

SEXUAL OFFENCE LAWS IN THE COMMONWEALTH

Issues, Good Practice & Advances In Reform

This Legal Snapshot provides an at-a-glance look at an extensive body of work by the Human Dignity Trust, which surveys the landscape of Commonwealth sexual offences legislation, examines discriminatory elements and patterns, identifies measurable indicators of good practice, and explores how effective law reform has been achieved in practice recently. Please visit our [website](#) for comprehensive reports on all of these topics.

DISCRIMINATORY SEXUAL OFFENCE LAWS

Many Commonwealth countries retain archaic laws that fail adequately to protect survivors of sexual violence, act to shield perpetrators from justice and discriminate against vulnerable communities, including LGBT people, women, children, and persons with disabilities. Many of these laws find their origins in colonial-era penal codes that still exist around the world today.

The Human Dignity Trust has produced a set of indicators of human rights compliant sexual offence laws, and assessed the status of sexual offence laws in 54 Commonwealth member states against those indicators.¹ Four broad areas are covered:

- Rape and sexual assault including marital rape
- Consensual same-sex sexual activity
- Sexual offences against children
- Sexual offences and persons with disabilities

While there are examples of good practice in every region of the Commonwealth, many member states fail to meet the standards necessary for human rights compliant sexual offences legislation. There remains in many states an urgent need to address these inadequate and discriminatory provisions.



“Across the world discriminatory laws made many years ago continue to affect the lives of many people, criminalising same-sex relations and failing to protect women and girls. I am all too aware that these laws were often put in place by my own country, they were wrong then and they are wrong now.”

Former UK Prime Minister Theresa May, 2018

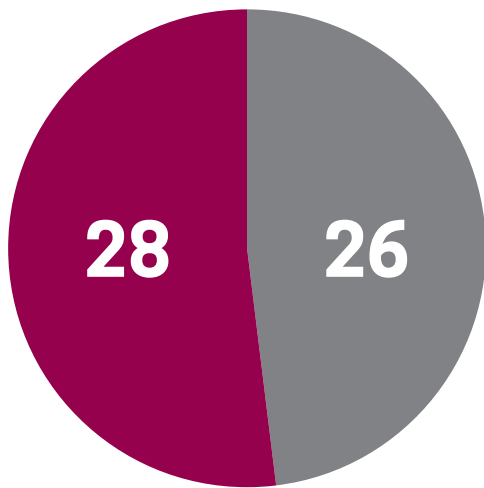
¹ Please see below for how to access the full reports cited in this briefing paper.

Rape & Sexual Assault

Gender-neutrality

Over half of all Commonwealth countries have rape and/or sexual assault laws that are gender specific, that is they only apply to female victims/survivors, failing to adequately and equally protect all survivors of sexual violence. Sexual offence laws should be framed to ensure equal protection to all victims of rape and other sexual offences. A move towards gender neutrality in sexual offences legislation does not preclude the use of targeted measures to reflect the fact that sexual violence predominantly affects women and girls.

Rape and Sexual Assault Laws & Gender-Neutrality ²



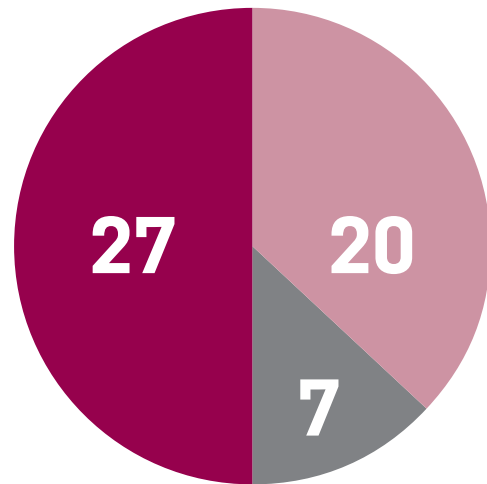
- No or limited gender-neutral rape and/or sexual assault laws
- Gender-neutral rape and/or sexual assault laws

Object and orifice neutrality

Many sexual offence laws fail to cover all non-consensual, penetrative sexual acts, often being limited for example to penile-vaginal penetration. Good practice rape or sexual assault laws must be broadly defined and cover non-consensual sexual penetration of any orifice (mouth, vagina, anus) by any body part (not limited to a penis) or object, and criminalise all such conduct equally, including prescribing the same penalty. Twenty Commonwealth countries currently fail to meet this standard, inadequately criminalising non-consensual sexual acts involving penetration³. In combination with a lack of gender-

neutrality, such provisions maintain the myth of rape being confined to penile penetration of a vagina and fail to capture the reality of sexual violence in the lives of women, men and children. The penetration in a sexual manner of any orifice with any body part or object constitutes a violation of sexual autonomy.

Non-Consensual Sexual Acts Involving Penetration



- Criminalises all forms of non-consensual sexual penetration
- Doesn't adequately criminalise all forms of sexual penetration
- Partially criminalises multiple forms of sexual penetration

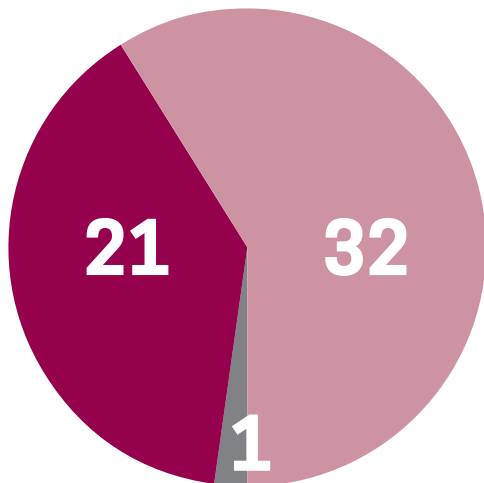
Marital rape

Rape within marriage remains lawful in over half of all Commonwealth countries.⁴ Only 21 Commonwealth countries expressly criminalise marital rape.⁵

Exemptions for rape in marriage remain common in Commonwealth jurisdictions despite being contrary to international law. Like many of the flaws in sexual offence laws in the Commonwealth, marital rape exemptions trace their origin to British colonial rule. The exemption is attributed to the remarks of British judge Sir Matthew Hale in 1736, viewing women as the contractual property of their husbands, which became part of the common law that Britain exported across the world. It was subsequently overturned in English law in 1992, but continues to feature in Commonwealth jurisdictions that inherited the exemption during colonial times.

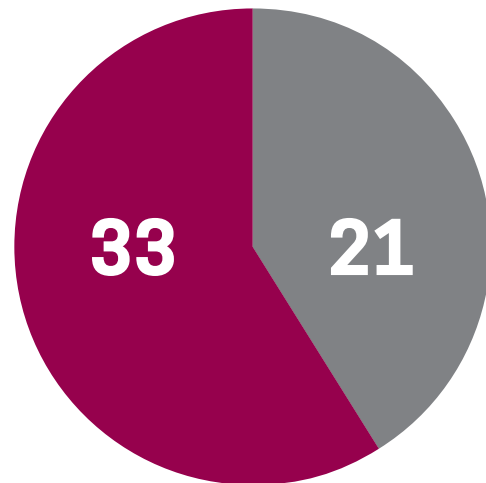
² The countries without adequate gender neutral sexual offence legislation are: Antigua & Barbuda, Bangladesh, Barbados, Botswana, Brunei, Cyprus, Dominica, The Gambia, Ghana, India, Jamaica, Kiribati, Malawi, Maldives, Malaysia, Mauritius, Namibia, Nigeria, Pakistan, Papua New Guinea, St. Kitts & Nevis, St. Vincent & the Grenadines, Sri Lanka, Tanzania, Tonga, Tuvalu, Uganda, Zambia.
³ Antigua & Barbuda, Bangladesh, Barbados, Belize, Brunei, Cameroon, Cyprus, The Gambia, Ghana, Malawi, Mauritius, Mozambique, Pakistan, St. Kitts & Nevis, St. Vincent & the Grenadines, Tanzania, Tonga, Tuvalu, Uganda, and Zambia.
⁴ Antigua & Barbuda, Bahamas, Bangladesh, Barbados, Botswana, Brunei, Dominica, The Gambia, Ghana, India, Jamaica, Kenya, Kiribati, Lesotho, Malawi, Maldives, Malaysia, Mauritius, Nigeria, Pakistan, Papua New Guinea, St. Kitts & Nevis, St. Lucia, St. Vincent, Seychelles, Singapore, Sri Lanka, Tanzania, Tuvalu, Uganda, Vanuatu, Zambia.
⁵ Australia, Belize, Cameroon, Canada, Cyprus, eSwatini, Fiji, Grenada, Guyana, Malta, Mozambique, Namibia, Nauru, New Zealand, Samoa, Sierra Leone, Solomon Islands, South Africa, Tonga, Trinidad & Tobago, United Kingdom. Rwanda is deemed to partly criminalise marital rape.

Criminalisation of Marital Rape



- Expressly criminalises marital rape
- Permits, or does not expressly exclude, marital rape exemption
- Criminalises marital rape with lesser punishment

Child Sexual Offences & the Defence of Consent



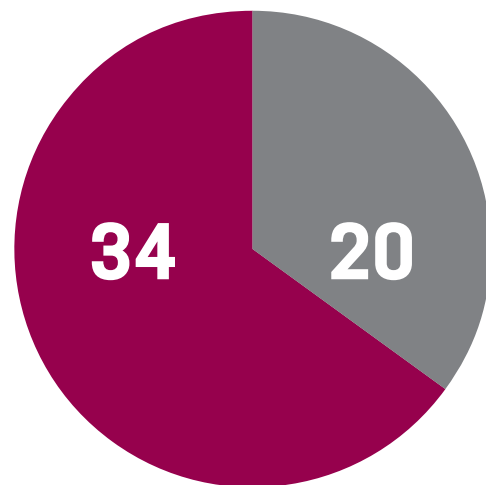
- Adequately excludes the defence of consent to child sexual offences
- Permits, or does not expressly exclude, the defence of consent to child sexual offences

Sexual Offences Against Children

Sexual offence laws protecting children are uneven across the Commonwealth and in many cases fail to protect against the range of violations that children suffer. For example, many provisions:

- apply only to girls, failing to afford equal protection to boys,⁶
- permit the defence of consent to child sexual assault,⁷
- fail to criminalise a wide range of acts, such as grooming and sexual activity with a child by abusing trust or authority, and
- do not include close-in-age exceptions, which appropriately avoid criminalising adolescents of similar ages who choose to engage in non-exploitative sexual activity.

Child Sexual Offences Laws & Gender-Neutrality



- Adequate gender-neutral child sexual offences laws
- Wholly/partly gender-specific child sexual offences laws

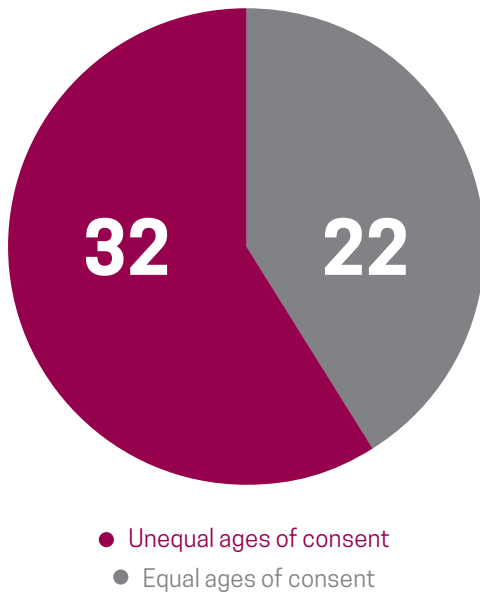
⁶ 20 Commonwealth countries make provision for sexual offences against children that are framed wholly or partly in a gender-specific manner: Antigua & Barbuda, Bangladesh, Botswana, Brunei, Cyprus, The Gambia, Jamaica, Kiribati, Malawi, Nigeria, Pakistan, Papua New Guinea, St. Kitts & Nevis, St. Vincent & the Grenadines, Seychelles, Sri Lanka, Tanzania, Tuvalu, Uganda, Zambia.

⁷ 21 Commonwealth countries either permit, or do not expressly exclude, the defence of consent to child sexual offences: Antigua & Barbuda, Bahamas, Botswana, Fiji, The Gambia, Malawi, Maldives, Malta, Nigeria (South), Papua New Guinea, St. Kitts & Nevis, St. Lucia, St. Vincent & the Grenadines, Samoa, Seychelles, Sierra Leone, Singapore, Sri Lanka, Tanzania, Trinidad & Tobago, Zambia.

Age of Consent

Only 22 Commonwealth states provide equal ages of consent both in relation to gender and sexual orientation. Of these, only 6 jurisdictions meet all the criteria of good practice age of consent laws. The discrepancy between the age at which males and females can consent to sexual activity perpetuates a power imbalance, while maintaining a different age for same-sex intimacy denies agency and equality to LGBT people.

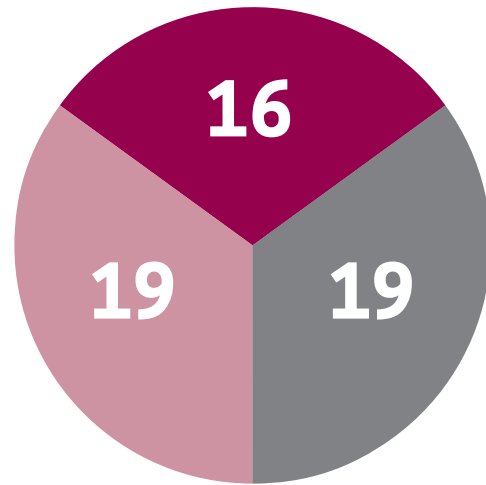
Discriminatory Ages of Consent



Consensual same-sex sexual activity

In two thirds of Commonwealth member states, consensual same-sex sexual acts are criminalised. This perpetuates stigma, fuels societal prejudice, and enables and legitimises discrimination and violence against LGBT people. Crucially, it prevents LGBT people from availing themselves of the protection of the state for fear of being arrested and/or re-victimised by law enforcement officials, allowing both state and non-state actors to harass, abuse, extort and commit violence against LGBT people with impunity.

Criminalisation of private consensual same-sex sexual activity



- Countries criminalise same-sex activity between all adults
- Countries criminalise same-sex activity only between men
- Countries do not criminalise same-sex activity



“[Criminalisation] shrouds the lives of the LGBT community in criminality and constant fear mars their joy of life. They constantly face social prejudice, disdain and are subjected to the shame of being their very natural selves.”

Johar v India, Supreme Court of India, 2018

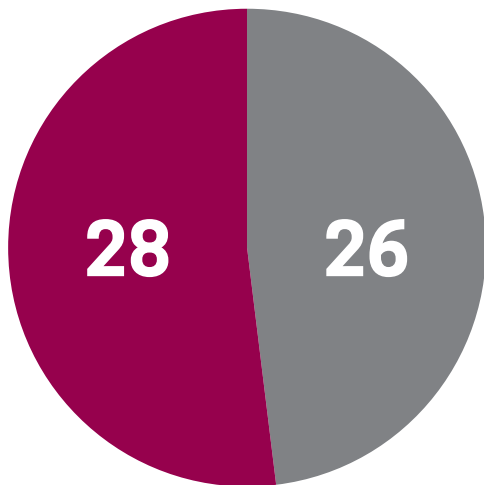
Sexual offences in relation to persons with disabilities

The treatment of persons with disabilities in Commonwealth sexual offence laws is markedly varied. In 28 Commonwealth countries, consensual sexual activity with persons with disabilities is criminalised, with no reference to their ability to consent, or the provisions relating to persons with disabilities do not apply the same consent standard as for sexual activity between persons without disabilities.⁸

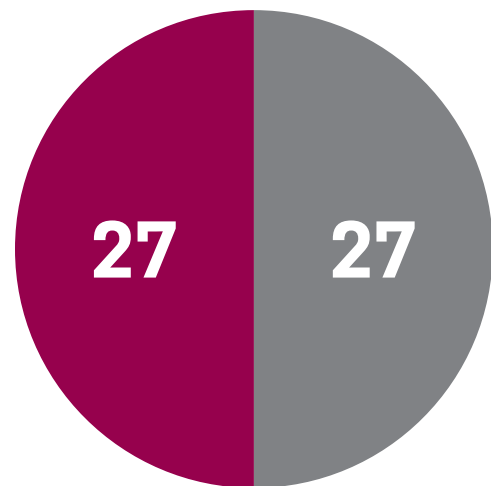
Moreover, 27 Commonwealth countries use derogatory language in their sexual offence laws to refer to persons with disabilities.⁹ The terms “idiot” and/or “imbecile” are used in 14 countries,¹⁰ with other derogatory language akin to “mentally subnormal” or “defective” used in others.

Use of Derogatory Language in Reference to Persons With Disability in Sexual Offences Laws

Consensual Sexual Activity & Disability



- Criminalises consensual sexual activity with people with disability, or the provisions do not apply the same consent criteria as for sexual activity between people who are not disabled
- Does not criminalise consensual sexual activity with people with disability



- Uses derogatory language to refer to people with disability
- Does not use derogatory language to refer to people with disability

The use of such offensive and dehumanising terminology fuels the stigmatisation of persons with disabilities. The definitions of sexual offences crimes should be respectful and should not devalue people in any way.

While the motivation for such laws may be to protect persons with disabilities from sexual abuse and exploitation, blanket criminalisation denies them the enjoyment of their fundamental human rights, including to legal autonomy and freedom from discrimination. Equally, much of the sexual offences legislation across the Commonwealth fails to provide comprehensive and robust protection for persons with disabilities who lack the capacity to consent to sexual activity.



“Persons with disabilities remain the group whose legal capacity is most commonly denied in legal systems worldwide.”

Committee on the Rights of Persons with Disabilities, General Comment No. 1, 2014

⁸ Antigua & Barbuda, Australia (New South Wales, Northern Territory, Queensland), Bahamas, Barbados, Botswana, Dominica, Fiji, The Gambia, Ghana, Grenada, Kenya, Lesotho, Malawi, Maldives, Mauritius, Namibia, Nigeria (South), St. Kitts & Nevis, St. Vincent & the Grenadines, Samoa, Sierra Leone, Singapore, Tanzania, Tonga, Trinidad & Tobago, Tuvalu, Uganda, Zambia.
⁹ Antigua & Barbuda, Australia (Northern Territory, Queensland), Bahamas, Barbados, Belize, Botswana, Dominica, Fiji, The Gambia, Ghana, Grenada, Jamaica, Kenya, Malawi, Maldives, Namibia, Nigeria (South), St. Kitts & Nevis, St. Lucia, St. Vincent & the Grenadines, Singapore, Tanzania, Tonga, Trinidad & Tobago, Tuvalu, Uganda, Zambia.
¹⁰ Barbados, Botswana, Cyprus, The Gambia, Ghana, Grenada, Malawi, Nigeria, St. Kitts & Nevis, Tanzania, Tonga, Tuvalu, Uganda, Zambia.

GOOD PRACTICE SEXUAL OFFENCES LAWS

A country’s sexual offence laws, if they are non-discriminatory, properly implemented and enforced consistently and fairly, can play a vital role in protecting people, deterring the commission of offences and providing redress for those affected by violations. Laws that align with good practice support the rule of law in general and build confidence in the formal justice system. They can also protect and guarantee fundamental human rights and eliminate stigma and abuse of vulnerable or marginalised groups. Crucially, human rights compliant sexual offence laws can also encourage positive shifts in attitude and behaviour at a societal and cultural level.

On the other hand, sexual offence laws that are discriminatory or unfair, either on paper or in practice, are ineffective and can harm people who are often already the most vulnerable in society, affecting all aspects of their lives.

To inform and aid reform of discriminatory and harmful sexual offence laws in the Commonwealth, the Human Dignity Trust

developed a set of good practice criteria to guide the assessment of existing legal frameworks and the drafting of new legislation.

Good Practice in Human Rights Compliant Sexual Offences Laws in the Commonwealth lays out for the first time detailed criteria for good practice laws, drawing on national and regional standards and using international human rights law as the benchmark. Fundamentally, for a law to be assessed as human rights compliant, it must adhere to the following core principles:

- Respects human dignity
- Ensures substantive equality
- Does not discriminate
- Protects personal agency & bodily integrity

For each of the four areas of law covered, the Good Practice Guide identifies and discusses the following essential indicators of good practice:

Rape and sexual assault	Persons with disabilities	Consensual same-sex activity	Age of Consent
<p><i>Equality & Non-discrimination</i></p> <ul style="list-style-type: none"> ▪ Inclusive ▪ Gender neutral ▪ No marital exemptions ▪ No time limits for prosecution 	<p><i>Equality & Non-discrimination</i></p> <ul style="list-style-type: none"> ▪ Disability neutral ▪ No special offences 	<p><i>Equality & Non-discrimination</i></p> <ul style="list-style-type: none"> ▪ No criminalisation ▪ No discriminatory offences ▪ Non-discriminatory implementation and policing 	<p><i>Equality & Non-discrimination</i></p> <ul style="list-style-type: none"> ▪ Gender, disability and sexual orientation neutral
<p><i>All relevant conduct captured</i></p> <ul style="list-style-type: none"> ▪ All types of penetration should be captured by rape provision ▪ Other forms of sexual assault should be captured ▪ Sexual offences against children should be outlined 			
<p><i>Dignity and respect</i></p> <ul style="list-style-type: none"> ▪ Recognised as a crime of power and violence not morality ▪ Respectful language that does not devalue, disparage or perpetuate gender discriminatory stereotypes and is not moralistic 	<p><i>Dignity and respect</i></p> <ul style="list-style-type: none"> ▪ No discriminatory language 	<p><i>Dignity and respect</i></p> <ul style="list-style-type: none"> ▪ No discriminatory language 	<p><i>Dignity and respect</i></p> <ul style="list-style-type: none"> ▪ Respect autonomy, with minimum age set at 16-18 years ▪ No parental consent

Rape and sexual assault	Persons with disabilities	Consensual same-sex activity	Age of Consent
<p><i>Rape and sexual assault are non-consensual</i></p> <ul style="list-style-type: none"> ▪ Definition of rape should be defined as non-consensual sexual conduct ▪ Submission is not consent ▪ Physical resistance not necessary ▪ Reasonable steps to ascertain consent ▪ Appropriate list of circumstances in which consent cannot be given 	<p><i>Rape and sexual assault are non-consensual</i></p> <ul style="list-style-type: none"> ▪ No criminalising of consensual sexual conduct ▪ Submission is not consent ▪ Physical resistance not necessary ▪ Reasonable steps to ascertain consent ▪ Appropriate list of circumstances in which consent cannot be given 		<p>Full & free consent by the persons themselves</p>
<p><i>Defences</i></p> <ul style="list-style-type: none"> ▪ No defence of provocation ▪ Limit mistake of fact defences 	<p><i>Defences</i></p> <ul style="list-style-type: none"> ▪ No defence relating to capacity or ignorance 		<p><i>Defences</i></p> <ul style="list-style-type: none"> ▪ No defence of parental consent ▪ Close in age defence exists ▪ No religious or cultural exemptions ▪ No exceptions for marriage
<p>Rules of evidence and procedure to protect rights of complainant and accused</p>	<p>Appropriate arrangements for rules of evidence and procedure</p>		
<p>Appropriate penalties that reflect the gravity of the crime</p>	<p>Appropriate penalties that reflect targeted or exploitative circumstances</p>		
<p>Mediation and settlement are not replacements for criminal prosecution</p>			
<p>Implementation and monitoring are essential</p>			

Model examples of good practice laws can be found across the Commonwealth and are outlined in the Good Practice Guide. These include:

- The legislative frameworks in **Fiji, Solomon Islands, Namibia** and **Guyana** as models of good practice with respect to rape/sexual assault laws;
- **Seychelles** as a country with a good practice disability-neutral sexual assault law;
- **Tasmania, Australia** for meeting all the criteria for good practice laws on consensual same-sex sexual activity;
- **Rwanda, South Africa, Belize, Canada, Australia,** and **Nauru** for meeting the good practice criteria on age of consent to sexual activity.

However, while these examples exemplify good practice in some areas, there remains areas where they need to be strengthened, and challenges to full implementation exist in some cases.

REFORM OF DISCRIMINATORY SEXUAL OFFENCES LAWS

The process of reforming discriminatory sexual offences laws to ensure that they comply with good practice can be difficult but is achievable. Several Commonwealth jurisdictions in all regions and of various sizes and cultural backgrounds have successfully embarked upon reform and several are presently developing reforms. The

experience of these jurisdictions provides a source of invaluable guidance for similar reforms in other parts of the Commonwealth.

The Human Dignity Trust developed case studies of six recent examples of successful sexual offences law reform:

Palau 2012-2014	Modernised, with the assistance of model laws, its sexual offence laws and completed the wholesale updating of its penal code.
Belize 2014-2016	Enacted major reforms to its sexual offences laws and achieved decriminalisation of consensual same-sex sexual acts through the courts.
Northern Cyprus 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.
Mozambique 2015	Completed a wholesale updating of its penal code, including the modernisation of its sexual offence laws, drawing on the Portuguese penal code for inspiration.
Seychelles 2016	Repealed a law criminalising consensual same-sex sexual intimacy between adults.
Nauru 2016	Completed a wholesale updating of its criminal code with international assistance, including the modernisation of its sexual offence laws.

There are both common lessons and divergent strategies and contexts in examples of successful reform. Importantly, there are a variety of different ways and means to reform discriminatory sexual offence laws. Any government

considering law reform can find or develop a model of change that best suits its country context and particular circumstances. The case study series identified three main forms of legislative reform:

<p>Wholesale Reform of Penal/Criminal Codes</p> <ul style="list-style-type: none"> ▪ Mozambique ▪ Nauru ▪ Palau 	<p>Broad Sexual Offences Reform</p> <ul style="list-style-type: none"> ▪ Belize ▪ Northern Cyprus ▪ Palau 	<p>Targeted Sexual Offences Reform</p> <ul style="list-style-type: none"> ▪ Seychelles
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It is also clear 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. In particular,

clear political leadership, strong civil society and international support provide a powerful force for reform. There are five key drivers of reform present in the case studies analysed:

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	■		■	■		

Legislative reform can be an extensive and protracted process that is susceptible to political instability and volatility. Delays and obstacles are encountered along the way in most cases, but genuine determination for reform can weather these temporary delays or obstacles, and persistence will ultimately prevail. All of the case studies illustrated 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. 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 identified through the case study project. 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. These include: ongoing training of the criminal justice sector, the provision of sufficient financial and human resources for law enforcement and implementation, including for the court system, and an integrated data collection programme, among others aspects.

FURTHER RESOURCES

Please visit www.humandignitytrust.org/hdt-resources
or scan these QR codes to access the publications in full.



***Reform of Discriminatory Sexual Offences Laws in the Commonwealth
and Other Jurisdictions: Case Study of Palau***

www.humandignitytrust.org/wp-content/uploads/resources/HDT-Palau-Report_web.pdf



***Reform of Discriminatory Sexual Offences Laws in the Commonwealth
and Other Jurisdictions: Case Study of Belize***

www.humandignitytrust.org/wp-content/uploads/resources/HDT-Belize-Report_web.pdf



***Reform of Discriminatory Sexual Offences Laws in the Commonwealth
and Other Jurisdictions: Case Study of Northern Cyprus***

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***Reform of Discriminatory Sexual Offences Laws in the Commonwealth
and Other Jurisdictions: Case Study of Mozambique***

www.humandignitytrust.org/wp-content/uploads/resources/HDT-Mozambique-Report_web.pdf



***Reform of Discriminatory Sexual Offences Laws in the Commonwealth
and Other Jurisdictions: Case Study of Seychelles***

www.humandignitytrust.org/wp-content/uploads/2019/06/HDT-Seychelles-Report_web_FINAL.pdf



***Reform of Discriminatory Sexual Offences Laws in the Commonwealth
and Other Jurisdictions: Case Study of Nauru***

www.humandignitytrust.org/wp-content/uploads/resources/HDT-Nauru-Report_web.pdf



***Reform of Discriminatory Sexual Offences Laws in the Commonwealth
and Other Jurisdictions: A Summary of Key Findings***

www.humandignitytrust.org/wp-content/uploads/resources/Case-Studies-Synopsis_web.pdf



Good Practice in Human Rights Compliant Sexual Offences Laws in the Commonwealth

https://www.humandignitytrust.org/wp-content/uploads/resources/Good-Practice-in-Human-Rights-Compliant-Sexual-Offences-Laws-in-the-Commonwealth_Final.pdf



Next Steps Towards Reform: Assessing Good Practice and Gaps in Commonwealth Sexual Offences Legislation: Africa

www.humandignitytrust.org/wp-content/uploads/resources/2020-Next-Steps-Africa.pdf



Next Steps Towards Reform: Assessing Good Practice and Gaps in Commonwealth Sexual Offences Legislation: Asia

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Next Steps Towards Reform: Assessing Good Practice and Gaps in Commonwealth Sexual Offences Legislation: Caribbean and the Americas

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Next Steps Towards Reform: Assessing Good Practice and Gaps in Commonwealth Sexual Offences Legislation: Europe

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Next Steps Towards Reform: Assessing Good Practice and Gaps in Commonwealth Sexual Offences Legislation: The Pacific

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Next Steps Towards Reform: Assessing Good Practice and Gaps in Commonwealth Sexual Offences Legislation: Map

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