Decriminalisation and the end of AIDS: keep the promise, follow the science, and fulfill human rights

A statement from the UNAIDS Reference Group on HIV and Human Rights

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To cite this article: UNAIDS Reference Group on HIV and Human Rights (2023) Decriminalisation and the end of AIDS: keep the promise, follow the science, and fulfill human rights, Sexual and Reproductive Health Matters, 31:1, 2194188, DOI: 10.1080/26410397.2023.2194188

To link to this article: https://doi.org/10.1080/26410397.2023.2194188

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Published online: 23 Jun 2023.

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A statement from the UNAIDS Reference Group on HIV and Human Rights

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Keywords: HIV, AIDS, human rights, public health, law, policy, criminalisation, criminal law, decriminalisation, gay men, homosexuality, sexual orientation, gender identity, gender expression, sex work, drugs, drug possession, law reform

Criminalisation is deadly; it fuels the HIV pandemic. The misuse of the criminal law also violates human rights on a mass scale globally. The evidence of these harms is overwhelming and undeniable.

States have unanimously committed to the Sustainable Development Goals of ending AIDS as a public health threat by 2030 and to achieving gender equality and just and inclusive societies. In the United Nations General Assembly’s Political Declaration on HIV of 2021, they recognised that ending inequalities is essential to the goal of ending AIDS and adopted the targets of the Global AIDS Strategy 2021–2026, including the abolition of criminal and other punitive laws, policies and practices targeting key populations affected by HIV.

States must keep these commitments. Without such action, the goal of ending the pandemic will remain out of reach. In this statement, the UNAIDS Reference Group for HIV and Human Rights, established in 2002 to advise the Joint UN Programme on HIV/AIDS (UNAIDS), presents the evidence and a call for action to international, regional and national stakeholders.

The evidence is clear: ending misguided and unjust criminalisation is good for public health and required as a matter of human rights obligation.

Ending AIDS requires that people everywhere have safe, effective access to services for HIV prevention, testing and treatment, as part of governments’ obligation to take steps to realise for all the right to the highest attainable standard of physical and mental health. Achieving this goal requires adequate investment in the right programmes, designed and implemented in collaboration with the populations and communities most affected.

It also requires bold, sustained action to remove the societal and structural barriers that increase people’s risk of HIV infection and impede access to, and the reach and impact of, HIV services. Key among such barriers are unfair, discriminatory and inhumane laws, regulations, policies and practices that criminalise and otherwise punish people because of their real or perceived HIV status, sexual orientation, gender identity, drug use or possession, or sex work. Such criminal laws are both at odds with public health efforts and incompatible with human rights standards.

Across the globe, laws protecting against discrimination and gender-based violence are associated with significantly higher knowledge of HIV status and higher viral suppression among people living with HIV. Meanwhile, in countries where same-sex sexual acts, sex work and/or drug use are criminalised, fewer people living with HIV know their status and fewer people achieve viral suppression. In a world where HIV is completely
preventable, the increased risk of infection and of death faced by key populations is linked directly and significantly to various structural barriers—including laws and policies that stigmatise, discriminate and punish.

International human rights bodies, regional and domestic courts and independent experts have found that such criminal laws violate a variety of human rights, including the rights to the highest attainable standard of physical and mental health, non-discrimination, privacy, autonomy, dignity, freedom of expression, freedom from arbitrary detention, and ultimately the right to life, among others. The recently published “8 March Principles for a Human Rights-Based Approach to Criminal Law Proscribing Sexuality and Reproduction, Drug Use, HIV, Homelessness and Poverty,” drafted by the International Commission of Jurists and endorsed by global legal experts, outline the ways in which such laws breach general principles of criminal law as well as international human rights standards. Even where such laws are not enforced, their presence amounts to a violation of human rights. They undermine public health efforts by increasing risk and creating barriers to accessing life-saving services. They are also weaponised in other ways as means of stigmatisation and social control of populations and communities. The underlying criminalisation often facilitates and is used to “justify” other punitive measures and practices, including by law enforcement and others, that target, harass, extort and otherwise abuse members of key populations. States must take proactive measures to end such practices and must abolish the underlying criminalisation.

In the past few years, the COVID-19 pandemic response has again illustrated that over-extension of criminal and other punitive laws in the name of public health, particularly when such policy is not well-founded in evidence or is discriminatory, fails to satisfy well-established legal standards required for limitations on human rights and is ultimately damaging to public health. This reinforces a key lesson from the HIV pandemic—namely, the importance of removing such punitive laws and policies, and of creating a legal environment that respects, protects and fulfills human rights. Doing so is essential to an effective response to HIV among key populations and to achieving the Sustainable Development Goal of ending AIDS as a public health threat by 2030.

**Criminalising gay, bisexual and other men who have sex with men**

Approximately 70 countries have laws criminalising consensual same-sex sexual activity; a handful still include the death penalty. Other laws are also used discriminatorily to harass, arrest and prosecute gay, bisexual and other men who have sex with men (GBMSM), including vague public order offences such as “loitering” or “indecency”. In some jurisdictions, laws against “promotion or propaganda of non-traditional sexual relations” are used to criminalise expression of lesbian, gay, bisexual or transgender (LGBT) identity beyond sexual activity, as well as advocacy for human rights of LGBT people. Such laws endanger and undermine the provision of health information and services to LGBT communities.

Such laws, and the stigma and discrimination they facilitate, are significant structural barriers to HIV prevention and care. Knowledge of HIV status among GBMSM is more than three times lower in countries with more repressive laws targeting LGBT people than in countries with less repressive laws. The prevalence of HIV among GBMSM living in countries that criminalise same-sex relations is five times higher than in countries without such punitive laws, and 12 times higher in countries reporting prosecutions within the past year compared to those with no such prosecutions. HIV prevalence among GBMSM is also much higher in countries with legal barriers to the operation of civil society organisations serving this key population. Criminalisation also undermines HIV prevention and treatment efforts by minimising or negating the existence of GBMSM: countries with laws criminalising same-sex sexual activity are more likely to report implausibly low numbers of GBMSM than countries without such punitive laws. According to UNAIDS, in 2021 GBMSM had a 28 times greater risk of acquiring HIV than other adult men.

International and regional human rights bodies, and domestic courts in many countries, have determined that criminalising consensual sex between persons of the same sex violates the rights to equality and non-discrimination, liberty (including freedom from arbitrary arrest and detention), privacy, health, and freedoms of expression and association. Differing ages of consent in the law are also discriminatory. Ending such legal persecution is essential from both a human rights and public health perspective, alongside efforts to reduce stigma and
discrimination, and the provision of acceptable and accessible HIV prevention, testing and treatment services for GBMSM.19

Criminalising transgender people
At least 20 countries have reported to UNAIDS that they have laws or prosecutions criminalising transgender people in some fashion.7 A handful of countries explicitly criminalise “cross-dressing” or “impersonating or imitating the opposite sex”, but there is evidence that in many other countries, various vague public order offences (e.g. laws against “vagrancy”, “indecency”, “loitering”, “public morals”, etc.) have been used to harass, arrest and prosecute trans people, as have laws authorising police, without justification, to demand official identification.20,21

High levels of stigma, discrimination and violence—including that which is embodied in or encouraged by laws, policies and practices—undermine HIV prevention, testing and treatment efforts and related health services for transgender people.22–26 Multiple studies have found that transgender people report encountering high levels of stigma and discrimination in health care settings and, hence, a high proportion avoid seeking HIV testing or other health care.27 According to UNAIDS, in 2021 transgender women had a 14 times greater risk of acquiring HIV than among adult women as a whole.13

International and regional human rights bodies, and domestic courts in some countries, have determined that criminalising people for the expression of their gender identity violates the rights to equality and non-discrimination, liberty (including freedom from arbitrary arrest and detention), privacy, health, and freedom of expression.14,28,29 Rather than criminalise or otherwise stigmatisate transgender people, with demonstrable harm, States should reform their laws to remove such punitive measures and to enable gender recognition on identity documents, which has been associated with significant reductions in reported stigma and discrimination experienced by transgender people.30,31

Criminalising sex work and sex workers, clients and third parties
In 2021, 153 out of 173 countries reporting to UNAIDS indicated that they have in place laws criminalising some aspect of sex work.7 Widespread human rights violations against sex workers, by both state and non-state actors, directly and indirectly increase HIV susceptibility, and undermine effective HIV prevention and other efforts. According to UNAIDS, in 2021, female sex workers had a 30 times greater risk of acquiring HIV than among adult women as a whole.13

There is ample evidence that “the legal environment, including laws, enforcement practices, and justice systems, is a key structural determinant of HIV risks for sex workers”, and that stigma and punitive laws related to sex work prevent the effective provision and uptake of HIV interventions.32,33,39 While abuses have been observed across all policy regimes, these occur most profoundly where sex work is criminalised.34,35 Sex workers living in countries that criminalise sex work were several times more likely to be living with HIV than those in countries that partially legalise sex work.38 The decriminalisation of sex work could have a substantial benefit in reducing new HIV infections among sex workers.36–39

Other “public order” offences (e.g. “vagrancy”, “loitering”, “public nuisance”, “indecency”, etc.) are also frequently used to harass, detain and abuse people engaged in sex work,40 and repressive policing is also associated with increased risk of HIV or other sexually transmitted infections (STIs).39 Where police and prosecutors use the possession of condoms as evidence of “prostitution”, this makes it riskier to possess this key HIV/STI prevention tool.41 Meanwhile, related punitive measures, such as licensing or registration requirements or mandating HIV/STI testing upon pain of penalty, open the door to additional layers of criminalisation and police abuse of sex workers. In addition, it is common to mischaracterise sex work as inherently exploitative and all sex workers as victims of “trafficking”. This can result in the misuse of anti-trafficking laws to target sex workers’ clients, their work sites or homes, advertising platforms, and “third parties” — and even to perpetrate further human rights abuses against sex workers ostensibly being “rescued”, through raids, detention, extortion and sometimes deportation.43,44

In some settings, punitive measures include the human rights violation of detaining sex workers in so-called “rehabilitation centres”, which frequently leads to other violations while detained. Such centres must be closed immediately.45–47

The criminalisation of sex work results in the infringement of human rights of sex workers,
including the rights to life, liberty and security of the person; equality and non-discrimination; privacy; health; freedoms of expression and association; and just and favourable conditions of work.48,49 UN health and human rights bodies have urged States to decriminalise sex work.14,50 Partial decriminalisation—as is the case under “end-demand” or “asymmetrical criminalisation” legal regimes—is inadequate. Decriminalising sex workers but leaving intact the criminalisation of their clients, work settings and “third parties” largely perpetuates the same harms, including to sex workers.32,34,51–54 Rather, States should implement full decriminalisation, including of clients and third parties. Instead, they should recognise sex work as work and ensure, in consultation with sex worker organizations, that sex workers are protected by labour laws, occupational health and safety laws, social insurance schemes, etc.55

Criminalising drugs and people who use drugs

In 2021, 115 out of 128 countries reporting to UNAIDS indicated that they criminalise drug possession, including simple possession for personal use.7 Such criminalisation is state-sanctioned stigmatisation of, and discrimination against, people who use drugs. It both reflects and significantly reinforces broader societal stigma, which has been identified as a key barrier for people who use drugs in accessing HIV treatment and achieving viral suppression.56,57 According to UNAIDS, in 2021 people who inject drugs had a 35 times greater risk of acquiring HIV than adults who do not.13

It is paradoxical that policies aimed at prohibiting or suppressing drugs are defended as necessary for public health and safety, “yet the evidence suggests they have contributed directly and indirectly to lethal violence, communicable disease transmission, discrimination, forced displacement, unnecessary physical pain, and the undermining of people’s right to health”.58,59 Criminalisation of drug use has a negative effect on HIV prevention and treatment.60,61 Street-level policing and incarceration, in particular, are associated with more syringe-sharing and higher HIV prevalence.60,62 Similarly, criminalisation of drug use and of possession for personal use have been identified as factors contributing to the prevalence of hepatitis C virus (HCV) among people who inject drugs.63 Incarceration is associated with substantial increase in the risk of both HIV and HCV infection among people who inject drugs; reducing the incarceration of people who use drugs, including through decriminalising use and possession, is a key structural intervention for prevention of both epidemics.64,65 In addition, punitive measures such as detention for compulsory drug dependence “treatment” impede not only access to evidence-based treatment for drug dependence but also engagement in HIV care.66

Meanwhile, the criminalisation of non-medical opioid use and dependence undermines the coverage and quality of access to opioid agonist treatment (OAT), which has been shown to be effective in improving multiple health and social outcomes, including reducing HIV and HCV infection,67 as well as undermining access to controlled medicines more generally.68 There is similarly extensive evidence that punitive laws impede scale-up and reach of other harm reduction services that reduce the sharing of injection equipment and are therefore key interventions for HIV and HCV prevention in this key population.69,70 Modelling analyses have concluded that decriminalising drug use and shifting the resources saved accordingly to scale up coverage of OAT and HIV treatment for people who use drugs could greatly reduce HIV transmission.71

States have the right under international drug control treaties to refrain from criminalising drug use, and the possession, purchase or cultivation of drugs for personal use, and doing so is in keeping with their obligations under international human rights law.72 Such reform is recommended by all UN agencies,73 including for the purpose of more effectively responding to HIV.6 UN agencies, among many others, have also unanimously called for the closure of detention centres for compulsory drug “treatment” as violating human rights and being harmful to health.74 Decriminalising provision and possession of the health services and goods needed to reduce the risk of infection with HIV and other harms—including opioid agonist treatment and sterile injection equipment—is also essential.4,75 Experience with the decriminalisation and legal regulation of drugs (particularly cannabis) has indicated that such reforms are most often not associated with increased drug use.76 Unsurprisingly, the available evidence also suggests that reforming punitive drug laws is necessary, but also not sufficient, to achieve HIV prevention benefits. It is essential to
also address law enforcement practices\textsuperscript{77} and to complement decriminalisation with improved access to evidence-based health interventions.\textsuperscript{78} 

**Criminalising people living with HIV**

HIV criminalisation is “the unjust application of criminal law to people living with HIV based solely on their HIV status. This includes the use of HIV-specific criminal statutes or general criminal laws to prosecute people living with HIV for unintentional HIV transmission, perceived or potential HIV exposure, and/or non-disclosure of known HIV-positive status.”\textsuperscript{79} Currently, 82 countries have HIV-specific criminal laws in place, and since the first documented prosecutions in the 1980s, 81 countries have pursued HIV criminalisation cases—under HIV-specific laws in 35 countries and under other laws of general application in 48 countries (with a few jurisdictions applying both HIV-specific and general laws).\textsuperscript{80} 

Such laws are often at odds with the best available science about HIV, including what we know about the low, negligible or non-existent possibility of transmission in circumstances that nonetheless still attract prosecution in many jurisdictions.\textsuperscript{81,82} Multiple reviews of the literature have demonstrated that HIV criminalisation laws appear to have little impact in reducing sexual risk behaviours, while causing harm in multiple ways to people living with and communities affected by HIV, and more generally undermining the relationship between providers and recipients of health services, including by compelling disclosure of confidential medical and other sensitive personal information for use in a prosecution.\textsuperscript{93–96} In many jurisdictions, HIV criminalisation exacerbates racial and other injustices, with ethno-racial minorities often disproportionately prosecuted and/or sentenced, and in all jurisdictions, the populations most affected by HIV—usually already subjected to infringements of human rights—are inevitably also heavily affected by the threat of criminalisation.\textsuperscript{97–99} HIV criminalisation compounds gender inequality: women living with HIV may face prosecution for alleged HIV non-disclosure even in circumstances where disclosure or taking prevention precautions were not realistic options, while also contributing to increased violence against women living with HIV.\textsuperscript{100,101} 

Numerous international bodies, including UN technical agencies as well as human right experts and treaty bodies, have found that HIV criminalisation amounts to a violation of human rights and discriminates on the basis of HIV status. They have repeatedly recommended that any use of the criminal law be limited to the exceptional circumstance in which there is actual, intentional transmission of HIV.\textsuperscript{102–110} 

**A call to action**

Effectively responding to the HIV pandemic requires coordinated action across a range of public health measures and structural barriers. This includes adopting laws, policies and other measures to respect, protect and fulfill human rights, especially those of key populations affected by HIV. 

Decriminalisation is an essential, necessary step on the road to achieving the end of AIDS as a public health threat. States must act, in keeping with the best available evidence, international guidance, and their human rights obligations. Specifically, the UNAIDS Reference Group on HIV and Human Rights calls on States to immediately repeal or reform their domestic law, in partnership with the relevant community-led organisations, as follows: 

**Decriminalise consensual same-sex sexual conduct and the expression of gender identity**

- Abolish any criminal or similar prohibition on consensual sexual conduct between those of the legal age of consent, regardless of the sex of the acts in question and regardless of the sex, gender identity, sexual orientation or marital status of those involved.
- Ensure that the age of consent to sexual activity specified in law does not discriminate based on any of these grounds.
- Abolish any criminal or similar prohibition on a person’s expression of their freely chosen gender identity (e.g. laws criminalising cross-dressing, other style of dress, length of hair, or “impersonation” of a person of a gender seen to be at odds with the sex assigned to a person
at birth; laws penalising the use of sex-segregated toilets by transgender persons, etc.).

- Abolish any criminal or similar prohibition on assisting another person to voluntarily access, with informed consent, health care related to their affirmation of their gender identity.

- End and prohibit any practice of discriminatory enforcement of criminal or similar laws of general application (including various “public order” laws) that proscribe consensual sexual activity or that limit the freedom of expression, association or assembly of persons, or their right to information, based on their real or perceived sexual orientation or gender identity.

- Abolish any law that imposes criminal or similar liability for statements, publications or actions that discuss or refer to the identity or expression of lesbian, gay, bisexual, trans or gender non-conforming persons or the defense of their human rights (so-called “anti-propaganda” or “don’t say gay” laws).

Decriminalise sex work and related activities

- Abolish any criminal or similar prohibition on the consensual sale of sexual services, or the purchase of such services, and on any advertising or communicating about such services.

- Abolish any criminal or similar prohibition on third parties who, without coercion, facilitate, manage, organise, or provide information and premises for the consensual sale of sexual services or the purchase of such services.

- Abolish any legal provisions or practice that allow the possession of condoms to be introduced as evidence in support of a prosecution for a criminal or similar charge related to sex work.

- End and prohibit any practice of discriminatory enforcement against sex workers of vague “public order” offences (e.g. “vagrancy”, “loitering”, “indecency”, etc.), as well as any laws authorising police to demand identification without justification, as these are used as a basis for harassing and detaining those who are or are perceived to be sex workers.

- Abolish any legal provisions or practice that facilitates involuntary detention of sex workers in so-called “rehabilitation centres”.

- Abolish any administrative penalties or other punitive measures that are used against sex workers and their clients, including any licensing schemes and mandatory testing requirements for HIV or other sexually transmitted infections.

- Ensure that any criminal laws related to human trafficking or exploitation are not applied in a manner that conflates all sex work with these concerns or acts as a de facto prohibition on sex work.

Decriminalise drug use and simple possession of drugs for personal use

- Abolish any criminal or similar administrative or other prohibition on the use of drugs and on the possession, purchase or cultivation for personal use of drugs, including when people use drugs together.

- Abolish any legal provisions or practice that facilitate involuntary or coerced detention of people who use drugs in so-called “rehabilitation centres” or “treatment centres”.

- Abolish any criminal or similar prohibition on the delivery of harm reduction services (e.g. opioid agonist treatment, sterile injection equipment) needed by people who use drugs, including those in prisons and other closed settings, to reduce the risk of HIV infection and other harms, including ensuring that any law prohibiting “incitement” or “encouragement” of drug use does not restrict the possession or distribution of equipment, goods or information about or for the purpose of such services.

End HIV criminalisation

- Abolish or reform relevant laws that are used to criminalise HIV transmission, exposure or non-disclosure, ensuring that the law, in whatever form, allows for criminal liability only in cases of actual, intentional transmission at most.

- Adopt legal or policy measures that prohibit the disclosure to, and use by, law enforcement of data gathered for public health purposes, including programmes of molecular HIV surveillance, and preclude the use of such data for purposes of criminal prosecution or other punitive measures.

In addition, the UNAIDS Reference Group on HIV and Human Rights calls on all international, regional and national stakeholders — including governments, UN agencies, regional human rights bodies, national human rights institutions, and funders engaged in the HIV response — to take positive steps, as relevant to their mandates and functions, to:
• involve relevant community-led organisations in the review, design and implementation of relevant law reform activities;
• support Member States, including with technical assistance, in making the above changes to their domestic law;
• support civil society organisations, including those representing key populations and communities particularly affected by HIV, in their advocacy for such law reform;
• support research, including community-based/led research, to document the ongoing harms of criminalisation and the benefits of decriminalisation; and
• adopt policies and standards consistent with, and in support of, the decriminalisation measures recommended above.

The UNAIDS Reference Group on HIV and Human Rights was established in 2002 to advise the Joint United Nations Programme on HIV/AIDS on all matters relating to HIV and human rights. The Reference Group speaks with an independent voice; thus, its views do not necessarily reflect the views of the UNAIDS Secretariat or any of the UNAIDS Cosponsors.

Disclosure statement

The members of the UNAIDS Reference Group on HIV and Human Rights serve in their individual capacity as experts. All members of the Reference Group are involved in advocacy for human rights-based responses to HIV in some fashion. Some have or have had affiliations with various non-governmental organisations that undertake such advocacy; some are academics who undertake research in this area. They receive no remuneration, including from UNAIDS, for their service, nor do they receive any benefit from the publication of this manuscript.

Funding

The preparation of this manuscript by the Reference Group was funded by the UNAIDS Secretariat, which also paid for its publication.

References

11. Lyons CE, Rwema JOT, Makofane K, et al. Associations between punitive policies and legal barriers to consensual
33. Krüsi A, D’Adamo K, Sernick A. Criminalised interactions with law enforcement and impacts on health and safety...


50. UN Human Rights Council. Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health UN Doc. A/HRC/14/20; 2010.


77. Arredondo J, Gaines T, Manion S, et al. The law on the streets: evaluating the impact of Mexico’s drug decriminalisation reform on drug possession arrests in...


