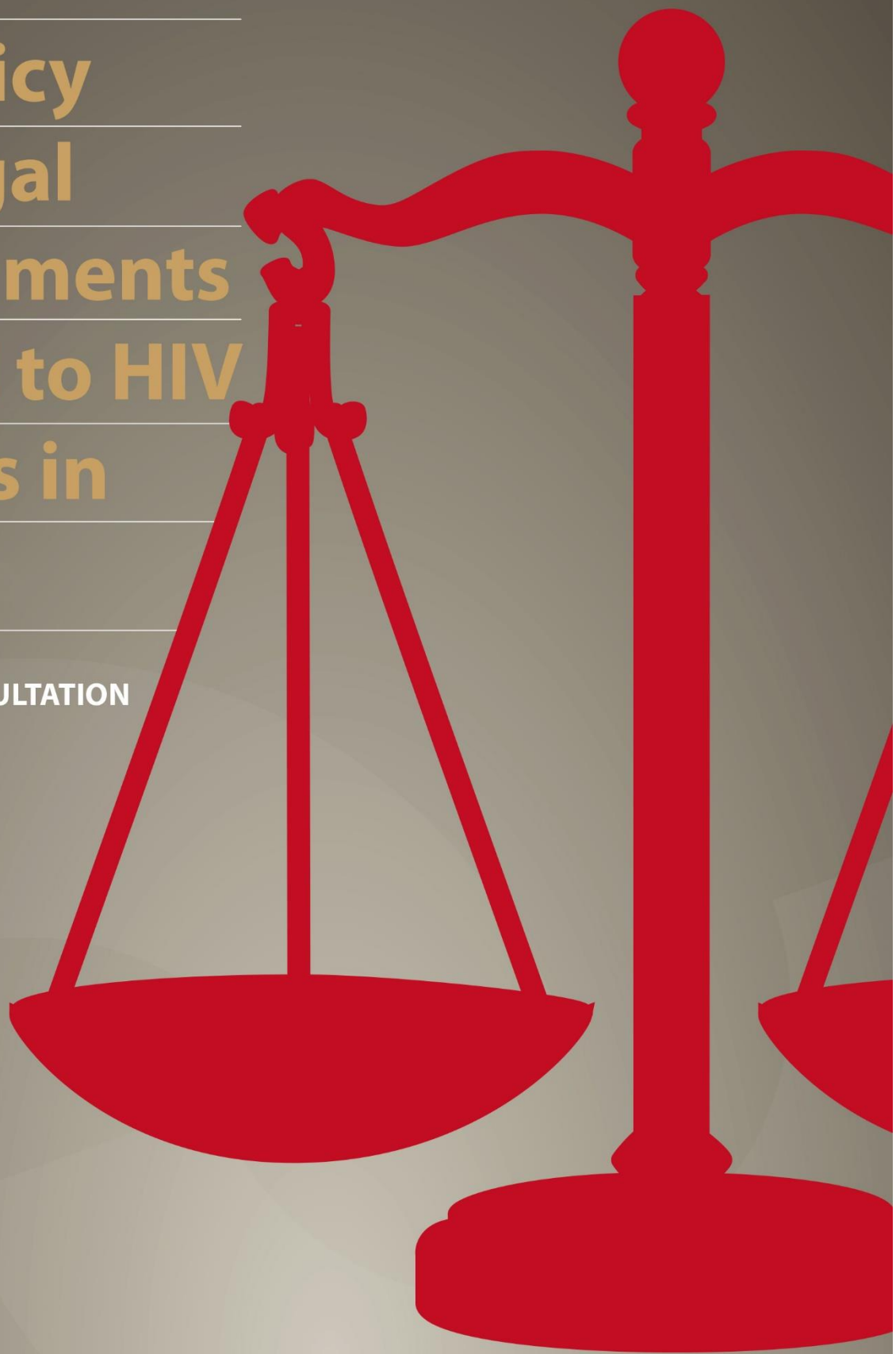

The Policy and Legal Environments Related to HIV Services in China

REVIEW AND CONSULTATION



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REVIEW AND CONSULTATION



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This report highlights the discussions and recommendations that came out of the consultation meeting in December 2013, together with additional research conducted by Dr. Jia Ping. Dr. Jia was the primary report writer and incorporated additional interviews with key stakeholders in both the legal and HIV/public health fields. Andrea Pastorelli, Policy Specialist on Poverty, Equity and Governance in UNDP China managed the entire process and helped in drafting sections of the report. Gu Qing, Team Leader, Poverty, Equity and Governance team, UNDP China, guided implementation of the entire initiative. Thanks to Siddharth de Souza, Mitchell Luo and Fu Rong in UNDP China for providing invaluable copy-editing and translation support, as well as fact checking and data analysis. Further thanks go to David Shallcross and Zhou Kai from the UNAIDS China office for the support provided during the national consultation meeting and the recruiting of the consultant. Thanks to Nana Taona Kuo, Hedia Belhadj and Catherine Sozi, successive UNAIDS Country Coordinators (UCC) in China, for strongly support this area of work.

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¹ "National Report on HIV and the Law", 2013, Renmin University Law School and UNDP.

Foreword

When countries gathered in New York at the beginning of this century to articulate a new development agenda, they elevated AIDS to the top of international development priorities. Acknowledging the historic impact of the AIDS epidemic, Millennium Development Goal (MDG) 6 called for global efforts to halt and begin to reverse the epidemic, an objective that has helped inspire unprecedented action globally. Through a series of high-level meetings, the UN General Assembly established strategies, goals and targets to give life to MDG 6 and to accelerate progress towards achieving global objectives by 2015.

At the 2011 General Assembly High-Level Meeting on HIV/AIDS, UN Member States reviewed a decade of historic progress in the HIV response and endorsed the “*2011 Political Declaration: Intensifying our Efforts to Eliminate HIV/AIDS*”. The political declaration commits governments to review laws and policies that adversely affect the successful and equitable delivery of HIV prevention, treatment and care programmes to people living with or affected by HIV. Governments in Asia and the Pacific have since reinforced this commitment with UN ESCAP Resolutions 66/10 and 67/9, and the agreed Regional Framework for the Implementation of the Political Declaration (*The Roadmap*) agreed at the 68th UN ESCAP Commission Meeting.

This past September, countries gathered back in New York to approve a new development agenda, the new Sustainable Development Goals (SDGs). This time the global community unanimously approved the most important and courageous commitment to date, to end AIDS everywhere by 2030.

Globally, UNDP is supporting governments to meet these commitments and targets. An example of such support is the *Global Commission on HIV and the Law*, an independent commission of global leaders that developed actionable, evidence-informed recommendations for effective national HIV responses. Hosted by UNDP, the commission called on governments to reform policies and laws that are acting as barriers to effective national responses to AIDS². The Commission’s recommendations offer guidance to governments and international bodies in shaping laws and legal practices that are science based, pragmatic and just.

UNDP, working in partnership with the UNAIDS Secretariat, other UN agencies, governments and civil society partners, has been supporting countries in Asia and the Pacific in taking forward the work of the Global Commission on HIV and the Law, including supporting country-level National consultations on HIV and the law and doing Legal Environment Assessments on HIV and key populations. These provided opportunities for governments, civil society, key populations and other relevant stakeholders to review and strengthen legal and regulatory environments for HIV through a national participatory process.

The message of these reviews is clear. While the HIV epidemic has become one of the greatest public health challenges of our time, it is now evident that it is also a crisis of law and social justice. We now have all the evidence and tools we need to radically slow new HIV infections,

² *Risks, Rights and Health*. Report from the Global Commission on HIV and the law, 2012.

however this comes at a time when punitive laws and other political obstacles are standing in the way of success³. Urgent efforts are needed to review and reform national legal and policy frameworks, revising or repealing laws to ensure a rights-based response that provides equitable access to essential HIV services. Particular attention needs to be paid on the removal of punitive laws regarding key populations, such as men who have sex with men (MSM), sex workers and people who use drugs. Better legal frameworks need to be complemented by robust, sustained investment in anti-stigma programming that works to forge healthier social norms of inclusion, tolerance and non-discrimination.

Three decades of experience have shown that the promotion and protection of human rights are essential for preventing HIV transmission and reducing the impact of HIV. Evidence-based approaches and protective and enabling legal environments reduce vulnerability to HIV and ensure that HIV prevention, treatment and care services are accessible by those most at risk. On the other hand, laws that criminalize HIV transmission, sex between men, sex work and drug use, or that fail to protect the rights of women and children, are major barriers to accessing HIV services and interventions, reinforcing social stigma and hindering effective responses to the HIV epidemic.

Notwithstanding years of substantial investments and political commitment by the Government, the HIV epidemic in China continues to increase. China is among 15 countries that account for the majority of new infections as well as total number of people living with HIV globally. For this reasons, it remains a top priority country for the UN Joint Programme on AIDS. We will not end AIDS globally if we do not make progress in China. And we will not make progress in China if we don't start looking at the social determinants of health and HIV infections, including the law.

The end of the global AIDS epidemic is within our reach. This will only be possible if science and action are accompanied by a tangible commitment to respecting human dignity and ending injustice. Law prohibits or permits specific behaviors, and in so doing, it shapes politics, economics and society. The law can be a human good that makes a material difference in people's lives. It is therefore not surprising that law has the power to bridge the gap between vulnerability and resilience to HIV. We hope this report and the national consultations based upon it will start a needed conversation about practical steps for China to take to translate international and regional commitments into action. Only in this way will China support the world in achieving the Sustainable Development Goals.



Agi Veres
Country Director, UNDP China

³ *Ibid.*

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List of Abbreviations/Acronyms

HIV	Human Immunodeficiency Virus
AIDS	Acquired Immune Deficiency Syndrome
UNDP	United Nations Development Programme
UNAIDS	Joint United Nations Programme on HIV/AIDS
CDC	Center for Disease Control and Prevention
PLHIV	People Living with HIV/AIDS
MSM	Men who Have Sex with Men
IDU	Injecting Drug Users
MMT	Methadone Maintenance Treatment
FSW	Female Sex Workers

PART ONE



Executive summary

Although the HIV epidemic in China remains one of generally low prevalence, it is marked by geographic and sub-regional heterogeneity (with six provinces containing the majority of infections), and it is highly concentrated among key populations, with increasing infections among men who have sex with men (MSM) and sex workers.

One of the main drivers of the Chinese epidemic remains the high level of stigma and discrimination faced by PLHIV and key populations. A key factor to this is China's failure to enforce protective laws for most at risk populations, which is now undermining the overall response to the HIV epidemic. China's *State Council* adopted the *National AIDS Prevention and Treatment Regulations* in March 2006 (hereby *2006 National AIDS Regulations*). The *2006 National AIDS Regulations* include the most comprehensive attempt at protecting the rights of PLHIV, including the right to marry, to access health-care services, to enjoy equal employment and education opportunities and the right to confidentiality and non-discrimination.

Although a big step forward, the *2006 AIDS Regulations* and other related regulations alone have not provided effective protection for people living with or affected by HIV in China, who are still experiencing high levels of stigma and discrimination. Better enforcement of these national regulations, together with targeted and evidence-based legal reforms are needed to make sure that people in most need of health or HIV services are able to access them. In fact, the current legal environment has a particularly negative public health impact on key populations including people who use drugs, commercial sex workers and men who have sex with men. This, in turn, is

contributing to the further spread of HIV in China. The preliminary findings of this national law review include:

1. While the *2006 National AIDS Regulations* are good, its progressive measures are not enforced and are still largely unknown at the Provincial level.

2. There are **conflicts and differences** that still exist between some provisions in the *2006 National AIDS Regulations* and provincial regulations that haven't been reformed. In this respect, in the last five years a number of Provincial or municipal governments have proposed enacting regulations that were stigmatizing and dehumanizing towards PLHIV. All of these regulations went in direct conflict with the *2006 National AIDS Regulations*.

3. Most importantly, the *2006 National AIDS Regulations* are subject to **overriding laws** that have a higher priority in the Chinese legal hierarchy, such as selection procedures that still permit HIV-related discrimination in employment, or criminal laws relating to sex work and drug use. **Contradictions between different provisions**, within the same law or between different laws or regulations at the national level, prevent efficient HIV prevention among key populations, especially sex workers and drug users and often lead to punitive law enforcement practices.

4. **Punitive laws, administrative regulations and severe law enforcement practices negatively affect public health interventions among drug users and sex workers.** The current legislation and law enforcement practices quasi-criminalize sex workers and drug users, preventing people from accessing prevention and treatment services and increasing the risk of HIV among these populations, and through them to the general population. Practical examples include: the continuous use of condom possession as evidence of sex work, custody and education (C&E) detention centers for sex workers, police crackdowns and rounding up of sex workers; compulsory treatment and detoxification centers for people who use drugs as well as specific parts of the Dynamic Control System (DCS), the national database for drug users.

5. **Lack of effective rules and mechanisms to protect confidentiality.** Mandatory testing is still the dominant model for testing, with poor follow-up on counseling and treatment initiation. Weak confidentiality protection and a lack of procedures to deal with breaches in confidentiality contribute to low testing rates among key populations.

6. **Overall, the lack of anti-discrimination legislation in China fuels the epidemic, with severe discrimination against PLHIV and key populations in areas of health, employment and education:**

1. **Employment discrimination is still widespread in both the private and public sectors.** In the private sector physical check-ups and health permits are required for anyone working in seven categories of the service industry. This includes small businesses in the "*locus publicus*". In the public sector the entire civil service still requires an HIV-test before the final offer of employment. This practically impedes PLHIV from entering the civil service.

- II. **Access to non-discriminatory medical treatment for PLHIV remains a challenge.** In China a separate system of infectious diseases hospitals provides specific medical services for people living with infectious diseases. This often leads to the situation where the general hospital system denies admission to PLHIV, especially for non-HIV related medical procedures, such as surgeries or neonatal and gynecology services for pregnant women. Infectious diseases hospitals lack the resources and know-how on general surgery and maternity issues, often leading to an institutional barrier to proper medical treatment for PLHIV.
- III. **Social and institutional discrimination against sexual and gender minorities pushes MSM underground, fueling the epidemic.** Censorship laws preventing public discussion of sexual minorities in the media continue to marginalize the LGBT community, while LGBT CBOs and NGOs are unable to officially register and operate and require considerable financial and capacity building support. This, together with rampant social stigma against sexual minorities, pushes most gay men or other MSM to live in the shadows and has a negative impact on their uptake of HIV prevention services. In the last 8 years the percentage of new infections arising from homosexual transmission has increased from 2.5% in 2006 to 29.4% at the end of 2012, posing a severe challenge to China's AIDS response.

The report concludes that HIV-specific law and judicial reform in China is urgently needed, with a view to protect PLHIV and key populations from discrimination while actively supporting effective outreach and prevention services. The report also provides a series of specific recommendations on legal and institutional reforms. Among these, the most important include the enactment of an overarching national AIDS law and an anti-discrimination Law; the abolition of the law-enforcement practice that uses condom possession as criminal proof of sex work; the repeal of the C&E detention center system for sex workers; and the reform of the compulsory detoxification center system for drug users. (*See conclusions section on page 42*).

Process and methodology

In 2012 UNDP China worked with Renmin University Law School to undertake a joint national law review on HIV and key populations. A report was published in 2013⁴ and led to a national consultation on HIV and the law in Beijing in December 2013. This report is based on information collected during the national dialogue as well as follow-up research conducted over a period of twelve months with key stakeholders in China.

1. Purpose of the research

The purpose of the report is to document the current legal, regulatory and policy environment impacting on access to HIV services by PLHIV and key populations, including a review of:

- Protective laws, regulations, policies and programmes which support human rights and access to health in the context of HIV and AIDS, including their implementation and enforcement;
- Punitive laws, regulations and policies which pose barriers to human rights and access to health in the context of HIV and AIDS;
- Gaps and weaknesses in the current legal environment, as well as contradictions between HIV-specific laws/regulations and other legal or regulatory frameworks at the Central or Provincial government levels;
- Identify practical recommendations, reforms and next steps to improve the legal environment and promote social inclusion and strengthen the national response to AIDS.

2. Research methodology

I. Literature review

Existing domestic laws, regulations and relevant policy documents were collected and analyzed. Attention was paid to the evolution of the HIV-related legal system in China and to document the status quo. The implementation of the Law and its impact and effects on key populations was also studied to discover gaps and inadequacies. Additionally, international norms, treaties and academic papers on international legal cases and best practices were also collated to understand international best practice and provide useful reference for China to improve relevant systems and practices. Finally, the research team collected and examined relevant books, papers and data related to HIV, criminal law and law enforcement practices in China.

II. Comparative research

Comparative research refers to a method aimed at carrying out comparison in specific legal system of AIDS from different dimensions, to acquire pros and cons of different

⁴ National Law Review on HIV and Key Populations, 2013, Renmin University and UNDP.

systems and to discover inadequacies in comparison and to draw from experience. The comparative research in this project includes the comparison of the following two directions:

A vertical comparison in systems and practices across different historical periods was carried out to assess the development of systems and their practical effects in every historical period; and

A horizontal comparison between mainland China and foreign legal systems and comparison between different regions and provinces of China was also carried out. Through this comparison, the research was able to better identify the gaps and challenges in the current Chinese legal system and practice as well as support the researchers in putting forward feasible and evidence-based recommendations.

III. Field research

In order to obtain accurate and first-hand information, especially on discrepancies between national and provincial laws and regulations and their impact on service delivery, the original project team arranged a field research programme which included visits to Yunnan, Beijing and Henan.

IV. National dialogue on HIV and the law

In December 2013 UNDP and UNAIDS organized a national dialogue on HIV and the law at Renmin University Law School in Beijing. More than one hundred people representing legal organizations, universities, UN agencies, HIV and key populations CSOs, PLHIV, as well as a number of government departments participated in the dialogue. This report includes information and recommendations identified during that meeting.

PART TWO



Introduction

1. The role of the law in the response to AIDS

Three decades of experience in the global response to the AIDS epidemic have shown that the promotion and protection of human rights are essential for preventing HIV transmission and reducing the impact of HIV. Rights-based approaches and protective and enabling legal environments reduce vulnerability to HIV, ensure that HIV prevention, treatment and care services are accessible by those most at risk and enable people living with and affected by HIV to participate in the planning and implementation of effective interventions. On the other hand, laws that criminalize HIV transmission, sex between men, sex work and drug use, or that fail to protect the rights of women and children, are major barriers to accessing HIV services by those who need them the most, reinforcing stigma and discrimination and hindering effective national and community responses to the HIV epidemic.

In 2001 and 2006, all UN member states committed to implement laws that eliminate discrimination against PLHIV and vulnerable groups and to ensure their full enjoyment of human rights, access to health care as well as legal protection. In 2011 this commitment was reiterated in the UN General Assembly Political Declaration on HIV/AIDS, where Member States committed to create legal, regulatory and social environments which advance and safeguard dignity, health and justice in the context of HIV. While some progress has been made in these areas in the last decade, in many countries criminalization, discrimination, punitive law enforcement practices, human rights abuses and failure to enforce protective laws continue to undermine the

response to the HIV epidemic⁵.

In too many countries⁶ the law, either on the books or on the streets, dehumanizes many of those at highest risk of HIV infection: sex workers, transgender people, MSM, people who use drugs, prisoners and migrants. Rather than providing protection, the law renders these “key populations” all the more vulnerable to HIV. Evidence shows that punitive laws, discriminatory and brutal policing and denial of access to justice for people with and at risk of acquiring HIV are actually fueling the epidemic. These legal practices create and punish vulnerability. They promote risky behavior, hinder people from accessing prevention tools and treatment, and exacerbate the stigma and social inequalities that make people more vulnerable to HIV infection and illness⁷.

In particular the criminalization of same-sex relationships, sex work, drug use and harm reduction measures create climates that enable civilian and police discrimination while legal redress for victims is impossible. Fear of discrimination or even arrest drives key populations underground, away from HIV prevention and harm reduction programmes. Incarceration and compulsory detention exposes detainees to sexual assault and unsafe injection practices, while condoms and harm reduction measures (often including antiretroviral medicines) are too often denied⁸.

Every efficient and effective national response to HIV needs to address stigma and discrimination and increase access to justice. Through education and awareness raising, national responses to AIDS should address the causes of stigma and discrimination. Most importantly, efforts to eliminate stigma and discrimination must reach beyond traditional health stakeholders and engage all arms of government, including legislative and judicial branches, as well as civil society and PLHIV. Steps are also needed to inform and sensitize those who make the laws (parliamentarians) and those who enforce them (Ministers of Interior and Justice, police, prosecutors, judges, lawyers, prison officials and traditional and religious leaders) regarding human rights in the context of HIV⁹.

Evidence shows how protective laws, adequately resourced and enforced, help broaden access to essential health and social services, enhance the quality and effectiveness of services and protect people living with or vulnerable to HIV from stigma, discrimination and violence¹⁰. However, while 123 countries, including China, have legislation to outlaw discrimination based on HIV and legally protect some populations based on their vulnerability to HIV, most of these laws are ignored, laxly enforced or aggressively flouted¹¹. Greater investment in enforcement mechanisms for antidiscrimination laws is needed, including support for legal services for people living PLHIV and members of key populations, as well as programmes that educate people living with or affected by HIV regarding their rights. New technology is helpful,

⁵ Regional report of the Global Commission on HIV and the law, 2012.

⁶ Seventy-six out of 193 countries (Global Commission Data).

⁷ Supra note 1.

⁸ *Ibid.*

⁹ Global AIDS report.

¹⁰ *Report on the global AIDS epidemic*. UNAIDS, 2013.

¹¹ Supra note 1.

but establishing an enabling legal environment is of paramount importance—if money is not to be wasted¹². At a time when international funding for AIDS is diminishing and national governments around the world are asked to fund ever larger portions of their AIDS programmes, using the law effectively will make the difference between success and failure.

2. The AIDS epidemic in China

By the end of 2013, there were an estimated 810,000 PLHIV in China. By the end of January, 2015, actual case reporting showed 508,864 PLHIV, including 302,498 individuals living with HIV and 206,366 AIDS patients. In the same year, about 160,288 deaths were reported¹³. Overall, the number of PLHIV continues to increase, as well as the percentage of all-cause mortality.

The HIV epidemic in China is described as overall low prevalence with marked geographic and sub-regional heterogeneity. The majority of PLHIV in China live within only six of China's thirty-three provinces: Yunnan, Guangxi, Henan, Sichuan, Xinjiang and Guangdong. These provinces report the highest number of HIV and AIDS cases, representing around 70 to 80 per cent of the national total.

The epidemic is concentrated among key populations—sex workers, MSM and people who inject drugs. Case reporting data indicate that the primary route of HIV transmission currently is through sexual intercourse – both heterosexual and male-to-male sex.

In the last three decades, China has instituted broad policy and programmes in HIV prevention, treatment and care within its ongoing health reforms. China has led the world in some of the most progressive policies, such as the establishment and scale up of methadone and harm reduction services for people who inject drugs – the impact of which has been a decline in HIV prevalence from 7.2% to 6.3% between 2003 and 2013. Similarly, the country is an “early adopter of Treatment as Prevention” where early antiretroviral treatment and a comprehensive package of services are provided to sero-discordant couples. These interventions reduced transmission within couples from 5.9% in 2009 to 1.0% in 2013. However, new infections among other key populations as well as women, continues to increase.

Gay men and other MSM: Within sexual transmission, the percentage of new infections arising from homosexual transmission has increased significantly, from 2.5% in 2006 to 21.4% at the end of 2013, clearly overtaking IDU as a source of new infections. This shows a disturbing increase in infections among MSM. According to the 2014 National Sentinel Surveillance (NSS) data, HIV prevalence among MSM was 7.3%¹⁴, which is significantly higher than in the general population. An academic cross-

¹² *Investing for results: results for people – the UNAIDS Investment Framework*. UNAIDS, 2011.

¹³ NCAIDS, NCSTD, China CDC. *Update on the AIDS/STD epidemic in China and main response in control and prevention in January, 2015*. Chinese Journal of AIDS & STD, 2015, 21(3): 175.

¹⁴ State Council AIDS Working Committee Office (SCAWCO), *Global AIDS Progress Report: China*. Beijing, Ministry

sectional study of over 47,000 MSM (a much larger sample than in the NSS) between 2008 and 2009 found a slightly lower prevalence of 4.9%¹⁵. It is estimated that of the 780,000 PLHIV in 2011, 17.4% had been infected through homosexual transmission.

In the last few years the government has made important efforts in expanding HIV services to key populations and this has led to an expansion of reach in treatment and prevention services. However, while condom use is relatively high, in 2011 the percentage of sex workers and MSM who received at least one HIV test during the past 12 months stood at only 38.2% and 50.4% respectively.

Injecting drug users (IDUs): In 1989 HIV was detected amongst injecting drug users (IDUs) in Yunnan province. Needle sharing drove the epidemic and HIV spread rapidly to IDUs in neighboring cities and along drug trafficking routes. By 2002 HIV was present amongst IDUs in all Chinese provinces. It is believed IDUs may have been the core source for all later sub-epidemics in China. Today the six provinces (or autonomous regions) of Yunnan, Xinjiang, Guangxi, Guangdong, Sichuan and Guizhou accounted for nearly 90% of the country's total number of IDU related infections.

A zero tolerance attitude to drug use meant that the government was slow to implement HIV prevention interventions with drug users. In the late 1990s the Chinese government began to show a change in attitude towards preventing HIV transmission among IDUs. A pilot needle exchange programme began in Guangdong in 2000. Further interventions for IDUs were also explored and in 2004 a methadone maintenance treatment (MMT) programme was piloted. The programme found that the rates of heroin use, intravenous injection and crime related to drug use decreased in the pilot areas. By the end of January, 2015, 623 counties (or districts) within 28 provinces (autonomous regions, municipalities) had established a total of 767 methadone maintenance clinics, currently providing MMT for 182,845 people who inject drugs. Thanks to these interventions and to a rapid change in drug consumption trends in China (mostly away from injecting drug use) new infections in drug users have declined consistently to less than 25% of overall new infections.

Sex workers: Data from the last National Sentinel Surveillance (NSS) suggest that HIV prevalence among sex workers is 0.3% in 2013, or over five times that of the general population¹⁶. However, other more comprehensive cross-sectional studies have found much higher prevalence rates. A study funded by UNFPA and the World Bank pooled data from twelve HIV studies in China published between 2007 and 2011, and found the HIV prevalence among sex workers overall to be 3%¹⁷. More recently, a study of 737 sex workers in Yunnan covering 'higher risk' (i.e. lower-end venues) and 'lower risk', (i.e. higher-end venues) found that the overall HIV prevalence among these sex workers was 10.3%. However, the difference between higher and lower risk venues

of Health of the People's Republic of China.

¹⁵ Wu ZY et al. *HIV and Syphilis Prevalence Among Men Who Have Sex With Men: A Cross-Sectional Survey of 61 Cities in China*. *Clinical Infectious Diseases*, 2013, 57:298-309.

¹⁶ Supra note 12.

¹⁷ Baral S et al. *Burden of HIV among female sex workers in low-income and middle-income countries: a systematic review and meta-analysis*. *The Lancet infectious diseases*, 2012, 12(7): 538-549.

was significant: 17.9% in higher risk venues (25.8% among street walkers) versus 5.7% in lower risk venues (and 0% among nightclubs workers)¹⁸. Another review of studies on sex workers between 1996-2010 found the median HIV prevalence to be 0.6%, but with a significantly higher prevalence in Yunnan (range 8.3%-10.3%), reporting also that sex workers in lower-end venues were twice as likely to be HIV-positive than those in higher-end venues¹⁹.

HIV and the law in mainland China—an overview

1. Note on hierarchy of law in China

Under Mainland China’s legal system, if there is an apparent conflict between two legal instruments, the higher-level instrument will override the lower level one. The hierarchy is established as follows:

- I. National Constitution
- II. Laws of the National People’s Congress (NPC-which meets annually) and those passed by the National People’s Congress Standing Committee (in the interim)
- III. National Regulations of the State Council
- IV. Regulations of Provincial People’s Congresses
- V. Regulations of Provincial Government and designated “large cities”²⁰

The applicable law in any situation is therefore a combination of both central government laws and regulations and any provincial or city regulations that might also apply. While China lacks an overarching HIV law, scholars have identified over 200 regulations, national and provincial, that relate to HIV. There are many more laws and regulations that are relevant but do not specifically mention HIV.

At the central government level, other types of policy documents, such as the “*Hongtouwenzhan*” (Red-headed documents) provide clear direction for subsequent central laws, regulations, as well as local regulations.

2. HIV and the law in the context of China’s legal system

While China lacks a comprehensive national AIDS law, the most important national piece of legislation on AIDS is the *2006 State Council AIDS Prevention and Treatment Act*, which the State Council issued in February 2006. The *2006 National AIDS*

¹⁸ Wang HB et al. *Prevalence and predictors of HIV infection among female sex workers in Kaiyuan City, Yunnan Province, China*. International journal of infectious diseases, 2009, 13(2):162-169.

¹⁹ Poon AN et al. *Review of HIV and other sexually transmitted infections among female sex workers in China*. AIDS care, 2011, 23 (sup1): 5-25.

²⁰ *Chinese Legislative Law*.

Regulations include the most comprehensive attempt at protecting the rights of PLHIV in China, including the right to marry, to access health-care services, to enjoy equal employment and education opportunities and the right to confidentiality and non-discrimination. The regulations also provided new detailed provisions concerning the treatment, care and support of PLHIV and institutionalized the "Four Frees and One Care" policy, effectively providing a strong legal basis for the protection of the rights of PLHIV and AIDS NGOs²¹.

The provisions included in the *2006 National AIDS Regulations* represented progress in government policy on HIV and paved the way for equally progressive amendments and adjustments of regulations at the local level. After collecting experience in implementation over the past 8 years, in accordance with common legislative techniques in the PRC, the government should consider to enact a more definitive and detailed AIDS law, instead of only regulatory acts.

However, the development of AIDS law and policy in China must be viewed in the context of China's emerging legal system, which has developed considerably over the past 35 years from almost nothing. In this context, the legal environment around HIV in the current legal system in China contains the following main weaknesses²²:

I. Gaps and conflicts in legislation and/or regulations

AIDS regulations and other laws often conflict with each other, and the courts are not always empowered to resolve the conflicts effectively. Consider the provisions in the new *2006 National AIDS Regulations* that require localities to reach out to intravenous drug users. These provisions conflict with provisions of administrative and criminal laws and policies that require local authorities to crack down on those who engage in intravenous drug use. As we discuss later in the report, the conflict also exist inside the Narcotics Law itself and this types of conflict also negatively impact sex workers.

II. Weakness of legal institutions and problematic bureaucratic coordination

For the courts, the lack of power to interpret laws along with the legislative gaps and conflicts in the law itself can result in less than perfect enforcement of laws and regulations, especially when the provisions are vague or the legislation lacks definitions or procedures. More importantly, lack of coordination among departments of the central government, or among local departments at the provincial and city level, impedes the proper implementation of the progressive provisions of the 2006 regulations for example.

III. Central-local issues

The lack of an institutionalized mechanism to deal with conflicts between the central and provincial levels within China creates problems in the implementation of central regulations and policies. Local governments will often adapt the central policy and law

²¹ *Supra* note 16.

²² John Balzano & Jia Ping. *Coming out of Denial: An Analysis of AIDS Law and Policy in China (1987-2006)*. *Loy. U. Chi. Int'l L. Rev.*, 2005, 3: 187.

to their own circumstances, thereby altering the main tenants of the center's policy. Sometimes the localities will simply refuse or thwart the enforcement of central policy.

Although the factors listed above are by no means a comprehensive list of all of the institutional obstacles to the effective enforcement of AIDS law and policy in China, they provide an important guide to more a specific analysis of AIDS law and legislation²³.

3. The development of AIDS policy and law since 1987

I. National policies and government plans regarding AIDS

At the top of the policy and law pyramid are major policy documents that the central government, sometimes jointly with the Chinese Communist Party, issues in an area of particular concern or development. These policy documents, sometimes referred to as "Red-headed documents" (*Hongtouwengjian*), are not officially a form of legislation, although they often pave the way for legislation in the form of central laws, administrative regulations, administrative rules, or various forms of local regulations²⁴.

Some major policy documents regarding HIV are:

- (a) *The 1987 Ministry of Health' first National Plan for the Prevention of HIV/AIDS (the 1987 Plan)*. The *1987 Plan* stated that the priority of the Ministry was primarily to prevent this foreign disease from entering China with measures including a ban on foreign blood products from entering the PRC. However, the plan did lay out the basic features of the government's methods for preventing and controlling AIDS, namely education, awareness and training, the first testing programme, quarantine (i.e. border control), research, as well as international cooperation.
- (b) In 1990 the State Council issued a more comprehensive national plan, *The 1990 Plan*, which covers a three year period (1990-1992), presents a more in-depth analysis of the circumstances surrounding AIDS and infectious diseases in China, and contains more specific strategies for treatment of those infected and the prevention of sexual transmission, transmission through blood transfusion or donation, and transmission from mothers to their children. HIV started to be regarded as not merely a foreign disease. The *1990 Plan* reflected a much deeper understanding of the disease and an increase in guidance from other countries and international organizations, such as the World Health Organization.
- (c) This was followed by a more comprehensive plan, the *1998-2010 National AIDS Plan (the 1998 Plan)*, which the government then supplemented with the *2001-2005 Plan (the 2001 Plan)*. These two plans reflect a larger, more cooperative strategy amongst many departments in the central government. The *1998 Plan* again represented progress in that it acknowledged and pledged to fix problems with the safety of the blood supply system, which at the time was behind most of the infections in China. It also paid attention to high-risk populations, including education for prisoners.

²³ *Ibid.*

²⁴ *Ibid.*

- (d) The *2001 Plan* can only be described as reflective of the government's increasing nervousness in the face of the surge of the AIDS epidemic in China through the late 1990s and into the twenty-first century. However, the *2001 Plan* did not lay out any true new concrete measures for increasing the effectiveness of public health measures, but instead, it merely stated that the situation was growing more serious and officials should take steps to increase supervision and monitoring of growing HIV infections.
- (e) The *State Council Notice on Further Strengthening the AIDS Response* was issued at the end of 2010 setting out new policy measures focusing on the “Five Expands, Six Strengthens” approach, resulting in important achievements, except on strengthening social mobilization and multi-sectorial engagement.

“Five Expands” includes:

- Information, education and communication activities;
- Surveillance and testing;
- PMTCT;
- Comprehensive interventions, and
- Coverage of ART.

“Six Strengthens” includes:

- Blood safety management;
- Health insurance;
- Care and support;
- Rights protection;
- Organizational leadership, and
- Strengthening of response teams.

II. Official HIV-related legislation

I. HIV testing

The Twelfth Five-Year Action Plan of China for the containment and prevention of AIDS adopted in 2012 included a significant change on the principle of HIV testing in China. The plan proposed for the first time the principle of “informed opt-out” HIV testing²⁵. The new policy on HIV testing expects all medical services, including public and private hospitals, clinics, emergency centers, substance abuse centers, medical surgical clinic, etc., to carry out HIV testing on all outpatients as a routine for HIV screening, with the patient retaining the right to decline.

The acceptance of the “opt out” system is actually a policy change from the previous controversial widespread “mandatory testing” in medical facilities. However, mandatory testing still exists in both private and public employment practices (such as the civil service examination) and in some aspects of port and customs requirements, especially related to student and business residency permits²⁶. Any foreign national

²⁵ The “opt-out principle” was first put forward by the US CDC in September 2006.

²⁶ *Notice on the Printing and Dissemination of HIV/AIDS Testing Management Measures*. Issued by: AQSIQ, 18 October, 2006. *HIV/AIDS Prevention and Management in Port Areas*, Order No. 96. Issued by Administration of Quality Supervision, Inspection and Quarantine (AQSIQ) of the People's Republic of China, 28 June, 2007.

applying for a residency permit in China is required to take an HIV test. If the test results positive, they are given 72 hours to leave the country.

Additionally, free voluntary counseling and testing system also exists nationally²⁷. Both the Global Fund and the Gates foundation invested heavily in community-based voluntary testing programs for key populations. The Chinese CDC has replaced foreign donors in funding the national testing programme.

The *AIDS Prevention and Treatment Act* set VCT as the center principle for the HIV response²⁸. The Ministry of Health (now the Health and Family Planning Commission) is expected to take charge of supervision and management of national HIV testing nationally. Chinese CDC and disease prevention centers in provinces, autonomous regions and municipalities take charge of daily management of HIV testing. Health departments above the county level are responsible for of HIV testing programmes within their jurisdiction, while disease prevention institutions at all levels, medical institutions, blood collection agencies and family planning technical offices are expected to provide HIV testing services following guidelines and professional guidance of Provincial Centers for Disease Control²⁹.

II. The right to know and confidentiality

Effective protection of the right to privacy or confidentiality is key to protect the rights of PLHIV. The *2006 National AIDS Regulations* stipulate that if a patient's right to privacy is infringed, he may sue the accused provider or bring a lawsuit in accordance with the *Chinese Law on Prevention and Treatment of Infectious Diseases (Infectious Disease Law)*³⁰. The act stipulates that no one should disclose the name, family address, employer, personal images, medical record and any other information related to the identity of a person living with HIV or their relatives. However, in somewhat contradictory fashion, Article 38 of the same law also stipulates that PLHIV should reveal their status to their sexual partners and their doctors without explaining or regulating under which “conditions” (such as to what extent the “vital interests” of those sexual partners may be threatened). This is an issue that needs to be clarified in the law.

Unfortunately, since the *2006 AIDS Regulations* are not considered a national law but only a national regulation of the State council, this did not pave the way for any kind of compensation system based on civil liability. Even worse, there is still no law that clearly protects “confidentiality” in Chinese civil law system. Thus, the only legal basis to launch a civil litigation against any breach of confidentiality is the “right of reputation”, as stipulated in Article 101 of the *Chinese Civil Law general rules (Minfatongze)*. Article 120 of the same law stipulates that citizens whose rights of

²⁷ See *Free HIV/AIDS voluntary counseling and testing management methods regulation*.

²⁸ See Article 23: The State carries out voluntary counseling and testing system.

²⁹ See: *Notice on Printing and Dissemination of National HIV Testing Management Regulations*. Issued by MOH, 12 June, 2006. Effective: 12 June, 2006. Level of effect: Ministry-level regulation. Others include the *National HIV testing technical specifications*, the *HIV testing laboratories basic standards*, the *National HIV sentinel surveillance embodiments (Trial) and more*.

³⁰ See *AIDS Prevention and treatment Act Article 56*, first paragraph. The second also stipulates a series of administrative punishment for medical entities (and other entities) breaking the law against the rights to confidentiality of PLHIV, patients or their relatives.

reputation, honor or image were violated can ask for redress in the attempt to recover their reputation, reduce of the impact of the offence, or receive an apology from the violator(s), as well as request compensation.

According to Chinese legal theory and legal practice, citizens can cite Article 120 for remedy of their right to confidentiality with the pre-condition that their reputation was damaged. Thus there exists an important loophole in the law for the specific protection of the right to confidentiality in HIV-related cases in main land China. After the *Chinese Torts Law* put into effect since 2010, plaintiffs can launch a civil suit based on “General Personality Right” for legal remedies, although it looks quite broad, it was well accepted by the courts in the most recent cases.

A related concept is the “Right to Know”. Article 42 of the *2006 National AIDS Regulations* stipulates that staff of medical institutions should notify the HIV status to patients directly or to their legal guardians in certain cases. But there is no legal liability embodied in the *Act* for those who did not fulfill their obligation of notification. The *Act* does not provide strict procedures on how to notify thus putting the right to confidentiality of PLHIV at risk. In addition, the Article only regulates behavior of “working staff” in medical institutions, and does not cover staff in other entities, such as prisons, custody and detention centers, nursing homes, etc. As China continues to have a large system of detention centers for sex workers and drug users this loophole impacts the lives of many PLHIV who are detained in these centers.

Article 31 of the *2006 National AIDS Regulations* stipulates that public security and judicial administrative entities should implement prevention and treatment measures targeted at PLHIV who are in prison or under custody in educational detention centers (sex workers), compulsory detention centers for drug rehabilitation, and re-education through labor education centers (which have been gradually closed down since 2014). The *Act* also mentions the need for “technical support” from the CDC in this area. In practice, it is still unclear whether this means that mandatory testing is widely implemented in these centers without proper notification to the detainees.

III. Anti-discrimination—an overview

Overall, anti-discrimination law is still in its early stage of development in the PRC. An increasing number of legal professionals have proposed draft bills in the recent years, most of them focusing on discrimination based on gender, age, disabilities and diseases such as Hepatitis B. All the same, there have been some high-profile anti-discrimination cases in the court system (including 5 public cases of HIV-related discrimination) and the body of law that includes anti-discrimination provisions is growing. Still, laws and regulations usually only contain anti-discrimination terminology or general concepts. There is no detailed procedure for collecting evidence and bringing lawsuits in order to enforce these provisions. Most importantly, China lacks a strong court system able to effectively respond to these cases³¹.

China’s HIV-focused anti-discrimination regulations need to be considered within this broader context. Regulations at both central and local levels only include provisions

³¹ *Supra* note 19.

that forbid discrimination in housing, marriage and employment. But these anti-discrimination provisions mainly focus on the PLHIV community and conflicts exist between regulations at the central level and local levels. Most importantly, clear, detailed and due procedure for redress are completely absent. Furthermore, there is no law or regulation that includes anti-discrimination clauses targeted at sex workers, drug-users or sexual and gender minorities. All this while punitive provisions within strong criminal laws targeting sex workers and drug users and social campaigns against these communities continue to have a negative impact on their vulnerability to HIV.

In summary:

- There is no clear definition of “discrimination” in current Chinese law;
- No feasible remedy clauses exist when damages occur;
- No overarching rules on anti-discrimination can be applied to HIV related cases;
- Punitive provisions criminalize drug users and quasi-criminalize sex workers. These provisions nullify the anti-discrimination clauses in the *2006 National AIDS Regulations*;
- Awareness raising of health professionals and policy-makers on the importance of anti-discrimination in responding to HIV is needed.

IV. “Four Frees and One Care” policy

In 2004, the central government launched the “Four Frees and One Care” policy, which was later incorporated into the *2006 AIDS Prevention and Treatment Act*³². This policy offered free treatment to rural and urban residents without social insurance, free voluntary counseling and testing from the Chinese Center for Disease Control, free treatment for pregnant mothers and free testing for infants and free education for children orphaned by AIDS (the “four frees”). The “One Care” part of the policy includes government subsidies for those living with HIV and their families in order to help improve their living conditions. This policy single handedly changed the national response to AIDS in China and is responsible for the large progress achieved in treatment coverage nationwide. Most importantly, it reflected a change in the attitude of the Chinese government from one of fear to one of compassion and active response, and its willingness to combat the disease among what at the time were important target groups (women and children) in rural and urban areas. However, the effectiveness of this policy is under question more than a decade later, mostly because of changes in the nature of the epidemic and because of the continuous legal and institutional constraints discussed in this report^{33,34}.

Issues related to blood transfusion

One of the reasons that prompted the Chinese government to launch the very successful “Four Frees and One Care” policy was the illegal blood donation scandal that

³² See Article 44.

³³ Supra note 19.

³⁴ For example, Zhenhai district in Wenzhou, Zhejiang province, established a targeted basic living allowance system for PLHIV. According to *Chengdu basic medical insurance Interim Methods for urban and rural residents*, HIV-related medical expenses are included in the basic medical insurance coverage.

happened in Henan and nearby Provinces in the 1990s³⁵. According to an estimation by the Ministry of Health, UNAIDS and WHO in 2011 there were 780,000 (620,000–940,000) PLHIV, among them 6.6% were infected through commercial blood collection and donation, blood transfusion and usage of blood products (92.7% in Henan, Anhui, Hubei and Shanxi provinces). According to these estimates, the number of living PLWHIV infected through blood transfusion or usage of blood products could be as high as 51,480–60,840³⁶.

Since the enactment and implementation of the *Blood Donation Law of the People's Republic of China* in 1998, HIV transmission through medical blood transfusion includes patients' usage of contaminated blood or blood products leading to HIV transmissions, which is in violation of the Blood Donation Law. Cases of this category can now be dealt with according to the Law. The victims may directly bring a suit against the blood supply/transfusion entities and a claim based on the General Principles of the Civil Law.

But according to the Chinese Tort Liability Law Article 54 and 58, the clinical damage liability should only follow 'fault liability' and 'fault presumption' principles. Article 7 of the Tort Liability Law specifies that "if an actor harmed others' civil rights, regardless of whether the actor had fault or not, he/she shall assume tort liability as specified in the law". Nonetheless, there was no relative specification in the existing laws. On the other hand, Article 29 and Article 60 of the Tort Liability Law stipulates that "in the case that the damage to others is caused by irresistible force, the actor does not bear tort liability" and that "if limited by medical technologies at time, the illness is difficult to diagnose and treat, then the clinical institution is not liable". This can be applied to cases with infections during a window period of infection or false negative test results. The provisions of these laws make it difficult for victims of blood transfusion to claim real compensation, for the burden of proof is on their side and is very difficult to fulfill—they have to provide evidence to prove that the hospitals or blood stations were "subjectively wrong" or made "a subjective error" which means the hospitals or blood stations knew that the blood or blood product was contaminated when the victim used it. This is often impossible.

In the year of 2011, a group of experts including academia on ethics, lawyers and health experts delivered a comprehensive report to the Chinese government (the Beijing Red Ribbon Forum also supported to organize ad hoc conferences) with recommendations on how to compensate those people in suffering³⁷. The report proposed to build an

³⁵ There are three types of cases of people infected by blood contaminated with HIV/AIDS in mainland China: The first type is the infection through retro-transfusion of erythrocytes (Red Cell) after trading blood in rural areas in many cities and provinces which are centered in Henan. The second type is the exposure through surgery transfusion by contaminated blood from illegal blood trade, among those many of which are compulsive transfusion. The last type of exposure concerns hemophiliacs who came into contact with infection during their treatment which requires injection of a blood product called FVIII (Factor VIII), many of those coming from Shanghai Institute of Biological Products.

³⁶ See Qiu RZ, et al. *Recommendations for the Establishment of Compensation and Medical liability insurance Scheme for the people infected with HIV by Contaminated Blood or Blood Products*. See Chinese Medical Ethics, Vol.26 No.1 Feb. 2013. Page 8-13. Also see Zhai Xiaomei. *Can the No Fault Approach to Compensation for HIV Infection through Blood Transfusion be Ethically Justified*. Asia Bioethics Review, 2014, 6.2: 143-157.

³⁷ Qiu RZ et al. *Recommendations for the Establishment of Compensation and Medical liability insurance Scheme for the people infected with HIV by Contaminated Blood or Blood Products*. Chinese Medical Ethics, 2013, 26(1): 8-13.

“Expert Examination (Panel)” and establish a “Coordination Mechanism of People Infected by HIV. Contaminated Blood” by introduce the “strict liability” as the basic principle for compensation. However, the proposed plan was not implemented and is still under discussion today.

V. Access to medicines

On 13 January 2012, the State Council approved the *China Action Plan to Prevent and Control HIV/AIDS during the 12th Five-Year Plan Period (2011-2015)*. The plan strengthened access to affordable medicines with regard to intellectual property and domestic production. In fact, one of the major challenges for HIV treatment scale-up in China had been the high cost of antiretroviral medicines (ARVs), even though ironically China is the leading API manufacturer for ARVs globally.

The government has not shown any willingness to issue a compulsory license (CL), partially due to lack of knowledge and poor understanding of the international system on trade and health issues at the decision-making level in China. This is related to how to use *TRIPS* flexibilities and how to develop a reasonable domestic Patent law system in response to these challenges.

The *Patent Law of the People’s Republic of China* was adopted on 12 March 1984 and put into effect on 1 April 1985. It was then revised in 1992, 2000 and 2008 respectively. The **2008 law** integrated *SIPO* (State Intellectual Property Office) Order No. 31 and 37³⁸, the *TRIPS* Protocol agreement on compulsory license and added an anti-monopoly clause³⁹. Article 49 of the law stipulates that when there is a national emergency, or for the purposes of public interests, *SIPO* can issue compulsory licenses on inventions or utility models⁴⁰. Article 49 covers both situations of “national emergency or other circumstances of extreme urgency” as well as “public non-commercial use” (Government Use) under the *TRIPS* Agreement.

One break-through in recent years has been the ***Measures for Compulsory License of China*** issued in May 2012. The *Measures* finally detailed the process and requirements for a department under the State Council to ask for a compulsory license under Article 49 of the Patent Law.

In summary, China already has a Patent Law with examination criteria and compulsory license clause to use *TRIPS* flexibility. Therefore there are no legal barriers to China

³⁸ *Measures on the Compulsory License for Exploitation of a Patent*, *SIPO* Order No. 31 (2003) and *Measures to Implement Public Health-Related Compulsory Licensing*, *SIPO* Order No. 37 (2005).

³⁹ See Article 48 of *China Patent Law*: “Under any of the following circumstances, the patent administration department under the State Council (i.e. *SIPO*) may, upon application made by any unit or individual that possesses the conditions for exploitation, grant a compulsory license for exploitation of an invention patent or utility model patent:

(1) When it has been three years since the date the patent right is granted and four years since the date the patent application is submitted, the patentee, without legitimate reasons, fails to have the patent exploited or fully exploited; or

(2) The patentee’s exercise of the patent right is in accordance with law, confirmed as monopoly and its negative impact on competition needs to be eliminated or reduced.”

⁴⁰ Article 49 of *China Patent Law*: “Where a national emergency or any extraordinary state of affairs occurs, or public interests so require, the Patent Administration Department under the State Council (*SIPO*) may grant a compulsory license for exploitation of an invention patent or utility model patent.”

implementing the *TRIPS* agreement or issuing a CL. But the challenge in practice is how to implement Article 12 of *2012 Measures* and Article 49 of the *Patent law*. Local manufacturers are mostly geared for export production and still lack incentives for the development of local generic pharmaceuticals in China. For one of the most troubling features of the *TRIPS* CL regime is Article 31(f) which requires that compulsory licenses be authorized “predominantly for the supply of the domestic market of the Member authorizing such use.” Although a CL for import is perfectly lawful, there may well be Article 31(f) restrictions on exporters that limit that right.

PART THREE



Key issues of concern—people living with HIV

1. Right to education and employment

As mentioned above, the *2006 National AIDS Regulations* prohibit discrimination against PLHIV and their families in education and employment settings. Unfortunately its implementation at the provincial level is weak and the knowledge around this provision still really low.

In 2011, Guangxi province's *Southern Country Today* reported that a six year-old AIDS orphan named A Long was denied entrance to a local primary school due to protests and complaints from other students' parents⁴¹. This is one of a number of similar cases that show the severe social discrimination still widely present in Chinese society against PLHIV. This is continuing despite central and local regulations and policy commitments to provide support for AIDS orphans in terms of education⁴².

Sometimes local governments' practices offset central government's efforts and commitments to tackle HIV-related discrimination. The lack of an institutionalized

⁴¹ <http://www.infzm.com/content/52933>, last visit on 29 October, 2014.

⁴² Article 45 of *2006 AIDS Prevention and Treatment Act* provides that AIDS orphans living in difficulty and minors living with HIV should be waived of book and other miscellaneous education fees; those who are receiving pre-school or high school education should get reduced or waived tuition fees and get subsidies for boarder living expenses. Meanwhile, as stated above, on the issue of discrimination against children and young PLHIV in education settings, the Bureau of Civil Affairs issued in 2009 the "*On Further Strengthening Welfare Protection Work of Children Affected by AIDS*" clarifying that the State should that "provide children affected by AIDS equal education opportunities as other children". Local regulations, such as 2009 *Opinion on enhance social welfare of children effected by HIV/AIDS* by provincial Civil Affair Bureau and 2011 *Implementation Plan on Social Relief for AIDS Patients*, regulates similar provisions.

mechanism to deal with these conflicts between the central and provincial policies within China—such as a constitutional court or efficient judicial review process by the judicial system—heightens the issues. For example, in May 2014 the Henan Provincial Education Bureau issued a policy named *Notification on enhance AIDS prevention and education among schools*, stipulating that all freshmen recruited by Universities and colleges in Henan should undergo mandatory testing for HIV, due to the “severe situation of the AIDS epidemic” in the province with rapid increasing of HIV infection cases among youth. The policy raised a big debate at the national level, even though it argued that the confidentiality of the testing results would be well protected and that Universities should not deny the admission of those HIV positive freshmen⁴³.

High levels of discrimination and general public fear of HIV often drive local government’s actions⁴⁴. This also applies to the area of employment.

The *Employment Promotion Law*⁴⁵, which came into effect in 2008, regulates that employers cannot refuse to hire carriers of pathogen of infectious diseases, but the last sentence of Article 30 points out that they (carriers) should not engage in any job that could “easily transmit the disease” already banned by a law, Acts of the State Council or regulations of the State council’s Health authority⁴⁶.

The language of the *Employment Promotion Law* actually is a generic version of the 2004 *Infectious Disease Law*⁴⁷, and obviously conflicts with the content of Article 3 of the 2006 *National AIDS Regulations*, which prohibits discrimination against PLHIV and their families on employment. The law provides too much power to administrative authorities when it says “Law, acts by State Council and regulations of the State Council’s health authority” to decide which type of work PLHIV should engage in.

However, the *Employment Promotion Law* provides a legal basis for a “right to claim”. According to Article 62 of the law, the employers or workers can launch litigation against anyone (employers or employee) who violates the law. Since 2008, there have been 5 public employment related cases dealing with HIV discrimination in mainland China. The latest one reached an agreement for compensation (total CNY 40,000 or approximately USD 6,500) while the plaintiff withdrew the litigation from the court⁴⁸. This is the second case where the plaintiff received compensation, but without a judicial judgment.

However, the main challenges on HIV-related employment discrimination are still

⁴³ See <http://www.gongyishibao.com/html/yaowen/6566.html>, last visit on 29 October, 2014.

⁴⁴ A research on discrimination conducted by UN agencies in 2011 pointed out that among 2000 respondents (PLHIV) 41.7% have the experience of be discriminated, 11.9% of pregnant women was suggested to do abortion. Another research in 2008 pointed that among 6000 respondents 41.3% would not work with PLHIV and 47.8% refuse to join a common meal with PLHIV. See <http://www.gongyishibao.com/html/yaowen/6566.html>, last visit on 29 October, 2014.

⁴⁵ Approved and passed by The 10th National People’s Congress standing committee on 30 August, 2007 and put into effect since 1 January, 2008.

⁴⁶ *Employment Promotion Law*, Article 30.

⁴⁷ See Article 16 of the 2004 *Infectious Disease Law*.

⁴⁸ See <http://news.sina.com.cn/o/2014-10-09/184930964830.shtml>, last visit on 25 October, 2014.

overwhelmingly unresolved. All the 5 cases mentioned above are related to discrimination in the public sector, and the broader civil service, which employs a large portion of workers in the country. The Ministry of Human Resources annual *Criteria for recruitment of Civil Servants* still includes an article which stipulates that PLHIV are not “qualified” to be civil servants. A number of Provinces including Yunnan, Guangxi, Jiangsu and Anhui all accepted the criteria and enacted similar local provincial regulations. PLHIV should not be discriminated when they apply for a job as civil servants (teachers are also regarded as a civil servants in mainland China⁴⁹). To response to social advocacy, the Ministry of Human Resources revised the *Criteria* and dropped PLHIV but still includes people living with AIDS in the list of unqualified applicants. This article still leads to widespread discrimination in the public sector.

Another major challenge is represented by institutional discrimination in the private sector. Article 30 of the *2006 National AIDS Regulations* states that a physical check-up and a health permit is required for staff working for seven categories of service providers (private businesses) in the “*locus publicus*”. The *locus publicus* covers, according to Article 2 of *Health Management Regulation in Locus Publicus*, hotels, cafés, bars, bathrooms, dance clubs, swimming pools, book stores, libraries, museums, art galleries, stadiums, shopping malls, clinics, departure halls in airports and rail-stations or ports, and any other kind of public transportation⁵⁰.

Interestingly, the *Health Management Implementation Regulation in Locus Publicus (2011)* itself does not mention HIV. It only regulates that people living with an Infectious disease of the digestive tract such as dysentery, typhoid, hepatitis A and E, or people with active pulmonary tuberculosis or exudative skin diseases should not engage in direct service for customers before they are “cured”⁵¹. In addition, a 2006 notice from the Ministry of Health states that PLHIV can work in the food industry⁵². However, Article 30 of the *2006 AIDS Prevention and Treatment Act* has had a negative impact on the lives of PLHIV pushing many of them to depend on low-skilled jobs and reinforcing social stigma and discrimination.

2. Access to treatment and medical services

To prevent discrimination against PLHIV in accessing medical services, Article 16 of *Law on Prevention and Treatment of Infectious Diseases* stipulates: “The state and society should take care of patients with infectious diseases, pathogen carriers and suspected patients of infectious diseases and help them receive timely medical treatment, and such population shall not be discriminated against by any institution or individual”. More specifically, the *2006 National AIDS Regulations* stipulate: “Medical institutions shall not refuse to carry on treatment to the patient because of he/she is or is suspected of being infected with HIV”. In recent years the Chinese government has

⁴⁹ Small progress was made in Guangdong province. The provincial *Teacher’s physical check criteria Regulation* deleted the provision of “AIDS patients are not qualified”.

⁵⁰ Article 2 of *Health Management Regulation in Locus Publicus (1987)* by State Council and Article 10 of *Health Management Implementation Regulation in Locus Publicus (2011)* by MOH.

⁵¹ *Ibid.*

⁵² See *Questions and Answers on PLHIV Working in the Food Production and Management Industry*, Issued by MOH, 27 February, 2006 (Ministry-level regulation).

made repeated commitments to deal with discrimination in healthcare settings, achieving some progress. However, discrimination against PLHIV in hospitals remains too commonplace.

The main reason rests with an institutional weakness. People living with infectious diseases are expected to attend Infectious Disease Hospitals present in each city or region. However these specialized infectious disease hospitals are not “general hospitals” with the full capacity to provide services such as cancer treatment, or gynecology and obstetrics treatment for pregnant women. Yet once PLHIV present themselves to the general hospitals for these types of services they are often rejected. In addition, insurance for occupational exposure is limited and there are no incentives for doctors and medical workers to provide qualified health services to PLHIV.

3. Right to free movement

The *Infectious Disease Law* provides three categories of diseases: A, B and C. AIDS is now a category B disease, not requiring isolation (quarantine) for treatment, this has been the case only since a revision of the law in 2004⁵³. This law protects patients by prohibiting discrimination (Article 16) and the release of private information (Article 12). The law also provides penalties for failure to report an outbreak of an infectious disease.

For ports and immigration issues, the *HIV/AIDS Prevention and Management in Port Areas*⁵⁴ regulates quarantine related issue as follows:

- Port Quarantine: the Administration of Quality Supervision, Inspection and Quarantine (AQSIQ) is in charge of inspection and management of human organs, biological products, blood, etc.
- PLHIV should report their status to AQSIQ or its branches when they enter or leave China.
- Citizens who live more than one year in foreign countries should report to AQSIQ branches or related hospitals above the county level to get an HIV test. Foreigners who apply for travel or stay in China should come to local branches of AQSIQ for physical examination.
- Physical check-up, including HIV test, is needed when citizens go abroad and stay more than one year.
- AQSIQ should set up an HIV/AIDS surveillance site network around port areas.

⁵³ *Law on Prevention and Treatment of Infectious Diseases*. Issued: 28 August, 2004. Effective: 1 December, 2004. Level of Effect: Law approved by NPC Standing Committee.

⁵⁴ *Order No. 96* Issued by Administration of Quality Supervision, Inspection and Quarantine (AQSIQ) of the People's Republic of China: 28 June, 2007. Effective: 1 December, 2007. Level of Effect: Ministry-level regulation.

- Information about epidemic situations should be reported to the health quarantine information system within six hours.

The Chinese government pays a lot attention on foreign travelers or citizens who stay abroad and go back and forth. Tightened controls are imposed on these populations—however to this day how to treat people who might be found positive in a port area and how to follow up on their positive result is still unclear according to these regulations.

4. Marriage rights

The *2006 National AIDS Regulations* include the right of marriage for PLHIV. The Act prohibits discrimination against PLHIV and their families in marriage and other areas. However, it does not grant a civil right of action, nor does it impose administrative punishments for violations of this basic right. Most importantly, some procedures already stipulated by other regulations and laws go in direct contrast to the AIDS Act in this respect:

- The *Marriage Law* of the PRC, which was amended in 2001, includes a provision that prohibits people living with certain diseases from marrying.
- Marriage registration agencies will not register the marriage if the medical authorities believe that one of the parties is living with a disease dangerous to the other party and not suitable for marriage.
- The Ministry of Health (MOH) has issued an “*Opinion on the Regulation of Persons with HIV and AIDS*” (1999), stating that those who have progressed to AIDS should postpone their marriages. The Opinion states that people with HIV should seek medical counseling before marrying⁵⁵.

It is clear that many of these provisions should be reformed as they still provide a basis on which authorities can deny marriages to PLHIV.

The impact of the legal environment on key populations

1. Sex workers

I. Background

For the majority of its history, sex work was legal in China. Under pre-Confucian imperial rule, sex work and pandering were legitimized by common court practice⁵⁶.

⁵⁵ See: *Marriage Law* (Amended 2001), issued: 9 October, 1980, amendment effective: 18 April, 2001, level of effect: national-level law by NPC. *Marriage Registration Regulations*, issued: 30 July, 2003, effective: 1 October, 2003, level of effect: State Council regulation.

⁵⁶ Gil VE & Anderson AF. *State-sanctioned aggression and the control of prostitution in the People's Republic of China: A review*. *Aggression and violent behavior*, 1998, 3 (2): 129-142.

Since the emergence of Confucianism as a moral code around mid-to-early-500s BC, sex work, pandering and buying sexual favors were still sanctioned as an upper-class privilege⁵⁷. In the tumultuous early 20th century, many Chinese provinces, like Guangdong, taxed sex work in order to increase public revenues⁵⁸. In 1949, however, sex work was outlawed and the government made concerted efforts to eradicate it completely, because sex work was seen as a symptom of capitalistic subjugation of women⁵⁹. All sex workers were essentially portrayed as victims, and started being detained in rehabilitation 'shelters' for re-education (in Communist morality) and re-training in new skills⁶⁰. In legal provisions, such as the 1957 Act of the People's Republic of China for Security Administration Punishment, selling of sex carried a misconduct connotation. Under the provisions of the Act, a woman caught doing sex work could be given a warning, or placed in detention for a maximum of ten days and fined up to 20 Yuan⁶¹. The process was set-up outside of the criminal justice system, instead directed by the Public Security Bureaus, the People's Procuratories and some local chapters of the Chinese Women's Federation⁶².

The era of reform and opening up starting in 1978 initiated, among other economic activity, a rapid expansion of the visible sex industry in China. This led to a reactive tightening of the legal framework in an attempt to limit sex trade, and later, especially in the 1990s, to control the spread of HIV and STDs⁶³.

II. Current legal environment

The "Measures for Detention and Education" developed by the Ministry of Public Security stipulates that detention in C&E centers can be implemented for those who refuse to abandon their "wrong behavior" after repeated education. Article 30 of the "Regulations of the People's Republic of China (PRC) on Administrative Penalties for Public Security" developed by MPS in 1986 stipulates that "Prostitution, whoring, pandering or housing prostitution or whoring with a prostitute are strictly forbidden. Whoever breaks the above ban shall be detained for a maximum of fifteen days, given a warning, made to sign a statement of repentance or given re-education through labor according to regulations, and shall be concurrently imposed a fine with maximum of CNY 5,000. Criminal liability shall be prosecuted if the action constitutes a crime."

With the rapid development of economy, prostitution in China has become increasingly professionalized and organized. According to MPS statistics, 12,281 sex workers and their clients were prosecuted in 1984; the number soared to over 100,000 in 1989 and over 200,000 in 1991. From 1984 to 1991, the total number of people prosecuted reached 620,000⁶⁴.

⁵⁷ *Ibid.*

⁵⁸ Remick EJ. *Prostitution Taxes and Local State Building in Republican China*. Modern China, 2003, 38-70.

⁵⁹ Choi SYP. *State control, female prostitution and HIV prevention in China*. The China Quarterly, 2011, 205: 96-114.

⁶⁰ *Supra* note 53.

⁶¹ Anderson and Gil as quoted in Choi, 2011, p. 98.

⁶² *Supra* note 56.

⁶³ *Supra* note 53.

⁶⁴ Zhang Cheng. *Reflection on phenomenon of prostitution*. Central Advisory Net, 2010.

In order to strictly prohibit the growing practice, the Standing Committee of NPC promulgated “*The Decision on Severely Prohibiting Prostitution and Whoring*”⁶⁵ on 4 September, 1991, and authorized the State Council to formulate relevant regulations accordingly; on 4 September, 1993, the Council issued *Regulations on Detention and Education for Prostitutes and Whoring Goers*⁶⁶, making the first step in establishing the current system of C&E centers.

The *Decision and Regulations* mentioned above have served as the legal ground for the punishment imposed on sex workers and their clients in juridical practice. Experts estimate that about 18,000–28,000 FSW are sent to C&E detention centers every year⁶⁷. From 1987 to 2000 the number of people detained in these centers reached around 300,000 with 200 C&E centers established nationwide⁶⁸. However, some scholars believe that number was underestimated and the data from the police department might constitute only 30% of the real number⁶⁹. Prosecutions have increased in recent years, with public security administrations processing more than 833,000 prostitution cases nationwide from 2002 to 2006, with the total number of people involved reaching to 1.82 million⁷⁰.

The C&E detention system has no legal basis and its application lacks explicit procedures, which causes arbitrary and selective law enforcement by public security administrations⁷¹. It is frequently the case that a sex worker or her client is detained for 15 days according to the “*Law of the PRC on Penalty in Public Security Administration*”, and then detained and educated again from six months to two years according to “*The Measures of Detention Education for Prostitutes and Whoring Goers*”. Public security bureaus apply the sex work laws arbitrarily. A survey of 348 migrant sex workers (higher-end, lower-end and street-based)⁷² in Beijing found that

<http://news.9ask.cn/falvlunwen/xflw/201001/302173.html>

⁶⁵ It is stipulated that “whoever engages in prostitution or whoring shall be punished in accordance with the provisions in Article 66 of the Regulations on Penalties in Public Security. With respect to persons who engage in prostitution or whoring, the public security administrations in conjunction with departments concerned may carry out compulsory education in law and morality and force them to participate in productive labor at a designated place in order to rid them of the pernicious habits. The term shall range from six months to two years. The specific measures shall be stipulated by the State Council.”

⁶⁶ It is stipulated that, “Persons who engage in prostitution or whoring shall be punished in accordance with Article 30 of the Regulations of the PRC on Penalties in Public Security (be detained for a maximum of fifteen days, given a warning, made to sign a statement of repentance or given re-education through labor according to regulations, and may be concurrently fined a maximum of CNY 5,000), in addition, with respect to those who do not need reeducation through labor can accept detention education decided by public security administrations.

⁶⁷ *Chinese sex workers lose guarantee for sexual rights under detention education system*. 8 January, 2014 <http://lady.163.com/14/0108/13/912QM0EA00264NDR.html>

⁶⁸ Xing Jing. *A Study in Detaining Education Procedures— the Perspective of Due Procedure*, a thesis for the degree of Master at Zhengzhou University, 2010. See also Xin Ren. *Prostitution and economic modernization of China*. *Violence Against Women*, 1999, 5:1411-1414. The paper points out that from 1989 to 1990, about 243,183 persons involved in prostitution were detained.

⁶⁹ Zhang Ping. *Social diseases in contemporary China*. Jindun, 1993, 12: 27.

⁷⁰ The Xinhua News Agency, Beijing reported on 29 March, 2007 that “Public security administrations have seized more than 830,000 cases of prostitution and whoring in five years.” <http://gb.cri.cn/14714/2007/03/29/107@1521832.htm>

⁷¹ Jia P et al. *Recommendations on Abolishing Detention Education System for Sex Workers and their Clients*. The Scholar: Saint Mary’s Law Review on Race and Social Justice, 2015, 18.

⁷² For simplicity, throughout this section sex workers will be classified into ‘higher-end’ (higher tariffs, usually fewer clients and working in entertainment venues, e.g. nightclubs, expensive hotels and KTV), ‘lower-end’ (lower tariffs, usually more clients, working in personal service venues such as hair salons, massage parlours, saunas and cheap hotels) and streetwalkers. Mistresses, although included in some publications (e.g. *Sex work and the Law in Asia and the Pacific*), will not be considered here. The terms higher- or lower-end are not in any way a valuation of the

the street-based sex workers were much more likely to be arrested: 62% of them reported having been arrested compared to 30% of the higher-end ones and 15% of the lower-end sex workers⁷³. In practice, sex workers and their clients who are able to pay (sometimes steep) fines are not detained, but those who are unable to pay are end up in the C&E system. Cases collected by some non-governmental organizations also show that relations with public security officers often determine whether a sex worker faces detention. Although detention and incarceration are supposed to be applied only to repeat offenders, the likelihood of detention increases for all sex workers during crackdowns when police are known to have arrest and detention target quotas⁷⁴. In 1999 only 29% of sex workers in detention centers in Zhejiang province were re-offenders⁷⁵. Arbitrary and selective law enforcement by public security officers causes judicial corruption, greatly undermines the seriousness of law and unity of the legal system, and violates the fairness of law enforcement, further damaging the credibility of state justice⁷⁶.

III. Negative impact on the HIV epidemic

The risk of being detained forces sex workers to hide their true information, making it difficult for them to access HIV testing and counseling as well as treatment services⁷⁷. Most importantly, despite explicit guidelines to not do so⁷⁸, the police often use condom possession as evidence of sex work and as basis for arrest. The practice is particularly likely during crackdowns, and decreases sex workers' use of condoms, as many stop carrying them, or venue managers do not allow them to be kept on premises⁷⁹. This has led to a situation where clearly most sex workers decline to use condoms for fear of this being taken as evidence of prostitution by the police⁸⁰. Police crackdowns also increase sex worker mobility, which expands sexual networks and increases risks of STD spread⁸¹, while disrupting professional and social networks resulting in increased vulnerability⁸².

people involved, but descriptive terms to distinguish between sex workers in different settings.

⁷³ Yi H et al. *A profile of HIV risk factors in the context of sex work environments among migrant female sex workers in Beijing, China*. *Psychology, health & medicine*. 2010, 15(2): 172-187.

⁷⁴ HRW. *Swept Away*. 2013.

⁷⁵ Fu H & Choy DW. *Administrative detention of prostitutes*. Springer Netherlands, 2009, 149-159.

⁷⁶ Asia Catalyst. *Detention Education: the Arbitrary Detention for Chinese Sex Workers*. December, 2013. The 31 interviews conducted in two cities shows that sex workers are forced to bribe law enforcement officers, and the sex workers interviewed all return to their former career after leaving reeducation centers.

⁷⁷ Wang YX. *An analysis of AIDS-related KABP behaviors and effectiveness of intervention among low graded female sexual workers in Shandong Province*. See <http://www.doc88.com/p-6703976745989.html>

Environment with no discrimination may attract more female sex workers to participate in face-to face health consultation and regular physical examination and laboratory tests.

⁷⁸ The use of condoms as evidence of prostitution is a violation of the 1998 "Notice on Principles for Propaganda and Education Concerning AIDS Prevention", which instructs police to "Refrain from using condoms as evidence of prostitution." HRW. *Swept Away*, 2013, 36.

⁷⁹ CSWONF. *Research on the Impact of 2010 Crackdown on Sex Work and HIV Interventions in China*, 2011; HRW. *Swept Away*, 2013.

⁸⁰ Liang Y. *Knowledge, beliefs and behaviors concerning STD/ HIV/AIDS among low-graded sex workers in Nanning*. 2010. See <http://www.doc88.com/p-4199995980709.html>

The subjects of this study are low graded sex workers chosen by method of quota sampling, namely 2-3 sex workers are chosen in each divided area to interview by chance, and the total is 243. With respect to promoting condom usage rate, the percentage of the most needed support among their responses is: bosses' support 16.5%; public security administrations no longer using condom as evidence of illegal behavior 20.2%; and customers' support 10.7%.

⁸¹ *HIV and AIDS Data Hub for Asia-Pacific – Evidence to Action*. Sex work and HIV in China, 2010.

⁸² Yu DB et al. *Decriminalizing sex work: Implications for HIV prevention and control in China*. *Gender Policy and HIV in China*. Springer Netherlands, 2009, 201-213.

Importantly, increased mobility and driving sex workers underground makes health workers' outreach more difficult⁸³, as they may lose existing contacts and find it harder to build trust for outreach work, thereby hampering public health intervention efforts responding to HIV⁸⁴. Despite the governments' recognition in many legal documents of sex workers as a key population in responding to HIV, the current legislation and law enforcement practices on sex work increase the risk of HIV among sex workers and through them to the general population. The further underground China's millions of sex workers are forced to operate, the more difficult it is to respond to the HIV epidemic through public health efforts. The equal rights of sex workers under the *2006 AIDS Prevention and treatment Act* must be affirmed clearly, and sex workers diagnosed with HIV guaranteed a sufficient alternative livelihood, social support and medical treatment⁸⁵.

2. People who use drugs

I. Background

In the early 1980s, China became a new market for a number of international drug cartels. Drugs started to be sold along the border regions of Yunnan province, especially between China and Myanmar. In about 10 years, China changed from a transit country for drug trafficking into a large drug consumption market.

The number of drug users and the diversity of drugs used kept increasing. According to official statistics, by the end of 2012, the number of registered drug users in China was almost 2.1 million, with opioid drug users accounting for 60.6 per cent while synthetic drug users accounted for 38 per cent (NCB 2013). In January 2014, it was reported that the number of registered drug users reached 2.4 million⁸⁶. But, it was estimated that the actual number could be as high as five times that, or more than 10 million, with the number of teenage drug users accounting for over 70 per cent of the total⁸⁷. In the last few years changes in the drug market have meant an especially high amount of new methamphetamine based drugs, which increased six fold from 2005 to 2012⁸⁸.

Injecting drug use was the original and primary driver of the HIV epidemic in China. While its total share of new infections has dropped considerably in the last ten years, injecting drug use still accounts for approximately 25% of new infections.

II. The chilling effect of Chinese narcotics law system on AIDS prevention

Facing this severe situation, the government and legislature of China decided to adopt

⁸³ Lin et al. *Is the HIV sentinel surveillance system adequate in China?* Findings from an evaluation of the national HIV sentinel surveillance system. *Western Pacific Surveillance and Response Journal*, 2012, 3(4): 76-85. Supra note 76, CSWONF, 2011.

⁸⁴ Supra note 56 & 79.

⁸⁵ Supra note 68.

⁸⁶ See *China Anti-Narcotic Report*, P6-7.

⁸⁷ Hu Q. *Drug Users Estimated at 10 million*, *Global Times*, 17 January, 2014.

⁸⁸ Huang Wen. *Ethical Challenges to Punitive Law on Drug Users in China*. *Asian Bioethics Review*, 2014, 6 (2).

a punitive approach to dealing with drug use. The *Anti-Narcotic Drug Decisions* promulgated by the National People's Congress Standing Committee in 1990 stipulated severe punitive measures for drug users, such as 15 days detention, mandatory treatment and education and even forced labor education⁸⁹.

In 2008, the *Anti-Narcotic Drug Law of the People's Republic of China* (NPC 2008) was formally promulgated (repealing the *1990 Anti-Narcotic Drug Decisions*). In this law, compulsory testing, compulsory registration, compulsory detoxification and detention were all strengthened⁹⁰. In addition to this national law, there are a series of relevant regulations or rules issued over the last fifteen years aimed at curtailing drug use, including: *Rules on the Procedure of Drug Abuse Tests (2009)*; *Management Measures for Compulsory Isolation Detoxification (2000)*; *Measures for Identifying Drug Addiction (2011)*; and the *Management Measures for Compulsory Isolation Detoxification of Public Security Department (2011)*.

Although the *2008 Anti-Narcotic Drug Law* provided more choices for drug users, in terms of voluntary detoxification and community detoxification in addition to compulsory detoxification, the majority of its focus remained on the latter. This law institutionalized the compulsory detoxification centers system as a parallel system to the re-education through labor (RTL—which has been gradually closed since 2013) system and the C&E centers system for sex workers. The compulsory detoxification system for drug users and the C&E system for sex workers, are both set-up as extra-judicial systems that in practice have **quasi-criminalized** drug users and sex workers even though both populations are not officially criminalized according to *China Criminal Law (1997)*.

The *2008 Anti-Narcotic Drug Law* stipulates that drug addicts who refuse to accept or “break the agreement on” community detoxification, break the agreement on community detoxification or continue to relapse should be send to compulsory detoxification centers, as decided by the Public Security Bureau (PSB) at county level

⁸⁹ See Article 8:

Whoever intakes or injects narcotic drugs shall be punished by the public security department with detention of no more than 15 days, and may simply or concurrently be punished with a fine of no more than CNY 2,000, and the narcotic drugs and the instruments used for drug intake or injection shall concurrently be confiscated.

Whoever is addicted to drug intake or injection shall, in addition to being punished as provided in the preceding provision, be forced to quit the addiction and be subjected to treatment and education.

Persons who intake or inject narcotic drugs again after being forced to quit shall be subjected to reeducation through labor and shall be forced to quit during the period

⁹⁰ See *China Anti-Narcotics Law Article 32*: Public security department may conduct the necessary test on persons suspected of using narcotic drugs, and the persons subjected to such test shall cooperate; a person who refuses to undergo the test [will] be subjected to compulsory testing upon approval by the responsible person of public security department affiliated with the people's government at or above the county level or of the local office dispatched by the public security department. Drug users shall register at public security department. Article 38: In one of the following cases a narcotic drug addict shall be subjected to compulsory isolation detoxification upon the decision made by the public security department of people's government at county or above county level.

(1) Refuse to accept community detoxification;

(2) Intake or inject narcotic drug during community detoxification;

(3) Seriously violate the agreement on community detoxification;

(4) Relapse in-taking or injecting narcotic drug after community detoxification or compulsory isolation detoxification.

With respect to a person who is seriously addicted to narcotic drug and is difficult to be detoxified through treatment in the community detoxification, the public security department may directly make a decision on her/his compulsory isolation detoxification.

or above^{91,92}. Article 38 is considered especially problematic when it comes to the implementation of the law. The term “serious violation” has no clear definition or criteria, while the expected “agreement” on the side of the drug user for community detoxification should be voluntary rather than a mandatory one.

In practice, local PSBs decide whether to administer community detoxification or send a drug user to a compulsory detoxification center⁹³. The PSB makes this decision through a process based on vague criteria without clear and adequate medical scientific evidence. It has in effect become an extra-judicial system, through which the PSB can make decision to deprive citizens’ (regarded as drug addicts) personal freedom without a due process before the court.

The compulsory detoxification system, along with the *Anti-Narcotics drug Law*, have a negative effect on the response to AIDS in China, especially impacting prevention services for drug users⁹⁴. Although progress has been made and the PSB now collaborates with public health workers, it is still hard to initiate and scale up health interventions inside these detention centers. Most importantly, the fear of being detained in these centers prevents many drug users from accessing HIV-related services in public hospitals or testing clinics.

Another obstacle to a more comprehensive HIV response is the DCS. This is a national system built to monitor the real time location and movement of all registered (convicted or formerly detained) drug users. In practice this means that if a drug user, or former drug user’s, name is included in this system, every time this person applies for a job, gets admitted into a hospital, checks into a hotel or a flight, the local police will be notified of his/her presence in the local community. This often leads to the police being called and the drug user being questioned. In July 2012, the Ministry of Public Security issued a revised “*Notice on enhanced management and control of drug users’ drivers*”, which called for the cancellation of the driver’s licenses for all drug users still considered as addicts or currently in the community or compulsory detoxification centers⁹⁵. These two measures prevent many drug users from living a normal life and most importantly act as a considerable hurdle for former drug users trying to reintegrate into society.

While the legal environment constitutes a challenge for effective HIV prevention among drug users, the policy environment is much more supportive and has enabled China to achieve impressive results. The 2004 *State Council’s Notice on Substantively Enhance AIDS Prevention and Treatment (the 2004 Notice)* pushed the Ministry of Health to work in close collaboration with the PSB to pilot (Methadone) substitution therapy and needle exchange programs in all areas where increased HIV infections were driven by injecting drug use⁹⁶. This was an important moment in the response

⁹¹ See *Detoxification regulation* Article 20, it regulates that if the drug user refuse or try to avoid test 3 times above or leave the county (city or district) where community detoxification implemented without approval or accumulate to above 30 days, it means “seriously violate” the community detoxification agreement.

⁹² *Supra* note 86.

⁹³ *Ibid.*

⁹⁴ See *Anti-Narcotics Law* Article 41.

⁹⁵ See point one of the Notice, http://www.law-lib.com/law/law_view.asp?id=396274

⁹⁶ See http://news.xinhuanet.com/newscenter/2004-05/09/content_1459256.htm

to HIV in China, with the government officially recognizing harm reduction practices. This was followed in March 2006, by the *China Action Plan on AIDS prevention and treatment (2006-2010)*. The Action Plan included a goal of covering 70% of key populations with prevention interventions. All counties (cities) with 500 plus registered drug users were asked to establish clinics for MMT while the regions to provide clean needle exchange services. Coverage of community methadone maintenance work increased steadily. At the end of 2011, a total of 738 methadone maintenance clinics had been established in 623 districts and counties of 28 provinces nationwide. A cumulative total of more than 344,000 drug addicts had received community MMT, and 140,100 were receiving treatment. An average of 190 people received treatment in each clinic. The treatment adherence rate was 74.9%. Community MMT and needle exchange played an important role in reducing new HIV infections among drug users in China⁹⁷.

Most importantly, both policies above influenced Article 17 of the *2006 National AIDS Regulations* which calls for the establishment of a governmental coordination mechanism to deal with HIV prevention and anti-narcotic work above the county level. The Act clearly states that the health, public security and food and drug administrations of each Province should collaborate and promote HIV prevention measures, including maintenance treatment for drug users. The *2006 National AIDS Regulations* also institutionalized the right to HIV services for those who are under arrest, detained and who are serving time in C&E or compulsory detoxification centers. The act made the PSB and the justice department responsible to implement these measures within the centers.

In March 2012, 12 UN agencies signed a joint statement calling for the closure of compulsory drug detention and rehabilitation centers⁹⁸. In response, in 2013 a group of Chinese scholars and lawyers issued a report proposing a new legal and policy framework to the Chinese government⁹⁹. The recommendations include:

- Carry out a national evaluate on the efficiency and effectiveness of compulsory drug detention and rehabilitation centers;
- Revise relevant legal standards to reform the current rehabilitation system and gradually promote treatment services initiated by community-based organizations and other social organizations;
- In the meantime, transform and upgrade the existing compulsory centers, improving the quality of the health services currently in place in accordance with international medical standards.

3. MSM and sexual and gender minorities

⁹⁷ Reid, G. Aitken, C. 2009.

⁹⁸ These 12 entities include: ILO, Human Rights Office of Higher Commissioner, UNDP, UNESCO, UNFPA, UNHCR, UNICEF, UNODC, UNWOMEN, WFP, WHO, and INAIDS.

⁹⁹ China Beijing Red Ribbon Forum on Drug Use and Detoxification Centers, 2013.

I. Historical context

Same-sex behavior in pre-1949 Chinese society was not demonized, per se, so long as family responsibilities were being met. Buddhism, Daoism, and other indigenous religions are largely silent in regard to same-sex desires; however, each religion, in one way or another, bolsters traditional concepts of family structure and responsibility. However, with the establishment of the People's Republic of China, same-sex behavior became more politicized, leading to tougher political and legal crackdowns. These became increasingly brutal during the Cultural Revolution. After economic reform and opening up of Chinese society in the 1980s, the concept of "homosexuality" in its modern form became known to the Chinese public, but in this historical context many misunderstood homosexuality as an import from the West, denying the long histories of same-sex desire, cross-dressing and gender diversity native to China.

II. The legal framework on LGBT issues

Same-sex behavior in China was never fully criminalized. As early as 1957, in a judicial explanation named "*The Supreme Court's response to the question of whether consenting Buggery behavior among adult males consists of a crime*", the Court pointed out that consenting same-sex behavior among adults should not be considered a crime in itself.

However, the *Chinese Criminal Law* passed in 1979 introduced the crime of "hooliganism". The article states: "those who commit...insult and harass women or commit other hooligan-like activities which damage public order to a severe extent, will be sentenced to imprisonment for a maximum of 7 years". This vague definition of hooliganism led to later judicial practices and explanations including within the "hooliganism crime" also "improper sexual behavior" among male persons. This meant, indirectly, that Article 160 could officially be applied to punish the MSM population. This was supported in 1988 by another case addressed by the research division of the Supreme People's Court¹⁰⁰. The Court basically stated that because there was no specific law or judicial explanation regulating behavior among same-sex males, these activities could in effect be interpreted in the law as hooliganism activities. However it also recommended deeper investigation of the specific cases and situations, looking at the consequences of such behavior, whether it was consensual or forced behavior before applying Article 160 of Criminal Law.

Over the last fifteen years this legal framework was reformed. In 1997 the National People's Congress revised the criminal law and removed the concept of "hooliganism" all together. As a result, the *2005 Public Security and Management Law* deleted the articles related to hooliganism activities, restricting the ability of policemen to intervene on issues of consensual, adult same-sex behavior; (unless there is an exchange of money, in which case according to a 2001 order issued by Ministry of Public Security "improper same-sex behavior" should be categorized as prostitution activities).

¹⁰⁰ China Supreme People's Court. *Reply to how to determine the nature of behavior to eating others' semen*. 24 November, 1988.

In 2001 the Chinese Society of Psychiatry commissioned a working group include 41 mental health organizations to study the psychology of gays and lesbians, and research findings led to the removal of homosexuality and bisexuality from the official list of mental disorders in the Chinese Classification of Medical Disorders 3rd Edition (CCMD-3)¹⁰¹; (with the exception of situations when sexuality leads individuals' to have low or compromised self-esteem issues)¹⁰². Finally, in summer 2012, the Ministry of Health changed the blood donation policy from banning all "homosexual" donors, as it had been for more than thirty years, to only "men who have sex with men"¹⁰³.

Despite these changes, the government has been largely silent on sexual orientation and gender identity related social issues, taking a "not encouraging, not discouraging, not promoting" attitude. In certain aspects of China's law, for example, censorship in the media, movies and television, homosexual content in any form is explicitly banned.

Overall, the lack of anti-discrimination laws or regulations protecting sexual minorities leave most LGBT people and MSM open to institutional and societal discrimination in a number of ways. While anti-discrimination regulations exist in a variety of forms, including in the Constitution, laws on the protection of women, laws on the protection of the disabled, laws on the protection of minors and of seniors, and laws on employment, etc., none of them explicitly defines sexual orientation and gender identity as a specific basis of discrimination¹⁰⁴.

(a) Criminal affairs related to LGBT people

- Lack of proper legal protections leads to the majority of discrimination cases going unreported and unnoticed. This relates especially to cases of extortion and violence towards members of the LGBT community (especially transgender sex workers) and between intimate sexual partners, as well as from public authorities, such as the security department. Victims of violence and extortion often do not report these cases to the police for fear of being further victimized.
- Same-sex rape is also a problem because the law clearly defines rape as an act committed against a woman. Rape of a man does not constitute a crime, unless it has caused considerable physical injury to the victim, in which case it could be sued as crime of wilful and malicious injury. The *1997 Chinese Criminal Law* did not regulate same-sex violation. Also there are no provisions or articles on Chinese civil law to regulate same sex harassment. The latest drafted 9th amendment of Chinese criminal law (2014) does include same-sex sexual assault or Coercive indecency crime, but still need to be approved by the National People's Congress.

(b) Civil rights related to LGBT people

- There are no specific articles in the Chinese labor Law to protect sexual minorities from being discriminated against based on sexual orientation or gender identity (SOGI). High levels of discrimination in both the private and public sector lead to the majority of LGBT remaining hidden at work and their rights may be violated if their sexual orientation was disclosed¹⁰⁵.

¹⁰¹ See China Mental Health Network website: http://www.21jk.cn/p/zdbz/allzdbz/ccmd-3/csp_article_main.htm

¹⁰² CCMD 62.39.

¹⁰³ *Ministry of Health Removes Ban on Lesbians from Donating Blood*. NetEase News, Available in Chinese at <http://news.163.com/12/0709/23/860QBJ920001124J.html>, 9 July 2012.

¹⁰⁴ See Anti-Discrimination Laws resource website <http://www.fanqishi.com/china.asp>

¹⁰⁵ *Chinese Labor Law* Article 12 stipulates that workers should not be discriminated against based on ethnic

- Same-sex couples have no legal status under the law. Rights regarding property and inheritance are not protected during or after cohabitation. As a result, several rights such as those to share property between partners, inheritance rights and the right to raise children jointly, as well as obligations towards each other, are not protected or enacted by law.

III. MSM and HIV policy environment

The Chinese Ministry of Health's *MSM AIDS Comprehensive Prevention and Control Pilot Program Work Plan (The Work Plan)* issued in 2008 is the most comprehensive policy focusing on China's MSM epidemic. It makes provisions for various aspects of HIV prevention among MSM, including establishing specific medium term goals, organizational management and implementation details, as well as funding requirements.

The *Work Plan* aimed that more than 90% of the MSM population with HIV testing and 95% of HIV-positive MSM with counseling services and strengthen prevention measures to reach more than 70% coverage. The plan also makes provision on the form of behavioral intervention and education among MSM, including "carry out behavioral intervention activities among MSM population mainly through core peer advocates to promote safe sex, reduce HIV-related high risk behaviors and improve skills of STD and HIV prevention." Local CDCs (or together with MSM civil society organizations) are responsible for the training of core peer advocates; MSM civil society organizations are recognized as being responsible for recruiting and training teachers and candidates for core peer advocates, while the CDC is responsible for overall supervision and evaluation. Training of trainers of peer advocates is conducted first, then with the support of local CDCs, the recruiting and training for core peer advocates is carried out, and trained peer advocates are encouraged to conduct intervention activities in their networks. Meanwhile, a number of hotlines and online platform as well as more traditional condom promotion and outreach intervention activities are incentivized.

These laws and regulations exemplify the increasing recognition of the need of focusing on key populations like MSM in order to successfully respond to HIV in China. However, China's legislation still lacks specific protections for the MSM population and the role of governmental organizations is still limited.

minority, race, sex, religious.

PART FOUR



Conclusions

The *2006 State Council AIDS Prevention and Treatment Act* was an important and useful step forward in AIDS-related law and rights protection in China. The *AIDS Act* includes the most comprehensive attempt at protecting the rights of PLHIV in China, including the right to marry, to access health-care services, to enjoy equal employment and education opportunities and the right to confidentiality and non-discrimination.

However, its implementation has remained weak and these regulations alone have not provided effective protection for people living with or affected by HIV, who in 2014 are still experiencing high levels of stigma and discrimination. Many of the most important provisions within the *2006 National AIDS Regulations* are still in direct conflict with local government regulations and continue to be challenged by alternative policy decisions of local authorities. Most importantly, the *2006 National AIDS Regulations* are subject to override by a number of laws that have a higher priority in the legal hierarchy, such as selection procedures that still permit HIV-related discrimination in employment for the public sector¹⁰⁶ or criminal laws and practices that undermine the successful response to the HIV epidemic amongst key populations, especially sex workers and drug users. Finally, conflicts between provisions of the same law and different laws and regulations have made proper law enforcement difficult, leading to law enforcement practices in direct opposition to the *2006 National AIDS Regulations*.

Overall, the *2006 National AIDS Regulations* are only the “law on paper”, with very

¹⁰⁶ “The Law of the People’s Republic of China on Promotion of Employment” article 30

limited impact in real life and a very different picture when it comes to the ‘law on the streets’. Targeted and evidence-based legal reforms are needed to make sure that people that need HIV services the most are able to access them. The current legal environment has an indisputable negative public health impact on populations such as sex workers, drug users and MSM and is contributing to the further spread of HIV in China.

This report provides a series of main findings and conclusions as below:

1. While **the 2006 National AIDS Regulations are good, they are not enforced** or well-known at the Provincial level.
2. **There are conflicts and differences that still exist between the 2006 provisions and provincial ones** that were never reformed since they came into place. More worryingly, a number of Provincial governments have recently proposed stigmatizing and dehumanizing regulations in direct conflict with the *2006 National AIDS Regulations*.
3. **Contradictions between different provisions** within the same law or between different laws or regulations at the national level **prevent efficient law enforcement**. These need to be clarified.
4. **The 2006 National AIDS Regulations are subject to overriding laws** that have a higher priority in the legal hierarchy, such as laws that still permit HIV-related discrimination in employment, or criminal laws relating to sex work and drug use.
5. One example is **employment discrimination**, with the civil service medical exam, which contradicts specific provisions protecting PLHIV from employment discrimination. This and other contradicting practices in the public sector need to be reformed by fully implementing the *2006 National AIDS Regulations*.
6. **Strong criminal laws and severe law enforcement practices negatively affect drug users and sex workers**. The current legislation and law enforcement practices prevent people from accessing prevention and treatment services, increase the risk of HIV among these populations and through them to the general population. Examples include: Condoms used as criminal evidence of sex work; C&E centers for sex workers; sex workers crackdowns; compulsory detoxification detention centers for drug users; as well as parts of the implementation of the DCS, the national database for drug users.

Recommendations

1. Deal with conflicts of legal provisions and institutional governance

The 2006 National AIDS Regulations need to be revised, together with other related AIDS regulations, thus to reduce internal conflicts with other laws. **The 2006 National AIDS Regulations should be upgraded to a national law— passed by the National People’s Congress to increase its authority and power**. This would give more teeth to some of the protections contained in the regulations.

The Chinese Government should set up an HIV Law Steering Committee to promote more effective coordination among different ministries, legislative bodies and judicial area, with a comprehensive action plans to initiate HIV-related legal reforms.

2. On anti-discrimination

More practical clauses could be added to the *2006 National AIDS Regulations*, as well as the *Civil Procedure Law* and its judicial explanations and the *Torts Law* to deal with HIV-related discrimination. This includes:

- **Deal with employment discrimination, by reforming the health examination requirements for the private sector and for the civil service;**
- **Deal with institutional discrimination in healthcare settings by reforming the infectious disease hospitals system.** Mechanisms for expanding and ensuring care of PLHIV in general hospitals need to be set-up, as well as incentives for medical workers to provide essential care services (such as better insurance, trainings, education and compensation for possible professional exposure, etc.);
- **Specific penalty clauses should be added** for the violation of the *2006 National AIDS Regulations* and for any HIV-related discrimination;
- To strengthen legal empowerment of PLHIV as well as deal with discrimination, **the Government and civil society organizations should work together to provide HIV-specific legal aid services.** The Ministry of Justice National Legal Aid Center could support community initiatives in this area;
- **China should consider enacting a comprehensive anti-discrimination law** in the future.

3. On sex workers

- I. The PSB should actively stop the law enforcement practice that treats condom possession as evidence of prostitution, especially during police crackdowns of sex work establishments. Measures at the central and provincial levels in key provinces are required to ensure that this practice is not continued.
- II. The C&E detention system violates the basic rights of sex workers while having a disproportionately negative effect on their vulnerability to HIV infection. These centers should be abolished in line with recent experiences from other countries such as Vietnam. In the meantime, the PSB should be made to work more closely with the CDC in supporting effective and accessible prevention services among sex workers.

4. On people who use drugs

- I. Abolish or deeply reform the compulsory detoxification and re-education center system;
- II. Strictly limit the use and disclosure of information from the drug addicts dynamic monitoring database and improve the management of the data in this system;
- III. One of the reforms should be to set up clear criteria for former drug users to “quit” the system. Possibly allow former drug users to leave the system after a specific number of years when they have consistently tested negative to drug use. This would be a first step in providing a more supportive environment for them to fully come back to society;

- IV. Reform the current driving ban for drug users – this negatively effects former drug users in their reintegration into society.

5. On MSM

- I. Address the lack of anti-discrimination measures for sexual and gender minorities. This should include passing an anti-employment discrimination clause/law on the basis of SOGI or adding SOGI criteria to existing laws and regulations;
- II. Amend media censorship laws that ban SOGI themes from being discussed. Promote public sex education and broader public sensitization on sexual and gender minority issues;
- III. Support easier registration processes for HIV and/or LGBT NGOs, especially encouraging the development of community based organizations (CBOs) working with the MSM community.

6. On mandatory testing and confidentiality

- I. China should reduce the use of mandatory testing while trying to improve the protection of confidentiality for PLHIV;
- II. The law and regulations need to be revised accordingly to empower the PLHIV community to seek remedy through the judicial system when there is a breach in confidentiality. This should include adding specific penalties for confidentiality breaches to enable stigma reduction;
- III. Finally, local procedures that require someone to inform their spouse of their HIV status should be reformed in accordance to the *2006 National AIDS Regulations*.

7. Research and training on HIV in China

China needs to pay more attention to legal and policy research on HIV, especially from a social sciences perspective focusing on the socio-economic determinants of HIV infection. More discussion and policy debates should be supported and multi-sectoral engagement and collaboration revived. More sensitization of government officials at all levels on how HIV-related law and rights protections can promote a more efficient and effective HIV response is needed.



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