



Call for inputs: Report on colonialism and sexual orientation and gender identity

The following is Kaleidoscope Trust's contribution to the OHCHR's upcoming report on colonialism, sexual orientation and gender identity. We are orienting our response to particularly focus on questions 1, 2, 3 and 5 as listed in the Call for Inputs. We will do so by providing a brief overview of how colonial laws have historically changed the understanding of sexual orientation and gender identity(1, 2); we will move on to review discriminatory laws still active today throughout the Commonwealth (3) and we will conclude by reviewing successful cases of repealing colonial laws, to help inform how change is possible (5).

The colonial roots of homophobic laws.

Former British Prime Minister Theresa May's speech in CHOGM 2018 – in response to calls from Kaleidoscope Trust, The Commonwealth Equality Network (TCEN) and other civil society actors, for the UK to acknowledge the homophobic legacy and continuing impact of colonial-era laws – was an important milestone in recognising that over half of the countries that criminalise homosexuality are members of the Commonwealth¹ as a direct result of the British Empire's introduction of legal codes which criminalised male-to-male sexual relations throughout

¹ Human Dignity Trust (2021). Map of Countries that Criminalise LGBT People. Available from: <https://www.humandignitytrust.org/lgbt-the-law/map-of-criminalisation/>

many of its colonies.² The Indian Penal Code (IPC), enacted in 1860, was established following the British government's concern that its *“soldiers and colonial administrators – particularly those without wives at hand – would turn to sodomy.”*³ The aim of the IPC was to both protect British officials from ‘corruption’ as well as to ‘correct’ local customs. The IPC was subsequently adapted as the basis of many penal codes across the colonies.

Evidence shows that at least 26 states use colonial-era public order offences and vagrancy laws to criminalise trans and gender-diverse people, while at least fifteen jurisdictions criminalise gender expression through so-called ‘cross-dressing’, disguise, impersonation and/or imitation laws, many of which originate from the British Empire.⁴ Such laws continue to contribute to the denial of the human rights of LGBTI+ people by reinforcing ignorance, discrimination and stigmatisation and by failing to protect them from violence, thereby keeping them on the margins of society. All too often, this occurs with the collusion of the very state agents and duty-bearers that should be protecting and upholding these rights. Persecution of LGBTI+ people is, in many parts of the Commonwealth, a legal and cultural legacy of the British Empire – effectively, it is a Commonwealth problem requiring a Commonwealth solution.⁵

² Countries that directly inherited laws that criminalise homosexual conduct from the British Empire include Australia, Bangladesh, Bhutan, Botswana, Brunei, eSwatini, Fiji, Gambia, Ghana, Hong Kong, India, Kenya, Kiribati, Lesotho, Malawi, Malaysia, Maldives, Marshall Islands, Mauritius, Myanmar (Burma), Nauru, New Zealand, Nigeria, Pakistan, Papua New Guinea, Seychelles, Sierra Leone, Singapore, Solomon Islands, Somalia, Sri Lanka, Sudan, Tanzania, Tonga, Tuvalu, Uganda, Samoa, Zambia, and Zimbabwe.

³ Gupta, A. (2008) *This Alien Legacy: The Origins Of ‘Sodomy’ Laws in British Colonialism*. New York: Human Rights Watch

⁴ Human Dignity Trust (2019). ‘Injustice Exposed: The Criminalisation of Transgender People and its Impacts’.

Retrieved from humandignitytrust.org:

<https://www.humandignitytrust.org/wp-content/uploads/resources/Injustice-Exposed-the-criminalisation-of-trans-people.pdf>

⁵ Brooks, D. and Daly, F. (2016). *A Commonwealth Toolkit for the Policy Progress on LGBT Rights*. The Royal Commonwealth Society, Kaleidoscope Trust and The Commonwealth Equality Network. Available from:

[https://www.kaleidoscopetrust.com/research/ACommonwealth-Toolkit-for-Policy-Progress-on-LGBT\[PLUS\]-Human-Rights](https://www.kaleidoscopetrust.com/research/ACommonwealth-Toolkit-for-Policy-Progress-on-LGBT[PLUS]-Human-Rights)

A brief overview of how colonial laws have historically changed the understanding of sexual orientation and gender identity.

While we recognise that legal systems are not uniform in all countries, for understandable reasons we believe that the need for a strong foundation of equality and non-discrimination holds true across the Commonwealth. Indeed, the Commonwealth Charter itself expresses member state's commitment to equality and human rights.⁶ Across the Commonwealth, LGBTI+ individuals are among the communities of people that have been most commonly and historically discriminated against and marginalised. LGBTI+ people often face the double burden of social exclusion due to hostile social norms and a lack of protection by national laws and government policies, including ones that actively criminalise them.

In 32 of 56 Commonwealth countries, homosexuality is still a criminal offence, and, in two, it can result in the death penalty. There is a lack of official data on the basis of sexual orientation, gender identity and expression (SOGIE) in most Commonwealth countries. Where it is available, research shows that the number of hate crimes and violence against LGBTI+ people is high – and on the increase.⁷

In Asia and the Pacific, LGBTI+ people are often the targets of violence on the basis of their real or perceived SOGIE. Studies focused on a variety of countries, including Bangladesh, India, and Sri Lanka, have concluded that LGBTI+ people are victims of violence as a direct result of their gender or sexual identity.^{8 9 10} Moreover, academics and NGOs have conducted research highlighting that LGBTI+ communities are

⁶ The Commonwealth. Commonwealth Charter. <https://thecommonwealth.org/charter>

⁷ Mawira, E., Walters, M. (2020). Hate Crimes against the LGBT Community in the Commonwealth: A Situational Analysis. Equality & Justice Alliance. London.

⁸ Fernandez, B., Gomathy, N. B. (2003). The Nature of Violence Faced by Lesbian Women in India, Research Centre on Violence Against Women. Mumbai: Tata Institute of Social Sciences

⁹ Creating Resources for Empowerment in Action (CREA) (2012b). Count me IN!: Research report on violence against disabled, lesbian, and sexworking women in Bangladesh, India, and Nepal. 20(40) Reproductive Health Matters 198.

¹⁰ EQUAL GROUND et al. (2014). Human Rights Violations against Lesbian, Gay, Bisexual and Transgender (LGBT) People in Sri Lanka: A Shadow Report. http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/LKA/INT_CCPR_CSS_LKA_18258_E.pdf.

affected by targeted violence, particularly in Africa.¹¹ In a Kenyan study surveying nearly 1,000 LGBTI+ people about their experiences of violence and mental health, 53 percent of respondents reported physical assaults in the previous 12 months – only 29 percent of whom had reported the assault to the police.¹² The data shows clearly that social attitudes in countries with discriminatory legal frameworks tend to be more opposing and apathetic towards LGBTI+ people, painfully compromising the community’s well-being.

As with previous health crises, LGBTI+ people have also been blamed for the COVID-19 pandemic in several countries, for example, in speeches by prominent political and religious leaders attributing the pandemic to LGBTI+ persons.¹³ In Ghana, for instance, the Executive Secretary of the National Coalition for Proper Human Sexual Rights and Family Values¹⁴ called for the police to shut down LGBT+ Rights Ghana, a human rights organisation. Similar scapegoating was reported in Botswana.¹⁵ Such stigmatisation caused by hatred-fueled social attitudes increases levels of discrimination and consequently makes the work of LGBTI+ defenders and activists all the more difficult.¹⁶ The pandemic and its ongoing consequences highlighted deep-set issues regarding the rights of LGBTI+ people across the world and *“the impact of neglect of responsibilities by or violence at the hands of law enforcement and other state agents.”*¹⁷

¹¹ Mawira, E., Walters, M. (2020). Hate Crimes against the LGBT Community in the Commonwealth: A Situational Analysis. Equality & Justice Alliance. London.

¹² Müller, A., Daskilewicz, K., The Southern and East African Research Collective on Health (2019). ‘Are we doing alright? Realities of violence, mental health, and access to healthcare related to sexual orientation and gender identity and expression in Kenya: Research report based on a community-led study in nine countries’. Amsterdam: COC Netherlands. Cited by Mawira, E. & Walters, M. (2020).

¹³ United Nations Office of the High Commissioner on Human Rights (2020). Statement by Victor Madrigal-Borloz, UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity at the 75th UN General Assembly. Available from: <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=26448&LangID=E>

¹⁴ A tripartite coalition made up of the Christian council, Catholic Secretariat, Catholic Bishops Conference, Ghana Pentecostal and Charismatic Council, the Muslim community and traditional rulers

¹⁵ Kaleidoscope Trust (2020). LGBTI+ in the Commonwealth in the COVID-19 Era. Available from: <https://www.commonwealth-covid19.com/>

¹⁶ Amnesty International UK and the Centre for Applied Human Rights (CAHR) et al. (2021) On the Human Rights Frontline. How the UK government can defend the defenders. London, 10 February 2021, p. 8

¹⁷ Ibid

Discriminatory laws still active today and how they have regulated sexual orientation and gender identity in the Commonwealth.

Despite the obligations arising from the Commonwealth Charter and 2018 CHOGM Communique, 32 Commonwealth countries retain criminal laws prohibiting consensual sexual activity between adults of the same sex. Such laws often use terms such as sodomy, buggery, “carnal knowledge or intercourse against nature”, vagrancy¹⁸ or acts against nature, morality or public decency. Even where such explicit legislation does not exist, trans and gender-diverse people are often targeted because of their real or imputed gender expression, which is misunderstood as implying their sexual orientation, and disproportionately impacted by bans on same-sex sexual acts.¹⁹ Today, there are many countries where homophobic laws are still active (see detailed table separately annexed to this paper):

Colonial laws regulating sexual orientation and gender identity can be repealed.

Criminalising laws throughout the Commonwealth imposed during colonial rule have greatly altered the way sexuality is perceived and expressed. This has helped fuel the pervasive homophobia and discrimination that LGBTI+ communities face both at an institutional state level and a wider societal level. However, largely through LGBTI+ advocacy, a number of these criminalising laws have been repealed through legal reform or the courts and the inequities they underpin reformed.

¹⁸ “Vagrancy” laws do not target same-sex sexual acts directly. Such laws criminalise a broad and vague range of public behaviours deemed undesirable by state authorities, including “loitering” and being “idle” or “disorderly”, and are disproportionately used against LGBTI people, particularly trans and gender diverse people, sex workers, informal workers and other economically marginalised groups. See Human Dignity Trust, *Injustice Exposed: The criminalisation of trans people and its impacts* (2019)

¹⁹ Botha, K. (2021). *Our identities under arrest: A global overview on the enforcement of laws criminalising consensual same-sex sexual acts between adults and diverse gender expressions*. ILGA World

In recent decades, progress to this end has been made in many Commonwealth countries, which should be celebrated. Notably, the 1996 South African constitution was the first in the world to safeguard sexual orientation as a human right and, in the past ten years alone, a number of Commonwealth member states have made progress in removing criminalising colonial-era laws and filling gaps in legal equality.

Since the start of 2018, national courts have struck down laws that disproportionately criminalise LGBTI+ people in four Commonwealth countries – Botswana, Guyana, India and Trinidad and Tobago – and upheld an earlier positive court ruling on decriminalisation in Belize. A constitutional challenge to the “sodomy law” in Mauritius and numerous legal challenges taking place in the countries of the Eastern Caribbean region have already and may bring further positive change in the near future. As our case studies on Botswana and Jamaica demonstrate, advocacy, research and litigation by LGBTI+ activists and organisations played a significant role in achieving these changes.

More particularly, in a significant victory for LGBTI+ rights in Africa, the High Court of Botswana ruled in June 2019 that colonial-era laws which criminalise same-sex sexual relations were unconstitutional in *Letsweletse Motshidiemang v. Attorney General*. The judges held that the criminalisation of same-sex relations was discriminatory and violated the rights to liberty, privacy and dignity. The judgement further affirmed that the constitution should be interpreted to include a prohibition on discrimination on the grounds of sexual orientation. The Court of Appeal upheld this judgement in November 2021, noting evidence of a “progressive change in attitudes towards the gay community” in Botswana and that the criminalisation of same-sex relations served “only to stigmatise gay men unnecessarily”. In its decision, the Court of Appeal did not make a ruling concerning Section 167 of Botswana’s Penal Code, which criminalises “gross indecency”, because the claimant did not include this section in their claim. “Gross indecency” is a broad offence which can include displays of intimacy between people of the same sex.

In Jamaica, the country's colonial-era Offences Against the Person Act (1864) had criminalised both consensual and non-consensual sex between men. In February 2021, the Inter-American Commission on Human Rights published its decision in the case of Gareth Henry & Simone Carline Edwards v. Jamaica. The case was initiated in 2011 by Gareth Henry, a gay man and former head of J-FLAG who later sought refuge in Canada, and Simone Edwards, a lesbian woman who obtained asylum in the Netherlands. Both claimants argued that provisions of the Offences Against the Person Act violated their rights and legitimised discrimination and violence towards LGBTI+ people in Jamaica. The Commission found in favour of the claimants, concluding that Jamaica had violated the principle of equality and non-discrimination and the right to privacy.

This is the first ever decision of the Commission to find that laws criminalising LGBTI+ people violate international law. The Commission held that, by maintaining the Offences Against the Person Act, Jamaica contributed to the perpetration of violent attacks against the claimants, and so was further responsible for violations of the right to humane treatment and freedom of movement and residence. The Commission recommended that Jamaica repeal the relevant sections of the Offences Against the Persons Act and prohibit and punish discrimination on the basis of sexual orientation, gender identity or expression, and bodily diversity. It also recommended that Jamaica collect disaggregated data on violence and discrimination against LGBTI people, conduct training for public officials and provide LGBTI+-inclusive educational programs, including sex education in schools.

These examples not only mark the importance of LGBTI+ advocacy but also how this recognition opens up possibilities for individuals to live freely and openly. Progress is being made towards a world where the rights of all members of the LGBTI+ community are fully recognised. But in order to truly get there, the only pathway forward is for Commonwealth countries to fully decriminalise LGBTI+ sexualities and identities and enact and implement protective legislation and policy. The enormous work that is being done by LGBTI+ organisations, activists and movements is a bright example of how change is possible.