Defining the issue

1. In the *Declaration of Commitment on HIV/AIDS* (2001), governments committed themselves to:
   a. enacting, strengthening or enforcing “legislation, regulations and other measures to eliminate all forms of discrimination” against people living with HIV and members of vulnerable groups, and to ensuring their access to “education, inheritance, employment, health care, social and health services, prevention, support and treatment, information and legal protection while respecting their privacy and confidentiality”
   b. promoting women’s full enjoyment of human rights, and to reducing their vulnerability to HIV “through the elimination of all forms of discrimination, as well as all forms of violence against women and girls”.1

2. In the *Political Declaration on HIV/AIDS* (2006), governments committed to “overcoming legal, regulatory or other barriers that block access to effective HIV prevention, treatment, care and support, medicines, commodities and services”.2

3. Since 2001, according to UNGASS progress reports, the number of countries reporting having legal protection for people living with HIV and members of vulnerable groups against HIV-related discrimination has increased. However, one-third of countries report that they have not enacted laws and regulations to protect people living with HIV from discrimination, and many countries fail to protect some of the most vulnerable populations from discrimination, in particular, men who have sex with men, sex workers, and people who use drugs. However, 63% of countries report the existence of laws and policies that present obstacles to their ability to provide effective prevention, treatment, care and support for most at risk populations. These include laws against same-sex sexual behaviour (those engaging in such behaviour risk prison in 86 countries and the death penalty in 7 countries), sex work, and possession of drug paraphernalia (including sterile syringes) or trace amounts of narcotics resulting in harsh penalties including incarceration. Even where anti-discrimination laws have been adopted, they do not appear to be rigorously enforced, often because of inadequate budget allocations.

4. Indeed, draft bills that would address critical HIV-related issues such as domestic relations, gender-based violence, and discrimination languish on parliamentary agendas, while those that authorize coercive measures that have proven to be

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ineffective – such as, for example, compulsory HIV testing of certain people or in certain situations – swiftly pass. Since 2004, many West and Central African parliaments have hurriedly enacted legislation that, while containing some elements that are rights-based (such as protection from HIV-related discrimination), includes provisions such as restrictions on provision of HIV education to children, mandatory HIV testing of certain populations, and overly broad criminalization of HIV transmission.

5. In the area of women’s rights, more than 80 per cent of countries report having policies in place to ensure women’s equal access to HIV prevention, treatment, care and support. However, where policies and programmes targeting women do exist, they may be undermined by the lack of legal protection against violence, disinheritance, and other abuses relating to inequality that fuel women’s HIV vulnerability.

6. Without greater action to address the many problems related to HIV-related laws, universal access cannot be achieved. These problems include:
   a. lack of legal protection for people living with HIV, members of vulnerable communities and women
   b. legal barriers to implementation of comprehensive and evidence-informed HIV prevention, treatment, care and support
   c. the recent epidemic of “bad” HIV laws, including overly broad criminalization of HIV exposure and transmission and legal obligations to disclose status
   d. lack of proper implementation and enforcement of existing supportive laws in some countries
   e. people’s lack of knowledge of their rights and how to claim them, including through accessible and quality legal services
   f. problems with how existing laws are enforced, particularly against women and members of vulnerable populations
   g. lack of capacity among civil society organizations and Parliamentarians, among others, to advocate for and shape supportive laws
   h. lack of capacity within the UNAIDS Programme to monitor legal developments and intervene early, before “bad” legislation is drafted, by supporting civil society and Parliamentarians and providing technical assistance on enabling legal environments.

Providing guidance on addressing HIV-related law

7. After its eighth meeting and a telephone conference in January 2008 on legislative developments in West and Central Africa concerning the problematic “Ndjamena law”, the Reference Group established a sub-committee on legislation, including criminalization of HIV exposure and transmission. The sub-committee drafted two letters to Peter Piot, asking for greater leadership from UNAIDS and UNDP specifically related to the developments in West Africa; and saying that UNAIDS and UNDP should be ready and able to offer technical assistance early on and take a pro-active role in the process of developing HIV legislation at country and regional level. The letters pointed out that urgent action was required not only because of the developments in West Africa, but because another “model” legislation initiative is currently underway in Southern Africa and...
because legislative developments in Malawi, Uganda and Mozambique raise concerns. The most recent letter was issued in October, 2008. It also drafted a statement to support the UNAIDS and UNDP policy brief on criminalization of HIV transmission, released just prior to the International AIDS Conference in Mexico City, and urging countries to change laws and policies that stand in the way of effective HIV prevention and treatment.

8. In order to respond to the problematic Ndjamena law, UNAIDS Secretariat, with partners, including UNDP, held consultations in Dakar in July, 2007 and April, 2008, bringing together Parliamentarians, government officials, civil society and concerned international organisations to discuss the Ndjamena law and national laws; provided official UNAIDS alternative language to the problematic aspects of the Ndjamena law; provided official UNAIDS comments to pending law in some 8 countries; and with UNDP; and developed road maps for change for all countries affected by the Ndjamena law; and technical visits to four countries who either had pending laws or had indicated they were willing to reconsider their laws (visits ongoing).

9. UNAIDS Secretariat also sent an email to all staff which briefed them on what had happened in West and Central Africa, encouraged them to support positive efforts regarding the legal situation in-country, and included power-point presentations on standards and the role of law, a legislation checklist and a short guidance note on addressing the legal challenges relevant to national responses to HIV.

10. The guidance note points out that, unfortunately, work on law and HIV “is often not prioritized among donors or UN agencies in terms of providing the financial and technical support to countries to implement concrete programmes to address HIV-related law issues successfully. This can be a serious lacuna in support to national AIDS programmes that should be avoided.” It proposes a number of key programmes to address HIV-related law. It suggests that, in light of limited financial and human capacity, efforts by national stakeholders, the UN system and donors focus on four areas of legal challenge in the response to HIV in the following order of priority:

- First, community empowerment and mobilization to know the law and to access justice;
- Second, monitoring and assessment of the law’s impacts;
- Third, human rights training for key service providers and those responsible for law enforcement; and
- Fourth, legislation and law reform.

11. The guidance note was originally drafted for UNAIDS secretariat staff and has been shared by some staff informally with their national partners. Towards the guidance note’s revision and finalisation, the Reference Group is invited to advise the UNAIDS Secretariat and UNDP on the most appropriate audience for the guidance note (i.e. UNAIDS Secretariat staff only, or expanded to include the entire UNAIDS Programme, governments, Parliamentarians, civil society, donors...
Questions for discussion

a. Does the Reference Group agree with the recommendations in Issue Paper 1 related to addressing the legal environment? What if anything should be changed, added or deleted?

b. Does the Reference Group agree with the approach outlined in the guidance note on addressing HIV-related law at national level? If not, what should be changed? Which audiences should this guidance note ultimately address?

c. Does the Reference Group agree with the suggestion of the sub-committee on legislation to issue a public statement to support the UNAIDS/UNDP policy on criminalization of HIV transmission, while at the same time calling on countries to change laws and policies that stand in the way of effective HIV prevention and treatment? What changes, if any, should be made to that statement before it is released?

Supporting documents

- Reference Group letter of 4 February 2008 to Peter Piot on “Mitigating the Risks Associated with the N’Djamena Model Law” (with briefing notes on the law)
- Reference Group letter of 23 October 2008 to Peter Piot on “Taking Action against Harmful HIV Legislation”
- Draft UNAIDS Guidance Note on Addressing HIV-related Law at National Level
- Draft Reference Group Statement on Criminalization of HIV Exposure and Transmission