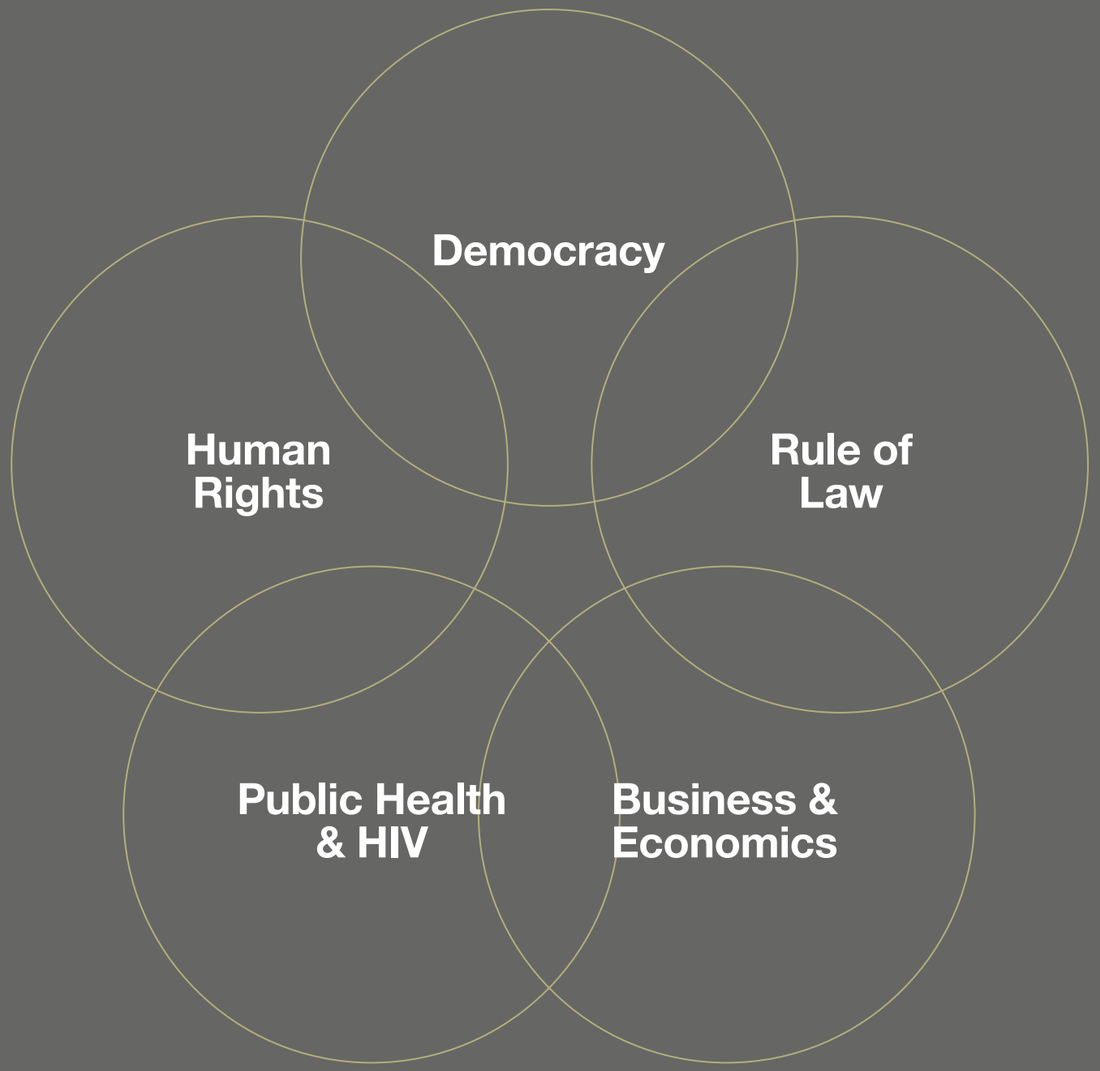
Criminalising Homosexuality: Irreconcilable with Good Governance: Synopsis and our Recommendations

HUMAN DIGNITY TRUST

***Corrigendum**, 09 September 2016*: Errors in the original text of these notes relating to the scale and impact of criminalisation of lesbian and bisexual women have been corrected as follows:

- On p. 6 of "Criminalising Homosexuality: Irreconcilable with Good Governance: Synopsis and our Recommendations";
- On p. 4 of "Criminalising Homosexuality and International Human Rights Law";
- On p. 4 of "Criminalising Homosexuality and Working through International Organisations"

For more detailed information on the topic of criminalisation of women, please see our report *Breaking the Silence: Criminalisation of Lesbian and Bisexual Women and its Impacts*.



This is one in a series of notes produced for the Human Dignity Trust on the criminalisation of homosexuality and good governance. Each note in the series discusses a different aspect of policy that is engaged by the continued criminalisation of homosexuality across the globe.

The Human Dignity Trust is an organisation made up of international lawyers supporting local partners to uphold human rights and constitutional law in countries private, consensual sexual conduct between adults of the same sex is criminalised. We are a registered charity no.1158093 in England & Wales. All our work, whatever country it is in, is strictly not-for-profit.

Contents

Background

01. This series of briefing notes was produced by the Human Dignity Trust in the second half of 2015. These notes aim to illustrate the link between the criminalisation of homosexuality and various aspects of good governance. They also offer information and guidance to governments, the international community, civil society and activists on how to bring about the decriminalisation of homosexuality across the globe. This research draws on our experience working with activists in criminalising countries and our expertise in international human rights law. They were produced in consultation with leading academics in each of the areas addressed.

02. The criminalisation of homosexuality conflicts with numerous aims and priorities of governments around the world, including, but not limited to, democracy, the rule of law, human rights, public health, and economic development. When considered from any one of these perspectives, the criminalisation of homosexuality is a hindrance to a country's progress. Different criminalising governments will be more or less sensitive to each of these priorities. The notes in this series are each designed to function as a stand-alone document, equipping stakeholders with the information to make a compelling case to criminalising governments.

03. The topics covered in this series of briefing notes are:

a) Criminalising Homosexuality and Democratic Values

b) Criminalising Homosexuality and the Rule of Law

c) Criminalising Homosexuality and International Business: the Economic and Business Cases for Decriminalisation

d) Criminalising Homosexuality and Public Health: Adverse Impacts on the Prevention and Treatment of HIV and AIDS

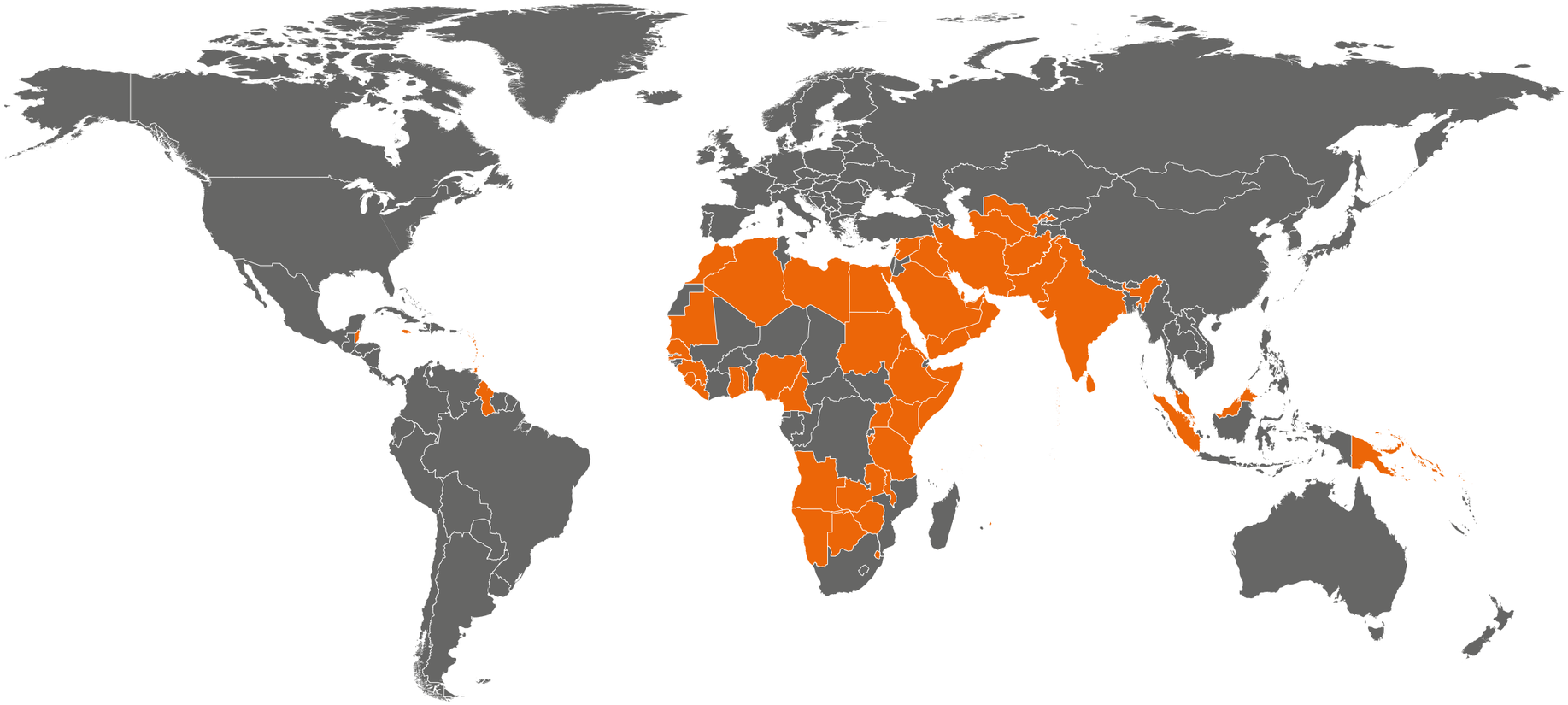
e) Criminalising Homosexuality and International Human Rights Law

f) Criminalising Homosexuality and Working through International Organisations

g) Criminalising Homosexuality and Understanding the Right to Manifest Religion

h) Criminalising Homosexuality and LGBT Rights in Times of Conflict, Violence and Natural Disasters

78 jurisdictions criminalise homosexuality



The scale of the problem

04. The criminalisation of homosexuality is a global problem that degrades millions of men and women. A snapshot is provided below:

Same-sex intimacy between consenting adults in private is a crime in 78 jurisdictions. Of these, at least 44 jurisdictions criminalise female same-sex intimacy as well as male.

In the 78 jurisdictions that criminalise men, approximately 94 to 145 million men are or will be 'un-apprehended felons' during the course of their lifetimes for having a same-sex sexual experience.[1]

Likewise, in the 44 jurisdictions that criminalise women, approximately 22 to 66 million women are or will be 'un-apprehended felons'.[2]

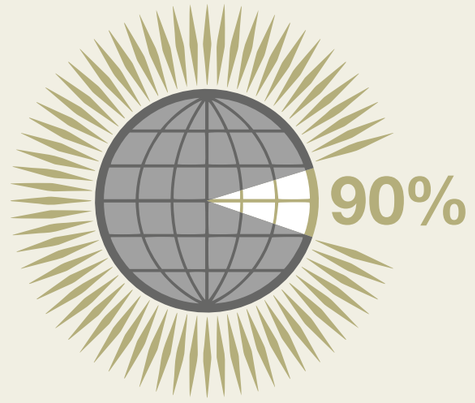
2.9 billion people live in these 78 jurisdictions (some 40% of the global population).

Of these 2.9 billion people, an estimated 58 to 174 million will identify as LGBT now or when they reach adulthood.[3]

These millions risk arrest, prosecution, imprisonment and, in some cases, execution.[4]

Laws that criminalise same-sex intimacy do more than outlaw certain sexual acts. These laws criminalise the LGBT identity. The full force of the state is used against LGBT people. This leaves LGBT people vulnerable to violence, abuse and harassment from state actors and non-state actors alike. At any point in time, it is estimated that 175,000 LGBT people will be in peril, seriously harmed or threatened with harm.[5] It also shuts LGBT people out from employment, healthcare and fulfilling other socio-economic rights.

Criminalisation is largely a problem for the Commonwealth. Of the 2.9 billion who live where same-sex intimacy is a crime, 2.1 billion live in the Commonwealth (some three-quarters of the total). 90% of Commonwealth citizens live in a jurisdiction that criminalises. Criminalisation is a legacy of British colonial law.



1 Based on estimates that between 6.5% and 10% of men will have a same-sex sexual experience in adulthood The 6.5% figure is for adult males aged 25 to 44, taken from: Mosher, W.D., Chandra, A., Jones, J., *Sexual Behavior and Selected Health Measures: Men and Women 15–44 Years of Age, United States, 2002*, Advance Data from Vital and Health Statistics (362): 2. Available at: http://www.cdc.gov/nchs/data/ad/ad362.pdf. The 10% figure is taken from a re-analysis of *The Kinsey Data*, Gebhard, P.H. and Johnson, A.B (1979). Available at: http://www.kinseyinstitute.org/resources/bib-homoprev.html

2 Based on estimates that between 3.7% and 11% of women will have a same-sex sexual experience in adulthood. Sources, at n. 1 above. Mosher estimates 11%; Gebhard estimates 3.7%. The total population of these 44 jurisdictions is 1.2 billion, with a female population of approximately 600 million.

3 Based on conservative to moderate estimates that 2% to 6% of the general adult population identifies as LGBT. In 2005, the UK Government estimated that 6% of the UK population is LG; in 2010, the UK Office of National Statistics found that 1.5% of UK adults openly identify as LGB; in 2013, the *US National Health Statistic Reports* found that 2.3% of US adults openly identify as LGB; in April 2011, the Williams Institute published estimates collated from multiple surveys finding that 3.5% of adults in the USA identify as LGB and 0.3% as transgender.

4 The death penalty is the maximum penalty in Iran, Mauritania, Saudi Arabia, Sudan and Yemen, and in some parts of Nigeria and Somalia. Additionally, Brunei Darussalam is phasing in its *Syariah Penal Code Order* (2013) between May 2014 and the end of 2016, which will apply the death penalty (stoning to death) for consensual same-sex sexual conduct.

5 Estimates from Organization for Refuge, Asylum & Migration (ORAM), *Opening Doors: A Global Survey of NGO Attitudes Towards LGBTI Refugees & Asylum Seekers*, June 2012. Available at: http://www.oraminternational.org/images/stories/PDFs/oram-opening-doors.pdf

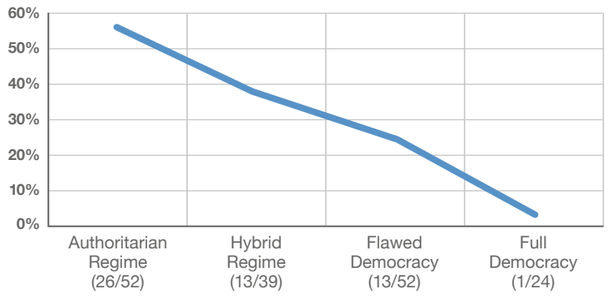
Criminalising homosexuality and democratic values

05. Criminalisation is a sign of poor democratic credentials. Excluding a segment of society on an arbitrary basis of identity in inherently undemocratic. It is no coincidence that the majority of authoritarian regimes criminalise.

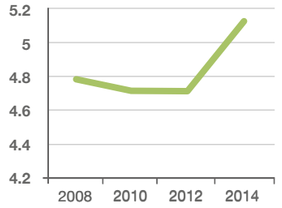
    We used the Economist Intelligence Unit's democracy rankings (2014) to test this correlation. There is a clear link. Of these 52 Authoritarian regimes 56% criminalise consensual same-sex intimacy. Conversely, of the 24 Full Democracies identified, 4% criminalise. It is evident that properly functioning democracies do not criminalise homosexuality.

06. How states treat LGBT people is a litmus test for their credibility as democracies. For example, early signs show Botswana and Kenya are becoming more democratic, and simultaneously their treatment of LGBT people is improving. Whereas when democratic rights are withdrawn, LGBT rights are some of the first to be denied, as we see today in Russia and The Gambia. As LGBT rights have progressed or retreated, countries' democratic credentials have shifted in a parallel direction.

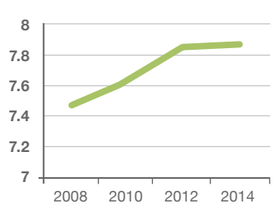
Propensity to criminalise consensual same-sex intimacy by regime type



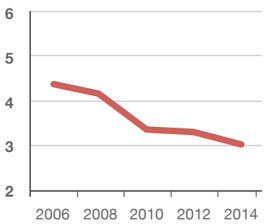
Kenya
Democratic credentials over time



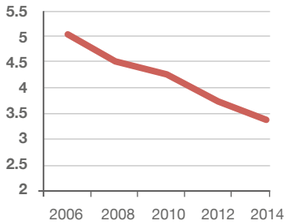
Botswana
Democratic credentials over time



The Gambia
Democratic credentials over time



Russia
Democratic credentials over time



Criminalising homosexuality and the rule of law

07. Criminalisation offends the rule of law. Where the rule of law is present, criminalisation should cease. Professor Sir Jeffrey Jowell, Director of the Bingham Centre for the Rule of Law, writes in the foreword to our note:

> **"Making homosexuality a crime cuts against the grain of the rule of law as a pillar of a fair and accountable society. The briefing note therefore provides an intellectual framework for understanding why these laws are not only unjust to individuals but also an affront to a country's constitutional values.**
>
> **The briefing note outlines a number of components (or 'ingredients' as Tom Bingham called them) of the rule of law and shows how criminalisation of homosexuality offends a number of them (such as inequality, arbitrariness, detention without reasonable justification, proportionality, and breach of international human rights standards).**

08. Human rights, democratic credentials, the rule of law and LGBT rights are intrinsically linked. Democracy cannot flourish without being underpinned by the rule of law which protects human rights. This means LGBT rights must necessarily be a part of the dialogue. The rule of law cannot be present to a meaningful degree when people are criminalised on the basis of their identity and for their consensual sexual conduct.

Criminalising homosexuality and the impact on business, the economy and investment

09. In recent years, international business has become a major ally in upholding the human rights of LGBT people. This should come as no surprise. The Western consumer is now firmly pro-LGBT, businesses are more profitable when they are inclusive, and it has been demonstrated that laws that criminalise homosexuality hinder economic growth. There is a clear business and economic rationale for decriminalisation. For instance, a study commissioned by the World Bank concluded that **India's economy loses up to 1.7% of GDP due to the impact of criminalisation and homophobia.[6] This is equivalent to up to US$30.8 billion.**

10. Politicians in criminalising countries should be advised of the economic benefits of repealing their criminalising laws. Repeal can be expected to boost productivity and attract investment and tourism. The economic case for decriminalisation can be made completely separately from arguments grounded in human rights, democracy or the rule of law.

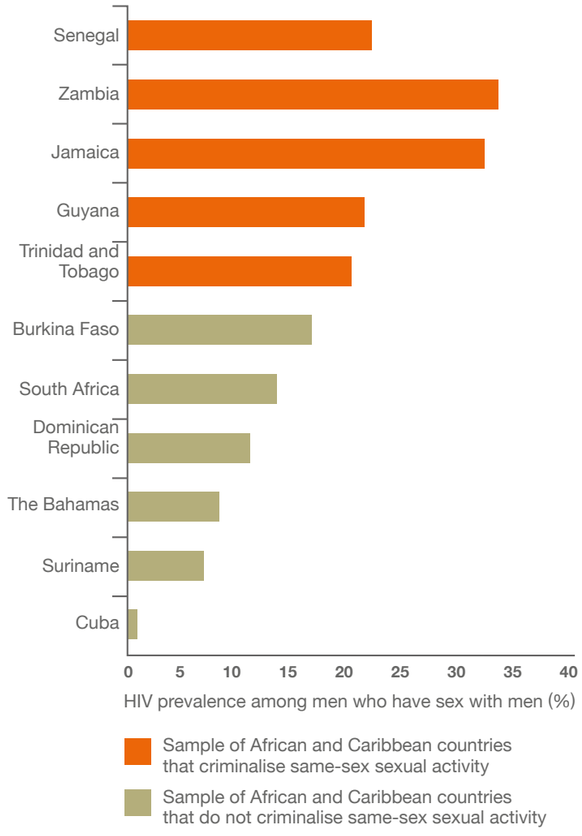
11. Businesses are in a unique position to advocate for decriminalisation and encourage governments that criminalise homosexuality to understand how they are inadvertently damaging their own economic prosperity.

6 Lee Badgett, M.V., *The Economic Cost of Homophobia & the Exclusion of LGBT People: A Case Study of India.* Available at: http://www.worldbank.org/content/dam/Worldbank/document/SAR/economic-costs-homophobia-lgbt-exlusion-india.pdf

Criminalising homosexuality and public health and HIV

12. Multiple studies have shown that criminalisation hinders efforts to curb HIV transmission. These laws reduce access to HIV testing and treatment and encourage riskier sexual practices. To cite just two studies from the many provided in our briefing note on this subject, UNAIDS found that **the HIV prevalence among men who have sex with men rose from 1 in 15 in Caribbean countries where homosexuality is not criminalised to 1 in 4 in Caribbean countries where it is criminalised.** Secondly, the UNAIDS-*Lancet* Commission compared HIV prevalence in criminalising countries (top graph opposite) with neighbouring non-criminalising countries (bottom graph).[8] Again the correlation is clear.

13. The global HIV/AIDS crisis simply cannot be brought under control while criminalisation persists. Again, the public health rationale for decriminalisation can be made completely separately from arguments grounded in human rights, democracy and the rule of law. The international community, national governments and public health organisations must make it clear to governments that criminalise homosexuality that they are undermining public health initiatives.



7 UNAIDS, 'Report on the global AIDS epidemic', 2008; UNAIDS, 'Keeping Score II: A Progress Report towards Universal Access to HIV Prevention, Treatment, Care and Support in the Caribbean', 2008.

8 Piot, P., et al., 'UNAIDS-*Lancet* Commission on Defeating AIDS – Advancing Global Health', *The Lancet*, 11 July 2015, Vol. 386, No. 9989, pp. 1 71-218. Available at: http://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736(15)60658-4.pdf

International human rights law and international organisations

14. Laws that criminalise homosexuality violate universal human rights. Criminalising laws are simply incompatible with the rights to privacy, dignity and non-discrimination, and can amount to inhuman and degrading treatment. Domestic courts around the world have held as much, as have the courts and bodies that oversee international human rights instruments.

15. The United Nations (UN) has stated repeatedly that criminalisation breaches international law and offends the principles of the UN.

16. **National governments can work within international organisations, such as the UN, the EU, the Council of Europe, the Organisation of American States, the African Union, the OSCE and the Commonwealth,** to complement and amplify their bilateral and behind the scenes work on this issue. At the grassroots level, activists and individuals in many criminalising countries might access international courts and committees to hold their governments to account for breaching international human rights law.

Understanding the right to manifest religion

17. Most of today's laws that criminalise homosexuality were originally put in place under British colonial rule. The remainder of criminalising laws across the globe stem from Islamic Sharia law. However, there is no firm correlation between Islam being a society's dominant religion and laws that criminalise homosexuality; many Muslim-majority countries do not criminalise.

18. The right to freedom of religion and LGBT people's rights to equality, privacy and dignity are all protected under international human rights law. There is no bar under international law on individuals holding a particular belief about homosexuality or morality or generally. However, states do not have the right to impose the belief of some through the law if it conflicts with human rights, regardless of whether the majority of the population hold that belief. To believe that the religious or moral belief of some justifies states in upholding laws that criminalisethe consensual conduct of others is to fundamentally misunderstand the meaning of one's right to manifest religion.

19. Religious leaders from around the world representing a variety of faiths have made multiple statements condemning the criminalisation of homosexuality and the persecution it engenders.

Conflict, violence and natural disasters

20. LGBT people are vulnerable to violence, abuse and neglect at the best of times. In times of conflict and natural disasters when resources become scarcer and law and order breaks down, these vulnerabilities are exacerbated. Moreover, humanitarian law has not caught up with other areas of international law by expressly recognising LGBT people, which heightens the risk of depravation in these unique circumstances. National governments must lead the way by including sexual orientation and gender identity in their military manuals and encouraging the International Committee of the Red Cross to update its interpretation of humanitarian law.

21. Relief programmes in times of conflict and disaster often fail to acknowledge and address the heightened vulnerabilities of LGBT people, leaving them with decreased access to aid. International organisations and national governments must adjust their relief programmes to specifically include LGBT people, as they do already for other groups.

Foreign policy

22. We appreciate that not all governments will voluntarily respond to the incentives and arguments that we have outlined above. As such, we have presented various means by which non-criminalising governments who see that criminalisation elsewhere is contrary to their foreign policy aims can pressurise criminalising countries into repealing these laws. These methods are listed below.

23. Political mechanisms:
International organisations and national governments can use their diplomatic influence to:

a) Convey the human rights grounds for decriminalisation and stress that it is necessary for governments to decriminalise in order to adhere to international human rights law.

b) Speak in the alternative voice of democracy and the rule of law when engaging with criminalising governments, which captures human rights albeit in a different tone.

c) Convey the business, economic and health arguments both as standalone reasons to decriminalise, or as part of the messages in a) and b) above.

d) Vocalise the arguments for decriminalisation both publicly at international organisations and bilaterally using quiet diplomacy. For example, raise decriminalisation at Universal Periodic Review, in a constructive manner that encourages the reviewed country to engage with the matter rather than respond with a knee-jerk refusal to decriminalise.

e) When acute abuses against LGBT people occur, place travel bans on politicians or other public figures who stoke homophobia or who sponsor laws that enhance criminalisation (such as has been seen in Uganda, Nigeria and The Gambia).

f) Consider appointing a national Special Envoy (or similar title) to coordinate the response to global LGBT persecution.[9]

24. Financial mechanisms:
National and supranational governments, like the EU, can use their economic influence to:

a) After consultations with local stakeholders, consider redirecting aid.

b) Continue to fund and expand funding to grassroots LGBT activists in countries that criminalise homosexuality.

c) Build a binding commitment to LGBT rights and human rights more generally into bilateral and multilateral trade agreements.

d) The EU, in particular, can provide economic and financial incentives to decriminalise, in particular via the mechanisms in the Contonou Agreement.

25. Technical mechanisms:
International organisations and national governments can use their technical expertise to:

a) Draft a model criminal code fit for the 21st century to replace the archaic colonial-era criminal laws which criminalise LGBT people. This model penal code should be non-gendered, victim-centric and based on understanding sexual relations vis-à-vis consent. This would have spill over benefits for other vulnerable groups like women and children, and would lessen the burden of legislative reform, particularly on small criminalising states with limited capacity. This could be done via the Commonwealth which has experience in such technical exchange or through another similar body.

b) Work with businesses to help them vocalise that criminalisation hinders their profitability, affects their investment decisions and worsens the broader economic climate in which they operate.

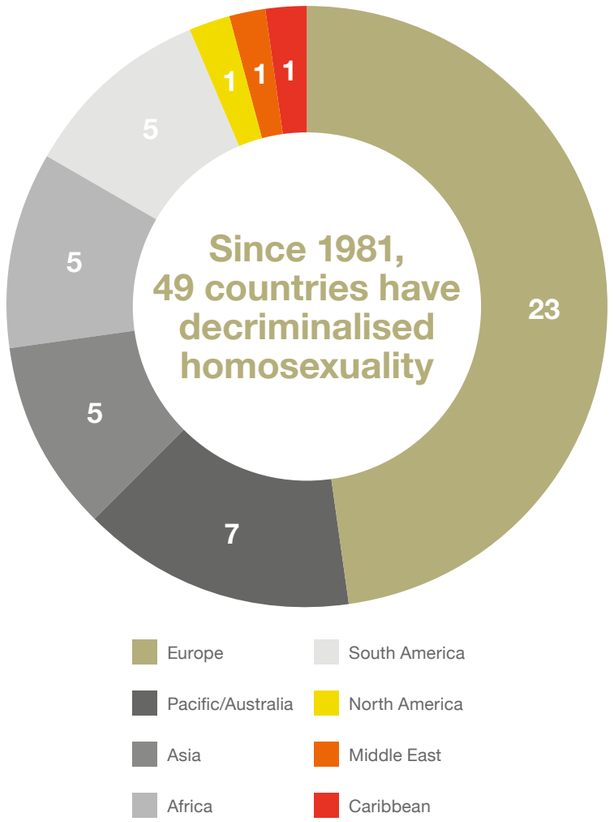
c) Work with public health authorities and agencies to articulate that criminalisation is detrimental to public health. For example, national governments, the World Health Organisation and UNAIDS could do this alone or collectively.

9 In the summer of 2015, the Human Dignity Trust consulted civil society in the UK and overseas on whether the UK Government should appoint a Special Envoy. Of the responses received during the consultation period, 69% supported the proposal, 23% were neutral, and 8% did not support.

The importance of external pressure

26. We strongly emphasise that the history of decriminalisation shows that external influence is crucial to bring about change. Since 1981, 49 countries have decriminalised. The majority did so due to the pressure of international organisations (in most instances being the Council of Europe), legal determinations under international law (at the European Court of Human Rights or the Human Rights Committee), or due to technical assistance from international organisations (such as guidance from UNAIDS and the WHO).

27. If the international community had remained silent in these instances, the current situation would be far graver. Most likely more than 78 jurisdictions would continue to criminalise today. History tells us that progress is possible, but only with ongoing, deliberate efforts from the international community.



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