

Developing principles to address the detrimental impact on health, equality and human rights of criminalization with a focus on select conduct in the areas of sexuality, reproduction, drug use and HIV

Written submission prepared by *MPact Global Action for Gay Men's Health & Rights* and the *Sustainable Health Advocacy with Gay men (SHAG) Consortium* to the *International Commission of Jurists*

Topline Recommendations

As described in an array of United Nations documents,^{1,2} the use of criminal law to prosecute and punish consensual same-sex sexual conduct and relationships amounts to a violation of fundamental human rights. These rights include, among others, the rights to life, liberty, security of person, equality before the law, privacy, the right to marry, freedom of thought, and to health and well-being.³

MPact and SHAG advocate for six primary actions to be taken within the realm of criminal law to move substantively towards a world in which gay, bisexual and other men who have sex with men and all lesbian, gay, bisexual, transgender, and intersex (LGBTI) people are able to fully enjoy all of their human rights:

1. Enact an immediate moratorium on the utilization of criminal law to harass, prosecute, and punish consensual same-sex relations.
2. Full decriminalization of all consensual same-sex sexual conduct.
3. Repeal of propaganda and morality laws, which limit the public discourse around, and freedoms of assembly and of association for, gay men and other LGBTI people.
4. Ensure LGBTI organizations are able to legally register.
5. Repeal criminal laws that are used to prosecute or penalize HIV non-disclosure, exposure, and transmission.
6. Ensure consistency across legal and public health approaches to the prevention, treatment, and management of HIV, sexually transmitted infections, and access to services. This includes ensuring that law enforcement does not use public health tools, such as condoms, or association with gay community health service providers, as basis for harassment or arrest.

The interest of our organizations: MPact Global Action for Gay Men's Health & Rights (MPact) and the Sustainable Health Advocacy with Gay men (SHAG) Consortium

[MPact](#) was founded in 2006 as the Global Forum on Men Who Have Sex with Men & HIV (MSMGF). Based on Oakland, California, USA, we are a global network of gay and bisexual men and organizations with a mission to ensure equitable access to sexual health services for all gay and bisexual men, while promoting human rights worldwide. MPact works to increase the visibility, engagement, and power of gay and bisexual men, so that we may live healthy, happy, and meaningful lives.

The SHAG Consortium is an alliance of global and regional networks by and for gay and bisexual men. SHAG is composed of five networks of diverse size, scope, and focus, including MPact as the technical lead and representing communities in four regions of the world: [M-Coalition](#) from Middle East and North Africa, [Eurasian Coalition on Male Health](#) (ECOM) from Eastern Europe and Central Asia, AfricaGay Contre le Sida (AGCS) from West and Francophone Africa, and [SomosGay](#) from Latin America. Under a

three-year grant from the Robert Carr Fund, SHAG aims to advocate for the decriminalization of gay identities and behaviors.

The issue of criminalization of consensual sexual conduct between men is of great interest and concern to our organizations and constituents. Over two billion people live in contexts where same-sex relations are criminalized; in September 2018, this number drastically decreased from over three billion following the Supreme Court of India's decision to repeal Penal Code 377, which banned "sex against the order of nature." Prohibition and criminalization of same-sex relations in criminal law are wide-ranging:

- 70 UN Member States (35%) criminalize consensual same-sex sexual acts, and in 26 countries these laws only apply to men.⁴ The penalties range, including:
 - 31 countries impose up to 8 years imprisonment.
 - 26 countries impose from 10 years to life imprisonment.
 - 11 countries allow for the death penalty for same-sex sexual conduct.⁵
- At least 32 UN Member States (17%) contain laws or policies that prohibit sexual orientation and gender identity (SOGI) media or web content, sometimes referred to as propaganda laws or morality laws that prohibit the "promotion of homosexuality."⁶

Other criminal laws also negatively impact the lives of gay and bisexual men, people living with HIV, and LGBTI communities, including:

- Laws related to HIV non-disclosure, exposure, or transmission
 - 68 countries have laws criminalizing HIV non-disclosure, exposure, or transmission
 - 33 countries have applied other criminal law to HIV non-disclosure, exposure, or transmission⁷
- Laws limiting or restricting the formation, establishment, or registration of sexual orientation-related non-governmental organizations exist in 41 countries.⁸

Such criminal laws have many negative impacts on gay and bisexual men, even when they are not routinely enforced, as they provide a basis for blackmail, extortion, bullying, and further stigmatization.⁹

Evidence: Scope and Health Impact of Criminal Laws related to Gay Men

According to the World Health Organization, "Without protective policies and efforts to decriminalize the behavior of key populations [such as gay men and other men who have sex with men], barriers to essential health services will remain."¹⁰ Many forms of evidence and documentation exist to show the linkage between criminal law and negative impacts on health for gay men.

Laws prohibiting sexual contact between people of the same sex, and their impact on health

Among the 70 countries which have laws criminalizing same-sex sexual conduct there is a range of enforcement patterns and penalties. Where there is criminalization of same-sex relations, it always applies to men; in a sub-set it applies to both men and women. Violation of the laws can legally result in being put to death in Afghanistan, Iran, Mauritania, Nigeria, Pakistan, Saudi Arabia, Somalia, Sudan, Qatar, United Arab Emirates, and Yemen.¹¹

Evidence that the criminalization of sexual conduct between men negatively impacts their health outcomes continues to mount. Beyrer, et al¹² cite examples from Nigeria, Malawi, Namibia, and Botswana¹³ in which the establishment and existence of anti-gay laws precipitated violence against gay men and substantially inhibited their access to health services, including HIV services. In Nigeria, the

enactment of the “Same-Sex Marriage Prohibition Act” in 2014 was directly correlated with significant increases in fear of seeking, and avoidance of, healthcare among a cohort of men who have sex with men enrolled in a prospective study of their risk related to HIV.¹⁴

The research among gay men and other men who have sex with men (MSM) in Botswana, Malawi, and Namibia pointed to more specific negative impacts on gay men’s health. Notably, “Being afraid to seek health services because of sexual orientation was reported by 17.6% (35/199) in Malawi, 18.3% (40/218) in Namibia, and 20.5% (24/117) in Botswana.” In addition, disclosing sexual orientation to a health care worker was found to have significant association with being denied health care.¹⁵

In Senegal, where sex between men is criminalized, the impact of police crackdowns on outreach workers for an HIV program for gay men and other men who have sex with men in 2008 was “immediate and marked declines in access to health care, fear of using services among MSM.... Providers reported sharp declines in MSM uptake and use of services.”¹⁶

The Eurasian Coalition on Male Health (ECOM) has detailed the experience and impact of Uzbekistan’s anti-sodomy law, which provides for imprisonment of up to three years for the offense of “voluntary sexual intercourse of two male individuals.”¹⁷ The law has been enforced and numerous cases of police abuse of gay men have been reported. From the ECOM report: “Even when [the law] is not actively applied, the existence of a criminalizing law...creates stigma against LGBTQ people and encourages violence and discrimination based on real or perceived sexual orientation or gender identity.”¹⁸

The findings of a global survey of more than 4000 gay and bisexual men—which was led by MPact—pointed to several ways in which their health is negatively impacted by the existence and enforcement of criminal laws prohibiting same-sex sexual conduct. In one 2016 analysis of the survey data, it was found that, “Arrests and convictions under laws relevant to being MSM have a strong negative association with access to HIV prevention and care services.”¹⁹

Dr. Chris Beyrer of the Center for Public Health and Human rights at Johns Hopkins University supplied testimony to the Supreme Court of Belize in the case through which the country’s sodomy law was found unconstitutional. The following excerpt of his testimony was cited by the court in its ruling:

Criminalization and stigmatization not only perpetuate systematic discrimination and violence that limit the study of HIV risks for MSM; they also restrict the extent to which health care providers can effectively offer and MSM can safely access health care services that would reduce HIV transmission and treat HIV infection.²⁰ Criminalization and stigmatization, therefore, complicate the health needs of MSM and act as severe barriers to individual country and global responses to the HIV epidemic.²¹

Indeed, in countries where same-sex behavior is criminalized, health care workers face a “dual loyalty” situation,²² whereby the health worker may require additional support and safeguards to ensure his/her principle ethical duty is to “do no harm” to patients. Criminalization laws impede the realization of this primary duty and decrease the quality of essential services overall.

Laws related to the “promotion of homosexuality,” also known as “morality laws.”

In 2013, the Russian Federation enacted a law to penalize the “Promotion of Non-Traditional Sexual Relations Among Minors.”²³ The law has been used to prosecute LGBTI organizations and has emitted a strong chill factor across LGBT organizing. In a brief filed with Russian courts in a case challenging the 2013 law, Dr. Ilan Meyer of the University of California, stated: “laws such as Russia’s propagandist law

can have serious negative impact on the health and well-being of homosexual youth and adults in that the law increases and enshrines stigma and prejudice, leading to discrimination and violence, and, thus, increasing risk for mental distress and suicide ideation.”²⁴

Hylton, et al, also looked at the impact of the Russian law on the mental health of gay men and other men who have sex with men, and concluded: “Depressive symptoms are common among MSM in Russia and exacerbated by stigma and laws that deny homosexual identities.”²⁵ Similar laws are in force in a total of 31 countries.²⁶

Legal Right to Register and Engage in Public Health and Human Rights Programs

Several global studies focusing on gay men and other men who have sex with men have demonstrated the “powerful protective role of community engagement and safe spaces to receive services.”²⁷ Community support, such as gay- and bisexual-specific health promotion, can have positive impacts such as encouraging condom use through education and sex-positive messaging.^{28,29} Service utilization may also be optimized when delivered by community-based organizations that are led by gay or bisexual men.³⁰ Additionally, the new WHO Framework on integrated people-centered health services (IPCHS) “recognizes the need to put people and communities, not diseases, at the center of health systems and empowering people to take charge of their own health rather than being passive recipients of services.”³¹ Laws that limit or restrict expression of SOGI-related content, or infringe on the ability of groups to register to provide such services, severely undermine the HIV response and the efficacy of health messaging for the gay community. Community-led peer outreach workers have reported harassment, arrest, and blackmail while implementing public health programs, on the basis of criminalization laws described above.

Concerns related to subgroups of gay men: migrants, refugees, sex workers, racial & ethnic minorities, and gay men living with HIV

Gay and bisexual men are not homogenous, and the health needs of men who have sex with men are diverse. While gay men share common experiences of discrimination based on sexual orientation, many also face intersections of race, ethnicity, ability, class, socioeconomic status, migration status, age, and other factors that drive exclusion. Studies conducted in Brazil, South Africa, and the U.S. found that sexual minority men from low socioeconomic statuses and/or minority ethnic communities experience greater psychological stress due to the combination of discrimination based on sexuality and other forms of prejudice.^{32,33,34} Within most criminal justice and law enforcement systems, these various identities are not treated equitably.

Conceptual Justification: Criminal laws punishing gay men are incongruent with human rights obligations and should be repealed

No area of consensual sexual conduct among adults should be subject to criminal law. Laws that criminalize same-sex relations only serve to deprive gay and bisexual men of their human rights and support the further perpetration of stigma, violence, and marginalization of gay and bisexual men, and people perceived to be gay or bisexual men, as well as other LGBTI people. A study examining public support for same-sex criminalization laws in the Caribbean found that the laws reinforce inaccurate, unscientific, and outdated understandings of sexuality.³⁵

The laws described in the previous section contradict an array of international agreements related to health and human rights, some binding and some not. These agreements include, but are not limited to, the Universal Declaration of Human Rights,³⁶ the Yogyakarta Principles,³⁷ the 2001 Declaration of

Commitment on HIV/AIDS,³⁸ and the 2016 UN Political Declaration on HIV and AIDS,³⁹ the Siracusa Principles,⁴⁰ and the 2008 UN General Assembly Statement on Human Rights, Sexual Orientation, and Gender Identity.⁴¹ According to the UN, “Criminalization of consensual same-sex conduct violates rights to privacy and to freedom from discrimination, both protected under international law, and **places States in material breach of their obligation to protect the human rights of all people, regardless of sexual orientation or gender identity.**”⁴²

In addition to the various agreements mentioned, the UNAIDS & OHCHR International Guidelines on HIV/AIDS and Human Rights⁴³ and the UNAIDS & IPU Handbook for Legislators⁴⁴ advise against the enactment of HIV-specific criminal statutes.

The use of criminal law in the area of consensual sexual conduct among men is not only in violation of these binding and advisory agreements and statements, but also has been routinely demonstrated to have substantial negative impacts on the health and well-being of gay and bisexual men. Thus, there is no acceptable justification for the use of criminal law in this area.

Prospective Use of Principles

MPact and SHAG look to the Yogyakarta Principles⁴⁵ and the YP+10⁴⁶ as a strong model for the present ICJ endeavor to establish principles for the use of criminal law in the select areas. The principles could be used as normative guidance to assist governments, development partners, civil society, and other stakeholders to foster a more equitable legal and social environment for LGBTI people. Principles from ICJ would make clear the specific ways in which laws could be reformed, repealed, and replaced to ensure health is not negatively impacted and fundamental human rights are not infringed.

Decriminalization will have an immediate and positive impact on the health and human rights of gay and bisexual men, and it will be essential in the effort to enact additional protective measures and policies to increase quality of life, including equitable and easy access to healthcare, education, employment, and housing. The process of full decriminalization of same-sex relations will take time for many countries. Therefore, we advocate for an immediate moratorium on the use of existing criminal law against gay and bisexual men, including interference with public health programs serving gay men, as a necessary first step.

As country governments continue to combat the HIV/AIDS epidemic, achieve the Sustainable Development Goals, and deliver on the promise to “leave no one behind,” the ICJ principles will serve as an important legal and policy guideline for respecting human rights and protecting public health.

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³ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: <https://www.refworld.org/docid/3ae6b3712c.html> [accessed 15 February 2019]

⁴ Mendos, Lucas Ramon et al. International Lesbian, Gay, Bisexual, Trans and Intersex Association. State-Sponsored Homophobia 2019 (Geneva; ILGA, March 2019).

⁵ *Ibid.*

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