Human Dignity Trust

REFORM
OF DISCRIMINATORY SEXUAL OFFENCES LAWS IN THE COMMONWEALTH AND OTHER JURISDICTIONS

A Summary of Key Findings

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BACKGROUND

The Human Dignity Trust is an organisation of international lawyers supporting local partners to uphold international and constitutional human rights law in countries where private, consensual sexual conduct between adults of the same sex is criminalised. More than 70 jurisdictions globally criminalise consensual same-sex intimacy, putting lesbian, gay, bisexual and transgender ('LGBT') people beyond the protection of the law and fostering a climate of fear, stigma, discrimination and violence.

The Trust provides technical legal assistance upon request to local human rights defenders, lawyers and governments seeking to eradicate these discriminatory laws. In most cases, these laws are part of a wider package of largely colonial-era sexual offences laws that discriminate against and fail adequately to protect multiple groups, including women, children, LGBT people and people with disability. Wholesale reform of these laws is urgently needed in many countries to make them compliant with contemporary human rights standards, and to ensure better protection against discrimination and violence.

Legislative reform – in which governments voluntarily reform discriminatory laws – is always the preferred route to change. Individuals who suffer under such laws can and do seek recourse through the courts where governments fail to act. However, any government seeking to abide by its international legal obligations and fundamental constitutional rights provisions, and which prioritises the protection of all individuals from sexual violence without discrimination, can and should undertake direct reforms.

With generous funding from Global Affairs Canada, and in partnership with The Royal Commonwealth Society, the Human Dignity Trust has developed a series of case studies on the ways in which a diverse range of Commonwealth and similarly situated governments around the world have achieved legislative reform of sexual offences laws in recent years. The Human Dignity Trust is very grateful to the law firm Dechert LLP, a member of our Legal Panel, for supporting us with this research project entirely *pro bono*. We also appreciatively acknowledge the government departments, parliamentarians, and officials as well as non-governmental and international organisations and individuals for their valuable assistance in researching this case study series. Covering six jurisdictions across four regions of the world, these case studies are the first of their kind.

The case study series includes examples of both wholesale updating of criminal codes, allowing multiple issues to be tackled together, and targeted legislative reforms.

By showcasing these examples, it is hoped that other countries can be inspired and assisted to undertake similar reforms.

The case study series includes:

- **Palau** in 2012 and 2014 respectively, with the assistance of model laws, modernised its sexual offences laws and completed the wholesale updating of its penal code;[1]
- **Belize** in 2014 enacted major reforms to its colonial-era sexual offences laws, including making rape laws gender-neutral, while it achieved decriminalisation of consensual same-sex sexual acts in 2016 through the courts;[2]
- **Northern Cyprus** in 2014 repealed a law that criminalised consensual same-sex sexual conduct, prompted by litigation before the European Court of Human Rights, as part of a package of reforms to the sexual offences chapter of its colonial-era criminal code;[3]
- **Mozambique** in 2015 completed a wholesale updating of its penal code, including the modernisation of its sexual offences laws, drawing on the Portuguese penal code for inspiration;[4]
- **Seychelles** in 2016 repealed a law criminalising consensual same-sex sexual intimacy between adults;[5] and
- **Nauru** in 2016, with international assistance, completed a wholesale updating of its criminal code, including the modernisation of its sexual offences laws.[6]

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1 Human Dignity Trust, *Reform of Discriminatory Sexual Offences Laws in the Commonwealth and other Jurisdictions – Case Study of the Republic of Palau* (available at: https://www.humandignitytrust.org/wp-content/uploads/resources/HDT-Palau-Report_web.pdf).

2 Human Dignity Trust, *Reform of Discriminatory Sexual Offences Laws in the Commonwealth and other Jurisdictions – Case Study of Belize* (available at: https://www.humandignitytrust.org/wp-content/uploads/resources/HDT-Belize-Report_web.pdf).

3 Human Dignity Trust, *Reform of Discriminatory Sexual Offences Laws in the Commonwealth and other Jurisdictions – Case Study of Northern Cyprus* (available at: https://www.humandignitytrust.org/wp-content/uploads/resources/HDT-TRNC-Report_web.pdf).

4 Human Dignity Trust, *Reform of Discriminatory Sexual Offences Laws in the Commonwealth and other Jurisdictions – Case Study of Mozambique* (available at: https://www.humandignitytrust.org/wp-content/uploads/resources/HDT-Mozambique-Report_web.pdf).

5 Human Dignity Trust, *Reform of Discriminatory Sexual Offences Laws in the Commonwealth and other Jurisdictions – Case Study of Seychelles*, (available at: https://www.humandignitytrust.org/wp-content/uploads/2019/06/HDT-Seychelles-Report_web_FINAL.pdf).

6 Human Dignity Trust, *Reform of Discriminatory Sexual Offences Laws in the Commonwealth and other Jurisdictions – Case Study of Belize* (available at: https://www.humandignitytrust.org/wp-content/uploads/resources/HDT-Nauru-Report_web.pdf).

BACKGROUND

These jurisdictions have taken diverse approaches to reforming their sexual offences laws but, whilst there are differences, there are also many parallels that can be drawn between the various experiences. This synopsis briefly draws together the lessons learned from each of the individual case studies and compares and contrasts the different models of change.

To read the detailed case studies, please visit our website at:
https://www.humandignitytrust.org/hdt-resources/


SARTENEJA
BELIZE
BLUE BIRD
SARTENEJA
BELIZE
BLUE BIRD

MODELS OF CHANGE

The case study series demonstrates that there are a variety of different ways and means to reform discriminatory sexual offences laws. Any government considering law reform can find or develop a model of change that best suits its country context and particular circumstances. The following is a summary of the various models of change evident in the six case studies.

Wholesale Reform of Penal/Criminal Codes	Broad Sexual Offences Reform	Targeted Sexual Offences Reform
▪ Mozambique ▪ Nauru ▪ Palau	▪ Belize ▪ Northern Cyprus ▪ Palau	▪ Seychelles

Wholesale Reform of Criminal/Penal Codes

Wholesale reform of criminal/penal codes was the preferred route for countries such as Mozambique, Nauru, and Palau, all of which had inherited and continued to apply their colonial-era legal frameworks several decades after independence. Their criminal codes, including the sexual offences provisions, had in some cases been modified on a piecemeal or ad hoc basis, but generally they remained largely untouched until the wholesale reform processes in each of these jurisdictions got underway. Their sexual offences laws were in many respects discriminatory, and did not represent or conform to international good practice, nor meet the needs of their citizens. For these countries, there was an **overwhelming recognition of the need to overhaul and modernise the criminal law** in its entirety to bring it into compliance with domestic and international human rights norms.

Broad Sexual Offences Reform

Countries that undertook broad sexual offences reform tackled only the specific chapter of their criminal code that addressed sexual offences (historically, often termed *Offences against Morality or Sex Crimes*). This was the model of the reform efforts in Belize, Northern Cyprus and Palau.

Both Belize and Northern Cyprus proposed sweeping changes to the sexual offences' chapters of their criminal codes in an attempt to create greater legal protection for women, children and (in the case of Northern Cyprus) LGBT people. Presenting the amendments to their criminal codes as a package, and through certain prisms (such as child protection and non-discrimination), provided the opportunity not only to address a variety of shortcomings in the criminal law, but also to afford some cover for more controversial issues, such as the decriminalisation of consensual same-sex sexual conduct (in the case of Northern Cyprus). Importantly, **the reform efforts were made more credible and probable as part of a suite of reforms** that the legislatures could and did coalesce behind and support. It is important that all discriminatory sexual offences laws be included in the reforms, failing which individual groups may need to seek recourse through the courts, leading to a judicial declaration that the government is in breach of its own national Constitution in maintaining some discriminatory laws (as in the case of Belize, in which the court struck down the law criminalising consensual same-sex sexual conduct).

In the case of Palau, the reform of its sexual offences laws was achieved as part of a drive to address the significant issue of domestic and family violence, which coincided with the overhaul of its penal code. Through the enactment of the *Family Protection Act 2012* ('FPA'), which was completed two years prior to the introduction of the new Penal Code, Palau introduced a new domestic violence framework, and at the same time overhauled its sexual offences laws. In this respect, the broad remit of the FPA proved effective at addressing a host of deficiencies in the criminal law relating to domestic and sexual violence, and it meant that, rather than specific issues being highlighted and individually debated (such as rape in marriage and the decriminalisation of consensual same-sex sexual acts between adults), they merely became particular aspects amongst many that were being tackled as part of the broad reform effort. Similar to the experience of Belize and Northern Cyprus, this approach facilitated the reform effort in Palau.

Targeted Sexual Offences Reform

A final model is targeted reform of a specific sexual offence provision to eliminate discrimination. It could be used where only one or two remaining provisions maintain discriminatory elements, or where heightened political will on a particular topic enables reform in that area. This model is not generally recommended where there are multiple discriminatory provisions, however, as the piecemeal approach is both lengthier (and

likely more costly) in the end, and can result in certain segments of society having their lives left hanging in the balance. Seychelles is an example of recent targeted reform. It is one of the few African countries to have recently taken very positive steps to repeal their laws criminalising private consensual same-sex sexual acts. As President Michel made clear at the time, Seychelles' national and international human rights commitments, the country's constitutional provisions on equality, and its character as a tolerant society all required that the offence be repealed. The **targeted approach and clear political leadership enabled a swift process of reform**, and the expeditious nature of the process avoided entangling the issue of decriminalisation in lengthy deliberation, which could have led to the reform being indefinitely delayed.


EQUAL
RIGHTS
FOR ALL
CYPRUS

DRIVERS OF REFORM

The case study series explores in detail the various drivers of legislative change, or in other words, the factors that prompted, caused or accelerated the legislative reforms. Fundamentally, these were the elements that gave force and impetus to the reforms that followed, and were crucial to achieving changes to the discriminatory sexual offences laws in question.

The graphic below provides a snapshot of the drivers that featured most prominently in the six case studies.

Main Drivers of Reform

	Seychelles	Belize	Northern Cyprus	Mozambique	Palau	Nauru
Political Will	■	■	■	■	■	■
Civil Society	■	■	■	■	■	
International/ Regional Support	■	■	■	■	■	■
Engagement of National/State Agencies		■				■
Litigation		■	■			
Lack of Significant Opposition from Faith Groups	■		■	■		

There was a significant amount of cross-over among the six case studies, yet the influence of particular drivers differed from country to country, and they did not function in isolation. In many respects, it was the amalgamation of factors and the coming together of certain elements at a specific time that gave rise to the legal reforms. Moreover, a number of the case studies demonstrated that it was crucial to position and understand the legal reforms within their historical context. For Northern Cyprus, Belize and Mozambique, the historical and political context created an environment that was conducive and receptive to reform.

Three factors, in particular, played a fundamental role in almost all the jurisdictions examined, specifically: political will, civil society and the international/regional community. We explore these elements in more detail below.

Political Will

"The extent of committed support among key decision makers for a particular policy solution to a particular problem."

Lori Ann Post, Amber N. W. Raile, Eric D. Raile, *Defining Political Will*, Politics and Policy, 38(4), 2010.

Political will, in terms of having a sufficient base of decision-makers with a common understanding of a particular problem, who are committed to supporting a particular policy solution,[7] is a vital factor in achieving any sort of legal or policy outcome. As one would expect, therefore, this element was visible in all six case studies, albeit to different degrees. For instance, in Belize, broad cross-party consensus and support for the Criminal Code Amendment Bill was especially pronounced, which enabled the reforms to pass swiftly through the legislature. In contrast, in jurisdictions such as Nauru and Mozambique, whilst there was a common understanding and agreement that the criminal law needed to be modernised, the political will to reform was less explicit and more tacit.

7 Lori Ann Post, Amber N. W. Raile, Eric D. Raile, *Defining Political Will*, Politics and Policy, 38(4), 2010.

DRIVERS OF REFORM

Another way that political will manifested itself in a number of the case studies was through the prominence of specific decision-makers or political champions. Political champions are decision-makers (i.e. parliamentarians and/or government ministers or agents) who are highly engaged on certain policy/legal issues and have significant influence with a target audience or over a relevant policy. Champions collaborate in a sustained way, advocating, supporting and driving specific positive legal and policy changes. Political champions were especially crucial to the reform efforts in Belize, Palau and Northern Cyprus. Without these dedicated individuals, it is unlikely that the legal reforms would have been placed on the legislative agenda or prioritised, nor would certain challenges along the way have been overcome.

Civil Society

In almost all the country case studies, civil society was either at the forefront of the campaign for legislative reform, instigating and initiating the process, or heavily involved in the legislative process once reforms were underway, pushing the boundaries of what was possible. In Northern Cyprus, Mozambique, Palau and Seychelles, in particular, a relentless campaign forged by many domestic civil society groups (with support from international organisations, where sought) placed legal reform to establish greater protection for women, children and LGBT people firmly on the legislative agenda.

The approaches and strategies employed by civil society were, in many instances, key to their success. Diverse strategies and an intersectional approach (which broadened civil society groups' campaigns, appeal and reach), were crucial in applying maximum pressure on the political establishment and bringing about legal and social change.

Working intersectionally, particularly in the collaboration between LGBT groups and women's organisations, was an important element that both broadened and strengthened advocacy efforts in Northern Cyprus and Mozambique. Equally, the development of a multi-pronged strategy, involving, for example, advocacy and lobbying, litigation, international and regional collaboration and awareness raising was very effective in Northern Cyprus, Belize, Mozambique and Seychelles. These actions combined to apply and maintain the necessary political pressure for the reform efforts to succeed.

International/Regional Community

The international and regional communities supported and influenced changes to the sexual offences laws in all the jurisdictions considered as part of this case study, and did so in a number of ways.

First, United Nations ('UN') treaty bodies and agencies and other regional organisations (such as the European Union and Secretariat of the Pacific Community) highlighted the prevalence of abuse and violence (including physical and sexual), particularly towards women and children, as well as the gaps in legal frameworks, either through **State reviews or thematic studies** commissioned in collaboration with States. This was evident in Belize, Mozambique, Nauru, Northern Cyprus, and Palau.

Second, and crucially, the changes made to sexual offences frameworks were prompted in part by a **desire to fulfil human rights obligations** (including States' domestic and international commitments) and to conform to international human rights standards. This was evident in Belize, Mozambique, Nauru, Northern Cyprus, Palau, and Seychelles.

Third, in a number of the case study countries, namely Belize, Northern Cyprus, Palau (post-reform), and Nauru, governments drew on the resources and expertise of international and regional organisations. In this respect, **international cooperation can be highly beneficial**. Law reform is a complex and technical process, making cooperation particularly beneficial for smaller countries that may not have sufficient domestic expertise and capacity. Many countries across the Commonwealth and beyond face considerable resource constraints, in terms of human capital and the requisite financial resources, to satisfactorily undertake large-scale legislative reform projects. Equally, those same limitations hinder their ability to adequately recruit and train domestic technical experts such as skilled legislative drafters, who are crucial to successfully implementing policy decisions. This was a particularly acute issue in the Pacific region, Mozambique, Northern Cyprus, and Belize. Engaging with other countries, either bilaterally or through international/regional organisations, allows those seeking reform to leverage the experience of those who have designed and implemented similar changes.

DRIVERS OF REFORM

As a response to these limitations, governments have drawn on a number of different mechanisms to supplement their national legislative drafting capabilities. For instance:

- Bilateral support to national legislative drafting services through donor-funded provision of external legislative drafters;
- The provision of legislative drafting services by regional and international organisations; and
- The sourcing of legislative drafting services from consultants.

In Nauru, the Australia Attorney-General's office ('AAG') provided the resources and expertise to support Nauru to execute the reform of its *Criminal Code*. Although there were committed personnel on the ground in Nauru dedicated to the review, they were very limited in terms of numbers, and Nauru simply did not possess the human resources and the required technical expertise to execute the wholesale review and reform of an entire criminal code on its own. The AAG's support was therefore both crucial and welcomed.

Importantly, where technical assistance is sought either bilaterally or from international and regional organisations, that support should not operate in silo. The technical work of legislative drafting must always be done in collaboration with local stakeholders so that laws fit within their context and the broader legislative framework, and to ensure that local needs are appropriately considered.

Fourth, **multilateral participation**, such as through the UN's Universal Periodic Review process, or with regional institutions such as the EU and the Pacific Islands Forum, and **bilateral/diplomatic engagement** were also influential in the reform processes in a number of countries. This was the case in Belize, Mozambique, Nauru, Northern Cyprus (regional engagement only), Palau and Seychelles.

International and Regional Support & Influence

	Seychelles	Belize	Northern Cyprus	Mozambique	Palau	Nauru
Thematic Studies/ Reports		■			■	
Technical Resources & Expertise		■	■		■	■
Regional Institutional Engagement			■		■	■
Multilateral Participation (e.g. UN UPR)	■	■		■	■	■

LEGISLATIVE PROCESS

As one would expect, the legislative processes in each of the jurisdictions in the case study series were unique, and therefore the reform processes differed. However, some comparisons can be drawn from the various experiences.

Duration

One particular parallel that was evident in the case of Belize, Mozambique, Northern Cyprus and Palau was that the particular reforms had been a long time in the making and were ignited intermittently.

In Belize, an initial amendment to the criminal code originally had been drafted in 2006, yet the Criminal Code Amendment Bill was not introduced until 2013 and finally passed in 2014. Likewise, in 2006, Mozambique's Technical Unit for Legal Reform published a draft of a revised penal code, but the reform process stalled shortly thereafter due to an impending election. It was not until 2010 that discussions resurfaced, and a revised penal code was enacted in 2014.

What this demonstrates is that legislative reform can be an extensive and protracted process that is susceptible to political instability and volatility. However, it also demonstrates that a genuine determination for reform can weather these temporary delays or obstacles, and that persistence will ultimately prevail.

While the process can be lengthy and discontinuous, the actual passage through the legislature can also be achieved expeditiously. This was the case in Belize, Northern Cyprus, Seychelles and Nauru. In all those cases, the political climate was favourable (significant government majorities or overwhelming cross-party consensus) and the political will was such that reform could be realised swiftly.

Drafting

Of the six jurisdictions explored, five either explicitly made use of model laws (in the case of Palau) or drew inspiration from existing precedents and frameworks from other countries (in the case of Belize, Mozambique, Nauru and Northern Cyprus).

Use of Model Laws

- Palau

Use of Existing Precedents or Frameworks from Other Countries

- Belize
- Mozambique
- Nauru
- Northern Cyprus

Precedents and models from other countries are an important and useful resource in the legislative drafting process, but it is paramount that any such precedent is carefully adapted to fit the legislative regime of the country undergoing reform. To achieve this aim, it is vital that local legal experts are involved early in the process. Ideally, legislative reform to ensure compliance with international legal standards should be a collaborative process, involving international experts who can provide examples and inspiration for what could be achieved, while at the same time local experts ensure that the legal drafting works within the boundaries of that country's legal framework.

Public Engagement

Public awareness and support is often vital to achieving legal reform, but also to changing social norms, and timely consultation (both public as well as private engagements) prior to introducing any bill to Parliament will facilitate a smoother legislative process and enhance the impact of implementation programmes. Belize provides a good illustration that engagement with the public is important in achieving broad reform. In particular, the public consultation sessions were integral to correcting some

"Engagement with the public is important in achieving broad reform"

of the misapprehensions and misunderstandings that underpinned public resistance to the Amendment Bill. Engaging the public through consultation at an early stage of the legal reform process allows the government to build trust and secure public backing from the outset. The use of public testimony from victims and enabling a two-way dialogue through the use of social media platforms were shown to be particularly effective tools in securing public support for the amendments.

Conversely, in the case study countries where there was more limited consultation and engagement, such as in Palau and Nauru, there was a resulting lack of clarity and understanding regarding the sexual offences reforms that were made, and this could impact the effective implementation of those changes going forward. Arguably, broader consultation could have contributed positively to the development of the new criminal law and fostered greater awareness of the legal changes.

Early engagement with the public and key stakeholders is important, especially where controversial aspects of the legislation are likely to lead to some societal resistance. It is important to ensure that affected groups, as well as the general public, have an opportunity to be heard in the legislative reform process. Engaging people in an open dialogue allows for early education on the need for change, and reduces opportunity for opposition later. Engaging the support of international partners, such as the UN, can be invaluable in terms of supporting reforms prior to enactment, as well as supporting implementation of the substantive reforms once enacted.

"Opposition need not paralyse progress"

Finally, all of the case studies illustrate that there will always be some degree of opposition from certain segments of society to some or all of the reforms, but that opposition need not paralyse progress. All of the countries studied have deeply religious societies and diverse cultural backgrounds. All of the governments in question understood and accepted that, while there may never be complete consensus, reform is possible.

POST-REFORM ENVIRONMENT

The reforms of sexual offences laws in each of the case study jurisdictions are significant achievements, resulting in improvements to the protection of women and children against sexual offences and the removal of discriminatory and derogatory provisions against LGBT people and persons with disability. These jurisdictions provide good examples of how reform – which does, or has the potential to, positively affect large segments of society – can be achieved, even in the face of obstacles, delays and limited resources.

They also provide encouragement that, even in the face of sometimes vocal opposition, the sky does not fall when reforms are made.

"The sky does not fall when reforms are made"

While the case studies all provide good examples of important and meaningful change, further reform is necessary in most if not all the jurisdictions studied, to address some continuing deficiencies in their sexual offences provisions, or to tackle other problematic provisions in their sexual offences laws that were not part of the original changes.

In some of the case studies (notably, Palau and Mozambique), the criminal procedure code or rules were not reformed together with the amendments to the criminal/penal codes. Procedural rules should be reviewed at the same time and, as appropriate, amended to ensure that they do not create obstacles to the implementation of the new substantive provisions, nor hinder the ability of victims to obtain redress.

In the case of Mozambique, this omission has played a role in the need for a new review of the criminal law (both substantive and procedural) due to inconsistencies. This demonstrates the need to take a holistic and contextual approach to legal reform, ensuring that when specific laws are reformed or enacted, they fit within the existing legal framework and are accompanied by suitable procedural rules.

The legislative process does not stop when a bill is passed by a legislature. Laws require implementation and, once enacted, they need to be monitored to ensure that the aims and objectives of the legislation are being realised, and that longer-term societal change

and progress is achieved. Effective monitoring mechanisms are also only possible where reliable, disaggregated data and statistics are collected and maintained.

"Legislative process does not stop when a bill is passed by a legislature"

Despite the achievement of important legal changes in each of the case studies, this has not been accompanied, in the vast majority of cases, by a comprehensive programme of implementation and monitoring. This may be a result of limited resources and technical expertise, but undoubtedly it is a missed opportunity, and one that may impact on the effective operation and application of the reformed criminal law. Importantly, international cooperation and support should not only be in respect of the early stages of the legislative process, but also as part of public consultations and in the course of post-reform implementation (such as was the case in Palau).

CONCLUSION

This case study series has sought to examine in detail the successful sexual offences law reform processes in six very diverse jurisdictions spanning four regions of the world, mostly in the Commonwealth, but also in non-Commonwealth countries that have a similar legal history and framework. It has revealed both common lessons and divergent strategies and contexts, from which other countries considering a path to sexual offences law reform can take inspiration.

What became clear in conducting the case studies is that while broad-based, human rights driven legislative reform is complex and sometimes controversial, it is possible with the right mix of drivers in place. Clear political leadership, strong civil society and international support provide a powerful force for reform. Delays and obstacles are encountered along the way in most cases, but persistence does ultimately lead to success. Opposition, to a greater or lesser degree, exists everywhere but need not paralyse progress, and indeed governments that engage with the public and persevere with reforms that comply with domestic and international human rights obligations ultimately enjoy increased domestic, regional and international respect and acknowledgement. More importantly, they lay the legal groundwork for better protecting their most marginalised citizens from discrimination, abuse and violence.

Implementation strategies are perhaps the most common weak link. Wide public engagement, awareness-raising and consultation are important to ensuring both knowledge of and support for the reforms, and ultimately aid implementation. Resources need to be directed not only at the legal change, but also at specific implementation measures, to maximise the effectiveness of the reforms for the people who need them most.

The countries studied – Palau, Belize, Northern Cyprus, Mozambique, Seychelles, and Nauru – have shown real leadership in this area, and we are thankful to all of the local and regional experts who participated in and provided invaluable insight for these case studies.

We commend the case studies to all governments in the Commonwealth and beyond that still need to grapple with reform of largely colonial-era sexual offences laws that inhibit safety, security, progress and justice in their countries.

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