

REPORT ON THE NATIONAL CONSULTATION ON THE DRAFT LEGISLATION ON HIV/AIDS

13-14 September 2003

BACKGROUND

The Lawyer's Collective instituted a HIV/AIDS Unit in 1998 to provide legal aid and allied services for people affected by HIV/AIDS. As a part of the HIV/AIDS Unit's main objective to protect and promote the fundamental rights of people affected by HIV/AIDS and the rights of marginalized groups that are most vulnerable to HIV/AIDS, the Lawyer's Collective undertook to Draft a Legislation on HIV/AIDS.

The process of drafting a legislation on HIV/AIDS began in May 2002, with the inter parliamentary group where the Prime Minister and Sonia Gandhi spoke about HIV/AIDS. In another meeting of parliamentarians Anand Grover of the Lawyers Collective emphasised the need for legislation on HIV/AIDS. Rajya Sabha member, Kapil Sibal supported this idea and requested The Lawyer's collective to formulate this legislation. National AIDS Control Organisation (NACO) has been involved in the process but would not be involved in the consultative meetings.

The Legislation is being drafted based on 2 conditions that includes-

- Preparing background information that consists of reviewing laws in various countries
- Making sure that this law is not ad-hoc and therefore involves the community through consultations

Need for the Law

- There are huge gaps in the existing law. Apart from a statutory law in Goa on HIV there are no laws that cannot be subject to arbitrary changes made by judges with different viewpoints.
- The law on discrimination only applies to the state and therefore there is a need to bring the private sector under the purview of the anti-discrimination law

Objective of the Consultations

- Need for a proper thought out law so that the mistakes made in formulating past laws is not repeated
- Need for critical inputs from all stakeholders to avoid basing the law on only a partial view point
- Consultations imply ownership and it makes implementation of the law easier

The draft legislation is being shared at various consultative meetings that comprise of individuals, groups and communities who would be affected by this law. The first national consultative meeting was with People Living with HIV/AIDS (PLHA), the second one with Sex Workers, Injecting Drug Users (IDUs) and Men who have Sex with Men (MSM) and the third meeting will be with Labour groups, Women's groups and Health care workers. After the commencement of the three national level meetings, 6 regional level meetings will be organised

INTRODUCTION

The second National Consultative Meeting on the Draft Legislation sought to involve the communities of sex workers, IDUs and MSM and those individual and organisations working on the issues. The need to address the three issues vis a vis HIV/AIDS was felt because certain existing laws and the stigma attached to these groups made them more vulnerable to HIV. Moreover intervention programmes with these groups were difficult because of the present legal and socio-economic conditions. The draft legislation on HIV/AIDS aims to take into consideration factors that increase vulnerability to HIV and therefore draft a law that not only provides a safe haven for those who are vulnerable but also make inroads to amending laws that are oppressive and violate the rights of certain individual and communities.

The objective of the meeting was to discuss whether and how the new law would benefit the community and the changes required making the law as inclusive and holistic as possible.

The key sections under the draft legislation that were shared with the group were clauses on discrimination, consent, confidentiality, existing laws that affected sex workers, IDUs and MSM and suggested law reforms, strategies for reduction of risk and grievance redressal and remedies.

The methodology used at the meeting to ensure maximum participation included presentations on various clauses of the draft legislation with special emphasis on areas that were contentious and those that required critical inputs from the group. Each presentation was followed by an open house discussion and then intensive small group discussions.

The following sections will provide a brief description of the clauses presented, issues for consideration and then a detailed reporting of the areas of concern expressed by the participants, suggestions and recommendations made by them.

SESSIONS

Opening Session

After sharing the history, purpose and scope of the draft legislation comments were invited from the participants. Some of their questions and apprehensions were about misusing the law for example in the case of an individual gaining employment without merit on the basis of his/her HIV+ status and the question of only focusing on a law for HIV/AIDS instead of health in general.

The members of Lawyer's Collective explained certain conditions and factors that needed specific attention especially with regards to ITPA¹ and Section 377² of the IPC as there were differing viewpoints. They also admitted that it was difficult to reform all laws that violate rights of marginalized communities but there were chances that this law could be used to reform other laws. The limitation of the legislation on HIV/AIDS shared was that this law would not protect someone on the basis of their marginalized status but would only do so on the basis of their HIV status. The participants were requested to discuss and share their concerns, identify key requirements and reflect on ways to create safe havens.

¹ Immoral Trafficking Prevention Act, 1986

² It states 'Whoever voluntarily has carnal intercourse against the order of nature, with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine'

Session on Prohibition of Unfair Discrimination

Overview of the presentation

The law on discrimination states that ‘ No person shall be subject to unfair discrimination in any form by the state or any other person’.

Doctrine of Classification states that classification has to be based on an objective basis, the objective basis should have relationship to the object and the act of discrimination should not be arbitrary

Discrimination on HIV related grounds would be on the basis of HIV status, actual or perceived; or actual or perceived association with an HIV positive person; or actual or perceived risk of exposure to HIV infection; or any other ground where discrimination related to HIV/AIDS- causes or perpetuates systematic disadvantage, undermines human dignity or adversely affects the equal enjoyment of a person’s rights and freedom in a serious matter

The law will prohibit only unfair discrimination. The discrimination in employment and health care will focus on denial and unfair treatment. Other situations covered under the discrimination clause will be education, residence, travel, access to services, access to institutions, insurance as well as the prohibition of hate propaganda

Some main issues for consideration that were discussed at the meeting were-

- The scope of the discrimination clause
- Discrimination on the basis of non-HIV related grounds

Discussion

The presentation on discrimination was followed by an open house discussion and smaller group discussions respectively. The discussions were indepth and the participants openly expressed their views and concerns.

A participant suggested that there is a need to not only define what constitutes discrimination but also define equality. Another valid concern was the absence of the category of non-injecting drug users in the legislation. It was also suggested that the right of health care workers needs to be looked into and certain benefits like insurance should be provided to them. Someone raised that discrimination around HIV/AIDS stemmed from notions of morality and therefore it should be addressed in the clause. Many were of the opinion that though HIV/AIDS required a separate law considering the stigma and discrimination around it there were other health conditions like leprosy, STDs and Mental Health that attracted a lot of stigma and discrimination as well.

Some were concerned that discrimination was often subtle and indirect and therefore it was difficult to take action. The example of hospitals refusing treatment to individuals with HIV/AIDS on the pretext of not having adequate facility was shared.

Participants also asked how the law on HIV/AIDS would benefit marginalized communities. They explained that marginalized individuals and communities face discrimination irrespective of their HIV status and therefore if the larger issue of discrimination was not addressed the law on discrimination vis a vis HIV/AIDS would be

limiting. They questioned the facilitators on the rights of prisoners. Some also raised the issue of the rights of illegal immigrants and non-citizens. A participant added that by discriminating against trafficked women in employment it implied that the state was also taking away their right to life.

The facilitator of the meeting responded to this by explaining that Health under Article 21's overarching right to life definitions is applicable to all non-citizens but employment is under Article 16 and only applicable to citizens.

The hijra and transgender representatives requested that castration and gender reassignment surgery be made legal. Criminalizing these procedures makes people seek back street castrations that cause infections. They also brought to notice that after a gender assignment surgery the individual loses entitlement to property because of the illegality of the surgery. The discrimination faced by the hijra community affects their employment opportunities and therefore they earn money through sex work that has serious implications in the context of HIV/AIDS.

Some participants feared that by associating HIV/AIDS with certain marginalized groups this law could be responsible for causing further marginalization. The question of which groups would be included and which excluded also arose. They suggested instead that those existing laws that were discriminatory should be reformed. Someone counter argued that it was important not to delink HIV/AIDS and marginalized groups because a generic law would not work..

Some more issues like discrimination also being based on class was brought up. The example of women from a higher socio-economic background who engage in sex work but do not face the kind of discrimination experienced by the visible sex worker community was given. Also the need to consider the discrimination faced by women who are not sex workers but have multiple partners was highlighted.

Only few participants in a small group discussion gave examples of discrimination experienced by them on the basis of being associated with a particular marginalized group. The issue of the role of media in interfering with private and personal issues was discussed in one of the smaller groups. The participants in the group felt that the media had a hand in disclosing identities and causing harm to marginalized groups. For example, in Lucknow HIV/AIDS workers were arrested through the media.

Session on Consent for HIV Testing, Treatment and Research

Overview of the presentation

The law on consent has been understood to mean, "when two or more persons agree upon the same thing in the same sense". The principle of consent elaborates that "every person has the right to bodily and psychological integrity including the right not to be subject to medical treatment, interventions or research without her/his informed consent" In the HIV context it therefore means that no HIV test, HIV treatment and HIV research of a person can be conducted except with informed consent in writing.

The clause on consent for HIV testing, treatment and research lays down certain conditions for informed consent including proxy consent and the specific situations that necessitate proxy consent. Certain protocols are laid down for HIV testing and exceptions to consent are made such as ordered by the law, permitted by law, for testing blood and organs and other bodily fluids; and for surveillance.

Some issues for consideration that were shared with the participants were-

- Whether mandatory testing should be allowed under the law, such as under ITPA, Juvenile justice Act, Criminal Procedure Court and other vagrancy acts
- Whether the provisions under the consent clause addressed the concerns of marginalized populations especially in health care and research settings
- Whether the provisions would enable children and young persons to access HIV counselling and testing services
- To deliberate on consent viz a viz HIV/AIDS research
- Whether pre and post test counselling should be mandatory even if the client wanted to voluntarily forgo it
- Whether mandatory testing should be allowed for post exposure prophylaxis (PEP) purposes³.
- Who should be held liable?
- What penalties should be imposed?
- How could voluntary counselling and testing centers (VCTC), path labs, blood banks, home test kits be regulated?

Discussion

The discussion on consent followed the format of a larger discussion and smaller group discussions. Many of the concerns shared were pertinent to making the draft legislation as inclusive and holistic as possible. A participant pointed out that the clause of consent could be used by doctors to delay treatment as a way to discriminate. There were apprehensions about the method of taking consent because presently consent is taken by not using the language familiar to the person including the use of medical jargon.

Many asked about the relevance of mandatory HIV testing in prisons, custodial homes, for sex workers detained under ITPA and of drug users in de-toxification centers. The concern of those working with IDUs were that through mandatory testing if a recovering addict found out about her/his positive HIV status the chances of relapse were high. Many were concerned about surveillance methods and the pressure put on HIV/AIDS workers to facilitate mandatory testing of marginalized communities under the pretence of doing it for epidemiological studies. Many gave examples of NACO laying conditions for funding etc in exchange of providing them with blood samples.

Other issues of mandatory testing were those of mandatory testing for PEP use. This was especially necessary in rape cases. However, someone questioned the scope of the law on mandatory testing for PEP use in the case of condom failure while having sex with a sex worker. Taking this discussion further someone said that testing for PEP use in the case of IDUs is problematic because one cannot ascertain the source of the infection.

³ Mother to child transmission, sexual assault, occupational exposure etc

Another interesting issue discussed was the relevance of pre and post test counselling and if it should be mandatory. Some felt that mandatory counselling was essential because it not only prepared a person for the test but was also a method of assessing if a test was required. Interestingly, others were of the opinion that anything mandatory was problematic because it would deter people from accessing a service as well as limit their agency. It was suggested that it should be mandatory for all testing centers to provide counselling. However all agreed that some sort of regulation was required to ensure good quality counselling. Someone added that in Manipur, the private sector could not provide testing facilities.

There was a discussion on determining the age at which consent could be given. The questions posed were whether it should be at 18 years because it was the majority age, or 16 years because a person could legally consent to having sex or 12 years like in England and the USA where it is believed that young people become sexually active at 12 years and were mature enough to make informed choices. In one group discussion someone stated that the age of consent should be 15 years whereas in another group the general consensus was 12 years. The problem foreseen was parents denying that their children are sexually active. Someone emphasised if the age of consent for testing was reduced then the age of consent for sexual activity would have to be amended. The question of consent with regard to street children was also mentioned.

With regards to substance abusers including alcoholics a participant expressed the need to consider the mental condition of recovering addicts in the consent procedure. Also there was a need to look at the minimum standards of testing because there were a large number of mobile IDUs who were being tested.

A participant also expressed concern about the right of a person to select a proxy consentor and whether the family members could challenge that selection. He gave the case of a man choosing his male partner as a proxy consentor and that being challenged.

Another concern was the need to have a body that would govern ethics in social and medical research. The facilitator of the meeting said that the ICMR⁴ Guidelines were being translated into law.

Session on Disclosure of information: privacy and confidentiality

Overview of the presentation

The law forbids forcible disclosure or disclosure by compulsion of “private or personal” information. Private or personal information includes medical information including HIV status, sexual orientation, marital status drug practice, etc.

Disclosure can be allowed under specific conditions that constitutes written informed permission, in the best interest of the person to provide him/her with appropriate care or treatment by a health worker, by an order of the court and if required by the law.

The clause also states when the partner needs to be notified. Some of the conditions under which notification would be required is when written informed consent is not given, when the health care provider “bona fide and reasonably” believes, that the partner is at significant risk” of being infected with HIV, when the HIV positive person is counselled

⁴ The Indian Council of Medical Research, New Delhi, is the apex body in India for the formulation, coordination and promotion of biomedical research

to inform partner and the health care provider bona fide believes that the HIV positive person will not inform the partner and the health care provider has informed the HIV positive person of the intention to disclose the HIV positive status to the partner. It also lays down other circumstances in which notification of a person's HIV status is required. The clause on disclosure of information also states that HIV positive persons who are aware of their status, have been counselled and aware of the methods of transmission of the disease, have a duty to inform their HIV positive status to their sexual or needle sharing partner or person at significant risk.

The data protection provision in the clause informs that data relating to personal/private information should be protected from disclosure and should be maintained in a particular form.

Some issues for consideration shared with the group were-

- The need to define what constitutes personal/private information
- Defining who would constitute as partner
- Defining what would constitute significant risk and who would be at risk with regards to 'duty to disclose'
- In the case of duty to disclose which relationship should be considered?. Would it only be fiduciary?
- Duty on media vis- a- vis privacy

Discussion

The discussion mainly centered on the 'duty to disclose' provision. Participants were not clear about who the partner should be and this was especially problematic in the context of sex work and multiple partner sex. Some suggested that it should be the duty of every individual to practice safer sex and not the duty of the partner to disclose HIV status. Another strategy proposed was encouraging condom use instead of making partner notification and 'duty to inform' mandatory. In the case of third party disclosure a suggestion was made to incorporate a clause that would put the burden on the person disclosing to prove the compulsion for disclosing.

Many had apprehensions about the implications the 'duty to inform' rule would have for sex workers as it could adversely affect their livelihood. Also that it should then also be imperative for the client to disclose his HIV status to the sex worker. A participant added that if the duty to inform was imposed on sex workers the law needed to make a provision for alternative employment for sex workers who have HIV/AIDS. The best option someone suggested was to extend the protocol of universal precaution for safety to sex workers and provide compensation for occupational risk to sex workers.

Other problems regard to the clause on 'duty to inform' was discussed at length. Many felt that the ground reality was different and disclosing status to a partner was not easy. In the case of hijras who are dependant on others it is difficult to disclose the HIV status. For injecting drug users the 'duty to inform' is hard because the urge to take drugs is so intense that it overrides any other reasoning. Also the risk of not getting drugs after revealing the HIV status is very real. Some feared that IDUs would not come for testing or avail of other services if 'duty to disclose' was made compulsory. Someone shared that the 'duty to disclose' clause would not work for MSMs because some identities

regard their sexual partners to be god and therefore are unable to ask for condom use. Certain men also find it disempowering to use condoms and therefore disclosing their HIV status would not be a consideration.

Looking at the long-term implications of this law, a participant also expressed his concern about HIV+ women disclosing their status to a partners/spouses and the negative impact it may have on their life.

The argument for keeping a provision like ‘duty to inform’ was to safeguard women especially married women who were at risk at getting infected from their male partners. It would also deter those HIV+ persons who have unsafe sex intentionally.

To the question of bringing the media within the purview of this law, someone recommended that the media could be involved in the consultations as to get them sensitized to the issues as well.

Session on Promotion of strategies for reduction of risk

Overview of the presentation

The reason for having a clause on risk reduction was a reaction to the criminal action taken against NGO’s who work on HIV/AIDS with communities whose behaviour is considered illegal. The shortcoming of the National AIDS policy is that though it encourages HIV/AIDS interventions with vulnerable groups it does not award them any protection.

Risk reduction in the draft legislation means the promotion of actions and practices that minimize a person’s risk of exposure to HIV/AIDS and/or to mitigate adverse impacts related to HIV/AIDS. Presently this clause is applied in the context of populations that are considered vulnerable to HIV/AIDS like sex workers, MSM and IDUs. However the clause aims to keep the category broad because in the future other vulnerable groups can be included within the purview of the law. The clause on risk reduction proposes various strategies for risk reduction and discusses existing laws that impede strategies for risk reduction.

The law that affects sex workers adversely is ITPA that not only hinders sex workers right to livelihood and health but also impacts HIV intervention programmes with sex workers.

Section 377 of the Indian Penal Code is misused by the police to harass, blackmail and extort money from men who have sex with men. The criminalisation of consensual, adult sex between men increases stigma and marginalisation, hampers HIV interventions and therefore increases their vulnerability to HIV.

NDPS⁵ Act makes consumption; possession etc. of drugs a punishable offence and therefore drives IDUs underground and affects their access to information and health.

The criminalisation of drug use exacerbates their vulnerability to HIV.

Taking into consideration the existing laws that hinders HIV interventions and violates the rights of marginalized groups; the draft law proposes that –

- The implementation of risk reduction programmes is not illegal
- The police cannot interfere with any risk reduction programme

⁵ Narcotic Drugs and Psychotropic Substances Act, 1985 has a harsh penal regime for trafficking, possession, use and consumption of drugs in accordance with international conventions of which India is a signatory

- Both providers and users of HIV related services have immunity from civil/criminal liability

This provision in the law would have different implications for different marginalized groups and would allow them to freely access services related to HIV and would also protect those carrying out HIV/AIDS intervention work. However, this legislation has certain limitations as it would only protect and create safe havens in the context of HIV/AIDS.

Some issues for consideration shared with the participants were-

- If the legislation would go far enough to protect vulnerable groups from harassment and persecution
- If certain physical spaces be created or identified to carry out risk reduction programmes
- The question of whether this provision could be used to introduce coercive measures like mandatory testing of vulnerable groups
- If the risk reduction programme would result in increased stigmatization and isolation of marginalized groups

Discussion

The discussions that followed after the presentation were focused on the limitations and benefits of this provision. Many participants made recommendations for the various strategies proposed for risk reduction.

The question of extending immunity to retrospective groups like Sahyog and Bharosa⁶ was clarified when the facilitator said that when the law takes away substantive rights or confers rights it cannot be retrospective.

The need to relate the Mental Health Act to the larger population of drug users was expressed. Some participants had problems with the law only focusing on IDUs. Especially when treatment for all drug use was going to be terminated and was cause for worry. The participants working on IDUs issues also emphasised that registration in needle exchange programmes had to be done carefully because the population of drug users was mobile and a small incident could cause the whole population to move away. Someone raised that registering drug users was difficult as they are constantly on the move. There was a concern that the creation of safety havens and registration programmes would increase dependency on others. Also the question whether registration would be for clients or organizations was asked because if it was for clients the police could harass them. The question of minor drug users also arose and whether they could access needle exchange programmes.

Another problem shared was the absence of drug reduction counselling at VCTC centres.

⁶ Both organizations are based in UP and work on HIV/AIDS. The members of the organisations were subjected to harassment by the police and imprisoned. One organisation was allegedly charged for publishing obscene material and the other for promoting sex between men and with children on the pretext of doing HIV intervention work with MSM.

Some felt that safe spaces created for drug use could prove beneficial as it would be done under supervision. A participant suggested that we find a way to accommodate non-rigid structures in law instead of specific procedures. For example, certificates issued by NGOs instead of registration. Responding to this someone added that certification helps within a confined area and may not be able to take care of the quality of services provided by NGOs and the quality of drugs, needles etc. Moreover it was necessary to have a level of protection outside of a particular locality especially for outreach workers. Another concern was if registration would arrest spread of false information and increase accountability. Another participant talked about the probability of registration becoming a tool to harass NGOs. Someone suggested standards in registration that would put onus on criteria and not on body.

A problem specific to the North East that was brought up at the meeting was the problems faced by NGOs from insurgents who feel that their work is immoral and harassment from the army if NGOs dialogue with the insurgents.

A participant asked if the section on adequate information for 'correct use' implied that condom promotion had to be accompanied by adequate information and the failure to do so would lead to police misusing the provision to harass people. Another question on the same provision was if it would only cover information on condom use or also include sexual health and sexual identity. Someone expressed the need for the law not only to protect NGOs but also commercial companies who for the fear of backlash are unwilling to advertise about lubricants etc.

Regarding sex workers issues a participant emphasized the need to repeal ITPA as a risk reduction strategy. The issue of child sex workers arose because though it was a reality that there were a large population of minor sex workers, intervention programmes with them would have legal and ethical repercussions. Someone asked if 'safe haven' would include area for solicitation as well. However identifying a safe haven for sex workers would lead to more stigmatization and discrimination. This strategy would leave out mobile groups. Someone gave the example of 'safe haven' controversy in Amsterdam where sex workers were not happy being confined to specific areas because it was difficult to get clients. A participant mentioned that there were no programmes for male sex workers and there was a need to create 'safety havens' and provide protection for transgender people and hijras

Sex worker representatives spoke about non-availability of free condoms from the government and the failing quality of free condoms that discourage its use. Many complained about State AIDS Control Society (SACS) and their focus on numbers at the cost of the quality of the interventions. They were of the opinion that the SACS Guidelines were rigid and hindered intervention work. Some others touched upon the role of the media in reaching out to invisible communities.

Session on Special provision for marginalized populations

Overview of the presentation

Since the meeting focused on issues and concerns of marginalized communities vis-a vis HIV/AIDS a presentation was made on special provisions for marginalised communities. It focused on the various laws that were impacting marginalized communities, making them more vulnerable to discrimination and HIV/AIDS.

The laws discussed were the NDPS Act, Section 377 of the IPC and the ITPA.

With regards to drug possession and consumption there are laws in many countries but what is specific to India is that NDPS criminalizes even the tiniest possession and therefore prevents more efficient ways of consuming drugs. There is a draft law pending in Manipur that looks at needle-exchange programmes.

Law reform for NDPS to consider were-

- Decriminalisation of some aspect of drug use
- Provide legal protection of Harm Reduction Programmes for HIV/AIDS including needle exchange and drug substitution
- Participation of police is necessary to ensure success of harm reduction programmes

Law reform options for Section 377 shared were-

- To delete the word voluntary from the section
- Make only non-consensual sex punishable. This would then also apply to child sexual abuse
- Change rape laws by having a graded sexual assault provision and also make it gender neutral so the same sex violence and violence faced by hijras and transgender community is covered.
- To remove marital rape as an exception in the rape law

The presentation on ITPA was a critique of the Act. ITPA is based on the UN Convention. It makes it obligatory for states to punish organised prostitution and third parties profiting from it.

Some of the shortcomings of this Act were its assumption that only third parties benefit from sex work and not sex workers themselves. It assumes that all prostitution is exploitative. The issue of consent is not a consideration in ITPA.

Though ITPA does not intend to penalize sex workers it is ironic that third party profiteers who are arrested can apply for bail but sex workers who are rescued are detained. Under ITPA individual sex workers have no control and they are unable to protect themselves and therefore vulnerable to violence, harassment and infections.

For an in depth discussion on specific concerns around IDUs, sex work and sexuality issues, participants were asked to select the issue they wanted to represent.

The following are the key concerns and recommendations that emerged from each of the three group discussions.

Discussion

IDUs

Don't have the notes.

Sex Work

The summary of the discussion on sex work is-

- Need to follow the Sonaghachi model as a harm reduction model
- Difficulty in self regulation as there is a lot of stigma around sex work
- The need to look at safe havens irrespective of HIV prevention
- Need to consider self regulation in the context of street based sex work

Sexuality

The summary of the discussion of sexuality is:-

- The need to reflect on the gamut of sexual assault and have gradations
- The need to consider violence faced by the hijra and transgender community and the binaries of male and female in the law
- The issue of child sexual abuse and the need to establish the age of consent
- Also the need to reflect that the age of consent evolves over cultures and therefore child sexuality needs to be explored
- The need to define fixed v/s open consent for instance in the case of two 17 year olds consenting to having sex.
- Need to define the private and public domain
- The need to consider the boundaries of privacy especially in the context of sex workspaces and police raids.
- Consider the option of removing Section 377 and making the rape law gender neutral. The need to look at gender neutral law as being favourable to the hijra and transgender community
- The Lawyers Collective report needs to cover the sexual violence faced by hijras and kothis

The group decided that by taking all the above into consideration, in the private area adult, consensual sex should not be criminalised under Section 377 and should not wait for the rape law to change. However private sex should not be defined under Section 377 but as a separate section.

Session on Information Education and Communication on HIV/AIDS

Overview of the presentation

The freedom of speech and expression is a fundamental right and it includes right to information, education and communication and right against misinformation

The duty of the state with regards to IEC on HIV/AIDS is to ensure privacy and confidentiality, ensure it is not discriminatory and that it is accurate information. The

state however reacts to HIV and sexual health information by restricting freedom of speech and expression on grounds of decency and morality. The consequence of this state policy of not providing information and education crucial to HIV/AIDS prevention and treatment and is therefore a violation of the right to life.

The draft legislation imposes an obligation to the State to institute IEC programmes, which are based on evidence based research, age appropriate, does not promote gender/sexual stereotypes and adopts a participatory approach.

It also proposes that no person shall be denied access to HIV/AIDS related material.

Some issues for consideration shared with the participants were:

- The exact content of information to be included in IEC programmes
- Find ways to incorporate experiences and concerns of marginalized populations
- Look at ways to address sexuality and sexual health in IEC programmes

Discussion

The discussion on IEC took place in the large group setting and was not followed by smaller group discussions. Some considerations were the provisions of IEC material on HIV/AIDS for people with hearing and visual impairment. Someone asked if the use of colloquial language could be interpreted as being obscene by the law. There was a concern that the government should be prevented from basing their messages on morality. The Balbir Pasha campaign example was given where sex workers were portrayed to be the vectors of HIV.

The Lawyer's Collective representative responded to this last concern and said that freedom of speech was a fundamental right and therefore nobody could prevent the promotion of certain messages. The gag rule could not be applied because someone could want it for us. To this someone added that if freedom of speech was a right then how could condom advertisements be curtailed.

The session on IEC ended with the note that the principles for IEC development needed to be identified, for example IEC material should be participatory, evidence based, gender-sensitive etc

Session on Implementation, grievance redressal remedies

Overview of the presentation

The provision of grievance redressal in the legislation would facilitate smoother implementation of the law. The purpose of grievance redressal and remedies is to prevent violations as well as provide a mechanism through which those who are violated can seek support and redressal. The clause has a detailed grievance redressal mechanism for institutions that comprises of the establishment of a Complaints Officer and an ethics committee. The protocols given for grievance redressal explains how, when and by whom the grievance redressal would be conducted.

The grievance redressal programme also includes the Health Ombudsmen for immediate redressal in case of violations of the provisions of the HIV/AIDS Act in a health care Institution. A section on the proceedings was given with a detailed description of special procedures in courts with regard to cases on HIV/AIDS related violations.

Some issues for consideration shared with the participants were-

- Deciding if NACO/SACS should be made statutory bodies
- Deciding the composition of the statutory body- NGO, civil society, PLHA representation etc
- Defining the exact functioning of the statutory body
- Finding a way of ensuring financial commitment from the government
- Finding a method to ensure accountability

Discussion

The discussion ensued in the large group setting. Some of the key discussion points were whether the case would go to NACO or SACS if not dealt with within a stipulated period and the need to ensure that people from the lower socio-economic strata would be able to avail of the facility. Also if there was a special procedure for sentencing and the concern that the redressal mechanism failed to focus on the preventive part.

The facilitator of the session added that there was a need to make it a state obligation to increase awareness about the act. He said that once substantive rights are conferred people automatically have remedies in place.

Conclusion

The meeting brought together Sex workers, IDUs and MSMs on a common platform to brainstorm around issues of HIV/AIDS and marginalisation. The meeting was very productive and some very valuable inputs were gained. Some of the critical concerns and debates were on the clause on discrimination, the 'duty to disclose' provision and around the suggested law reforms of Section 377, ITPA and NDPS Act.

The Lawyers Collective will take on the concerns and suggestions given by the group and incorporate it into the next draft of the Legislation. The organisation will also share the concerns expressed by the participants with various stakeholders to build a case for having a law on HIV/AIDS that not only protects the rights of people with HIV/AIDS but also protects the rights of vulnerable communities.

Issues for consideration

Areas of concern

a) sex work

b) IDUs

c) MSM

Suggestions and recommendations

Disclosure of information- privacy and confidentiality

Issues for consideration

Areas of concern

a) sex work

b) IDUs

c) MSM

Suggestions and recommendations

Promotion of strategies for reduction of risk

Issues for consideration

Areas of concern

a) sex work

b) IDUs

c) MSM

Suggestions and recommendations

Implementation, grievance redressal and remedies

Issues for consideration

Areas of concern

a) sex work

b) IDUs

c) MSM

Suggestions and recommendations