



General Assembly

Distr.: General
22 February 2012

English only

Human Rights Council

Nineteenth session

Agenda item 3

**Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development**

Written statement* submitted by the Commonwealth Human Rights Initiative, a non-governmental organization in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[13 February 2012]

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

The decriminalisation of same-sex conduct

The report of the High Commissioner for Human Rights, entitled “Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity”¹ (hereafter the High Commissioner’s Report), which follows the UN Human Rights Council resolution 17/19, shows the need for a collective and systematic response to ongoing persecution of individuals based on their sexual orientation and gender identity.

The nature of criminalisation

Commonwealth Human Rights Initiative (CHRI) agrees with the report’s assertion that criminalisation of same-sex conduct is incompatible with international human rights law and whether enforced or not, its mere existence encourages and reinforces intolerance, abuse and violence against the lesbian, gay, bisexual, transgender and intersex (LGBTI) community. Such laws are incompatible with the human rights obligations enshrined in instruments such as the ICCPR and ICESCR. In particular, criminalisation impinges on the right to equality and non-discrimination (Article 26 of the ICCPR and Art.2 of the ICESCR), the right to privacy (Art. 17 of the ICCPR) and the right to health (Art.12 of the ICESCR).

Laws that penalise same-sex conduct also serve to stigmatise and further marginalise LGBTI persons and make it difficult for LGBTI persons to claim and assert their rights. Such laws expose them to arbitrary arrest and detention, harassment, and violence from State agents as well as private actors, often within a context of impunity. CHRI calls on the UN Human Rights Council to deliberate on a resolution that calls on States currently criminalising same-sex conduct to immediately embark on a process of decriminalisation.

Criminalisation of same-sex conduct and sexual identity comes in several different forms and all of the laws outlined below, regardless of their impact, usage or application, constitute a breach of State obligations to promote and protect international human rights.²

- The full criminalisation of sexual identity: The criminalisation of status or identity involves making it criminal to be either gay or lesbian. Some States, through the course of enforcing laws criminalising same-sex conduct, have used criminal law doctrines, such as attempted or inchoate offences, to effectively criminalise sexual identity. In Cameroon, the arrest and conviction of Jean-Claude Mbede in April 2011 for attempted homosexuality was based on the content of a text message he sent to a male friend.³ Mbede’s actions fall significantly short of the standard generally used when criminalising attempted crimes and this conviction is symptomatic of a wider policy in Cameroon of arresting and harassing men believed to be ‘effeminate’ or ‘homosexual’, which effectively criminalises sexual orientation. The proposed offence of aggravated homosexuality in Uganda is also a law that is designed to criminalise sexual identity.⁴
- Sexual conduct laws that directly discriminate against the gay or lesbian community: Laws criminalising same-sex conduct are laws that describe a particular sexual practice and make it illegal. In some countries, almost every non-heterosexual sexual

¹ Report of the UN High Commissioner for Human Rights, A/HRC/19/41 17 November 2011.

² As described in Section B of the High Commissioners report.

³ B Dittrich et. Al ‘Appeal to Cameroon’s Top Leaders to Overturn Conviction of Roger Jean-Claude Mbede’ Human Rights Watch 17 May 2011.

⁴ Anti-Homosexuality Bill (2009) Uganda < <http://wthrockmorton.com/wp-content/uploads/2009/10/anti-homosexuality-bill-2009.pdf>> Last accessed 6 February 2012.

practice is criminalised, but in other countries sexual practices are criminalised in a manner designed to deliberately discriminate against the LGBTI persons. In Botswana, following a Supreme Court Decision, the sexual practices of lesbians were criminalised to bring the criminalisation of same-sex practices into line with constitutional principles of equality.⁵ The creation and enactment of these laws is a form of substantive discrimination, as they are designed to treat an individual differently solely on the basis of their sexual orientation. Although these laws are not explicitly designed to criminalise sexual identity (in the same way the laws described in paragraph (a) are) they implicitly criminalise sexual identity in a manner that is substantively indistinct.

- Historic sodomy laws: Sodomy or Buggery laws in many countries were derived from the British 1861 Offences Against the Person Act and the 1860 Indian Penal Code, which, under section 377, criminalised “carnal intercourse against the order of nature”. The Indian Penal Code was the template for colonial-era legislation in the majority of British colonies. Following independence, many of these provisions remained in force although in many countries few if any prosecutions were brought under these laws. The lack of prosecutions brought under these laws is irrelevant when it comes to determining whether or not they are discriminatory or pose a danger to an individual’s right to privacy.⁶

All of these laws are discriminatory and a violation of a State’s duty to prevent violence and discrimination based on sexual orientation and gender identity. Whilst the High Commissioner’s report focuses on the practical manifestation of these laws it should be recognised that these laws represent a threat to human rights regardless of their origin or propensity of application.

The Meaning of decriminalisation

Decriminalisation means the removal of any criminal or civil penalties that may be imposed on an adult who engages in private same-sex sexual activity. There should be no legal powers available to the authorities to arrest, investigate or prosecute private, consensual same-sex sexual activity between adults. This is a substantive definition and describes what should be the eventual end point of a constitutional, political or legal process of decriminalisation.

Decriminalisation is not any of the following things:

- A commitment not to enforce laws that criminalise same-sex sexual conduct. This is too uncertain and still constitutes a human rights violation as the mere fact of ‘black letter’ criminalisation means that LGBTI individuals are marginalised in society.
- A ‘stand alone’ declaration of equal rights or anti-discrimination statement: Some States, such as Mauritius, have retained laws criminalising same-sex conduct whilst at the same time adopting civil laws to ensure equality or protect against discrimination.⁷ The continued criminalisation of sexual conduct effectively nullifies any progress towards non-discrimination on the basis of sexual orientation as the threat of criminalisation automatically creates a differential social status for members of the LGBTI community.

⁵ Ditshwanelo ‘Gays, Lesbians, and Bisexuals of Botswana’ See <
<http://www.ditshwanelo.org.bw/gay.html>> Last accessed 9 February 2012 .

⁶ *Mondinos v Cyprus* [1993] (Application No. 15070/89).

⁷ Employment Rights Act 2008 [Mauritius] S.2, S.5 and S.38 (1).

- The decriminalisation of a particular status: Some jurisdictions, such as Pakistan, have decriminalised transexuality but kept laws criminalising same-sex conduct. Decriminalisation must mean that the criminal law does not penalise any individual on the basis of their sexual orientation or gender.

Monitoring decriminalisation

As stated in the High Commissioner's report, decriminalisation of the laws criminalising same-sex conduct is essential for the realisation of international human rights obligations. Decriminalisation is a process that is specific to individual jurisdictions and is contingent on their own political, legal and constitutional processes. Decriminalisation does however have a specific end point, the removal of criminal or civil sanctions based on sexual orientation, and it is important to record the progress of State parties towards decriminalisation and acknowledge when State parties have reached that goal.

It is proposed that the Office of the High Commissioner compile, in consultation with civil society organisations, national human rights institutions, government bodies and other expert parties, an annual decriminalisation monitor to record the progress of States toward decriminalisation. This would monitor the relative progress of the 76 States that have yet to decriminalise same-sex conduct toward the eventual aim of decriminalisation, and would complement the existing work of the High Commissioner. This report would review all legal and political developments over the course of the calendar year in relation to the decriminalisation of same-sex conduct, and would use the guidelines on decriminalisation stated in paragraphs 4 & 5 above to assess the substance of any given reforms.

Globally, the LGBTI community continues to face a variety of different human rights challenges. The challenge of decriminalisation of sexual orientation and same-sex conduct is a specific but important challenge and one that requires constant review in order to ensure that States can provide a stable foundation for anti-discrimination laws.

Recommendations

In the process of debating and implementing the High Commissioner's report, CHRI calls on the UN Human Rights Council to:

- Urge UN member States to embark immediately on a process of decriminalising laws that criminalise same-sex conduct and sexual orientation.
- Encourage the High Commissioner's Office to annually monitor and report back on the decriminalisation of same-sex conduct and its global status.
- Initiate and continue a constructive dialogue on LGBTI rights based on international human rights law, including standards such as the Yogyakarta Principles.
- Support recommendation 85 (b) in the High Commissioner's report and encourage Special Procedures to include LGBTI issues and decriminalisation of same-sex conduct within the context of their mandates.