



THE ROYAL COMMONWEALTH SOCIETY

A COMMONWEALTH TOOLKIT FOR POLICY PROGRESS ON LGBT RIGHTS



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The Commonwealth
Equality Network

Kaleidoscope Trust

ABOUT THIS REPORT

This report brings together the second phase of research carried out by the Royal Commonwealth Society and the Kaleidoscope Trust which maps LGBT rights in the Commonwealth as well as views expressed by a broad range of Commonwealth diplomats in an ongoing series of discussions. The report presents a range of good practice in policies, laws and judgments drawn from all regions of the Commonwealth. The aim is to show how Commonwealth governments have made progress on LGBT rights and present experience that other Commonwealth governments can adapt to their own contexts. This report has been written by Lewis Brooks, Policy and Research Manager at the Royal Commonwealth Society (RCS) and Felicity Daly Dr.PH, Executive Director of the Kaleidoscope Trust. The authors are grateful for the input and support on this document from colleagues at the RCS and the Kaleidoscope Trust as well as the following people: Caleb Orozco, Rosanna Flamer-Caldera, Joleen Mataele, Jonah Chinga, Alex Cisneros and Jacob Thomas. A particular thank you is due to Alistair Stewart who played a key role in compiling much of the research published in this report. The Royal Commonwealth Society, the Kaleidoscope Trust and the Commonwealth Equality Network welcomes comments on this report. Please use the contact details shown on the back cover.

ABOUT THE ROYAL COMMONWEALTH SOCIETY

The Royal Commonwealth Society (RCS) is an international network of individuals and organisations committed to improving the lives and prospects of Commonwealth citizens across the world. The RCS engages with its educational, civil society, business and governmental networks, championing human rights and democracy and promoting youth education and empowerment. Founded in 1868, the Society is constituted by Royal Charter and as a charity. It is non-partisan, is independent of governments and is supported by public generosity.

ABOUT THE KALEIDOSCOPE TRUST

The Kaleidoscope Trust works to uphold the human rights of lesbian, gay, bisexual and trans people internationally by listening to, amplifying and communicating their voices to a wider audience, and by standing with them in persuading public and political opinion of the need for an end to all discrimination based on sexual orientation and gender identity. We work with activists and organisations around the world to advance the belief that the rights of all people should be respected equally, regardless of their sexual orientation or gender identity.

ABOUT THE COMMONWEALTH EQUALITY NETWORK

Established in 2013, The Commonwealth Equality Network is a network of Commonwealth civil society organisations working to challenge inequality in the Commonwealth, based on sexual orientation and gender identity. The Network was set up with the aim of giving a voice to LGBTI communities across the Commonwealth and to support joint advocacy in identifying a Commonwealth solution to a Commonwealth problem. Much like the Commonwealth itself, the membership of the Network is dominated by organisations in low and middle-income countries, in particular sub Saharan Africa.

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EXECUTIVE SUMMARY

Across the Commonwealth incremental gains are being made in the struggle for equal rights for Lesbian, Gay, Bisexual and Trans (LGBT)¹ citizens. In many countries governments and civil society have quietly expanded progress through areas of policy enacted by executive, legislative and judicial branches of government. While 40 of the 53 Commonwealth members still criminalise consensual same sex relations between adults and few countries have laws that recognise the gender identity of trans people or protect their rights, this toolkit presents the progress that has been made, as a pool of experience that can be learned from. This progress includes:

- Non-discrimination on the basis of sexual orientation in employment law in countries as diverse as Botswana, Seychelles, Samoa and Saint Lucia
- Repeal of colonial-era bans on consensual same sex relations between adults, most recently occurring in Mozambique
- Supreme court judgments upholding the rights of 'third gender' groups such as Hijras and Kothis in India and Pakistan
- The formation of a Consultative Council of LGBT organisations to advise the Government of Malta on areas of policy and legislation
- Anti-homophobic bullying campaigns conducted by civil society and the Jamaican Ministry of Education
- Specific constitutional protections against discrimination on the grounds of 'sexual orientation' in South Africa; with Fiji and Malta also including 'gender identity' as a protected characteristic in their constitutions.

With a reputation for being a network that supports respectful dialogue and the exchange of policy expertise, the Commonwealth is well placed to facilitate learning from this experience. Governments should be able to use the Commonwealth in a number of ways to support their attempts to build equality for all their citizens by:

- 1 Requesting from the Commonwealth Secretariat support for legislative drafting, technical assistance and strengthening institutions from women's machineries to human rights institutions.
- 2 Accessing the professional expertise of Commonwealth accredited and associated organisations on areas as diverse as law, parliamentary procedure and health.
- 3 Engaging with civil society to help shape societal debates and turn to domestic LGBT groups in particular to understand their needs and gain support in policy design and implementation.
- 4 Building knowledge-exchange between fellow Commonwealth members to learn from their experience and use their expertise of policy making in this area.

INTRODUCTION

The Commonwealth, a diverse network of 53 states, provides a unique opportunity to share and explore new ways of making progress on the rights of Lesbian, Gay, Bisexual and Trans (LGBT) citizens. This network contains different experiences and approaches to achieving progress, yet due to similar language, history, culture; and the shared values of democracy, human rights and the rule of law, these efforts provide us with a wealth of learning to draw from. This 'Commonwealth Approach' to advancing the rights of LGBT people has been articulated by the Royal Commonwealth Society and the Kaleidoscope Trust in the first paper in this series: *Collaboration and Consensus: Building a Constructive Commonwealth Approach to LGBT Rights*². This second paper draws on this approach and seeks to provide a toolkit of promising practice and exemplary policies undertaken by the legislative, executive and judicial branches of governments in member states to advance the rights of LGBT citizens.

The challenges faced by Lesbian, Gay, Bisexual and Trans (LGBT) citizens across the Commonwealth have been well documented. Attention has often focused on the worst cases of discrimination and persecution against LGBT citizens and condemnation from Western political leaders. While a spotlight on persecution is warranted an exclusive focus on worst cases has obscured progress being made on the rights of LGBT people around the Commonwealth.

Across the Commonwealth policy progress is being made as legislators, judges and politicians make progressive decisions to protect minorities, reform outdated laws and unlock inclusive development. Mozambique recently became the latest Commonwealth country to decriminalise same sex relationships. As part of the modernisation of its penal code legislators opted to remove provisions left over by Portuguese colonialists. Meanwhile, Malta has passed a new law described by some as 'setting a new benchmark' on legal provisions concerning gender identity³. The new law provides simplified processes for gender recognition based on a person's own identity. It is important to note that the sheer scale of discrimination against people based on sexual orientation and gender identity and expression in various forms across the Commonwealth is immense. It is important to acknowledge the real challenges that LGBT citizens in all countries continue to face, yet also find ways of highlighting and practically supporting progress where possible. Existing policy progress in all regions of the Commonwealth such as the legislative changes mentioned above can provide a range of examples which policy makers in any member-state can learn from, adapt and transfer to their own countries and contexts.

This paper is by no means a comprehensive overview of the continued discrimination and violence faced by LGBT people in the Commonwealth as this experience has been well documented elsewhere including the Kaleidoscope Trust's report *Speaking Out 2015: The Rights of LGBTI People Across the Commonwealth*⁴. The need for the progress-orientated toolkit contained in this report is twofold. Firstly, it serves to highlight the progressive actions taken by governments across the Commonwealth and move beyond the idea of a polarised Commonwealth on this issue. Secondly, it provides a range of examples of promising practice drawn from a variety of countries and contexts and from every region of the Commonwealth, which can be learned from. This paper does not suggest a simple line of development to be followed but draws on existing policies to show how different countries have advanced the rights of their citizens in ways that reflect their own cultural and political situations.

The report explores a range of policies which advance and protect the rights of LGBT citizens. The report is structured to group policies together depending on whether they were made by legislative, judicial or executive branches of government. Finally, this paper examines the three countries in the Commonwealth which specifically and positively acknowledge sexual orientation or gender identity in their Constitutions.

LAWS FROM COMMONWEALTH LEGISLATURES

The legislative branch of government provides the most concrete way of creating policy change in most societies. By passing new laws and reforming out of date legal codes parliaments and assemblies can establish exactly the state's policy towards its citizens and take steps to ensure that other actors within society interact appropriately. National legislatures have exhibited a variety of approaches to protecting LGBT citizens and other minority groups and ensuring they have equal rights in society. While some countries have taken a somewhat linear approach from decriminalisation to enacting hate-crime laws others have simply looked to include LGBT citizens in general anti-discrimination provisions. This section examines a range of laws from Commonwealth countries which have sought to advance the rights of LGBT citizens.

Decriminalisation of Consensual, Adult, Same sex relationships

40 of the 53 Commonwealth countries criminalise consensual sexual acts between same sex adults in some way. Many of these laws are direct copies, or expanded from, laws imposed on colonies by the British Empire⁵. Countries in the Commonwealth repealed these laws for a variety of reasons, but there appears to be a dual imperative of needing to remove laws criminalising consensual acts between adults as well as banishing legal relics left over from the days of Empire. The most direct way of removing these laws is simply to repeal them. In some cases this has taken place following court decisions invalidating criminalising laws. The UK, Canada and Cyprus are some of the countries that have gone down this route. Last year Mozambique became the latest country to decriminalise consensual same sex acts between adults when its National Assembly amended the Penal Code to remove the vague Portuguese-colonial provisions which could be used to criminalise same sex activity⁶.

The repeal of criminalising laws has often been accompanied by further consolidation and clarification of sexual offences laws to ensure they are focused on victim protection. One notable example of this is in Lesotho's 2012 review of the Penal Code. This effectively decriminalised consensual, adult, same sex relations by replacing all common law offences without reference to anti-sodomy offences. The new penal code effectively replaced the old common law crime of sodomy with more modern and better defined sexual offences that targeted non-consensual acts against minors/children rather than consenting adults. The Penal Code and its accompanying guidelines quietly removed the likelihood of prosecutions against consenting adults and strengthened legal protections for victims of abuse⁷. Although there is still an undesirable inequality in the age of consent for heterosexual and homosexual activity, Bahamas has also decriminalised consensual, same sex relations between adults by updating sexual offences laws in 1991 while increasing the penalties for abuse of minors⁸.

Some countries have taken a more local approach to decriminalisation. In Australia repeal of the colonial-era laws occurred at the level of state legislatures. From the 1970s state and territory legislatures began decriminalising consensual same sex activities between adult males. When the Tasmania legislature failed to change its laws, activists appealed to the United Nations Human Rights Council which famously ruled that Australia was in breach of the International Covenant on Civil and Political Rights, setting an international precedent. Federal and Tasmanian-state level law reform followed⁹. This shows that while legislatures are often the leading political actors in improving rights of LGBT citizens this is sometimes not without judicial, executive and international intervention.

Anti-discrimination Laws

Anti-discrimination legislative provisions are among the most common ways of protecting minority rights in Commonwealth countries. Examples are usually parts of two main types of legislation: human rights and employment laws. These policies often list numerous grounds for protection from discrimination including characteristics such as race, religion, ethnicity, age, disability status and in the examples below, sexual orientation and gender identity. Employment laws are one of the most common vehicles for anti-discrimination provisions. The International Labour Organization notes that many private companies and businesses understand the business logic of open recruitment policies free of discrimination in order to attract the best staff¹⁰. Meanwhile numerous governments are ensuring that sexual orientation is not a basis for discrimination or unfair dismissal from employment.

In the Commonwealth there is a particular trend in employment laws protecting people on the basis of sexual orientation. General provisions banning discrimination in employment on the basis of sexual orientation can be found in countries such as Samoa, Mauritius, Mozambique, South Africa, Cyprus, Australia, Malta and the UK. Botswana's Employment Law was amended in 2010 to prohibit termination of contracts on the basis of health status and sexual orientation¹¹, a provision also found in Saint Lucia's labour code of 2006¹². In the Seychelles, a 2006 amendment to the 1995 Employment Act contains provisions to compel Chief Executives to investigate any discrimination in the workplace¹³ and the Mozambique Labour Law from 2007 protects the right to privacy for employees and the right to equal work¹⁴. Australia, Malta and the UK also have employment law provisions protecting people on the basis of gender identity or transgender/reassignment status.

Another route to enshrining anti-discrimination provisions in law is using specific human rights legislation. Canada and New Zealand, in their national human rights acts, include sexual orientation as a prohibited ground for discrimination. At the provincial level in Canada many human rights laws also include gender identity as a prohibited ground for discrimination. Many countries combine human rights and employment provisions on anti-discrimination in the same Act outlawing discrimination in a range of areas of public life. Australia's two Same sex Relationships Acts of 2008 amended numerous previous laws to prevent discrimination on the basis of family or relationship status. This affected areas as diverse as tax, immigration, care for the aged and veterans' affairs¹⁵. Meanwhile, The Sex Discrimination Amendment Act 2013 amended a previous version of the act to prohibit discrimination on grounds of sexual orientation, gender identity, intersex status and relationship status¹⁶. South Africa was the first of three Commonwealth countries to enact specific constitutional prohibitions of discrimination on the basis of sexual orientation with Malta and Fiji also prohibiting discrimination on the grounds of gender identity.

Hate-crime and Anti-harassment Legislation

In addition to laws specifically prohibiting discrimination on the basis of sexual orientation and in some cases gender identity and intersex status, a few states have enacted laws banning the incitement of hatred or violence or laws prohibiting harassment against citizens on the grounds of sexual orientation and gender identity.

South Africa's 2000 Promotion of Equality and Prevention of Unfair Discrimination Act, the Seychelles Employment Act and the UK's 2010 Equality Act all protect people from harassment on the basis of their sexual orientation. The Equality Act also includes protection for anyone who "is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex"¹⁷.

Cyprus, Malta and Canada's criminal codes all contain provisions outlawing the incitement of hatred and violence on the basis of sexual orientation and gender identity. The Canadian criminal code is particularly interesting in that it includes any group identified by their sex or sexual orientation as a potential victim of genocide, the promotion or advocacy of which carries a prison sentence of up to 5 years¹⁸.

Laws Governing Gender Identity, Expression and Recognition of Diversity

The legal framework for the rights to self-defined gender identity is among the most complex of all areas of legislation. While no country has attained an ideal situation, Malta has achieved what has been described by trans activists as one of the most progressive pieces of legislation world-wide¹⁹ in the 2015 Gender Identity, Gender Expression and Sex Characteristics Act. One of its central pillars is to allow any Maltese resident to change their gender based on their own self-determination and without the need for medical certification or intervention. While other countries, such as the UK and Australia, also have legislative provisions covering a change of legally recognised sex or gender they often require medical certification or intervention. As a recent UK Parliamentary report by the Women and Equalities Committee argued, this model is outdated as it does not allow for self-determined gender²⁰. For example the UK's 2004 Gender Recognition Act medicalises identity in line with one's bodily characteristics rather than one's sense of self. The Committee also criticised the UK legislation for focusing on binary notions of male and female and change from one to the other, rather than having broader notions of gender identity including non-binary identities. As discussed elsewhere in this paper, recognition of 'third gender' identities constitutes an alternate model implemented in various policy areas in New Zealand, Australia and Bangladesh.

Equal Partnership and the Right to a Family Life

Laws around same sex partnership and the state's recognition of it have tended to be one of the most contentious issues as the rights of LGB citizens advance. In many settings LGBT communities remain mainly concerned with achieving their basic civil and political rights as well as economic and social rights rather than proposing legal same sex partnerships. Some Commonwealth countries have aggressively legislated to close down opportunities for equal recognition of partnership (particularly marriage) for same sex couples. However, a number of countries have passed laws to equalise family rights. South Africa equalised access to adoption in 2005²¹. New Zealand has also equalised adoption rules which were brought in as part of the 2013 Marriage (Definition of Marriage) Amendment Act which provided for same sex marriages²². As in the UK, the right to equal marriage was legislated on after a previous form of civil union. In South Africa the 2006 Civil Union Act²³ allows same and different sex couples the equal right to become married and chose whether they wish to describe it as a marriage or a civil union. In the UK however, heterosexual couples have unsuccessfully tried to lobby government to allow them to enter civil unions²⁴. Same sex marriage has raised concerns about the interaction between freedom of religion and right to a family life and marriage. The UK government sought to navigate this by ensuring that religious organisations could opt in to conducting same sex marriages yet *neither* a religious organisation nor an individual minister could be forced to conduct a same sex marriage²⁵.

JUDGMENTS FROM COMMONWEALTH JUDICIARIES

The judicial branch of governments have a key role in law in interpreting legislation and acting as a check and balance on unconstitutional actions by individuals and other branches of government. Where legislators have failed to decriminalise same sex relationships or codify protection of minority groups from discrimination and harassment, instead citizens and civil society have looked to the judicial branches of Commonwealth governments. Local, national, regional and even international courts and tribunals have handed down decisions which advance the rights of LGBT citizens. While not all petitions for the advancement of LGBT rights in Commonwealth countries have been successful, there are many examples of success which are discussed below.

Decriminalisation

Attempts to have courts strike down laws that criminalise same sex relationships have usually focused on either invoking articles of national constitutions in domestic courts or utilising regional courts. Perhaps the most famous decision which has impacted legislation was by a body that was not a court at all. In 1994 the United Nations Human Rights Committee responded to a case brought by activist Nicholas Toonen by declaring that Australia was in breach of Articles 17 and 26 of the International Covenant on Civil and Political Rights, as Tasmania's anti-sodomy laws violated Mr Toonen's right to privacy and equality before the law. Subsequently the federal government passed a law legalising sexual activity between consenting adults. Prior to this decision the European Court of Human Rights decided in 1981 that Northern Ireland's continued criminalisation of homosexual acts breached Article 8 of the European Convention on Human Rights which also guaranteed the right to privacy.

Since these two legal landmarks in Australia and the UK, many legal battles in Commonwealth countries have been fought at both the national and local level. One exception is the ongoing case of Gareth Henry Vs Jamaica whereby Mr Henry has taken his case to the regional Inter-American Commission on Human Rights alleging, amongst other matters, that the Jamaican state is not protecting his right to life and humane treatment. While any declaration will not be legally binding on Jamaica, such a pronouncement by the Commission will carry political and moral weight, which it is hoped, could encourage policy change²⁶. Domestically, three other cases in the Commonwealth are noteworthy. The first took place in South Africa in 1998. The Supreme Court struck down several laws from the apartheid-era which targeted consenting adults of the same sex including restrictions on how they should behave at social parties. The court ruled that these were incompatible with the provisional constitution of 1994 and the African National Congress (ANC) Government did not oppose this²⁷.

In India the judiciary has debated the constitutionality of colonial-era provisions in the penal code. In 2009 the Delhi High Court struck down Section 377 of the penal code, which criminalised consensual sex in private, on the grounds that this violated Articles 21, 14 and 15 of the Indian Constitution which guarantee the right to personal liberty, equality and protection from discrimination. Crucially, the court also held that Section 377 would continue to outlaw non-consensual sexual activity as well as that involving minors thereby ensuring that victims are protected from sexual abuse until a more robust piece of legislation could be passed by the legislature²⁸. The Supreme Court of India subsequently struck down the Delhi High Court's judgment, however in February 2016 activists successfully petitioned the Supreme Court to reconsider. A five judge bench of the Supreme Court will reconsider the issue, presided over by the Chief Justice of India²⁹.

Meanwhile in Belize a similar case has been brought by Belizean citizen, Mr. Caleb Orozco, who is seeking to have the criminalisation of consensual sex between adult men struck down as a violation of his constitutional rights to human dignity, privacy, equality before the law and health. Similar to the Indian case, Mr Orozco

and the interested parties, including the Commonwealth Lawyers Association, are arguing for the court to retain section 53 of the criminal code in order that it continues to criminalise non-consensual sex with a male or sex with an animal, which are not currently covered under other provisions of the Criminal Code³⁰. Although a judgment has not yet been handed down from the Supreme Court of Belize, the case has opened up a broader debate on the rights of LGBT Belizeans which has led to the positive inclusion of sexual orientation in the Government's gender policy (see later in this report) and improved attitudes towards LGBT citizens³¹.

Challenging Persecution

In addition to ongoing cases surrounding the decriminalisation of consensual same sex acts, one of the most high-profile cases globally took place in Uganda. Following the exceptionally controversial passing of the Anti-Homosexuality Act 2014, a coalition of lawyers, MPs, journalists and activists challenged the Act in the Constitutional Court. The Court declared the Act null and void on the basis that it had not been passed with a quorate number of MPs as required by the Constitution³². While some have speculated that this judgment was the result of pressure by international aid donors³³, the case was not the first time the Ugandan judiciary has upheld constitutional rights and due process in the face of discrimination from Ugandan politicians. In 2011 the High Court ordered an injunction against the Rolling Stone newspaper, holding that its publication of the personal details of various LGBT citizens violated their constitutional rights to dignity and privacy³⁴. While never in fact decriminalising consensual same sex acts between adults, the Ugandan judiciary has acted as a check on extreme persecution by private individuals, organisations and the state.

Recognition of the right to Gender Identity and Expression

In addition to protecting the rights of citizens from discrimination on the basis of sexual orientation, judiciaries in several Commonwealth countries have handed down judgments acknowledging and protecting the right to gender identity and/or expression for trans persons, including the establishment of recognition of a third gender. The Supreme Courts of India and Pakistan have both taken this approach. In 2009 the Supreme Court of Pakistan ordered that 'eunuchs' be given national identity cards and asserted that they were entitled to the same constitutional rights as any citizen of Pakistan³⁵. It also reprimanded the police and authorities for not doing more to protect and communicate with this group. In 2014 the Indian Supreme Court made a similar decision outlining a 'third gender' based on cultural understandings of Hijra and Kothi identities, as well as other trans persons, and upholding the right of Indian citizens to determine their gender. It also compelled state authorities to do more to provide a range of welfare services for third gender citizens³⁶.

Courts have also passed judgments to challenge discriminatory laws in a similar check on the power of other branches of government as the Ugandan Constitutional Court was in 2014. In Malaysia the Putrajaya Court of Appeal temporarily struck down a regional Sharia law prohibition of 'any male person who in any public place wears a woman's attire or poses as a woman' on the grounds that it was unconstitutional. The Court found that the ban was unconstitutional as it violated the transgender appellants' rights to live with dignity, earn a livelihood, and directly affected their freedom of movement, expression, and equal protection under the law³⁷. This decision was regretfully reversed on procedural grounds a year later³⁸. Meanwhile in Kenya in July 2014 the High Court ruled that the Kenyan Non-Governmental Organizations Co-ordination Board acted unconstitutionally in banning the Transgender Education and Advocacy (TEA) organisation from registering with the government. The court found that Article 27(4) of the Kenyan Constitution which prohibits discrimination protected the organisation from discrimination on the basis of sex or gender³⁹. New Zealand has prohibited discrimination on the grounds of gender identity by interpreting the protected characteristic 'sex' broadly, to ensure that transgender people are not deprived of protection under the New Zealand Human Rights Act⁴⁰.

Civil Society Protection

Civil society (whether professional associations, community organisations or religious groups) can play a key part in supporting government in protecting and providing for their citizens and informing policy. The judiciary has played a role in several countries in ensuring that civil society groups have the right to assemble. In addition to upholding the right of TEA to be legally registered with the government, in the case of the National Gay and Lesbian Human Rights Commission, the High Court of Kenya found that Article 36 of the Kenyan Constitution “includes all persons living within the republic of Kenya despite their sexual orientation”, and thus guaranteed the right of the petitioner to form an association⁴¹. The High Court of Botswana has previously upheld Article 13 of the Botswana Constitution, which protects the right to freedom of assembly and association, when it ordered the government to register the Lesbians, Gays and Bisexuals of Botswana (LEGABIBO)⁴². Both judgments uphold the constitutional rights of all citizens regardless of sexual orientation or gender identity and provides legal recourse for communities. Governments are thereby held accountable and in addition have the opportunity to partner expert organisations to address LGBT issues together.

In the USA one civil society body from a Commonwealth country has taken the unique legal step of protecting itself from persecution. Ugandan NGO Sexual Minorities Uganda (SMUG) is using an obscure piece of American legislation called the Alien Tort Statute⁴³ to open up a federal court case against U.S. based, ‘anti-gay extremist’, Scott Lively for his alleged role in the persecution of LGBT people in Uganda. So far the case has passed the first legal hurdles and SMUG are seeking a judgment declaring Mr Lively’s actions illegal, together with compensatory and punitive damages for violations of their fundamental rights⁴⁴. If the judgment is passed it could potentially act as a legal deterrent to other American citizens who promote homophobia and discrimination across the world, including in Commonwealth countries.

POLICIES FROM COMMONWEALTH EXECUTIVES

The executive branch of government forms one of the most crucial roles in bringing about policy change on any issue. Ministers and civil servants act as the implementers for judgments handed down and legislation passed by the other branches of government. Prime Ministers and Presidents have a leadership role to play in shaping domestic and international debate. In the Westminster political system, which many Commonwealth states have replicated in some way, Ministers are also often drawn from the largest political party in the legislature, thereby giving them a key role in proposing and pushing legislative change. The executive branch of government therefore has substantial discretion in many cases as to how to implement policy and run government services. In all these areas various Commonwealth governments have used these powers to advance the rights of LGBT citizens in some way.

Showing Societal Leadership

Prime Ministers and Presidents are the focal points of political attention in their countries. They are political leaders holding the highest office. In addition to demonstrating political leadership in forging new policies, Heads of Government and Ministers can play a key role in impacting societal views and norms. Several governments have abused this position to foster discrimination and vilify sections of society based on misinformation, however many other Commonwealth leaders have used their voice to support inclusion within society. The previous President of Fiji used his time in office to support the UN's Free and Equal Campaign and stated that everyone needed to explore practical ways to advance LGBTI rights⁴⁵. More conservative leaders have simply stated that it is not for them to judge people based on their sexual orientation. Barbadian Prime Minister Freundel Stuart invoked Christian teaching in August 2013 to declare that at present, "it does not lie within our competence to sit in seats of judgement and to condemn those who pursue that practice"⁴⁶. Prime Minister of St Kitts and Nevis, Hon Dr Timothy Harris⁴⁷ as well the ex-Presidents of Mozambique and Botswana⁴⁸ have spoken in support of ending discrimination on the basis of sexual orientation and gender identity, particularly in order to ensure a more effective response to HIV. The Tonga Royal Family has shown support to *Fakaleiti* citizens of Tonga⁴⁹ through patronage of the annual Miss Galaxy Pageant for Leitis. In 2016 Canadian Prime Minister Justin Trudeau will become the first Canadian Prime Minister to lead Toronto's Pride March⁵⁰. Numerous other politicians across the Commonwealth have acted through speeches, press conferences and other comments to help shape a positive or non-judgemental view of their citizens regardless of sexual orientation and gender identity.

Moratoria and Declarations on Citizenship

Tangible policies that governments can enact include declarations on implementation of laws which advance progress without a legislative or judicial change in law. There are several such declarations in the Commonwealth that stand out. The first is a declaration by the government of Bangladesh on the status of the Hijra community⁵¹. In 2013 the cabinet of Prime Minister Sheikh Hasina issued a decision that Hijras would be considered as a separate gender and given legal recognition as well as education among other rights. The government was keen to stress that, "they will be referred as Hijras in both English and Bangla language. Any other translations in English is (sic) misleading", noting the importance of cultural context when referring to gender identity and expression⁵². This decision has commonalities with the Indian and Pakistani court decisions on 'third gender' communities referenced above and could be relevant to other Commonwealth countries with culturally distinct non-binary gender groups.

The second executive action of note was the creation of a moratorium on prosecution against consenting adults engaging in same sex activity in Malawi. There is a colonial-era law that bans this behaviour, however in July 2014 the Malawian Solicitor General and then Justice Secretary, Janet Chikaya Banda announced that the police had been ordered not to arrest citizens for same sex activity. In December 2015 Minister for

Justice and Constitutional Affairs, Samuel Tembenu, restated the moratorium in the aftermath of the arrest of two men for engaging in consensual same sex activity. The two men were released and charges dropped in line with this policy⁵³. At present this moratorium has been suspended while the issue is under judicial review. This demonstrates that although moratoria can be a temporary solution for governments in advancing non-prosecution of LGBT people, decriminalisation nonetheless remains a more comprehensive solution.

A more successful moratorium was implemented in response to Belize's colonial-era ban on homosexuals entering the country. In response to a legal challenge by LGBT activist, Maurice Tomlinson, the Belizean Director of immigration and the Minister of immigration have both reiterated that Belizean officials do not enforce this law and do not enquire about any visitor's sexual orientation upon entry into the country⁵⁴.

Inclusive Policy Making

While mainstream national policies on the legal status of LGBT people are some of the biggest policy changes governments can undertake, they are not the only policy approaches available. Commonwealth governments have shown innovative and inclusive policy making for example in relation to passports, welfare, gender policies and blood donation.

National and local governments in Malta and India respectively have taken particularly innovative approaches to inclusive policy making by engaging LGBT civil society in a collaborative method of consultation. In India the state government of Tamil Nadu has brought civil society and government together to support the rights of transgender Indians. The Tamil Nadu Transgender Welfare Board convened by the state Ministry of Social Welfare brings together multiple state government departments and transgender community leaders to coordinate policies and responses to the needs of transgender individuals⁵⁵. The state of Maharashtra has reportedly replicated its own board along these lines⁵⁶. The Ministry for Social Dialogue, Consumer Affairs and Civil Liberties in Malta appointed a LGBTIQ Consultative Council made up of representatives of Maltese LGBT groups to support government by providing advice and proposing legislation. The Council is a mutually beneficial innovation for governments and civil society and enables both parties to discuss more easily challenges facing either the government or LGBT people⁵⁷. These models of consultation and discussion could be of potential use to all Commonwealth governments by allowing them to better understand problems affecting LGBT citizens in their jurisdiction and culture and explore mutually beneficial solutions.

There are numerous examples of policies adopted by Commonwealth governments that are of inclusive of LGBT peoples' needs. Belize's gender policy includes as a guiding principle, 'Respect for Diversity' including of 'persons of all ages who come from diverse races, cultures, ethnicities, faiths, sexual orientations, socio-economic situations and behavioural lifestyles'⁵⁸. In 2013 the Mauritian Department of Health amended its policy to allow citizens who engage in same sex sexual activity to give blood, a crucial resource for health services in any country. While there are ongoing concerns about the extent to which this is being implemented⁵⁹, the policy change is of particular note as campaigners in countries such as the UK and Canada are still pushing for the governments to review blood donor policy to allow for similar changes. New Zealand has expanded its passport registration to include the option of declaring your gender as X to denote indeterminate or unspecified, a move that has been celebrated by transgender citizens of New Zealand⁶⁰ and one that is replicated in Australia and also parallels third gender recognition in South Asia. The Kenyan Ministry of Health's AIDS Strategic Framework includes consideration of the needs of men who have sex with men (MSM) and suggests building legal policies to prevent violence and stigma against key populations⁶¹. Similarly the National Strategic Plans on HIV for Ghana, Lesotho, Namibia and Nigeria draw attention to the human rights of MSM, even though they still criminalise same sex relations⁶². Furthermore commitments in national HIV policy in Mozambique, Rwanda, Seychelles, Swaziland and Tanzania aim to ensure MSM access to HIV prevention and treatment services⁶³ often as a result of the engagement of MSM affected by HIV in policy development.

Public Awareness and Education

In addition to inclusive policy making and leadership through statements and declarations, governments can influence public attitudes and debate through sensitisation and education campaigns for members of the public and public servants. One of the most impactful areas of training for many countries is LGBT sensitisation with the police. Numerous countries in the Caribbean including Barbados, Saint Lucia, Grenada, St Kitts and Antigua have provided police training on upholding human rights and decreasing discrimination⁶⁴. Civil society partners, including LGBT groups, have been crucial partners for police forces in delivering this training. In Antigua and Barbuda police officers who have undergone this training have been stationed where violence against LGBT people has been most highly reported⁶⁵. Saint Kitts and Nevis Assistant Police Commissioner, Vaughn Henderson, commended the training in the following way, "I think it is timely and I think that education brings a deeper understanding for people of different, beliefs, different culture and different sexual orientation"⁶⁶.

While Jamaica often hits the headlines for the wrong reasons, given the prevalence of homophobic attitudes in society, government departments have taken action. The Ministry of Education initiated programmes to address homophobic bullying in schools while the Ministry of Health has worked with LGBT groups such as J-FLAG to sensitise health-care providers about issues specific to LGBT people. Malta has also turned to LGBT groups to combat homophobic and transphobic bullying⁶⁷.

Open Military Service

A number of Commonwealth countries have previously had specific prohibitions in place on LGBT citizens openly serving in their armed forces, however after much consultation these military orders have been repealed by several Ministries of Defence. The Australian Military took such action in 1992 after a decision by the Cabinet, as did the Canadian Forces (also in 1992) after they failed to maintain a legal argument in defence of the ban in a court challenge brought against it. The UK also had to respond to a legal challenge in 2000, from the European Court of Human Rights, which repealed the ban. The Ministry of Defence anticipated this decision and had made preparations including a new Social Code of Conduct, a letter from the Chief of the Defence Staff to all service chiefs and a pack explaining the policy⁶⁸. Meanwhile the South African National Defence Force (SANDF) has had anti-discrimination provisions in place since 1996⁶⁹ and in 2002 the SANDF extended spousal medical and pension benefits to life-partners before same sex marriage was legal in South Africa from 2006. The SANDF's push for LGBT inclusion has been part of a broader post-Apartheid push for equality and affirmative action within the forces and supported by a Directorate and an Advisory Board within the Ministry of Defence⁷⁰.

Responding to domestic pressure on the U.S. Armed Forces to repeal their ban on open service by LGBT people, Secretary of Defence Robert Gates commissioned a study which examined policies which allow LGBT people to openly serve in the military in several Commonwealth countries including Australia, Canada and the UK. The study found there had been no significant change to military performance, recruitment or retention and noted that, 'some commanders and serving personnel told us that the policy change had improved unit performance because gay personnel could now devote their full attention to their jobs rather than living under the threat of losing their jobs and having to monitor what they said and how they behaved'⁷¹. These findings support a rights based argument for advancing LGBT employees ability to work openly and also suggests there is a benefit to performance of the personnel and organisations involved⁷².

Diplomacy

International leadership is an area in which the executive branch of government can also support progress on LGBT rights. Diplomatic missions can support local civil society, spearhead multilateral initiatives and speak out on rights violations and progress. In the Commonwealth diplomats have supported dialogue on LGBT rights in inter-governmental and civil society-opened spaces in contrast to public condemnations issued by some Commonwealth leaders. Commonwealth countries have also broached LGBT rights in numerous other fora including the Organisation of American States and the African Union both of which have condemned violence on the grounds of sexual orientation. The Commonwealth members' record on voting in the UN is, however, rather mixed. In successive votes and statements in the UN Human Rights Council there has been a roughly equal push for and against LGBT rights from Commonwealth members. South Africa has played one of the most progressive roles in introducing the 2011 UNHRC resolution on sexual orientation and gender identity. Rwanda, Fiji and Sierra Leone have also shifted to a progressive stance by signing a statement on sexual orientation in 2011, joining 13 other Commonwealth members who had already signed the statement. Commonwealth members performed much better in voting against Russia's move to end UN staff benefits to same sex couples with 18 voting against, 14 abstaining and only 9 members supporting Russia. Ultimately, diplomacy is dialogue and a forum like the Commonwealth should be able to excel in this respect. Unfortunately despite some positive results on LGBT rights in the diplomatic field, too often such efforts involving Commonwealth countries are characterised by attempts either to defend discriminatory laws and practices or to reprimand these countries

CONSTITUTIONAL PROTECTION FOR LGBT CITIZENS

The strongest statement of support for LGBT that can be enshrined in law is the protection afforded by a country's constitution. Most written constitutions include articles detailing the fundamental rights of all their citizens which overrides any other law, policy or action in terms of its legal status. Three countries in the Commonwealth have specifically protected their citizens' rights irrespective of sexual orientation in their constitutions with South Africa becoming the first country in the world to do so in 1996. In other countries courts have interpreted non-specific provisions in their constitutions as binding policy makers to uphold the rights of *all* their citizens regardless of sexual orientation or gender identity. This has been the case even where constitutions do not specifically refer to sexual orientation or gender identity.

Specific Provisions on Sexual Orientation and Gender Identity

Three Commonwealth members afford constitutional protection to their citizens in their written constitutions with specific reference to sexual orientation and two include specific reference also to gender identity. The ANC included a prohibition of discrimination on the grounds of sexual orientation in the South African constitution of 1996. Fiji became the second country in the world when it followed suit with its constitution of 1997⁷³, this was later abolished but the provision returned in the 2013 constitution along with a prohibition against discrimination on the grounds of gender identity. Malta became the third commonwealth member to protect LGBT citizens explicitly in its constitution with a 2014 amendment that guarantees the rights of the constitution to every person whatever their sex, sexual orientation or gender identity among other grounds.

Interpretation of Fundamental Rights

The importance of having constitutional protection for all citizens has been most apparent in providing guidance to courts when interpreting other areas of government law or policy. In South Africa this was demonstrated by the Supreme Court which struck down several apartheid-era laws which targeted activity between consenting adults of the same sex, ruling that they were incompatible with the new constitution. In Kenya the High Court has invoked anti-discrimination clauses (Article 27) in the constitution covering one's 'sex' to protect the Transgender Education and Advocacy organisation's right to be registered with the government.

While non-discrimination provisions assist with reinforcing the rights of LGBT citizens, courts in several Commonwealth countries have handed down judgments based on the principle that constitutional rights apply to *all* citizens of a country regardless of specific non-discrimination provisions. The upholding of third gender rights in India and Pakistan is based on the judgments of their respective Supreme Courts that held that constitutional rights apply to all citizens. The Putrajaya Court of Appeal in Malaysia temporarily struck down a Sharia law ban on 'cross dressing' for violating the rights of transgender citizens. In Kenya and Botswana the High Courts specifically upheld the right to form associations regardless of sexual orientation invoking Articles 36 and 13 respectively. In Uganda in 2011 the High Court granted an injunction against Red Pepper magazine for 'outing' LGBT Ugandans, upholding the rights of those appearing in the magazine to dignity and privacy. These judgments from numerous Commonwealth courts show a determination by judiciaries to ensure that constitutional rights are upheld for all citizens regardless of their sexual orientation or gender identity and expression⁷⁴.

UTILISING THIS TOOLKIT IN POLICY MAKING

Within the Commonwealth there are three levels of actors who can action this toolkit and the principle of sharing good practice. These are local civil society, governments and pan-Commonwealth organisations. Each type of actor can support the advance of LGBT equality:

Civil society can encompass: LGBT activists, organisations and/or communities; faith groups; community associations; trade unions; the media and non-governmental organisations delivering services such as health or education. Out of these, local LGBT activists, organisations and/or communities should be consulted in order to understand the legal and policy priorities of the community as well as their pressing needs. Governments must consult with LGBT activists, organisations and/or communities when considering policy changes. In turn the community can be an ally within society supporting government initiatives and influencing societal discussion. This toolkit has pointed to several areas where governments and civil society have worked well together to support progress from policy making to public education. The Commonwealth Equality Network includes LGBT groups in all five regions and can facilitate interaction between governments and national LGBT rights groups⁷⁵. The Commonwealth Equality Network is a key vehicle for LGBT communities to exchange their own experiences of advocacy and working with governments across the Commonwealth.

Governments are the obvious drivers of policy making. This toolkit draws together a rich array of government policies which it is hoped all governments can learn from. The policy examples identified in this toolkit provide a base which countries can adapt to their own context. Civil society presents one group which is indispensable for governments but so are fellow governments. Networks of diplomats, UN, Commonwealth and other inter-governmental bodies as well as meetings of ministers and senior officials such as the Commonwealth Heads of Government Meeting present opportunities for governments to connect and find mechanisms for sharing good policy practice. One option would be for governments to send officials on secondments to other governments to facilitate the direct sharing of policy expertise in areas that governments need assistance.

The Commonwealth is a network where international government and civil society collaboration and interchange already exist. The Commonwealth Secretariat exists to support inter-governmental assistance in a range of areas. Numerous quasi-governmental networks such as the Commonwealth Parliamentary Association and Commonwealth Local Government Forum support specific parts of the governmental apparatus. Pan-Commonwealth professional associations can facilitate the provision of expertise in areas as diverse as law, health and education⁷⁶. Governments and civil society can access different aspects of this network of Commonwealth stakeholders in order to gain technical support but can also convene their own working groups, commissions or advisory networks made up of multiple Commonwealth actors to support change.

CONCLUSION

To achieve legal and policy progress on the rights of LGBT citizens the experience of Commonwealth nations suggest a range of solutions. From employment laws in Botswana, to upholding constitutional protections for gender minorities in Pakistan, to education campaigns in St Kitts and Nevis, to moratoria in Belize, this toolkit has highlighted a range of promising practices that governments, parliamentarians and judges can learn from, adapt and implement in their own contexts. LGBT communities and their allies can also learn from the experience of other Commonwealth countries in order to identify where the next policy change may come from and how to support government allies in achieving it. Governments and LGBT communities have the potential to support each other in protecting the rights of all citizens through connected policy making. But where societal conversations remain politically difficult or challenges arise in policy design there are international networks which can be leveraged for support and solidarity.

As has previously been articulated in *Collaboration and Consensus* the Commonwealth, as a diverse network, can support the sharing of technical expertise and knowledge of progressive policies. Governments should feel that they can use the Commonwealth in a number of ways to support their attempts to build equality for all their citizens:

- 1 Requesting from the Commonwealth Secretariat support for legislative drafting, technical assistance and strengthening institutions from womens' machineries to human rights institutions.
- 2 Accessing the professional expertise of Commonwealth accredited and associated organisations on areas as diverse as law, parliamentary procedure and health.
- 3 Engaging with civil society to help shape societal debates and turn to domestic LGBT groups in particular to understand their needs and gain support in policy design and implementation.
- 4 Building knowledge-exchange between fellow Commonwealth members to learn from their experience and use their expertise of policy making in this area.

To advance progress in the modern world policy makers must work in union and support progress along multiple avenues from political and societal debates to legislative or policy change. The Commonwealth as a network of diverse states, inter-governmental organisations and civil society can support multiple aspects of this change. The Royal Commonwealth Society, the Kaleidoscope Trust and the Commonwealth Equality Network have sought to support this momentum through opening constructive and respectful conversations on the rights of LGBT people and offering their assistance to Commonwealth stakeholders in advancing equality.

GLOSSARY

Bisexual:	A person romantically and/or sexually attracted to men and women.
Cisgender:	Someone whose deeply held sense of gender identity is the same as their biological sex assigned at birth.
Gay:	A man romantically and/or sexually attracted to men.
Gender Identity:	A person's conception of oneself as male or female or both or neither.
Homosexual:	A person attracted to the same sex.
Intersex:	A condition in which a person is born with a reproductive or sexual anatomy that does not seem to fit the typical definitions of female or male, or a person who may be born with genitals that seem to be in between male and female.
Lesbian:	A woman romantically and/or sexually attracted to women.
LGBT:	Lesbian, Gay, Bisexual, and trans.
LGBTI:	Lesbian, Gay, Bisexual, trans and intersex.
Sex:	The genitals; the physical distinction between male and female.
Sexual Orientation:	A person's romantic and sexual attractions to individuals of a different gender or the same gender or more than one gender.
SOGI:	Sexual Orientation and Gender Identity.
Trans:	Someone whose deeply held sense of gender identity is different from their sex assigned at birth.

END NOTES

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- ⁷³ Canada: Immigration and Refugee Board of Canada, 2007. *Fiji: Treatment of homosexuals by society and government authorities; recourse and protection available to homosexuals who have been subject to ill treatment (2005 - March 2007)*, 2nd April 2007, FJI102479.E. Available at: <http://www.refworld.org/docid/469cd69b44.html>
- ⁷⁴ See the section 'Judgments from Commonwealth Judiciaries' for more information on some of these cases.
- ⁷⁵ More information and contact details for the Commonwealth Equality Network can be found here: <http://www.commonwealthequality.org/>

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