

**Report of the Special Rapporteur on the right to health, Anand Grover,  
A/HRC/14/20, 27 April 2010**

*I. INTRODUCTION*

1. In the present report, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health considers several issues relating to the criminalization of private, consensual sexual behaviour between adults, and the impact of such criminalization on the enjoyment of the right to health. The law concerning health practices and behaviours can protect the health of individuals or create barriers to effective health interventions and outcomes. The Special Rapporteur considers criminalization to include not only laws that are enacted to render certain conduct deserving of criminal punishment, but additionally, the use of pre-existing criminal laws against certain individuals or communities on the basis of certain characteristics (such as sexuality or occupation).

2. The Special Rapporteur believes that the criminalization of private, consensual sexual interaction between adults represents a significant impediment to the realization of the right to health of all persons, particularly those against whom the law is directed. He emphasizes that all human rights are universal, indivisible, interdependent and interrelated. The criminalization of private, consensual sexual conduct between adults infringes on not only the right to health, but also various other human rights, including the rights to privacy and equality. In turn, infringement of these human rights impacts indirectly on the right to health.

*II. SAME-SEX CONDUCT, SEXUAL ORIENTATION AND GENDER IDENTITY*

6. Criminal laws concerning consensual same-sex conduct, sexual orientation and gender identity often infringe on various human rights, including the right to health. These laws are generally inherently discriminatory and, as such, breach the requirements of a right-to-health approach, which requires equality in access for all people. The health related impact of discrimination based on sexual conduct and orientation is far-reaching, and prevents affected individuals from gaining access to other economic, social and cultural rights. In turn, the infringement of other human rights impacts on the realization of the right to health, such as by impeding access to employment or housing.

7. These infringements ultimately undermine the inherent dignity of persons upon which the international human rights framework is based. Denying the dignity of individuals through the criminalization of certain conducts substantially diminishes their self-worth and, in doing so, prevents the realization of the right to health. The decriminalization of such conduct is necessary to address the disempowerment that affected individuals and communities face, and to enable full realization of the right to health.

A. Criminalization of same-sex conduct, sexual orientation and gender identity:  
background

8. Various criminal laws exist worldwide that make it an offence for individuals to engage in same-sex conduct, or penalize individuals for their sexual orientation or gender identity. For example, consensual same-sex conduct is a criminal offence in about 80

countries. Other laws also indirectly prohibit or suppress same-sex conduct, such as antidebauchery statutes and prohibitions on sex work. Many States also regulate extra-marital sexual conduct through criminal or financial sanctions, which affects individuals who identify as heterosexual but intermittently engage in same-sex conduct. These laws also have a significant impact on individuals engaging in sexual conduct with members of the opposite sex outside of marriage, particularly women, although this is outside the scope of this report. These laws represent an infringement of the right to health as outlined in article 12 of the International Covenant on Economic, Social and Cultural Rights. Article 2, paragraph 2, of the Covenant requires that State parties undertake to guarantee that the rights within the Covenant, including the right to health, are exercised without discrimination of any kind, including on the basis of "other status". This is further developed in general comment No. 14 (2000) of the Committee on Economic, Social and Cultural Rights, which notes that the Covenant proscribes any discrimination in access to health care and underlying determinants of health, including on the grounds of sexual orientation (para. 18). The Committee also recognizes gender identity as a prohibited ground of discrimination.<sup>10</sup> In its general comment No. 4 (2003), the Committee on the Rights of the Child also confirmed that "other status" extends to sexual orientation (para. 6). Such criminalization impedes the right to health, not only through discrimination, but by denying equal access to health services, as will be demonstrated.

10. Sexual orientation is defined as "each person's capacity for profound emotional, affectional, and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender". Gender identity refers to "each person's deeply felt internal and individual experience of gender", which may or may not correspond with the sex assigned at birth, including the personal sense of the body ... and other expressions of gender.

#### *Interpretation and legal developments:*

11. The European Court of Human Rights has held that discrimination based on sexual orientation or gender identity is in violation of human rights. In 1981, in *Dudgeon v. United Kingdom*, the European Court of Human Rights determined that the criminalization of private homosexual acts constituted an unjustified interference with the right to privacy enshrined within article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The United Nations Human Rights Committee in *Toonen v. Australia* subsequently ruled that "sex" discrimination includes discrimination based upon sexual orientation, noting that criminalization was not a reasonable measure to prevent spread of HIV/AIDS. In *S.L. v. Austria*, the European Court of Human Rights also held that differences in the treatment of heterosexual and homosexual populations based on age of consent had no objective and reasonable justification, and was therefore discriminatory.

12. A number of States now prohibit discrimination on the basis of sexual orientation, following judicial decisions or the introduction of legislation concerning this issue. In the landmark 1998 case *National Coalition for Gay and Lesbian Equality and another v. Minister of Justice and others*, the South African Constitutional Court struck down three separate sodomy laws, noting the right of all people to dignity and equality in concluding that discrimination based on sexual orientation was prohibited under the South African

Constitution. The Supreme Court of the United States declared Texan sodomy laws unconstitutional in the case of *Lawrence v. Texas*, on the basis that it infringed on the liberty protected under the Fourteenth Amendment to the Constitution through the criminalization of intimate, consensual sexual conduct.

13. In the matter of *Naz Foundation v. Government of NCT of Delhi and Others*, the High Court of Delhi cited the case of *Toonen* and considered the reasoning of the South African Constitutional Court in finding section 377 of the Indian Penal Code unconstitutional. This section of the code criminalized, "carnal intercourse against the order of nature with any man, woman or animal" – wording from colonial rule that is still in use in more than half of the jurisdictions criminalizing sodomy worldwide. The Naz Foundation submitted that by criminalizing private, consensual same-sex conduct, section 377 perpetuated negative and discriminatory beliefs towards same-sex conduct, driving activities underground and crippling HIV/AIDS prevention efforts.

14. In February 2010, Fiji passed a law decriminalizing consensual same-sex conduct, through the National Crimes Decree.<sup>21</sup> Hong Kong Special Administrative Region of China also overturned a long-standing statute banning sodomy in 2005, and since 2007, consensual same-sex acts have also been legal in Nepal.

15. Despite these recent developments in decriminalization, bringing many States into conformity with international human rights obligations, a significant number of countries maintain criminal penalties for consensual same-sex conduct. Some States have taken steps to broaden the application of existing laws, or to impose harsher penalties for same-sex conduct. Section 365A of the penal code of Sri Lanka formerly prohibited male homosexual acts, but was subsequently amended to be "gender-neutral", resulting in the criminalization of female same-sex conduct. The Parliament of Uganda introduced a bill in October 2009 that would allow for the death penalty as punishment for the violation of certain provisions of the anti-sodomy statute. Uganda, praised by HIV/AIDS activists for its treatment programme and policies, will put its campaign to eliminate HIV in great danger should this bill pass.

16. Conversely, an article proposed for inclusion in the penal code of Rwanda that would have carried penalties ranging from 5 to 10 years' imprisonment for any person who "practices, encourages or sensitizes people of the same sex, to sexual relation or any sexual practice" was recently rejected. The Minister of Justice of Rwanda, Tharcisse Karugarama, stated that "... sexual orientation is a private matter and each individual has his or her own orientation – this is not a State matter at all".

## B. Effects of criminalization on the right to health

### *Poor health outcomes and inhibition of access to health services*

17. The Special Rapporteur believes that criminalization has adverse consequences on the enjoyment of the right to health of those who engage in consensual same-sex conduct, through the creation of the societal perception that they are "abnormal" and criminals. This has a severe deleterious impact on their self-regard, with significant, and sometimes tragic, consequences on their health-seeking behaviour and mental health. Rates of suicide attempts amongst youth who engage in consensual same-sex conduct

have been variously reported as between three and seven times higher than for youth who identify as heterosexual; the rates are similar for adults.

18. In jurisdictions in which their sexual conduct is criminalized, affected individuals are much more likely to be unable to gain access to effective health services, and preventive health measures that should be tailored to these communities are suppressed. The fear of judgement and punishment can deter those engaging in consensual same-sex conduct from seeking out and gaining access to health services. This is often a direct result of the attitudes of health-care professionals who are not trained to meet the needs of same-sex practising clients – not only in terms of sexual health, but also with regard to health care more generally. Often, health professionals may refuse to treat homosexual patients altogether, or respond with hostility when compelled to do so. Where patients may be guilty of a criminal offence, by engaging in consensual same-sex conduct, this has the potential to jeopardize the obligations of confidentiality that arise during the course of the doctor-patient relationship, as health professionals may be required by law to divulge details of patient interaction.

19. These problems are compounded for persons living with HIV/AIDS. Due to historical circumstances – most significantly, the association of AIDS with the gay community – the enjoyment of the right to health is disproportionately impacted as it pertains to HIV/AIDS diagnosis and treatment. For instance, in the Asia-Pacific region, almost 90 per cent of homosexual men have no access to HIV prevention or care. While this is due to a range of circumstances, a general atmosphere of fear has been the predominant factor in preventing HIV-positive individuals from accessing health services and treatment. This atmosphere of fear also impacts adversely on the wider community. In countries where homosexuality is criminalized, the negative association of HIV/AIDS with homosexuality can result in individuals who do not engage in consensual same-sex conduct avoiding testing and treatment for HIV/AIDS, for fear of being subject to criminal sanctions, violence or discrimination.

#### *Violence and abuse*

20. Sanctioned punishment by States reinforces existing prejudices, and legitimizes community violence and police brutality directed at affected individuals. Seven States, or parts thereof, currently retain the death penalty as a possible punishment for sodomy. The Special Rapporteur believes that the imposition of the death penalty for consensual same-sex conduct is not only unconscionable, but further represents arbitrary deprivation of life, constituting an infringement of the right to life recognized in article 6 of the International Covenant on Civil and Political Rights.

21. Many reports indicate instances of violence directed at individuals based on same-sex conduct and gender identity. Violence can inhibit individuals from seeking access to health services out of fear of reprisals and secondary victimization resulting from identification as a victim of such an attack.

#### *Stigmatization*

22. Criminalization may not be the sole reason behind stigma, but it certainly perpetuates it, through the reinforcement of existing prejudices and stereotypes. Same-

sex conduct was long considered a psychiatric disorder; until recently, the world's major professional psychological classification system retained homosexuality as a psychological disorder, which speaks to how deeply this stigma was embedded.

23. Stigmatization prevents legislative and policymaking institutions from adequately addressing health-related matters in communities that are especially vulnerable to the infringement of the enjoyment of the right to health. Where same-sex conduct is illegal, sexual orientation may be treated as a problem that needs to be corrected, ignored or used to legitimize violence directed towards these individuals. Attempts to "cure" those who engage in same-sex conduct are not only inappropriate, but have the potential to cause significant psychological distress and increase stigmatization of these vulnerable groups.

#### C. Right-to-health approach

24. As with all human rights, States are required to take steps to respect, protect and fulfill the right to health. The criminalization of private, consensual same-sex conduct creates an environment that is not conducive to affected individuals achieving full realization of their right to health. Health services must be accessible for all, without discrimination, especially for the most vulnerable or marginalized sections of the population. The repeal of laws criminalizing consensual same-sex conduct between adults helps to ensure compliance with this State obligation.

25. Criminalization is not only a breach of a State's duty to prevent discrimination; it also creates an atmosphere wherein affected individuals are significantly disempowered and cannot achieve full realization of their human rights. For instance, States are bound to take steps to establish prevention and education programmes for behaviour-related health concerns such as HIV/AIDS. Decriminalization facilitates the achievement of this obligation because a social atmosphere wherein adult consensual same-sex conduct is accepted constitutes an essential part of structural prevention of HIV/AIDS. A legal framework promoting an enabling environment has been noted as one of the most important prerequisites to achieve this goal, along with combating both discrimination and structural violence.

26. A right-to-health approach requires that States decriminalize same-sex consensual conduct, as well as repeal laws that discriminate in respect of sexual orientation and gender identity, in order to meet core obligations of the right to health and create an environment enabling full enjoyment of the right.

#### V. RECOMMENDATIONS

76. The Special Rapporteur calls upon States:

- a. To take immediate steps to decriminalize consensual same-sex conduct and to repeal discriminatory laws relating to sexual orientation and gender identity, as well as to implement appropriate awareness-raising interventions on the rights of affected individuals.