

Enabling legal environments for effective HIV responses:



A leadership challenge for the Commonwealth



With financial support from the:



Acknowledgements

This report was developed as a component of a project that aims to contribute to the creation of enabling legal environments in Commonwealth countries to ensure universal access to HIV prevention, treatment, care and support services.

The project supports a partnership between the:

- Commonwealth Foundation
- International HIV/AIDS Alliance (Alliance) in collaboration with the Commonwealth HIV and AIDS Action Group (CHAAG).

The Alliance and CHAAG managed the production of the report, including consultations with stakeholders. The Commonwealth Foundation supported the production process.*

CHAAG was established to promote and monitor the implementation of paragraph 55 in the communique issued at the Commonwealth Heads of Government Meeting in South Africa in 1999. It is a multidisciplinary group of Commonwealth Associations and civil society organisations with an interest in promoting the Commonwealth response to HIV and AIDS.

The report was authored by John Godwin, consultant.

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Published November 2010

ISBN: 978-1-905055-80-7

Registered charity number 1038860

* The Commonwealth Secretariat also provided a financial contribution to the production of the report.

Forewords

The Commonwealth Foundation was set up almost fifty years ago to make civil society stronger. We work on behalf of the people of the Commonwealth of Nations, spanning 54 countries, six continents and almost a third of the world's population.

We are delighted to be supporting the Commonwealth HIV and AIDS Action Group, and for the second year, working with the International HIV/AIDS Alliance to help civil society and other key stakeholders in Commonwealth countries develop a wider understanding of the link between the legal environment and its ability to aid an effective HIV and AIDS response.

**Mark Collins, Director
Commonwealth Foundation**

The Alliance is a global partnership of organisations working in Africa, Asia, Eastern Europe and Latin America and the Caribbean to support community action to prevent HIV infection, meet the challenges of AIDS and build healthier communities. Last year, our partners reached nearly 3.2 million people with services, particularly those groups who are most marginalised and vulnerable to HIV infection.

We see first hand the difference that punitive laws, and law enforcement practices, can make to people who need quick and easy access to HIV and AIDS treatment, prevention and care services. Through this project we want to ensure that the human rights of people living with HIV and other vulnerable groups are protected, and expand their access to services.

**Alvaro Bermejo, Executive Director
International HIV/AIDS Alliance (the Alliance)**

CHAAG is committed to ensuring that the Commonwealth is more responsive to HIV and AIDS. We share a belief that the Commonwealth, with its shared culture and history, is uniquely placed to tackle the most challenging structural and legal barriers that hinder efforts to reverse an HIV epidemic that continues to have a devastating impact on the lives of far too many Commonwealth citizens.

It is a pleasure to be working with the Commonwealth Foundation and Commonwealth Secretariat and for the ongoing support of the International HIV/AIDS Alliance. We hope this report fosters a stronger commitment to laws that reduce Commonwealth citizens' vulnerability to HIV.

**Anton Kerr, Chair
The Commonwealth HIV and AIDS Action Group (CHAAG)**

Final communiqué of the Commonwealth Heads of Government Meeting, 2009:

'Human rights: reaffirming our commitment to the Universal Declaration of Human Rights and human rights covenants and instruments; and recalling our belief that equality and respect for protection and promotion of civil, political, economic, social and cultural rights for all without discrimination on any grounds, including the right to development, are foundations of peaceful, just and stable societies, and that these rights are universal, indivisible, interdependent and interrelated and cannot be implemented selectively.'



Top: Serah Wangari and her sons Alex Mwangi and Edge Shikuku. Serah is living with HIV and through prevention of mother-to-child transmission interventions was able to have Edge who she is breastfeeding exclusively, Nairobi, Kenya © Nell Freeman for the Alliance

Bottom: Juliette Mueswa (7 years old), eats her after-school meal prepared for her by her adoptive mother. Both of Juliette's parents died of HIV-related illnesses, Mukono, Uganda © Nell Freeman for the Alliance

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Abbreviations and acronyms

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
CHAAG	Commonwealth HIV and AIDS Action Group
DMSC	Durbar Mahila Samanwaya Committee
ICCPR	International Covenant on Civil and Political Rights
KELIN	Kenya Legal and Ethical Issues Network on HIV/AIDS
MSM	men who have sex with men
OST	opioid substitution therapy
PEP	post-exposure prophylaxis
SADC	Southern African Development Community
STI	sexually transmitted infection
UNAIDS	Joint United Nations Programme on HIV/AIDS
UNDP	United Nations Development Programme
UNGASS	United Nations General Assembly Special Session
UNODC	United Nations Office on Drugs and Crime

Executive summary

There is a trend towards using punitive laws to address HIV. Many countries have recently introduced new laws criminalising HIV transmission. Increased penalties for sex work and sodomy offences have been proposed or enacted. Media attention given to prosecutions and draconian bills is feeding stigma. These are dangerous developments that will lead to more people being infected with HIV, not fewer. Punitive laws and law enforcement practices make it more difficult for HIV programmes to reach sex workers, men who have sex with men (MSM), transgender people and people who use drugs. Leadership from government and civil society is required to reverse this situation in Commonwealth states.

Laws and law enforcement practices should support people living with HIV and most-at-risk populations to access essential HIV services, not drive them away. Laws should promote gender equality and empower women and girls to protect themselves from HIV. Where laws protecting human rights are in place, people living with HIV and most-at-risk populations are better able to access HIV services and participate in prevention, treatment, care and support programmes without fear of arrest or prosecution. Protecting public health and promoting human rights are mutually reinforcing strategies.

The HIV response of the legal sector often lags behind that of the health sector. Greater coordination between law and health ministries is required. Law ministries can provide leadership by supporting efforts of the judiciary, prosecutors, police and the legal profession to create human rights-based legal frameworks for more effective national HIV responses. An approach is required in which law ministry officials and police work in partnership with communities of people living with HIV and most-at-risk populations to prevent HIV and combat stigma. Human rights-based legal environments are essential to protect people from discrimination and to ensure that public health measures reach those most at risk.

Efforts to improve legal environments can be focused at three levels:

1. Empowerment of communities to influence laws and policies and to access the legal system

People living with HIV often do not know about their legal rights or how to claim them through the legal system. Advances in responding to HIV can be made where affected communities have been educated in rights-based approaches and mobilised to claim their rights and influence policy agendas. Legal aid services and human rights monitoring support a community empowerment approach.

2. Law enforcement

Police conduct can affect access of most-at-risk populations to HIV services and protection from violence and discrimination. Police harassment of sex workers, people who inject drugs, transgender people and MSM can be a significant barrier to effective, peer-based HIV responses.

3. Law reform, which requires long-term commitment

Punitive laws that undermine HIV responses should be repealed. Laws promoting gender equality and providing protection from gender-based violence, discrimination and human rights violations should be enacted. In some countries, law reform to enable harm reduction services to operate effectively for people who inject drugs and to decriminalise sex work and sex between men may not be feasible in the short term due to religious and political factors. In advance of and in addition to law reform, pragmatic solutions can be negotiated at the operational level by working in partnership with local police, judges, magistrates and community leaders.

The report describes developments affecting legal environments related to people living with HIV and most-at-risk populations. It provides examples of human rights-based approaches, and sets out an agenda for action relating to advocacy, community mobilisation, law reform and law enforcement.



Carnival revellers in Trinidad © the Alliance

1. Introduction and context

Purpose and focus of the report

The purpose of this report is to define an agenda for action on HIV and the law in Commonwealth states. This agenda is intended to inform the work of legislators, officials and diplomats of Commonwealth states. It is also intended to assist civil society organisations to engage with governments of Commonwealth states on the legal dimensions of HIV responses. The report provides recommendations for governments, civil society organisations and Commonwealth institutions.

The focus of this report is the creation of enabling legal environments for HIV responses among the following populations that are heavily affected by the HIV epidemic in the Commonwealth:

- women and girls
- sex workers
- MSM
- transgender people
- people who inject drugs.

Particular attention is given to the removal of punitive laws that criminalise people living with HIV and most-at-risk populations, and the importance of enacting and enforcing protective laws that empower these populations to protect their own health and prevent the spread of HIV. Focus is also given to laws related to gender equality and legal rights to violence protection, property and inheritance as they relate to women and girls.

There are many other legal issues that should be considered in national HIV responses, including laws related to employment, immigration, patents, treatment rights, consent, confidentiality, censorship and insurance. As the main focus of this report is on criminal laws, these other legal issues are not addressed here.

The report considers the legal environments affecting specific populations in separate chapters. These chapters should not be considered in isolation from each other. Many of these issues intersect and overlap in people's lives.

HIV and the Commonwealth

Many Commonwealth countries are highly affected by HIV. The Commonwealth comprises over 30% of the world's population and over 60% of people living with HIV. In 2008 33.4 million people were estimated to be living with HIV, and 21 million of them live in Commonwealth countries. In many countries, sex workers, people who inject drugs, MSM and transgender people have much higher HIV prevalence than the general population. Women and girls are also highly vulnerable. Prevention and treatment needs continue to escalate globally as millions of new infections occur each year.

There is still no cure or vaccine for HIV. However, lives can be saved through access to HIV treatments. A range of prevention approaches have proved effective in reducing HIV transmission, including condom use, antiretroviral drugs for prevention of mother-to-child transmission, and harm reduction responses such as needle and syringe programmes for people who inject drugs. These approaches operate most effectively when structural factors are also addressed, including the legal and human rights context in which programmes operate. In countries where there has been a failure to address the structural inequalities that marginalise most-at-risk populations, prevention efforts are failing and HIV services are not reaching those who need them most.

Legal environments

Legal environments that influence HIV responses comprise:

- laws and regulations, including customary and religious laws
- judgments of courts, tribunals and traditional village courts
- law enforcement practices of police and prosecution authorities
- management of prison systems and other closed settings such as detention centres for people who use drugs
- programmes providing access to justice for communities through legal aid for people living with HIV and education for communities about their rights.

Efforts to improve legal environments for HIV responses can be focused at three levels:¹

1. Empowerment of communities to influence laws and policies and to access the legal system

People living with HIV often do not know about their legal rights or how to claim them through the legal system. Advances in preventing HIV can be made where affected communities have been educated in rights-based approaches and mobilised to claim their rights, respond to rights violations, and influence policy agendas. Legal aid services and human rights monitoring support a community empowerment approach. Access to legal representation can help to address and prevent police abuses and ensure that the legal rights of people who are arrested and detained are respected. Greater awareness of legal rights and the limits of police powers, and access to robust legal representation, can reduce vulnerability to police abuses and empower populations to advocate for and defend their rights.

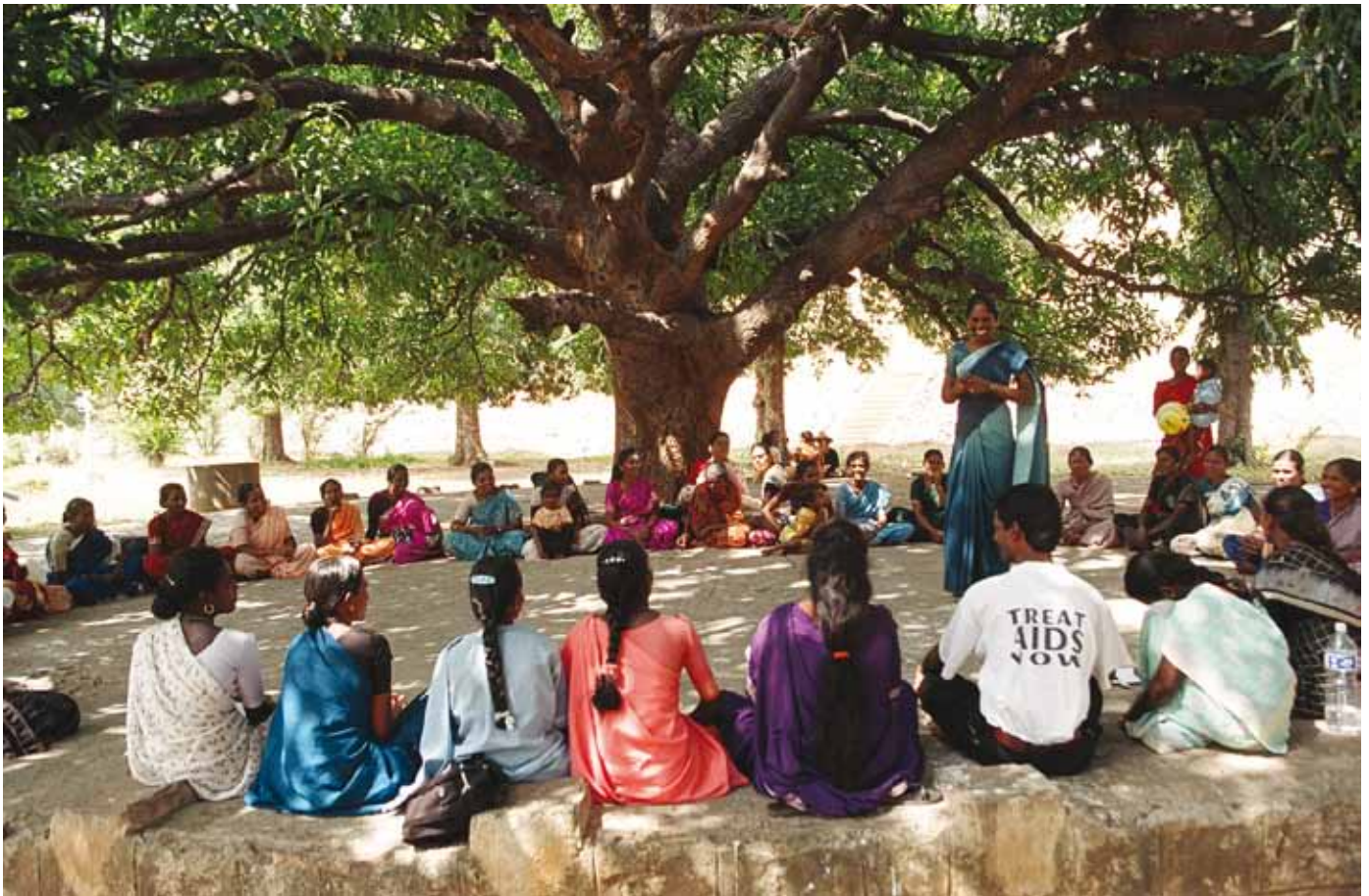
1. UNAIDS (2008), 'Addressing HIV-related law at national level – guidance note', Geneva: UNAIDS.

2. Law enforcement

Police conduct can affect access of most-at-risk populations to HIV services and protection from violence and discrimination. Police harassment of most-at-risk populations can be a significant barrier to effective, peer-based HIV responses. Where police cooperation with communities is established, police can be key partners in programmes providing outreach to most-at-risk populations.

3. Law reform, which requires long-term commitment

Laws promoting gender equality and providing redress for discrimination and human rights violations should be enacted. Law reform to enable harm reduction services to operate effectively for people who use drugs and to decriminalise sex work and sex between men should be the ultimate goal, but may not always be feasible in the short term due to religious and political factors. In advance of law reform, pragmatic solutions can be negotiated at the operational level by working in partnership with local police, judges, magistrates and community leaders.



The Theni District Positive Network holds regular social events which provide relaxation, comfort and support, India © Gideon Mendel for the Alliance

2. Principles, international commitments and model laws

Principles and commitments

Human rights-based approaches

Principles and priorities related to implementation of human rights-based approaches to HIV have been defined by the *International Guidelines on HIV/AIDS and Human Rights*² (summarised in Annex 1). Important principles that inform human rights-based approaches include:

- the universal, inalienable, interrelated and inter-dependent nature of human rights
- respect for human dignity
- equality and non-discrimination
- accountability, transparency and the rule of law
- participation and empowerment.

States have a duty, regardless of their political, economic and cultural systems, to promote and protect universal human rights standards and fundamental freedoms.³

2. Office of the United Nations High Commissioner for Human Rights and UNAIDS (2006), 'International guidelines on HIV/AIDS and human rights', Geneva: UNAIDS.

3. Office of the United Nations High Commissioner for Human Rights and UNAIDS (2006), 'International guidelines on HIV/AIDS and human rights', Geneva: UNAIDS; Inter-Parliamentary Union, UNDP, UNAIDS (2007), 'Taking action against HIV: a handbook for parliamentarians', Geneva: Inter-Parliamentary Union; OHCHR and UNAIDS (2007), 'Handbook on HIV and human rights for national human rights institutions', Geneva: OHCHR and UNAIDS.

United Nations General Assembly commitment on HIV and the law

At the United Nations General Assembly Special Sessions (UNGASS) on HIV/AIDS in 2001,⁴ member states committed to: Enact, strengthen or enforce as appropriate legislation, regulations and other measures to eliminate all forms of discrimination against, and to ensure the full enjoyment of all human rights and fundamental freedoms by people living with HIV/AIDS and members of vulnerable groups; in particular to ensure their access to, inter alia, education, inheritance, employment, health care, social and health services, prevention, support, treatment, information and legal protection, while respecting their privacy and confidentiality; and develop strategies to combat stigma and social exclusion connected with the epidemic.

Human rights-based approaches provide the conditions in which people can make responsible and safer choices about their health. Relevant human rights established by international law include rights to:

- the highest attainable standard of health, including to the tools and technologies for HIV prevention
- privacy, including in consensual adult sexual relationships
- freedom from violence, assaults on bodily integrity, rape (including marital rape) and all forms of sexual coercion
- freedom from arbitrary arrest, detention and violence
- non-discrimination, equal protection and equality before the law, including equality in access to property and inheritance
- life, liberty and security of person
- freedom of movement
- freedom of opinion and expression, and the right to receive and impart information
- freedom of association
- work and education
- be free from torture and cruel, inhuman or degrading treatment or punishment.

Participation of people living with HIV and most-at-risk populations in law reform and policy development processes is a key principle that underpins the effectiveness of laws and policies.

Human rights and public health are mutually reinforcing

Protecting public health and promoting human rights are mutually reinforcing strategies. Where laws protecting human rights are in place, people living with HIV and most-at-risk populations are better able to access HIV services and participate in prevention, care and support programmes without fear of arrest or human rights violations. Protective and enabling legal environments ensure that public health measures reach those most at risk and enable communities to participate in planning and implementing effective HIV responses.

In countries where HIV transmission, sex between men, sex work and drug use are criminalised, people living with HIV and most-at-risk populations face barriers to participation in managing and delivering HIV programmes. Community participation ensures that programmes are acceptable, relevant and responsive to needs. The rights to privacy and freedom of association must be protected so that people living with HIV and most at-risk populations can participate in developing laws, policies and programmes without fear of discrimination or adverse legal consequences.

Laws and law enforcement practices should support people living with HIV and most-at-risk populations to access essential HIV services, not drive them away. An approach is required whereby police work in partnership with communities to prevent HIV and combat stigma.

Punitive approaches impede prevention, treatment, care and support efforts

Punitive law enforcement approaches can directly impede HIV prevention services. Confiscation by police of condoms or injecting equipment as evidence of illegal behaviour is reported from many countries and can directly frustrate HIV prevention efforts. Police harassment of outreach workers can also interrupt efforts to reach most-at-risk populations with education, condoms and clean injecting equipment. Criminalisation can be a barrier to forming peer support groups, which are essential for effective HIV prevention, treatment, care and support interventions. Laws and policies that prohibit community-based groups from registering as non-governmental organisations can hinder grassroots responses to HIV.

4. Declaration of Commitment on HIV/AIDS (2001), Clause 58.

Criminalisation of most-at-risk populations can lead to inappropriate censorship of educational material that contains clear information on sexual health or safer drug use practices. In some countries, educational materials have been censored on the grounds that they “encourage” or “aid and abet” illegal acts of drug use, sex between men or sex work. Such health promotion materials should be permitted where they are carefully targeted to specific populations.

Police abuses, such as harassment of sex workers, MSM, transgender people and people who inject drugs, increase stigma and alienate these populations, with the result that they are more difficult to reach with HIV services. Most-at-risk populations may be reluctant to present for testing or to identify themselves to providers of HIV services for fear of discrimination or that their identity will be disclosed to police or media.

Fear of arrest, harassment by police, discrimination and stigma contribute to low self-esteem and social marginalisation. Low self-esteem is often associated with behaviours that increase risk for HIV. People with low self-esteem may fail to protect themselves or their partners from HIV, and avoid identifying themselves to services.

Punitive laws reinforce discriminatory attitudes, and punitive legal environments can add legitimacy to discrimination. Abuse and a reluctance of health and police services to address the specific needs of MSM, transgender people, sex workers and people who inject drugs are influenced by repressive legal environments that reinforce negative and judgmental social attitudes. MSM, transgender people, sex workers and people who inject drugs report high levels of abuse by police and discrimination by providers of health services.⁵

Greater alignment of law and health ministry HIV responses

The HIV response of the legal sector often lags behind that of the health sector. Greater coordination between law and health ministries is required to ensure that the legal sector response complements and supports the health sector response as defined by the national HIV/AIDS strategy. Law ministries can provide leadership by supporting efforts of the judiciary, prosecutors, police and the legal profession to create human rights-based legal frameworks for effective national HIV responses.

Model HIV laws and comprehensive HIV bills

Model HIV laws have become increasingly popular as an approach to encourage legislators to address a range of issues through a single act of parliament. A comprehensive HIV-specific law can address public health and human rights priorities. Model laws can provide very helpful precedents for legislators. However, caution is required in advocating any form of HIV-specific legislation, as it can sometimes lead to punitive outcomes.

The **Southern African Development Community (SADC) model HIV law** includes anti-discrimination and privacy protections, and a requirement for the state to ensure that women and girls are protected against all forms of violence and traditional practices that may negatively affect their health.⁶ This model law is human rights based and does not include punitive measures such as criminalisation of HIV transmission or compulsory testing. SADC governments have tended to adopt some of the model law provisions while also incorporating punitive provisions, such as broadly drafted offences for HIV transmission.

The **N'Djamena model HIV law**, developed for West African states in 2004, has led to difficulties. The law includes punitive provisions on mandatory disclosure, testing and criminalisation that can be applied to a broad range of conduct. As a result of the promotion of this model, several countries are considering or have adopted HIV-specific laws that criminalise HIV transmission.

Global Commission on HIV and the Law

The Global Commission on HIV and the Law was launched by the United Nations Development Programme (UNDP) in 2010 to assess evidence on the impact of human rights protections on HIV responses. It aims to develop recommendations for responses that promote and protect the human rights of people living with and most vulnerable to HIV. The Commission is addressing punitive laws and practices that criminalise lives, sustain violence and discrimination against women, and impede treatment access. It is also providing leadership by synthesising knowledge about the interaction between the legal environment and HIV, fostering evidence-informed public dialogue on the need for rights-based law and policy and identifying recommendations with a plan for follow-up. The Commission will be holding hearings in Africa, Asia and Latin America, and is due to report by December 2011.

African Commission on Human and Peoples' Rights

The African Commission on Human and Peoples' Rights Resolution on HIV of 2010 has established a Committee on the Protection of People Living with HIV and Those at Risk for a period of two years. The Committee is to give special attention to women, children, sex workers, migrants, MSM, people who inject drugs and prisoners. It can make recommendations, and it may request and respond to information from individuals, organisations and governments.

5. See, for example, Godwin, J. (2010), 'Legal environments, human rights and HIV responses among men who have sex with men and transgender people in Asia and the Pacific: an agenda for action', Bangkok: UNDP, pp. 29–38; Paxton, S. et al. (2005), 'AIDS-related discrimination in Asia', *AIDS Care* 17(4): 413–24; Chatterjee, P. (2006), 'AIDS in India: police powers and public health', *Lancet*, 367(9513): 805–6.

6. See SADC Parliamentary Forum (2008), 'Model Law on HIV in Southern Africa', adopted on 24 November 2008.

The East African Community HIV Prevention and Management Bill is at draft stage and proposes to establish minimum standards for HIV services in Burundi, Kenya, Rwanda, Tanzania and Uganda.⁷ Countries can adopt the law or develop their own laws so long as national laws are consistent with the regional approach. The bill addresses discrimination, guaranteeing rights to privacy and ensuring the provision of health care regardless of HIV status. The draft bill makes no mention of sex workers, MSM, transgender people or people who inject drugs. Criminal law is not an area of cooperation under the East Africa Community Treaty. Laws criminalising the deliberate transmission of HIV, which exist in Kenya and in a draft Ugandan bill, will be addressed at national level.

Kenya's HIV and AIDS Prevention and Control Act 2006 contains a wide range of public health measures, anti-discrimination and confidentiality protections, and establishes a specialist HIV and AIDS tribunal.

In India a comprehensive HIV/AIDS bill has been developed through a national community consultation process. The bill was drafted after three years of extensive consultation that involved all stakeholders, including people living with HIV, most-at-risk populations, health care workers and trade unions. The bill was sent to state governments and different ministries for their comments. The National AIDS Control Organisation worked with the Law Ministry in finalising the bill in 2009. If enacted, the bill will introduce important protections from discrimination.⁸

Another example of the approach of adopting a comprehensive HIV-specific law is Papua New Guinea's HIV/AIDS Management and Prevention Act 2003.⁹ The act includes a declaration that HIV is not a venereal disease (thereby excluding inappropriate Public Health Act provisions related to venereal disease); forbids HIV-related discrimination; ensures partner notification; forbids mandatory testing (except in emergency situations); requires that information about a person's HIV status be kept confidential; and guarantees access to protection from HIV infection (including the use of condoms).

7. IRIN, 'East Africa: one region, one HIV law', 31 March 2010. Available at: www.irinnews.org/report.aspx?ReportID=88635

8. 'Finally, India's HIV patients can hope against discrimination' The Indian, 20 September 2009. Available at: www.thaindian.com/newsportal/health1/finally-indias-hiv-patients-can-hope-against-discrimination_100249992.html

9. www.paclii.org/pg/legis/consol_act/hmapa2003313/; See also the HIV and AIDS Act 2006 (Mauritius), www.chr.up.ac.za/undp/domestic/docs/legislation_36.pdf.



MSM in India © Jenny Mathews /Alliance/ Photovoice

3. Criminalisation of HIV exposure and transmission

Trends in criminalisation of HIV exposure and transmission¹⁰

HIV exposure and transmission is criminalised in many countries, as a result of:

- enactment of new HIV-specific offences, which may be inserted within criminal codes, sexual offences acts, public health acts or other legislation
- application of existing provisions of criminal codes or crimes acts (such as causing grievous bodily harm) to situations of intentional or reckless HIV transmission
- application of existing public health offences (which criminalise exposure to notifiable, infectious or communicable diseases) to HIV.

Public health legislation generally provides fines or terms of imprisonment for people who intentionally cause the infection of another person with specified diseases of public health concern (which may include HIV). Many countries have a public health act (or equivalent) that provides for the control of “infectious”, “contagious” or “notifiable” diseases.¹¹ These acts are based on laws originally drafted in colonial times and in the context of concerns about highly contagious diseases. The legislation usually provides wide powers to public health authorities to test and detain people, and imposes duties on infected people to take

10. See Human Rights Council (2010), ‘Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover’, 27 April 2010; Bernard, E. (2010), ‘HIV and the criminal law’, London: NAM; Canadian HIV/AIDS Legal Network (2010), ‘Responding to the criminalization of HIV transmission or exposure: resources for lawyers and advocates’. Available at: www.aidslaw.ca/lawyers-kit.

11. See Commission on AIDS in the Pacific (2009), ‘Turning the tide: an open strategy for a response to AIDS in the Pacific. Report of the Commission on AIDS in the Pacific’, UNAIDS, p. 55 and annex 4.

precautionary measures against the spread of disease. Public health act provisions have been used to justify detention of people living with HIV in certain circumstances (sometimes without criminal charges being laid), particularly where they are thought to be placing others at risk of infection.

In addition to inclusion of HIV in public health laws, an increasing number of countries criminalise HIV transmission or exposure through enactment of HIV-specific offences. It is these new provisions that are often being used as a basis for prosecutions and harsh sentences. At least 20 African countries have introduced HIV-specific offences since 2000, including the Commonwealth countries of Kenya, Nigeria (Enugu and Lagos states), Sierra Leone and Tanzania. An overview of recent developments in Africa summarised the situation as follows:¹²

In most African countries, new laws criminalising HIV exposure and transmission were introduced 'very quickly and with little consultation', and in the absence of any local calls for their introduction. In several locations, local people have begun protesting against the more extreme provisions. In Sierra Leone, pressure from civil society resulted in the repeal of the law criminalising vertical HIV transmission in 2010. In Mozambique, the law requiring mandatory HIV testing of pregnant women has been repealed. And in Cameroon, the introduction of HIV-related criminal laws appears to have stalled. Protests are underway in Burkina Faso. Local civil society is resisting the new legislation in Côte d'Ivoire, the Gambia and Malawi.

There are also examples of HIV-specific offences in the Bahamas and Bermuda, and a new law criminalising HIV transmission has been proposed in Trinidad and Tobago. In Singapore there has been a prosecution of a man for exposing his partner to risk of HIV transmission through oral sex, despite lack of actual transmission of the virus. Malta recently enacted a HIV-specific offence. There have been numerous prosecutions of HIV transmission under general criminal laws for aggravated assault and disease transmission in Canada, Australia, New Zealand and the UK.

In Australia authorities have established an alternative to prosecutions for addressing people who place others at risk. National guidelines provide a framework based on graduated levels of intervention, underpinned by the principle that preference should be given to strategies that are least restrictive of liberties, as these will be most effective in changing behaviours in the long term.¹³

Prosecution is a last resort. The five recommended levels of intervention are:

1. Comprehensive counselling, education and support.
2. If it is clear that the initial intervention will not lead to change in behaviour, an HIV advisory panel should be convened by the health department to provide formal support to the individual's primary health care provider.
3. The chief health officer, on advice from the advisory panel, may make an order that requires the individual to undergo counselling, treatment, refrain from specific behaviour or be subject to supervision.
4. The chief health officer, on advice from the advisory panel, may make an order for the person to be subject to isolation or detention.
5. Referral to police for prosecution.

12. Cameron, S. and Reynolds, L. (2010), 'The global criminalisation scan report 2010: documenting trends, presenting evidence', Amsterdam: GNP+, p. 15.

13. Griew, R., Russell, L., Buchannan, D. (2007), 'Review of policies for the management of people with HIV who risk infecting others. Report commissioned by the Blood Borne Virus and STI Subcommittee (BBVSS) of the Australian Population Health Development Principal Committee (APHDPC)'.

Reasons to oppose criminalisation of HIV exposure and transmission¹⁴

- Criminalisation of HIV exposure and transmission:
 - > undermines HIV prevention efforts
 - > promotes fear and stigma
 - > oppresses women
 - > reinforces the stereotype that people living with HIV are immoral and dangerous
 - > is a simplistic response that ignores the complex challenges of HIV prevention.
- Laws criminalising HIV exposure and transmission are often applied unfairly and selectively.
- Laws are drafted too broadly, and as a result can punish behaviour that is not blameworthy.

Criminalisation undermines HIV prevention

There is no evidence that applying criminal law to HIV transmission is effective in reducing the spread of HIV. Rather, it reinforces stigma, drives the epidemic underground and can be interpreted by many people living with HIV as a signal that the state considers them to be a threat to the community. Criminalisation creates distrust between people living with HIV and authorities. They may avoid attending for care for fear that information regarding their HIV status may be used against them as evidence in a prosecution. Medical records may be required to be disclosed to police or courts to establish a person's HIV status during a criminal prosecution. This may reduce the willingness of people living with HIV to discuss risk behaviours with health care workers or agree to HIV testing and counselling.

Prosecutions have not been shown to act as a deterrent to others from engaging in risk behaviours. Applying criminal law to HIV transmission can discourage people from getting tested and finding out their HIV status, as lack of knowledge of one's status could be the best defence to a criminal charge. Even at the individual level, imprisoning a person with HIV is unlikely to prevent the transmission of HIV. HIV risk behaviours are prevalent in prisons, where condoms and sterile injecting equipment are rarely available.

There is no evidence that fear of prosecution encourages disclosure of HIV status to sexual partners by people living with HIV. Most people living with HIV already believe they have a responsibility to protect others from HIV infection. In any case, people are more likely to transmit HIV during the first months following infection when their viral load is high, meaning the risk of HIV transmission to others is high. Few people realise that they are infected during this period. This limits the potential preventive value of any criminal offence.

There is little evidence to suggest that criminal penalties will rehabilitate a person so that they avoid future conduct that carries the risk of HIV transmission. Sexual and drug use behaviours are difficult to change through criminal penalties. Behaviour change is more likely to result from voluntary counselling, education and measures that address underlying reasons for engaging in risk behaviours.

14. This section draws from Jürgens, R. et al. (2008), '10 reasons to oppose the criminalization of HIV exposure or transmission', New York: Open Society Institute; Cameron, E., Burris, S., Clayton, M. (2008), 'HIV is a virus, not a crime: ten reasons against criminal statutes and criminal prosecutions', *Journal of the International AIDS Society* 11(7).

Placing legal responsibility exclusively on people living with HIV for preventing HIV transmission undermines the public health message that everyone should practise safer behaviours, regardless of their HIV status, and that sexual health should be a shared responsibility between sexual partners. Focusing on criminal law can also divert resources from more effective, evidence-based interventions such as education for young people, prevention of parent-to-child transmission services, and access to condoms, harm reduction services and programmes that address the root causes of HIV vulnerability, including gender-based violence, stigma and discrimination.

Prosecutions can spread myths and misinformation about HIV

Criminal laws related to exposure to risk of HIV transmission do not take into account variations in transmission risk. HIV transmission risk varies according to numerous factors, including the type of sexual activity, the amount of HIV in a person's blood or other bodily fluid, the presence of sexually transmitted infections (STIs), and whether or not a man has been circumcised. People living with HIV have even been prosecuted for biting, spitting or scratching, although the risk of HIV transmission is extremely small. Overly vigorous prosecutions can result in distorted outcomes:

The adversarial justice system has encouraged prosecutors to make sweeping and highly inaccurate statements about the risk of HIV transmission, when this risk is often minimal, including for people with HIV on effective antiretroviral treatment and without sexually transmitted infections. Such prosecutions and statements not only undermine efforts to educate the public about HIV, but further engender fear of people living with HIV.¹⁵

Laws criminalising HIV exposure and transmission are often applied very broadly, and as a result can punish behaviour that carries no risk, or very minimal risk, of injury to others. Some laws require that people with HIV inform all sexual contacts of their status, which may mean they could be prosecuted for not revealing their HIV status before kissing someone.

Risk of harm to a sexual partner as a result of one sexual act is much lower than risk of harm associated with other criminalised conduct, such as assault with a weapon. Risk of sexual transmission from an insertive partner to a receptive partner during fellatio is very low, and is estimated as ranging from a risk of zero to a risk of 1 in 2,500. Risk for the insertive partner in fellatio¹⁶ is so low it is impossible to calculate. Risk of HIV transmission from a man to a woman during a single instance of vaginal intercourse is also very low, and has been calculated at between 1 in 1,250 and 1 in 333. Risk of transmission from a woman to a man during a single instance of vaginal intercourse is estimated at between 1 in 2,500 and 1 in 263. In the case of anal sex, risk of HIV transmission from an HIV-positive insertive partner is estimated at between one chance in 122 and one chance in 70.¹⁷

Proving that an accused person was HIV positive at the time of an alleged offence, as well as proving who infected whom and when, is technically challenging. In a sexual relationship, the person blamed for transmitting HIV will most likely be the one who first learned of their status. This is not necessarily the person who was first infected. Even if the accused person was infected first, it could have been a third party who actually infected their sexual partner.

To prove guilt, scientific evidence of transmission by the accused person is required. In recent years, prosecutors have used phylogenetic testing to establish a genetic relationship between the HIV viruses of the two parties. However, this evidence can only indicate similarities in the viruses. Phylogenetic¹⁸ analysis can be used reliably to exonerate the accused; that is, to determine if the two viruses are different, so as to prove that there was no HIV transmission between the two people.¹⁹ It does not prove beyond a reasonable doubt the source of the virus. This is often not well understood by prosecutors, lawyers or judges.

15. Jürgens, R. et al. (2008), '10 reasons to oppose the criminalization of HIV exposure or transmission', New York: Open Society Institute.

16. Fellatio refers to penis to mouth sex.

17. Cameron, S. and Reynolds, L. (2010), 'The global criminalisation scan report 2010: documenting trends, presenting evidence', Amsterdam: GNP+, p. 21.

18. Phylogenetics in this context refers to the history of evolution of a virus.

19. NAT and NAM (2007), 'HIV forensics: the use of phylogenetic analysis as evidence in criminal investigation of HIV transmission', London: National AIDS Trust and NAM.

Criminal offences can be applied selectively to oppress women and most-at-risk populations

Laws criminalising HIV exposure and transmission are often applied selectively. Prosecutions are directed disproportionately at those who are socially and economically marginalised, including immigrants and refugees, foreigners, sex workers, MSM and transgender people.

Many legislators justify enacting criminal laws for HIV transmission to protect women. However, instead of providing justice to women, these laws may be used to prosecute them. Women are at risk of prosecution because they are more likely to know their HIV status than their male partners. They engage with the health system more often than men, particularly during pregnancy and childbirth, and so they typically find out about their positive HIV status before their male partners as a result of antenatal testing.

As they are often the first to be diagnosed, women are more likely to be blamed for “bringing HIV into the home” than men. This can result in prosecution, as well as eviction, loss of property and inheritance, and loss of child custody. Laws criminalising HIV exposure or transmission can provide another tool to threaten and oppress women. An allegation of being at fault for bringing HIV into the family can jeopardise a women’s legal position in a family dispute (in legal systems that are fault based) or in relation to inheritance rights (particularly under customary law).

Some laws criminalise pregnant women by punishing any act that a person with HIV can “reasonably foresee” will transmit HIV to another. This means that women risk being prosecuted for mother-to-child transmission or for merely being pregnant while living with HIV.

HIV-specific offences opposed: South Africa

In 2001, the South African Law Commission concluded that an HIV-specific offence would have no or little practical utility, the social costs entailed in creating an offence could not be justified and an offence would infringe the right to privacy. In 2007, a Member of Parliament, Henrietta Bogopane-Zulu, stated:

“In countries such as South Africa where there are still high levels of discrimination against people living with HIV, a specific law criminalising HIV transmission can never be implemented. HIV would be pushed underground. Criminalisation would defeat attempts to encourage testing and voluntary disclosure. It will also further perpetuate stigma, creating a parallel society of ‘us’ and ‘them’.”²¹

Public health concerns inform decision not to criminalise HIV transmission: Mauritius

Mauritius has decided not to criminalise exposure to HIV or even HIV transmission. Legislators realised that criminalising HIV exposure and/or transmission would be unable to withstand a constitutional challenge because of the difficulties with proof, the likely vagueness of the definition of exposure and the risk of selective prosecution.

However, the main reason for not criminalising HIV transmission was a concern about detrimental impacts on public health and the conviction that it would not serve any preventive purposes. In effect, it would create more problems than it would solve. Therefore Mauritius decided to put its resources where they are most likely to have a positive impact on reducing the spread of HIV: increased funding for HIV testing and counselling, and evidence-informed prevention measures.

Rama Valayden, Attorney General and Minister of Justice and Human Rights, Mauritius, 2007²⁰

20. Jürgens, R. et al. (2008), ‘10 reasons to oppose the criminalization of HIV exposure or transmission’, New York: Open Society Institute, p. 21.

21. Jürgens, R. et al. (2008), ‘10 reasons to oppose the criminalization of HIV exposure or transmission’, New York: Open Society Institute, p. 16.



A mother with her young daughter at Lean On Me, a project for young mothers living with HIV, Nairobi, Kenya © Nell Freeman for the Alliance

4. Women and girls

Gender inequality and HIV vulnerability

Legislation and law enforcement practices can contribute to gender inequality, particularly in areas related to violence protection, family law, property and inheritance. Lack of legal protections for women's human rights can contribute to their lack of power in society generally and in their personal relationships, with the result that they are less able to insist on fidelity from their partners and less able to negotiate condom use effectively. Many traditional practices, often recognised in customary law, contribute to women's vulnerability, such as wife inheritance, child brides, bride price, polygamy and "sexual cleansing" of widows.²²

Constitutional rights to gender equality

International law requires states to take all appropriate measures to eliminate prejudices and any customary practices that are based on the idea of the superiority of either of the sexes or on stereotyped roles for men and women.²³ States are required to take all appropriate measures, including legislation, to modify or abolish customs and practices that constitute discrimination against women.²⁴

The extent to which legislation of Commonwealth countries complies with international law varies. Many Commonwealth countries have constitutional guarantees of equality and non-discrimination on the grounds of sex. However, these constitutional protections are usually subject to pre-existing customary laws in relation to personal legal matters, such as family disputes and inheritance. Customary law governs the lives of most people in Africa

22. Sexual cleansing refers to sexual intercourse performed as a ritual and is associated with burial ceremonies. The intention of this ritual is to cleanse evil spirits and to sanctify. Widows who are not cleansed are ostracised.

23. Convention on the Elimination of All Forms of Discrimination Against Women, Article 5.

24. Convention on the Elimination of All Forms of Discrimination Against Women, Article 2.

and much of the Pacific. It often legitimates male dominance in public and domestic affairs, rather than equality. Courts are often required to strike a balance between formal law and customary practices. Courts of African countries have generally been reluctant to overturn customary law even where it contradicts constitutional guarantees of protection from sex discrimination, particularly in relation to inheritance matters.²⁵

An unambiguous constitutional guarantee can ensure discriminatory customary practices do not prevail over principles of equality and non-discrimination. With appropriate legal frameworks in place, courts can reconcile this conflict while preserving the operation of non-discriminatory aspects of customary law. In South Africa the Constitution states that when developing customary law, a court must promote the spirit, purport and objects of the Bill of Rights (which guarantees gender equality), and that the Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by customary law, to the extent that they are consistent with the Bill of Rights.²⁶

Property and inheritance

Customary laws

Customary inheritance laws often favour men, and these laws are generally applied or taken into account by courts in African countries and the Pacific islands.²⁷

A review of nine Pacific island countries (Marshall Islands, Federated States of Micronesia, Fiji, Papua New Guinea, Solomon Islands, Samoa, Vanuatu, Kiribati and Tuvalu) found that these countries give constitutional status to customary law in relation to land, which may result in discriminatory outcomes for women in inheritance and property ownership.²⁸

Customary law in some African countries treats women as minors²⁹ and women cannot enter into a binding legal contract or make a court claim, without the consent of a husband. In some countries, women married under customary law can only inherit property as a widow in a family with no sons. The Constitution may provide for equality before the law but nonetheless preserves customary law for personal matters, even if it is discriminatory. Some customary law authorises polygamy with the consent of the first wife.³⁰ A widow has no right to inheritance from her husband: all property passes to the eldest son.

Inheritance legislation

Legislation regarding rights of inheritance can ensure women are left with a fair share of the estate should their husband or partner die first. This can be important in the context of an HIV epidemic where women bear significant financial burdens in caring for and supporting their families should their husband die. A woman's HIV vulnerability may significantly increase if she is left financially destitute after her husband's death.

25. See summary of cases from Nigeria, Kenya and Zimbabwe: Ndashe, S. and Sacco, S. (2009), 'Watch the courts dance: litigating the right to non-discrimination on the ground of sex', *Equal Rights Review* 4: 26–34.

26. Section 39, Republic of South Africa Constitution 1996.

27. UNDP Pacific Centre and UNAIDS (2009), 'Enabling effective responses to HIV in Pacific island countries: options for human rights-based legislative reform'.

28. Jivan, V. and Forster, C. (2007) 'Translating CEDAW into law: CEDAW legislative compliance in nine Pacific island countries', UNDP Pacific Centre and UNIFEM Pacific Regional Office.

29. Ozoemena, R. (2006), 'African customary law and gender justice in a progressive democracy', Masters in Law thesis, Rhodes University. Available at: <http://eprints.ru.ac.za/968/1/Ozoemena-LLM.pdf>

30. Botswana Centre for Human Rights (2010) 'Africa for women's rights: dossier of claims – Botswana'. Available at: www.africa4womensrights.org/tag/Botswana

Use of traditional legal systems to reinstate disinherited women and children: Kenya³¹

Under the custom of Kenya's Luo tribe, a widow is regarded as similar to property and is "inherited" by the deceased husband's brother or other male relative. In this way the widow and her children remain within the husband's clan. With the onset of the HIV epidemic, there are many cases in which the widow is not accepted into the husband's clan and is disinherited from the husband's property. This is particularly the case when the husband has died from an AIDS-related illness.

The right of Kenyan women to inherit property from their husbands is protected by legislation. However, rural women generally prefer disputes to be handled by elders rather than the formal courts. The formal legal system is not a realistic alternative due to expense, delay and inaccessibility of courts.

Disinheritance leads to women leaving their villages to live in townships, and some turn to sex work for income. Poverty associated with disinheritance also means that women and children are less able to access treatment, care and support.

The Kenya Legal and Ethical Issues Network on HIV/AIDS (KELIN) supports elders to act as mediators in the resolution of inheritance disputes. Training is provided to elders, widows and local law enforcement officials to create awareness on human rights. The elders are trained on alternative dispute resolution approaches. Mediation occurs between a widow and her in-laws, led by the elders. The process aims at reconciliation based on customary law, guided by human rights norms. The approach recognises that customary law can evolve and incorporate gender equality considerations.

Two legislative approaches for ensuring that a widow has access to an adequate share of her husband's estate are:

- family provisions legislation, which can ensure that the widow is provided for even if the husband's will has left the whole or most of the estate to others³²
- statutory legacies, which can ensure that a widow is left a substantial share of her husband's estate when there is no will.

Property division after separation or divorce

Loss of financial security after marital breakdown can contribute to women's HIV vulnerability. Some women turn to sex work to supplement income or exchange sex for goods and services. Loss of property after divorce can cause great hardship if the wife has the added burden of caring for children or elderly relatives.

Women are disadvantaged in property disputes if legal title to property is in the husband's name and the law fails to recognise women's non-financial contributions to a marriage. Legislation regarding division of marital property after divorce should require recognition of a woman's non-financial contributions during a marriage, such as raising children, caring for elderly relatives and household duties.

Legal protections from gender-based violence

Legislation related to protection of women from sexual violence should incorporate the following features:³³

- A range of offences should be defined, covering all the ways women are violated (not limited to penile penetration).
- There should be no exemption for marital rape.
- There should be no defence of honest and reasonable belief that the victim is of legal age.
- Consent should be comprehensively defined to include absence of threat or any form of coercion.
- Prior sexual conduct of the victim should not be taken into account.
- Domestic violence legislation should include restraining orders and specific offences.³⁴

31. See CARICOM Model Legislation on Inheritance (Family Provisions), available at: www.caricom.org/jsp/secretariat/legal_instruments/model_legislation_inheritance.jsp. Some Pacific island countries have family provision laws, such as Part VI Wills Probate and Administration Act (Cap 291) (PNG); Part IV Administration Act (Samoa); Part VII Wills Probate and Administration Act Cap 33 (Solomon Islands); Inheritance (Family Provision) Act 1938 (UK) (may apply in Kiribati and Tuvalu).

32. Godwin, J. (2010), 'Scaling-up HIV-related legal services: report of case studies', Rome: IDLO and UNAIDS.

33. Jivan, V. and Forster, C. (2007), 'Translating CEDAW into law: CEDAW legislative compliance in nine Pacific island countries', UNDP Pacific Centre and UNIFEM Pacific Regional Office.

34. SADC member states with domestic violence legislation in place are Botswana – Domestic Violence Act 2007; Malawi – Prevention of Domestic Violence Act 2006; Mauritius – Protection from Domestic Violence Act 1991; Mozambique – Law Against Domestic Violence 2009; Namibia – Combating of Domestic Violence Act 2003; South Africa – Domestic Violence Act 1998; Zimbabwe – The Prevention of Domestic Violence and Protection of Victims of Domestic Violence Act 2007. Source: 'Fifteen-year review of the implementation of the Beijing Platform for Action in Africa (BPfA) +15: synthesis report 1995–2009', ECA, November 2009.

The Caribbean community has developed draft model legislation related to domestic violence.³⁵ This enables interim protection orders to be made in the absence of the perpetrator to ensure immediate protection. It provides for a wide variety of protective orders restricting the perpetrator from assaulting, threatening, approaching, phoning or otherwise contacting the person, and the court may recommend that the perpetrator attend counselling.

Kenya, Namibia, South Africa and Tanzania have laws specifically focusing on sexual violence that define various forms of sexual assault and provide penalties for perpetrators and compensation for survivors.

The rape offence in some countries does not apply to rape within marriage. Law reform to criminalise rape in marriage is sometimes opposed by male community leaders on the basis that wives are considered to be the property of their husbands, and forcing sex on them is consistent with traditional practices.

Duties to provide medical assistance to sexual assault survivors

In Kenya³⁶ and South Africa,³⁷ legislation requires the government to provide post-exposure prophylaxis (PEP)³⁸ to prevent HIV transmission to survivors of sexual assault.

South African legislation allows for alleged perpetrators of sexual assault to be compulsorily tested for HIV. Testing the perpetrator can help the survivor of the assault to decide whether to take antiretroviral drugs to prevent HIV transmission.

Compulsory HIV testing is generally not recommended as a public health measure because it may violate the human rights of the person tested and deter other people at risk of HIV from accessing HIV services. In the case of HIV testing of perpetrators of sexual assault, legislators need to consider carefully the human rights of both the survivor and the perpetrator, and the public health ramifications of introducing a compulsory testing approach. If a law enabling compulsory testing of perpetrators is introduced, it is important that it is viewed as a highly exceptional measure.

35. CARICOM Model Legislation on Domestic Violence
www.caricom.org/jsp/secretariat/legal_instruments/model_legislation_domestic_violence.jsp

36. Sexual Offences Act 2006 (Kenya).

37. Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007 (South Africa).

38. PEP involves administering antiretroviral drugs, usually for 28 days. It is most effective when begun as soon as possible after exposure to HIV, but it can be started up to 72 hours after exposure.



Sri Kalahasti drop-in centre and Mythri clinic, Andhra Pradesh, India. Manema is a peer educator and living with HIV © Jenny Matthews for the Alliance

5. Sex workers

Overview³⁹

There are many forms of sex work. Sex workers can be escorts, street workers and people who work from brothels, entertainment venues, massage parlours, salons or other establishments. Many people who undertake sex work may not identify as sex workers. Transactional sex, in which sex is exchanged for food, clothing or other resources, is often more widespread than the organised sex industry. Transactional sex is generally not the intended focus of criminal laws, although sometimes women engaging in transactional sex may be subject to harassment, arrest or detention in police roundups or crackdowns on street workers.

Most Commonwealth countries criminalise aspects of the sex industry, such as soliciting in public or keeping a brothel. Types of criminal laws applied to sex work include laws dealing with sexual offences, vagrancy and public order offences, and human trafficking offences.

Criminal laws focus on a range of people associated with the sex industry. These include offences for encouraging others to become sex workers, living off the earnings of sex work and use of premises for sex work. Some countries also directly criminalise the act of sex work itself, and many countries apply vagrancy and public order offences against sex workers operating in public.

Some countries (such as Brunei, Malaysia, Maldives, certain states in north Nigeria and districts of north-west Pakistan) incorporate *Sharia*⁴⁰ principles into criminal law for Muslim citizens, which can result in severe penalties for sex work, including corporal punishment.

39. For the purposes of this report, the term “sex worker” does not apply to children or to people who are forced to work in the sex industry.

40. *Sharia* refers to traditional Islamic law derived from the Koran.

In communities where sex work is criminalised, sex workers are often reluctant to report experiences of rape to police for fear of further abuse at the hands of the police or prosecution for sex work. This increases their vulnerability to HIV.

Police raids and “rescue operations”⁴¹ in brothel areas can adversely affect outreach work to provide health and support services to sex workers, as has been reported recently from Malaysia, for example.⁴² Sex workers from many countries report police roundups, sometimes accompanied by violence from law enforcement officers and other government officials. Some report being sexually assaulted by police when in detention as a form of humiliation, and being coerced into providing sex to police.⁴³ Many sex workers also report that they are subjected to police abuses during street clean-up operations, police-led brothel closures or “rescue operations”.⁴⁴

Removing legal penalties for sex work assists HIV prevention and treatment programmes to reach sex workers and their clients. Rather than arresting sex workers and closing down brothels, the most effective approach to preventing HIV is to view sex workers as partners in prevention, and encourage them to engage in sexual health promotion as peer educators and advocates. Involving sex workers directly in HIV prevention and health promotion programmes can raise their self-esteem and increase their trust and confidence in HIV and sexual health services.

Health and safety standards, which are an accepted part of the regulation of most forms of work, are not applied to sex work where it is an illegal activity. In decriminalised contexts, legally backed workplace standards can contribute to a reduction in HIV transmission and improvements in overall working conditions. Standards can require the use of condoms, proper lighting, sanitation and measures to ensure the personal security of sex workers.

It is important that advocacy for decriminalisation of sex work on public health grounds makes a clear distinction between voluntary sex work (criminalisation of which results in harm to public health) and the need for criminal offences to address trafficking of people against their will into sex work and child prostitution.

Caribbean

A review of Caribbean sex work laws identified a trend towards more severe penalties for sex work or involvement in the sex industry.⁴⁵ Seven of twelve Caribbean countries reviewed in 2007 (Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, St. Lucia and Trinidad and Tobago) have introduced new sexual offence laws, resulting in increases in severity of penalties for sex work and sex between men. Under these new sexual offences laws:

- “prostitution” is defined in gender-neutral terms, which means that a man or transgender person can be charged with sex work
- the penalties for offences dealing with activities related to sex work as a business have been increased
- soliciting is a more serious offence and is no longer restricted to soliciting in public places
- acts of “indecentcy” and “unnatural sex” are more heavily penalised.

41. The term “rescue operations” refers to efforts of NGOs, police or other authorities to remove sex workers from their workplace. Those carrying out rescue operations generally assume that the sex workers being rescued are engaged in their work involuntarily, which is often not the case.

42. Asia Pacific Network of Sex Workers (2010), ‘Brothel broken: brothel raids in Kuala Lumpur’. Available at www.plri.org/resource/brothel-broken-brothel-raids-kuala-lumpur

43. Godwin, J. (2010), ‘Legal environments, human rights and HIV responses among men who have sex with men and transgender people in Asia and the Pacific: an agenda for action’, Bangkok: UNDP, p. 109; Lafont, S. (2008) ‘Help Wanted: Sex Workers in Katutura, Namibia: Monograph No. 2, Legal Assistance Centre’, Windhoek: LAC. p. 10.

44. International HIV/AIDS Alliance (2008), ‘Sex work, violence and HIV: a guide for programmes with sex workers’.

45. Robinson, T. (2007), ‘A legal analysis of sex work in the Anglophone Caribbean’, UNIFEM, p. 10.

Pacific

In many Pacific island countries, while the act of sex work is not itself a crime, activities surrounding sex work, such as keeping a brothel, soliciting or using the proceeds of sex work, are criminalised.⁴⁶ In Papua New Guinea, sex work itself has been criminalised as a result of a court decision that interpreted the scope of the criminal offence of living on the earnings of prostitution to include sex workers, as well as pimps and other persons who profit from employing sex workers.⁴⁷ Sex workers in Papua New Guinea report being picked up by police and forced into sex under threat of prosecution, sometimes amounting to serious gang rape⁴⁸. Police are reported in some cases to exploit the illegal status of sex workers by subjecting them to violence or rape and extortion.⁴⁹

The need for decriminalisation of sex work and sex between men in Papua New Guinea: A parliamentarian's view

Dame Carol Kidu MP, Papua New Guinea Minister for Community Development (2009):⁵⁰

... Decriminalisation of homosexuality and sex work would actively empower both of these community groups in mobilising a strong response to HIV and violence in their communities. It would do so by:

- reducing practices of police corruption, violence and abuse of police powers
- reducing the barriers faced in reporting crimes against them (including sexual violence)
- improving the capacity of service providers to access highly marginalised and elusive communities
- empowering these communities to be proactively engaged in representation informing the development and implementation of strategies to reduce risk of HIV and violence
- underpinning and facilitating responses to the stigma, violence and discrimination that increases the risk of HIV
- enhancing community belonging, harmony and inclusion, through the promotion of human rights and HIV prevention, care and treatment as a shared community responsibility, rather than the discord and disharmony that erupts with segregation, blaming, and criminalisation
- removing the evidentiary use of HIV prevention tools as proof of crime (including HIV prevention information, education, and safe sex equipment such as condoms), and facilitate the promotion of safer sex equipment vital to the prevention of HIV.

(MSM and sex workers) have been proactively involved in the HIV prevention and management response strategy of Papua New Guinea. And yet they are legally “criminals” under outdated legislation. It is time to change the law. The challenge will be to move away from polarised moralistic arguments to dialogue based on facts, human rights and access to services for all.

46. Lemisio, M. (2008), 'Should prostitution be decriminalised in the Pacific? The pros and cons', *Journal of South Pacific Law* 12(1): 101–4.

47. *Anna Wemay and Others. v. Kepas Tumdual and Others* (1978) PNGLR 173.

48. Commission on AIDS in the Pacific (2009), 'Turning the tide: an open strategy for a response to AIDS in the Pacific. Report of the Commission on AIDS in the Pacific', UNAIDS, p. 34.

49. *Ibid.*, p. 55.

50. Godwin, J. (2010), 'Legal environments, human rights and HIV responses among men who have sex with men and transgender people in Asia and the Pacific: an agenda for action', Bangkok: UNDP, p. 102.

Sub-Saharan Africa

There are a variety of legislative approaches to sex work in African Commonwealth states, reflecting their diverse legal systems. Many countries have prohibitions on soliciting, living off the earnings of sex work or keeping a brothel, based on English law. Sex workers are also policed under loitering and vagrancy laws, and some (for example, in Malawi) have been allegedly subject to coerced HIV testing by police.⁵¹ While many countries have a British colonial legal heritage, some have mixed legal systems with elements from other European legal traditions. Some jurisdictions also recognise *Sharia* law (for example, northern Nigerian states), with strict prohibitions on sex work. In South Africa and Namibia, some municipalities have adopted loitering by-laws that make specific reference to sex work and facilitate arrest of street workers. In South Africa, although sex work is illegal, in 2010 the Labour Court recognised sex workers as having employment rights.⁵²

A recent assessment of sex work in Botswana, Namibia and South Africa reported the following findings:⁵³

- Sex work (or generating an income from sex work) is illegal. The predominant attitude towards sex work is that it is immoral. There is little dialogue or activities on law reform. Evidence-based approaches that protect and promote the rights of sex workers are extremely rare.
- Violence and discrimination against sex workers, police raids and incarceration, and a lack of accessible and relevant information, prevention tools and treatment services compromise the ability of sex workers living with HIV to protect their health. Sex workers report discrimination in accessing health care. Migrant sex workers are particularly excluded from access to HIV treatment and care due to xenophobia and rules restricting access to health services to nationals. Transgender and MSM sex workers seeking non-judgmental health care are neglected.
- In Botswana, sex workers reported the deaths of colleagues due to unsafe abortions. Sex workers were affected by a lack of access to safe and legal abortion in Botswana and Namibia.
- In addition to the discrimination sex workers face from police and health officials, sex workers also experience discrimination in school, employment and banks.
- The criminalisation of sex work has precluded the enforcement and protection of sex workers' labour rights. Workers in brothels are vulnerable to labour abuses such as withheld wages, arbitrary fines, restrictions on seeking medical assistance or assistance after violence, restrictions on mobility, confiscations of belongings, including medication, and sexual harassment by management.

51. Mpaka, C. (2009), 'Police force HIV tests for sex workers'. Available at: <http://ipsnews.net/africa/nota.asp?idnews=48800>

52. Mabuza, E., 'Sex worker wins labour appeal court ruling in unfair dismissal case', 31 May 2010. Available at: <http://allafrica.com/stories/201005310403.html>

53. Arnott, J. and Crago, A-L. (2009), 'Rights not rescue: a report on female, male, and trans sex workers' human rights in Botswana, Namibia, and South Africa', Open Society Institute.

Indian judges question the wisdom of criminalising sex work

In 2009 two judges of the Supreme Court of India suggested that legalising the sex industry may assist in addressing issues of concern to governments. In a hearing regarding trafficking of children, the judges observed that no legislation anywhere in the world has successfully managed to stop the sex trade.

“When you say it is the world’s oldest profession and when you are not able to curb it by laws, why don’t you legalize it? You can then monitor the trade, rehabilitate and provide medical aid to those involved.”

Judges Dalveer Bhandari and AK Patnaik, comment to the government solicitor.⁵⁴

Court improves the legal environment for sex workers in Bangladesh

In Bangladesh the Oppression of Women and Children (Special Enactment) Act 1995 makes the selling of a woman for sex work an offence. However, it is the brothel operators who are punishable, not the sex worker.

In the Bangladesh Society for Human Rights case (2000), the Society challenged in the Supreme Court the forcible eviction by police of sex workers. The Court held that sex workers have a right to work and are not to be treated as beggars or vagrants. Sex workers enjoy the constitutional protections of their human rights to privacy, dignity, life and liberty. The Court also observed that although sex work is not illegal, it is not encouraged, as the Constitution provides that the “State shall endeavour to prevent gambling and prostitution”.

South Asia

In South Asia most aspects of the organised sex industry, such as operating a brothel, are illegal. This drives the industry underground and contributes to police corruption. In Bangladesh selling a woman for sex is illegal. In India it is legal to engage in sex work in private, but soliciting in public is illegal, and public order offences are used against sex workers. In India, legislation regarding trafficking is used as a basis for prosecuting sex workers for soliciting. In Sri Lanka there is no specific offence for sex work, but acts of soliciting in public are criminalised by the Vagrancy Ordinance and brothels are illegal. In Pakistan extra-marital sex is illegal, and selling a person for sex or buying sex is illegal.

In India efforts intended to rescue and rehabilitate sex workers by law enforcement agencies sometimes lead to harmful consequences, including separating sex workers who are voluntarily participating in sex work from their livelihood and families. Conditions in rehabilitation homes are often poor, with women detained and forced to undergo HIV testing. Many sex workers fear the consequences of being rescued.

There are instances where progress is being made in improving the legal environment. In India a number of community-based initiatives have engaged sex workers and police in partnerships to help improve the legal environment for HIV prevention and care. In some localities policies have been put in place to support income-generation schemes for sex workers that also focus on providing them with education and HIV prevention services. Interventions that mobilise sex workers to seek changes in laws and law enforcement practices have proved effective in a variety of settings in India.⁵⁵

The Durbar Mahila Samanwaya Committee (DMSC), founded in 1995, represents 60,000 female, male and transgender sex workers. It was established with support from the Sonagachi Project, which was initiated in Kolkata as an HIV intervention for sex workers. DMSC’s political objectives are decriminalisation of adult sex work, recognition of sex work as a valid profession, and establishing sex workers’ right to self-determination. The project uses empowerment approaches, including community mobilisation, advocacy and micro-finance. Research has demonstrated a significant increase in condom use among sex workers who have participated in these empowerment interventions. The influence on the legal environment of the organisation of sex workers into a powerful union has been summarised as follows:

Reports from sex workers in almost every sex work site describe a significant reduction in police raids, police harassment, exploitation from local gangs and violence. Although incidents do still occur, sex workers (and the perpetrators) know that they now have an organization to call on which will take action on their behalf. Durbar activists have become increasingly confident and capable of organising rallies, street protests, sit-ins, blockades and advocacy with high level political actors to force action to be taken on their behalf at the local level. Sex workers also frequently report that they are now in a better position to negotiate health and work issues.⁵⁶

54. The court was hearing a claim filed by two non-governmental organisations, Bachpan Bachao Andolan (Save Childhood Movement) and Childline, seeking directives to contain child trafficking. Times of India ‘Legalize prostitution if you can’t curb it: SC to gov’ 10 December 2009. Available at: <http://timesofindia.indiatimes.com/india/Legalize-prostitution-if-you-cant-curb-it-SC-to-govt/articleshow/5322127.cms>

55. Biradavolu, M.R. et al. (2009), ‘Can sex workers regulate police? Learning from an HIV prevention project for sex workers in southern India’, *Social Science & Medicine* 68(8): 1541–47; Swendeman, D. et al. (2009), ‘Empowering sex workers in India to reduce vulnerability to HIV and sexually transmitted diseases’, *Social Science and Medicine* 69(8): 1157–66.

56. The Durbar Mahila Samanwaya Committee Theory and Action for Health Research Team (2007), ‘Meeting community needs for HIV prevention and more: intersectoral action for health in the Sonagachi red-light area of Kolkata’, WHO, p. 16.

Models of legalisation, decriminalisation and regulation⁵⁷

Some countries regulate the sex industry to protect health and safety, and to reduce opportunities for police corruption and abuses. In many Latin American and European countries, sex work is legal and brothels are regulated. However, the only African country in which sex work is legal and regulated is Senegal.

It is useful to distinguish the following four broad approaches to sex work law reform, although some jurisdictions may apply aspects of more than one model concurrently.⁵⁸ Sexual health experts argue that, of these four models, full decriminalisation offers the best health outcomes for sex workers and their clients.⁵⁹

1. Full decriminalisation

Decriminalisation refers to the removal of all criminal laws related to the operation of the sex industry. Decriminalisation enables occupational health and safety issues to be addressed through existing general employment laws. Under this model, sex work is treated as a legitimate form of work, and the sex industry is subject to the same general laws related to workplace health and safety as other industries. These laws may enable specific guidelines on workplace health to be developed for the sex industry.

This model has been adopted in New Zealand and parts of Australia. It is considered by those jurisdictions to have been a successful approach. It is also supported by sex workers as an approach that reduces stigma and empowers them to take control of their own sexual health, as well as addressing other health and safety issues they and their clients experience. Evidence from these jurisdictions confirms that decriminalisation has a positive effect on health and provides sex workers with tools to manage their work environment. With knowledge of their employment rights, brothel workers are better able to assert these rights with brothel operators and clients. The relationship between sex workers and police also improves in decriminalised settings.⁶⁰

Decriminalisation has not led to an increase in the number of street-based sex workers. In New Zealand, decriminalisation has led to sex workers being more willing to disclose their occupation to health workers, carry condoms and negotiate safe sex.⁶¹

2. State regulation and licensing

The licensing model involves a government body regulating the licensing of sex industry businesses, operators, managers and, in some cases, sex workers. This approach can be highly regulatory or merely define the operation of the various sectors of the sex industry. Licensing is often accompanied by strict criminal penalties for sex industry businesses that operate outside the legal framework. Where licensing is burdensome, it can result in a small percentage of the industry operating legally but the remainder of the industry continuing to operate illegally.

The experience of jurisdictions with this model has been mixed. The model delivers benefits to some sex workers but has proved problematic when licensing conditions are too complex and costly to comply with. Many sex workers may have little choice but to operate outside of the licensed industry if it becomes over-regulated.

Canadian court strikes down sex industry laws

In *Bedford v. Canada* (2010 ONSC 4264) the Superior Court of Justice, Ontario, held that criminalisation of the sex industry breaches human rights of sex workers. The court found that criminalisation created dangers for sex workers that amount to a severe deprivation of the right to security of the person in violation of Canada's Charter of Rights and Freedoms.

57. For a global map of countries that criminalise or legalise sex work, see <http://chartsbin.com/view/snb>

58. See Law and Policy Project (2005), 'A provisional framework for analyzing laws and policies that affect sex workers', New York: Columbia University.

59. Abel, G., Fitzgerald, L., Healy, C. and Taylor, A. (eds) (2010), 'Taking the crime out of sex work: New Zealand sex workers' fight for decriminalisation', Bristol: Policy Press; Harcourt, C., Egger, S., Donovan, B. (2005), 'Sex work and the law', *Sexual Health* 2(3): 121–8; Donovan, B., Harcourt, C., Egger, S., Fairley, C. (2010), 'Improving the health of sex workers in NSW: maintaining success', *NSW Public Health Bulletin* 21(3-4): 74–7; Jeffreys, E., Matthews, K. and Thomas, A. (2010), 'HIV criminalisation and sex work in Australia', *Reproductive Health Matters* 18(35): 129–36.

60. Abel, G., Fitzgerald, L., Healy, C. and Taylor, A. (eds) (2010), 'Taking the crime out of sex work: New Zealand sex workers' fight for decriminalisation', Bristol: Policy Press.

61. Cameron, S. and Reynolds, L. (2010), 'The global criminalisation scan report 2010: documenting trends, presenting evidence', Amsterdam: GNP+, p. 38.

This approach has been adopted in many high-income countries, where regulation focuses on safety standards in brothels and during sexual acts. The approach can be effective in circumstances of good governance, and where there are well-resourced monitoring mechanisms. However, it faces many challenges in poorer countries with weak infrastructure. There are risks associated with requirements such as mandatory health checks, which may be implemented in a way that is disrespectful of sex workers and that perpetuates the stigma associated with sex work. Where the rule of law is weak, those responsible for monitoring compliance with sex industry regulation may use their positions of power for corrupt practices, such as demanding bribes or sexual services.

The legalisation of sex work in Senegal follows the regulatory approach, but is considered to have been unsuccessful. Senegal legalised sex work in 1969 and all sex workers are required to register with the government. Registered sex workers must receive monthly check-ups at specialised health centres, where they can receive condoms and contraception. If they do not comply their registration cards may be revoked. However, many sex workers operate outside the legal industry. Although legal sex workers have access to routine health care, unregistered sex workers do not, and they are persecuted by law enforcement agencies, which drives them further underground and makes outreach and HIV prevention difficult.⁶²

A proposal from Antigua and Barbuda's Ministry of Health, Sports and Youth Affairs in 2006 sought to license sex work during the Cricket World Cup held in 2007 in the Caribbean.⁶³

3. Partial prohibition

Many Commonwealth countries do not criminalise the act of sex work itself. However, in countries such as Bangladesh and Canada other aspects of the sex industry, such as operating a brothel or living on the earnings of sex work, are illegal. This approach can drive the industry underground and contribute to police corruption. Another example of partial prohibition is the Swedish model (implemented in Sweden, Iceland and Norway). Under this approach, sex work is legal but it is illegal to buy the services of a sex worker. This model has reduced street sex work in Sweden. However, there are concerns that the model has driven the overall industry underground and out of the reach of health promotion programmes, with an increase in sex work organised through the internet or other discreet means.

4. Non-prosecution policies

This approach involves a policy decision not to arrest or prosecute sex work where it occurs between consenting adults, allowing health promotion to occur openly within the industry.

In Thailand sex work is criminalised, but the government issues health codes for brothels and sex workers, and promotes a 100% condom use programme as a pragmatic approach. The programme requires that condoms be used in all brothels, and includes monthly STI screening, a media campaign directed at male clients and free access to condoms in brothels. Brothel owners who do not comply are subject to sanctions. In theory this approach empowers sex workers to better negotiate condom use with clients, through establishing condom use rules and providing training on how to negotiate. It can help sex workers by placing the primary responsibility for condom use on the owner or manager, so they will be motivated to help sex workers in their negotiations if customers are reluctant to comply.

In many countries and localities, 100% condom use programmes operate in an environment in which authorities register sex workers and require health checks, which means that the approach is one of regulation and licensing – an approach that has proven problematic in some contexts (see above).

In countries where decriminalisation of sex work is not a realistic political option in the short term, other pragmatic options can be considered in advance of law reform. Legislation or prosecution policy can prohibit use of the possession of condoms or HIV education materials as evidence of the commission of a sex work offence. Without such protection, sex workers may fear carrying condoms or keeping supplies where they work in case of police searches or raids.

The International Guidelines on HIV/AIDS and Human Rights state:

With regard to adult sex work that involves no victimization, criminal law should be reviewed with the aim of decriminalizing, then legally regulating occupational health and safety conditions to protect sex workers and their clients, including support for safe sex during sex work. Criminal law should not impede provision of HIV prevention and care services to sex workers and their clients.

62 Open Society Institute (2007), 'HIV/AIDS policy in Senegal: a civil society perspective', New York: OSI.

63. Robinson, T. (2007), 'A legal analysis of sex work in the Anglophone Caribbean', UNIFEM, p. 42.

Anti-discrimination laws

In addition to removing criminal sanctions, legal environments for HIV prevention can be improved by introducing legal protections from discrimination. Sex workers can face discrimination due to their employment status in accessing other forms of employment, accommodation, education and other services. In the state of Queensland, Australia, discrimination against lawfully employed sex workers is illegal.⁶⁴

Training police about MSM and sex work in a criminalised context: The Poro Sapot Project, Save the Children, Papua New Guinea⁶⁵

In Papua New Guinea the Poro Sapot Project has been invited to train police recruits on HIV. Staff and volunteers, who are themselves MSM or sex workers, provide basic information about HIV and introduce the recruits to issues faced by MSM, sex workers and people living with HIV. These sessions establish a public health rather than a moralistic point of view. They explain the police role in protecting human rights, allowing the recruits to share their experiences and prejudices, and use personal stories. The project is working with the police college to incorporate sensitisation information into its standard curriculum. Lessons learned include the importance of working within the police hierarchy, starting at the top but not neglecting constables on the ground, and ensuring that MSM or sex workers (including people living with HIV) lead the sensitisation process. The police commissioner has endorsed the project.

64. Anti-Discrimination Act 1991 Queensland.

65. Godwin, J. (2010), 'Legal environments, human rights and HIV responses among men who have sex with men and transgender people in Asia and the Pacific: an agenda for action', Bangkok: UNDP, p. 99.



Members of the MSM rights organisation PEMA, Kenya © Nell Freeman for the Alliance

6. MSM and transgender people

Criminalisation of sex between men in the Commonwealth

Sex between men occurs in every society, and encompasses a range of sexual and gender identities. It may involve men who identify as homosexual, gay, bisexual, heterosexual, or with other culturally specific identities, such as the *fa'afafine* of Samoa and *kothi* of India. MSM⁶⁶ are often married to women, particularly in societies where homosexuality is stigmatised and discriminatory laws exist. Some heterosexual men have sex with other men while in all male institutions such as prisons, or as a source of income.

Many Commonwealth countries have offences for sodomy, buggery and gross indecency for sex between men in their criminal codes inherited from the British colonial era or imposed by *Sharia* law (see Annex 4). Some offences are drafted so that they appear to be neutral (such as the offence of “unnatural sex” or “carnal intercourse against the order of nature”), but in effect are discriminatory because they are only enforced against MSM and, in some cases, transgender people. Maximum penalties can be severe, including lengthy prison sentences, life imprisonment or the death penalty. Legislation of eight Commonwealth countries imposes a maximum sentence of life imprisonment.⁶⁷

In Malawi a man and his transgender partner were sentenced to 14 years in prison for the offence of sodomy in 2010. The couple were later released after meetings with representatives of the Joint United Nations Programme on HIV/AIDS (UNAIDS) and the Global Fund to Fight AIDS, Tuberculosis and Malaria secured a presidential pardon on humanitarian grounds.⁶⁸

66. MSM refers to all men who have sex with other men, regardless of their sexual identity or sexual orientation, and regardless of whether they also have sex with women. MSM refers to a behaviour rather than a single identifiable community.

67. Bangladesh, Barbados, Guyana, Pakistan, Sierra Leone, Tanzania, Uganda, Zambia.

68. Associated Press. 'Malawi's leader pardons gay couple, orders them freed from prison; still rejects homosexuality.' 29 May 2010. Available at: www.foxnews.com/world/2010/05/29/malawis-president-orders-pardon-immediate-release-gay-couple-sentenced-years/

In Rwanda and Uganda, draconian penalties were proposed in draft legislation in 2009 (but not enacted). This included a proposal in Uganda’s Anti-Homosexuality Bill for the death penalty for a man living with HIV convicted of consensual sex with another man. In Zambia, the maximum penalty for unnatural sex was increased from 14 years to life imprisonment in 2005.⁶⁹ In Zimbabwe, the legal definition of sodomy was broadened in 2006 to include not only anal intercourse but also “any act involving physical contact other than anal sexual intercourse that would be regarded by a reasonable person to be an indecent act”.⁷⁰

In some Caribbean countries the penalties for buggery offences have increased in recent years. In Antigua and Barbuda, for example, the maximum penalty was increased from 10 to 15 years imprisonment in 1998.⁷¹

Sharia penalties for sex between men can be severe, and include death (in certain states of Nigeria and certain districts of Khyber Pakhtunkhwa Province of Pakistan), whipping (Nigeria, Maldives, Malaysia, Brunei and parts of Pakistan), and long prison sentences.

By contrast, the former French colonies generally do not criminalise sex between men, as it was not a part of the nineteenth-century French penal code. The following 11 Commonwealth jurisdictions also do not currently criminalise consensual sex between men: Australia, Bahamas, Canada, Cyprus, India (Delhi), Malta, New Zealand, Rwanda, South Africa, the UK and Vanuatu. As a result of recent law reform, Fiji also does not criminalise sex between men.⁷²

The existence of sodomy offences creates an atmosphere of fear and intimidation in which MSM risk violence and abuse targeted against them, particularly if they are open about their sexuality. MSM report that police often use the threat of criminal prosecution to harass and extort money. MSM are highly stigmatised, and fear discrimination or prosecution if they identify themselves to health authorities. Criminalisation also creates pressure on MSM to marry and hide their sexuality, which can then place their wives at risk of HIV.

Research from the Asia Pacific region confirms that HIV services are more effective in reaching MSM and transgender people and meeting their needs when police harassment does not occur, when punitive laws are repealed or not actively enforced, and when protective and enabling laws and law enforcement practices are introduced.⁷³

Data from Caribbean countries indicate a correlation between punitive laws and increased HIV prevalence. Countries that criminalise sex between men have much higher HIV prevalence among MSM than countries that do not criminalise (see Table 1).⁷⁴

Criminalisation is associated with higher HIV prevalence among MSM

Countries that criminalise sex between men		Countries that do not criminalise sex between men	
Jamaica	32%	Dominican Republic	11%
Guyana	21%	Bahamas	8%
Trinidad and Tobago	20%	Suriname	7%

Table 1: Comparison of HIV prevalence among MSM in Caribbean countries

69. Section 155 Penal Code (Zambia), as amended by Act No.15 of 2005.

70. Section 73 Criminal Law (Codification and Reform) Act 2004 (Zimbabwe), commenced 2006.

71. The Sexual Offences Act, 1995, Antigua and Barbuda, ss. 12 and 13.

72. Crimes Decree 2009 (Fiji), and see *McCoskar v State* (2005) FJHC 500.

73. Godwin, J. (2010), ‘Legal environments, human rights and HIV responses among men who have sex with men and transgender people in Asia and the Pacific: an agenda for action’, Bangkok: UNDP, p. 20.

74. Traore, C. (2009), ‘Congressional briefing: HIV, human rights and men who have sex with men (MSM)’, New York: UNDP.

Homosexual law reform: an ongoing blind spot of the Commonwealth of Nations⁷⁵

The Hon. Michael Kirby AC CMG, retired Judge of the High Court of Australia

“In 41 of the 53 countries of the Commonwealth of Nations, the criminal code punishes adult, private, consensual homosexual acts. Such laws are wrong:

- wrong in legal principle because they exceed the proper ambit and function of the criminal law in a modern society
- wrong because they oppress a minority in the community and target them for an attribute of their nature that they do not choose and cannot change. In this respect they are like other laws of colonial times that disadvantaged people on the ground of their race or sex
- wrong because they fly in the face of modern scientific knowledge about the incidence and variety of human sexuality
- wrong because they put a cohort of citizens into a position of stigma and shame that makes it hard to reach them with vital messages about safe sexual conduct, essential in the age of HIV/AIDS.

... None of the laws imposed on the British colonies was the product of demands by the local people. These were the concepts of the Imperial power. They reflected the notions of the Judeo-Christian ethics of Victorian Britain. Usually, or often, there was no equivalent preceding law and certainly none with the highly punitive consequences of the Penal Code. So these laws are not of great antiquity. Historically, they are relics of a bygone empire, long since repudiated (in 1969) by the Imperial country itself.”

HIV prevalence among MSM populations of sub-Saharan Africa is, in many instances, much higher than among adult men in the general population (see Table 2). In some West African countries HIV prevalence among MSM is over ten times that of the male general population. High prevalence of HIV among MSM in sub-Saharan Africa has been driven by cultural, religious and political unwillingness to accept them as equal members of society. Prejudice towards MSM leads to harassment and isolation, which in turn leads to risky sexual practices. Research identifies profound stigma and social hostility concerning same-sex behaviours, reinforced both by punitive legislation and some aspects of customary and religious laws. African MSM face family rejection, public humiliation, harassment and derision by health workers.⁷⁶

Country	HIV prevalence among MSM	HIV prevalence in the general adult population (15+ years)
Ghana	25.0%	1.67%
Jamaica	31.8%	1.38%
Kenya	15.2%	7.49%
Malawi	21.4%	11.46%
Tanzania	12.4%	5.88%
Zambia	32.9%	15.72%

Table 2: HIV prevalence among MSM compared to prevalence in the general adult population⁷⁷

75. Extracts from Kirby, M. (2009), 'Homosexual law reform, an ongoing blind spot of the Commonwealth of Nations', address to the 16th Commonwealth Law Conference, Hong Kong, 8 April 2009.

76. Smith, A. et al. (2009), 'Men who have sex with men and HIV/AIDS in sub-Saharan Africa', *Lancet* 374: 416–22.

77. 'The global epidemics of HIV among MSM in 2010: epidemiology, responses, and human rights', The Global Forum on MSM & HIV Pre-Conference, 17 July 2010, Vienna.

Legal environments that support effective HIV responses among MSM are ones in which sex between consenting men has been decriminalised and in which police work as partners in promoting violence protection and HIV prevention. Much progress has been made through this approach in countries such as Australia, Canada, the UK, South Africa and New Zealand. Some of these countries have also introduced laws that protect MSM from hate crimes and prohibit discrimination on the ground of sexual orientation and transgender status. In 2010 Botswana amended its Employment Act to prohibit discrimination on the grounds of sexual orientation. In Namibia, the Labour Act 1992 prohibited discrimination on the ground of sexual orientation, but this protection was removed by the Labour Act 2007.

Progress has also been made in jurisdictions where sex between men remains criminalised, but where pragmatic approaches have been adopted and police have sought to develop constructive partnerships with MSM communities. For example, in parts of India and Papua New Guinea police participate in HIV education and sensitisation programmes delivered by MSM groups. In some countries, although sodomy laws remain on the statute books, police and prosecutors have a policy of not actively enforcing the laws. For example, the Singapore government has indicated that it will not require police to enforce criminal laws against consenting adult men for sexual behaviour in private. However, even in countries where such offences are no longer actively enforced, the mere existence of the offence adds significantly to stigma.

Developments in human rights law related to MSM

The criminalisation of consensual sex between adults violates human rights to privacy, equality and non-discrimination, which are protected by international human rights law. This has been confirmed by courts in India, South Africa, Hong Kong, Fiji, the US Supreme Court, the European Court of Human Rights and the UN Human Rights Committee.⁷⁸

The principal human rights relevant to consideration of whether sodomy offences violate international law are:

- the right to equal treatment (International Covenant on Civil and Political Rights (ICCPR) articles 2, 3, 26; African Charter on Human and Peoples' Rights (ACHPR) article 2; American Convention on Human Rights (ACHR) article 1)
- the right to human dignity and to be free from cruel, inhuman or degrading treatment or punishment (ICCPR articles 7, 17; ACHPR article 5; ACHR article 5)
- the right to privacy and to personal and social development (ICCPR article 1; ACHPR articles 19, 22; ACHR article 11).

In *Toonen v. Australia*⁷⁹ the United Nations Human Rights Committee found that the right to privacy guaranteed by the ICCPR was breached by a law that criminalised private sexual behaviour between consenting men. The United Nations Human Rights Committee has also found that discrimination against people on the grounds of sexuality is a breach of the right to equality and non-discrimination as contained in the ICCPR.⁸⁰

78. See: 'Principles on the application of international human rights law in relation to sexual orientation and gender identity (2007) available at: www.yogyakartaprinciples.org; see: *Toonen v. Australia*, HRC Communication No. 488/1992, U.N. Doc CCRP/C/50/D/488/1992 (1994); *Naz Foundation (India) Trust v. Government of NCT* (2009) 160 DLT 277; W.P. (C) No. 7455/2001 of 2009 (Delhi HC); *McCoskar v. State* (2005) FJHC 500; *Secretary for Justice v Yau Yuk Lung Zigo & Another* (2007) 3 HKLRD 903 *Leung T.C. William Roy v. Secretary of Justice* (2006) 4 HKLRD 211(C.A.); *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (CCT11/98) (1998) ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517; *Lawrence and Garner v. Texas*, 539 U.S. 558 (2003); *Norris v. Ireland*, Application No. 10581/83 (1988) ECHR 22.

79. *Toonen v. Australia*, *ibid*.

80. See for example *Young v. Australia*, HRC Communication No. 941/2000, U.N. Doc CCRP/C/78/D/941/2000 (2003).

Rwanda rejects criminalisation proposal

In 2009 Rwanda rejected plans to criminalise same-sex sexual practices or the encouragement of people to same-sex sexual practices. Minister of Justice Tharcisse Karugarama stated: “Sexual orientation is a private matter and each individual has his or her own orientation – this is not a State matter at all.”⁸³

The African Commission on Human and Peoples’ Rights has not yet considered challenges to legislation that criminalises sex between men. Senior human rights lawyers have advised the Commonwealth Lawyers Association that sodomy laws of African states contravene the ACHPR.⁸¹

ACHPR does not contain an express right to privacy, and article 18 refers to the status of the family as the “natural unit and basis for society”. However, this does not mean that the protections afforded by the ACHPR are less than those of the ICCPR. Article 18 is identical in substance to article 23 of the ICCPR, which has not prevented successful challenges to sodomy laws before the United Nations treaty bodies. The principal issue is the impact of the legislation on the inherent dignity and humanity of the individual. The ACHPR contains protections for the core values of dignity and personal and social development.

Toonen v. Australia sets an important precedent that should be taken into account by national courts and bodies such as the African Commission on Human and Peoples’ Rights, although it does not establish a universal rule. In determining whether legislation complies with the ICCPR, the specific circumstances of the legislation in each country must be assessed.

Legislation is considered to be in breach of the ICCPR if it arbitrarily interferes with privacy. A law is not considered in breach of the ICCPR if it is found to be reasonable in the circumstances, proportional to the end sought and necessary in the circumstances. However, given the evidence of the difficulties for HIV prevention programmes created by criminalisation, it would be very difficult to argue that sodomy offences are reasonable, proportional and necessary. In *Toonen v. Australia* the law was found to be unreasonable in the circumstances because no link was shown between the continued criminalisation of sex between men and the effective control of the spread of HIV. Further, the law was not being actively enforced. The United Nations Human Rights Committee rejected this argument that criminalisation was necessary for HIV prevention in Tasmania, and concluded:

... criminalization of homosexual practices cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of HIV/AIDS ... by driving underground many of the people at risk of infection ... (it) would appear to run counter to the implementation of effective education programmes in respect of HIV/AIDS prevention.⁸²

Leading Commonwealth cases on the human rights of MSM and transgender people

South Africa: National Coalition for Gay and Lesbian Equality case (1998)⁸⁴

This case concerned the constitutional validity of South African sodomy laws. The Constitutional Court found that the sodomy offences were unconstitutional because they breach rights to equality, non-discrimination and privacy. Justice Ackerman pointed out that such provisions encourage blackmail, police entrapment, violence and discrimination. He described the impact of sodomy offences on human dignity as follows:

(The) harm imposed by the criminal law is far more than symbolic. As a result of the criminal offence, gay men are at risk of arrest, prosecution and conviction of the offence of sodomy simply because they seek to engage in sexual conduct which is part of their experience of being human. Just as apartheid legislation rendered the lives of couples of different racial groups perpetually at risk, the sodomy offence builds insecurity and vulnerability into the daily lives of gay men. There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society.⁸⁵

81. Otty, T., Cooper, J., Farbey, J., Hobcraft, G. (Doughty Street Chambers), Smyth, M., Campbell, F. (Clifford Chance Solicitors) (London) (2010), ‘The Anti Homosexuality Bill 2009 (Uganda): legislative provisions and proposals relating to the criminalisation of homosexuality’. Opinion for the Commonwealth Lawyers Association, 9 March 2010.

82. *Toonen v. Australia* (488/1992), CCPR/C/50/D/488/1992 (1994); 1-3 IHRR 97 (1994) at para. 8.5; ‘Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health’, Commission on Human Rights, 16 February 2004, E/CN.4/2004/49 at para. 38.

83. IGLHRC (2009), ‘Rwanda: law criminalizing homosexuality not included in text of penal code revisions’, 23 December 2009.

84. South African Constitutional Court, *National Coalition for Gay and Lesbian Equality and Others v. Minister of Home Affairs and Others* (CCT10/99) (1999) ZACC 17; 2000 (2) SA 1; 2000 (1) BCLR 39.

85. *Ibid.* paras. 28–32.

India: Naz Foundation case (2009)

In 2009 the Delhi High Court judgment in the Naz Foundation case⁸⁶ decriminalised sex between consenting men in private in India's National Capital Territory. The case was brought by an Indian non-governmental organisation, which claimed that section 377 of the Indian Penal Code obstructed effective HIV prevention.

In the Delhi High Court hearing, India's National AIDS Control Organisation gave evidence that section 377 of the Indian Penal Code impedes HIV prevention efforts because men were reluctant to reveal same-sex behaviour due to the fear of arrest, making it difficult for public health workers to access them.

The judgment in the Naz Foundation case accepted the argument that criminalisation is harmful to HIV responses. The court concluded that to criminalise people because of their sexual orientation is against constitutional morality and principles of inclusiveness in the Indian Constitution. The court held that criminalisation is in breach of the article of the Indian Constitution that provides that no person shall be deprived of their life or personal liberty except according to procedure established by law. The court stated:

The sphere of privacy allows persons to develop human relations without interference from the outside community or from the State. The exercise of autonomy enables an individual to attain fulfilment, grow in self-esteem, build relationships of his or her choice and fulfil all legitimate goals that he or she may set. In the Indian Constitution, the right to live with dignity and the right of privacy both are recognised as dimensions of Article 21.

In addition, the court held that criminalisation of sex between men under section 377 violated articles of the Constitution related to equality before the law and prohibiting discrimination on the grounds of sex.

The Delhi High Court's judgment provides a summary of international sources, including:

- the Yogyakarta Principles,⁸⁷ developed by international human rights experts in 2007, which recognise that people of all sexual orientations and gender identities are entitled to full enjoyment of all human rights
- academic studies that have traced the colonial origins of legislation criminalising sex between men and which provide evidence of the harm it has caused to the self-worth and self-esteem of MSM
- the broad consensus of medical opinion that same-sex behaviour should not be regarded as a disease or disorder and should instead be regarded simply as another expression of human sexuality, and that furthermore there is no evidence capable of justifying criminalisation on public health grounds
- the rejection of arguments that decriminalisation would be damaging to the moral fabric of society.

Fiji: McCoskar case (2005)⁸⁸

The High Court of Fiji held that offences for sodomy and gross indecency between men were unconstitutional because criminal laws should not be used to discriminate against private consensual same-sex acts. The court stated that difference should not be the basis for exclusion, marginalization, stigma and punishment. The court accepted evidence that the offences had been unequally applied for prosecutions against homosexuals and therefore clearly offended the constitutional guarantee of equality.

86. *Naz Foundation (India) Trust v. Government of NCT (2009)* 160 DLT 277; W.P. (C) No. 7455/2001 of 2009 (Delhi HC). The Supreme Court has admitted appeals against the Delhi High Court judgment. The Indian government has not lodged an appeal. When the Supreme Court considers the appeals, its judgment will have national application.

87. 'The Yogyakarta Principles: principles on the application of international human rights law in relation to sexual orientation and gender identity', 2007. Available at: www.yogyakartaprinciples.org/principles_en.pdf

88. *McCoskar v. State* (2005) FJHC 500.

Chief Justice supports move to decriminalise sex between men in Ghana

The Ghana AIDS Commission has reported that the rate of HIV infection is increasing rapidly among MSM because discrimination is making it difficult for them to access treatment. “In Ghana, under the law, it is illegal for a man to have sexual intercourse with another man. Homosexuals are severely stigmatised, and this is one of the reasons why human rights groups are making moves to decriminalise homosexuality and open up the channels of treatment,” said Georgina Wood, Chief Justice of Ghana.⁹⁰

Uganda: Mukasa and Oyoo case (2008)⁸⁹

In the Mukasa and Oyoo case, the High Court of Uganda declared that rights guaranteed by Uganda’s Constitution apply to lesbians, gay men, bisexuals and transgender people regardless of their sexual orientation or gender identity. Mukasa was the president of an advocacy organisation for sexual minority rights (Sexual Minorities in Uganda). The case was brought against the government after officials raided Mukasa’s home without a search warrant. The officials detained a guest, Oyoo, and treated Mukasa and the guest in an inhuman and degrading manner amounting to sexual harassment and indecent assault.

The High Court ruled that the government was required to pay damages to Mukasa and Oyoo for violating their rights, torturing them, and seizing documents. The judgement confirmed that constitutional protections apply to all people, regardless of their sexual orientation or gender identity, including rights to personal liberty, privacy, respect for human dignity, and protection from torture, cruel, inhuman or degrading treatment or punishment.

Legal equality for transgender people

Due to the lack of laws recognising transgender identities, transgender people have often been excluded from basic rights associated with citizenship, such as passports, property rights, inheritance, employment, education and health care. They also experience harassment by police and discrimination in access to medical services, education, accommodation and employment. They rarely have access to legal protections from discrimination. Transgender people are also subject to police harassment and prosecution related to sodomy and sex work offences. Some Commonwealth countries, such as Malaysia, Samoa and Tonga, have specific criminal offences for female impersonation.

Lack of legal recognition of their gender identity means that transgender people are highly marginalised, which contributes to their HIV vulnerability. Many turn to sex work for income due to lack of educational and employment opportunities. Transgender populations often have very high HIV prevalence. For example, studies in Asia have found HIV prevalence of between 30% and 50% in some transgender populations in urban areas such as Delhi and Mumbai.

Among the Commonwealth states, laws enabling transgender people to change their sex for legal purposes in prescribed circumstances exist in South Africa, Pakistan, Singapore, India (electoral registration), the UK, Canada, Australia and New Zealand. In 2003 the South African government passed legislation amending the Birth and Death Registration Act to allow transgender people to request that their sex as entered in the official register be changed.

Since 2005 passport applicants in India have had the option of identifying themselves as male, female or “others” on the application form, enabling *hijras*⁹¹ to identify as “others” regardless of whether they have had gender reassignment surgery.⁹² The Indian electoral law was changed in 2009 to enable transgender people to register as third sex.

Apart from the Indian state of Tamil Nadu, application forms for other identity cards, such as a ration card or driver’s license, do not yet recognise a third gender identity or third sex category. In 2006 the Tamil Nadu government issued a regulation to improve the social status of transgender people.⁹³ This addresses identity cards, discrimination in access to education, options for vocational training and free gender reassignment surgery in state hospitals. A special state welfare board has also been established for transgender people.⁹⁴

89. International Humanist and Ethical Union (2008), ‘Human rights victory for Ugandan LGBTs’. Available at: www.ihcu.org/node/3369

90. UNAIDS (2010), ‘Report of the meeting of eminent African jurists on HIV and law in the 21st century’.

91. *Hijras* refers to a distinct cultural group of Indian transgender people.

92. See Indian Passports Office: <http://passport.gov.in/cpv/ppapp1.pdf>

93. Government of Tamil Nadu (2006), ‘Social welfare – rehabilitation of aravanis (eunuchs) recommendation sub-committee – orders Issued. G.O. (Ms) No.199, 21.12.2006. Available at: www.tn.gov.in/gorders/social/sw_e_199_2006.htm

94. See Tamil Nadu state policy, at: www.tn.gov.in/policynotes/archives/policy2008-09/pdf/swmp/women_child_welfare.pdf

In a series of rulings in 2009, the Supreme Court of Pakistan held that transgender citizens have rights to equal treatment and access to government benefits.⁹⁵ The case was filed after police arrested several transgender people. The Supreme Court ordered that transgender people, being equal citizens of Pakistan, should benefit from the federal and provincial governments' financial support schemes. The court held that transgender people enjoy constitutional protections. The court directed the government to ensure that police officers provide protection to transgender people from crime, add a third gender column on national identity cards, and register transgender people in electoral rolls.

Legislation and policy in the UK, Australia and New Zealand recognises the rights of transgender people to change legal sex. They are able to obtain a passport that identifies their sex as corresponding to their gender identity (regardless of whether the person has had gender reassignment surgery). In Australia and New Zealand a transgender person's change of sex is recognised by the law for the purpose of the validity of a marriage.⁹⁶ The decision of the Family Court of Australia in *In re Kevin*⁹⁷ confirmed that post-operative transgender people can marry according to their new sex.

Although historically relationships between police and transgender communities have often been poor, more recently in settings such as Tamil Nadu police are working in partnership with communities of transgender people to support HIV prevention. Effective community-based responses to law enforcement issues are characterised by involvement of transgender people in planning and delivering training and sensitisation for law enforcement personnel, and provision of access to legal aid for people whose rights have been violated.

Anti-discrimination protections for transgender people

There is legislation in the UK, Australia, New Zealand and some Canadian cities that provides protections from discrimination for transgender people in areas such as employment, accommodation, education and access to services. In the UK, the Sex Discrimination (Gender Reassignment) Regulations 1999 provide protection from discrimination in employment on gender reassignment grounds. In Australia, anti-discrimination laws related to transgender status were first introduced in 1992 (in the Australian Capital Territory), and since 2003 have been in place in all states and territories. In South Africa, the constitutional prohibition of discrimination based on "sexual orientation" was interpreted as covering transsexual people in the National Coalition for Gay and Lesbian Equality case.⁹⁸

95. *Dr Muhammad Aslam Khaki & Almas Shah (alias Boby) v. SSP (Operations) Rawalpindi & others*, Constitutional Petition 43/2009, Supreme Court of Pakistan, 4 November 2009; 23 December 2009.

96. *Attorney-General v. Otahuhu Family Court* (1994) 1 NZLR 603, High Court, Ellis J.

97. *In re Kevin* (Validity of Marriage of a Transsexual) (2001) FamCA1074 (Chisholm J), upheld by the Full Court of the Family Court of Australia: *The Attorney-General for the Commonwealth v. "Kevin and Jennifer" and Human Rights and Equal Opportunity Commission* (2003) FamCA 94.

98. *National Coalition for Gay and Lesbian Equality v. Minister of Justice* 1999 (1) SA 6 (Constitutional Court), para. 21.



*Outreach worker Isaiah Wabwire, from Alliance partner organisation DARAT, sits with injecting drug users 'Niko' and 'Omar', Nairobi, Kenya
© Nell Freeman for the Alliance*

7. People who inject drugs

Punitive drug control laws⁹⁹

Injecting drug use is a major factor in HIV transmission in Asia and is recognised as a rapidly emerging issue for Africa and the Caribbean. Evidence from Kenya, Malawi, Mauritius, Namibia, Botswana and Tanzania (Zanzibar) confirms increasing incidence of injecting drug use and the associated spread of HIV.¹⁰⁰

Injecting drug use should be considered primarily as a health issue, not a criminal justice issue. Drug dependency is a chronic, relapsing medical condition. Yet globally, punitive approaches have taken priority in the legal response to drugs. This approach has not worked to control drug use. Law enforcement has failed to prevent the availability of illegal drugs, and there is no evidence that increasing law enforcement meaningfully reduces the prevalence of drug use.¹⁰¹

The criminalisation of people who use drugs is fuelling the HIV epidemic. Criminal laws, disproportionate penalties, and punitive law enforcement practices result in negative health outcomes.¹⁰² Legal prohibitions on the provision of sterile needles and opioid substitution therapy (OST)¹⁰³ directly impede HIV prevention efforts. Some drug control efforts have resulted in human rights abuses, including police mistreatment, arbitrary detention, and

99. This section draws from: International Harm Reduction Association (IHRA) and Human Rights Watch (2009), 'Drugs, punitive laws, policies, and policing practices, and HIV/AIDS', New York: Human Rights Watch.

100. Beyrer, C. et al. (2010), 'Time to act: a call for comprehensive responses to HIV in people who use drugs', *Lancet*, p. 111.

101. See references cited in 'A global call to action: the Vienna declaration', Declaration of the XVIII International AIDS Conference. Available at: www.viennadeclaration.com/the-declaration.html

102. Cohen, J. (2004), 'Not enough graves: the war on drugs, HIV/AIDS, and violations of human rights', *Human Rights Watch* 16(8(C)): 36-42.

103. OST refers to the administration under medical supervision of a prescribed psychoactive substance pharmacologically related to the substance producing dependence. For example, methadone may be prescribed to people who are dependent on heroin.

denial of essential medicines and health services. Abusive law enforcement practices exacerbate stigma and reinforce systemic discrimination, which alienate people from services.

People who inject drugs are criminalised as a result of a range of offences, including possession of drugs for personal use, self-administration of drugs and possession of equipment for drug use, such as syringes.

People who inject drugs may not carry sterile syringes or other injecting equipment because of fear of arrest or other negative consequences that can follow from identification as a drug user, such as harassment and violence or dismissal from employment. Many do not seek treatment or attend harm reduction services for fear of arrest.

Laws that create criminal penalties for incitement to use drugs, or aiding and abetting drug use, exist in many countries. Such laws can criminalise outreach workers and act as a deterrent to harm reduction services. Harm reduction providers are frequently accused of facilitating drug use. Offences for possession of drug use equipment can deter harm reduction services from providing clean injecting equipment. Providers of harm reduction services sometimes face charges for aiding and abetting possession or use of drugs, or allowing premises to be used for an offence. The law is often obstructive or ambiguous in reference to OST, the provision of sterile syringes and other harm reduction approaches such as medically supervised safe injecting rooms and heroin prescription.

The penalties for possession of drugs for personal use can be severe and disproportionate to the crimes involved. Commonwealth member states that retain the death penalty for drug offences (usually restricted to trafficking cases) include Bangladesh, India, Malaysia, Pakistan, Singapore and Sri Lanka, and the death penalty has recently been proposed for Mauritius.¹⁰⁴

Police may target harm reduction services, seeing easy opportunities to harass, entrap and extort clients to supplement police salaries. In some countries police must fulfil quotas of arrests to maintain their status or be eligible for promotion. The pressure on police officers to meet arrest quotas exacerbates abuses by encouraging arrest of easy targets, such as people who use drugs, even if evidence of a crime is absent. Police presence can result in people who use drugs relocating away from health services and support networks.

People who use illegal drugs in many countries are included on government registers, with the result that their status as a drug user may be made known to others in government or the community. Registration as a drug user may be a precondition to receiving certain services, including HIV services. Being listed on a register can lead to loss of employment, housing or child custody. Ostracism and other forms of discrimination can result if a person's status as a registered drug user is disclosed to third parties.

Police presence at or near needle and syringe programmes or drug treatment centres drives people away from these services due to fear of arrest or police harassment. Police practices affect the context in which drugs are injected, and can lead to risk behaviour if people inject hurriedly in unsafe places to avoid arrest or resort to hasty and unsafe storage of injecting equipment to avoid detection. In one study, people who inject drugs who reported being beaten by police were more likely to report high-risk behaviours such as sharing syringes, and researchers concluded that a substantial number of new HIV infections could be averted by eliminating police beatings.¹⁰⁵

104. Gallahue, P. and Lines, R. (2010), 'The death penalty for drug offences: global overview 2010', London: IHRA.

105. Strathdee, S. et al. (2010), 'HIV and risk environment for injecting drug users: the past, present, and future', *Lancet* 376(9737): 268–84.

Enabling legal environments for harm reduction

United Nations agencies endorse comprehensive harm reduction services for people who inject drugs.¹⁰⁶ A comprehensive package of services includes:

- needle and syringe programmes
- OST and other drug dependence treatment
- HIV testing and counselling
- antiretroviral therapy
- prevention and treatment of STIs
- condom distribution programmes
- targeted information, education and communication
- vaccination, diagnosis and treatment of viral hepatitis
- prevention, diagnosis and treatment of tuberculosis.

International Guidelines on HIV/AIDS and Human Rights

States should review and reform criminal laws and correctional systems to ensure that they are consistent with international human rights obligations and are not misused in the context of HIV or targeted against vulnerable groups. ... Criminal law should not be an impediment to measures taken by States to reduce the risk of HIV transmission among injecting drug users and to provide HIV-related care and treatment for injecting drug users.

The interventions should be delivered using a range of modalities, including community outreach and peer-to-peer work, and should be implemented in the community, prisons and other closed settings.

Further interventions to address other social needs and protect the human rights of people who use drugs include the provision of legal services and advocacy for harm reduction to improve access to services and end police harassment and violence.¹⁰⁷

Supportive police attitudes are critical to the success of harm reduction programmes. Partnerships between police and public health services can occur where police use a community policing approach, with referral systems to health and welfare services, and training for police on HIV and human rights-based approaches.¹⁰⁸

OST reduces the spread of HIV, hepatitis C and other blood-borne diseases, and decreases deaths from drug overdose. Legal barriers exist in many countries to provision of OST due to scheduling of methadone and buprenorphine as prohibited or controlled drugs. For OST programmes to operate, laws need to enable medical practitioners to prescribe and supply these drugs lawfully.

OST has commenced in India and Bangladesh, but is as yet too small in scale to be effective as a response to expanding epidemics of HIV and other blood-borne viruses.

Harm reduction is cost effective. Each year 32 million needles and syringes are distributed to people who inject drugs in Australia. Research has estimated that Australia's needle and syringe programme prevented 32,050 new HIV infections and 96,667 new hepatitis C infections between 2000 and 2009, resulting in savings of AUD\$1.03 billion in health care costs.¹⁰⁹

Decriminalisation of drug use and possession is politically controversial, but has proven public health benefits. In 2001 Portugal abolished criminal penalties for drug possession, and people who use drugs were provided with therapy rather than prison sentences. Following decriminalisation, drug use and the rate of HIV infections among people who use drugs dropped, and the number of people seeking treatment for drug addiction increased.¹¹⁰

106. WHO, UNODC, UNAIDS (2009), 'Technical guide for countries to set targets for universal access to HIV prevention, treatment and care for injecting drug users', Geneva.

107. International HIV/AIDS Alliance (2010), 'Good practice guide: HIV and drug use'.

108. 'Report of the meeting on the development of the regional strategy for harm reduction in Asia and the Pacific 2010–2015: confronting HIV among people who inject drugs', 7–9 December 2009, Kuala Lumpur, Malaysia.

109. National Centre in HIV Epidemiology and Clinical Research, University of New South Wales, Department of Health and Ageing (2009), 'Return on investment 2: evaluating the cost-effectiveness of needle and syringe programs in Australia', Sydney: UNSW.

110. Greenwald, G. (2009), 'Drug decriminalization in Portugal: lessons for creating fair and successful drug policies', Washington: Cato Institute.

Law reform options include measures to:

- decriminalise possession of drug use equipment, and possession and use of small amounts of drugs for personal use
- facilitate lawful implementation of OST, sterile syringe programmes, medically supervised safe injecting facilities and heroin prescription programmes.

Medically supervised safe injecting facilities have been evaluated as a successful harm reduction measure, and exist in Australia, Canada and six European countries (Switzerland, Netherlands, Germany, Spain, Norway, Luxembourg). These facilities can be effective at reaching extremely marginalised people. Access is provided to other services through the facilities, such as needle exchange, HIV prevention information, medical care and counselling. Facilities have been demonstrated to reduce deaths and injuries from overdose, reduce public injecting and reduce transmission of hepatitis C and HIV.¹¹¹

Concerns about the harmful effects of a criminal justice approach on the health and human rights of people who use drugs have prompted a number of governments to decriminalise possession of small quantities of drugs for personal use. Many Latin American countries (including Brazil, Mexico, Argentina and Colombia) have decriminalised possession of drugs for personal use. Spain, Portugal and Italy do not consider possession of drugs for personal use to be a punishable offence. It is feasible to adopt models of decriminalisation of drug use that incorporate safeguards, such as licensed pharmaceutical supply, prescription or supervised use models in the case of drugs associated with problematic dependent use.¹¹²

The United Nations Office on Drugs and Crimes (UNODC) has raised concerns that criminalisation causes harm to the health of people who use drugs. UNODC encourages creative approaches to law enforcement, including not imprisoning petty offenders and avoiding use of performance indicators that promote arrests of people for minor offences.¹¹³

Some jurisdictions have protected drug users' access to harm reduction services by prohibiting police from arresting needle exchange participants for drug possession based on drug residue in used syringes, and by orders directing police not to patrol areas near syringe distribution sites.

Enabling legal environments in prisons and other closed settings

Prisons

People who inject drugs experience high rates of incarceration. Without harm reduction services in place, prisons and drug detention centres can be incubators for HIV, tuberculosis and hepatitis C epidemics. Drug use and sharing of injecting equipment occurs in many prison systems, and prisoners learn drug use behaviours from their peers. Provision of HIV testing and treatment and harm reduction services in prisons is important, including access to OST and condoms. Efforts are needed to ensure continuity of HIV and tuberculosis treatments and OST at all stages: while in police custody, during pre-trial detention, in transfer to prison, within the prison system and on release.

The implementation of prison OST programmes benefits prisoners, prison staff and the community. OST reduces heroin use, associated deaths, HIV-risk behaviours and criminal activity. Prison OST programmes provide the benefit of reduced heroin use in prisons, with associated reductions in morbidity and mortality. Released offenders are more likely to remain in the community rather than re-offending. OST in prisons is also associated with improvements in inmate manageability and prison safety.¹¹⁴

111. Della Bosca, J. 'Medically supervised injecting rooms: speech to Legislative Council New South Wales', Hansard, 22 June 2010.

112. See Rolles, S. (2009), 'After the war on drugs: blueprint for regulation', Bristol: Transform Drug Policy Foundation.

113. UNODC (2009), 'World drug report 2009', Vienna: UNODC, pp. 163ff.

114. Stover, H. and Michels, I. (2010), 'Drug use and opioid substitution treatment for prisoners', Harm Reduction Journal 7:17.

OST has been made available in many prison systems globally, including Malaysia, Canada, the UK and Australia. In India, a pilot OST programme has operated in Tihar prison, Delhi, since 2008. Initial success of the Tihar model has led to the programme being considered for replication in Sri Lanka and Maldives. The Tihar project is being carried out in collaboration with the All India Institute of Medical Sciences and UNODC.¹¹⁵

Prison needle and syringe distribution programmes have been demonstrated as safe for prison officers and effective in preventing transmission of HIV and other blood borne viruses. They are provided in more than 60 prisons in 11 countries globally.¹¹⁶

Drug detention centres

In some countries people spend years in drug treatment centres, regardless of whether they need treatment, and with limited legal oversight. “Treatment” provided at these centres may include military drills, hard labour and forced exercise.

Compulsory drug treatment or rehabilitation centres have been associated with allegations of torture and other severe human rights violations in South Africa, India, Singapore and Malaysia.¹¹⁷ Malaysian drug detention centres have used military approaches, involving paramilitary drills and military regimentation.¹¹⁸ In Singapore, people who use drugs can be arbitrarily detained for extended periods and may be caned if they relapse.

Punitive drug detention approaches are ineffective as a strategy to prevent drug use or HIV. Detention centres inappropriately treat drug dependence as a moral issue, attracting a punitive approach, rather than as a health issue. Services to treat drug dependence should be provided by health care professionals and therapy should be tailored to the individual clinical needs of the patient. Compulsory drug detention centres that rely on beatings and forced labour waste public resources, are in breach of human rights and should be closed down. Voluntary community treatment options should be provided, accompanied by psychosocial support.

Harm reduction in Malaysia¹¹⁹

The Malaysian government supports a national harm reduction programme. Although aspects of the legal environment remain highly punitive, progress is being made. By 2009 there were 68 methadone sites and 21 needle and syringe programme sites. The size and number of compulsory rehabilitation centres has been reduced.

The Malaysian government has also approved methadone maintenance programmes in prisons. By 2010 there were 151 methadone maintenance therapy centres nationwide, with 11 of these comprising the prison pre-release programme. In 2009 6,538 patients were receiving methadone through these centres.

Needle and syringe programmes have been accessed by a total of 11,059 people who inject drugs, although this is still a small proportion of the total need. It is critical to reach a much larger numbers of people who inject drugs with harm reduction interventions to reduce new infections.

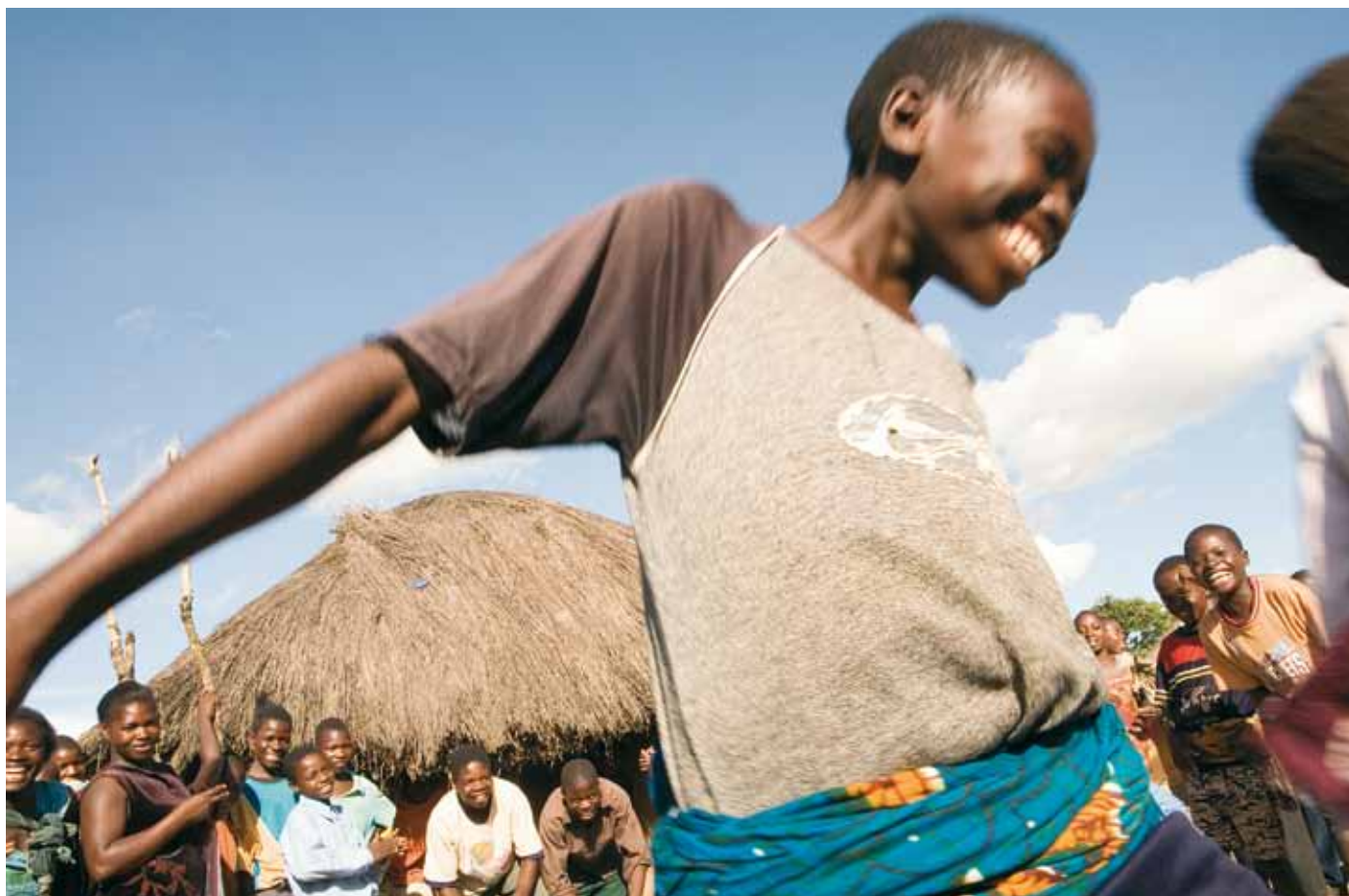
115. UNODC, ‘Oral substitution treatment (OST) for drug users in Tihar prisons’. Available at: www.unodc.org/india/en/india_-tihar-jail-looking-beyond-the-bars.html

116. Wodak, A., ‘AIDS incubators we can do without: HIV’, *The Australian*, 24 April 2010; ‘Harm reduction in places of detention: briefing 3’, IHRA, 2009.

117. OSI and IHRD (2009), ‘Human rights abuses in the name of drug treatment: reports from the field. Public health factsheet’.

118. Scorzelli, J. (2009), ‘Has Malaysia’s drug rehabilitation effort been effective?’, *International Journal of Psychosocial Rehabilitation* 13(2): 21–4.

119. United Nations Regional Task Force on Injecting Drug Use and HIV/AIDS for Asia and the Pacific (2009), ‘Malaysia country advocacy brief: injecting drug use and HIV’, UNODC and UNAIDS.



Students from Chiwoko Basic School perform a dance and drama display on HIV awareness in Chiwoko Village, Zambia © Nell Freeman for the Alliance

8. Recommendations

8.1 Civil society advocacy and government action

The following areas are recommended as priority advocacy objectives for civil society organisations and as priority action areas for governments.

8.1.1 National planning

- (i) Governments should develop national plans to define priorities for creating enabling legal environments for HIV responses. National HIV plans should define law and justice sector responsibilities related to the promotion and protection of human rights, and promote coordination and harmonised efforts between law ministries, health ministries, professional associations and community-based organisations.
- (ii) People living with HIV and most-at-risk populations should be represented in national planning processes related to HIV and legal environments.

8.1.2 Law reform

- (i) Sensitisation of the judiciary, religious leaders, legislators and key policymakers should occur on HIV-related law reform and human rights issues in a non-confrontational way (for example, using peer-based approaches such as judge to judge, religious leader to religious leader).
- (ii) Governments should review and repeal laws that criminalise or discriminate against people living with HIV and most-at-risk populations.
- (iii) Laws that discriminate against women in family matters, inheritance and property should be reviewed and repealed.
- (iv) Governments should engage with traditional and religious leaders to ensure that customary and religious laws are not applied to disadvantage women in matters of property, inheritance and violence protection.

- (v) Comprehensive domestic violence legislation should be enacted. Sexual offences laws should provide for the right of survivors of sexual assaults to PEP. Rape in marriage should be a criminal offence.
- (vi) Sodomy offences and other offences that criminalise sex between consenting adults (for example, gross indecency between men) should be repealed.
- (vii) Adult sex work and the sex industry should be decriminalised and subject to workplace health and safety laws.
- (viii) HIV-specific laws that criminalise HIV transmission, exposure to HIV or failure to disclose HIV status should be reviewed and repealed. Cases of intentional transmission of HIV should be prosecuted under the general criminal law, not HIV-specific laws.
- (ix) Legislation should be enacted making it unlawful to discriminate against people in employment, education, accommodation or access to services on the grounds of HIV status, sexual orientation, gender identity or occupation, including sex worker status. Sex work should be recognised as a legitimate occupation, in which workers have legal rights to health and safety protections.
- (x) Governments should remove legal barriers to condoms, comprehensive and age-appropriate sex education, sexual and reproductive health services, needle and syringe programmes, effective drug dependence treatment (including OST), and other evidence-based HIV prevention approaches.
- (xi) Transgender people should enjoy legal equality, including in matters of identification, marriage and entitlement to welfare support.
- (xii) Drug control legislation should support a response to drug use as a health issue, rather than a criminal justice issue.

8.1.3 Law enforcement and prisons

- (i) Police services should ensure that most-at-risk populations are not targeted by police for harassment, abuse, blackmail or violence. Protocols should be developed between law enforcement agencies and HIV prevention / harm reduction programmes that require the police not to harass staff or clients at services, and not to target services or their immediate surroundings.
- (ii) The practice of confiscating condoms and syringes for use as evidence, or destroying condoms and information resources on safe sex and safe injecting, should be prohibited.
- (iii) People living with HIV in prison or police custody should be treated with dignity. They should not be treated less favourably than other detainees, and they should be provided with access to comprehensive prevention, treatment and care services. Prisoners should have access to harm reduction services, including condoms and drug substitution programmes.
- (iv) Lessons learned from the successful implementation of innovative harm reduction programmes such as prison-based OST and needle and syringe programs and medically supervised injecting facilities should be taken into account by governments.
- (v) Prosecuting authorities should be educated about the social and scientific dimensions of HIV transmission so that prosecutions of people living with HIV do not occur for acts where the risk of transmission is extremely low or negligible. Prosecution guidelines should be developed related to offences of HIV exposure or transmission to ensure that prosecutions occur only as a last resort and are informed by accurate information about HIV risk and the nature of HIV transmission.
- (vi) The practice of subjecting people who use drugs to administrative detention in compulsory “treatment” centres should end.

8.1.4 Capacity-building of the legal sector

- (i) Governments should ensure that police, judges, prison officers and justice ministry officials have access to evidence-based information on HIV and the harmful public health impacts of punitive laws and law enforcement practices.
- (ii) Judicial leadership programmes on HIV and human rights should be supported.
- (iii) Human rights institutions such as human rights commissions and ombudsman offices should be supported to provide leadership on HIV-related issues, including initiatives to: address violence against women; reduce stigma associated with HIV, sex work, sex

between men and drug use; and provide redress for discrimination on the grounds of HIV, sexual orientation and gender identity.

- (iv) HIV should be mainstreamed in policies related to operations of prisons, courts, police and legal aid services. This requires workforce training on HIV and human rights, and measures to ensure that internal workplace policies protect from discrimination. Services administered by the justice sector should not contribute to HIV vulnerability and should respect human rights.

8.1.5 Community mobilisation, legal aid and access to justice

- (i) Governments should support Know Your Rights campaigns for people living with HIV, sex workers, MSM, transgender people and people who use drugs, and support community-based education and advocacy regarding HIV-related human rights.
- (ii) Governments should provide access to legal aid for people living with HIV, sex workers, MSM, transgender people, people who inject drugs and prisoners who have experienced human rights violations.
- (iii) People living with HIV and most-at-risk populations should be represented in law and policy reform processes. Community-based organisations should be supported in:
 - a. participating in law and policy reform
 - b. mobilising people living with HIV and most-at-risk populations to advocate for improvements to policy, legislation and law enforcement practices
 - c. sensitisation and capacity-building of law enforcement agencies
 - d. monitoring of human rights violations.

8.2 Commonwealth institutions and associations

8.2.1 The Commonwealth Heads of Government biennial meetings should provide global leadership in calling for urgent action by states to repeal punitive laws that criminalise people living with HIV and most-at-risk populations; to highlight the benefits to public health of human rights-based approaches to HIV; and to promote protective and enabling legal environments.

8.2.2 The Commonwealth Secretariat should:

- (i) provide advice and assistance to member countries to give effect to international human rights obligations as they relate to HIV, particularly the *International Guidelines on HIV/AIDS and Human Rights* (Annex I), the recommendations of the Special Rapporteur on the Right to Health related to criminalisation (Annex 2) and the recommendations of the UNDP-convened Global Commission on HIV and the Law (due to be issued by December 2011)
- (ii) develop a Commonwealth Plan of Action on HIV and Human Rights to guide high-level advocacy on action to remove punitive laws and practices that are obstacles to effective HIV responses, to ensure that these issues are addressed on the agendas of relevant meetings (including meetings of Commonwealth law, health, women's affairs and youth ministers), and to ensure use of its high-level convening power to facilitate exchanges of good practice and peer-learning among members
- (iii) integrate action to promote reform of criminal laws related to transmission of HIV, drug use, sex work and sexuality into the rule of law, human rights and human development work programmes of the Commonwealth Secretariat
- (iv) provide country-specific and regional technical assistance to efforts to improve legal environments affecting people living with HIV and most-at-risk populations, including assistance to judges, investigators, prosecutors, police, legal drafters and registrars on issues related to decriminalisation, gender equality and the human rights of people living with HIV, MSM, transgender people, sex workers and people who use drugs
- (v) facilitate the exchange of best practice in HIV prevention efforts that involve police working in partnership with communities, including MSM, transgender people, sex workers and people who use drugs.

8.2.3 The **Commonwealth Foundation** should:

- (i) provide practical assistance through grants, tools and resources to support civil society organisations (including community-based organisations and networks representing people living with HIV and most-at-risk populations) to coordinate advocacy efforts and to engage with policymakers on HIV-related legal issues
- (ii) work in partnership with civil society organisations to ensure that issues related to HIV legal environments are discussed at relevant forums, including the Commonwealth People's Forum, ministerial meetings and heads of government meetings.

8.2.4 The **Commonwealth Lawyers Association, Commonwealth Medical Association and Commonwealth Nurses Association** should encourage national associations to play a leadership role in advocating for protective and enabling laws, and for review of punitive laws and law enforcement practices that undermine HIV responses. The Commonwealth Lawyers Association can promote improved compliance of states with international human rights obligations by providing expert opinion on draft legislation such as bills in relation to same-sex sexual conduct, sex work, drug use, gender-based violence and gender equality.

8.2.5 The **Commonwealth Magistrates and Judges Association** should promote dialogue on the role of the judiciary in providing leadership on human rights-based approaches to HIV; provide forums for judicial officers to share lessons in redressing stigma and institutionalised discrimination within the justice system; and develop practical guidance to support magistrates and judges in addressing issues in relation to HIV, gender, sexuality, human rights and the law.

Annex 1

International Guidelines on HIV and AIDS and Human Rights

Guidelines for states (updated 2006) issued by the Office of the United Nations High Commissioner for Human Rights and UNAIDS are summarised below.

1. States should establish an effective national framework for their response to HIV, which ensures a coordinated, participatory, transparent and accountable approach, integrating HIV policy and programme responsibilities across all branches of government.
2. States should ensure, through political and financial support, that community consultation occurs in all phases of HIV policy design, programme implementation and evaluation, and that community organisations are enabled to carry out their activities effectively, including in the field of ethics, law and human rights.
3. States should review and reform public health laws to ensure that they adequately address public health issues raised by HIV, that their provisions applicable to casually transmitted diseases are not inappropriately applied to HIV, and that they are consistent with international human rights obligations.
4. States should review and reform criminal laws and correctional systems to ensure that they are consistent with international human rights obligations and are not misused in the context of HIV or targeted against vulnerable groups.
5. States should enact or strengthen anti-discrimination and other protective laws that protect vulnerable groups, people living with HIV and people with disabilities from discrimination in both the public and private sectors, ensure privacy, confidentiality and ethics in research involving human subjects, emphasise education and conciliation, and provide for speedy and effective administrative and civil remedies.
6. States should enact legislation to provide for the regulation of HIV-related goods, services and information, so as to ensure widespread availability of quality prevention measures and services, adequate HIV prevention and care information, and safe and effective medication at an affordable price. States should also take measures necessary to ensure for all persons, on a sustained and equal basis, the availability and accessibility of quality goods, services and information for HIV prevention, treatment, care and support, including antiretroviral and other safe and effective medicines, diagnostics and related technologies for preventive, curative and palliative care of HIV and related opportunistic infections and conditions. States should take such measures at both the domestic and international levels, with particular attention to vulnerable individuals and populations.
7. States should implement and support legal support services that will educate people affected by HIV about their rights, provide free legal services to enforce those rights, develop expertise on HIV-related legal issues and utilise means of protection in addition to the courts, such as offices of ministries of justice, ombudspersons, health complaint units and human rights commissions.

8. States, in collaboration with and through the community, should promote a supportive and enabling environment for women, children and other vulnerable groups by addressing underlying prejudices and inequalities through community dialogue, specially designed social and health services and support to community groups.
9. States should promote the wide and ongoing distribution of creative education, training and media programmes explicitly designed to change attitudes of discrimination and stigmatisation associated with HIV to understanding and acceptance.
10. States should ensure that government and the private sector develop codes of conduct regarding HIV issues that translate human rights principles into codes of professional responsibility and practice, with accompanying mechanisms to implement and enforce these codes.
11. States should ensure monitoring and enforcement mechanisms to guarantee the protection of HIV-related human rights, including those of people living with HIV, their families and communities.
12. States should cooperate through all relevant programmes and agencies of the United Nations system, including UNAIDS, to share knowledge and experience concerning HIV-related human rights issues and should ensure effective mechanisms to protect human rights in the context of HIV at international level.

Annex 2

Recommendations of the UN Special Rapporteur on the right to health

In April 2010, the UN Special Rapporteur on the Right to Health submitted a report to the UN Human Rights Council calling upon all states:¹²⁰

- (a) to take immediate steps to decriminalise consensual same-sex conduct and to repeal discriminatory laws relating to sexual orientation and gender identity, as well as to implement appropriate awareness-raising interventions on the rights of affected individuals
- (b) to repeal all laws criminalising sex work and practices around it, and to establish appropriate regulatory frameworks within which sex workers can enjoy the safe working conditions to which they are entitled. He recommends that states implement programmes and educational initiatives to allow sex workers access to appropriate, quality health services
- (c) to immediately repeal laws criminalising the unintentional transmission of or exposure to HIV, and to reconsider the use of specific laws criminalising intentional transmission of HIV, as domestic laws of the majority of states already contain provisions that allow for prosecution of these exceptional cases
- (d) to introduce monitoring and accountability mechanisms so as to ensure their obligations to safeguard the enjoyment of the right to health through legislative, judicial and administrative mechanisms, including policies and practices to protect against violations
- (e) to provide human rights education for health professionals, and to create an environment conducive to collective action and participation.

120. Human Rights Council (2010), 'Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover', 27 April 2010.

See <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.20.pdf>

Annex 3

Selected resources

Cameron, S. and Reynolds, L. (2010), 'The global criminalisation scan report 2010: documenting trends, presenting evidence', Amsterdam: GNP+.

Cáceres, C., Pecheny, M., Frasca, T., Rios, R.R., Pocahy, F. (2009), 'Review of legal frameworks and the situation of human rights related to sexual diversity in low and middle income countries: study commissioned by UNAIDS', Geneva: UNAIDS.

Commonwealth Lawyers Association (2009), 'Resolution on decriminalization of sexual orientation', 16th Commonwealth Law Conference, Hong Kong SAR, 5–9 April 2009.

Human Rights Council (2010), 'Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover', 27 April 2010.

Human Rights Watch (2008), 'This alien legacy: the origins of "sodomy" laws in British colonialism', New York: Human Rights Watch.

International Commission of Jurists (2009), 'Practitioners guide No. 4: sexual orientation, gender identity and international human rights law', Geneva: ICJ.

Inter-Parliamentary Union, UNDP, UNAIDS (2007), 'Taking action against HIV and AIDS', Geneva: UNAIDS.

Kirby, M. (2009), 'Homosexual law reform, an ongoing blind spot of the Commonwealth of Nations', address to the 16th Commonwealth Law Conference, Hong Kong, 8 April 2009.

OHCHR and UNAIDS (2007), 'Handbook on HIV and human rights for national human rights institutions', Geneva: OHCHR and UNAIDS.

Office of the United Nations High Commissioner for Human Rights and UNAIDS (2006), 'International guidelines on HIV/AIDS and human rights', Geneva: UNAIDS.

Ottosson, D. (2010), 'State sponsored homophobia: a world survey of laws prohibiting same sex activity between consenting adults', ILGA (www.ilga.org).

'The Yogyakarta Principles: principles on the application of international human rights law in relation to sexual orientation and gender identity', 2007. Available at: www.yogyakartaprinciples.org/principles_en.pdf.

UNDP and UNAIDS (2009), 'UNAIDS action framework: universal access for men who have sex with men and transgender people', Geneva: UNAIDS.

UNAIDS (2008), 'Addressing HIV-related law at national level – guidance note', Geneva: UNAIDS.

World Bank (2007), 'Legal aspects of HIV/AIDS: a guide for policy and law reform', Washington DC: World Bank.

Annex 4

Legality of sex between men in Commonwealth countries¹²⁰

Country	Maximum penalty for consensual sex between men	Legislation
Antigua and Barbuda	15 years	<p>Sexual Offences Act of 1995</p> <p><i>Article 12: Buggery</i></p> <ol style="list-style-type: none"> 1. A person who commits buggery is guilty of an offence and is liable on conviction to imprisonment: <ol style="list-style-type: none"> (a) for life, if committed by an adult on a minor (b) for 15 years, if committed by an adult on another adult (c) for 5 years, if committed by a minor. 2. In this section “buggery” means sexual intercourse per anum (anal intercourse) by a male person with a male person or by a male person with a female person. <p><i>Article 15: Serious indecency</i></p> <ol style="list-style-type: none"> 1. A person who commits an act of serious indecency on or towards another is guilty of an offence and is liable on conviction to imprisonment: <ol style="list-style-type: none"> (a) for 10 years, if committed on or towards a minor under 16 years of age (b) for 5 years, if committed on or towards a person 16 years of age or more. 2. Subsection 1 does not apply to an act of serious indecency committed in private between: <ol style="list-style-type: none"> (a) a husband and his wife (b) a male person and a female person each of whom is 16 years of age or more. 3. An act of “serious indecency” is an act, other than sexual intercourse (whether natural or unnatural), by a person involving the use of genital organ for the purpose of arousing or gratifying sexual desire.
Australia	Legal	
Bahamas	Legal	
Bangladesh	Life imprisonment	<p>Penal Code 1860</p> <p><i>Section 377: Carnal intercourse against the order of nature</i></p> <p>Penalty: imprisonment which may extend to life.</p>
Barbados	Life imprisonment	<p>Sexual Offences Act 1992</p> <p><i>Section 9: Buggery</i></p> <p>Any person who commits buggery is guilty of an offence and is liable on conviction on indictment to imprisonment for life.</p> <p><i>Section 12: Serious indecency</i></p> <ol style="list-style-type: none"> 1. A person who commits an act of serious indecency on or towards another or incites another to commit that act with the person or with another person is guilty of an offence and, if committed on or towards a person 16 years of age or more or if the person incited is of 16 years of age or more, is liable on conviction to imprisonment for a term of 10 years. 2. A person who commits an act of serious indecency with or towards a child under the age of 16 or incites the child under that age to such an act with him or another, is guilty of an offence and is liable on conviction to imprisonment for a term of 15 years. 3. An act of “serious indecency” is an act, whether natural or unnatural, by a person involving the use of the genital organs for the purpose of arousing or gratifying sexual desire.

120. Sources: Ottoson, T. (2010), ‘State sponsored homophobia: a world survey of laws prohibiting same sex activity between consenting adults’, ILGA (www.ilga.org); Godwin, J. (2010), ‘Legal environments, human rights and HIV responses among men who have sex with men and transgender people in Asia and the Pacific: an agenda for action’, Bangkok: UNDP.

Country	Maximum penalty for consensual sex between men	Legislation
Belize	10 years	<p>Criminal Code <i>Section 53: Unnatural crime</i> Every person who has carnal intercourse against the order of nature with any person or animal shall be liable to imprisonment for 10 years.</p>
Botswana	7 years	<p>Penal Code <i>Section 164: Unnatural offences</i> Any person who: (a) has carnal knowledge of any person against the order of nature (b) has carnal knowledge of any animal (c) permits any other person to have carnal knowledge of him or her against the order of nature is guilty of an offence and is liable to imprisonment for a term not exceeding seven years. <i>Section 165: Attempts to commit unnatural offences</i> Any person who attempts to commit any of the offences specified in section 164 is guilty of an offence and is liable to imprisonment for a term not exceeding 5 years. <i>Section 167: Indecent practices between persons</i> Any person who, whether in public or private, commits any act of gross indecency with another person, or procures another person to commit any act of gross indecency with him or her, or attempts to procure the commission of any such act by any person with himself or herself or with another person, whether in public or private, is guilty of an offence.</p>
Brunei	10 years	<p>Penal Code <i>Section 377: Carnal intercourse against the order of nature</i> Penalty: fine or prison sentence up to 10 years. <i>Sharia</i> law also operates, which criminalises sexual relations between male persons (<i>Liwaḥ</i>).</p>
Cameroon	5 years	<p>Penal Code of 1965 and 1967 <i>Section 347: Homosexuality</i> Any person who has sexual relations with a person of the same sex shall be punished with a term of imprisonment of 5 years and a fine of between 20,000 and 200,000 francs.</p>
Canada	Legal	
Cyprus	Legal	
Dominica	10 years	<p>Sexual Offences Act 1998 <i>Section 14: Gross indecency</i></p> <ol style="list-style-type: none"> Any person who commits an act of gross indecency with another person is guilty of an offence and liable on conviction to imprisonment for 5 years. Subsection 1 does not apply to an act of gross indecency committed in private between an adult male person and an adult female person, both of whom consent. For the purposes of subsection 2: <ol style="list-style-type: none"> an act shall be deemed not to have been committed in private if it is committed in a public place a person shall be deemed not to consent to the commission of such an act if <ol style="list-style-type: none"> the consent is extorted by force, threats or fear of bodily harm or is obtained by false and fraudulent representations as to the nature of the act the consent is induced by the application or administration of any drug, matter or thing with intent to intoxicate or stupefy the person that person is, and the other party to the act knows or has good reason to believe that the person is suffering from a mental disorder. In this section “gross indecency” is an act other than sexual intercourse (whether natural or unnatural) by a person involving the use of genital organs for the purpose of arousing or gratifying sexual desire.

Country	Maximum penalty for consensual sex between men	Legislation
Dominica (cont.)		<p><i>Section 16: Buggery</i></p> <ol style="list-style-type: none"> 1. A person who commits buggery is guilty of an offence and liable on conviction to imprisonment for: <ol style="list-style-type: none"> (a) 25 years, if committed by an adult on a minor (b) 10 years, if committed by an adult on another adult (c) 5 years, if committed by a minor and, if the court thinks it fit, the court may order that the convicted person be admitted to a psychiatric hospital for treatment. 2. Any person who attempts to commit the offence of buggery, or is guilty of an assault with the intent to commit the same, is guilty of an offence and liable to imprisonment for 4 years and, if the court thinks it fit, the court may order that the convicted person be admitted to the psychiatric hospital for treatment. 3. In this section “buggery” means sexual intercourse per anum (anal intercourse) by a male person with a male person or by a male person with a female person.
Gambia	14 years	<p>Criminal Code 1965</p> <p><i>Article 144: Unnatural offences</i></p> <ol style="list-style-type: none"> 1. Any person who: <ol style="list-style-type: none"> (a) has carnal knowledge of any person against the order of nature (b) has carnal knowledge of an animal (c) permits any person to have carnal knowledge of him or her against the order of nature is guilty of a felony, and is liable to imprisonment for a term of 14 years. 2. In this section “carnal knowledge of any person against the order of nature” includes: <ol style="list-style-type: none"> (a) carnal knowledge of the person through the anus or the mouth of the person (b) inserting any object or thing into the vulva or the anus of the person for the purpose of simulating sex (c) committing any other homosexual act with the person.
Ghana	25 years	<p>Criminal Code, 1960</p> <p><i>Section 104: Unnatural carnal knowledge</i></p> <ol style="list-style-type: none"> 1. Whoever has unnatural carnal knowledge: <ol style="list-style-type: none"> (a) of any person of the age of 16 years or over without his consent shall be guilty of a first degree felony and shall be liable on conviction to imprisonment for a term of not less than 5 years and not more than 25 years (b) of any person of 16 years or over with his consent is guilty of a misdemeanour (c) of any animal is guilty of a misdemeanour 2. “Unnatural carnal knowledge” is sexual intercourse with a person in an unnatural manner or with an animal.
Grenada	10 years	<p>Criminal Code</p> <p><i>Article 435:</i> “If any two persons are guilty of unnatural connexion (sic), or if any person is guilty of an unnatural connexion with an animal, every such person shall be liable to imprisonment for ten years.”</p>

Country	Maximum penalty for consensual sex between men	Legislation
Guyana	Life imprisonment	<p>Criminal Law (Offences) Act</p> <p><i>Section 352: Committing acts of gross indecency with male person</i></p> <p>Any male person, who in public or private, commits, or is a party to the commission, or procures or attempts to procure the commission, by any male person, of an act of gross indecency with any other male person shall be guilty of misdemeanour and liable to imprisonment for 2 years.</p> <p><i>Section 353: Attempt to commit unnatural offences:</i></p> <p>Everyone who:</p> <p>(a) attempts to commit buggery</p> <p>(b) assaults any person with the intention to commit buggery</p> <p>(c) being a male, indecently assaults any other male person</p> <p>shall be guilty of felony and liable to imprisonment for 10 years.</p> <p><i>Section 354: Buggery</i></p> <p>Everyone who commits buggery, either with a human being or with any other living creature, shall be guilty of felony and be liable to imprisonment for life.</p>
India	Legal	<p>Legal in the National Capital of Delhi, as a result of Naz Foundation case 2009. Application of the High Court of Delhi judgment to other jurisdictions of India is yet to be determined. Supreme Court proceedings are pending. The Union government is not appealing the High Court decision.</p>
Jamaica	10 years	<p>The Offences Against the Person Act</p> <p><i>Article 76 (Unnatural Crime)</i></p> <p>“Whosoever shall be convicted of the abominable crime of buggery (anal intercourse) committed either with mankind or with any animal, shall be liable to be imprisoned and kept to hard labour for a term not exceeding ten years.”</p> <p><i>Article 77 (Attempt)</i></p> <p>“Whosoever shall attempt to commit the said abominable crime, or shall be guilty of any assault with intent to commit the same, or of any indecent assault upon any male person, shall be guilty of a misdemeanour, and being convicted thereof shall be liable to be imprisoned for a term not exceeding seven years, with or without hard labour.”</p> <p><i>Article 78 (Proof of Carnal Knowledge)</i></p> <p>“Whenever upon the trial of any offence punishable under this Act, it may be necessary to prove carnal knowledge, it shall not be necessary to prove the actual emission of seed in order to constitute a carnal knowledge, but the carnal knowledge shall be deemed complete upon proof of penetration only.”</p>
Kenya	21 years	<p>Penal Code</p> <p><i>Section 162:</i> Any person who:</p> <p>(a) has carnal knowledge of any person against the order of nature</p> <p>(b) has carnal knowledge of an animal</p> <p>is guilty of a felony and is liable to imprisonment for 14 years</p> <p>provided that, in the case of an offence under paragraph (a), the offender shall be liable to imprisonment for 21 years if</p> <p>(i) the offence was committed without the consent of the person who was carnally known</p> <p>(ii) the offence was committed with that person’s consent but the consent was obtained by force or by means of threats or intimidation of some kind, or by fear of bodily harm, or by means of false representations as to the nature of the act.</p> <p><i>Section 163:</i> Any person who attempts to commit any of the offences specified in section 162 is guilty of a felony and is liable to imprisonment for 7 years.</p> <p><i>Section 165:</i> Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony and is liable to imprisonment for 5 years.</p> <p>(Sections amended by Act No. 5 of 2003)</p>

Country	Maximum penalty for consensual sex between men	Legislation
Kiribati	14 years	<p>Penal Code</p> <p>Sex between males is prohibited.</p> <p><i>Section 153</i> of the Penal Code prohibits “buggery” and “permitting buggery”. Penalty: imprisonment for 14 years.</p> <p><i>Section 155</i> prohibits gross acts of indecency between males “whether in public or in private”.</p>
Lesotho	Fine or imprisonment	Sodomy is prohibited as a common-law offence. It is defined as “unlawful and intentional sexual relationship per anum (anal intercourse) between two human males”.
Malawi	14 years	<p>Penal Code</p> <p><i>Section 153: Unnatural offences</i></p> <p>Anyone who:</p> <p>(a) has carnal knowledge of any person against the order of nature</p> <p>(b) has carnal knowledge of any animal</p> <p>(c) permits a male person to have carnal knowledge of him or her against the order of nature shall be guilty of a felony and shall be liable to imprisonment for 14 years, with or without corporal punishment.</p> <p><i>Section 156: Indecent practices between males</i></p> <p>Any male who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, shall be guilty of a felony and shall be liable to imprisonment for 5 years, with or without corporal punishment.</p>
Malaysia	Whipping and up to 20 years	<p>Penal Code</p> <p><i>Section 377A</i>: Carnal intercourse against the order of nature</p> <p>Punishment: whipping and up to 20 years imprisonment.</p> <p><i>Section 377D</i> criminalises “gross indecency”, maximum penalty 2 years in prison.</p> <p>State-level <i>Sharia</i> law operates to criminalise sexual relations between males (<i>Liwaḥ</i>). For example, Section 82 Syariah Criminal Offences Enactment 1995 (Sabah); Section 25 Syariah Criminal Offences (Federal Territories) Act 1997; Syariah Criminal Offences (State of Penang) 1996.</p> <p>Penalty: imprisonment for a term not exceeding 3 years or whipping not exceeding 6 strokes.</p>
Maldives	Whipping	<i>Sharia</i> law regarding sexual conduct is recognised by the Penal Code (Section 88) and Rules Relating to the Conduct of Judicial Proceedings (100 and 173). <i>Sharia</i> law punishment for sex between men is banishment for 1 to 3 years, imprisonment or a whipping of 10 to 39 strokes.
Malta	Legal	
Mauritius	5 years	<p>Criminal Code of 1838</p> <p><i>Section 250: Sodomy and bestiality</i></p> <p>1. Any person who is guilty of the crime of sodomy or bestiality shall be liable to penal servitude for a term not exceeding 5 years.</p>
Mozambique	Unspecified	<p>Penal Code (inherited from the Portuguese colonial era)</p> <p><i>Articles 70 and 71</i> add security measures on people who habitually practise acts against the order of nature, stating that such people shall be sent to labour camps.</p>
Namibia	Fine or imprisonment	Sodomy remains a crime according to the Roman–Dutch common law. Common law is a legal tradition based mainly on precedent court decisions; there is no codified sodomy provision in Namibia.

Country	Maximum penalty for consensual sex between men	Legislation
Nauru	14 years	Nauru adopted the Criminal Code of Queensland, including offences of having carnal knowledge against the order of nature, and indecent practices between males (sections 208, 211). Penalty for carnal knowledge against the order of nature: imprisonment with hard labour for 14 years.
New Zealand	Legal	
Nigeria	14 years; death penalty where <i>Sharia</i> applies	<p>Criminal Code Act <i>Section 214</i> Any person who: (1) has carnal knowledge of any person against the order of nature (2) has carnal knowledge of an animal (3) permits a male person to have carnal knowledge of him or her against the order of nature is guilty of a felony, and is liable to imprisonment for 14 years.</p> <p><i>Section 215</i> Any person who attempts to commit any of the offences defined in the last preceding section is guilty of a felony, and is liable to imprisonment for 7 years. The offender cannot be arrested without warrant.</p> <p><i>Section 217</i> Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony, and is liable to imprisonment for 3 years. The offender cannot be arrested without warrant.</p> <p>Several Northern Nigerian states have adopted <i>Sharia</i> laws, criminalising sexual activities between persons of the same sex. The maximum penalty for such acts between men is the death penalty. The states that have adopted such laws are: Bauchi (2001), Borno (2000), Gombe (2001), Jigawa (2000), Kaduna (2001), Kano (2000), Katsina (2000), Kebbi (2000), Niger (2000), Sokoto (2000), Yobe (2001), Zamfara (2000).</p>
Pakistan	Life imprisonment; death penalty if <i>Sharia</i> applies	<p>Penal Code 1860 <i>Section 377: Carnal intercourse against the order of nature</i> Maximum penalty: imprisonment for life. In parts of Pakistan sex between men is also prohibited under <i>Sharia</i> law, with penalties of up to 100 lashes or stoning to death.</p>
Papua New Guinea	14 years	<p>Criminal Code 1974 <i>Section 210</i> provides for the offence of sexual penetration against the order of nature. Penalty: imprisonment for a term not exceeding 14 years. <i>Section 212</i> provides for the offence of gross indecency between males. Penalty: imprisonment for a term not exceeding 3 years.</p>
Rwanda	Legal	A 2009 bill proposed a maximum penalty of life imprisonment.
Saint Kitts and Nevis	10 years	<p>Offences against the Person Act <i>Section 56</i> The abominable crime of buggery: up to 10 years' imprisonment, with or without hard labour.</p> <p><i>Section 57</i> Whosoever attempts to commit the said abominable crime, or is guilty of any assault with intent to commit the same, or of any indecent assault upon any male person, is guilty of misdemeanour, and being convicted thereof shall be liable to be imprisoned for any term not exceeding 4 years with or without hard labour.</p>

Country	Maximum penalty for consensual sex between men	Legislation
Saint Lucia	10 years	<p>Criminal Code <i>Section 132: Gross indecency</i></p> <ol style="list-style-type: none"> 1. Any person who commits an act of gross indecency with another person commits an offence and is liable on conviction on indictment to imprisonment for 10 years or on summary conviction to 5 years. 2. Subsection 1 does not apply to an act of gross indecency committed in private between an adult male person and an adult female person, both of whom consent. 3. For the purposes of subsection 2: <ul style="list-style-type: none"> (a) an act shall be deemed not to have been committed in private if it is committed in a public place (b) a person shall be deemed not to consent to the commission of such an act if <ul style="list-style-type: none"> (i) the consent is extorted by force, threats or fear of bodily harm or is obtained by false and fraudulent representations as to the nature of the act (ii) the consent is induced by the application or administration of any drug, matter or thing with intent to intoxicate or stupefy the person (iii) that person is, and the other party to the act knows or has good reason to believe that the person is, suffering from a mental disorder. 4. In this section “gross indecency” is an act other than sexual intercourse (whether natural or unnatural) by a person involving the use of the genital organs for the purpose of arousing or gratifying sexual desire. <p><i>Section 133: Buggery</i></p> <ol style="list-style-type: none"> 1. A person who commits buggery commits an offence and is liable on conviction on indictment to imprisonment for: <ul style="list-style-type: none"> (a) life, if committed with force and without the consent of the other person (b) 10 years, in any other case. 2. Any person who attempts to commit buggery, or commits an assault with intent to commit buggery, commits an offence and is liable to imprisonment for 5 years. 3. In this section “buggery” means sexual intercourse per anus by a male person with another male person.
Saint Vincent and the Grenadines	10 years	<p>Criminal Code <i>Section 146</i> Any person who: <ol style="list-style-type: none"> (a) commits buggery with any other person (b) commits buggery with an animal (c) permits any person to commit buggery with him or her is guilty of an offence and liable to imprisonment for 10 years.</p> <p><i>Section 148</i> Any person, who in public or private, commits an act of gross indecency with another person of the same sex, or procures or attempts to procure another person of the same sex to commit an act of gross indecency with him or her, is guilty of an offence and liable to imprisonment for 5 years.</p>
Samoa	5 years	<p>Crimes Ordinance 1961 <i>Section 58D</i> prohibits indecent acts between males, regardless of consent. <i>Section 58E</i> prohibits sodomy and consent is not a defence. Penalty for sodomy of a male: imprisonment for a term not exceeding 5 years.</p> <p><i>Section 58J</i> prohibits keeping of any premises used as a place of resort for the commission of indecent acts between males.</p> <p><i>Section 58N</i> provides an offence for a male impersonating or representing himself to be a female.</p>

Country	Maximum penalty for consensual sex between men	Legislation
Seychelles	14 years	Criminal Code of 1955 <i>Section 151: Any person who:</i> (a) has carnal knowledge of any person against the order of nature (b) has carnal knowledge of an animal (c) permits a male person to have carnal knowledge of him or her against the order of nature is guilty of a felony, and is liable to imprisonment for 14 years.
Sierra Leone	Life imprisonment	Offences against the Person Act 1861 <i>Section 61</i> of the above named act criminalises buggery and bestiality, with a penalty of life imprisonment.
Singapore	2 years	Penal Code <i>Section 377A: Act of gross indecency by male with another male person</i> Since 2007 police do not proactively enforce the provision. Penal Code (Chapter 22), Revised Edition 2007 <i>Section 377A: Outrages on decency</i> Any male person who, in public or private, commits, or abets the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be punished with imprisonment for a term which may extend to 2 years.
Solomon Islands	14 years	Penal Code <i>Section 160</i> criminalises buggery with another person; the permitting of a male person to commit buggery on him or her; and attempts. Penalty: imprisonment for 14 years. <i>Section 161</i> provides for a lesser offence of “committing any act of gross indecency” by persons of the same sex.
South Africa	Legal	
Sri Lanka	10 years	Penal Code <i>Article 365: Carnal intercourse against the order of nature</i> Penalty: imprisonment for a term which may extend to 10 years. <i>Article 365A: Gross indecency</i> Penalty: imprisonment for a term which may extend to 2 years and/or a fine.
Swaziland	Fine or imprisonment	Sodomy – sexual intercourse per anus between two human males – is prohibited as a common law offence. The government has plans to include prohibitions of all same-sex sexual acts in its revision of the sexual offences laws. The proposed penalties are imprisonment for a minimum period of 2 years or a minimum fine of E5,000.

Country	Maximum penalty for consensual sex between men	Legislation
Tanzania	Life imprisonment	<p>Penal Code of 1945</p> <p><i>Section 154: Unnatural offences</i></p> <p>1. Any person who:</p> <ul style="list-style-type: none"> (a) has carnal knowledge of any person against the order of nature (b) has carnal knowledge of an animal (c) permits a male person to have carnal knowledge of him or her against the order of nature commits an offence, and is liable to imprisonment for life and in any case to imprisonment for a term of not less than 30 years. <p><i>Section 155: Attempt to commit unnatural offences</i></p> <p>Any person who attempts to commit any of the offences specified under section 154 commits an offence and shall on conviction be sentenced to imprisonment for a term not less than 20 years.</p> <p><i>Section 138A: Gross indecency</i></p> <p>Any person who, in public or private commits, or is a party to the commission of, or procures or attempts to procure the commission by any person of, any act of gross indecency with another person, is guilty of an offence and liable on conviction to imprisonment for a term not less than one year and not exceeding five years or to a fine not less than one hundred thousand and not exceeding three hundred thousand shillings; save that where the offence is committed by a person of 18 years of age or more in respect of any person under 18 years of age, a pupil of a primary school or a student of secondary school the offender shall be liable on conviction to imprisonment for a term not less than 10 years, with corporal punishment, and shall also be ordered to pay compensation of all amount determined by the court to the person in respect of whom the offence was committed or any injuries caused to that person.</p>
Tonga	10 years	<p>Penal Code</p> <p><i>Criminal Offences Act, sections 136–40</i></p> <p>Sodomy and indecent assaults upon males are illegal. Penalty: imprisonment for a period not exceeding 10 years.</p> <p>Section 81 provides an offence for a male to impersonate a female.</p>
Trinidad and Tobago	25 years	<p>Sexual Offences Act 1986</p> <p><i>Section 13</i></p> <p>1. A person who commits buggery is guilty of an offence and is liable on conviction to imprisonment:</p> <ul style="list-style-type: none"> (a) if committed by an adult on a minor, for life (b) if committed by an adult on another adult, for 25 years (c) if committed by a minor, for 5 years. <p>2. In this section “buggery” means sexual intercourse per anus by a male person with a male person or by a male person with a female person.</p> <p><i>Section 16</i></p> <p>1. A person who commits an act of serious indecency on or towards another is guilty of an offence and is liable on conviction to imprisonment:</p> <ul style="list-style-type: none"> (a) if committed on or towards a minor under 16 years of age for 10 years for a first offence and to imprisonment for 15 years for a subsequent offence (b) if committed on or towards a person 16 years of age or more for 5 years. <p>2. Subsection 1 does not apply to an act of serious indecency committed in private between:</p> <ul style="list-style-type: none"> (a) a husband and his wife (b) a male person and a female person each of whom is 16 years of age or more, both of whom consent to the commission of the act. <p>3. An act of “serious indecency” is an act, other than sexual intercourse (whether natural or unnatural), by a person involving the use of the genital organ for the purpose of arousing or gratifying sexual desire.</p>

Country	Maximum penalty for consensual sex between men	Legislation
Tuvalu	14 years	<p>Penal Code</p> <p><i>Section 153</i> prohibits buggery or permitting buggery. Penalty: imprisonment for 14 years.</p> <p><i>Section 155</i> prohibits the commission of acts of gross indecency between males “whether in public or private”.</p>
Uganda	Life imprisonment	<p>The Penal Code Act of 1950</p> <p><i>Section 145: Unnatural offences</i></p> <p>Any person who:</p> <ul style="list-style-type: none"> (a) has carnal knowledge of any person against the order of nature (b) has carnal knowledge of an animal (c) permits a male person to have carnal knowledge of him or her against the order of nature commits an offence and is liable to imprisonment for life. <p><i>Section 146: Attempt to commit unnatural offences</i></p> <p>Any person who attempts to commit any of the offences specified in section 145 commits a felony and is liable to imprisonment for 7 years.</p> <p><i>Section 148: Indecent practices</i></p> <p>Any person who, whether in public or in private, commits any act of gross indecency with another person or procures another person to commit any act of gross indecency with him or her or attempts to procure the commission of any such act by any person with himself or herself or with another person, whether in public or in private, commits an offence and is liable to imprisonment for 7 years.</p>
United Kingdom	Legal	
Vanuatu	Legal	
Zambia	Life imprisonment	<p>The Penal Code Act</p> <p><i>Section 155. Any person who:</i></p> <ul style="list-style-type: none"> (a) has carnal knowledge of any person against the order of nature; or (b) has carnal knowledge of an animal; or (c) permits a male person to have carnal knowledge of him or her against the order of nature; <p>commits a felony and liable, upon conviction, to imprisonment for a term not less than 15 years and may be liable to imprisonment for life:</p> <p><i>Section 156.</i> Any person who attempts to commit any of the offences specified in section 155 commits a felony and is liable, upon conviction of not less than 7 years but not exceeding 14 years.</p> <p><i>Section 158. (1)</i> Any male who, whether in public or private, commits any act of gross indecency with a male child or person, or procures a male child or person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male child or person, whether in public or private, commits a felony and is liable, upon conviction, to imprisonment for a term of not less than seven years and not exceeding fourteen years.</p>

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