

Legislative reform

The Commonwealth People's Forum (CPF) is a biennial event held prior to the Commonwealth Heads of Government Meeting. CPF 2018 took place on 16-18 April in London and was jointly organised by the Government of the United Kingdom and the Commonwealth Foundation. CPF 2018 critically explored policy based actions under the theme of 'Inclusive Governance: The Challenge for a Contemporary Commonwealth'. It provided an innovative opportunity for civil society organisations to share knowledge and learn from each other as well as to interact with governance institutions on key policy issues. The CPF 2018 series elaborates on the issues covered in the London Declaration on Inclusive Governance for a Renewed Commonwealth.

Introduction

In many Commonwealth countries, legislation such as those relating to sexual orientation, gender identity, and mental health were codified in colonial times and continue to impact the lives of citizens. In the majority of Commonwealth countries, colonial laws remain in place and, while in some countries legislation may not contain punitive provisions, the presence of unreformed statutes leads to and perpetuates exclusion. In the remainder, steps have been taken to modernise laws.

The Commonwealth People's Forum 2018 (CPF 2018) examined how civil society and policy makers can work together to reform colonial laws in Commonwealth countries to gain full rights for people with mental health vulnerabilities and LGBT+ people. This built on a policy dialogue which took place at CPF 2015 entitled *LGBTI in the Commonwealth*. While these colonial-era laws continued unreformed in most of the Commonwealth, Britain, as the former colonial power,

decriminalised same-sex sexual relationships a half a century ago and has instituted legislation to provide mental care services universally and at the point of need.

'The Seychelles experience may offer several other valuable lessons for Commonwealth countries looking to build political support for legislative reform'

Participants shared experiences of the legal reform journeys of Belize and the Seychelles, two Commonwealth countries that have been successful in reforming colonial-era laws governing same-sex sexual relationships and mental health laws respectively. Discussion focussed on the biggest challenges faced by these countries when attempting to reform the law, the role played by civil society, how far each country had progressed, and the remaining challenges.

Issues and strategies

There are multiple challenges that face any attempt to reform colonial legislation. Often reform can be delayed not by a lack of political will or resistance to change within government, but because of a lack of awareness about the impacts of outdated legislation and limited institutional capacity to effect reform.

Delegates heard that in several Commonwealth countries, cultural norms and resistance from faith groups have represented a major challenge; governance reforms are characterised as an existential threat to a way of life instigated by foreigners. Resistance of this kind can make it difficult for political leaders and citizens to support reform. Indeed, where there are outspoken advocates on either side, parliamentarians can be unwilling to expend political capital even when they are sympathetic to reform. In some countries, budgetary costs incurred in mobilising for reform are also a barrier to progress.

Mental health reform in the Commonwealth

In 2013, the Commonwealth Health Professionals Alliance (CHPA) undertook a Commonwealth Foundation-funded study examining the state of mental health legislation in the Commonwealth. The study showed that legislation in the vast majority of member countries pre-dated the United Nation's (UN) 2008 Convention on Persons with Disabilities. Legislation continues to deny mental health rights and to include discriminatory and exclusionary provisions, for example permitting irreversible surgery and requiring no legal consent for experimental research. By 2013 less than a quarter of Commonwealth member states had signed the UN Convention; only 30 % of legislation included appeal provisions, and just half included legislation outlawing cruel treatment.

Subsequently, the Commonwealth has played an important catalytic role in promoting

mental health reform by providing practical support to member countries. The CHPA through a multi-stakeholder process has worked with the governments of Seychelles and Botswana to reform mental health legislation providing assessment reports on existing legislation. In both cases, recommendations have been taken forward; the Seychelles is close to finalising and passing a new mental health bill and has written a new mental health policy. Similar steps have also been taken in Botswana.

Lessons from Belize and Seychelles

In the Seychelles, significant work has been done to eliminate colonial legislation that does not conform with United Nation's conventions, including laws on the protection of disabled people and gender equality. Advocating for conformity with UN Conventions has proved a successful strategy, mobilising domestic support for change and providing governments with a means to demonstrate their increasing adherence to international norms. This approach has also leveraged and deepened collaborative support from the Commonwealth.

The Seychelles' experience may offer several valuable lessons for other Commonwealth countries looking to build political support for legislative reform. These lessons include: the importance of recognising that diverse strategies are needed to mobilise political support and moderate opposition to change, and that even where there is political will, institutional capacity for legislative reform is limited.

Reforming LGBT+ legislation using diverse strategies

Various strategies have been used to achieve legislative reform on LGBT+ issues in Commonwealth countries. While both Belize and the Seychelles have reformed laws prohibiting same sex relations, the two countries have taken different approaches in doing so. In Belize same sex relations were

prohibited until 2016 when the courts found the prevailing legislation illegal, whereas in the Seychelles change was effected legislatively in 2016 and circumvented the courts.

Adapting approaches to the social and political context

In both countries, progress was achieved by identifying key champions in government and civil society to lead and deliver change. In the Seychelles, acceptance of change required a shift in the political discourse and a straightforward argument was deployed to achieve this; namely that people in the Seychelles had lived for many years without the penal code making same sex relationships a crime and criminalisation had been introduced in colonial-era laws. In Belize, adapting this context-specific strategy has resulted in changing definitions in legislation which introduce provisions to protect minors and to make rape gender-neutral.

Educating people about dignity, respect and discrimination

Expanding education on dignity, respect, human rights and the importance of confronting discriminatory behavior was crucial to reform in both cases. Ensuring that there was a cadre of people who can own and lead the process of reform was also important. Representatives of excluded communities, civil society members and researchers must be given opportunities to participate in decision-making processes.

Listening to all sides

Politicians have the power to set the tone of debate and provide a space for communities to make their case. For example, the Government of Belize held an inclusive political debate and opted to arbitrate the dispute between sides. No laws were passed to undermine rights or the voice of civil society and government officials shunned inflammatory language. Marginalised voices were permitted to defend their positions in

court. As one CPF 2018 participant observed, ‘politicians need help to get the right position’.

Maintaining pressure across elections

These case studies show that constitutional reform can be advanced through good legislation. But this can be a slow process often fraught with policy reversals, particularly between elections when pre-election rhetoric can distort debate. This suggests a need to take account of electoral cycles when planning advocacy. Judicial decisions on controversial or complex policy issues can also be helpful in diffusing political tension. Prior legal advice can prove crucial for passing legislation without loopholes. In Belize the authorities met with the Chief Justice to ensure their proposals were watertight and The Commonwealth Lawyers Association continues to play an important longer-term role in fostering legislative reform by raising awareness among lawyers.

A focussed, strategic approach with political champions

Countries are finding increasingly effective ways to achieve legislative change. This has been done by: identifying champions in the political sphere who can steer and lead reform; selecting and focusing on a limited number of strategic imperatives; ensuring that issues are owned by a limited and clearly-defined group of champions; and through a process of public education, to ensure that the reform agenda focusses on issues where maximum consensus can be found. For example, a decision in Trinidad and Tobago in April 2018 has led to the recognition of same sex relationships. This was achieved by finding principle agreement on overturning colonial legacies, which moderated political opposition.

Developed by Cyrus Rustomjee, Chief Rapporteur,
Commonwealth People's Forum, April 2018

Edited by Gillian Cooper and Leo Kiss

Reviewed by Caleb Orozco and Philippa Drew

Speakers Ambassador Barry Faure, Caleb Orozco, Jill Iliffe, Kim
Simplis Barrow and Evan Davis (chair)

Design by Leo Kiss

Disclaimer

The Commonwealth Foundation encourages the use, translation, adaptation and copying of this material for non-commercial use.

We ask that appropriate credit be given to the Commonwealth Foundation. The perspectives expressed are the views of the author while documenting the opinions expressed by participants of CPF 2018 in their deliberations and do not necessarily reflect the views of the Commonwealth Foundation