Overcoming legal barriers to comprehensive prevention among men who have sex with men and transgender people in Asia and the Pacific

9th International Congress on AIDS in Asia and the Pacific

Symposium Report
Tuesday, 11 August 2009
Acknowledgments

The Symposium and follow up report were organized and developed by Edmund Settle, UNDP HIV policy specialist in Bangkok and Mandeep Dhaliwal, UNDP HIV Cluster Leader: Human Rights, Gender & Sexual Diversities based in New York.

Special thanks to Pramod Kumar, UNDP Senior HIV Programme Advisor and Bhagya Ratnayake (UNDP Colombo) for facilitating the Symposium's media outreach during the 9th ICAAP, and Ian Mungall (UNDP Bangkok) and Milinda Rajapaksha (UNDP Colombo) for supporting the design and editing of the Symposium report.
During the recent 9th International Congress on AIDS in Asia and the Pacific (9th ICAAP) held in Bali, Indonesia, the United Nations Development Programme (UNDP) working in close collaboration with government, non-government and United Nations partners helped raise the policy profile on key issues affecting the HIV epidemics in the Asia Pacific Region with a series of cross cutting, high level symposiums. This symposium report aims to highlight the key messages conveyed by panelists, issues raised, and points to the way forward for further action.

The “Overcoming legal barriers to comprehensive prevention among men who have sex with men and transgender people in Asia and the Pacific” Symposium was jointly convened by UNDP and the Asia Pacific Coalition on Male Sexual Health (APCOM) to discuss how effective and comprehensive HIV prevention among men who have sex with men and transgender people can take place in a conducive and enabling legal environment.

Under the dramatic rising tide of new HIV infections among men who have sex with men and transgender people in the region, the high level panel demonstrated that developing strategic partnerships and alliances between the legal profession, human rights bodies, academics, parliamentarians and affected communities is critical to successfully address discriminatory legal and structural barriers that impede effective and comprehensive HIV services for these populations.

A strategy of comprehensive prevention requires bold and effective policy measures to reach out to communities and individuals at risk. It is here that enhanced social protection and the removal of punitive laws, policies and practices concerning men who have sex with men and transgender populations must be seen as affording important steps in the path of reducing the impact of HIV on these highly marginalized populations.

In order to achieve universal access to HIV prevention, treatment, care and support and realize the Millennium Development Goals, we must facilitate an enabling legal environment and human rights based HIV policies and programmes for men who have sex with men and transgender people. This will mean stepping up our joint investment in social and legal programmes which effectively address discrimination and stigmatization among men who have sex with men and transgender people.

Nicholas Rosellini
Deputy Assistant Administrator and
Deputy Regional Director
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UNDP Regional Center Bangkok

Foreword

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Nicholas Rosellini
Deputy Assistant Administrator and
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Regional Bureau of Asia and Pacific
UNDP Regional Center Bangkok
Overcoming legal barriers to comprehensive prevention among MSM and TG in Asia Pacific
Nusa Indah, Bali International Conference Center (BICC), Westin Hotel, Denpasar, Bali
Date and Time: Tuesday, 11 August 2009, 16:00 – 17:30

Chairs: Jeff O’Malley, Director, HIV/AIDS Group, UNDP
        Shivananda Khan, O.B.E., Chairperson, APCOM

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PANELIST PRESENTATIONS AND STATEMENTS
Jeffrey O’Malley is the Director of the HIV/AIDS Group in the United Nations Development Programme’s Bureau for Development Policy. The UNDP HIV/AIDS Group is responsible within the UNAIDS system for leadership on human rights, gender and sexual diversity; governance of HIV responses; and development planning and mainstreaming. The Group also manages and supports UNDP involvement in the Global Fund to Fight AIDS, Tuberculosis and Malaria, for which UNDP serves as Principal Recipient in 26 countries, as well as UNDP involvement in other health partnerships such as Roll Back Malaria.

Jeff has 25 years of experience in public health and development, including almost 20 years of international leadership on HIV/AIDS. Prior to joining UNDP, Jeff worked as Country Director for India with PATH, an international public health NGO. Between 1993 and 2004 Jeff established and led the International HIV/AIDS Alliance, an international development NGO specializing in HIV and AIDS. Jeff has also worked for the Harvard School of Public Health and for the World Health Organization. He is originally from Canada.

Shivananda Khan formed Shakti, the first South Asian LGBT organisation in the UK in 1988, and in 1991 established the first South Asian HIV organisation, The Naz Project. In 1996 Mr Khan formed the Naz Foundation International (NFI) focusing on male-male sexualities and HIV in South Asia, which since then has assisted in the development of four national MSM and HIV organisations in the region, as well as helping to establish some 70 locally run MSM community based HIV service providers. He is the Interim Chairperson of the Asia Coalition on Male Sexual Health APCOM and is on the Steering Committee of the Global Forum on MSM and HIV.

In 2005 he was awarded the Order of the British Empire (OBE) in the 2005 New Year’s Honours List of the British Queen for his services in HIV prevention and care with males who have sex with males in South Asia.
This session of the ICAAP Congress is addressed to one of the most important issues for a successful strategy in tackling the spread of the HIV virus that causes AIDS. The strategy is the prevention of more infections. That strategy will not succeed without carefully targeted policies aimed at affecting the behaviour of individuals and groups especially at risk. Amongst these, MSM (or men who have sex with men) is a key target. Research shows, not only in developed countries, that this cohort of the most vulnerable populations at risk, is largely ignored in many nations where AIDS presents its greatest challenges. The result is that MSM are generally placed outside the essential messages both of prevention and of access to treatment. This is a predicament that needs to be changed quickly.

Until recently, it was rare to see leaders of the international community addressing this vulnerable group. Sadly, many of such leaders fell victim to the kind of feeling described by Nelson Mandela in the words of Maire Bopp Dupont at the opening plenary session today. President Mandela told her that, on his release from Robben Island, many leaders of the population in South Africa recoiled from addressing the communities most in need of support. Nelson Mandela would become an important voice. But until recently, there were few heads of state and few heads of government who would lift their voices.

At this ICAAP Congress, the President of Indonesia, Susilo Bambang Yudhoyono, lifted his voice at the opening ceremony. So did his wife. Both of them referred to the crucial communities who have to be brought into the strategy if the struggle against HIV/AIDS is to succeed: MSM, IDUs (drug users) and CSWs (sex workers). It is difficult to overstate the importance of the President’s willingness to refer to these groups and to acknowledge their human rights and dignity in addressing the AIDS pandemic. So many other leaders have been silent. Ronald Reagan, a great communicator, could not bring himself in his first term as President of the United States of America, to mention AIDS or MSM and other groups in the front line. How precious therefore it is to have the President of Indonesia acknowledge the importance of reaching out to vulnerable groups, and specifically MSM. One hopes that this gesture will give an example to political leaders in the Asia-Pacific region. The prospects of other leaders quickly following the initiatives taken up may seem remote. But a step has been taken in the right direction.

MSM: ACTION, NOT MORE WORDS

The Hon. Michael Kirby AC CMG*

AN IMPORTANT MOMENT

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* Former Justice of the High Court of Australia; one-time member of the WHO Global Commission on AIDS; member of the UNAIDS Reference Panel on AIDS and Human Rights.
3 WHO, UNDP and UNAIDS, Health Sector Response to HIV/AIDS Among Men Who Have Sex With Men. Consultation, Hong Kong, February 2009 (WHO).
I acknowledge the work of the organisers of this Congress. I also acknowledge the crucial work that United Nations Development Programme (UNDP) has performed. Its publications, often jointly with UNAIDS, constitute an institutional recognition in the United Nations family of the importance of communicating with MSM both as a human rights strategy and as one that is central to the effective public health outreach to a crucial community at risk. I acknowledge the important work performed by Mr. Jeffrey O’Malley, Director HIV/AIDS Practice within UNDP and by Dr. Mandeep Dhaliwal, UNDP leader on Human Rights, Gender and Sexual Diversities. They have been champions of the involvement of MSM in the forefront of the international effort to turn the epidemic around.

IN THE BEGINNING

Of the thousands of participants in this ICAAP meeting, few will have been engaged in the HIV/AIDS pandemic longer than I. This is no boast; just a fact. My involvement began very soon after the World Health Organization (WHO) recognised the significance of AIDS.

The first director of the Global Programme on AIDS, Dr. Jonathan Mann, secured my appointment to the Global Commission on AIDS in the mid-1980s. Other members of that Commission included Professors Luc Montagnier and Robert Gallo, the two scientists credited with isolating and describing the virus, HIV. At the time, the scientists told the Commission that the world would probably have a vaccine against HIV within ten years. Within twenty years, we would have a cure. Neither of these predictions has proved accurate. A vaccine remains elusive. Although anti-retroviral drugs have been developed to give significant relief to persons infected with HIV, a cure to rid the body of the virus is not yet available.

We must therefore continue with the difficult strategies of education and behaviour modification. As one who served in the judiciary of my country for thirty-four years, I can attest to the fact that laws, and even education, are only partly successful in altering human behaviour. What is essential to achieve this end is a full realisation by those most at risk of the urgent necessity to change their conduct so as to protect themselves and thereby to protect others.

As I listened to the speeches at the opening plenary of this second day of the Congress, I reflected on the messages that were expressed and how similar that many of them were to the lessons that Jonathan Mann taught in the earliest years of AIDS:

1. AIDS is a women’s issue: Dr. Mann repeatedly taught this lesson. It was advocated today by Geeta Rao Gupta, whilst emphasising that men too must be reached.

2. AIDS is a human rights issue: This was the message given by Kyung-whu Kang, Deputy High Commissioner for Human Rights of the United Nations. Like Jonathan Mann, she emphasised that, in addressing this particular epidemic, we will learn not only strategies that work against a virus. We will also learn the urgent need to protect and respect the human rights of every one at risk. Already, in the Office of the High Commissioner for Human Rights and elsewhere in the United Nations, HIV has forced even the most reluctant to address, and acknowledge, how universal principles of human rights must be accorded respect for all persons at risk, including MSM, IDUs and CSWs.

3. AIDS demands engagement with the vulnerable: This was another insight that Jonathan Mann taught us twenty-five years ago. It was repeated today in our plenary. Dr. Michael Tan of The Philippines and Dr. Jon Yungphakom once again described the importance of outreach to vulnerable groups and of the impediments so often put in the path of such endeavours. We were witness to the fulfilment of one of the principles upon which Jonathan Mann always insisted, namely the participation and involvement of people living with HIV and AIDS. Maire Bopp Dupont spoke for positive people as a member of the Pacific Island AIDS Foundation from Cook Islands. Her tears, when she reflected on the children who suffer in the epidemic, were precious to this Congress. They brought home to us the human dimension. AIDS is not over. And it is not about mere statistics.
THE PAIN OF VULNERABILITY

As I listened to these speeches, I also reflected on my own experience as a member of a group vulnerable to HIV, namely MSM. I grew up in Australia when being a member of this community exposed one to illegality and criminality. It was a time of irrational denial, of isolation, of stigma, of vulnerability and of shame. MSM were forced to consider themselves second-class citizens. In most countries, they still are. Yet when AIDS came along, fortunately in Australia, we had political leadership on both sides of politics that addressed the AIDS paradox. Paradoxically, the most effective strategies to contain and treat HIV/AIDS are those which involve the making of laws and the taking of other measures to protect those at risk. It is paradoxical because the knee-jerk reaction is to punish, not support, the risk-bearers. But punishment alienates people from self-protective messages. Outreach and engagements is the only hope of influencing their minds and hence their behaviour.

Reform of the law on MSM has come very slowly. Sixty years after Dr. Alfred Kinsey published his trail-blazing research; fifty years after the Wolfenden report in Britain proposed reform; forty years after reform of the law was achieved in Britain, the fact remains that in eighty countries of our world, MSM are still exposed to severe criminal sanctions. Just as I was when I was a young man.

There are two paths to reform. One is the path of the legislature. This was the strategy that Wolfenden proposed in the United Kingdom. It was achieved forty years ago in Britain. It was also the strategy observed in Australia, New Zealand, Canada and many other countries. Yet eighty lands still remain with criminal sanctions. This says nothing about the other laws and policies that discriminate against people on the basis of their sexual orientation.

Forty-one of the fifty-three countries of the [British] Commonwealth of Nations retain the old criminal laws four decades after the United Kingdom had repealed them. In twenty countries of the Asia-Pacific region, these relics of colonial rule remain in place. Many of the countries in our region opposed the endeavour of France and Brazil and other lands at the end of 2008 to secure from the General Assembly a statement calling for the repeal of criminal laws against MSM. This level of inactivity and opposition from countries that know the burden of unjust discrimination is a sad reflection on the past failures of leadership in the Asia-Pacific region that we must turn around.

In the face of such unyielding opposition, it is natural that proponents of reform would seek alternative redress in the courts. Thus, proceedings were successfully brought in the European Court of Human Rights in the cases of Northern Ireland, the Irish Republic and Cyprus. They were brought before the Human Rights Committee of the United Nations, in the case of Tasmania, Australia, the last jurisdiction of my own country to resist reform. All of these proceedings succeeded. So did proceedings in South Africa, in the Supreme Court of the United States of America, and most recently in the Delhi High Court in the NAZ Foundation Case. I pay a tribute to Anand Grover, a member of this panel at the Congress. His work as senior advocate before the Delhi High Court convinced that court, led by Chief Justice A.P. Shah, of the merits of the legal arguments to demonstrate that such laws, targeting MSM, offend basic principles of equality and respect for privacy now found in many national constitutions, including that of India.

We should pause and reflect upon the courage and insight of the Indian and other judges. Their decisions will, we must hope, influence the many other lands that inherited the colonial criminal codes that have imposed such a sad and unjust blight upon members of sexual minorities. It is part of the rationality of our species to recognise such discrimination and injustice for what it is. We must be grateful to the judges and advocates who have the insight and the wisdom and courage to say: ‘Enough is enough’.

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6 Toonen v Australia (1994) 1 Int.Hum.Rts Reports 97 (No.3).
In the Asia-Pacific region there has been bad news in recent times. Bad news that none of the many lands with the equivalence to s377 of the Indian Penal Code have seen fit to repeal such provisions. Bad news in Singapore. There, although a committee of the Law Society of that State recommended repeal of the local s377, the measure was opposed by an appointed member of the Singapore parliament who is a professor of law in Singapore, no less. Her association with an opposing Christian denomination led her to denounce legislative reform with talk of “Sodom and Gomorrah”. In Singapore! It is a tragedy that her opposition succeeded on this occasion. And this in the face of statements by the original Prime Minister of Singapore, Lee Kwan Yu, suggesting that the time was ripe for reform.

In other states of our region, notably Cambodia, steps have been taken to turn back the clock on the measures adopted to help prevent the spread of HIV, specifically to empower sex workers and other vulnerable groups in the community. There seems to be an element of inaction, moralising and hypocrisy abroad that impedes successful strategies for legal policy.

As against this bad news, there is good news. A number of decisions of the Hong Kong courts have asserted the right to equality of MSM. Likewise, a decision of the Supreme Court of Nepal has insisted on equal rights to sexual minorities. A recent decision of the courts in Pakistan has upheld the right of transgender citizens to be recognised as a special category. The decision of the Delhi High Court is a shining example of what can be achieved through legal process where the courts are independent and strong and open to persuasive arguments that draw on international wisdom. And in China and other lands, UNDP has taken initiatives to study MSM communities and to draw inferences on the need for legal and policy changes. It has done so partly for a successful strategy against HIV/AIDS and partly because this is warranted by universal principles of human rights.

On the whole, in the balance of good and bad news, it must be acknowledged that, for the moment, the balance favours the bad. Endless conferences, countless speeches and persuasive logic, good precedents from courts and fine examples of reforming legislation mean nothing to those who are locked in their ignorance of science and who blindly repeat the errors of an uninformed reading of religious and scriptural texts. The victims of this ignorance include MSM throughout our region. It has been estimated that only ten percent of MSM in the region has access to treatment of HIV and to effective measures for protection and prevention of the spread of the virus. This is why the issue of MSM is one of the most pressing issues in the epidemic as well as an issue of fundamental human rights.

THE THIRD PHASE OF AIDS

The injustice to MSM in our region takes on a special urgency in the current phase of the global response to the AIDS pandemic. The first phase, under Dr. Jonathan Mann, concerned the alert he gave to the existence of HIV and the need of the global community to respond. The second phase, under UNAIDS, led by Dr. Peter Piot, involved an urgent strategy to provide access to treatment, including to MSM infected with HIV. The creation of the Global Fund has brought life and hope to millions, including many in the MSM community.

But now we face the third phase. It is a phase when prevention will be the central strategy of the global community. The world cannot afford to continue to fund the costs of an ever-increasing cohort of persons infected with HIV. At present, this group increases by 2.7 million persons every year. Particularly in the context of the global financial crisis, the world will not pay the great costs of providing for the expanding needs for the anti-retroviral drugs. This is why prevention is now at the top of the agenda of UNAIDS led by Michel Sidibé and the Global Fund, led by
Michel Kazatchkine. So long as MSM and other vulnerable groups are criminalised, marginalised and excluded from their societies, effective strategies of prevention are unlikely to be devised. It is not only irrational, it is unjust and harmful. Sadly, the laws that many countries now seek to pass are those that criminalise consensual adult transmission of HIV. What is needed most is repeal of oppressive laws; the adoption of protective policies; and the stepping up of education to assure respect for all those in the front line of this epidemic.

NEVER SUCH AN OPPORTUNITY

In one of the publications supported by UNDP, Dr. Neal Blewett, who was the Health Minister in Australia who led my country to supportive strategies that respected the rights of vulnerable groups, urged that the most effective measures would be those that spoke softly to leaders of the world and did not try to crash through with reforms that were culturally difficult for them to accept. I entirely agree with the need for strategies that are respectful to the cultural, social and religious mores of the many diverse countries of our region. On the other hand, there has been quiet speaking now for a quarter of a century as this pandemic has continued to ravage millions of vulnerable human beings, including millions of MSM. In the face of inactivity and indifference, a time must be reached where new and bolder strategies must be devised. Quiet talking will not convince those who have shut their ears, their eyes and their hearts to the predicament of MSM.

Fortunately, the leadership of the world community on the HIV/AIDS epidemic is now speaking with a single voice. The Secretary-General of the United Nations, Ban Ki-moon has said, in memorable words:

“In countries without laws to protect sex workers, drug users and men who have sex with men, only a fraction of the population has access to prevention. Conversely, in countries with legal protection and the protection of human rights for these people, many more have access to services. As a result, there are fewer infections, less demand for anti-retroviral treatment and fewer deaths. Not only is it unethical not to protect these groups; it makes no sense from a health perspective. It hurts all of us.”

These words, spoken in August 2009, resonate in this Congress. They resonate with the words of UNAIDS, of the Global Fund, of UNDP, of the High Commissioner for Human Rights and of the President of Indonesia. Never has there been such a unanimity of leaders embracing the previously unmentionable and acknowledging the necessity to respect and uphold the fundamental human rights of all human beings as a strategy to help contain HIV/AIDS. We will never have another moment like this in history to tackle the issues of MSM and of other vulnerable groups. These groups include prisoners, refugees, detainees, and women disempowered by reason of their gender.

It behoves us all to make sure that words are turned into action, and that action springs to the help of the vulnerable. That is why this session on MSM is so important for the successful strategy against the further spread of HIV. And why we must all embrace the wisdom of the Secretary-General of the United Nations and the courage shown by the President of Indonesia at the opening of the 9th ICAAP Congress in Bali.

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9 UNAIDS, Policy Brief, HIV and Sex Between Men, August 2006, p.4.
The Hon. Dame Carol Kidu is Minister for Community Development in Papua New Guinea and is the only woman member of the 109-member Papua New Guinea Parliament. Dame Kidu was first elected into the PNG Parliament in 1997. Between 1997 and 2002, she facilitated the preparation of major legislative reforms to the criminal code on rape and sexual assault, as well as new legislation on child sexual abuse and sexual exploitation of children. Dame Kidu was re-elected to parliament in 2002, and appointed Minister of Welfare and Social Development.

In 2007, she was re-elected to Parliament for the third term and resumed the portfolio of the Ministry For Community Development and is now focusing on developing a Social Protection Policy to complement the Integrated Community Development Policy. She facilitated the establishment of the Parliamentary Committee on HIV and AIDS in 2003 and the establishment of a PNG Parliamentary Group on Population and Development in 2008.

Dame Kidu received the Imperial Award of Dame of the British Empire in January 2005 and was awarded International Woman of Courage Award by the Secretary of State of the United States of America in March 2007. She was named Pacific Person of the Year December 2007 and the 2008 Regional Rights Resource Team Pacific Human Rights Award winner for her contribution to promoting the rights of Pacific Islanders. In February 2009 she was honoured with the highest award for a non-citizen by the French Government - the Cross of Knight in the Order of the Legion d’Honneur.

Addressing Legal Issues Preventing Comprehensive Prevention among MSM PNG case study

Carol Kidu DBE MP
9th ICAAP, Bali, 11 August 2009

DISCLAIMER!!!

I am a legislator but not a lawyer and apologise that I cannot quote with authority from case law in this presentation. My presentation will outline present work in progress that aims to de-criminalize the issues of homosexuality and prostitution. More detail on case law can be found in Christine Stewart’s Working Paper 19 Gender Relations Centre Research School of Pacific & Asian Studies, The Australian National University ISSN: 1320–4025 (pbk).

BACKGROUND TO MY PRESENT WORK ADDRESSING MSM LEGAL ISSUES

• Requests to me from some members of the medical profession to reform various areas of sexual and reproductive health legislation working from a public health and a human rights perspective

• Established a multi-sectoral and stakeholder working group as Minister For Community Development to begin consultation on the issues – needed to sensitise the key Policy Division staff first

• Targeted consultations included Attorney General and his senior officers, the First Legislative Counsel’s office, Police, CIS, relevant NGOs, some church leaders, sex workers and MSM representatives
BACKGROUND (CONT.)

- Did desktop studies of comparative research and sought direct advice from international experience (Scarlett Alliance & NZ Prostitutes Collective) – working group consultation went as far as it could then identifies need for technical support
- AFAO provided funds for a legal consultancy to consolidate the work into a Cabinet submission and AUSAID (through one of its HIV support projects) is now financially supporting the next stage of the work
- About 5 years on the lead-up work with various stakeholders but have avoided media to delay polarised moralistic debates
- Working group now being re-activated and refocused as a Reference Group to oversee the next stage of political sensitisation in the lead up to taking the matter to Parliament
- Reference Group will also plan an implementation and monitoring strategy for the proposed reform

PNG LAW ON SEX BETWEEN MEN

The Criminal Code of PNG was adopted from that of Queensland over a century ago. Offences of sex between men in present Criminal Code Act 1974 are:

- the crime of ‘carnal knowledge against the order of nature’ under the heading ‘Unnatural offences’ (S.210 – maximum penalty 14 years)
- the crime of ‘indecent treatment’ of boys under fourteen years of age (S.111 – maximum penalty 7 years); the misdemeanour of indecent practice between males, described as ‘an act of gross indecency’ (S.212 – maximum penalty 3 years)
- Criminal Code Amendments 2002 on rape and sexual offences made rape a gender neutral offence and covered sexual offences against children (but failed to repeal Sections 210 and 212 which criminalize consensual adult sexual preferences)

TRADITIONAL PNG SOCIETY

- These "offences" were not recognised as such in traditional PNG society
- Initiation ceremonies of some PNG societies included male-to-male sex (ritualised homosexuality)
- In other parts of the country, sex between males was ignored when it occurred, or regarded as something amusing
- The offences in PNG law today were derived from the English law of many centuries ago – repealed in the UK and Australia but still remain in the PNG law (often reinforced by Christian doctrine)

THE LEGAL REFORM PROPOSALS

- To repeal Sections 55, 56 and 57 of the Summary Offences Act 1977 (relevant to prostitution) and to repeal Sections 210 to 212 (relevant to homosexuality), and 231 (relevant to prostitution) of the Criminal Code Act 1974
- To direct the Minister For Community Development to take appropriate further action to progress this legislative reform
### HOMOSEXUALITY AND HUMAN RIGHTS

- Article 7 of the Universal Declaration of Human Rights 1948: All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any such discrimination in violation of this Declaration and against any incitement to such discrimination.
- International Convention on Civil and Political Rights (PNG ratified in July 2008). Article 17 prohibits arbitrary interference with an individual’s privacy, and this has been interpreted to include consensual sexual activity between adults in private.
- The Constitution of Papua New Guinea enshrines a set of fundamental rights that should be accorded to all citizens. The recognition of some of these rights conflicts with legislative provisions that criminalise consensual male to male sex. These include the right to privacy (Section 49) and the right to equality (Section 55).
- The HIV and AIDS Management and Prevention Act, 2003 has provided an effective enabling environment for HIV prevention, treatment, care and support. The decriminalisation of sex work and male to male sex will complement this legislation and strengthen Papua New Guinea’s efforts to stabilise and reduce the transmission of the virus.

### THE HUMAN RIGHTS REALITY IN PNG

- As with sex work, there are many documented cases of police brutality, harassment and blackmail against men who have sex with men, although cases are rarely taken to court.
- Because of the stigma associated with male to male sex in Papua New Guinea, much of this sexual activity takes place furtively, and many of the men involved also have a wife and family.
- The need to maintain secrecy around male to male sex, due to the threat of criminal sanctions, heightens the vulnerability of these men and their families to HIV infection.
- It is very difficult to carry out effective HIV prevention work when the people one needs to reach are subject to such a level of stigma, police harassment and potential criminal sanctions.
- It should be noted that police attitudes and behaviour in some instances seems to have improved as a result of the work of MSM projects in the HIV Management strategic Plans.

### THE REALITY

- Charges have rarely been laid under the sections of the Criminal Code in recent years, so their repeal is unlikely to have significant legal consequences in practice. It is acknowledged that many people within Papua New Guinea have strong moral objections to male to male sex, even where it takes place between consenting adults.
- The proposal does not seek to challenge these moral views, nor to undermine the position that Church leaders and others may wish to adopt in relation to male to male sex.
- Rather, the recommendation for decriminalisation of consensual male to male sex is driven by the over-arching imperative to ensure that Papua New Guinea is able to act effectively to reduce vulnerability to HIV infection across the community.
- Ensuring that men who have sex with men have good access to HIV prevention, treatment and support services is an important part of an effective response, and this cannot happen under the cloud of the criminal law.
BENEFITS OF DECRIMINALIZATION

- Decriminalization of homosexuality (and sex work) would actively empower both of these community groups, considered to be at high risk of both violence and HIV, in mobilising a strong response to address HIV and violence in their communities.

It would do so by:

- Reducing practices of police corruption, violence and abuse of police powers
- Reduce the barriers MSM face in reporting crimes against them (including sexual violence)
- Improving the capacity of service providers to access highly marginalised and elusive communities
- Empowering MSM to be proactively engaged in representation informing the development and implementation of strategies to reduce risk of HIV and violence
- Underpinning and facilitating responses to the stigma, violence and discrimination that increases the risk of HIV and violence in the lives of MSM
- Enhancing community belonging, harmony and inclusion, through the promotion of human rights and HIV prevention, care and treatment as a shared community responsibility, rather than the discord and disharmony that erupts with segregation, blaming, and criminalisation
- Removing the evidentiary use of HIV prevention tools as proof of crime (including HIV prevention information, education, and safer sex equipment such as condoms), and facilitate the promotion of safer sex equipment vital to the prevention of HIV and other STIs

THE HYPOCRISY

The MSM community through the Poro Support project (and sex workers through Friends Frangipanni project) have been proactively involved in the HIV prevention and management response strategy of PNG. And yet they are legally “criminals” under outdated legislation.

It is time to change the law. The challenge will be to move away from polarised moralistic arguments to dialogue based on facts, human rights and access to services for all.

PNG looks forward to learning from your experiences and empowering people and strengthening networks with you

THANK YOU
**Professor Vitit Muntarbhorn** is a Professor of Law, at Chulalongkorn University in Thailand, and has been a lecturer and trainer at many human rights programmes in Thailand and other countries. In 2007, he was one of the co-chairs of the Yogyakarta Principles drafting committee. The Yogyakarta Principles was developed in response to well-documented patterns of abuse targeted toward persons because of their actual or perceived sexual orientation and gender identity.

Professor Muntarbhorn has served as the Nations Special Rapporteur on the sale of children, child prostitution and child pornography from 1990-1994, and from 2005 has been the Special Rapporteur on the Situation of Human Rights in Democratic People's Republic of Korea (North Korea). In 2004, he was awarded the UNESCO Prize for Human Rights Education. His work includes Human Right issues, including the rights of sexual minorities.

**OVERCOMING BARRIERS TO THE PREVENTION OF HIV AND AIDS:**

**THROUGH HUMANE LAWS AND PRACTICES**

One of the key challenges for overcoming barriers to the prevention of HIV/AIDS is to promote the formulation of humane laws and policies which enable people to participate in addressing the disease in a cooperative manner, rather than driving those living with HIV/AIDS underground. The latter approach is counterproductive, as it makes the disease more difficult to control. For this reason, it is essential to advocate the adoption of laws which do not lead to discrimination and marginalization, and to provide space to respect sexual activities between consenting adults in the private sphere in their diversity.

Paradoxically, there are many laws, policies and practices worldwide which create the opposite effect. For instance, some 80 countries criminalize some form of sexual behavior between men who have sex with men (MSM). On this front, some 20 countries can impose very serious sanctions ranging from long term prison sentences to capital punishment. Many of these laws are in the guise of anti-sodomy laws dating from the colonial era, while there are also various anti-debauchery laws and other criminal laws which are at times used to curb behavior associated with those who express their sexual orientation and gender identity. Various practices such as hate crimes have led to an array of attacks on gays, lesbians, bisexuals and transgendered persons (LGBT).

Fortunately, international human rights law has increasingly provided protection for LGBT and this sets the tone for the preferred laws, policies and practices at the national and local level. For instance, under the International Covenant on Civil and Political Rights, the Human Rights Committee has indicated that the prohibition against discrimination in regard to “sex” includes the call for non-discrimination in regard to sexual orientations. Various UN investigators have consistently monitored violations of human rights affecting LGBT, including attacks on their right to life, such as summary executions and extra-judicial killings, and have called for improved protection of their human rights, including their right to privacy.

In 2007, a number of human rights experts from all corners of the globe came together in Yogyakarta to summarize the state of international law on the issue of sexual orientation and gender identity and to offer greater clarity to guide States and other actors in their conduct towards LGBT. Thus were born the “Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity”. While the Principles are not tantamount to a treaty, they encapsulate, in a succinct and liberal manner, international human rights law drawn from international practice, including the jurisprudence of human rights committees under various UN-backed human rights treaties.
The Principles provided value added in a number of ways:

First, they provide a definition of sexual orientation and gender identity. Basically, the former refers to one’s capacity for attraction towards other persons (including those of the same gender), while the latter refers to a person’s inner sense of identity which is not necessarily that assigned at birth, thus opening the door to transgendered persons.

Second, the Principles list a variety of rights to be protected as part of the universality of human rights premised on non-discrimination – varying from civil and political rights, such as the right to security of the person, to economic, social and cultural rights, such as the right to work, education, housing and highest attainable standard of health.

Third, the Principles provide a checklist of actions which are needed to ensure the realization of human rights, for example, the position that laws which criminalize LGBT sexual behavior (impliedly including MSM) need to be reformed. They also advocate a comprehensive approach based on community awareness to counter stereotypes and to build a sense of understanding for human biodiversity.

Fourth, the Principles underline the protection needed for human rights defenders working in this field and call for remedies from and accountability of those who harm LGBT. Fifth, they target the UN, the courts, national human rights commissions and other stakeholders to adopt follow up measures to help implement the Principles. They have been bolstered by a recent UN resolution which refers, for the first time, to MSM as an issue requiring responses from health and other services.

International human rights law, especially as concretized by the Yogyakarta Principles, has thus had a catalytic effect, resulting in a number of good practices in recent years which can be further advanced.

First, last year nearly 80 countries under the UN issued a joint statement condemning human rights violations based on sexual orientation and gender identity, and advocated the need to decriminalize laws which undermine respect for sexual orientations.

Second, the courts in Nepal and more recently India have been instrumental in pressing for reform of criminal laws which give rise to injustices in this field, particularly anti-sodomy laws.

Third, a court in Pakistan has upheld the rights of transgendered persons.

Fourth, a number of countries, including Indonesia and South Africa, now allow identity documents to be changed so as to reflect a person’s preferred gender identity. Spain and the United Kingdom have gone further by adopting new laws to enable persons wishing to change their gender to do so and to be recognized as such by the State, even without gender reassignment surgery.

Fifth, national human rights commissions from the Asia-Pacific region held a meeting this year to address the question of sexual orientation and gender identity under the umbrella of the Yogyakarta Principles.

At the recent World Out Games 2009, which was a global venue for LGBT held in Copenhagen, an international conference took place which launched the Copenhagen Catalogue of Good Practices on this issue. This booklet documents constructive actions based on non-discrimination drawn from all over the world. They include such examples as business indexes monitoring non-discrimination, religious leaders and trade unions with a liberal approach, campaigns against hate crimes (in South Africa), LGBT film and art festival (in Indonesia), humane health policy to develop HIV programmes for MSM (in Kenya), and school curriculum to promote an understanding of sexual diversity under the notion of Social Justice (in Canada).

On a more sensitive front, even though the Yogyakarta Principles do not go as far to stipulate the obligation of States to register the marriage of LGBT, they do affirm that “in States that recognize same-sex marriages or registered partnerships,” any benefits available to different-sex married or regis-
tered partners should be equally available to same-sex couples. This reinforces the jurisprudence of European Courts, including the regional human rights court, and South American Courts, such as in Colombia and Brazil, which affirm that welfare benefits should be available to same-sex couples where they are also available for other couples. However, there is still a long road to be traveled. For instance, some parts of the medical sector still regard LGBT as behavior which can be altered, rather than a state of being. The military in some countries, such as Thailand, also classify transgendered persons as “ill”. This attitude is contrary to international human rights law.

From a human rights angle, while laws and policies are important for reflecting international standards, it is equally essential to promote a sense of values and empathy, through an educational, participation and mobilization process, that opens the door to acceptance of human biodiversity. The bottom line should at least follow this exhortation: no criminalization, no discrimination, and no violence, please.

Mr. Vitit Muntarbhorn is a Professor at the Faculty of Law, Chulalongkorn University, Bangkok. He has helped the UN in a variety of capacities, including as an expert, consultant and Special Rapporteur. These views were presented at the 9th International Congress on AIDS in Asia and the Pacific (9th ICAAP), 4-12 August 2009, Bali.

Anand Grover is a well-known long-time advocate and activist on HIV and human rights. He is a practicing lawyer in the Bombay High Court and the Supreme Court of India. He has argued many cases relating to the rights of people living with HIV, including rights of sex workers and the first HIV case in India relating to employment law. Most recently, he successfully argued against the constitutionality of India’s anti-sodomy law. Anand Grover is also Director of the Lawyers Collective HIV/AIDS Unit, an NGO involved in HIV and AIDS related litigations and advocacy in India. In 2008, Anand Grover was appointed UN Special Rapporteur on the right to health.

Overcoming Legal Barriers
Men Having Sex with Men
Anand Grover
The Constitutional Route - Naz Foundation (India) Trust v. Government of NCT, Delhi & Others
9th ICAAP, Bali, 11 August 2009

VULNERABLE GROUPS - ESTIMATES
• Injecting Drug Users
• Worldwide, 3 million out of 16 million drugs users are HIV positive
• Argentina (49.7%), Brazil (48%), Kenya (42.9%), Nepal (41.39%) and Thailand (42.5%), Cambodia (22.8%), Russia (37.15%) and Spain (39.7%)
• India 10.16% [NACO 2006]
### VULNERABLE GROUPS - ESTIMATES

- **Sex Workers**
  - 14-16% infection in sex workers in Indonesia  
    (*National AIDS Commission, Indonesia, 2006*)
  - Ghana 38%  
    (*UNAIDS 2008*)
  - Vietnam 4%  
    (*UNGASS Report 2008*)
  - India 4.9%  
    (*NACO-2006*)
- **Men who have sex with men (MSM)**
  - Ghana 25%  
  - Thailand 24.6%  
  - Germany 10.7%  
  - Spain 9.2%  
    (*UNAIDS 2008*)

### WHAT IS HARM REDUCTION?

- For certain groups Harm Reduction programmes have proven effective, like Needle Exchange Programmes and Oral Substitution Therapy for IDUs, Condom Promotion Programmes for Sex Workers and MSMs.
- Harm Reduction is the promotion of actions or practices that:
  - minimize a person's risk of exposure to HIV/AIDS
  - and/or mitigate adverse impacts related to HIV/AIDS
  - Specifically applied in the context of populations that are considered vulnerable to HIV/AIDS like Sex Workers, Men who have sex with Men and Injecting Drug Users.

### STRATEGIES FOR HARM REDUCTION

- **For MSM**: Provision of IEC on safer sexual practices, counselling, testing & support services.
- **For Sex Workers**: Provision of safe sex tools - male & female condoms, lubricants, microbicides etc.
- **For IDUs**: Provision of clean needles, syringes, bleach & sterilising equipment within an ‘enabling’ environment which encourages adoption of safer practices among populations at risk.

### SONAGACHI - PREVENTION OF HIV THROUGH PROTECTION OF RIGHTS

<table>
<thead>
<tr>
<th>Intervention</th>
<th>Impact</th>
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<tbody>
<tr>
<td><em>STD/HIV project introduced in 1992</em></td>
<td><em>Condom use: Up from 3% in 1992 to 90% in 1998</em></td>
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<tr>
<td><em>Components: STD treatment, IEC &amp; Condom promotion</em></td>
<td><em>STD rates: Fell from 25.4% in 1992 to 11.5% in 1998</em></td>
</tr>
<tr>
<td><em>Strategies: Participatory, Peer oriented &amp; Rights based</em></td>
<td><em>HIV prevalence: Has remained stagnant at 5%</em></td>
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### IMPACT OF SECTION 377

- Criminalises non-penile vaginal sexual acts b/w consenting adults
- Facialy neutral, i.e, text does not distinguish b/w heterosexuals & homosexuals but, in effect, it applies *unfairly to MSM by prohibiting the only form of sexual expression b/w men*
- Conviction of consenting adults rare; used 'extra-legally' by the Police to harass/blackmail/extort money from MSM
- Provides moral & legal sanction for continued discrimination, eg: NHRC cited Sec 377 to justify its refusal to take cognisance of rights violations (aversion therapy) against LGBT persons
SECTION 377, INDIAN PENAL CODE (IPC)

“Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punishable with imprisonment for life, or with imprisonment of either description for a term which may extend to 10 years, and shall also be liable to fine.”

Explanation: Penetration is sufficient to constitute carnal intercourse

SECTION 377, IPC

Meaning & Scope

• **Whoever:** Man only? Till date, no female convicted for same sex acts
• **Voluntarily:** Consent irrelevant
• **Carnal intercourse:** Sexual acts other than penile-vaginal intercourse
  - Offence of sodomy constitutes anal intercourse only [Government v. Bapoji Bhatt 1884(7) Mysore LR 280, 345]
  - Subsequently, over ruled to include oral sex [Khanu v. Emperor, 1925 Sind 286, Lohana Vasantlal v. State, AIR 1968 Guj 252, Calvin Francis v. Orissa, 1992(2) Crimes 455]

And other penetrative acts:
  - Manipulation of penis, held tightly by hands [Brother John Antony v. State, 1992 Cri LJ 1352]

• **Against the order of nature:**
  - Sexual acts w/o possibility of conception [Khanu v. Emperor 1925 Sind 286]
  - Imitative & perverse [Lohana Vasantlal Devchand v. State, AIR 1968 Guj 252]
  - **With man, woman or animal:** Applicable to homosexuals, heterosexuals & bestiality [See Grace Jeyramani v. E. P. Peter AIR 1982 Karnataka 46]
  - **Penetration:** “Since statute does not specify any particular opening to which penetration can be made, penetration into any orifice of any one’s body except vaginal opening of a female is sufficient for establishment of the crime.” [State v. Bachmiya Musamiya, 1999 (3) Guj LR 2456]

SECTION 377, IPC

The Barrier can be overcome by 2 routes:

Amendment of the law - That was not possible in India because Parliamentarians were not empathetic

Constitutional Route - India has a written constitution which allows a law to be struck down if it violates Fundamental Rights in Chapter III of the Constitution
### THE NAZ CHALLENGE

- **Basis:**
  - Naz Foundation (India) Trust – NGO engaged in sexual health promotion for men having sex with men (MSM)
  - And, Section 377:
    - Impeded outreach & participation in HIV prevention
    - Created fear of arrest & harassment by Police
    - Interfered with rights of MSM
  - **Contention:** Section 377 is unconstitutional in that it applies to private, adult, consensual sex
  - **Prayer:** Section be read down; to only cover non-consensual acts & sex with minors

### CASE DEVELOPMENTS

- **2001:** Petition filed in Delhi High Court (HC)
- **2002:** Notice issued to Govt of India; Attorney General asked to appear
- **2003:** Ministry of Home files affidavit opposing petition
- **2004:** Petition dismissed for lack of “standing”
- **2004:** Review petition in HC rejected
- **2005:** Appeal filed in Supreme Court
- **2006:** Matter sent back to HC
- **2004-06:** Interventions (in support & against)
- **2006:** AIDS Department files affidavit admitting legal hurdles in HIV prevention with MSM
- **2008:** Final arguments
- **2009:** HC pronounces verdict

### ARGUMENTS FOR NAZ

**Section 377 violates Fundamental Rights:**

- Article 14 (Equality and Equal Protection of Law)
  - Vague; arbitrary; unreasonable
  - Disproportionate impact
- Article 15 (Non-discrimination)
  - Prohibited grounds of sex includes sexual orientation
- Article 19 (Freedom of speech, expression & association)
  - Obstructs right to receive/impart information
  - Forbids self-expression
  - Prevents organising
- Article 21 (Right to Life and Liberty)
  - Intrusion in Privacy; w/o compelling state interest
  - Violates right to Dignity
  - Infringes right to Health (HIV arguments)

### COUNTER ARGUMENTS BY GOVT OF INDIA

**Substantive Arguments**

- Article 14:
  - Not arbitrary; clear intent to prevent acts against nature
  - No disparate impact; covers heterosexual too
- Article 15: Constitution does not recognise sexual orientation and/or sexual minorities
- Article 19: No hindrance to freedoms; eg: “gay parades”
- Article 21:
  - No right to commit an offence; private/adult/consent irrelevant
  - Injurious to public health
  - Decriminalization will increase AIDS
  - Homosexuality is a disease
  - Threatens public order; slippery slope
  - Against public morality

Section 377 preserves public interest; restrictions on rights justified
COUNTER ARGUMENTS BY GOVT OF INDIA

Technical Grounds
- Mere perception or abuse of law – no basis to invalidate statute
- Decriminalization - prerogative of legislature, not judiciary
- Prayer for declaration - impermissible

HC DECISION …

“We declare that Section 377 IPC, insofar it criminalizes consensual sexual acts of adults in private, is violative of Articles 21, 14 and 15 of the Constitution.”
-Naz Foundation (India) Trust v. Government of NCT, Delhi
- Continue to govern non-consensual acts & sex involving children (> 18yrs)
- Advised Parliament to modify rape law in line with 172nd Law Commission Report

HIGHLIGHTS
- Firmly establishes privacy – of person, not just space or acts, as a fundamental right
- Interprets sex to also mean sexual orientation as grounds prohibiting discrimination
- Affirms “integrationist” policy; protection of rights = promotion of public health
- Rejects public disapproval as basis to restrict rights
- Sets constitutional morality (principles of inclusion/equality/plurality) as standard to assess if state interest in curtailing rights is compelling

Decision allows LGBT to claim other rights

IMPLICATIONS
- Applies only to Delhi?
  - NO, ruling holds unless overturned by another Court of same or higher stature
- Applies to cases (adult/consensual) where prosecution is pending?
  - YES, after decision attains finality i.e expiry of limitation, appeal/revision/review
- Recognises adult, same sex relationships?
  - YES & NO. While same sex adults can freely be in relationship(s), the law will not recognise rights/duties arising from such relationships

RECENT DEVELOPMENTS…
- Special Leave Petitions filed in Supreme Court:
  - Suresh Kumar Kaushal
  - S.K. Tijarawala, spokesperson of Baba Ramdev
  - Apostolic Church
  - Bhim Singh
- Govt of India not preferred an appeal yet
- Decision not stayed; matter to be heard in due course
- Next date: 29 September 2009
John Godwin is an independent consultant based in Sydney, Australia. He has an extensive background in HIV, human rights law and development. He has 20 years experience working with civil society, government departments and UN agencies to address HIV-related issues. In the 1990s he practised as a lawyer in Australia specializing in anti-discrimination law and conducted test cases relating to sexuality and HIV. He co-authored the Australian HIV/AIDS Legal Guide. From 2004-2008 he was the lead HIV adviser to the Australian Government’s International Development Agency (AusAID). He has a broad range of international experience in policy, advocacy and project management. John has been involved in high-level policy development and liaison with international NGOs, national governments, donors and multilateral organizations.

<table>
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<tr>
<th>Laws that impede HIV responses among MSM and Transgender populations</th>
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**John Godwin, Consultant**

Symposium: Overcoming legal barriers to comprehensive prevention among MSM and TG persons in Asia and the Pacific

9th ICAAP, Bali, 11 August 2009

**WE NEED YOUR INPUT**

Timeframe: Aug 2009 – Jan 2010

**Objectives**

- Summarise laws affecting HIV responses for MSM & TG
- Analyse impact of laws on national HIV responses
- Recommendations for advocacy

**METHODOLOGY**

1. Desk research: Literature review, status of laws
2. Convene Advisory Panel: Community, government, technical experts
3. Interviews: TG, MSM, PLHIV groups; governments; human rights orgs
   Impact of laws on vulnerability & access to HIV services; recommendations
4. Community consultation on draft: end of 2009
5. Interim report: 1 Dec 2009
6. Final report: early 2010
7. Post report consultations: implementation

**SCOPE**

**Subregions**

- South Asia
- East and South East Asia
- Pacific

**Laws, policies and law enforcement practices**

- Harmful (e.g. sodomy laws)
- Helpful (e.g. equality laws)

......What do we already know?
SEX BETWEEN MEN IS A CRIME IN 20 COUNTRIES IN THE REGION

South Asia (6)
Afghanistan, Bangladesh, Bhutan, Maldives, Pakistan, Sri Lanka

East & South East Asia (4)
Brunei, Malaysia, Myanmar, Singapore

Pacific (10)
Cook Islands, Fiji, Kiribati, Nauru, Palau, PNG, Solomon Islands, Samoa, Tonga, Tuvalu

LAWS CAN BE HARMFUL OR HELPFUL

Harmful
- Pornography law (Indonesia)
- Public Assembly laws (Myanmar)
- Wilful transmission (Fiji)
- Soliciting (Malaysia)
- Public Indecency (Malaysia)
- Loitering / Public Nuisance (Fiji, India)
- Trafficking (Cambodia)

Helpful
- Decriminalization of homosexuality (India, Hong Kong)
- Recognition of 3rd gender (Nepal)
- TG rights to welfare and freedom from police harassment (Pakistan)

MOMENTUM: 2008

Commission on AIDS in Asia Report
Review of Legal Frameworks and the Situation of Human Rights Related to Sexuality Diversity in Low and Middle Income Countries
Mexico AIDS Conference: Ban Ki Moon calls for protective MSM laws
UN Declaration on Human Rights, Sexual Orientation & Gender Identity
- Supported: Nepal, Timor Leste, Japan, Australia, New Zealand
- Opposed: Afghanistan, Bangladesh, Brunei, Indonesia, Malaysia, North Korea, Pakistan, Fiji, Solomon Islands

MOMENTUM: 2009

Global
UNAIDS Action Framework on Universal Access for MSM and TG
Global Fund Strategy on Sexual Orientation and Gender Identities
UN Committee on Economic, Social and Cultural Rights - International law prohibits gender identity discrimination
### MOMENTUM: 2009

**Regional**
- Asia Pacific Forum of National Human Rights Institutions
- Meeting & 1st statement on MSM TG rights (Yogyakarta)
- Health Sector Response to HIV Among MSM (Hong Kong)
  - UN, Hong Kong Health Department
- Regional Consensus Meeting on Developing Comprehensive Package of Services to Reduce HIV among MSM and TG (Bangkok)
  - UN, ASEAN, USAID, APCOM

### 2010 AND BEYOND

Study findings will be relevant to UNGASS process

March 2010, countries will report to UN:
- Whether laws protect MSM and TG from discrimination
- Whether legal obstacles exist to effective HIV responses

2011⇒ 10 year review of Declaration of Commitment on HIV/AIDS

### WE NEED YOUR INPUT

- What laws & law enforcement practices are affecting HIV efforts?
- What law & policy reform processes are occurring?
- What arguments & strategies can bring about change?
- What should the national & regional advocacy agenda be?
Way Forward...

The time for action is now! The Commission on AIDS in Asia has constructed a grim picture of how HIV epidemics among men who have sex with men have developed in the region, and how these are likely to accelerate exponentially in the future if effective and comprehensive responses are not dramatically scaled up. The regional projections show large increases in new infections among MSM if risk behaviour stays at current levels of low condom use with many concurrent male partners. In the worst case scenario, by 2020, some 50% of all new infections will be linked to male to male sex.

To achieve universal access and to reverse the rates of HIV infection among men who have sex with men and transgender people, the United Nations, governments, affected communities and a broad range of actors must intensify efforts to devise and deliver targeted and evidence-informed interventions. The UNAIDS Action Framework: Universal Access for MSM and TG People, recently endorsed by the UNAIDS Programme Coordinating Board (June 2009), aims to assist the UN system to accelerate efforts, guided by the following principles:

- Action must be grounded in an understanding of, and commitment to, human rights, the cornerstone to an effective response to HIV
- Action must be based on, and informed by, an evidence-base on HIV among MSM and TG people
- Action is required by a broad range of partners, simultaneously addressing both short- and long-term needs and opportunities to ensure broader and better responses to HIV among MSM and TG people

While the promotion and protection of human rights protection is a public good and essential to transforming society’s approach to AIDS, it is not enough in and of itself. Effective HIV programmes must challenge punitive laws, policies, practices, stigma and discrimination which impede access to services, in particular access for key populations such as men who have sex with men and transgender people.

This symposium effectively highlighted the efforts of parliamentarians, the legal community, academics, community advocates and the UN in overcoming the legal barriers hampering effective responses for men who have sex with men and transgender people in the Asia Pacific region. The presentations highlight the importance of advancing human rights commitments, establishing broad partnerships, and mobilising communities – especially communities of those most vulnerable to HIV in challenging punitive laws, policies, practices, stigma and discrimination. One of the most powerful messages from this symposium is that a real difference can be made in the lives of men who have sex with men, transgender people and those people living with and vulnerable to HIV through embracing diversity, challenging pernicious inequalities and by bringing together the collective knowledge and resources of governments, academics and communities.

Jeff O’Malley
Director, HIV Group
United Nations Development Programme
9th International Congress on AIDS in Asia and the Pacific

90 per cent of men having sex with men have no access to HIV prevention and care

Nusa Dua, Bali, August 11: More than 90 per cent of the men having sex with men in Asia Pacific do not have access to HIV prevention and care services and if interventions are not urgently intensified, the spread of HIV among this marginalized population will be steep in a short period of time, said speakers at a high level symposium here at the 9th ICAAP today.

Due to the increased availability of epidemiological data on HIV among MSM in recent years, there is a better understanding of the magnitude and nature of the epidemic amongst MSM and TG within the Asia Pacific region, they said. There is still a dramatic lack of HIV interventions for MSM and TG which comprehensively address their HIV prevention, treatment, care and support needs throughout the region. A 2006 survey of the coverage of HIV interventions in 15 Asia-Pacific countries estimated that targeted prevention programmes reached less than 8% of MSM.

The Symposium was organized by the United Nations Development Programme (UNDP) and the Asia Pacific Coalition on Male Sexual Health (ACPOM) and was titled “Overcoming legal barriers to comprehensive prevention among men who have sex with men (MSM) and transgender people (TG) in Asia and the Pacific” during the 9th International Congress on AIDS in Asia and the Pacific (ICAAP).

This ground breaking symposium discussed how effective and comprehensive HIV prevention among MSM and TG can take place only when a conducive and enabling legal environment is created that allows unimpeded dissemination of prevention messages and services, appropriate provision of treatment, care and support services, and the creation of confidence among the most marginalized and vulnerable to seek essential information and access services.

According to Jeffrey O’Malley, the Global Director of UNDP’s HIV Group, “in order to achieve universal access to HIV prevention, treatment, care and support and realize the Millennium Development Goals, we must facilitate an enabling legal environment and human rights based HIV policies and programmes for MSM and TG. This will mean stepping up our investment in legal and social programmes which effectively address discrimination and stigmatization amongst MSM and TG.”

Currently 20 countries in the Asia Pacific Region criminalize male to male sex behavior, and these laws often take on the force of vigilantism, leading to abuse and human rights violations. Even in the absence of criminalization, other provisions of law which violate the rights of MSM and TG are arbitrary and in appropriate enforcement obstruct HIV interventions, advocacy and outreach, and service delivery. These structural barriers significantly increase the vulnerability of MSM and TG to HIV and have an immense adverse effect on their health and human rights. This very debate was at the heart of the recent landmark ruling by the Delhi High Court that Section 377 of the Indian Penal Code unfairly discriminates against MSM and consenting adults in general.

“A strategy of prevention requires bold and effective legal and policy measures to reach out to the vulnerable communities and individuals at risk,” stated Honourable Michael Kirby. “It is here that reform of laws concerning MSM must be seen as affording important steps in the path of reducing the isolation, stigma and vulnerability felt by MSM communities and individuals. Enhancing their self-respect and dignity as citizens; and protecting their legal rights, including receiving information on safer sex practices.”
Developing strategic partnerships and alliances between affected communities, the legal profession, human rights bodies, parliamentarians and policy makers is critical to successfully address discriminatory legal and structural barriers that impede effective and comprehensive HIV services for MSM and TG populations.

“The recent case of the reading down of Section 377 of the Indian Penal Code that the Delhi High Court addressed is a shining example of such an approach, where education and sensitization of these different sectors was central to the success of the case,” said Shivananda Khan, APCOM chairperson. He added that, “Other key rulings in the region include the 2007 Nepal Supreme Court ruling recognizing the rights of sexual minorities, and the June 2009, Pakistan Supreme Court ruling that hijras are a minority community.”

In circumstances of the current global financial and economic crisis and the ever-increasing bill for life-saving anti-retroviral treatment, the impetus for effective comprehensive prevention becomes even stronger. Only a strategy of comprehensive, right based prevention - supported by an enabling legal environment offers a possibility of reducing the numbers of persons infected with HIV each year. In this context, it is both cost-effective and imperative to implement legal and social programmes which counter discrimination and stigmatization for MSM and TG.

For more information contact Edmund Settle, UNDP HIV policy specialist at edmund.settle@undp.org or +66 (0) 818369300