

## **Human rights in the Overseas Territories: In policy but not in practice?**

### **Abstract**

Since the late 1990s emphasis has been placed by the UK government on enhancing human rights in its Overseas Territories. Some early changes were enforced, but more recently persuasion and capacity building have been prioritised. However, due to the complexity of the bilateral relationships and the cultural diversity that exists, fostering and embedding reform is difficult. These challenges are seen most clearly in two examples: the rights of the child to be protected from sexual exploitation, and the securing of equality in relation to sexual orientation with reference to LGBT rights. The article analyses the constitutional and legal changes that have been made in regard to these two issues, and whether the creation of stronger human rights principles have led to enhanced rights in practice.

### **Keywords**

Overseas Territories; governance; rights of the child; LGBT rights; cultural relativity; small-size

## **Introduction**

In recent years progress has been made in strengthening national constitutional and legal safeguards in the United Kingdom Overseas Territories (UKOTs) in relation to human rights. This disparate group of territories are scattered across the globe and form the last remnants of the British Empire – the ‘Last Pink Bits’ (Richie, 1997). Indeed, in much legislation pertaining to the territories the term ‘colony’ is still used. They have considerable local autonomy (which varies from territory to territory), but the UK is the sovereign power. Thus, in promoting human rights the UK has taken the principal role and this has created tensions with the territories, which sometimes take a different normative approach when human rights are considered or have difficulty in applying the necessary changes due to their small size and associated capacity constraints. As a consequence, this creates a setting in which the principles of human rights incorporated into local constitutions and/or enshrined into local law do not necessarily bring about the desired advances in the practice of human rights in the territories. In the article, two issues are considered which most clearly highlight the tensions at play: the rights of the child to be protected from sexual exploitation and the securing of equality in relation to sexual orientation with reference to Lesbian, Gay, Bisexual and Transgender (LGBT) rights. The article begins by providing a brief survey of the territories themselves, before going on to assess the nature of the constitutional relationships that are in place between the UK and the territories. The article then considers the constitutional and legal changes that have been made in relation to the two issues under consideration. Finally, it analyses the situation on the ground concerning those rights, and to what extent the creation of stronger human rights principles have led to enhanced rights in practice.

## **An Overview of the Territories**

There are 14 UKOTs spread across the globe – Anguilla, British Virgin Islands, Cayman Islands, Montserrat, and Turks and Caicos Islands (in the Caribbean); Bermuda (in the West Atlantic); Falklands Islands, South Georgia and South Sandwich Islands, and St Helena, Ascension and Tristan da Cunha (in the South Atlantic); British Antarctic Territory; Gibraltar and Sovereign Base Areas of Akrotiri and Dhekelia in Cyprus (in Europe); British Indian Ocean Territory; and Pitcairn, Henderson, Ducie and Oeno Islands (commonly known as the Pitcairn Islands) (in the Pacific). All have permanent populations except for British Antarctic Territory, British Indian Ocean Territory, and South Georgia and South Sandwich Islands. For those territories that are permanently populated, the number of inhabitants range from 65,000 in Bermuda to 54 in Pitcairn (Foreign and Commonwealth Office, 2012a). The population across all the UKOTs is approximately a quarter of a million.

The territories have also quite different histories. Those in the Caribbean were colonised by the British in the 1600s. Some had significant sugar plantation economies (such as Cayman Islands); while others were not exploited to the same extent (Anguilla). Some were governed in regional groupings (such as Montserrat in the Leeward Islands Federation), while others were ruled by neighbouring colonies (Cayman Islands by Jamaica, and Turks and Caicos Islands by The Bahamas and then Jamaica). Bermuda, the UK’s oldest territory (from 1620), has never been governed as part of a wider federation or by another colony. Further, the role of indentured labour

was very important, while at the same time the black population was tightly controlled, including through the planned emigration of free blacks. In Falkland Islands, the British first laid their claim in 1765, and in 1832 a British expedition expelled colonists from Argentina and a Crown Colony government was established the following year. Unlike the Caribbean territories and Bermuda the population grew after 1833 due to Scottish and Welsh immigrants. St Helena was a colony of the British East India Company for many years; Napoleon was exiled there in 1815; and it became a Crown Colony in 1834. The role of slavery and Chinese indentured labour were important in the island's development. Gibraltar became a British colony in 1713 by the Treaty of Utrecht, which ended the War of the Spanish Succession. Gibraltar then became a key base for the Royal Navy. Pitcairn was first settled in 1790 by some of the HMS Bounty mutineers, and became a British Territory in 1838. But, it has always struggled to overcome its small population. As a consequence of these varied histories the demographic profile of the territories is quite different. For example, in the Caribbean territories, the vast majority of the populations are black; while in Falkland Islands and Gibraltar they are largely white.

In the next section we will consider the political and constitutional arrangements in place as they relate directly to the focus of the paper – and these arrangements have been framed, at least in part, by the distinct historical path of each territory. Before that, however, we would like to assess briefly two other aspects of modern life that are worth noting within the context of the article. First, their economies. Many are performing well. For example, Bermuda had a gross domestic product (GDP) per head of US\$85,302 in 2013 (UN, 2015a), and is one of the world's leading centres for international insurance companies, while Cayman Islands had a GDP per head of US\$59,448 in 2013 (UN, 2015b), and is the world's leading centre for hedge funds. The Falkland Islands economy is also doing well based on fisheries, tourism, and agriculture. But the territories' economic vulnerability is a concern, which has been seen most clearly in Bermuda and the Caribbean since the 2007/08 global economic crisis, with deep recessions and weak recoveries. Other territories have more fundamental problems – particularly Montserrat, Pitcairn, and St Helena – all of which still receive budgetary aid from the UK. It is hoped that conditions will improve in St Helena with its soon-to-be-completed international airport, but for Montserrat (with the effects of the Soufriere Hills Volcano) and Pitcairn (with its barely sustainable population) their futures remain more uncertain.

A second issue relates to the rapid increases in population that have taken place in particular territories (mainly in the Caribbean) in recent years. In Turks and Caicos Islands, for example, the population was 11,465 in 1990; in 2012 it was 31,458 (*Turks and Caicos Sun*, 2012). In Cayman Islands, the population totalled 25,335 in 1989; in 2014 it was 58,238 (Cayman Islands Government, 2015). These increases have been caused by strong economic growth, high demand for labour, and relatively open immigration policies. Influential ex-pats and a large number of manual workers have arrived, but this has made the longer-established residents determined to maintain their privileges and way of life. They are fearful of losing their identity and position within society.

Within this context a key issue is the rights of 'Belongers' as against 'non-Belongers'. Formal nationality issues as we have seen are the responsibility of the UK, but each territory has its own more informal arrangements – equivalent to 'local citizenship'. Belonger status (this term is used in a generic way because territories use different terminology: Caymanian; Bermudian; Turks and Caicos Islander) is granted to those individuals who are seen to have particularly strong links with a territory. In some territories (such as British Virgin Islands and Falkland Islands) the status is set out in their constitutions; in others (Bermuda, Cayman Islands and St Helena) local legislation (sometimes guided by the constitution) defines the status. In the main, the only ways to become a Belonger are by birth, descent, adoption, by marriage, or being the dependent child of someone who becomes a Belonger by marriage. Also, Belonger status can sometimes be granted based on the time spent in a territory, for example in Anguilla. Being a Belonger is highly prized and the privilege strongly defended. This is because there are a range of benefits that Belongers have, which non-Belongers do not. The benefits vary across territories, but commonly they include the right to live in a territory without immigration restrictions; better job opportunities; the right to own property without the need for a licence; and important political rights – chiefly the right to vote and to stand as a candidate for election (Hendry and Dickson, 2011).

However, there is a growing imbalance in certain territories between the total population and the number of Belongers. This is especially true for Turks and Caicos Islands. According to a recent report Turks and Caicos Islanders account for 40 per cent of the population; compared to 52 per cent in 2001. It should also be noted that the non-Belonger population is mainly concentrated in the main working age group of 25-44 years (Caribbean Development Bank, 2012). Such a demographic profile is interesting in highlighting the dependency of Turks and Caicos Islands on non-Belonger/migrant labour. However, it also has implications for democracy and the size of the electorate, as the right to vote is dependent on Belonger status. In Turks and Caicos Islands less than 30 per cent of the adult population could vote in the 2012 general election. In Cayman Islands, approximately 45 per cent of the adult population were registered for the 2013 election. The disparity is not so great in Falkland Islands, but just 60 per cent of the adult population had voting rights in the 2013 referendum which reaffirmed the territory's link to the UK. In St Helena, a similar percentage was registered for the 2013 election. As we will see later in the article this imbalance (and often growing imbalance) between the size of the adult population and the number of Belongers has impacted on the human rights debate: first because Belongers have frequently a stronger adherence to Conservative Christian values than non-Belongers, and second because those views often differ with western liberal approaches to human rights.

### **The Constitutional Relationship**

The relationship between the UK and the territories is underpinned by several Acts of Parliament. The British Settlement Acts 1887 and 1945 provide the statutory legal basis for the constitutions of some territories (Ascension, British Antarctic Territory, Falkland Islands, Pitcairn, South Georgia and the South Sandwich Islands, and Tristan da Cunha). There is also the St Helena Act 1833, which was originally named the Government of India Act 1833. But all parts of the original act have been repealed

except for the section dealing with St Helena. For the territories in the Caribbean the relevant legislation is more recent. This was because the West Indies Federation (1958-1962) had been the UK's preferred method of administering its territories in the region. However, when the Federation collapsed new legislation was necessary and the West Indies Act 1962 was approved for this purpose. As Davies states, the Act '... conferred power upon Her Majesty the Queen to provide for the government of those colonies that at the time of the passing of the Act were included in the Federation, and also for the British Virgin Islands' (1995, p. 118). The Act remains today the foremost provision for four of the five territories. The fifth, Anguilla, was dealt with separately owing to its long-standing association with St Kitts and Nevis. When Anguilla broke away and came under direct British rule in the 1970s, eventually becoming a separate territory in 1980, the Anguilla Act 1980 became the principal source of authority. Finally, Bermuda is overseen by the Bermuda Constitution Act 1967, and the Sovereign Base Areas of Akrotiri and Dhekelia by the Cyprus Act 1960. That leaves Gibraltar and the British Indian Overseas Territory, whose relations with the UK are defined by Orders in Council made exclusively through Royal prerogative power (Hendry and Dickson, 2011). This is because, 'Neither territory is within the scope of the British Settlements Acts 1887 and 1945, because each was acquired by cession and thus falls outside the definition of "British settlement" for the purposes of those Acts' (Hendry & Dickson, 2011, p. 19). However, even for the other territories the role of the UK Parliament is limited because all constitutions are passed by Orders in Council and thus do not require the support of either House in Parliament.

Due to the territories' particular histories and legal ties to the UK, there are differences in the constitutions and the balance of power between each territory and the UK. New constitutions have been established for most of the territories over the last decade, and the majority gave greater autonomy to the territories (albeit in relatively narrow areas of policy). Each constitution allocates responsibilities between the Crown (i.e. the UK government and the Governor) and the territory. Those powers generally reserved for the Crown include defence, external affairs, internal security, including the police, and the public service; while territory governments have control over all aspects of policy that are not overseen by the Crown including the economy, immigration, education, health and social security. However, as noted above, there are differences in the level of autonomy afforded to each territory. For example: in both Bermuda and Gibraltar the Governor does not chair the local Cabinet; in St Helena the Governor also oversees finance and shipping, and in some of the Caribbean territories aspects of international finance; in Bermuda it is much more difficult to legislate by Order in Council (other than in relation to the constitution); and in some such as Cayman Islands and Gibraltar the constitution confers a special legislative power on the Governor – although there is variation here too in terms of the scope and procedure for the exercise of this power (see Hendry & Dickson, 2011, pp. 64-65).

A further issue that complicates matters is the lack of clarity that sometimes exists between the UK (and the Governors) on the one hand and the territories on the other when it comes to decision-making. There are several reasons for this. First, the constitutions provide many opportunities for turf wars between Governors and local ministers. As Taylor noted: 'In my time in Montserrat Ministerial attempts to encroach on the Governor's areas of responsibility and to challenge his powers were the normal

stuff of day-to-day administration as they are to a greater or lesser extent in all the Territories' (Taylor, 2000, p. 339). Second, the UK authorities are often reluctant to use their full powers, even in areas where they have responsibility – rather consensus and persuasion are preferred. The UK is aware of the importance of maintaining good relations with democratically elected governments and this is particularly true when territories are no longer in receipt of UK government funding – as is the case with most of them. Third, the powers of the UK are in reality quite limited. As has been argued, 'Governors have few intermediate levers between ... influence on the one hand and the constitutional power on the other, despite the responsibilities they must discharge' (NAO, 2007, p. 26). Because of these factors it is sometimes difficult for the UK to get its way entirely – as this article illustrates.

The overview that we have just presented in relation to the historical, demographic, constitutional and legislative development of the territories is necessary as it provides context to better understand the following sections that focus particularly on the issue of human rights. Even though, as we will see, the UK government has tried to promote a generally comprehensive approach to human rights across the territories, the specific circumstances in each are crucial in regard to how measures are debated, adopted, and followed.

### **Human Rights in the Overseas Territories**

In regard to human rights, the UK has taken a particular interest since the late 1990s when the Labour Party entered government, and this has been maintained since the Conservatives (initially in coalition with the Liberal Democrats) won power in 2010. In 1999 a White Paper was published, *Partnership for Progress and Prosperity*, which set out the UK government's approach to the territories, including in relation to human rights (FCO, 1999). The government made clear that 'high standards of observance' were required, and that the territories 'should abide by the same basic standards of human rights, openness and good government that British people expect of their Government' (FCO, 1999, p. 20). Thus, the expectation was the territories' 'legislation should comply with the same international obligations to which Britain is subject', such as the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR). The UK government felt that if certain changes were not made then it – as the sovereign authority in the territories – would risk being in breach of its international commitments and in turn be liable to an 'unavoidable contingent liability of costs and possible damages' (FCO, 1999, p. 20). The White Paper indicated three issues on which the UK required rapid action: judicial corporal punishment, capital punishment, and legislation outlawing homosexual acts between consenting adults in private. The UK hoped that in the territories where changes needed to be made (Bermuda and those in the Caribbean) the local governments would sanction the necessary reforms. However, the UK was prepared to impose changes on the Caribbean territories via Orders in Council, and for Bermuda (in relation to the abolition of the death penalty) by an Act of Parliament (FCO, 1999, p. 20). The latter's greater constitutional autonomy would have stopped an Order in Council being used.

The legislation for abolishing judicial corporal punishment and the death penalty was passed locally, but the issue of decriminalising homosexuality was more difficult. Despite lengthy consultations with the Caribbean territories, involving governments, religious and social leaders, the media, and the general public, there remained strong resistance to the decriminalisation of homosexual acts. Many in the territories believed the issue was a local one, and local views and predispositions should take precedence over British demands (Clegg, 2005). However, in early 2001, in spite of widespread controversy the UK government passed an Order in Council to force the change in legislation. The decision generated tremendous ill feeling among many in the territories because they felt that the Order encroached upon an area of responsibility formerly overseen at the local level, and this chastened the UK. Nevertheless, the UK action highlighted its early determination to enforce basic standards of human rights, but it is interesting to note that although the law was changed the view of many in the territories has not and in some (for example Bermuda which has greater local autonomy) local differences remain, with the age of consent for male homosexuals remaining higher than for other forms of sexual activity.

The recent revisions made to the territories' constitutions, mentioned previously, have brought a more general strengthening of protections in regard to human rights – primarily through the inclusion of a fundamental rights chapter in each constitution. This has been a vital step, as enshrining rights in the constitution rather than through legislation embeds them more securely, rather than leaving them subject to the whims of politicians (Hendry and Dickson, 2011). Having not been through a full constitutional review process, Bermuda and Anguilla whose constitutions date back to 1968 and 1982 respectively, offer less extensive protections than those with more recent documents. The more limited protections are a reflection of the historic context in which these constitutions were created. As was the preference with constitutional drafters in the Commonwealth at the time, constitutions were written as extensions to the European Convention of Human Rights, rather than with rights written out in full and clearly enunciated (Hendry and Dickson, 2011).

As well as reinforcing constitutional safeguards, the Foreign and Commonwealth Office (FCO), the lead government department for the territories, often in collaboration with the Department of International Development (DFID), has stressed the importance of extending all the key human rights conventions to the territories. The UK can do this via persuasion, capacity building, and sometimes through force of legislation. Also, the FCO has the responsibility for ensuring that each territory fulfils the obligations that have been extended to them. Although not uniform, territories are subject to a number of European and international instruments. A 2012 White Paper, *The Overseas Territories: Security, Success and Sustainability*, set out the UK's commitment to extend six United Nations (UN) conventions to the territories by 2013, including ICCPR, International Covenant on Economic, Social and Cultural Rights (ICESCR) and Convention on the Rights of the Child (CRC). So far only British Virgin Islands, Falkland Islands and Turks and Caicos Islands have signed up to all six. Whilst progress has been made, Anguilla is yet to have either the ICESCR or the ICCPR extended to it. The government has agreed in principle to an extension, however, progress has been slow (FCO, 2014, p. 146). Likewise the CRC is yet to be adopted by Gibraltar (FCO, 2015a). Additionally, the UK has extended the ECHR to all territories

(with the exception of Pitcairn), and the fundamental rights chapters in the new constitutions are designed to better reflect these commitments (FCO, 2012a).

In order to foster tangible behaviour change with the adoption of these conventions several programmes have been introduced by the UK government. The most significant completed programmes to date are 'Building Human Rights Capacity in the British Overseas Territories' (2007-2012); Child Protection Project (CPP, 2005-2008); and The Safeguarding Children in the Overseas Territories (SCOT) project (2009-2013) (following on from the CPP) (DFID, 2015a). The latter project has been extended again (SCOT2) and will run until 2017. As can be seen there has been a particular focus on child safeguarding, because of wide-spread concerns about child safety across the UKOTs. Meanwhile, the aim of the 'Building Human Rights Capacity in the British Overseas Territories' project, which was allocated one million pounds and was led by the Commonwealth Foundation, was to 'uphold the observance of human rights' and to 'garner multi-sectoral support for human rights' (DFID, 2012, p. 2). Every territory took part in the project, and a range of activities were supported, including providing training workshops and assisting governments to improve the implementation of human rights commitments. Particular examples of support included, training for civil servants, police and social workers in British Virgin Islands, and formulating proposals for a Human Rights Commission in St Helena (FCO, 2012a). However, because of a degree of ignorance about human rights in many UKOTs, the weakness in the capacity both of local officials and civil society, delays in implementation, and the finite length of the project not all objectives were met. Indeed, the FCO noted that results were mixed with limited success in bolstering monitoring and reporting arrangements and developing a human rights agenda amongst the territories (FCO, 2012b).

It appears at first sight that a great deal of work has been undertaken to enhance the territories' adherence to, and awareness of, key human rights commitments. The recent constitutional changes, in particular the insertion of fundamental rights chapters, and the extension of UN conventions to the territories, have been important; so too the UK-funded projects to build capacity and awareness in relation to defending human rights (albeit with qualifications). However, there are concerns that to some extent these changes have not fundamentally altered the way in which territories view human rights, particularly in regard to the most vulnerable groups within their societies. The next two sections assess this claim in detail, by focusing on the safeguarding of children and the securing of LGBT rights.

### **Safeguarding of Children**

Child abuse takes many forms, all of which have destructive effects on the individuals and families involved, with serious impacts for the wider societies. Through violence, sexual exploitation and neglect the troubles of one generation are passed onto the next. With differing approaches to what constitutes child sexual abuse both across and within societies, finding a commonly recognised definition is itself a difficult task. Despite there being a relatively clear definition in law, conceptually there is little agreement (Jones & Trotman Jemcott, 2009, p. 8). For instance, a UNICEF-backed study into attitudes and opinions on child sexual abuse in the Eastern Caribbean found



that despite pockets of consensus on some issues there was disagreement on what represented sexual abuse (Jones & Trotman Jemmott, 2010, p. 8).

The under-reporting of acts which constitute child sexual abuse are an important caveat to any research on the topic. The lack of reliable data on its prevalence is not only a hindrance to research; it also provides an obstacle to progress in addressing the problem. Of the English-speaking Caribbean, UNICEF claims there has been and continues to be 'a serious lack of in-depth research and information on child sexual abuse' (UNICEF, 2013, p. 15). DFID contends the problem is not limited to the Caribbean, with a lack of reliable data across all the UKOTs (DFID, 2014a). Despite the absence of data on the issue it is evident that child sexual abuse is a pervasive and persistent problem in the territories, particularly amongst those in the Caribbean (DFID, 2014a); although the highest profile cases of abuse have been in Pitcairn. Also, across the territories there remain substantial gaps in the legal framework on child safeguarding that have not been addressed sufficiently (DFID, 2014b, p. 2). Highlighted in the compliance review on legislation relating to CRC, the majority of Eastern Caribbean territories (Anguilla, British Virgin Islands, and Montserrat) have not ratified the child prostitution and trafficking protocol (DFID, 2015b, p. 5).

Although not extensive there have been some positive changes. For example, Anguilla has introduced a Child Protection Steering Committee mandated to meet obligations set out in the CRC. It has also introduced, in conjunction with UNICEF, an Inter-agency Child Protection Protocol (FCO, 2013, p. 8). Also noteworthy are Gibraltar's Children's Act 2009 and British Virgin Islands' National Action Plan for Children and Child Protection Protocol (2014) (Searle, 2013; FCO, 2015a). In addition, special mention should be given to Falkland Islands, which has afforded significant attention to promoting child rights and has introduced a number of measures to do so. Among these is the creation of posts such as a Children's Champion 'to ensure that the well-being of children and their families is taken into account in the formulation of government policy', and 'a comprehensive revision of safeguarding procedures' (FCO, 2015a). The Falklands has also taken the lead in seeking to promote cooperation and information sharing across the territories (FCO, 2015a).

Through the CRC, which has been extended to all but Gibraltar, 'children have the right to freedom from trafficking, prostitution, sexual exploitation and sexual abuse' (United Nations, 2007, p. 5). States who sign up have to modify laws to align with the CRC and ensure their institutions and legal systems serve the best interests of children. However, as we have seen, comprehensive legislative frameworks are absent in some territories. Nevertheless, it is perhaps the weak defence of these protections that is the most serious deficiency. Several territories have ineffective and poorly designed judicial systems, insufficiently resourced public bodies to deal with the issue, and few government departments willing to take responsibility. All of which are magnified by a lack of coordination across government bodies. Pitcairn and St Helena exhibit the most extreme examples of these problems.

Pitcairn received a raft of negative publicity after the convictions of a number of men from the community on child sex abuse charges in the mid- to late-2000s, which highlighted a culture of abuse spanning years if not decades. Several leading figures,

including two ex-mayors of the islands, were convicted (Fickling, 2004; *New York Times*, 2004; Gay, 2013). Pitcairners considered the age of consent to be 12 and so argued that the sex concerned was consensual. However, because the island is subject to British common law, under which the age of consent is 16, these arguments were dismissed. Nonetheless, formerly weak day-to-day oversight on the part of the UK certainly contributed to the view of some in the territory that UK norms did not apply (Cawley, 2015). In response to the scandal, a new constitution was enacted, which contained a stronger focus on human rights. As we noted previously, it contained a fundamental rights chapter enforceable in the territory courts with final appeal to the Judicial Committee of the Privy Council; and it also saw the appointment of an attorney general. However, the legacy of the scandal continues to impact on Pitcairn. The FCO has a travel advisory which asks that any visits or settlements involving children younger than 16 years of age must be authorised by the Governor's Office (FCO, 2015b). Whilst attempts to encourage new settlers have been unsuccessful, in part because of the 2004 convictions (Rowley, 2015a).

The second example is St Helena and Ascension. In 2012 anonymous allegations were made to the FCO about the improper investigation and prosecution of sexual offenses. Then two separate allegations followed from former employees including a suspended Senior Social Work Manager allegedly removed for whistleblowing who stated that child abuse until recently was 'ignored throughout society' (Rowley, 2015b). In response the FCO launched several new investigations, which highlighted the 'abusive and exploitative' premature sexual relations with teenage girls, including significant grooming of teenage girls by older men (Sheath & Todd, 2013, p. 2). A key component of the judicial framework, the police force, was singled out for criticism. According to Sheath and Todd, overly aggressive police methods 'alienated those they were attempting to assist and protect' (2013, p. 2). There has seemingly been a breakdown at all levels with a convicted offender having advised on child protection and FCO officials allegedly informed of the issues on St Helena over a decade earlier (Rowley, 2015b). Other claims include 'police corruption and incompetence, and a conspiracy by the St Helena Government, the FCO and DFID to cover these up' (Hammond, 2014). In reply, a FCO spokesman stated:

We take all measures of child abuse very seriously. Where we could act, we believe we have ... However, we know from the current allegations that there is more to do to make sure that children on St Helena are given the right level of protection. That is why the Foreign Secretary launched the Wass inquiry which will look at these allegations (Rowley, 2015b).

In November 2014 an independent inquiry led by Sasha Wass QC was established and its work is ongoing. However, concerns have been expressed about what happened and why. One critic quoted in an article in *The Telegraph* from 18 January 2015, said:

They [the Foreign Office] were aware that we didn't have the resources to cope with it because we've been pointing it out ever since ... I said to them, you've signed up to this convention [on the Rights of the Child], but it's going to require big money and we don't have the social workers nor the

resources to do it ... The police weren't equipped enough, they didn't have all the tools that were necessary (Rowley, 2015b).

There has also been some focus on Bermuda. Here a key issue is the lack of reporting of child sexual abuse by families and members of the community aware of the problem. This concern is underlined by Martha Dismont from Family Centre Bermuda: 'Unfortunately in families where this has occurred years ago there are still many that have said very little or nothing ... It is a very ugly side of a hurting population ... We're a small community [and] we have a bit of a silence culture' (Dismont, 2009). Victims who have spoken out have been ostracised by other children and 'harassed by members of the community', including cyber-bullying through social media (McGrath, 2014).

The examples of Bermuda, Pitcairn, and St Helena, together with the problems in the Caribbean territories in relation to the sexual abuse of children highlight a number of concerns that mean policy and practice do not match up – many of which relate to their small and close-knit communities, often located on remote islands, and different cultural perspectives. The key issues are worth exploring in a little more detail here.

First, the 'culture of silence' is a significant issue that runs through some societies and undermines measures to target the problem. It perpetuates abuse as offenders are not apprehended (Jones & Trotman Jemmott, 2009, p. 16). Inherent in this damaging culture is the inability of victims or those with knowledge of abuse to speak out. This is often due to fear of reprisals or simply not being believed. The situation is often exacerbated by the inability of the authorities to deal with claims of abuse effectively, or their attempts to actually deter people from speaking out (Jones & Trotman Jemmott, 2009, pp. 13-14).

Second, is the poor treatment of victims by those in authority that are meant to help. As highlighted in St Helena, the police are seemingly untrained and ignorant of how to deal properly with claims of abuse. Without adequate training, even those with the best intentions can badly serve the victims. Bermuda's Police Inspector Mark Clarke has highlighted the importance of 'treating victims with dignity, without prejudice, fear of ridicule, and increased public awareness via education' (McGrath, 2014), but often this does not happen.

Third, many are small societies lacking the required infrastructure and human and financial resources to address the issue. A summary of some of these problems is provided by Jones and Trotman Jemmott (2009, pp. 9-10) citing their study into child abuse in the Caribbean:

The procedures for dealing with reports, systems for monitoring abuse and services to deal with the impact of disclosure are underdeveloped; ... [while] poverty and the economic and social reliance of many Caribbean women on men mean that action which may affect the main breadwinner (such as reporting abuse) is often undermined by women themselves.

Further, a UNICEF report on Turks and Caicos Islands highlighted 'inadequate human and physical resources' as reasons for the territory's inability to suitably implement

the mandated protocols in the CRC (UNICEF, 2013, p. 30). Similar problems were raised in the investigations that led to the current Wass inquiry in St Helena.

Fourth, views on what constitutes child sexual abuse varies considerably both between and within UKOTs. This inevitably impacts upon how societies respond. Where certain aspects of child abuse are not universally considered wrong, these tend to carry on 'under the radar' with the relevant bodies not informed or unresponsive. This has been seen most clearly in Pitcairn and St Helena.

Fifth, and finally, is of course the approach of the UK government. As we have seen it has supported, and often pushed the territories to adopt new constitutional provisions and accept international covenants that pertain to human rights. The UK has also funded programmes to improve the capacity and awareness of the territories in this area. However, it is clear problems remain. An important factor is that the UK is often reluctant to impose its will on the territories. A further constraint is the limited powers Governors have in some instances. Thus concerns that are serious but not extremely so are sometimes left unattended and allowed to worsen or are dealt with inappropriately, as in the cases of Pitcairn and St Helena in particular. Finally, despite the UK providing some funding, there is an expectation that the territories themselves will provide most of the resources to enact and enforce their human rights commitments but often sufficient funds are not allocated; either due to a lack of will or because of budgetary constraints.

### **LGBT Rights**

Whilst there may not be a consensus definition of child abuse across the territories, there is a generally accepted view that it is wrong. This is not the case with equality on the basis of sexual orientation. As we mentioned earlier this is at odds with both the position of the UK government, international agreements to which they are signatories, and in most cases, the constitutions of the territories themselves. Gibraltar whilst not offering formal protection in its constitution does take into account rulings of the ECHR. Appearing narrow at first, this provision gives citizens of Gibraltar relatively expansive protection. However, Anguilla, Cayman Islands, and Bermuda offer no constitutional safeguards against such discrimination (although the latter's Human Rights Amendment Act 2013 prohibited discrimination based on sexual orientation). In the case of Cayman Islands there was heated debate surrounding the drafting of the new constitution (introduced in 2009). In the end Cayman decided not to include a freestanding commitment against discrimination on the basis of sexual orientation. This decision was criticised by both the UK Foreign Affairs Committee and Human Rights Watch; with the latter stating 'there can be no rationale for offering different treatment and lesser protection to the population of the Cayman Islands' (Human Rights Watch, 2009).

However, even in those territories where constitutional protections have been included there has often been reluctance to align practice with policy. So despite the existence of legal protection in most territories, the reality for many LGBT people is little improved since the time preceding the adoption of these provisions. This is particularly true in English-speaking Caribbean societies (as well as Bermuda), which

are amongst the most homophobic in the world (Pan-Caribbean Partnership, 2002; Human Rights Watch, 2014; Macleish, 2014). Here many suffer a life of discrimination, harassment, and sometimes violence (Human Rights Watch, 2009; Inter-American Commission on Human Rights, 2012). For example, Amnesty Bermuda reported 'the LGBT community is subject to slander, verbal and physical assault including but not limited to murder' (Amnesty Bermuda, 2011). Whilst not the norm across all territories (such as in Falklands Islands and Gibraltar) this trend of discrimination and harassment is sufficient to raise significant questions over the success of strengthening legal safeguards for human rights in the UKOTs. As a result LGBT people are often forced to keep their sexual orientation secret; as it is not something accepted in the public (or indeed the private) sphere.

The attitude of Caribbean territories and Bermuda towards LGBT rights were brought into sharp focus with the abuse directed at gay-themed cruises. As well as vocal protests directed at the cruises and their passengers, there is often anti-LGBT commentary in the media by politicians and prominent figures, primarily from religious groups. Examples of such criticism were seen in the Cayman Islands in 1999 and 2006 and Bermuda in 2004 and 2007 (Caribbean Net News, 2006; Reding, 2003, p. 77; *USA Today*, 2007). Further, in a survey published in July 2014 it was revealed that a majority of Bermudians (55 per cent to 39 per cent) would not support an initiative to attract gay-themed cruises (Fingham, 2014). Rather candidly, in advice to UK tourists visiting Caribbean territories the FCO warns of the 'conservative' attitudes of locals and advises same sex couples against public displays of affection (FCO, 2015c).

Perhaps unsurprisingly the more particular issue of same-sex marriage is one that is very controversial amongst the territories and illustrates the divide with the UK. Nowhere is this more the case than in the Caribbean. According to Hendry and Dickson, these territories 'are unanimously opposed to same-sex marriages and marriages involving a transsexual marrying a person who is of the birth sex of the transsexual' (2013, p. 156). The passing of legislation allowing same-sex marriage in England and Wales in 2013 and Scotland in 2014 ignited fears that the UK would seek to introduce the same measure in the territories. However, this is very unlikely due to the strong opposition in the territories; because the European Court of Human Rights has ruled 'that the right to marry ... refers to a traditional marriage between two persons of opposite biological sex' (Hendry & Dickson, 2011, p. 156); and since several territories, including British Virgin Islands and Cayman Islands made sure their constitutions contained language that defended local positions on marriage (see Virgin Islands Constitution, s 20(1); Cayman Islands Constitution s 14(1)). Nevertheless, there have been concerns that such a change might be made. For instance, British Virgin Islands Minister for Health and Social Development, stated that while 'none of us will probably vote for same-sex marriages ... if Britain wants us to adopt it, unless we go on our own, we will have no choice ... That's what they did with the homosexuality in private places' (Virgin Islands Platinum News, 2013). Of the UKOTs Gibraltar and Pitcairn stand counter to this attitude: Gibraltar introduced civil partnerships for same-sex couples in 2014, while Pitcairn now allows same-sex marriage – although there are no same-sex couples presently living in the territory (Simmonds, 2014; *The Guardian*, 2015).

As a result of the anti-LGBT feeling in many territories little legislation has been passed to protect the group's rights since the Caribbean Territories (Criminal Law) Order, 2000, which legalised homosexual acts between consenting adults in private. In explanation Vlcek argues 'homosexuality has connotations in the Caribbean very different than in Europe; and because it is such a politically charged issue no politician could be seen to support it' (2013, p. 354). Consequently there remain a number of legal disparities that negatively affect the LGBT community. For instance, as noted earlier, there is an unequal age of consent in a number of the territories (Itaborahy and Zhu, 2013). Also, Whittaker emphasises other legal disparities in Cayman Islands, with 'a law restricting group sex for gay people, and lack of access to certain rights for couples – including the right for a gay partner to be listed as a dependant for immigration purposes' (2015a). Some positive measures have been introduced, such as the creation of Human Rights Commissions in British Virgin Islands and Cayman Islands, whose role is to educate on the rights chapters of their constitutions and relevant human rights provisions in international conventions, but overall progress has been disappointing.

Similar to the political environment, there has been little in the way of effective support or promotion of LGBT rights by civil society. Indeed many civil society groups have been proponents of restricting the introduction of such rights. Of these the most vocal have been church and religious organisations. For example, in British Virgin Islands Bishop John Cline, senior pastor of the New Life Baptist Church in Tortola, stated, 'If you want to build a stable community, build it on family and same sex relationships do not do that ... we should do more to promote family' (Virgin Islands Platinum News, 2013). These groups disruptive influence was most evident in the talks on revising the Cayman Islands Constitution. Controversy arose after late changes were made to section 16 dealing with non-discrimination, which removed a free-standing guarantee of equality before the law and limited anti-discrimination protections only to rights expressly included in the constitution (Human Rights Watch, 2009). Furthermore section 16 now limits the scope of protection to discrimination by the government – thus horizontal discrimination by private entities is not forbidden. It was alleged that the scope of section 16 was narrowed by the Cayman government at the last moment after representations were made by religious and other civil society groups. The intention was to deny protections to LGBT people (Human Rights Watch, 2009). The religious groups argued that discrimination protection on the basis of sexual orientation would infer an acceptance of 'gay lifestyles', of which they did not approve (Vlcek, 2013, p. 363).

Further, it is worth noting the significant role played by Belongers/Caymanians in the process. As a predominately conservative Christian group they represented some of the most vocal opponents of a free-standing guarantee of equality. Thus, when a referendum was held on the constitutional order (an unusual move for this process) it was unsurprising that with the Caymanians, the only residents permitted to vote (11,244 people; a clear minority of the adult population), the order passed (Vlcek, 2013, p. 364). The government tried to explain this anomaly by arguing that those voting would have the strongest connection to the islands. Alden M. McLaughlin,

Minister of Education, talking about the fact that the human rights provisions of the draft constitution were not as expansive as some people had hoped, argued:

Accept that Cayman is in a unique position; one of the few countries in the world where the vast majority of the population cannot vote because they do not have a sufficient connection to the Islands. But I do not believe that we have yet reached the point where the Caymanian population who can vote are prepared to simply say that because there are more of you who can't vote who have more liberal views our constitutional document ought to reflect those views (Cayman Islands Legislative Assembly, 2009, p. 869).

In short McLaughlin inferred that just because the majority of residents had a certain view that was more liberal in outlook that 'does not mean the Constitution should reflect those views rather than the conservative Christian values of the Belongers' (Vlcek, 2013, p. 364).

It is crucial to note also that despite the earlier Order in Council on homosexuality and initiatives to promote a human rights based approach, the UK is often reluctant to take a leading role. Illustrative of this was the response by Helen Kilpatrick, Governor of the Cayman Islands, to the issue of discrimination. Following the controversy over the constitution she stated the position of the UK was to not become directly involved with the issue 'preferring legislation to be introduced locally by elected politicians' (Whittaker, 2015b). Indeed, despite section 16 of the Cayman Islands constitution sanctioning discrimination based upon sexual orientation both the FCO and the Governor approved it. As with child safeguarding discussed above, the UK is limited in what it can do, or sometimes self-limits its involvement, and thus its ability to force the issue is restricted. So what results, as Boris O. Dittrich, Advocacy Director of the LGBT Rights Program at Human Rights Watch argues is that, 'the British government is using a double standard, approving a draft constitution for an overseas territory that gives fewer protections than British citizens enjoy at home, equality means equality, and it should apply across the board' (Human Rights Watch, 2009). The realities of a complex constitutional relationship with a territory unwilling to change can often provoke a breach between policy and practice.

## **Conclusion**

Over the last decade and a half the UK government, under both Labour and Conservative administrations have taken a keen interest in strengthening human rights safeguards in the Overseas Territories. They have felt this has been the right course to take, but they have also been concerned about likely reputational damage and legal liabilities if certain core human rights are not upheld in the territories. In order to achieve this, the UK has used a range of methods – enforcement through Orders in Council; stipulated changes in local constitutions; joint efforts to achieve the adoption of international covenants; and the disbursement of funds to improve the capacity and awareness in the territories of the human rights agenda. It is clear that progress has been made in relation to policy, but question marks certainly remain about whether human rights practice has been advanced to the same degree. This is not surprising given the large geographical, social and cultural diversity amongst the territories, and their particular relationships with the UK. These differences are seen

clearly in two examples that have been considered in this article: the rights of the child to be protected from sexual exploitation, and the securing of equality in relation to sexual orientation with reference to LGBT rights.

Of the two it is the protection of LGBT rights where the territories display the most noticeable disparity between policy and practice, and where the normative distance from the UK's approach is greatest. Although progress has been made in improving protections, clear gaps remain. The lack of constitutional or domestic legal safeguards in Cayman Islands and Anguilla are the most obvious examples. However, what is more fundamental and more difficult to overcome is the apathy and often outright aversion towards LGBT rights, particularly in the Caribbean territories and Bermuda, on the part of key stakeholders such as 'Belongers' and church groups. This opposition means that even where safeguards exist, rights are often not upheld. In many cases this leaves both the territories and the UK at odds with international law to which they are subject. In regard to child rights progress has been more tangible. This can be seen with the greater willingness on the part of territories to engage with the issue and a more proactive approach by the UK government. Yet, as we have shown significant obstacles remain that are preventing further improvements being made. The cases of Pitcairn and Saint Helena highlight most clearly not only the systematic and institutional failures that allowed abuse to take place on a large-scale over a sustained period of time, but also the cultural acceptance of such behaviour. Once again a real change in attitudes is required; new policies are important, but not sufficient.

Looking forward, despite the inherent difficulties there seems to be greater scope for improvement in the promotion of child rights in the territories. With clear strategies, such as increasing the number of skilled personal and having comprehensive national action plans with a multi-agency focus, the territories with support from UK government programmes like SCOT 2, can deliver results. Progressive change on LGBT rights will be more difficult. Across the Territories, but particularly in the Caribbean, the deep-rooted social attitudes and the prominence of certain groups are significant barriers to change, and the UK is limited in terms of what it can do. Indeed, the article has highlighted the nuanced relationship between the UK on the hand and the territories on the other, and that the UK does not have the power nor often the inclination to enforce change. Also, as we have seen even when the UK does use it power, the territories and their people have to engage as well for real reform to take place. Therefore it is not surprising that in relation to human rights in the Overseas Territories change can be seen in policy but not always in practice.

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