

Issues Paper – HIV and the Law

A leadership role for Senior Officials of the Law Ministries in supporting an effective response to HIV in the Commonwealth

Introduction

This paper has been prepared by the International HIV/AIDS Alliance and the Commonwealth HIV & AIDS Action Group (CHAAG) as part of a wider project involving civil society and state actors which focuses on 'Addressing the Structural Barriers to HIV & AIDS - Stigma, Human Rights and Law Reform in the Commonwealth'.

Our aim is to increase understanding of the legal frameworks that undermine the Commonwealths ability to respond effectively to HIV. A more detailed report illustrating the impact of specific laws and policies will be published to coincide with a Commonwealth World AIDS Day Lecture on Human Rights and HIV, with keynote speaker Justice Ajit Shah, to be held at Marlborough House on 30 November 2010.

This paper aims to foster a constructive dialogue with Senior Officials of the Law Ministries and other actors by highlighting the many issues that link criminalisation, legislation and discrimination to poor HIV responses in the Commonwealth. We hope that this will lead Senior Officials of the Law Ministries to schedule a meeting on HIV and the Law in 2011 to inform discussions and recommendations in the run up to the next Commonwealth Heads of Government Meeting.

The International HIV/AIDS Alliance (the Alliance)

The Alliance is a global partnership of NGOs and community-based organisations working in over 40 countries in Africa, Asia, Eastern Europe and Latin America and the Caribbean. This global partnership supports community action to prevent HIV infection, meet the challenges of AIDS and build healthier communities.

The Commonwealth HIV & AIDS Action Group (CHAAG)

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

Issues Paper – HIV and the Law

A leadership role for Senior Officials of the Law Ministries in supporting an effective response to HIV in the Commonwealth

1. HIV remains a public health crisis for the Commonwealth

The Commonwealth comprises over 30% of the world's population - and over 60% of people living with HIV. In many countries, sub-populations of sex workers, men who have sex with men (MSM), transgender people, injecting drug users and prisoners have much higher HIV prevalence than the general population. Measures to improve legal environments for HIV responses can assist HIV programmes to reach these populations who are most-at-risk of HIV, and stem the spread of the epidemic.

2. Punitive legal responses undermine efforts to halt and reverse HIV and AIDS

There is a trend towards use of punitive laws to address HIV. Many countries have introduced new laws criminalising HIV transmission. Increased penalties for sodomy and sex work have been proposed or enacted. Media attention around prosecutions and in response to draconian Bills is feeding stigma. This is a dangerous development that will lead to more people being infected with HIV, not less. Punitive legal environments make it more difficult for HIV programmes to reach sex workers, MSM and people who inject drugs. Leadership is required to reverse this situation.

Laws and law enforcement practices should support people living with HIV and most-at-risk populations to access HIV services – not drive them away. With human rights protections in place, people living with HIV and most-at-risk populations are more likely to access HIV services and participate in prevention, care and support programmes. Protecting public health and promoting human rights are mutually reinforcing strategies.

Efforts to improve legal environments for HIV responses require empowerment of communities to influence laws and to access the legal system. People living with HIV often do not know about the law or how to claim legal rights. Advances in fighting 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.

Police conduct can affect access to HIV services and to protection from violence. Punitive law enforcement practices impede HIV responses in the following ways:

- Confiscation of condoms or injecting equipment as evidence of illegal behaviour can place people at risk of HIV.
- Police harassment of peer outreach workers can stop prevention reaching the most vulnerable, hidden populations.
- Criminalisation can be a barrier to the formation of peer support groups, which are essential for effective delivery of HIV programmes.
- Censorship of materials can stop messages on sexual health or safer injecting reaching target audiences on the grounds that it aids and abets illegal acts.
- Police abuses increase stigma. 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 contributes to low self-esteem, which is associated with behaviours that increase risk for HIV.
- Fear of arrest can prevent most-at-risk populations from participating in planning and management of HIV programmes, which is required for effective responses.

3. Criminalisation of HIV transmission is an ineffective prevention response

Placing legal responsibility for preventing HIV transmission exclusively on people living with HIV undermines the public health message that prevention is a shared responsibility between partners. HIV transmission offences can discourage people from being tested, as lack of knowledge of one's HIV status can be a defence to a charge.

Applying criminal law to HIV transmission promotes fear and stigma, and reinforces the stereotype that people living with HIV are immoral and dangerous. Prosecutions are directed disproportionately at those who are marginalised, such as migrants and sex workers. These laws are likely to be used to prosecute women more often than men, because women are tested during pregnancy and are more likely to know their HIV status than men. Where HIV exposure or transmission is made a criminal offence, pregnant women may avoid antenatal care, for fear that they will test HIV-positive and be exposed to abuse or prosecution. Some laws have been drafted so broadly that transmission of HIV from mother-to-child is criminalised, with shockingly unjust results.

Criminal offences for HIV transmission are only warranted in cases where someone sets out to infect another person, and achieves this aim. HIV transmission as a result of forced sex, sex with a minor, or with intent certainly should be punished. Offences that already exist for rape, sexual assault and aggravated assault can be used to prosecute people in these situations. There is no need to enact new HIV-specific laws.

Rather than applying criminal laws, priority should be given to implementing evidence-based prevention programs. Laws and law enforcement should be directed at ensuring gender equality and women's freedom from violence and all forms of sexual coercion. Equal access to property and inheritance is essential, so that women and children are not driven into poverty and higher HIV vulnerability by the death of their spouse or dissolution of marriage. Legal measures that support women's economic empowerment can also support women to negotiate safety in their sexual relationships.

4. Sodomy offences drive men who have sex with men (MSM) away from services

Studies in countries of sub-Saharan Africa, the Caribbean, South and South East Asia have found HIV prevalence among MSM to be more than ten times that of prevalence among the general population. It is vital that prevention services reach this population.

Many Commonwealth countries have sodomy offences, inherited from the British colonial era. Sodomy offences promote violence and allow for blackmail, abuse and the destruction of people's lives. Criminalisation makes it difficult for HIV services to reach MSM or involve them in health promotion. In countries where sodomy is a crime, MSM are highly stigmatised, and fear discrimination, prosecution and violence if they identify themselves to health authorities. In addition to sodomy offences, police selectively enforce a range of other public order offences against MSM. Such law enforcement practices add to stigma and provide opportunities for police abuses.

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, the US Supreme Court, the European Court of Human Rights and the UN Human Rights Committee. The following 11 Commonwealth states do not criminalise homosexual conduct between adults: Australia, Bahamas, Canada, Cyprus, India (Delhi), Malta, New Zealand, Rwanda, South Africa, UK and Vanuatu. Some of these countries also have laws that protect MSM from hate crimes and prohibit discrimination due to sexual orientation.

Progress can be made where police are willing to work in partnerships with MSM communities. For example, in parts of India and Papua New Guinea (where sodomy remains a crime), police participate in HIV education programmes delivered by MSM. In some countries, although sodomy remains on the statute books, police and prosecutors have agreed not to actively enforce the law. The government of Singapore does not enforce offences for consensual homosexual conduct in private. However, even in countries where this offence is no longer enforced, its existence adds to stigma.

5. Decriminalisation of sex work helps HIV prevention reach those most-at-risk

Most countries of the Commonwealth still criminalise aspects of the sex industry, such as soliciting or keeping a brothel. Many countries do not criminalise the act of sex work itself. However, other aspects of the sex industry are illegal, which drives the industry underground, exposes sex workers to police abuses and contributes to corruption.

Some countries regulate the sex industry to protect health and safety. In many Latin American and European countries, sex work is legal and brothels are regulated. In South Africa, although sex work is technically illegal, the Labour Court recognises sex workers as having employment rights.

Evidence from Australia and New Zealand 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. In parts of Australia, discrimination against lawfully employed sex workers is illegal. These improvements to the legal environment have assisted with HIV prevention and sexual health promotion by enabling sex workers to engage in peer education under safe conditions and enabling workers to access sexual health services without fear of discrimination.

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 campaigns can raise their self-esteem and empower them, thereby encouraging sex workers to look after their health and to access HIV and sexual health services.

6. Legal support to harm reduction will prevent HIV spread due to injecting drugs

Injecting drug use is a major factor in Asia's escalating HIV epidemics and a rapidly emerging issue for Africa and the Caribbean. Injecting drug use should be considered primarily as a health issue, not a criminal justice issue. Harm reduction approaches that have proved to be effective in preventing HIV include needle and syringe programmes, substitution therapy (e.g. methadone programmes), peer education and decriminalisation of possession of injecting equipment.

It is essential that people working in harm reduction services, including outreach workers, are allowed to work without fear of arrest. This may require licensing of harm reduction services and legislation to protect needle and syringe programme workers from prosecution for carrying out their work. Supportive police attitudes are critical to the success of harm reduction. Police presence 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 risky behaviour if people inject hurriedly in unsafe places to avoid arrest.

Decriminalisation of drug use and possession has proven public health benefits. In 2001, Portugal abolished criminal penalties for drug possession and drug users were provided with therapy rather than prison sentences. Following decriminalisation, drug use and the rate of HIV infections among drug users dropped, and the number of people seeking treatment for drug addiction increased. Law enforcement measures that can help harm reduction efforts include not patrolling near syringe distribution or drug treatment sites and not jailing petty drug offenders.

Injecting drug users experience high rates of incarceration. Provision of testing, treatment and harm reduction services in prisons is important, including access to substitution therapy and condoms. Prison syringe programmes have been demonstrated to be safe for prison officers and effective in preventing transmission of HIV and other blood borne viruses, and are provided in more than 60 prisons in 11 countries globally. Compulsory drug treatment centres have been associated with severe human rights violations. Punitive drug detention approaches are ineffective as a strategy to prevent drug use or HIV. Drug dependency services should be voluntary, provided by health care professionals and tailored to individual clinical needs.

7. Areas for action

7.1 Leadership by Senior Officials of the Law Ministries

- Senior Officials of the Law Ministries should ensure that law reform to create enabling environments for effective HIV responses is a core theme of the 2011 Commonwealth Head of Government Meeting.
- Senior Officials of the Law Ministries should fully engage in the work of Ministries of Health in support of effective national HIV and AIDS plans.
- Law Ministers should foster greater dialogue and collaboration with Ministries of Health on HIV-related law reform and policy priorities, starting by engaging with the Commonwealth Health Ministers Meeting in 2011.

7.2 National planning to harmonise legal and health sector responses to HIV

- Governments should develop national plans in partnership with communities to define national priorities for creating enabling legal environments for HIV responses.
- The HIV response of the legal sector often lags behind the health sector. Coordination is required. National HIV Plans can define law and justice sector responsibilities relating to the protection of human rights, and promote coordination across government.
- Law officials and police should work in partnership with communities to combat stigma and to ensure that public health measures reach those most-at-risk.

7.3 Law reform

- Governments should review and, where necessary, repeal laws that criminalise or discriminate against people living with HIV and most-at-risk populations.

- Sodomy and sex work offences should be repealed.
- HIV-specific laws that criminalise HIV transmission, exposure to HIV or failure to disclose HIV status should be reviewed and repealed. Intentional transmission should be prosecuted under the general criminal law, not HIV-specific laws.
- 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.
- Governments should remove legal barriers to condoms and comprehensive, age-appropriate sex education and sexual and reproductive health services, needle and syringe programmes, drug dependence treatment (including substitution therapy) and other evidence-based HIV prevention approaches.

7.4 Law enforcement, prisons and drug detention

- In advance of law reform, pragmatic solutions can be negotiated through partnerships between police, judiciary and community leaders.
- Police services should monitor police practices to ensure that most-at-risk populations are not targeted for harassment, abuse, blackmail or violence.
- The practice of confiscating condoms and syringes for use as evidence, and/or destroying condoms and safer sex educational materials should be prohibited.
- People living with HIV in prison or police custody should be treated with dignity, should not be treated less favourably than other detainees and should be provided with access to treatment and care. Prisoners should have access to harm reduction services, including condoms and drug substitution programmes.
- The practice of detaining people who use drugs in compulsory drug treatment or rehabilitation centres is ineffective and inhumane, and should end.

7.5 Capacity building of the legal sector

- 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.
- Judicial leadership programmes on HIV and human rights should be supported.
- Human rights institutions such as Human Rights Commissions and Ombudsman's offices should be supported to provide leadership on HIV-related issues, including initiatives to address violence against women and discrimination on the grounds of sexual orientation and gender identity.
- HIV should be mainstreamed in policies relating to operations of prisons, courts, police and legal aid services. This requires training of staff on HIV and human rights, and measures to ensure workplace policies protect from discrimination.

7.6 Legal aid and access to justice

- Governments should support 'know your rights' campaigns on HIV and the law for people living with HIV, sex workers, MSM and people who use drugs.
- 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.
- 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:
 - participating in law and policy reform;
 - mobilising people living with HIV and most-at-risk populations to advocate for improvements to laws and law enforcement practices;
 - providing HIV education to law enforcement agencies; and
 - monitoring of human rights violations.

For more information, please contact Anton Kerr akerr@aidsalliance.org

<http://www.aidsalliance.org/homepagedetails.aspx?id=1>

<http://www.para55.org/index.html>