



## Lessons from the Wolfenden Report

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## Lessons from the Wolfenden Report

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The article traces the recent history of homosexual law reform in the UK and the countries of the Commonwealth of Nations, using as its point of departure the Report of the Committee on Homosexual Offences and Prostitution, 1957 ('Wolfenden Report'). In light of the Wolfenden principle – that certain matters of private morality are not the law's business and especially not the proper business of punishment under the criminal law – the article proposes a methodology for law reform in those countries of the Commonwealth that inherited the penal offences but have not yet acted to repeal them.

### Learning from Wolfenden

Fifty years ago, in September 1957, the report of the English committee on homosexual offences was delivered to the British government.<sup>1</sup> The committee was chaired by a distinguished university vice-chancellor, Sir John Wolfenden. With respect to the prevailing English law on homosexual offences, the committee concluded, with near unanimity, that,<sup>2</sup> 'Unless a deliberate attempt is made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business'.

Once the Wolfenden report was delivered, it attracted a great deal of coverage. It also inspired a famous public debate between proponents and opponents of the reform.<sup>3</sup> The opponents, through the writings of Lord Devlin, contended that the criminal law had a place in upholding the majority of the community's moral standards, including in respect of private sexual conduct which the majority found offensive and immoral. The proponents, through the writings of Professor H. L. A. Hart of Oxford University, drew on the principles expressed a century earlier by John Stuart Mill in his essay *On Liberty*. Essentially, they contended that, so far as purely 'self-regarding' activity was concerned, the law had no legitimate right to criminalize adult, private, consenting conduct. Activities did not become 'other-regarding' simply because they upset individuals in society, without directly and immediately impinging upon their lives.

Initially, the Conservative government then in office in Britain announced that no action would be taken to implement the Wolfenden reforms. They suggested that the British

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1 The *Report of the Committee on Homosexual Offences and Prostitution*, Cmnd 247, HMSO, 1957 ('Wolfenden Report').

2 *Ibid.*, pp. 187–8.

3 Devlin, Patrick (1959) *The Enforcement of Morals*, Maccabean Lecture in Jurisprudence of the British Academy (London: Oxford University Press); Hart, H. L. A. (1959) Immorality and treason, *The Listener*, 30 July, p. 162. The Devlin/Hart debates are described in Lacy, N. (2004) *The Life of H. L. A. Hart – The Nightmare and the Noble Dream* (Oxford: Oxford University Press), p. 243.

community was 'not yet ready' to accept the amendments to the criminal law that Wolfenden and his colleagues had proposed.<sup>4</sup> However, many supporters of reform urged that action should be taken. Committees were established throughout Britain to promote both the necessity of reform and the justice of the Wolfenden proposals. Particular members of the United Kingdom Parliament took up the cudgels. In the House of Commons, Mr Leo Abse proposed a Bill to amend the laws on sexual offences.<sup>5</sup> In the House of Lords, Lord Annan did likewise.<sup>6</sup> Neither of these men was himself homosexual. However, each was convinced by the Wolfenden logic that reform was required.

After a decade of debate, the United Kingdom Parliament changed the law for England and Wales.<sup>7</sup> At first, the age of consent was fixed at 21 years. There were a number of exceptions. The law did not at first apply to Scotland or Northern Ireland. Eventually, however, the age of consent was lowered to coincide with that applicable to sexual conduct with a person of the opposite sex. Exceptions that were first enacted (dealing with the armed services, etc.) were repealed or confined. Eventually similar reforming laws were enacted for Scotland and Northern Ireland. The last-mentioned reform was achieved only after a decision of the European Court of Human Rights held that the United Kingdom was in breach of its obligations under the *European Convention on Human Rights* by continuing to criminalize the adult private consenting sexual conduct of homosexuals in that province.<sup>8</sup>

One by one, a number of Commonwealth countries followed the Wolfenden lead. Reform of the law was achieved in Canada, New Zealand, the States and Territories of Australia and South Africa. Similar reforms were also secured in many of the States of the United States of America and in Ireland which likewise traced its criminal law to Britain. In Australia, the last of the States to be reformed was Tasmania. The change there was achieved only after the stimulus of a decision of the United Nations Human Rights Committee upholding a complaint under the First Optional Protocol that the old offences, in their application to adult, private, consensual conduct, offended the privacy rights guaranteed in the *International Covenant on Civil and Political Rights*.<sup>9</sup>

In the Irish Republic, as earlier in Northern Ireland, it took a decision of the European Court of Human Rights to stimulate the reform agenda.<sup>10</sup> In South Africa, reform came about as a result of a constitutional decision.<sup>11</sup> In the United States, a decision of the Supreme Court struck down a law of Texas which restricted adult same-sex conduct, holding that it was contrary to the provisions of the federal Constitution.<sup>12</sup> In effect, all of these court decisions, and the legislative changes that they stimulated, reflected the Wolfenden principle – that certain matters of private morality were not the law's business and especially not the proper business of punishment under the criminal law.

4 Grey, Antony (1992) *Quest for Justice – Towards Homosexual Emancipation* (London: Sinclair-Stevenson), p. 84.

5 *Ibid.*, pp. 59, 93, 113–30.

6 *Ibid.*, 3, 110, 125, 147.

7 *Sexual Offences Act 1967* (UK).

8 *Dudgeon v United Kingdom* (1981) 4 EHRR 149; see also later *Norris v Republic of Ireland* (1988) 13 EHRR 186; *Modinos v Cyprus* (1993) 16 EHRR 485.

9 *Toonen v Australia* (1994) 1 Int Hum Rts Reports 97 (No 3).

10 *Norris v Republic of Ireland* (1988) 13 EHRR 186.

11 *National Coalition for Gay and Lesbian Equality v Minister of Justice* (1999) 1 SA 6. See also *Leung T C William Roy v Secretary for Justice (HK)* [2006] HKCA 106; *Secretary for Justice (HK) v Yan Yuk Lung Zigo* [2007] HKCFA 49.

12 *Lawrence v Texas* 539 US 558 (2003).

In some Commonwealth countries, change has come very slowly, or not at all. This is in spite of the fact that leading Commonwealth citizens have spoken in favour of the change, including South African Archbishop Desmond Tutu;<sup>13</sup> former Singapore Prime Minister Lee Kuan Yew,<sup>14</sup> the Indian Nobel Laureate Amartya Sen<sup>15</sup> and other outstanding Commonwealth personalities.

Governments typically gave various reasons for the slow pace of reform in this area. Many of these reflect those initially expressed by the Conservative Government of Britain immediately after the Wolfenden report was delivered: 'The population is not ready'; 'The reform is inconsistent with local moral values'; 'The churches or religious leaders are opposed'; 'Reform on this subject is not a priority'. It has also been suggested that homosexuals do not exist in certain societies; that this is a foreign import; and that Western fashions on the subject are not relevant to local concerns. From early days, this form of denial and xenophobia has marked national reactions to awareness about adult same-sex conduct. When the first sodomy laws were enacted in England in the reign of Henry VIII, they were initially said to be a response to the influx of foreigners,<sup>16</sup> allegedly polluting the purity of English ways. Since that time, denial and xenophobia have been constant themes invoked to support the continuance of laws creating homosexual offences. Even at a time when some Commonwealth countries enter cautiously upon the debate, police and other government forces have been seen to react adversely.

The path towards reform of the law on homosexual offences is therefore strewn with tears, frustration and failed effort. Although the Commonwealth of Nations has attained important advances in the principle of respect for basic human rights for women and minorities (especially racial and religious minorities), it may not have been as successful in standing up for sexual minorities. Inequality before the law and unjust discrimination still mark the laws of a number of Commonwealth countries on this subject. It is timely to speak bluntly about this. The excuses of ignorance should no longer be accepted. Fifty years after Wolfenden and 60 years after the first Kinsey report disclosing the diversity of human sexual behaviour,<sup>17</sup> the reasons for failing to reform the criminal laws on this subject are running out.

The purpose of this article is to propose a methodology of law reform on homosexual offences in Commonwealth countries. Of course, what is needed, and what would work, varies from one country to another. No blanket approach, of universal application, can be suggested. Nevertheless, drawing on the experience of the United Kingdom, other Commonwealth countries and other lands, notably in Europe where virtually universal reform of the law has been achieved, a number of possible initiatives will be catalogued. These measures should be considered and, where appropriate, they should be implemented to stimulate and bring about changes in the criminal law. The remaining homosexual offences, that constitute one of the most ignoble and oppressive of the legacies of British colonialism, need to be addressed.

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13 Address by Nobel Laureate Archbishop Desmond Tutu in Nairobi, Kenya to the Anglican Church conference of Africa, 12 January 2007.

14 Former PM hits out at Singapore gay sex ban, *The Age*, Melbourne, 24 April 2007, p. 8.

15 Open letter signed by Nobel Laureate Amartya Sen, former Attorney-General Soli Sorabjee and others dated 19 September 2006. Available at <http://mrzine.monthlyreview.org/india160906.html>. Accessed 18 August 2008.

16 Described in Crompton, L. (2003) *Homosexuality and Civilization* (Cambridge, MA: Belknap Press, Harvard University), p. 362ff.

17 Kinsey, A. C. et al. (1948) *Sexual Behaviour in the Human Male* (Philadelphia: Saunders). See also Kinsey, A. C. et al. (1953) *Sexual Behaviour in the Human Female* (Philadelphia: Saunders).

## A Methodology for Reform

### Secure a committee

Proposals for reform of homosexual offences (like those concerned with other parts of the criminal law) tend, for a time at least, to engage high passions. The only way that reform can be considered cool-headedly, as a matter of principle and basic policy of the criminal law, and in terms of fundamental human rights, is by calm investigation; rational dialogue; study of changes in other jurisdictions; and perception of the impact of the law as presently applicable.

This is why the starting point for reform is usually the formation of a respected committee, like the Wolfenden committee whose recommendations ushered in reform in Britain. A similar process has now commenced in Singapore where a committee of the Law Society has recommended reform.<sup>18</sup> Reform of the criminal law on homosexual offences does not *ipso facto* sweep away the many laws that result in unequal treatment of sexual minorities. However, the imposition of criminal offences upon consenting, adult, private sexual conduct lies at the heart of the stigmatization. Until such laws are abolished inequality will always be sustained by reference to the existence of the criminal provisions.

When the Wolfenden committee was established there was no commitment on the part of the Government of the United Kingdom to introduce any reforms that it recommended. Even after it reported, the Government, at first, declined to act. Yet the Wolfenden report immediately became the focus of bipartisan consideration of the issue in the United Kingdom Parliament. It attracted support (and opposition) from people of different political persuasions. It became a catalyst for substantial civil debate. It promoted the establishment of civil society organizations, such as the Homosexual Law Reform Committee and the Campaign for Homosexual Equality.<sup>19</sup> As well, other established bodies concerned with law reform (such as legal and medical professional organizations) picked up the proposals. Their members become engaged in, and leaders of, the debates about change.

### Religious supporters

An early initiative in Britain was to enlist the support of liberal members of different religious groups. Their voices became important sources of appeals for reason and opposition to the application of the harsh criminal law.

Many members of sexual minorities are active participants in religious organizations. Some make friendships there and some of them persuade others to understand the unfairness of criminalizing sexual minorities. In England, from the early days, leading churchmen supported the Wolfenden proposals. They included Bishop John Robinson, the Bishop of Woolwich,<sup>20</sup> Canon John Collins, and eventually the Archbishops of Canterbury and York. Many of these religious supporters of reform adhered to traditional understandings of scripture as it has been taught in the past before knowledge became available of scientific data on the existence and distribution of human sexual diversity.<sup>21</sup> However, these religious

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18 Law Society of Singapore (2007) *Law Gazette*, Singapore, May 2007 (containing extracts from the report of the Law Society).

19 Grey, *supra* n 4, pp. 154–8, 177.

20 *Ibid.*, pp. 242–8.

21 Brash, Alan A. (1995) *Facing our Differences – The Churches and Their Gay and Lesbian Members* (Geneva: World Council of Churches Publications).

leaders moved away from the assertion that it was necessary, or appropriate, to enforce those understandings by *criminal* sanctions. In more recent times, Bishop Desmond Tutu in South Africa has become a strong proponent of the need for reform of African church and popular views on this subject.

## Making common cause

In the contemporary world, there is merit in making common cause with other agencies of reform of the criminal law, as for example those created to provide effective responses to the HIV/AIDS epidemic.

The countries that have succeeded most in promoting behaviour modification, essential to reduce the spread of HIV, are those that have promoted awareness of risks involved in sexual and drug using behaviour. Criminal law can sometimes act as an impediment to effective strategies to contain the spread of HIV. To encourage behaviour modification, it is necessary for essential messages to reach the minds of those most at risk. That is less likely to happen where those at risk are stigmatized and subject to official harassment and criminal punishment.

There are dangers, of course, in broadening the proposals for law reform. There are risks of confusion between sexual minorities and persons living with HIV. In most developing countries of the Commonwealth, sexual minorities have not predominated amongst those infected with HIV. Nevertheless, despite the dangers and risks, the size of the HIV/AIDS epidemic adds to the urgency of adopting effective responses that diminish impediments to safer sexual practices and drug use. International support from agencies of the United Nations, including UNAIDS, WHO, UNDP and the Office of the High Commissioner for Human Rights, may sometimes afford funding and expertise to help local groups in the effort to promote the cause of legal reform in these areas.

## Scientific and other academics

An important part of the strategy of reform that ultimately succeeded in England was engagement with scientists concerned in the care of members of sexual minorities.

Medical practitioners, psychologists, social workers and others were brought into the law reform movement to bring to more general notice awareness about the harm and stigmatization (even violence) caused by the laws against homosexual offences.

## Engaging international help

Reference has already been made to securing assistance from United Nations agencies, particularly those concerned with addressing the spread of HIV. There are now numerous international bodies and individuals willing and able to assist with up to date information about the progress that has been made in abolishing crimes targeted at homosexual people. Under the influence of the decisions of the European Court of Human Rights, such crimes have now been abolished, where they previously existed, in the member states of the Council of Europe. They no longer exist in any European country from Galway in Ireland, to the west, to Vladivostok in the Russian Federation, to the east. Informed overseas speakers can be invited to provide public lectures on the course of reform followed now in many

countries and of constitutional and other judicial decisions that have stimulated such reforms. They can explain the consequences of changes to the law and help to dispel exaggerated fears. There is no need to reinvent the wheel in this regard. Many useful lessons can be learned from the experience of other countries, such as my own country, Australia, where I am invited to deliver many such lectures on the subject.

## Advertisements and letters

In Britain, following the Wolfenden report, paid advertisements were published in the general media supporting the Wolfenden proposals. They were signed by many notable community leaders. The same has happened recently in India. A public letter, signed by many of the most distinguished public thinkers in India, has received widespread publicity. Similarly, letters to the editors of newspapers and participation in discussion programmes on radio and television have helped to promote awareness and discussion of the issues. If it can be arranged, the participation of articulate, persuasive, empathetic local individuals who are open about their sexuality, and their families, can help personalize the injustice of the old offences and the burdens that they cause, without justification, to fellow citizens.

## Conducting surveys

In England and elsewhere an important part of the strategy to achieve reform involved the repeated undertaking of surveys to demonstrate changing social opinions on the subject of homosexual offences. The more information that the general community received about the pernicious effect which these offences have had on the lives of individuals, the greater became the shift of opinion in favour of reform of the law. The major problem to be addressed in securing reform is to get members of the majority population to think about the issue at all.

## Compromise on detail

Proponents of homosexual reform must be prepared to compromise on issues of detail. Thus, they must recognize that, sometimes, it requires time for full equality to be achieved. In Britain, as in Australia and many other countries, early reform legislation included discriminatory requirements about the age of consent. Whereas, in most legislation, an age of consent of 16 years was provided in criminal statutes governing heterosexual conduct, the initial reforms in the case of homosexual conduct typically fixed the age of consent at 17 years, 18 years or even 21 years. The last was the age initially provided in the first legislation implementing the Wolfenden reforms in Britain.<sup>22</sup> Similar provisions were at first copied in Western Australia.<sup>23</sup> In due course, most such discriminatory provisions have been removed and replaced by identical provisions irrespective of the sexual identity of participants or their conduct. Proponents of reform must be ready for the process of education and persuasion to take time. The primary challenge is to put the wheels of change in motion.

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22 *Sexual Offences Act 1967* (UK).

23 *Law Reform (Decriminalization of Sodomy) Act 1989* (WA), s 10 amending *Criminal Code* (WA), s 187.

## Popular culture

An important feature of securing reform of the law in Australia was that it sometimes came about in unexpected ways. A popular television soap opera in Australia, *Number 96*, told the stories of a group of people living in a suburban apartment block in Sydney. One of these stories concerned the life of a young homosexual man. The aspects of his life were explained and dramatized in a matter-of-fact but sympathetic way.

Popular newspaper columnists also took part in promoting the cause of reform. To some extent, sporting, political, acting and other personalities associated themselves with the cause of reform. Those involved were not necessarily themselves homosexual. Some gave their support as a matter of principle. Others because of family, friends and particular experiences. Such communicators can explain that there are many things in life that are not fully understood by us all, without direct experience. Yet attributes of common humanity and understanding of the diversity of human existence supports acceptance of minorities and their essential human dignity and promotes a spirit of 'live and let live'.

In Australia, reform of the White Australia policy was achieved in the 1960s in part because of growing acquaintance of the majority Caucasian population with Asian immigrants. Similarly, acquaintance with the ordinariness and unthreatening character of members of sexual minorities and their families can help break down barriers of prejudice, often based on stereotypes.

## International movements

In addition to spreading knowledge about the work of tribunals and courts, both national, regional and international relevant to homosexual law reform, it is useful to keep abreast of new initiatives of international agencies concerned with the human rights of sexual minorities.

In mid-2007, the Office of the High Commissioner for Human Rights in Geneva initiated the appointment of an officer who will investigate aspects of human rights concerned, amongst other things, with sexuality. Other initiatives have sprung up relevant to the developing world. The International Commission of Jurists organized a conference in Yogyakarta, Indonesia, which produced a statement addressed to the human rights dimension of sexual minorities.<sup>24</sup> This dimension is also now a significant aspect of the work of Amnesty International, based in London. It has featured in the agenda of the International Service for Human Rights in Geneva and many other national and international non-governmental organizations. Each of these international human rights bodies (and others) can be a source of information, materials and encouragement for local individuals and civil society organizations. Some of them have access to funding available for improving the lot of women and members of sexual minorities throughout the world.

## Increasing visibility

Like all stereotypes, especially those founded on racial differences, those based on perceived features of sexual minorities are often the result of ignorance, fear and unfamiliarity. In some societies, it is still extremely difficult and even dangerous for individuals who

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24 International Commission of Jurists (2005) *Yogyakarta Statement on Homosexuality and Human Rights*.



are homosexual, or members of other sexual minorities, to 'come out' and explain the burden and injustice of criminal laws and other unequal provisions and practices.

The experience of Western countries is that, once the process of openness begins, it follows a generally predictable pattern unless further oppression halts the movement towards honesty, candour and change. When criminal sanctions are removed, a cloud is normally lifted from members of the sexual minorities who have been subject to a legal regime that is designed to terrify them into silence, shame, denial and furtiveness. The experience of many countries is that, once the spell is broken, oppression of this kind begins to melt away. Parents, siblings, colleagues and friends are then quickly found to demand an end to the oppression and equality in the treatment of this small minority in society.

Just as the earlier moves to end discrimination on racial, gender and like grounds took time, so the process of reform affecting sexual minorities throughout the Commonwealth of Nations will take time. One of the reasons why some opponents cling to the criminal offences against homosexuals is that such offences are used to humiliate and frighten members of the sexual minorities into continuing denial of their reality and existence and thus to ensure their invisibility. Reality generally only emerges when it becomes safe to do so.

## Sexuality and rule of law

So long as the criminal law remains unreformed, it is the duty of judges and lawyers, in appropriate cases to which it applies, to give effect to it. Thus, there can be no 'free kicks' for homosexuals before the courts.<sup>25</sup>

On the other hand, courts in many lands can, and now do, bring contemporary knowledge about sexual orientation to bear on decisions affecting the legal position of homosexuals in society.<sup>26</sup> Lawyers have a professional commitment to the attainment of justice and to upholding the fundamental human rights of all persons. Obviously, this also includes homosexuals and others in sexual minorities. Many of the leading proponents of law reform in England and Australia were lawyers. They saw from close up the oppression and injustice of the enforcement of the old criminal laws. Even when those laws were not generally enforced, lawyers recognized how they could be used intermittently to cause harassment, stigma, blackmail and fear amongst a vulnerable minority in society.

The fact that the law on homosexual offences is not generally enforced is sometimes put forward as a reason for leaving things alone. However, so long as criminal offences remain, people who do no harm to others are put beyond the pale. They suffer greatly in their self-esteem and in the enjoyment of human dignity and equality before the law. A just legal system will address this burden. It will remove it in the way that Wolfenden and his colleagues recommended.

## Skill, patience and common ground

Religious, cultural and political opposition will sometimes prove a significant impediment to the process of reform in this area. Confronting the causes of the impediments will require skill, patience, persuasiveness and constant exploration to try to find common ground.

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25 Cf *R v Reid* [2006] 1 Qd R 64. Special leave to appeal was refused by the High Court of Australia: see *Reid v The Queen* [2006] HCA Trans 666 (Kirby, Hayne and Callinan JJ).

26 Cf *Appellant S 395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473.

Because of the power of global ideas in today's world and the operation of the internet, it is likely that the ideas set in train by Wolfenden and his colleagues will continue to spread their message to all countries.<sup>27</sup> Especially so in the countries of the common law which share the same basic principles respectful of individual justice, human dignity and the ideal of equality before the law for all persons.

## The Progress of Human Freedom

In the eyes of the *Universal Declaration on Human Rights* and the international treaties that have resulted from that Declaration's brave, original concepts, adopted 60 years ago, every individual is precious. The notion that there inheres in every individual basic human rights which no other individual or organization or the State itself can take away is a powerful idea. It is still at work in the imagination of humanity. It is not yet fully realized. Many wrongs remain to be righted. But the concept that a minority can be stigmatized for a feature of their sexual nature which they do not choose and cannot change is intolerable to rational and just people in the present age.

The Commonwealth of Nations has always been a strong champion of human rights. It has been strong on opposing racial and ethnic discrimination. It has also been active in the cause of opposing gender discrimination. However, a true multiracial, diverse Commonwealth, committed to respect and equality for all of its citizens, will not be selective in the wrongs it sets out to rectify and the causes of justice that it embraces.<sup>28</sup> It will not be opportunistic; nor will it advance only the interests that are seen as a priority for the majority of its citizens. Human rights always involve issues of principle. They are concerned with each precious individual. If individuals are subject to discrimination for indelible causes of nature, that is wrong. Lawyers, above all, will say so. Commonwealth lawyers before all others.

In the Commonwealth of Nations we should take out, dust off, and read again the Wolfenden report, 50 years after it was written. We should act to give effect to Wolfenden's message as it concerns the many remaining instances of one of the least attractive legacies of colonial rule still evident in Commonwealth criminal laws. Lawyers in the Commonwealth should take the lead because the starting point of reform is the removal of the criminal laws. As the Hong Kong Court of Appeal recently observed:

Denying persons of a minority class the right to sexual expression in the only way available to them, even if that way is denied to all, remains discriminatory when persons of a majority class are permitted the right to sexual expression in a way natural to them. During the course of submissions, it was described as 'disguised discrimination'. It is, I think, an apt description. It is disguised discrimination founded on a single base: sexual orientation.<sup>29</sup>

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27 See e.g. *Newsweek*, 17 September 2007, pp. 39ff ("Legal in Unlikely Places").

28 There are few references to sexual minority rights in Commonwealth documents. See e.g. Commonwealth Secretariat, *Harare Commonwealth Declaration 1991* (printed London 2004), para 9. Commonwealth Health Ministers' Meetings have occasionally recognized the need for specific attention to such issues in HIV prevention initiatives towards 'gay and bisexual' people. See Statement, 21 April 2006. However, a search of the Commonwealth Secretariat website returns meagre pickings.

29 *Leung T C William Roy v Secretary for Justice (HK)* [2006] HKCA 106 at [48].