Criminalising Homosexuality and Public Health: Adverse Impacts on the Prevention and Treatment of HIV and AIDS

HUMAN DIGNITY TRUST

Structural factors, such as stigma, discrimination and violence based on sexual orientation and gender identity and the criminalization of same-sex sexual practices, contribute to hindering the availability, access and uptake of HIV prevention, testing and treatment services among gay men and other men who have sex with men.

UNAIDS, The Gap Report, 2014.[1]

This is one in a series of notes produced for the Human Dignity Trust on the criminalisation of homosexuality and good governance. Each note in the series discusses a different aspect of policy that is engaged by the continued criminalisation of homosexuality across the globe.

The Human Dignity Trust is an organisation made up of international lawyers supporting local partners to uphold human rights and constitutional law in countries where private, consensual sexual conduct between adults of the same sex is criminalised. We are a registered charity no.1158093 in England & Wales. All our work, whatever country it is in, is strictly not-for-profit.

Contents

1 UN Joint Programme on HIV/AIDS (UNAIDS), *The Gap Report*, 2014, p. 203. Available at: http://www.unaids.org/sites/default/files/media_asset/UNAIDS_Gap_report_en.pdf

Overview

01. The criminalisation of same-sex intimacy between consenting adults intersects with HIV/AIDS in multiple ways. This note addresses two broad concerns.

02. The first part of this note sets out research from scientific studies and statements from international organisations on the link between the criminalisation of homosexuality and the prevalence and incidence of HIV. Criminalisation hinders the availability, access and uptake of HIV prevention, testing and treatment services, thus increases HIV transmission. Due to this link, multiple international organisations have called for the decriminalisation of homosexuality on public health grounds alone. This part captures the public health rationale for decriminalisation, which can stand completely separately from human rights arguments for decriminalisation.

03. The second part of this note addresses the human rights concerns associated with HIV and criminalisation. This part of the note looks at three areas. First, HIV transmission has been used as an excuse to support criminalisation. Notwithstanding that this argument is empirically false, as shown in the first part of this note, this argument is also legally unsound. Secondly, at a societal level, criminalisation is an indicator of poor human rights protection in general, which creates an environment that facilitates the transmission of HIV. Thirdly, at an individual level, human rights law is relevant as criminalisation acts a barrier to lesbian, gay, bisexual and transgender (LGBT) people accessing healthcare. These human rights violations are health-specific and exist in addition to the more general violations engendered by the criminalisation of homosexuality.[2]

04. Although this note treats public health and human rights separately, in order to emphasise the point that there is an independent public health rationale to decriminalise, the two are obviously intertwined. As is evidenced below, the denial of human rights to LGBT people increases HIV transmission.

Terms used in this note

05. The term 'men who have sex with men' (MSM) is used by public health professionals when discussing the health risks emerging from sexual behaviour among gay and bisexual men, as well as men who do not identify in these ways. MSM is not an ideal term when articulating the right not to be criminalised for consensual same-sex intimacy, as such laws do more than criminalise physical sexual acts, they also have the effect of criminalising the LGBT identity. However, this note uses MSM in line with scientific usage, which also has the benefit of emphasising that HIV disproportionately affects certain groups, often referred to as 'key populations', including MSM and trans women.

2 These human rights are discussed in other briefing note in this series, *Criminalising Homosexuality and International Human Rights Law* and *Criminalising Homosexuality and the Rule of Law*.

Public health – the link between criminalisation and HIV prevalence

06. Perceptions of public health and the criminalisation of homosexuality have been deeply entwined since at least Victorian times.[3] In the past and still today in some countries, criminalisation is defended using a range of standard, albeit ill informed, justifications. Public health arguments in favour of criminalisation include the fallacy that it curbs sexually transmitted infections, such as HIV. This section summarises a wide range of global expert evidence that firmly establishes that these arguments are wrong. Experts have repeatedly concluded that, rather than slowing the spread of HIV, the criminalisation of homosexuality seriously impedes the effectiveness of measures designed to reverse the HIV pandemic. Further, on an individual level criminalisation leads to increased morbidity and risk of death in those infected with HIV due the barriers it creates to accessing treatment.

Reports documenting increased HIV prevalence in countries that criminalise homosexuality

***The Lancet*, 'Common roots: a contextual review of HIV epidemics in black men who have sex with men across the African diaspora'[4]**

07. This Lancet report of July 2012 found that disparities in the prevalence of HIV infection in several African and Caribbean countries were directly correlated to the status of criminalisation:

> *The odds of HIV infection in black MSM relative to general populations were nearly two times higher in African and Caribbean countries that criminalise homosexual activity than for those living in countries where homosexual behaviour is legal. The odds of being infected with HIV are significantly greater in Caribbean countries that criminalise homosexual sex than in those where such behaviour is legal.*[5]

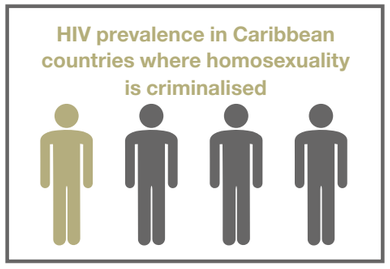
3 JS Mill's 'harm principle' was influential in both Victorian times and when England and Wales debated decriminalisation in the 1950s and 1960s. This principle provides that states may legislate to regulate the conduct of individuals in order to protect the wellbeing of others, thus giving a perceived reason to criminalise homosexuality if it is believed that public health will be improved. See, for example, McSherry, B., et al, *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law*, (2008), pp. 201-203.

4 Fenton, K.A., Flores, S.A., Heilig, C.M., Jeffries, W.L., Lane, T., Malebranche, D.J., Millett, G.A., Peterson, J.L., Steiner, R., Wilson, P.A., 'Common roots: a contextual review of HIV epidemics in black men who have sex with men across the African diaspora', *The Lancet*, 28 July 2012, Vol. 380, Issue 9839, pp. 411-423. Available at: http://www.humandignitytrust.org/uploaded/Library/Other_Reports_and_Analysis/The_Lancet__Common_roots__a_contextual_review_of_HIV_epidemics_in_black_men_who_have_sex_with_men_across_the_African_diaspora.pdf

5 *Ibid*, p. 417.

UNAIDS, 'Keeping Score II: A Progress Report towards Universal Access to HIV Prevention, Treatment, Care and Support in the Caribbean'[6]

08. This study of HIV prevalence in the Caribbean, commissioned by UNAIDS, found that the HIV prevalence among MSM rose from 1 in 15 in countries where homosexuality is not criminalised to 1 in 4 in countries where it is criminalised.



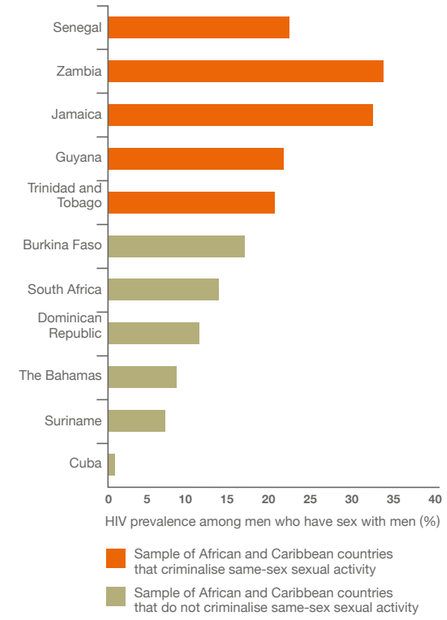
***The Lancet*, 'UNAIDS-Lancet Commission on Defeating AIDS – Advancing Global Health'[7]**

09. The UNAIDS-Lancet Commission's report of July 2015 sets out '*the path to ending AIDS as a public health threat*'.[8] Integral to this aim is decreasing the stigma attached to homosexuality in order to facilitate access to HIV prevention and treatment.[9] The report expressly '*highlights how criminalisation can negatively affect HIV transmission*'.

10. This link is demonstrated by the report's use of the following chart (opposite page) entitled the '*effect of criminalisation of same-sex sexual activity on HIV prevalence in selected countries*'. This chart compares HIV prevalence in criminalising countries (top) with neighbouring non-criminalising countries (bottom):[10]

11. Elaborating on this data, the report found that:

> **"[In criminalising countries], there is increased fear and hiding, decreased provision and uptake HIV prevention services, and decreased uptake of HIV care and treatment services.[11]**



12. In addition to highlighting the risks faced by MSM, the report highlights the vulnerability of transgender women to HIV infection:

> *Transgender women are more likely to acquire HIV than most adults of reproductive age, and **19% of transgendered women are estimated to be living with HIV...** Transgender people often face stigma and ill treatment, including refusal of care, harassment, verbal abuse, and violence. Despite evidence of heightened HIV risk, the coverage of HIV prevention programmes among transgender people remains poor across all regions.*[12]

13. For the UNAIDS-Lancet Commission and the authors of their report, the link between the stigma associated with criminalisation and HIV rates is clear, and the solution is clear too, namely decriminalisation:

> *Stigma is often multi-layered, and can strongly interface with other structural drivers, such as gender inequality, poverty, human rights violations, and violence. This is particularly evident for marginalised groups. For both generalised and concentrated HIV epidemics, decriminalisation of sex work and of same-sex relations could avert incident infections through combined effects on violence, police harassment, safer work environments, and HIV transmission pathways.*[13]

6 UNAIDS, 'Report on the global AIDS epidemic', 2008; UNAIDS, 'Keeping Score II: A Progress Report towards Universal Access to HIV Prevention, Treatment, Care and Support in the Caribbean', 2008.

7 Buse, K., Dybul, M., Goosby, E., Hecht, R., Karim, S.S.A., Kilonzo, N., Legido-Quigley, H., McManus, J., Mogedal, S., Piot, P., Resch, S., Ryckman, T., Sidibe, M., Stover, J., Watts, C., 'UNAIDS-Lancet Commission on Defeating AIDS – Advancing Global Health', *The Lancet*, 11 July 2015, Vol. 386, No. 9989, pp. 171-218. Available at: http://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736(15)60658-4.pdf

8 *Ibid*, p. 171.

9 *Ibid*, p. 178.

10 *Ibid*, p. 178.

11 *Ibid*, p. 178.

12 *Ibid*, p. 179.

13 *Ibid*, p. 181.

14. The UNAIDS-Lancet Commission draws its expertise from diverse backgrounds, including from criminalising countries. The Commission is Co-Chaired by Joyce Banda (Former President of Malawi), Nkosazana Dlamini Zuma (Chairperson, African Union Commission), and Professor Peter Piot (Director, London School of Hygiene & Tropical Medicine).[14] Malawi continues to criminalise consensual same-sex intimacy, as do most members of the African Union.

***AIDS,* 'Hidden from Health: structural stigma, sexual orientation concealment, and HIV across 38 countries in the European MSM Internet Survey'[15]**

15. Although not concerned with criminalisation per se, this report from June 2015 studies the link between the stigmatisation of male homosexuality and HIV prevalence among MSMs in Europe. The criminalisation of homosexuality is an extreme form of state-sanctioned stigmatisation. The report firmly debunks the myth that HIV rates can be reduced by forcing the LGBT identity underground via legislation or coercive social norms.

16. The report notes that, although in high-stigma countries MSM have fewer opportunities to meet and so report fewer sexual partners than in low-stigma countries, this does not reduce HIV prevalence:

    [R]ecent surveillance indicates an increase in new HIV diagnoses among MSM across Europe, especially in high-stigma countries. Our findings, therefore, suggest that stigma might increase the rate of new HIV infections as opportunities for transmission increase with technological advancements.[16]

17. Despite these stigmatised MSM having fewer sexual partners, the riskier sexual activity conducted in a stigmatised environment results in increased HIV incidence:

    Our results support a theory whereby oppressive legislation and social attitudes regarding homosexuality encourage the concealment of same-sex attraction, which suppresses both the odds of HIV diagnoses and opportunities for sexual contact, as well as access to prevention services and accompanying knowledge and precautionary behaviours. These results therefore contribute to a growing empirical literature documenting the role of social and political drivers of the HIV epidemic among MSM, as well as other syndemic risks among MSM, including mental health, substance abuse and suicidality.[17]

18. Governments that claim to legislate against the LGBT community for reasons of public health are thus, in fact, acting counterproductively to their espoused aims. Rather, as the report concludes, the correct course of action for governments concerned with HIV transmission is:

> **"[S]tructural and policy interventions must simultaneously reduce stigma towards MSM while also providing support to reduce their HIV transmission risk especially in current high-stigma countries.**[18]

14 *Ibid*, p. 211.

15 Berg, R.C., Hatzenbuehler, M.L., Hickson, F., M.L., Markus, U., Pachankis, J.E., Schmidt, A.J., Weatherburn, P., 'Hidden from Health: structural stigma, sexual orientation concealment, and HIV across 38 countries in the European MSM Internet Survey', *AIDS*, 19 June 2015, Vol. 29, Issue 10, pp. 1239-1246. Available at: http://journals.lww.com/aidsonline/Fulltext/2015/06190/Hidden_from_health_structural_stigma,_sexual.15.aspx

16 *Ibid*, p. 244.

17 *Ibid*, p. 244.

18 *Ibid*, p. 244.

***The Lancet* 'The immediate effects of the Same-Sex Marriage Prohibition Act on Stigma, discrimination, and engagement on HIV prevention and treatment services in men who have sex with men in Nigeria: analysis of prospective data from the TRUST cohort'[19]**

19. This publication in The Lancet in July 2015 reported on the immediate effects of Nigeria's Same-Sex Marriage (Prohibition) Act, 2013 on HIV prevention and treatment. In addition to outlawing same-sex marriage, this Act places severe restrictions on LGBT people, for instance by prohibiting 'gay' organisations and banning same-sex couples from living together.[20]

This Lancet report found an increase in societal stigma after the legislation was passed that resulted in a 'significant increase' in MSM reporting:

a) Fear of seeking healthcare due to being MSM.

b) Avoiding seeking healthcare due to being MSM.

c) No safe places to go to socialise with other MSM.

d) Verbal harassment for being MSM.

e) Blackmail due to being MSM.

20. The increase in these indicators was shown in the report in the following graphical representations:

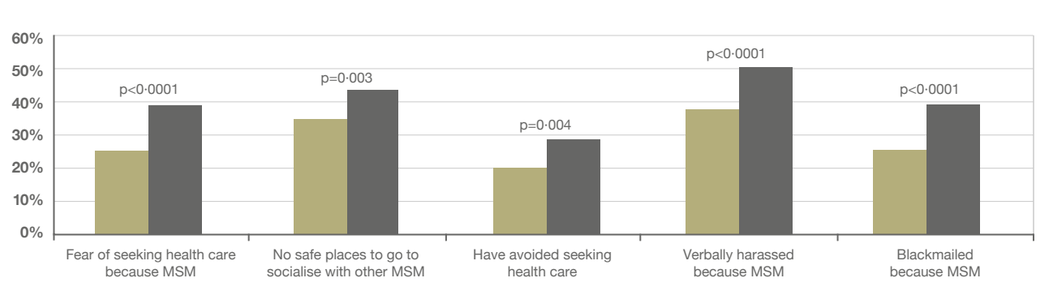


Figure 1: Reporting of discrimination and stigma during study visits in the prelaw and postlaw periods
MSM=men who have sex with men.

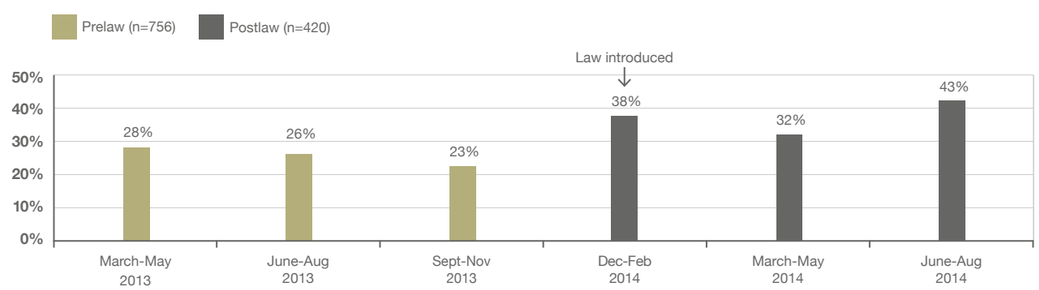


Figure 2: Cumulative lifetime experiences of reported fear of seeking healthcare services across study visits (n=1175 visits)

19. Ake, J., Baral, S.D., Blattner, W.A., Charurat, M.E., Kennedy, S., Keshinro, B., Njoku, O., Nowak, R.G., Orazulike, I., Schwartz, S.R., 'The immediate effects of the Same-Sex Marriage Prohibition Act on Stigma, discrimination, and engagement on HIV prevention and treatment services in men who have sex with men in Nigeria: analysis of prospective data from the TRUST cohort', *The Lancet*, July 2015, Vol. 2, Issue 2, pp 299-306. Available at: http://www.thelancet.com/journals/lanhiv/article/PIIS2352-3018(15)00078-8/abstract

20 More information on Nigeria's *Same-Sex Marriage (Prohibition) Act*, 2013 can be found on The Human Dignity Trust's website at: http://www.humandignitytrust.org/uploaded/Library/Other_Material/Briefing_on_Same_Sex_Marriage_Prohibition_Act_2013_final.pdf

21. This report summed up the implications of this data as follows:

[O]ur findings reinforce the negative HIV-related health effects of anti-homosexuality legislation in young MSM with a high HIV prevalence and incidence. Urgent efforts to characterise safe and trusted HIV prevention and treatment services are needed, particularly in countries with discriminatory legal environments, to minimise the risks of HIV acquisition and transmission and finally achieve an AIDS-free generation.[21]

22. The report also highlighted how the stigmatisation of MSM has trickle-down effects on the public health of women and the wider heterosexual population. **11% of the MSM surveyed reported as being married to or living with women.**[22] The impact on women of criminalising MSM/LGBT people is discussed further below.

Statements from international and regional bodies on the link between criminalisation and HIV: causes, reactions and solutions

23. Given the link between the criminalisation and stigmatisation of LGBT people and HIV transmission, it will come as little surprise that international organisations have spoken out on this matter. These organisations declare unanimously that decriminalisation will reduce HIV transmission and is a requirement of tackling the global HIV pandemic.

Global Commission on HIV and the Law

24. The United Nations Development Programme (UNDP)'s Global Commission on HIV and the Law has stated that criminalising homosexuality 'both causes and boosts' the rate of HIV infection among MSM.[23]

25. Over the course of 2011, the 14-member Commission analysed the relationship between legal systems and HIV in order to develop appropriate recommendations for necessary law reforms to reduce the prevalence of HIV. It assessed research and submissions from more than 1,000 authors covering 140 countries, and engaged parliamentarians, ministries of justice and health, judiciaries, lawyers, police, civil society and community groups in frank and constructive policy dialogue. The Commission concluded that:

> **"[T]he decriminalisation of homosexuality is an essential component of a comprehensive public health response to the elevated risk of HIV acquisition and transmission among men who have sex with men.**[24]

26. According to an expert submission made to the Commission, health service providers in criminalising countries are less likely to want to offer their services to MSM because of the possibility of criminal sanctions for abetting criminal activity.[25]

27. The Commission concluded unequivocally that laws criminalising consensual adult same-sex relations, as well as a range of other discriminatory laws and legal practices, are undermining effective HIV programmes. The Commission also found that:

a) Laws or legal provisions criminalising HIV transmission and exposure are arbitrarily and disproportionately applied to those who are already deemed inherently criminal, such as MSM. This situation not only illustrates and perpetuates existing inequalities, but also increases stigma against these men and impedes their access to existing HIV and health services.

b) In far too many countries, discriminatory and brutal policing is tacitly authorised by punitive laws and social attitudes. Such law enforcement practices violate the human rights of MSM and drive them away from seeking HIV support and health services.

OHCHR's and UNAIDS's International Guidelines on HIV/AIDS and Human Rights

28. In 2011, the United Nations Office of the High Commissioner for Human Rights (OHCHR) and UNAIDS issued the *International Guidelines on HIV/AIDS and Human Rights*. According to these guidelines, the threat of criminal sanctions can act as a deterrent to accessing HIV services:

> *[P]eople will not seek HIV-related counselling, testing, treatment and support if this would mean facing discrimination, lack of confidentiality and other negative consequences.*[26]

29. The High Commissioner and UNAIDS jointly recommended that:

> **"[C]riminal laws prohibiting sexual acts (including adultery, sodomy, fornication and commercial sexual encounters) between consenting adults in private should be reviewed, with the aim of repeal.**[27]

30. Further, a separate study commissioned by UNAIDS concerning HIV in the Caribbean called on governments to remove punitive laws, stating:

> **"[L]aws that perpetuate stigma and discrimination and limit access to health care and fuel the spread of HIV are not in the national interest.**[28]

UN Human Rights Committee

31. The UN Human Rights Committee is the treaty body that monitors the implementation of the International Covenant on Civil and Political Rights (ICCPR). All state-parties are obliged to submit regular reports to the Human Rights Committee on how they are implementing the ICCPR. The Human Rights Committee makes recommendations to state-parties via 'concluding observations'.[29]

21 Schwartz, S.R., et al, at n. 19 above, p. 300.

22 *Ibid*, p. 301.

23 Global Commission on HIV and the Law, *Final Report of the Global Commission on HIV and the Law*, 9 July 2012, p. 45.

24 *Ibid*, p. 48.

25 Beyrer, C., Baral, S., 'HIV and the Law: The Case of Gay, Bisexual and Other Men who have Sex with Men (MSM)', *Working Paper for the Global Commission on HIV and the Law*, 2011, p. 47.

26 Office of the United Nations High Commissioner for Human Rights and the Joint United Nations Programme on HIV/AIDS, *International Guidelines on HIV/AIDS and Human Rights*, 2011, p. 78.

27 *Ibid*, pp. 29-30.

28 UNAIDS, *The status of HIV in the Caribbean*, 2010. Available at: http://www.unaids.org/en/resources/presscentre/featurestories/2010/march/20100316msmcaribbean/

29 For more information, see: http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx

32. In its concluding observations on Cameroon, a criminalising country, the Human Rights Committee expressly linked criminalisation to HIV transmission:

> **The Committee is also concerned that the criminalization of consensual sexual acts between adults of the same sex impedes the implementation of effective education programmes in respect of HIV/AIDS prevention.**
>
> **The State party should take immediate steps towards decriminalizing consensual sexual acts between adults of the same sex, in order to bring its law into conformity with the [ICCPR] Covenant. The State party should also take appropriate measures to address social prejudice and stigmatization of homosexuality and should clearly demonstrate that it does not tolerate any form of harassment, discrimination and violence against individuals because of their sexual orientation. Public health programmes to combat HIV/AIDS should have a universal reach and ensure universal access to HIV/AIDS prevention, treatment, care and support.**[30]

33. The Human Rights Committee's other role is acting as a quasi-court to determine breaches of the ICCPR alleged against state-parties that have ratified the ICCPR's Optional Protocol. This second role is discussed later in this note.

UN Special Rapporteur on the Right to Health

34. Anand Grover, the previous Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (2008-2014), concluded that decriminalisation facilitates the achievement of States' obligations to establish prevention and education programmes for HIV/AIDS, saying:

> **[A] legal framework promoting an enabling environment has been noted as one of the most important prerequisites to achieve this goal.**[31]

30 UN Document No. 22/2006 on Cameroon (A/HRC/4/40/Add.1), para. 12. Available at: http://www1.umn.edu/humanrts/hrcommittee/cameroon2010.html

31 UN Human Rights Council, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, A/HRC14/20, 27 April 2010, para. 25. Available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.20.pdf

Commonwealth Eminent Persons Group

35. The Commonwealth Eminent Persons Group (EPG), a group of 10 leading figures from around the Commonwealth chaired by Tun Abdullah Badawi, former Prime Minister of Malaysia, was commissioned in 2009 by the Commonwealth Heads of Government to examine key areas for reform of the Commonwealth. After extensive study and consultations, the EPG unanimously recommended in its 2011 Report that steps be initiated to procure the repeal of laws criminalising homosexuality as a critical move in the fight against HIV. This was noted as particularly important given that Commonwealth countries comprise over 60% of people living with HIV globally, despite only representing about 30% of the world's population.[32]

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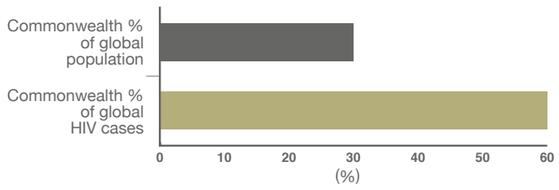


36. The EPG Report states:

> *We have… received submissions concerning criminal laws in many Commonwealth countries that penalise adult consensual private sexual conduct including between people of the same sex.* **These laws are a particular historical feature of British colonial rule. They have remained unchanged in many developing countries of the Commonwealth despite evidence that other Commonwealth countries have been successful in reducing cases of HIV infection by including repeal of such laws in their measures to combat the disease. Repeal of such laws facilitates the outreach to individuals and groups at heightened risk of infection.** *The importance of addressing this matter has received global attention through the United Nations. It is one of concern to the Commonwealth not only because of the particular legal context but also because it can call into question the commitment of member states to the Commonwealth's fundamental values and principles including fundamental human rights and non-discrimination.*[33]

32 Commonwealth Secretariat, *A Commonwealth of the People: Time for Urgent Reform, Report of the Eminent Persons Group to Commonwealth Heads of Government*, 2011, pp. 98-102.

33 Ibid, p.100.

37. Among the resulting EPG recommendations was that:

> **Heads of Government should take steps to encourage the repeal of discriminatory laws hat impede the effective response of CW countries to the HIV/AIDS epidemic, and commit to programmes of education that would help a process of repeal of such laws.**[34]

38. In 2012 the Commonwealth Heads of Government adopted this recommendation, indicating that Member governments should identify which, if any, of their laws are discriminatory, and what steps should be taken to address these.[35]

Outreach to MSM and trans women, not stigmatisation, is necessary to tackle HIV: in further support of a public health rationale for decriminalisation

39. The Political Declaration on HIV/AIDS from the UN General Assembly Special Session in July 2011 urged member states to focus HIV prevention interventions on '*populations that epidemiological evidence shows are at higher risk, specifically men who have sex with men, people who inject drugs and sex workers.*'[36] The UNAIDS-Lancet Commission echoed this list and adds to it young women, prisoners, migrants and, of relevance to this note, transgender people.[37]

40. MSM and trans women bear a disproportionately greater risk of HIV infection for a variety of reasons, including social marginalisation and sexual behaviour.[38] Public health interventions around MSM vulnerability are largely based on epidemiological evidence that receptive anal sex carries a high risk of HIV transmission.[39] MSM are 19 times more likely to be infected than other adult men.[40] Both the US President's Emergency Plan for AIDS Relief (PEPFAR) Programme and the World Health Organisation (WHO) recognise that prevention and health strategies tailored to MSM must be an essential component of any best practice response to the HIV epidemic.[41]

41. Rather than being stigmatised and discouraged from seeking HIV testing and treatment, MSM and trans women should be encouraged to do so, and educated about risky sexual behaviours and condom use. Gains can be made in reducing the incidence of HIV infection by outreach to these groups in particular. The criminalisation of homosexuality hinders the ability of governmental and non-governmental health organisations to do this.

34 *Ibid*, p. 102, Recommendation 60.

35 Commonwealth Secretariat, Agreement by Heads of Government to the EPG Recommendations. Available at: http://secretariat.thecommonwealth.org/files/252052/FileName/EPGRecommendationsOutcomes.pdf. See also: Commonwealth Secretariat, *Foreign Ministers agree on Draft Commonwealth Charter and EPG Recommendations*, 1 October 2012. Available at: http://thecommonwealth.org/media/press-release/foreign-ministers-agree-draft-commonwealth-charter-and-epg-recommendations

36 United Nations General Assembly, 2011, Political Declaration on HIV/AIDS.

37 At n. 7 above, pp. 171-218.

38 'A call to action for comprehensive HIV services for men who have sex with men', *The Lancet*, 20 July 2012, Vol. 380, Issue 9839, pp. 424–38.

39 Degruttola, V., Seage, G. R., 3rd, Mayer, K. H. & Horsburgh, C. R., 'Infectiousness Of HIV Between Male Homosexual Partners', *J Clin Epidemiol*, 1989, 42, pp. 849-56.

40 Global Commission on HIV and the Law, *Final Report of the Global Commission on HIV and the Law*, 9 July 2012, p. 45.

41 PEPFAR, *Technical Guidance on Combination HIV Prevention for MSM*, 2011. WHO, *Prevention and treatment of HIV and other STI among MSM and transgender people: recommendations for a public health approach*, 2011.

The irrationality complex

42. It defies public health logic that authorities hinder access to HIV prevention and treatment services, and even more so that legislatures in The Gambia, Uganda and Nigeria have passed new anti-gay laws that further hinder such access (as discussed further below). The irrational manner in which governments approach HIV was captured by Elizabeth Pisani, an epidemiologist and author of the book *The Wisdom of Whores: Bureaucrats, Brothels and the Business of AIDS*, when she stated:

> **People do stupid things - that's what spreads HIV… Yes, people do stupid things for perfectly rational reasons… So it's rational for a drug injector to share a needle due to a stupid decision made by a politician, and it's rational for a politician to make that stupid decision because they are responding to what they think the voters want.**[42]

43. Due to entrenched homophobia within these societies, anti-gay laws are popular, which results in politicians maintaining these laws or passing even more draconian laws for political gain. These laws change the behaviour of MSM by deterring them from accessing HIV prevention services and treatment, as demonstrated, for example, by the *The Lancet* after Nigeria's *Same-Sex Marriage (Prohibition) Act* was passed (see paragraph 19 above).

Reports on poor HIV knowledge among MSM and their exclusion from HIV health initiatives

44. Despite the importance of outreach, a global online survey of 5,000 MSM commissioned by the Global Forum on MSM & HIV found that only 36% of respondents were able to access treatment easily, and under 33% reported being able to access HIV education materials easily.[43]

> **Less than 40% of MSM in the Caribbean and 20% of MSM in the Asia-Pacific region are reached by HIV/AIDS prevention programmes.**[44] **By contrast, 60% of MSM are reached by HIV prevention services in countries where homosexuality is legal.**[45]

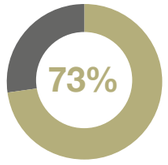
42 Elizabeth Pisani, *Sex, drugs and HIV – let's get rational*, Ted Talk, February 2010. Available at: https://www.ted.com/talks/elizabeth_pisani_sex_drugs_and_hiv_let_s_get_rational_1?language=en#t-1088628

73 Wilson, P., 'Access to HIV Prevention Services and Attitudes about Emerging Strategies: A Global Survey of Men Who Have Sex with Men (MSM) and their Health Care Providers', *The Global Forum on MSM & HIV*, 2011.

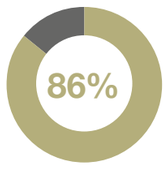
44 'Common roots: a contextual review of HIV epidemics in black men who have sex with men across the African diaspora', *The Lancet*, 28 July 2012, Vol. 380, Issue 9839, pp. 411-423. United Nations Development Programme, *Legal Environments, Human Rights, and HIV Responses among Men who Have Sex with Men and Transgender People in Asia and the Pacific*, July 2010, p. 3.

45 UNAIDS, *Report on the global AIDS epidemic*, 2008, p. 84.

45. Unsurprisingly, there is less awareness about HIV prevention among MSM in countries that criminalise homosexuality. This lack of knowledge reduces their ability to take precautions against HIV transmission. According to one study, 73% of Zambian MSM believed that anal sex was safer than vaginal sex.[46] 86% of Lesotho's MSM were unaware that receptive anal sex was even a risk factor in HIV transmission.[47] This in turn increases the probability that MSM in these countries will engage in riskier sexual behaviour. Studies of MSM in Cameroon, Senegal and Kenya have reported a strong correlation between non-participation in HIV prevention programmes and the likelihood of MSM having unprotected anal sex.[48]



According to one study, 73% of Zambian MSM believed that anal sex was safer than vaginal sex



86% of Lesotho's MSM were unaware that receptive anal sex was even a risk factor in HIV transmission

46. In June 2014, The Lancet Global Health report explained that:

    Prevention of HIV in these marginalised groups is difficult to address because of stigma, discrimination, and their sequelae. Key populations [including MSM] actually experience a double stigma related to both being associated with HIV and the reinforcement of pre-existing stigmas. This situation has led to inadequate access to service provision and treatment, in addition to many other negative outcomes.[49]

47. A report published in The Lancet in 2012 confirmed that MSM bear a disproportionate burden of HIV and yet continue to be excluded, sometimes systematically, from HIV services because of stigma, discrimination and criminalisation.[50] The report recounts the powerful correlations that have been found between the criminalisation of same-sex intimacy and a lack of financing and implementation of HIV programmes for MSM.[51]

46 Zulu, K., Bulawo, N.K., Zulu, W., 'Understanding HIV risk behavior among men who have sex with men in Zambia', *International AIDS Conference, Toronto, Canada*, 13 August 2006.

47 Baral, S., Adams, D., Lebona, J., et al. 'A cross-sectional assessment of population demographics, HIV risks and human rights contexts among men who have sex with men in Lesotho', *J Int AIDS Soc*, 2011, 14, p. 36.

48 Henry, E., Marcellin, F., Yomb, Y., et al., 'Factors associated with unprotected anal intercourse among men who have sex with men in Douala, Cameroon', *Sex Transm Infect* (2010) 86: 136–40; Larmarange, J., Wade, A.S., Diop, A.K., *et al*. 'Men who have sex with men (MSM) and factors associated with not using a condom at last sexual intercourse with a man and with a woman in Senegal' *PLoS One*, 2010, 5, e13189. Geibel, S., Luchters, S., King'Ola, N., Esu-Williams, E.., Rinyiru, A., Tun, W., 'Factors associated with self-reported unprotected anal sex among male sex workers in Mombasa, Kenya', *Sex Transm Dis*, 2008, 35, pp. 746–752.

49 Pulerwitz, J, 'Tackling stigma: fundamental to an AIDS-free future', *The Lancet Global Health*, June 2014, Vol. 2, Issue 6, pp. 311-312.

50 Altman, D., Beyrer, C., Collins, C., Dowdy, D., Katabira, E., Kazatchkine, M., Mayer, K.H., Sanchez, J., Sidibe, M., Sullivan, P.S., Trapence, G., 'A call to action for comprehensive HIV services for men who have sex with men', *The Lancet*, 20 July 2012, Vol. 380, Issue 9839, pp 424–38. Available at: http://www.humandignitytrust.org/uploaded/Library/Other_Reports_and_Analysis/The_Lancet_A_call_to_action_for_comprehensive_HIV_services_for_men_who_have_sex_with_men_Vol._380_Issue_9839_Pages_42438.pdf

51 *Ibid*, p. 433.

48. The disincentives to public disclosure of sexuality hinder HIV screening, maintaining the high prevalence of HIV.[52] As the criminalisation of homosexuality also makes it more difficult for same-sex couples to form lasting relationships and families, MSM in these countries are more likely to adopt non-monogamous, anonymous, unsafe sexual practices, exposing them to a higher risk of HIV infection.[53] This report viewed the decriminalisation of same-sex sexual intimacy, as a key structural intervention to legitimise HIV services for gay and other MSM.[54]

49. UNAIDS's The Gap Report, 2014 similarly found that:

    Prevailing stigma, discrimination and punitive social and legal environments based on sexual orientation and gender identity, often compounded by the limited availability of and access to sexual and reproductive health services for young people, are among the main determinants of this high vulnerability to HIV among young gay men and other men and other men who have sex with men.[55]

50. Decriminalising homosexuality was the foremost recommendation in this UNAIDS report to close the gap between the higher HIV prevalence in MSM and that of the general population.[56]

51. There is also a strong correlation between criminalisation and under-investment in HIV services for MSM.[57] This is partly because these laws make it politically difficult for governments to justify the necessary funding for providing HIV support.[58] More broadly, criminalisation lowers the visibility of MSM and leads to inaccurate data on HIV sub-epidemics.[59] By the end of 2011, only 87 countries had reported prevalence of HIV in MSM, with data most sparse for the Middle East and Africa, '*regions where criminal sanctions against same-sex sexual behaviour can make epidemiological assessments challenging*'.[60] This paucity of information means that HIV prevention programmes are less likely to be adequately resourced and driven by reliable.

Africa

52. Looking at some further regional analyses, a systematic review of National Strategic Plans on HIV and AIDS across Africa presented the inclusion of MSM in national HIV policy and programming. The review found most African governments exhibited neither adequate knowledge of epidemic dynamics among MSM nor the social dynamics behind African MSM's HIV risk. **Of 34 African National Strategic Plans, 22 identified MSM as being most at risk for HIV infection**, while 10 acknowledged the role of social stigma and marginalisation and 11 noted criminalisation of same-sex sexuality as a factor in MSM vulnerability.[61]

52 *Ibid*, p. 428.

53 *Ibid*, p. 433.

54 *Ibid*, p. 433.

55 At n. 1 above, p. 205.

56 *Ibid,* p. 212.

57 American Foundation for AIDS Research, *Achieving an AIDS-free generation for gay men and other MSM: financing and implementation of HIV programs targeting MSM*, 2012.

58 Beyrer, C., 'Global prevention of HIV infection for neglected populations: men who have sex with men', *Clin Infect Dis*, 2010, 50, Suppl 3, pp. 108–113.

59 Jenkins, C., 'Male sexuality and HIV: the case of male-to-male sex', Background Paper: Risks and Responsibilities, Male Sexual Health and HIV in Asia and the Pacific, New Delhi (2006): 11

60 'A call to action for comprehensive HIV services for men who have sex with men', *The Lancet*, 20 July 2012, Vol. 380, Issue 9839, pp. 424–438.

61 Gueboguo, C., Lyons, D., Makofane, K., Sandfort, T., 'Men who have sex with men inadequately addressed in African AIDS National Strategic Plans', *Global Public Health: An International Journal for Research, Policy and Practice*, 2013, 8, 2, pp. 129-143.

53. Despite the overwhelming evidence on the adverse effects of criminalisation on HIV transmission, a small number of African countries have passed, or attempted to pass, enhanced criminal laws against the LGBT community:

a) In October 2014, The Gambia amended its *Criminal Code* to include the offence of '*aggravated homosexuality*'. This offence increases the penalty for consensual same-sex intimacy from 14 years to life imprisonment, including when the '*offender is a person living with HIV Aids*'.[62]

b) Uganda's *Anti-Homosexuality Act,* 2014 included an identical offence to The Gambia's, plus the offence of the '*promotion of homosexuality*'.[63] Uganda's Constitutional Court has since struck down this law. To replace it, the Ugandan government has drafted the *Prohibition of the Promotion of Unnatural Sexual Practices Bill*, which too prohibits the '*promotion of homosexuality*', and in addition criminalises those who provide services to LGBT people, potentially including safe sex advice.[64] These laws not only further stigmatised MSM and trans women, but also put medical professionals at risk of prosecution for 'promoting' homosexuality via their outreach to the LGBT community.

c) Nigeria's Same-Sex Marriage (*Prohibition*) Act, 2013, discussed above at paragraph 19, attempts to eliminate any space for the LGBT identity.

The Caribbean

54. In an article of May 2014, Dr Ernest Massiah, UNAIDS Caribbean Regional Support Team Director, wrote:

> **"There is consensus around this among leaders of the region's HIV response. Over the last ten years, under the umbrella of the Pan Caribbean Partnership against AIDS (PANCAP), civil society, national AIDS responses and international partners have supported the goal of removing laws that criminalise sexual orientations and behaviours. The 2008 – 2012 Caribbean Regional Strategic Framework reinforced this target. This is a regional goal and a global one. It is one of the key steps that must be taken to end AIDS.**[65]

Asia-Pacific

55. The Commission on AIDS in Asia found that MSM account for between 10–30% of new HIV infections annually, and projects that MSM will constitute close to half of all new HIV infections occurring annually in Asia by 2020.[67]

62 Further information is available on our website: http://www.humandignitytrust.org/uploaded/Library/Other_Material/Gambia_-_Criminal_Code_Act_2014_briefing_note.pdf

63 Further information is available on our website: http://www.humandignitytrust.org/uploaded/Library/Other_Material/Briefing_on_Anti-Homosexuality_Act_2014_final.pdf

64 Further information is available on our website: http://www.humandignitytrust.org/uploaded/Library/Other_Reports_and_Analysis/Uganda_USP_Bill_2014_Briefing_Final_28_11_2014.pdf and http://www.humandignitytrust.org/uploaded/Library/Other_Material/Uganda_Breadth_of_the_USP_Blll_2013.pdf

65 Massiah, E., *HIV in the Caribbean: science, rights and justice*, 28 May 2014. Available at: http://unaidscaribbean.org/node/347

66 Commission on AIDS in Asia, 'Redefining AIDS in Asia: Crafting an Effective Response', *UN AIDS*, 2008, p. 203.

67 *Ibid*, p. 57.

56. Steven Kraus, the UNAIDS Director for Asia and the Pacific, speaking at the International AIDS Society meeting in Kuala Lumpur, said that laws that punish same-sex sexual activities and impose harsh sentences on offenders have prompted a rise in transmissions in parts of Asia:

> **"Punitive laws and practices that discriminate (against) people and prevent them from getting treatment are not helping.**[68]

57. A study commissioned by the UN Development Programme focusing on Asia and the Pacific found that laws criminalising homosexuality are regularly used by police to:

a) Prohibit HIV prevention activities on the grounds that they aid and abet criminal activities.

b) Harass HIV outreach workers, many of whom are MSM.

c) Confiscate condoms and lubricants as evidence of prostitution or illegal male-male sex.

d) Censor HIV education materials and otherwise prohibit the dissemination of public health information about safe sex practices.

58. Criminalisation also affects important patterns of socialising and sexual behaviour among MSM. By making it more difficult for MSM to socialise in private establishments, these laws increase the likelihood that sexual encounters will occur in public places at night, which is conducive to more hurried and thus less safe sex.[70]

Burden of HIV on lesbian, bisexual and heterosexual women

59. MSM and trans women within LGBT communities are particularly susceptible to HIV as a result of criminalisation and persecution. However, it must not be forgotten that lesbian and bisexual women also bear adverse effects.

60. Lesbian and bisexual women in persecutory environments and other contexts where there are high levels of homophobia are vulnerable to sexual violence wherein perpetrators seek to 'correct' their sexuality via so-called 'corrective rape'. Persecutory environments frequently exist within criminalising countries, but also arise in non-criminalising countries too; a problem which is particularly acute in South Africa. Navi Pillay, the former United Nations High Commissioner for Human Rights, highlighted this when she said:

> **"South Africa has given the world some powerful ideas – foremost among them the concept of the rainbow nation, where diversity is a source of strength and everyone is entitled to equal rights and respect. So it is especially saddening that the country reborn under Nelson Mandela's watchful eye should now be the setting for a sinister phenomenon that undermines everything the rainbow nation stands for: so-called 'corrective' or 'punitive' rape.**
>
> **Recognizing that lesbians, gays and bisexuals, transgender and intersex persons are vulnerable to violence and discrimination is an important step towards realizing the basic rights of all people.** [71]

68 'Laws in Asia hindering Aids fight, say UN health officials', *South China Morning Post*, 2 July 2013. Available at: http://www.scmp.com/news/asia/article/1273330/laws-asia-hindering-aids-fight-say-un-health-officials

69 United Nations Development Programme, *Legal Environments, Human Rights, and HIV Responses among Men who Have Sex with Men and Transgender People in Asia and the Pacific*, July 2010, p. 4. Available at: http://www.undp.org/content/dam/undp/library/hivaids/English/HIV-Legal_Environment-FullReport.pdf

70 *Ibid*, p. 5.

71 Pillay, N., 'The shocking reality of homophobic rape', *The Asian Age* and published in eight other newspapers, 20 June 2011. Available at: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11229&LangID=E#sthash.9auAwyey.dpuf http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11229&LangID=E

61. It is well documented that rape increases the likelihood of HIV transmission in many capacities. Violence against women by intimate partners increases the risk of HIV transmission,[72] particularly as these rapists are unlikely to take precautions such as using condoms.[73] Hence so-called 'corrective rape' leaves lesbian and bisexual women vulnerable to sexually transmitted diseases, including HIV.

62. Emerging evidence has also established that in hyper endemic settings, such as Southern Africa, there is a higher prevalence of sexually transmitted diseases, including HIV, among lesbian and bisexual women than was expected given available international data. This suggests that these women not only face transmission risks through men, including for transactional sex, but also in their same-sex relationships.[74]

63. Heterosexual women's sexual health is also impacted by the criminalisation and persecution of LGBT people as increased HIV prevalence among MSM spills over into the heterosexual population. Many MSM also have sex with women.[75] This may be due to attraction and/or social pressure to maintain concurrent heterosexual relationships.[76] For instance, half of all MSM in the Asia-Pacific region are believed to have sex with women, including spouses, partners, female clients and female sex workers.[77] Some of these women will acquire HIV from these men. Therefore, failure to repeal these laws significantly heightens the overall HIV infection and transmission rate for all adult groups. By contrast, evidence shows that in a range of epidemic settings, universal access to HIV services for MSM together with anti-discrimination efforts can significantly reduce infections both among those men and the wider community.[78]

72 United Nations, *Intersections of violence against women and HIV/AIDS*, 17 January 2005, Rep. no. E/CN.4/2005/72.

73 *Ibid.*

74 Daly, F. *Claiming the Right to Health for Women Who Have Sex with Women Through South Africa's National Strategic Plans on HIV and STIs*. Health Economics and HIV Research Division, University of Kwa Zulu Natal.

75 UNAIDS, *Universal Access for Men who have Sex with Men and Transgender People, Action Framework*, 2009. Available at: http://data.unaids.org/pub/report/2009/jc1720_action_framework_msm_en.pdf

76 UNAIDS, *Universal Access for Men who have Sex with Men and Transgender People, Action Framework*, 2009.

77 Commission on AIDS in the Pacific, *Turning the Tide: An Open strategy for a response to AIDS in the Pacific*, 2008, p. 39.

78 Baral, S.D., Beyrer, C., Johns, B., Sifakis, F., Walker, D., Wirtz, A.L., 'The Global HIV Epidemics among Men Who Have Sex with Men (MSM)', *The World Bank*, 2011. Available at: http://issuu.com/world.bank.publications/docs/9780821387269. UNAIDS, UNDP, *UNAIDS Action Framework: Universal Access for Men who have Sex with Men and Transgender People*, 2009. Available at: http://data.unaids.org/pub/report/2009/jc1720_action_framework_msm_en.pdf

Human Rights, criminalisation and HIV

64. This second part addresses the human rights concerns associated with HIV and criminalisation. Human rights are relevant to the interplay between criminalisation and HIV in several ways. First, HIV transmission has been used as an excuse to justify criminalisation. Notwithstanding that this argument is false from an empirical point of view, as shown above, this argument is legally unsound. Secondly, at a societal level, criminalisation is an indicator of poor human rights protection in general, which impacts HIV prevention across the board. Thirdly, at an individual level, human rights law is relevant as criminalisation acts as a barrier to LGBT people accessing healthcare.

Public health arguments for criminalisation fail to meet the test of human rights law

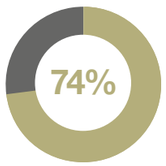
65. In *Toonen v. Australia*, the United Nations Human Rights Committee considered and rejected the claim by the Tasmanian authorities that laws criminalising private consensual homosexual conduct were justified on public health and moral grounds. The Human Rights Committee held that:

While the State party acknowledges that the impugned provisions constitute an arbitrary interference with Mr. Toonen's privacy, the Tasmanian authorities submit that the challenged laws are justified on public health and moral grounds, as they are intended in part to prevent the spread of HIV/AIDS in Tasmania…

As far as the public health argument of the Tasmanian authorities is concerned, the Committee notes that the criminalization of homosexual practices cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of AIDS/HIV… Criminalization of homosexual activity thus would appear to run counter to the implementation of effective education programmes in respect of the HIV/AIDS prevention. Secondly, the Committee notes that no link has been shown between the continued criminalization of homosexual activity and the effective control of the spread of the HIV/AIDS virus.[79]

66. With 168 state-parties, the International Covenant on Civil and Political Rights (ICCPR) is a lynchpin of the international human rights system. Of the 78 jurisdictions that currently criminalise homosexuality, 58 are parties to the ICCPR.[80] The Human Rights Committee is the treaty body that interprets the ICCPR. State-parties' domestic law must be reconciled with the Human Rights Committee's decision in *Toonen* for those states to keep their international treaty obligations under the ICCPR. The Human Rights Committee in *Toonen* was clear when it stated:

[T]he criminalization of homosexual practices cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of AIDS/HIV.



Of the 78 jurisdictions that currently criminalise homosexuality, 58 (74%) are parties to the ICCPR

79 *Toonen v. Australia*, CCPR/C/50/D/488 (1992), paras. 8.4 and 8.5.

80 The human rights laws in this area, including the fallacy of public health arguments and the effect of the decisions in *Toonen*, is discussed further in two other briefing notes in this series: *Criminalising Homosexuality and the Rule of Law* and *Criminalising of Homosexuality and Working through International Organisations.*

67. In *Commonwealth v. Wasson*,[81] while striking down the state 'sodomy' statute, Justice Leibson writing for a Kentucky Supreme Court majority ruled that:

> *The growing number of females to whom AIDS (Acquired Immune Deficiency Syndrome) has been transmitted is stark evidence that AIDS is not only a male homosexual disease. The only medical evidence in the record before us rules out any distinction between male-male and male-female anal intercourse as a method of preventing AIDS. The act of sexual contact is not implicated, per se, whether the contact is homosexual or heterosexual.*

Poor human rights protection helps HIV to spread

68. Various statements have been made by international bodies and in scientific journals about the link between human rights and HIV transmission.

Office of the High Commissioner for Human Rights

69. The Office of the High Commissioner for Human Rights (OHCHR) says the following about the link between poor human rights and HIV:

> *Human rights are inextricably linked with the spread and impact of HIV on individuals and communities around the world. A lack of respect for human rights fuels the spread and exacerbates the impact of the disease, while at the same time HIV undermines progress in the realisation of human rights. This link is apparent in the disproportionate incidence and spread of the disease among certain groups which, depending on the nature of the epidemic and the prevailing social, legal and economic conditions, include women and children, and particularly those living in poverty. It is also apparent in the fact that the overwhelming burden of the epidemic today is borne by developing countries, where the disease threatens to reverse vital achievements in human development. AIDS and poverty are now mutually reinforcing negative forces in many developing countries.*[82]

70. The OHCHR highlights three ways in which HIV and human rights are interlinked:

> ***Increased vulnerability:*** *Certain groups are more vulnerable to contracting the HIV virus because they are unable to realize their civil, political, economic, social and cultural rights. For example, individuals who are denied the right to freedom of association and access to information may be precluded from discussing issues related to HIV, participating in AIDS service organizations and self-help groups, and taking other preventive measures to protect themselves from HIV infection. Women, and particularly young women, are more vulnerable to infection if they lack of access to information, education and services necessary to ensure sexual and reproductive health and prevention of infection. The unequal status of women in the community also means that their capacity to negotiate in the context of sexual activity is severely undermined. People living in poverty often are unable to access HIV care and treatment, including antiretrovirals and other medications for opportunistic infections.*
>
> ***Discrimination and stigma:*** *The rights of people living with HIV often are violated because of their presumed or known HIV status, causing them to suffer both the burden of the disease and the consequential loss of other rights. Stigmatisation and discrimination may obstruct their access to treatment and may affect their employment, housing and other rights. This, in turn, contributes to the vulnerability of others to infection, since HIV-related stigma and discrimination discourages individuals infected with and affected by HIV from contacting health and social services. The result is that those most needing information, education and counselling will not benefit even where such services are available.*
>
> ***Impedes an effective response:*** *Strategies to address the epidemic are hampered in an environment where human rights are not respected. For example, discrimination against and stigmatization of vulnerable groups such as injecting drug users, sex workers, and men who have sex with men drives these communities underground. This inhibits the ability to reach these populations with prevention efforts, and thus increases their vulnerability to HIV. Likewise, the failure to provide access to education and information about HIV, or treatment, and care and support services further fuels the AIDS epidemic. These elements are essential components of an effective response to AIDS, which is hampered if these rights are not respected.*[83]

UNAIDS-Lancet Commission

71. The UNAIDS-*Lancet* Commission's report of July 2015[84] emphasises the fundamental importance of human rights in the path towards ending HIV/AIDS as a public health threat:

> *A crucial lesson from the HIV epidemic (and for global health generally) is that the commitment expressed in universal human rights to enjoyment by everyone of the highest available standard of physical and mental health can be fulfilled. To uphold and defend the human rights of people with infections or people at most risk of infection can bring down the rates of infection and death. These lessons are still hard to learn and teach. Many people die when these lessons are not learned.*
>
> *Practical solutions are needed to expedite changes in the laws, policies, and public attitudes that violate the human rights of vulnerable populations who might be at particular risk of HIV infection, such as women, sex workers, MSM, transgender people, injecting drug users, prisoners, and migrants. UNAIDS and its co-sponsors should redouble their efforts in this respect. Work at local level is key to increase inclusivity and community involvement. The creation of safe service havens for marginalised and vulnerable groups at high risk of HIV is a crucial step to ensure that no one is denied access to health care and HIV prevention.*[85]

81 *Commonwealth v. Wasson*, 1992, 842 S. W. 2d 487.
82 Available at: http://www.ohchr.org/EN/Issues/HIV/Pages/HIVIndex.aspx
83 *Ibid*.
84 At n.7 above, pp. 171-218.
85 *Ibid*, 173.

72. One of the report's seven key recommendations was to:

Forge new paths to uphold human rights and address criminalisation, stigma, and discrimination using practical approaches to change laws, policies, and public attitudes that violate human rights.[86]

UN Secretary-General Ban Ki-moon

73. At the launch of the UNAIDS-Lancet Commission report at the CARICOM Heads of Government Summit in Barbados, UN Secretary-General Ban Ki-moon called for regional governments to repeal legislation that promotes discrimination as a means of containing the spread of HIV. The Secretary-General stated:

> **The epidemic is only made worse by laws and stigma. These are [impacting] our vulnerability to HIV infection and our answers to life saving achievements. They threaten both human rights and public health. We cannot tolerate discrimination on the basis of sexual orientation or on the basis of gender identity…**
>
> **We can leave no one behind. AIDS can only end when we protect the human rights of all… We have to [correct] all kinds of societal ills including stigma, intolerance, discrimination and violence. To end this epidemic, we need gender equality. We need to protect the sexual and reproductive rights.**[87]

Individual human rights engaged by the adverse effects of criminalisation on HIV treatment

74. The criminalisation of consensual same-sex intimacy raises numerous human rights issues, such as the rights to privacy, dignity and equality, and the prohibition on cruel, inhuman and degrading treatment, which are discussed in detail in our other briefing notes. In addition, criminalisation and stigmatisation raise specific health-related human rights violations connected with access to HIV testing and treatment.

75. The obligations of states towards their citizens are contained in international treaties, such as the ICCPR and the International Covenant on Economic Social and Cultural Rights; as well as regional treaties, such as the European Convention on Human Rights (ECHR), the American Convention on Human Rights, and the African Charter on Human and Peoples' Rights; and within national constitutions and domestic laws that protect civil, political and socio-economic rights.

86 *Ibid*, 171.

87 Reported by Madden, M.,'UN chief concerned about HIV/AIDS approach in the region', *Barbados Today*, 4 July 2015. Available at: http://www.barbadostoday.bb/2015/07/04/un-chief-concerned-about-hivaids-approach-in-the-region/

76. OHCHR lists the following rights as being relevant to HIV, which states are obliged to promote and protect: [88]

a) The right to life.
b) The right to liberty and security of the person.
c) The right to the highest attainable standard of mental and physical health.
d) The right to non-discrimination, equal protection and equality before the law.
e) The right to freedom of movement.
f) The right to seek and enjoy asylum.
g) The right to privacy.
h) The right to freedom of expression and opinion and the right to freely receive and impart information.
i) The right to freedom of association.
j) The right to marry and found a family.
k) The right to work.
l) The right to equal access to education.
m) The right to an adequate standard of living.
n) The right to social security, assistance and welfare.
o) The right to share in scientific advancement and its benefits.
p) The right to participate in public and cultural life.
q) The right to be free from torture and other cruel, inhuman or degrading treatment or punishment.

77. Former Special Rapporteur Anand Grover commented on the right to health in the Human Rights Council report of April 2010:

> **The Special Rapporteur believes that criminalization has adverse consequences on the enjoyment of the right to health of those who engage in consensual same-sex conduct, through the creation of the societal perception that they are 'abnormal' and criminals. This has a severe deleterious impact on their self-regard, with significant, and sometimes tragic, consequences on their health-seeking behaviour and mental health. Rates of suicide attempts amongst youth who engage in consensual same-sex conduct have been variously reported as between three and seven times higher than for youth who identify as heterosexual; 25 the rates are similar for adults.**[89]

78. Mr Grover examined the relationship between the right to health and the criminalisation of private, adult, consensual same-sex intimacy. His 2010 report was firm in its conclusion, that:

> **[D]ecriminalization of such conduct is necessary to address the disempowerment that affected individuals and communities face, and to enable full realization of the right to health.**[90]

88 Available at: http://www.ohchr.org/EN/Issues/HIV/Pages/HIVIndex.aspx

89 UN Human Rights Council, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, A/HRC14/20, 27 April 2010, para. 8.

90 *Ibid*, para. 7.

79. Mr Grover concluded that criminalising same-sex intimacy adversely affects the right to health by creating the perception that those who engage in such activities are 'abnormal' and 'criminals',[91] and went on to say:

> **"The fear of judgement and punishment can deter those engaging in consensual same-sex conduct from seeking out and gaining access to health services. This is often a direct result of the attitudes of health-care professionals who are not trained to meet the needs of same-sex practising clients – not only in terms of sexual health, but also with regard to health care more generally. Often, health professionals may refuse to treat homosexual patients altogether, or respond with hostility when compelled to do so. Where patients may be guilty of a criminal offence, by engaging in consensual same-sex conduct, this has the potential to jeopardize the obligations of confidentiality that arise during the course of the doctor-patient relationship, as health professionals may be required by law to divulge details of patient interaction.[92]**

80. Decisions from regional human rights courts interpreting these rights include:

a) *D v. United Kingdom* (1997), an ECHR decision that confirmed the denial of access to treatment can amount to inhuman or degrading treatment.[93]

b) *Jorge Odir Miranda Cortez v. El Salvador* (2009), an Inter-American Commission decision that emphasised that persons living with HIV are in an especially vulnerable situation, given the characteristics of the illness, the medical treatment required, and the exclusion and discrimination usually associated with it.[94]

c) *I.B. v. Greece* (2013), another ECHR decision, determined that the dismissal of an employee due to his HIV-status violated the prohibition on discrimination.[95]

d) *Ángel Alberto Duque v. Colombia* (2014), another Inter-American Commission decision, determined that the applicant's right to personal integrity was violated by various factors, including his sexual orientation and uncertainty over his access to HIV treatment.[96]

81. LGBT people possess the human rights listed above by virtue of the fact that they are universal by definition. However, the criminalisation and stigmatisation of LGBT people creates a barrier to their fulfilment. Fear of arrest acts as a barrier to LGBT people obtaining HIV testing and treatment. Further, LGBT people often face 'double' discrimination simultaneously due to their being LGBT and their HIV or perceived HIV status.

91 *Ibid*, para 17.

92 *Ibid*, para 18.

93 24 EHRR 423. Available at: http://www.bailii.org/eu/cases/ECHR/1997/25.html

94 IACHR, Report No. 27/09, Merits, Case 12.249, para. 70. Available at: https://www.cidh.oas.org/annualrep/2009eng/ElSalvador12249eng.htm

Conclusions

82. The criminalisation of same-sex intimacy between consenting adults intersects with HIV/AIDS in multiple ways. Flawed public health arguments may once have provided flimsy arguments in support of criminalisation. Today, however, there is overwhelming empirical evidence demonstrating the causal link between criminalisation and increased rates of HIV transmission. Experts have repeatedly concluded that, rather than halting the spread of HIV, the criminalisation of homosexuality seriously impedes the effectiveness of measures designed to halt and reverse the HIV pandemic. Decriminalisation is thus a key element of any effective public health strategy particularly any relating to reducing the incidence and prevalence of HIV.

83. Addressing the stigmatisation of LGBT people is necessary to address the disproportionately high HIV rates among MSM and trans women, as well as the specific vulnerability of lesbian and bisexual women and trans men where risks emerge; which in turn is a crucial aspect of any national or international response to HIV/AIDS. The global evidence is clear that public health is best served by removing discrimination and prejudice against LGBT people and thereby ensuring that the widest possible information regarding safe sex practices, health services and HIV prevention and treatment measures is accessible to the people who need it most. LGBT people and wider society alike benefit from reducing the stigma against LGBT people. The continued criminalisation of consensual same-sex intimacy is a major barrier to stemming the transmission of HIV. Decriminalisation is imperative, not optional, on public health grounds alone.

84. Additionally, the criminalisation of homosexuality raises a number of HIV-related human rights concerns. On a societal level, criminalisation is an indicator of poor human rights protection in general. It is known that poor human rights protection overall enables HIV transmission and hinders access to treatment. On an individual level, criminalisation acts as a further barrier for LGBT people to access HIV testing and healthcare, placing them at a discriminatory and systematic disadvantage when trying to realise their health-related human rights.

85. Removing stigma through decriminalisation of private, adult, consensual same-sex intimacy is a first step in promoting healthy, tolerant and flourishing societies.

95 Application no. 552/10. English language summary available at: hudoc.echr.coe.int/webservices/content/pdf/003-4520290-5453651

96 IACHR Report No. 5/14, Merits Case 12,841, para. 101. Available at: http://www.oas.org/en/iachr/decisions/court/12841FondoEn.pdf

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