



## Government regulation of sex and sexuality: in their own words

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**Abstract:** *Criminalisation is but one of the tools employed by governments to regulate sex and sexuality. Other types of regulation can equally have an impact on health and well-being and thus merit consideration. While restrictive laws related to sexuality are often driven by moral argumentation, public health evidence and human rights norms highlight the need for supportive legal and policy environments. International legal commitments can serve as a check against national laws and policies which do not conform to international consensus. Reporting mechanisms which draw attention to affected populations in the context of HIV have provided a lens through which governments can begin to see the harms to health and well-being caused by their own regulation of sexuality. A review of 2008 self-reported legal and policy data from the 133 countries reporting under the Declaration of Commitment on HIV/AIDS offers important insights. International and national legal and policy environments relating to sexuality are evolving. By identifying dissonance between international standards and national laws and policies, a refocusing of efforts is possible, aiding governments to meet their international obligations and ensuring an appropriate environment for the free and safe expression of sexuality. ©2009 Reproductive Health Matters. All rights reserved.*

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THE scope of behaviours that fall under governmental regulation of sex and sexuality is broad and raises a multitude of health and human rights concerns.<sup>1–3</sup> The HIV pandemic, in which one of the primary modes of transmission is unprotected sex, draws attention to the importance of knowing how sex and sexuality are regulated within and across countries. Laws and policies can facilitate or impede efforts to address HIV by affecting access to health information and services as well as health status. While national frameworks often criminalise specific sexual behaviours, HIV has provided a lens through which the harms caused to the health and well-being of individuals and populations can be seen.

Criminalisation is but one of the regulatory tools employed by governments in relation to sex and sexuality. For example, national or local policies that prohibit contraceptive sales, including condoms, to unmarried persons can impede efforts to prevent HIV prevention among non-married people, including men who have sex with men. Mandatory HIV testing of sex workers may drive some sex workers underground for fear of losing their livelihood. Hence, it is useful to consider regulation in its broadest sense to best understand governmental efforts to control sex and sexuality.

A challenge to assessing regulation of sex and sexuality across countries is the differences in how these issues are presented in national and

international legal and policy frameworks. At national level, sexual behaviours are generally regulated while international legal and policy frameworks, and associated reporting mechanisms, tend to focus on population groups, often termed “vulnerable populations”, such as men who have sex with men and sex workers, rather than behaviours.

This article focuses on regulation of sex between men and sex work because of the ways in which they highlight current debates on and the evolving nature of regulation, and because quantitative and qualitative self-reported government data for 2008 are publicly available for them. We begin with an overview of relevant international legal standards and briefly summarize the HIV-related impacts of laws and policies in these areas, highlighting some of the work that has been done to date around their documentation. We then present an analysis of the self-reported data of 133 governments concerning men who have sex with men and sex workers in the context of HIV, and discuss the implications of the findings.

### **The legal basis for assessing government regulation of sex and sexuality**

The evolution of the ways sex between men and sex work are covered under international human rights law is a useful marker for judging the progression of international consensus on sensitive topics. The evolution of international human rights law takes place through a wide variety of mechanisms. Most relevant to this discussion is the work of the UN Treaty Monitoring Bodies, each composed of independent experts nominated and elected by national governments in consultation with a wide range of specialized agencies, NGOs, academics and other human rights experts.

While the independent experts on these committees represent many different political and legal ideologies, reaching consensus amongst a relatively small group of people can be achieved fairly quickly as compared to similar advances at the national level. This can in large part be attributed to the complexity of effecting legal reform at the national level, but some governments, including those that have ratified the relevant human rights instruments, also remain reluctant to make changes that run counter to their political ideologies.

Despite these limitations, international human rights law affords insight into how responsibilities for regulating sex and sexuality are understood at global level, and provides the overarching framework within which national laws and policies should be situated. It can therefore act as a check if national laws do not conform to international consensus.

With an emphasis on non-discrimination and the equality of all human beings, the focus of international human rights law is on promoting and protecting the rights of individuals and populations “*without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*”.<sup>4</sup>

Importantly, the language of “other status” is flexible and has grown over time, now encompassing, for example, HIV status and disability. Prior to 1994, sexual orientation was not in any way recognised as a protected “other status” under international human rights law but with the advent of the AIDS epidemic, the Human Rights Committee (the expert group that monitors implementation of the International Covenant on Civil and Political Rights) explicitly rejected the criminalisation of consensual sex between adult males in Australia, stating in the Toonen case that the “*...criminalization of homosexual practices cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of HIV/AIDS.*”<sup>5</sup>

Focusing on people rather than their behaviour, international standards have gradually increased protections for men who have sex with men in a number of ways. In 2000, the Committee on Economic, Social and Cultural Rights recognised discrimination on grounds of sexual orientation as unacceptable with respect both to the underlying determinants of health and access to health services.<sup>6</sup> More recently, the proscription of discrimination on the grounds of sexual orientation has broadened to include gender identity, including with respect to the availability of health information and services.<sup>7</sup>

While these international pronouncements may seem distant from national realities, it is worth noting both the change to the Australian law after the Toonen case<sup>5</sup> and the recent Delhi High Court judgement, which recognised the criminalisation of consensual sexual acts between

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