

BRIEFING: HIV AND THE LAW

COMMONWEALTH LAW MINISTERS MUST TACKLE LEGAL OBSTACLES THAT UNDERMINE EFFECTIVE HIV RESPONSES

HIV remains a public health crisis for the Commonwealth. The Commonwealth comprises 30% of the world's population – yet over 60% of all people living with HIV reside in Commonwealth countries.

In many Commonwealth countries, women and girls are highly vulnerable to HIV because of entrenched gender inequalities. Law reform to address the property and inheritance rights of women and girls and to strengthen violence protections can help to reduce HIV vulnerability.

Populations of sex workers, injecting drug users and men who have sex with men have much higher HIV prevalence than the general population. Measures to address the rights of these populations can assist HIV programmes to reach those most at risk and stem the spread of the epidemic.

This Briefing Paper summarises the key reasons why Law Ministries must ensure that legal obstacles to HIV responses are removed, and provides recommendations on priority actions for consideration.

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: *Addressing the Structural Barriers to HIV & AIDS - Stigma, Human Rights and Law Reform in the Commonwealth*. More detailed information is available from the report *Enabling legal environments for effective HIV responses: A leadership challenge for the Commonwealth*, available from the Alliance website, <http://www.aidsalliance.org/publicationsdetails.aspx?id=496>

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 of 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.

BRIEFING PAPER – HIV AND THE LAW

Leadership is key

Many Commonwealth countries are failing in their HIV responses because they are neglecting to address laws and law enforcement practices that present obstacles to effective HIV responses. To reverse this situation, the leadership of Law Ministers is key.

In its draft report of 3 May 2011, the Commonwealth Eminent Persons Group recommended:

Heads of Government should take steps to encourage the repeal of laws that may impede the effective response of Commonwealth countries to the HIV/AIDS epidemic, and commit to programmes of education that would help a process of repeal of such laws.

On 10 June 2011, the UN General Assembly Special Session on HIV/AIDS adopted the *Political Declaration on HIV/AIDS: Intensifying our Efforts to Eliminate HIV/AIDS*. This Declaration commits member states to review laws so as to:

create enabling legal frameworks to eliminate stigma, discrimination and violence related to HIV and promote access to HIV prevention, treatment, care and support and non-discriminatory access to education, health care, employment and social services, provide legal protections for people affected by HIV..., and promote and protect all human rights and fundamental freedoms with particular attention to all people vulnerable to and affected by HIV.

The UN General Assembly *Political Declaration on HIV/AIDS* also notes that many national HIV responses inadequately focus on populations that evidence shows are at higher risk, specifically men who have sex with men, people who inject drugs and sex workers.

Punitive legal responses undermine HIV prevention

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, sex work and drug use have been proposed or enacted. Media attention around prosecutions and in response to draconian Bills is feeding HIV-related stigma. These are dangerous developments that will lead to more people being infected with HIV, not fewer.

Law Ministers must ensure that laws 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.

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.
- 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 can prevent most-at-risk populations from participating in planning and management of HIV programmes, which is required for effective responses.

Criminalisation of HIV transmission is not an effective prevention response

Placing legal responsibility for preventing HIV transmission exclusively on people living with HIV undermines the public health message that HIV prevention is a shared responsibility between partners. Criminal offences for HIV transmission can discourage people from being tested, for fear of their HIV status being used against them in criminal prosecution.

Applying criminal law to HIV transmission promotes fear and stigma, and reinforces the stereotype that people living with HIV are immoral and dangerous. Where HIV exposure is a crime, pregnant women may avoid antenatal care, for fear that they will test HIV-positive and be exposed to 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. 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.

Laws should be directed at ensuring gender equality and women's freedom from sexual violence. 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. Legal measures that support women's economic empowerment can also support women to negotiate safer sex in their sexual relationships.

Sodomy offences require review

Studies across the Commonwealth, in Africa, the Caribbean and Asia have found HIV prevalence among men who have sex with men (MSM) to be more than ten times higher than 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. Such discriminatory laws expose men who have sex with men to violence and allow for blackmail and police abuses. In addition to sodomy offences, a range of other public order offences may be targeted at men who have sex with men. Criminalisation of sex between men makes it difficult for HIV services to reach men who have sex with men or involve them in health promotion. In countries where sodomy is a crime, men who have sex with men are highly stigmatised, and fear discrimination, prosecution and violence if they identify themselves to health authorities.

Progress can be made where health services work in partnerships with police and affected communities. For example, in some countries, AIDS authorities encourage police to participate in HIV education programmes delivered by men who have sex with men.

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. This drives the sex 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. Evidence from jurisdictions where sex work offences have been repealed confirms that decriminalisation of the sex industry has a positive effect on public health.

In decriminalised settings, health officials can work with sex worker communities to establish occupational health and safety standards and ensure that sex workers have the education and tools required to manage a safe work environment. Decriminalisation supports HIV prevention by enabling sex workers to educate their peers and their clients under safe conditions, and by enabling workers to access sexual health services without fear of discrimination.

Harm reduction services prevent HIV spread due to injecting drugs

Injecting drug use is a major factor in the escalating HIV epidemics of Asia and Eastern Europe 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. Drug dependency is a treatable illness.

Effective harm reduction approaches that prevent HIV include needle and syringe programmes, substitution therapy (e.g. methadone programmes), peer education and decriminalisation of possession of injecting equipment. The evidence base for harm reduction measures, which demonstrates the effectiveness of this approach, is extensive.

It is essential that people working in harm reduction services 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.

Cooperation between health ministries and police officials is critical to ensure needle and syringe programmes and substitution therapy services reach their target populations. The presence of police near needle and syringe programmes or drug treatment centres drives people away from these services due to fear of arrest or police harassment.

Routine detention and incarceration of people who use drugs fuels HIV, hepatitis C and tuberculosis (TB) transmission. Drug use continues in prisons, and disease control in prisons is often ineffective. After release, many drug users continue to use drugs, and overdose rates are high. So the health cost of incarceration is high, along with the human rights cost of treating drug dependency with incarceration rather than with effective treatment in the community. Treating drug use as a health issue, and providing substitution therapy programmes, saves lives, saves money and protects the rights of citizens.

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.

Decriminalisation of drug use 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. 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.

AREAS FOR ACTION AND LEADERSHIP BY HEALTH MINISTERS

Leadership by Law Ministries

- Law Ministries should ensure that commitments made at the June 2011 UN General Assembly Special Session on HIV/AIDS to review legal obstacles to HIV responses are fully implemented.
- Law Ministries should ensure that law reform to create enabling environments for effective HIV responses is discussed at Commonwealth meetings of Law Ministers, Law Officials, Health Ministers and Heads of Government.
- The HIV response of the legal sector often lags behind the health sector. Coordination is required. Law Ministries should fully engage in the work of Ministries of Health in support of effective national HIV and AIDS plans.

Law reform

- Governments should repeal laws that criminalise people living with HIV and most-at-risk populations. Sodomy and sex work offences should be repealed.
- Intentional HIV transmission should be prosecuted under the general criminal law, not through HIV-specific laws. Laws that criminalise HIV exposure or transmission that is not intentional should be repealed.
- Sex work should be recognised as a legitimate occupation, in which workers have legal rights to health and safety protections.
- Governments should ensure that laws are in place to protect women and girls from all forms of violence. Comprehensive domestic violence laws and sexual assault laws should be enacted.
- Governments should ensure that women and girls enjoy gender equality in their property and inheritance rights.
- Governments should remove legal barriers to condoms, sex education, needle and syringe programmes, drug dependence treatment (in particular substitution therapy, such as methadone and buprenorphine) and other evidence-based HIV prevention approaches.

Law enforcement, prisons and drug detention

- In advance of law reform, pragmatic solutions that protect everybody's dignity and human rights and further public health goals can be negotiated through partnerships between police, health authorities and community leaders.
- Law enforcement practices that undermine HIV responses, such as confiscating condoms and syringes for use as evidence in prosecutions, or restricting access to condoms and safer sex educational materials, should be prohibited.
- People living with HIV who are in prison should be provided with access to harm reduction services, including condoms and drug substitution programmes, and HIV treatment and care.
- The practice of detaining people who use drugs in compulsory drug treatment or rehabilitation centres is ineffective and inhumane, and should end. Drug dependence is more effective when it is offered on a voluntary basis in community settings and when it uses methods that are proven to be effective.

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.

Legal aid and access to justice

- Law Ministries should support 'know your rights' campaigns on HIV and the law for people living with HIV, sex workers, MSM and people who use drugs.
- Law Ministries 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.

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