



In December 2011, the White House released a Presidential Memorandum “...directing all agencies engaged abroad to ensure that U.S. diplomacy and foreign assistance promote and protect the human rights of LGBT persons.” In that context, the memorandum directs foreign affairs agencies to “...strengthen existing efforts to effectively combat the criminalization by foreign governments of LGBT status or conduct and to expand efforts to combat discrimination, homophobia, and intolerance on the basis of LGBT status or conduct.”

This paper recommends concrete programming ideas to help U.S. government agencies build an inclusive and effective decriminalization strategy at the global level. The Council for Global Equality is available for any further discussion or consultation on other implementation strategies.

Components of a Global Program

An inclusive decriminalization agenda might include some combination of the following program elements:

- **Legal Analysis:** Country Team efforts to combat in-country LGBT discrimination must be based on a clear understanding of national laws that, whether by intent or interpretation, carry a discriminatory impact on LGBT citizens. Some laws, of course, may explicitly and directly target the LGBT community. (Of note, approximately half of the explicitly anti-LGBT laws target both lesbians and gay men, while the other half reference gay male sexual activity only.) However, in many countries, some of the most problematic laws often may not be, on their face, LGBT-specific: e.g., vague morality, debauchery or public-scandal laws that are used, in practice, to target homosexual relations and relationships. Laws that prohibit cross-dressing, regulate marriage, or prohibit sodomy also may be enforced solely or primarily against LGBT citizens. Discrimination in, e.g., housing or employment may also occur less through law than through the lack of specific legal protections for LGBT people in homophobic climates. In some former British colonies, sodomy laws are also used to prosecute acts of sexual violence against minors and sometimes also domestic violence. It is important to understand whether sodomy or other related criminal laws are being used in those ways, and if they are, to support additional legal analysis to understand how prosecutions for such crimes can be pursued under other existing criminal laws, or how the protective aspects of the law can be preserved while simultaneously stripping the law’s impact on consensual adult relations and relationships. Most embassies have contacts of some sort with a local legal firm; these might be engaged to help tease out the legal landscape. Similarly, most countries have some local LGBT civil society groups, and many of those groups have connections to local lawyers who also may be able to frame the legal landscape in more precise terms. The insights of locally hired embassy employees may also be helpful, especially foreign service nationals who are working with resident legal advisers, as might the legal departments of local American Chamber of Commerce member companies and contacts within other foreign embassies that have a longer history of supporting LGBT-related human rights concerns (e.g., the Netherlands).
- **Non-Discrimination and Equality Provisions:** In some countries with laws that criminalize consensual relations or relationships, the focus of local legal reform efforts or advocacy campaigns may not be punitive criminal laws themselves but efforts to adopt non-discrimination provisions at some level of governance,

guided by the understanding that non-discrimination advances may be prefatory to nullifying existing criminal laws. In South Africa, for example, sexual orientation was protected in the non-discrimination provisions of the 1996 Constitution, and only later did the courts rule that the criminalization of consensual conduct must therefore be unconstitutional. In other countries, such as Nepal and Pakistan, where there are large and culturally significant transgender communities, litigation and legal reforms have focused on efforts to recognize and protect the rights of transgender individuals (recognized now as a “third gender” in Nepal) that have also led to broader protections for lesbian, gay and bisexual individuals. Apart from understanding the legal landscape, embassies should gauge the legal reform priorities of local LGBT communities, and on that basis determine how embassy programming and other engagement might support the comparative research, advocacy or public visibility of such reform campaigns. As one example, a resident legal adviser in the U.S. Embassy Tirana provided support to local LGBT advocates and parliamentarians to help them draft an expansive non-discrimination law that provides strong equality protections on the basis of sexual orientation and gender identity.

- **Legislative, Administrative or Executive Reform:** While U.S. government attention is often focused on hostile attempts by foreign legislatures to criminalize or otherwise exacerbate existing criminal statutes, most decriminalization in fact has occurred through penal code reform or other legal review processes that are sanctioned and ultimately approved by legislative or executive branches of government. Many countries periodically review their penal codes and perform wholesale reform, and resident U.S. legal advisers in U.S. embassies may have an opportunity to lend perspectives or comparative legal analysis to that process. Civil society support programs funded both by DRL and USAID also regularly provide support for local civil society organizations to monitor and participate in those reform efforts. The American Bar Association’s Rule of Law Initiative, for example, regularly supports local lawyers and contributes to such legal reform efforts with support from U.S. government funds. U.S. embassies should consider using existing civil society or rule of law programs, and/or the expert advice of resident legal advisers, to empower local civil society groups to monitor and participate in such processes with a view to ensuring that problematic laws against LGBT citizens are reformed. Local LGBT groups and NGOs with significant expertise in sexual orientation and gender identity law should be consulted and incorporated in such rule of law programs.

- **Legal Clinics:** Small pilot projects have demonstrated the success and cost-effectiveness of legal advice clinics that provide basic legal information and assistance to LGBT individuals facing discrimination and violence, whether in the workplace or at home. In representing their clients, lawyers and paralegals working in these clinics may:

- Defend their clients against criminal charges, including subsidiary claims against extrajudicial arrest (where charges were never filed);
- Bring administrative charges against police, school administrators or employers for harassment or for failing to respond to complaints of violence;
- Insist that proper legal procedures are followed in the case of employment termination and seek compensation when they are not; or
- Use landlord-tenant laws to limit the harms inflicted by homophobic landlords.

While providing assistance to a larger number of LGBT individuals in a more immediate way, the large volume of these smaller cases also provides the documentation that is often needed to identify patterns of abuse that can then be used to bring forward larger, test case litigation around decriminalization. And by handling many small cases, these clinics are also able to identify potentially groundbreaking cases that have sympathetic facts and particularly sympathetic litigants for higher-level appeals and media advocacy. Clinics are often effectively co-located in community health or HIV-AIDS clinics, in centers that provide resources to women victims of violence, or in local LGBT centers or LGBT-supportive establishments, where they exist.

Embassies might consider funding technical assistance to legal clinics: whether the focus of that assistance is on the LGBT community only or on a broader set of marginalized communities may depend on the degree to which the local LGBT community is accepted within other marginalized groups. Ambassadors or other senior officials might inaugurate such a program, in order to draw attention to its importance; they also might do interviews about why the project is important. Washington visitors and delegations might be encouraged to visit those facilities, bringing the accompanying media along if that is judged to be helpful. In many African contexts, USAID has supported mobile legal advice clinics to reach out to those most in need over a broader geographic focus. A number of international NGOs, including the American Bar Association’s Rule of Law Initiative, have a long and distinguished record of creating and then institutionalizing such legal clinics with U.S. government support.

- Documentation:** As an initial foray into this work, U.S. embassies, together with USAID and the State Department, might consider supporting local documentation efforts to establish the full range of human rights abuses impacting LGBT communities, including detailed information about the perpetrators, any patterns of abuse that can be determined, and the needs of victims. For example, lawyers and human rights defenders in India spent years documenting the ways in which Article 377 of the Indian Penal Code harmed LGBT people, limited public health investments, and undermined public trust in law enforcement. Some of those patterns of abuse were documented through legal clinics (see above), as well as through direct human rights reporting by local human rights advocates who recorded abuses, followed up with the police and generally tracked patterns of violence. Innovative new uses of social media are making it easier to track these abuses, but the information must still be verified and analyzed for trends that help establish the ways in which existing criminal laws, even where not directly enforced, give license or social support to certain categories of police or communal violence. Funding for documentation projects should be considered an important step in the larger decriminalization agenda.
- Communications:** Any local effort to reform laws, decrease the impact of societal discrimination, or open up space for civil society to advocate for the human rights of LGBT communities requires a well-coordinated public relations strategy. Even where LGBT groups are actively engaged in legislative or administrative reform efforts, there must be an effective strategy in place to respond to the nearly universal charge that steps towards equality for LGBT people reflect attempts to impose Western cultural values on the rest of the world. U.S. embassies have supported public service announcements and public diplomacy on these issues in a number of countries, including recently in Jamaica, Uganda, and Mongolia. This is especially important given that conservative religious organizations in the United States or elsewhere have offered support for counter-messaging or counter-litigation. Important components of such a communications strategy could include public polling (often through NDI and/or IRI), efforts to provide appropriate platforms for moderate religious voices (or to amplify their comments), or other public diplomacy efforts that present a range of affirming local voices.
- Protect Against Re-criminalization:** While focusing on decriminalization, it is also important to guard against “re-criminalization.” In many countries we see new efforts to extend existing criminal laws or to increase penalties in dangerous ways. For example, in Africa, including Uganda, there have been a number of efforts to increase penalties or codify criminal laws in new and more forceful ways. In Eastern Europe, there have been a number of attempts to criminalize or otherwise make it an administrative offense to discuss homosexuality in public settings where youth could be present, including on television and in public fora. Embassies might usefully prioritize efforts to prevent re-criminalization in order to ensure the long-term impact of gains everywhere.
- Build Coalitions:** An effective decriminalization strategy must unify national groups that might instinctively be in favor of change. These might include bringing together, for instance, feminist, HIV prevention, democracy-promotion, workplace fairness, faith-based organizations and other similar groups working to repeal or reform outdated laws that limit the fundamental rights of minority groups – whether because of a basic belief in fairness, out of concern for the security ramifications sometimes present in homophobic climates, or to facilitate the transfer of LGBT employees in their business operations. Building coalitions of allies in promoting change can be crucial to your success.
- Encourage Inclusion of LGBT Civil Society With Broader Human Rights Community:** Every embassy has a variety of opportunities to ensure that LGBT groups are connected with the wider human rights community and institutions. Helping those leaders come together and be seen with equal importance helps the LGBT community out of the margins and elevates the importance of their struggles. Where appropriate, encourage legal reform to be contextualized within a larger set of critical human rights issues facing a country. This framing is an important element to successful decriminalization.

The Council for Global Equality brings together international human rights activists, foreign policy experts, LGBT leaders, philanthropists and corporate officials to encourage a clearer and stronger American voice on human rights concerns impacting LGBT communities around the world. **Find out more at globalequality.org**