

# The Global Commission on HIV and the Law: Men Who Have Sex With Men (MSM)

*HIV and the Law: Risks, Rights and Health* is a July 2012 report by the Global Commission on HIV and the Law. The Commission was an independent body of experts and respected statespersons established by United Nations Development Programme to address the ways in which human rights abuses, stigma, and discrimination fuel the global HIV epidemic. The Commission set out to examine where and how these abuses were occurring and to consider how legal reforms—through new legislation, better enforcement of existing law, and court decisions—could slow the spread of HIV and reduce its impact.

The Commission conducted an eighteen month process of research, consultation, analysis, discussion, and decision-making. They held regional dialogues in seven global regions and collected **written and oral submissions from over 1000 individuals and organizations**, more than 700 of whom included people living with, or directly affected by HIV and AIDS.

*The report is an important tool for civil society groups, particularly those working with populations at high risk of HIV. This briefing paper highlights the report's findings about people living with HIV. It offers information and language that may be useful for advocacy, campaigning, and lobbying.*

## Key Report Findings on Men Who Have Sex With Men (MSM)

Countries that criminalize same-sex sexual activity have higher HIV prevalence rates among MSM than countries that do not.

- ▶ One chart in the report compares six African and Caribbean countries that criminalize same-sex sexual activity to six neighboring countries that do not (page 46). In those that do criminalize it, between 20 and 33 percent of MSM have HIV. In countries that do not, the rate is half as much—between 5 and 15 percent.

Homophobic laws, state-sanctioned discrimination against MSM, and the absence of legal protections from discrimination put MSM at significantly higher risk of HIV and reduce access to HIV prevention, treatment, care, and support services.

- ▶ “A multi-lingual global online survey of 5,000 MSM found that only 36 percent were able to easily access treatment and less than a third had easy access to behavioral interventions and HIV education materials” (page 46). Direct and indirect factors cause this reduced access, including:
  - Police harassment and brutality, and the threat of arrest in countries where homosexuality is illegal.
  - Police raids on HIV education and prevention activities, and the confiscation of condoms, lubricants, and other materials as evidence of crimes.
  - Government-sanctioned hostility against health care providers. When nine prevention workers were jailed in Senegal in 2008 for “acts against nature ... local advocacy groups disbanded, HIV information and treatment sites shut down and workers and organizers went into hiding” (page 47).
  - Failure to require appropriate education for service providers, resulting in providers treat-

ing MSM clients with contempt, violating their right to confidentiality, and refusing to provide treatment.

To achieve legal reforms, advocates can challenge the constitutionality of existing laws and policies and their inconsistency with international human rights treaties that their countries endorse.

- ▶ In Hong Kong, gay men challenged their arrests and ultimately obtained court rulings prohibiting discrimination on the basis of sexual orientation. Criminalization of consensual sex between adult men was declared unconstitutional in the U.S. in 2003, in Fiji in 2005, and in India in 2009. Similar suits were filed in Belize in 2010 and Jamaica in 2011.

The *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity*, drafted in 2006 by a group of leading human rights experts, do not have the force of law but serve as a strong basis for advocacy in this area.

## Actions the Report Recommends (page 50)

To respect human rights and create effective, sustainable national HIV responses, countries must:

- ▶ Repeal existing laws and policies that criminalize same-sex sexual activity between consenting adults or permit discrimination or denial of rights based on real or perceived sexual identity.
- ▶ Revise anti-discrimination laws to specifically prohibit discrimination on the basis of sexual orientation and gender identity, just as discrimination on the basis of race and gender is prohibited.
- ▶ Remove existing barriers (legal, administrative, or regulatory) that inhibit the ability of sexual minority groups to form and maintain public community organizations and associations.

- ▶ Recognize and respect existing civil and religious laws and practices that support individual privacy and right to health.
- ▶ Promote effective measures to prevent violence against MSM.

## How You Can Use the Report

This report provides concrete precedents and examples you can use as evidence when advocating to government and other influential organizations, the media, civil society organizations, and the general public. Because of the report’s legitimacy as an official UN document, these case studies and the statements made about them are important tools to support your advocacy, campaigning, and lobbying.

### 1. To demonstrate the need for law reform, including decriminalization and the introduction of anti-discrimination legislation.

Point to the chart on page 46 showing much higher rates of HIV infection in countries where same-sex sexual activity is criminalized. You can also point to the Yogyakarta Principles and the cases cited on page 49 in which MSM have changed their country’s policy on criminalization by persuading courts that such laws were inconsistent with their country’s constitutional guarantees and position as a signatory to international human rights treaties.

### 2. To call for a seat for MSM at the table.

The report cites examples of countries in which MSM advocates have demanded and won seats on the planning bodies responsible for creating their country’s National Strategic Plan for HIV/ADS. This has enabled them to educate other board members and gradually change attitudes about the urgent need for non-homophobic, MSM-responsive HIV programming. The Tunisian 2012–2016 National AIDS Plan, for example, now calls for the “decriminalization of same-sex relations” (page 48).

The Ministry of Health in every country has the responsibility of ensuring that MSM and other key affected groups are effectively involved in

the national response to HIV. If your country receives PEPFAR funding (U.S. government funding through the President’s Emergency Plan for AIDS Relief), you might want to point out that PEPFAR now requires recipient countries to develop a 5-year strategic framework showing how its National Strategic Plan is developed through a collaborative, consultative process involving in-country stakeholders from civil society representing MSM and other groups, as well its own government’s personnel, U.S. government personnel, private sector businesses, and business coalitions, funders, and other relevant organizations such as UNAIDS.

### 3. To cast the issue of police violence against sexual minorities as an HIV issue.

The report shows that police violence against MSM and other populations at high risk of HIV is counter-productive and wastes public funding spent on HIV prevention. This evidence can be presented to the Ministry of Interior, Ministry of Health, and other relevant government agencies, highlighting the harm that police violence does to the government’s HIV effort. When the police harass and arrest MSM, raid agencies working on HIV prevention, arrest outreach workers, and confiscate condoms, they directly waste public money. These actions also have a chilling effect on providers of HIV care and treatment, which will fuel the country’s epidemic (pages 46–48).

### 4. To argue, where strategic, that international funders get better value investing in countries that are not repressive.

The report notes that, as the major international HIV and AIDS funders consider their investments, they see “that the millions they invest in human HIV responses can be quickly negated by the political and material support provided to repressive legal environments in those same countries” (page 88). If a national government is influenced by external donors, then it may be useful to engage them to advocate for law reform regarding MSM. However, this should be weighed against any potential backlash from perceived foreign influence on domestic issues.

## “Sound Bite” Quotes

One benefit of this report is that it simply and eloquently frames key arguments we make as we advocate for change in existing policies. These are listed below as sound bites that organizations can use in their own documents or when talking to the media. Citing the Global Commission on HIV and the Law may add credibility for audiences who are less receptive to such arguments.

- ▶ “To those who are lesbian, gay, bisexual or transgender, let me say: You are not alone. Your struggle to end violence and discrimination is a shared struggle. Any attack on you is an attack on the universal values the United Nations and I have sworn to defend and uphold.”

—Ban Ki-moon, UN Secretary-General. Statement to the Human Rights Council, March 7, 2012

- ▶ “Punitive laws, discriminatory and brutal policing and denial of access to justice for people with and at risk of acquiring HIV are fueling the epidemic. These legal practices create and punish vulnerability. They promote risky behavior, hinder people from accessing prevention tools and treatment, and exacerbate the stigma and social inequalities that make people more vulnerable to HIV infection and illness” (page 7).

- ▶ “There is growing international consensus that the decriminalization 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” (page 48).

- ▶ “A needle or a condom is only the concrete representation of what key populations (like everyone else) are entitled to: the fundamental human rights to dignity, autonomy and freedom from ill treatment, as well as the right to the highest attainable standard of physical and mental health, regardless of sexuality of legal status” (page 26).

- ▶ “It is not easy or popular to call for the legalization of homosexuality in many countries, but it is the right thing to do. It is right because it is essential to slow the spread of HIV and to ensure that human rights protections are extended to all our citizens. But it is also right because people in Africa understand that the State has far more urgent priorities than interfering in the private lives of consenting adults.”

—Festus Gontebanya Mogae,  
former President of Botswana

## Open Society Public Health Program

The Public Health Program of the Open Society Foundations aims to build societies committed to inclusion, human rights, and justice, in which health-related laws, policies, and practices reflect these values and are based on evidence. The program works to advance the health and human rights of marginalized people by building the capacity of civil society leaders and organizations, and by advocating for greater accountability and transparency in health policy and practice.

For more information, see: [www.opensocietyfoundations.org](http://www.opensocietyfoundations.org).