

Statement by the UNAIDS Reference Group on HIV and Human Rights
ANTI-HOMOSEXUALITY LAWS AND PROSECUTIONS VIOLATE HUMAN RIGHTS
AND THREATEN AIDS RESPONSES

3 March 2010

The UNAIDS Reference Group on HIV and Human Rights (the Reference Group) is an independent, advisory body, established in 2002 to advise the Joint United Nations Programme on HIV/AIDS (UNAIDS) on all matters relating to HIV and human rights. The Reference Group is composed of individuals from many different perspectives with a common commitment to, and expertise in, the area of HIV and human rights. The views of the Reference Group are independent of UNAIDS and do not necessarily reflect the views of the Secretariat or the Cosponsoring Organizations of UNAIDS.

The UNAIDS Reference Group on HIV and Human Rights (the Reference Group) notes with concern the growing use of criminal law, or proposals to use criminal law, against members of sexual minorities, including a number of recent cases of harassment, arrest and prosecution of gay men in a number of African countries. The Reference Group also notes inflammatory statements issued by national and local leaders which vilify sexual minorities, and in extreme cases, call for violence against them. In some recent cases, gay men and HIV-related health centres have been subject to mob violence and attack. Such a legal and social environment is discriminatory, violates the human rights principles that all States have endorsed in the Universal Declaration of Human Rights and at UNGASS¹, and seriously undermines attempts to provide effective HIV prevention, treatment, care and support. This statement by the Reference Group highlights the need for the Joint United Nations Programme on HIV/AIDS (UNAIDS) to reinforce urgently its support to countries towards the adoption and implementation of laws and law enforcement that protect sexual minorities from discrimination, harassment, violence, and arrest and prosecution on the basis of sexual orientation. The Reference Group believes that laws criminalizing sexual acts between consenting adults are violations of the rights to privacy, liberty and non-discrimination.

The Reference Group is further concerned by reports of forensic medical examinations conducted on individuals, as part of prosecutions under sodomy laws, to "prove" their alleged homosexual conducts. Such practices, when conducted without informed consent, constitute unjustifiable invasions of the rights to privacy and liberty and are contrary to international human rights law.

The Reference Group welcomes the priorities set forth by UNAIDS in the *Joint Action for Results, UNAIDS Outcome Framework 2009-2011*, including the priority action area calling for the "removal of punitive laws, policies, practices, stigma and discrimination that block effective responses to AIDS". The Reference Group agrees that these priorities areas will accelerate the achievement of universal access to HIV prevention, treatment, care and support: In particular, it agrees that punitive laws, policies, practices, stigma and discrimination *do* block effective responses to HIV, as well as violate rights, as in the case of laws that criminalize people based on their sexual orientation. This priority, like the others, should be a major part of UNAIDS' "continuous efforts to support to all countries to halt and reverse the epidemic, address its drivers and mount an effective response." The Reference Group also welcomes the *UNAIDS Action Framework: Universal Access for Men who have Sex with Men and Transgender People* (2009) which states as Objective 1: "Improve the human rights situation for men who have sex with men and transgender people—the cornerstone to an effective response to HIV".²

In light of these documents that the Reference Group believes that all agencies in the UNAIDS Programme have an obligation to take urgent action to respond to increasing reports of harassment, arrest, detention, prosecutions and violence targeting men who have sex with men and members of sexual minorities in many parts of the world, especially in Africa, Asia, the Caribbean and Latin America. The Reference Group believes UNAIDS should be greatly concerned by attempts in some countries to introduce new coercive legislation criminalising same sex practices between consenting adults. The Reference Group recommends that UNAIDS action includes the following:

¹ United Nations General Assembly Special Session on HIV/AIDS, "Declaration of Commitment on HIV/AIDS" (2001). General Assembly resolution S-26/2 of 27 June 2001.

² See http://data.unaids.org/pub/Report/2009/jc1720_action_framework_msm_en.pdf

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- Meet with Ministry of Justice and/or Ministry of Interior officials regarding individual cases of harassment, arrest, detention, prosecutions and violence against men who have sex with men and members of sexual minorities, urgently expressing concern about negative consequences for the response to HIV;
- Work with national partners to ensure safety and support “safe havens” for lesbian, gay, bisexual, transgender and intersex people and their defenders who are at grave risk of violence and other serious harms;
- Support civil society organisations to gain access to prisons and police stations where lesbian, gay, bisexual, transgender and intersex people are detained, and join their advocacy for their safety and the dropping of all charges based on or motivated by sexual orientation;
- Promote the involvement of government and civil society in law reform processes and audits of the legal environment (including laws, law enforcement and access to justice), towards the adoption and implementation of laws and law enforcement, as well programmes that provide legal support and redress, to protect sexual minorities from discrimination, harassment, violence, and arrest and prosecution on the basis of sexual orientation;
- Reinforce country efforts to produce and use data and other strategic information that illustrates how HIV is affecting men who have sex with men and other sexual minorities, and how law and law enforcement practices are or are not protecting the health and human rights of members of these populations; and
- Increase high-level advocacy for the full protection of the human rights of gay, lesbian, bisexual, transgender and intersex people, in all cultural contexts, as matter of obligation under international law, and an essential action for effective responses to AIDS.

The Reference Group stresses that the protection of human rights for all, including for highly stigmatised and discriminated populations, including men who have sex with men, people who use drugs and sex workers, is essential to an effective response to AIDS. With regard to men who have sex with men, research conducted in many parts of the world reveals that HIV prevalence among men who sex with men – regardless of the nature of the AIDS epidemic – is up to ten times higher than that of the general population.³ Their vulnerability is compounded by the fact that, too often, their health needs are overlooked or ignored in national AIDS programmes largely because of prejudices and discriminatory legislation criminalising them. Recognising the adverse impact of the criminalisation of consensual sex between adults on the AIDS response, the *International Guidelines on HIV/AIDS and Human Rights* (UNAIDS/OHCHR) state that: “Anti-discrimination and protective laws should be enacted to reduce human rights violations against men having sex with men, including in the context of HIV, in order, *inter alia*, to reduce the vulnerability of men who have sex with men to infection by HIV and to the impact of HIV and AIDS.”⁴

The United Nations Human Rights Committee, which authoritatively interprets the *International Covenant on Civil and Political Rights* (ICCPR) and evaluates State compliance with its provisions, found in the 1994 case of *Toonen v. Australia* that laws criminalising consensual homosexual conduct between adults violate the rights to privacy and non-discrimination guaranteed under the ICCPR. Furthermore, the United Nations Working Group on Arbitrary Detention has consistently held that the arrest and detention of individuals on the sole basis of their sexual orientation constitutes arbitrary detention.

Echoing mounting challenges against sodomy laws in many parts of the world, the Delhi High Court held on 2 July 2009, in the case of *Naz Foundation v. Government of NCT of Delhi and Others*, that Section 377 of the Indian Penal Code which criminalises “carnal intercourse against the order of nature” violates Articles 21 (protection of life and personal liberty), 14 (equality before law) and 15 (prohibition of discrimination) of the Constitution of India, and that this provision should no longer apply to consensual sexual acts between adults.

The Reference Group calls on UNAIDS to intensify its engagement with governments and civil society with the aim of supporting them to remove punitive laws based on sexual orientation and end the harassment, arrest and prosecution of members of sexual minorities. These actions would take countries a long way in achieving both rights-based responses to HIV as well as universal access to HIV-related prevention, treatment and care services.

³ See UNAIDS/WHO (2009), *AIDS Epidemic Update*, UNAIDS/09.36E/JC1700E.

⁴ OHCHR/UNAIDS (2006), *International Guidelines on HIV/AIDS and Human Rights, 2006 Consolidated Version*, HR/PUB/06/9.