

## IN THE MATTER OF A DRAFT CHARTER OF THE COMMONWEALTH

---

### OPINION

---

1. We have been asked to provide the Human Dignity Trust (“HDT”) with a legal Opinion on the contents of the *“Draft Charter of the Commonwealth”*. The background to this is the Commonwealth leaders’ agreement to adopt the recommendation of the Eminent Persons Group for a Charter of the Commonwealth. This agreement was reached at the Commonwealth Heads of Government Meeting 2011. A process of consultation on the content of the Draft Charter is presently underway, and it is anticipated that the Charter will be approved by Commonwealth leaders in September 2012.
2. The HDT works for the decriminalisation of consensual, private same-sex sexual conduct between adults. It does so by reliance on the application of settled, existing human rights law. Forty two of the fifty four commonwealth countries continue to criminalise homosexuality.

#### **The Draft Charter**

3. The Draft Charter refers in its preamble to the Universal Declaration of Human Rights and affirms *“support [for] each other in the observance of the Values and Aspirations of this Charter, both in the Commonwealth and throughout the world”*.
4. In identifying the *“Values of the Commonwealth”*, the Draft Charter reads as follows:

*“5. We believe in universal human rights and that they are applicable to all persons throughout the commonwealth in accordance with the principles of international law:*

5.1 *We re-affirm our commitment to the Universal Declaration of Human Rights of 1948 and to human rights covenants and instruments that declare the universal rights of all;*

5.2 *We believe that equality and respect for the protection and promotion of civil, political, economic, social and cultural rights for all, without discrimination on any grounds, are foundations for the creation and maintenance of a peaceful, just and stable society; and*

5.3 *We believe that all these rights are universal, indivisible, inter-dependent and inter-related and that they may not be implemented or denied selectively.”*

5. There is specific provision addressing gender equality (Article 6).

6. At Article 11, the Draft Charter reads:

*“We believe in human diversity and human dignity and we oppose all forms of discrimination whether it be based in race, ethnicity, creed or gender or other like cause. We believe in freedom of thought conscience and religion and oppose discrimination upon any such ground.”*

7. The Charter’s “*aspirations*” for the Commonwealth include “*the elimination of poverty, unjust discrimination, powerlessness and despair*” (Article 17).

8. There is no specific reference to sexual orientation or gender identity amongst the enumerated grounds protected by the Draft Charter’s equality and non-discrimination guarantees, nor is there any provision according privacy rights. There are no enforcement or complaint procedures contained within the Charter.

9. The Commonwealth Secretary-General, Kamallesh Sharma has recalled that the 2009 Affirmation of Commonwealth Values and Principles, which includes a clear commitment to tolerance, respect and understanding, means that the

Commonwealth embraces difference, including sexual identity.<sup>1</sup> Accordingly, discrimination and criminalisation on grounds of sexual orientation “*is at odds*” with the Commonwealth’s values (speech by Commonwealth Secretary General, opening of the Commonwealth People’s Forum, Perth, 25 October 2011).

## **International Human Rights Law**

10. As mentioned, the draft Charter in its preamble refers to the Universal Declaration of Human Rights which confers an entitlement to equality, dignity and non-discrimination including on grounds of “*other status*” (Articles 1 and 2). The principles of human dignity and non-discrimination are core principles underpinning the United Nation’s (UN) system. The UN core human rights instruments contain non-discrimination guarantees ensuring that the rights set out are available to everyone without discrimination, including on grounds of “*other status*” (International Covenant on Civil and Political Rights (“ICCPR”), Article 2(1); International Covenant on Economic, Social and Cultural Rights (“ICESCR”), Article 2(2)). In their preambles the ICCPR and the ICESCR recognize the inherent dignity of the person.

11. As seen, the specific grounds of discrimination identified in the ICCPR and the ICESCR are non-exhaustive. Sexual orientation and gender identity are not specifically enumerated. However, the Human Rights Committee has determined that “*other status*” embraces sexual orientation (*Toonen v Australia, Communication No. 488/1992* (CCPR/C/50/D/488/1992; *Young v Australia, Communication No. 941/2000* (CCPR/C/78/D/941/2000; *X v Columbia, Communication No. 1361/2005* (CCPR/C/89/D/1361/2005)). Further, numerous General Comments, reports and resolutions of the Treaty bodies recognise sexual orientation and gender identity as protected characteristics for the purposes of the UN’s human rights instruments. These include,

(a) “*Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on Their Sexual Orientation and Gender Identity*”, the report of the

---

<sup>1</sup> Affirmation of Commonwealth Values and Principles (1999), available at [http://www.thecommonwealth.org/document/181889/34293/35468/216908/commonwealth\\_values\\_and\\_principles.hdm](http://www.thecommonwealth.org/document/181889/34293/35468/216908/commonwealth_values_and_principles.hdm)

United National High Commissioner for Human Rights (2011) A/HRC/19/41, paragraph 7.

- (b) UNHCR's "*Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*" HCR/GIP/02/01 (7 May 2002) and UNHCR, "*Guidance Note on Refugee Claims relating to sexual orientation and gender identity*" (2008).
- (c) General Comments No.s 14, 15 and 20, Committee on Economic, Social and Cultural Rights.
- (d) General Assembly and other Treaty Body resolutions on sexual orientation discrimination; for example, "Human Rights, Sexual Orientation and Gender Identity" AG/RES. 2435 (XXXVIII-O/08) (Adopted at the fourth plenary session, held on June 3, 2008) and "Human Rights, Sexual Orientation and Gender Identity" AG/RES. 2504 (XXXIX-O/09) (Adopted at the fourth plenary session, held on June 4, 2009); both reaffirming the "*the principles of universality, indivisibility, and interdependence of human rights*" and resolving, *inter alia* "[t]o express concern about acts of violence and related human rights violations committed against individuals because of their sexual orientation and gender identity" and "[t]o condemn acts of violence and related human rights violations committed against individuals because of their sexual orientation and gender identity", respectively.
- (e) The committee on the Elimination of Discrimination against Women has made repeated references to sexual orientation (see, for example, Docs.: A54/38, August 20, 1999; A/53/38, May 14, 1998; Ireland, A/54/38, July 1, 1999; Canada, A/52/38/Rev.1, August 12, 1997; New Zealand, A/49/38, April 12, 1994; Sweden, A/56/38, July 31, 2001).

12. In summary, therefore, the International Bill of Rights (UDHR; ICCPR and ISESCR), and other human rights standards impose a duty on States to prohibit discrimination on grounds of sexual orientation and gender identity. This protection arises from the key non-discrimination guarantees, the requirement of respect for human dignity, and sometimes in addition privacy rights.

13. Modern constitutional guarantees against inequality and discrimination contain explicit reference to sexual orientation and gender identity (see South African Constitution, Chapter 2 (Bill of Rights), Section 9(3)<sup>2</sup>; Article 21, Charter of Fundamental Rights of the European Union; Article 19, Treaty on the Functioning of the European Union). Further, other major constitutional instruments have been construed as protecting against sexual orientation discrimination (U.S, Fourteenth Amendment to the US Constitution, Equal Protection Clause) *Romer v. Evans* 517 U.S. 620 (1996); (South Africa, section 9(3), South African Constitution); (Canada, section 15, Canadian Charter of Rights and Freedoms) *Egan v Canada* [1995] 2 S.C.R. 513; *Vriend v Alberta* [1998] 1 S.C.R. 493).
14. The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity (“Yogyakarta Principles”) (March 2007) set out standards for protecting sexual minorities against discrimination. The Principles were developed by the International Commission of Jurists and the International Service for Human Rights, and were unanimously adopted during an expert meeting in Yogyakarta. They are referred to in the UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity (2008), as reflecting binding international legal standards.
15. Sexual orientation and gender identity are increasingly regarded as “suspect classes” under human rights law and equality law, so that any differentiation connected with them will be subject to rigorous scrutiny (ECtHR in *Kozak v Poland*, App No 13102/02, *ADT v UK* [2000] ECHR 35765/97; *Dudgeon v UK* (1982) 4 EHRR 149; *Modinos v Cyprus* [1993] 16 EHRR 485; *Norris v Ireland* (1991) 13 EHRR 186; *Salgueiro da Silva Mouta v Portugal* (2001) 31 EHRR 1055; *SL v Austria* (2003) 37 EHRR 39; *Karner v Austria* (2004) 38 EHRR 24).
16. In addition to equality and dignity rights, most human rights instruments contain guarantees conferring the right to respect for private life. From these “privacy” rights many cases have carved out non-discrimination rights for same sex partners, requiring the repeal of so called “anti-sodomy” laws (see, for example, Article 8,

---

<sup>2</sup> *Satchwell v The President of the Republic of South Africa and A’or* 2001 (12) BCLR 1284; *National Coalition for Gay and Lesbian Equality and O’rs v Minister for Home Affairs and O’rs*<sup>2</sup> Case CCT 11/98; 1999 (3) BCLR 280 (c).

European Convention on Human Rights *Dudgeon v United Kingdom* (1981) 4 EHRR 149; *Norris v Ireland* (1988) 13 EHRR 186 and see *Toonen*, supra in which the Human Rights Committee held that laws used to criminalise private, adult, consensual same sex sexual relations violated rights to privacy, as well as non-discrimination).

17. The absence of any explicit reference to sexual orientation and gender identity in the Draft Charter does not reflect the requirements of International human rights law or reflect more modern human rights instruments. Further, the absence of any “*privacy*” rights may impede efforts to address the more egregious forms of sexual orientation and gender identity discrimination (including through the criminalisation of same sex consensual sexual relationships).

## **Enforcement**

18. The Draft Charter contains no enforcement or complaint mechanisms. This can be contrasted with human rights instruments in other jurisdictions (including at regional level). The UN, of course, includes both complaints and reporting mechanisms (and cases on sexual orientation, as referred to above, have been addressed by, inter alia, the Human Rights Committee of the UN). The Inter-American Commission on Human Rights permits individual petitions which may be referred to the Inter-American Court in appropriate circumstances. The European Union permits complaints to be made to the European Commission<sup>3</sup> and these may include complaints concerning the application of the Charter of Fundamental Rights of the European Union. The Council of Europe permits applications to be made directly by individuals to the European Court of Human Rights in relation to alleged violations by States of the rights contained within the European Convention on Human Rights.

19. The Draft Charter contains no provision requiring reporting, permitting complaints or imposing sanctions.

## **Conclusion**

---

<sup>3</sup> As well as directly to the Court of Justice of the European Union on requests for preliminary rulings referred by courts of Member States.

20. In failing to make reference to sexual orientation, the draft Charter does not explicitly reflect international human rights standards. The absence of any privacy rights will further undermine efforts to address discriminatory so – called “anti-sodomy” laws.
21. Further, the Charter does not appear to fully reflect the Commonwealth’s Values and Principles, as referred to above.
22. The Charter’s non-discrimination provision covers discrimination based on in certain enumerated grounds and “other like cause” (Article 11). Given analogous phrases in many of the important UN and constitutional human rights instruments, and their effectiveness in addressing sexual orientation discrimination, the draft Charter may yet come to be read as protecting against sexual orientation and gender identity discrimination. However, the lack of specific references risks marginalising sexual orientation and gender identity rights in Commonwealth human rights protections.
23. Further, the absence of any complaints, reporting or enforcement procedures is likely to significantly undermine the Charter’s effectiveness. It is an aspirational document but without the mechanisms necessary to secure its effective application.
24. We hope this is of assistance to the HDT. If we can be of any other assistance in relation to this matter, they should not hesitate in contacting us.

GODFREY SMITH  
Belize Bar

KARON MONAGHAN QC  
Bar of England and Wales

20 March 2012

**IN THE MATTER OF A  
DRAFT CHARTER OF THE  
COMMONWEALTH**

---

**OPINION**

---