

**COMMONWEALTH LAW BULLETIN**  
**LESSONS FROM WOLFENDEN - A METHODOLOGY FOR**  
**HOMOSEXUAL LAW REFORM IN THE COMMONWEALTH OF**  
**NATIONS**  
**Michael Kirby\***

LEARNING FROM WOLFENDEN

Fifty years ago, in September 1957, the report of the English committee on homosexual offences was delivered to the British government<sup>1</sup>. The committee was chaired by a distinguished university vice-chancellor, Sir John Wolfenden. With respect to the prevailing English law on homosexual offences, the committee concluded, with near unanimity, that<sup>2</sup>:

"Unless a deliberate attempt is made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business".

---

\* Justice of the High Court of Australia. One-time President of the International Commission of Jurists.

<sup>1</sup> *The Report of the Committee on Homosexual Offences and Prostitution*, Cmnd 247, HMSO, 1957 ("Wolfenden Report").

<sup>2</sup> *Ibid*, 187-188.

## 2.

Once the Wolfenden report was delivered, it attracted a great deal of coverage. It also inspired a famous public debate between proponents and opponents of the reform<sup>3</sup>. The opponents, through the writings of Lord Devlin, contended that the criminal law had a place in upholding the majority of the community's moral standards, including in respect of private sexual conduct which the majority found offensive and immoral. The proponents, through the writings of Professor H L A Hart of Oxford University, drew on the principles expressed a century earlier by John Stuart Mill in his essay *On Liberty*. Essentially, they contended that, so far as purely 'self-regarding' activity was concerned, the law had no legitimate right to criminalise adult, private, consenting conduct. Activities did not become 'other-regarding' simply because they upset individuals in society, without directly and immediately impinging upon their lives.

Initially, the Conservative government then in office in Britain announced that no action would be taken to implement the Wolfenden reforms. They suggested that the British community was "not yet ready" to accept the amendments to the criminal law that Wolfenden and his colleagues had proposed<sup>4</sup>. However, many supporters of reform urged

---

<sup>3</sup> Patrick Devlin, *The Enforcement of Morals*, Maccabean Lecture in Jurisprudence of the British Academy (London: Oxford University Press, 1959). H L A Hart, "Immorality and Treason", *The Listener* (30 July 1959), 162. The Devlin/Hart debates are described in N Lacy, *The Life of H L A Hart - The Nightmare and the Noble Dream*, Oxford University Press, 2004, 243ff.

<sup>4</sup> Antony Grey, *Quest for Justice - Towards Homosexual Emancipation* (Sinclair-Stevenson, London, 1992), 84.

### 3.

that action should be taken. Committees were established throughout Britain to promote both the necessity of reform and the justice of the Wolfenden proposals. Particular members of United Kingdom Parliament took up the cudgels. In the House of Commons, Mr Leo Abse proposed a Bill to amend the laws on sexual offences<sup>5</sup>. In the House of Lords, Lord Annan did likewise<sup>6</sup>. Neither of these men was himself homosexual. However, each was convinced by the Wolfenden logic that reform was required.

After a decade of debate, the United Kingdom Parliament changed the law for England and Wales<sup>7</sup>. At first, the age of consent was fixed at 21 years. There were a number of exceptions. The law did not at first apply to Scotland or Northern Ireland. Eventually, however, the age of consent was lowered to coincide with that applicable to sexual conduct with a person of the opposite sex. Exceptions that were first enacted (dealing with the armed services etc) were repealed or confined. Eventually similar reforming laws were enacted for Scotland and Northern Ireland. The last-mentioned reform was achieved only after a decision of the European Court of Human Rights held that the United Kingdom was in breach of its obligations under the *European*

---

<sup>5</sup> *Ibid*, 59, 93, 113-130.

<sup>6</sup> *Ibid*, 3, 110, 125, 147.

<sup>7</sup> *Sexual Offences Act 1967* (UK).

*Convention on Human Rights* by continuing to criminalise the adult private consenting sexual conduct of homosexuals in that province<sup>8</sup>.

This is not the occasion to recount the impact that the Wolfenden report had on similar penal legislation which had been enacted for virtually the whole of the former British Empire. In most Commonwealth countries, the statute book, enacted in colonial times, had introduced laws against so-called "unnatural offences" (including sodomy or buggery) and laws concerning acts of sexual indecency between men. Consent and the fact that the participants were adults acting in private did not constitute a defence to such laws.

One by one, the old Commonwealth countries followed the Wolfenden lead. Reform of the law was achieved in Canada, New Zealand, the States and Territories of Australia and South Africa. Similar reforms were also secured in many of the States of the United States of America and in Ireland which likewise traced its criminal law to Britain. In Australia, the last of the States to be reformed was Tasmania. The change there was achieved only after the stimulus of a decision of the United Nations Human Rights Committee upholding a complaint under the First Optional Protocol that the old offences, in their application to adult, private, consensual conduct, offended the privacy

---

<sup>8</sup> *Dudgeon v United Kingdom* (1981) 4 EHRR 149; see also later *Norris v Republic of Ireland* (1988) 13 EHRR 186; *Modinos v Cyprus* (1993) 16 EHRR 485.

rights guaranteed in the *International Covenant on Civil and Political Rights*<sup>9</sup>.

In the Irish Republic, as earlier in Northern Ireland, it took a decision of the European Court of Human Rights to stimulate the reform agenda<sup>10</sup>. In South Africa, reform came about as a result of a constitutional decision<sup>11</sup>. In the United States, a decision of the Supreme Court struck down the anti-sodomy law of Texas, holding that it was contrary to the provisions of the federal Constitution<sup>12</sup>. In effect, all of these court decisions, and the legislative changes that they stimulated, reflected the Wolfenden principle. Some matters of private morality were not the law's business and especially not the proper business of punishment under the criminal law.

In the new Commonwealth of Nations, change came very slowly, or not at all. A schedule to this paper sets out the Commonwealth countries that retain criminal laws against adult, consensual, private homosexual acts. Leading Commonwealth citizens spoke in favour of

---

<sup>9</sup> *Toonen v Australia* (1994) 1 Int Hum Rts Reports 97 (No 3).

<sup>10</sup> *Norris v Republic of Ireland* (1988) 13 EHRR 186.

<sup>11</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice* (1999) 1 SA 6. See also *Leung T C William Roy v Secretary for Justice (HK)* [2006] HKCA 106; *Secretary for Justice (HK) v Yan Yuk Lung Zigo* [2007] HKCFA 49.

<sup>12</sup> *Lawrence v Texas* 539 US 558 (2003).

the change, including South African Archbishop Desmond Tutu<sup>13</sup>; former Singapore Prime Minister Lee Kuan Yew<sup>14</sup>, the Indian Nobel Laureate Amartya Sen<sup>15</sup> and other outstanding Commonwealth personalities. However, the process of legal reform seems largely to have ground to a halt.

Governments typically gave various excuses. Many of these reflect those initially expressed by the Conservative Government of Britain immediately after the Wolfenden report was delivered. 'The population is not ready'. 'The reform is inconsistent with local moral values'. 'The churches or religious leaders are opposed'. 'Reform on this subject is not a priority'. Some new Commonwealth leaders suggest that homosexuals do not exist in their societies; that this is a foreign import; and that Western fashions on the subject are not relevant to local concerns. From early days, this form of denial and xenophobia has marked national reactions to awareness about adult same-sex conduct. When the first sodomy laws were enacted in England in the reign of Henry VIII, they were initially said to be a response to the influx of

---

<sup>13</sup> Address by Nobel Laureate Archbishop Desmond Tutu in Nairobi, Kenya to the Anglican Church conference of Africa, 12 January 2007.

<sup>14</sup> "Former PM hits out at Singapore gay sex ban", *The Age*, Melbourne, 24 April 2007, p 8.

<sup>15</sup> Open letter signed by Nobel Laureate Amartya Sen, former Attorney-General Soli Sorabjee and others dated 19 September 2006. For text see <<http://www.openletter377.com/>>.

foreigners<sup>16</sup>, allegedly polluting the purity of English ways. Since that time, denial and xenophobia have been constant themes invoked to support the continuance of laws creating homosexual offences. Even at a time when countries of the new Commonwealth enter cautiously upon the debate, police and other government forces have been seen to react adversely. Thus, following a recent proposal by the Singapore Law Society for the repeal of the offending provisions of the Singapore Penal Code in 2007<sup>17</sup>, Government agents prohibited a public event to discuss the question and refused a visa to an overseas legal scholar, invited to address the event to explain the legal changes that had occurred elsewhere in the world, including in Commonwealth countries.

The path towards reform of the law on homosexual offences is therefore strewn with tears, frustration and failed effort. Although the Commonwealth of Nations has attained important advances in the principle of respect for basic human rights for women and minorities (especially racial and religious minorities). it has substantially failed to stand up for sexual minorities. Indeed, this has been a significant point of inactivity, denial and failure on the part of the Commonwealth of Nations. Oppression, inequality before the law and unjust discrimination still mark the laws of most Commonwealth countries on this subject. It is

---

<sup>16</sup> Described in L Crompton, *Homosexuality & Civilisation* (Belknap Press, Harvard Uni, Cambridge, Mass, 2003) 362ff.

<sup>17</sup> Law Society of Singapore, *Law Gazette*, Singapore, May 2007 (containing extracts from the report).

timely to speak bluntly about this. The excuses of ignorance should no longer be accepted. Fifty years after Wolfenden and sixty years after the first Kinsey report disclosing the diversity of human sexual behaviour<sup>18</sup>, the excuses for failing to reform the criminal laws on this subject are running out.

The purpose of this essay is to propose a methodology of law reform on homosexual offences in the new Commonwealth. Of course, what is needed, and what would work, varies from one country to another. No blanket approach, of universal application, can be suggested. Nevertheless, drawing on the experience of the United Kingdom, countries of the old Commonwealth and other lands, notably in Europe where virtually universal reform of the law has been achieved, a number of possible initiatives will be catalogued. These measures should be considered and, where appropriate, they should be implemented to stimulate and bring about changes in the criminal law. The remaining homosexual offences, that constitute one of the most ignoble and oppressive of the legacies of British colonialism, need to be addressed. People who cherish liberty and who insist on respect for their own human dignity, should be willing to accord respect to minorities, including sexual minorities such as homosexuals.

---

<sup>18</sup> A C Kinsey, W B Pomeroy, C E Martin, *Sexual Behaviour in the Human Male* (Saunders, Philadelphia, 1948). See also A C Kinsey, W B Pomeroy, C E Martin and P H Gebhard, *Sexual Behaviour in the Human Female* (Saunders, Philadelphia, 1953).

## A METHODOLOGY FOR COMMONWEALTH REFORM

*Secure a committee:* Proposals for reform of homosexual offences (like those concerned with other parts of the criminal law) tend, for a time at least, to engage high passions. The only way that reform can be considered with cool heads, as a matter of principle and basic policy of the criminal law, and in terms of fundamental human rights, is by calm investigation; rational dialogue; study of changes in other jurisdictions; and perception of the impact of the law as presently applicable.

This is why the starting point for reform is usually the formation of a respected committee, like the Wolfenden committee whose recommendations ushered in reform in Britain. As stated, a similar process has now commenced in Singapore where a committee of the Law Society has recommended reform. Reform of the criminal law on homosexual offences does not *ipso facto* sweep away the many laws that result in unequal treatment of sexual minorities. However, the imposition of criminal offences upon consenting, adult, private sexual conduct lies at the heart of the stigmatisation. Until such laws are abolished inequality will always be sustained by reference to the existence of the criminal provisions.

When the Wolfenden committee was established there was no commitment on the part of the Government of the United Kingdom, to introduce any reforms that it recommended. Even after it reported, the

Government, at first, declined to act. Yet the Wolfenden report immediately became the focus of bipartisan consideration of the issue in the United Kingdom Parliament. It attracted support (and opposition) from people of different political persuasions. It became a catalyst for substantial civil debate. It promoted the establishment of civil society organisations, such as the Homosexual Law Reform Committee and the Campaign for Homosexual Equality<sup>19</sup>. As well, other established bodies concerned with law reform (such as legal and medical professional organisations) picked up the proposals. Their members become engaged in, and leaders of, the debates about change.

*Religious supporters:* An early initiative in Britain was to enlist the support of liberal members of different religious groups. Their voices became important sources of appeals for reason and opposition to the application of the harsh criminal law.

Many members of sexual minorities are active participants in religious organisations. Some make friendships there and some of them persuade others to understand the unfairness of criminalising sexual minorities. In England, from the early days, leading churchmen supported the Wolfenden proposals. They included Bishop John Robinson, the Bishop of Woolwich<sup>20</sup>, Canon John Collins, and eventually

---

<sup>19</sup> Grey, above n 4, 154-158, 177.

<sup>20</sup> *Ibid*, 242-248.

the Archbishops of Canterbury and York. Many of these religious supporters of reform adhered to traditional understandings of scripture as it has been taught in the past before knowledge became available of scientific data on the existence and distribution of human sexual diversity<sup>21</sup>. However, these religious leaders moved away from the assertion that it was necessary, or appropriate, to enforce those understandings by *criminal* sanctions. After all, criminal sanctions were not generally invoked for adultery and rarely for blasphemy, offences also referred to in holy texts. In more recent times, Bishop Desmond Tutu in South Africa has become a strong proponent of the need for reform of African church and popular views on this subject.

*Making common cause:* In the contemporary world, there is merit in making common cause with other agencies of reform of the criminal law, as for example those created to provide effective responses to the HIV/AIDS epidemic.

The countries that have succeeded most in promoting behaviour modification, essential to reduce the spread of HIV, are those that have promoted awareness of risks involved in sexual and drug using behaviour. Criminal law can sometimes act as an impediment to effective strategies to contain the spread of HIV. To encourage

---

<sup>21</sup> Alan A Brash, *Facing our Differences - The churches and Their Gay and Lesbian Members*, World Council of Churches Publications, Geneva, 1995.

behaviour modification, it is necessary for essential messages to reach the minds of those most at risk. That is less likely to happen where those at risk are stigmatized and subject to official harassment and criminal punishment.

There are dangers, of course, in broadening the proposals for law reform. There are risks of confusion between sexual minorities and persons living with HIV. In most developing countries of the Commonwealth, sexual minorities have not predominated amongst those infected with HIV. Nevertheless, despite the dangers and risks, the size of the HIV/AIDS epidemic adds to the urgency of adopting effective responses that diminish impediments to safer sexual practices and drug use. International support from agencies of the United Nations, including UNAIDS, WHO, UNDP and the Office of the High Commissioner for Human Rights, may sometimes afford funding and expertise to help local groups in the effort to promote the cause of legal reform in these areas.

*Scientific and other academics:* An important part of the strategy of reform that ultimately succeeded in England was engagement with scientists concerned in the care of members of sexual minorities.

Medical practitioners, psychologists, social workers and others were brought into the law reform movement to bring to more general notice awareness about the harm and stigmatisation (even violence) caused by the laws against homosexual offences. Invoking sound

scientific research concerning the causes, features and prevalence of sexual variation amongst human beings is an important factual foundation to correct the assumption that such variations are "foreign" or "Western" aberrations. They are not. They are present in all countries and all societies. The more dangerous disclosure - because of legal or religious sanctions - the more difficult it is to persuade members of those sexual minorities to reveal themselves openly to fellow citizens, and even with their families and friends.

Silence because of fear was true also in Western societies before the Kinsey and Wolfenden reports. In particular, the appeal to medical and psychological data can help to dispel the confusion, sometimes promoted by opponents of legal reform, between homosexuality and paedophilia. Sexual attraction to under-age children is no more common proportionately amongst homosexuals than heterosexuals. As the cases coming before courts demonstrate, the overwhelming majority of instances of paedophilia, or of sexual offences against children, involve heterosexual offenders, often in a family setting.

*Engaging international help:* Reference has already been made to securing assistance from United Nations agencies, particularly those concerned with addressing the spread of HIV. There are now numerous international bodies and individuals willing and able to assist with up to date information about the progress that has been made in abolishing crimes targeted at homosexual people. Under the influence of the decisions of the European Court of Human Rights, such crimes have

now been abolished, where they previously existed, in the member states of the Council of Europe. They no longer exist in any European country from Galway in Ireland to the West to Vladivostok in the Russian Federation, to East. Informed overseas speakers can be invited to provide public lectures on the course of reform followed now in many countries and of constitutional and other judicial decisions that have stimulated such reforms. They can explain the consequences of changes to the law and help to dispel exaggerated fears. There is no need to reinvent the wheel in this regard. Many useful lessons can be learned from the experience of other countries. In my own country, Australia, I give many such lectures. They can help to combat the ignorance and animosity that still exists in the minds of many people because they believe they have never met a homosexual person.

*Advertisements and letters:* In Britain, following the Wolfenden report, paid advertisements were published in the general media supporting the Wolfenden proposals. They were signed by many notable community leaders. The same has happened recently in India. A public letter, signed by many of the most distinguished public thinkers in India, has received widespread publicity. Similarly, letters to the editors of newspapers and participation in discussion programmes on radio and television have helped to promote awareness and discussion of the issues. If it can be arranged, the participation of articulate, persuasive, empathetic local individuals who are open about their sexuality, and their families can help personalise the injustice of the old

offences and the burdens that they cause, without justification, to fellow citizens.

*Conducting surveys:* In England and elsewhere an important part of the strategy to achieve reform involved the repeated undertaking of surveys to demonstrate changing social opinions on the subject of homosexual offences. The more information that the general community received about the pernicious effect which these offences have had on the lives of individuals, the greater became the shift of opinion in favour of reform of the law. The major problem to be addressed in securing reform is to get members of the majority population to think about the issue at all. Yet only when they do is it likely that moves will be stimulated in legislative and other governmental bodies towards repeal of the old laws.

*Compromise on detail:* Proponents of homosexual reform must be prepared to compromise on issues of detail. Thus, they must recognise that, sometimes, it requires time for full equality to be achieved. In Britain, as in Australia and many other countries, early reform legislation included discriminatory requirements about the age of consent. Whereas, in most legislation, an age of consent of sixteen years was provided in criminal statutes governing heterosexual conduct, the initial reforms in the case of homosexual conduct typically fixed the age of consent at seventeen years, eighteen years or even twenty-one

years. The last was the age initially provided in the first legislation implementing the Wolfenden reforms in Britain<sup>22</sup>. Similar provisions were at first copied in Western Australia<sup>23</sup>. In due course, most such discriminatory provisions have been removed and replaced by identical provisions irrespective of the sexual identity of participants or their conduct. Proponents of reform must be ready for the process of education and persuasion to take time. The primary challenge is to put the wheels of change in motion.

*Popular culture:* An important feature of securing reform of the law in Australia was that it sometimes came about in unexpected ways. A popular television 'soap opera' in Australia, *Number 96*, told the stories of a group of people living in a suburban apartment block in Sydney. One of these stories concerned the life of a young homosexual man. The aspects of his life were explained and dramatised in a matter-of-fact but sympathetic way.

Popular newspaper columnists also took part in promoting the cause of reform. To some extent, sporting, political, acting and other personalities associated themselves with the cause of reform. Those involved were not necessarily themselves homosexual. Some gave their support as a matter of principle. Others because of family, friends and

---

<sup>22</sup> *Sexual Offences Act 1967 (UK)*.

<sup>23</sup> *Law Reform (Decriminalization of Sodomy) Act 1989 (WA)*, s 10 amending *Criminal Code (WA)*, s 187.

particular experiences. Such communicators can explain that there are many things in life that are not fully understood by us all, without direct experience. Yet attributes of common humanity and understanding of the diversity of human existence supports acceptance of minorities and their essential human dignity and promotes a spirit of 'live and let live'.

In Australia, reform of the White Australia policy was achieved in the 1960s in part because of growing acquaintance of the majority Caucasian population with Asian immigrants. Similarly, acquaintance with the ordinariness and unthreatening character of members of sexual minorities and their families can help break down barriers of prejudice, often based on stereotypes.

*International movements:* In addition to spreading knowledge about the work of tribunals and courts, both national, regional and international relevant to homosexual law reform, it is useful to keep abreast of new initiatives of international agencies concerned with the human rights of sexual minorities.

In mid-2007, the Office of the High Commissioner for Human Rights in Geneva initiated the appointment of an officer who will investigate aspects of human rights concerned, amongst other things, with sexuality. Other initiatives have sprung up relevant to the developing world. The International Commission of Jurists organised a

conference in Bandung, Indonesia, which produced a statement addressed to the human rights dimension of sexual minorities<sup>24</sup>. This dimension is also now a significant aspect of the work of Amnesty International, based in London. It has featured in the agenda of the International Service for Human Rights in Geneva and many other national and international non-governmental organisations. Each of these international human rights bodies (and others) can be a source of information, materials and encouragement for local individuals and civil society organisations. Some of them have access to funding available for improving the lot of women and members of sexual minorities throughout the world.

*Increasing visibility:* Like all stereotypes, especially those founded on racial differences, those based on perceived features of sexual minorities are often the result of ignorance, fear and unfamiliarity. In some societies, it is still extremely difficult and even dangerous for individuals who are homosexual, or members of other sexual minorities, to 'come out' and explain the burden and injustice of criminal laws and other unequal provisions and practices.

The experience of Western countries is that, once the process of openness begins, it follows a generally predictable pattern unless further oppression halts the movement towards honesty, candour and change.

---

<sup>24</sup> International Commission of Jurists, *Bandung Statement on Homosexuality and Human Rights* (2005).

When criminal sanctions are removed, a cloud is normally lifted from members of the sexual minorities who have been subject to a legal regime that is designed to terrify them into silence, shame, denial and furtiveness. The experience of many countries is that, once the spell is broken, oppression of this kind begins to melt away. Parents, siblings, colleagues and friends are then quickly found to demand an end to the oppression and equality in the treatment of this small minority in society.

Just as the earlier moves to end discrimination on racial, gender and like grounds took time, so the process of reform affecting sexual minorities throughout the Commonwealth of Nations will take time. One of the reasons why some opponents cling to the criminal offences against homosexuals is that such offences are used to humiliate and frighten members of the sexual minorities into continuing denial of their reality and existence and thus to ensure their invisibility. Reality generally only emerges when it becomes safe to do so.

*Sexuality and rule of law:* So long as the criminal law remains unreformed, it is the duty of judges and lawyers, in appropriate cases to which it applies, to give effect to it. Thus, there can be no "free kicks" for homosexuals before the courts<sup>25</sup>.

---

<sup>25</sup> cf *R v Reid* [2006] 1 Qd R 64. Special leave to appeal was refused by the High Court of Australia: see *Reid v The Queen* [2006] HCA Trans 666 (Kirby, Hayne and Callinan JJ).

On the other hand, courts in many lands can, and now do, bring contemporary knowledge about sexual orientation to bear on decisions affecting the legal position of homosexuals in society<sup>26</sup>. Lawyers have a professional commitment to the attainment of justice and to upholding the fundamental human rights of all persons. Obviously, this also includes homosexuals and others in sexual minorities. Many of the leading proponents of law reform in England and Australia were lawyers. They saw from close up the oppression and injustice of the enforcement of the old criminal laws. Even when those laws were not generally enforced, lawyers recognised how they could be used intermittently to cause harassment, stigma, blackmail and fear amongst a vulnerable minority in society.

The fact that the law on homosexual offences is not generally enforced is sometimes put forward as a reason for leaving things alone. However, so long as criminal offences remain, people who do no harm to others are put beyond the pale. They suffer greatly in their self-esteem and in the enjoyment of human dignity and equality before the law. A just legal system will address this burden. It will remove it in the way that Wolfenden and his colleagues recommended.

*Skill, patience and common ground:* The lesson of developments in many societies, including my own in Australia, suggests that, at least

---

<sup>26</sup> cf *Appellant S 395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473.

in most communities, reform of the criminal offences concerned with homosexual acts will eventually be attained. In societies that are less democratic, less sensitive to the rights of individuals, more autocratic in their governance or unyielding in their treatment of this minority, the process of reform will take longer.

Religious, cultural and political opposition will sometimes prove a significant impediment to the process of reform. Confronting the causes of the impediments will require skill, patience, persuasiveness and constant exploration to try to find common ground. Because of the power of global ideas in today's world and the operation of the internet, it is likely that the ideas set in train by Wolfenden and his colleagues will continue to spread their message to all countries<sup>27</sup>. Especially so in the countries of the common law which share the same basic principles respectful of individual justice, human dignity and the ideal of equality before the law for all persons.

#### THE PROGRESS OF HUMAN FREEDOM

Those who establish committees and who undertake the painstaking efforts in the attempt to change the opinions of the majority deserve respect. They should ensure that the record of their endeavours is retained. In effect, it is part of the record of progress in

---

<sup>27</sup> See eg *Newsweek*, 17 September 2007, pp 39ff ("Legal in Unlikely Places").

human freedom. The struggle certainly does not affect as many people in society as have been affected by the movement for the equality of women. It cannot rival in numbers the movement to eradicate all forms of racial discrimination. It does not even affect as many people as are the subject of the new *Universal Convention on Disabled Persons*<sup>28</sup>.

However, in the eyes of the *Universal Declaration on Human Rights* and the international treaties that have resulted from that Declaration's brave, original concepts, adopted sixty years ago, every individual is precious. The notion that there inheres in every individual basic human rights which no other individual or organisation or the State itself can take away, is a powerful idea. It is still at work in the imagination of humanity. It is not yet fully realised. Many wrongs remain to be righted. But the concept that a minority can be stigmatised for a feature of their sexual nature which they do not choose and cannot change is intolerable to rational and just people in the present age.

Eventually all governments and all religions and all people in the world will come to this realisation just as earlier religions abandoned their support for slavery or notions of the inferiority of particular races. In the meantime, it is the responsibility of informed and thinking people to promote the cause of equality and justice. This means working towards

---

<sup>28</sup> United Nations, *Convention on the Rights of Persons with Disabilities* (open for signature 30 March 2007) (not yet in force).

the urgent repeal of homosexual offences as a priority target for those countries that still have such offences as part of their law.

So far, the Commonwealth of Nations has been somewhat patchy in the causes of human rights that it has championed<sup>29</sup>. It has been strong on opposing racial and ethnic discrimination. Rightly so. It has lately been active in the cause of opposing gender discrimination. Rightly so. However, a true multiracial, diverse Commonwealth, committed to respect and equality for all of its citizens, will not be selective in the wrongs it sets out to rectify and the causes of justice that it embraces. It will not be opportunistic; nor will it advance only the interests that are seen as a priority for the majority of its citizens. Human rights always involve issues of principle. They are concerned with each precious individual. If individuals are subject to discrimination for indelible causes of nature, that is wrong. Lawyers, above all, will say so. Commonwealth lawyers before all others.

In the Commonwealth of Nations we should take out, dust off, and read again the Wolfenden report, fifty years after it was written. We should act to give effect to Wolfenden's message as it concerns the

---

<sup>29</sup> There are few references to sexual minority rights in Commonwealth documents. See eg Commonwealth Secretariat, Harare Commonwealth Declaration 1991 (printed London 2004), para 9. Commonwealth Health Ministers' Meetings have occasionally recognised the need for specific attention to such issues in HIV prevention initiatives towards "gay and bisexual" people. See Statement, 21 April 2006. However, a search of the Commonwealth Secretariat website returns meagre pickings.

many remaining instances of one of the least attractive legacies of British colonial rule still evident in Commonwealth criminal laws. Lawyers in the new Commonwealth should take the lead because the starting point of reform is the removal of the criminal laws. As the Hong Kong Court of Appeal recently observed:

"Denying persons of a minority class the right to sexual expression in the only way available to them, even if that way is denied to all, remains discriminatory when persons of a majority class are permitted the right to sexual expression in a way natural to them. During the course of submissions, it was described as 'disguised discrimination'. It is, I think, an apt description. It is disguised discrimination founded on a single base: sexual orientation."<sup>30</sup>

---

<sup>30</sup> *Leung T C William Roy v Secretary for Justice (HK)* [2006] HKCA 106 at [48].

## SCHEDULE

### LAWS OF COMMONWEALTH COUNTRIES WHICH CONTINUE TO CRIMINALISE ADULT CONSENSUAL PRIVATE SEXUAL CONDUCT

Bangladesh	<i>Penal Code</i> 1860, s 377
Barbados	<i>Sexual Offences Act</i> 1992, ss 9, 12.
Belize	<i>Criminal Code</i> (Revised 2003), s 53
Botswana	<i>Penal Code</i> ss 164, 165, 167
Brunei	<i>Penal Code</i> 1951, s 377
Cook Islands	<i>Crimes Act</i> 1969, ss 154, 155
[Fiji	<i>Penal Code</i> 1985, ss 175, 176, 177 (declared unconstitutional 2005)]
Gambia	<i>Criminal Code</i> 1965, art 144
Ghana	<i>Criminal Code</i> 1960 (Rev 1997) art 105
Grenada	<i>Criminal Code</i> , art 431
Guyana	<i>Criminal Law (Offences) Act</i> ss 352, 353, 354
India	<i>Indian Penal Code</i> 1860, s 377
Jamaica	<i>Offences Against the Person Act</i> , arts 76, 77, 79
Kenya	<i>Penal Code</i> Cap 63, ss 162, 163, 165
Kiribati	<i>Penal Code</i> Cap 67 Revised 1977 ss 153, 154, 155
Lesotho	Sodomy is reportedly a criminal offence
Malawi	<i>Penal Code</i> Cap 7:01, ss 153, 156
Malaysia	<i>Penal Code</i> (Act No 574 consol 1998) 377A, 377B
Maldives	<i>Penal Code</i> of 1960, ss 377C, 377D
Mauritius	<i>Criminal Code</i> s 250
Mozambique	<i>Penal Code</i> of September 16, 1886, arts 70, 71
Namibia	Sodomy offence reported.
Nauru	<i>Criminal Code</i> of Qld (since repealed in Queensland) applied to Nauru, s 208
Nigeria	<i>Criminal Code Act</i> (Ch 77, Laws 1990), ss 214, 215, 217 Also laws of States of Nigeria
Pakistan	<i>Penal Code</i> 1860, s 377
Papua & New Guinea	<i>Criminal Code</i> 1974, ss 210, 212, 336
Saint Kitts and Nevis	<i>Offences Against the Person Act</i> , ss 56, 57
Saint Lucia	<i>Criminal Code</i> ss 132, 133
St Vincent and The Grenadines	<i>Criminal Code</i> 1990, ss 146, 148
Sierra Leone	<i>Offences Against the Person Act</i> 1861, ss 61, 62
Singapore	<i>Penal Code</i> (Cap 22 Revised 1998) ss 377, 377A
Solomon Islands	<i>Penal Code</i> (Cap 26) ss 160, 161, 162

Sri Lanka	<i>Penal Code</i> of 1883 (No 2 Cap 19), art 365
Swaziland	Sodomy offence reported
Tanzania	<i>Penal Code</i> of 1945 (amended 1998), arts 154, 155
Tonga	<i>Carnal Offences</i> [Cap 18] ss 136, 137, 139, 140
Trinidad & Tobago	<i>Sexual Offences Act</i> (Cap 106) ss 140, 141, 143
Western Samoa	<i>Crimes Ordinance</i> 1961, ss 58D, 58E, 58G
Zambia	<i>The Penal Code Act</i> (1995 ed rev'd) ss 155, 156, 158
[Zimbabwe	<i>Criminal Law (Codification and Reform) Act</i> [Chapter 9:23] Act 23/2004), s 73]

**COMMONWEALTH LAW BULLETIN**  
**LESSONS FROM WOLFENDEN - A METHODOLOGY FOR**  
**HOMOSEXUAL LAW REFORM IN THE COMMONWEALTH OF**  
**NATIONS**

**Michael Kirby**