been able to discuss LGBT rights and question politicians' stance on the matter,⁴⁰ and very recently LGBT people have been allowed to organise a gay pride event.⁴¹

48. A free press can help sow the first seeds of change, which may later lead to decriminalisation and fuller rights for LGBT people. Forthcoming events in Belize and Jamaica may evidence this.

³⁸ Available at: <https://index.rsf.org/#/>

³⁹ *The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011* repealed and substituted Chapter III of the Constitution (Charter of Fundamental Rights and Freedoms). The new Chapter III continues to protect fundamental rights, such as privacy and equality. Yet, it includes a new section 13(12) that states: 'Nothing contained in or done under the authority of any law in force immediately before the commencement of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011, relating to – (a) sexual offences; (b) obscene publications; or (c) offences regarding the life of the unborn, shall be held to be inconsistent with or in contravention of the provisions of this Chapter.'

⁴⁰ For instance, in: http://www.jamaicaobserver.com/news/LGBT-issues-raise-new-challenges-for-Jamaica-_19000791

⁴¹ See: <http://www.theguardian.com/world/2015/aug/10/jamaica-first-gay-pride-celebration-symbol-change>

Conclusions

49. The above data and case studies on LGBT rights give colour to a commitment to democracy. Human rights and democratic credentials are intrinsically linked. The treatment of LGBT people is a test for democracy. Where democracy properly takes root, LGBT rights progress, as was seen in South Africa and Spain. There are encouraging signs that nascent democratic reforms in Kenya and Botswana are bettering the position of LGBT people. These green shoots of democracy should be nurtured, and other countries encouraged to follow suit. Where democracy is in retreat, LGBT rights suffer, as is being seen in The Gambia and Russia. Where democracy is already absent, LGBT rights suffer further, as is being seen in Nigeria.

50. Protecting LGBT rights is integral to democratic values and the foreign governments' aim to promote these values. Democracy cannot be encouraged without LGBT rights being a part of the dialogue of democracy.

Appendix 1: democratic rating of each criminalising country

Democratic credentials of the jurisdictions that criminalise consensual same-sex intimacy.⁴²

Economist Intelligence Unit, *Democracy Index 2014*

State	Democratic Rating	Rank	Status
1. Syria	1.74	163	Authoritarian Regime
2. Saudi Arabia	1.82	161	Authoritarian Regime
3. Turkmenistan	1.83	160	Authoritarian Regime
4. Iran	1.98	158	Authoritarian Regime
5. Eritrea	2.44	155	Authoritarian Regime
6. Uzbekistan	2.45	154	Authoritarian Regime
7. Sudan	2.54	153	Authoritarian Regime
8. United Arab Emirates	2.64	152	Authoritarian Regime
9. Afghanistan	2.77	151	Authoritarian Regime
10. Zimbabwe	2.78	150	Authoritarian Regime
11. Yemen	2.79	149	Authoritarian Regime
12. Guinea	3.01	143	Authoritarian Regime
13. The Gambia	3.05	141	Authoritarian Regime
14. Myanmar (Burma)	3.05	141	Authoritarian Regime
15. Swaziland	3.09	140	Authoritarian Regime
16. Oman	3.15	139	Authoritarian Regime
17. Egypt	3.16	138	Authoritarian Regime
18. Qatar	3.18	136	Authoritarian Regime
19. Burundi	3.33	134	Authoritarian Regime
20. Angola	3.35	133	Authoritarian Regime
21. Cameroon	3.41	130	Authoritarian Regime
22. Togo	3.45	129	Authoritarian Regime
23. Comoros	3.52	127	Authoritarian Regime
24. Ethiopia	3.72	124	Authoritarian Regime
25. Nigeria	3.76	121	Authoritarian Regime
26. Kuwait	3.78	120	Authoritarian Regime
27. Libya	3.80	119	Authoritarian Regime
28. Algeria	3.83	117	Authoritarian Regime
29. Morocco	4.00	116	Authoritarian Regime
30. Mauritania	4.17	112	Hybrid Regime
31. Iraq (status unclear)	4.23	111	Hybrid Regime
32. Sierra Leone	4.56	109	Hybrid Regime
33. Pakistan	4.64	108	Hybrid Regime
34. Gaza (Occupied Palestinian Territory)	4.72	106	Hybrid Regime
35. Bhutan	4.87	102	Hybrid Regime
36. Liberia	4.95	101	Hybrid Regime
37. Lebanon	5.12	98	Hybrid Regime
38. Kenya	5.13	97	Hybrid Regime
39. Uganda	5.22	96	Hybrid Regime

⁴² The Economist Intelligence Unit, *Democracy Index 2014*.

Economist Intelligence Unit, *Democracy Index 2014*

State	Democratic Rating	Rank	Status
40. Malawi	5.66	89	Hybrid Regime
41. Sri Lanka	5.69	87	Hybrid Regime
42. Tanzania	5.77	86	Hybrid Regime
43. Bangladesh	5.78	85	Hybrid Regime
44. Guyana	5.91	78	Hybrid Regime
45. Papua New Guinea	6.03	75	Flawed Democracy
46. Singapore	6.03	75	Flawed Democracy
47. Senegal	6.15	74	Flawed Democracy
48. Namibia	6.24	73	Flawed Democracy
49. Tunisia	6.31	70	Flawed Democracy
50. Ghana	6.33	68	Flawed Democracy
51. Zambia	6.39	67	Flawed Democracy
52. Malaysia	6.49	65	Flawed Democracy
53. Indonesia (South Sumatra and Aceh Province)	6.95	49	Flawed Democracy
54. Trinidad & Tobago	6.99	48	Flawed Democracy
55. Jamaica	7.39	43	Flawed Democracy
56. Botswana	7.87	28	Flawed Democracy
57. India	7.92	27	Flawed Democracy
58. Mauritius	8.17	17	Full Democracy

Appendix 2: tracking LGBT rights and democracy 2006 to 2014

Shifting democratic credentials of selected countries where the legislature or the courts have been active on fundamental rights for LGBT people⁴³

Economist Intelligence Unit *Democracy Index*, scores 2006 to 2014

Country	2006	2008	2010	2012	2014
Kenya	5.08 (Hybrid)	4.79 (Hybrid)	4.71 (Hybrid)	4.71 (Hybrid)	5.13 (Hybrid)
Botswana	7.60 (Flawed)	7.47 (Flawed)	7.63 (Flawed)	7.85 (Flawed)	7.87 (Flawed)
Uganda	5.14 (Flawed)	5.03 (Hybrid)	5.05 (Hybrid)	5.16 (Hybrid)	5.22 (Hybrid)
The Gambia	4.39 (Hybrid)	4.19 (Hybrid)	3.38 (Authoritarian)	3.31 (Authoritarian)	3.05 (Authoritarian)
Russia	5.02 (Hybrid)	4.48 (Hybrid)	4.26 (Hybrid)	3.74 (Authoritarian)	3.39 (Authoritarian)
Nigeria	3.52 (Authoritarian)	3.53 (Authoritarian)	3.47 (Authoritarian)	3.77 (Authoritarian)	3.76 (Authoritarian)
Mozambique	5.28 (Hybrid)	5.49 (Hybrid)	4.99 (Hybrid)	4.88 (Hybrid)	4.66 (Hybrid)

⁴³ The Economist Intelligence Unit, *Democracy Indices 2006, 2008, 2010, 2012 and 2014*.

Appendix 3: press freedom rating of each criminalising country

Press freedom of the jurisdictions that criminalise consensual same-sex intimacy.⁴⁴

Reporters Without Borders, *World Press Freedom Index 2015*

State	Press Freedom Rating	Rank	Status
1. Eritrea	84.86	180	Very Low Freedom
2. Turkmenistan	80.83	178	Very Low Freedom
3. Syria	77.29	177	Very Low Freedom
4. Somalia	75.31	172	Very Low Freedom
5. Sudan	72.34	174	Very Low Freedom
6. Iran	72.32	173	Very Low Freedom
7. Yemen	66.36	168	Very Low Freedom
8. Uzbekistan	61.14	166	Very Low Freedom
9. Sri Lanka	60.28	165	Very Low Freedom
10. Saudi Arabia	59.41	164	Very Low Freedom
11. Pakistan	50.46	159	Low Freedom
12. Egypt	50.17	158	Low Freedom
13. Iraq (status unclear)	47.76	156	Low Freedom
14. Swaziland	47.28	155	Low Freedom
15. Libya	45.99	154	Low Freedom
16. Singapore	45.87	153	Low Freedom
17. The Gambia	44.5	151	Low Freedom
18. Malaysia	43.29	147	Low Freedom
19. Bangladesh	42.95	146	Low Freedom
20. Burundi	42.93	145	Low Freedom
21. Myanmar (Burma)	42.08	144	Low Freedom
22. Ethiopia	41.83	142	Low Freedom
23. Gaza (Occupied Palestinian Territory)	41.01	140	Low Freedom
24. Indonesia (South Sumatra and Aceh Province)	40.75	138	Low Freedom
25. India	40.49	136	Low Freedom
26. Cameroon	39.63	133	Low Freedom
27. Zimbabwe	39.19	131	Low Freedom
28. Morocco	39.19	130	Low Freedom
29. Oman	38.83	127	Low Freedom
30. Tunisia	38.68	126	Low Freedom
31. South Sudan	38.04	125	Low Freedom
32. Angola	37.84	123	Low Freedom
33. Afghanistan	37.44	122	Low Freedom
34. Brunei	36.76	121	Low Freedom
35. United Arab Emirates	36.73	120	Low Freedom
36. Algeria	36.63	119	Low Freedom
37. Qatar	35.35	115	Low Freedom
38. Zambia	34.35	113	Mid Freedom
39. Maldives	34.32	112	Mid Freedom

⁴⁴ Reporters Without Borders, *2015 World Press Freedom Index*. Available at: <https://index.rsf.org/#/>

Appendix 3: press freedom rating of each criminalising country

Press freedom of the jurisdictions that criminalise consensual same-sex intimacy:⁴⁵

Reporters Without Borders, World Press Freedom Index 2015

State	Press Freedom Rating	Rank	Status
40. Nigeria	34.09	111	Mid Freedom
41. Bhutan	32.65	104	Mid Freedom
42. Guinea	32.56	102	Mid Freedom
43. Kenya	32.07	100	Mid Freedom
44. Lebanon	31.81	98	Mid Freedom
45. Uganda	31.65	97	Mid Freedom
46. Seychelles	31.55	96	Mid Freedom
47. Kuwait	30.84	90	Mid Freedom
48. Liberia	30.78	89	Mid Freedom
49. Togo	28.5	80	Mid Freedom
50. Sierra Leone	28.47	79	Mid Freedom
51. Tanzania	28.09	75	Mid Freedom
52. Senegal	27.77	71	Mid Freedom
53. Mauritius	27.69	68	Mid Freedom
54. Guyana	27.21	62	Mid Freedom
55. Malawi	26.41	59	Mid Freedom
56. Papua New Guinea	25.87	56	Mid Freedom
57. Mauritania	25.27	55	Mid Freedom
58. Comoros	24.52	50	High Freedom
59. Trinidad & Tobago	23.39	41	High Freedom
60. Tonga	23.37	44	High Freedom
61. Botswana	22.91	42	High Freedom
62. Samoa	22.32	40	High Freedom
63. Belize	18.54	30	High Freedom
64. Ghana	15.5	22	High Freedom
65. Namibia	12.5	17	Very High Freedom
66. Jamaica	11.18	9	Very High Freedom

⁴⁵ Reporters Without Borders, 2015 World Press Freedom Index. Available at: <https://index.rsf.org/#/>

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**HUMAN
DIGNITY
TRUST**

Criminalising Homosexuality and the Rule of Law

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.

Preamble to the Universal Declaration of Human Rights, 1948

This is one in a series of notes produced for the Human Dignity Trust on the criminalisation of homosexuality and good governance. Each note in the series discusses a different aspect of policy that is engaged by the continued criminalisation of homosexuality across the globe.

The Human Dignity Trust is an organisation made up of international lawyers supporting local partners to uphold human rights and constitutional law in countries where private, consensual sexual conduct between adults of the same sex is criminalised. We are a registered charity no.1158093 in England & Wales. All our work, whatever country it is in, is strictly not-for-profit.

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Foreword, by Sir Jeffrey Jowell QC

Democracy, human rights and the rule of law constitute the three interlocking parts of the constitutional structure that ensures equal respect for human dignity in any society. Democracy requires representative government. But even a fairly elected government should not be able to invade an individual's human rights. The rule of law allows access to those rights (which otherwise could exist on paper alone), through fair trials before independent courts. Yet the rule of law does more work still, by requiring equal application of law, and that law itself should not be arbitrary, or arbitrarily applied.

This briefing note is original in that it looks at the criminalising of homosexuality through the prism of the rule of law. It would have been much easier simply to proclaim the criminalisation of homosexuality as an affront to liberty, equality or human dignity. The rule of law perspective, however, highlights just how making homosexuality a crime cuts against the grain of the rule of law as a pillar of a fair and accountable society. The briefing note therefore provides an intellectual framework for understanding why these laws are not only unjust to individuals but also an affront to a country's constitutional values.

The briefing note outlines a number of components (or 'ingredients' as Tom Bingham called them) of the rule of law and shows how criminalisation of homosexuality offends a number of them (such as inequality, arbitrariness, detention without reasonable justification, proportionality, and breach of international human rights standards). The content of the briefing note thus provides very useful practical support to those seeking to overturn existing laws.

As Vikram Seth has written about the criminalisation of homosexuality in India, a country which professes to observe democracy, human rights and the rule of law:

“ ...To undo justice, and to seek
To quash the rights that guard the weak –
...With specious reason and no rhyme.
This is the true unnatural crime.¹

Sir Jeffrey Jowell QC

Director of The Bingham Centre for The Rule of Law

¹ Seth, V., 'Through Love's Great Power', The New York Review of Books, 20 March 2014 Issue.

Overview

01. The criminalisation of consensual same-sex intimacy offends against the Rule of Law. From a procedural point of view, criminalisation means that rights granted to all citizens in national constitutions, domestic laws and via international treaty obligations are being dis-applied to the lesbian, gay, bisexual and transgender (LGBT) minority. From a substantive point of view, criminalisation is inconsistent with the human rights that should be present in a well-functioning domestic system, and which are indeed protected by the rights-based international system.
02. Where the Rule of Law is truly present, criminalisation will cease. Criminalisation is both symptomatic of a failure of the Rule of Law and indicative that efforts to instil the Rule of Law to a meaningful degree have failed to take root. Tackling the criminalisation of homosexuality is an integral part of wider efforts to instil and uphold the Rule of Law, to promote democracy, and to uphold universally recognised human rights.

The meaning of the Rule of Law

03. The term 'Rule of Law' was popularised in the 19th century by British jurist A.V. Dicey, who viewed it as one of two pillars of the constitution, alongside 'sovereignty'.² Today, the term Rule of Law is used to describe and assess the basic institutional frameworks for enforcing laws and dispensing justice.
04. Perhaps the quintessential modern description of the Rule of Law was provided by Tom Bingham, former Lord Chief Justice of England and Wales, who defined it as:
“ [A]ll persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.³
05. Lord Bingham elaborated by providing eight fundamental components of the Rule of Law:
 - a) The law must be accessible and so far as possible intelligible, clear and predictable.
 - b) Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion.
 - c) Equality before the law.
 - d) Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably.
 - e) The law must provide adequate protection of fundamental human rights.

² Dicey, A.V., *An Introduction to the Study of the Law of the Constitution*, 9th ed., 1945.

³ Bingham, T., *The Rule of Law*, 2010, p. 8.

- f) Means must be provided for resolving, without prohibitive cost or inordinate delay, *bona fide* civil disputes which parties are themselves unable to resolve.
 - g) Adjudicative procedures provided by the state should be fair.
 - h) The rule of law requires compliance by the state with its obligations in international law as well as in national law.⁴
06. Similar concepts exist such as *Rechtstaat* in German and *État de droit* in French. In 2011, the Council of Europe's Venice Commission set out to examine the similarity between these concepts and to provide a universal definition of the Rule of Law. The Venice Commission approved Lord Bingham's definition and set out in six elements the essence of the overlapping concepts found in different legal traditions:⁵
- a) Legality, including a transparent, accountable and democratic process for enacting law.
 - b) Legal certainty.
 - c) Prohibition of arbitrariness.
 - d) Access to justice before independent and impartial courts, including judicial review of administrative acts.
 - e) Respect for human rights.
 - f) Non-discrimination and equality before the law.
07. The Rule of Law is placed at the core of documents underpinning states and their institutions. For example, the term is used in international human rights instruments (such as the United Nations Universal Declaration of Human Rights), regional human rights treaties (such as the European Convention on Human Rights), written constitutions (such as South Africa's 1996 Constitution) and constitutional instruments (such as the UK's *Constitutional Reform Act, 2005*).
08. Lord Bingham's principles and the Venice Commission's elements offer a mixture of formalistic aspects to the Rule of law (such as legal certainty and equality before the law), and substantive elements (including the protection of human rights). Older commentaries on the Rule of Law often focused on the formalistic, but today the division between the formal and substantive is less important. It is clear that the Rule of Law requires more than a formalistic adherence to the laws and procedures that happen to be in force at a particular moment in time. The Rule of Law is not merely rule *by* law. Rather, it rejects arbitrary power, whatever its alleged source or justification. For the Rule of Law to be upheld, fundamental human rights must be respected. Sometimes these substantive rights must be interfered with, but the Rule of Law requires that interference may occur only when it is justified: necessary, proportionate and not arbitrary.

4 *Ibid.*

5 The European Commission for Democracy Through Law (Venice Commission), Report on the Rule of Law, adopted by the Venice Commission at its 8th plenary session 25–26 March 2011, paras. 36 and 41.

Criminalising homosexuality offends the Rule of Law

09. The Rule of Law alone is reason to object to the criminalisation of homosexuality. The Appendix to this briefing note addresses this through Lord Bingham's eight fundamental components of the Rule of Law, by showing how criminalisation offends against each of these. The Appendix also offers a few encouraging examples of LGBT rights taking root via adherence to these components of the Rule of Law.
10. In more general terms, most countries guarantee fundamental rights and freedoms in their domestic laws or via their treaty obligations. It is well established, from decisions of domestic, regional and international courts and tribunals that laws that criminalise consensual same-sex intimacy violate these rights.⁶ Therefore, applying the ordinary law of the land in force in most jurisdictions, the criminalisation of homosexuality must be held to be unlawful. At the domestic level, criminalisation breaches fundamental human rights, such as privacy, dignity and equality, contained in domestic law. At the international level, criminalisation is a breach of treaty obligations. Where criminalisation persists in parallel with these laws and obligations, the Rule of Law has failed.
11. The Rule of Law sits at the core of the Human Dignity Trust's purpose, namely to assist LGBT people challenge laws that criminalise consensual same-sex intimacy. We do not seek law reform, rather we seek the mere enforcement of existing rights possessed by LGBT people and other citizens alike. How our purpose intersects with the Rule of Law was considered by the English courts when granting us charitable status:
- “ [T]here is constitutional supremacy and a legitimate role for the court in interpreting and enforcing superior constitutional rights where the domestic law is thought to be in conflict with those rights.⁷
12. Our aim in supporting activists and their lawyers in seeking to overturn laws that criminalise homosexuality is to seek no more than to uphold existing laws and treaty obligations. The decriminalisation of homosexuality is the pursuit of the Rule of Law.
13. Other examples of how criminalisation offends against the Rule of Law include:
- a) **Inequality in the application of the law to LGBT people**, including the fundamental rights contained in constitutions and treaty obligations. Even where these rights are generally respected, the Rule of Law flounders if LGBT people do not enjoy these rights in the same manner as their heterosexual peers. LGBT people are not asking for any special rights, rather the application of existing rights.

6 For example, South Africa's Constitutional Court held that criminalisation is contrary to the rights to equality, privacy and dignity (*National Coalition for Gay and Lesbian Equality v. Minister of Justice* CCT 11/98 [1998] ZACC 15, paras. 27 and 32); the US Supreme Court held that criminalisation is contrary to the rights to equality and privacy (*Lawrence v. Texas* 539 US 558 (2003), pp.14, 15, 18); the European Court of Human Rights has determined that criminalisation *per se* is contrary to the right to privacy (e.g. *Norris v. Ireland* [1988] ECHR 22, para. 38), and that differing criminal laws for heterosexuals and homosexuals regarding ages of consent is contrary to the rights to equality (e.g. *L and V v. Austria*, Application No. 39392/98 para. 54); the Human Rights Committee determined that criminalisation is contrary to the rights to privacy and equality (*Toonen v. Australia*, Communication No. 488/1992, U.N. Doc-CCPR/C/50/D/488/1992 (1994), paras. 8.6 and 8.7).

7 *The Human Dignity Trust v. The Charity Commission for England and Wales*, First Tier Tribunal (Charity) General Regulatory Chamber, Appeal number: CA/2013/0013, para. 96.

b) **Criminalising laws persecute on the arbitrary basis of identity.** Laws that criminalise the physical acts of same-sex intimacy, in effect, criminalise the LGBT identity. LGBT people are often assumed to be criminals, placing them outside of other legal protection. Differential treatment must be grounded in legitimate aims, such as national security, health or morals, public safety, or the protection of rights of others. None of these justifications applies to the criminalisation of homosexuality so as to justify the disapplication of rights to LGBT people. Criminalisation is arbitrary.

c) **The arrest, detention and prosecution of LGBT people amounts to persecution.** LGBT people are singled out by reason of their identity. LGBT people are, and are viewed by the state and society as, un-apprehended felons. To use the full force of the state through the criminal law to target a defined group of people on the basis of their immutable identity amounts to inhuman and degrading treatment. There can be no justification for this.

d) Even if a justification could be found, any interference with the human rights of LGBT people on the basis of their sexual orientation or gender identity **needs to be necessary in a democratic society and proportionate.** The burden is on those interfering with LGBT people's human rights to justify the legality of their laws, actions or failure to act or protect. **Proportionality under such circumstances imposes a very exacting test.** Failure to meet this test is a failure of the Rule of Law. It can **never be necessary or proportionate to criminalise consensual sex between adults,** no matter what the supposed aim.

14. When one considers the substantive rights associated with the Rule of Law too, the case against criminalisation becomes even more compelling. The former United Nations Secretary-General, Kofi Annan, captured this in his definition of the Rule of Law:

“ **A principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.**⁸ (emphasis added)

15. These rights include privacy and dignity, equality and non-discrimination. The criminalisation of consensual same-sex intimacy is incompatible with these fundamental human rights norms.

Particularly relevant is the International Covenant on Civil and Political Rights (ICCPR), which with 168 state-parties is a lynchpin of the international human rights system.

The treaty body that interprets the ICCPR, the Human Rights Committee, has determined that criminalising homosexuality violates the right to privacy (Article 17(1) of the ICCPR), and that the right to non-discrimination (Article 26) protects against discrimination on the ground sexual orientation.⁹ The Human Rights Committee is not alone in its conclusion. The treaty bodies of the remaining core international human rights instruments also include the protection of sexual minorities in their work.¹⁰ Criminalisation is not compatible with the rights-based international system. Simply put, if a legal system is to adhere to the Rule of Law, it cannot have in its substance the criminalisation of consensual same-sex intimacy.

The arbitrariness of criminalisation: there can be no justification

16. An essential element of the Rule of Law is the absence of arbitrariness, both in terms of how the law is enforced and what the law attempts to regulate. For the state to regulate any aspect of a person's life there must be a justification and it must be necessary and proportionate to do so. This is captured by a quote from one of South Africa's leading public lawyers at the time the country moved from apartheid to democracy, and from rule by law to the Rule of Law:

“ **If the new Constitution is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to a culture of justification – a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired at its command.**¹¹ (emphasis added)

⁸ Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies (2004).

⁹ *Toonen*, at n. 6 above, paras. 8.6 and 8.7.

¹⁰ The Committee on Economic, Social and Cultural Rights determined that the phrase 'other status' in ICESCR Article 2(2) (equal protection/non-discrimination) implicitly includes sexual orientation (CESCR General Comment No. 20, UN-Doc-E/C.12/GC/20/(2009), paragraph 32); the Committee on the Rights of the Child determined that Article 2 of its treaty (equal protection/non-discrimination) prohibits different ages of consent for heterosexuals and homosexuals (Concluding Observations of the Committee on the Rights of the Child: (Isle of Man), UN-Doc-CRC/C/15/Add.134/(2000), paragraph 22); the Committee on the Elimination of Discrimination Against Women called for the decriminalisation of lesbianism (Report of the Committee on the Elimination of Discrimination against Women, UN-Doc-CEDAW/A/54/38 (1999), paragraphs 127, 128); the Committee on Torture determined that its treaty protects against discriminatory treatment in prisons based on sexual orientation (Concluding Observations of the Committee against Torture: Egypt, UN-Doc-CAT/s/XXIX/Misc.4 (2002), paragraph 5(e)). The UN's sixth treaty body, the Committee on the Elimination of Racial Discrimination, only addresses the prohibited ground of race. Another briefing note in this series, *Criminalising Homosexuality and International Human Rights Law*, covers this topic in more detail.

¹¹ Mureinik, E., *A Bridge to Where? Introducing the Interim Bill of Rights, 1994*, 10, SAJHR 31 at 32.

17. Just like there can be no justification for apartheid based on race, there can be no justification for criminalising the consensual sexual behaviour of adults in private. Where criminalisation persists, domestic law and international law are applied arbitrarily. Heterosexuals are not regulated in the same manner. But, the issue of criminalisation and the Rule of Law is not just about the physical act of sexual intimacy. Where criminalisation persists, a whole identity is criminalised. Every aspect of a person's sense of self is criminalised, stigmatised and subject to the feeling of shame. There can never be a justification for this, no matter the cultural, religious or historical background of the criminalising country. Justifications for criminalisation based on religion and culture have been found false around the world, as discussed further in the Appendix.¹² Religious freedom and culture must be respected, but not where this freedom undermines the dignity of others.

18. The 'justification' approach to the Rule of Law also demonstrates how the Rule of Law interlocks and overlaps with democracy and human rights. The substantive rights protected by the Rule of Law vest with individual people against the authorities. In that regard, it will be no surprise that the majority of authoritarian regimes criminalise homosexuality.¹³ For the Rule of Law to be upheld, all must enjoy substantive rights – even the marginalised, regardless of what those in a position of authority or the population at large believe. In that regard, British judges Lord Hoffmann and Lady Hale have said, respectively, that equality is in itself 'one of the building blocks of democracy',¹⁴ and that 'democracy values everyone equally, even if the majority does not'.¹⁵

19. To take a real life example on the arbitrariness of criminalisation, the UN Human Rights Council's Working Group on Arbitrary Detention concluded in respect of Cameroon's criminalising laws and arrest of gay men:

[T]he existence of laws criminalizing homosexual behaviour between consenting adults in private and the application of criminal penalties against persons accused of such behaviour violate the rights to privacy and freedom from discrimination set forth in the International Covenant on Civil and Political Rights...

*The Working Group text concludes that the deprivation of liberty of the above-mentioned 11 persons was arbitrary, and that regardless of the fact that they were ultimately released.*¹⁶

¹² This topic is discussed further in the briefing note in this series, *Criminalising Homosexuality and the Right to Manifest Religion*.

¹³ This topic is discussed further in the briefing note in this series, *Criminalising Homosexuality and Democratic Values*.

¹⁴ *Matadeen v. Pointu and Minister of Education and Science* [1999] AC 98 (PC), para. 109.

¹⁵ *Chester v. Secretary of State for Justice* [2013] UKSC 63, para. 88. See also *Ghaidan v. Godin Mendoza* [2004] 2 AC 557 (where it was held that a same-sex partner is entitled to same inheritance rights as an opposite-sex partner): '[Unequal treatment] is the reverse of rational behaviour... Power must not be exercised arbitrarily' (per Lady Hale).

¹⁶ *François Ayissi et al. v. Cameroon*, Working Group on Arbitrary Detention, Opinion No. 22/2006, U.N. Doc. A/HRC/4/40/Add.1 at 91, 2006, paras. 19 and 20.

20. This quote again demonstrates the difference between the Rule of Law and rule by law. Even where criminalising countries follow to the letter their criminal laws and procedures when arresting and sanctioning LGBT people, they nonetheless act in an arbitrary manner and offend against the Rule of Law.

21. At the other extreme, where criminalising laws subsist on national statute books without being enforced, these laws are still arbitrary and offend against the Rule of Law. As Lord Walker said in a House of Lords judgment when reflecting on decriminalisation in the UK and Ireland:

“To criminalise any manifestation of an individual's sexual orientation plainly fails to respect his or her private life, even if in practice the criminal law is not enforced.”¹⁷

22. Likewise, the Human Rights Committee determined that criminalising laws:

“[I]nterfere with the author's privacy, even if these provisions have not been enforced for a decade.”¹⁸

23. There is no such thing as 'benign' criminalisation of gay men and women through official moratoria or a blind-eye approach to enforcement. The mere existence of such laws on the statute book diminishes LGBT people's sense of self. The persistence of these laws is arbitrary and offends the Rule of Law.

¹⁷ *M v. Secretary of State for Work and Pensions* [2006] UKHL 11, para. 83.

¹⁸ *Toonen*, at n. 6 above, para. 8.2.

Appendix: analysis of criminalisation – offending each fundamental component of the Rule of Law

The first column of the table below sets out the eight fundamental components of the Rule of Law provided by Tom Bingham, former Lord Chief Justice of England and Wales.¹⁹ The second column then tests whether and how criminalisation offends against these components. In doing so, the table provides case studies of how the Rule of Law has been undermined by continued criminalisation, plus some examples of good Rule of Law on the issue of criminalisation and LGBT rights more generally.

Lord Bingham's Fundamental Components	The criminalisation of homosexuality offends against these Fundamental Components
<p>1. The law must be accessible and so far as possible intelligible, clear and predictable</p>	<p>Per Lord Bingham:</p> <p>“ if you and I are liable to be prosecuted, fined and perhaps imprisoned for doing or failing to do something, we ought to be able, without undue difficulty, to find out what it is that we must or must not do on pain of criminal penalty”.²⁰</p> <p>Applied to criminalisation:</p> <p>Many criminalising jurisdictions retain British colonial-era laws against ‘carnal knowledge against the order of nature’ and ‘gross indecency’, or similar. The <i>actus reus</i> of each of these offences (i.e. the conduct criminalised) is often undefined. What amounts to ‘against the order of nature’ and ‘indecent’, therefore, is dependant on the subjective beliefs of the arresting police officer and presiding judge. The breadth of these nebulous offences allowed British courts (in the past) and allows other Commonwealth courts today to prosecute successfully same-sex couples for an undefined number of acts. This legal uncertainty and unintelligibility alone is reason enough to conclude that these laws offend against the Rule of Law.</p> <p>Further, governments in some criminalising jurisdictions place moratoria on the enforcement of laws that criminalise homosexuality. Although this situation is preferable to the state actively pursuing arrests and prosecutions, it creates legal uncertainty as moratoria can be lifted or ignored, which is often realised only upon the first arrest and prosecution. Legal certainty and predictability are achieved only by the repeal of these laws.</p>

¹⁹ Bingham, at n. 3 above.

²⁰ *Ibid*, p. 37.

Lord Bingham's Fundamental Components	The criminalisation of homosexuality offends against these Fundamental Components
	<p>Case studies:</p> <p>India's Supreme Court (not the Delhi High Court, which was overturned) commented on the vagueness of its criminalising law:</p> <p><i>[N]o uniform test can be culled out to classify acts as ‘carnal intercourse against the order of nature’. In our opinion the acts which fall within the ambit of the section can only be determined with reference to the act itself and the circumstances in which it is executed.</i>²¹</p> <p>The Singaporean Court made a similar conclusion with regards to ‘gross indecency’. In 1997 the then-Chief Justice, Yong Pung How, held that there was no actual definition of ‘gross indecency’ and that the <i>actus reus</i> for this offence would essentially evolve with the times:</p> <p><i>What amounts to a grossly indecent act must depend on whether in the circumstances, and the customs and morals of our times, it would be considered grossly indecent by any right-thinking member of the public.</i>²²</p> <p>Such ‘know-it-when-the-authorities-see-it’ criminal laws dis-enable citizens from regulating their behaviour within the limits of the law, and thus offend against this first component of the Rule of Law. It is particularly disappointing that, having recognised the ambiguity and unintelligibility of their laws that criminalise homosexuality, both the Indian and Singaporean courts upheld these laws. Those decisions demonstrate a failure by the courts to uphold the first component of the Rule of Law, especially in circumstances where they had recognised the unintelligibility of these laws.</p> <p>The deficiency of moratoria was also demonstrated in Singapore. In that country, there were ministerial statements in Parliament indicating that Singapore's criminalising laws would not be proactively enforced. About this moratorium, the Singaporean Court of Appeal stated:</p> <p><i>[T]here is nothing to suggest that the policy of the Government on s 377A [the criminalising law] will not be subject to change... Therefore, as long as s 377A remains in the statute books, the threat of prosecution under this section persists, as the facts of this case amply illustrate.</i>²³</p> <p>The accused in that case was arrested, despite the moratorium, and he ultimately lost his challenge to have s 377A declared unlawful (as discussed further below at component 5).</p>

²¹ *Naz Foundation v. Suresh Kumar Koushal*, Civil Appeal No. 10972 of 2013, p. 77.

²² *Ng Huat v. Public Prosecutor* [1995] 2 SLR 783, para. 27.

²³ *Tan Eng Hong v. Attorney-General*, 2012, SGCA 45, 21 August 2012, para. 182.

Appendix: analysis of criminalisation – offending each fundamental component of the Rule of Law

Lord Bingham's Fundamental Components	The criminalisation of homosexuality offends against these Fundamental Components
2. Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion	<p>Per Lord Bingham:</p> <p>“Legislation should not confer ‘excessive and unchallengeable discretions on ministers (to be exercised, in practice, by officials)’ and, likewise, ‘[t]he job of judges is to apply the law, not to indulge their personal preferences.’²⁴</p> <p>Applied to criminalisation:</p> <p>All legal rights must be applied to LGBT people without discretion. Discretion leaves the legal system lacking legal certainty. Further, interference is permissible only if it is justified.²⁵ Cultural, religious and historic justifications for criminalising homosexuality are not reasonable justifications. Grounding criminalising laws on these supposed justifications lends excessive discretion to the legislature and the courts to apply their own concept of morality over and above domestic and international human rights protection.</p> <p>In addition, LGBT people often face arbitrary harassment by arms of the state, most notably by the police. Laws that criminalise consensual same-sex intimacy, in effect, criminalise the LGBT identity, leaving LGBT people vulnerable to harassment and persecution even where there is no evidence of sexual intimacy having taken place. Further, the vagueness of many criminalising laws allows judges wide discretion to convict accused persons and to validate the discriminatory conduct of arms of the state towards LGBT people.</p> <p>Looking again at moratoria, these amount to providing the authorities with prosecutorial discretion. The Rule of Law cannot be present when a Minister or senior member of the police has discretion as to whether to start and end a moratorium. Those living under the moratorium face the constant threat that it will end.</p> <p>Case studies:</p> <p>Supposed cultural, religious and historic justifications have proved false time and time again when legislatures and courts with good Rule of Law credentials have examined the issue. The fact that religious belief cannot justify criminalisation was articulated in the Wolfenden Report of 1957 by the then-Archbishop of Canterbury, Dr Geoffrey Fisher, who stated:</p> <p>“There is a sacred realm of privacy... into which the law, generally speaking, must not intrude. This is a principle of the utmost importance for the preservation of human freedom, self-respect, and responsibility.²⁶</p>

²⁴ Bingham, at n. 3 above, pp. 49–51.

²⁵ This topic is discussed further in the briefing note in this series, *Criminalising Homosexuality and the Right to Manifest Religion*.

²⁶ Report of the Committee of Homosexual Offences and Prostitution, September 1957, p. 38.

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	<p>England and Wales implemented the Wolfenden Report's recommendations when partial decriminalisation was brought about by legislative change in the <i>Sexual Offences Act, 1967</i>.</p> <p>Other courts considering this issue have found the same sentiment, that religion, culture and tradition are not justifications for criminalisation. South Africa's Constitutional Court's approach demonstrates a good application of the Rule of Law when it considered and dismissed religious justifications for criminalisation:</p> <p><i>Yet, while the Constitution protects the right of people to continue with such beliefs, it does not allow the state to turn these beliefs – even in moderate or gentle versions – into dogma imposed on the whole of society.</i>²⁷</p> <p>This view of the South African court was approved by the Kenyan High Court in a case concerning the freedom of association of LGBT people. The Kenyan High Court provided a wonderfully apt conclusion on the interaction of religion with LGBT rights:</p> <p><i>The Board and the Attorney General rely on their moral convictions and what they postulate to be the moral convictions of most Kenyans. They also rely on verses from the Bible, the Quran and various studies which they submit have been undertaken regarding homosexuality. We must emphasize, however, that no matter how strongly held moral and religious beliefs may be, they cannot be a basis for limiting rights: they are not laws as contemplated by the Constitution. Thus, neither the Penal Code, whose provisions we have set out above, which is the only legislation that the respondents rely on, nor the religious tenets that the Board cites, meet the constitutional test for limitation of rights.</i>²⁸</p> <p>The United States Supreme Court drew the same conclusions about religion and tradition in its judgment that declared the criminalisation of homosexuality as unconstitutional:</p> <p><i>The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. 'Our obligation is to define the liberty of all, not to mandate our own moral code.'</i>²⁹</p>

²⁷ *National Coalition for Gay and Lesbian Equality*, at n. 6 above, paragraph 137.

²⁸ *Eric Gitari v. NGO Board & 4 others* [2015], Petition 440 of 2013, The High Court of Kenya at Nairobi, para. 121.

²⁹ *Lawrence v. Texas*, at n. 6 above, p. 10.

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These statements and decisions from Europe, Africa and America show that where the Rule of Law prevailed, religion, culture and tradition cannot amount to a justification for limiting the rights of LGBT people. This same outcome was made against different sets of beliefs, different cultures and at different points of history.

Turning to ministerial and judicial discretion and poor Rule of Law, in February 2012 Uganda's Minister for Ethics and Integrity, Reverend Simon Lokodo, arrived at and shut down a LGBT advocacy workshop taking place at the Entebbe resort outside of Kampala. His rationale was that LGBT people freely associating and advocating for their rights amounted to their inciting one another to commit unlawful sex acts. In a subsequent court judgment in June 2014, the High Court of Uganda relied on Uganda's 'carnal knowledge' and 'gross indecency' laws, in conjunction with laws that prohibit incitement and conspiracy, to uphold the Minister's decision. No intimacy had taken place; merely a discussion about LGBT rights. The Court was unwilling to protect the attendees' freedom of expression to discuss LGBT rights issues, as it determined that this freedom does not extend to the promotion of 'illegal acts' and the Minister acted in the 'public interest'. The discretion allowed of the Minister and the courts to interpret this legislation and the term 'public interest'³⁰ with such breadth offends against the second component of the Rule of Law.

In the past, the English domestic courts possessed the same wide discretion to interpret the nebulous offence of 'gross indecency' until defences to it were introduced in 1967 (namely, two men, over 21 years of age, in private) and it was finally repealed in 2003. For example, in *R v. Hunt*, which concerned an allegation of two males exposing themselves to each other, the Lord Chief Justice made his personal views on the facts of the case clear:

“ I do not propose to go through the disgusting evidence in this case. The movements of the appellants, who are two grown men, had caused some suspicion and they were watched by the police. They were found in a shed in positions in which they were making filthy exhibitions the one to the other.³¹

What the judge subjectively views as 'disgusting' has no place in his judgment if the Rule of Law is to be upheld. The case *R v. Hunt* also demonstrates the overlap between the undue discretion in component 2 of the Rule of Law and the legal uncertainty in component 1. In *R v. Hunt* 'gross indecency' was interpreted to include situations where there had been no physical contact, a fact that was commented on in the Wolfenden Report, which ultimately led to the offence being repealed in England and Wales.³²

³⁰ *Kasha Nabagasera and others v. Attorney General and Lokodo*, No. 033 of 2012.

³¹ *R v. Hunt* [1950] 34 Cr App R 135, p. 26.

³² Wolfenden Report, at n. 26 above, p. 38.

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3. Equality before the law

Per Lord Bingham:

“ The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation'.³³

Applied to criminalisation:

National constitutions and international human rights instruments often open with a statement that the rights contained therein apply to all, for example the ICCPR opens with:

[In] recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family... [State Parties] Agree upon the following articles.

To deny LGBT people rights due to sexual orientation or gender identity creates a two-tiered system of law that offends against the Rule of Law.

Justification is relevant here too. As Lord Bingham states, equality before the law applies unless there is an **objective** difference that justifies differential treatment. Certain categories of person can be treated differently due to a characteristic that objectively differentiates them from the rest of society. A reasonable justification must be based on objective grounds, not subjective views (e.g. based on religion, culture or tradition). Examples of objective justification include 'sectioned' psychiatric patients whose liberty is deprived for their own safety and the safety of others, and children who lack the same freedoms as adults due to their lack of capacity. Health concerns, in particular HIV, have been posited as an objective reason to treat LGBT people differently. These arguments are devoid of merit in fact and law.

Case studies:

The UN's Human Rights Committee has dispelled any doubt that human rights apply equally to LGBT people, notwithstanding that consensual same-sex intimacy is criminal in a jurisdiction. In its communication *Toonen v. Australia*, the Committee determined that LGBT people are entitled to equal treatment, and that Article 26 of the ICCPR prohibits discrimination on the ground of sexual orientation.³⁴

³³ Bingham, at n. 3 above, p. 55.

³⁴ *Toonen*, at n. 6 above, para. 8.7.

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Further, the Human Rights Committee in *Toonen* dismissed supposed health arguments for criminalisation:

[T]he criminalization of homosexual practices cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of AIDS/HIV.³⁵

Since *Toonen*, multiple studies have shown a link between criminalisation and increased HIV transmission, further dispelling the myth that differential treatment of LGBT people in the criminal law is necessary.³⁶

More generally, recently at a domestic level there have been examples of the Rule of Law being upheld via equality before the law. On 24 April 2015, the Kenyan High Court held that LGBT people enjoy free association rights under the Kenyan Constitution, which thus allows the registration of LGBT human rights organisations. Encouragingly, the court also held that the Kenyan Constitution's non-discrimination clause implicitly protects against discrimination on the ground of sexual orientation.³⁷ In a similar registration claim, the Botswanan High Court held that LGBT people enjoy the same fundamental rights as others under the Botswanan Constitution, and concluded that the refusal of registration infringed the constitutional rights to freedom of expression, assembly and association.³⁸ These courts upheld the rights of LGBT people, notwithstanding the fact that consensual same-sex intimacy remains criminal.

Conversely, Uganda exemplifies poor Rule of Law, as equality before the law has been discarded. In the aforementioned Lokodo judgment the applicants were deemed not to enjoy freedom of expression to advocate for LGBT rights due to the illegality of same-sex intimacy.³⁹

A further example of poor equality before the law can be seen in Jamaica's amendment to its constitution to dis-apply its human rights provisions to Jamaica's sexual offences laws, including those that criminalise homosexuality. This constitutional amendment expressly bars LGBT people from the same constitutional protection enjoyed by heterosexual people on matters of sexual intimacy.⁴⁰ It compels the courts to close their minds to human rights arguments when assessing challenges to laws that criminalise homosexuality, yet they may consider these human rights arguments when hearing other challenges.

³⁵ *Ibid*, para. 8.5.

³⁶ This topic is discussed further in the briefing note in this series, *Criminalising Homosexuality and Public Health: Adverse Impacts on the Prevention and Treatment of HIV and AIDS*.

³⁷ *Eric Gitari v. NGO Board & 4 others* [2015], Petition 440 of 2013, The High Court of Kenya at Nairobi.

³⁸ *Thuto Rammoge & others v. the Attorney General of Botswana* [2014] MAHGB-000175-13.

³⁹ Bingham, at n. 3 above, pp. 15–16.

⁴⁰ The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011 repealed and substituted Chapter III of the Constitution (Charter of Fundamental Rights and Freedoms). The new Chapter III continues to protect fundamental rights, such as privacy and equality. Yet, it includes a new section 13(12) that states: 'Nothing contained in or done under the authority of any law in force immediately before the commencement of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011, relating to (a) sexual offences; (b) obscene publications; or (c) offences regarding the life of the unborn, shall be held to be inconsistent with or in contravention of the provisions of this Chapter'.

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The UK's own history in this area is informative. Until 2001, different ages of consent applied to heterosexual and homosexual sex. From 1967 until 1994, the age of consent for sex between men was 21 years old; in 1994 it was reduced to 18 years old; and it was finally reduced to 16 years old (parity with heterosexual sex) in 2001. This differential treatment was applied due to those aged 16 to 21 supposedly lacking capacity to decide whether to engage in same-sex relations and to their supposed vulnerability to being preyed upon. The European Commission of Human Rights determined the issue in 1997 in *Sutherland v. United Kingdom*, which resulted in the 2001 law that equalised the age of consent. In that case, the UK Government argued:

[First] certain young men between the ages of 16 and 18 do not have a settled sexual orientation and that the aim of the law is to protect such vulnerable young men from activities which will result in considerable social pressures and isolation which their lack of maturity might cause them later to repent: it is claimed that the possibility of criminal sanctions against persons aged 16 or 17 is likely to have a deterrent effect and give the individual time to make up his mind. Secondly, it is argued that society is entitled to indicate its disapproval of homosexual conduct and its preference that children follow a heterosexual way of life.⁴¹

The UK Government's arguments were rejected outright by the Commission. The different ages of consent were found to breach the right to privacy and to discriminate on the ground of sexual orientation. On the first argument, the Commission referred to the prevailing view of the medical profession showing the falsity of the UK Government's argument:

The BMA Council concluded in its Report that the age of consent for homosexual men should be set at 16 since the then existing law might inhibit efforts to improve the sexual health of young homosexual and bisexual men. An equal age of consent was also supported by the Royal College of Psychiatrists, the Health Education Authority and the National Association of Probation Officers as well as by other bodies and organizations concerned with health and social welfare.⁴²

On the second argument, the Commission firmly dismissed the UK Government:

As to the second ground relied on – society's claimed entitlement to indicate disapproval of homosexual conduct and its preference for a heterosexual lifestyle – the Commission cannot accept that this could in any event constitute an objective or reasonable justification for inequality of treatment under the criminal law.

The above court decisions demonstrate how Lord Bingham's third component of the Rule of Law, equality before the law, is offended when LGBT people are treated differently, but upheld when they are treated in the same manner as other citizens.

⁴¹ *Sutherland v. United Kingdom*, Application No. 25186/94, Report of the Commission, para. 63.

⁴² *Ibid*, para. 60.

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<p>4. Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably</p>	<p>Per Lord Bingham:</p> <p>“ It is an elementary principle that anyone purporting to exercise a statutory power must not act beyond or outside the power conferred. ... There are countries in the world where all judicial decisions find favour with the powers that be, but they are probably not places where any of us would wish to live’.⁴³</p> <p>Applied to criminalisation:</p> <p>A known problem in criminalising countries is police extorting LGBT people at threat of arrest. LGBT people are left vulnerable to this conduct due to criminalising laws placing them outside the law and its normal protection of citizens. Separately, the courts in criminalising jurisdictions must be free to interpret their national constitutions, other domestic laws, and international human rights instruments without interference from the other arms of government.</p> <p>Case studies:</p> <p>Again, Uganda's Minister Lokodo's conduct in shutting down the LGBT advocacy workshop demonstrates a public officer exceeding the reasonable interpretation of the limits to his power. Another example from Uganda is the Speaker of Parliament convening in December 2013 an inquorate session to vote on legislation. In that session, the <i>Anti-Homosexuality Act</i> was passed and subsequently signed into law by President Museveni, despite the Ugandan Constitution stipulating that a quorum must be present in Parliament. Demonstrating good Rule of Law credentials, Uganda's Constitutional Court ultimately struck down the law.⁴⁴</p> <p>Turning now to instances of political interference, which are suspected in court cases concerning LGBT rights, but cannot be confirmed, it is tempting for governments to show anti-LGBT sentiment to appeal to a conservative or religious electorate or to make a scapegoat out of a vulnerable minority group to distract from other issues. On the related issue of social and religious influences, judges (or ministers) being affected by these influences amounts to an unreasonable exercise of their powers, as discussed above in component 2.</p>

⁴³ Bingham, at n. 3 above, pp. 63 and 65.

⁴⁴ *Oloka-Onyango & 9 Ors v. Attorney General* [2014] UGCC 14.

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<p>5. The law must provide adequate protection of fundamental human rights</p>	<p>Per Lord Bingham:</p> <p>“ A state which savagely represses or persecutes sections of its people cannot in my view be regarded as observing the rule of law, even if the transport of the persecuted minority to the concentration camp or the compulsory exposure of female children on the mountainside is the subject of detailed laws duly enacted and scrupulously observed. So to hold would, I think, be to strip ‘the existing constitutional principle of the rule of law’.⁴⁵</p> <p>Applied to criminalisation:</p> <p>This fifth component of the Rule of Law is highly relevant to criminalisation. If the substance of domestic law protects fundamental human rights, criminalisation should end. At the same time, as Lord Bingham recognises, these fundamental human rights must be adequately protected. This means that interference with these rights can only occur when it is justified, necessary and proportionate.</p> <p>Criminalisation is an egregious human rights violation. In and of itself, criminalisation subjects the LGBT community to inhuman and degrading treatment. It violates the basic human rights to privacy, dignity and equality. The criminalisation of same-sex intimacy does more than prohibit certain sexual acts, it criminalises identity, takes away dignity, and denies LGBT people a private sphere in which they can live as themselves. Where a domestic system lacks laws or procedures to address these violations, it lacks the Rule of Law. Where laws and procedures exist in theory, but are inadequately enforced, the system too lacks the Rule of Law.</p> <p>There are multiple court decisions, communications from treaty bodies, and statements from international organisation that state that the criminalisation of homosexuality breaches fundamental human rights.⁴⁶ To give two brief quotes on this matter, in 2008 the UN General Assembly adopted a declaration urging states:</p> <p>“ to ensure that sexual orientation or gender identity may under no circumstances be the basis for criminal penalties.⁴⁷</p> <p>In 2012, the current Secretary-General, Ban Ki-moon, stated:</p> <p>“ It is an outrage that in our modern world, so many countries continue to criminalise people simply for loving another human being of the same sex.⁴⁸</p> <p>Again, moratoria on arrests and prosecutions of those who engage in same-sex intimacy are not sufficient to uphold human rights.</p>

⁴⁵ Bingham, at n. 3 above, p. 67.

⁴⁶ Another briefing note in this series, *Criminalising Homosexuality and Working Through International Organisations*, covers this topic in more detail.

⁴⁷ Letter dated 18 December 2008 from the Permanent Representatives of Argentina, Brazil, Croatia, France, Gabon, Japan, the Netherlands and Norway to the United Nations addressed to the President of the General Assembly, UN-Doc-A/63/635, signed by 66 member states.

⁴⁸ Ban Ki Moon, *Leadership in the fight against homophobia*, New York, 11 December 2012.

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On the matter of the **adequate** protection of human rights, there must be proportionality where human rights are interfered with. Not all rights are absolute. People's rights can be interfered with, but only if there is a justification **and** the interference is necessary and proportionate with that justification. Sentencing is also relevant. It goes without saying that to imprison, degrade or even execute individuals for having consensual same-sex intimacy is disproportionate.

Case studies:

In jurisdictions with good Rule of Law credentials, court challenges to laws that criminalise same-sex intimacy are inevitably successful, notwithstanding political or social opposition. The United States achieved federal decriminalisation via the case *Lawrence v. Texas*, in which the Supreme Court held that criminalisation is contrary to the constitutional right to privacy.⁴⁹ South Africa achieved decriminalisation via the case *National Coalition*, in which the Constitutional Court held that criminalisation is contrary to the Constitution's provisions on non-discrimination, privacy and dignity.⁵⁰ Northern Ireland's and the Republic of Ireland's criminalising laws were held by the European Court of Human Rights in Strasbourg as contrary to the European Convention's protection of private life. In the Irish case, the domestic court's failure to declare the criminalising laws as incompatible might be seen as a failure of the Rule of Law, but it must be remembered that the domestic Rule of Law mechanisms in Ireland includes referrals to Strasbourg, which ultimately led to the repeal of these laws.

The jurisdictions whose courts have upheld their criminalising laws are: Botswana,⁵¹ Zimbabwe,⁵² India,⁵³ and Singapore.⁵⁴ Botswana's and Zimbabwe's judgments are lacking as they do not consider and make no reference to key human rights instruments, including the ICCPR and the Human Rights Committee's communication in *Toonen*, despite Botswana and Zimbabwe being state-parties at the time of the court cases. The judgment from Singapore is disappointing, albeit explicable as Singapore lacks the legal human rights protection afforded in many other jurisdictions and it is not a party to the ICCPR. The decision from India is highly disappointing given India's constitutional human rights protection and its being a state-party to the ICCPR. These examples demonstrate different failures of the Rule of Law: failures of the formalistic Rule of Law, as not all applicable human rights protection was applied; and failures of the substantive Rule of Law, as adequate human rights protection was lacking.

⁴⁹ *Lawrence v. Texas*, at n. 6 above, p. 18.

⁵⁰ *National Coalition for Gay and Lesbian Equality v. Minister of Justice* at n. 6 above, paras. 27 and 32.

⁵¹ *Kanane v. the State* (2003) (2) BLR 67, Court of Appeal, 30 July 2003.

⁵² *Banana v. State* [2000] 4 LRC 621, Supreme Court, 29 May 2000.

⁵³ *Koushal v. NAZ Foundation*, Civil Appeal No. 10972 of 2013, Supreme Court.

⁵⁴ *Tan Eng Hong v. Attorney General* [2014] SGCA 53, Court of Appeal.

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On the subject of moratoria, the Singaporean Court of Appeal made some useful comments in its earlier judgment to determine the accused's standing to challenge the law (see component 1 above). However, the ultimate judgment discussed above, unfortunately, upheld Singapore's criminalising laws. A much better approach to the insufficiency of moratoria in upholding human rights comes from the European Court of Human Rights in Strasbourg. In the case of *Dudgeon v. UK* from Northern Ireland, where the applicant had been actively investigated by police, the court held:

*[T]he maintenance in force of the impugned legislation constitutes a continuing interference with the applicant's right to respect for his private life... either he respects the law and refrains from engaging – even in private with consenting male partners – in prohibited sexual acts to which he is disposed by reason of his homosexual tendencies, or he commits such acts and thereby becomes liable to criminal prosecution.*⁵⁵

In the subsequent case *Norris v. Ireland* from the Republic of Ireland, the Strasbourg Court held:

*It is true that, unlike Mr Dudgeon, Mr Norris was not the subject of any police investigation. However, the Court's finding in the Dudgeon case that there was an interference with the applicant's right to respect for his private life was not dependent upon this additional factor... The Court therefore finds that the impugned legislation interferes with Mr Norris's right to respect for his private life.*⁵⁶

In a further case, the Strasbourg Court found that the right to privacy is still violated, even where there is an official moratorium on bringing prosecutions under the law that criminalises homosexuality:

*It is true that since the Dudgeon judgment the Attorney-General... has followed a consistent policy of not bringing criminal proceedings in respect of private homosexual conduct on the basis that the relevant law is a dead letter. Nevertheless, it is apparent that this policy provides no guarantee that action will not be taken by a future Attorney-General to enforce the law... Against this background, the Court considers that the existence of the prohibition continuously and directly affects the applicant's private life.*⁵⁷

⁵⁵ *Dudgeon v. United Kingdom*, 4 EHRR 149 (1981), para. 41.

⁵⁶ *Norris v. Ireland*, at n. 6 above, para. 38.

⁵⁷ *Modinos v. Cyprus*. Application no. 15070/89, 22 April 1993, paras. 23 and 24.

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The above Strasbourg Court cases from the UK and Ireland, also inform us about the proportionality element of the Rule of Law. The Strasbourg Court in *Norris* stated:

*[T]he Court considers that, as regards Ireland, it cannot be maintained that there is a 'pressing social need' to make such acts criminal offences. On the specific issue of proportionality, the Court is of the opinion that 'such justifications as there are for retaining the law in force unamended are outweighed by the detrimental effects which the very existence of the legislative provisions in question can have on the life of a person of homosexual orientation like the applicant. Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved' (quoting from *Dudgeon*, para. 60).*

Proportionality was also discussed in *Sutherland v. United Kingdom*, the case concerning the unequal age of consent, in which the Commission commented:

Even if, as claimed in the Parliamentary debate, there may be certain young men for whom homosexual experience after the age of 16 will have influential and potentially disturbing effects and who may require protection, the Commission is unable to accept that it is a proportionate response to the need for protection to expose to criminal sanctions not only the older man who engages in homosexual acts with a person under the age of 18 but the young man himself who is claimed to be in need of such protection.

For Lord Bingham's fifth component of the Rule of Law to be upheld, there must be both a justification to curtail the rights of an individual, and that curtailment must be proportionate to achieving that justification. As the judgments discussed above show, where the Rule of Law is present: (1) the curtailment of the fundamental human rights of LGBT people can rarely, if ever, be justified, and (2) even if a reasonable justification can be found, it can never be proportionate to impose criminal sanctions on consenting adults. Any outcome at court other than decriminalisation demonstrates a failure of the Rule of Law, either as the domestic system does not contain substantive human rights, or due to these human rights not being adequately protected by the courts.

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6. Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which parties are themselves unable to resolve

Per Lord Bingham:

“ Lord Bingham applied his component 6 to civil disputes, but his sentiment applies to criminal laws too: *'An unenforceable right or claim is a thing of little value to anyone'*.⁵⁸

Applied to criminalisation:

In addition to the Rule of Law problems discussed that are specific to LGBT people, the poor functioning of courts in many criminalising countries facilitates the continuance of criminalisation, as the courts do not have the capacity, experience or appetite to determine a challenge to criminalising laws. Additionally, for LGBT people to access dispute resolution on any LGBT-related issue (whether it be criminalisation, or freedom of expression, etc), they must, in effect, declare to the authorities that they are 'un-apprehended felons'. The risk of attracting criminal investigation and sanctions acts as a barrier to LGBT people accessing justice to assert their constitutional and other rights.

Case studies:

The aforementioned *Lokodo* case in Uganda was adjourned multiple times prior to it being heard by a judge. When it was heard and judgment was handed down, as discussed above, the court found that fundamental rights in Uganda's constitution do not apply in disputes to be resolved between the State and LGBT people. The applicants in this case, and many others, also took great personal risk when accessing the dispute resolution mechanisms to which they are entitled.

A more calculated barrier to LGBT people accessing the courts to enforce their rights is Jamaica's constitutional amendment, which bars LGBT people from proper judicial adjudication on the issue of criminalisation (as discussed above at component 3). Since Magna Carta, 800 years ago, it has been accepted that no person shall be condemned *'except by lawful judgment of his peers or by the law of the land'*. Jamaica's constitutional amendment to dis-apply constitutional human rights (the highest law of the land) to the issue of criminalising homosexuality amounts to a serious digression from the Rule of Law, as the human rights protection in the constitution is now unenforceable on the issue of criminalisation.

⁵⁸ Bingham, at n. 2 above, p. 85.

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7. Adjudicative procedures provided by the state should be fair	<p>Per Lord Bingham:</p> <p>“ First, it must be recognized that fairness means fairness to both sides, not just one... It must, secondly, be accepted that fairness is a constantly evolving concept, not frozen at any moment of time... The constitution of a modern democracy governed by the rule of law must, thirdly, guarantee the independence of judicial decision-makers’.⁵⁹</p> <p>Applied to criminalisation:</p> <p>This component encompasses many of the other components listed. For the Rule of Law to be maintained, LGBT people must be able to challenge effectively laws that criminalise homosexuality. LGBT people’s access to a fair trial is compromised by: the unclear and unpredictable laws used to prosecute them; the degree of discretion that such uncertainty provides courts; the unequal constitutional and other protection afforded to them in court rooms; the political and societal pressure that pollutes court decisions on LGBT matters; and states’ tendencies to apply less rigorous standards of human rights to them. In general, where the formal principles of the Rule of Law are lacking, substantive human rights principles cannot entrench for LGBT people.</p>
8. The rule of law requires compliance by the state with its obligations in international law as well as in national law	<p>Per Lord Bingham:</p> <p>“ [T]he rule of law in the international order is, to a considerable extent at least, the domestic rule of law writ large... the international rule of law may be understood as the application of the rule of law principles to relations between States and other subjects of international law’.⁶⁰</p> <p>Applied to criminalisation:</p> <p>Nation states agree to international treaties as sovereign equals and, in doing so, create rights and obligations between themselves. The ICCPR prohibits the criminalisation of same-sex intimacy, as determined by the Human Rights Committee in its communication <i>Toonen v. Australia</i>.⁶¹ The ICCPR has 168 state-parties, of which 58 criminalise same-sex intimacy. As discussed above in paragraph 15, the treaty bodies that interpret other UN human rights treaties view discrimination against LGBT people as a violation of their treaties.⁶²</p>

⁵⁹ Bingham, at n. 3 above, p. 91.

⁶⁰ Bingham, at n. 3 above, p. 111.

⁶¹ *Toonen*, at n. 6 above.

⁶² Again, another briefing note in this series, *Criminalising Homosexuality and International Human Rights Law*, covers this topic in more detail.

Lord Bingham's Fundamental Components	The criminalisation of homosexuality offends against these Fundamental Components
	<p>Case studies:</p> <p>Whenever the criminalisation of LGBT people or discrimination against them has been considered by regional human rights courts or human rights treaty bodies, it has been held to violate treaty obligations. <i>Toonen</i>, <i>Dudgeon</i> and <i>Norris</i> have already been mentioned regarding the ICCPR and ECHR respectively. Further, the Inter-American Court of Human Rights held that the American Convention on Human Rights is violated by discrimination against LGBT people (<i>Case of Atala Riffo and Daughters v. Chile</i>, Judgment (2012)⁶³). Likewise, the African Commission in <i>Zimbabwe Human Rights NGO Forum v. Zimbabwe</i>, confirmed that Article 2 of the African Charter, which prohibits discrimination on the grounds of ‘other status’, among others, also extends to protect persons on the basis of ‘sexual orientation’.⁶⁴</p> <p>Although the European, American and African courts interpret international treaty law applicable at the regional level, the protection contained in these regional treaties is near identical to the protection contained in the ICCPR and other international treaties. As the Jamaican international lawyer and judge at the International Court of Justice, Patrick Robinson, stated:</p> <p>“ The UN Charter and other instruments of universal, or near universal, coverage may be seen as instruments with centripetal, normative forces supporting an international rule of law. However, the pull of national sovereignty often functions as a centrifugal, normative force gravitating away from an international rule of law. Regional instruments, although confined to a specific geographical area, may nonetheless have features that are consistent with and, in fact, serve to promote an international rule of law... The need to observe the rule of law at the international level is as urgent as it is at the domestic level’.⁶⁵</p>

⁶³ ACHR, Report No. 139/09 (merits), Case 12.502.

⁶⁴ *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Communication 245/02, May 2006, paras. 169–170. See also, General Comments on Article 14 (1) (d) and (e) of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, para. 4.

⁶⁵ Robinson, P., *Affirming the International Rule of Law*, EHRLR 2012, Issue 1, 32, pp. 33 and 43.

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HUMAN
DIGNITY
TRUST

**Criminalising
Homosexuality
and International
Business:**
**the Economic and
Business Cases for
Decriminalisation**

To carelessly and needlessly open unnecessary wars with such useful customers [in the USA and the EU] is irresponsible to say the least... The issue now, is therefore, not what other governments are telling us. It is about us deciding what is best for our country in the realm of foreign trade, which is such an important stimulus for growth and transformation that it has no equal.

President Museveni of Uganda,
The way forward on homosexuality, 2014¹

This is one in a series of notes produced for the Human Dignity Trust on the criminalisation of homosexuality and good governance. Each note in the series discusses a different aspect of policy that is engaged by the continued criminalisation of homosexuality across the globe.

The Human Dignity Trust is an organisation made up of international lawyers supporting local partners to uphold human rights and constitutional law in countries where private, consensual sexual conduct between adults of the same sex is criminalised. We are a registered charity no.1158093 in England & Wales. All our work, whatever country it is in, is strictly not-for-profit.

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¹ As quoted in, 'Museveni calls for fresh debate on homosexuality', *New Vision*, 3 October 2014, <http://www.newvision.co.ug/news/660387-museveni-calls-for-fresh-debate-on-homosexuality.html>

Overview

01. International business can play a crucial role in bringing about the decriminalisation of homosexuality. As key players and stakeholders in civil society, businesses have the means to influence the debate on lesbian, gay, bisexual and transgender (LGBT) rights at home and abroad. More directly, many multinational corporations have direct access to governments and politicians in countries where homosexuality is a crime and where the lives of LGBT people are severely restricted. These businesses have possessed the means to influence for many years; some have used it to great effect. Today, given the groundswell of support for LGBT rights in developed markets, there exists a business case for more companies to apply strategically their influence on the issue of criminalisation.

02. In parallel, there really is an economic case for decriminalisation. There is mounting evidence that criminalising homosexuality reduces productivity and economic growth. This alone should provide political impetus within criminalising countries to decriminalise. At the same time, international businesses can articulate to governments which criminalise homosexuality that these restrictive laws make them less attractive as a destination for global capital. Their attractiveness is diminished twofold: objectively due to reduced productivity, and subjectively due to pro-LGBT businesses being put off as criminalisation runs counter to their corporate culture. As captured by the quote on the cover page from President Museveni of Uganda, commercial relationships and trade can have far greater impact on criminalising regimes than traditional diplomatic interventions.

03. International business has never been better poised to help bring about the decriminalisation of homosexuality. The size and influence of many companies allows them to deliver this message loud and clear to criminalising regimes via both words and conduct that decriminalisation is good for their bottom line, good for investment relationships, and good for the wider economy. In addition, the way that businesses behave in these jurisdictions informs societal attitudes towards LGBT people.

04. These business and economic arguments do not replace arguments for decriminalisation grounded in morality or human rights. The latter arguments alone are vitally important. The former arguments complement the latter, and reflect a reality where the voice of human rights can fall on deaf ears.

05. Governments, international organisations and non-government organisations alike can assist international businesses to use their influence more effectively. Despite the clear business and economic cases for decriminalisation and a moral will too, individual companies may not be as informed as they could be, may be reluctant to speak out unilaterally, or may not know how to do so. A handbook on business and LGBT rights would be useful, which industry bodies, international organisations or national governments can consider compiling. National governments and industry bodies can help their companies speak out together or encourage them to coalesce to advocate for decriminalisation. These governments, industry bodies and international organisations too can articulate to criminalising governments that there is an economic case for decriminalisation, which is only set to grow as multinational businesses become increasingly vocal on this issue.

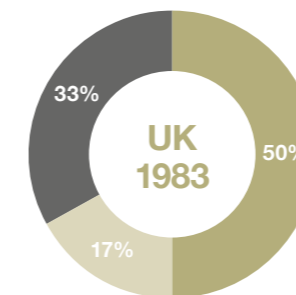
The business case for supporting decriminalisation

Businesses must appeal to the pro-LGBT consumer

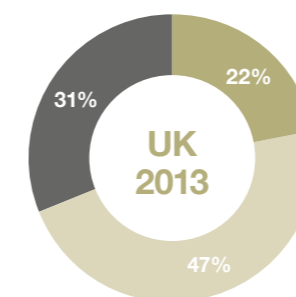
06. Today's consumers and shareholders are increasingly demanding that businesses act on LGBT rights. In developed Western markets attitudes towards homosexuality have changed dramatically in the space of a generation. For example:

a) Since 1983 the *British Social Attitudes* survey² has recorded the British public's attitude towards homosexuality:

i. In 1983, 50% of respondents believed that same-sex relationships are 'always wrong', with 17% believing 'not wrong at all'.

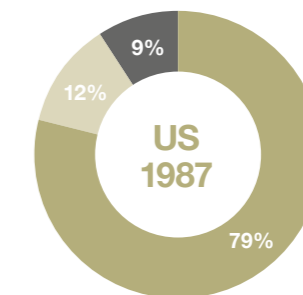


ii. By 2013, there had been a near reversal of attitude, with only 22% responding 'always wrong', and 47% responding 'not wrong at all'.

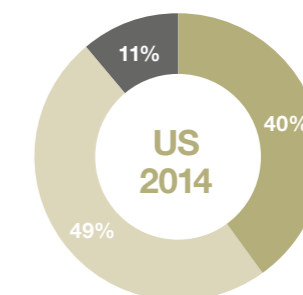


b) In the USA, there has been a similar shift in attitude, evidenced by the General Social Survey,³ which recorded:

i. In 1987, 79% of respondents believed that same-sex relationships are 'always wrong', with 12% believing 'not wrong at all'.



ii. By 2014, respondents stating 'always wrong' had fallen to 40%, and those responding 'not wrong at all' had risen to 49%.

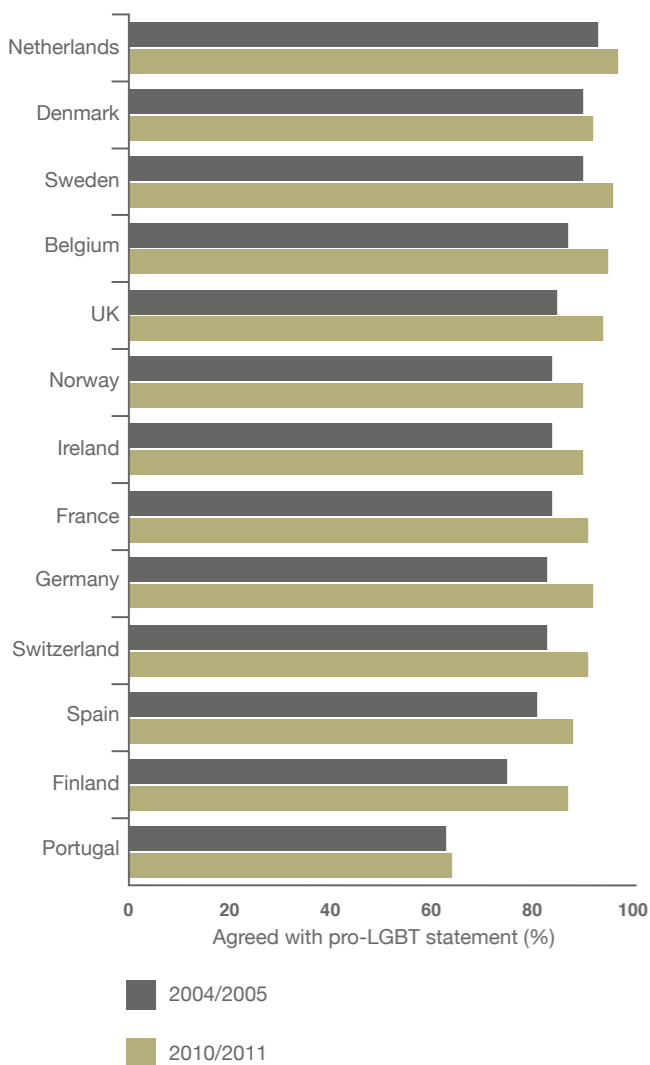


Legend:
■ Always wrong
■ Not wrong at all
■ Abstained

² NatCen Social Research, *British Social Attitudes 30th Edition*, 2013. Available at: <http://www.bsa.natcen.ac.uk/latest-report/british-social-attitudes-30/personal-relationships/homosexuality.aspx>

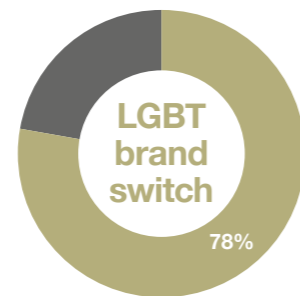
³ The Associated Press-NORC Center for Public Affairs Research, General Social Survey in *Same-Sex Marriage and Gay Rights: a Shift in Americans' Attitudes*. Available at: http://www.apnorc.org/PDFs/SameSexStudy/LGBT%20issues_D5_FINAL.pdf

c) Where the question is asked differently, to remove morality from it, the public support for LGBT rights is even more overwhelming. In a pan-European survey conducted in 2010/2011,⁴ respondents were asked whether ‘gay men and lesbians should be free to live their own lives as they wish’.



07. Citizens living in developed Western economies are overwhelmingly pro-LGBT. These individuals represent international businesses’ core markets and main shareholders. It is their sentiments to which international businesses must most appeal. In that regard, surveys demonstrate that LGBT rights affect consumer preferences:

a) A report in 2009 found that 78% of the LGBT community, their friends and relatives would switch to brands that are known to be LGBT-friendly.⁵



b) More recently, in September 2015, the Brunswick Group’s Open for Business report surveyed UK and US consumers on how LGBT rights influence their behaviour towards companies. The survey found that:⁶

- i. 47.5% of consumers would support a boycott of companies working in countries that have anti-gay laws.
- ii. 52.5% would be unlikely to support international development aid going to a country that has anti-gay laws.
- iii. 52% would be unlikely to work for a company that does business in a country that has anti-gay laws.
- iv. 42.5% would be unlikely to buy coffee from a country that has anti-gay laws.
- v. 51% would be unlikely to go on holiday to a country that has anti-gay laws.

⁴ European Research Infrastructure, *European Social Survey – Selected findings from first five rounds*, 2010/11, p. 17. Available at: http://www.europeansocialsurvey.org/docs/findings/ESS1_5_select_findings.pdf

⁵ Witeck and Harris Interactive, ‘The evidence is growing – there really is a business case for diversity’, *Financial Times*, 15 May 2014. Available at: <http://www.ft.com/cms/s/0/4f4b3c8e-d521-11e3-9187-00144feabdc0.html#axzz3mRtEieJL>

⁶ Miller, J., and Parker, L., *Open for Business – the economic and business case for global LGBT&T inclusion*, October 2015, p. 7.

Businesses benefit when homophobia is reduced

08. The business case for publicly appearing pro-LGBT is clear. At the same time, it is beneficial for businesses to be pro-LGBT in how they treat staff, and businesses benefit from society being pro-LGBT too. As Lord Browne, former Group Chief Executive of BP, states in his book *The Glass Closet*:

“Inclusion creates a level playing field, which allows the best talent to rise to the top. Respecting diversity of sexual orientation and gender identity should therefore be recognised as a matter of strategic importance to every company competing in the global market for talent.”⁷

09. Further, as discussed below, there is an economic case for decriminalisation. Individual businesses suffer as the broader economy suffers in terms of lost productivity resulting from homophobia. Decriminalisation is the first legal step to eradicating that homophobia.

The economic case for decriminalisation

10. In addition to the business case for individual companies to support decriminalisation, there is also an economic case for decriminalisation. This economic case has two aspects. It interacts with the business case, as businesses subjectively find it problematic to invest where LGBT people are persecuted. Less investment lowers economic growth. But perhaps more significantly, recent studies have revealed that poor LGBT rights equate with lower economic growth. This correlation provides an objective reason for decriminalisation that is completely separate from the pressures applied by businesses, foreign governments or other groups.

Criminalising homosexuality reduces economic growth

11. In recent years, various studies have concluded that productivity and gross domestic product (GDP) per capita are hindered by the criminalisation of homosexuality and homophobia more generally.

12. In November 2014, the Williams Institute at the University of California published a study entitled *The Relationship between LGBT Inclusion and Economic Development: An Analysis of Emerging Economies*.⁸ This study, led by Professor M.V. Lee Badgett, consisted of a micro-level approach focusing on the individual experiences of LGBT people, and a macro-level approach focusing on the impact of LGBT rights on GDP per capita.

⁷ Browne, J., *The Glass Closet, Why Coming Out is Good for Business*, 2014, WH Allen, p. 98.

⁸ Lee Badgett, M.V., *The Relationship between LGBT Inclusion and Economic Development: An Analysis of Emerging Economies*, November 2014. Available at: <http://williamsinstitute.law.ucla.edu/wp-content/uploads/lgbt-inclusion-and-development-november-2014.pdf>

13. On a micro level, the Williams Institute identified examples of how LGBT people's freedom is limited in persecutory countries. These included:

Police officers unjustly arrest, detain, jail, beat, humiliate, and extort LGBT people, taking LGBT people out of productive employment.

LGBT people face disproportionate rates of physical, psychological, and structural violence, which can restrict someone's ability to work because of physical injuries and psychological trauma.

Workplace discrimination causes LGBT people to be unemployed or underemployed, which mean their full productive capacity is not being used.

LGBT people face multiple barriers to physical and mental health, which reduces their ability to work and their productivity in the workplace.

LGBT students face discrimination in schools by teachers and other students, which hampers their learning and encourages students to drop out, in turn reducing their skills and knowledge related to the workplace.⁹

14. These phenomena raise multiple human rights concerns. Yet, as the report addresses, individual instances of homophobia aggregate to produce a negative effect on the economy:

At this micro-level, the costs to the economy of just these five examples of exclusionary treatment include lost labor time, lost productivity, underinvestment in human capital, and the inefficient allocation of human resources through discrimination in education and hiring practices. The decreased investment in human capital and suboptimal use of human resources, in turn, act as a drag on economic output at the broader economy level.¹⁰

15. The Williams Institute's macro-level analysis then attempted to quantify the negative externalities of homophobia by analysing the relationship between GDP per capita and the legal recognition of homosexuality. Criminalisation represents the lowest form of recognition, i.e. a complete absence of it. The report concluded (emphasis added):

*The macro-level analysis reveals a clear positive correlation between per capita GDP and legal rights for LGB and transgender people across countries, as measured by the Global Index on Legal Recognition of Homosexual Orientation (GILRHO) and the Transgender Rights Index (TRI) respectively. The simplest correlation shows that one additional right in the GILRHO (out of eight rights included) is associated with \$1,400 more in per capita GDP and with a higher HDI value. In other words, **countries with more rights for LGBT people have higher per capita income and higher levels of well-being.** The positive correlation between LGBT rights and the HDI suggests that the benefits of rights extend beyond purely economic outcomes to well-being measured as educational attainment and life expectancy.*

The relationship remains strong for GDP per capita even after taking into account other factors that influence development, although the effect is smaller. The impact of an additional right on per capita GDP is approximately \$320 after those controls, or about 3% of the average GDP per capita in our sample. A positive correlation with the HDI is not seen in some models, however. Unlike with the micro-level analysis, in the macro-level analysis we do not draw a firm conclusion about the direction of the causal link, that is, whether more rights cause higher levels of development or whether more developed countries tend to have more rights. The theoretical perspectives suggest that both directions are likely at work. The micro-level findings, aggregated up to an economy-wide level, support the idea that exclusion leads to lower levels of development and are consistent with the macro-level findings.¹¹

16. In a related preliminary study for the World Bank released in February 2014, *The Economic Cost of Homophobia & the Exclusion of LGBT People: A Case Study of India*,¹² the impact of homophobia on the Indian economy was assessed. This preliminary report estimated the cost of homophobia to have been between US\$1.9 and US\$30.8 billion in 2012 alone (or up to 1.7% of total GDP).¹³ This estimate included lost productivity caused by social exclusion and health-related costs and losses arising from HIV, depression and suicide. Commenting on her research on India, Professor Badgett stated:

“ Our recent study shows that emerging economies that protect more rights for LGBT people through decriminalization of homosexuality, nondiscrimination laws, and recognition of LGBT families have higher GDP per capita, even after controlling for other influences on a country's economic output. Each additional right is associated with a 3% increase in GDP per capita for those countries.¹⁴

This preliminary report estimated the cost of homophobia to have been between US\$1.9 and US\$30.8 billion in 2012 alone (or up to 1.7% of total GDP).

17. The Brunswick Group's Open for Business Report too indicates a correlation between economic performance and LGBT rights. The report proposes nine reasons for this relationship:¹⁵

- LGBT inclusion signals a diverse and creative environment, which creates the right conditions for urban economic growth.
- LGBT inclusion results in higher levels of enterprise, creativity and innovation.
- LGBT discrimination often goes hand-in-hand with a culture of corrupt practices and a lack of openness.

⁹ *Ibid*, p. 2.

¹⁰ *Ibid*, p. 2.

¹¹ *Ibid*, p. 2.

¹² Lee Badgett, M.V., *The Economic Cost of Homophobia & the Exclusion of LGBT People: A Case Study of India*. Available at: <http://www.worldbank.org/content/dam/Worldbank/document/SAR/economic-costs-homophobia-lgbt-exclusion-india.pdf>

¹³ *Ibid*, slide 14.

¹⁴ Miller and Parker, at n. 6 above, foreword by M.V. Lee Badgett, p. 14.

¹⁵ Miller and Parker, at n.6 above, pp. 30–37.

- d) LGBT inclusion is associated with countries which attract higher levels of foreign direct investment.
- e) LGBT discrimination may inhibit local companies from connecting to global markets.
- f) LGBT discrimination results in a 'brain drain' – the emigration of talented and skilled individuals.
- g) LGBT discrimination leads to negative economic consequences as a result of poor health outcomes.
- h) LGBT discrimination can shape perceptions on a world stage with a negative impact on tourism, talent attraction and export markets for consumer goods.
- i) LGBT discrimination leads to lower levels of national productivity.

18. These studies demonstrate that there is a genuine economic case for decriminalisation. The economy and the government coffers are net losers from criminalisation, in addition to the personal losses suffered by LGBT citizens. These studies show that there is an objective economic reason to repeal laws that criminalise homosexuality, which is completely separate from moral and human rights arguments and the pressure exerted by governments and rights groups in that regard. These studies provide powerful data that can be used by governments and businesses alike to convey this message. As always, the message could be strengthened by further studies being carried out, for instance in Africa and the Caribbean. Governments and other entities can support this and encourage the World Bank, or others whose voice resonates, to conduct further studies.

International organisations embracing the economic case for decriminalisation

19. International organisations have recognised the economic case for decriminalisation and the importance of including LGBT rights in development goals and outcomes. Professor Badgett's presentation of her preliminary study on India elicited the following comments:¹⁶

“Protection of human rights and empowering people are important for strengthening economic outcomes and sustainable development. The study on the economic cost of homophobia towards LGBT presented today that we have supported, is a clear example of how important it is to start looking at the economic implications of homophobia and exclusion to better inform how we can work on poverty reduction and inclusive development.

(Ms Satu Santala, Executive Director for Nordic and Baltic Countries, Member of the World Bank Board of Directors)

“Every time a girl drops out of school in Pakistan, every time a man who has sex with another man gets HIV, and every time the Roma community is defamed, society pays a heavy price. Excluding sexual minorities is not only a human tragedy but it is also a significant self-inflicted economic wound, and so we at the World Bank need to listen to their voices.

(Mr Fabrice Houdart, Team Lead, Sexual Orientation, Gender Identity and Development, World Bank)

“Punitive laws are affecting our efforts to end the AIDS epidemic and are impacting countries' economies. Inclusive, rights-based responses are the hall-marks of the AIDS response and offer platforms on which to build. We need more evidence and data to convince policy makers and politicians about the need to address LGBT issues and homophobia, to ensure protection of human rights and equity in health and development.

(Dr Luiz Loures, UNAIDS Deputy Executive Director and Assistant Secretary General of the United Nations)

Criminalising homosexuality scares away investment

20. The business case for supporting decriminalisation and the economic case to decriminalise interact. In addition to the micro and macro findings referred to above, criminalisation and poor LGBT rights affect decisions regarding whether and where to invest. The effect is twofold, which, again, can be framed in objective and subjective terms. The lower productivity associated with criminalisation renders a country objectively less attractive as a destination for investment. In parallel, a poor record for LGBT rights makes the country subjectively less attractive to companies that are pro-LGBT. The latter was neatly captured by a managing partner at EY, Andy Baldwin, who told *Gay Star News*:

“I think some of my clients have been quite shocked by what has happened in Russia [regarding LGBT rights]. We are probably not there yet but I think in some of these markets we may reach a tipping point where corporates will say we are not prepared to do business in this market.¹⁷

21. Despite these factors, some countries have passed or considered passing enhanced criminal laws that further diminish their attractiveness to investors. Uganda's proposed *Prohibition of the Promotion of Unnatural Sexual Practices Bill, 2014* lists an extraordinary range of activities that would be criminalised under the crime of 'promotion' of homosexuality. Among other things, if this legislation is passed individuals could face criminal sanctions for 'using information technology' to promote homosexuality, or distributing material that is 'likely' to promote homosexuality. A crime could be committed, for example, if a company allows access in Uganda to the company's global website containing pro-LGBT content.¹⁸

Criminalising homosexuality and tourism

22. It is not only multinational corporations that decide whether to spend in foreign economies. Individuals travel as tourists, and can express their solidarity with LGBT rights in their choice of destination. Virgin's Richard Branson commented that due to its stance on LGBT rights Uganda could:

“find it[self] being ostracised by companies and tourists worldwide

¹⁶ As stated on 12 March 2014, Preston Auditorium, World Bank Headquarters, Washington, DC. Available at: <http://www.unaids.org/en/resources/presscentre/featurestories/2014/march/20140314homophobia>

¹⁷ <http://dot429.com/articles/3510-european-corporations-considering-boycott-of-countries-with-anti-gay-laws>

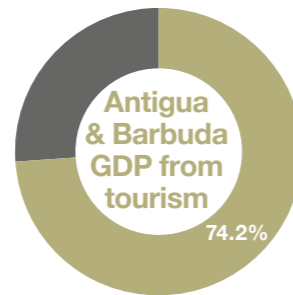
¹⁸ For a more detailed analysis of how Uganda's proposed *Prohibition of the Promotion of Unnatural Sexual Practices Bill* might affect international businesses, please see our website: http://www.humandignitytrust.org/uploaded/Library/Other_Material/Uganda_Breadth_of_the_USP_Bill_2013.pdf

24. The Brunswick Group's Open for Business report supports this assertion. The report found that 51% of the US and UK consumers surveyed are 'unlikely' to go on holiday to a country with anti-gay laws.¹⁹ Another recent initiative raises the public's awareness of the holiday destinations that criminalise homosexuality. In November 2015, the International HIV/AIDS Alliance launched an online quiz 'Paradise or Persecution' that tests respondents' knowledge of where homosexuality is criminalised.²⁰



25. Many criminalising jurisdictions are heavily reliant on tourism. The island nations of the Caribbean and Indian Ocean are hotspots for poor LGBT rights. The following criminalise: Antigua and Barbuda, Barbados, Dominica, Grenada, Jamaica, the Maldives, Mauritius, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, the Seychelles, and Trinidad and Tobago.²¹ To take one example,

tourism was estimated to account for 74.2% of Antigua and Barbuda's GDP in 2011.²²



These island nations are particularly susceptible to intolerance from Western holidaymakers to their anti-gay laws. This issue may become particularly acute in the Caribbean, as the region's largest island, Cuba, opens up as a competitor to attract tourists.

26. Decriminalisation ought to be a strategic economic move for these nations in the Caribbean and the Indian Ocean, and for other nations reliant on tourism. However, this area must be navigated with caution by those outside these countries. The ideal situation would be for criminalising countries to be prescient about the economic benefits of being pro-LGBT by repealing their criminalising laws in order to attract tourists. Public boycotts by tourists or pressure groups to force change could prove counterproductive. As the Jamaican lawyer and LGBT rights activist Maurice Tomlinson stated:

“Boycotts are very blunt instruments that one uses to get attention. They should be used sparingly or they can do more harm than good. I only recommend that they be resorted to when there is no other way to get the intended party to take you seriously.”²³

¹⁹ Miller and Parker, at n. 6 above.

²⁰ Available at: <http://www.paradiseorpersecution.com>

²¹ <http://www.humandignitytrust.org/pages/COUNTRY%20INFO/Criminalising%20Homosexuality>

²² <http://antiguaobserver.com/report-antigua-most-dependent-on-tourism/>

²³ Tomlinson, M., *Boycott Jamaica to push for an end to anti-gay attacks?*, 25 August 2013.

Available at: <http://76crimes.com/2013/08/25/boycott-jamaica-to-push-for-an-end-to-anti-gay-attacks/>

As another Caribbean-based LGBT activist puts it:

“ [The] reaction [to boycotts] could easily be one that further isolates LGBT folks, saying well now I'm losing my job or I'm missing out on my salary because of you and because the U.S. thinks that you're so important. I'm not sure that that is the most useful approach.”²⁴

26. There is much to be gained from consulting with LGBT activists in the country in question. An example of such engagement came in September 2015 when representatives from Marriott, Club Med, Cruise Planners and Silver Sea Cruises met with LGBT activists from the Bahamas, the Dominican Republic, Dominica, St. Lucia, Grenada, Trinidad and Tobago, Jamaica and Belize to discuss how the travel industry could support LGBT advocacy efforts.²⁵

27. This consultative approach is equally important when international businesses determine how they publicly apply their influence in criminalising countries.

How has and how can international business react to criminalisation?

28. The business and economic cases for the decriminalisation of homosexuality are clear. Businesses can support the goal of global decriminalisation in multiple ways, some direct, some indirect. The paragraphs below examine the means available to businesses to effect influence in theory and offer examples of how this influence has been used in practice. The examples examined cover corporate actions on LGBT rights generally, in both criminalising countries and those with inclusive LGBT rights. Actions taken in liberal environments demonstrate how far the attitude towards LGBT rights has progressed and what businesses must now do to please their pro-LGBT consumers and shareholders. Also, actions in liberal environments raise the issue of consistency. A business' pro-LGBT corporate culture applies equally in criminalising countries too. Many businesses have supported LGBT rights in criminalising countries, as examples below show, but often companies that are pro-LGBT at home are silent in places where the LGBT community faces state-sanctioned persecution via criminal laws.

²⁴ Malaika Brooks-Smith-Lowe of Groundation Grenada, as quotes in the 'Travel industry representatives meet with Caribbean LGBT', *Washington Blade*. Available at: <http://www.washingtonblade.com/2014/09/24/exclusive-travel-industry-representatives-meet-caribbean-lgbt-advocates/>

²⁵ *Ibid.*

Corporate social responsibility and inclusive capitalism: commitments to LGBT rights

29. Businesses increasingly view a commitment to corporate responsibility and inclusive capitalism as a part of their business models. These occurrences can result in express support for LGBT rights, or a tacit commitment that may need to be teased out.

Sponsoring LGBT initiatives

30. The *Open for Business* report is an example of an express commitment to LGBT rights by some of the world's largest and most influential businesses: American Express, AT&T, Brunswick, EY, Google, IBM, LinkedIn, Linklaters, Mastercard, RBS, Standard Chartered, Thomson Reuters, and Virgin.²⁶ The report describes itself as: 'a response by a number of leading businesses to the spread of anti-LGB&T sentiment in many parts of the world'.⁷ Similarly, AXA and Accenture are sponsoring concurrent events organised by *The Economist* in Hong Kong, London and New York entitled *Pride and Prejudice: the business and economic case for LGBT diversity and inclusion*.²⁸

31. A corporate commitment to LGBT rights can also be seen by the increased visibility of companies at LGBT Pride events. For instance, at London Pride 2015 several global businesses sponsored the event, including: ASDA (Wal-Mart), Baker & McKenzie, Barclays, Citibank, CMS, Exterion Media, Prudential, SAB Miller, Smirnoff (Diageo), Starbucks, Tesco, and Thomson Reuters.²⁹ These businesses operate in criminalising and non-criminalising countries alike, yet now view it as beneficial to associate publicly their brands with the LGBT community.

32. Many companies have gone beyond sponsorship by supporting legal reform too. Companies have been vocally supportive of same-sex marriage.

Prior to the US Supreme Court's decision declaring that bans on same-sex marriage are unconstitutional, 379 companies and employer organisations submitted an *amici curiae* brief to the court.

This type of court document is filled by parties interested in the outcome of the case, and can be used by the court to inform its opinion. These 379 companies and employer organisations saw the ban on same-sex marriage as directly relevant to their businesses and profitability. The topics addressed in the brief were:

A. *Our Businesses Benefit From Diversity and Inclusion*

B. *To Reap The Rewards of Diversity, Employers Need To Be Able To Recruit And Retain Top Talent, In Part Through Equitable and Competitive Benefits Packages*

1. *Employees in same-sex relationships receive varying, if any, access to the rights, benefits, and privileges that different-sex couples enjoy*
2. *Marriage discrimination drives talented individuals away from jurisdictions in which amici do business*

C. *Marriage Discrimination Injures Amici's Businesses*

1. *The states' bans impose significant burdens on our employees and our businesses*
2. *State bans undermine our corporate cultures*³⁰

33. The 379 amici included American and foreign companies. The European companies included Barclays, Credit Suisse, Deloitte, Deutsche Bank, Diageo, Ernst & Young, HSBC and UBS.

34. Similarly, as Australia debates the same issue, businesses there are publicly showing their support. In May 2015, multiple businesses joined to take out a full-page advertisement in *The Australian* newspaper backing same-sex partnerships. Again the businesses involved were both Australian and foreign.³¹ Commenting on the advertisement, national director of Australian Marriage Equality, Rodney Croome, said:

“It was about corporate saying it's not just about us individually supporting this, we want to do it collectively and send the strongest possible message... They're also very sensitive of course to Australia's international reputation ... that is at risk of suffering if we don't catch up to countries that are most like us – New Zealand, the UK, the US, Canada and now, Ireland.”³²

35. While corporate support for these LGBT initiatives is welcome, their focus is on countries where LGBT rights have advanced beyond state-sanctioned persecution. If there is a moral and business case to intervene in these countries on more advanced rights, the case for intervening in criminalising countries must exist and the imperative to do so even greater.

36. On the matter of court litigation, both the Indian and Singaporean courts heard cases on the legality of their laws that criminalise homosexuality. Shockingly, both courts upheld the criminal laws³³ (which is a matter addressed in another briefing note in this series *Criminalising Homosexuality and the Rule of Law*). Many of the companies that intervened in the US Supreme Court case and took out the advertisement in Australia have significant operations in India and Singapore. If these companies had a consistent corporate culture across the globe, they ought to have intervened there too. As the examples from the US and Australia show, foreign companies have not shied away from supporting legislative change in their host country.

26 Miller and Parker, at n. 6 above, p. 1.

27 *Ibid.*, p. 1.

28 Taking place on 2 March 2016: <http://www.economist.com/events-conferences/emea/pride-and-prejudice>

29 <http://prideinlondon.org/2015parade/>

30 *Obergefell v. Hodges, Brief of 379 Employers and Organizations Representing Employers as Amici Curiae in Support of Petitioners*. Available at: <http://www.scribd.com/doc/257794356/Employer-Amicus-Brief-Obergefell-v-Hodges>

31 'Gay marriage: Australia's businesses take out full-page ad backing same-sex partnerships', *ABC*, 29 May 2015. Available at: <http://www.abc.net.au/news/2015-05-29/corporations-behind-same-sex-marriage/6505758>

32 *Ibid.*

33 *Koushal v. NAZ Foundation*, Civil Appeal No.10972 of 2013, Supreme Court, 11 December 2013; and *Tan Eng Hong v. Attorney General*, 29 October 2014, SGCA 53, Court of Appeal.

37. Singapore, as an open economy, which is reliant on foreign trade, and which has an independent judiciary should, in particular, be a place to intervene. The Singaporean Government and court should accept *amici curiae* briefs for what they are, assistance to the court from interested stakeholders. Briefs providing a business case for decriminalisation are not human rights-based, so cannot attract the criticism of interference with a cultural issue. Rather, these briefs equip the court with information from those affected by the laws challenged. In order for courts to reach a balanced and reasoned legal determination, the views of business must be heard in court challenges to laws that criminalise homosexuality.

A commitment to human rights is a commitment to decriminalisation: the United Nations' Global Compact

38. As well as backing LGBT-specific initiatives, many international businesses have committed to generic human rights initiatives. One example is the United Nations' Global Compact.³⁴ As at October 2015, **8,375 companies in 162 countries have opted-in to this initiative.** The Global Compact's overarching aim is to work with businesses:

*To transform our world aiming to create a sustainable and inclusive global economy that delivers lasting benefits to all people, communities and markets.*³⁵

39. Signatory companies commit to 10 principles based on international conventions on human rights, labour rights, the environment and corruption, including the Universal Declaration of Human Rights.

40. On the issue of criminalising homosexuality, Principle 1 of the Global Compact says it all:

“ Businesses should support and respect the protection of internationally proclaimed human rights.

As the Universal Declaration of Human Rights states in its opening article:

“ All human beings are born free and equal in dignity and rights.

41. A commitment to these principles is a commitment to the decriminalisation of homosexuality.³⁶ A commitment to the Global Compact is a public endorsement of the view that laws criminalising homosexuality should be repealed.

42. Membership of the Global Compact, or similar initiatives, can provide companies with a hook on which to hang their discussions about LGBT rights with governments that criminalise homosexuality. These companies can say that they have committed to the Global Compact and now run their businesses accordingly. Criminalisation stands in stark contrast to their commitments and is a legitimate issue for businesses to raise in their dealings with these criminalising governments.

43. The Appendix to the note lists selected companies in criminalising countries that have signed the Global Compact. These companies are obvious candidates with whom governments, international organisations and other entities can work to articulate to criminalising regimes the business and economic cases for decriminalisation.

Inclusive capitalism includes the LGBT community

44. Distinct from corporate social responsibility is the idea of 'inclusive capitalism'. According to the Coalition for Inclusive Capitalism:

Inclusive Capitalism is a global effort to restore capitalism as an engine of broadly shared prosperity. Together we can achieve this through business and investment practices that extend the opportunities and benefits of our economic system to everyone...

Every firm must seek a license to operate from the society in which it trades. This is both a legal and a socially defined license. This means that firms must contribute proportionately to the societies in which they do business; not free-riding on services that others have paid for...

The public are increasingly demanding that firms account for their behaviour and values. We see this expressed in consumer buying patterns, citizen shareholder activism and demands for

*more consumer-focused corporate information. Firms that practice unsustainable activities and disrespect their stakeholders and the communities in which they operate will find their licences called into question. Firms that practice Inclusive Capitalism will see their license strengthened over the long term.*³⁷

45. Like the business case for being pro-LGBT, the Coalition for Inclusive Capitalism concludes that:

*Corporations that practice Inclusive Capitalism are more successful. There is strong evidence for this. Firms that invest in improving their performance on material ESG [environmental, social and governance metrics] issues experience a stock valuation premium and better profitability. Firms practicing ESG approaches have a lower cost of both debt and equity. Firms that adopt ESG metrics into their core corporate reporting practices attract more of the long-term, dedicated investors that help management make clear-sighted decisions for the long-term.*³⁸

46. LGBT people are stakeholders in society. Their inclusion reaps benefits for businesses, and for society and the economy as a whole. A part of a company's commitment to inclusive capitalism is the inclusion of LGBT people. A basic step to achieving this is applying the company's global LGBT policy in the criminalising countries (as discussed further below at paragraph 51 and 52 below).

³⁴ For more information, see <https://www.unglobalcompact.org/what-is-gc/mission/principles>

³⁵ See United Nations Global Compact: <https://www.unglobalcompact.org/>

³⁶ This topic is discussed in more detail in another briefing note in this series, *Criminalising Homosexuality and International Human Rights Law*. To give one example, the Human Rights Committee made it clear in its communication *Toonen v. Australia* UN Doc CCPR/C/50/D/488/1992 (1994) that the criminalisation of homosexuality is incompatible with the rights to privacy and non-discrimination, as contained in the International Covenant on Civil and Political Rights.

³⁷ Coalition for Inclusive Capitalism: <http://www.inc-cap.com/about-us/>

³⁸ *Ibid.*

47. Expressing LGBT rights in terms of inclusive capitalism may be most effective in criminalising countries with developed, open economies, such as Singapore. Singapore's own leaders acknowledge that an inclusive economy is crucial for Singapore's continued economic success. Singaporean President Tony Tan Keng Yam spoke of 'Singapore's policies for a competitive and inclusive economy' in May 2014:

“Singapore has no choice but to stay globally competitive so that our economy will continue to grow... Singapore has evolved its policies over the last 50 years based on a strong social compact that allowed tradeoffs to be made between different stakeholder groups for the country to make progress, and this would continue to be critical to Singapore's ability to ensure that growth continues to be inclusive and beneficial to our current and future generations at all levels.”³⁹

48. Like a company's commitment to inclusive capitalism must include LGBT people, Singapore's – and other countries' – commitment to an inclusive economy must include LGBT people too. International businesses can help articulate to Singapore's leaders the absurdity of their continued criminalisation of homosexuality, which is at odds with Singapore's publicly stated 'policies for a competitive and inclusive economy'.

How a corporate pro-LGBT stance can manifest in criminalising countries

49. In recent years, there have been multiple examples of corporate interventions against the criminalisation and persecution of LGBT people. Given the groundswell of support for LGBT rights among their consumers and shareholders in developed markets, for many multinational companies the balance has tipped. Their commercial interests are served by vocalising their pro-LGBT credentials in criminalising jurisdictions, and even by directly confronting criminalising regimes. Some examples are given below:

1) **Corporate reactions to Uganda's Anti-Homosexuality Act, 2014 (AHA), which increased the penalty for consensual same-sex sex to life imprisonment, introduced the offence of 'aggravated homosexuality' for repeat offenders and those with HIV, and outlawed the 'promotion' of homosexuality, in effect criminalising all aspects of the LGBT identity:**

a) **Virgin** responded to Uganda's introduction of the AHA Bill by working with Ugandan businesspeople to create a list of figures and companies to lobby Ugandan President Yoweri Museveni not to sign the AHA into law. Richard Branson, founder of Virgin, said:

“[S]ometimes business leaders have more freedom to make controversial comments than politicians, and it is important to stimulate debate and challenge injustices – even if it hurts your business... ideally, businesses and organisations should work with governments to try to change their attitudes from within countries.”⁴⁰

Whilst ultimately unsuccessful, as the AHA was signed, Richard Branson's statements provoked significant response and increased awareness on the issue. The Virgin founder was also active in meeting other government leaders, including in Nigeria, to discuss approaches to changing attitudes in countries that Virgin operates in and even in those where it does not. Virgin has since decided not to move ahead with plans to expand Virgin into Uganda. Mr Branson states on his website:

“I have been courted by various people and government officials to do business in Uganda. I was seriously considering it. However, the dreadful witch hunt against the gay community and lifetime sentences means it would be against my conscience to support this country. I would urge other companies worldwide to follow suit. Uganda must reconsider or find it being ostracised by companies and tourists worldwide.”⁴¹

b) **Barclays**, the third largest bank in Uganda, raised the subject of the AHA with Uganda's government prior to the law being passed. At the time, a spokesperson for Barclays stated:

“Barclays is aware of the proposed legislation relating to homosexuality in Uganda and we are engaging at appropriate levels of the Ugandan Government to express our views.”⁴²

³⁹ Speech by President Tony Tan Keng Yam at the St Gallen Symposium Circle of Benefactors Dinner on 7 May 2014. Available at: <http://www.istana.gov.sg/news/speeches/2014/speech-president-tony-tan-st-gallen-symposium-circle-benefactors-dinner>

⁴⁰ Branson, R., 'Let people love whoever they want', *Virgin*, 23 December 2013. Available at: <http://www.virgin.com/richard-branson/let-people-love-whoever-they-want>

⁴¹ *Ibid.*

⁴² Roberts, S., 'Barclays discusses anti-gay bill with Ugandan officials', *Pink News*, 3 December 2012. Available at: <http://www.pinknews.co.uk/2012/12/03/barclays-discusses-anti-gay-bill-with-ugandan-officials/>

a) **The Four Seasons Hotel** in Irving, Dallas displayed its solidarity with the Ugandan LGBT community in autumn 2014, after the AHA was signed into law, by refusing to host President Museveni, after a campaign from the local gay community.⁴³

b) **Orange**, the telecommunications company, in March 2014 pledged to offer any necessary legal and security assistance to LGBT employees in Uganda in need of aid. Orange also symbolically removed all of its advertising from the Ugandan newspaper, *Red Pepper*, that published the names, photographs and addresses of LGBT peoples in the country. At the same time, the organisation All Out called on other multinationals in Uganda, including Heineken, Coca-Cola and KLM to follow Orange's example. Andre Banks, Executive Director and co-founder of All Out said:

“Orange are doing exactly the right thing by refusing to continue business as usual, and taking steps to protect their employees affected by the Anti-Homosexuality Act. Whether it's Russia, Nigeria, or Uganda, global corporations should urgently follow their lead. Other global corporations should be announcing they're afraid to do business in a country where their employees might be jailed for being gay. Religious leaders in Uganda and around the world must speak up now. Countries with diplomatic ties to Uganda should be acting with the urgency of a life and death human rights crisis. Now is the time for action.”⁴⁴

II) **Corporate reactions to the Indian Supreme Court's decision in December 2013 to re-criminalise homosexuality by overturning a lower court's judgment:**

c) After the judgment was handed down businesses including **Goldman Sachs**, **IBM**, **Royal Bank of Scotland**, **Cisco**, **Citigroup**, **Google**, **Dell**, **Novell**, **General Electric** and **Microsoft** met to discuss strategies to protect their LGBT employees.⁴⁵

d) **IBM** subsequently sponsored talks amid concerns that staff could be persecuted as a result of the criminal laws being reinstated. Claudia Brind-Woody, IBM's vice president and managing director of global intellectual property licensing, was quoted as saying:

“Stonewall and other NGOs can only do so much. It's the power of our corporate brands, when we put them together and go into a country that's hard (on LGBT staff), which allows us to have that convening power, to have the dialog, to discuss why fundamental human rights are important, not only from a social justice perspective, but just from a business perspective. It's good for business.”⁴⁶

III) **Corporate reactions to Singapore's continued criminalisation of homosexuality:**

e) **Goldman Sachs** advertised an invitation to an LGBT recruiting and networking dinner at its Singapore office. Under Section 377A of the Penal Code, sex between men is punishable by up to two years' imprisonment.⁴⁷ The Singaporean Minister for Social and Family Development publicly denounced Goldman Sachs, saying that while discrimination had '*no place in our society*', foreign companies should '*respect local culture and context*' and '*not venture into public advocacy for causes [that] sow discord among Singaporeans*'. Goldman Sachs nonetheless renewed its sponsorship of PinkDot, Singapore's annual gay pride event, in 2015.⁴⁸

IV) **Corporate reactions to Russia's 'gay propaganda' laws:**

- f) **AT&T** was the first major US corporation to publicly condemn anti-LGBT laws in Russia, stating the laws were harmful to individuals, families and society.⁴⁹
- g) **Google** in Russia promoted tolerance towards LGBT people in connection with the 2014 Winter Olympics by re-designing its home page using the rainbow colours of the gay pride flag over its Winter Olympic-themed image. It also made a statement emphasising the importance of non-discrimination in sport. The image and translated statement were available on Google's Russian home page.⁵⁰
- h) **Eight of the top ten sponsors** of the 2014 Winter Olympics raised concerns about Russian anti-gay laws with the International Olympic Committee. (None of these companies agreed to urge the IOC to lobby Russia to repeal the laws.)

LGBT rights now form a part of the historic narrative on the Sochi Olympics, perhaps more than the sport.

⁴³ Taffet, D., 'Four Seasons in Irving cancels Ugandan president's stay', *Dallasvoice.com*, 18 September 2014. Available at: <http://www.dallasvoice.com/seasons-irving-cancels-ugandan-presidents-stay-10179667.html>

⁴⁴ McCormick, J.P., 'Orange pledges to offer support for gay employees based in Uganda', *Pink News*, 12 March 2014. Available at: <http://www.pinknews.co.uk/2014/03/12/orange-pledges-support-gay-employees-based-uganda/>

⁴⁵ Miller and Parker, at n. 6 above, p. 20.

⁴⁶ Doe, L., 'IBM leads talks to tackle India's gay sex ban', *HR Magazine*, 17 January 2014. Available at: <http://www.hrmagazine.co.uk/article-details/ibm-leads-talks-to-tackle-indias-gay-sex-ban>

⁴⁷ *Penal Code of Singapore* (Chapter 224) s. 377A. Available at: <http://statutes.agc.gov.sg/aol/search/display/view.w3p;ident=9f804d76-c39f-4e35-8cfe-1be8d20bfe9;page=0;query=DocId%3A%22025e7646-947b-462c-b557-60aa55dc7b42%22%20Status%3Ainforce%20Depth%3A0;rec=0#pr377A-he>

⁴⁸ Wong, T., 'Singapore dilemma: When diversity policy meets local law', *BBC News*, 14 June 2014. Available at: <http://www.bbc.co.uk/news/world-asia-27584565>

⁴⁹ HRC staff, 'AT&T Becomes First Major U.S. Corporation to Condemn Russia's Anti-LGBT Law', *Human Rights Campaign Blog*, 4 February 2014. Available at: <http://www.hrc.org/blog/entry/att-condemns-anti-lgbt-law-in-russia-sets-example-for-other-olympic-sponsor>

⁵⁰ Braiker, B., 'Sochi sponsors grapple with Russia's LGBT laws', *Digiday*, 14 February 2014. Available at: <http://digiday.com/brands/sochi-sponsors-lgbt/>

V) Other corporate actions and policies:

- i) **Deutsche Bank** has frequently engaged with government officials to report on the negative effects of anti-gay laws on economic activity. Leading executives from the top banks also gathered for the second *Out on the Street: Europe* summit which focused on global LGBT issues discussing what initiatives can be pursued to encourage better connections between workplace organisations and to promote diversity of leadership.⁵¹
- j) One **Fortune 100 Company** presented an amicus brief in a foreign court supporting the repeal of laws criminalising same-sex consensual behaviour.⁵²
- k) **Shell-Netherlands**, through its LGBT organisation, Pink Pearl, and its policy of inclusion and diversity, has accommodated its LGBT employees willing to work in countries where it is considered dangerous for LGBT people by affording them one week of home leave in the Netherlands for every three weeks that they are away from their partners.⁵³
- l) **Cisco**, the American technology company, has changed its travel policy to ensure the safety of its employees who are able to refuse to travel to an assignment if they feel their personal safety would be at risk in a specific country.⁵⁴
- m) **IBM** does not allow its non-discrimination policies to be adjusted in any of the 170 countries in which it operates, including those in Africa and the Middle East.⁵⁵ In Saudi Arabia, where segregation is a legal requirement, IBM removed the partition separating men and women in one of its conference rooms. Chairman of IBM Europe, Harry van Dorenmalen has stated that he is confident that companies can make a really positive change for some of the worst offending countries in the world in terms of hostility towards members of the LGBT community, adding that IBM has invested a considerable amount of time and effort in IBM Africa.
- n) **Thomson Reuters** offers same-sex partner benefits in Saudi Arabia,⁵⁶ despite consensual sex between a married man and another man being punishable by death and all sex outside marriage being illegal.
- o) **Nike, Deutsche Bank, Dell, Disney** and **Google** provide health benefits to same-sex partners globally.⁵⁷

Categories of corporate interventions and actions, and when should they be used?

50. The examples above can be categorised into four different types:
- i. Producing and implementing internal policies aimed at protecting the business' own employees.
 - ii. On-going dialogue with the offending government in line with the business' corporate culture and business needs.
 - iii. Indirect action via public statements in response to an acute problem.
 - iv. Direct action aimed at the offending government in response to an acute problem.

Internal policies

51. Businesses can gently encourage LGBT rights by ensuring that their global policy on diversity is indeed implemented globally. LGBT employees are in need of these policies no matter their location. A uniform message on diversity across all operations is encouraged. As Nigerian LGBT activist, Bisi Alimi, stated when addressing the UK Government's All Party Parliamentary Committee (APPG) on Global LGBT Rights:

“ There is no need for businesses to dumb down diversity training, just make it cultural sensitive.”⁵⁸

52. Businesses can be subtle in breaking down homophobia, for instance by talking about the benefits of diversity as a global concern and in general terms, while noting that sexual orientation and gender identity are included in this. The message that diversity is beneficial slowly changes attitudes. Likewise, providing equal benefits to same-sex couples regardless of laws that criminalise homosexuality can subtly change attitudes. Even if LGBT employees feel unable to declare their sexuality – even in confidence – to take these benefits, presenting LGBT people as people in stable relationships challenges the perception that LGBT people are only interested in 'deviant' sex. LGBT employees should be given every opportunity to take these benefits, regardless of their location.

On-going dialogue

53. Businesses have a major role in putting forward a positive message about decriminalisation and the benefits that can accrue from it. On-going dialogue changes hearts and minds. It can be done either in private or by contributing openly to the UK Government's public debate.

51 Welch, M., 'European corporations considering boycott of countries with anti-gay laws', *FourTwoNine*, 20 November 2013. Available at: <http://dot429.com/articles/3510-european-corporations-considering-boycott-of-countries-with-anti-gay-laws>

52 Bromley, M., Dorf, J., Guest, M., 'Anchoring Equality: How U.S. Corporations Can Build Equal and Inclusive Workforces', *Council for Global Equality*, October 2009, p 52. Available at: http://www.globalequality.org/storage/documents/pdf/councilforglobalequalityreportfinal_lowres.pdf

53 *Ibid*, p. 17.

54 *Ibid*, p. 17.

55 Ganguly, 'Ex-BP CEO John Browne champions LGBT rights at the workplace', *The Economic Times*, 15 August 2015. Available at: http://articles.economicstimes.indiatimes.com/2014-08-15/news/52846107_1_mncs-own-story-lgbt

56 Ernst & Young, *Making it real – globally: a practical guide for advancing lesbian, gay, bisexual and transgender diversity and inclusion across global companies*, 2015, p 13. Available at: [http://www.ey.com/Publication/vwLUAssets/EY-making-it-real-globally/\\$FILE/EY-making-it-real-globally.pdf](http://www.ey.com/Publication/vwLUAssets/EY-making-it-real-globally/$FILE/EY-making-it-real-globally.pdf)

57 Gessen, M., 'Pro-Gay Companies Stop Being Pro-Gay in Russia. Here's How to Fix That', *Slate* (web blog), 12 March 2014. Available at: http://www.slate.com/blogs/outward/2014/03/12/coca_cola_ford_ikea_pro_gay_in_america_but_not_in_russia.html

58 *Exposing LGBT persecution in Nigeria*, 22 October 2015, Portcullis House.

54. The issue of criminalisation can be quietly raised behind closed doors with Ministers from criminalising governments. If multiple businesses consistently articulate that criminalisation is bad for business and bad for the economy, governments are more likely to act upon this message. Although this dialogue can be expressed in terms of moral disapproval, human rights or adherence to a corporate culture, the same points can be made in terms of self-interested business needs. The fact that homophobia is a drain on productivity gives businesses a Euros-and-cents reason to raise this issue with a host government, just as they would raise, for example, tax issues or poor infrastructure investment as hindrances to their business interests. On that note, when addressing the UK's APPG on Global LGBT Rights, the Nigerian activists Olumide Makanjuola and Bibi Bakare-Yusuf said, respectively:

“ The business community in the UK can come together to tell the government that homophobia costs money.

“ We need to have a conversation about the economic cost of homophobia. Like malaria, it makes people sick.⁵⁹

55. The dialogue on criminalisation can also be enriched by businesses including on their global websites and printed literature a message that they are pro-LGBT and anti-criminalisation. Businesses intervening in court proceedings is another contribution to the dialogue, as it adds to the material at the court's disposal and the public debate surrounding the litigation.

56. If change does not occur, businesses can consider investing elsewhere, in an economy where their needs are better accommodated by the host government. For instance, Singapore is reliant on service industry jobs, which are often transportable, for example to Hong Kong where international businesses do not have to deal with the problems brought by criminalisation.

Indirect and direct action against acute problems

57. When acute problems arise, such as Uganda's AHA or Russia's propaganda laws, international businesses can vocalise their opposition in the media. This can be done whether the business has operations in the country in question or not. The media forms the debate and informs the public. Richard Branson's comments on Uganda's AHA were covered in Ugandan news outlets including the *Daily Monitor*,⁶⁰ and *The Insider*⁶¹ as well as international outlets *CNN*,⁶² *Al Jazeera*⁶³ and the *Washington Post*⁶⁴.

58. International businesses with the means can also take direct action by confronting the offending government when acute problems arise. This can take the form of private statements made directly to political leaders, or public threats to withdraw or divert investment.

59. These acute situations sometimes arise with little warning. For instance, Uganda's AHA was passed on 20 December 2013, during Parliament's Christmas recess. Businesses can plan for these acute situations as a part of their on-going risk assessments of the jurisdictions where they operate. They can consider in advance what actions they might take, and what scale of abuse against LGBT people would prompt them to divest completely. In addition, plans should be in place to protect LGBT employees when acute situations arise.

The role of consumers in prompting businesses to act

60. For the most part, it appears that international businesses act of their own volition, in line with their moral concerns, corporate culture or business strategy to appear pro-LGBT. At the same time, businesses' conduct can be influenced by direct consumer pressure. For instance, it was reported that Barclays' intervention in Uganda was encouraged by more than half a million people signing a petition calling on it to condemn the AHA, due to Barclays having significant operations in Uganda.⁶⁵

61. An example of a company reversing its position completely on an LGBT issue can be seen in Sandals lifting a ban on same-sex couples staying at its Caribbean resorts. Sandals' policy to allow only heterosexual adult couples attracted direct action, for instance a ban on its advertisements on the London Underground, the removal of direct links on Yahoo!, and Sandals holidays being dropped from Expedia and Barclaycard promotions. The ban on same-sex couples was eventually lifted.⁶⁶

62. Direct consumer action plays a part in making businesses realise the business case for being pro-LGBT. Consumers can also play a part in monitoring whether a business' apparent pro-LGBT stance is merely 'window dressing' and in challenging them to act if their conduct on LGBT rights does not live up to their projected corporate culture.

59 *Ibid.*

60 Kalinaki, D.K., 'Why does the West criminalise polygamy and allow homosexuality?', *Daily Monitor*, 23 January 2014.

61 'UK tycoon to Ugandans: accept gays, lesbians or die poor', *The Insider*, 16 November 2014. Available at: <http://www.theinsider.ug/uk-tycoon-to-ugandans-accept-gays-lesbians-or-die-poor/>

62 Farshbaf, N., Labott, L., 'U.S., Richard Branson slam Uganda's anti-gay bill', *CNN*, 24 December 2013. Available at: <http://edition.cnn.com/2013/12/24/world/africa/uganda-anti-gay-bill/>

63 'US voices concern over Uganda anti-gay bill', *Al Jazeera*, 25 December 2013. Available at: <http://www.aljazeera.com/news/africa/2013/12/us-voices-concern-over-uganda-anti-gay-bill-20131224235136296647.html>

64 Bariyo, N., 'Gay Ugandans Fight Discriminatory Law', *Washington Post*, 1 April 2014. Available at: <http://www.wsj.com/articles/SB10001424052702304688104579463151211505302>

65 Barclays discusses anti-gay bill with Ugandan officials, *Pink News*, 3 December 2012. Available at: <http://www.pinknews.co.uk/2012/12/03/barclays-discusses-anti-gay-bill-with-ugandan-officials/>

66 Hughes, H.L., 'Pink Tourism: Holidays of Gay Men and Lesbians', *CABI*, 2006, p. 84.

Are these corporate interventions effective?

63. Six months after Uganda's AHA was signed into law by President Museveni, Uganda's Constitutional Court declared it null and void on a technicality due to the way it was passed in Parliament.

64. Tellingly, President Museveni commented upon the issue in an article entitled: *The way forward on homosexuality. Should we involve Uganda in endless wars with our trade partners on account of this?*⁶⁷ He stated:

“ **To carelessly and needlessly open unnecessary wars with such useful customers [in the USA and the EU] is irresponsible to say the least... The issue now, therefore, is not what other governments are telling us. It is about us deciding what is best for our country in the realm of foreign trade, which is such an important stimulus for growth and transformation that it has no equal...**

It is now an issue of: omusota oguli muntamu – a snake in a clay cooking pot. We want to kill the snake, but we do not want to break the pot. We want to protect our children from homosexuality, but we do not want to kill our trade opportunities.

65. He explained that although the threats from governments in Europe and the United States to cut aid did not frighten him:

“ **[A] more serious problem cropped up – the possibility of trade boycott by Western companies under the pressure of the homosexual lobbies in the West.**

The President then concluded:

“ **It is us to determine the destiny of our people in all matters – big and small; and trade is a big one.**

66. Activists in Uganda agree that international businesses play an important role. The human rights organisation Uganda Civil Society Coalition on Human Rights and Constitutional Law produced guidelines on how concerned parties could react to the AHA, including:

*Call on multinational companies that have businesses in Uganda to go public about their concerns on the Act and their future economic engagements in Uganda. For example Heineken, KLM, British Airways, Turkish Airlines, Barclays Bank, and other companies with important interests in Uganda and that already respect and value LGBT rights in their own internal policies, should note the risk that these laws pose for the safety of their own employees, as well as the impact on their brand image of continuing to do business in Uganda.*⁶⁸

67. More generally, there is academic support for the view that pro-LGBT legislation becomes easier to pass if large employers align themselves with LGBT campaigners.⁶⁹

68. Of course, pressure from international business is not always applied, and where it is applied it is not always effective. The role of business alone will not bring about the decriminalisation of homosexuality, but the experience in Uganda demonstrates that pressure from international business is part of a multi-pronged approach, which also includes engagement from foreign governments, international organisations, activists and civil society.

What can governments do to assist businesses tackle criminalisation?

69. The business and economic cases for decriminalisation are clear. Governments, both national and supranational, can help convey this message to governments that criminalise homosexuality, for instance:

- a) In diplomatic relations with criminalising countries, persistently convey the message that criminalisation harms the economy and productivity.
- b) Help educate companies in their own jurisdictions on the business and economic cases for decriminalisation.
- c) As a complement to the UN Global Compact, establish a voluntary association with the objective of promoting human rights through business. A requirement of membership could include a formal commitment that the member organisation will promote international human rights principles in their international operations, pursuant to the UN Guiding Principles on Business and Human Rights.
- d) Use its influence to advocate for further studies to be carried out by the World Bank on the economic costs of homophobia, and specifically the costs of criminalisation. West Africa, East Africa and Southern Africa would make good case studies to complement the study already carried out for India.

67 'Museveni calls for fresh debate on homosexuality', *New Vision*, 3 October 2014. Available at: <http://www.newvision.co.ug/news/660387-museveni-calls-for-fresh-debate-on-homosexuality.html>

68 Uganda Civil Society Coalition on Human Rights and Constitutional Law, *Guidelines to national, regional and international partners on how to offer support now that the Anti-Homosexuality Act has been assented to*, 3 March 2014.

69 Bromley, M., Dorf, J., Guest, M., at n. 53 above, p.

Appendix:

Selected companies in jurisdictions that criminalise homosexuality that have signed the United Nations Global Compact⁷⁰

	Company	Sector	Country	Joined
1.	The Coca-Cola Bottling Company of Ghana Ltd.	Beverages	Ghana	2002-08-31
2.	GLICO GROUP LTD	Financial Services	Ghana	2007-05-15
3.	Stanbic Bank Ghana Limited	Financial Services	Ghana	2006-10-18
4.	Standard Chartered Bank - Ghana	Financial Services	Ghana	2006-11-12
5.	Unilever Ghana Limited	Household Goods & Home Construction	Ghana	2006-10-13
6.	CSS Corp	Software & Computer Services	India	2014-12-03
7.	The Indian Hotels Company Ltd.	Travel & Leisure	India	2001-06-21
8.	Indian Oil Corporation Limited	Oil & Gas Producers	India	2001-04-21
9.	Infosys Ltd.	Software & Computer Services	India	2001-09-10
10.	Mindtree Limited	Software & Computer Services	India	2014-08-12
11.	The Shipping Corporation of India Ltd.	Industrial Transportation	India	2001-03-01
12.	Tata International Limited	General Industrials	India	2002-08-30
13.	Tata Motors Ltd.	General Industrials	India	2002-09-23
14.	Tata Steel	Industrial Metals & Mining	India	2001-03-09
15.	Tata Teleservices Ltd.	Mobile Telecommunications	India	2008-08-08
16.	Tata Hitachi Construction Machinery Company Private Limited	Industrial Engineering	India	2002-10-14
17.	Vedanta Ltd.	Mining	India	2008-07-24
18.	Airtel Networks Kenya Ltd	Mobile Telecommunications	Kenya	2014-08-07
19.	Ericsson Kenya	Mobile Telecommunications	Kenya	2014-08-14
20.	Imperial Bank Limited	Banks	Kenya	2014-07-07
21.	Kenya Power	Electricity	Kenya	2007-08-23

⁷⁰ *Ibid.*

	Company	Sector	Country	Joined
22.	Tata Chemicals Magadi Ltd.	Chemicals	Kenya	2007-02-07
23.	Talisman Malaysia Limited	Oil & Gas Producers	Malaysia	2008-09-05
24.	The Mauritius Commercial Bank Limited	Financial Services	Mauritius	2008-04-09
25.	Deloitte and Touche Namibia	Support Services	Namibia	2007-06-19
26.	First Bank of Nigeria Limited	Banks	Nigeria	2013-01-23
27.	Zenith Bank Plc	Banks	Nigeria	2014-08-21
28.	Banyan Tree Holdings Ltd	Travel & Leisure	Singapore	2006-03-21
29.	CapitaLand Limited	Real Estate Investment & Services	Singapore	2015-08-25
30.	Credit Suisse Singapore Branch	Financial Services	Singapore	2006-03-21
31.	Hyflux Ltd	Gas, Water & Multiutilities	Singapore	2010-03-10
32.	Keppel Land Limited	Real Estate Investment & Services	Singapore	2011-12-13
33.	Noble Agri	Food Producers	Singapore	2015-01-16
34.	OCBC Bank Ltd.	Financial Services	Singapore	2006-12-21
35.	Qi Group of Companies	General Retailers	Singapore	2015-08-11
36.	Shell Eastern Petroleum Pte Ltd	Oil & Gas Producers	Singapore	2006-12-21
37.	Singapore Telecommunications Limited	Fixed Line Telecommunications	Singapore	2007-06-01
38.	Standard Chartered Bank - Singapore	Financial Services	Singapore	2007-07-30
39.	StarHub Limited	Mobile Telecommunications	Singapore	2012-11-27
40.	Commercial Bank of Ceylon PLC	Financial Services	Sri Lanka	2002-09-23
41.	Sudatel Telecom Group	Mobile Telecommunications	Sudan	2013-09-20
42.	Standard Chartered Bank Uganda Ltd	Banks	Uganda	2010-06-28

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**HUMAN
DIGNITY
TRUST**

**Criminalising
Homosexuality
and Public Health:
Adverse Impacts
on the Prevention
and Treatment of
HIV and AIDS**

Structural factors, such as stigma, discrimination and violence based on sexual orientation and gender identity and the criminalization of same-sex sexual practices, contribute to hindering the availability, access and uptake of HIV prevention, testing and treatment services among gay men and other men who have sex with men.

UNAIDS, *The Gap Report*, 2014.¹

This is one in a series of notes produced for the Human Dignity Trust on the criminalisation of homosexuality and good governance. Each note in the series discusses a different aspect of policy that is engaged by the continued criminalisation of homosexuality across the globe.

The Human Dignity Trust is an organisation made up of international lawyers supporting local partners to uphold human rights and constitutional law in countries where private, consensual sexual conduct between adults of the same sex is criminalised. We are a registered charity no.1158093 in England & Wales. All our work, whatever country it is in, is strictly not-for-profit.

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¹ UN Joint Programme on HIV/AIDS (UNAIDS), *The Gap Report*, 2014, p. 203.
Available at: http://www.unaids.org/sites/default/files/media_asset/UNAIDS_Gap_report_en.pdf

Overview

01. The criminalisation of same-sex intimacy between consenting adults intersects with HIV/AIDS in multiple ways. This note addresses two broad concerns.
02. The first part of this note sets out research from scientific studies and statements from international organisations on the link between the criminalisation of homosexuality and the prevalence and incidence of HIV. Criminalisation hinders the availability, access and uptake of HIV prevention, testing and treatment services, thus increases HIV transmission. Due to this link, multiple international organisations have called for the decriminalisation of homosexuality on public health grounds alone. This part captures the public health rationale for decriminalisation, which can stand completely separately from human rights arguments for decriminalisation.
03. The second part of this note addresses the human rights concerns associated with HIV and criminalisation. This part of the note looks at three areas. First, HIV transmission has been used as an excuse to support criminalisation. Notwithstanding that this argument is empirically false, as shown in the first part of this note, this argument is also legally unsound. Secondly, at a societal level, criminalisation is an indicator of poor human rights protection in general, which creates an environment that facilitates the transmission of HIV. Thirdly, at an individual level, human rights law is relevant as criminalisation acts a barrier to lesbian, gay, bisexual and transgender (LGBT) people accessing healthcare. These human rights violations are health-specific and exist in addition to the more general violations engendered by the criminalisation of homosexuality.²

04. Although this note treats public health and human rights separately, in order to emphasise the point that there is an independent public health rationale to decriminalise, the two are obviously intertwined. As is evidenced below, the denial of human rights to LGBT people increases HIV transmission.

Terms used in this note

05. The term 'men who have sex with men' (MSM) is used by public health professionals when discussing the health risks emerging from sexual behaviour among gay and bisexual men, as well as men who do not identify in these ways. MSM is not an ideal term when articulating the right not to be criminalised for consensual same-sex intimacy, as such laws do more than criminalise physical sexual acts, they also have the effect of criminalising the LGBT identity. However, this note uses MSM in line with scientific usage, which also has the benefit of emphasising that HIV disproportionately affects certain groups, often referred to as 'key populations', including MSM and trans women.

² These human rights are discussed in other briefing note in this series, *Criminalising Homosexuality and International Human Rights Law and Criminalising Homosexuality and the Rule of Law*.

Public health – the link between criminalisation and HIV prevalence

06. Perceptions of public health and the criminalisation of homosexuality have been deeply entwined since at least Victorian times.³ In the past and still today in some countries, criminalisation is defended using a range of standard, albeit ill informed, justifications. Public health arguments in favour of criminalisation include the fallacy that it curbs sexually transmitted infections, such as HIV. This section summarises a wide range of global expert evidence that firmly establishes that these arguments are wrong. Experts have repeatedly concluded that, rather than slowing the spread of HIV, the criminalisation of homosexuality seriously impedes the effectiveness of measures designed to reverse the HIV pandemic. Further, on an individual level criminalisation leads to increased morbidity and risk of death in those infected with HIV due the barriers it creates to accessing treatment.

Reports documenting increased HIV prevalence in countries that criminalise homosexuality

The Lancet, 'Common roots: a contextual review of HIV epidemics in black men who have sex with men across the African diaspora'⁴

07. This *Lancet* report of July 2012 found that disparities in the prevalence of HIV infection in several African and Caribbean countries were directly correlated to the status of criminalisation:

*The odds of HIV infection in black MSM relative to general populations were nearly two times higher in African and Caribbean countries that criminalise homosexual activity than for those living in countries where homosexual behaviour is legal. The odds of being infected with HIV are significantly greater in Caribbean countries that criminalise homosexual sex than in those where such behaviour is legal.*⁵

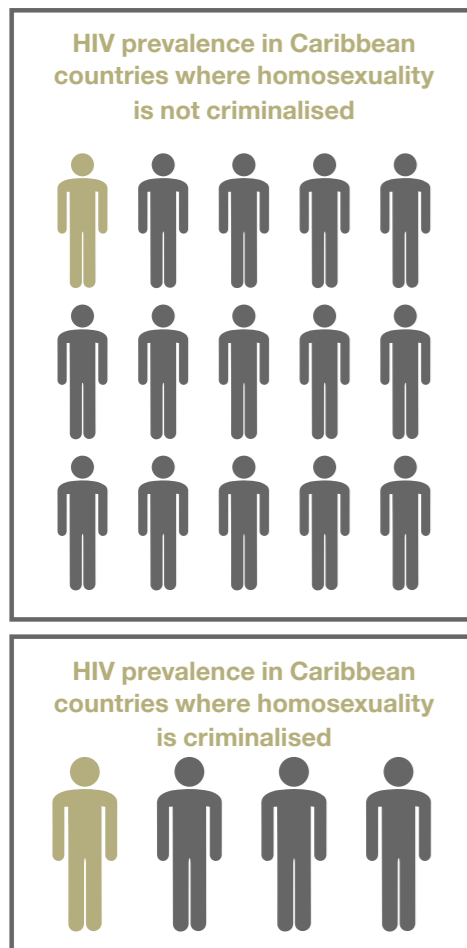
³ JS Mill's 'harm principle' was influential in both Victorian times and when England and Wales debated decriminalisation in the 1950s and 1960s. This principle provides that states may legislate to regulate the conduct of individuals in order to protect the wellbeing of others, thus giving a perceived reason to criminalise homosexuality if it is believed that public health will be improved. See, for example, McSherry, B., et al, *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law*, (2008), pp. 201-203.

⁴ Fenton, K.A., Flores, S.A., Heilig, C.M., Jeffries, W.L., Lane, T., Malebranche, D.J., Millett, G.A., Peterson, J.L., Steiner, R., Wilson, P.A., 'Common roots: a contextual review of HIV epidemics in black men who have sex with men across the African diaspora', *The Lancet*, 28 July 2012, Vol. 380, Issue 9839, pp. 411-423. Available at: http://www.humandignitytrust.org/uploaded/Library/Other_Reports_and_Analysis/The_Lancet_Common_roots_a_contextual_review_of_HIV_epidemics_in_black_men_who_have_sex_with_men_across_the_African_diaspora.pdf

⁵ *Ibid*, p. 417.

UNAIDS, 'Keeping Score II: A Progress Report towards Universal Access to HIV Prevention, Treatment, Care and Support in the Caribbean'⁶

08. This study of HIV prevalence in the Caribbean, commissioned by UNAIDS, found that the HIV prevalence among MSM rose from 1 in 15 in countries where homosexuality is not criminalised to 1 in 4 in countries where it is criminalised.



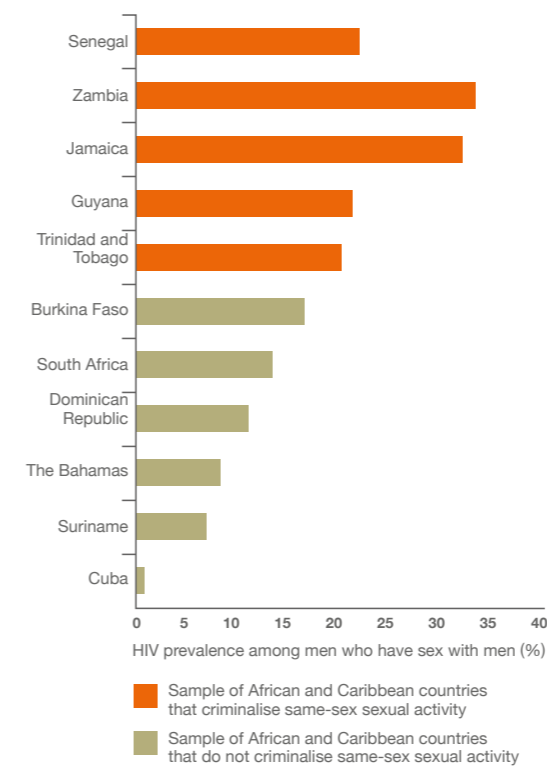
The Lancet, 'UNAIDS-Lancet Commission on Defeating AIDS – Advancing Global Health'⁷

09. The UNAIDS-Lancet Commission's report of July 2015 sets out 'the path to ending AIDS as a public health threat'.⁸ Integral to this aim is decreasing the stigma attached to homosexuality in order to facilitate access to HIV prevention and treatment.⁹ The report expressly 'highlights how criminalisation can negatively affect HIV transmission'.

10. This link is demonstrated by the report's use of the following chart (opposite page) entitled the 'effect of criminalisation of same-sex sexual activity on HIV prevalence in selected countries'. This chart compares HIV prevalence in criminalising countries (top) with neighbouring non-criminalising countries (bottom):¹⁰

11. Elaborating on this data, the report found that:

“ [In criminalising countries], there is increased fear and hiding, decreased provision and uptake HIV prevention services, and decreased uptake of HIV care and treatment services.¹¹



12. In addition to highlighting the risks faced by MSM, the report highlights the vulnerability of transgender women to HIV infection:

Transgender women are more likely to acquire HIV than most adults of reproductive age, and 19% of transgendered women are estimated to be living with HIV... Transgender people often face stigma and ill treatment, including refusal of care, harassment, verbal abuse, and violence. Despite evidence of heightened HIV risk, the coverage of HIV prevention programmes among transgender people remains poor across all regions.¹²

13. For the UNAIDS-Lancet Commission and the authors of their report, the link between the stigma associated with criminalisation and HIV rates is clear, and the solution is clear too, namely decriminalisation:

Stigma is often multi-layered, and can strongly interface with other structural drivers, such as gender inequality, poverty, human rights violations, and violence. This is particularly evident for marginalised groups. For both generalised and concentrated HIV epidemics, decriminalisation of sex work and of same-sex relations could avert incident infections through combined effects on violence, police harassment, safer work environments, and HIV transmission pathways.¹³

6 UNAIDS, 'Report on the global AIDS epidemic', 2008; UNAIDS, 'Keeping Score II: A Progress Report towards Universal Access to HIV Prevention, Treatment, Care and Support in the Caribbean', 2008.

7 Buse, K., Dybul, M., Goosby, E., Hecht, R., Karim, S.S.A., Kilonzo, N., Legido-Quigley, H., McManus, J., Mogedal, S., Piot, P., Resch, S., Ryckman, T., Sidibe, M., Stover, J., Watts, C., 'UNAIDS-Lancet Commission on Defeating AIDS – Advancing Global Health', *The Lancet*, 11 July 2015, Vol. 386, No. 9989, pp. 171-218. Available at: [http://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736\(15\)60658-4.pdf](http://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736(15)60658-4.pdf)

8 *Ibid*, p. 171.

9 *Ibid*, p. 178.

10 *Ibid*, p. 178.

11 *Ibid*, p. 178.

12 *Ibid*, p. 179.

13 *Ibid*, p. 181.

14. The UNAIDS-Lancet Commission draws its expertise from diverse backgrounds, including from criminalising countries. The Commission is Co-Chaired by Joyce Banda (Former President of Malawi), Nkosazana Dlamini Zuma (Chairperson, African Union Commission), and Professor Peter Piot (Director, London School of Hygiene & Tropical Medicine).¹⁴ Malawi continues to criminalise consensual same-sex intimacy, as do most members of the African Union.

AIDS, 'Hidden from Health: structural stigma, sexual orientation concealment, and HIV across 38 countries in the European MSM Internet Survey'¹⁵

15. Although not concerned with criminalisation per se, this report from June 2015 studies the link between the stigmatisation of male homosexuality and HIV prevalence among MSMs in Europe. The criminalisation of homosexuality is an extreme form of state-sanctioned stigmatisation. The report firmly debunks the myth that HIV rates can be reduced by forcing the LGBT identity underground via legislation or coercive social norms.

16. The report notes that, although in high-stigma countries MSM have fewer opportunities to meet and so report fewer sexual partners than in low-stigma countries, this does not reduce HIV prevalence:

[R]ecent surveillance indicates an increase in new HIV diagnoses among MSM across Europe, especially in high-stigma countries. Our findings, therefore, suggest that stigma might increase the rate of new HIV

*infections as opportunities for transmission increase with technological advancements.*¹⁶

17. Despite these stigmatised MSM having fewer sexual partners, the riskier sexual activity conducted in a stigmatised environment results in increased HIV incidence:

*Our results support a theory whereby oppressive legislation and social attitudes regarding homosexuality encourage the concealment of same-sex attraction, which suppresses both the odds of HIV diagnoses and opportunities for sexual contact, as well as access to prevention services and accompanying knowledge and precautionary behaviours. These results therefore contribute to a growing empirical literature documenting the role of social and political drivers of the HIV epidemic among MSM, as well as other syndemic risks among MSM, including mental health, substance abuse and suicidality.*¹⁷

18. Governments that claim to legislate against the LGBT community for reasons of public health are thus, in fact, acting counterproductively to their espoused aims. Rather, as the report concludes, the correct course of action for governments concerned with HIV transmission is:

“**[S]tructural and policy interventions must simultaneously reduce stigma towards MSM while also providing support to reduce their HIV transmission risk especially in current high-stigma countries.**¹⁸

¹⁴ *Ibid*, p. 211.

¹⁵ Berg, R.C., Hatzibuehler, M.L., Hickson, F., M.L., Markus, U., Pachankis, J.E., Schmidt, A.J., Weatherburn, P., 'Hidden from Health: structural stigma, sexual orientation concealment, and HIV across 38 countries in the European MSM Internet Survey', *AIDS*, 19 June 2015, Vol. 29, Issue 10, pp. 1239-1246. Available at: http://journals.lww.com/aidsonline/Fulltext/2015/06190/Hidden_from_health_structural_stigma_sexual.15.aspx

¹⁶ *Ibid*, p. 244.

¹⁷ *Ibid*, p. 244.

¹⁸ *Ibid*, p. 244.

The Lancet 'The immediate effects of the Same-Sex Marriage Prohibition Act on Stigma, discrimination, and engagement on HIV prevention and treatment services in men who have sex with men in Nigeria: analysis of prospective data from the TRUST cohort'¹⁹

19. This publication in The Lancet in July 2015 reported on the immediate effects of Nigeria's Same-Sex Marriage (Prohibition) Act, 2013 on HIV prevention and treatment. In addition to outlawing same-sex marriage, this Act places severe restrictions on LGBT people, for instance by prohibiting 'gay' organisations and banning same-sex couples from living together.²⁰

This Lancet report found an increase in societal stigma after the legislation was passed that resulted in a 'significant increase' in MSM reporting:

- a) Fear of seeking healthcare due to being MSM.
- b) Avoiding seeking healthcare due to being MSM.
- c) No safe places to go to socialise with other MSM.
- d) Verbal harassment for being MSM.
- e) Blackmail due to being MSM.

20. The increase in these indicators was shown in the report in the following graphical representations:

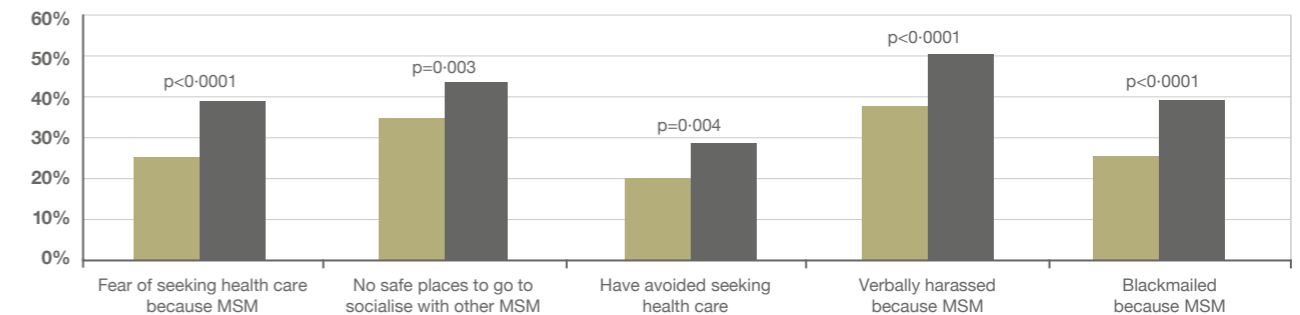


Figure 1: Reporting of discrimination and stigma during study visits in the prelaw and postlaw periods
MSM=men who have sex with men.

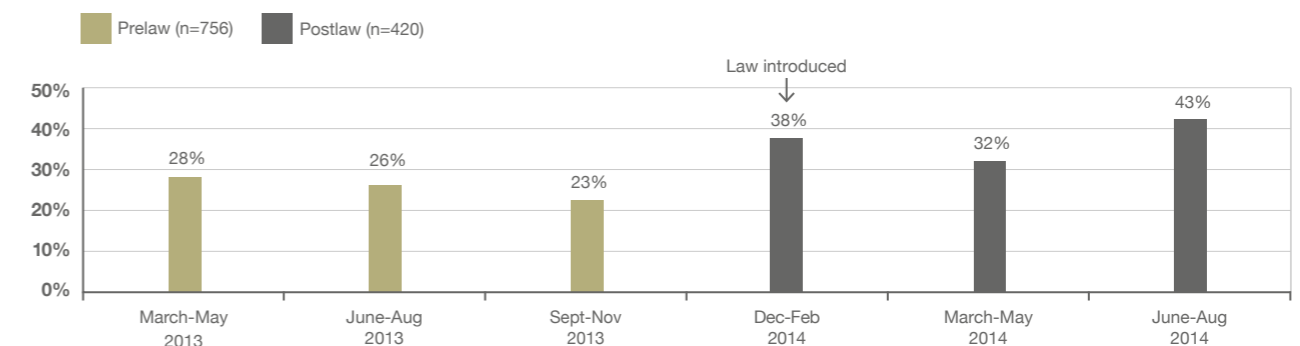


Figure 2: Cumulative lifetime experiences of reported fear of seeking healthcare services across study visits (n=1175 visits)

¹⁹ Ake, J., Baral, S.D., Blattner, W.A., Charurat, M.E., Kennedy, S., Keshinro, B., Njoku, O., Nowak, R.G., Orazulike, I., Schwartz, S.R., 'The immediate effects of the Same-Sex Marriage Prohibition Act on Stigma, discrimination, and engagement on HIV prevention and treatment services in men who have sex with men in Nigeria: analysis of prospective data from the TRUST cohort', *The Lancet*, July 2015, Vol. 2, Issue 2, pp 299-306. Available at: [http://www.thelancet.com/journals/lanhiv/article/PIIS2352-3018\(15\)00078-8/abstract](http://www.thelancet.com/journals/lanhiv/article/PIIS2352-3018(15)00078-8/abstract)

²⁰ More information on Nigeria's *Same-Sex Marriage (Prohibition) Act, 2013* can be found on The Human Dignity Trust's website at: http://www.humandignitytrust.org/uploaded/Library/Other_Material/Briefing_on_Same_Sex_Marriage_Prohibition_Act_2013_final.pdf

21. This report summed up the implications of this data as follows:

[O]ur findings reinforce the negative HIV-related health effects of anti-homosexuality legislation in young MSM with a high HIV prevalence and incidence. Urgent efforts to characterise safe and trusted HIV prevention and treatment services are needed, particularly in countries with discriminatory legal environments, to minimise the risks of HIV acquisition and transmission and finally achieve an AIDS-free generation.²¹

22. The report also highlighted how the stigmatisation of MSM has trickle-down effects on the public health of women and the wider heterosexual population. **11% of the MSM surveyed reported as being married to or living with women.²²** The impact on women of criminalising MSM/LGBT people is discussed further below.

Statements from international and regional bodies on the link between criminalisation and HIV: causes, reactions and solutions

23. Given the link between the criminalisation and stigmatisation of LGBT people and HIV transmission, it will come as little surprise that international organisations have spoken out on this matter. These organisations declare unanimously that decriminalisation will reduce HIV transmission and is a requirement of tackling the global HIV pandemic.

Global Commission on HIV and the Law

24. The United Nations Development Programme (UNDP)'s Global Commission on HIV and the Law has stated that criminalising homosexuality 'both causes and boosts' the rate of HIV infection among MSM.²³

25. Over the course of 2011, the 14-member Commission analysed the relationship between legal systems and HIV in order to develop appropriate recommendations for necessary law reforms to reduce the prevalence of HIV. It assessed research and submissions from more than 1,000 authors covering 140 countries, and engaged parliamentarians, ministries of justice and health, judiciaries, lawyers, police, civil society and community groups in frank and constructive policy dialogue. The Commission concluded that:

“ [T]he decriminalisation of homosexuality is an essential component of a comprehensive public health response to the elevated risk of HIV acquisition and transmission among men who have sex with men.²⁴

26. According to an expert submission made to the Commission, health service providers in criminalising countries are less likely to want to offer their services to MSM because of the possibility of criminal sanctions for abetting criminal activity.²⁵

27. The Commission concluded unequivocally that laws criminalising consensual adult same-sex relations, as well as a range of other discriminatory laws and legal practices, are undermining effective HIV programmes. The Commission also found that:

- a) Laws or legal provisions criminalising HIV transmission and exposure are arbitrarily and disproportionately applied to those who are already deemed inherently criminal, such as MSM. This situation not only illustrates and perpetuates existing inequalities, but also increases stigma against these men and impedes their access to existing HIV and health services.
- b) In far too many countries, discriminatory and brutal policing is tacitly authorised by punitive laws and social attitudes. Such law enforcement practices violate the human rights of MSM and drive them away from seeking HIV support and health services.

OHCHR's and UNAIDS's International Guidelines on HIV/AIDS and Human Rights

28. In 2011, the United Nations Office of the High Commissioner for Human Rights (OHCHR) and UNAIDS issued the *International Guidelines on HIV/AIDS and Human Rights*. According to these guidelines, the threat of criminal sanctions can act as a deterrent to accessing HIV services:

[P]eople will not seek HIV-related counselling, testing, treatment and support if this would mean facing discrimination, lack of confidentiality and other negative consequences.²⁶

29. The High Commissioner and UNAIDS jointly recommended that:

“ [C]riminal laws prohibiting sexual acts (including adultery, sodomy, fornication and commercial sexual encounters) between consenting adults in private should be reviewed, with the aim of repeal.²⁷

30. Further, a separate study commissioned by UNAIDS concerning HIV in the Caribbean called on governments to remove punitive laws, stating:

“ [L]aws that perpetuate stigma and discrimination and limit access to health care and fuel the spread of HIV are not in the national interest.²⁸

UN Human Rights Committee

31. The UN Human Rights Committee is the treaty body that monitors the implementation of the International Covenant on Civil and Political Rights (ICCPR). All state-parties are obliged to submit regular reports to the Human Rights Committee on how they are implementing the ICCPR. The Human Rights Committee makes recommendations to state-parties via 'concluding observations'.²⁹

21 Schwartz, S.R., et al, at n. 19 above, p. 300.

22 *Ibid*, p. 301.

23 Global Commission on HIV and the Law, *Final Report of the Global Commission on HIV and the Law*, 9 July 2012, p. 45.

24 *Ibid*, p. 48.

25 Beyrer, C., Baral, S., 'HIV and the Law: The Case of Gay, Bisexual and Other Men who have Sex with Men (MSM)', *Working Paper for the Global Commission on HIV and the Law*, 2011, p. 47.

26 Office of the United Nations High Commissioner for Human Rights and the Joint United Nations Programme on HIV/AIDS, *International Guidelines on HIV/AIDS and Human Rights*, 2011, p. 78.

27 *Ibid*, pp. 29-30.

28 UNAIDS, *The status of HIV in the Caribbean*, 2010. Available at: <http://www.unaids.org/en/resources/presscentre/featurestories/2010/march/20100316msmcaribbean/>

29 For more information, see: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>

32. In its concluding observations on Cameroon, a criminalising country, the Human Rights Committee expressly linked criminalisation to HIV transmission:

“ The Committee is also concerned that the criminalization of consensual sexual acts between adults of the same sex impedes the implementation of effective education programmes in respect of HIV/AIDS prevention.

The State party should take immediate steps towards decriminalizing consensual sexual acts between adults of the same sex, in order to bring its law into conformity with the [ICCPR] Covenant. The State party should also take appropriate measures to address social prejudice and stigmatization of homosexuality and should clearly demonstrate that it does not tolerate any form of harassment, discrimination and violence against individuals because of their sexual orientation. Public health programmes to combat HIV/AIDS should have a universal reach and ensure universal access to HIV/AIDS prevention, treatment, care and support.³⁰

33. The Human Rights Committee’s other role is acting as a quasi-court to determine breaches of the ICCPR alleged against state-parties that have ratified the ICCPR’s Optional Protocol. This second role is discussed later in this note.

UN Special Rapporteur on the Right to Health

34. Anand Grover, the previous Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (2008-2014), concluded that decriminalisation facilitates the achievement of States’ obligations to establish prevention and education programmes for HIV/AIDS, saying:

“ [A] legal framework promoting an enabling environment has been noted as one of the most important prerequisites to achieve this goal.³¹

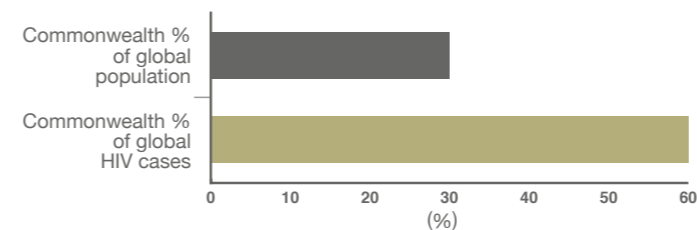
Commonwealth Eminent Persons Group

35. The Commonwealth Eminent Persons Group (EPG), a group of 10 leading figures from around the Commonwealth chaired by Tun Abdullah Badawi, former Prime Minister of Malaysia, was commissioned in 2009 by the Commonwealth Heads of Government to examine key areas for reform of the Commonwealth. After extensive study and consultations, the EPG unanimously recommended in its 2011 Report that steps be initiated to procure the repeal of laws criminalising homosexuality as a critical move in the fight against HIV. This was noted as particularly important given that Commonwealth countries comprise over 60% of people living with HIV globally, despite only representing about 30% of the world’s population.³²

36. The EPG Report states:

We have... received submissions concerning criminal laws in many Commonwealth countries that penalise adult consensual private sexual conduct including between people of the same sex. **These laws are a particular historical feature of British colonial rule. They have remained unchanged in many developing countries of the Commonwealth despite evidence that other Commonwealth countries have been successful in reducing cases of HIV infection by including repeal of such laws in their measures to combat the disease. Repeal of such laws facilitates the outreach to individuals and groups at heightened risk of infection.** The importance of addressing this matter has received global attention through the United Nations. It is one of concern to the Commonwealth not only because of the particular legal context but also because it can call into question the commitment of member states to the Commonwealth’s fundamental values and principles including fundamental human rights and non-discrimination.³³

Commonwealth countries comprise over 60% of people living with HIV globally, despite only representing about 30% of the world’s population



30 UN Document No. 22/2006 on Cameroon (A/HRC/4/40/Add.1), para. 12. Available at: <http://www1.umn.edu/humanrts/hrcommittee/cameroon2010.html>

31 UN Human Rights Council, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/HRC/14/20, 27 April 2010, para. 25. Available at: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.20.pdf>

32 Commonwealth Secretariat, A Commonwealth of the People: Time for Urgent Reform, Report of the Eminent Persons Group to Commonwealth Heads of Government, 2011, pp. 98-102.

33 Ibid, p.100.

37. Among the resulting EPG recommendations was that:

“ **Heads of Government should take steps to encourage the repeal of discriminatory laws that impede the effective response of CW countries to the HIV/AIDS epidemic, and commit to programmes of education that would help a process of repeal of such laws.**³⁴

38. In 2012 the Commonwealth Heads of Government adopted this recommendation, indicating that Member governments should identify which, if any, of their laws are discriminatory, and what steps should be taken to address these.³⁵

Outreach to MSM and trans women, not stigmatisation, is necessary to tackle HIV: in further support of a public health rationale for decriminalisation

39. The Political Declaration on HIV/AIDS from the UN General Assembly Special Session in July 2011 urged member states to focus HIV prevention interventions on ‘populations that epidemiological evidence shows are at higher risk, specifically men who have sex with men, people who inject drugs and sex workers.’³⁶ The UNAIDS-Lancet Commission echoed this list and adds to it young women, prisoners, migrants and, of relevance to this note, transgender people.³⁷

40. MSM and trans women bear a disproportionately greater risk of HIV infection for a variety of reasons, including social marginalisation and sexual behaviour.³⁸ Public health interventions around MSM vulnerability are largely based on epidemiological evidence that receptive anal sex carries a high risk of HIV transmission.³⁹ MSM are 19 times more likely to be infected than other adult men.⁴⁰ Both the US President’s Emergency Plan for AIDS Relief (PEPFAR) Programme and the World Health Organisation (WHO) recognise that prevention and health strategies tailored to MSM must be an essential component of any best practice response to the HIV epidemic.⁴¹

41. Rather than being stigmatised and discouraged from seeking HIV testing and treatment, MSM and trans women should be encouraged to do so, and educated about risky sexual behaviours and condom use. Gains can be made in reducing the incidence of HIV infection by outreach to these groups in particular. The criminalisation of homosexuality hinders the ability of governmental and non-governmental health organisations to do this.

³⁴ *Ibid*, p. 102, Recommendation 60.

³⁵ Commonwealth Secretariat, Agreement by Heads of Government to the EPG Recommendations. Available at: <http://secretariat.thecommonwealth.org/files/252052/FileName/EPGRecommendationsOutcomes.pdf>. See also: Commonwealth Secretariat, *Foreign Ministers agree on Draft Commonwealth Charter and EPG Recommendations*, 1 October 2012. Available at: <http://thecommonwealth.org/media/press-release/foreign-ministers-agree-draft-commonwealth-charter-and-epg-recommendations>

³⁶ United Nations General Assembly, 2011, Political Declaration on HIV/AIDS.

³⁷ At n. 7 above, pp. 171-218.

³⁸ ‘A call to action for comprehensive HIV services for men who have sex with men’, *The Lancet*, 20 July 2012, Vol. 380, Issue 9839, pp. 424-38.

³⁹ Degrootola, V., Seage, G. R., 3rd, Mayer, K. H. & Horsburgh, C. R., ‘Infectiousness Of HIV Between Male Homosexual Partners’, *J Clin Epidemiol*, 1989, 42, pp. 849-56.

⁴⁰ Global Commission on HIV and the Law, *Final Report of the Global Commission on HIV and the Law*, 9 July 2012, p. 45.

⁴¹ PEPFAR, *Technical Guidance on Combination HIV Prevention for MSM*, 2011. WHO, *Prevention and treatment of HIV and other STI among MSM and transgender people: recommendations for a public health approach*, 2011.

The irrationality complex

42. It defies public health logic that authorities hinder access to HIV prevention and treatment services, and even more so that legislatures in The Gambia, Uganda and Nigeria have passed new anti-gay laws that further hinder such access (as discussed further below). The irrational manner in which governments approach HIV was captured by Elizabeth Pisani, an epidemiologist and author of the book *The Wisdom of Whores: Bureaucrats, Brothels and the Business of AIDS*, when she stated:

“ **People do stupid things - that’s what spreads HIV... Yes, people do stupid things for perfectly rational reasons... So it’s rational for a drug injector to share a needle due to a stupid decision made by a politician, and it’s rational for a politician to make that stupid decision because they are responding to what they think the voters want.**⁴²

43. Due to entrenched homophobia within these societies, anti-gay laws are popular, which results in politicians maintaining these laws or passing even more draconian laws for political gain. These laws change the behaviour of MSM by deterring them from accessing HIV prevention services and treatment, as demonstrated, for example, by the *The Lancet* after Nigeria’s *Same-Sex Marriage (Prohibition) Act* was passed (see paragraph 19 above).

Reports on poor HIV knowledge among MSM and their exclusion from HIV health initiatives

44. Despite the importance of outreach, a global online survey of 5,000 MSM commissioned by the Global Forum on MSM & HIV found that only 36% of respondents were able to access treatment easily, and under 33% reported being able to access HIV education materials easily.⁴³

Less than 40% of MSM in the Caribbean and 20% of MSM in the Asia-Pacific region are reached by HIV/AIDS prevention programmes.⁴⁴ By contrast, 60% of MSM are reached by HIV prevention services in countries where homosexuality is legal.⁴⁵

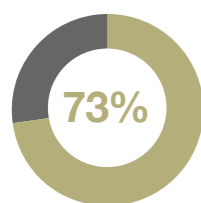
⁴² Elizabeth Pisani, *Sex, drugs and HIV – let’s get rational*, Ted Talk, February 2010. Available at: https://www.ted.com/talks/elizabeth_pisani_sex_drugs_and_hiv_let_s_get_rational_1?language=en#t-1088628

⁷³ Wilson, P., ‘Access to HIV Prevention Services and Attitudes about Emerging Strategies: A Global Survey of Men Who Have Sex with Men (MSM) and their Health Care Providers’, *The Global Forum on MSM & HIV*, 2011.

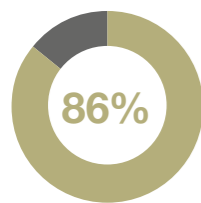
⁴⁴ ‘Common roots: a contextual review of HIV epidemics in black men who have sex with men across the African diaspora’, *The Lancet*, 28 July 2012, Vol. 380, Issue 9839, pp. 411-423. United Nations Development Programme, *Legal Environments, Human Rights, and HIV Responses among Men who Have Sex with Men and Transgender People in Asia and the Pacific*, July 2010, p. 3.

⁴⁵ UNAIDS, *Report on the global AIDS epidemic*, 2008, p. 84.

45. Unsurprisingly, there is less awareness about HIV prevention among MSM in countries that criminalise homosexuality. This lack of knowledge reduces their ability to take precautions against HIV transmission. According to one study, 73% of Zambian MSM believed that anal sex was safer than vaginal sex.⁴⁶ 86% of Lesotho's MSM were unaware that receptive anal sex was even a risk factor in HIV transmission.⁴⁷ This in turn increases the probability that MSM in these countries will engage in riskier sexual behaviour. Studies of MSM in Cameroon, Senegal and Kenya have reported a strong correlation between non-participation in HIV prevention programmes and the likelihood of MSM having unprotected anal sex.⁴⁸



According to one study, 73% of Zambian MSM believed that anal sex was safer than vaginal sex



86% of Lesotho's MSM were unaware that receptive anal sex was even a risk factor in HIV transmission

46. In June 2014, The Lancet Global Health report explained that:

*Prevention of HIV in these marginalised groups is difficult to address because of stigma, discrimination, and their sequelae. Key populations [including MSM] actually experience a double stigma related to both being associated with HIV and the reinforcement of pre-existing stigmas. This situation has led to inadequate access to service provision and treatment, in addition to many other negative outcomes.*⁴⁹

47. A report published in The Lancet in 2012 confirmed that MSM bear a disproportionate burden of HIV and yet continue to be excluded, sometimes systematically, from HIV services because of stigma, discrimination and criminalisation.⁵⁰ The report recounts the powerful correlations that have been found between the criminalisation of same-sex intimacy and a lack of financing and implementation of HIV programmes for MSM.⁵¹

48. The disincentives to public disclosure of sexuality hinder HIV screening, maintaining the high prevalence of HIV.⁵² As the criminalisation of homosexuality also makes it more difficult for same-sex couples to form lasting relationships and families, MSM in these countries are more likely to adopt non-monogamous, anonymous, unsafe sexual practices, exposing them to a higher risk of HIV infection.⁵³ This report viewed the decriminalisation of same-sex sexual intimacy, as a key structural intervention to legitimise HIV services for gay and other MSM.⁵⁴

49. UNAIDS's The Gap Report, 2014 similarly found that:

*Prevailing stigma, discrimination and punitive social and legal environments based on sexual orientation and gender identity, often compounded by the limited availability of and access to sexual and reproductive health services for young people, are among the main determinants of this high vulnerability to HIV among young gay men and other men and other men who have sex with men.*⁵⁵

50. Decriminalising homosexuality was the foremost recommendation in this UNAIDS report to close the gap between the higher HIV prevalence in MSM and that of the general population.⁵⁶

51. There is also a strong correlation between criminalisation and under-investment in HIV services for MSM.⁵⁷ This is partly because these laws make it politically difficult for governments to justify the necessary funding for providing HIV support.⁵⁸ More broadly, criminalisation lowers the visibility of MSM and leads to inaccurate data on HIV sub-epidemics.⁵⁹ By the end of 2011, only 87 countries had reported prevalence of HIV in MSM, with data most sparse for the Middle East and Africa, 'regions where criminal sanctions against same-sex sexual behaviour can make epidemiological assessments challenging'.⁶⁰ This paucity of information means that HIV prevention programmes are less likely to be adequately resourced and driven by reliable.

Africa

52. Looking at some further regional analyses, a systematic review of National Strategic Plans on HIV and AIDS across Africa presented the inclusion of MSM in national HIV policy and programming. The review found most African governments exhibited neither adequate knowledge of epidemic dynamics among MSM nor the social dynamics behind African MSM's HIV risk. **Of 34 African National Strategic Plans, 22 identified MSM as being most at risk for HIV infection**, while 10 acknowledged the role of social stigma and marginalisation and 11 noted criminalisation of same-sex sexuality as a factor in MSM vulnerability.⁶¹

46 Zulu, K., Bulawo, N.K., Zulu, W., 'Understanding HIV risk behavior among men who have sex with men in Zambia', *International AIDS Conference, Toronto, Canada*, 13 August 2006.

47 Baral, S., Adams, D., Lebona, J., et al. 'A cross-sectional assessment of population demographics, HIV risks and human rights contexts among men who have sex with men in Lesotho', *J Int AIDS Soc*, 2011, 14, p. 36.

48 Henry, E., Marcellin, F., Yomb, Y., et al., 'Factors associated with unprotected anal intercourse among men who have sex with men in Douala, Cameroon', *Sex Transm Infect* (2010) 86: 136-40; Larmarange, J., Wade, A.S., Diop, A.K., et al. 'Men who have sex with men (MSM) and factors associated with not using a condom at last sexual intercourse with a man and with a woman in Senegal' *PLoS One*, 2010, 5, e13189. Geibel, S., Luchters, S., King'Ola, N., Esu-Williams, E., Rinyiru, A., Tun, W., 'Factors associated with self-reported unprotected anal sex among male sex workers in Mombasa, Kenya', *Sex Transm Dis*, 2008, 35, pp. 746-752.

49 Pulerwitz, J., 'Tackling stigma: fundamental to an AIDS-free future', *The Lancet Global Health*, June 2014, Vol. 2, Issue 6, pp. 311-312.

50 Altman, D., Beyrer, C., Collins, C., Dowdy, D., Katabira, E., Kazatchkine, M., Mayer, K.H., Sanchez, J., Sidibe, M., Sullivan, P.S., Trapence, G., 'A call to action for comprehensive HIV services for men who have sex with men', *The Lancet*, 20 July 2012, Vol. 380, Issue 9839, pp 424-38. Available at: http://www.humandignitytrust.org/uploaded/Library/Other_Reports_and_Analysis/The_Lancet_A_call_to_action_for_comprehensive_HIV_services_for_men_who_have_sex_with_men_Vol_380_Issue_9839_Pages_42438.pdf

51 *Ibid*, p. 433.

52 *Ibid*, p. 428.

53 *Ibid*, p. 433.

54 *Ibid*, p. 433.

55 At n. 1 above, p. 205.

56 *Ibid*, p. 212.

57 American Foundation for AIDS Research, *Achieving an AIDS-free generation for gay men and other MSM: financing and implementation of HIV programs targeting MSM*, 2012.

58 Beyrer, C., 'Global prevention of HIV infection for neglected populations: men who have sex with men', *Clin Infect Dis*, 2010, 50, Suppl 3, pp. 108-113.

59 Jenkins, C., 'Male sexuality and HIV: the case of male-to-male sex', Background Paper: Risks and Responsibilities, Male Sexual Health and HIV in Asia and the Pacific, New Delhi (2006): 11

60 'A call to action for comprehensive HIV services for men who have sex with men', *The Lancet*, 20 July 2012, Vol. 380, Issue 9839, pp. 424-438.

61 Gueboguo, C., Lyons, D., Makofane, K., Sandfort, T., 'Men who have sex with men inadequately addressed in African AIDS National Strategic Plans', *Global Public Health: An International Journal for Research, Policy and Practice*, 2013, 8, 2, pp. 129-143.

53. Despite the overwhelming evidence on the adverse effects of criminalisation on HIV transmission, a small number of African countries have passed, or attempted to pass, enhanced criminal laws against the LGBT community:

- a) In October 2014, The Gambia amended its *Criminal Code* to include the offence of 'aggravated homosexuality'. This offence increases the penalty for consensual same-sex intimacy from 14 years to life imprisonment, including when the 'offender is a person living with HIV Aids'.⁶²
- b) Uganda's *Anti-Homosexuality Act*, 2014 included an identical offence to The Gambia's, plus the offence of the 'promotion of homosexuality'.⁶³ Uganda's Constitutional Court has since struck down this law. To replace it, the Ugandan government has drafted the *Prohibition of the Promotion of Unnatural Sexual Practices Bill*, which too prohibits the 'promotion of homosexuality', and in addition criminalises those who provide services to LGBT people, potentially including safe sex advice.⁶⁴ These laws not only further stigmatised MSM and trans women, but also put medical professionals at risk of prosecution for 'promoting' homosexuality via their outreach to the LGBT community.

c) Nigeria's Same-Sex Marriage (*Prohibition*) Act, 2013, discussed above at paragraph 19, attempts to eliminate any space for the LGBT identity.

The Caribbean

54. In an article of May 2014, Dr Ernest Massiah, UNAIDS Caribbean Regional Support Team Director, wrote:

“ There is consensus around this among leaders of the region's HIV response. Over the last ten years, under the umbrella of the Pan Caribbean Partnership against AIDS (PANCAP), civil society, national AIDS responses and international partners have supported the goal of removing laws that criminalise sexual orientations and behaviours. The 2008 – 2012 Caribbean Regional Strategic Framework reinforced this target. This is a regional goal and a global one. It is one of the key steps that must be taken to end AIDS.⁶⁵

Asia-Pacific

55. The Commission on AIDS in Asia found that MSM account for between 10–30% of new HIV infections annually, and projects that MSM will constitute close to half of all new HIV infections occurring annually in Asia by 2020.⁶⁷

56. Steven Kraus, the UNAIDS Director for Asia and the Pacific, speaking at the International AIDS Society meeting in Kuala Lumpur, said that laws that punish same-sex sexual activities and impose harsh sentences on offenders have prompted a rise in transmissions in parts of Asia:

“ Punitive laws and practices that discriminate (against) people and prevent them from getting treatment are not helping.⁶⁸

57. A study commissioned by the UN Development Programme focusing on Asia and the Pacific found that laws criminalising homosexuality are regularly used by police to:

- a) Prohibit HIV prevention activities on the grounds that they aid and abet criminal activities.
- b) Harass HIV outreach workers, many of whom are MSM.
- c) Confiscate condoms and lubricants as evidence of prostitution or illegal male-male sex.
- d) Censor HIV education materials and otherwise prohibit the dissemination of public health information about safe sex practices.

58. Criminalisation also affects important patterns of socialising and sexual behaviour among MSM. By making it more difficult for MSM to socialise in private establishments, these laws increase the likelihood that sexual encounters will occur in public places at night, which is conducive to more hurried and thus less safe sex.⁷⁰

Burden of HIV on lesbian, bisexual and heterosexual women

59. MSM and trans women within LGBT communities are particularly susceptible to HIV as a result of criminalisation and persecution. However, it must not be forgotten that lesbian and bisexual women also bear adverse effects.

60. Lesbian and bisexual women in persecutory environments and other contexts where there are high levels of homophobia are vulnerable to sexual violence wherein perpetrators seek to 'correct' their sexuality via so-called 'corrective rape'. Persecutory environments frequently exist within criminalising countries, but also arise in non-criminalising countries too; a problem which is particularly acute in South Africa. Navi Pillay, the former United Nations High Commissioner for Human Rights, highlighted this when she said:

“ South Africa has given the world some powerful ideas – foremost among them the concept of the rainbow nation, where diversity is a source of strength and everyone is entitled to equal rights and respect. So it is especially saddening that the country reborn under Nelson Mandela's watchful eye should now be the setting for a sinister phenomenon that undermines everything the rainbow nation stands for: so-called 'corrective' or 'punitive' rape.

Recognizing that lesbians, gays and bisexuals, transgender and intersex persons are vulnerable to violence and discrimination is an important step towards realizing the basic rights of all people.⁷¹

62 Further information is available on our website: http://www.humandignitytrust.org/uploaded/Library/Other_Material/Gambia_-_Criminal_Code_Act_2014_briefing_note.pdf

63 Further information is available on our website: http://www.humandignitytrust.org/uploaded/Library/Other_Material/Briefing_on_Anti-Homosexuality_Act_2014_final.pdf

64 Further information is available on our website: http://www.humandignitytrust.org/uploaded/Library/Other_Reports_and_Analysis/Uganda_USP_Bill_2014_Briefing_Final_28_11_2014.pdf and http://www.humandignitytrust.org/uploaded/Library/Other_Material/Uganda_Breadth_of_the_USP_Bill_2013.pdf

65 Massiah, E., *HIV in the Caribbean: science, rights and justice*, 28 May 2014. Available at: <http://unaids-caribbean.org/node/347>

66 Commission on AIDS in Asia, 'Redefining AIDS in Asia: Crafting an Effective Response', *UN AIDS*, 2008, p. 203.

67 *Ibid*, p. 57.

68 'Laws in Asia hindering Aids fight, say UN health officials', *South China Morning Post*, 2 July 2013. Available at: <http://www.scmp.com/news/asia/article/1273330/laws-asia-hindering-aids-fight-say-un-health-officials>

69 United Nations Development Programme, *Legal Environments, Human Rights, and HIV Responses among Men who Have Sex with Men and Transgender People in Asia and the Pacific*, July 2010, p. 4. Available at: http://www.undp.org/content/dam/undp/library/hivaids/English/HIV-Legal_Environment-FullReport.pdf

70 *Ibid*, p. 5.

71 Pillay, N., 'The shocking reality of homophobic rape', *The Asian Age* and published in eight other newspapers, 20 June 2011. Available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11229&LangID=E#sthash.9auAwyey.dpuf> <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11229&LangID=E>

61. It is well documented that rape increases the likelihood of HIV transmission in many capacities. Violence against women by intimate partners increases the risk of HIV transmission,⁷² particularly as these rapists are unlikely to take precautions such as using condoms.⁷³ Hence so-called 'corrective rape' leaves lesbian and bisexual women vulnerable to sexually transmitted diseases, including HIV.
62. Emerging evidence has also established that in hyper endemic settings, such as Southern Africa, there is a higher prevalence of sexually transmitted diseases, including HIV, among lesbian and bisexual women than was expected given available international data. This suggests that these women not only face transmission risks through men, including for transactional sex, but also in their same-sex relationships.⁷⁴

63. Heterosexual women's sexual health is also impacted by the criminalisation and persecution of LGBT people as increased HIV prevalence among MSM spills over into the heterosexual population. Many MSM also have sex with women.⁷⁵ This may be due to attraction and/or social pressure to maintain concurrent heterosexual relationships.⁷⁶ For instance, half of all MSM in the Asia-Pacific region are believed to have sex with women, including spouses, partners, female clients and female sex workers.⁷⁷ Some of these women will acquire HIV from these men. Therefore, failure to repeal these laws significantly heightens the overall HIV infection and transmission rate for all adult groups. By contrast, evidence shows that in a range of epidemic settings, universal access to HIV services for MSM together with anti-discrimination efforts can significantly reduce infections both among those men and the wider community.⁷⁸

⁷² United Nations, *Intersections of violence against women and HIV/AIDS*, 17 January 2005, Rep. no. E/CN.4/2005/72.

⁷³ *Ibid.*

⁷⁴ Daly, F. *Claiming the Right to Health for Women Who Have Sex with Women Through South Africa's National Strategic Plans on HIV and STIs*. Health Economics and HIV Research Division, University of Kwa Zulu Natal.

⁷⁵ UNAIDS, *Universal Access for Men who have Sex with Men and Transgender People, Action Framework*, 2009. Available at: http://data.unaids.org/pub/report/2009/jc1720_action_framework_msm_en.pdf

⁷⁶ UNAIDS, *Universal Access for Men who have Sex with Men and Transgender People, Action Framework*, 2009.

⁷⁷ Commission on AIDS in the Pacific, *Turning the Tide: An Open strategy for a response to AIDS in the Pacific*, 2008, p. 39.

⁷⁸ Baral, S.D., Beyrer, C., Johns, B., Sifakis, F., Walker, D., Wirtz, A.L., 'The Global HIV Epidemics among Men Who Have Sex with Men (MSM)', *The World Bank*, 2011. Available at: <http://issuu.com/world.bank.publications/docs/9780821387269>. UNAIDS, UNDP, *UNAIDS Action Framework: Universal Access for Men who have Sex with Men and Transgender People*, 2009. Available at: http://data.unaids.org/pub/report/2009/jc1720_action_framework_msm_en.pdf

Human Rights, criminalisation and HIV

64. This second part addresses the human rights concerns associated with HIV and criminalisation. Human rights are relevant to the interplay between criminalisation and HIV in several ways. First, HIV transmission has been used as an excuse to justify criminalisation. Notwithstanding that this argument is false from an empirical point of view, as shown above, this argument is legally unsound. Secondly, at a societal level, criminalisation is an indicator of poor human rights protection in general, which impacts HIV prevention across the board. Thirdly, at an individual level, human rights law is relevant as criminalisation acts as a barrier to LGBT people accessing healthcare.

Public health arguments for criminalisation fail to meet the test of human rights law

65. In *Toonen v. Australia*, the United Nations Human Rights Committee considered and rejected the claim by the Tasmanian authorities that laws criminalising private consensual homosexual conduct were justified on public health and moral grounds. The Human Rights Committee held that:

While the State party acknowledges that the impugned provisions constitute an arbitrary interference with Mr. Toonen's privacy, the Tasmanian authorities submit that the challenged laws are justified on public health and moral grounds, as they are intended in part to prevent the spread of HIV/AIDS in Tasmania...

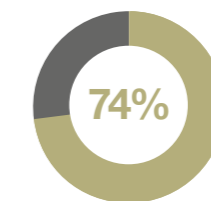
⁷⁹ *Toonen v. Australia*, CCPR/C/50/D/488 (1992), paras. 8.4 and 8.5.

⁸⁰ The human rights laws in this area, including the fallacy of public health arguments and the effect of the decisions in *Toonen*, is discussed further in two other briefing notes in this series: *Criminalising Homosexuality and the Rule of Law* and *Criminalising of Homosexuality and Working through International Organisations*.

As far as the public health argument of the Tasmanian authorities is concerned, the Committee notes that the criminalization of homosexual practices cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of AIDS/HIV... Criminalization of homosexual activity thus would appear to run counter to the implementation of effective education programmes in respect of the HIV/AIDS prevention. Secondly, the Committee notes that no link has been shown between the continued criminalization of homosexual activity and the effective control of the spread of the HIV/AIDS virus.⁷⁹

66. With 168 state-parties, the International Covenant on Civil and Political Rights (ICCPR) is a lynchpin of the international human rights system. Of the 78 jurisdictions that currently criminalise homosexuality, 58 are parties to the ICCPR.⁸⁰ The Human Rights Committee is the treaty body that interprets the ICCPR. State-parties' domestic law must be reconciled with the Human Rights Committee's decision in *Toonen* for those states to keep their international treaty obligations under the ICCPR. The Human Rights Committee in *Toonen* was clear when it stated:

[T]he criminalization of homosexual practices cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of AIDS/HIV.



Of the 78 jurisdictions that currently criminalise homosexuality, 58 (74%) are parties to the ICCPR

67. In *Commonwealth v. Wasson*,⁸¹ while striking down the state 'sodomy' statute, Justice Leibson writing for a Kentucky Supreme Court majority ruled that:

The growing number of females to whom AIDS (Acquired Immune Deficiency Syndrome) has been transmitted is stark evidence that AIDS is not only a male homosexual disease. The only medical evidence in the record before us rules out any distinction between male-male and male-female anal intercourse as a method of preventing AIDS. The act of sexual contact is not implicated, per se, whether the contact is homosexual or heterosexual.

Poor human rights protection helps HIV to spread

68. Various statements have been made by international bodies and in scientific journals about the link between human rights and HIV transmission.

Office of the High Commissioner for Human Rights

69. The Office of the High Commissioner for Human Rights (OHCHR) says the following about the link between poor human rights and HIV:

Human rights are inextricably linked with the spread and impact of HIV on individuals and communities around the world. A lack of respect for human rights fuels the spread and exacerbates the impact of the disease, while at the same time HIV undermines progress in the realisation of human rights. This link is apparent in the disproportionate incidence and spread of the disease among certain groups which, depending on the nature of the epidemic and the prevailing

*social, legal and economic conditions, include women and children, and particularly those living in poverty. It is also apparent in the fact that the overwhelming burden of the epidemic today is borne by developing countries, where the disease threatens to reverse vital achievements in human development. AIDS and poverty are now mutually reinforcing negative forces in many developing countries.*⁸²

70. The OHCHR highlights three ways in which HIV and human rights are interlinked:

Increased vulnerability: *Certain groups are more vulnerable to contracting the HIV virus because they are unable to realize their civil, political, economic, social and cultural rights. For example, individuals who are denied the right to freedom of association and access to information may be precluded from discussing issues related to HIV, participating in AIDS service organizations and self-help groups, and taking other preventive measures to protect themselves from HIV infection. Women, and particularly young women, are more vulnerable to infection if they lack of access to information, education and services necessary to ensure sexual and reproductive health and prevention of infection. The unequal status of women in the community also means that their capacity to negotiate in the context of sexual activity is severely undermined. People living in poverty often are unable to access HIV care and treatment, including antiretrovirals and other medications for opportunistic infections.*

Discrimination and stigma: *The rights of people living with HIV often are violated because of their presumed or known HIV status, causing them to suffer both the burden of the disease and the consequential loss of other rights. Stigmatisation and discrimination may obstruct their access to treatment and may affect their employment, housing and other rights. This, in turn, contributes to the vulnerability of others to infection, since HIV-related stigma and discrimination discourages individuals infected with and affected by HIV from contacting health and social services. The result is that those most needing information, education and counselling will not benefit even where such services are available.*

Impedes an effective response: *Strategies to address the epidemic are hampered in an environment where human rights are not respected. For example, discrimination against and stigmatization of vulnerable groups such as injecting drug users, sex workers, and men who have sex with men drives these communities underground. This inhibits the ability to reach these populations with prevention efforts, and thus increases their vulnerability to HIV. Likewise, the failure to provide access to education and information about HIV, or treatment, and care and support services further fuels the AIDS epidemic. These elements are essential components of an effective response to AIDS, which is hampered if these rights are not respected.*⁸³

UNAIDS-Lancet Commission

71. The UNAIDS-Lancet Commission's report of July 2015⁸⁴ emphasises the fundamental importance of human rights in the path towards ending HIV/AIDS as a public health threat:

A crucial lesson from the HIV epidemic (and for global health generally) is that the commitment expressed in universal human rights to enjoyment by everyone of the highest available standard of physical and mental health can be fulfilled. To uphold and defend the human rights of people with infections or people at most risk of infection can bring down the rates of infection and death. These lessons are still hard to learn and teach. Many people die when these lessons are not learned.

*Practical solutions are needed to expedite changes in the laws, policies, and public attitudes that violate the human rights of vulnerable populations who might be at particular risk of HIV infection, such as women, sex workers, MSM, transgender people, injecting drug users, prisoners, and migrants. UNAIDS and its co-sponsors should redouble their efforts in this respect. Work at local level is key to increase inclusivity and community involvement. The creation of safe service havens for marginalised and vulnerable groups at high risk of HIV is a crucial step to ensure that no one is denied access to health care and HIV prevention.*⁸⁵

⁸¹ *Commonwealth v. Wasson*, 1992, 842 S. W. 2d 487.

⁸² Available at: <http://www.ohchr.org/EN/Issues/HIV/Pages/HIVIndex.aspx>

⁸³ *Ibid.*

⁸⁴ At n.7 above, pp. 171-218.

⁸⁵ *Ibid.*, 173.

72. One of the report's seven key recommendations was to:

*Forge new paths to uphold human rights and address criminalisation, stigma, and discrimination using practical approaches to change laws, policies, and public attitudes that violate human rights.*⁸⁶

UN Secretary-General Ban Ki-moon

73. At the launch of the UNAIDS-Lancet Commission report at the CARICOM Heads of Government Summit in Barbados, UN Secretary-General Ban Ki-moon called for regional governments to repeal legislation that promotes discrimination as a means of containing the spread of HIV. The Secretary-General stated:

“**The epidemic is only made worse by laws and stigma. These are [impacting] our vulnerability to HIV infection and our answers to life saving achievements. They threaten both human rights and public health. We cannot tolerate discrimination on the basis of sexual orientation or on the basis of gender identity...**

We can leave no one behind. AIDS can only end when we protect the human rights of all... We have to [correct] all kinds of societal ills including stigma, intolerance, discrimination and violence. To end this epidemic, we need gender equality. We need to protect the sexual and reproductive rights.⁸⁷

Individual human rights engaged by the adverse effects of criminalisation on HIV treatment

74. The criminalisation of consensual same-sex intimacy raises numerous human rights issues, such as the rights to privacy, dignity and equality, and the prohibition on cruel, inhuman and degrading treatment, which are discussed in detail in our other briefing notes. In addition, criminalisation and stigmatisation raise specific health-related human rights violations connected with access to HIV testing and treatment.

75. The obligations of states towards their citizens are contained in international treaties, such as the ICCPR and the International Covenant on Economic Social and Cultural Rights; as well as regional treaties, such as the European Convention on Human Rights (ECHR), the American Convention on Human Rights, and the African Charter on Human and Peoples' Rights; and within national constitutions and domestic laws that protect civil, political and socio-economic rights.

76. OHCHR lists the following rights as being relevant to HIV, which states are obliged to promote and protect:⁸⁸

- a) The right to life.
- b) The right to liberty and security of the person.
- c) The right to the highest attainable standard of mental and physical health.
- d) The right to non-discrimination, equal protection and equality before the law.
- e) The right to freedom of movement.
- f) The right to seek and enjoy asylum.
- g) The right to privacy.
- h) The right to freedom of expression and opinion and the right to freely receive and impart information.
- i) The right to freedom of association.
- j) The right to marry and found a family.
- k) The right to work.
- l) The right to equal access to education.
- m) The right to an adequate standard of living.
- n) The right to social security, assistance and welfare.
- o) The right to share in scientific advancement and its benefits.
- p) The right to participate in public and cultural life.
- q) The right to be free from torture and other cruel, inhuman or degrading treatment or punishment.

77. Former Special Rapporteur Anand Grover commented on the right to health in the Human Rights Council report of April 2010:

“**The Special Rapporteur believes that criminalization has adverse consequences on the enjoyment of the right to health of those who engage in consensual same-sex conduct, through the creation of the societal perception that they are 'abnormal' and criminals. This has a severe deleterious impact on their self-regard, with significant, and sometimes tragic, consequences on their health-seeking behaviour and mental health. Rates of suicide attempts amongst youth who engage in consensual same-sex conduct have been variously reported as between three and seven times higher than for youth who identify as heterosexual; 25 the rates are similar for adults.**⁸⁹

78. Mr Grover examined the relationship between the right to health and the criminalisation of private, adult, consensual same-sex intimacy. His 2010 report was firm in its conclusion, that:

“**[D]ecriminalization of such conduct is necessary to address the disempowerment that affected individuals and communities face, and to enable full realization of the right to health.**⁹⁰

⁸⁶ *Ibid*, 171.

⁸⁷ Reported by Madden, M., 'UN chief concerned about HIV/AIDS approach in the region', *Barbados Today*, 4 July 2015. Available at: <http://www.barbadostoday.bb/2015/07/04/un-chief-concerned-about-hiv-aids-approach-in-the-region/>

⁸⁸ Available at: <http://www.ohchr.org/EN/Issues/HIV/Pages/HIVIndex.aspx>

⁸⁹ UN Human Rights Council, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, A/HRC/14/20, 27 April 2010, para. 8.

⁹⁰ *Ibid*, para. 7.

79. Mr Grover concluded that criminalising same-sex intimacy adversely affects the right to health by creating the perception that those who engage in such activities are ‘abnormal’ and ‘criminals’,⁹¹ and went on to say:

“ The fear of judgement and punishment can deter those engaging in consensual same-sex conduct from seeking out and gaining access to health services. This is often a direct result of the attitudes of health-care professionals who are not trained to meet the needs of same-sex practising clients – not only in terms of sexual health, but also with regard to health care more generally. Often, health professionals may refuse to treat homosexual patients altogether, or respond with hostility when compelled to do so. Where patients may be guilty of a criminal offence, by engaging in consensual same-sex conduct, this has the potential to jeopardize the obligations of confidentiality that arise during the course of the doctor-patient relationship, as health professionals may be required by law to divulge details of patient interaction.⁹²

80. Decisions from regional human rights courts interpreting these rights include:

- a) *D v. United Kingdom* (1997), an ECHR decision that confirmed the denial of access to treatment can amount to inhuman or degrading treatment.⁹³
- b) *Jorge Odir Miranda Cortez v. El Salvador* (2009), an Inter-American Commission decision that emphasised that persons living with HIV are in an especially vulnerable situation, given the characteristics of the illness, the medical treatment required, and the exclusion and discrimination usually associated with it.⁹⁴
- c) *I.B. v. Greece* (2013), another ECHR decision, determined that the dismissal of an employee due to his HIV-status violated the prohibition on discrimination.⁹⁵
- d) *Ángel Alberto Duque v. Colombia* (2014), another Inter-American Commission decision, determined that the applicant’s right to personal integrity was violated by various factors, including his sexual orientation and uncertainty over his access to HIV treatment.⁹⁶

81. LGBT people possess the human rights listed above by virtue of the fact that they are universal by definition. However, the criminalisation and stigmatisation of LGBT people creates a barrier to their fulfilment. Fear of arrest acts as a barrier to LGBT people obtaining HIV testing and treatment. Further, LGBT people often face ‘double’ discrimination simultaneously due to their being LGBT and their HIV or perceived HIV status.

Conclusions

82. The criminalisation of same-sex intimacy between consenting adults intersects with HIV/AIDS in multiple ways. Flawed public health arguments may once have provided flimsy arguments in support of criminalisation. Today, however, there is overwhelming empirical evidence demonstrating the causal link between criminalisation and increased rates of HIV transmission. Experts have repeatedly concluded that, rather than halting the spread of HIV, the criminalisation of homosexuality seriously impedes the effectiveness of measures designed to halt and reverse the HIV pandemic. Decriminalisation is thus a key element of any effective public health strategy particularly any relating to reducing the incidence and prevalence of HIV.
83. Addressing the stigmatisation of LGBT people is necessary to address the disproportionately high HIV rates among MSM and trans women, as well as the specific vulnerability of lesbian and bisexual women and trans men where risks emerge; which in turn is a crucial aspect of any national or international response to HIV/AIDS. The global evidence is clear that public health is best served by removing discrimination and prejudice against LGBT people and thereby ensuring that the widest possible information regarding safe sex practices, health services and HIV prevention and treatment measures is accessible to the people who need it most. LGBT people and wider society alike benefit from reducing the stigma against LGBT people. The continued criminalisation of

consensual same-sex intimacy is a major barrier to stemming the transmission of HIV. Decriminalisation is imperative, not optional, on public health grounds alone.

84. Additionally, the criminalisation of homosexuality raises a number of HIV-related human rights concerns. On a societal level, criminalisation is an indicator of poor human rights protection in general. It is known that poor human rights protection overall enables HIV transmission and hinders access to treatment. On an individual level, criminalisation acts as a further barrier for LGBT people to access HIV testing and healthcare, placing them at a discriminatory and systematic disadvantage when trying to realise their health-related human rights.
85. Removing stigma through decriminalisation of private, adult, consensual same-sex intimacy is a first step in promoting healthy, tolerant and flourishing societies.

⁹¹ *Ibid*, para 17.

⁹² *Ibid*, para 18.

⁹³ 24 EHRR 423. Available at: <http://www.baillii.org/eu/cases/ECHR/1997/25.html>

⁹⁴ IACHR, Report No. 27/09, Merits, Case 12.249, para. 70. Available at: <https://www.cidh.oas.org/annualrep/2009eng/EISalvador12249eng.htm>

⁹⁵ Application no. 552/10. English language summary available at: <http://hudoc.echr.coe.int/web/services/content/pdf/003-4520290-5453651>

⁹⁶ IACHR Report No. 5/14, Merits Case 12,841, para. 101. Available at: <http://www.oas.org/en/iachr/decisions/court/12841FondoEn.pdf>

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Criminalising Homosexuality and International Human Rights Law

Corrigendum, 09 September 2016: Errors in the original text of these notes relating to the scale and impact of criminalisation of lesbian and bisexual women have been corrected as follows:

- On p. 6 of "Criminalising Homosexuality: Irreconcilable with Good Governance: Synopsis and our Recommendations";
- On p. 4 of "Criminalising Homosexuality and International Human Rights Law";
- On p. 4 of "Criminalising Homosexuality and Working through International Organisations"

For more detailed information on the topic of criminalisation of women, please see our report [*Breaking the Silence: Criminalisation of Lesbian and Bisexual Women and its Impacts.*](#)

The criminalization of private, consensual sex between adults of the same sex breaches a State's obligations under international law, including the obligations to protect individual privacy and to guarantee non-discrimination.

The Office of the High Commissioner for Human Rights, September 2012¹

This is one in a series of notes produced for the Human Dignity Trust on the criminalisation of homosexuality and good governance. Each note in the series discusses a different aspect of foreign policy that is engaged by the continued criminalisation of homosexuality across the globe.

The Human Dignity Trust is an organisation made up of international lawyers supporting local partners to uphold human rights and constitutional law in countries where private, consensual sexual conduct between adults of the same sex is criminalised. We are a registered charity no.1158093 in England & Wales. All our work, whatever country it is in, is strictly not-for-profit.

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¹ UN OHCHR, *Born Free and Equal - Sexual Orientation and Gender Identity in International Human Rights Law*, 14 September 2012, pp. 9 and 10.

The Scale of the problem

01. The criminalisation of homosexuality is a global problem that degrades millions of men and women. A snapshot is provided below:

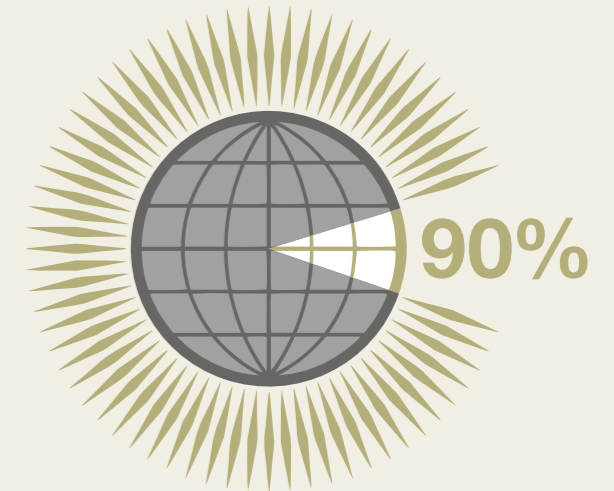
Same-sex intimacy between consenting adults in private is a crime in 78 jurisdictions. Of these, at least 44 jurisdictions criminalise female same-sex intimacy as well as male.

In the 78 jurisdictions that criminalise men, approximately 94 to 145 million men are or will be 'un-apprehended felons' during the course of their lifetimes for having a same-sex sexual experience.²

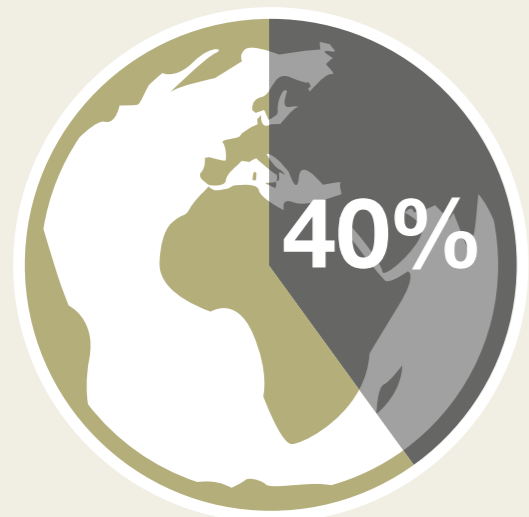
Likewise, in the 44 jurisdictions that criminalise women, approximately 22 to 66 million women are or will be 'un-apprehended felons'.³

Of these 2.9 billion people, an estimated 58 to 174 million will identify as LGBT now or when they reach adulthood.⁴

Criminalisation is largely a problem for the Commonwealth. Of the 2.9 billion who live where same-sex intimacy is a crime, 2.1 billion live in the Commonwealth (some three-quarters of the total). 90% of Commonwealth citizens live in a jurisdiction that criminalises. Criminalisation is a legacy of British colonial law.



Laws that criminalise same-sex intimacy do more than outlaw certain sexual acts. These laws criminalise the lesbian, gay, bisexual and transgender (LGBT) identity. Every aspect of a person's sense of self is criminalised, stigmatised and subject to feelings of shame. The full force of the state is used against LGBT people, so that society views them as worthless, deficient, sick, depraved. This leaves LGBT people vulnerable to violence, abuse and harassment from state actors and non-state actors alike, and shut out from employment, health care and other services. There can never be a justification for this state-sanctioned persecution, no matter the cultural, religious or historical background in the criminalising country



2.9 billion people live in these 78 jurisdictions (some 40% of the global population).

² Based on estimates that between 6.5% and 10% of men will have a same-sex sexual experience in adulthood. The 6.5% figure is for adult males aged 25 to 44, taken from: Mosher, W.D., Chandra, A., Jones, J., *Sexual Behavior and Selected Health Measures: Men and Women 15-44 Years of Age, United States, 2002*, Advance Data from Vital and Health Statistics (362): 2. Available at: <http://www.cdc.gov/nchs/data/ad/ad362.pdf>. The 10% figure is for taken from a re-analysis of *The Kinsey Data*, Gebhard, P.H. and Johnson, A.B (1979). Available at: <http://www.kinseyinstitute.org/resources/bib-homoprev.html>

³ Based on estimates that between 3.7% and 11% of women will have a same-sex sexual experience in adulthood. Source, at n. 3 above. Mosher estimates 11%; Gebhard estimates 3.7%. The total population of these 44 jurisdictions is 1.2 billion, with a female population of approximately 600 million.

⁴ Based on conservative to moderate estimates that 2% to 6% of the general adult population identifies as LGBT. In 2005, the UK Government estimated that 6% of the UK population is LG; in 2010, the UK Office of National Statistics found that 1.5% of UK adults openly identify as LGB; in 2013, the *US National Health Statistic Reports* found that 2.3% of US adults openly identify as LGB; in April 2011, the Williams Institute published estimates collated from multiple surveys that 3.5% of adults in the United States identify as LGB and 0.3% of adults as transgender.

Overview

03. Laws that criminalise homosexuality contravene international law. Criminalisation infringes upon the rights to privacy, non-discrimination and dignity, and may amount to inhuman and degrading treatment. These rights are included in various international and regional treaties, through which states have taken on binding obligations to uphold these rights for everyone within their jurisdiction. Additionally, they represent international norms and values to which all states should adhere, regardless of the treaties that they have ratified. After all, human rights treaties merely affirm existing rights that attach to each of us by virtue of our humanity. The fact that these rights are universal can be seen by their inclusion in the Universal Declaration of Human Rights produced under the auspices of the United Nations (UN), whose membership encompasses nearly all states and includes 76 out of the 78 jurisdictions that criminalise homosexuality.⁵ Criminalisation is also repugnant to the human rights protection contained in domestic constitutions and domestic laws.
04. The right to privacy protects all individuals from arbitrary interference from the state. There can be nothing more arbitrary than the state regulating the consensual sexual activity of adults in private and imposing criminal sanctions, especially in circumstances where other consenting adults are not criminalised for engaging in the same or comparable behaviour.
05. The prohibition on discrimination is universally recognised. It applies to everyone, including LGBT people. It is never justifiable for the state to single out a defined group, and impose on it criminal sanctions that do not apply to others.
06. The right to dignity interacts with other rights. It is not expressly found in all human rights treaties or domestic constitutions, but treating people with dignity is at the core of human rights law. The criminalisation of homosexuality does more than outlaw certain sexual acts, it criminalises an entire identity, ostracises a group from the rest of society, leaving LGBT people vulnerable to violence and harassment. There is no dignity in the state criminalising homosexuality.
07. The prohibition on inhuman and degrading treatment is absolute. Laws that criminalise homosexuality permit severe mistreatment of LGBT people by state and non-state actors alike. These laws facilitate inhuman and degrading treatment. There is also a growing understanding that the very existence of these laws amounts to inhuman and degrading treatment.

5 Two criminalising jurisdictions are not UN members, Gaza (a part of the Palestinian Territories, which has non-member observer status at the UN) and the Cook Islands (which is in a free association with New Zealand, albeit has full treaty-making capacity at the UN).

08. This briefing note analyses the rights referred to above and demonstrates why each is violated by the criminalisation of homosexuality. The note then goes on to compare the relative strengths of these rights and their ability to progress rights for LGBT people more generally. The UK, Europe and (until recently) the United States each grounded their recognition of the rights of LGBT people in privacy. Although any progress is welcome, the use of privacy has only slowly been able to bring about parity between LGBT people and the rest of society. In more recent times, countries like South Africa and Nepal have used the right to equality, which resulted in much more rapid and broader legal protection for LGBT people. This briefing then goes on to examine how international human rights law can be enforced in domestic courts.

What is international law and when is it relevant?

09. International law defines the legal responsibilities of states in their conduct with each other, and in their treatment of individuals within the state's jurisdiction. It encompasses a wide range of issues of international concern, including human rights. There are at least four sources of international law,⁶ but for the purposes of this note only treaty law is relevant. States are the subject of international human rights law, as it is they who take on obligations. Individual people are the object, as it is their human rights that are to be respected.

6 Article 38(1) of the Statute of the International Court of Justice lists the sources of international law as: 'a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law'.

7 In addition, at least two other treaties will have specific application depending on the person seeking to uphold her or his rights. For lesbian and bisexual women, the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) will be relevant. For those below the age of 18, for example in equal age of consent challenges, the Convention on the Rights of the Child (CRC) may have application.

Treaty law

10. In terms of the international law that forbids the criminalisation of homosexuality, multiple international human rights treaties have been ratified under the auspices of the UN and within regional organisations. These international treaties contain commitments to uphold human rights, each of which borrows heavily from the UN's Universal Declaration of Human Rights, 1948.
11. At the UN level, all of the main UN human rights treaties have relevance to the criminalisation of homosexuality, but two treaties are of particular importance to all LGBT people striving to assert their rights:
- The International Covenant on Civil and Political Rights (ICCPR).
 - The Convention Against Torture (UNCAT).⁷
12. At the regional level, there are various international treaties that impose obligations among neighbouring states. The obligations in these regional-level treaties are broadly the same as each other, and broadly the same as the UN-level treaties. These regional treaties are:
- The European Convention on Human Rights (ECHR).
 - The American Convention on Human Rights (American Convention).
 - The African Charter on Human and Peoples' Rights (African Charter).
 - The Revised Arab Charter on Human Rights (Arab Charter).
13. Appendix 1 to this note lists the international treaties ratified by countries that criminalise homosexuality.

14. It is important to note at the outset that the international treaties discussed below apply to everyone within the signatory state's jurisdiction, and to the inclusion of LGBT people and all other groups. To give just one example of how this inclusivity is phrased, the Universal Declaration of Human Rights declares:

*Whereas recognition of the inherent dignity and of the **equal and inalienable rights of all members of the human family** is the foundation of freedom, justice and peace in the world...*

All human beings are born free and equal in dignity and rights. *They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.*

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind...⁸

The right to privacy

15. On multiple occasions the criminalisation of homosexuality has been found to violate the right to privacy. The right to privacy is contained in all of the treaties of international human rights law discussed in this note, except for the African Charter (see Appendix 2, where each treaty's privacy right is set out in full).
16. It is a common feature of these treaties that the state may interfere with one's privacy, but only if the interference is lawful and not arbitrary. Case law is consistent in concluding that the criminalisation of consensual same-sex intimacy amounts to an arbitrary interference with private life, and thus violates this right.

ICCPR

17. The Human Rights Committee is the treaty body that monitors and interprets the ICCPR. It has clearly and repeatedly stated that the criminalisation of homosexuality violates the right to privacy protected by Article 17 of the ICCPR. This determination was first made in 1994 in the case *Toonen v. Australia*. Mr Toonen was a leading member of the Tasmanian Gay Law Reform Group. He complained to the Human Rights Committee that Tasmanian law allowed 'police officers to investigate intimate aspects of his private life and to detain him if they have reason to believe that he is involved in sexual activities' with his long-term partner in the privacy of their own home.⁹ The Human Rights Committee was firm in its conclusion:

“ **Inasmuch as article 17 is concerned, it is undisputed that adult consensual sexual activity in private is covered by the concept of “privacy”.**¹⁰

The continued existence of the challenged provisions therefore continuously and directly “interferes” with the author’s privacy.

18. Since Toonen, it has been clear that all state-parties to the ICCPR have an obligation to repeal any laws that criminalise consensual same-sex sex between adults. In September 2012, the Office of the High Commissioner for Human Rights reiterated that the decriminalisation of homosexuality is an obligation under international law:

*The criminalization of private, consensual sex between adults of the same sex breaches a State’s obligations under international law, including the obligations to protect individual privacy and to guarantee non-discrimination. This has been the consistent position of United Nations human rights experts since 1994, when the Human Rights Committee decided Toonen v. Australia.*¹¹

19. Despite this unambiguous obligation, 58 parties to the ICCPR continue to criminalise homosexuality (see Appendix 1). Twenty-five of these state-parties allow individual complainants, like Mr Toonen, to petition the Human Rights Committee. The fact that criminalisation persists demonstrates the difficulty for individual applicants in accessing this process to protect their human rights. In particular, domestic remedies must be exhausted before the Human Rights Committee can be petitioned. In addition, applicants must come forward and, in doing so, declare their sexuality at the risk of arrest, violence and other harm. State-parties to the ICCPR, on the other hand, do not encounter these obstacles when bringing a state-to-state claim. Other state-parties are owed treaty obligations under the ICCPR. They should consider pursuing the state-to-state option to hold to account the 58 criminalising state-parties to the ICCPR that are flouting their obligations under international law.

58 parties to the ICCPR continue to criminalise homosexuality

ECHR

20. Like the Human Rights Committee, the European Court of Human Rights in Strasbourg has held that laws that criminalise homosexuality violate the right to privacy protected by Article 8 of the ECHR. This has been the consistent stance since the Strasbourg Court's judgment in 1981 in the case of *Dudgeon v. the United Kingdom*. Mr Dudgeon was a shipping clerk and gay rights activist living in Northern Ireland, which unlike the rest of the UK had not revised its criminalising laws. After Mr Dudgeon was interrogated by the police about his sexual activities, he petitioned the Strasbourg Court. The Strasbourg Court was as clear in its conclusion as the Human Rights Committee:

“ **[T]he maintenance in force of the impugned legislation constitutes a continuing interference with the applicant’s right to respect for his private life (which includes his sexual life) within the meaning of Article 8 par. 1... [T]he very existence of this legislation continuously and directly affects his private life: either he respects the law and refrains from engaging – even in private with consenting male partners – in prohibited sexual acts to which he is disposed by reason of his homosexual tendencies, or he commits such acts and thereby becomes liable to criminal prosecution.**¹²

⁸ Universal Declaration of Human Rights, Preamble and Articles 1 and 2, respectively.

⁹ *Toonen v. Australia*, UN Human Rights Committee, Communication No. 488/1992, CCPR/C/50/d/488/1992, 31 March 1994 ('*Toonen*'), paras. 2.2 and 2.3.

¹⁰ *Ibid.*, para. 8.2.

¹¹ OHCHR, *Born Free and Equal - Sexual Orientation and Gender Identity in International Human Rights Law*, 14 September 2012, p. 30.

¹² *Dudgeon v United Kingdom*, 4 EHRR 149 (1981), para. 41.

21. In a subsequent case, *Norris v. Ireland*, the Strasbourg Court added that mere existence of the criminalising laws interferes with the right to privacy:

“ It is true that, unlike Mr Dudgeon, Mr Norris was not the subject of any police investigation. However, the Court’s finding in the Dudgeon case that there was an interference with the applicant’s right to respect for his private life was not dependent upon this additional factor... The Court therefore finds that the impugned legislation interferes with Mr Norris’s right to respect for his private life.¹³

22. In a further case, *Modinos v. Cyprus*, the Strasbourg Court found that the right to privacy is still violated, even where there is an official moratorium on bringing prosecutions:

“ It is true that since the Dudgeon judgment the [Cypriot] Attorney-General... has followed a consistent policy of not bringing criminal proceedings in respect of private homosexual conduct on the basis that the relevant law is a dead letter. Nevertheless, it is apparent that this policy provides no guarantee that action will not be taken by a future Attorney-General to enforce the law... Against this background, the Court considers that the existence of the prohibition continuously and directly affects the applicant’s private life.¹⁴

23. In light of these decisions, Europe is now a criminalisation-free continent. All Council of Europe members must ratify and are subject to the ECHR. Since *Dudgeon*, no fewer than 20 Council of Europe members have decriminalised. These countries were compelled to decriminalise or lose their membership. The experience of the Council of Europe demonstrates the power of binding international human rights law that is accessible and actionable by individuals. The wide ripple effects of *Dudgeon* can be contrasted with *Toonen*, which has not had the same effect, as the right of individuals to petition the Human Rights Committee is more limited than that of the Strasbourg Court.

24. Looking beyond criminalisation, the right to privacy in the ECHR has been used by the Strasbourg Court to provide a remedy for other violations, for example:

- a) Discharge from the armed services based on sexual orientation.¹⁵
- b) The absence of state-sanctioned civil unions for same-sex couples.¹⁶

¹³ *Norris v. Ireland*, [1988] ECHR 10581/83, para. 38.

¹⁴ *Modinos v. Cyprus*, App. no. 15070/89, 22 April 1993, paras. 23 and 24.

¹⁵ *Smith & Grady v. the United Kingdom* 29 (1999) EHRR 493, 27 September 1999.

¹⁶ *Oliari and Others v. Italy*, [2015] ECHR 716, 21 July 2015.

American Convention

25. Unlike the Council of Europe and its ECHR, it is not a requirement that members of the Organisation of American States (OAS) ratify the American Convention. Although **11 countries that criminalise homosexuality are OAS members**, only four are parties to the American Convention (Barbados, Dominica, Grenada, and Jamaica, see Appendix 1).¹⁷ Of those, only one (Barbados) has given jurisdiction to the Inter-American Court of Human Rights to hear complaints from individual applicants. One other (Jamaica) has given jurisdiction to the Inter-American Commission on Human Rights to hear state-to-state claims. Due to the lack of coverage of this treaty in criminalising countries, there has not been a judgment specifically on the criminalisation of homosexuality as it relates to the American Convention.¹⁸ Again, contrasting the OAS with the Council of Europe shows the importance of a binding and accessible international treaty in bringing about decriminalisation.

26. However, from other cases on the American Convention, it is clear that the right to privacy contained therein is violated by the criminalisation of homosexuality. Both the Inter-American Court and the Inter-American Commission have made determinations on the right to privacy in the context of sexual orientation. Two cases best illustrate this.

27. In the case of *Atala Riffo and Daughters v. Chile*, the petitioner was denied child custody due to her being a lesbian. Ms Atala Riffo was a judge and mother of three daughters. She separated from her husband and reached a settlement with him that she would retain custody of their children. When Ms Atala Riffo ‘came out’ as a lesbian, her ex-husband sued for custody and was awarded it by the Chilean Supreme Court. The Inter-American Court held that the denial of custody on the basis of sexual orientation violated the right to privacy. The state’s conduct amounted to an arbitrary interference with Ms Atala Riffo’s private life.¹⁹

28. In the case of *Marta Lucia Alvarez Giraldo v. Colombia*, the petitioner was a lesbian who had been convicted of murder. Her heterosexual inmates were permitted conjugal visits from their male partners. She was not given the same privilege with her female partner. Ms Alvarez Giraldo alleged that the state’s refusal to permit her conjugal visits was due to her sexual orientation. The Inter-American Commission held that her complaint was admissible as Colombia’s conduct ‘could constitute an arbitrary or abusive interference with her private life’.²⁰

¹⁷ See: <http://www.oas.org/en/iachr/mandate/Basics/conventionrat.asp>

¹⁸ Although opportunities for individual-to-state and state-to-state complaints are scant, helpful opinions could be sought from the Inter-American Commission: (a) By an individual applicant regarding a state-party’s compliance with its obligations under the American Convention, as provided for by Article 44 of the American Convention – any of Barbados, Dominica, Grenada, and Jamaica could be the target of this procedure; or (b) By any OAS member regarding the interpretation of human rights law applicable in the Americas, as provided for in Article 64 of the American Convention. These options will not have binding effect, but if they were used would confirm that the criminalisation of homosexuality violates the American Convention and other human rights law applicable in the Americas.

¹⁹ *Atala Riffo and Daughters v. Chile*, Case 12.502, Inter-American Court of Human Rights, 24 February 2012, para. 167.

²⁰ *Marta Lucia Alvarez Giraldo v. Colombia*, Case 11.656, Report No. 71/99 (Admissibility Decision), Inter-American Commission on Human Rights, 4 May 1999, at para. 21.

29. If the American Convention recognises that the right to privacy is violated by the denial of conjugal rights to incarcerated LGBT people, it must of necessity recognise a violation where all same-sex sexual intimacy is criminalised. The four criminalising state-parties to the American Convention cannot deny that they are in breach of their treaty obligations by their continued criminalisation of homosexuality.

The prohibition on discrimination

30. The right to non-discrimination is contained in all of the treaties of international human rights law referred to above, except the CAT (see Appendix 2 for full text of these rights). Each of these international human rights treaties lists ‘prohibited grounds’. For example the ICCPR provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

31. Neither sexual orientation nor gender identity is included in these lists. However, with the exception of the Arab Charter, these lists are not exhaustive. For each of the ICCPR, ECHR, American Convention and African Charter:

- Discrimination is prohibited on **any ground**.
- The grounds expressly listed **are examples only**.
- The references to ‘other status’, ‘any other social condition’ and ‘any status’ confirm that the list of prohibited grounds is **non-exhaustive**.

32. The courts and bodies interpreting the ICCPR, ECHR, American Convention and African Charter have each recognised that sexual orientation is included as a prohibited ground for discrimination.

ICCPR

33. The Human Rights Committee determined in *Toonen* that sexual orientation is included in Article 26 of the ICCPR.²¹ Likewise, concerning Cameroon’s laws that criminalise homosexuality the Human Rights Committee stated:

*The Committee remains deeply concerned about the criminalization of consensual sexual acts between adults of the same sex ... As the Committee and other international human rights mechanisms have underlined, such criminalization violates the rights to privacy and freedom from discrimination enshrined in the [ICCPR] Covenant ... The State party should take immediate steps towards decriminalizing consensual sexual acts between adults of the same sex, in order to bring its law into conformity with the Covenant.*²²

²¹ *Toonen*, at n. 9 above, para. 8.7.

²² Concluding observations of the Human Rights Committee on Cameroon (CCPR/C/CMR/CO/4), at para. 12.

34. As a consequence, all 58 state-parties to the ICCPR that criminalise homosexuality cannot deny that they are in breach of their obligations under this treaty.

ECHR

35. The Strasbourg Court in the case of *Salgueiro da Silva Mouta v. Portugal*, held that discrimination on the ground of sexual orientation is prohibited by Article 14 of the ECHR. This case concerned Mr da Silva Mouta being denied child custody rights due to his being gay. The Strasbourg Court concluded that:

“ [S]exual orientation [is] a concept which is undoubtedly covered by Article 14 of the [ECHR] Convention. The Court reiterates in that connection that the list set out in that provision is illustrative and not exhaustive, as is shown by the words “any ground such as”.²³

36. In the ECHR system, discrimination on the ground of sexual orientation is permissible only in the strictest of circumstances. As stated by the Strasbourg Court in another case:

*On the one hand the Court has held repeatedly that, just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification.*²⁴

37. The Strasbourg Court has rich case law on non-discrimination on the ground of sexual orientation. It has held that this right was violated, for example, in the following instances:

- The refusal to grant adoption based on the sexual orientation of the adoptive parent.²⁵
- The failure to extend sickness insurance to a same-sex partner of an insured person.²⁶
- The placing of an LGBT prisoner in solitary confinement.²⁷
- The failure to grant civil unions to same-sex couples in circumstances where opposite-sex couple have access to the institution.²⁸
- The failure to protect LGBT people from violent attacks from the counter-demonstrators at a gay pride march, and a failure to investigate effectively the incident by establishing, in particular, the discriminatory motive behind the attacks.²⁹

²³ *Salgueiro da Silva Mouta v. Portugal* [1999] ECHR 176, 21 December 1999, para. 28.

²⁴ *Gas and Dubois v. France* (2014) 59 EHRR 22, para. 59.

²⁵ *E.B. v. France* (no. 43546/02), 22 January 2008.

²⁶ *P.B. and J.S. v. Austria* (no. 18984/02), 22 July 2010.

²⁷ *X. v. Turkey* (no. 24626/09), 9 October 2012.

²⁸ *Vallianatos v. Greece*, (no. 29281/09), 7 November 2013.

²⁹ *Identoba v. Georgia* (no. 73235/12), 12 May 2015.

American Convention

38. Like its European counterpart, the American Convention clearly prohibits discrimination on the ground of sexual orientation. In the case of *Atala Riffo*, the Inter-American Court found that discrimination on the ground of sexual orientation violates the American Convention, holding that sexual orientation is included in Article 1(1)'s reference to 'other social condition'. Helpfully, in this case the Inter-American Court demonstrated the breadth of the right to non-discrimination for LGBT people, which can be referred to in future challenges:

*[T]he Inter-American Court establishes that the sexual orientation of persons is a category protected by the Convention. Therefore, any regulation, act, or practice considered discriminatory based on a person's sexual orientation is prohibited. Consequently, no domestic regulation, decision, or practice, whether by state authorities or individuals, may diminish or restrict, in any way whatsoever, the rights of a person based on his or her sexual orientation.*³⁰

39. As a result, the four criminalising state-parties to the American Convention (Barbados, Dominica, Grenada, and Jamaica) cannot deny that they are in breach of their obligations under this treaty by their continued criminalisation of homosexuality.

African Convention

40. Likewise, the African Commission, in *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, confirmed that the reference to 'other status' in Article 2 of the African Charter prohibits discrimination on the grounds sexual orientation. The African Commission observed that:

*Together with equality before the law and equal protection of the law, the principle of non-discrimination provided under Article 2 of the [African] Charter provides the foundation for the enjoyment of all human rights. As Shestack [an author to whom the Commission referred] has observed, equality and non-discrimination "are central to the human rights movement." The aim of this principle is to ensure **equality of treatment for individuals irrespective of nationality, sex, racial or ethnic origin, political opinion, religion or belief, disability, age or sexual orientation.***³¹

41. Of the 78 jurisdictions that criminalise homosexuality, 32 are parties to the African Charter (see Appendix 1). They too cannot deny that they are in breach of their obligations under this treaty by their continued criminalisation of homosexuality.

Other international treaties

42. It is uncontroversial among other UN treaty bodies responsible for interpreting international treaties that discrimination on the ground of sexual orientation is prohibited. For example:

- a) The Committee on Economic, Social and Cultural Rights determined that sexual orientation is implicitly included in Article 2(2) (non-discrimination) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).³²
- b) The Committee on the Rights of the Child determined that Article 2 (non-discrimination) of the Convention of the Rights of the Child prohibits different ages of consent for heterosexuals and homosexuals.³³
- c) The Committee on the Elimination of Discrimination Against Women has called for the decriminalisation of same-sex intimacy between women.³⁴
- d) The Committee on Torture determined that the Convention Against Torture protects against discriminatory treatment in prisons based on sexual orientation.³⁵

43. Further, the UN High Commissioner on Refugees declared that the Convention on Refugees must be interpreted as prohibiting discrimination based on sexual orientation.³⁶

44. Like the right to privacy, the prohibition on discrimination has been crucial in establishing LGBT rights. This right has more universal coverage than the right to privacy, as it is a standard provision in treaties and constitutions; and once it has been established that LGBT people enjoy equal status with other citizens, treating them in any discriminatory manner breaches this right. As such, the right to non-discrimination can be seen as more substantial than the right to privacy, as the latter risks carving out only small areas of private space where LGBT people are free to conduct themselves as they wish. Privacy and equality are compared in further detail below at paragraphs 69 and 80.

³⁰ *Atala Riffo*, at n. 19 above, para. 91, also see paras 83-92.

³¹ *Zimbabwe Human Rights NGO Forum v Zimbabwe*, Communication 245/02, May 2006, para 169. See also, General Comments on Article 14 (1) (d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, para. 4.

³² *CESCR General Comment No. 20*, UN-Doc-E/C.12/GC/20/(2009), para. 32.

³³ *Concluding Observations of the Committee on the Rights of the Child: (Isle of Man)*, UN-Doc-CRC/C/15/Add.134, (2000), para. 22.

³⁴ *Report of the Committee on the Elimination of Discrimination against Women*, UN-Doc-CEDAW/A/54/38 (1999), paras. 127, 128.

³⁵ *Concluding Observations of the Committee against Torture: Egypt*, UN-Doc-CAT/s/XXIX/Misc.4 (2002), para. 5(e).

³⁶ *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, UN-Doc-HCR/GIP/12/09 (2012), para. 6.

The right to dignity

45. The right to dignity is contained in the substantive articles of the American Convention and the African Charter, and its importance is emphasised in the Preamble of the African Charter and Arab Charter (see Appendix 2 for full text).
46. Dignity is relevant to the criminalisation of homosexuality both as a standalone right and via its interplay with other substantive rights, such as privacy, non-discrimination, inhuman or degrading treatment, and the right to life. Dignity can be seen as the very essence of human rights treaties. In that regard, while the ECHR makes no reference to dignity in its Preamble or substantive Articles, the Strasbourg Court has declared on multiple occasions the importance of dignity when assessing breaches of the ECHR:

“ **The very essence of the [ECHR] Convention is respect for human dignity and human freedom.**³⁷
Any interference with human dignity strikes at the very essence of the Convention.³⁸

47. The interplay between dignity and other human rights was summed up in a court judgment from South Africa:
- Human dignity ... informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life... [W]here the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour.*³⁹
48. Although this decision is from a domestic court, it nonetheless informs how dignity can be viewed as underpinning the rights contained in international human rights treaties. The indignity caused by the criminalisation of homosexuality animates the substantive human rights contained in international human rights treaties and further illustrates that these rights are violated.

³⁷ *Pretty v. the United Kingdom*, 24 EHRR (1997) 423, at para. 65.

³⁸ *Bouyid v. Belgium*, Grand Chamber decision (2015) *Application no. 23380/09*, para. 101.

³⁹ *Dawood v. Minister of Home Affairs* [2000] 5 Law Reports of the Commonwealth 147, 2000 (3) SA 936 (CC), para. 35.

49. Domestic court decisions specifically on the criminalisation of homosexuality have considered dignity in this way. The Constitutional Court of South Africa in striking down South Africa's anti-sodomy laws stated:

*Its symbolic effect is to state that in the eyes of our legal system all gay men are criminals. The stigma thus attached to a significant proportion of our population is manifest. But the harm imposed by the criminal law is far more than symbolic. As a result of the criminal offence, gay men are at risk of arrest, prosecution and conviction of the offence of sodomy simply because they seek to engage in sexual conduct which is part of their experience of being human.*⁴⁰

50. The Court acknowledged that anti-gay laws do much more than merely prohibit certain sexual conduct:

*Only in the most technical sense is this a case about who may penetrate whom where. At a practical and symbolic level it is about the status, moral citizenship and sense of self-worth of a significant section of the community. At a more general and conceptual level, it concerns the nature of the open, democratic and pluralistic society contemplated by the Constitution...*⁴¹

“ **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 daily 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 and a breach of section 10 of the Constitution...**

*The harm caused by the provision can, and often does, affect his ability to achieve self-identification and self-fulfilment. The harm also radiates out into society generally and gives rise to a wide variety of other discriminations, which collectively unfairly prevent a fair distribution of social goods and services and the award of social opportunities for gays.*⁴²

⁴⁰ *National Coalition for Gay and Lesbian Equality and Anor v. Minister of Justice*, 6 BHR 127 (CCT 11/98), [1998], ZACC 15, 1998 (12) BCLR 1517 (CC), 9 October 1998 (“National Coalition”), para. 28.

⁴¹ *Ibid*, para. 36.

⁴² *Ibid*, paras. 28 and 36.

51. The Supreme Court of the United States, in *Lawrence v. Texas*, also acknowledged that dignity is undermined by laws that criminalise homosexuality, even in the absence of an express constitutional right to dignity. In this case, the court held:

*When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres... The stigma this criminal statute imposes, moreover is not trivial... it remains a criminal offense with all that imports for the dignity of the persons charged.*⁴³

52. The Privy Council, which incidentally is the final court of appeal for 11 criminalising jurisdictions, has also emphasised the importance of dignity when applying the right of equality to LGBT people. In a case from Gibraltar concerning the denial of joint tenancies to couples unless they were ‘married to one another’ or ‘have a child in common’, the Privy Council stated.

*In this case, the criterion is one which this [lesbian] couple, unlike other unmarried couples, will never be able to meet... As Ackermann J put it in the South African Constitutional Court decision in National Coalition for Gay and Lesbian Equality v Minister of Home Affairs [2000] 4 LRC 292, at para 54, the impact of this denial “constitutes a crass, blunt, cruel and serious invasion of their dignity”.*⁴⁴

53. Similarly, again in the absence of an express right to dignity, the Court of Appeal in Hong Kong referred to dignity in a case challenging differing ages of consent for heterosexual and homosexual sex. In this case, *Leung v. Secretary for Justice*, the court stated that:

[T]he question before us in the present case affects the dignity of a section of society in a significant way...⁴⁵

54. These domestic decisions exemplify how dignity can inform the content of substantive human rights, including those contained in international treaties. There are many other court decisions on dignity on issues other than the criminalisation of homosexuality, which serve as further examples of how dignity animates substantive rights.⁴⁶

The prohibition on inhuman and degrading treatment

55. The prohibition on inhuman and degrading treatment has relevance to the criminalisation of homosexuality in two senses. First, there are strong legal arguments that targeting a person or group on account of an immutable characteristic amounts, in and of itself, to inhuman and degrading treatment (see the *East African Asians* case below). Laws that criminalise homosexuality do more than outlaw certain sexual acts. These laws criminalise a person’s identity and permit the full force of the state to suppress that identity.

56. Secondly, these laws give license to specific and acute abuses against LGBT people, which individually may amount to inhuman and degrading treatment. Examples include forced anal examinations while in police custody and the failure of the state to prevent non-state actors violating the rights of LGBT people. These violations are facilitated by criminalisation, as laws that criminalise homosexuality place LGBT people outside of other legal protection, leaving them vulnerable to harassment, violence and abuse by both state and non-state actors.

57. Inhuman and degrading treatment is prohibited by each of the treaties referred to above (see Appendix 2). The prohibition on inhuman and degrading treatment is absolute. States who are parties to these international human rights treaties have an obligation under international law to protect individuals from such inhuman or degrading treatment. This obligation includes the state refraining from carrying out such acts itself; in this regard criminal laws that are inhuman or degrade LGBT people form a part of the state’s conduct.

58. This obligation also requires the state to act to prevent violations by non-state actors, and to provide redress when they occur. The failure to investigate and bring to justice perpetrators is itself a breach of international human rights law.

ICCPR

59. The Human Rights Council, another entity in the UN distinct from the Human Rights Committee, has recognised that the mistreatment of LGBT people by states engages the ICCPR’s prohibition on inhuman and degrading treatment. In November 2011, the High Commissioner for Human Rights released a report on ‘Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity’, which contained a statement on states’ obligations under international law, including:

To prevent torture and other cruel, inhuman or degrading treatment on grounds of sexual orientation or gender identity

The right to be free from torture and other cruel, inhuman or degrading treatment is absolute. Article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights provide that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”⁴⁷

UNCAT and UN Special Rapporteurs

60. The treaty body that monitors and interprets that the UNCAT, the Committee against Torture warned about the risk of the UNCAT being violated as a result LGBT people being targeted:

[B]oth men and women and boys and girls may be subject to violations of the [UNCAT] Convention on the basis of their actual or perceived non-conformity with socially determined gender roles.⁴⁸

⁴³ *Lawrence v. Texas*, 539 US 558 (2003), p. 575.

⁴⁴ *Rodriguez v. Minister of Housing of the Government*, [2009] UKPC 52, para. 19.

⁴⁵ *Leung v. Secretary for Justice*, Civil Appeal No 317 of 2005, 20 September 2006, para. 29.

⁴⁶ Some of these court decisions are discussed on our website at: http://www.humandignitytrust.org/uploaded/Briefing_Notes/Series_1/Dignity_BN-FINAL.pdf

⁴⁷ UN Human Rights Council, *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 November 2011, UN Doc. A/HRC/19/41, p. 6.

⁴⁸ Committee against Torture, General Comment No. 2, para. 22.

61. The UN Special Rapporteur on Torture has recommended that states must decriminalise same-sex relationships between consenting adults and repeal all laws that criminalise persons on the basis of their actual or perceived sexual orientation or gender identity or expression.⁴⁹ In his 2016 report on the applicability of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment in international law to the unique experiences of women, girls, and LGBT people, he stated that:

*States fail in their duty to prevent torture and ill-treatment whenever their laws, policies or practices perpetuate harmful gender stereotypes in a manner that enables or authorizes, explicitly or implicitly, prohibited acts to be performed with impunity. States are complicit in violence against women and lesbian, gay, bisexual and transgender persons whenever they create and implement discriminatory laws that trap them in abusive circumstances.... A clear link exists between the criminalization of lesbian, gay, bisexual and transgender persons and homophobic and transphobic hate crimes, police abuse, community and family violence and stigmatization...Such laws foster a climate in which violence against lesbian, gay, bisexual and transgender persons by both State and non-State actors is condoned and met with impunity.*⁵⁰

62. Of particular concern in countries that criminalise homosexuality is the practice of forced anal examinations by authorities to obtain evidence for prosecutions. These examinations are used, notwithstanding that they have been described as ‘medically worthless’ and amount to torture or ill-treatment according to Committee against Torture and the Special Rapporteur on Torture.⁵¹ The Special Rapporteur on Torture and the Working Group on Arbitrary Detention have also held that the practice contravenes the prohibition on inhuman and degrading treatment.⁵²

63. Similarly, suspected lesbians have been subjected to sex identification tests and forced medical examinations to determine whether digital penetrative sex had occurred between them.⁵³ Other medical procedures breach the prohibition on inhuman and degrading treatment when they are forced or are otherwise involuntary; these include so-called ‘conversion therapy’, sterilisation and gender reassignment.⁵⁴ The laws that criminalise homosexuality occasion the use of these forced examinations and treatments.

49 See Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, 5 January 2016, UN Doc. A/HRC/31/57, para. 69.

50 *Ibid.*, paras. 10 and 15.

51 See the concluding observations of the Committee against Torture on Egypt, UN Doc. CAT/C/CR/29/4, paras. 5 (e) and 6 (k); See also UN Doc. A/56/156, para. 24; A/HRC/4/33/Add.1, para. 317; UN Doc. A/HRC/10/44/Add.4, para. 61; UN Doc. A/HRC/16/52/Add.1, para. 131; and UN Doc. A/HRC/16/47/Add.1, opinion no. 25/2009 (Egypt), paras. 24, 28-29; Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, 5 January 2016, UN Doc. A/HRC/31/57, para. 36.

52 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, 1 February 2013, UN Doc A/HRC/22/53, paras. 76 and 79.

53 Fernandez, B., and Gomathy N.B., ‘The Nature of Violence Faced by Lesbian Women in India’ (2003), Centre on Violence Against Women: Mumbai pp. 50 to 59.

54 See A/HRC/22/53, paras. 76-79, 88, CRC/C/CHE/CO/2-4, paras. 42-43, CAT/C/DEU/CO/5, para. 20.

64. The Special Rapporteur on Torture has also highlighted allegations of mistreatment of prisoners and detainees on the basis of their sexual orientation or gender identity in his reports. In a 2016 report he wrote:

*Women, girls, and lesbian, gay, bisexual and transgender persons are at particular risk of torture and ill-treatment when deprived of liberty, both within criminal justice systems and other, non-penal settings. Structural and systemic shortcomings within criminal justice systems have a particularly negative impact on marginalized groups. Measures to protect and promote the rights and address the specific needs of female and lesbian, gay, bisexual and, transgender prisoners are required and cannot not be regarded as discriminatory.*⁵⁵

In 2001, he wrote:

*[I]t appears that members of sexual minorities are disproportionately subjected to torture and other forms of ill-treatment, because they fail to conform to socially constructed gender expectations. Indeed, discrimination on grounds of sexual orientation or gender identity may often contribute to the process of the dehumanization of the victim, which is often a necessary condition for torture and ill-treatment to take place.*⁵⁶

55 See Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, 5 January 2016, UN Doc. A/HRC/31/57, para. 13.

56 Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (A/56/156), para. 19.

57 Reports of the Special Rapporteur on violence against women: E/CN.4/2006/61/Add.1, paras. 1 and 2; and A/HRC/4/34/Add.1, paras. 448-454.

58 Report of the Special Rapporteur on violence against women (A/HRC/17/26/Add.2), paras. 28-29.

65. The Special Rapporteur on Violence against Women has detailed allegations of ‘metis’ (a local term for trans women) in Nepal being beaten by police, who demand money and sex.⁵⁷ In one case in El Salvador, a transgender woman was detained in a cell with gang members where she was ‘raped more than 100 times, sometimes with the complicity of prison officials’.⁵⁸

American Convention

66. In May 2015, the Inter-American Commission of Human Rights issued a statement expressing concern about the treatment of LGBT people in custody, which advertently or inadvertently results in inhuman and degrading treatment perpetrated by state actors and/or non-state actors:

In recent months, the IACHR has received troubling information on instances of violence and inhuman and degrading treatment against LGBT persons or those perceived as such, in prisons, lock up facilities, police stations, and immigration detention centers. LGBT persons who are deprived of their liberty are at a heightened risk for sexual violence – including higher risk for multiple sexual assaults – and other acts of violence and discrimination at the hands of other persons deprived of liberty or custodial staff. According to a 2010 Report by the UN Special Rapporteur on Torture, LGBT persons are at the bottom of the informal hierarchy in detention facilities, which results in double or triple discrimination.

The IACHR has also received troubling information on the routine use of solitary confinement as a measure aimed at “protecting” LGBT individuals. The IACHR reiterates that solitary confinement should only be used in exceptional circumstances, for the shortest period possible and only as a last resort measure. Solitary confinement and similar forms of deprivation of human contact for a prolonged period of time may produce physical and mental irreversible damage, and amount to inhuman or degrading treatment. Sexual orientation and gender identity should not be used as criteria to subject persons to unduly prolonged solitary confinement. Persons deprived of liberty must not be penalized or punished due to prejudice and discrimination based on perceived or actual sexual orientation and gender identity.⁵⁹

African Charter

67. In May 2014, the African Commission released a Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity. It contained the following:

Recalling that Article 2 of the African Charter on Human and Peoples’ Rights (the African Charter) prohibits discrimination of the individual on the basis of distinctions of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status;

Further recalling that Article 3 of the African Charter entitles every individual to equal protection of the law;

Noting that Articles 4 and 5 of the African Charter entitle every individual to respect of their life and the integrity of their person, and prohibit torture and other cruel, inhuman and degrading treatment or punishment;

Alarmed that acts of violence, discrimination and other human rights violations continue to be committed on individuals in many parts of Africa because of their actual or imputed sexual orientation or gender identity;

Noting that such violence includes ‘corrective’ rape, physical assaults, torture, murder, arbitrary arrests, detentions, extra-judicial killings and executions, forced disappearances, extortion and blackmail;

Further alarmed at the incidence of violence and human rights violations and abuses by State and non-State actors targeting human rights defenders and civil society organisations working on issues of sexual orientation or gender identity in Africa;

Deeply disturbed by the failure of law enforcement agencies to diligently investigate and prosecute perpetrators of violence and other human rights violations targeting persons on the basis of their imputed or real sexual orientation or gender identity;

1. Condemns the increasing incidence of violence and other human rights violations, including murder, rape, assault, arbitrary imprisonment and other forms of persecution of persons on the basis of their imputed or real sexual orientation or gender identity;

2. Specifically condemns the situation of systematic attacks by State and non-state actors against persons on the basis of their imputed or real sexual orientation or gender identity;

3. Calls on State Parties to ensure that human rights defenders work in an enabling environment that is free of stigma, reprisals or criminal prosecution as a result of their human rights protection activities, including the rights of sexual minorities; and

4. Strongly urges States to end all acts of violence and abuse, whether committed by State or non-state actors, including by enacting and effectively applying appropriate laws prohibiting and punishing all forms of violence including those targeting persons on the basis of their imputed or real sexual orientation or gender identities, ensuring proper investigation and diligent prosecution of perpetrators, and establishing judicial procedures responsive to the needs of victims.

ECHR

68. The Strasbourg Court has particularly well-developed case law in this area that can be applied to LGBT people. In the case of *East African Asians v. United Kingdom*, the issue at hand was a British law that denied immigration status to the husbands of British nationals on the ground that the husbands were East Africans of Asian origin.⁶⁰ The European Commission held that immigration measures that lowered a person’s rank, position or character as a result of an immutable characteristic discriminated on the basis of race. The Commission concluded that this could amount to degrading treatment provided it reached a minimum level of severity.

69. Similarly, in *Smith and Grady v. the United Kingdom*, the Strasbourg Court held that, in principle, bias in discharging gay men and lesbian women from the armed forces

could constitute degrading treatment if it attained the minimum level of severity, though this was not found on the facts of this case.⁶¹ As such, if this threshold is passed, singling out LGBT people on the basis of their identity can amount to inhuman and degrading treatment. As with other rights, inhuman and degrading treatment interacts with dignity. Completing the quote above at paragraph 46, which originated in *Bouyid v. Belgium*, a case concerning the mistreatment of a juvenile while in police custody:

*Any interference with human dignity strikes at the very essence of the Convention. For that reason any conduct by law-enforcement officers vis-à-vis an individual which diminishes human dignity constitutes a violation of [inhuman and degrading treatment protected by] Article 3 of the Convention.*⁶²

A comparison of privacy and equality

70. Different countries have taken different routes to establish LGBT rights. The rights to privacy and equality have both been used successfully to bring about decriminalisation. That said, the choice of right in which to ground decriminalisation has longer-term consequences for the progression of LGBT rights in that jurisdiction.

Privacy

71. Decriminalisation came about in the UK, Europe and the United States due to the acceptance that LGBT people have an inalienable private space in which to have sex and into which the state must not intrude. However, in reality the private physical space and metaphorical space granted to LGBT people using this privacy approach has invariably been restricted.

59 OAS, IACHR, Press Release, No. 053/15, 21 May 2015.

60 *East African Asians v. the United Kingdom*, (1973) 3 EHRR 76.

61 *Smith and Grady v. the United Kingdom*, (1999) 29 EHRR 493, para. 122.

62 *Bouyid v. Belgium*, Grand Chamber decision (2015) App. no. 23380/09, para. 101.

72. When England & Wales decriminalised male same-sex intimacy by legislative change in 1967, it did so on the basis of privacy. (Lesbian sex was never criminalised.) Henceforth, gay and bisexual men were allowed a private space in which to have sexual intimacy, so long as only two people were present, they were both 21 years of age or older, and it was in private. In effect, this provided a defence to prosecution. But consensual same-sex intimacy between adults remained a crime in all other circumstances; for example, it remained a crime where one partner was between 16 and 20 years old, another person was present (even in another room of a private house⁶³), or the sexual act took place in a public place. Full decriminalisation occurred only in 2003, when the offence of 'gross indecency' was repealed.

73. In the intervening 36 years between 1967 and 2003, around 30,000 gay and bisexual men were convicted for behaviour that would not have been a crime had their partner been a woman.⁶⁴

This number of convictions should be of little surprise. While homosexuality remained stigmatised by the criminal law and by society, gay and bisexual men lacked private spaces in which they could lawfully conduct sexual, intimate or emotional relationships. A licence to be intimate in one's own bedroom is of little use when societal homophobia and the law prevent gay and bisexual men from meeting, forming and maintaining relationships in

public. Further, making use of the private space where sex was legal might have required 'coming out' to the family, friends or flatmates with whom that space was shared. Even then, sex remained a crime if another was present somewhere else in the private residence. Gay sex was thus pushed into public places, where it remained unlawful and where gay and bisexual men remained vulnerable to arrest and abuse by both state and non-state actors.

74. Had an equality approach been taken, full decriminalisation would have been achieved at an earlier date. It would have been unlawful to treat LGBT people differently from the heterosexual majority. Not only would this have spared 30,000 gay and bisexual men from conviction, but it is likely stigmatisation would have ended sooner, thus lessening the emotional and psychological burden that LGBT people have faced over the past decades. It was not only gay and bisexual men who suffered from the incremental approach; lesbian and bisexual women, and trans men and women too continued to face stigma and discrimination in the absence of a right to equal treatment.

75. The graphic on the next page demonstrates the slow and incremental pace of change in England & Wales under the privacy route to LGBT rights. The red discs show how gay and bisexual men remained criminalised for conduct that was not a crime for heterosexuals. The blue discs show how LGBT people incrementally have been granted more rights. The green disc represents full equality; a position that England & Wales is approaching, but has not yet achieved.

Pre-1967: consensual intimacy between men is always a criminal offence, and no laws to protect sexual orientation. No space for the LGBT identity.

1967-2003: changes to criminal law via respect for privacy, but gay/bi men still criminalised.

- 1967: Partial decriminalisation of consensual intimacy between men. Defence to criminal law introduced, if two men, in private, and both 21 years of age or older. Other intimacy between men remains a criminal offence, and solicitation, public order offences and byelaws remain applicable in the prosecution of gay/bi men.
- 1994: Further decriminalisation. Age of consent reduced to 18 years.
- 2001: Further decriminalisation. Age of consent equalised with heterosexuals, at 16 years. Gay/bi men are still prosecuted for 'gross indecency' if group sex or sex not in private.
- 2003: Full decriminalisation, as 'gross indecency' repealed. This offence only ever applied to gay/bi men, never heterosexuals or women. There were 30,000 convictions for gross indecency between 1967-2003.

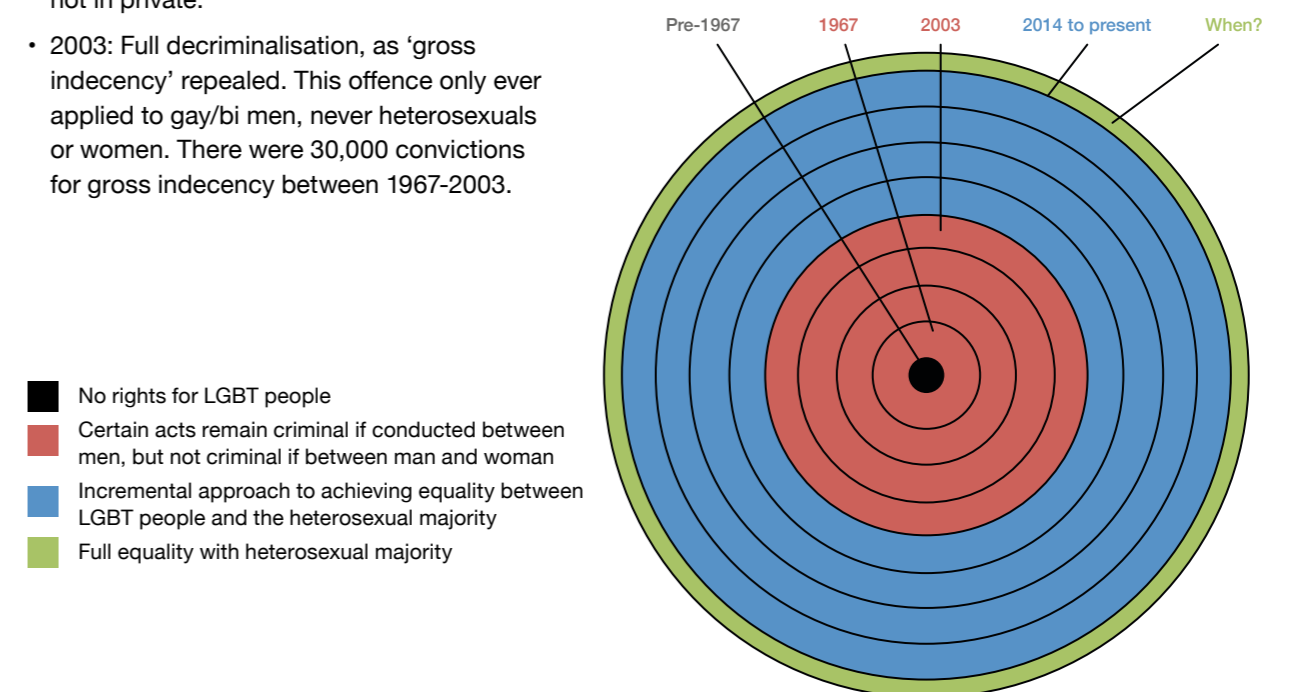
2003 to present: incremental steps towards equality (selected steps):

- 2003: Work-place discrimination outlawed. This is the first non-discrimination law to protect sexual orientation.
- 2003: Section 28 repealed.
- 2004: First state-sanctioned unions via civil partnership.
- 2007: Discrimination when providing goods and services outlawed.
- 2014: Marriage equality.

An alternative path: full equality recognised in law

A single law granting full equality with heterosexuals would have provided each right incrementally achieved since 1967. In England & Wales today, full equality still lacks (e.g. unequal pension rights for surviving spouses).

Figure 1: Parliament granting LGBT rights in England & Wales: the privacy



63 Source: http://www.petertatchell.net/lgbt_rights/criminalisation_of_gays/still_criminal.htm

64 Bedell, G., 'Coming out of the dark ages', *The Guardian*, 24 June 2007. Available at: <http://www.theguardian.com/society/2007/jun/24/communities.gayrights>

Equality

76. South Africa, on the other hand, drafted into its post-apartheid constitution a right to equality that protects against discrimination on the ground of sexual orientation. LGBT people became equal to others as soon as the constitution came into force, first in 1993 with the Interim Constitution and then continued in the permanent 1996 Constitution. In one legislative move, South Africa gave LGBT people the right to equal treatment in all regards, equivalent to the entire space in the green disc. In very rapid succession this space was filled with substantive rights via court cases and legislative change.⁶⁵

77. South Africa not only recognised the full array of LGBT rights in a shorter space of time than England & Wales, but also recognised certain rights years earlier than the UK did, e.g. work place discrimination five years earlier and same-sex marriage nine years earlier. South Africa achieved in nine years what took 47 years to achieve in England & Wales.

Figure 2: sexual orientation is recognised in law as a prohibited ground for discrimination: the equality approach to LGBT rights (below)



65 National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others (CCT11/98) [1998] ZACC 15; Employment Equity Act, 1998; Du Toit and Another v. Minister for Welfare and Population Development and Others (CCT40/01) [2002] ZACC 20; Alteration of Sex Description and Sex Status Act, 2003; Minister of Home Affairs and Another v. Fourie and Another (CCT 60/04) [2005] ZACC 19; The Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, also referred to as the Sexual Offences Act.

78. An added advantage to advocating for equality is that it moves the focus of the dialogue away from gay sex, a topic that can cause strong and adverse reactions in conservative societies. England & Wales' privacy approach was firmly rooted in gay sex. The law changed on an incremental basis to permit gay and bisexual men to have sex in more places, at a younger adult age, and finally with more than one partner at a time, until the catalogue of sexual proclivities that were legalised matched those that were legal for heterosexuals. The debates surrounding these changes in law, unsurprisingly, focused on the act of sex. Parliament, the media and the public had to debate how, where, using which body parts and with whom men should be permitted to have sex.

79. This mode of advancing LGBT rights provokes socially conservative opposition. Incremental change was allowed at the whim of the legislature, so long as the sexual act in question was not deemed too outrageous so as to require Parliament to uphold the criminal law so as to seemingly 'protect' gay and bisexual men from each other. For example, in 2000 the House of Lords voted down a Bill to equalise the age of consent. The Lords agreed to a series of amendments to allow same-sex couples to do certain acts at the age of 16, but maintained the age of consent for 'buggery' at 18.⁶⁶ The Government had to invoke the Parliament Acts to force the Bill through in order to meet its undertaking to the European Commission to equalise the age of consent.⁶⁷

80. The equality approach, on the other hand, need not focus on sex. Rather, its premise is that LGBT people have a legal right to be treated in the same manner as others. The focus is on the rights possessed by others in society and how those can be applied to all. Encouragingly, the nascent recognition of LGBT rights in Kenya and Botswana has embarked on the equality path. The Kenyan courts allowed the registration of an LGBT non-governmental organisation, as it recognised that the constitutional right to equality protects against discrimination on the ground of sexual orientation.⁶⁸ Similarly, the Botswanan courts allowed the registration of an LGBT non-governmental organisation as LGBT people are included in 'all persons in Botswana' so as to attract constitutional rights.⁶⁹ These may be early signs that an equality approach is forming in Kenya and Botswana, after which substantive rights will follow.

81. Of course, decriminalisation by any route would be a welcome development in any of the 78 jurisdictions that continue to criminalise homosexuality. Yet, it must be appreciated that the path chosen for decriminalisation – privacy or equality – produces different dialogues, and leads to different outcomes and timescales, and once a path is chosen a jurisdiction tends to stick to it. A short-term fix to decriminalisation on the privacy route may not produce the best results over the longer-term.

66 Hansard, H.L., November 13, 2000, cols 21–2 and 62–6.

67 For further analysis, see Laverack, P., LGBT-friendly Legislation and the House of Lords' use of "Wrecking Amendments", European Human Rights Law Review, Issue 2 2014, pp. 89 to 93.

68 Eric Gitari v. NGO Board & 4 others, [2015], Petition 440 of 2013, The High Court of Kenya at Nairobi, paras. 132 to 137.

69 Thuto Ramogoe & others v. the Attorney General of Botswana, [2014] MAHGB-000175-13, para. 32.

Enforcing international human rights law in practice

82. International human rights law is actionable at international courts or committees by both states and individuals. States can access the International Court of Justice, and both states and individuals can access regional courts/commissions or UN quasi-courts, but only if certain criteria are met. This topic is covered in detail in another briefing note in this series, *Criminalising Homosexuality and Working Through International Organisations*. State-to-state claims on human rights issues are extremely rare. Individual-to-state claims are of limited use because of the tremendous difficulties encountered in accessing this form of justice, for example the requirement first to exhaust domestic remedies. Bringing a claim at the international level is a last resort. Alternative routes to utilise international law must, therefore, be considered.
83. A quicker solution is to consider how to utilise international human rights law and norms at the domestic level. When considering whether international law binds directly in the domestic legal system, the most important question is whether the legal system imports the state's treaty obligations into domestic law. For example, in monist jurisdictions, international treaties ratified by the state automatically become a part of domestic law. Therefore, if the state has ratified an international human rights treaty, such as the ICCPR, the rights contained therein are actionable in the domestic courts (so long as judicial review of human rights matters is allowed).
84. In dualist states, an active step on the part of the legislature must be taken after ratification of the treaty in order to

incorporate the treaty into domestic law. In dualist states, each treaty must be incorporated by a specific Act of Parliament. A few dualist states, however, have tempered the strict separation of domestic law and international law by including in their constitutions a requirement that courts must 'consider' or 'have regard to' applicable international law.

85. Of the 78 jurisdictions that criminalise homosexuality, 14 are monist (see Appendix 3). All but one of these 14 monist states (Comoros) is a party to the ICCPR. The human rights protection contained in the ICCPR is a part of their domestic law. As demonstrated above, the rights contained in the ICCPR unambiguously prohibit the criminalisation of homosexuality. There should be no obstacle to enforcing international human rights law at the domestic level in these countries to bring about decriminalisation.
86. The constitutions of a further eight jurisdictions require the domestic decision-makers to 'respect', 'have regard to', etc, international law when interpreting domestic human rights protection (Belize, Malawi, Maldives, Papua New Guinea, Seychelles, Tuvalu, The Gambia, and Zimbabwe). Again, there should be no obstacle to giving direct effect to international human rights law at the domestic level to bring about the decriminalisation of homosexuality.
87. Even in dualist jurisdictions that do not give direct effect to international human rights law, the treaties and case law set out in this briefing note are of crucial relevance, as they provide an aid to interpret domestic human rights protection. As the Indian Supreme Court acknowledged:

*International law can be used to expand and give effect to fundamental rights guaranteed under our Constitution. This includes UDHR, ICCPR and ICESCR which have been ratified by India.*⁷⁰

88. However, it must also be acknowledged that international law will not always penetrate into the decision-making of national legislators and judges in domestic courts. The fact that it does not is critiqued in another briefing note in this series, *Criminalising Homosexuality and the Rule of Law*. In these circumstances, states that are owed obligations under these treaties can step in to help bring about decriminalisation. In recalcitrant jurisdictions, the only appropriate method for decriminalisation may be an inter-state action. State-parties to the ICCPR can bring a claim at the UN Human Rights Committee against criminalising state-parties for breach of their treaty obligations. This option is covered in detail in another briefing note in this series, *Criminalising Homosexuality and Working Through International Organisations*.

Conclusions

89. Laws that criminalise homosexuality contravene international law. International, regional and domestic courts around the world have repeatedly found that the criminalisation of homosexuality infringes the rights to privacy, non-discrimination and dignity, and may amount to inhuman and degrading treatment. Not only do these rights

represent international norms and values to which all states should adhere, but they represent binding obligations that states have taken on with regard to the treatment of people in their jurisdiction. Human rights law is about treating people with dignity and only infringing on their rights when it is justified and proportionate to do so. There can never be a justification for criminalising consensual same-sex intimacy between adults.

90. The millions of LGBT people in the 78 jurisdictions that criminalise homosexuality have a clear and unambiguous right under international law not to be criminalised.

There is no excuse for their continued persecution. While laws that criminalise homosexuality persist, international human rights law is left unobserved, inter-state obligations are being treated with contempt, and citizens suffer violations of basic and fundamental rights.

91. Individual applicants can seek to enforce their rights in their own domestic courts and seek redress at the international level. However, where this is not possible, other states must consider accessing state-to-state mechanisms to assert their treaty rights to end the criminalisation of homosexuality.
92. Both individual applicants and state-parties to treaties can draw upon the wealth of case law on LGBT rights to bring about the end of laws that criminalise homosexuality and persecute LGBT people across the globe.

⁷⁰ *Koushal v. NAZ Foundation*, Civil Appeal No.10972 of 2013, Supreme Court, 11 December 2013, para. 19.11.

Appendix 1: 78 criminalising jurisdictions' membership of international organisations

	A	B	C	D	E	F	G	H	I	J
78 criminalising jurisdictions ⁷¹ (bold: women criminalised too)	UN Treaties and Mechanisms									Regional
	UN member	ICCPR state- party ⁷²	ICCPR: individual complaint ⁷³	ICCPR: state-to- state complaint ⁷⁴	CAT state- party ⁷⁵	CAT: individual complaint ⁷⁶	CAT: state-to- state complaint ⁷⁷	ICJ state ⁷⁸	OAS ⁷⁹ AU ⁸⁰ Arab Charter ⁸¹	
1. Afghanistan	Yes	Yes	No	No	Yes	No	No	No	No	No
2. Algeria	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	AU, AC
3. Angola	Yes	Yes	Yes	No	No	No	No	No	No	AU
4. Antigua and Barbuda	Yes	No	No	No	Yes	No	No	No	No	OAS
5. Bangladesh	Yes	Yes [^]	No	No	Yes	No	No	No	No	No
6. Barbados	Yes	Yes	Yes	No	No	No	No	Yes	Yes	OAS [^] #
7. Belize	Yes	Yes [^]	No	No	Yes	No	No	No	No	OAS
8. Bhutan	Yes	No	No	No	No	No	No	No	No	No
9. Botswana	Yes	Yes [^]	No	No	Yes	No	No	Yes	Yes	AU
10. Brunei	Yes	No	No	No	No	No	No	No	No	No
11. Burundi	Yes	Yes	No	No	Yes	Yes	No	No	No	AU
12. Cameroon	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	AU
13. Comoros	Yes	No [*]	No	No	No [*]	No	No	No	No	AU
14. Cook Islands	No	No	No	No	No	No	No	No	No	No
15. Dominica	Yes	Yes	No	No	No	No	No	Yes	Yes	OAS#
16. Egypt	Yes	Yes	No	No	Yes	No	No	Yes	Yes	AU
17. Eritrea	Yes	Yes [^]	No	No	Yes	No	No	No	No	AU
18. Ethiopia	Yes	Yes	No	No	Yes	No	No	No	No	AU
19. Gambia	Yes	Yes	Yes	Yes	No [*]	No	No	Yes	Yes	AU
20. Gaza	No ^{**}	Yes ^{**}	No	No	Yes ^{**}	No	No	No	No	AC
21. Ghana	Yes	Yes [^]	Yes	Yes	Yes	Yes	Yes	No	No	AU
22. Grenada	Yes	Yes	No	No	No	No	No	No	No	OAS#
23. Guinea	Yes	Yes	Yes	No	Yes	No	No	Yes	Yes	AU

70 *Koushal v. NAZ Foundation*, Civil Appeal No.10972 of 2013, Supreme Court, 11 December 2013, para. 19.11.

71 List of 78 criminalising jurisdictions in column A taken from: <http://www.humandignitytrust.org/pages/COUNTRY%20INFO/Criminalising%20Homosexuality>

72 <http://indicators.ohchr.org>

73 I.e. the state-party has ratified the ICCPR's Optional Protocol. <http://indicators.ohchr.org>

74 I.e. the state-party has consented under Article 41 of the ICCPR https://treaties.un.org/pages/viewdetails.aspx?chapter=4&src=treaty&mtmsg_no=iv-4&lang=en

75 <http://indicators.ohchr.org>

76 I.e. the state-party has consented under Article 22 of the CAT https://treaties.un.org/Pages/ViewDetails.aspx?src=treaty&mtmsg_no=iv-9&chapter=4&lang=en

77 I.e. the state-party has consented under Article 21 of the CAT https://treaties.un.org/Pages/ViewDetails.aspx?src=treaty&mtmsg_no=iv-9&chapter=4&lang=en

78 <http://www.icj-cij.org/jurisdiction/?p1=5&p2=1&p3=3>

79 American Convention and OAS membership: <http://www.oas.org/en/iachr/mandate/Basics/conventionrat.asp>

80 African Union (AU) http://www.au.int/en/member_states/countryprofiles

81 Arab Charter (AC).

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24. Guyana	Yes	Yes	Yes	Yes	Yes	No	No	No	No	OAS
25. India	Yes	Yes	No	No	No [*]	No	No	Yes	No	No
26. Indonesia (S. Sumatra; Aceh)	Yes	Yes [^]	No	No	Yes	No	No	No	No	No
27. Iran	Yes	Yes	No	No	No	No	No	No	No	No
28. Iraq (unclear)	Yes	Yes	No	No	Yes	No	No	No	No	AC
29. Jamaica	Yes	Yes	No	No	No	No	No	No	No	OAS [^] #
30. Kenya	Yes	Yes	No	No	Yes	No	No	Yes	Yes	AU
31. Kiribati	Yes	No	No	No	No	No	No	No	No	No
32. Kuwait	Yes	Yes [^]	No	No	Yes	No	No	No	No	AC
33. Lebanon	Yes	Yes	No	No	Yes	No	No	No	No	AC
34. Liberia	Yes	Yes [^]	No [*]	No	Yes	No	No	Yes	Yes	AU
35. Libya	Yes	Yes	Yes	No	Yes	No	No	No	No	AU
36. Malawi	Yes	Yes	Yes	No	Yes	No	No	Yes	Yes	AU
37. Malaysia	Yes	No	No	No	No	No	No	No	No	No
38. Maldives	Yes	Yes [^]	Yes	No	Yes	No	No	No	No	No
39. Mauritania	Yes	Yes [^]	No	No	Yes	No	No	No	No	AU
40. Mauritius	Yes	Yes	Yes	No	Yes	No	No	Yes	Yes	AU
41. Morocco	Yes	Yes	No	No	Yes	Yes	No	No	No	No
42. Myanmar	Yes	No	No	No	No	No	No	No	No	No
43. Namibia	Yes	Yes [^]	Yes	No	Yes	No	No	No	No	AU
44. Nauru	Yes	No [*]	No [*]	No	Yes	No	No	No	No	No
45. Nigeria	Yes	Yes	No	No	Yes	No	No	Yes	Yes	AU
46. Oman	Yes	No	No	No	No	No	No	No	No	No
47. Pakistan	Yes	Yes [^]	No	No	Yes	No	No	Yes	Yes	No
48. Papua New Guinea	Yes	Yes [^]	No	No	No	No	No	No	No	No
49. Qatar	Yes	No	No	No	Yes	No	No	No	No	AC
50. St Kitts & Nevis	Yes	No	No	No	No	No	No	No	No	OAS
51. St Lucia	Yes	No ^{**}	No	No	No	No	No	No	No	OAS
52. St Vincent & Grenadines	Yes	Yes	Yes	No	Yes	No	No	No	No	OAS
53. Samoa	Yes	Yes [^]	No	No	No	No	No	No	No	No
54. Saudi Arabia	Yes	No	No	No	Yes	No	No	No	No	AC

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55. Senegal	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	AU
56. Seychelles	Yes	Yes	Yes	No	Yes	Yes	No	No	No	AU
57. Sierra Leone	Yes	Yes [^]	Yes	No	Yes	No	No	No	No	AU
58. Singapore	Yes	No	No	No	No	No	No	No	No	No
59. Solomon Islands	Yes	No	No	No	No	No	No	No	No	No
60. Somalia	Yes	Yes	Yes	No	Yes	No	No	Yes	AU	
61. South Sudan	Yes	No	No	No	Yes	No	No	No	AU##	
62. Sri Lanka	Yes	Yes	Yes	Yes	Yes	No	No	No	No	
63. Sudan	Yes	Yes	No	No	No*	No	No	Yes	AU	
64. Swaziland	Yes	Yes [^]	No	No	Yes	No	No	Yes	AU	
65. Syria	Yes	Yes	No	No	Yes	No	No	No	AC	
66. Tanzania	Yes	Yes	No	No	No	No	No	No	AU	
67. Togo	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes	AU	
68. Tonga	Yes	No	No	No	No	No	No	No	No	
69. Trinidad & Tobago	Yes	Yes	No	No	No	No	No	No	OAS	
70. Tunisia	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	AU	
71. Turkmenistan	Yes	Yes [^]	Yes	No	Yes	No	No	No	No	
72. Tuvalu	Yes	No	No	No	No	No	No	No	No	
73. Uganda	Yes	Yes [^]	Yes	No	Yes	No	Yes	Yes	AU	
74. UAE	Yes	No	No	No	Yes	No	No	No	AC	
75. Uzbekistan	Yes	Yes [^]	Yes	No	Yes	No	No	No	No	
76. Yemen	Yes	Yes	No	No	Yes	No	No	No	AC	
77. Zambia	Yes	Yes	Yes	No	Yes	No	No	No	AU	
78. Zimbabwe	Yes	Yes	No	Yes	No	No	No	No	AU	

* Signed, but not ratified.

** The State of Palestine has observer status at the UN. It has acceded to certain UN treaties. Within Palestine, the West Bank does not criminalise, Gaza does.

[^] Signed ICCPR after Toonen communication was released by HRC.

^{^^} Barbados recognises the jurisdiction of the Inter-American Court; Jamaica recognises the competence of the Inter-American Commission.⁸²

[#] Members of OAS that have ratified the American Convention on Human Rights.⁸³

^{##} Member of AU that have NOT ratified the African Charter on Human and Peoples' Rights.

⁸² <http://www.oas.org/en/iachr/mandate/Basics/conventionrat.asp>

⁸³ <http://www.oas.org/en/iachr/mandate/Basics/conventionrat.asp>

Appendix 2: relevant human rights provisions in international and regional treaties

Treaty / Right	Statement that treaty applies to all
ICCPR	<p>Preamble:</p> <p>Considering that... the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, ... [T]hese rights derive from the inherent dignity of the human person, Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights...</p>
UNCAT	<p>Preamble:</p> <p>Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...</p>
ECHR	<p>Article 1:</p> <p>The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.</p>
American Convention	<p>Preamble:</p> <p>Reiterating that, in accordance with the Universal Declaration of Human Rights, the ideal of free men enjoying freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his economic, social, and cultural rights, as well as his civil and political rights...</p>
African Charter	<p>Article 2:</p> <p>Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind...</p>
Arab Charter	N/A

Appendix 2: relevant human rights provisions in international and regional treaties

Treaty / Right	Privacy
ICCPR	<p>Article 17(1):</p> <p><i>No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.</i></p>
UNCAT	N/A
ECHR	<p>Article 8:</p> <ol style="list-style-type: none"> 1. <i>Everyone has the right to respect for his private and family life, his home and his correspondence.</i> 2. <i>There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.</i>
American Convention	<p>Article 11(2):</p> <p><i>No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.</i></p>
African Charter	N/A
Arab Charter	<p>Article 21:</p> <p><i>No one shall be subjected to arbitrary or unlawful interference with regard to his privacy, family, home or correspondence, nor to unlawful attacks on his honour or his reputation.</i></p>

Appendix 2: relevant human rights provisions in international and regional treaties

Treaty / Right	Prohibition on discrimination
ICCPR	<p>Article 2(1):</p> <p><i>Each State Party... undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.</i></p> <p>Article 26:</p> <p><i>All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.</i></p>
UNCAT	N/A
ECHR	<p>Article 14:</p> <p><i>The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.</i></p>
American Convention	<p>Article 1(1):</p> <p><i>The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.</i></p>
African Charter	<p>Article 2:</p> <p><i>Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.</i></p>
Arab Charter	<p>Article 3(1):</p> <p><i>Each State party to the present Charter undertakes to ensure to all individuals subject to its jurisdiction the right to enjoy the rights and freedoms set forth herein, without distinction on grounds of race, colour, sex, language, religious belief, opinion, thought, national or social origin, wealth, birth or physical or mental disability.</i></p>

Appendix 2: relevant human rights provisions in international and regional treaties

Treaty / Right	Dignity
ICCPR	N/A
UNCAT	N/A
ECHR	N/A
American Convention	Article 11(1) <i>Everyone has the right to have his honor respected and his dignity recognised.</i>
African Charter	Preamble: <i>[F]reedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples.</i> Article 5: <i>Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment or treatment shall be prohibited.</i>
Arab Charter	Preamble: <i>Based on the faith of the Arab nation in the dignity of the human person whom God has exalted ever since the beginning of creation and in the fact that the Arab homeland is the cradle of religions and civilisations whose lofty human values affirm the human right to a decent life based on freedom, justice and equality.</i>

Appendix 2: relevant human rights provisions in international and regional treaties

Treaty / Right	Prohibition on inhuman and degrading treatment
ICCPR	Article 7: <i>No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.</i>
UNCAT	Article 16(1): <i>Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.</i>
ECHR	Article 3: <i>No one shall be subjected to torture or to inhuman or degrading treatment or punishment.</i>
American Convention	Article 5(2): <i>No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.</i>
African Charter	Article 5: <i>Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.</i>
Arab Charter	Article 8: <ol style="list-style-type: none"> <i>No one shall be subjected to physical or psychological torture or to cruel, degrading, humiliating or inhuman treatment.</i> <i>Each State party shall protect every individual subject to its jurisdiction from such practices and shall take effective measures to prevent them. The commission of, or participation in, such acts shall be regarded as crimes that are punishable by law and not subject to any statute of limitations. Each State party shall guarantee in its legal system redress for any victim of torture and the right to rehabilitation and compensation.</i>

Appendix 3: legal frameworks in the 78 criminalising jurisdictions

Jurisdiction	Legal system ⁸⁴	Monist or dualist? ⁸⁵	Jurisdiction	Legal system ⁸⁴	Monist or dualist? ⁸⁵
1. Afghanistan	Mixed civil / Islamic	Unclear	21. Ghana	Common law	Dualist
2. Antigua & Barbuda	Common law	Dualist	22. Grenada	Common law	Dualist
3. Algeria	Mixed civil / Islamic	Monist	23. Guinea	Civil law	Monist
4. Angola	Civil law	Monist	24. Guyana	Mixed civil / common	Dualist
5. Bangladesh	Mixed common / Islamic	Dualist	25. India	Common law	Dualist
6. Barbados	Common law	Dualist	26. Indonesia	Civil law	Dualist
7. Belize	Common law	Dualist ⁸⁶	27. Iraq	Mixed civil / Islamic	Unclear
8. Botswana	Mixed civil / common	Dualist	28. Iran	Islamic law	Dualist
9. Bhutan	Civil law	Unclear	29. Jamaica	Common law	Dualist
10. Brunei	Mixed common / Islamic	Dualist	30. Kenya	Common law	Monist
11. Burundi	Civil law	Unclear	31. Kiribati	Common law	Dualist
12. Cameroon	Mixed civil / common	Monist	32. Kuwait	Mixed common / civil / Islamic	Dualist
13. Comoros	Mixed civil / Islamic	Monist	33. Lebanon	Civil law	Monist
14. Cook Islands	Common law	Dualist	34. Liberia	Common law	Dualist
15. Dominica	Common law	Dualist	35. Libya	Unclear	Unclear
16. Egypt,	Mixed civil / Islamic	Unclear	36. Malawi	Common law	Dualist ⁸⁸
17. Eritrea	Mixed civil / Islamic	Dualist	37. Malaysia	Mixed common / Islamic	Dualist
18. Ethiopia	Civil law	Monist	38. Maldives	Mixed common / Islamic	Dualist ⁸⁹
19. The Gambia	Mixed common / Islamic	Dualist ⁸⁷	39. Mauritania	Mixed civil / Islamic	Monist
20. Gaza	Unclear	Unclear	40. Mauritius	Mixed civil / common	Dualist

⁸⁴ Source: <https://www.cia.gov/library/publications/the-world-factbook/fields/2100.html>

⁸⁵ Sources: Baik, T., *Emerging Regional Human Rights Systems in Asia*, 2012, Cambridge University Press; Child Rights International Network, *Access to Justice for Children: Challenging Violations of Children's Rights*, (2014-15). Available at: <https://www.crin.org/en/home/law/access>; Ferdinand, K., *Islam: State and Society*, 2002, Routledge; Francesch, L. G., *The African Human Rights Judicial System: Streamlining Structures and Domestication Mechanisms Viewed from the Foreign Affairs Power Perspective*, 2014, Cambridge Scholars Publishing; PacLII, 'Pacific Island Treaty Series: How Treaties become Law'. Available at: <http://www.pacilii.org/pits/en/domestication.shtml>; United Nations Development Programme, *Compendium of key documents relating to human rights and HIV in Eastern and Southern Africa*, 2008, Pretoria University Law Press; Viljoen, F., *International Human Rights Law in Africa*, 2012, Oxford University Press.

⁸⁶ Belize Constitution, 1981, Preamble E states: 'WHEREAS the People of Belize... require policies of state... with respect for international law and treaty obligations in the dealings among nations'.

⁸⁷ The Constitution of Republic of The Gambia, 1997, Article 216(3) regarding 'social objectives' states: 'The State, in pursuing policies under subsection (2) [regarding policies to protect the rights and freedoms of the disabled, the aged, children and other vulnerable members of society], ... shall be guided by international human rights instruments to which The Gambia is a signatory'.

⁸⁸ Constitution of the Republic of Malawi, 1994, Article 11(2) 'In interpreting the provisions of this Constitution a court of law shall... (c) where applicable, have regard to current norms of public international law and comparable foreign case law'.

⁸⁹ Constitution of the Republic of Maldives, 1998, Article 68: 'When interpreting and applying the rights and freedoms contained within this Chapter, a court or tribunal... shall consider international treaties to which the Maldives is a party'.

Appendix 3: legal frameworks in the 78 criminalising jurisdictions

Jurisdiction	Legal system ⁸⁴	Monist or dualist? ⁸⁵	Jurisdiction	Legal system ⁸⁴	Monist or dualist? ⁸⁵
41. Morocco	Mixed civil / Islamic	Monist	60. Somalia	Mixed civil / Islamic	Unclear
42. Myanmar	Common law	Dualist	61. South Sudan	Unclear (if like Sudan, mixed civil / common)	Dualist
43. Namibia	Mixed civil / common	Monist	62. Sri Lanka	Mixed civil / common	Dualist
44. Nauru	Common law	Dualist	63. Sudan	Mixed civil / common	Monist
45. Nigeria	Mixed common / Islamic	Dualist	64. Swaziland	Mixed civil / common	Dualist
46. Oman	Mixed common / Islamic	Dualist	65. Syria	Mixed civil / Islamic	Dualist
47. Pakistan	Mixed common / Islamic	Dualist	66. Tanzania	Common law	Dualist
48. Papua New Guinea	Common law	Dualist ⁹⁰	67. Togo	Customary law	Unclear
49. Qatar	Mixed civil / Islamic	Dualist	68. Tonga	Common law	Dualist
50. St Kitts	Common law	Dualist	69. Trinidad	Common law	Dualist
51. St Lucia	Common law	Dualist	70. Tunisia	Mixed civil / Islamic	Monist
52. St Vincent & the Grenadines	Common law	Dualist	71. Turkmenistan	Mixed civil / Islamic	Unclear
53. Samoa	Common law	Dualist	72. Tuvalu	Common law	Dualist ⁹²
54. Saudi Arabia	Islamic	Unclear	73. Uganda	Common law	Dualist
55. Senegal	Civil law	Monist	74. United Arab Emirates	Mixed civil / Islamic	Unclear
56. Seychelles	Mixed civil / common	Dualist ⁹¹	75. Uzbekistan	Civil law	Dualist
57. Sierra Leone	Common law	Dualist	76. Yemen	Mixed common / civil / Islamic	Dualist
58. Singapore	Common law	Dualist	77. Zambia	Common law	Dualist
59. Solomon Islands	Common law	Dualist	78. Zimbabwe	Mixed civil / common	Dualist ⁹³

* Dualist, but international human rights law must be considered.

⁹⁰ Article 39(3): 'For the purposes of determining whether or not any law, matter or thing is reasonably justified in a democratic society that has a proper regard for the rights and dignity of mankind, a court may have regard to— ... (e) judgements, reports and opinions of the International Court of Justice, the European Commission of Human Rights, the European Court of Human Rights and other international courts and tribunals dealing with human rights and fundamental freedoms, (f) previous laws, practices and judicial decisions and opinions in the country; and (g) laws, practices and judicial decisions and opinions in other countries.'

⁹¹ Constitution of Republic of Seychelles, 1993, Article 48, 'This Chapter shall be interpreted in such a way so as not to be inconsistent with any international obligations of Seychelles relating to human rights and freedoms and a court shall, when interpreting the provisions of this Chapter, take judicial note of – (a) the international instruments containing these obligations; (b) the reports and expression of views of bodies administering or enforcing these instruments; (c) the reports, decisions or opinions of international and regional institutions administering or enforcing Conventions on human rights and freedoms; (d) the Constitutions of other democratic states or nations and decisions of the courts of the states or nations in respect of their Constitutions'.

⁹² Constitution of Tuvalu, 1978, Article 15(5), 'In determining whether a law or act is reasonably justifiable in a democratic society that has a proper respect for human rights and dignity, a court may have regard to (b) law, practices and judicial decisions of other countries that the court reasonably regards as democratic; and (c) international conventions, declarations, recommendations and judicial decisions concerning human rights; and (d) any other matters that the court thinks relevant'.

⁹³ Zimbabwe's Constitution of 2013, Article 46(1): 'When interpreting this Chapter, a court, tribunal, forum or body-- ... (c) must take into account international law and all treaties and conventions to which Zimbabwe is a party'. The constitution in force in 2000 when the court in *Banana v. State* [2000] upheld Zimbabwe's criminalising law did not contain this or a similar provision.

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**HUMAN
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Criminalising Homosexuality and Working through International Organisations

Corrigendum, 09 September 2016: Errors in the original text of these notes relating to the scale and impact of criminalisation of lesbian and bisexual women have been corrected as follows:

- On p. 6 of "Criminalising Homosexuality: Irreconcilable with Good Governance: Synopsis and our Recommendations";
- On p. 4 of "Criminalising Homosexuality and International Human Rights Law";
- On p. 4 of "Criminalising Homosexuality and Working through International Organisations"

For more detailed information on the topic of criminalisation of women, please see our report [*Breaking the Silence: Criminalisation of Lesbian and Bisexual Women and its Impacts.*](#)

We believe that the international community must stand firm against all forms of discrimination, including on the basis of sexual orientation and gender identity, and that we should all accept, respect and value diversity. This is why we and like-minded countries work through the UN to address discrimination and violence against LGB&T people, and why we work with individual countries to review, revise and abolish discriminatory laws and policies.

United Kingdom
Foreign & Commonwealth Office,
12 March 2015¹

This is one in a series of notes produced for the Human Dignity Trust on the criminalisation of homosexuality and good governance. Each note in the series discusses a different aspect of policy that is engaged by the continued criminalisation of homosexuality across the globe.

The Human Dignity Trust is an organisation made up of international lawyers supporting local partners to uphold human rights and constitutional law in countries where private, consensual sexual conduct between adults of the same sex is criminalised. We are a registered charity no.1158093 in England & Wales. All our work, whatever country it is in, is strictly not-for-profit.

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¹ FCO, Human Rights and Democracy Report 2014. Available at: <https://www.gov.uk/government/publications/human-rights-and-democracy-report-2014/human-rights-and-democracy-report-2014#chapter-iv-democracy>

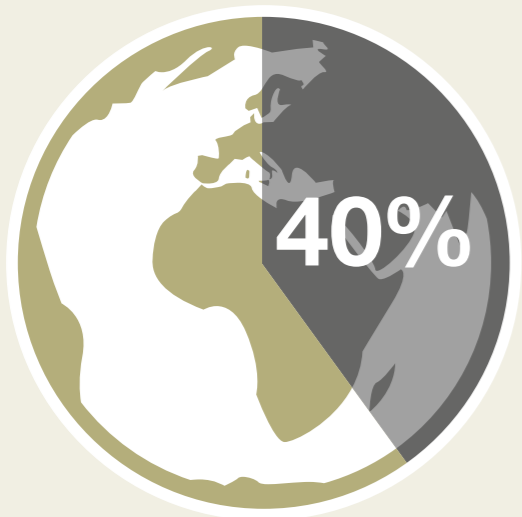
Scale of the problem

01. The criminalisation of homosexuality is a problem for the international community. A snapshot is provided below:

Same-sex intimacy between consenting adults in private is a crime in 78 jurisdictions. Of these, at least 44 jurisdictions criminalise female same-sex intimacy as well as male.

In the 78 jurisdictions that criminalise men, approximately 94 to 145 million men are or will be 'un-apprehended felons' during the course of their lifetimes for having a same-sex sexual experience.²

Likewise, in the 44 jurisdictions that criminalise women, approximately 22 to 66 million women are or will be 'un-apprehended felons'³



2.9 billion people live in these 78 jurisdictions (some 40% of the global population).

2 Based on estimates that between 6.5% and 10% of men will have a same-sex sexual experience in adulthood. The 6.5% figure is for adult males aged 25 to 44, taken from: Mosher, W.D., Chandra, A., Jones, J., *Sexual Behavior and Selected Health Measures: Men and Women 15–44 Years of Age, United States, 2002*, Advance Data from Vital and Health Statistics (362): 2. Available at: <http://www.cdc.gov/nchs/data/ad/ad362.pdf>. The 10% figure is for taken from a re-analysis of The Kinsey Data, Gebhard, P.H. and Johnson, A.B (1979). Available at: <http://www.kinseyinstitute.org/resources/bib-homoprev.html>

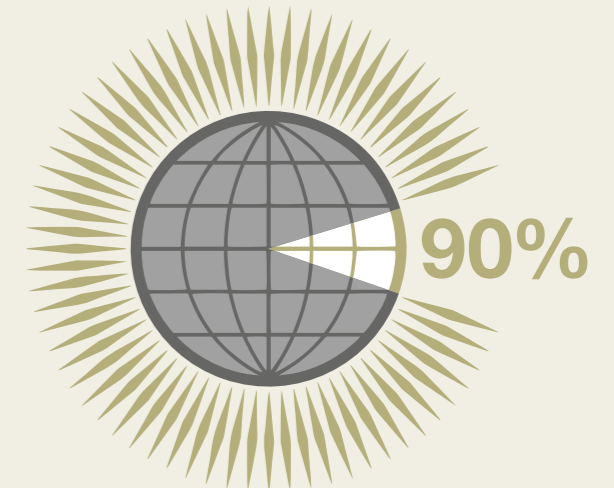
3 Based on estimates that between 3.7% and 11% of women will have a same-sex sexual experience in adulthood. Source, atn.3 above. Mosher estimates 11%; Gebhard estimates 3.7%. The total population of these 44 jurisdictions is 1.2 billion, with a female population of approximately 600 million.

Of these 2.9 billion people, an estimated 58 to 174 million will identify as LGBT now or when they reach adulthood.⁴

These millions risk arrest, prosecution, imprisonment and, in some cases, execution.⁵

Laws that criminalise same-sex intimacy do more than outlaw certain sexual acts. These laws criminalise the LGBT identity. The full force of the state is used against LGBT people. This leaves LGBT people vulnerable to violence, abuse and harassment from state actors and non-state actors alike. At any point in time, it is estimated that 175,000 LGBT people will be in peril, seriously harmed or threatened with harm.⁶ It also shuts LGBT people out from employment, healthcare and fulfilling other socio-economic rights.

Criminalisation is largely a problem for the Commonwealth. Of the 2.9 billion who live where same-sex intimacy is a crime, 2.1 billion live in the Commonwealth (some three-quarters of the total). 90% of Commonwealth citizens live in a jurisdiction that criminalises. Criminalisation is a legacy of British colonial law.



4 Based on conservative to moderate estimates that 2% to 6% of the general adult population identifies as LGBT. In 2005, the UK Government estimated that 6% of the UK population is LG; in 2010, the UK Office of National Statistics found that 1.5% of UK adults openly identify as LGB; in 2013, the *US National Health Statistic Reports* found that 2.3% of US adults openly identify as LGB; in April 2011, the Williams Institute published estimates collated from multiple surveys that 3.5% of adults in the United States identify as LGB and 0.3% of adults as transgender.

5 The death penalty is the maximum penalty in Iran, Mauritania, Saudi Arabia, Sudan and Yemen, and in some parts of Nigeria and Somalia. Additionally, Brunei Darussalam is phasing in its Syariah Penal Code Order (2013) between May 2014 and the end of 2016, which will apply the death penalty (stoning to death) for consensual same-sex sexual conduct.

6 Estimates from Organization for Refuge, Asylum & Migration (ORAM), *Opening Doors: A Global Survey of NGO Attitudes Towards LGBTI Refugees & Asylum Seekers*, June 2012. Available at: <http://www.oraminternational.org/images/stories/PDFs/oram-opening-doors.pdf>

As covered in other briefing notes in this series, criminalisation not only amounts to a serious breach of individuals' human rights. Criminalisation also offends against the rule of law, undermines democracy, boosts the transmission of HIV, hinders economic growth, reduces productivity, and amounts to a serious violation of international law. Yet, the criminalisation of homosexuality persists in all parts of the world other than Europe.

02. Laws that criminalise same-sex intimacy do more than outlaw certain sexual acts. These laws criminalise the lesbian, gay, bisexual and transgender (LGBT) identity. Every aspect of a person's sense of self is criminalised, stigmatised and subject to feelings of shame. The full force of the state is used against LGBT people, so that society views them as worthless, deficient, sick, depraved. This leaves LGBT people vulnerable to violence, abuse and harassment from state actors and non-state actors alike, and shut out from employment, health care and other services. Where only men are criminalised, lesbian and bisexual women and trans people suffer these effects too. There can never be a justification for this state-sanctioned persecution, no matter the cultural, religious or historical background in the criminalising country.

Overview

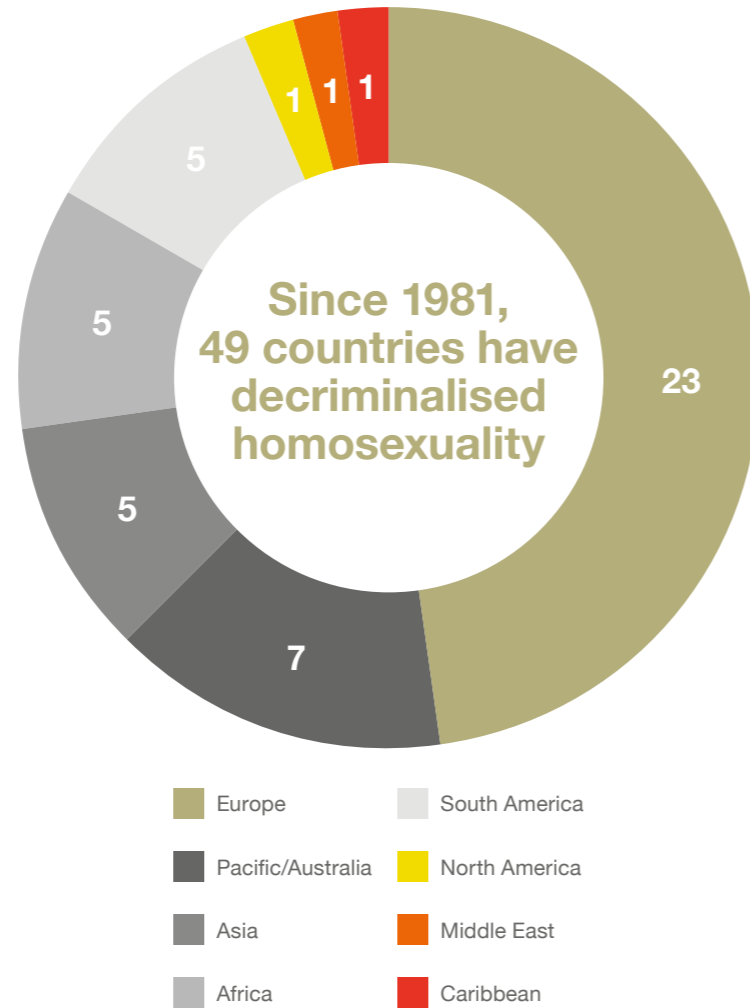
03. History shows that international organisations have been integral to bringing about the decriminalisation of homosexuality in domestic legal systems. The Council of Europe was of fundamental importance in making Europe a criminalisation-free continent. The United Nations has taken progressive steps to bring about change and is increasingly vocal on this issue. The United Nations now looks primed to act upon the content of its treaties and in accordance with its ethos and principles to help bring about decriminalisation. The European Union's stance on this issue is firm, but its influence can be applied more directly in the countries with which it trades or has cultural links. The Commonwealth could be a powerful vehicle for change if it acts strategically. Like-minded governments can work within these organisations to provide the external influence that is so often required to bring about the decriminalisation of homosexuality.
04. LGBT people are found in every population, but make-up a small percentage wherever they are found. Due to this thin spread, LGBT people often cannot coalesce to advocate for their rights. Criminalisation, persecution by the state, and social stigmatisation each create further barriers

to domestic LGBT groups being established. International organisations can fill this advocacy gap by ensuring that universal standards are indeed applied universally. International organisations have in the past, and must now and in the future, advocate for decriminalisation and enforce international human rights law and norms so as to end the criminalisation of homosexuality.

05. This briefing note starts by examining the role of the Council of Europe to show just how effective an international organisation can be on this issue. This note then looks at the United Nations, which has had some success in ending criminalisation, and has recently increased its efforts to promote decriminalisation. The note then looks at the European Union, which can use its political and economic clout to encourage reform outside of its membership. Finally, it looks at the Commonwealth, which can encourage reform within its own membership. Members of these organisations can exert their influence individually or collectively to end the criminalisation and persecution of LGBT people around the globe.

06. This note sets out the options that governments can use via their membership of international organisations to bring about the decriminalisation of homosexuality; it sets out the statements made by international organisations and parts thereof to help identify like-minded partners with whom governments can work.

07. Appendix 1 lists the 78 jurisdictions that criminalise homosexuality today, against their membership of various international organisations and treaties mentioned in this note. Through these organisations and treaties, pressure can be exerted to encourage, or even compel, decriminalisation. Appendix 2 lists the jurisdictions that have decriminalised since 1981 and demonstrates how important international organisations have been as the driving force behind decriminalisation.



The role of international organisations in the past

08. Since 1981, 49 jurisdictions have decriminalised homosexuality. Appendix 2 lists these jurisdictions and states under what influence, if any, they decriminalised. By far the biggest driver was membership of the Council of Europe. 20 members of the Council of Europe have decriminalised since 1981, 17 by repeal and three via judgments from the Strasbourg

Court. Additionally, three other European jurisdictions decriminalised due to the influence of the Council of Europe, namely Belarus, Kosovo and Northern Cyprus. The next biggest influences were the provision of technical assistance by UNAIDS and the World Health Organisation; additionally, the break-up of the USSR and the UN Universal Periodic Review process have provided catalysts for change, which each accounted for 2 to 4 jurisdictions.

20 members of the Council of Europe have decriminalised since 1981, as have three non-members in Europe (Belarus, Kosovo and Northern Cyprus)



The Council of Europe

The success of an international organisation

09. Europe is now a criminalisation-free continent due to the work of the Council of Europe. Its court, the European Court of Human Rights in Strasbourg, held in 1981 that the criminalisation of consensual same-sex intimacy breaches the right to privacy protected under the European Convention on Human Rights (ECHR).⁷
10. Since, the *Dudgeon* judgment in 1981, no fewer than 20 Council of Europe members have decriminalised (see Appendix 2). This process started with the few remaining Western European countries that criminalised homosexuality repealing their laws (such as Portugal in 1983 and Liechtenstein in 1989). The greatest influence of the Council of Europe came when it expanded in the 1990s into the former Communist states of Eastern Europe and the ex-Soviet Union. With this expansion, the Council of Europe's stance on decriminalisation spread east. It was a condition of membership that new states repeal their criminalising laws. Likewise,

The last European jurisdiction to decriminalise was Northern Cyprus in 2014.⁸

Russia's continued membership of the Council of Europe prevents it from passing laws that re-criminalise homosexuality, despite the regime of Vladimir Putin's attempt to limit LGBT rights severely in other respects. The Council of Europe and the Strasbourg Court have a continuing role to play in monitoring events in Russia and in enforcing the ECHR if these new laws amount to the re-criminalisation of homosexuality. The last European jurisdiction to decriminalise was Northern Cyprus in 2014.⁸ This action brought Northern Cyprus in line with the rest of Europe and ended criminalisation on this continent.

⁷ *Dudgeon v. United Kingdom*, 4 EHRR 149 (1981) (regarding Northern Ireland). This 1981 judgment in *Dudgeon v. the United Kingdom* concerned Northern Ireland's criminalising laws, under which the police questioned Mr Dudgeon. Seven years later, in *Norris v. Ireland*, [1988] ECHR 10581/83, the Strasbourg Court confirmed this finding and held that the right to privacy is breached even if the law is not enforced. Another five years later, in *Modinos v. Cyprus* (1993) No. 15070/89, the Strasbourg Court held that Cyprus violated the right to privacy notwithstanding an official moratorium on arrests and convictions.

⁸ Although not a member of the Council of Europe itself, the Council of Europe was used to apply pressure in this jurisdiction. The Human Dignity Trust represented the applicant in a case at the Strasbourg Court against Turkey, which is responsible for Northern Cyprus under international law. In January 2014, while awaiting directions from the Strasbourg Court, the Northern Cyprus Parliament repealed its laws criminalising homosexuality. For further information, see: <http://www.humandignitytrust.org/pages/OUR%20WORK/Cases/Northern%20Cyprus>

Other regional organisations

11. Today, other regional organisations can be used to encourage the decriminalisation of homosexuality among their member states.

The Organisation for Security and Co-operation in Europe

12. Although Europe is a criminalisation-free continent, one European-centred organisation has members situated in Central Asia that criminalise homosexuality: Turkmenistan and Uzbekistan, which are members of the Organisation for Security and Co-operation in Europe (OSCE). The OSCE must become a criminalisation-free organisation. Decriminalisation fits with the OSCE's mission and functions:

“ Respect for human rights and fundamental freedoms forms a key part of the OSCE's comprehensive security concept. The OSCE monitors the human rights situation in its 57 participating States.⁹

13. As is discussed in other briefing notes in this series, laws that criminalise homosexuality offend more than individual human rights. These laws are also a symptom of poor rule of law and a lack of democracy and other freedoms, and they have implications in times of conflict and natural disasters.¹⁰ That these laws persist on the statute books of OSCE members is a matter of concern for the OSCE. Advocating for the removal of these laws falls squarely within the OSCE's mission, whereby the pressure of the vast majority of the OSCE's members can be brought to bear on Turkmenistan and Uzbekistan. OSCE members can work actively to facilitate this, for example through its Office for Democratic Institutions and Human Rights.

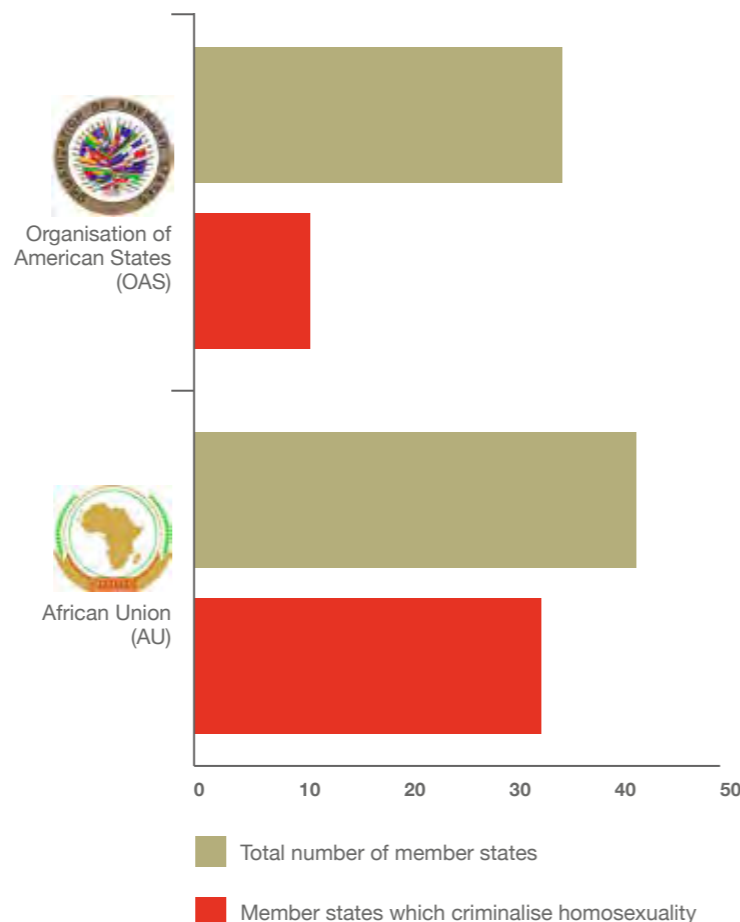
⁹ See: <http://www.osce.org/what/human-rights>

¹⁰ For more information, see our briefing notes on *Criminalising Homosexuality and Democratic Values*, *Criminalising Homosexuality and the Rule of Law*, and *Criminalising Homosexuality and LGBT Rights in Times of Conflict, Violence and Natural Disasters*.

The Organisation of American States and the African Union

14. Organisations akin to the Council of Europe exist in the Americas and Africa, namely the Organisation of American States (OAS) and the African Union (AU).¹¹ Within the OAS's 35 member states, a minority of 11 criminalise (all of which are Commonwealth Caribbean nations, see Appendix 1, columns K and M). Again, the pressure of the vast majority of the OAS's members – including global players like the USA, Canada and Brazil – can be brought to bear on these Caribbean nations to encourage them to decriminalise homosexuality. Within the AU's 42 member states, 33 criminalise (the majority of which are in the Commonwealth or have an English-derived legal system).

15. Members of the OAS and AU can work within these organisations to bring about change from within. Non-members can assist too. The Council of Europe can share its experiences of decriminalisation. Additionally, given the historical connection between criminalisation and British colonial law, the UK may play a role by advising on the Westminster-derived, common law system of governance, perhaps working with Canada and South Africa in their respective regions.



¹¹ Asia has its own regional organisations, such as ASEAN, but unlike the Council of Europe, OAS and AU, they lack a binding human rights treaty and a human rights court or commission.

The United Nations

16. Unlike the Council of Europe, it is not a condition of United Nations (UN) membership to decriminalise, nor does the UN have a court like the Strasbourg Court where individuals can petition for breaches of human rights law. However, the UN's reach is global. All but two jurisdictions that criminalise homosexuality are members of the UN (Appendix, column B), namely, the Cook Islands and Gaza.¹²

17. Like other human rights issues, the criminalisation of homosexuality can be raised at the UN in two broad ways:

- a) **UN treaty mechanisms:** Various treaties have been agreed under the auspices of the UN. These treaties are entered into voluntarily; they are not a requirement of UN membership. In respect of human rights treaties like the International Covenant on Civil and Political Rights (ICCPR) and Convention against Torture (UNCAT), state-parties are subject to these treaties and individuals benefit from them. State-parties have taken on obligations to one another about how they will treat individuals in their jurisdiction. If these obligations are breached, the obligation to other state-parties is breached, and ordinarily these other state-parties may act upon the breach. In addition, treaty bodies monitor state-parties' implementation of the obligations contained in the treaty. The ICCPR's treaty body is the Human Rights Committee. The UNCAT's treaty body is the Committee Against Torture.

Where states choose to adhere to the individual complaint mechanisms provided for under the Optional Protocols to these treaties, individuals can petition these treaty bodies to allege that their human rights have been breached. These decisions are not court decisions, but nonetheless carry weight.

- b) **UN Charter mechanism:** Each UN member accepts to abide by the obligations contained in the UN Charter. The Charter establishes the constituent institutions of the UN: the Security Council, the General Assembly, the Secretariat, the International Court of Justice, and the Economic and Social Council. These institutions may, in turn, establish subsidiary bodies that can address human rights, for example the Human Rights Council and the Office of the High Commissioner for Human Rights (OHCHR). Both of these promote and protect human rights in all UN member states, regardless of treaty membership. The Human Rights Council also conducts a Universal Periodic Review, which assesses the human rights situations in all 193 UN member states, and thus 76 of the 78 criminalising jurisdictions.

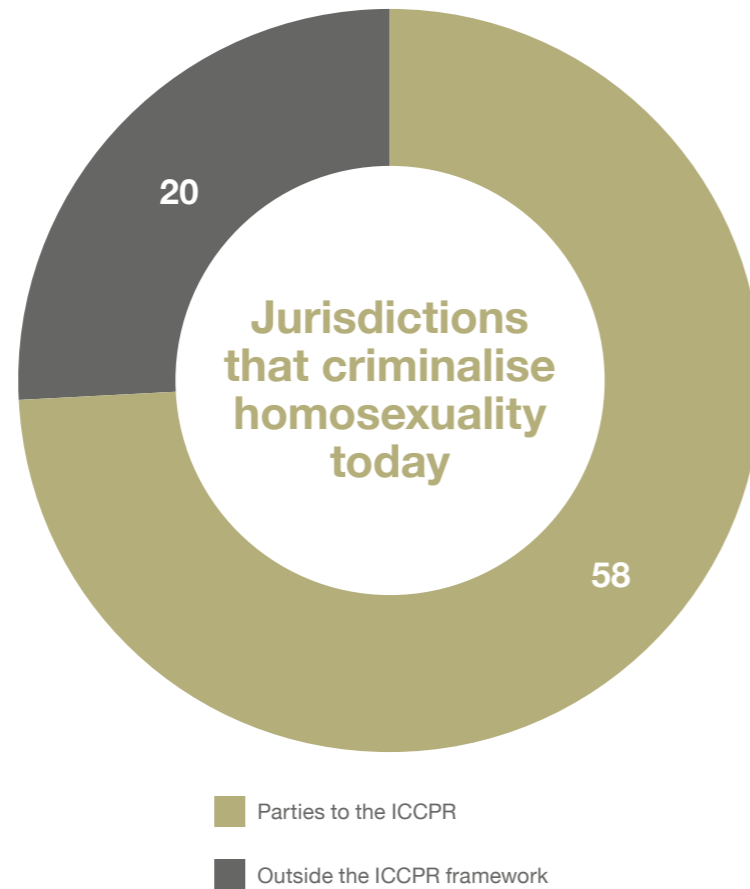
18. UN membership and treaty membership allow countries to play an integral role in using UN mechanisms to end criminalisation, persecution and violence against LGBT people across the globe.

¹² The Cook Islands is in a free association with New Zealand, albeit has full treaty-making capacity at the UN. Gaza is a part of the Palestinian Territories, which has non-member observer status at the UN. The other part of the Palestinian Territories, the West Bank, does not criminalise as its British-era laws were repealed during Jordan's occupation, whereas Gaza retains these British-era laws.

Treaty mechanisms

International Covenant on Civil and Political Rights (ICCPR) and Human Rights Committee

19. With 168 state parties, the International Covenant on Civil and Political Rights (ICCPR) is a lynchpin of the international human rights framework. The ICCPR is an international treaty under which state parties undertake obligations to promote, protect, respect and fulfil certain civil and political rights. Of the 78 jurisdictions that criminalise homosexuality today, 58 are parties to the ICCPR (Appendix 1, column C). It is clear that state parties' obligations under the ICCPR are incompatible with laws that criminalise consensual same-sex intimacy, as determined by the Human Rights Committee in its communication *Toonen v. Australia*.¹³ State parties to the ICCPR have a treaty obligation to repeal their laws that criminalise private, consensual same-sex intimacy. This obligation is owed to all other parties to the ICCPR.
20. The Human Rights Committee is the treaty body that interprets the ICCPR and monitors its implementation. Individuals may petition the Human Rights Committee if the state in question has ratified the ICCPR's Optional Protocol; 25 criminalising countries have done so (Appendix 1, column D). In theory, petitioners from these countries can use the Human Rights Committee to end the criminalisation of homosexuality. However, obstacles prevent this, in particular the need to exhaust domestic remedies, and that willing applicants will have to 'out' themselves with all the risks that this entails.



¹³ *Toonen v. Australia* (1994) Communication No. 488/1992, U.N. Doc-CCPR/C/50/D/488/1992 (1994). It is worth noting that 20 of these states ratified the ICCPR after *Toonen* was decided, when it was unquestionable that they were making a treaty commitment to the UK and all other state-parties not to criminalise homosexuality.

21. As such, other governments cannot rely on the ICCPR to be used like a magic wand to end the criminalisation of homosexuality. Someone has to be pro-active to make sure that it is being complied with. Other state parties can fill this role. The Human Rights Committee will hear state-to-state claims if both the referring and the referred states recognise its competence.¹⁴ Eight criminalising countries recognise competence: Algeria, The Gambia, Ghana, Guyana, Senegal, Sri Lanka, Tunisia and Zimbabwe (Appendix 1, column E). For some criminalising countries, a state-to-state referral may be the only effective method to have their criminalising laws scrutinised against international law. Given the decision in *Toonen*, in such a case the decision of the Human Rights Committee will predictably be in favour of decriminalisation. Like-minded countries should consider this option seriously. Making use of state-to-state claims does not amount to interference in the sovereign affairs of another country; these states have voluntarily ratified the ICCPR and voluntarily accepted the competence of the Human Rights Committee to consider compliance with it.

¹⁴ Art 41.

¹⁵ The sixth treaty body, the Committee on the Elimination of Racial Discrimination, only addresses the prohibited ground of race.

¹⁶ *Concluding Observations of the Committee against Torture: Egypt*, UN-Doc-CAT/s/XXIX/Misc.4 (2002), para. 5(e).

¹⁷ *CESCR General Comment No. 20*, UN-Doc-E/C.12/GC/20 (2009).

¹⁸ *Concluding Observations of the Committee on the Rights of the Child: (Isle of Man)*, UN-Doc-CRC/C/15/Add.134 (2000)

¹⁹ *Report of the Committee on the Elimination of Discrimination against Women*, UN-Doc-CEDAW/A/54/38 (1999).

Other UN treaties and treaty bodies

22. The other UN-backed human rights treaties each have their own treaty body to interpret the treaty and monitor its implementation. Each of these treaty bodies has confirmed that their respective treaties protect LGBT people:¹⁵
- i. The Committee against Torture determined that its Convention against Torture protects against discriminatory treatment based on sexual orientation.¹⁶
 - ii. The Committee on Economic, Social and Cultural Rights determined that the International Covenant on Economic and Social and Cultural Rights prohibits discrimination on the ground of sexual orientation;¹⁷
 - iii. The Committee on the Rights of the Child determined that the Convention on the Rights of the Child prohibits different ages of consent for heterosexuals and homosexuals,¹⁸ and
 - iv. The Committee on the Elimination of Discrimination Against Women called for the decriminalisation of same-sex intimacy between women.¹⁹

23. As such, it is well established that the UN-backed human rights treaties, which form the backbone of global human rights protection, prohibit the criminalisation of homosexuality. State parties to each of these treaties are owed obligations. Other state parties that criminalise homosexuality are in breach of their obligations by the continued existence of these criminal laws. As with the ICCPR, like-minded state parties can play their part in enforcing these treaty obligations.

24. In addition, for all treaties, like-minded countries can encourage non-state parties to ratify these treaties, encourage states to accept the competence of treaty bodies to hear complaints and, if and when appropriate, consider bringing state-to-state claims under these treaties.

UN Charter mechanisms

25. UN Charter mechanisms arise from mere membership of the UN, rather than ratification of a specific treaty. In that regard they have the benefit of encompassing almost all (76 out of the 78) jurisdictions that criminalise homosexuality (Appendix 1, column B).

Universal Periodic Review

26. Universal Periodic Review (UPR) examines the human rights records of all UN members. It is a state-driven process conducted within the Human Rights Council. The ultimate aim of this mechanism is to improve the human rights situation in all countries and address human rights violations wherever they occur.²⁰ UPR provides an opportunity to name and shame countries that criminalise, persecute and harass their LGBT populations.

27. UPR assesses the extent to which the country under examination respects human rights obligations contained in:

- a) The UN Charter.
- b) The Universal Declaration of Human Rights (UDHR).
- c) Human rights instruments (e.g. the ICCPR) to which the state is a party.
- d) Voluntary pledges and commitments made by the state.
- e) Applicable international humanitarian law.²¹

28. The UDHR protects the rights that are echoed in the ICCPR, such as privacy and non-discrimination. As determined by the Human Rights Committee in *Toonen*, laws that criminalise homosexuality violate these rights. The criminalisation of homosexuality is, therefore, very much a legitimate topic at UPR for each of the 76 UN members that continue to criminalise.

29. Criminalisation is, indeed, frequently raised at UPR, often with positive outcomes. At UPR, several countries have made commitments regarding their criminalising laws. For example, Palau,²² and São Tomé²³ made positive commitments to repeal and then did so. Four further countries have provided a positive commitment to repeal: Nauru,²⁴ Kiribati,²⁵ Seychelles²⁶ and Mauritius.²⁷ In addition Belize,²⁸ Guyana,²⁹ St Kitts & Nevis,³⁰ and Tonga³¹ provided positive responses to consider repeal. It is open to debate whether UPR by itself prompts countries to commit to decriminalise, but these public commitments made at UPR are tangible and difficult to backtrack from.

30. It must be noted, however, that UPR can result in entrenching criminalising laws. During UPR countries are confronted with a binary choice to 'support' or 'not support' recommendations. As such, UPR risks forcing criminalising countries to take a defensive position that supports their existing laws. The language used to recommend decriminalisation should be chosen carefully to avoid it becoming needlessly confrontational.

22 United Nations General Assembly, Report of the Working Group on the Universal Periodic Review-Palau, Addendum, A/HRC/18/5/Add.1, 28 July 2011, paras. 62.38-62.40 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/153/54/PDF/G1115354.pdf?OpenElement>

23 *African Activist*, 'São Tomé and Príncipe set to decriminalise homosexuality', (14 February 2011) <http://www.africanactivist.org>

24 United Nations General Assembly, National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21 Nauru, A/HRC/WG.6/23/NRU/1, 14 October 2015, paras. 37 and 61 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G15/237/21/PDF/G1523721.pdf?OpenElement>

25 United Nations General Assembly, Report of the Working Group on the Universal Periodic Review Kiribati, Addendum, Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, A/HRC/15/3/Add.1 (30 September 2010); and United Nations General Assembly, Report of the Working Group on the Universal Periodic Review, Kiribati, Addendum, Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, A/HRC/29/5/Add.1, 1 July 2015, paras. 50, 51 <http://www.ohchr.org/EN/HRBodies/UPR/Pages/KISession21.aspx>

26 United Nations General Assembly, Report of the Working Group on the Universal Periodic Review Seychelles, A/HRC/18/7 (11 July 2011) paras 58. 100.60 and 100.61 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/144/43/PDF/G1114443.pdf?OpenElement>

27 United Nations General Assembly, Report of the Working Group on the Universal Periodic Review Mauritius, Addendum, Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, A/HR/25/8/Add.1, 14 March 2014, para. 34.

28 United Nations General Assembly, Report of the Working Group on the Universal Periodic Review Belize, Addendum, Views on Conclusions and/or Recommendations, voluntary commitments and replies presented by the State under review, A/HRC/12/4/Add.1, 18 September 2009, para. 28 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/156/96/PDF/G0915696.pdf?OpenElement>

29 United Nations General Assembly, Report of the Working Group on the Universal Periodic Review Guyana, Addendum, Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, A/HRC/15/14/Add. 1, 13 September 2010, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/160/27/PDF/G1016027.pdf?OpenElement>

30 United Nations General Assembly, Report of the Working Group on the Universal Periodic Review Saint Kitts and Nevis, A/HRC/17/12, 15 March 2011, para. 14, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/118/07/PDF/G1111807.pdf?OpenElement>

31 United Nations General Assembly, Report of the Working Group on the Universal Periodic Review Tonga, Addendum, Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, A/HRC/23/4/Add.1, 3 June 2013, para. 9, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/142/81/PDF/G1314281.pdf?OpenElement>

20 As described by the OHCHR on the UPR homepage, available at: <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx>

21 OHCHR, *Fact Sheet: Human Rights Council – Universal Periodic Review*, November 2008, available at: <http://www.ohchr.org/EN/HRBodies/UPR/Documents/UPRFactSheetFinal.pdf>

Working with the Office of the High Commissioner for Human Rights and the Human Rights Council

31. The Office of the High Commissioner for Human Rights (OHCHR) and the Human Rights Council play an integral role in monitoring international human rights, both at UPR and otherwise. The OHCHR is a subsidiary body of the UN Secretariat, and the Human Rights Council is a subsidiary body of the General Assembly. Both now frequently make statements on LGBT rights, including to denounce laws that criminalise homosexuality.

This development is significant, as it further isolates the 78 jurisdictions that criminalise homosexuality, and it allows non-criminalising countries to be vocal on this issue as their calls to decriminalise adhere to the core principles of the UN. The OHCHR and the Human Rights Council have worked in tandem to bring the issue of LGBT rights to the forefront of the UN's human rights work. The UN's stance is now unambiguous: UN members must decriminalise. Some recent initiatives and statements from the OHCHR and the Human Rights Council are summarised below:

a) In June 2011, the Human Rights Council adopted its first resolution on human rights, sexual orientation and gender identity.³² Its adoption paved the way for the first official UN report on this subject.

b) This report prepared by the UN Office of the High Commissioner for Human Rights included a set of recommendations addressed to UN member states designed to strengthen protection of the human rights of LGBT people. On the matter of laws that criminalise homosexuality, the report was clear:

“ The criminalization of private consensual homosexual acts violates an individual's rights to privacy and to non-discrimination and constitutes a breach of international human rights law.³³

Former High Commissioner for Human Rights, Navi Pillay, stated that the UN had reached 'a new chapter' by the inclusion of LGBT rights in its work.

c) In September 2012, the OHCHR released a booklet, *Born Free and Equal*, to set out the core obligations that UN member states have towards LGBT people, and to describe how UN mechanisms have applied international law in this context. Having regard to the issue of criminalisation, it stated:

“ The criminalization of private, consensual sex between adults of the same sex breaches a State's obligations under international law, including the obligations to protect individual privacy and to guarantee non-discrimination. This has been the consistent position of United Nations human rights experts since 1994, when the Human Rights Committee decided *Toonen v. Australia*.³⁴

d) In July 2013, Navi Pillay launched a public information campaign designed to raise awareness of homophobic and transphobic violence and discrimination and promote greater respect for the rights of LGBT people everywhere.³⁵

e) In September 2014, a new High Commissioner was appointed, Zeid bin Ra'ad (Prince Zeid of Jordan). He too is vocal on this issue. In his opening remarks to the 29th Session of the Human Rights Council, Prince Zeid drew specific attention to a report on discrimination on grounds of sexual orientation and gender identity:

“ There have been many recent advances in the protection of the rights of lesbian, gay, bisexual, transgender and intersex people – including the introduction of new anti-discrimination and hate crime laws; legal recognition of same-sex relationships; protection of intersex children; and changes that make it easier for transgender people to have their gender identity legally recognized. Even so, LGBT and intersex people in all regions face continuing, pervasive, violent abuse, harassment and discrimination, as our thematic report before this Council on this issue indicates. Far more must be done to end this damaging discrimination.³⁶

32. The UN's activities, via the OHCHR and the Human Rights Council, have rapidly evolved on the issue of LGBT rights. This was able to come about by the adoption of resolution 17/19 at the Human Rights Council. This resolution passed by a fine margin, 23 to 19 with 3 abstentions. It is important that like-minded countries keep up the momentum within the OHCHR and Human Rights Council. One way to do this, which is perhaps optimistic at this point in time, would be the appointment of a *Special Rapporteur on the Persecution and Criminalisation of LGBT People*. Special Rapporteurs are given a specific thematic or country mandate from the Human Rights Council.

The criminalization of private, consensual sex between adults of the same sex breaches a State's obligations under international law, including the obligations to protect individual privacy and to guarantee non-discrimination.

³² Human Rights Council, *Resolution on human rights, sexual orientation and gender identity*, 14 July 2011, UN Doc. A/HRC/RES/17/19.

³³ OHCHR, *Report of the United Nations High Commissioner for Human Rights, Discriminatory Laws and Practices and Acts of Violence against Individuals Based on their Sexual Orientation and Gender Identity*, 17 November 2011, UN Doc. A/HRC/19/41, para. 41.

³⁴ *Ibid.*, p. 30.

³⁵ All campaign materials are available through a dedicated website: www.unfe.org

³⁶ *Opening Statement to the 29th Session of the Human Rights Council by the High Commissioner for Human Rights*, 15 June 2015. Available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16074&LangID=E#sthash.4h8h5bwW.dpuf>

Human Rights Council complaints procedure

33. In addition to the public-facing Charter mechanisms referred to above, there is also a private, behind-closed-doors procedure for raising human rights violations, adopted by the Human Rights Council in June 2007 in resolution 5/1. The 5/1 process addresses consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms occurring in any part of the world and under any circumstances. It is accessible by individuals, groups, or non-governmental organisations that claim to be victims of human rights violations or that have direct, reliable knowledge of such violations. This mechanism is mentioned for completeness; its use is unusual and unlikely on the issue of criminalising homosexuality.

Working through UN institutions and agencies to end criminalisation

34. The UN has five institutions: the General Assembly, the Security Council, the Secretariat, the International Court of Justice, and the Economic and Social Council. It also has 16 specialised agencies, such as the World Health Organisation, and multiple subsidiary bodies created by the institutions. The criminalisation of homosexuality touches upon the work of many of these institutions, agencies and bodies. Many of them have provided positive words on and encouragement to countries to decriminalise. Like-minded countries can work with these UN entities to help bring about global decriminalisation.

The General Assembly

35. Since 2003, the General Assembly has repeatedly called attention to killings targeted on the basis of sexual orientation or gender identity through its resolutions on extrajudicial, summary or arbitrary executions.³⁷ Going beyond condemning violence to advocating for substantive rights, the General Assembly's Fifth Committee rejected a resolution proposed by Russia to withdraw benefits from same-sex spouses of UN staff. This resolution was rejected by a margin of 77 to 44 with 36 abstentions, thus retaining equal benefits for all UN staff, regardless of sexual orientation.³⁸

36. These resolutions demonstrate that there is now a critical mass within UN member states to support pro-LGBT resolutions. Now that this critical mass exists, other pro-LGBT resolutions can be proposed with confidence that they will pass. This critical mass has increased in recent years. Even in 2008, when two opposing resolutions were considered in the General Assembly, the pro-LGBT camp had the backing of most countries. That year France and The Netherlands used the General Assembly to present a letter to the President of the General Assembly concerning the criminalisation of and violence against LGBT people. The letter was signed by 66 member states, who urged, among other things:

“States to take all the necessary measures, in particular legislative or administrative, to ensure that sexual orientation or gender identity may under no circumstances be the basis for criminal penalties.”³⁹

37. At the same session, a rival statement was read by Syria on behalf of 57 member states, which questioned ‘so-called notions’ of sexual orientation and gender identity, stating that they ‘have no legal foundation’, and expressing that:

“ [T]he notion of orientation spans a wide range of personal choices that expand way beyond the individual's sexual interest in copulatory behaviour with normal consenting adult human beings, thereby ushering in the social normalisation, and possibly legitimisation, of many deplorable acts including paedophilia.”⁴⁰

38. Between 2008 and 2014, the critical mass of pro-LGBT countries has grown from 60 to 77 (perhaps now more). This is not yet a majority of all the UN's 193 member states but, when abstentions are excluded, pro-LGBT members outnumber the anti-LGBT. This critical mass serves to isolate the remaining 76 UN member states that criminalise homosexuality. As momentum at the UN builds, diplomatic pressure can be increased via further resolutions or bilateral discussions.

The Security Council

39. At the Security Council small but significant steps have been taken. In August 2015, the Security Council held its first meeting on an LGBT issue, namely violence committed by ISIS against LGBT people in Iraq and Syria. The meeting was co-sponsored by the United States and Chile. Commenting on this private meeting, the US State Department published the following press release:

Between 2008 and 2014, the critical mass of pro-LGBT countries has grown from 60 to 77.

“ Today, members of the UN Security Council held their first Arrria-formula meeting on Lesbian, Gay, Bisexual, and Transgender (LGBT) issues, particularly in the context of ISIL's crimes against LGBT individuals in Iraq and Syria. This historic event recognizes that the issue of LGBT rights has a place in the UN Security Council.

Around the world, the UN has documented thousands of cases of individuals killed or injured in brutal attacks simply because they are LGBT or perceived to be LGBT. This abhorrent practice is particularly widespread in ISIL-seized territory in Iraq and Syria, where these violent extremists proudly target and kill LGBT individuals or those accused of being so. No one should be harmed or have their basic human rights denied because of who they are and who they love.”⁴¹

³⁷ General Assembly resolutions – *Extrajudicial, summary or arbitrary executions*, A/RES/69/182 (30 January 2015), A/RES/67/168 (15 March 2015), A/RES/65/208 (30 March 2011), A/RES/63/182 (16 March 2009), A/RES/61/173 (19 December 2006), A/RES/59/197 (10 March 2005), A/RES/57/214 (25 February 2003).

³⁸ General Assembly, Fifth Committee, *Human Resources Management*, 21 December 2014, UN Doc. A/C.5/69/L.5, available at:

³⁹ Letter dated 18 December 2008 from the Permanent Representatives of Argentina, Brazil, Croatia, France, Gabon, Japan, the Netherlands and Norway to the UN addressed to the President of the General Assembly, UN-Doc-A/63/635, signed by 66 member states.

⁴⁰ Reported by ARC International, available at: <http://www.sxpolitics.org/wp-content/uploads/2009/03/unga-statement-background.pdf>

⁴¹ Press Statement, *UN Security Council Holds Inaugural Meeting on LGBT Issues*, US State Department, 24 August 2015, available at: <http://www.state.gov/r/pa/prs/ps/2015/08/246296.htm>

40. Permanent members of the Security Council and rotating non-permanent members can be encouraged that the Security Council has broken the ice on the topic of LGBT rights. Now that this willingness to act has been established, other pro-LGBT resolutions can be proposed.

The Secretariat

41. The current Secretary-General, Ban Ki-moon, has been a consistent and vocal supporter of LGBT rights. The Secretary-General is an ally with whom like-minded governments can work to bring about the decriminalisation of homosexuality. Some of the Secretary-General's statements on this issue are set out below. A point to note is how the Secretary-General's tone becomes less conciliatory towards criminalising countries as time progresses. His words move from considering LGBT people as a marginalised group who need protection, towards considering LGBT people as a normalised group who require equality. This shift in tone reflects the greater acceptance of LGBT rights at the UN and also a greater acceptance of LGBT equality across the globe.

42. In January 2011, he stated:

“ We must reject persecution of people because of their sexual orientation or gender identity who may be arrested, detained or executed for being lesbian, gay, bisexual or transgender.

They may not have popular or political support, but they deserve our support in safeguarding their fundamental human rights.

I understand that sexual orientation and gender identity raise sensitive cultural issues. But cultural practice cannot justify any violation of human rights.⁴²

43. In March and December 2012, respectively, the Secretary-General stated:

“ Today, I stand with you... and I call upon all countries and people to stand with you, too. A historic shift is under way. More States see the gravity of the problem. We must: Tackle the violence... decriminalize consensual same-sex relationships... ban discrimination... and educate the public.

It is an outrage that in our modern world, so many countries continue to criminalize people simply for loving another human being of the same sex.⁴³

44. In June 2015, the Secretary-General again called for decriminalisation and equated the movement for LGBT rights with women's rights and civil rights movements:

“ Millions of people, in every corner of the world, are forced to live in hiding, in fear of brutal violence, discrimination, even arrest and imprisonment, just because of who they are, or whom they love.

Today, I stand with them. With the bullied teen rejected by his parents. With the homeless transgender woman denied healthcare and employment. With the young couple jailed and tortured simply for loving one another. With the activist arrested for daring to stand up for human rights.

The abuses and indignity suffered by members of the LGBT community are an outrage – an affront to the values of the United Nations and to the very idea of universal human rights.

I consider the struggle to end these abuses to be a great cause on a par with the struggle to end discrimination against women and on the basis of race.

I am proud of our work to repeal discriminatory laws and to open people's hearts and minds to change.⁴⁴

Millions of people,
in every corner
of the world, are
forced to live in
hiding, in fear
of brutal violence,
discrimination,
even arrest and
imprisonment, just
because of who
they are, or whom
they love.

⁴² Ban Ki-moon, *Secretary-General's remarks to the Human Rights Council*, Geneva, 25 January 2011, available at: <http://www.un.org/sg/STATEMENTS/index.asp?nid=5051>

⁴³ Secretary-General Ban Ki Moon, respectively: *Video message to Human Rights Council meeting on violence and discrimination based on sexual orientation or gender identity*, Geneva, 7 March 2012; and *Leadership in the fight against homophobia*, New York, 11 December 2012; both available at: <http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBTSpeechesandstatements.aspx>

⁴⁴ Ban Ki-moon, *Secretary-General's Remarks at the UN Free & Equal Lunch [as delivered]*, San Francisco, 26 June 2015, available at: <http://www.un.org/sg/statements/index.asp?nid=8772>

The International Court of Justice

45. The use of the UN's fourth institution, the International Court of Justice (ICJ), at present remains a theoretical possibility. Although the ICJ has some jurisdiction to adjudicate breaches of international law, it is not active on the issue of laws that criminalise of homosexuality, nor LGBT rights more generally. It is possible for a state party to the ICJ to bring a claim against another state party for its breach of international law due to its criminalising legislation. At present, this would be ill advised. For completeness, Appendix 1, column I lists the criminalising countries who have given jurisdiction to the ICJ.
46. Another theoretical possibility is that a UN specialised agency requests an advisory opinion from the ICJ on the legality of laws that criminalise homosexuality. For the ICJ to have jurisdiction, the issue must raise 'legal questions arising within the scope of their activities'.⁴⁵ The World Health Organisation is perhaps best placed to request an advisory opinion due to the link between criminalisation and increased HIV rates.⁴⁶

47. This course of action is not recommended at this stage.

The Economic and Social Council

48. The fifth and final UN institution is the Economic and Social Council (ECOSOC). It is relevant to the extent that it has established subsidiary bodies whose work encompasses LGBT rights. Two subsidiary bodies of particular relevance are UNAIDS (discussed in the next section) and ECOSOC's Committee on NGOs.
49. Several LGBT groups have consultative status on the Committee on NGOs,⁴⁷ which gives them the opportunity to engage with other UN entities. Like-minded countries can work with this committee to encourage it to ensure that LGBT NGOs are able to acquire this status, and can also work with those organisations that already have status in terms of how then they might engage with the UN. They can also work to encourage NGOs who advocate for reform in criminalising countries to apply for consultative status, particularly from countries where it is difficult to operate an LGBT NGO domestically.

UN specialised agencies and subsidiary bodies

50. There are 16 specialised agencies that act as autonomous organisations linked to the UN through special agreements,⁴⁸ and the UN's institutions have themselves formed multiple subsidiary bodies. The OHCHR and the Human Rights Council, discussed above, are two such subsidiary bodies. Specialised agencies and subsidiary bodies do and can play a part in the decriminalisation of homosexuality. Like-minded countries can work with them.
51. In September 2015, in an unprecedented move, 12 UN specialised agencies and subsidiary bodies issued a joint statement on *Ending Violence and Discrimination against Lesbian, Gay, Bisexual, Transgender and Intersex People*.⁴⁹ The joint statement covered multiple themes, which overlap with the themes in the Human Dignity Trust's briefing notes in this series. These include the negative health and economic effects of criminalising homosexuality, human rights obligations, and that cultural and religious belief are no justification for criminal laws. These 12 entities identified how their work is engaged in the following ways:

Failure to uphold the human rights of LGBTI people and protect them against abuses such as violence and discriminatory laws and practices, constitute serious violations of international human rights law and have a far-reaching impact on society – contributing to increased vulnerability to ill health including HIV infection, social and economic exclusion, putting strain on families and communities, and impacting negatively on economic growth, decent work and progress towards achievement of the future Sustainable Development Goals.

“ **States bear the primary duty under international law to protect everyone from discrimination and violence. These violations therefore require an urgent response by governments, parliaments, judiciaries and national human rights institutions.** ”

*Community, religious and political leaders, workers' organizations, the private sector, health providers, civil society organizations and the media also have important roles to play. Human rights are universal – cultural, religious and moral practices and beliefs and social attitudes cannot be invoked to justify human rights violations against any group, including LGBTI persons.*⁵⁰

45 UN Charter, Article 96(2).

46 The link between criminalisation and HIV transmission is discussed in another note in this series, Criminalising Homosexuality and Public Health: Adverse Impacts on the Prevention and Treatment of HIV and AIDS

47 For a full list, see: <http://csonet.org/content/documents/E-2014-INF-5%20Issued.pdf>

48 For a full list, see <http://www.un.org/Overview/uninbrief/institutions.shtml>

49 The 12 entities were: the International Labour Organization (ILO), OHCHR, UNAIDS, the United Nations Development Programme (UNDP), UNESCO, the United Nations Population Fund (UNFPA), the United Nations High Commissioner for Refugees (UNHCR), UNICEF, the United Nations Office on Drugs and Crime (UNODC), UN Women, the World Food Programme (WFP) and the WHO.

50 Joint Statement, *Ending Violence and Discrimination against Lesbian, Gay, Bisexual, Transgender and Intersex People*, 29 September 2015, available at: http://www.ohchr.org/Documents/Issues/Discrimination/Joint_LGBTI_Statement_ENG.PDF

52. Furthermore, these 12 UN entities called for action from member states:

States should respect international human rights standards, including by reviewing, repealing and establishing a moratorium on the application of: Laws that criminalize same-sex conduct between consenting adults...

53. These 12 entities span the spectrum of the UN's work, demonstrating how the issue of criminalising homosexuality impacts LGBT people's lives in multiple ways and offends against the UN's ethos to its core.

Diplomacy at the UN

54. The paragraphs above set out the treaty and Charter mechanisms available at the UN. Of course, in addition to using these formal frameworks, governments and diplomats can work behind the scenes to bring about the decriminalisation of homosexuality.

55. The frequency and tone of comments coming from the UN on LGBT rights shows a hardening stance and growing intolerance towards laws that criminalise homosexuality. National representatives can raise the issue of criminalisation more vocally, more frequently, and more forcefully at the UN without deviating from the UN's stance on the issue. There is no need to shy away. Global opinion is on the side of decriminalisation.

These 12 entities span the spectrum of the UN's work, demonstrating how the issue of criminalising homosexuality impacts LGBT people's lives in multiple ways and offends against the UN's ethos to its core.

56. Also government should take note that statements at the UN demonstrate how advocacy on LGBT rights is evolving. The Secretary-General's comments above are particularly indicative of this evolution. The narrative of LGBT rights is increasingly focused on achieving equality. As such, pushing for the gradual expansion of privacy rights, as was the model in the UK between 1967 and 2003, is not necessarily the optimal route in the early 21st century. This privacy/equality debate is discussed in further detail in another note in this series, *Criminalising Homosexuality and International Human Rights Law*.

The European Union

57. It is firmly entrenched at the European Union (EU) that LGBT people enjoy equality with others. No EU member state criminalises homosexuality, nor could it. The EU Charter of Fundamental Rights includes sexual orientation as a prohibited ground for discrimination (Article 21). This legal framework protects LGBT people within the EU, yet there is much that the EU can do outside of its own borders too.

58. The EU is committed to including the human rights of LGBT people in its external work. In June 2013, the EU's Foreign Ministers adopted 'Guidelines to Promote and Protect the Enjoyment of All Human Rights by Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Persons'. The EU's position on LGBT rights is provided on the opening page of these guidelines:

“ The rights of LGBTI persons are protected under existing international human rights law, although specific action is often required in order to ensure the full enjoyment of human rights by lesbian, gay, bisexual, transgender and intersex (LGBTI) persons. LGBTI persons have the same rights as all other individuals — no new human rights are created for them and none should be denied to them. The EU is committed to the principle of the universality of human rights and reaffirms that cultural, traditional or religious values cannot be invoked to justify any form of discrimination, including discrimination against LGBTI persons... The EU is particularly concerned that in some countries, sexual relations between consenting adults of the same sex are criminalised and are liable to be punished with imprisonment or with the death penalty.⁵¹

⁵¹ Council of the European Union, *Guidelines to Promote and Protect the Enjoyment of All Human Rights by Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Persons*, 24 June 2013, p. 1, available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/foraff/137584.pdf

59. These guidelines aim to provide officials of the EU institutions and EU member states with assistance in their interactions with third countries, international organisations and civil society organisations, in order to promote and protect the human rights of LGBT people. The guidelines focus on diplomatic actions as means to progress LGBT rights overseas. While these guidelines are welcome, they must be acted upon consistently; erratic use suggests that the EU is willing to abandon LGBT rights if there is some 'greater' consideration.

60. Diplomatic dialogue is only one tool. The EU can apply pressure beyond spoken words. As the world's largest economic bloc, the EU possesses much potential to exert pressure on its trading partners. Of particular relevance is the Cotonou Agreement, signed in June 2000 by 78 African, Caribbean and Pacific countries and by the then-fifteen EU member states. The agreement was subsequently revised in 2010. An essential element of the Cotonou agreement is 'good governance', the violation of which may lead to the partial or complete suspension of development cooperation between the EU and the country in violation. The criminalisation of homosexuality amounts to a serious failure of good governance.⁵² It is legitimate that the EU raises this failure in the context of the treaty obligations contained in the

Cotonou Agreement and reconsiders the favourable trading arrangements granted to criminalising parties to the Cotonou Agreement (Appendix, column L). The current version of the Cotonou Agreement expires in 2020. When the negotiations for the next version take place, EU members can consider raising more forcefully the issue of criminalising homosexuality in the context of economic and trade benefits if and where decriminalisation occurs.

61. Further, the EU is equipped to respond strategically to acute breaches of human rights, included those against LGBT people. For instances, the Council of the EU is empowered to impose a range of sanctions to promote 'respect for the rule of law, human rights and international law'.⁵³ The EU can also coordinate the response of its various member states, which can use their domestic tools in unison to maximise the effect. EU Commissioners can on behalf of all EU member states criticise governments who persecute their LGBT citizens. The EU did, indeed, respond to new laws passed in Nigeria, Uganda and The Gambia that further criminalised and persecuted LGBT people:

- a) In March 2014, the European Parliament passed a non-binding resolution criticising new anti-gay laws in Nigeria and Uganda and calling on member countries to impose travel and visa bans on 'key individuals responsible for drafting and adopting' the laws.⁵⁴ In December 2014, following the passing in The Gambia of a new anti-gay law, the European Union cut US\$186 million in aid to The Gambia.
- b) Again in response to Uganda's new anti-gay law, the EU's High Representative, Catherine Ashton, highlighted the international human rights treaties ratified by Uganda that are violated by this new law:

“ The European Union condemns the adoption of the Anti-Homosexuality Act by Uganda on 24 February. The EU fully shares the concerns expressed by the United Nations Secretary-General, the UN High Commissioner for Human Rights and by Nobel Peace Prize laureate Desmond Tutu. The EU is firmly committed to the promotion of human rights worldwide and denounces any discriminatory legislation. The EU will review how best to achieve this in Uganda in this changed context. The Anti-Homosexuality Act contradicts the international commitments of the Ugandan government to respect and protect the fundamental human rights of all its citizens. The EU calls upon Uganda to ensure equality before the law and non-discrimination in line with its obligations under international human rights law, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the African Charter of Human and Peoples' Rights.⁵⁵

62. The use of travel bans directly targets those who are the source of state-sanctioned homophobia. Whereas economic sanctions may not personally affect these people, but do affect the citizenry, denying politicians the opportunity to visit the EU affects them directly.

52 As discussed our notes *Criminalising Homosexuality and the Rule of Law, Criminalising Homosexuality and Democratic Values, and Criminalising Homosexuality and International Human Rights Law*.

53 European Delegation to the United Nations, 'Sanctions: Factsheet on EU restrictive measures', 4 March 2013, http://eu-un.europa.eu/articles/en/article_13226_en.htm

54 Murwira, Z., 'African anti-gay stance touches storm', *The Herald* (online), 18 March 2014. Available at: <http://africanleadership.co.uk/uganda-faces-travel-ban-over-anti-gay-law/>

55 European Union, *Declaration by the High Representative on behalf of the European Union concerning the Ugandan Anti-Homosexuality Act*, Brussels, 4 March 2014, 7267/1/14 REV 1

The Commonwealth



63. The criminalisation of homosexuality is a problem intimately connected with the Commonwealth. Of the 78 jurisdictions that currently criminalise consensual same-sex intimacy, 40 are Commonwealth members (Appendix, column M), which sadly accounts for the majority of the Commonwealth's total membership of 53. Of the Commonwealth's 2.3 billion citizens, 2.1 billion (or 90%) live in a country that criminalises. Three-quarters of all people who live in a criminalising jurisdiction live in the Commonwealth.⁵⁵ The concentration of criminalising countries in the Commonwealth is a result of their shared British colonial histories, during which time Britain imposed these laws. In addition to these 40 countries, several others inherited their laws from Britain (Appendix, column M).

The criminalisation of homosexuality is a problem intimately connected with the Commonwealth. Of the 78 jurisdictions that currently criminalise consensual same-sex intimacy, 40 are Commonwealth members, which sadly accounts for the majority of the Commonwealth's total membership of 53. Of the Commonwealth's 2.3 billion citizens, 2.1 billion (or 90%) live in a country that criminalises. Three-quarters of all people who live in a criminalising jurisdiction live in the Commonwealth.⁵⁶

⁵⁶ The 78 criminalising jurisdictions' total population is 2.87 billion, of which 2.09 billion are in the Commonwealth.

64. With the vast majority of Commonwealth countries criminalising, there is little prospect at present of bringing about change via weight in numbers. However, other strategies can be used, which may result in decriminalisation as a side-product rather than as a target itself. General legislative reform is one route. Among Commonwealth countries, laws that criminalise homosexuality are often contained within archaic criminal codes that reflect a Victorian approach to criminal justice. As well as criminalising consensual same-sex intimacy, these British-era laws frequently permit rape within marriage, provide inadequate protection of children from sexual predation, and do not recognise that a man can be raped. In many Commonwealth countries reform across the board of criminal laws, or specifically sexual offences laws, might result in the criminalisation of homosexuality quietly falling away.
65. Due to the common heritage, shared language and similar systems of law and government among its members, the Commonwealth is well placed to act as the focal point for drafting a model criminal code.
66. Legislative reform has been an effective way to bring about decriminalisation in the past. Most recently, in July 2015 Mozambique became the latest country to decriminalise via a new criminal code coming into force. The drafting of a model criminal code for the Commonwealth could prove a powerful and subtle way to bring about the decriminalisation of homosexuality. In doing so, it can also address other issues, such as protecting women and children from sexual abuse and sexual violence.
67. In December 2012, the members of the Commonwealth agreed the Charter of the Commonwealth, in which they reaffirm the values of the Commonwealth. These include democracy (Article 1), human rights for all without discrimination on any ground (Article 2), and the rule of law (Article 7). This Charter can provide a framework for reform and a guide to the content of model legislation. Commonwealth countries might wish to build on this Charter by advocating for the appointment of a Commonwealth Commissioner to work with Commonwealth members on human rights issues.

68. Outgoing Commonwealth Secretary-General Kamalesh Sharma has made progress, first by overseeing the agreement of the Charter of the Commonwealth. He has since acknowledged to the LGBT community that the Commonwealth *'continue[s] to work with national human rights institutions and parliaments, building capacities to further protect and promote equality and non-discrimination'*.⁵⁷ Encouragingly, at the 2015 Commonwealth Heads of Government Meeting in Malta, Secretary-General Sharma remarked that:

“ We embrace difference, and that includes sexual identity. Discrimination and criminalisation in any form on grounds of sexual orientation is incompatible with our Commonwealth values.⁵⁸ ”

69. With the appointment in November 2015 of the new Secretary-General, Patricia Scotland, there might be greater impetus within the Commonwealth Secretariat to build upon outgoing Secretary-General Sharma's comments and to address the issue of criminalising homosexuality.

11 of the 78 jurisdictions use the London-based Privy Council as their final court of appeal.

70. Additionally, it should also be borne in mind that Commonwealth countries are bound together by other institutions that display some characteristics of internationality. In particular, the legal systems of many Commonwealth countries remain intertwined, to varying degrees, with English law. 11 of the 78 jurisdictions use the London-based Privy Council as their final court of appeal (see Appendix, column M). The Privy Council may well have the opportunity to hear a case on the criminalisation of homosexuality. Further, the common law legal system is followed in almost all Commonwealth countries and some other criminalising countries too (see Appendix, column M). Court judgments from both the Privy Council and the English courts enrich this shared common law. The common law may offer an alternative way to show that laws that criminalise homosexuality are unlawful.

Conclusions

71. History shows that international organisations have been integral in bringing about the decriminalisation of homosexuality in domestic legal systems. Contemporary statements from various international organisations show that those who now push for decriminalisation will be on the right side of history. Like-minded governments can use their position within multiple international organisations to further the goal of decriminalising homosexuality across the globe.

72. The UN now looks primed to act upon the content of its treaties and in accordance with its ethos and principles to help bring about decriminalisation. Yet, it is states within the UN who provide the impetus for this. Like-minded governments must continue with their quiet diplomacy, but they must not forget that they are owed obligations under international law, which are being flouted by countries that criminalise homosexuality. In some instances, quiet diplomacy will not be sufficient. There are mechanisms at the UN level where more pro-active approaches can be taken. In particular, state-to-state claims at the Human Rights Committee may be the only viable solution to bring about change in some criminalising countries.

73. Likewise, the EU's stance on this issue could be firmer in practice to reflect the admirable principles codified at the EU. The EU and the Council of Europe have been crucial players in progressing LGBT rights in their immediate sphere of influence. The EU's influence can be applied strategically in other regions too, in particular in countries with which it trades or has cultural links. The EU's Cotonou Agreement is one tool that can be used to encourage compliance with human rights.

74. Similarly, the Commonwealth could be a powerful vehicle for change if it acts strategically. Recent statements from the Commonwealth are welcomed, and suggest that it will now engage with this issue if it is approached sensitively.

75. Had international organisations been silent in the past, many more than 78 jurisdictions could still criminalise today. This number will be reduced further and more rapidly only if pressure is felt from the international community.

⁵⁷ Letter dated 23 September 2014 to the Kaleidoscope Trust, Peter Tatchell Foundation and Equality Network. Available at: <http://kaleidoscopetrust.com/usr/library/documents/main/lgbt-human-rights-petition.pdf>

⁵⁸ The Commonwealth Equality Network, *PRESS RELEASE: Historic inclusion of LGBTI Rights in Commonwealth Discussions*. Available at: <https://www.thercs.org/assets/Press-Releases/25.11.15-Historic-Inclusion-of-LGBTI-Rights-in-Commonwealth-Discussions.pdf>

Appendix 1: 78 criminalising jurisdictions' membership of international organisations

	A	B	C	D	E	F	G	H	I	J	K	L	M
	78 criminalising jurisdictions ⁵⁹ (bold: women criminalised too)	UN Treaties and Mechanisms									Regional	EU	Other
		UN member	ICCPR state-party ⁶⁰	ICCPR: individual complaint ⁶¹	ICCPR: state-to-state complaint ⁶²	CAT state-party ⁶³	CAT: individual complaint ⁶⁴	CAT: state-to-state complaint ⁶⁵	ICJ state ⁶⁶	ICC state ⁶⁷	OAS ⁶⁸ AU ⁶⁹ member	Cotonou party ⁷⁰	Commonwealth member ⁷¹
1.	Afghanistan	Yes	Yes	No	No	Yes	No	No	No	Yes	No	No	No
2.	Algeria	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	AU	No	No
3.	Angola	Yes	Yes	Yes	No	No	No	No	No	No	AU	Yes	No
4.	Antigua and Barbuda	Yes	No	No	No	Yes	No	No	No	Yes	OAS	Yes	Yes++
5.	Bangladesh	Yes	Yes^	No	No	Yes	No	No	No	Yes	No	No	Yes
6.	Barbados	Yes	Yes	Yes	No	No	No	No	Yes	Yes	OAS^ ^ #	Yes	Yes
7.	Belize	Yes	Yes^	No	No	Yes	No	No	No	Yes	OAS	Yes	Yes
8.	Bhutan	Yes	No	No	No	No	No	No	No	No	No	No	No
9.	Botswana	Yes	Yes^	No	No	Yes	No	No	Yes	Yes	AU	Yes	Yes
10.	Brunei	Yes	No	No	No	No	No	No	No	No	No	No	Yes
11.	Burundi	Yes	Yes	No	No	Yes	Yes	No	No	Yes	AU	Yes	No
1.	Cameroon	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes	No	AU	Yes	Yes
2.	Comoros	Yes	No*	No	No	No*	No	No	No	Yes	AU	Yes	No
3.	Cook Islands	No	No	No	No	No	No	No	No	Yes	No	Yes	No+ ++
4.	Dominica	Yes	Yes	No	No	No	No	No	Yes	Yes	OAS#	Yes	Yes
5.	Egypt	Yes	Yes	No	No	Yes	No	No	Yes	No	AU	No	No
6.	Eritrea	Yes	Yes^	No	No	Yes	No	No	No	No	AU	Yes	No
7.	Ethiopia	Yes	Yes	No	No	Yes	No	No	No	No	AU	Yes	No
8.	The Gambia	Yes	Yes	Yes	Yes	No*	No	No	Yes	Yes	AU	Yes	No+
9.	Gaza	No**	Yes**	No	No	Yes**	No	No	No	Yes**	No	No	No
10.	Ghana	Yes	Yes^	Yes	Yes	Yes	Yes	Yes	No	Yes	AU	Yes	Yes
11.	Grenada	Yes	Yes	No	No	No	No	No	No	Yes	OAS#	Yes	Yes++
12.	Guinea	Yes	Yes	Yes	No	Yes	No	No	Yes	Yes	AU	Yes	No

59 List of 78 criminalising jurisdictions in column A taken from: <http://www.humandignitytrust.org/pages/COUNTRY%20INFO/Criminalising%20Homosexuality>

60 <http://indicators.ohchr.org>

61 I.e. the state-party has ratified the ICCPR's Optional Protocol. <http://indicators.ohchr.org>

62 I.e. the state-party has consented under Article 41 of the ICCPR https://treaties.un.org/pages/viewdetails.aspx?chapter=4&src=treaty&mtmsg_no=iv-4&lang=en

63 <http://indicators.ohchr.org>

64 I.e. the state-party has consented under Article 22 of the CAT https://treaties.un.org/Pages/ViewDetails.aspx?src=treaty&mtmsg_no=iv-9&chapter=4&lang=en

65 I.e. the state-party has consented under Article 21 of the CAT https://treaties.un.org/Pages/ViewDetails.aspx?src=treaty&mtmsg_no=iv-9&chapter=4&lang=en

66 <http://www.icj-cij.org/jurisdiction/?p1=5&p2=1&p3=3>

67 http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx

68 http://www.oas.org/en/member_states/

69 http://www.au.int/en/member_states/countryprofiles

70 http://eeas.europa.eu/delegations/sierra_leone/eu_sierra_leone/political_relations/partnership_framework/acp_eu_agreement/index_en.htm

71 <http://www.commonwealthofnations.org>

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	78 criminalising jurisdictions ⁵⁹ (bold: women criminalised too)	UN Treaties and Mechanisms									Regional	EU	Other
		UN member	ICCPR state-party ⁶⁰	ICCPR: individual complaint ⁶¹	ICCPR: state-to-state complaint ⁶²	CAT state-party ⁶³	CAT: individual complaint ⁶⁴	CAT: state-to-state complaint ⁶⁵	ICJ state ⁶⁶	ICC state ⁶⁷	OAS ⁶⁸ AU ⁶⁹ member	Cotonou party ⁷⁰	Commonwealth member ⁷¹
24.	Guyana	Yes	Yes	Yes	Yes	Yes	No	No	No	Yes	OAS	Yes	Yes
25.	India	Yes	Yes	No	No	No*	No	No	Yes	No	No	No	Yes
26.	Indonesia (S. Sumatra; Aceh)	Yes	Yes^	No	No	Yes	No	No	No	No	No	No	No
27.	Iran	Yes	Yes	No	No	No	No	No	No	No	No	No	No
28.	Iraq (unclear)	Yes	Yes	No	No	Yes	No	No	No	No	No	No	No
29.	Jamaica	Yes	Yes	No	No	No	No	No	No	No	OAS^ ^ #	Yes	Yes++
30.	Kenya	Yes	Yes	No	No	Yes	No	No	Yes	Yes	AU	Yes	Yes
31.	Kiribati	Yes	No	No	No	No	No	No	No	No	No	Yes	Yes++
32.	Kuwait	Yes	Yes^	No	No	Yes	No	No	No	No	No	No	No+
33.	Lebanon	Yes	Yes	No	No	Yes	No	No	No	No	No	No	No
34.	Liberia	Yes	Yes^	No*	No	Yes	No	No	Yes	Yes	AU	Yes	No+
35.	Libya	Yes	Yes	Yes	No	Yes	No	No	No	No	AU	No	No
36.	Malawi	Yes	Yes	Yes	No	Yes	No	No	Yes	Yes	AU	Yes	Yes
37.	Malaysia	Yes	No	No	No	No	No	No	No	No	No	No	Yes
38.	Maldives	Yes	Yes^	Yes	No	Yes	No	No	No	Yes	No	No	Yes
39.	Mauritania	Yes	Yes^	No	No	Yes	No	No	No	No	AU	Yes	No
40.	Mauritius	Yes	Yes	Yes	No	Yes	No	No	Yes	Yes	AU	Yes	Yes++
41.	Morocco	Yes	Yes	No	No	Yes	Yes	No	No	No	No	No	No
42.	Myanmar	Yes	No	No	No	No	No	No	No	No	No	No	No+
43.	Namibia	Yes	Yes^	Yes	No	Yes	No	No	No	Yes	AU	Yes	Yes
44.	Nauru	Yes	No*	No*	No	Yes	No	No	No	Yes	No	Yes	Yes
45.	Nigeria	Yes	Yes	No	No	Yes	No	No	Yes	Yes	AU	Yes	Yes
46.	Oman	Yes	No	No	No	No	No	No	No	No	No	No	No+
47.	Pakistan	Yes	Yes^	No	No	Yes	No	No	Yes	No	No	No	Yes
48.	Papua New Guinea	Yes	Yes^	No	No	No	No	No	No	No	No	Yes	Yes
49.	Qatar	Yes	No	No	No	Yes	No	No	No	No	No	No	No
50.	St Kitts & Nevis	Yes	No	No	No	No	No	No	No	Yes	OAS	Yes	Yes++
51.	St Lucia	Yes	No^	No	No	No	No	No	No	Yes	OAS	Yes	Yes++
52.	St Vincent & Grenadines	Yes	Yes	Yes	No	Yes	No	No	No	Yes	OAS	Yes	Yes++

Appendix 1: 78 criminalising jurisdictions' membership of international organisations

	A 78 criminalising jurisdictions (bold: women criminalised too)	B UN member	C ICPR state-party ⁶⁰	D ICPR: individual complaint ⁶¹	E ICPR: state-to-state complaint ⁶²	F CAT state-party ⁶³	G CAT: individual complaint ⁶⁴	H CAT: state-to-state complaint ⁶⁵	I ICJ state ⁶⁶	J ICC state ⁶⁷	K OAS ⁶⁸ AU ⁶⁹ member	L Cotonou party ⁷⁰	M Commonwealth member ⁷¹													
														UN Treaties and Mechanisms										Regional	EU	Other
53.	Samoa	Yes	Yes [^]	No	No	No	No	No	No	Yes	No	Yes	Yes													
54.	Saudi Arabia	Yes	No	No	No	Yes	No	No	No	No	No	No	No													
55.	Senegal	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	AU	Yes	No													
56.	Seychelles	Yes	Yes	Yes	No	Yes	Yes	No	No	Yes	AU	Yes	Yes													
57.	Sierra Leone	Yes	Yes [^]	Yes	No	Yes	No	No	No	Yes	AU	Yes	Yes													
58.	Singapore	Yes	No	No	No	No	No	No	No	No	No	No	Yes													
59.	Solomon Islands	Yes	No	No	No	No	No	No	No	No	No	Yes	Yes													
60.	Somalia	Yes	Yes	Yes	No	Yes	No	No	Yes	No	AU	Yes	No													
61.	South Sudan	Yes	No	No	No	Yes	No	No	No	No	AU##	No	No													
62.	Sri Lanka	Yes	Yes	Yes	Yes	Yes	No	No	No	No	No	No	Yes													
63.	Sudan	Yes	Yes	No	No	No*	No	No	Yes	No	AU	Yes	No+													
64.	Swaziland	Yes	Yes [^]	No	No	Yes	No	No	Yes	No	AU	Yes	Yes													
65.	Syria	Yes	Yes	No	No	Yes	No	No	No	No	No	No	No													
66.	Tanzania	Yes	Yes	No	No	No	No	No	No	Yes	AU	Yes	Yes													
67.	Togo	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes	No	AU	Yes	No													
68.	Tonga	Yes	No	No	No	No	No	No	No	No	No	Yes	Yes													
69.	Trinidad & Tobago	Yes	Yes	No	No	No	No	No	No	Yes	OAS	Yes	Yes++													
70.	Tunisia	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	AU	No	No													
71.	Turkmenistan	Yes	Yes [^]	Yes	No	Yes	No	No	No	No	No	No	No													
72.	Tuvalu	Yes	No	No	No	No	No	No	No	No	No	Yes	Yes++													
73.	Uganda	Yes	Yes [^]	Yes	No	Yes	No	Yes	Yes	Yes	AU	Yes	Yes													
74.	UAE	Yes	No	No	No	Yes	No	No	No	No	No	No	No													
75.	Uzbekistan	Yes	Yes [^]	Yes	No	Yes	No	No	No	No	No	No	No													
76.	Yemen	Yes	Yes	No	No	Yes	No	No	No	No	No	No	No+													
77.	Zambia	Yes	Yes	Yes	No	Yes	No	No	No	Yes	AU	Yes	Yes													
78.	Zimbabwe	Yes	Yes	No	Yes	No	No	No	No	No	AU	Yes	No+													

* Signed, but not ratified.
 ** The State of Palestine has observer status at the UN. It has acceded to certain UN treaties. Within Palestine, the West Bank does not criminalise, Gaza does.
 ^ Signed ICCPR after Toonen communication was released by HRC.
 ^^ Barbados recognises the jurisdiction of the Inter-American Court of Human Rights; Jamaica recognises the competence of the Inter-American Commission on Human Rights.⁷²
 + Countries with common law mixed common law legal systems derived from English law, but not members of the Commonwealth.⁷³
 ++ Judicial Committee of the Privy Council, based in London with UK judges, is the final court of appeal. (In Kiribati, criminalisation is unlikely to fall under the Privy Council's jurisdiction.)⁷⁴
 # Members of OAS that have ratified the American Convention on Human Rights.⁷⁵
 ## Members of AU that have NOT ratified the African Charter on Human and Peoples' Rights
 72 <http://www.oas.org/en/iachr/mandate/Basics/conventionrat.asp>
 73 <https://www.cia.gov/library/publications/the-world-factbook/fields/2100.html>
 74 <https://www.jcpc.uk/about/role-of-the-jcpc.html#Commonwealth>
 75 <http://www.oas.org/en/iachr/mandate/Basics/conventionrat.asp>

Appendix 2: Jurisdictions that have decriminalised homosexuality since 1981

	Country	Methods and of repeal and external influences			
		Year	External influence	Litigation to strike down law or force repeal	
				YearYear	Ground of litigation (and external influence)
1.	Mozambique	2015	Inter-governmental		
2.	Palau	2014	UPR and USA		
3.	Sao Tome	2014	UPR		
4.	Northern Cyprus	2014	Strasbourg Court ⁷⁶ and EU provided impetus		
5.	Lesotho	2012	None		
6.	Nicaragua	2008	None		
7.	Panama	2008	Unclear ⁷⁷		
8.	Nepal			2007 ⁷⁸	Equality
9.	Tokelau	2007	UNAIDS/WHO ⁷⁹		
10.	Vanuatu	2007	UNAIDS/WHO	2005 ⁸⁰	Equality and privacy
11.	Fiji				
12.	Marshall Islands	2005	UNAIDS/WHO		
13.	Armenia	2003	Council of Europe ⁸¹		Privacy
14.	United States			2003 ⁸²	Privacy
15.	Azerbaijan	2000	Council of Europe		
16.	Georgia	2000	Council of Europe		
17.	Chile	1999	None		
18.	UK Overseas Territories	2000-01	Pressure from UK		

Yellow shading indicates overt external influence that forced or facilitated decriminalisation

Orange shading indicates no known external influence.

76 A case against Turkey, which is responsible for Northern Cyprus under international law, was commenced at the European Court of Human Right. In response, Northern Cyprus repealed.

77 *Pink News* reported that the 'ban on gay sex was found to be inconsistent with international human rights treaties that Panama has signed, as well as the Panamanian Constitution' and that 'sexual preference' was already recognised in government health policy. See: <http://www.pinknews.co.uk/2008/08/14/gay-sex-becomes-legal-in-panama/>

78 *Pant v. Nepal Government, Office of the Prime Minister and Council of Ministers*, NJA Law Journal 2008, 262.

79 In 2007 the UNAIDS Secretariat and UNDP reviewed the legislation of 15 Pacific Island countries relevant to HIV issues, including discrimination, ethics, access to treatment and privacy and confidentiality. The Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Marshall Islands, Nauru, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu and Vanuatu were included in this project. See: <http://www.unaids.org/en/resources/presscentre/featurestories/2010/march/20100304fiji>

80 *McCoskar v. The State*, Criminal Appeals HAA0085 & 86 of 2005, 26 August 2005. Law remained in place until it was repealed in 2010.

81 For an analysis of the effect of the Council of Europe on decriminalisation in Europe, see Noble, B., 'Decriminalising sex between men: former USSR' in, Goodall, K.E. and Mallco, M.S. (eds), *Building Justice in Post-transition Europe: Processes of Criminalisation*, Routledge (2013).

82 *Lawrence v. Texas* (2003) 539 US 558.

Appendix 2: Jurisdictions that have decriminalised homosexuality since 1981

	Country	Methods and of repeal and external influences			
		Voluntary influence		Litigation to strike down law or force repeal	
		Year	External influence	YearYear	Ground of litigstion (and external influence)
19.	Kazakhstan ⁸³	1998	Break-up of USSR		
20.	Kyrgyzstan	1998	Break-up of USSR		
21.	South Africa			1998 ⁸⁴	Equality, privacy and dignity
22.	Tajikistan	1998	Break-up of USSR		
23.	Cyprus			1998 ⁸⁵	Privacy (Strasbourg Court judgment)
24.	Bosnia & Herzegovina	1998-2001	Council of Europe		
25.	China	1997	None		
26.	Ecuador			1997 ⁸⁶	?
27.	Macedonia	1996	Council of Europe		
28.	Romania	1996	Council of Europe		
29.	Albania	1995	Council of Europe		
30.	Moldova	1995	Council of Europe		
31.	Australia (Tasmania)			1994 ⁸⁷	Privacy (Human Rights Committee decision)
32.	Belarus	1994	Council of Europe ⁸⁸		
33.	Kosovo	1994	Council of Europe		
34.	Serbia	1994	Council of Europe		

⁸³ For an analysis of decriminalisation in the non-Council of Europe, Ex-Soviet Republics of Kazakhstan, Kyrgyzstan and Tajikistan, see Noble, at n. 81 above. These countries replaced their Soviet-era criminal codes upon independence.

⁸⁴ *National Coalition for Gay and Lesbian Equality v. Minister of Justice* CCT 11/98.

⁸⁵ *Modinos v. Cyprus* (Application No. 15070/89).

⁸⁶ *Constitutional Tribunal Case No. 111-97-TC*.

⁸⁷ *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994), 31 March 1994. Tasmania's criminalising law was repealed three years later in 1997.

⁸⁸ Belarus is not a member of the Council of Europe, but was granted 'guest status' in 1992, which in all other cases has led to full membership.

Appendix 2: Jurisdictions that have decriminalised homosexuality since 1981

	Country	Methods and of repeal and external influences			
		Voluntary influence		Litigation to strike down law or force repeal	
		Year	External influence	YearYear	Ground of litigstion (and external influence)
34.	Serbia	1994	Council of Europe		
35.	Guinea-Bissau	1993	None		
36.	Lithuania	1993	Council of Europe		
37.	Russia	1993	Council of Europe		
38.	Estonia	1992	Council of Europe		
39.	Latvia	1992	Council of Europe		
40.	Ukraine	1991	Council of Europe		
41.	Bahamas	1991	None		
42.	Andorra	1990	Council of Europe		
43.	Liechtenstein	1989	Council of Europe		
44.	Israel	1988	None		
45.	Ireland			1993 ⁸⁹	Privacy (Strasbourg Court judgment)
46.	New Zealand	1986	None		
47.	Portugal	1983	Council of Europe		
48.	Columbia	1981	None		
49.	United Kingdom (Northern Ireland)			1981 ⁹⁰	Privacy (Strasbourg Court judgment)

⁸⁹ *Norris v. Ireland*, [1988] ECHR 22. Ireland's criminalising law was repealed five years later in 1993.

⁹⁰ *Dudgeon v. UK* A 45 (1982) 4 EHRR 149.

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**HUMAN
DIGNITY
TRUST**

Criminalising Homosexuality and LGBT Rights in Times of Conflict, Violence and Natural Disasters

There is a need to devote specific attention to the LGBT population, particularly in post-disaster and post-conflict situations. Stigmatization and discrimination on the basis of sexual orientation increase gender-based violence in post-conflict and post-disaster situations, negatively affecting LGBT persons in the provision of food assistance, shelters & humanitarian aid.

UN Human Rights Council Advisory Committee, 2014¹

This is one in a series of notes produced for the Human Dignity Trust on the criminalisation of homosexuality and good governance. Each note in the series discusses a different aspect of policy that is engaged by the continued criminalisation of homosexuality across the globe.

The Human Dignity Trust is an organisation made up of international lawyers supporting local partners to uphold human rights and constitutional law in countries where private, consensual sexual conduct between adults of the same sex is criminalised. We are a registered charity no.1158093 in England & Wales. All our work, whatever country it is in, is strictly not-for-profit.

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¹ UN Human Rights Council, *Progress report on the research-based report of the Human Rights Council Advisory Committee on best practices and main challenges in the promotion and protection of human rights in post-disaster and post-conflict situations*, A/HRC/27/57, 11 August 2014, para. 57.

Overview

01. Lesbian, gay, bisexual and transgender (LGBT) people are a vulnerable group at the best of times. During times of turmoil (conflict, natural disasters or widespread violence) this vulnerability is exacerbated, often leaving LGBT people to experience a level of violence and exclusion beyond that borne by others.
02. This heightened vulnerability arises for two main reasons. First, in times of increased lawlessness and pressure on scarcer resources, homophobia rises to the surface and can be acted upon with impunity. Pre-existing stigma becomes amplified. Secondly, international humanitarian law (IHL) pays little regard to the vulnerability and needs of LGBT people. Both of these factors ultimately arise due to the past and present criminalisation of homosexuality. Even where same-sex intimacy is no longer a crime, homophobia can persist and surface in an extreme way in times of conflict or disaster. Further, IHL was codified after World War II when laws that criminalise homosexuality were the norm. Today, it must be recognised that IHL prohibits targeting people based on their sexual orientation or gender identity, as is the case with other branches of international law.
03. As the UN High Commissioner for Refugees (UNHCR) has stated:
- [A] large majority of the challenges surrounding protection work focused on LGBTI persons of concern stem from the criminalisation of LGBTI identity, expression, and association in many countries of operation.²*

04. Compounding these vulnerabilities is the scant regard to LGBT people in aid and reconstruction programmes provided by the international community. This lack of coverage allows LGBT people to be targeted by others, excluded from the allocation of resources, and leaves them lacking support after violations are committed against them. Aid and reconstruction programmes can be improved by including these vulnerabilities and associated needs, as is done already for other vulnerable groups such as women and children. UNHCR has made progress in this regard on the issue of refugees, but the same must be done in other areas, such as IHL and the international community's responses to conflicts and disasters.
05. It is also important to consider the opportunities that arise post-conflict or post-disaster. State-building programmes funded or informed by foreign governments or international agencies can address structural issues that allow homophobia and persecution to persist. Laws that criminalise homosexuality are often part of out-dated, British-colonial criminal codes. Channelling the influence provided by reconstruction efforts to update a country's sexual offences law could have multiple benefits. It could not only bring about the decriminalisation of homosexuality, but it could also help other groups by providing a more victim-centred law, and have the indirect effect of improving public health and productivity.³

06. National government and international organisations can play a crucial role in protecting LGBT people in times of conflict and disaster, both by acting in advance by improving the frameworks that apply, and by reacting to conflict and disaster in a manner that includes LGBT people. For example:
- a) Continue with and enhance efforts to improve LGBT rights across the globe in order to reduce the homophobia that is amplified in times of trouble. Advocating for decriminalisation is a part of this.
- b) Publicly state that under international humanitarian rights law (IHL) it is unlawful to target people based on their sexual orientation or gender identity; include this in national military's manuals; and work with organisations who interpret IHL, such as the International Committee of the Red Cross, to include this expressly in their work.
- c) When violations are known to have been committed against LGBT people in times of conflict or disaster, raise these as a part of the diplomatic dialogue on the underlying conflict or disaster, for example at the United Nations.
- d) Include LGBT people in the aid programmes in response to overseas conflicts and disasters, and encourage aid agencies and non-governmental organisations to do the same.
- e) Where a national government or international organisation is involved in state building, take the opportunity to address laws that criminalise and persecute LGBT people.

- f) When the consequences of the conflict or disaster are felt at home by way of asylum applications, national governments should provide asylum to those who are persecuted on the basis of their sexual orientation or gender identity, and do so as rapidly and as humanely as possible.

Violations against LGBT people in the context of conflict, post-conflict and post-disaster situations

07. LGBT people are prone to violence and discrimination on the basis of their sexual orientation or gender identity in times of peace. The additional pressures felt by society in times of conflict and natural disasters act to amplify homophobia, which can lead to serious and acute instances of violence against LGBT people and their being denied assistance. This vulnerability has been recognised by various United Nations (UN) entities that deal with conflict and human rights. In August 2014, the Human Rights Council observed:

[S]igmatization and discrimination on the basis of sexual orientation increase gender-based violence in post-conflict and post-disaster situations, negatively affecting LGBT persons in the provision of food assistance, shelters and humanitarian aid.⁴

² UNHCR, *Protecting Persons with Diverse Sexual Orientations and Gender Identities: A Global Report on UNHCR's Efforts to Protect Lesbian, Gay, Bisexual, Transgender, and Intersex Asylum-Seekers and Refugees*, December 2015, Executive Summary. Available at: <http://www.refworld.org/docid/566140454.html>

³ These latter two issues are discussed in other briefing notes in this series, *Criminalising Homosexuality and International Business: the Economic and Business Cases for Decriminalisation, and Criminalising Homosexuality and Public Health: Adverse Impacts on the Prevention and Treatment of HIV and AIDS*.

⁴ UN Human Rights Council, at n. 1 above.

08. Similarly, in May 2015 the Office of the High Commissioner for Human Rights (OHCHR) recognised that:

“ **Discrimination against LGBT individuals is often exacerbated by... socioeconomic factors, such as poverty and armed conflict.**⁵

09. In September 2015, 12 UN entities released an unprecedented joint statement urging states to act urgently to end violence and discrimination against LGBT people. The statement noted the impacts of ‘widespread physical and psychological violence against LGBTI persons’ and continued:

*Failure to uphold the human rights of LGBTI people and protect them against abuses such as violence and discriminatory laws and practices... [contributes] to increased vulnerability to ill health including HIV infection, social and economic exclusion, putting strain on families and communities, and impacting negatively on economic growth, decent work and progress towards achievement of the future Sustainable Development Goals.*⁶

10. In December 2015, the UN High Commissioner for Refugees (UNHCR) stated that:

*[A] large majority of the challenges surrounding protection work focused on LGBTI persons of concern stem from the criminalisation of LGBTI identity, expression, and association in many countries of operation.*⁷

11. This UNHCR report highlighted the particular vulnerability of LGBT people in the context of asylum, which is indicative of the situation faced by LGBT people generally in times of civil strife, the break down of law and order and scarce resources:

*Offices expressed that LGBTI asylum-seekers and refugees are subject to severe social exclusion and violence in countries of asylum by both the host community and the broader asylum-seeker and refugee community. While the degree of acceptance of LGBTI persons was reported as very low in all accommodation settings, the lowest degrees of acceptance, across all respondents, were noted in camp settings. Similarly, of the 39 offices that indicated efforts to specifically track the situation of LGBTI persons of concern in immigration detention facilities, most indicated that LGBTI persons are frequently subject to abuse and/or exploitation by both detention authorities and other inmates.*⁸

12. The UN Special Rapporteur on Torture has recommended that states must decriminalise same-sex relationships between consenting adults and repeal all laws that criminalise persons on the basis of their actual or perceived sexual orientation or gender identity or expression.⁹ In his 2016 report on the applicability of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment in international law to the unique experiences of women, girls, and LGBT people, he also observed that:

“ **Torture and ill-treatment of persons on the basis of actual or perceived sexual orientation or gender identity is rampant in armed conflict and perpetrated by State and non-State actors alike, with rape and other forms of sexual violence sometimes being used as a form of “moral cleansing” of lesbian, gay, bisexual and transgender persons.**¹⁰

13. The sections below provide just a few examples to illustrate how LGBT people suffer in times of conflict, natural disasters and their aftermath.

Iraq after the 2003 intervention

14. The problems faced by LGBT people in post-Saddam Hussein Iraq pre-date the rise of the self-styled Islamic State of Iraq and Syria (ISIS). Iraq is illustrative of latent homophobia within a society being acted upon after the collapse of state apparatus, thus allowing groups with anti-LGBT sentiments or ideology to act with impunity.

15. In 2009, Human Rights Watch reported that violence against LGBT people in Iraq was on the rise amidst the country’s conflict:

“ **While the country remains a dangerous place for many if not most of its citizens, death squads started specifically singling out men whom they considered not ‘manly’ enough, or whom they suspected of homosexual conduct. The most trivial details of appearance – the length of a man’s hair, the fit of his clothes – could determine whether he lived or died.**¹¹

16. In 2009, a number of men perceived to be gay were forced to go underground after posters appeared on walls in eastern Baghdad naming them and threatening to kill them. Amnesty International reported at the time that at least 25 men alleged to be gay had been killed in Baghdad in the space of a few weeks.¹²

5 UN Human Rights Council, *Discrimination and violence against individuals based on their sexual orientation and gender identity: Report of the Office of the United Nations High Commissioner for Human Rights*, A/HRC/29/23, 4 May 2015, para. 42.

6 ILO, UNDP, UNESCO et al., *Ending violence and discrimination against lesbian, gay, bisexual, transgender and intersex people*, 29 September 2015. Available at: <http://www.ohchr.org/EN/Issues/Discrimination/Pages/JointLGBTIstatement.aspx>

7 UNHCR, at n. 2 above.

8 UNHCR, at n. 2 above.

9 See Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/HRC/31/57, 5 January 2016, para. 69.

10 *Ibid*, para. 51.

11 Human Rights Watch, *‘They Want Us Exterminated’: Murder, Torture, Sexual Orientation and Gender in Iraq*, 2009. Available at: <https://www.hrw.org/report/2009/08/17/they-want-us-exterminated/murder-torture-sexual-orientation-and-gender-iraq>

12 Muir, J., ‘Iraqi gay men face ‘lives of hell’’, BBC News, 18 April 2009. Available at: http://news.bbc.co.uk/1/hi/world/middle_east/8005420.stm

17. More recently, in November 2014, research and analysis jointly produced by OutRight (formerly the International Gay and Lesbian Human Rights Commission), MADRE and the Organization of Women's Freedom in Iraq found that:

*[W]hile the conflict in Iraq has placed hundreds of thousands of Iraqis at risk of serious human rights violations, LGBT Iraqis face unique threats to their safety.*¹³

18. This report explained that LGBT people in Iraq were found to be at greater vulnerability due to:

*[L]ittle communal safety or protection from family, tribal or community members... Once exposed, family and community members, along with the authorities, are often complicit in abuses against LGBT individuals.*¹⁴

Iraq and Syria today

19. The rise of ISIS has brought an even more deadly dynamic. Whereas vigilante groups operating prior to ISIS taking control could, in theory, face prosecution by the Iraqi or Syrian authorities for violence committed against LGBT people, ISIS now acts as a *de facto* state across swathes of Iraq and Syria. The report mentioned above stated:

“**[T]he Islamic State's imposition and enforcement of its interpretation of Islamic law compels the conclusion that LGBT individuals are highly likely to be at imminent risk of death.**¹⁵

20. However, it is not only ISIS's operatives and ideology that perpetrate violence against the LGBT community. In Iraq in May 2014, the League of the Righteous (a militia assembled by former Iraqi Prime Minister Nuri al-Maliki to fight ISIS) published on signs around Baghdad the names and neighbourhoods of 23 people accused of the 'crime' of homosexual acts. The following month, the League of the Righteous killed and beheaded two adolescent boys who were thought to be gay. Another two men were injured in the same attack.¹⁶

21. The heightened risk to LGBT people in Iraq and Syria was discussed during a closed session of the UN Security Council in August 2015, co-sponsored by the United States and Chile. Jessica Stern of OutRight told the Security Council that the presence of ISIS had:

“**[I]ncreased the vulnerability of millions... and further entrenched structural and cultural violence against women and [lesbian, gay, bisexual, transgender] persons.**¹⁷

22. A gay Syrian refugee, Subhi Nahas, provided direct testimony to the UN Security Council, in which he described how attacks on LGBT people in Syria increased after 2011, with rebel militias and armed groups as well as Syrian government troops explicitly targeting gay men.¹⁸ He elaborated on his experience to Newsweek, stating that in 2012 the militant group Jabhat al-Nusra took control of his hometown of Idlib and vowed to cleanse the city 'of everyone who was involved in sodomy'. Mr Nahas escaped from Syria to Lebanon and Turkey, then to the USA where he was granted asylum. He stated in the interview:

“**I was terrified that would be my fate... I knew I would face death if I didn't do anything, so I contacted my friend in Lebanon and I arranged my escape there.**¹⁹

23. Similarly, a Syrian trans woman spoke about her experience to CBC News in Canada, where she has been granted asylum, which reported:

In Syria, both the rebels and the government security forces also targeted lesbian, gay and transgender civilians...

*She began receiving death threats as the civil war went on. A transgender friend was jailed in Damascus after having had sexual reassignment surgery.*²⁰

24. The trans woman, who is not named in the report, then fled Syria to Jordan, where she says she was raped, assaulted and robbed by Jordanian police officers, who threatened to return her and fellow trans refugees to Syria. She added:

“**Each of us went with a police person in a private car. We choose to have sex instead of going to Syria. It was like there was nothing in our hands, nothing we can do.**

The conflict in Ukraine

25. Following the outbreak of conflict in the east of Ukraine, LGBT groups have reportedly been alarmed by the way the situation appears to be worsening for LGBT people, both in terms of the de-prioritisation of LGBT issues and an increase in homophobic attacks.²¹ Elise Thomas of the Graduate Institute of International and Development Studies in Geneva wrote in April 2015 that:

“**[A]gainst the backdrop of conflict [in Ukraine], the rising tide of anti-LGBT aggression makes it both more difficult and more important than ever to hold the Ukrainian state to account for the safety of its LGBT citizens.**²²

26. Even prior to the annexation of Crimea and the conflict in Eastern Ukraine, LGBT rights were being politicised with pro-Russian groups stirring up homophobia to alienate people against closer ties with the European Union (EU).²³ The scapegoating of LGBT people for political purposes is not uncommon and only serves to increase their vulnerability.

13 OutRight Action International, *Exposing persecution of LGBT individuals in Iraq*, 2014. Available at: <http://www.outrightinternational.org/content/exposing-persecution-lgbt-individuals-iraq>

14 *Ibid.*

15 *Ibid.*

16 OWFI, MADRE and IGLHRC, *When Coming Out is a Death Sentence: Persecution of LGBT Iraqis*, 2014. Available at: <http://www.refworld.org/docid/547437c44.html>

17 *Ibid.*

18 *Ibid.*

19 Westcott, L., 'Gay Refugees Addresses U.N. Security Council in Historic Meeting on LGBT Rights', Newsweek, 25 August 2015. Available at: <http://www.newsweek.com/gay-refugees-addresses-un-security-council-historic-meeting-lgbt-rights-365824>

20 Fraser, L., 'Transgender woman survives rape, assault while fleeing', *CBC News*, 30 November 2015. Available at: <http://www.cbc.ca/news/canada/toronto/trans-refugee-syria-1.3342724>

21 Thomas, E., 'Amid Conflict, Worsening Discrimination Makes It Harder to Organize for LGBT Rights in Ukraine', *Truthout*, 14 April 2015. Available at: <http://www.truth-out.org/news/item/30191-amid-conflict-worsening-discrimination-makes-it-harder-and-more-necessary-to-organize-for-lgbt-rights-in-ukraine>

22 *Ibid.*

23 Feder, J.L., 'The Russian Plot To Take Back Eastern Europe At The Expense Of Gay Rights', *Buzzfeed*, 10 November 2013. Available at: <http://www.buzzfeed.com/lesterfeder/russia-exports-homosexual-propaganda-law-in-effort-to-fight#.gnAAdnDdNv>

27. It has been reported that the situation for Ukraine's LGBT community is even more precarious in areas under Russian control.²⁴ Describing the situation in rebel-held Eastern Ukraine in June 2015, gay rights activist Oleksandr Zinchenkov said:

“The level of homophobia in the east is high. It is worse now than it was in the Soviet era. Many gays and lesbians have simply fled.”²⁵

28. In an indication of the pervasiveness of homophobia, it was reported that a former parliamentary candidate, Oleg Kytserib, and his son attacked two men outside their house and then bragged about the attack on Facebook, stating:

“Have you gone crazy, pidoras [a slur used against gay men in Ukraine], bitches, being cute here? There's a war going on, and you're here relaxing? This is not Gay-rope, especially beside my home... Two pidoras and the two sympathizers [sitting beside them] will be in the hospital for two weeks.”

29. A local activist told of the dangers associated with reporting such attacks, which contributes to impunity for the perpetrators:

“I'm going to write a police report, but I'm not sure whether the police will be careful with information about where I live... I don't know that these right-wing activists won't show up at my door. I will write the report, but I still feel in danger.”²⁶

30. The EU's response to growing homophobia and violence against LGBT people was to avoid the issue completely. The EU exempted the Ukraine from adopting anti-discrimination legislation that includes sexual orientation, which is a standard requirement in exchange for the EU liberalising visa requirements. Commenting on this, Olena Shevchenko, chairwoman of a Ukrainian LGBT advocacy and education group, said:

“The EU seems to have given Ukraine a pass on this issue because of the country's unique situation.”

Further examples during conflicts

31. Violence against LGBT people is reported in other conflict settings. The forty-year civil conflict in Columbia reportedly exacerbated the potential for abuse directed towards LGBT people as:

*[S]tate protections waver, individuals rely upon force to achieve their goals, and armed actors seek societal control through intimidation and violence.*²⁷

32. Likewise, during the conflict in Peru during the 1980s and 1990s, the Tupac Amaru Revolutionary Movement (MRTA) expressly targeted LGBT people and publicly announced their murders.²⁸

33. As discussed in other briefing notes in this series, the rights of LGBT people suffer as democracy and the rule of law retreat. This occurs with or without an accompanying ideology specifically directed against the LGBT community. In situations of conflict where democracy and the rule of law have all but evaporated many view LGBT people as legitimate targets for violence. LGBT people also make for an easy scapegoat for authoritarian regimes to vilify in order to garner support and to distract from other issues.

Sexual violence as a war crime: the conflict in the Democratic Republic of Congo

34. The issue of sexual violence committed against men in conflict situations is often overlooked. In a 2013 working paper, the Refugee Law Project at Makerere University School of Law in Uganda found that sexual victimisation is perpetrated on both men and women in conflict situations. The working paper observed that in both instances it is a 'crime of power, intended to degrade, humiliate, and subjugate victims'.²⁹ With reference to conflict-related sexual violence against men in the Democratic Republic of Congo (DRC), it stated:

*[P]erpetrators target men, in part, to attack males as leaders and protectors, diminish their masculinity, and unravel social hierarchies.*³⁰

35. As of April 2014, the Refugee Law Project was supporting 370 male survivors of sexual violence, 320 of whom were refugees from the neighbouring DRC.³¹ Despite the gravity and apparent prevalence of conflict-related sexual violence against men in an estimated 25 distinct armed conflicts in the past two decades alone,³² empirical data regarding the crime is limited. The Refugee Law Project suggests that:

*[T]he paucity of data may be explained, in part, by the result of lack of attention to male victims, lack of training of first responders to identify and treat male victims, fear by victims of stigma and potential criminal prosecution under anti-sodomy laws if they report their victimisation, and a lack of relief available to victims.*³³

Post-disaster situations

36. There is a significant body of research on the heightened vulnerability of LGBT people following natural disasters. In a 2011 briefing paper, OutRight and SEROVie considered several recent natural disasters, including the Haiti earthquake in 2010, the Indian Ocean Tsunami in 2004, Hurricane Katrina in 2005, and the earthquake in Chile in 2010. The paper concluded that:

“[T]he lack of response to the specific impact of disasters on LGBT communities and individuals is itself an emergency that has doubtless resulted in unnecessary suffering and an untold number of deaths.”³⁴

24 Rohrich, K., 'Human Rights Diplomacy Amidst "World War LGBT": Re-examining Western Promotion of LGBT Rights in Light of the "Traditional Values" Discourse', *Humanity In Action*, 2015. Available at: <http://www.humanityinaction.org/knowledgebase/588-human-rights-diplomacy-amidst-world-war-lgbt-re-examining-western-promotion-of-lgbt-rights-in-light-of-the-traditional-values-discourse>

25 Savochenko, O., 'Hounded and out of work, gay Ukrainians flee rebel east', *Yahoo! News*, 28 June 2015. Available at: <http://news.yahoo.com/hounded-gay-ukrainians-flee-rebel-east-135403270.html?nf=1>

26 Lytvynenko, J., 'Intolerance and Violence Against LGBT People Is on the Rise in War-Torn Ukraine', *Vice News*, 9 September 2015. Available at: http://www.vice.com/en_uk/read/in-war-torn-ukraine-there-is-no-time-for-lgbtq-rights

27 US Office on Columbia, *The impact of conflict on lesbian, gay, bisexual, & transgender individuals*. Available at: http://www.usofficeoncolombia.org/understanding_colombia/pdf/lgbtt.pdf

28 Mora, R., 'Peru: LGBT Community Targeted During Armed Conflict', *TeleSUR TV*, 21 November 2014. Available at: <http://www.telesurtv.net/english/news/Peru-LGBT-Community-Targeted-During-Armed-Conflict-20141121-0038.html>

29 Refugee Law Project, Makerere University (RLP) and Berkeley Law International Human Rights Law Clinic, 'Promoting Accountability For Conflict-Related Sexual Violence Against Men: A Comparative Legal Analysis Of International And Domestic Laws Relating To IDP And Refugee Men In Uganda', *Refugee Law Project Working Paper*, July 2013, No. 24, p. 1. Available at: http://refugeelawproject.org/files/working_papers/RLP.WP24.pdf

30 *Ibid*, p. 1.

31 'Uganda's anti-gay law reinforces homophobia, xenophobia, says report', *IRIN*, 30 April 2014. Available at: <http://www.irinnews.org/report/100018/uganda-s-anti-gay-law-reinforces-homophobia-xenophobia-says-report>

32 Refugee Law Project, at n. 29 above, p. 2.

33 *Ibid*, p. 1.

34 OutRight Action International and SEROVie, *The Impact of the Earthquake, and Relief and Recovery Programs on Haitian LGBT People*, 2011. Available at: <http://www.ighrc.org/sites/default/files/505-1.pdf>

37. With regard to the Haiti earthquake, the paper found that:

*[T]he emotional and physical suffering, political and social upheaval, and mass displacement resulting from the earthquake have heightened pre-existing inequalities and prejudices, including those against LGBT people.*³⁵

38. Other examples of heightened suffering include transgender people being denied entry to camps for internally displaced people after the 2010 floods in Pakistan because they did not possess government ID that matched their appearance; and Aravanis (feminine male-bodied people) being discriminated against in access to housing, medical care and toilets in the aftermath of the 2004 tsunami in Tamil Nadu, India.³⁶
39. In 2014, a paper in Home Cultures found that natural disasters ‘unmake’ the LGBT home, community and sense of belonging in three ways:

*[F]irst, destruction of individual residences, and problems with displacement and rebuilding; second, concerns about privacy and discrimination for individuals and families in temporary shelters; and third, loss and rebuilding of LGBT neighbourhoods and community infrastructure.*³⁷

Perceived gaps in international humanitarian law

40. An additional problem arises during times of conflict, which compounds the amplification of homophobia discussed above. International humanitarian law (IHL) is the specialist law designed to govern behaviour during international and non-international conflicts. An aim of IHL is to provide rules of war so as to allow conflicts to progress while still protecting civilians and combatants from the worst excesses of war. IHL does not replace human rights law during times of conflict, but provides certain derogations from it, and IHL is what combatants and their commanders turn to first when assessing how to act towards the civilian population and enemy combatants.
41. IHL prohibits the targeting of individuals on the basis of ‘race, colour, religion or faith, sex, birth or wealth, or any other similar criteria’, as per Common Article 3 of the Geneva Convention. Article 3 then goes on to state:

[T]he following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

42. Neither sexual orientation nor gender identity is included expressly in Common Article 3 of the Geneva Conventions. This may lead combatants to conclude that it is lawful to target individuals on the basis of sexual orientation and gender identity. This conclusion would be wrong for two reasons, but the international community is not articulating its falsity. First, international human rights law still applies in times of conflict, and this law protects LGBT people. Secondly, the phrasing of Common Article 3 is substantially the same as the non-discrimination clauses contained in other treaties of international law.³⁸ Like the Geneva Conventions, none of these treaties refers expressly to sexual orientation in its non-discrimination clause or elsewhere. However, the courts and bodies that interpret these treaties have each concluded that their non-discrimination clauses prohibit discrimination on the basis of sexual orientation.³⁹
43. This interpretative process came about as individual citizens can petition these courts and bodies to uphold their rights. With regards to IHL, individual citizens cannot petition a court or body. As such there is no decision applying the prevailing view in international law to IHL. The International Court of Justice (ICJ) could in theory make such a declaration, but this would require a state-to-state claim on this matter, which is unlikely in the foreseeable future.

44. However, given that all other areas of international law have been interpreted to include sexual orientation as a prohibited ground for discrimination, it would be absurd if IHL did not offer the same protection. In the absence of a judgment from the ICJ to the contrary, it must be assumed that IHL prohibits the targeting of people on the basis of sexual orientation and gender identity. It is entirely within the logic of IHL to interpret it in this manner.
45. Sexual orientation and gender identity are not expressly included in the Rome Statute either, the treaty that established the International Criminal Court (ICC). The Rome Statute allows for personal prosecution of state and non-state actors for certain breaches of IHL that occasion war crimes, genocide or crimes against humanity. For the same reason, the Rome Statute must be read to prohibit the targeting of individuals based on sexual orientation and gender identity.
46. Until the international community vocalises that sexual orientation and gender identity are prohibited grounds for targeting individuals during conflict, LGBT people face threats not faced by other vulnerable groups. The current situation risks leaving state and non-state actors with the belief that they can act with impunity when singling out LGBT people for adverse treatment. The perceived gap in IHL also risks giving the false impression that LGBT rights are a ‘luxury’, from which states can derogate as soon as a conflict arises.

³⁵ *Ibid.*

³⁶ Knight, K., Sollom, R., ‘Making disaster risk reduction and relief programmes LGBTI inclusive: examples from Nepal’, *Humanitarian Exchange Magazine*, September 2012. Available at: <http://www.odihpn.org/humanitarian-exchange-magazine/issue-55/making-disaster-risk-reduction-and-relief-programmes-lgbti-inclusive-examples-from-nepal>

³⁷ Dominey-Howes, D., Gorman-Murray, A., Mckinnon, S., ‘Queer Domicide’, *Home Cultures*, 2014, 11:2, pp. 237-261. Available at: http://www.researchgate.net/publication/262607121_Queer_Domicide_LGBT_Displacement_and_Home_Loss_in_Natural_Disaster_Impact_Response_and_Recovery

³⁸ For example the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the European Convention on Human Rights (ECHR); the American Convention on Human Rights (American Convention); the African Charter on Human and Peoples’ Rights (African Charter); and the Refugee Convention.

³⁹ ICCPR: *Toonen v. Australia* Communication No. 488/1992, U.N. Doc-CCPR/C/50/D/488/1992 (1994); ECHR: For example, *Dudgeon v. UK* (1981) 4 EHRR 149; American Convention: *Case of Atala Riffo and Daughters v. Chile*, IACHR, Report No. 139/09 (merits), Case 12.502; African Charter: *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Communication 245/02, May 2006. This topic is covered in detail in another note in this series, *Criminalising Homosexuality and International Human Rights Law*.

Steps that can be taken to make international humanitarian law more inclusive

47. As it is unlikely that the ICJ will hear a case on this issue any time soon, the onus falls on states to vocalise their views that sexual orientation and gender identity are protected. This vocalisation will serve two purposes. First, actors in the theatre of war will be put on notice that they cannot lawfully target LGBT people. If a broad section of the international community states their belief that sexual orientation and gender identity are included implicitly in Common Article 3 of the Geneva Conventions, this affirms that IHL is no different from other international law. Secondly, if and when these actors are prosecuted at the ICC or another court, such statements will help provide evidence that the targeting of LGBT people is illegal and attracts personal liability, thus avoiding the impunity gap.
48. Some small but significant steps have been taken to vocalise the view that LGBT people cannot be targeted in armed conflicts. In August 2015, the UN Security Council held its first meeting on an LGBT issue, when it discussed violence committed by ISIS against LGBT people. The meeting

was co-sponsored by the United States and Chile. Commenting on this private meeting, the US State Department published the following press release:

Today, members of the UN Security Council held their first Arria-formula meeting on Lesbian, Gay, Bisexual, and Transgender (LGBT) issues, particularly in the context of ISIL's crimes against LGBT individuals in Iraq and Syria. This historic event recognizes that the issue of LGBT rights has a place in the UN Security Council.

“ **Around the world, the UN has documented thousands of cases of individuals killed or injured in brutal attacks simply because they are LGBT or perceived to be LGBT. This abhorrent practice is particularly widespread in [ISIS]-seized territory in Iraq and Syria, where these violent extremists proudly target and kill LGBT individuals or those accused of being so. No one should be harmed or have their basic human rights denied because of who they are and who they love.**⁴⁰

49. National governments can say more on this issue, at the UN and elsewhere, to help build up a body of state practice and opinion on this matter.

50. Similarly, and perhaps most importantly, when national defence ministries and departments next update their military manuals, they can state that sexual orientation and gender identity are implicitly included in Common Article 3 of the Geneva Conventions, and that military personnel must be trained and act accordingly. If multiple countries make this addition to their military manuals, a body of state practice will grow that can form the basis for establishing a customary international norm. The work of the International Committee of the Red Cross (ICRC) is relevant here too. The ICRC expresses its view on the development of IHL and the customary international law therein. The views of national militaries on this matter will inform the ICRC.

International refugee law as an example to follow

51. Sexual orientation and gender identity have gradually been incorporated into the work of the UN High Commission for Refugees (UNHCR) via interpretation of the Refugee Convention. Importantly, refugee law was interpreted to include sexual orientation despite the absence of an international court that individuals may petition. It thus serves as an example of how IHL can come to recognise publicly that sexual orientation and gender identity are prohibited grounds for discrimination.
52. In October 2008, UNHRC identified the incorporation of sexual orientation and gender identity into its work as a key challenge, commenting:

*UNHCR's programmes usually tend to focus on sexual violence against women, while other forms of psychological, economic, or socio-cultural gender based violence are less commonly and comprehensively addressed. In particular, the absence of an appropriate guiding policy on how to address and respond to SGBV [sexual and gender-based violence] against lesbian, gay, bisexual and transgendered people of concern (LGBT) remains a serious problem. In addition, the sexual abuse of boys and men is often neglected, under-reported and hardly addressed by any of UNHCR's programmes.*⁴¹

53. In October 2010, UNHCR announced how sexual orientation and gender identity would be incorporated into its work:

*UNHCR guidelines and policies will be revised to ensure that the particular vulnerability of these groups is recognized at every stage in our interaction with refugees. The 1951 Refugee Convention spells out that a refugee is someone who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality, and is unable to, or owing to such fear, is unwilling to avail himself of the protection of that country. In 2008 we issued a guidance note recognizing that individuals being persecuted due to sexual orientation and gender identity should be considered within the 'fleeing due to membership of a particular social group' convention ground.*⁴²

⁴⁰ US State Department, *UN Security Council Holds Inaugural Meeting on LGBT Issues*, 24 August 2015. Available at: <http://www.state.gov/r/pa/prs/ps/2015/08/246296.htm>

⁴¹ UNHRC, *Evaluation of UNHCR's efforts to prevent and respond to sexual and gender-based violence in situations of forced displacement*, October 2008, p. 2. Available at: <http://www.unhcr.org/48ea31062.pdf>

⁴² UNHCR Press Briefing, spokesperson Melissa Fleming, 1 October 2010. Available at: <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=4ca5da949&query=lgbt>

54. Two years later, in October 2012, UNHCR released specific guidelines on LGBT refugees, which included the following:

It is widely documented that LGBTI individuals are the targets of killings, sexual and gender-based violence, physical attacks, torture, arbitrary detention, accusations of immoral or deviant behaviour, denial of the rights to assembly, expression and information, and discrimination in employment, health and education in all regions around the world. Many countries maintain severe criminal laws for consensual same-sex relations, a number of which stipulate imprisonment, corporal punishment and/or the death penalty. In these and other countries, the authorities may not be willing or able to protect individuals from abuse and persecution by non-State actors, resulting in impunity for perpetrators and implicit, if not explicit, tolerance of such abuse and persecution. ... These Guidelines provide substantive and procedural guidance on the determination of refugee status of individuals on the basis of their sexual orientation and/or gender identity, with a view to ensuring a proper and harmonized interpretation of the refugee definition in the 1951 Convention.⁴³

55. Then in December 2015, UNHCR released a document entitled 'Protecting Persons with Diverse Sexual Orientation and Gender Identities: A Global Report on UNHCR's Efforts to Protect Lesbian, Gay, Bisexual, Transgender, and Intersex Asylum-Seekers and Refugees'. This report gives examples on the particular vulnerabilities of LGBT people, concrete examples of how UNHCR's offices have specifically addressed the needs of LGBT people, and guidance on how LGBT refugees can be protected in the future. For example, the report states:

Almost two thirds of participating offices indicated having implemented reception or registration measures specifically targeting LGBTI persons of concern to UNHCR. Among these offices, the most common measures in place include (a) ensuring that registration forms are gender neutral and do not assume a particular sexual orientation and (b) creating 'safe spaces,' such as secure waiting areas and special times for LGBTI persons to register. Although only one third of participating offices reported formal partnerships to assist outreach to LGBTI persons of concern, two thirds indicated having established referral pathways to and from external organisations for SOGI-related issues. In countries with widespread hostility toward LGBTI persons, offices called for further support in developing culturally sensitive training materials and standard outreach materials that take into account challenging operational contexts.

⁴³ UNHCR, *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, paras. 2 and 4. Available at: <http://www.unhcr.org/50ae466f9.html>

... Roughly 60% of participating offices reported having either a formal or an informal focal point to provide support for the determination of asylum claims related to SOGI.

... Almost all participating offices repeatedly called for more extensive training led by UNHCR on SOGI issues. Many emphasised that such trainings should explicitly take into account the difficult cultural, religious, and legal contexts in which the offices operate. Some offices called for a 'training of trainers' model to allow SOGI-related information to be more widely disseminated among offices, with others calling for the creation of a platform for offices working in similar cultural and legal contexts to share best practices on SOGI-related issues.⁴⁴

56. The actions of the UNHCR have brought about the recognition of sexual orientation and gender identity as characteristics covered by the Refugee Convention, and UNHCR is now in the process of mainstreaming LGBT people into its work. A similar pattern must be achieved in respect of IHL. As with refugee law, the ingredients for recognising sexual orientation in IHL are already present. These ingredients are the multiple decisions of courts and bodies that have interpreted similarly worded treaties. However, it must be vocalised that these decisions also inform the meaning of Common Article 3 of the Geneva Conventions, and IHL more broadly. National governments, the Security Council, and other actors must express their view that IHL prohibits the targeting of civilians and combatants on the basis of their sexual orientation or gender identity. The ICRC documents the current content of IHL. The ICRC should be prompted by these governments and entities to state in its publications that sexual orientation and gender identity are included in IHL, and the ICRC should then publish guidance similar to that published by UNHCR.

57. Strengthening the legal protection of LGBT people during times of conflict will not eradicate the vulnerability of LGBT people, but it can help reduce vulnerability. It will fill a perceived gap in IHL, signal to state and non-state actors that targeting LGBT people is deemed illegal under IHL, and provide a basis for bringing prosecutions at the ICC or other courts when LGBT people are targeted by the likes of ISIS.

General vulnerability to violence

58. The lack of legal protection in IHL does not alone explain the particular vulnerability of LGBT people in times of conflict or disaster. Addressing the gaps in IHL will only partially address the problem. Further, IHL is not relevant outside times of conflict, including natural disaster or violence short of an armed conflict. LGBT people still face particular vulnerabilities and hardships in these situations. These vulnerabilities must be understood in order to address the problems faced by LGBT people in times of conflict, disasters and their aftermath.
59. A brief analysis of LGBT people's general vulnerabilities informs about their increased vulnerabilities during times of conflict and disaster. There is no shortage of evidence that LGBT people are uniquely targeted for violence and abuse, especially where the state is dysfunctional or resources are scarce.

⁴⁴ UNHCR, at n. 2 above.

60. The breadth and scale of the problems faced by LGBT people is evident from an unprecedented statement in September 2015, in which 12 UN entities released a joint statement urging states to act urgently to end violence and discrimination against LGBT people. The statement noted the impacts of *'widespread physical and psychological violence against LGBTI persons'* and continued:

The United Nations and others have documented widespread physical and psychological violence against LGBTI persons in all regions - including murder, assault, kidnapping, rape, sexual violence, as well as torture and ill-treatment in institutional and other settings. LGBTI youth and lesbian, bisexual and transgender women are at particular risk of physical, psychological and sexual violence in family and community settings. LGBTI persons often face violence and discrimination when seeking refuge from persecution and in humanitarian emergencies. They may also face abuse in medical settings, including unethical and harmful so-called "therapies" to change sexual orientation, forced or coercive sterilization, forced genital and anal examinations, and unnecessary surgery and treatment on intersex children without their consent. In many countries, the response to these violations is inadequate, they are underreported and often not properly investigated and prosecuted, leading to widespread impunity and lack of justice, remedies and support for victims. Human rights defenders combatting these violations are frequently persecuted and face discriminatory restrictions on their activities.⁴⁵

61. The fact that 12 UN entities made this joint statement shows how violence against LGBT people impacts the UN's and the international community's work across the board and how current reactions to it are deficient. These 12 entities with diverse remits are: the International Labour Organization, OHCHR, UN Development Programme, UNESCO, UN Population Fund, UNHCR, UNICEF, UN Office on Drugs and Crime, UN Women, the World Food Programme, the World Health Organization, and UNAIDS.

62. Turning now to specific examples, there are reports from a number of countries – including South Africa,⁴⁶ the Democratic Republic of Congo,⁴⁷ India,⁴⁸ Jamaica,⁴⁹ and Zimbabwe,⁵⁰ of lesbian and bisexual women being subjected to so-called 'corrective rape' to 'cure' them of their sexual orientation. Statistics for corrective rape are difficult to obtain due to a lack of reporting, but one support group in Cape Town told researchers in 2009 that it dealt with 10 new cases every week.⁵¹ Action Aid draws a direct link between socioeconomic hardship and vulnerability to 'corrective rape':⁵²

And it is black lesbians from townships – who lack sufficient support systems and are already disadvantaged by cultural, economic and social discrimination – who are particularly at risk. Gay rights group Triangle's 2008 research revealed that, while 44% of white lesbians from the Western Cape lived in fear of sexual assault, 86% of their black counterparts felt the same.

⁴⁵ Joint statement, at n. 6 above.

⁴⁶ Strudwick, P., 'Crisis in South Africa: The shocking practice of 'corrective rape' - aimed at 'curing' lesbians', *The Independent*, 4 January 2014. Available at: <http://www.independent.co.uk/news/world/africa/crisis-in-south-africa-the-shocking-practice-of-corrective-rape-aimed-at-curing-lesbians-9033224.html>

⁴⁷ Bangre, H., 'Gays find courage to come out in Kinshasa', *Agence France-Presse*, 17 May 2014. Available at: <https://sg.news.yahoo.com/gays-courage-come-kinshasa-035244076.html>

⁴⁸ Keating, F., 'India: Parents use 'corrective rape' to cure their gay children', *International Business Times*, 1 June 2015. Available at: <http://www.ibtimes.co.uk/india-parents-use-corrective-rape-cure-their-gay-children-1503912>

⁴⁹ Louw, A., 'Men are also 'corrective rape' victims', *Mail and Guardian*, 11 April 2014. Available at: <http://mg.co.za/article/2014-04-11-men-are-also-corrective-rape-victims>

⁵⁰ US State Department's Bureau of Democracy, Human Rights and Labor, *Country Reports on Human Rights Practices for 2014: Zimbabwe*, 2015.

⁵¹ Strudwick, at n. 44 above.

⁵² Action Aid, *Hate crimes: The rise of 'corrective' rape in South Africa*, March 2009, p 8.

Available at: https://www.actionaid.org.uk/sites/default/files/publications/hate_crimes_the_rise_of_corrective_rape_in_south_africa_september_2009.pdf

63. Not only are LGBT people especially vulnerable, particularly in times of hardship, but the violations committed against them are grave. As the UK Foreign & Commonwealth Office observed in its Human Rights and Democracy Report 2013:

[T]he LGBT community [in many countries] continues to experience violence; hate crimes; intolerance; violation and abuse of their human rights, including torture inhuman or degrading treatment; restrictions on their freedom of expression, association and peaceful assembly; discrimination in employment; and restricted access to health services and education.⁵³

64. A report by OHCHR in May 2015 found that:

[V]iolence motivated by homophobia and transphobia is often particularly brutal, and in some instances characterized by levels of cruelty exceeding that of other hate crimes.⁵⁴

65. The report noted that *'data are patchy but, wherever available, suggest alarmingly high rates of homicidal violence.'* The statistics cited in the report include the following:

a) In Brazil, authorities documented 310 murders in 2012 in which homophobia or transphobia was a motive.

b) Within the 25 member states of the Organization of American States, The Inter-American Commission on Human Rights reported 594 hate-related killings of LGBT people between January 2013 and March 2014.⁵⁵

c) The Trans Murder Monitoring project, which collects reports of homicides of transgender persons, recorded 1,612 murders in 62 countries between 2008 and 2014, equivalent to a killing every two days.

d) Within the United States, the National Coalition of Anti-Violence Programs reported 18 hate violence homicides and 2,001 incidents of anti-LGBT violence in the United States in 2013.

e) A Europe-wide survey of 93,000 LGBT people conducted in 2013 for the European Union Agency for Fundamental Rights found that a quarter of all respondents had been attacked or threatened with violence in the previous five years.

⁵³ UK Foreign and Commonwealth Office, *Human Rights and Democracy Report 2013*.

Available at: <https://www.gov.uk/government/publications/human-rights-and-democracy-report-2013/human-rights-and-democracy-report-2013>

⁵⁴ UN Human Rights Council, at n. 5 above.

⁵⁵ *Ibid*, para. 27.

66. Violence against LGBT people is committed by state actors too. In countries where male homosexuality is criminalised, forced anal examinations are used as a flawed means of obtaining evidence. These invasive examinations have been long-discredited as medically worthless yet a number of countries continue to use them during investigations – including, in recent years, Egypt,⁵⁶ Malawi,⁵⁷ Zambia,⁵⁸ Lebanon,⁵⁹ and Uganda.⁶⁰ The UN Special Rapporteur on Torture,⁶¹ the UN Human Rights Council Working Group on Arbitrary Detention,⁶² and the African Commission on Human and Peoples' Rights⁶³ have all affirmed that medical procedures performed without informed consent constitute cruel, inhuman or degrading treatment and thus breach international law. Forced examinations are also a clear violation of the World Medical Association International Code of Medical Ethics, which states that medical practitioners must respect a patient's right to accept or refuse treatment and provide services 'with compassion and respect for human dignity'.⁶⁴
67. Given the level of violence that LGBT people risk at the best of times, it is unsurprising that they are the victims of serious violence and other human rights violations in time of conflict and disasters, when resources are scarce, laws are left unenforced and latent homophobia can rise to the surface and be acted upon with impunity. Strategies to tackle the acute problems faced by LGBT people in times of trouble must also look to address LGBT rights more generally.⁶⁵ The decriminalisation of homosexuality is a key step to reducing homophobia. While it remains permissible over large swathes of the globe to imprison a person on the basis of his or her sexual orientation or gender identity, homophobic views are validated even in places where homosexuality is not a crime.

⁵⁶ Dearden, L., 'Egypt still using anal examinations to detect and imprison 'chronic homosexuals'', *The Independent*, 17 February 2015.

⁵⁷ Amnesty International, 'Malawi: Amnesty International calls for the unconditional release of gay couple', 6 January 2010.

⁵⁸ Amnesty International, 'Zambia urged to release two men charged with same-sex sexual conduct', 8 May 2013.

⁵⁹ Human Rights Watch, 'Lebanon: stop 'Tests of Shame'', 10 August 2012. Available at: <https://www.hrw.org/news/2012/08/10/lebanon-stop-tests-shame>

⁶⁰ Chapter Four Uganda, 'The Abuse of the Rights of Sexual Minorities in Uganda's Criminal Justice System', 27 February 2015. Available at: http://diversity.berkeley.edu/sites/default/files/the_abuse_of_sexual_minorities_in_ugandas_criminal_justice_system.pdf

⁶¹ See UN Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/31/57*, 5 January 2016. Available at: <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/31/57&Lang=E>; See also UN Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/22/5*, 1 February 2013. Available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf

⁶² UN Human Rights Council Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention. Addendum: Opinions adopted by the Working Group on Arbitrary Detention*, Opinion No. 25/2009, 18 May 2009.

⁶³ African Commission on Human and Peoples Rights, *Resolution on Involuntary Sterilisation and the Protection of Human Rights in Access to HIV services*, 54th Ordinary Session, 5 November 2013. Available at <http://www.achpr.org/sessions/54th/resolutions/260/>

⁶⁴ World Medical Association, *World Medical Association International Code of Medical Ethics*, adopted at the 57th WMA General Assembly, October 2006.

⁶⁵ This topic is covered in detail in another note in this series, *Criminalising Homosexuality and International Human Rights Law and Criminalising Homosexuality and Working Through International Organisations*.

Including LGBT people in responses to conflict and disaster

68. Notwithstanding the heightened vulnerability of LGBT people in times of conflict and disaster, international and bilateral response programmes pay little, if any, attention to the vulnerability and the needs of LGBT people. For example, the ICRC's *Strategy 2015-2018* makes no mention either, despite the opening paragraph of the ICRC's vision for 2015-2018 being:

*The ICRC's overarching goal is to address the needs and vulnerabilities of people affected by armed conflicts and other situations of violence – in all their many dimensions – in line with the core principles of its action: humanity, neutrality, impartiality, and independence. At the centre of its action is the commitment to protect and assist victims, based on the applicable international legal frameworks and through a sustained dialogue with all the parties concerned.*⁶⁶

69. LGBT people are particularly vulnerable. Ignoring LGBT people leaves a gap in planned responses to conflicts and natural disasters. The above quote from the ICRC is telling for another reason; the reference to 'applicable legal frameworks' renders the ICRC hamstrung in what it can do for LGBT people. As discussed above, little has been said to affirm that applicable legal frameworks protect LGBT people. This again illustrates the continued effects of past criminalisation on today's LGBT people; as they were not recognised in the 1940s when international law was codified, LGBT people continue to be ignored today. It also illustrates the importance of national governments taking action to build state practice and opinion on the inclusion of sexual orientation and gender identity in IHL. This will allow the ICRC to incorporate sexual orientation and gender identity into its work, strategies and recommendations.
70. With regards to how LGBT people can be included in post-conflict and post-disaster programmes, several commentators and non-governmental organisations have expressed how this can be done. In considering the impact of natural disasters on LGBT people, the Deputy Director of Physicians for Human Rights, Richard Sollom, recommended that:

“ [E]ngagement with LGBTI NGOs and community organisations [is] beneficial as these groups can provide efficient and meaningful support in the wake of disasters.⁶⁷

⁶⁶ ICRC *Strategy 2015-2018*, adopted by the ICRC Assembly on 18 June 2014. Available at: <https://www.icrc.org/eng/assets/files/publications/icrc-002-4203.pdf>

⁶⁷ Knight and Sollom, at n. 36 above.

71. Another option is to provide specific facilities to cater to the needs of LGBT people, as occurred following the 2014 earthquake in Nepal, when charities set up 15 relief camps for sexual minorities. Ditya Raj Paudel of the Nepal Red Cross Society explained the rationale for this focus on LGBT people:

“ They are more vulnerable than others in terms of their access to relief and safety after the earthquake... many of them don't get any help from their families and are left alone after the disaster.⁶⁸

72. Addressing the vulnerabilities and needs of LGBT people will have to be tailored to the host nation's society and circumstances. Initiatives that are overtly LGBT may discourage those in need from seeking help for fear of being 'outed' or targeted in vigilante attacks due to raising their visibility as LGBT. OutRight recommends that governments consult local LGBT organisations when planning responses to future disasters and, if not a detrimental step in itself, 'work with police, military, and security forces to ensure that LGBT people are not stigmatized in the course of responding to a disaster'.⁶⁹

State-building as a means to remove structural homophobia

73. As well as challenges, post-conflict and post-disaster situations provide opportunities with regards to the protection of LGBT people from violence and persecution. International and bilateral state-building efforts that occur post-conflict or post-disaster can be used to correct structural deficiencies that allow homophobia to thrive.

74. Many countries retain archaic criminal codes that criminalise homosexuality, often inherited from British colonial rule. Efforts to rebuild a state can include overhauling these archaic criminal codes, both to erase the criminalisation of homosexuality and to produce victim-centred sexual offences laws that are fit for the 21st century.

75. Contemporary beneficiaries could be Liberia, Sierra Leone, Myanmar (Burma), and Sri Lanka, the latter three of which retain British-era laws that criminalise homosexuality. The post-Ebola reconstruction of Liberia and Sierra Leone, coupled with health arguments for decriminalisation, may be all that is needed to end criminalisation subtly and quietly in these countries. Likewise the emergence of democracy in Myanmar (Burma) and the end of Sri Lanka's civil war may too provide an opportunity to update archaic sexual offences laws.

Providing asylum to LGBT people

76. Many of the problems and potential solutions discussed above require international or bilateral cooperation. Closer to home, national governments can take steps in the domestic sphere. Asylum applications from individuals persecuted on the basis of their sexual orientation or gender identity are a manifestation at home of foreign conflicts, disaster and other situations. Conflicts and disasters are not the only source of LGBT asylum-seekers. As discussed in other briefing notes in this series, the Human Dignity Trust takes the view that criminalisation in and of itself amounts to persecution, so that LGBT people will be forced to seek refuge abroad while laws that criminalise homosexuality persist.

77. While providing asylum does not address the root causes of violence and persecution directed towards LGBT people (in conflicts, disasters or otherwise), it is an important means of providing support when no other mechanism will alleviate the situation in the short-term. The asylum process for LGBT people in countries that receive LGBT asylum-seekers can be improved. For instance, a report from the OHCHR in May 2015 found that:

[A]t international borders, migrants and refugees may be subjected to invasive physical screenings and examinations and denied entry on discriminatory grounds.⁷⁰

[S]ixteen gay and transgender individuals in the United States were allegedly subjected to solitary confinement, torture and ill-treatment, including sexual assault, while in detention in immigration facilities.⁷¹

78. In a submission to the independent review into the welfare in detention of vulnerable persons, the UK Lesbian and Gay Immigration Group wrote:

Around the world, serious concerns as to the quality of asylum decision-making [in the UK]... and serious concerns have been expressed as to the experiences of LGBTI people in immigration detention. LGBT detainees frequently experience social isolation, physical and sexual violence and harassment by both facility staff and other detainees. Trans people are particularly at risk.⁷²

⁶⁸ Sharma, G., 'Nepal sets up post-quake camps for sexual minorities', *Reuters*, 1 June 2015. Available at: <http://www.reuters.com/article/2015/06/01/us-quake-nepal-lgbt-idUSKBN00H2YJ20150601>

⁶⁹ OutRight Action International and SEROViE, at n. 34 above, p 9.

⁷⁰ UN Human Rights Council, at n. 2 above, para. 64.

⁷¹ *Ibid*, para. 35

⁷² *Ibid*.

79. Certain minimum standards must be adhered to. In December 2014, the European Court of Justice ordered states to cease the use of intrusive questioning and medical tests purportedly designed to reveal applicants' sexual orientation.⁷³ Similarly, former UN High Commissioner for Human Rights, Navi Pillay, made observations during her time in office about inadequate procedures for LGBT asylum-seekers. She also raised the issues of resettlement in safe countries and the dangers of sending LGBT people back to their home countries (refoulement):

“ Even in countries that recognize these grounds for asylum, practices and procedures often fall short of international standards. Review of applications is sometimes arbitrary and inconsistent. Officials may have little knowledge about or sensitivity towards conditions facing LGBT people. Refugees are sometimes subjected to violence and discrimination while in detention facilities and, when resettled, may be housed within communities where they experience additional sexuality and gender-related risks. Refoulement of asylum-seekers fleeing such persecution places them at risk of violence, discrimination and criminalisation.⁷⁴ ”

80. In that regard, states also have an obligation not to return refugees to places where their lives or freedom would be threatened on account of actual or perceived sexual orientation and gender identity.⁷⁵ The OHCHR has emphasised:

Ensuring that no one fleeing persecution on grounds of sexual orientation or gender identity is returned to a territory where his or her life or freedom would be threatened, that asylum laws and policies recognize that persecution on account of sexual orientation or gender identity may be a valid basis for an asylum claim; and eliminating intrusive, inappropriate questioning on asylum applicants' sexual histories, and sensitizing refugee and asylum personnel.⁷⁶

81. Similarly, UNHCR's report of December 2015 identified problems faced when resettling LGBT asylum-seekers, in terms of the limited number of recipient states:

While a few of these offices indicated having successfully facilitated local integration for LGBTI refugees, no office reported having facilitated voluntary repatriation due to the continued risk of persecution in countries of origin. Almost 80% of participating offices indicated that they prioritise LGBTI refugees for resettlement. Of these offices, roughly 70% reported having actually facilitated resettlement for LGBTI refugees. The limited number of resettlement countries viable for LGBTI refugees was frequently cited as a significant impediment to facilitating resettlement for LGBTI refugees.⁷⁷

82. In an act of good practice, in December 2015 the UK Government confirmed that LGBT Syrians qualify as a vulnerable group for the purpose of the UK's Syria resettlement programme.⁷⁸ Likewise, Canada and the United States have longstanding resettlement programmes that include LGBT people and both launched Syria-specific programmes in 2015. The UNHCR estimates that some 42 states have granted asylum to individuals with a well-founded fear of persecution owing to sexual orientation or gender identity.⁷⁹

83. In domestic policy, non-criminalising governments can ease the suffering of LGBT victims of conflict and disaster by adhering to best practice in their asylum policies and processes, and by acknowledging that they provide rare safe havens for LGBT refugees, whereas many other places cannot due to their laws that criminalise homosexuality.

73 UK Lesbian and Gay Immigration Group, 'Written Submission to the Independent Review into the Welfare in Detention of Vulnerable Persons', 29 May 2015, para.65.

74 OHCHR, 'Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity', 2011, p. 13.

75 See also UNHCR, *Guidelines on international protection No. 9*, 23 October 2012; CCPR/C/108/D/2149/2012.

76 OHCHR, 'Discrimination and violence against individuals based on their sexual orientation and gender identity', 4 May 2015.

77 UNHRC, at n.3 above.

78 As reported by Wheaton, O., 'David Cameron: We will resettle LGBT refugees from Syria and Iraq', *The Metro*, 9 December 2015.

Available at: <http://metro.co.uk/2015/12/09/david-cameron-we-will-resettle-lgbt-refugees-from-syria-and-iraq-5555194/#ixzz3u1qvVmyF>

79 UK Lesbian and Gay Immigration Group, 'Written Submission to the Independent Review into the Welfare in Detention of Vulnerable Persons', 29 May 2015, para.64.

Conclusions

84. LGBT people face violence and persecution in times of peace. In times of conflict, disaster and civil unrest, this pre-existing homophobia becomes amplified. LGBT people thus face vulnerabilities above and beyond the population at large. These vulnerabilities are compounded by a perceived lack in legal protection in IHL for LGBT people. These gaps in legal protection and the persistence of homophobia can both be viewed as legacies of the criminalisation of homosexuality. Even where homosexuality is no longer a crime, LGBT people in times of conflict, disaster and civil unrest are affected by these legacies. They are vulnerable to violence and persecution by state and non-state actors, they are denied assistance and resources, and often ignored in aid and reconstruction programmes.
85. The international community has tailored specific responses to other vulnerable groups, in particular women and children. The same must be done for LGBT people. UNHCR has made efforts to mainstream sexual orientation and gender identity into its work and, in doing so, it has brought its refugee work in line with other fields of international law. The same process must now be applied to IHL; governments, international organisations and the ICRC must act to achieve this. The legacy of criminalising homosexuality in the 1940s should, and must, be corrected today by bringing the interpretation of IHL into line with all other fields of international law.
86. The continued criminalisation of homosexuality across the globe also manifests in non-criminalising countries, which are the only viable recipient states for LGBT asylum-seekers fleeing conflict, disasters and other situations. At present, non-criminalising countries must ensure that their asylum policies are adequate to provide safe havens for LGBT people, who have nowhere else to turn. In the medium- to long-term, these governments must seek to bring about the decriminalisation of homosexuality for the sake of LGBT people and to reduce the number of asylum applications that they receive.

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**HUMAN
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Criminalising Homosexuality and Understanding the Right to Manifest Religion

Yet, while the Constitution protects the right of people to continue with such beliefs, it does not allow the state to turn these beliefs – even in moderate or gentle versions – into dogma imposed on the whole of society.

South African Constitutional Court, 1998¹

This is one in a series of notes produced for the Human Dignity Trust on the criminalisation of homosexuality and good governance. Each note in the series discusses a different aspect of policy that is engaged by the continued criminalisation of homosexuality across the globe.

The Human Dignity Trust is an organisation made up of international lawyers supporting local partners to uphold human rights and constitutional law in countries where private, consensual sexual conduct between adults of the same sex is criminalised. We are a registered charity no.1158093 in England & Wales. All our work, whatever country it is in, is strictly not-for-profit.

¹ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* [1998] ZACC 15 (Constitutional Court), para. 137.

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Overview

01. Consensual sex between adults of the same-sex is a crime in 78 jurisdictions.² These laws, in general terms, originate from two sources: the British Empire and Islam. The British variety was born out of political manoeuvring against religious authority, not adherence to religious doctrine, albeit these laws later took on a religious guise. Islamic countries that criminalise do so, generally, due to the influence of Sharia law on their criminal law.
02. This briefing note covers three points of connection between religion and the criminalisation of homosexuality. First, it looks at the origins of today's laws that criminalise consensual same-sex intimacy. To say that these laws were based on religious doctrine is only partially true. In fact, 'buggery' laws were initially used by the state *against* the Church to wrestle power from the Pope in Rome. To the extent that these laws were based on religion, they were contemporaneous with laws that punish witchcraft, heresy and blasphemy, which have long since been repealed or fallen into obscurity.
03. The note then examines whether, as a matter of international human rights law, adherence to religious doctrine has any bearing on whether the state is permitted to criminalise homosexuality. The answer to this is clear: the right to freedom of religion must be respected, but this right can never justify criminalising homosexuality or inflicting harm on lesbian, gay, bisexual and transgender (LGBT) people. To think otherwise is fundamentally to misunderstand the right to manifest one's religion.
04. The third part of this note then sets out statements from religious leaders confirming that the state has no business criminalising homosexuality, no matter the religious beliefs of those in power or the population at large.

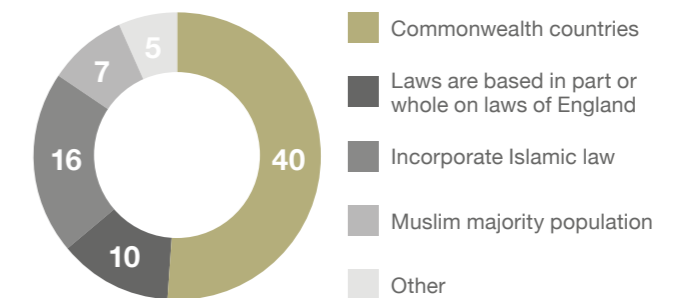
2 For a full list, see: <http://www.humandignitytrust.org/pages/COUNTRY%20INFO/Criminalising%20Homosexuality>

The origin of modern laws that criminalise homosexuality

05. In 1533, as a part of England's disengagement from the Roman Catholic Church, King Henry VIII passed the 'buggery' law, which for the first time made a secular crime of an act that had previously been an infraction of ecclesiastical law.³ The Buggery Act of 1533 was one of many steps taken by Henry VIII to break the influence of Rome in England and to seize the Church's land and property. Monasteries in England were portrayed by Henry's investigators as dens of '*manifest sin, vicious carnal, and abominable living*'.⁴ Henry's buggery law was passed to carry the death sentence and, importantly for his aims, provided for the seizure of property and applied to the clergy and layman alike.
06. As England colonised North America and then as Britain's Empire spread, buggery laws went global. In this process, these laws were associated with religion. For instance, the East New Jersey law of 1683 described the crime of buggery as an '*offense against God*', and the Massachusetts Bay code of 1641 imposed the death sentence for buggery, heresy, witchcraft, and blasphemy.⁵ Thankfully Massachusetts' heretics, witches and blasphemers are no longer criminalised, and since 1974 nor are its gay and bisexual men.
07. After the 13 American colonies' formal independence in 1783, buggery laws were spread on two fronts, being simultaneously replicated across the new states of the United States and in the colonies of Britain's

expanding Empire in Asia, Africa and the Pacific. For instance, the Indian Penal Code of 1860 made a crime of '*carnal knowledge against the order of nature*' and was later amended to include the crime of '*gross indecency*'. The references to '*the order of nature*', '*gross*' and '*indecency*' gave these crimes a distinctly moralistic religious undertone. The provisions of the Indian Penal Code were exported to Britain's colonies in Malaysia and East Africa, for example. At the same time, British laws including the 1861 Offences Against the Person Act and the 1885 Criminal Law Amendment Act were rolled out across West Africa.⁶ Today, 40 Commonwealth countries retain their British-era laws that criminalise homosexuality, as do up to 10 further jurisdictions whose laws are based in whole or in part on the laws of England (see Appendix). France, Spain, Belgium, The Netherlands and their colonies did not criminalise, as their legal systems were based on Napoleon's civil code that did not criminalise homosexuality.

78 countries criminalise homosexuality



3 Katz, J.N., '*The Age of Sodomitical Sin, 1607-1740*', in Goldberg, J., *Reclaiming Sodom*, p. 46.

4 *Ibid*, pp. 46 to 47.

5 *Ibid*, p. 47.

6 Metcalf, T.R., *Imperial Connections*, Ch. 1 'Governing Colonial Peoples', 2008, pp. 24, 25 and 31.

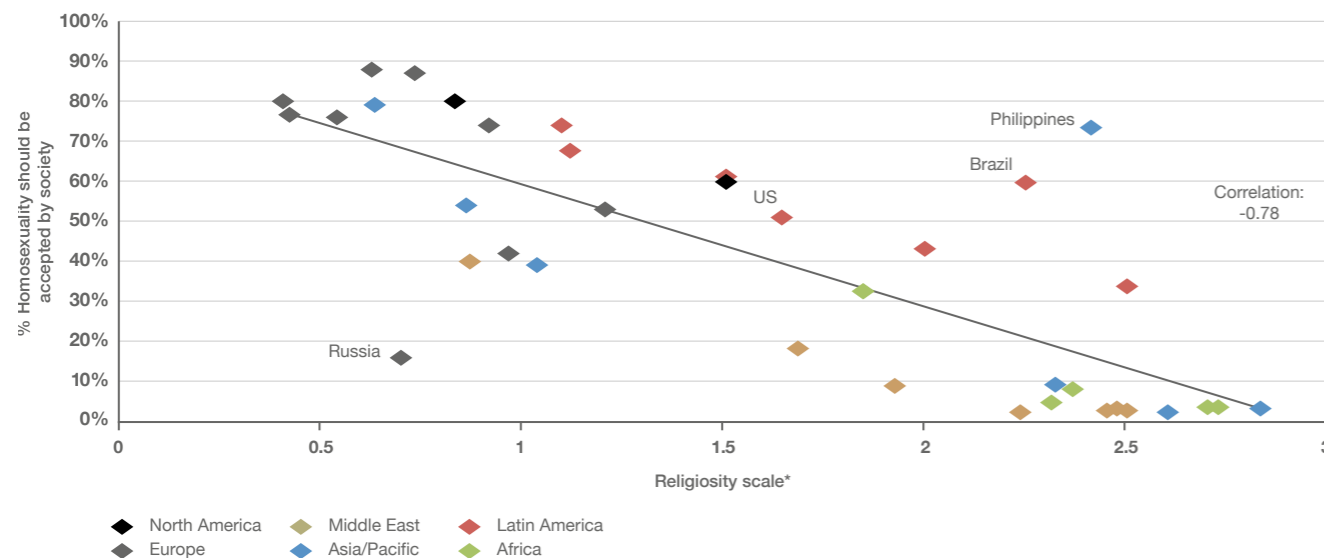
08. Of the remaining 28 jurisdictions that criminalise, 16 incorporate Islamic law into their domestic law and a further seven have a Muslim majority population (see Appendix). However, it is not as simple as concluding that these jurisdictions criminalise because they are Muslim;⁷ at least 19 Muslim-majority jurisdictions do not criminalise.⁸ Whereas for Britain's former colonies there is a clear connection between their laws that criminalise homosexuality and their colonial histories, in the Islamic world it cannot be said that there is a clear and direct causal connection between criminalisation and Islam.

09. Whether or not laws that criminalise homosexuality can be said to originate from religious doctrine, some proffer religion as a reason to retain these laws and to propagate homophobia. Highlighting this connection, in 2014 a report by the UN Special Rapporteur on freedom of religion or belief found that:

*[H]omophobic and transphobic violence against lesbian, gay, bisexual and transgender (LGBT) persons may also be perpetrated in the name of religion... Violence against women and against LGBT persons is often justified and given legitimacy by discriminatory laws based on religious laws or supported by religious authorities, such as laws criminalizing adultery, homosexuality or cross-dressing.*⁹

10. Furthermore, in 2013 a report by the Pew Research Center provided anecdotal evidence of a link between religion and homophobia. The report surveyed people in 39 countries, and found that 'there is far less acceptance of homosexuality in countries where religion is central to people's lives'.¹⁰ Plotted on a graph, the responses show a reasonably clear relationship between religiosity and intolerance towards homosexuality, albeit with some outlying countries.

Correlation between religiosity and tolerance of homosexuality



7 This topic has been explored by *The Economist* in its article *Straight but narrow*, 4 February 2012. Available at: <http://www.economist.com/node/21546002>

8 Albania, Azerbaijan, Bahrain, Bosnia & Herzegovina, Burkina Faso, Chad, Djibouti, Guinea-Bissau, Jordan, Kazakhstan, Kosovo, Kyrgyzstan, Mali, Niger, Tajikistan, Turkey, West Bank (State of Palestine), most of Indonesia, and Northern Cyprus.

9 UN General Assembly, *Report of the Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt*, 29 December 2014, UN Doc A/HRC/28/66.

10 The report's measure of religiosity was whether respondents considered religion to be very important, whether they believed it is necessary to believe in God in order to be moral, and whether they prayed at least once a day. Kohut, A., et al., *The Global Divide on Homosexuality*, (June 2013) Pew Research Center.

11. Yet, not all countries with a high level of religiosity and/or a low tolerance of homosexuality criminalise homosexuality. A report by the Pew Center cited by Sexual Minorities Uganda (SMUG)¹¹ shows only a limited correlation in sub-Saharan Africa between the importance of religion in citizens' lives and whether the country criminalises homosexuality:

12. No matter the source of homophobia – religion or otherwise – governments, legislatures and judiciaries in criminalising countries are tasked with determining whether the criminalisation of homosexuality is lawful. The next section of this note explores whether religious belief can ever justify criminalising consensual same-sex intimacy between adults. The answer is clear: it can never be legitimate to make a crime of other adults' consensual sexual conduct.

Fig 5: Respondents saying religion is very important in their lives

Country	(%)	Is homosexuality criminalised?
Senegal	98	Yes
Mali	93	No
Tanzania	93	Yes
Guinea Bissau	90	No
Zambia	90	Yes
Rwanda	90	No
Cameroon	89	Yes
Ghana	88	Yes
Mozambique	87	Yes
Liberia	87	Yes
Kenya	87	Yes
Nigeria	87	Yes
Chad	86	No
Djibouti	86	No
Uganda	86	Yes
DR Congo	82	No
Ethiopia	79	Yes
South Africa	74	No
Botswana	69	Yes

11 Data from Pew Research Center, *Tolerance and Tension: Islam and Christianity in Sub Saharan Africa*, 2010, used in SMUG, *Expanded Criminalisation of Homosexuality in Uganda: A Flawed Narrative*, 2014, p. 23.

Overview of the right to freedom of religion and its interaction with LGBT rights

13. The right to freedom of religion has a long history.¹² Under contemporary international law, the right is contained at Article 18 of the Universal Declaration of Human Rights, 1948 (UDHR), which affirms that ‘everyone has the right to freedom of thought, conscience and religion’. This right, along with its limitations, is further delineated at Article 18 of the International Covenant on Civil and Political Rights (ICCPR):

1. *Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*
2. *No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.*
3. *Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.*

14. Similar provisions exist in the major regional human rights treaties, such as the European Convention on Human Rights (ECHR, Article 9), the American Convention on Human Rights (Article 12), the African Charter on Human and Peoples’ Rights (Article 8), and the Arab Charter on Human Rights (Article 30). Similar rights are contained in national constitutions and domestic laws. Features common to most of these international treaties and domestic laws include:

- a) There is an absolute right to possess one’s own religion, thoughts and beliefs. This is the internal aspect of religion. The state can never require a person to reject his or her religion or cease believing something.
- b) There is also a right to manifest one’s religion. Manifestation is the external aspect of religion, which includes praying with others, and conduct such as wearing certain clothes or items. Manifestations can be restricted in certain circumstances.
- c) Religion cannot be imposed by the state on individuals. The right to freedom of religion also includes the right not to believe in any religion.¹³

15. Both the internal and external aspects of freedom of religion may, at times, interact with the rights of LGBT people. Regarding the internal aspect, religion and belief are to be interpreted broadly.¹⁴ As such, freedom of religion and belief allows any person to hold views on homosexuality, LGBT people and LGBT rights. People have an absolute right to believe what they will on these topics, positive or negative.

16. On the external aspect, there are limitations on how these beliefs can manifest externally in society. The ICCPR, the lynchpin of the international system of human rights with 168 state-parties, requires that no manifestation of religion or belief may amount to ‘advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence’.¹⁵ Accordingly, a person has an absolute right to think the deepest homophobic thoughts, but there are limitations on how those views can manifest externally. Applying international human rights law, expressing a belief in the sinfulness of homosexuality is a justifiable expression of religious belief; provided that the language used does not rise to the level of hate speech. However, religious belief cannot justify legal restrictions on others forming a same-sex relationship. This is clear from the analysis of proportionality in the next section, and specifically the conclusions drawn on moral/religious justifications in *Toonen v. Australia*,

Dudgeon v. the United Kingdom and *Norris v. Ireland*, and similar conclusions in national case law from South African and Kenya. Such restrictions would amount to the imposition of specific religious beliefs on others, violating their rights, including the rights to privacy, equality and dignity.¹⁶

17. If individuals believe that homosexuality is contrary to their religion, they are free to manifest that belief by not forming a same-sex relationship. Human rights law will not protect any manifestation beyond this self-imposed abstention, and certainly would not allow the criminalisation of homosexuality on religious grounds. As Article 5 of the ICCPR records, one person’s rights cannot be used to destroy the rights of others:

Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein.

18. The United Nations (UN) Secretary-General Ban Ki-moon captured the essence of how religion interacts with the human rights of LGBT people in a UN brochure entitled ‘*The United Nations Speaks Out: Tackling Discrimination on Grounds of Sexual Orientation and Gender Identity*’:

“Let there be no confusion: where there is tension between cultural attitudes and universal human rights, rights must carry the day.”¹⁷

12 For example, Professor Urfan Khaliq cites a number of examples: ‘Under the Edict of Milan (313 CE) the Emperor Constantine granted religious freedom to Christians.... In 532 CE the Emperor Justinian entered into a treaty with the Persians which sought to allow Christians to practice their faith and to exclude them from the official faith Zoroastrianism... The Religious Peace of Augsburg of 1555 in the aftermath of the Reformation sought to protect religious freedoms in Europe and ease tensions between Protestant and Catholic princes. A number of treaties between various European powers and the Ottoman Empire also sought to protect religious freedoms.... Religious freedom thus has a strong claim to being one of the, if not the, oldest issues which we would now consider to be a human right in international law’; quoted from Khaliq, U., ‘Freedom of Religion and Belief in International Law: A Comparative Analysis’ in Emon, A. M., Ellis, M. and Glah, B. (eds), *Islamic Law and International Human Rights Law* (Oxford University Press, 2012), pp. 183 and 184.

13 For instance, the European Court of Human Rights in *Kokkinakis v. Greece* [1993] 17 EHRR 397 stated that the right to freedom of religion ‘is also a precious asset for atheists, agnostics, sceptics and the unconcerned’.

14 UN Human Rights Committee, *General Comment No. 22*, UN Doc CCPR/C/21/Rev.1/.

15 *Ibid.*

16 Another briefing note in this series, *Criminalising Homosexuality and International Human Rights Law*, discusses in further detail how the criminalisation of homosexuality violates the rights to equality, privacy and dignity and can amount to inhuman and degrading treatment.

17 OHCHR, UNDP, UNAIDS, WHO et al, *The United Nations Speaks Out: Tackling Discrimination on Grounds of Sexual Orientation and Gender Identity*, (New York, 2011).

19. To the extent that there is a purported religious justification for the criminalisation of homosexuality, the human rights of LGBT people prevail. Nor are religious or homophobic beliefs sufficient to exclude LGBT people wholesale from human rights protection. Internationally proclaimed human rights and domestic human rights protections apply to everyone, as can be seen clearly from the wording of these human rights documents. For example, in Article 2 of the UN's Universal Declaration of Human Rights:

“ [E]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind...

20. Likewise, as stated in a UN Human Rights Council report:

“ [A]ll people, including LGBT persons, are entitled to enjoy the protections provided for by international human rights law.¹⁸

21. With regard to the tensions between religious belief and LGBT rights, this UN report cited the 1993 Vienna Declaration and Programme of Action, which confirms that:

“ While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.¹⁹

22. These quotes confirm the proposition that the internal aspect of freedom of religion and belief is universal and absolute. But, where such internal beliefs are manifested externally to criminalise homosexuality, human rights law will be violated. Justifying the criminalisation of homosexuality on purported religious grounds is in stark contrast with human rights laws and norms. The human rights framework is all about proportionality. It is wholly disproportionate that a homophobic belief be translated into criminal sanctions imposed on others.

¹⁸ UN Human Rights Council, *Report of the United Nations High Commissioner for Human Rights on Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, 17 November 2011, 5.

¹⁹ UN General Assembly, *Vienna Declaration and Programme of Action*, A/CONF.157/23, 12 July 1993.

Religion and proportionality

23. The paragraphs below set out court decisions and statements on proportionality and freedom of religion, as made by courts and commissions interpreting international human rights law. These statements and decisions cover all regions and cultures. Two categories of decisions are discussed below. First, where LGBT people have asserted their right to privacy, equality, etc., and the state has attempted to justify the curtailment of those rights for religious or moral purposes. Secondly, where people have claimed that their rights to religious freedom have been violated; some of these cases interact with LGBT rights, others do not, but together they show how international human rights law delineates the right to religious freedom. These cases demonstrate how far the manifestation of religious belief can reach into the public domain, and thus inform about the interaction between religious belief and other potentially competing rights, including LGBT rights.

UN Human Rights Committee

24. The UN Human Rights Committee is the treaty body that interprets and monitors the implementation of the ICCPR. Its decision in *Toonen v. Australia* assessed whether Tasmania's laws criminalising homosexuality violated the right to privacy contained at Article 17 of the ICCPR. An issue for the Committee was whether the infringement of Mr Toonen's right to privacy could be justified on supposed moral grounds. The Human Rights Committee concluded that the right to privacy was infringed and that this right must prevail over the supposed moral justification:

While the State party acknowledges that the impugned provisions constitute an arbitrary interference with Mr. Toonen's privacy, the Tasmanian authorities submit that the challenged laws are justified on public health and moral grounds... The Committee cannot accept either that for the purposes of article 17 of the Covenant, moral issues are exclusively a matter of domestic concern ... [T]he Committee concludes that the provisions do not meet the "reasonableness" test in the circumstances of the case, and that they arbitrarily interfere with Mr. Toonen's right under article 17, paragraph 1.²⁰

25. Outside of the context of LGBT rights, the Human Rights Committee has used the reasonableness or proportionality approach to further define the scope of the right to manifest religion. For instance, in its decisions in 1989 in *Singh Bhinder v. Canada*, Canada was permitted to restrict a Sikh man's manifestation of religion via his wearing a turban, by requiring him to wear a safety helmet at work. In particular, the Human Rights Committee found that the use of helmets in employment for safety purposes was reasonable and compatible with the limitations on religious manifestation contained in Article 18(3) of the ICCPR. In this case, it was proportionate for the state to restrict religious freedom in order to create a safe working environment. This case exemplifies the restrictions that can be placed on the manifestation of religion under the ICCPR.

²⁰ *Toonen v. Australia* Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994), paras. 8.4 to 8.6.

African Commission on Human and Peoples' Rights

26. The African Commission on Human and Peoples' Rights has not heard a decriminalisation case, but it has considered how to delineate the right to freedom of religion at Article 8 of the African Charter. Again, decision-making is driven by proportionality. In 2004 in the case of *Garreth Anver Prince v. South Africa*,²¹ Mr Prince claimed that smoking cannabis was a manifestation of his Rastafarian religion, so that South Africa's laws prohibiting the drug breached his right to freedom of religion. Drawing on the reasoning of the Human Rights Committee in *Singh Bhinder v. Canada*, the African Commission ruled that the restrictions on the use and possession of cannabis were reasonable as they served a 'general purpose' and affected Rastafarians only incidentally. The Commission also noted that the right to freedom of religion:

*Does not in itself include a general right of the individual to act in accordance with his or her belief. While the right to hold religious beliefs should be absolute, the right to act on those beliefs should not. As such, the right to practice one's religion must yield to the interests of society in some circumstances.*²²

27. In another case, *Amnesty International v. Sudan*, the African Commission considered the application of Sharia law to non-Muslims in Sudan, in light of both Article 8 of the Charter and Article 2, which provides for equal protection under the law. The African Commission ruled that:

“ [W]hile fully respecting the religious freedom of Muslims in Sudan [the Commission] cannot countenance the application of law in such a way as to cause discrimination and distress to others.²³

28. The Commission went on to emphasise that:

“ Trials must always accord with international fair-trial standards. Also, it is fundamentally unjust that religious laws should be applied against non-adherents of the religion. Tribunals that apply only Shari'a are thus not competent to judge non-Muslims, and everyone should have the right to be tried by a secular court if they wish.²⁴

European Court of Human Rights and European Commission of Human Rights

29. The European Court of Human Rights in Strasbourg has produced a rich body of case law on both categories of decisions discussed in this note: first, the criminalisation of homosexuality and, secondly, limits placed on the manifestation of religion. Again, a proportionality approach is taken.

30. With regards to the first category, in the case of *Dudgeon v. the United Kingdom*, Northern Ireland's law criminalising homosexuality was challenged pursuant to the right to privacy protected by Article 8 of the European Convention Human Rights (ECHR). The UK Government argued that the law's interference with Mr Dudgeon's right to privacy was justified, in part due to the religious and moral standards of Northern Irish society, stating that:

“ [T]he general aim pursued by the legislation remains the protection of morals in the sense of moral standards obtaining in Northern Ireland... Northern Irish society was said to be more conservative and to place greater emphasis on religious factors, as was illustrated by more restrictive laws even in the field of heterosexual conduct.²⁵

31. The Strasbourg Court accepted that religion and morality were factors to be considered, but concluded that religious or moral views cannot justify criminalisation. In finding that Mr Dudgeon's privacy rights prevailed, the court stated that:

“ Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved.²⁶

32. After this court decision, Northern Ireland's criminalising law was repealed. Seven years later, the Strasbourg Court considered the issue again in *Norris v. Ireland*, this time concerning the Republic of Ireland. The Irish Supreme Court had upheld Ireland's criminalising law, which led to Mr Norris taking the matter to Strasbourg. The Irish court had concluded that criminalisation was lawful and not inconsistent with 'the Christian and democratic nature of the Irish State'.²⁷ Christianity is entrenched into the Irish Constitution.²⁸

21 *Garreth Anver Prince v. South Africa* [2004] AHRLR 105 (ACHPR 2004).

22 *Ibid.*, para. 41.

23 *Amnesty International and Others v. Sudan* [2000] AHRLR 297 (ACHPR 1999), para. 73.

24 *Ibid.*

25 *Dudgeon v. the United Kingdom* [1981] ECHR 5, para. 46.

26 *Ibid.*, para. 60.

27 *Norris v. Attorney General* [1984] IR 36, cited in *Norris v. Ireland*, para. 24.

28 The Preamble starts: 'In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred, We, the people of Éire [Ireland], Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ'.

33. However, the Strasbourg Court disagreed that religious views justify the criminalisation of homosexuality and repeated its earlier finding in *Dudgeon* (as quoted above).²⁹ The Strasbourg Court acknowledged that the Irish state has a 'margin of appreciation' on moral matters, so that its unique national culture and traditions might lead to a different result on the proportionality approach. Yet, even with Ireland's unusually religious Constitution, its margin of appreciation could not justify the state's interference with Mr Norris's privacy rights.³⁰ The criminalisation of homosexuality was found to be a disproportionate measure, notwithstanding religious or moral views in society. Ireland's criminalising laws were repealed after Strasbourg's judgment.

34. With regards to the second category of decisions, the Strasbourg Court has produced rich case law delineating the right to freedom of religion, protected under Article 9 of the ECHR. Some involve LGBT rights. These Article 9 cases again apply a proportionality approach.

35. The case of *Eweida v. the United Kingdom*³¹ concerned two applicants relying on Article 9 in circumstances that intersected with LGBT rights. The applicants included a registrar of births, deaths and marriages, and a relationship counsellor. They had been disciplined after refusing, respectively, to preside over civil partnership ceremonies and to counsel same-sex couples, as they believed these tasks would condone homosexuality in contravention of their Christian beliefs. The applicants contended that their refusal to carry out these tasks was a manifestation of their religious

beliefs. Taking a proportionality approach, the Strasbourg Court found against these two applicants. In particular, the majority ruled that a reasonable balance had been struck between the employers' right to secure the rights of others (here LGBT users of their services) and the applicants' right to manifest their religion.³²

36. Other decisions on Article 9, which do not concern LGBT rights at all, further show how the right to manifest religion is delineated. For example, in *Eweida*, there were two other applicants in addition to the two applicants referred to above. They both complained of a violation of their right to religious freedom by their respective employers disallowing them from wearing Christian crucifixes around their necks while at work. One applicant, a British Airways flight attendant, succeeded in her allegation that her right to manifest her religion had been violated. The Strasbourg Court held that the proportionality test required the state to accommodate her outward expression of religion in the workplace.³³ The second applicant, a nurse at a state hospital, did not succeed. The court held that the ban on her crucifix was proportionate, as the ban pursued health and safety on a hospital ward, which was a concern of greater importance (due to risk of injury if patients pulled the crucifix or infection if it came into contact with an open wound).³⁴ For one of these applicants, the proportionality test required that she be allowed to wear a crucifix at work; for the other it required that she refrain from wearing it. The factual circumstances of each applicant, including the potential for harm to others, dictated the different outcomes.

37. In another case, *Kokkinakis v. Greece* in 1993, the Strasbourg Court held that Greece violated Article 9 by convicting an elderly Jehovah's Witness couple for 'illegal proselytising'. The Court ruled that in doing so the Greek Government had interfered with their right to manifest religion.³⁵ The right to freedom of religion allows proselytising, but, as discussed below, there are limits to what can be preached so as to uphold the rights of others.

38. Turning to another area of case law on Article 9, the state has a positive obligation to protect those with religious beliefs from conduct that is an insult to their religion. One might argue that this positive obligation requires the state to shield people with a particular religious view from homosexuality. But this would be incorrect; the positive obligation is narrow. For instance, in 1991 a complaint was made against the UK alleging that it failed to protect the quiet enjoyment of Islamic religious belief. The applicants alleged that Article 9 of the ECHR required a positive act by the authorities to ban Salman Rushdie's book, *Satanic Verses*, and to prosecute Mr Rushdie for blasphemy. The case did not proceed past the Commission stage, which rejected the application, as freedom of religion was held not to include a right not to be offended.³⁶

39. Similarly, in a case against Poland concerning a picture of Jesus Christ and the Virgin Mary wearing gas masks, the complaint was rejected. The Commission held that '*members of a religious community must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith*'.³⁷ However, when the work in question is not viewed as having broader societal value, greater sympathy is given to the religious applicant. In 1994, the Strasbourg Court upheld Austria's seizure and ban of a film that presented the Christian God as old, infirm and ineffective, Jesus Christ as a 'mummy's boy' of low intelligence and the Virgin Mary as an 'unprincipled wanton'. The Austrian authorities seized the film on the ground that it insulted Christians. Albeit in an authority that is now two decades old, the Strasbourg Court held that the ban did not violate the filmmakers' right to freedom of expression, as the film was 'gratuitously offensive' and the authorities were right to act:

*to ensure religious peace in that region and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner.*³⁸

29 *Norris v. Ireland* (1988), 13 EHRR 186, para. 46.

30 *Ibid*, para. 45.

31 *Case of Eweida and Others v. the United Kingdom* [2013] Nos. 48420/10, 59842/10, 51671/10 and 36516/10.

32 *Ibid*, paras. 106 and 109.

33 *Ibid*, para. 95.

34 *Ibid*, paras. 99 to 101.

35 *Kokkinakis*, at n. 13 above.

36 *Choudhury v. the United Kingdom*, App. no. 17439/90, 5 March 1991.

37 *Dubowska and Skup v. Poland*, App. nos. 33490/96 and 34055/96, 18 April 1997.

38 *Otto Preminger Institut v. Austria*, App no. 13470/87, 20 September 1994, para. 49.

40. It should also be noted that the right to freedom of religion protected under Article 9 overlaps with the right to freedom of expression protected under Article 10. The proportionality approach also applies. In that regard, the Strasbourg Court has assessed the right to freedom of expression against the interests of LGBT people. The court's approach informs how it will deal with the manifestation of religion when it potentially conflicts with LGBT rights. In *Vejdeland v. Sweden*, the applicants challenged their convictions and (non-custodial) sentences for 'agitation against a group of persons with allusion to sexual orientation'. They were convicted for posting leaflets in school lockers headed 'Homosexual Propaganda', which, among other things, claimed that homosexuals are responsible for HIV and wish to legalise paedophilia. The applicants challenged their convictions on the ground that their right to free expression was violated. The Strasbourg Court found no violation. The court held that the leaflets amounted to 'serious and prejudicial allegations' and that:

[[]nciting to hatred does not necessarily entail a call for an act of violence, or other criminal acts. Attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favour combating racist speech in the face of freedom of expression exercised in an irresponsible manner... In this regard, the Court stresses that discrimination based on sexual orientation is as serious as discrimination based on "race, origin or colour".³⁹

Inter-American System

41. There has been no decriminalisation challenge heard in the Inter-American system, but it has produced case law to define the scope of the right to manifest religion. The jurisprudence of the Inter-American system on Article 12 of the American Convention mirrors that of the Human Rights Committee, African Commission and Strasbourg Court. It includes a number of cases concerning Jehovah's Witnesses, and legitimate limitations on the right to freedom of religion. In one case, *Jehovah's Witnesses v. Argentina*, the Inter-American Commission on Human Rights found that prosecuting members of that religion for refusing to swear oaths of allegiance, recognise the state and its symbols and to serve in the military violated Article 12.⁴⁰



Applying the proportionality test to the criminalisation of homosexuality and religious belief

42. As discussed above, decisions concerning the criminalisation of homosexuality and decisions concerning the delineation of the right to manifest religion all apply a proportionality test.
43. On the first category of cases, the decisions of the Human Rights Committee and the Strasbourg Court clearly show that it is wholly disproportionate for religious or moral beliefs to translate into the criminalisation of homosexuality. In each decision, criminalisation was found to be an unreasonable interference with privacy rights. Indeed, such laws undermine the idea of individual private autonomy that is an important component of the right to freedom of religion itself. This conclusion applied just as much to Ireland – with religion entrenched into its constitution – as to more secular Australia. Under international law, religious or moral beliefs simply cannot justify the criminalisation of consensual same-sex intimacy.
44. On the second category of cases, international law is consistent in applying a proportionality test when assessing how far religious belief can reach into the public domain. The proportionality approach is consistently used across all three regional

human rights commissions and courts (Africa, the Americas and Europe) and at the international level at the Human Rights Committee. As such, even in courts that have not heard a decriminalisation challenge, we can nonetheless conclude that the criminalisation of homosexuality breaches the international law applicable; criminalisation cannot meet the proportionality test. People of all religions are free to manifest their religious belief however they please, so long as the manifestation does not disproportionately affect others in society.

45. Some of the cases cited above exist at the borderline of how religious belief may manifest legitimately in society: a crucifix may be worn, but not if it causes risk to others; a safety helmet must be worn as it protects the individual himself; beliefs can be evangelised, but not if they incite hatred or exploit others; the conduct of others can be offensive towards religion, but not gratuitously so.

³⁹ *Vejdeland v. Sweden*, Application no. 1813/07, para. 55.

⁴⁰ *Jehovah's Witnesses v. Argentina* [1978] IACHR Case 2137.

46. Other cases are more clear-cut: religious-based law may never be imposed on anyone to restrict their adult, consensual behaviour; the state has only a narrow positive obligation to protect against conduct offensive to religious belief; and religious or moral beliefs rarely justify the infringement of others' rights. Religious freedom itself relies on respect for private autonomy and cannot therefore be used to justify destroying the autonomy and privacy of LGBT individuals.

47. The proportionality test falls firmly on the side of decriminalisation and equality for LGBT people. LGBT people having the freedom to live openly and equally may offend some with extreme homophobic views, but it is inconceivable that their doing so is 'gratuitously offensive' so as to warrant the curtailment of their rights by their arrest and imprisonment. Further, as a matter of established human rights law, even in countries where laws are influenced by religion, these laws cannot be imposed on society at large. Even, if it could ever be evidenced that religious law requires adherents not to engage in same-sex intimacy, this cannot be imposed on non-adherents. Even for willing adherents to the religion, the imposition of a jail sentence or capital punishment can never be proportionate.

National case law

48. The paragraphs above demonstrate the nature of the international law obligations that states have taken on between themselves regarding the treatment of people in their jurisdictions, and therein how religious rights and LGBT rights are to be upheld. The same reasoning has been applied in domestic courts when applying domestic law.

South Africa

49. In 1998 in the case of *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, the Constitutional Court of South Africa found the offence of sodomy to be inconsistent with the country's constitutional rights to equality, dignity and privacy. In doing so, the court drew a sharp distinction between the right of people to hold religious beliefs and the ability of the state to impose these beliefs on the whole of society. The court also pointed out that:

“ Such [religious] views, however honestly and sincerely held, cannot influence what the Constitution dictates in regard to discrimination on the grounds of sexual orientation.

...Yet, while the Constitution protects the right of people to continue with such beliefs, it does not allow the state to turn these beliefs – even in moderate or gentle versions – into dogma imposed on the whole of society.⁴¹

41 *National Coalition*, at n. 1 above, paras. 38 and 137.

50. In 2008, in *Strydom v. Nederduitse Gereformeerde Gemeente Moreleta Park*,⁴² a religious school argued before the Equality Court of South Africa that its constitutional right to freedom of religion trumped anti-discrimination laws, so it was free to fire a gay music teacher. The court distinguished between the right to hold religious ideas 'hostile to homosexual relationships', which was protected under the constitution, and the right to apply those beliefs in employment practices, which was not. In drawing a divide between 'external' and 'internal' freedom of religion, the court held that the school had discriminated against the teacher when it terminated his employment contract.

Kenya

51. In 2015, the High Court of Kenya gave judgment in a case concerning the registration of an LGBT non-governmental organisation. The court held that the national NGO board was wrong to refuse the registration, as this impinged on the freedom of association of LGBT people. The Kenyan High Court, like courts around the world, used a proportionality approach and held that religious beliefs cannot justify the curtailment of human rights for LGBT people:

“ The Board and the Attorney General rely on their moral convictions and what they postulate to be the moral convictions of most Kenyans. They also rely on verses from the Bible, the Quran and various studies which they submit have been undertaken regarding homosexuality.

We must emphasize, however, that no matter how strongly held moral and religious beliefs may be, they cannot be a basis for limiting rights: they are not laws as contemplated by the Constitution. Thus, neither the Penal Code, whose provisions we have set out above, which is the only legislation that the respondents rely on, nor the religious tenets that the Board cites, meet the constitutional test for limitation of rights.⁴³

United Kingdom

52. In 2012 in the case *Bull & Bull v. Hall & Preddy*, the English Court of Appeal reviewed a case regarding a same-sex couple who were refused accommodation at a hotel owned by a Christian family due to the owners' religious belief. The court held that restricting the hotel owners' right to manifest their religion was 'necessary and proportionate' to protect others against discrimination. In reaching this decision, the Court affirmed that:

“ No individual is entitled to manifest his religious belief when and where he chooses so as to obtain exemption in all circumstances from some legislative provisions of general application.⁴⁴

42 *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* [2008] 30 ILJ 868 (Equality Court).

43 *Eric Gitari v. NGO Board & 4 others*, [2015], Petition 440 of 2013, The High Court of Kenya at Nairobi, para. 121.

44 *Bull & Bull v. Hall & Preddy* [2012] EWCA Civ 83, para. 65.

United States

53. When the US Supreme Court decriminalised homosexuality at a federal level in 2003, it considered whether religious belief should influence its decision. It concluded that its role is not to apply its own moral code or that of society, but to uphold the rights of all:

The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. 'Our obligation is to define the liberty of all, not to mandate our own moral code'.⁴⁵

54. This decision was in keeping with established US case law on the role of religion in legislation. For example, in *Stone v. Graham*, the US Supreme Court considered a Kentucky statute that required a copy of the Ten Commandments to be displayed in all public classrooms within the state. The court ruled that the statute was unconstitutional because it lacked a non-religious legislative purpose, in violation of the Establishment Clause of the First Amendment to the US Constitution.⁴⁶

55. In 1990, the US Supreme Court held in the matter of *Employment Division, Oregon Department of Human Resources v. Smith* that the 'free exercise of religion' clause in the First Amendment to the US Constitution does not excuse an individual from the obligation to comply with a law of general applicability that incidentally forbids or requires the performance of an act that his religious beliefs require or forbid.⁴⁷

This decision was subsequently followed by the Supreme Court of California in 2008 in the case of *North Coast Women's Care Medical Group v. San Diego County*. In that case, the court rejected an argument advanced by two doctors that they could lawfully refuse to perform an intrauterine insemination for a lesbian woman due to their religious objections and in breach of non-discrimination laws.⁴⁸

56. At present, there is some tension in the United States between LGBT rights and the rights of small businesses with religious values. In *Burwell v. Hobby Lobby* in 2014, the US Supreme Court held that 'closely held corporations'⁴⁹ could be exempted from a law to which its owners objected on religious grounds. In the circumstances of the case, this meant that the Hobby Lobby store could not be forced to pay for insurance coverage for contraception for employees. In reaching this ruling, the Court relied on the *Religious Freedom*

Restoration Act 1993, a federal law with the aim of 'ensur[ing] that interests in religious freedom are protected'. The more recent case of *Obergefell v. Hodges*, of June 2015, held that states must not discriminate against same-sex couples.⁵⁰ Commentators predict that in light of these two judgments, the US Supreme Court will have to delineate more precisely how religious freedom and LGBT rights are to be given effect in a proportionate manner.⁵¹

Canada

57. In *Chamberlain v. Surrey School District* of 2002, the Supreme Court of Canada considered whether a public school board could rely on religious objections of parents when it banned books and other resource materials that made reference to same-sex families. The Supreme Court held that the school board had failed to conform to their secular requirements and that its decision was therefore unreasonable.⁵²

Religion and government policy

58. Only a handful of disputes concerning the intersection of religion and LGBT rights find their way to courtrooms. However, all three arms of government should follow the sentiments expressed above regarding proportionality, i.e. this approach applies to the executive and the legislature when passing laws and forming policy just as much as it applies to the judiciary when making court judgments. Unfortunately, in some countries government policy is often disproportionate in terms of the influence given to religious groups, to the detriment of LGBT people. The examples of Ireland and the Caribbean region are briefly discussed below.

59. Ireland's 1937 Constitution instilled into the nation's legal framework the 'special position' of the Catholic Church. This provision was then removed in 1973, albeit the Preamble's reference to Christianity remains (see footnote 29 above). As discussed above, a judgment against Ireland at the Strasbourg Court held that criminalisation is not justified, notwithstanding the religious Preamble to the Irish Constitution. Another briefing note in this series, *Criminalising Homosexuality and Democratic Values*, discusses Ireland in further detail.

⁴⁵ *Lawrence v. Texas* 539 US 558 (2003), p. 10.

⁴⁶ *Stone v. Graham*, 449 US 39 (1980).

⁴⁷ *Employment Division, Department of Human Resources of Oregon v. Smith* [1990] 494 U.S. 872.

⁴⁸ *North Coast Women's Care Medical Group v San Diego County* [2008] Ct.App. 4/1 D045438.

⁴⁹ A closely held corporation is defined by the US Internal Revenue Service as one which 'has more than 50% of the value of its outstanding stock owned (directly or indirectly) by 5 or fewer individuals at any time during the last half of the tax year and is not a personal service corporation'.

⁵⁰ *Obergefell v. Hodges* 576 (2015).

⁵¹ For instance, see: Lupu, I. C., *Moving Targets: Obergefell, Hobby Lobby, and the Future of LGBT Rights*, (2015) Alabama Civil Rights & Civil Liberties Law Review, Vol. 7, no. 1.

⁵² *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, 2002 SCC 86.

60. However, the link between religion and the state need not be constitutional or formal for religion to have a disproportionate effect on government policy. LGBT activists in a number of Caribbean nations have complained that churches hinder their governments' ability to pass legislation that protects the basic rights of LGBT people. For instance, in January 2001 Guyana's Parliament unanimously passed an amendment to the Guyanese Constitution to include sexual orientation as a prohibited ground of discrimination. However, after pressure was applied by religious groups, in an unprecedented move President Bharrat Jagdeo refused to sign the amending Bill into law, causing a constitutional crisis in Guyana.⁵³ Grenadian LGBT activist Richie Maitland cites this example from Guyana as one of many instances of the 'religious involvement in public policy in the Caribbean [that] often operates in ways that are not only harmful in their own right[s], but which fundamentally compromise "democracy"'.⁵⁴

61. Belizean Prime Minister Dean Barrow has expressed concern about the influence of churches on governmental policy towards LGBT people, in particular foreign evangelical churches. Prime Minister Barrow has stood firm in articulating that constitutional rights apply to all, including the LGBT population. He said in September 2013 during the annual independence address:

“ *A version of the culture wars has come to our country and it is souring the harmony and disrupting the rhythm of Belizean life. The golden knot that ties us all together, is in danger of coming loose ... [W]e cannot afford for Government and the Churches to be at odds. The filigree chain that links the two is a proud part of the national ornamentation, and it cannot be allowed to break*

*Government will therefore fully respect the right of the churches to propagate their understanding of the morality, or immorality, of homosexuality. What government cannot do is to shirk its duty to ensure that all citizens, without exception, enjoy the full protection of the law.*⁵⁵

When manifestation of belief harms others: protecting LGBT people from religious-inspired hatred

62. It is clear from the international and domestic law discussed above that the right to manifest religion, correctly understood, does not include the propagation of homophobic views. The state has a positive obligation to step in to protect LGBT people if a purported manifestation of religion causes harm to LGBT people. Additionally, it is not legitimate for a religious belief to translate into government policy that harms LGBT people, or restricts their freedom or physical integrity via criminal punishments. Where the state is complying with international law and human rights norms, it should not be permissible for LGBT people to be targeted on religious grounds by state or non-state actors. If the state is complying with its obligations, the opportunities for religious belief to manifest as aggressive homophobia should be few and far between.

63. However, Belizean Prime Minister Barrow's remarks above highlight a current phenomenon in some countries, whereby evangelical Christian groups (particularly from the United States) establish a presence and stoke homophobia. Much has been written about aggressive anti-LGBT sermons of certain US evangelicals. In a study entitled 'Colonizing African Values: How the US Christian Right is Transforming Sexual Politics in Africa', seven African countries were analysed by Dr Kapya Kaoma,⁵⁶ an Anglican priest from Zambia. Dr Kaoma stated that right-wing Christian groups wrongly paint homosexuality as 'un-African' and imposed by the West, whereas in reality it was not homosexuality but the Bible that arrived with colonialism. Dr Kaoma told *The Guardian* newspaper that:

“ *[The US evangelicals] seem to know they are losing the battle in the US, so the best they can do is to be seen to be winning somewhere... This gives them a reason to be fundraising in the US. Africa is a pawn in the battle they are fighting at home.*⁵⁷

⁵³ Denny, P., 'Comprehensive Gay Rights Bill at Risk', *Stabroek News*, 30 January 2001. Available at: <http://legalminds.lp.findlaw.com/list/queerlaw-edit/msg03708.html>

⁵⁴ Maitland, R., 'On Religion and Rights in the Caribbean', *Groundation Grenada*. Available at: <http://groundationgrenada.com/2013/10/07/on-religion-and-rights-in-the-caribbean/>.

⁵⁵ Reported by Pan Caribbean Partnership Against HIV&AIDS. Available at: <http://www.pancap.org/en/caribbean-news/2035-belize-pm-independence-speech-supports-equality-for-all-citizens.html>

⁵⁶ Available at: <http://www.politicalresearch.org/2009/12/01/globalizing-the-culture-wars-u-s-conservatives-african-churches-homophobia/#sthash.vQ0ZsyFu.dpbs>

⁵⁷ Smith, D., 'US evangelical Christians accused of promoting homophobia in Africa', *The Guardian*, 24 July 2014. Available at: <http://www.theguardian.com/world/2012/jul/24/evangelical-christians-homophobia-africa>

64. If such homophobia were propagated in their home countries, the state would act to limit their supposed manifestation of religion to prevent harm to others. These evangelists are violating international human rights norms. Compounding the conduct of evangelicals, political leaders in some places ignore their obligations to their LGBT citizens. As Dr Kaoma says:

“The presidents of Zambia, Zimbabwe, and Uganda themselves accused opposition parties of promoting homosexuality to undercut their influence and cater to powerful African religious conservatives.”⁵⁸

65. To give some examples, in 2013 a documentary entitled *The Abominable Crime* drew a link between evangelism and the increased enforcement in the 1980s and 1990s of Jamaica's laws that criminalise homosexuality.⁵⁹ Separately, the influence of US Pastor Scott Lively in stoking homophobia in Uganda has been reported widely.⁶⁰

66. Notwithstanding the lack of legal protection and the complicity of politicians in certain countries, evangelical preachers are not immune from legal repercussions. Pastor Lively's experience provides a cautionary tale to those who export homophobia abroad. He is currently the subject of an action in the US courts brought by the Ugandan human rights organisation Sexual

Minorities Uganda (SMUG). The claim was made under the US *Alien Torts Statute*, which allows US citizens to be sued in their home courts for torts 'committed in violation of the law of nations or a treaty of the United States'. The long arm of American law has allowed Pastor Lively to be pursued for compensation for his alleged perpetration of crimes against humanity against LGBT Ugandans.⁶¹ Additionally, during the course of proceedings it was discovered that a Ugandan Pastor known for his homophobic sermons, Martin Ssempe, is a dual US citizen and thus subject to US law. The organisation bringing the case on behalf of SMUG, the Center for Constitutional Rights, has requested that the US courts subpoena Pastor Ssempe:

*The Center for Constitutional Rights has learned that Martin Ssempe, a leading and notorious figure in the persecution of the LGBTI community in Uganda, is in fact a U.S. citizen. Ssempe is not himself a target of the lawsuit, but as a close ally of Scott Lively he has intimate knowledge of key facts in the case. As a witness who is a U.S. citizen, he is subject to the jurisdiction of the U.S. court presiding over the case brought on behalf of Sexual Minorities Uganda against Lively for the role he has played in the persecution of LGBTI people and organizations in Uganda.*⁶²

58 *Ibid.*

59 Ebony, 'The Abominable Crime Spotlights Homophobia in Jamaica', 18 February 2015. Available at: <http://www.ebony.com/entertainment-culture/the-abominable-crime-spotlights-homophobia-in-jamaica-999#axzz3pyup142x>

60 For instance, see Freeman, C., 'Have US evangelists helped to inspire Uganda's anti-gay laws?', *The Telegraph* online blog, 26 February 2014. Available at: <http://blogs.telegraph.co.uk/news/colinfreeman/100261161/have-us-evangelists-helped-to-inspire-ugandas-anti-gay-laws/>

61 For more information, see: Center for Constitutional Rights, 'Active Cases: Sexual Minorities Uganda v. Scott Lively': <https://ccrjustice.org/home/what-we-do/our-cases/sexual-minorities-uganda-v-scott-lively>

62 See: <https://ccrjustice.org/home/press-center/press-releases/anti-gay-ugandan-extremist-martin-ssempe-us-citizen-testimony>

Statements from religious leaders on LGBT matters

67. Fortunately, offsetting each homophobic remark supposedly based on religious principles, there is a statement from a religious leader that encourages compassion towards and the inclusion of LGBT people. Importantly, senior religious leaders are providing these positive comments, whereas the homophobia by-and-large originates from minor figures who can now use the internet and social media to propagate their views to a wider audience. Religion is part of the solution to homophobia, as can be seen by the statements below from religious leaders across different faiths and regions.

The Anglican Communion

68. In January 2016, the Primates of the global Anglican Communion issued a joint communiqué agreed at their 2016 global meeting. In it they unequivocally denounced laws that criminalise homosexuality (emphasis added):

“The Primates condemned homophobic prejudice and violence and resolved to work together to offer pastoral care and loving service irrespective of sexual orientation. This conviction arises out of our discipleship of Jesus Christ. The Primates reaffirmed their rejection of criminal sanctions against same-sex attracted people.”⁶³

The Primates recognise that the Christian church and within it the Anglican Communion have often acted in a way towards people on the basis of their sexual orientation that has caused deep hurt.

63 Primates 2016, Walking Together in the Service of God in the World, 15 January 2016. Available at: <http://www.primates2016.org/articles/2016/01/15/communique-primates/>

64 As reported by, Sherwood, H., 'Justin Welby says sorry to LGBTI community for hurt and pain caused by Anglican church', *The Guardian*, 15 January 2016. Available at: <http://www.theguardian.com/world/2016/jan/15/justin-welby-says-sorry-to-lgbti-community-for-hurt-caused-by-church>.

65 *Report of the Committee of Homosexual Offences and Prostitution*, September 1957, p. 38.

Where this has happened they express their profound sorrow and affirm again that God's love for every human being is the same, regardless of their sexuality, and that the church should never by its actions give any other impression.

69. In his closing press conference at the 2016 global meeting, the Archbishop of Canterbury, Justin Welby, added:

“It's a constant source of deep sadness that people are persecuted for their sexuality. I want to take this opportunity personally to say how sorry I am for the hurt and pain, in the past and present, that the church has caused and the love that we at times completely failed to show, and still do, in many parts of the world including in this country.”⁶⁴

70. Long before the 2016 global Anglican Communion, the Church of England was instrumental in the decriminalisation of homosexuality in England & Wales. The fact that religious belief cannot justify criminalisation was articulated in the Wolfenden Report of 1957 by the then-Archbishop of Canterbury, Dr Geoffrey Fisher, who stated:

“There is a sacred realm of privacy... into which the law, generally speaking, must not intrude. This is a principle of the utmost importance for the preservation of human freedom, self-respect, and responsibility.”⁶⁵

71. The UK Parliament implemented the Wolfenden Report's recommendations in England & Wales when partial decriminalisation was brought about by legislative change in the *Sexual Offences Act, 1967*.

72. Prior to South Africa adopting a post-apartheid constitution and it decriminalising homosexuality, Anglican Archbishop of Cape Town, Desmond Tutu, sent a letter to the Constitutional Assembly urging it to include a sexual orientation clause in the final draft of the constitution. In the letter, Tutu argued that:

“It would be a sad day for South Africa if any individual or group of law-abiding citizens in South Africa were to find that the Final Constitution did not guarantee their fundamental right to a sexual life, whether heterosexual or homosexual.”⁶⁶

73. Archbishop Tutu has continued to challenge stigma and discrimination on the basis of sexual orientation, calling repeatedly for homosexuality to be decriminalised elsewhere. Some selected quotes from Archbishop Tutu are set out below:

“It isn't that it's questionable when you speak up for the right of people with different sexual orientation. People took some part of us [during apartheid] and used it to discriminate against us. In our case, it was our ethnicity; it's precisely the same thing for sexual orientation. People are killed because they're gay....”⁶⁷

I would refuse to go to a homophobic Heaven.... I would not worship a God who is homophobic.⁶⁸

All over the world, LGBT people are persecuted. They face violence, torture and criminal sanctions because of how they live and who they love. We make them doubt that they too are children of God – and this must be nearly the ultimate blasphemy.⁶⁹

74. In December 2014, an Anglican Minister in Jamaica, Sean Major-Campbell, invited members of Kingston's LGBT community to attend his service to commemorate Human Rights Day during which he washed the feet of two lesbian women. After a backlash from his congregation, he commented:

“It is quite understandable that some persons will have some difficulty because human sexuality is a difficult subject and, generally speaking, in our country and culture, we really do not have enough safe spaces for people to explore the subject, without feeling safe or judged, and that is true even of the Church itself.

The truth is the call to love is not just about your close friends and close family and those it is easy to love; the call transcends those we are not so comfortable with, as well.”⁷⁰

66 Tutu, D., 'Re: Retention of the Sexual Orientation Clause in the Bill of Rights' (2 June 1995), reproduced in Hoad et al, above n. 8. 222.

67 Pulliam Bailey, S., 'Desmond Tutu Talks Gay Rights, Middle East and Pope Francis', *Charisma News*, 16 September 2013. Available at: <http://www.charismanews.com/world/41002-desmond-tutu-talks-gay-rights-middle-east-and-pope-francis>

68 Speaking at a UN event in July 2013, as reported by *BBC News*: <http://www.bbc.co.uk/news/world-africa-23464694>

69 Statement at UN High Level Panel on Ending Criminal Laws and Violence, September 2010, Available at: <http://geneva.usmission.gov/wp-content/uploads/2010/09/Tutu.pdf>

70 Reported by Duffy, N., 'Jamaican priest washes the feet of lesbians and calls for 'respect' for human rights' *Pink News*, 10 December 2014. Available at: <http://www.pinknews.co.uk/2014/12/10/jamaican-priest-washes-the-feet-of-lesbians-and-calls-for-respect-for-human-rights/>

75. In May 2012, the Archbishop of York, John Sentamu, stated on his website:

“There is no question about the equality of all human beings, “heterosexual” or “homosexual”. None of us is of greater value than anyone else in the eyes of the God who made us and loves us. At the deepest ontological level, therefore, there is no such thing as “a” homosexual or “a” heterosexual; there are human beings, male and female, called to redeemed humanity in Christ, endowed with a complex variety of emotional potentialities and threatened by a complex variety of forms of alienation.”⁷¹

76. In a lecture to the World Council of Churches Ecumenical Centre in February 2012, the then-Archbishop of Canterbury, Dr Rowan Williams, stated that:

“The existence of laws discriminating against sexual minorities as such can have no justification in societies that are serious about law itself. Such laws reflect a refusal to recognize that minorities belong, and they are indeed directly comparable to racial discrimination.”⁷²

77. Bishop Christopher Ssenyonjo, the former Bishop of West Buganda in Uganda, called for the global decriminalisation of homosexuality during an informal interactive panel discussion at the United Nations in New York in April 2011:

“The criminalisation of homosexuality remains the most significant barrier that needs to be dismantled to reduce the spread of AIDS... We need to ask if our laws or beliefs help or prevent the spread of HIV and hinder or support families caring for loved ones. Over 80 countries still criminalise homosexuality and see it as a crime against God and nature. Denying people their humanity puts us all at risk because AIDS spreads fast in the darkness of ignorance.”⁷³

78. In May 2010, the Anglican Bishops of Southern Africa issued a joint statement opposing the sentencing of two gay men in Malawi to 14 years' imprisonment for 'unnatural acts and gross indecency'. They denounced the sentence as a 'gross violation of human rights' inconsistent with the teachings of the Scriptures 'that all human beings are created in the image of God and therefore must be treated with respect and accorded human dignity' adding:

“Though there is a breadth of theological views among us on matters of human sexuality, we are united in opposing the criminalisation of homosexual people... [we] appeal to law-makers everywhere to defend the rights of these minorities.”⁷⁴

71 Available at: <http://www.archbishopofyork.org/articles.php/2481/a-response-on-marriage-and-civil-partnerships>

72 Archbishop of Canterbury, Dr Rowan Williams, 'Human Rights and Religious Faith', World Council of Churches Ecumenical Centre in Geneva, 28 February 2012. Available at: <http://rowanwilliams.archbishopofcanterbury.org/articles.php/2370/human-rights-and-religious-faith>

73 *San Diego Gay & Lesbian News*, 'Bishop Christopher Senyonjo [sic] of Uganda speaks at UN gathering today', 8 April 2011. Available at: <http://sdgln.com/news/2011/04/08/bishop-christopher-senyonjo-uganda-speaks-un-gathering#sthash.UK5Lbv3E.dpuf>

74 Statement by the Anglican Bishops in Southern Africa, 'The Imprisonment of Stephen Monjeza and Tiwonge Chimbalanga', 26 May 2010. Available at: <http://archbishop.anglicanchurchsa.org/2010/05/imprisonment-of-stephen-monjeza-and-tiwonge-chimbalanga.html>

The Catholic Church ☸

79. Pope Francis told a former student in 2010 that *'in my pastoral work there is no place for homophobia'*⁷⁵ and declared in an interview in 2013 that:

“ If a homosexual person is of good will and is in search of God, I am no one to judge ... Religion has the right to express its opinion in the service of the people, but God in creation has set us free: it is not possible to interfere spiritually in the life of a person.⁷⁶

80. In March 2011, Archbishop Silvano M. Tomasi, Permanent Representative of the Holy See to the United Nations, delivered an address at the 16th Session of the UN Human Rights Council, which met to consider the topic of sexual orientation. He stated that:

“ [The Vatican affirms] the inherent dignity and worth of all human beings... A state should never punish a person or deprive a person of the enjoyment of any human right based just on the person's feelings and thoughts, including sexual thoughts and feelings.⁷⁷

79. In April 2014, Peter Turkson, a Vatican Cardinal and leader of the Pontifical Council for Justice and Peace in Ghana, criticised Uganda's anti-gay laws, stating that *'homosexuals are not criminals'*.⁷⁸

Other Christian denominations and cross-denominational statements

81. In April 2014, senior pastor of the Riruta United Methodist Church in Kenya, Pastor John Makokha, invited the LGBT community to join his church stating:

“ Gays and lesbians are children of God and created in his image... they should be accepted and affirmed as such. They deserve a place to worship and serve God.⁷⁹

82. Following recent litigation in Jamaica challenging laws criminalising homosexuality where a number of Christian groups have intervened to oppose the claim, senior Christian theologians wrote an editorial reminding local Christians of the need to respect the secular nature of Jamaican society:

“ The homosexual does not cease being a human person by his/her homosexuality, nor does the adulterer by his adultery, nor the liar by her lies. Holding firmly to the view that God's normative sexual standard is one man with one woman in the context of marriage does not entail 'looking down on' or treating as 'less than' those who are sexually contrary to God's norm.⁸⁰

83. Many other Christian institutions share this position. In 1972, the United Methodist Church formally resolved that, notwithstanding the attitude toward homosexuality found in the scriptures, gays and lesbians were entitled to full and equal civil rights.⁸¹ In 1987, the Unitarian Universalist General Assembly passed a resolution calling for the repeal of all laws governing private sexual behaviour between consenting adults.⁸² Likewise, the Quakers (Society of Religious Friends) have long taken the view that discrimination against LGBT people is incompatible with Christian values:

“ We affirm the love of God for all people, whatever their sexual orientation, and our conviction that sexuality is an important part of human beings as created by God, so that to reject people on the grounds of their sexual behaviour is a denial of God's creation.⁸³

Islam ☪

84. Several progressive Islamic organisations have distinguished between the Quran's apparent injunction against homosexuality and the religious implications of laws criminalising homosexuality. For example, the Al-Fatiha Foundation and the Progressive Muslim Union of North America both argue that these laws are incompatible with the values of tolerance and love espoused by Mohammed.⁸⁴ In March 2008,

Siti Musdah Mulia, Islamic scholar and Chair of the Indonesian Conference of Religions and Peace stated:

“ Homosexuality is from God and should be considered natural... In the eyes of God, people are valued based on their piety. The essence of the religion (Islam) is to humanise humans, respect and dignify them.⁸⁵

Judaism ✡

85. Three of the four major Jewish traditions openly support decriminalisation. Reform Judaism was the first to adopt this position. As early as 1965, the Women of Reform Judaism passed a resolution calling for decriminalisation of homosexuality, and twelve years later the Union for Reform Judaism and the Central Conference of American Rabbis (the Reform movement's rabbinical council) passed resolutions urging governments to decriminalise homosexuality.⁸⁶ According to Reconstructionist Judaism, discrimination against gays and lesbians constitutes a violation of Jewish values, including justice, human dignity, inclusivity and caring for those who need protection.⁸⁷

75 *The Guardian*, "'This is not like him': Kim Davis meeting shocks Pope Francis's gay ex-student", 4 October 2015. Available at: <http://www.theguardian.com/world/2015/oct/04/pope-francis-gay-former-student-shocked-kim-davis-meeting>

76 Spadaoro, A. S. J., 'A Big Heart Open to God: the Exclusive interview with Pope Francis', *America: The National Catholic Review*. Available at: <http://americamagazine.org/pope-interview>

77 Statement by Archbishop Silvano M. Tomasi, Permanent Representative of the Holy See to the United Nations in Geneva at the 16th Session of the Human Rights Council – General Debate Geneva, 22 March 2011. Available at: http://en.radiovaticana.va/news/2011/03/22/vatican_addresses_un_debate_on_sexual_orientation/en1-471925

78 Fox News, 'Vatican cardinal criticizes Uganda's anti-gay law but urges continued international aid', 8 April 2014. Available at: <http://www.foxnews.com/world/2014/03/04/vatican-cardinal-criticizes-uganda-anti-gay-law-but-urges-continued/>

79 Nzwilli, F., 'Amid widespread discrimination, he ministers to Nairobi's gays and lesbians', *The Washington Post*, 30 April 2014. Available at: http://www.washingtonpost.com/national/religion/amid-widespread-discrimination-he-ministers-to-nairobis-gays-and-lesbians/2014/04/30/961903b2-d08a-11e3-a714-be7e7f142085_story.html

80 Rev Dr Clinton Chisolm, 'A Radical Suggestion for Jamaican Christians', *The Gleaner*, 15 July 2013. Available at: <http://jamaica-gleaner.com/gleaner/20130715/cleisure/cleisure4.html>

81 Keyser, C., 'In the Aftermath of Atlanta', *Good News* (Summer, 1972) 38, 45.

82 General Assembly of the Unitarian Universalist Association, Business Resolution (1987).

83 Society of Religious Friends, Wandsworth Preparative Meeting, 1989.

84 Kincheloe, J. L., Steinberg, S. R. and Stonebanks, C. D., *Teaching Against Islamophobia*, (Peter Lang Publishing Inc, 2010), 192.

85 Khalik, A., 'Islam recognizes homosexuality', *The Jakarta Post*, 28 March 2008. Available at: <http://www.thejakartapost.com/news/2008/03/27/islam-039recognizes-homosexuality039.html>

86 Union for Reform Judaism (then Union of American Hebrew Congregations) 45th General Assembly, 'Rights of Homosexuals', 88th Annual Convention of the Central Conference of American Rabbis (November 1977).

87 Federation of Reconstructionist Congregations, Homosexuality and Judaism: *The Report of the Reconstructionist Commission on Homosexuality*, (1993).

86. While Conservative or Masorti Judaism had traditionally taken a more ambivalent stance towards homosexuality, in 1990 the Rabbinical Assembly, the leading international assembly for Conservative Jewish Rabbis, announced its support for 'full civil equality for gays and lesbians' and condemned all violence and discrimination against the LGBT community.⁸⁸ Though the Orthodox tradition has yet to adopt an official position on the issue, a number of Orthodox leaders argue that criminalisation of homosexuality is inconsistent with the Torah. In 2010, 104 Orthodox leaders released a joint statement that:

“ **Embarrassing, harassing or demeaning someone with a homosexual orientation or same-sex attraction is a violation of Torah prohibitions that embody the deepest values of Judaism.**⁸⁹

Eastern Religions

87. In contrast to Judaism, Christianity and Islam, homosexuality is rarely even discussed in the religions that originated in Asia. Confucian and Hindu texts are generally silent on the subject, while Buddhism does not treat homosexuality as sinful, a fact reflected in the laws of the pre-colonial Buddhist societies of Sri Lanka and Burma (Myanmar).⁹⁰

88. In May 2014, Ram Madhav, then spokesperson of Rashtriya Swayamsevak Sangh, India's leading Hindu think-tank was quoted as saying that, while he did not glorify certain kinds of behaviour covered by Section 377 of the Indian Penal Code ('unnatural offences') it was debatable whether they should be considered a crime. He reiterated the view in a conversation with India's leading daily newspaper.⁹¹

Academics' statements on religion and human rights

89. In addition to religious leaders speaking out on the need to respect and protect LGBT people, various religious leaders and scholars of religion have made the link between religion and human rights norms.

90. With reference to his own religious tradition, former Archbishop of Canterbury, Rowan Williams, wrote in 2012 on human rights and religious faith that:

“ **It is just as important for religious believers not to back away from the territory and treat rights language as an essentially secular matter, potentially at odds with the morality and spirituality of believers.**⁹²

88 Rabbinical Assembly, *Proceedings of the Rabbinical Assembly* 52 (1990), 275.

89 Rabbi Yosef Adler et al., 'Statement of Principles on the Place of Jews with a Homosexual Orientation in Our Community' (July 2010). Available at: <http://statementofprinciplesny.blogspot.co.uk/>

90 Asia-Pacific Coalition on Male Sexual Health and UNDP, 'Legal environments, human rights and HIV responses among men who have sex with men and transgender people in Asia and the Pacific: An agenda for action', (UNDP, 2010), 15.

91 Mukherji, A., 'Gay sex: RSS comment sparks hope on Section 377', *Times of India*, 28 May 2014. Available at: <http://timesofindia.indiatimes.com/india/Gay-sex-RSS-comment-sparks-hope-on-Section-377/articleshow/35644859.cms>

92 Archbishop Rowan Williams, 'Human Rights and Religious Faith', (28 February 2012). Available at: <http://rowanwilliams.archbishopofcanterbury.org/articles.php/2370/human-rights-and-religious-faith>

91. Abdullah Ah-Na'im, Professor of Law at Emory University, similarly argues in respect of Islam, that this approach is the only way of achieving the goal of the international human rights project:

“ **If the human rights [the Universal Declaration of Human Rights] proclaims are truly universal, they must be recognised as such by different societies as such on the basis of their own worldview, value system and practical experience.**⁹³

92. Charles Taylor, a scholar on Buddhism, has similarly demonstrated that Thailand's majority religion, Theravada Buddhism,

“ **provides an alternative way of linking together the agenda of human rights and that of democratic development' which 'provides a strong support for human rights legislation.**⁹⁴

Conclusion

93. International human rights law protects both the right to manifest religion and the rights of LGBT people. It is a misconception that religious belief and LGBT rights cannot exist in parallel, or that respecting one represents a setback for the other. Freedom of religion and LGBT rights can be complementary, rather than in conflict. In a recent address in New York, US President Barack Obama expressed a sensible and achievable aspiration:

“ **We affirm that we cherish our religious freedom and are profoundly respectful of religious traditions. But we also have to say clearly that our religious freedom doesn't grant us the freedom to deny our fellow Americans their constitutional rights.**⁹⁵

93 An-Na'im, A., 'The Universal Declaration as a Living and Evolving 'Common Standard of Achievement' in van der Heijden, B. and Tahzib-Lie, B. (eds), *Reflections on the universal declaration of human rights: a fiftieth anniversary anthology* (Brill, 1998) 45, 46.

94 Taylor, C., 'Towards a more inclusive human rights regime', in Bauer, J. and Bell, D. (eds), *The East Asian Challenge for Human Rights* (Cambridge University Press, 1999), 134

95 Fang, M., 'Obama Jabs GOP For Being Behind The Times On Marriage Equality', *Huffington Post*, 27 September 2015. Available at: http://www.huffingtonpost.com/entry/obama-mocks-gop-marriage-equality_56088e71e4b0af3706dcb44d

Appendix: English law and Sharia law influences in 78 jurisdictions that criminalise homosexuality⁹⁶

Common law and mixed common law jurisdictions			Non-common law jurisdictions		
	Jurisdiction	System		Jurisdiction	System
1.	Antigua	Common law	1.	Afghanistan	Mixed civil / Islamic
2.	Bangladesh	Mixed common / Islamic	2.	Algeria	Mixed civil / Islamic
3.	Barbados	Common law	3.	Angola**	Civil law
4.	Belize	Common law	4.	Bhutan**	Civil law
5.	Botswana	Mixed civil/common	5.	Burundi**	Civil law
6.	Brunei	Mixed common / Islamic	6.	Comoros	Mixed civil / Islamic
7.	Cameroon	Mixed civil / common	7.	Egypt	Mixed civil / Islamic
8.	Cook Islands*	Common law	8.	Eritrea	Mixed civil / Islamic
9.	Dominica	Common law	9.	Ethiopia**	Civil law
10.	Gambia*	Mixed common / Islamic	10.	Guinea	Civil law
11.	Ghana	Common law	11.	Indonesia (S. Sumatra, Aceh)	Civil law
12.	Grenada	Common law	12.	Iran	Islamic law
13.	Guyana	Mixed civil / common	13.	Iraq	Mixed civil / Islamic
14.	India	Common law	14.	Lebanon	Civil law
15.	Jamaica	Common law	15.	Mauritania	Mixed civil / Islamic
16.	Kenya	Common law	16.	Morocco	Mixed civil / Islamic
17.	Kiribati	Common law	17.	Saudi Arabia	Islamic law
18.	Kuwait*	Mixed common / civil / Islamic	18.	Senegal	Civil law
19.	Liberia*	Common law	19.	Somalia	Mixed civil / Islamic
20.	Malawi	Common law	20.	Togo**	Customary law
21.	Malaysia	Mixed common / Islamic	21.	Qatar	Mixed civil / Islamic
22.	Maldives	Mixed common / Islamic	22.	Syria	Mixed civil / Islamic
23.	Mauritius	Mixed civil / common	23.	Tunisia	Mixed civil / Islamic
24.	Myanmar*	Common law	24.	Turkmenistan	Mixed civil / Islamic
25.	Namibia	Mixed civil / common	25.	United Arab Emirates	Mixed civil / Islamic

Appendix: English law and Sharia law influences in 78 jurisdictions that criminalise homosexuality⁹⁶

Common law and mixed common law jurisdictions			Non-common law jurisdictions		
	Jurisdiction	System		Jurisdiction	System
26.	Nauru	Common law	26.	Uzbekistan	Civil law
27.	Nigeria	Mixed common / Islamic	27.	Gaza	Unknown
28.	Oman*	Mixed common / Islamic	28.	Libya	Unknown / in flux
29.	Pakistan	Mixed common / Islamic			
30.	Papua New Guinea	Common law			
31.	St Kitts	Common law			
32.	St Lucia	Common law			
33.	St Vincent	Common law			
34.	Samoa	Common law			
35.	Seychelles	Mixed civil / common			
36.	Sierra Leone	Common law			
37.	Singapore	Common law			
38.	Solomon Islands	Common law			
39.	South Sudan*	Unclear (if like Sudan, mixed civil / common)			
40.	Sri Lanka	Mixed civil / common			
41.	Sudan*	Mixed civil / common			
42.	Swaziland	Mixed civil / common			
43.	Tanzania	Common law			
44.	Tonga	Common law			
45.	Trinidad	Common law			
46.	Tuvalu	Common law			
47.	Uganda	Common law			
48.	Yemen*	Mixed common / civil / Islamic			
49.	Zambia	Common law			
50.	Zimbabwe*	Mixed civil / common			

*The 10 common law or mixed common law jurisdictions that are not in the Commonwealth

**The five non-common law jurisdictions that do not have a Muslim majority

⁹⁶ Source: <https://www.cia.gov/library/publications/the-world-factbook/fields/2100.html>



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Criminalising Homosexuality: Indicators

In addition to the criminalisation of homosexuality being an indicator of poor governance and poor human rights in and of itself, countries that criminalise tend to rank poorly on other indicators too.

This is one in a series of notes produced for the Human Dignity Trust on the criminalisation of homosexuality and good governance. Each note in the series discusses a different aspect of policy that is engaged by the continued criminalisation of homosexuality across the globe.

The Human Dignity Trust is an organisation made up of international lawyers supporting local partners to uphold human rights and constitutional law in countries where private, consensual sexual conduct between adults of the same sex is criminalised. We are a registered charity no.1158093 in England & Wales. All our work, whatever country it is in, is strictly not-for-profit.

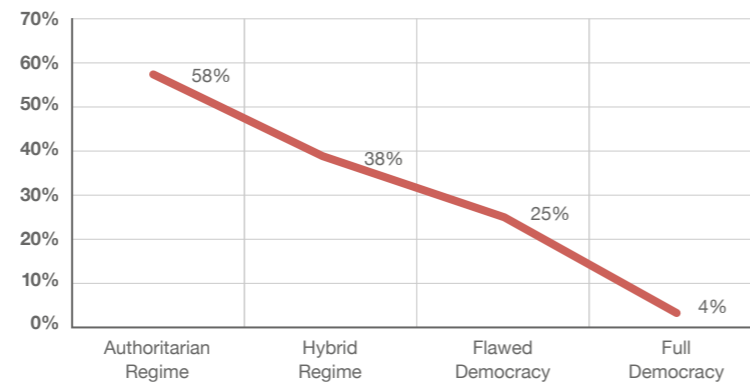
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1. Democratic credentials

- Of the world's 24 **Full Democracies**, only one criminalises homosexuality (Mauritius). I.e. only 4% of Full Democracies criminalise homosexuality.
- Of the world's 52 **Flawed Democracies**, 13 criminalise homosexuality (25%).
- Of the world's 39 **Hybrid Regimes**, 15 criminalise homosexuality (38%).
- Of the world's 52 **Authoritarian Regimes**, 29 criminalise homosexuality (58%).¹

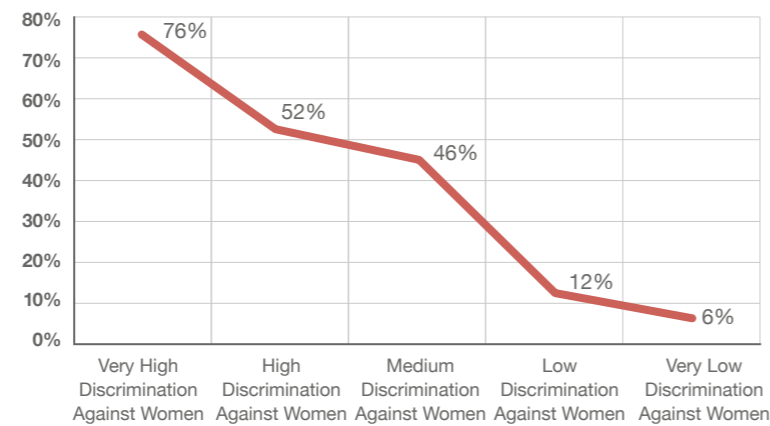
Propensity to criminalise homosexuality by regime type



2. Gender equality

- Of the 16 countries with **Very Low Levels of Discrimination Against Women**, only one country criminalises homosexuality (Trinidad & Tobago). I.e. only 6% of countries with Very Low Levels criminalise homosexuality.
- Of the 25 countries with **Low Levels of Discrimination Against Women**, three of these criminalise homosexuality (12%).
- Of the 28 countries with **Medium Levels of Discrimination Against Women**, 13 criminalise homosexuality (46%).
- Of the 21 countries with **High Levels of Discrimination Against Women**, 11 criminalise homosexuality (52%).
- Of the 17 countries with **Very High Levels of Discrimination Against Women**, 13 criminalise homosexuality (76%).²

Propensity to criminalise homosexuality by level of discrimination against women



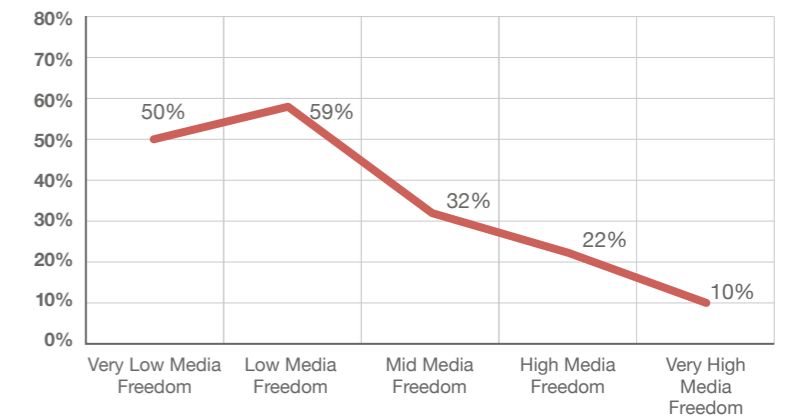
¹ Regime classifications are from the Economist Intelligence Unit's *Democracy Ranking 2014*. Available at: http://www.eiu.com/public/topical_report.aspx?campaignid=Democracy0115; criminalisation information is from the Human Dignity Trust. In its report, the Economist identified the level of democracy in a state by examining the following categories: Electoral process and pluralism, civil liberties, the functioning of government, political participation, and political culture.

² Organisation for Economic Cooperation and Development (OECD) Social Institutions and Gender Index (SIGI) 2014 <http://www.genderindex.org/ranking>. The SIGI measures discrimination against women in social institutions through formal and informal laws, social norms and practices on a state-by-state basis. In determining the level of discrimination in each state, the SIGI examined the following factors: Discriminatory Family Code, Restricted Physical Integrity, Son Bias, Restricted Resources and Assets, and Restricted Civil Liberties.

3. Press freedom

- Of the 21 countries with **Very High Media Freedom**, only two criminalise homosexuality (Jamaica and Namibia). I.e. only 10% of countries with Very High Media Freedom criminalise homosexuality.
- Of the 31 countries with **High Media Freedom**, seven criminalise homosexuality (22%).
- Of the 62 countries with **Medium Media Freedom**, 20 criminalise homosexuality (32%).
- Of the 46 countries with **Low Media Freedom**, 27 criminalise homosexuality (59%).
- Of the 20 countries with **Very Low Media Freedom**, 10 criminalise homosexuality (50%).³

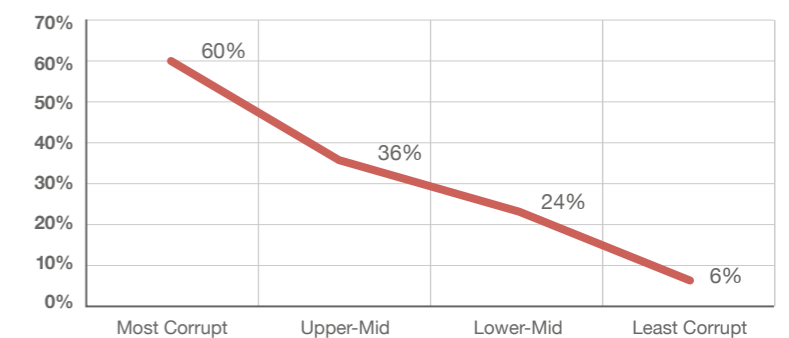
Propensity to criminalise homosexuality by media freedom classification



4. Corruption

- Of the 17 countries that scored **76 to 100 (Least Corrupt)**, only one criminalises homosexuality (Singapore). I.e. only 6% of the Least Corrupt countries criminalise homosexuality.
- Of the 34 countries that scored **51 to 75 (Lower-Mid Corruption)**, 8 criminalise homosexuality (24%).
- Of the 85 countries that scored **26 to 50 (Upper-Mid Corruption)**, 31 criminalise homosexuality (36%).
- Of the 30 countries that scored **0 to 25 (Most Corrupt)**, 18 criminalise homosexuality (60%).⁴

Propensity to criminalise homosexuality by levels of corruption



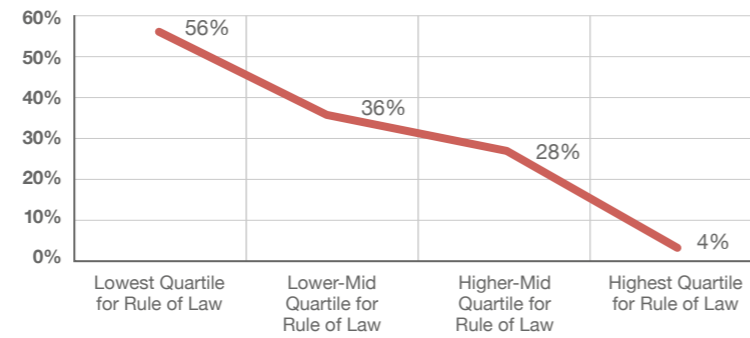
³ Media freedom classifications from Reporters Without Borders, *2015 World Press Freedom Index*. Available at: <https://index.rsif.org/#/>. In order to determine the level of press freedom in each state, Reporters Without Borders examined the following factors: Pluralism, Media Independence, Environment and Self-Censorship, Legislative Framework, Transparency, and Infrastructure.

⁴ Transparency International, *Corruption Perceptions Index 2015*. Available at: <https://www.transparency.org/cpi2015/#results-table>. 58 countries that criminalise homosexuality were reviewed (alongside 110 other countries) for Transparency International's *Corruption Perceptions Index 2015*. This index measures the perceived levels of public sector corruption on a global scale.

5. Rule of law

- Of the 26 countries in the **Highest Quartile for Rule of Law**, only one criminalises homosexuality (Singapore). I.e. only 4%.
- Of the 26 countries in **Higher-Mid Quartile for Rule of Law**, seven criminalise homosexuality (28%).
- Of the 26 countries in the **Lower-Mid Quartile for Rule of Law**, nine criminalise homosexuality (36%).
- Of the 26 countries in **Lowest Quartile for Rule of Law**, 15 criminalise homosexuality (56%).⁵

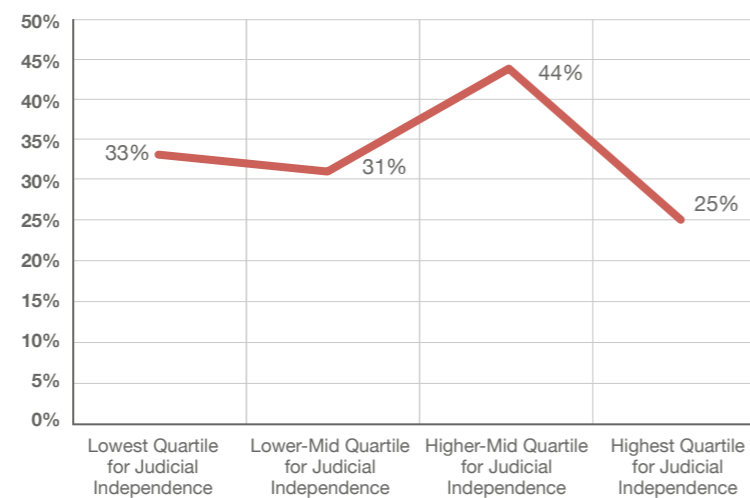
Propensity to criminalise homosexuality by adherence to the rule of law



6. Judicial independence

- Of the 36 countries in **Highest Quartile for Judicial Independence**, nine criminalise homosexuality (Singapore, UAE, Barbados, Saudi Arabia, Oman, Mauritius, Botswana, Malaysia) (25%).
- Of the 36 countries in **Higher-Mid Quartile for Judicial Independence**, 16 criminalise homosexuality (44%).
- Of the 36 countries in **Lower-Mid Quartile for Judicial Independence**, 11 criminalise homosexuality (31%).
- Of the 36 countries in the **Lowest Quartile for Judicial Independence**, 12 criminalise homosexuality (33%).⁶

Propensity to criminalise homosexuality by judicial independence classification



⁵ World Justice Project *Rule of Law Index 2015*. Available at: http://worldjusticeproject.org/sites/default/files/roli_2015_0.pdf 32 countries that criminalise homosexuality were reviewed (alongside 70 other countries) for the World Justice Project's Rule of Law Index 2015. In its review, the World Justice Project identified the level of adherence to the rule of law by examining the following factors: Constraints on Government Powers, Absence of Corruption, Open Government, Fundamental Rights, Order and Security, Regulatory Enforcement, Criminal Justice, and Civil Justice.

⁶ World Economic Forum *Global Competitiveness Report 2014-2015*. Available at: http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2014-15.pdf 48 countries that criminalise homosexuality were reviewed (alongside 96 other countries) for the World Economic Forum *Global Competitiveness Report 2014-2015*. Among the categories under review was judicial independence. The preliminary research asked each country the following: 'In your country, to what extent is the judiciary independent from influences of members of government, citizens, or firms?'

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