

# LIVING A LIFE OF CRIME

## The ongoing criminalisation of homosexuality within the Commonwealth

PAULA GERBER

The Commonwealth, which accounts for 30% of the world population, has shown a stubborn refusal to address the human rights of its lesbian, gay, bisexual, transgender and intersex ('LGBTI') citizens.<sup>1</sup>

Approximately four out of every five countries that make up the Commonwealth continue to criminalise homosexuality. This can be contrasted with only 25 per cent of countries outside the Commonwealth that still retain laws that make consensual, adult, gay sex a crime. Of the 80 countries which still criminalise homosexuality around the world, over half belong to the Commonwealth, leading to accusations that 'the Commonwealth is a bastion of global homophobia' and 'the poisonous legacy of British colonialism'.<sup>2</sup> It is ironic that Commonwealth nations that readily accepted Britain's anti-sodomy laws during the colonial era, now actively resist Britain's suggestion that they should repeal such laws on the basis that 'homosexuality is a western import, designed to weaken traditional cultures and religions', ignoring the fact that the laws criminalising such conduct are themselves a western import. Furthermore, much of the resistance to homosexuality is based on Christian religious values, which are, of course, another western import.<sup>3</sup>

This article begins by examining the modern Commonwealth of Nations, including an analysis of the Charter which governs it, and the laws in many of the Commonwealth countries that still criminalise consensual same-sex sexual conduct. This is followed by an analysis of whether the UN and global civil society have a role to play in increasing respect for the rights of LGBTI persons.

### The Commonwealth

The Commonwealth comprises 53 countries that were colonised by the British. It was originally formalised by the *London Declaration* in 1949.<sup>4</sup> In March 2013, the Commonwealth adopted a new Charter.<sup>5</sup> This represented an opportunity to modernise the principles and working of this international association. The Charter was intended to move the Commonwealth from being a collection of nations that shared a common history of having once been part of the British Empire, to a gathering of likeminded countries with 'shared values and principles and by concern for the vulnerable'.<sup>6</sup> The Charter consists of 16 articles, the second of which is devoted to human rights, and states that:

We are committed to the Universal Declaration of Human Rights and other relevant human rights covenants and international instruments. We are committed to equality

and respect for the protection and promotion of civil, political, economic, social and cultural rights, including the right to development, for all without discrimination on any grounds as the foundations of peaceful, just and stable societies. We note that these rights are universal, indivisible, interdependent and interrelated and cannot be implemented selectively.

We are implacably opposed to all forms of discrimination, whether rooted in gender, race, colour, creed, political belief or other grounds.

The absence of sexual orientation and gender identity from the grounds of discrimination is a striking omission. Although sexual orientation and gender identity do not appear in the *International Covenant on Civil and Political Rights* ('ICCPR'), or other human rights instruments, this is reflective of the era when they were drafted (in the case of the ICCPR, over 60 years ago). However, the UN has, in more recent times, affirmed that sexual orientation and gender identity are captured by the term 'or other status' in Article 2.<sup>7</sup> It is unfortunate that the Commonwealth Charter does not reflect contemporary understandings of prohibited grounds of discrimination.

However, the new Charter appears to be having little influence on government leaders who largely ignored human rights issues, including LGBTI rights, at the most recent Commonwealth Heads of Government Meeting ('CHOGM') in Sri Lanka, in October 2013. Furthermore the Charter is weak because, unlike international human rights instruments, it contains no institutional mechanisms that allow individuals to petition the Commonwealth about a state's alleged violation of human rights. Indeed, in September 2012, three Nobel prize-winners — Archbishop Desmond Tutu, Nadine Gordimer and Wole Soyinka — wrote an open letter, urging member states *NOT* to sign any Commonwealth charter unless proper enforcement mechanisms were included.<sup>8</sup>

Notwithstanding its weaknesses, the Charter could prove to be a useful tool for activists, because it provides another measure by which to lobby governments and hold them to account.<sup>9</sup> However, it is more likely that other mechanisms, discussed below, will prove more effective for achieving reform.

### The 42 states

Scanning this QR code provides comprehensive, up-to-date data about the criminal laws relating to homosexuality in each of the



#### REFERENCES

1. Kaleidoscope Trust, *Speaking Out: The Rights of LGBTI Citizens from Across the Commonwealth* (2013) 9. <<http://kaleidoscopetrust.com/user/library/documents/main/speaking-out-lgbti-rights-in-the-cw.pdf>>.
2. Peter Tatchell, 'The Commonwealth is a Bastion of Homophobia', *The Guardian* (online), 17 May 2011 <<http://www.theguardian.com/commentisfree/2011/may/17/commonwealth-homophobia-anti-gay-discrimination>>.
3. Paula Gerber, 'Should the west be held accountable for gay persecution?' *The Conversation* (online), 8 April 2014 <<https://theconversation.com/should-the-west-be-held-accountable-for-gay-persecution-24624>>.
4. See, *The London Declaration* (26 April 1949) <<http://www.secretariat.thecommonwealth.org/files/214257/FileName/TheLondonDeclaration1949.pdf>>.
5. <http://thecommonwealth.org/our-charter>.
6. *Ibid.* Preamble to the Charter.
7. See, eg, The Committee on Economic, Social and Cultural Rights' General Comment 20 E/C.12/GC/20, 2 July 2009.
8. Philip Murphy, 'What is the Point of a Commonwealth Charter?' (2013) 102(1) *Round Table: The Commonwealth Journal of International Affairs* 93, 93.
9. *Ibid.*

*While the initial criminalisation of homosexuality in many Asian countries came from colonial laws, the current adherence to them often stems from religious beliefs.*

42 Commonwealth countries that continue to criminalise homosexuality.<sup>10</sup>

An analysis of these 42 Commonwealth countries reveals some interesting facts. The first is the geographical spread of the countries.

Region	Number of Commonwealth countries that criminalise homosexuality	Percentage of Commonwealth Countries that criminalise homosexuality
Africa	16	89%
The Americas	11	85%
Asia	8	100%
Pacific	7	64%
Europe	0	0

### Africa

As the above table illustrates, Africa is the region with the greatest number of Commonwealth countries that still criminalise homosexuality (although not the highest percentage). Only two Commonwealth countries in Africa no longer criminalise homosexuality. One is Rwanda, where consensual same-sex sexual conduct between persons of the same sex has never been an offence. In 2009, there was an attempt to create such an offence in Rwanda, but it was halted by Justice Minister Tharcisse Karugarama, who said that sexual orientation was a private matter, not a state business.<sup>11</sup> The second country is South Africa, the only state on the African continent that has not only decriminalised homosexuality, but has also embedded a prohibition on discrimination based on sexual orientation in its constitution and legalised same-sex marriage.

### The Americas

The Americas, like Africa, have only two Commonwealth countries where homosexuality is not a crime, namely the Bahamas and Canada. The Bahamas provides an interesting case study of decriminalisation in this region. Its anti-sodomy laws were repealed in 1991, with bipartisan support. It appears the reform came about, despite opposition from churches and Christian groups, because of a concern about breaches of privacy following the publication of a list of people thought to be homosexual. One activist from that time observed that:

Apparently the sissy list was circulating for a few weeks and kept growing and growing to a point where names of prominent people and close relatives of politicians started appearing on it. This is what triggered a huge debate in parliament on the invasion of privacy, and how the list or any other such list (HIV+ people list for example) was a violation of an individual's right to privacy.<sup>12</sup>

The decriminalisation of homosexuality in the Bahamas in 1991 does not appear to have diminished homophobia, with four gay men murdered in their homes in a seven-month period spanning 2007–08, for which no one has been imprisoned.<sup>13</sup> Religious leaders continue to campaign, unsuccessfully, for the re-criminalisation of homosexuality. The reason political leaders are not giving in to such pressure appears to have more to do with economics, than privacy. In February 2014, Foreign Affairs Minister Fred Mitchell commented, in relation to LGBT rights in the Bahamas, that:

You will be aware that this country receives millions of dollars in military assistance and that, given the way American foreign policy works, human rights abuses may lead to cutbacks in that assistance mandated by law. So as we shape our social domestic policies, we are always cognisant of that fact.<sup>14</sup>

Thus, there are different reasons behind the government's decriminalisation of homosexuality 23 years ago, and its support for LGBTI rights today, which support includes voting in favour of a 2011 UN resolution condemning acts of violence and discrimination committed against individuals because of their sexual orientation and gender identity.<sup>15</sup>

The Bahamas stands in stark contrast to its near neighbours, many of which still treat homosexual conduct in the same way as bestiality. For example, in Jamaica, the law provides:

Whosoever shall be convicted of the abominable crime of buggery [anal intercourse] committed either with mankind or with any animal, shall be liable to be imprisoned and kept to hard labour for a term not exceeding ten years.<sup>16</sup>

Jamaica is among the most homophobic of Caribbean countries with 'rampant violence against gays and lesbians'.<sup>17</sup> In these circumstances, repeal of criminal laws is difficult. However, reform may be made by appealing to the promotion of health rather than respect for human rights. Thus, it has been observed that there is an increasing call for the decriminalisation of homosexuality in the Caribbean by health professionals within the context of addressing the HIV/AIDS pandemic, and that '[a]ttempts to stem the

10. Paula Gerber, 'Countries that still criminalise homosexuality' <<http://antigaylaws.wordpress.com/commonwealth/>>. This QR code can be accessed by scanning with a phone or tablet, or a PC with a webcam. For further information, <[www.qreateandtrack.com/blog/qr-codes-how-to-read-them](http://www.qreateandtrack.com/blog/qr-codes-how-to-read-them)>.

11. Kaleidoscope Trust, above n 1.

12. Joseph Gaskins Jr, "'Buggery" and the Commonwealth Caribbean: a comparative examination of the Bahamas, Jamaica, and Trinidad and Tobago' in Corinne Lennox & Matthew Waites (eds) *Human Rights, Sexual Orientation and Gender Identity in The Commonwealth: Struggles for Decriminalisation and Change* (University of London, 2013) 441.

13. *Ibid* 439.

14. Ava Turnquest, 'Mitchell: US Could Cut Assistance over Bahamas Stance on LGBT Rights', *Tribune* 242 (online), 20 February 2014 <[www.tribune242.com/news/2014/feb/20/mitchell-us-could-cut-assistance-over-bahamas-stance/](http://www.tribune242.com/news/2014/feb/20/mitchell-us-could-cut-assistance-over-bahamas-stance/)>.

15. Human Rights Council Resolution A/HRC/17/L.9/Rev.1, 15 June 2011; and Juan McCartney, 'Bahamas backs gay rights', *The Nassau Guardian* (online), 18 June 2011 <[www.thenassauguardian.com/index.php?option=com\\_content&view=article&id=11069:bahamas-backs-gay-rights&catid=3:news&Itemid=27](http://www.thenassauguardian.com/index.php?option=com_content&view=article&id=11069:bahamas-backs-gay-rights&catid=3:news&Itemid=27)>.

16. Article 76 of the *Offences Against the Person Act*.

17. Gaskins, above n 12, 429.

spread of HIV have opened a “back door” for advocacy in favour of tolerance and decriminalisation, not just as a human rights issue, but as an issue of national health.’<sup>18</sup>

### Asia

In Asia, every Commonwealth country still criminalises homosexuality and, similar to Africa, the situation for LGBTI people is getting worse rather than better. This is evident in Brunei which recently announced the introduction of death by stoning for the crime of sodomy, and Malaysia where, in March 2014, opposition leader Anwar Ibrahim was sentenced to five years imprisonment; a conviction largely viewed as being politically motivated. It is also evident in India where, in December 2013, the Supreme Court re-criminalised homosexuality after a four-year period of it being legal following the Delhi High Court decision declaring invalid the section of the Indian *Penal Code* that criminalises voluntarily carnal intercourse against the order of nature. Interestingly, the re-criminalisation of homosexuality by the courts made LGBTI rights an election issue, for the first time, albeit a peripheral one.<sup>19</sup>

A recent survey undertaken by the Pew Research Centre found that 85 per cent of people in Pakistan, and 88 per cent in Malaysia, believe that homosexuality is unacceptable.<sup>20</sup> These are marginally better than attitudes to homosexuality in African Commonwealth countries (96 per cent opposition in Uganda and 98 per cent in Nigeria), but still indicate a hostile environment for recognition of LGBTI rights.

While the initial criminalisation of homosexuality in many Asian countries came from colonial laws, the current adherence to them often stems from religious beliefs. Thus, Malaysia now condemns homosexuality as an affront to Islam,<sup>21</sup> while in Sri Lanka, with a majority Buddhist population, it has been observed that:

Now homophobia is being embraced as part of Sri Lankan culture rather than as something which was introduced by the West many years ago ... the greatest obstacle to their cause [LGBTI rights] is the emergence of Buddhist fundamentalism...<sup>22</sup>

Therefore, changing laws that criminalise homosexuality in many Asian states will require addressing contemporary deeply held religious beliefs that homosexuality is wrong.

### Pacific

Notwithstanding that seven of the 11 Commonwealth countries in the Pacific still have laws making homosexuality a crime, this region receives very little attention in either the media or scholarly literature. This may be because, in many of these countries, the laws are not actively enforced. However, the ongoing existence of such laws impedes the achievement of equality for LGBTI people through, for example, the enactment of anti-discrimination laws.

So far Australia, New Zealand, Fiji and Vanuatu are the only countries in this region to have decriminalised homosexuality. Vanuatu did this in 2007, and Fiji in 2010. Other Pacific nations appear to also be working towards this goal with Palau, Nauru and the Cook

Islands<sup>23</sup> all indicating to the UN Human Rights Council, in 2011, that they are willing to repeal their laws that criminalise homosexuality. At the same time, other Pacific Commonwealth nations rejected recommendations to decriminalise homosexuality made during the Human Rights Council Universal Periodic Review (‘UPR’), including Papua New Guinea, Samoa, the Solomon Islands and Tonga. Nevertheless, a commitment to the decriminalisation of homosexuality by three Pacific nations suggests that reform is beginning in this region.

### Europe

Europe is the only region where homosexuality is legal in all countries (not just Commonwealth countries). This is perhaps largely due to the fact that the British Empire did not export their anti-sodomy laws to this part of the world. There are only three Commonwealth countries in Europe (Cyprus, Malta and the UK), and they all decriminalised homosexuality last century.

### The gender dimension

Another interesting aspect of the criminalisation of homosexuality in Commonwealth nations is the gender dimension. Most of the discussion regarding the continued criminality of homosexuality is focused on men who have sex with men. This is undoubtedly because most of the people prosecuted under these laws are men. However, the criminal laws in the majority of these countries also apply to women who have sex with women, either because of an express provision, or by virtue of the general language used. Malawi is an example of an express provision making lesbian sex a crime. Section 137A of the Malawi *Penal Code* provides that any female person who, whether in public or private, commits ‘any act of gross indecency with another female’ shall be guilty of an offence and liable to a prison term of five years. The old colonial empire cannot be blamed for these laws, since lesbian sex was never outlawed in Britain. Folklore says this is because Queen Victoria found the very idea of women having sex with each other inconceivable.

The criminal laws in many Commonwealth countries use gender neutral language such as ‘any person’. The effect of this is that the laws — other than sodomy or buggery — apply equally to women. Thus, in Nigeria, s 214 of the *Criminal Code Act* creates the crime of ‘Unnatural Offences’ which is a felony attracting a penalty of up to 14 years imprisonment. The offence is committed when any person has carnal knowledge of another person ‘against the order of nature’. It has been asserted that the Nigerian courts:

have interpreted the order of nature to mean, a *man* having sexual relations with a *woman*. Thus it is clear that they will interpret lesbianism to be ‘against the order of nature.’<sup>24</sup>  
[Emphasis in original]

It should also be noted that several northern Nigerian states have adopted Islamic Sharia laws criminalising sexual activities between persons of the same sex. The maximum sentence for such acts between men is the death penalty, while the maximum sentence

18. Ibid 444.

19. See, Nish Gera, ‘800 Million Voters in World’s Biggest Election: Are Gay Rights on the Ballot?’, *Huffington Post* (online), 21 April 2014 <[www.huffingtonpost.com/nish-gera/800-million-voters-in-india-gay\\_b\\_5176179.html](http://www.huffingtonpost.com/nish-gera/800-million-voters-in-india-gay_b_5176179.html)>.

20. See, Pew Research, Global Views on Morality: Homosexuality’ <[www.pewglobal.org/2014/04/15/global-morality/table/homosexuality/](http://www.pewglobal.org/2014/04/15/global-morality/table/homosexuality/)>.

21. Shanon Shah, ‘The Malaysian dilemma: negotiating sexual diversity in a Muslim-majority Commonwealth state’ in Lennox and Waites, above n 12, 261.

22. Mathew Jenkin, ‘Lifting of gay ban must come from people says Sri Lankan activist’, 4 July 2012, *Gay Star News* (online), <[www.gaystarnews.com/article/lifting-gay-ban-must-come-people-says-sri-lankan-activist040712](http://www.gaystarnews.com/article/lifting-gay-ban-must-come-people-says-sri-lankan-activist040712)>.

23. Palau and Cook Islands are not members of the Commonwealth.

24. John Elnathan, ‘Legal Opinion: Is Lesbianism a Crime under Nigerian Secular Criminal Law?’ (23 May 2011) <[https://www.academia.edu/757724/LEGAL\\_OPINION\\_IS\\_LESBIANISM\\_A\\_CRIME\\_UNDER\\_NIGERIAN\\_SECULAR\\_CRIMINAL\\_LAW](https://www.academia.edu/757724/LEGAL_OPINION_IS_LESBIANISM_A_CRIME_UNDER_NIGERIAN_SECULAR_CRIMINAL_LAW)>.

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for such acts between women is whipping and/or imprisonment.

### **Enforcement**

While the laws criminalising homosexuality do not appear to be actively enforced against women, the same cannot be said for men. In some Commonwealth countries the laws exist on paper but nobody has been charged under them for many years. However as the Hon Michael Kirby noted, these 'criminal laws are used in many lands to sustain prosecutions, police harassment and official denigration and stigmatisation'.<sup>25</sup> However, in several African countries, the laws are not only being actively enforced but new crimes with harsher penalties are being created. For example, in early 2014, Uganda enacted the *Anti-Homosexuality Act* which created the offence of 'aggravated homosexuality' which carries a sentence of life imprisonment. Similarly, in Nigeria, the *Same Sex Marriage Prohibition Act (2014)* provides that anyone belonging to a gay organisation can be jailed for up to 10 years, and anyone married to someone of the same sex can be jailed for up to 14 years. Navi Pillay, the UN Human Rights Commissioner, said of these laws:

Rarely have I seen a piece of legislation that in so few paragraphs directly violates so many basic, universal human rights. Rights to privacy and non-discrimination, rights to freedom of expression, association and assembly, rights to freedom from arbitrary arrest and detention: this law undermines all of them.<sup>26</sup>

The media is reporting that dozens of gay people have been arrested and jailed in Uganda and Nigeria as police actively enforce these new laws and LGBTI persons are also being subject to mob attacks. Thus, it is clear that in many Commonwealth countries, particularly in Africa, the criminalisation of homosexuality poses a very real and present danger to sexual minorities, especially gay men.

### **United Nations**

With the ongoing criminalisation of homosexuality in so many states, it is appropriate to consider whether the UN can use international human rights law to assist in achieving greater respect for LGBTI rights. No international human rights treaty specifically mentions homosexuality, sexual orientation, gender identity or the rights of sexual minorities. However, ALL human rights treaties state that human rights belong to ALL people. In recent times, the UN has been making a concerted effort to ensure that all states understand this, as well as the fact that persecuting individuals

because of their sexual orientation or gender identity is a violation of international human rights law. Three different UN bodies have been particularly active in trying to increase respect for the rights of LGBTI, and their work is analysed below.

#### **(i) Human Rights Committee ('HR Committee')**

The HR Committee is the body responsible for monitoring implementation of the ICCPR. It has consistently held that the persecution of LGBTI persons breaches the ICCPR. In *Toonen v Australia* the Committee held that Tasmania's sodomy laws violated Article 17 (privacy) and Article 2 (discrimination).

In its periodic reviews of State Parties' compliance with the ICCPR, the HR Committee regularly includes recommendations regarding the decriminalisation of homosexuality within its concluding observations.

For example, in its review of Kenya it stated, 'The Committee ... recommends that the State party decriminalize sexual relations between consenting adults of the same sex in order to bring its legislation in line with the Covenant.'<sup>27</sup> Thus, the HR Committee appears to be attuned to the need to discuss the decriminalisation of homosexuality with states.

#### **(ii) Human Rights Council ('HRC')**

The HRC is another body that has made a significant contribution to the UN's efforts to promote and protect the rights of LGBTI persons. It has done this through issuing statements, passing a landmark resolution on sexual orientation and gender identity in 2011 ('SOGI Resolution'),<sup>28</sup> and through comments and recommendations made during the UPR process.

In March 2011, 85 states endorsed a groundbreaking HRC joint statement to end acts of violence and related human rights violations based on sexual orientation and gender identity.<sup>29</sup> This declaration was signed by 16 Commonwealth states including a number which have not yet decriminalised same-sex sexual behaviour, such as Dominica, Nauru, Samoa, Seychelles, Sierra Leone and Tuvalu.

Three months after this joint statement, the HRC passed the SOGI Resolution. This is of particular importance because it is the first time a UN body has passed a resolution on LGBTI rights. It was presented by South Africa, with 39 additional co-sponsors from all regions of the world. It was passed by a vote of 23 in favour, 19 against and 3 abstentions. A look at how Commonwealth countries voted is revealing. Only two African Commonwealth states supported

25. Hon Michael Kirby, 'Homosexual law reform: an ongoing blind spot of the Commonwealth of Nations', (Paper presented at 16th Commonwealth Law Conference, Hong Kong, 8 April 2009) 6.

26. UN News Centre, 'UN human rights chief denounces "draconian" anti-homosexuality law in Nigeria', 14 January 2014.

27. *Concluding Observations on Kenya*, CCPR/C/KEN/CO/3, 31 August 2012, para 8.

28. Human Rights Council, *Resolution on Human Rights, Sexual Orientation and Gender Identity*, A/HRC/17/L.9/Rev.1, 15 June 2011.

the resolution (South Africa and Mauritius), four voted against it (Cameroon, Ghana, Nigeria and Uganda) while Zambia abstained. In the Asia Pacific region, Australia and New Zealand were the only Commonwealth states to support the resolution, while Bangladesh, Malaysia, Maldives and Pakistan all voted against it. It is now imperative that the HRC build on this success by adopting a follow up resolution further condemning the ongoing discrimination and violence against LGBTI persons, and establishing a process whereby the HRC can identify and respond to violations of LGBTI rights, such as prosecutions for homosexuality, in a systematic, coordinated and ongoing manner.<sup>30</sup>

The criminalisation of homosexuality has been raised with a number of Commonwealth countries during the UPR and many have accepted recommendations that they repeal these laws, including Mauritius, Nauru and Seychelles. However, to date, none appear to have taken steps to implement these recommendations. Nonetheless, the UPR provides a valuable forum for these issues to be raised, and makes states aware that the international community is monitoring the extent to which they respect or violate the rights of their sexual minorities. Indeed it has been observed that, 'the dialogic process [of the UPR] can be instrumental in tackling contentious human rights issues, such as the criminalisation of sexual orientation, in a way that was not previously possible.'<sup>31</sup>

### (iii) Office of the High Commissioner for Human Rights ('OHCHR')

The OHCHR has taken a number of actions to try and combat violence and discrimination against LGBTI persons. These include the drafting of the first UN report documenting discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity.<sup>32</sup> This report was prepared by the High Commissioner in November 2011, pursuant to a request by the HRC in the SOGI Resolution. Five paragraphs of the Report are devoted to the criminalisation of homosexuality, with the High Commissioner noting that, '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.'<sup>33</sup>

In July 2013, the OHCHR launched a new campaign entitled *Free and Equal*, designed to raise awareness of homophobic and transphobic violence and persecution. It is aimed at engaging 'millions [of] people around the world in conversations that will help promote the fair treatment of LGBT people and generate support for measures to protect their rights.'<sup>34</sup>

Between the Human Rights Committee, the Human Rights Council and the OHCHR, the UN is demonstrating a commitment to working with states to end the criminalisation of homosexuality, but progress is slow.

## Civil society

In addition to the role that the UN can play in the decriminalisation of homosexuality in the Commonwealth, it is appropriate to also consider the role that civil society can play. Dr Jemilah Mahmood, in her keynote address to the 2013 Commonwealth People's Forum, observed that the United States' government classifies countries as 'friend', 'foe' or 'neutral', and allocates attention based on who is offering the greatest resistance to the position the US wishes to pursue. Dr Mahmood suggests that civil society should adopt a similar approach, and that the efficacy of their work would be improved by:

actively identifying governments and classifying them, subsequently placing greatest effort on governments with strong influence, but very conservative positions. These are the ones (the spoilers some might dare say) who hold the rest back. We need to spend less and less time with 'friendly governments', even if we keep them updated (and not preach to the converted).<sup>35</sup>

On this basis, human rights advocates would do well to identify which of the 42 countries are strenuously opposed to decriminalising homosexuality and are powerful or influential states within the Commonwealth. They should then concentrate their efforts on convincing these states of the benefits of law reform, not just for the LGBTI community, but for the country as a whole. Based on the above analysis of different geographic regions, it appears that civil society should focus attention on the following states, and enlist the support of 'friendly' regional governments to convince these states that LGBTI people have rights that should be respected and protected.

Region	'Spoilers'	'Friendly' states
Africa	Uganda and Nigeria	Rwanda and South Africa
The Americas	Jamaica, and Trinidad and Tobago	Bahamas
Asia	Malaysia and Sri Lanka	None?
Pacific	Papua New Guinea	Fiji and Vanuatu

## Conclusion

This article has recognised that the Commonwealth is unlikely to be able to influence its member nations to repeal their laws criminalising homosexuality. It has a majority of states that support treating LGBTI people as criminals and a weak Charter when it comes to human rights. This combination of factors makes it highly unlikely that the Commonwealth will play a significant role in the decriminalisation of homosexuality among its members.

In many countries it can be problematic for local LGBTI activists to campaign for the decriminalisation of homosexuality. This is because there is a real risk that vocal opposition to anti-homosexuality laws will be met with violent recriminations. For example, Eric Ohena Lembembe, a prominent LGBTI rights activist in Cameroon was brutally murdered in July 2013<sup>36</sup> and, in

29. See, <[www.state.gov/r/pa/prs/ps/2011/03/158847.htm](http://www.state.gov/r/pa/prs/ps/2011/03/158847.htm)>.

30. Paula Gerber, 'LGBTI Rights and the UN: Where to from here?' *Human Rights Monitor* (March 2014) <[www.ishr.ch/news/dr-paula-gerber-lgbti-rights-and-un-where-here#sthash.w12j5n5b.dpuf](http://www.ishr.ch/news/dr-paula-gerber-lgbti-rights-and-un-where-here#sthash.w12j5n5b.dpuf)>.

31. Frederick Cowell and Angelina Milon, 'Decriminalisation of Sexual Orientation through the Universal Periodic Review' (2012) 12(2) *Human Rights Law Review* 341, 352.

32. 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*, A/HRC/19/41, 17 November 2011.

33. *Ibid* para 41.

34. 'Free & Equal' <<https://www.unfe.org/en/about>>.

35. Jemilah Mahmood, 'The role of civil society in post-2015 development architecture' (Speech delivered at the Commonwealth People's Forum, Sri Lanka, 11 November 2013) <[www.commonwealthfoundation.com/updates/commonwealth-peoples-forum-2013-keynote-lecture](http://www.commonwealthfoundation.com/updates/commonwealth-peoples-forum-2013-keynote-lecture)>.

36. Andrew Katz, 'Cameroon: Murder of LGBT Activist Illustrates Plight of Gay Rights in Africa', *Time World* (online), 18 July 2013 <<http://world.time.com/2013/07/18/cameroon-murder-of-lgbt-activist-illustrates-plight-of-gay-rights-in-africa/>>.

*In recent times, the UN has been making a concerted effort to ensure that all states understand ... that persecuting individuals because of their sexual orientation or gender identity is a violation of international human rights law.*

2011, David Kato, a Ugandan gay rights campaigner was beaten to death.<sup>37</sup>

It is therefore important to look at who else can play a role in achieving reform. This article has identified two other actors that have a role to play: the UN, through constructive dialogue — not denunciation — with states about how they might improve their compliance with international treaties; and civil society, through engagement with influential states that vehemently resist reform.

There are, of course, other pathways to reform, including involving religious groups/leaders who

support LGBTI rights and using education to combat homophobic attitudes.<sup>38</sup> Achieving decriminalisation of homosexuality within the Commonwealth is a lengthy and challenging process that will require multifaceted approaches by diverse stakeholders, at both the local and global levels.

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37. 'Uganda gay rights activist David Kato killed' *BBC News* (online), 27 January 2011 <[www.bbc.co.uk/news/world-africa-12295718](http://www.bbc.co.uk/news/world-africa-12295718)>.

38. A detailed exploration of the role that religion and education might play in combatting homophobia and the persecution of LGBTI people is beyond the scope of this article.

## Lizards cast their spell

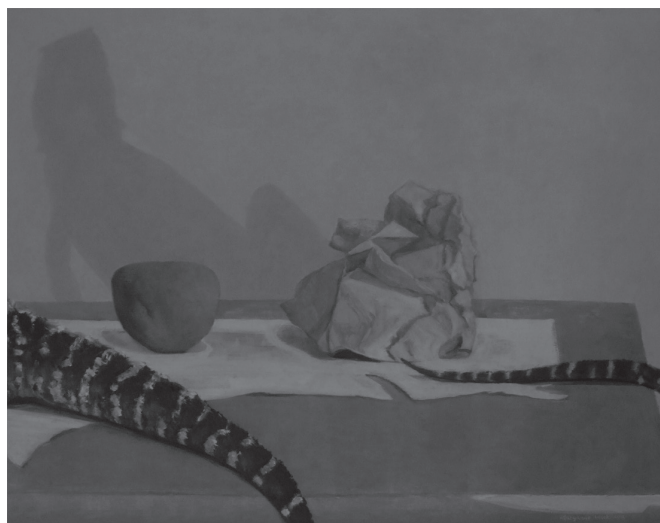
Maryanne Wick often talks about the lizards and small birds that frequent her home in the Illawarra, on the New South Wales south coast, and their antics which are a constant influence on her paintings and drawings. 'Believe it or not, the Australian water dragons all have their own distinct personalities and habits,' she says. 'They lounge on the deck and in the garden, and occasionally come into the studio while I am working.'

Wick, who has worked in London, China and South Korea, focuses mainly on metaphorical still life and figurative composition, melding Australian and North Asian themes. 'In some indigenous cultures throughout the world, the lizard is symbolic of ancestry, fertility, life and death,' she explains. 'I use my lizards as a metaphor for human influence or impact on a situation.'

'The unpredictable chance nature of the game "rock, paper, scissors" is influenced and changed by the lizard/human impact. I have removed the scissors (a sharp, hard, occasionally dangerous implement) and replaced it with the more playful and interesting lizard/human influence.'

Wick says the underlying message in *Rock Paper Lizards* is: 'Life is precious and, while occasionally unpredictable, unpredictable isn't always bad.'

As a painter of still life, Wick has learned how to observe detail. 'It's the small things that you fall in love with and try to capture in paint. You want others to see what you see.' No matter the subject of her



work, Wick 'has always tried to draw attention to the fact that we should try and slow down and take it in, appreciate what surrounds us and never take it for granted'.

Maryanne Wick <[maryannewick.com](http://maryannewick.com)>  
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Maryanne Wick, 'Rock Paper Lizards', still life oil painting on wood, 51 x 62.5 cm. Courtesy of Lorraine Pilgrim Gallery, Southport.