Chapter 4: Building blocks for effective public health laws

SUMMARY POINTS

- Public health legislation should clearly set out the mandate, powers and responsibilities of the government and of public health officials. This not only ensures that public health officials have the powers they need; it also helps to ensure that governments remain accountable for the discharge of their statutory duties and functions.

- The responsibilities of regional, local and city councils should be explicitly set out in legislation. However, countries that have devolved public health functions to regional and local levels should ensure that national coordination is not jeopardized, and that the availability, accessibility and quality of public health services is not thereby compromised.

- Public health legislation should establish clear mechanisms for coordinating the activities of different levels of government during public health emergencies.

- Governments may consider imposing a general duty on persons not to create a serious risk to public health (as defined), and a general power that permits the minister or chief health officer to take action and to make such orders as are reasonable and necessary to deal with a risk to public health. However, except in cases of genuine emergency, legislation should authorize the courts to review the exercise of executive powers.

- Governments have an obligation to frame public health laws in ways that are consistent with human rights obligations. In some countries, a human rights commission or equivalent body can investigate complaints of discrimination occurring on the basis of protected attributes set out in legislation. These protected grounds may include sex, religious belief, colour, race or ethnic origins, disability, age, political opinions and marital or family status.

- Governments should seek to ensure coherence between public health laws and criminal laws. For example, criminal penalties for the transmission of HIV may have unintended effects, discouraging women from being tested or from having their babies tested for fear of prosecution.

Introduction

This chapter considers some building blocks for good public health laws that may assist law reformers as they design legislation and implement the recommendations of a legislative review process. Effective legislation must be built on a solid understanding of the specific legal powers and safeguards that are needed in order to respond effectively to the situation at hand. Where they exist, model laws may provide helpful guidance. However, law reform is a country-owned process that will reflect the legal history, legal and constitutional structure and political context of each country. As a result, the legal mechanisms used to implement law reform recommendations may vary considerably, even between countries that share a similar culture, language and geography.
4.1 Legislative goals, mandates and principles

The public health functions of government cover a wide range of activities (Table 4.1). In considering public health law reform, governments need to consider the way in which these functions can best be supported by legislation. It is important for public health laws to explicitly set out the mandate, powers and responsibilities of government, and of public health officials. This not only ensures that health ministries and public health officials have the powers they need, but also helps to ensure that they remain accountable for the discharge of their statutory duties and functions. It also ensures that health ministries do not overlook critical functions or responsibilities or adopt an unduly narrow definition of public health.

Table 4.1: The core public health functions of government

<table>
<thead>
<tr>
<th>Generating evidence for action</th>
<th>Surveillance and monitoring of the health status of the population, and of health risks.</th>
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<tr>
<td>Taking action</td>
<td>Public health protection and assurance, including through the performance of regulatory functions and the discharge of legislative responsibilities relating to the investigation of health risks and the prevention of disease and injury.</td>
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<tr>
<td>Taking action</td>
<td>Health promotion, including education and partnerships to support community-based health programmes and to empower individuals to live healthy lives.</td>
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<tr>
<td>Financing</td>
<td>Financing of public health interventions, including financing essential medicines and technologies and health care services.</td>
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<td>Training</td>
<td>Training and capacity-building, including accreditation and renewal of the public health workforce.</td>
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<td>Supporting research</td>
<td>Research and evaluation, including funding research and developing research capacity.</td>
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There is no single way of expressing the goals and objects of public health legislation, since these goals will reflect the specific needs of each country and the distribution of powers and responsibilities between ministries and levels of government. In the Australian state of Victoria, the Public Health and Wellbeing Act 2008 states that the objective of the Act is: “to achieve the highest attainable standard of public health and wellbeing by:

(a) protecting public health and preventing disease, illness, injury, disability or premature death;

(b) promoting conditions in which people can be healthy;

(c) reducing inequalities in the state of public health and wellbeing”.

This legislative mandate encompasses three important themes. Firstly, governments have a duty to protect and promote the health of the population as a whole. This duty extends to those who, for
example, live in remote parts of the country, or who cannot afford to pay for services. Secondly, governments have a duty to work to reduce health inequalities. This means giving special attention to the health needs of the disadvantaged and vulnerable: those people whose health needs might be forgotten if government focused only on improving the average level of health. Both of these ideas are encompassed by the obligation of governments to ensure that health facilities, goods and services are accessible – economically, physically and without discrimination – to all members of the population. Secondly, by recognizing the goal of promoting the conditions for healthy living, the legislation recognizes the concept of sustainability, understood here to mean that people should possess the resources that enable them to lead a healthy life, now and into the future. Sustainability also has an important intergenerational dimension: governments have a duty to develop policies to protect the health of future generations from emerging threats, such as the health consequences of climate change.

The legislative goals set out in South Africa’s National Health Act (see Box 1.5 in Section 1.2) provide another example. This Act establishes a national health system with the goal of providing equitable access to the “best possible health services that available resources can afford”. In view of the enormous and persistent health inequalities suffered by large parts of the population as a result of the policies of apartheid, the Act draws attention to the goal of providing “uniformity in respect of health services across the nation”. The Act acknowledges that the achievement of this goal is assisted by the obligation of the State to protect, respect, promote and fulfil key constitutional rights affecting health. These include the right to health care services, including reproductive health care, an environment that does not harm health or well-being, and basic nutrition for children. The Act gives powerful expression to the need for government to protect vulnerable groups, including women, children, the elderly and those with disabilities.

In some countries, public health legislation includes statutory principles that are intended to provide guidance to those who administer the legislation. For example, Victoria’s Public Health and Wellbeing Act, discussed above, provides that decisions about public health interventions, and the use of resources to promote and protect public health, should be evidence-based. However, when faced with a serious public health threat, “lack of full scientific certainty should not be used as a reason for postponing measures to prevent or control the public health risk”. Balancing the need to act on the basis of evidence with the need to prevent significant threats to public health is an important function of government. In order to ensure accountability, members of the public should have access to reliable information about risks to public health and the opportunity to participate in the development of policies and programmes.

4.2 Powers and responsibilities of the health ministry, and coordination with other agencies

Public health legislation should clearly state the functions and responsibilities of the relevant Minister. In many countries, these Ministerial or departmental functions are exercised through a duly appointed chief health officer (or equivalent). The chief health officer’s functions will usually include advising the Minister, and ensuring compliance with public health legislation. These functions may
also include the preparation of public health plans, proposals for improving services and submitting periodic reports to the Minister on the state of public health within the jurisdiction.

The factors that influence health, both positively and negatively, are complex, ranging across a number of sectors and – as a result – government agencies and ministries. For this reason, an effective response to a particular risk or health challenge may require the carefully coordinated exercise of statutory powers by a number of agencies – often referred to as an “all-of-government” approach. For example, while many countries will have an agency or department that regulates tobacco products, misleading and deceptive claims about the health impact of particular products may be more appropriately dealt with by the agency that regulates consumer affairs and business conduct, rather than a health agency. Legislation can facilitate intersectoral and interdepartmental responses to health risks in a variety of ways. For example, public health legislation may explicitly authorize the chief health officer or health ministry to seek the assistance and collaboration of other government agencies in responding to a specific issue.

Regional, municipal, local and city councils play an important role in public health administration, by enforcing legislation within local government boundaries, and by contracting for or ensuring the direct provision of core public health services, such as immunizations, postnatal health checks of mothers and children, and the removal of waste and rubbish. The responsibilities of local government and of local public health officials should be explicitly stated in the legislation. Legislation may require local councils to prepare public health plans, and to report on their progress in meeting local area objectives.6

Subject to local circumstances, the delegation of public health functions to the local level may create the risk that these functions will not be performed, a risk which may be exacerbated by lack of resources. To minimize this risk, legislation may set out a process for local councils to cooperate jointly in a broader regional response to public health risks, for a council to transfer its functions to the chief health officer, or for the minister to direct the chief health officer to perform the functions that a local council has failed to perform. Countries that have devolved key public health functions to the local level should ensure that the capacity and obligation of the national government to ensure the availability, accessibility and quality of public health services is not thereby compromised (see Section 1.2).

Coordination is critical during public health emergencies. For example, coordination may be required between different levels of government (national, state, local, and city governments), and between agencies and ministries with specialized responsibilities in the areas of customs, border control, passenger surveillance, human quarantine, contact tracing, travel advisories and the reporting of notifiable and quarantinable diseases. At the global level, the International Health Regulations (2005) require countries to designate a National Focal Point for coordinating the flow of information between WHO and relevant parts of the government of each country.7 At the national level, law reformers may consider a formal legislative mechanism for ensuring coordination between relevant national, regional, local and city administrations. Formal intergovernmental agreements may also achieve the same result.
4.3 Legal tools and strategies for discharging public health responsibilities

Government officials and other stakeholders engaged in the revision of public health laws need to approach the process of implementing law reform recommendations with a good working knowledge of the variety of legal strategies that the law makes available. The wide range of matters regulated in public health statutes can be understood in terms of these basic strategies, which are summarized in Table 4.2 and discussed in detail below.

Table 4.2: Some important strategies and targets for public health law

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<tr>
<th><strong>Public health infrastructure and governance structures:</strong> A government can use law to establish agencies with legal mandates, and to establish the infrastructure, processes and capabilities that enable the government to discharge its public health functions.</th>
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<tr>
<td><strong>Economic policies:</strong> Governments have the power to impose taxes and to spend taxation revenues on funding or subsidizing the provision of health-related goods and services (e.g. health care services, immunizations and subsidized pharmaceuticals). Governments can make grants, offer subsidies and create economic incentives and disincentives to encourage healthier behaviours, choices and purchases.</td>
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<td><strong>The informational environment:</strong> Governments can use law to shape the informational environment in order to encourage healthier behaviours, to inform consumer choices, to protect the population from misleading and deceptive communications and to moderate exposure to the commercial marketing of unhealthy products. The mandatory collection of information by governments creates information assets that can inform the allocation of resources and ensure a timely response to health risks, including during public health emergencies.</td>
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<td><strong>Regulation of businesses, professionals and individuals:</strong> Governments can mitigate risks to health by imposing specific technical requirements, and performance standards on businesses, employers and providers of goods and services.</td>
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<td><strong>Environmental policies:</strong> Law is a powerful tool for improving the environments in which people live, work, eat and play. Governments can use law to mitigate risks to health in the natural environment (in relation to water, air and soil, natural disasters), while shaping the built environment in ways that minimize risks to health and encourage healthy behaviours.</td>
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<td><strong>Health inequalities:</strong> In considering the use of law in each of the areas noted above, governments have a responsibility to ensure that there is equality of opportunity in access to health services and to other resources that are needed to live a healthy life.</td>
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<td><strong>Indirect regulation through the tort system:</strong> While government is the key actor in protecting public health, national constitutions and legal systems may also permit individuals to vindicate private rights in ways that benefit the health of the public.</td>
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The basic strategies listed in Table 4.2 are described in more detail below.

**Public health infrastructure and governance structures**

As discussed above, public health law reform begins by establishing the public health infrastructure: setting out the legal mandate of the Minister of Health, and of key public health officials. Legislation supports the administration of the public health system by creating the structures and pathways for communication and coordination between ministries, and between different levels of government.

**Economic policies**

Secondly, governments can use economic policies in a variety of ways to support public health and the costs of public health administration. For example, governments can impose excise taxes in order to suppress demand for tobacco and for other products whose consumption may carry health risks, such as alcohol and sugar-sweetened beverages. It can impose licensing fees on food establishments in order to offset the costs of performing food safety inspections and other health-related functions. Compliance with legal requirements that prohibit certain kinds of conduct (e.g. dumping toxic waste, polluting a waterway or selling tobacco to children) is often encouraged through the imposition of fines and other penalties. Governments can make grants to lower levels of government to support public health programmes and the delivery of services. These grants may be subject to conditions that recipients must meet, including the provision of matching funds. For example, in the United States, as a condition for receiving federal grants for mental health and substance abuse programmes, the federal government imposed a legislative condition requiring the states to pass laws prohibiting the sale of tobacco products to children. Conditional grants are an important strategy that national governments can use to encourage regional and local governments to discharge their public health obligations.

**The informational environment**

Thirdly, good information is a foundation for healthy policies and behaviours. Governments have a role in educating the public about health risks, and encouraging healthy behaviours. For example, governments can influence the informational environment through the regulation of food labelling, or by requiring the provision of warnings to consumers about the risks of particular products (e.g. tobacco), or activities (e.g. use of sunbeds). The provision of information by government to support individuals to make informed choices about their health forms part of the obligation of governments to fulfil the right to health. Subject to constitutional considerations, governments can also restrict the advertising of certain goods, including tobacco and alcohol.

**Regulation of businesses, professionals, and individuals**

Fourthly, governments can regulate businesses and other providers of goods and services in order to mitigate risks to health (e.g. through occupational health and safety standards, emission standards, manufacturing standards, regulations on working conditions and other controls on manufacturers...
and retailers). Conventionally, statutory regulation takes the form of technical requirements that are identified and described by the State, and set out in legislation, regulations or codes of practice. However, legislation may also require businesses to meet specific targets and performance standards, while permitting a degree of flexibility in how these will be achieved. This may create incentives for businesses to innovate and find new ways of reducing pollution, improving the nutritional quality of food, or reducing risks associated with their products.

**Environmental policies**

The capacity to lead a healthy life is powerfully influenced by the physical environment, which encompasses both the natural and the built environment. Public health regulation has long recognized that the quality of the natural environment has direct impacts on health, whether through contaminated air, water or soil or through the health consequences of natural disasters. Governments can use law to shape the built environment in ways that reduce health risks and encourage healthy behaviours, for example by improving access to healthy food, improving safety and security in urban areas, and creating safe, well-lit open spaces that facilitate physical activity.

**Health inequalities**

In order to discharge their responsibility to provide “equality of opportunity for people to enjoy the highest attainable level of health”, governments must address the socioeconomic factors that contribute to health inequalities. Law is a powerful tool for ensuring that the poor and vulnerable are not deprived of access to health care services and other resources for leading a healthy life. The context of government interventions in this area is likely to vary significantly from country to country, and to cover a wide range of economic and regulatory interventions. Examples include: government-subsidized school lunches and breakfasts for the children of low-income families, the subsidized provision of pharmaceuticals to aid smoking cessation, the provision of long-lasting insecticide-treated mosquito nets to high-burden areas (see Section 8.2), and cash transfers to alleviate poverty and stimulate economic growth.

One way that legislation can help to reduce health inequalities is by recognizing the right of individuals to challenge policies and actions that undermine the freedoms and entitlements that comprise the right to health. **Box 4.1** draws on the conclusions of a study of constitutional provisions recognizing the right to health in east and southern Africa, and illustrates the variety of forms that these provisions take. Legislative recognition of the entitlement of everyone to a basic system of health protection (encompassing health care services, vaccination and essential medicines) is likely to increase pressures for these entitlements to be realized, through effective planning and resource allocation by governments. It can also provide the basis for more effective advocacy by civil society organizations, and litigation to challenge denial of these rights.
Box 4.1: Legal recognition of the right to health and to other health-related rights: some best practice examples from eastern and southern Africa

**Constitution of the Republic of Mozambique, Article 116: non-discriminatory access to health facilities**

1. Medical and health care for citizens shall be organized through a national health system, which shall benefit all Mozambican people.
2. To achieve the goals of the national health system, the law shall establish the ways in which medical and health care is delivered.
3. The State shall encourage citizens and institutions to participate in raising the standard of health in the community.
4. The State shall promote the expansion of medical and health care and the equal access of all citizens to the enjoyment of this right...

**Constitution of the Republic of South Africa, Section 27: the right to health care, food, water and social protection**

1. Everyone has the right to have access to:
   a. health care services, including reproductive health care;
   b. sufficient food and water; and
   c. Social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.
3. No one may be refused emergency medical treatment.

**Constitution of the Republic of Uganda: national objectives and directive principles of State policy**

XIV. General social and economic objectives

The State shall endeavour to fulfil the fundamental rights of all Ugandans to social justice and economic development and shall, in particular, ensure that-

...  

(ii) all Ugandans enjoy rights and opportunities and access to education, health services, clean and safe water, work, decent shelter, adequate clothing, food security and pension and retirement benefits.

XXII: Food security and nutrition

The State shall:

(a) take appropriate steps to encourage people to grow and store adequate food;
(b) establish national food reserves; and
(c) encourage and promote proper nutrition through mass education and other appropriate means in order to build a healthy State.
Indirect regulation through the tort system

Although the strategies discussed above are principally legislative, governments can also promote the health of the population indirectly by ensuring that individuals who have suffered harm can access the courts and pursue private remedies. Successful claims for compensation, injunctions, declarations and other remedies can create pressure on businesses, employers and others to change their products and practices in ways that reduce health risks. In addition, supporting the capacity of individuals and groups to pursue public interest litigation, and to make effective use of the health-related rights set out in national constitutions, is an important strategy for advancing the right to health. The capacity for public interest litigation to serve as a trigger for public health law reform was discussed in Section 3.4(c).

Governments can also promote public health by properly resourcing an independent agency to protect consumers from harmful, deceptive and manipulative claims and practices that create risks to health. Consumer protection agencies have a unique mandate to protect the public interest by preventing businesses from exploiting the vulnerability and trust of consumers. For example, without regulation, tobacco companies may advertise that “light” or “mild” cigarettes are less harmful than others, pharmaceutical companies may advertise the health benefits of untested or harmful compounds, and food businesses may undermine breastfeeding by making claims about the benefits or superiority of breast-milk substitutes.

4.4 Building flexibility into public health laws

Knowledge and understanding of the determinants of health and disease have evolved rapidly over the past few decades. New risks and hazards continue to emerge and the predominant causes of death and disability are also changing at the country level. These factors support the need for flexibility in the operation of legal powers to enhance the law’s capacity to respond to new and emerging health risks. For example, by framing legal powers in generic terms, and by permitting the health ministry to add new diseases or risks through subsidiary regulations or executive orders, lawmakers can dramatically reduce the time involved in responding to new threats (Box 4.2).

Box 4.2: Building flexibility into public health legislation

<table>
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<tr>
<th>The threats and risks to public health that require regulation are likely to evolve over time. Legislatures have developed a wide variety of statutory mechanisms for building flexibility into public health laws. Examples include:</th>
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<tr>
<td><strong>Communicable diseases:</strong> Despite some exceptions (e.g. HIV), it will usually be impractical to enact new laws that are designed specifically to meet each new disease or threat. Typically, communicable diseases are regulated through generic provisions in public health laws. These provisions may impose reporting requirements, and new diseases or threats can be declared by executive order to be “notifiable diseases” as soon as there is an adequate case definition. Similarly, an emerging, highly transmissible disease may be declared to be a “quarantinable disease” under legislation dealing with public health emergencies, thus triggering a range of additional powers.</td>
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• **Noncommunicable diseases:** In British Columbia (Canada), the Public Health Act (2008) provides that a “condition, thing or activity” that causes or is associated with a “health impediment” may be prescribed and thereafter regulated in regulations. The concept of a health impediment refers to something that adversely affects public health over a period of time, that causes “significant chronic disease or disability in the population”, or that interferes with public health initiatives for the prevention of chronic disease and disability. British Columbia has used this legislative mechanism to prescribe transfats as a health impediment, and thereafter to impose limits on transfats originating from partially hydrogenated vegetable oil and margarine within food service establishments. This mechanism has also been used to authorize the screening of children for vision and hearing impairments, and tooth and gum decay, with test results being communicated to parents.

• **Power to regulate “public health risk activities” and “public health risk procedures”:** In the Australian Capital Territory, the Public Health Act (1997) gives the Minister of Health the power to declare an activity (or a procedure forming part of that activity) that may result in disease transmission or harm to health as a “public health risk activity”. Thereafter, the Minister can impose licensing conditions on that activity. An “improvement notice” can be issued to a person carrying on a public health risk activity or performing a public health risk procedure. A “prohibition notice” can also be issued. This mechanism has been used to regulate water utilities and businesses performing skin penetration procedures, including tattooing and body piercing. The same Act contains powers allowing the Minister to issue Codes of Conduct for the performance of particular activities. Codes issued by the Minister must be put before Parliament in the same way as other regulations made under the Act.

Flexibility is an important attribute in public health legislation because it preserves the capacity for judgments to be made by public health officials about whether or not a regulatory response is necessary or appropriate in the circumstances. At the international level, the International Health Regulations (2005) preserve flexibility by requiring countries to respond to any “public health emergencies of international concern”, rather than only to specific diseases. In order to determine whether an event may constitute a public health emergency of international concern, within their territories, countries apply an algorithm that requires consideration of whether the outbreak is serious, unexpected and carries significant risk of international spread, and whether there is a significant risk of international restrictions to travel and trade as a result. Within countries, legislation can preserve flexibility by authorizing public health officials to exercise powers that are triggered by the assessment, on reasonable grounds, that a particular outbreak, event or occurrence creates a serious risk to public health.

Flexibility is also important because of the difficulty of predicting emerging health risks or even providing a comprehensive list of current ones. This explains why public health statutes may also contain a general duty not to create a “significant risk” or a “serious risk” to public health (as defined). Legislation may also contain a general power that permits the Minister to take action and to make orders that are reasonable and necessary to deal with a risk to public health. Legislation should clearly define the conditions that must be met before such powers are exercised, and, wherever feasible, authorize the courts to review the exercise of executive powers.
4.5 Integrating human rights protections into public health law

The process of reforming public health laws provides an important opportunity for lawmakers to integrate human rights safeguards into health legislation. Human rights encompass both civil and political rights, such as non-discrimination and privacy, as well as the right to health itself and other social and economic rights (see Box 1.2 in Section 1.1). While human rights have inherent value, they also have an important instrumental value within public health legislation.

The right to health, as recognized in international law, provides a foundation for development. General Comment 14, discussed in Section 1.1, frames the right to health in terms of the “facilities, goods, services and conditions” that are necessary to realize the highest attainable standard of health. In addition to non-discriminatory access to appropriate health care services, the right to health encompasses rights to a range of underlying determinants of health. These include: access to safe water, an adequate supply of uncontaminated food, adequate sanitation and housing, healthy working conditions and a healthy environment, as well as access to health-related education, including on sexual and reproductive health.

Viewing the public health law reform process through the lens of a country’s obligation to progressively realize the right to health carries some important benefits. For example, it ensures that States do not define their responsibilities too narrowly; it also draws attention to the broader social determinants of health and to the importance of considering the health impacts of policies and laws across many sectors of government.

Self-evidently, the violation of human rights (e.g. slavery, torture, violence against women and children, hazardous working conditions, and the maiming and disfigurement of the body) can lead to lifelong ill-health. Failure to protect the human rights of vulnerable groups can also lead to ill-health as a result of the denial or discriminatory provision of services and resources. This is a particular problem for marginalized groups who experience deprivation as a result of absent or inadequate access to basic infrastructure, including water, electricity, adequate sanitation, transport, housing and health care (see Section 1.1). Human rights violations can also harm health in more indirect ways. For example, children deprived of education are less likely to acquire the knowledge and skills that are necessary to lead a healthy lifestyle and to make healthy choices. Discrimination against marginalized groups can affect mental health and well-being, leading to harmful lifestyles, violence and self-harm.

Discrimination against women and children is an important area for countries to address, given the health inequalities that women and children can suffer because of discrimination based on their sex or age. The Convention on the Elimination of All Forms of Discrimination against Women targets discrimination in services affecting women. In particular, Article 12(1) recognizes that States must “take measures ... to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning”.

The Convention on the Rights of the Child also highlights the importance of protecting children from discrimination. Article 2.1 requires States to respect the protections set out in the Convention,
without reference to the “race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status” of the child or of his/her parents or legal guardians. The Convention recognizes the right of children to the “enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health”34 (Box 4.3).

**Box 4.3: The right to health for children**

**International recognition:** Article 24 of the Convention on the Rights of the Child requires States Parties to implement the right of the child to the highest attainable standard of health by taking appropriate measures, including the following:

(a) to diminish infant and child mortality;
(b) to provide medical assistance and health care to all children, with an emphasis on primary health care;
(c) to combat disease and malnutrition, including through the provision of adequate nutritious food and clean drinking water;
(d) to provide prenatal and postnatal health care for mothers;
(e) to ensure that parents and children can access education and are supported in their use of knowledge about child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation, and accident prevention;
(f) to develop preventive health care, guidance for parents and family planning education and services.

**National recognition:** Many countries recognize the rights of children in their national Constitutions. For example, the Constitution of Brazil states that:

“It is the duty of the family, the society and the State to ensure children and adolescents, with absolute priority, the right to life, health, nourishment, education, leisure, professional training, culture, dignity, respect, freedom and family and community life, as well as to guard them from all forms of negligence, discrimination, exploitation, violence, cruelty and oppression”.

Significantly, Article 227 also recommends that the State allocate a percentage of its public health care funds to mother and child assistance.

Public health legislation can and should protect individuals from discrimination, and ensure fair access to health services for everyone. However, the precise legal mechanisms for achieving protection from discrimination, and for vindicating human rights protections, may vary between countries. For example, discrimination on the basis of a person’s health status may be prohibited in disability rights legislation, health legislation, a principal act or statute, or subsidiary legislation. In some countries, specific anti-discrimination laws provide a complaints mechanism for individuals who have been subjected to direct or indirect discrimination on a range of prohibited grounds. For example, under New Zealand’s Human Rights Act, the Human Rights Commission hears complaints of discrimination in a range of areas including: employment, the provision of goods and services (including health care services), access to education, housing and accommodation, and by
professional associations and vocational training bodies. The Act provides protection from discrimination on the basis of a range of protected attributes, including a person’s sex, marital status, religious or ethical belief, colour, race or ethnic origins, disability (including physical illness or impairment, psychiatric illness, and intellectual impairment), age, political opinions and family status.

In some countries (or parts of countries), individuals and groups can appeal directly to the courts to vindicate their constitutional rights. For example, in Colombia, the Constitution provides for the protection of specific groups, including women and newborn children, and enables an individual to petition any judge to protect his or her constitutional rights using a special writ known as a tutela. All such decisions are referred to the Constitutional Court, which can review them at its discretion. In one case initiated under this process, the Court recognized a woman’s right to equal opportunity in the workforce, holding that dismissal from employment of a pregnant or lactating woman without cause amounts to a violation of the human right to dignity and self-fulfilment. In another case, the Court held that the State owes pregnant or lactating women special protection in terms of job security, particularly women who are the head of a household. The Court declared that the termination of employment during pregnancy or within three months of birth creates a presumption of gender discrimination, placing the burden of proof on the employer if a tutela is filed. The Constitutional Court has also recognized a duty to provide special protection to women affected by forced displacement or civil war.

4.6 Creating coherence between public health laws and other laws

The process of reforming public health laws and implementing the recommendations of a legislative review does not occur in a vacuum, but should include an assessment of the extent to which existing laws are consistent with public health goals. In addition to gaps, there may be inconsistencies in a country’s public health laws, and even contradictory approaches to reducing risks from disease and injuries.

One area where inconsistencies may arise is between public health laws and criminal laws. The poor health of vulnerable populations and minorities, including undocumented migrants, men who have sex with men, drug users and sex workers, can be exacerbated by criminal laws that create barriers to the effective delivery of health services. For example, the Global Commission on HIV and the Law has warned that specific criminal offences for the transmission of HIV, and laws imposing compulsory HIV testing and disclosure of HIV status, can be counterproductive. In addition to entrenching stigma and discrimination against people living with HIV, individuals who fear criminal penalties may be less likely to seek testing, to access counselling services or to disclose their HIV status to partners (see Section 10.2(c)). Similarly, criminal penalties for transmission may dissuade pregnant women and mothers from undergoing testing, while leaving them little choice but to continue breastfeeding where breast milk substitutes and clean water are not available.

Inconsistencies may also arise with laws affecting children. For example, laws that prevent persons under 18 years of age from accessing advice about contraception have been described as a manifestation of discrimination on the grounds of both age, and sex: their practical effect may be to
expose young people to sexually transmitted infections and unwanted pregnancies. Laws restricting the availability of abortion may force women to seek unsafe methods for terminating a pregnancy, leading to serious injury or death.43

REFERENCES

1 Public Health and Wellbeing Act 2008 (Vic) s 4(2) (Australia).
5 Public Health and Wellbeing Act 2008 (Vic) ss 4-11, 111 (Australia).
6 For example, the Australian state of Victoria’s Public Health and Wellbeing Act 2008 requires municipal councils to prepare and make publicly available public health and wellbeing plans: s 26(1).

i All references were accessed on 1 May 2016.
22 Constitution of the Republic of Uganda, 1995 (Uganda). Article I of the National Objectives and Directive Principles of State Policy states that: “The following objectives and principles shall guide all organs and agencies of the State, all citizens, organizations and other bodies and persons in applying, or interpreting the Constitution or any other law and in taking and implementing any policy decisions for the establishment and promotion of a just, free and democratic society”.
36 Constitución Política de Colombia, 1991 (Colombia). Article 43 provides that “during pregnancy and after delivery, [women] are entitled to special assistance and protection by the State, and will receive food subsidies if unemployed or homeless,” and requires the State to “provide special support to female heads of households”. Article 44 provides special protection to children, declaring that the rights of children prevail over the rights of all others, securing the right to life, physical integrity, health, social security, a balanced diet, education, culture, recreation, and free expression, and guaranteeing protection against neglect, violence, abduction, sale, sexual abuse, labour exploitation, and hazardous work.
38 Acción de tutela interpuesta por la señora María Angélica Sánchez contra Buho Seguridad Limitada, Corte Constitucional [C.C.] [Colombian Constitutional Court], 29 May 2008, Judgment T-549/08 (Colombia) (http://ww3.lawschool.cornell.edu/AvonResources/Colombia-20Sentencia-20T-549-08-20SPANISH.pdf).
39 For example, see Protección de los derechos fundamentales de las mujeres víctimas del desplazamiento forzado por causa del conflicto armado, Corte Constitucional [C.C.] [Colombian Constitutional Court],


