Background: Recent calls for decriminalization and removal of punitive laws, policies, practices, stigma and discrimination that block effective responses to AIDS

1. In April 2009, after a process of multi-stakeholder consultation, UNAIDS released “Joint Action for Results – UNAIDS Outcome Framework 2009-2011”. Under the framework, UNAIDS will continue to advocate for scaling up comprehensive national HIV responses but will refocus its efforts on achieving results in nine priority areas. One of the key priority areas is removing punitive laws, policies, practices, stigma and discrimination that block effective responses to AIDS.

2. The commitment to prioritizing action on removing punitive laws, policies and practices reflects a growing recognition among key stakeholders that, as expressed by UNAIDS Executive Director Michel Sidibé, “punitive laws that discriminate against men who have sex with men, sex workers, injecting drug users, migrants and people living with HIV must be removed from the statute books, country by country”. Such calls for removal of discriminatory laws relating to drug use, sex work, and same-sex sexual activity, have been made not only by the UNAIDS Executive Director, but also by other high level officials, including Secretary-General of the United Nations, Ban Ki-Moon, who at the International AIDS Conference in Mexico City in August 2008 stated: “In countries without laws to protect sex workers, drug users and men who have sex with men, only a fraction of the population has access to prevention. Conversely, in countries with legal protection and the protection of human rights for these people, many more have access to services. As a result, there are fewer infections, less demand for anti-retroviral treatment and fewer deaths. Not only is it unethical not to protect these groups; it makes no sense from a health perspective. It hurts all of us”. More recently, during the HIV/AIDS review at the 63rd United Nations General Assembly, the Secretary-General talked about the issue of criminalization of HIV transmission, noting that, “[i]n recent years, a growing number of countries have taken steps to criminalize HIV transmission” and adding that such measures have been “reducing the effectiveness of HIV prevention efforts by reinforcing the stigma.” Talking explicitly about decriminalization, Michel Kazatchkine, Executive Director of the Global Fund to Fight AIDS, Tuberculosis and Malaria, said in April 2009 that “[a] repressive way of dealing with drug users is a way of facilitating the spread of the [HIV] epidemic.” Kazatchkine continued: “If you know you will be arrested, you will not go for treatment. I say drug use cannot be criminalised. I’m talking about criminalising trafficking but not users. From a scientific perspective, I cannot understand the repressive policy perspective.” The High Commissioner for Human Rights, Navanethem Pillay, in December 2008 supported the call for a

---

2 Speech by Secretary General at the International AIDS conference in Mexico City, 3 August 2008, quoted UNAIDS, UN Guidance Note on HIV and Sex Work (2009, Geneva).
universal statement by the United Nations to abolish the criminal offences against men who have sex with men, saying that “ironically many of these laws, like apartheid laws that criminalised sexual relations between consenting adults of different races, are relics of the colonial era and are increasingly recognised as anachronistic and as inconsistent both with international law and with traditional values of dignity, inclusion and respect for all”.

On 2 July 2009, Justices Shah and Muralidhar of the Delhi High Court in their decision decriminalizing homosexuality, recognized the impediment created by criminalization to public health programming.

3. Such statements explicitly recognize that punitive approaches to drug use, sex work, and homosexuality fuel stigma and discrimination against people who use drugs, sex workers, and men who have sex with men, pushing them further into hiding and away from services to prevent, treat and mitigate the impact of HIV.

At the same time, the resources devoted to HIV prevention, treatment, care and support for these populations are not proportional to the HIV prevalence in these groups, which represents an ineffective use of resources and a failure to respect fundamental human rights.

(1) In many countries, people who use illicit drugs represent the smallest fraction of individuals receiving antiretroviral treatment, despite accounting for the majority of people living with HIV. Harsh drug laws effectively criminalize the status of being a drug user, leading many people who use drugs to end up in prison or in a revolving door of ineffective and coercive rehabilitation programmes, rarely receiving the health and social services for drug addiction or HIV prevention and treatment that they desperately need.

(2) Sex workers, whose conduct also attracts criminal penalties under laws prohibiting prostitution, soliciting, pimping, brothel-keeping and trafficking, often lack access to HIV services due to exploitation within the industry, as well as widespread police abuse. Forcible displacement of sex workers from commercial development areas further interferes with sex workers’ access to community-based HIV services. Prejudicial and coercive treatment of sex workers in health facilities deters them from seeking HIV treatment and care. Aggressive efforts to abolish human trafficking often translate into lack of attention or opposition to programmes that focus on the health and human rights of sex workers.

(3) In many countries, men who have sex with men, transgender people, lesbians, gays and bisexuals cannot protect themselves from HIV infection or live successfully if infected due to the discrimination, violence, marginalisation and other violations of human rights they face. Many governments either deny the existence of men who have sex with men, transgender people, lesbians, gays and bisexuals in their societies, and/or have not adequately invested in their health and human rights. This has a pernicious impact in terms of hampering their access to HIV and health services and making them even more

---


vulnerable to HIV. In some regions, as few as 12% of men who have sex with men have access to HIV services. Furthermore, where these groups are marginalised or criminalised, many fear to take up the HIV, health and other services that are available, because of the likelihood of facing discrimination, and in some places, violence or criminal prosecution.\(^7\)

4. By taking on “removal of punitive laws” as a priority action area, UNAIDS recognizes that UNAIDS Secretariat and Cosponsors have a mandate to do everything possible to create the conditions for achieving universal access to HIV prevention, treatment, care and support. This also underscores fundamental human rights values which are core to the United Nations.

5. Policy coherence amongst the UNAIDS Cosponsors on the removal of punitive laws and policies is likely to be a challenge. For example, the response to HIV has been shifting towards more medical, “test and treat” approaches which are being supported by a growing number of scientists and promoted by WHO staff (see issue paper 4 for more details). In addition, it is far from clear to what extent other Cosponsors – such as UNODC - the lead agency within the UNAIDS family for prevention and care of HIV among people who inject drugs and in prison settings, and UNFPA - the lead agency for prevention efforts targeting sex workers – will be ready to embrace calls for decriminalization and the removal of punitive laws and policies relating to drug use and sex work.

6. While some point to extensive documentation from scholarly research and NGO reports that criminal laws against sex work, drug use, and same-sex acts impede access to HIV services and undermine the capacity of sex workers, people who use drugs, and men who have sex with men and transgender people to act as agents of HIV prevention and care, others continue to question whether removal of punitive laws, policies and practices and decriminalization has an impact on HIV prevention and treatment, care and support.

7. Experience in providing advisory support to countries on establishing protective laws and removing punitive laws/provisions and policies has proven challenging and complex – requiring a significant level of effort and investment. Thus far progress and results have been mixed. UNAIDS Executive Director Michel Sidibé, in his speech to the 24th meeting of PCB, pointed to “progress being made on this front” [removal of punitive laws and practices], citing the release from prison of nine men accused of having sex with men in Senegal, advocacy “to governments from Burundi to Norway to the Czech Republic to refrain from punitive laws that criminalize people for who they are” and efforts to urge the Prime Minister of Thailand to revisit national policies on injecting drug use and on migrants. At the same time other countries have passed laws criminalizing same-sex acts or establishing overly broad provisions criminalizing HIV exposure and transmission. UNAIDS is likely to encounter a lot of resistance from Member States who may resist a push for changing laws, policies, and enforcement practices, arguing that “national laws are the purview of sovereign states”, “reflect democratically expressed values”, or are not easy to change.

8. By the end of 2009, the UNAIDS Secretariat, UNDP and other key Cosponsors will have to identify goals, strategies and realistic, achievable targets related to

---

\(^7\) S Whiter. UNAIDS: Decriminalisation is key to universal access to HIV treatment. PinkNews.co.uk, 22 December 2008.
the removal of punitive laws, policies and practices that block effective AIDS responses. Proposed strategies include: (1) promoting programmes to reduce stigma and discrimination and increase access to justice, (2) promoting rights-based approaches and a protective legal environment, and (3) strengthening the evidence base on human rights, law and HIV. As announced at the 24th PCB meeting, one key activity will be the establishment of a High Level Independent Commission on Criminal Law and HIV under the leadership of UNDP.\(^8\) The Commission will aim to:
(1) objectively assess the relationship between criminal law and HIV responses – looking specifically at issues of criminalization of: (1) HIV transmission and exposure and (2) behaviours/practices such as engaging in sex work, same sex sexual relations, injecting/using drugs.
(2) develop actionable evidence-informed and human rights based recommendations for law and policy reform which will facilitate and support the achievement of universal access to HIV prevention, treatment, care and support.

9. It is important to note that the success of goals and strategies for removal of punitive laws, policies and practices that block effective AIDS responses cannot ultimately be measured solely on the basis of how many punitive laws will be changed over the next years. Appropriate and realistic short- and medium-term indicators of success need to be established.

Questions for discussion
a) How can the Reference Group, and human rights advocates more broadly, best support the UNAIDS Executive Director, UNAIDS Secretariat and UNDP as they move towards implementation of priority area 5?
b) What advice can the Reference Group provide specifically related to the establishment of an Independent Commission on Criminal Law and HIV? (see draft concept note)
c) How can the evidence-base on the relationship between criminal law and HIV be strengthened? (see draft ToR)
d) What advice can the Reference Group provide related to the establishment of goals and strategies for removal of punitive laws, policies and practices as well as indicators of success?

Background documents


This issue paper was prepared by the Reference Group Secretariat to facilitate discussion at the Reference Group’s July 2009 meeting. Please do not reproduce, redistribute or cite.

\(^8\) Michel Sidibé, Crisis, opportunity and transformation: AIDS response at a crossroads, Programme Coordinating Board, 23 June 2009.