



VERDICT ON A VIRUS

PUBLIC HEALTH, HUMAN RIGHTS AND CRIMINAL LAW

“There is still an opportunity for advocates and activists to resist this adoption of criminal law responses. Now is a critical time to resist this trend and promote public health alternatives.”

Mike Kennedy, Executive Director Victorian AIDS Council, Australia, 2008

HIV

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PUBLIC HEALTH, HUMAN RIGHTS AND CRIMINAL LAW

The criminal law is a blunt instrument for HIV prevention. It raises serious human rights concerns and risks undermining our hard won gains in the global response to HIV. There is a need for better coordination between organizations working on human rights and those working on HIV.

WHO IS THIS BOOKLET FOR?

It is for anyone who wants to know more about the criminalization of HIV transmission or exposure and the related health, human rights and legal implications. This guide can help you to become more familiar with the latest laws, legal support and other services relating to HIV in your country or region.

The ten key questions in this guide provide a snapshot of case studies and opinions from around the world. They ask and answer the key questions about the criminalization of HIV transmission and exposure – what it is and why it is an increasingly important issue now; and what are the human dimensions in terms of health, stigma, human rights, the law and the experiences of people living with HIV.

This guide provides resources and information to:

- 1. Support legal advocacy and social mobilization** in countries that criminalize HIV transmission or exposure in order to repeal or reform these laws;
- 2. Consolidate arguments** and document why the criminalization of HIV transmission or exposure is not an effective approach for promoting public health;
- 3. Catalyse national and international activism** to prevent future laws on criminalization being enacted or applied; and
- 4. Support people living with HIV** to become more familiar with legal issues and their rights.

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AIDS	Acquired Immunodeficiency Syndrome
ARASA	AIDS and Rights Alliance for Southern Africa
ART	Antiretroviral Therapy
CPS	Crown Prosecution Service
GBH	Grievous Bodily Harm
GIPA	Greater Involvement of People Living with HIV/AIDS
GNP+	Global Network of People Living with HIV
HIV	Human Immunodeficiency Virus
HRW	Human Rights Watch
ICW	International Community of Women Living with HIV/AIDS
IPPF	International Planned Parenthood Federation
MSM	Men who have Sex with Men
NAM	National AIDS Manual (Aidsmap)
NFI	Naz Foundation International
NGO	Non-Governmental Organisation
PEP	Post-Exposure Prophylaxis
PILS	Prevention information et lutte contre le SIDA
PLHIV	People Living with HIV
PMTCT	Prevention of Mother-to-Child Transmission
SRH	Sexual and Reproductive Health
STI	Sexually Transmitted Infection
UNAIDS	Joint United Nations Programme on HIV/AIDS
UNFPA	United Nations Population Fund
VCT	Voluntary Counselling and Testing
WHO	World Health Organization

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THE VERDICT

Since we first heard of HIV over 25 years ago, we have learned much about prevention. Knowledge about HIV transmission and the role of key interventions to prevent HIV transmission from mother-to-child and harm reduction initiatives for people who use drugs have dramatically altered the prevention landscape. However, a worrying trend has emerged from the shadows. The use of criminal statutes and criminal prosecutions against HIV transmission is an important human rights issue facing the world today.

From Mali to Mozambique; Azerbaijan to Australia; and from Canada to Côte d'Ivoire, policy makers have been utilizing and drafting legislation that threatens to undo many of our hard won gains. These approaches spread doubt, confusion and stigmatization – a fertile breeding ground for the continued spread of HIV.

In many countries, criminal prosecutions relating to HIV are being brought under laws that have only recently been enacted, or under old laws that have only recently been applied to HIV transmission or exposure. The full extent of the impact of these laws has not yet been played out and the landscape is changing with each new law and each new case that is investigated. In the future, more questions will be raised – and will need to be answered.

Criminalization of HIV transmission or exposure weakens HIV prevention efforts (and therefore public health), undermines human rights, and fosters stigma and discrimination. Moreover, it can further marginalize people who are already vulnerable to HIV infection.

IPPF, GNP+ and ICW – drawing on the insights gained from the Living 2008 Summit¹ – recognized the importance of ensuring that criminal prosecutions relating to HIV have no place in a comprehensive and rights-based approach.

Verdict on a Virus – based on the voices of leading legal and judicial experts, UN advisors and people living with HIV – provides examples from around the world which strengthen our understanding of the criminalization of HIV transmission and exposure.

For the foreseeable future we will never have an AIDS-free world, but we will have found a new way to live and to love, becoming wiser and richer because of it. We must all – irrespective of age, health status, gender or sexual orientation – foster the advocacy champion within each of us and raise our voices against injustice.

"I am deeply worried about the criminalization of HIV. I simply don't believe you can legislate adequately for a sexual relationship between two consenting adults... [A]s someone living with a person with HIV, I also know that it's not easy to be accepting of your own status when you know that you have the virus. More importantly, though, we must stop demonising people with this virus. To do so promotes the assumption that 'everyone who has HIV is a danger to someone who does not'. This is simply untrue."

Mark McGann, HIV activist and actor, UK, 2004

1

WHAT IS 'CRIMINALIZATION' AND WHY IS IT AN ISSUE NOW?

"Efforts should be made to address the root causes that drive the demand for criminalization."

Michaela Clayton, AIDS and Rights Alliance of Southern Africa, Namibia, 2008

'Criminalization' refers to the application of criminal law to prosecute HIV transmission or exposure to another person. Such laws appear to be spreading and include much of the world spanning Australia, Canada, Europe and the United States into Sub-Saharan Africa and Asia.² Little research has been done on why policy makers pass such laws, or their effect,³ but they seem to go hand in hand with the frustration that, despite increasing access to treatment and two decades of HIV prevention efforts, HIV continues to spread unchecked.

In an increasing number of countries, transmitting or exposing another person to HIV can be an offence under criminal law. Charges are being brought under a variety of laws, either specific to HIV transmission or exposure, or under other laws such as murder, manslaughter, attempted murder, assault, grievous bodily harm (GBH) or poisoning. In some countries a distinction is made between intentional, 'reckless', or even negligent transmission of HIV. Exposure laws are primarily concerned with consent whereas transmission laws are concerned with both consent and proof of transmission.

While some people believe that criminalization can promote public health outcomes and improve HIV prevention efforts, it may also deter people from accessing voluntary counselling and testing (VCT) services, discourage them from knowing their HIV-status and impede people from seeking appropriate care and support.

Recently there has been an increased use of the law in relation to HIV and new laws are also being introduced as part of national responses to HIV. Yet there is little evidence to suggest that the application of criminal law is effective in responding to HIV.⁴ In countries with a low or concentrated HIV epidemic, some governments see legislation as a method to stop it from

becoming generalized. It may also be viewed as a vehicle to control the 'unacceptable' behaviour of some people. In countries with a high HIV prevalence, governments may need to show that they are now doing something proactive to address 'prevention fatigue'.

These efforts are misguided. The criminalization of HIV transmission or exposure is a blunt instrument in preventing new HIV infections and jeopardizes the benefits of a broader, comprehensive HIV response.

Some key issues for consideration:

- **Sexual health should be the responsibility of each individual and both partners in a sexual relationship.** Yet the criminalization of HIV transmission or exposure undermines this principle and forces people living with HIV to bear greater responsibility for protecting the sexual health of their partners. For prevention to work, everyone must be empowered to take control over their own health and have access to prevention, treatment, testing, care and support.
- **The criminalization of HIV transmission or exposure, together with laws criminalizing behaviours related to HIV (sex work, injecting drug use or sex with someone of the**

same sex) can further marginalize those people most affected by HIV. Depending on the context these groups could include: women, young people, children whose mothers could be jailed, men who have sex with men (MSM), people who use drugs, migrants (both documented and undocumented), visible minorities, sex workers, internally displaced people, people affected by conflict and disasters and indigenous peoples. Fear of prosecution can weaken attempts to ensure that HIV prevention efforts reach those who need them most.

- **Policy, law makers and women's rights groups often seek specific legislation as a measure to 'protect women' but when applied these laws could target women.** Criminal laws treat men and women as equals when it comes to criminal culpability in the transmission of HIV. Yet other statutory or customary laws often discriminate against women and girls such as laws that deprive women of equal property and inheritance rights. Women are more likely to be tested for and thus know their HIV-status, either through routine gynecological exams or pre-natal care, and this could lead to disproportionate prosecution of women for the transmission of HIV.
- **Criminalization of HIV transmission or exposure targets those who are aware of their HIV-status.** Yet many people living with HIV do not know their status and may unknowingly transmit HIV. In some circumstances or jurisdictions it may also impact on those who are perceived to be HIV-positive (without actually being diagnosed) and is linked with social marginalization and vulnerability to HIV.

Exacerbating the stigma and discrimination often experienced by people living with HIV or those most vulnerable to HIV may undermine, rather than promote, efforts to prevent it.

- **The evidence in criminal prosecutions relating to HIV can be misinterpreted.** The law is an instrument that should only be used to penalize or reprimand someone based on sound evidence or proof. Yet providing the evidence around the transmission of HIV from one person to another is becoming an increasingly complex question. Issues such as the effect of antiretroviral therapy (ART) on 'infectiousness' and the great difficulty of scientifically determining the timing and direction of infection (i.e. 'who had it first') in cases of sexual transmission have to be carefully considered.
- **Criminal laws relating to HIV transmission or exposure undermine the human rights of people living with HIV.** The law can be a tool for promoting human rights and for enabling the highest attainable standard of health for all, free from stigma and discrimination. Yet an approach of prosecuting HIV transmission denies both. When applied to HIV, it singles out those living with HIV and undermines their human rights.
- **Everyone is affected by the criminalization of HIV transmission or exposure.** People living with HIV may experience heightened prejudice or stigma and/or may internalize this and begin to think of themselves as potential criminals. Everyone is affected by the criminalization of HIV transmission since the association of HIV transmission with criminal prosecutions can foster stigma and discrimination.

resources

- UNAIDS (2008) Policy brief: Criminalization of HIV Transmission, http://data.unaids.org/pub/BaseDocument/2008/20080731_jc15113_policy_criminalization_en.pdf
- Bernard, E (2008) Criminal HIV Transmission: A collection of published news stories and opinions about so-called 'HIV crimes', <http://criminalhivtransmission.blogspot.com/>
- World AIDS Campaign (2008) The Criminalization of HIV. <http://www.worldaidscampaign.org/en/content/download/30226/352986/file/Crim%20%20English.pdf>

"Like in the early years of the epidemic when I declared that we have 'HIL – Highly Inefficient Laws', when there were the proposals for testing everyone in society, we now have a new wave of HIL. And it's a wave that's coming particularly in Africa, but also in other parts of the world."

Michael Kirby, Justice of the Supreme Court, Australia, 2007²

SWITZERLAND: RAISING DOUBT – ARE YOU INFECTIOUS IF YOU ARE HIV-POSITIVE AND HAVE AN UNDETECTABLE VIRAL LOAD?

Recent scientific research indicates that under specific circumstances someone living with HIV may in fact not be able to sexually transmit the virus. A consensus statement from the Swiss Federal AIDS Commission in early 2008 stated that HIV-positive individuals who are on effective antiretroviral therapy [this includes having an undetectable viral load for at least 6 months, being adherent to treatment and being under medical supervision] and do not have any other sexually transmitted infections (STIs) cannot sexually transmit HIV.

This statement has implications for criminal law as it outlines that under certain circumstances a person living with HIV could not sexually transmit or expose HIV to another person – and therefore should not be prosecuted simply because they have a virus in their body.

Vernazza P et al. (2008) *Sero-positive people that do not have any other STI and are following an effective regime of ARVs are uninfected through sexual contact*, Swiss Medical Bulletin 89 (5)

definition

Criminalization of HIV transmission or exposure: the application of the criminal law to prosecute the transmission of or exposure to the human immunodeficiency virus (HIV) to another person.

2

IS CRIMINAL LAW AN EFFECTIVE PUBLIC POLICY FOR PROMOTING PUBLIC HEALTH?

If the criminalization of the transmission or exposure to HIV is a measure to intensify and strengthen HIV prevention efforts (and thereby protect public health), can we be sure that we have explored all other avenues before resorting to criminal law? And can we prove with certainty before criminalizing innocent people that such laws have a positive impact on HIV prevention?

Criminal law – although applied differently in different countries and cases – is generally used to achieve some or all of the following objectives:

1. to provide retribution (for the victim or the victim's family to feel justice has been served);
2. to offer a deterrent (to discourage the offender from repeating the crime, and to discourage other diagnosed HIV-positive individuals from doing the same);
3. to incapacitate (to disable the offender from committing the same or similar crime);
4. to rehabilitate (to change the behavioural patterns of the offender in such a way that they will not repeat the crime in the future); and
5. to provide restitution (in an attempt to repair any damages or costs incurred during the crime).⁶

The criminal law – by design and application – can provide for punishment and a sense of justice for those affected by HIV transmission. However, this justice is bittersweet, since the very same law subsequently considers the 'victim' in one case a potential perpetrator in another.

Relating to HIV, there is little data supporting the claim that criminal prosecution (or the threat thereof) encourages disclosure to sexual partners by people living with HIV or deters conduct that poses a risk of transmitting the virus.⁷ There is also little data supporting the claim that criminal prosecutions provide a direct disincentive for testing, but evidence suggests that it does fuel stigma.⁸ Stigma and discrimination undermine prevention efforts, and more research is needed to understand the depth and breadth of the impact that criminal prosecutions relating to HIV have on individuals as well as on public health.

"A simplistic law-and-order response creates the impression that decisive action is being taken. We know that stigma and discrimination are potent accelerators of an HIV epidemic and the kind of court, media and community responses we have seen around the world when the criminal law is part of a society's HIV response will exacerbate rather than ameliorate increasing HIV trends. There is still an opportunity for advocates and activists to resist this adoption of criminal law responses. Now is a critical time to resist this trend and promote public health alternatives."

Mike Kennedy,
Executive Director Victorian
AIDS Council, Australia, 2008

“Individuals who feel ‘betrayed’ by becoming HIV-positive through having unprotected sex with a previously diagnosed HIV-positive partner should seek counselling, rather than retribution via the criminal justice system.”

Edwin J Bernard, NAM,
UK, 2008

Public health can more effectively be achieved without resorting to the criminal law, for example by:

- Linking people living with HIV with community health workers and peer educators who can share information about the risks of transmission and how best to reduce or eliminate these risks. They can also help refer people to appropriate and diverse treatment, care and support options.
- Strengthening anti-stigma campaigns that could create a supportive environment that could promote voluntary disclosure.
- Providing legal support services for people living with HIV and their families and friends who have faced discrimination.
- Providing counselling services for newly diagnosed people and offer support on a range of issues such as repeated disclosure or dating with HIV.
- Including prevention programmes aimed at people living with HIV as part of a comprehensive prevention package within national HIV responses.
- Providing sexuality, relationships and values education as a core part of all school curricula.

resources

- UNAIDS (2002) Criminal Law, Public Health and HIV Transmission: A Policy Options Paper, http://data.unaids.org/Publications/IRC-pub02/JC733-CriminalLaw_en.pdf
- AIDS and Rights Alliance for Southern Africa <http://www.arasa.info>
- Sigma Research (2005) Grievous Harm: the use of the Offences Against the Persons Act 1861 for sexual transmission of HIV, <http://www.sigmaresearch.org.uk/downloads/report05b.pdf>
- Open Society Institute (forthcoming) Ten reasons why criminalization of HIV exposure of transmission is bad public policy. Document under review. <http://www.soros.org/health/10reasons>

definition

Post-Exposure Prophylaxis (PEP) is a one-month antiretroviral therapy to reduce the risk of a person becoming infected with HIV and administered immediately after possible exposure. In some countries, although evidence is not available, it is recommended that PEP is administered within 4 hours of exposure if possible and it will not be administered after 48 hours (in some countries this limit is extended to 72 hours). There is a need for more established research to measure the effectiveness of PEP including the effectiveness by time after possible exposure, the actual impact on seroconversion and its availability and accessibility in different settings.

http://www.pep.chapsonline.org.uk/pep_basics.htm

ASK AN EXPERT

IS THERE ANY LEGITIMACY IN CRIMINALIZING HIV?

Matthew Weait, Senior Lecturer in Law and Legal Studies, Birkbeck, University of London, 2008

Criminal law is the most powerful mechanism a society has for expressing collective disapproval of a person's conduct and typically results in the imposition of punishment – whether that be a monetary penalty or imprisonment.

Criminal law serves a social purpose: it is not, nor should be, a means of achieving private vengeance. For criminalization to be legitimate there must be a public interest at stake, not just the interest of the individual concerned.

When considering the justification for criminalizing HIV transmission, it is therefore important to think carefully about precisely what the public interest in prosecution is. Some might argue that this is self-evident: society has a right to be protected against those who would use others to their own ends, for selfish gratification, and who harm them in doing so. But – and it is a big but – we need to acknowledge that the criminalization of HIV transmission may have adverse public consequences, especially for public health. Take a few examples:

- If people knowingly living with HIV infection fear that they may have passed it to someone else, they may be less likely to advise that person to seek Post-Exposure Prophylaxis (PEP) for fear that in doing so they are confessing to the commission of an offence.
- Those who are HIV-positive but do not know for certain, or people who believe they might be, may be less willing to discover their status for fear that this knowledge could be used against them.

- Condoms are not 100% effective. Where criminal liability may be imposed merely for exposing someone to the risk of transmission, some people living with HIV (even if only a very small minority) may take the view that there is no point taking precautions. In the absence of a defence for appropriate condom use, such a criminal law provides no incentive to minimize onward transmission risk.

All of these possible consequences can only serve to increase onward transmission, and as such brings into question the efficacy of criminalization as a publicly justifiable response.

A practical reason for questioning the criminalization of HIV transmission is the difficulty of proof. The science (phylogenetic analysis) simply is not good enough to determine the source, route or timing of transmission. Even where the defendant and victim have the same HIV sub-type it is impossible, in the absence of other compelling evidence, to be sure that the defendant is guilty as charged. There has been a number of cases in which people have pleaded guilty having been confronted with such scientific evidence and there can be no certainty that they were rightly convicted. The potential for miscarriages of justice is great.

When considering whether it is legitimate to criminalize HIV transmission and exposure it is critical that whatever our moral views are we acknowledge the wider – and in my opinion dangerous – consequences of doing so.

resources

- Weait, Matthew (2007) *Intimacy and Responsibility: the Criminalization of HIV Transmission* (Abingdon: Routledge-Cavendish)
- Weait, Matthew (2005) 'Knowledge, Autonomy and Consent: R v Konzani' *Criminal Law Review*, October pp763-772.
- Weait, Matthew (2005) 'Criminal Law and the Sexual Transmission of HIV: R v Dica' *Modern Law Review* 68(1): 121-134
- Weait, Matthew (2001) 'Taking the Blame: Criminal Law, Social Responsibility and the Sexual Transmission of HIV' *Journal of Social Welfare and Family Law*, 23(1): 441-457

3

WHAT LAWS ARE USED TO PROSECUTE HIV TRANSMISSION OR EXPOSURE?

"It's actually not our actions that are being prosecuted, it's our virus."

Julian Hows, former Board Member GNP+, UK, 2008

"I have never met a positive person who wishes to transmit the virus – and I have met many!"

Chris Mallouris, Director of Programmes GNP+, 2008

Some countries have developed laws which **explicitly relate to HIV** that prohibit transmission or exposure of another person to HIV. Other countries have applied **existing laws** to prosecute the transmission of HIV where specific laws on HIV do not exist. This would include laws relating to transmission of contagious diseases, sexually transmitted infection or causing injury to health; laws relating to bodily harm, assault, GBH and aggravated assault; and/or laws relating to homicide, such as murder, manslaughter, killing, and poisoning.

Recent trends indicate that these laws have often been employed specifically against people living with HIV even though they have not been methodically implemented in the past.⁹ This can violate social justice (since it implies a selective application of the law) and it hampers efforts to address HIV (since it further marginalizes some of the groups most vulnerable to infection).

HIV transmission or exposure may impact the application of other laws that criminalize behaviours that are associated with HIV vulnerability (such as drug use, sex work or sex with someone of the same sex) for example on sentencing. Many of the laws relating to sodomy, debauchery and indecency are a legacy from the colonial era¹⁰ and/or are moulded by cultural or religious beliefs. They foster an environment in which stigma thrives and people most vulnerable to HIV are forced to hide for fear of persecution and violence.

In cases where intention to do harm is clear, criminal prosecution is appropriate. But even in these cases, there is no need for HIV-specific laws and existing laws can be used to prosecute the action rather than the virus.

resources

- Global Network of People Living with HIV/AIDS Europe and Terrence Higgins Trust (2005) Criminalisation of HIV transmission in Europe. <http://www.gnpplus.net/criminalisation/index.shtml>
- ARASA/OSISA (2007) Report on the ARASA/OSISA civil society consultative meeting on the criminalization of the wilful transmission of HIV http://www.arasa.info/files/pub_Meeting%20report%20final.doc

WEST AFRICA: HOW 'MODEL' IS THE MODEL LAW?

The N'Djamena Model Law: Article 36 makes it an offence to wilfully transmit HIV, with Article 1 defining wilful transmission very broadly, as transmitting HIV 'through any means by a person with full knowledge of his/her HIV/AIDS status to another person.'

This case study highlights an example of an HIV specific law and how policy makers appear to be passing legislation without considering the possible implications or potentially selective application of those laws.

In the last few years, Western and Central Africa have experienced a dramatic increase in the number of countries introducing HIV-specific criminal exposure and transmission laws.

The laws vary depending on country, and some are more severe than others. For instance, in Benin exposure to HIV alone is criminalized (even when transmission has not occurred), or in Tanzania proof of wilful transmission leads to life imprisonment.¹¹ Most of these laws are based on the African Model Law, created in September 2004 during a workshop by Action for West Africa Region– HIV/AIDS (AWARE–HIV/AIDS), in N'Djamena, Chad. Since 2005 Benin, Guinea, Guinea-Bissau, Mali, Niger, Togo and Sierra Leone have passed laws¹² and more countries are proposing similar laws.¹³

Despite having some policies that promote pre- and post-test counselling, the laws also contain provisions that are problematic and arguably detrimental to public health. In Tanzania for example, 'wilful transmission'¹⁴ through any means' creates a grey area when it comes to enforcement. Because it is unclear what a reasonable person should do to prevent transmission, even people who use condoms or who disclose their HIV-status can be prosecuted for criminal transmission. In some cases the law is so broad that it could include the criminal prosecution for the transmission of HIV from mother-to-child.

resources

- Human Rights Watch Open Civil Society Letter to the Participants of the "Capacity Building Workshop on Human Rights and Gender in HIV Legal Frameworks," 15 April 2008, at http://hrw.org/english/docs/2008/04/15/africa18552_txt.htm
- Welbourn, A (2008). HIV/AIDS a war on women. Open Democracy http://www.opendemocracy.net/article/5050/international_womens_day/hiv_aids
- Canadian HIV/AIDS Legal Network (2007). A human rights analysis of the N'Djamena model legislation on AIDS and HIV-specific legislation in Benin, Guinea, Guinea-Bissau, Mali, Niger, Sierra Leone and Togo

"The UN and others were remiss to let this West African Model Law form under our noses. That law has spread like a virus. We have tried to stop it, but it continues to spread."

Kevin Osborne,
IPPF Senior HIV Advisor, 2008

"I am concerned about the weak advocacy response from civil society in the US. The involvement of people living with HIV is dying in the US and that is part of the problem. I don't think most people living with HIV in the US have a clue what the laws are here from state to state or have any idea that USAID funding supported the model laws that are being propagated in Africa."

Beri Hull, ICW, USA, 2008

ASK AN EXPERT

AN EPIDEMIC OF BAD LAWS: BUILDING RESISTANCE

Richard Pearshouse, Director, Research & Policy, Canadian HIV/AIDS Legal Network, 2008

Since 2005, an epidemic of HIV laws has swept Africa. National legislators often feel a strong impulse to 'do something' in response to the epidemic. The issue of HIV legislation is inherently sensitive – far too often it has led to simplistic laws driven by prejudice rather than evidence. Momentum to legislate HIV appears to be increasing, rather than slowing. It's vitally important to resist this simplistic urge to legislate.

In west and central Africa, the impulse to legislate has been stimulated by a USAID-funded 'model law' on HIV. Even though a detailed framework of human rights principles exists to guide policy-makers in legislating the pandemic, it would appear that the best thinking on how to approach this sensitive task has been ignored.¹⁵ 'Bad' laws for example may contain restrictions on HIV education to minors, mandate partner disclosure or contain broad provisions criminalizing HIV transmission 'through any means'.

Among countries that have recently passed such laws, there are some egregious provisions. By way of example: Guinea's HIV law makes HIV tests mandatory before marriage; and Sierra Leone's HIV law explicitly criminalizes a mother living with HIV who exposes her child or foetus to HIV (other

national laws could do this implicitly). These laws must be changed. There is no turning away from the long and taxing effort required to roll-back these laws for people and organizations working on issues related to HIV and human rights in these countries. As a matter of urgency, national strategies need to be developed to change these provisions.

But it's often more difficult to amend a recent law than influence its content while it's being drafted.

There are a number of African jurisdictions with draft bills under consideration at the moment (at the time of writing these include Côte d'Ivoire, Mozambique, Malawi and The Gambia among others). Where such laws are planned, both policy-makers and civil society organizations must take action and analyse their laws with a more critical eye. People and organizations working in countries that are currently developing HIV legislation need to actively engage in the drafting process by informing themselves of the content of the bills and submitting proposals for amendments. UNAIDS has prepared 'alternative language' to the particularly problematic provisions found in the 'model law' on HIV mentioned above which may be a useful advocacy tool.¹⁶

Canadian HIV/AIDS Legal Network <http://www.aidslaw.ca/women>

EGYPT: TO SERVE AND PROTECT OR TO DISCRIMINATE AND PUNISH?

Egypt: Article 9(c) of Law No. 10/1961 (on Combating Prostitution, Incitement and its Encouragement) makes the “habitual practice of debauchery [fujur]” an offence.

This case study highlights an example of the use of another law (in this case relating to homosexuality) to criminalize those living with HIV and further marginalize – and stigmatize – people vulnerable to and affected by HIV. In this case, it is not the transmission of HIV that is criminal, it is simply living with HIV – ‘proof’ enough that ‘debauchery’ has occurred.

In 2007, police in Egypt launched a crackdown and have arrested people they suspect are living with HIV. To date 12 men have been prosecuted, nine of whom have been convicted and sentenced on charges of ‘habitual debauchery’. Some of the men tested positive to HIV and there is evidence of men having been tested without their consent, allegedly beaten by police as part of the interrogation process, and chained to their hospital beds.

The authorities are using the positive HIV-status of men as proof of their involvement in having sex with other men, an illegal act under Egyptian law – and they have been subsequently charged with the ‘habitual practice of debauchery’.¹⁷ This has been met with widespread condemnation from the international human rights community, but such policies are yet to be rescinded.¹⁸ By directly associating men who have sex with men with being HIV-positive the authorities are compounding stigma related to both.

resources

- BBC News Online (2008) Egypt police widen HIV arrests http://news.bbc.co.uk/1/hi/world/middle_east/7247228.stm (accessed 28/08/08)
- Human Rights Watch (2008) Egypt: Stop Criminalizing HIV : HIV-Motivated Arrests and Convictions Threaten Justice and Public Health <http://www.hrw.org/english/docs/2008/02/05/egypt17972.htm>
- Human Rights Watch (2004), *In a Time of Torture: The assault on justice in Egypt’s crackdown on homosexual conduct.* <http://www.hrw.org/english/docs/2008/02/05/egypt17972.htm>

“This not only violates the most basic rights of people living with HIV, it also threatens public health, by making it dangerous for anyone to seek information about HIV prevention or treatment.”

Rebecca Schleifer, HIV adviser at Human Rights Watch, 2008¹⁹

“Lucknow police have a shameful record of harassing gay men as well as non-governmental organizations that work with them. They are able to do so because India’s government clings to the criminalization of homosexual conduct, which only prevents people from coming forward for HIV/AIDS testing, information, and services.”

Scott Long, director of Human Rights Watch’s Lesbian, Gay, Bisexual, and Transgender Rights Program, USA, 2006²⁰

“By criminalizing homosexuals for who they are, Section 377 violates the right to live with dignity.”

Anand Grover, Lawyer and director, Lawyers Collective HIV/AIDS Unit in India, India, 2008

INDIA: ARE YOU A CRIMINAL IF YOU HAND OUT CONDOMS?

India: Section 308 and 420 of the Indian Penal Code allows for prosecution of HIV exposure following non-disclosure (and potentially ‘reckless’ HIV transmission), ‘attempting to commit culpable homicide’ and ‘cheating and dishonestly inducing delivery of property’. Section 377 allows for prosecution of ‘Unnatural Offences’ which includes ‘carnal intercourse against the order of nature’ and has been used to prosecute or intimidate men who have sex with men.

This case study highlights how a non-HIV specific law (section 377, also known as the ‘sodomy law’) and associated criminalization of one of the key populations vulnerable to HIV is in fact undermining health. It also shows how civil society can advocate to revise or improve the law.

In India, men who have sex with men have long been targeted by the police and authorities. For instance, in 2001, police raided the local offices of two Non-Governmental Organizations (NGOs) working in HIV prevention, one of which was the Naz Foundation International (NFI). Four staff members were jailed for over a month, accused of running a gay ‘sex racket’ and were charged under India’s sodomy law, criminal conspiracy, aiding and abetting a crime and the sale of obscene materials. There was international condemnation and the group became known as the ‘Lucknow Four’.

Although there is an explicit law about HIV transmission, there

have been no known prosecutions to date. However, there have been prosecutions under the sodomy law, which is hampering prevention efforts and is directly undermining public health efforts. The law is perpetuating the marginalization, stigmatization, and vulnerability of one of the groups most affected by HIV in a country with one of the highest number of people living with HIV in the world. The Naz Foundation India Trust brought a challenge to the sodomy law before the Delhi High Court in 2001 asking that the law no longer apply to consenting adults. The government response at the time was that ‘the purpose of the law is to provide a healthy environment in the society by criminalizing unnatural sexual activities’.

In 2006 the National AIDS Control Organization (under the Ministry of Health) filed an affidavit in which they conceded that Section 377 is an impediment to HIV prevention and should be repealed. According to a human rights lawyer in India, Aditya Bondyopadhyay, this was recently supported by the Indian Health Minister Ambumani Ramodass but incurred strong opposition from the Law Ministry. Shivananda Khan of the NFI recalls a conversation he had with a government official, who once told him that “while the Health Ministry has stated its support for working on HIV prevention, care and support for MSM, the Home Ministry is more powerful.” The Court has in fact asked the Health and Home Ministries to come up with a joint advice to the court!

At the time of printing this case was before the Delhi High Court.

PROTECTING OR PROSECUTING WOMEN?

This case study highlights how laws that criminalize HIV transmission or exposure – even though they may have been conceived to protect women and girls – can in fact place them at greater risk of prosecution and exacerbate their vulnerability to HIV, violence and marginalization.

Policy, law makers and women's rights groups often seek specific legislation as a measure to 'protect women' who are vulnerable to HIV. However, such an approach can put them at greater risk of being prosecuted because laws are not gender specific and application of the criminal law does not address the economic, social, political and personal marginalization that underpins gender violence and women's vulnerability to HIV.

Because women are often the first to find out their HIV-status in a relationship, many laws would place the responsibility of disclosing to a partner on the woman, putting her at risk of violence and/or abandonment and/or being blamed for bringing HIV into the home. Women can be put at greater risk of prosecution in countries that criminalize the 'knowing' or 'reckless' transmission of HIV to another person because women are more likely to be tested for and thus know their HIV-status, either through routine gynaecological exams or antenatal care.²¹ Women could also be prosecuted for transmitting HIV to a child during pregnancy or breastfeeding.²² These social and biological factors could result in disproportionate prosecution of women for HIV

transmission or exposure. Moreover where there is a clear power imbalance in a relationship, women often find it impossible to negotiate safer sex, which can make them even more vulnerable to prosecution under many laws. All of these factors perpetuate the vulnerability of women and girls to HIV and relating issues of social exclusion, disempowerment and gender violence.

This vulnerability is exacerbated by laws that deprive women of equal property and inheritance rights, access to credit, or salaried employment. Lack of rights to property during marriage and at divorce means women may be forced to remain in abusive relationships. Some customary laws condone harmful traditional practices, such as early marriage, polygamy (in which first wives have no say about their husband taking additional wives), widow inheritance (in which the deceased husband's kin 'inherits' the widow, which often involves sexual relations), and widow cleansing (in which widows must be sexually cleansed after the death of their husbands) all have clear implications for both the contraction and transmission of HIV by women and girls.²³

Even though women and men can equally be prosecuted under the legislation, women are more liable to prosecution because they are often tested sooner than their partners. Meanwhile, national laws continue to ignore crucial issues – and human rights abuses – that perpetuate gender inequalities and vulnerability to HIV.

"It took time to understand that women are physiologically more vulnerable to HIV transmission than men, at least where heterosexual transmission is concerned. It took even more time to recognize that physiological factors were only one aspect of women's vulnerability to HIV. The vast majority of African HIV laws are deathly silent with respect to HIV among women."

Richard Pearshouse, Canadian HIV/AIDS Legal Network, September 2008

“Criminalization acts increase stigma for women living with HIV and AIDS by blaming women for transmission of HIV, especially in the context of mother to foetus transmission. This serves to entrench the stigma against women as the vectors and transmitters of the epidemic, justifying violence against HIV-positive women, their expulsion from their homes, and denial of their right to inherit property.”

Tzili Mor, Georgetown University Law Center, and Aziza Ahmed, ICW, USA, 2008

CANADA: PROSECUTING MOTHERHOOD?

Canada: Section 215(2)(a)(ii) of the Canadian Criminal Code says that a parent, guardian or head of a family, who has a legal duty to provide the ‘necessaries of life for a child under the age of sixteen years’, and who fails to do so without a legitimate excuse, commits an offence if ‘the failure to perform the duty endangers the life of the person to whom the duty is owed or causes or is likely to cause the health of that person to be injured permanently.’²⁴

This example shows how a non-HIV specific law has been used to criminally prosecute a mother for failing to seek prevention of mother-to-child transmission (PMTCT) services. It underscores how the law can have unforeseen and unintended impacts on women.

A woman in Canada was charged with criminal negligence causing bodily harm having chosen not to access PMTCT services. The case is unusual. The charge the woman was convicted of is typically reserved for cases of child neglect. The woman was also charged with criminal negligence causing bodily harm and aggravated assault. However, those charges were withdrawn.²⁵

The woman has two children – the first born in 2003, does not have HIV. When she became pregnant the second time, in 2004, she changed her health care provider and did not tell her new doctors that she was HIV-positive. Her second child did not receive essential medication after birth, and tested HIV-positive in 2005. Although the woman did not breastfeed her first baby (under her doctor’s advice) she did breastfeed the second, which may have also facilitated the transmission of HIV. The woman was sentenced to a 6 month conditional sentence followed by 3 years of probation and also burdened with a criminal record, which can have serious implications in terms of future employment, travel, and access to social welfare.

This has implications for other countries (such as Sierra Leone) where the law could also be applied to the transmission of HIV from mother-to-child but where access to PMTCT is more difficult. Women may be discouraged from accessing services if they think they may be HIV-positive, as antenatal clinics tend to insist on HIV testing as a prerequisite to ante-natal care, with little option for opting out or for confidentiality; while on the other hand women that are already aware of their status may also not access

PMTCT services for fear of becoming stigmatized or prosecuted. The example also highlights significant inequalities in access to health services, treatment and care. Many health care providers around the world still fail to offer PMTCT, and so it becomes difficult (in fact almost impossible) for some mothers not to commit 'criminal' acts.

resources

- Berger, J. (2007) *Identifying an appropriate role for the criminal law in addressing HIV/AIDS: a South African case study*, AIDS Law project.
- Clayton, M et al. (2008) *Criminalising HIV transmission: is this what women really need?* 17th International AIDS Conference, Mexico City, abstract WEA0102.
- Tshwaranang Legal Advocacy Centre to end Violence against Women http://www.tlac.org.za/component/option,com_frontpage/Itemid,1/

Not enough has been done to address the violence, inequality and human rights abuses that drive the epidemic among women and girls and compound its impact upon them. Not enough has been done to address the real legal challenges.

One initiative to help address this gap is draft legislation in certain areas of women's rights currently being developed by the Canadian HIV/AIDS Legal Network. This project draws together international human rights law and illustrative examples of national legislation as the basis for developing a draft legal framework to respect, protect and fulfil women's rights in the context of HIV.

<http://www.aidslaw.ca/women>

"It is stigma that I believe lies behind the enactment of these bad laws. Those laws seem attractive, but they are not prevention or treatment friendly. They are hostile to both. And this is simply because they increase stigma. They add fuel to the fires of stigma."

Edwin Cameron, Justice of the Supreme Court, South Africa, 2008²⁶

4

DOES CRIMINALIZATION INCREASE STIGMA RELATED TO HIV?

“Criminalizing HIV can affect people living with HIV who are already suffering from several kinds of stigmatization and discrimination.... If the law criminalizes HIV transmission it could lead to the total exclusion of people living with HIV.”

Ghizlane Naoumi, Moroccan Family Planning Association, 2008

The use of the criminal law to address an issue instantly gives it a degree of seriousness that would not be the case if it were addressed through other legal or civil channels. Criminalization of HIV transmission or exposure has far-reaching and long lasting effects – much longer and more insidious than just a jail term. It combines the attitudes, perceptions and morality associated with HIV with those relating to criminality. HIV is still a highly moralized virus that is associated with social taboos and intimate behaviours such as sex and drug use. While there are abundant differences in morality, context and knowledge between incidents of HIV transmission, the law is not able to succinctly capture this human complexity.

By criminalizing HIV transmission or exposure, the lack of distinction in the law contributes to a lack of distinction in the media and in general public perception about the different rights, needs, priorities and experiences of different people living with HIV. It confuses ‘crime’ with HIV-status, and generalizes criminal offences and behaviours to all people living with HIV and to a health condition rather than to an action.

For example it can:

- **Influence the relationship between health professionals and their clients.** Conversations where the possible transmission of HIV are discussed, frequency and type of sexual encounters, testing or counselling could become evidence if a criminal investigation was instigated.
- **Affect the self-esteem of people living with HIV.** People living with HIV become grouped as ‘potential criminals’ because of the virus in their blood not because of their actions. This sense of ‘self stigma’ runs deep and affects uptake of treatment, care and support services.
- **Affect general perceptions about people living with HIV.** Efforts to normalize HIV are severely jeopardized as HIV and criminality become synonymous. This fosters prejudice and stigma which fuels HIV transmission and is counterproductive to HIV prevention efforts.
- **Disrupt the lives of those directly involved in a police investigation.** The invasion of privacy can be just as damaging an effect on someone’s life as a prosecution for all involved.

definitions

Stigma is a process of producing and reproducing inequitable power relations, where negative attitudes towards a group of people, on the basis of particular attributes such as their HIV-status, gender, sexuality or behaviour, are created and sustained to legitimize dominant groups in society. The stigma associated with HIV is often based upon the association of HIV with already marginalized and stigmatized behaviours, such as sex work, drug use and same-sex and transgender sexual practices. Stigma relating to HIV affects people living with HIV and – through association – their partners, children, households and others in their communities.

Internal or self stigma refers to the way a person living with HIV feels about themselves and specifically if they feel a sense of shame about being HIV-positive. Internal stigma can lead to low self-esteem, depression or can result in a person living with HIV withdrawing from social and intimate contact.

Discrimination is a manifestation of stigma. Discrimination consists of actions (or lack of actions) directed towards individuals who are stigmatized. Discrimination occurs at many different levels, for example within a family or community setting, in an institutional or educational setting, and/or in national policies or laws.

<http://www.hivcode.org/silo/files/stigma--discrimination-.pdf>

SCANNING FOR EVIDENCE: THE GLOBAL CRIMINALISATION SCAN

GNP+ is embarking on the Global Criminalisation Scan: a new global programme to document laws criminalizing HIV-transmission and cases where people have been prosecuted for transmitting HIV.

The methodology has been tested in Europe with the Terrence Higgins Trust and is currently being expanded globally. The Global Criminalisation Scan will work with regional and national networks and will include training of people living with HIV at all levels on the research methodology and how to use the evidence to inform advocacy and programming. Country, regional and global reports based on the collected evidence will enable networks of people living with HIV to advocate with lawyers, human rights activists, parliamentarians, governments and other stakeholders to ensure the protection of the rights of people living with HIV.

The Global Criminalisation Scan will continuously update information and facilitate the development of evidence-informed advocacy campaigns against the criminalization of HIV-transmission. For more information contact: infognp@gnpplus.net



5

WHERE IS THE CRIMINAL LAW BEING USED TO PROSECUTE HIV TRANSMISSION OR EXPOSURE?

This map shows the complex interaction of the criminal law and HIV around the world. It highlights countries where there are laws criminalizing HIV transmission or exposure (red) and those that have laws criminalizing behaviours closely linked with HIV vulnerability (grey). These laws have been grouped together to form a 'heat' map of laws relating to sex work, drug use, or having sex with someone of the same sex – the darkest grey shows countries that have criminal laws relating to all three; the darkest red shows where these countries also criminalize HIV transmission or exposure. A country is shaded white where the law does not apply or there was no information available. The scope and overlap between these laws illustrates how the application of the law can create a deadly obstacle for HIV prevention, fuel stigma and perpetuate the marginalization of those most vulnerable to HIV.

This map is accurate at time of printing but data is limited. It draws on a range of sources referenced in annex 1. There is a need for a comprehensive scan of laws relating to HIV and the map will be updated in 2009.

GREENLAND

ICELAND

CANADA

UNITED STATES OF AMERICA

BERMUDA

MEXICO

THE BAHAMAS

CUBA

JAMAICA

BELIZE

GUATEMALA

EL SALVADOR

NICARAGUA

PANAMA

COSTA RICA

DOMINICAN REPUBLIC

PUERTO RICO

HAITI

ST. KITTS & NEVIS

BARBUDA

ANTIGUA

DOMINICA

ST. LUCIA

BARBADOS

GRENADA

TRINIDAD & TOBAGO

GUYANA

SURINAME

FRENCH GUIANA

VENEZUELA

COLOMBIA

ECUADOR

PERU

CHILE

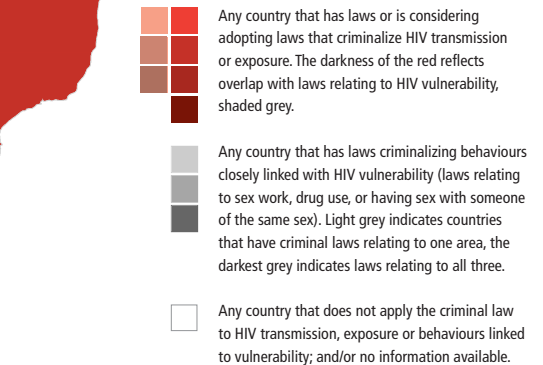
ARGENTINA

BOLIVIA

PARAGUAY

URUGUAY

BRAZIL



“We know that the main barriers to testing are fear, stigma and denial. Laws that criminalize HIV exposure or transmission, and the media coverage of arrests, investigations and prosecutions, work – subtly or not-so-subtly – at increasing all three of these factors.”

Edwin J Bernard, NAM, UK, 2008

MEASURING THE IMPACT: THE PEOPLE LIVING WITH HIV STIGMA INDEX

Much of what we know about the stigma attached to HIV, and resulting discrimination, is anecdotal or fragmented. Existing surveys of community and healthcare provider attitudes mean much more is known about their influence: namely that stigma can create a barrier to accessing HIV prevention, treatment and care services. Without concerted action the goal of universal access will be impossible to achieve. The People Living with HIV Stigma Index provides a tool that will measure and detect changing trends in relation to stigma and prejudice experienced directly by people living with HIV.

“The index provides the best opportunity for people living with HIV to tell their secrets – so we need to develop the skills to ask them.”

Princey Mangalika, Lanka+, Sri Lanka, 2008

The findings from the People Living with HIV Stigma Index will ensure that the policy implications of criminalization are backed by the evidence and experiences of people living with HIV.

The People Living with HIV Stigma Index will contribute to improving policies by:

- I. Providing evidence to advocate for alternatives to criminalization, such as scaling-up and improving existing prevention, treatment, care and support programmes and promoting prevention among people living with HIV by advocating for its inclusion more prominently in national health strategies.
- II. Advocating that all agencies involved in criminal prosecutions relating to HIV reconsider and clarify their approaches in light of the detrimental impact to public health they are likely to have. Agencies to be targeted include those working in migration, human rights, education, health, justice and the bodies that manage the national and local police services.
- III. Promoting informed public debate and influencing public opinion to reduce stigma associated with living with HIV and other associated sources (such as racism, immigration, homophobia, misogyny, xenophobia and stigma relating to drug use).

<http://www.stigmaindex.org>

DO CRIMINAL PROSECUTIONS RELATING TO HIV STRENGTHEN OR UNDERMINE PUBLIC HEALTH INTERVENTIONS?

The criminal law is not effective – and is in fact counterproductive – for promoting public health interventions related to HIV. By exacerbating both HIV-related stigma and the vulnerability on which it thrives, criminalization can:

- **Provide a disincentive for people to be tested for HIV.** The benefits of knowing your status could be weighed against the risk of any potential prosecution in the future. People who are particularly vulnerable to HIV already face a number of obstacles when seeking voluntary counselling and testing services.
- **Provide a deterrent to disclosure.** If a person fears they may have passed the virus on to their sexual partner (if, for example, a condom breaks), they may be very wary of disclosing (if they had not disclosed their status previously) because they could be implicated in a crime.
- **Create a barrier to accessing services.** People who know that they are living with HIV require a comprehensive package of services from their clinics and hospitals. The stigma relating to HIV, exacerbated by the criminalization of HIV transmission or exposure, creates barriers to regular medical checkups and psycho-social support. It could also lead to distrust between the health care providers and their clients.
- **Create a culture of blame, rather than one of ownership.** It is the responsibility and right of every person to have access to up-to-date and accurate information. Everybody is responsible for reducing HIV transmission and there should be no undue burden on people who are aware of their HIV-positive status. Safer and responsible sexual behaviour is the responsibility of all partners.
- **Undermine prevention strategies.** By focusing on the relatively few people who know their status, criminalization

will have a limited impact. With increased access to ART becoming a reality, many people who are aware of their status are also on effective medication (see page 8, conclusions from the Swiss statement) which has implications for their ‘infectiousness’. In the few countries (such as Singapore or Switzerland) where exposing someone to the risk of transmission is an offence (with or without a condom, and with or without disclosure), some people may not see the value in taking precautions.

- **Breed false assumptions.** If prosecutions become commonplace and the law indicates that disclosure is essential in order to avoid criminal liability, people may start to assume that those that don’t disclose are automatically HIV negative which may also promote – rather than prevent – HIV transmission.
- **Increase vulnerability to and risk of HIV infection for key populations.** Women, young people, sex workers, men who have sex with men, prisoners and people who use drugs may be further marginalized – reducing their ability and willingness to access services and support.
- **Undermine human rights.** Discrimination against people living with HIV, and the associated stigma, violates the human rights of people living with HIV. It is something that the legal system could in fact address, but in jurisdictions where the transmission of HIV has been criminalized, the paradox in practice is that the law is actively undermining the very pillars of justice and equality that it strives to achieve.

“Condoms and lube and sterile injecting equipment are much more effective at preventing HIV transmission than criminal laws, and leave you (rather than the State) in control of protecting you and your sexual or injecting partners.”

Michael Kennedy, Executive Director Victorian AIDS Council, Australia, 2008

resources

Open Society Institute (forthcoming) Ten reasons why criminalization of HIV exposure of transmission is bad public policy. Document under review. <http://www.soros.org/health/10reasons>

WHO (2006). Technical consultation in collaboration with the European AIDS Treatment Group and AIDS Action Europe on the criminalization of HIV and other sexually transmitted infections, Copenhagen, 16 October 2006 WHO, *International Digest of Health Legislation* <http://www.who.org/dsa/periodicals/dig.html>.

Sigma research (2005) Grievous harm: use of the Offences Against the Person Act 1861 for sexual transmission of HIV, <http://www.sigmaresearch.org.uk/go.php/reports/policy>

Dodds, C. and P. Keogh (2006) Criminal prosecutions for HIV transmission: people living with HIV respond in *International Journal of STD & AIDS*, 2006, 17(5): 315-318(4).

“People make health decisions based on what they read in the newspapers ... [T]here can be no doubt that the appalling state of health reporting is now a serious public health issue.”

Ben Goldacre, UK journalist, September 2008³⁸

START SPREADING THE NEWS: MEDIA COVERAGE OF CRIMINAL PROSECUTIONS CAN STIGMATIZE HIV

‘Jailed for ten years, the one-man HIV epidemic’²⁷

‘AIDS assassin is jailed’²⁸

‘Sexual predator who infected women with HIV starts 10-year jail term’²⁹

This case study highlights an example of how the conflation of HIV and criminality – and its coverage in the media – can promote stigma and affect public perceptions.

Crime sells newspapers, especially when related to social taboos. In countries where HIV transmission or exposure is criminalized, media coverage may focus more on criminal investigations and convictions rather than on other possible angles for covering HIV (such as access to appropriate treatment, care and support services, and/or everyday experiences of living with HIV). Coverage of crime is often sensationalized. This can cultivate fear, stigma and shame relating to HIV which can in turn pervade personal, social, legal and public health responses to HIV. For example in a survey conducted in Nigeria, Journalists Against AIDS learnt that Nigerian health staff reported that they obtain 70% of their knowledge about AIDS from the Nigerian media.³⁰

In some countries, media coverage may conflate criminal prosecutions relating to HIV with other emotive issues relating to offences such as rape, under-age sex or debauchery. This can make it harder to conduct a reasoned and informed public

debate about HIV legislation. For example the Kenyan Sexual Offences Act (2006) – where HIV transmission is explicitly criminalized (Art. 26) along with other laws relating to rape and other sexual offences – was passed amidst media reports profiling cases of rape and child defilement. One story was about ‘Laura’, a 12-year-old girl, who had allegedly been sexually abused by a neighbour since she was six and was HIV-positive as a result. This prompted numerous letters to the editor and other reports of similar stories.³¹ Media coverage of the legislation was fuelled by a climate of general public anger towards the perpetrators of such offences. One newspaper reader argued for a harsher penalty (capital punishment, as opposed to the proposed chemical castration) “...especially because of the Aids factor.”³² Instead of focusing on child abuse, this example focused on the HIV-status and generalized this offender’s behaviour to the behaviour of all people living with HIV.

There is a need for critical analysis to understand the relationship between race, criminal justice and HIV and how these issues are covered in the media. In one example, Nushawn Williams (a 21-year-old African American man from Brooklyn, New York) was sentenced to 4-to-12-years in prison for pleading guilty to having sex with a minor and reckless endangerment for passing on HIV to two women.³³ He was initially indicted on charges of attempted assault, sexual misconduct and endangering the welfare of a child but the details of his case

evoked a media furore since he had identified almost 50 sexual partners to authorities, 13 of whom subsequently tested positive for HIV. In 1997, public authorities in Chautauqua County, New York, were granted an exception to the State's HIV confidentiality law – and released his name and picture to the media as a “public health threat”.³⁴ Some of the headlines that followed included ‘The One Man AIDS Epidemic’ and Williams was referred to as an “AIDS predator”, a “monster”, a “dirtbag”, a “maggot”, the “bogeyman incarnate”.³⁵ There were exaggerations, misunderstandings, and distortions in the media coverage which possibly fuelled a pervasive atmosphere of threat, undermined the integrity and fairness of application of criminal justice, and arguably reinforced racist stereotypes about the hyper-sexuality of African Americans.³⁶

In another example, African migrants in the UK are among the most vulnerable to HIV infection, accounting for the greatest number of new diagnoses in recent years. Being HIV-positive can intensify experiences of stigma and marginalization, apparent in limited employment opportunities and/or lack of visibility in policy decisions. These practical realities are exacerbated by current and historical constructions of racism, xenophobia, and stereotypes of African hypersexuality which can be reflected in media coverage and sensationalized in headlines. Stigmatizing media coverage of African migrants can exacerbate the feelings of isolation, frequently prevents people from coming forward to access health services, and can fuel a vicious cycle of reduced

access to services leading ultimately to increased vulnerability.³⁷

More research is needed to analyse the coverage of criminal investigations and prosecutions relating to HIV in the media and to understand the impact that it is having on people living with HIV, politics, policy making and public perceptions. Journalists should be encouraged to follow guidelines including respecting the right to privacy, and the publication of accurate and non-stigmatizing reporting on HIV and issues relating to vulnerability (such as migration, sex work or drug use).

resources

- National AIDS Trust (NAT) and National Union of Journalists (NUJ) (2007) Guidelines on Reporting HIV <http://www.nat.org.uk/document/254>
- Kaiser Family Foundation (2008) Reporting Manual on HIV/AIDS <http://www.kff.org/hiv/aids/7124.cfm>
- Panos London (2007) Start the Press: How African communities in the UK can work with the media to confront HIV stigma. Resources for journalists, advocates and activists and includes a language guide <http://www.panos.org.uk/?lid=293>
- Panos Global AIDS Programme <http://www.panosaid.org>
- Edwin J Bernard Blog: Criminal HIV transmission: A collection of published news stories and opinion about so-called ‘HIV crimes’. <http://criminalhivtransmission.blogspot.com/>

“In addition to the 3 pillars of Universal Access – prevention, treatment, care and support – we need to include non-discrimination. People need to understand that non-discrimination is just as much a programmatic priority as the other three and that addressing it is critical in national responses to HIV.”

Susan Timberlake, Senior Human Rights and Law Advisor, UNAIDS, 2008

BRAZIL: LEGAL SERVICES AND SUPPORT FOR PEOPLE LIVING WITH HIV

Brazil: The Penal Code explicitly criminalizes the transmission of HIV through sex (articles 129, 130, 131); through vertical transmission (article 131); and through blood or infected syringes or sharp instruments (articles 129, 131, 267 and 268).

This case study highlights how a local NGO can provide the legal and referral services to support people living with HIV. Their success rate in defending the human rights of people living with HIV underscores the deficiency in the existing laws and policies to safeguard the rights of people living with HIV.

Gestos is a communication and human rights NGO in Pernambuco in the Northeast of Brazil. The increase in new cases of HIV in Pernambuco has also been accompanied by growing numbers of violations against the rights of people living with HIV. According to Kariana Lima, the head of the juridical work at Gestos, “people living with HIV are often discriminated against in Pernambuco, which promotes illness.”

Gestos provides free legal assistance for people living with HIV and supports cases in the key areas of:

1. Accessing basic medicines and ART at pharmacies, clinics, hospitals and other healthcare facilities
2. Challenging the discrimination experienced by people living with HIV in public health services
3. Improving the antenatal care received by women living with HIV
4. Promoting workplace policies that protect the rights of people living with HIV and challenging cases of discrimination in the workplace
5. Advocating for social security for people living with HIV such as benefits, housing allowance or other sources of income

Gestos provides legal support for more than a hundred people each year. To date more than 50 lawsuits annually have been brought before the court alleging violations of the rights of people living with HIV, with a success rate of about 70%. They also advocate for support outside the law and facilitate the establishment of self-help groups and other networks to promote the rights of people living with HIV.

<http://www.gestospe.org.br/>

7

WHAT ARE THE LEGAL IMPLICATIONS OF APPLYING THE CRIMINAL LAW TO HIV?

In addition to the social and public health implications, criminal prosecutions relating to HIV highlight serious inequalities in the application of the law. Many of the laws explicitly criminalizing HIV transmission or exposure are poorly drafted and capture behaviour that society has no interest in punishing.³⁹ The laws are often applied unfairly and selectively. This undermines human rights and cultivates a risk that due process may not be applied, confidentiality may be breached and inconclusive scientific evidence may be misinterpreted.

Some examples of how the law can be applied differentially include:

- **Sentencing.** Offences such as rape usually carry heavy custodial sentences in all countries but should the length of these sentences differ if the defendant is HIV-positive and has/has not passed on HIV?
- **Custody.** If a person living with HIV is prosecuted and sentenced to a custodial term, their care needs (such as access to ART, condoms and clean injecting equipment) are often overlooked or not adequately provided for in prison. There is an increased risk of onward HIV transmission within many prisons and the rights of the person living with HIV may be further violated.
- **Consent.** In most countries, a legal defence against a charge relating to the transmission of HIV rests on the concept of consent. Yet consent is open to interpretation and raises several questions such as when does one give consent? To what extent does that consent have to be 'informed' for it to be valid consent? Open disclosure or sometimes indirect inference of HIV-status can be sufficient for a defence in court. However, it can be very difficult to prove.
- **Evidence.** Where the resources exist, genetic tests of the HIV viruses in the different individuals can be used.⁴⁰ But the tests

and their limitations are not sufficiently understood by lawyers, police, people living with HIV and their advocates, juries and by those reporting on the case (such as the media). This creates a risk of an unfounded guilty plea or an unjust conviction based on misrepresentation of inconclusive evidence.

- **Police behaviour and law enforcement.** Due to the difficulties in proving the direction of transmission in a court case, extensive police investigations are often necessary and the sexual histories of many individuals are scrutinized. This can be a violation of people's right to privacy and such investigations can be as disruptive and stigmatizing as a prosecution itself – for the person bringing the charge and the witnesses, as well as for the accused.
- **Lack of accessible information for people living with HIV regarding legal services.** Many people living with HIV remain unaware of their rights and how to ensure that these are protected. The availability of – and access to – quality legal representation and advice should be an integral component of services available to people living with HIV.

Ensuring that those most susceptible to persecution and prosecution are well informed about the law, their rights, and about comprehensive prevention techniques is an effective way of mitigating the negative impact that criminal prosecutions relating to HIV can have.

“Living with HIV I feel like I am in prison, criminalization makes me feel like I have been locked up twice.”

African woman living with HIV, UK, 2005⁴¹

resources

- Weait, Matthew; Azad, Yusef (2005) *The criminalization of HIV transmission in England and Wales: questions of law and policy.* HIV/AIDS Policy and Law Review, Volume 10, Number 2, August 2005.
- EJ Bernard, Y Azad, AM Vandamme, M Weait and AM Geretti (2007) *HIV forensics: pitfalls and acceptable standards in the use of phylogenetic analysis as evidence in criminal investigations of HIV transmission,* HIV Medicine, 8, 382–387
- Pearshouse, R et al. (2008) *Legislation contagion: the spread of problematic new HIV laws in Africa.* 17th International AIDS Conference, Mexico City, abstract WEA0101, 2008
- UNAIDS Handbook for Legislators on HIV/AIDS, Law and Human Rights

“Experience over the past few years in the UK has demonstrated a real lack of knowledge amongst police, for example on how HIV is transmitted (there is too often an incorrect assumption that transmission is inevitable in any act of sex), or on the effectiveness of treatments (for many police in the UK it is still an ‘imminent death sentence’) ... All this simply underscores the need for effective HIV training for the police and criminal justice system, both on the biological facts around HIV and also on the social and human rights issues which are so inextricably involved.”

Yusef Azad, Director of Policy and Campaigns, National AIDS Trust (UK) (NAT)

ENGLAND AND WALES: PARTNERS IN CRIME

England and Wales: Section 20 of the Offences Against the Persons Act (OAPA) 1861 makes it a criminal offence to inflict grievous bodily harm, while Section 18 makes it an offence to do so with intent. Section 20 carries a maximum prison sentence of five years while the penalty for a Section 18 offence may be life in prison. ‘Grievous bodily harm’ can in fact include psychological harm.⁴²

Non-HIV-specific laws can be applied to the criminal prosecution of HIV transmission. This case study shows how civil society groups have successfully worked alongside policy makers to ensure clearer guidelines on how the law can (and cannot) be applied.

In England and Wales, the OAPA 1861 is a non HIV-specific law but has been interpreted by the courts to include the transmission of a serious disease. To date, HIV is the only disease to result in a successful conviction under this law (one case in Scotland, which has different laws, also included Hepatitis C) which fuels the stigma associated with HIV and the environment of fear, shame and secrecy in which the virus thrives.

From 2006 to 2008 HIV advocates in England and Wales worked with the Crown Prosecution Service (CPS) to develop guidelines clarifying the application of the law to HIV transmission. In March 2008 the CPS for England and Wales released an updated policy on cases involving the intentional or reckless sexual transmission of infection.⁴³ The National AIDS Trust is now working with the Association of Chief Police Officers to develop guidance for police in the investigation of such cases which will be consistent with the newly published CPS Guidelines.

Working with police is an important aspect of legal advocacy, as is outreach to support people living with HIV during their involvement with law enforcement services. Often, police assume they have a right to investigate the whole sexual history of someone living with HIV and they contact past sexual partners even where there is no evidence of a crime having been committed. The investigations can be very invasive for the accused as well as the person bringing the case to the police’s attention – and can in fact take many months to resolve, even if the case never goes to court. In addition, investigations may involve police disclosing someone’s HIV-status to others, undermining their right to privacy. There are instances of people living with HIV who have felt bullied or pressurized by the authorities (including health advisors) into making a complaint against a sexual partner. Laws that criminalize transmission can provide a cloak of legitimacy for unjustified and discriminatory harassment of people living with HIV.

resources

- NAT (2008) ‘Prosecuting HIV transmission: developing guidelines for prosecutors’ <http://www.nat.org.uk/document/457>
- CPS Policy for prosecuting cases involving the intentional or reckless sexual transmission of infection <http://www.cps.gov.uk/publications/prosecution/sti.html>
- Azad, Y. (2008) *Developing guidance for HIV prosecutions: an example of harm reduction?* HIV/AIDS Policy and Law Review 13[1]
- Terrence Higgins Trust, Criminal prosecutions for transmitting HIV: <http://www.tht.org.uk/informationresources/prosecutions/>
- African HIV Policy Network (2005) *Position Paper on the Criminalization of HIV Transmission*, http://www.ahpn.org/downloads/policies/ahpn_position_on_criminalization1.doc

8

WHAT ARE THE HUMAN RIGHTS IMPLICATIONS OF APPLYING THE CRIMINAL LAW TO HIV?

According to the WHO, 'health' refers to a 'state of complete physical, mental, and social well-being' (1946). This is significant because it recognizes the wider social and cultural aspects of someone's life, not only their physical fitness. As a result, rights relating to education, accessing information and civic participation have direct bearing on the right to health; and vice versa. However, HIV is not only directly relevant to the right to health and effective responses to HIV require the implementation of all human rights (civil and political, economic, social and cultural) and fundamental freedoms of all people.⁴⁴ Addressing issues such as stigma and discrimination are therefore pivotal cornerstones of any rights-based approach to addressing HIV.

Under international law, States have the obligation to implement for all within their jurisdiction human rights recognized under customary international law or in treaties ratified by the State. Implementation of human rights requires States to ensure that human rights are respected, protected and fulfilled for everyone. This includes ensuring that domestic laws, including criminal laws and correctional systems are consistent with international human rights obligations and are not misused in the context of HIV or targeted against vulnerable groups.

Whose rights and whose responsibilities?

Criminal prosecution relating to HIV seems to favour the rights of people who are not living with HIV over the rights of people who are. The first criteria for the law to be applied are related to a virus in the blood; and the alleged action or incident is only a secondary consideration. In addition, the law can be selectively applied and can be used as an instrument to further marginalize or discriminate. This is particularly true for people whose existence may already be seen as 'illegal' such as

undocumented migrants, or sex workers, people who use drugs or men who have sex with men where there are laws criminalizing these behaviours.

Key issues highlighting how criminal prosecutions relating to HIV undermine fundamental principles of human rights:

- **The right to the highest attainable standard of health.**⁴⁵ The criminalization of HIV transmission or exposure does not recognize (and in fact may reinforce) the barriers and inequalities to accessing health services.
- **The law can create barriers to seeking health services.** This is especially true for people on the margins of society and for those most vulnerable to HIV. For example an undocumented migrant living with HIV risks deportation in some countries if they become known to the immigration officials through medical records. This can be equivalent to a death sentence if deportation is to a country where ART is not accessible or available.

"The laws do not take into account existing social, economic or other existing inequalities or injustices in our societies. Therefore those most needing the protection of the law are in fact in most danger of having their human rights further eroded by these laws."

Alice Welbourn, ICW, UK, 2008

"Not enough has been done to address the violence, inequality and human rights abuses that drive the epidemic – in other words, not enough has been done to address the real legal challenges."

Richard Pearshouse, Director, Research & Policy, Canadian HIV/AIDS Legal Network, 2008

Member States of the UN have recognized that “the full realization of all human rights and fundamental freedoms for all is an essential element in the global response to the HIV/AIDS pandemic, including in the areas of prevention, treatment, care and support, and recognize that addressing stigma and discrimination is also a critical element in combating the global HIV/AIDS pandemic.”

Political Declaration on HIV/AIDS, 2006⁴⁷

- **Access to appropriate health services can be difficult.** In some countries, a woman who does not access PMTCT services could be prosecuted for passing the virus on to her child, even though the law does not recognize the difficulties she might face in accessing them. These could include the proximity of the services, the cost and opportunity of accessing them, the quality of the services available, as well as the potential stigma or discrimination she may face (or fears) if she is HIV-positive.
- **Quality of care.** Clients from vulnerable groups may face stigma from clinic staff and may receive a lower quality of care compared to other clients.
- **The right to privacy.** Criminalization of HIV transmission or exposure does not recognize the sensitivity and obstacles to disclosure. When and how people choose to disclose their status is a very personal choice – it is not for any other individual, or the state for that matter, to force or expect disclosure. If a person is under investigation for an HIV-related crime, their status becomes common information to those conducting the investigation and often more publicly. The concept of confidentiality is ignored and even if not prosecuted or convicted, their disclosure is no longer in their own hands. However, the right to privacy is not absolute, and in some very limited circumstances a person’s privacy may be interfered with by the State in accordance with the mechanisms set out in the relevant human rights conventions.⁴⁶
- **Equality in the eyes of the law.** In all consensual sexual relationships, each partner has equal responsibility to protect their own sexual and reproductive health, yet the criminalization of HIV transmission or exposure shifts the balance of responsibility onto a person living with HIV. While the laws relating explicitly to HIV transmission or exposure are not gender specific, there may be other statutory or customary laws that do not treat all people the same (for example laws impeding property ownership or inheritance for women or laws that criminalize debauchery or same sex relationships).

resources

Gruskin, S. and Tarantola, D. (2005) “Health and Human Rights”, in *Perspectives on health and human rights*, in S. Gruskin et al (eds), pp. 3-58.

UNAIDS International Guidelines on Health and Human Rights

UNGASS (2008) Declaration of Commitment on HIV/AIDS and Political Declaration on HIV/AIDS: midway to the Millennium Development Goals: Report of the Secretary-General (2008). UN Document A/RES/60/262.

Amnesty Guidelines on Health and Human Rights, <http://www.amnesty.org/en/health-and-human-rights/background> (Accessed 2008)

Human Rights Watch: HIV and human rights http://www.hrw.org/doc/?t=hivrights&document_limit=0,5 (Accessed 2008)

ASK AN EXPERT

REASSERTING RIGHTS Susan Timberlake, Human Rights Advisor, UNAIDS, 2008

The threat of criminal prosecution intensifies a climate of denial, secrecy, and fear. It creates legal liability without empowering citizens to do what they want to do anyway: avoid getting infected, avoid infecting others, and live. It creates an 'us' and 'them' mentality when HIV has taught us that we have mutual responsibility for sexual health. A human rights achievement of the HIV epidemic has been the recognition of positive people as equal and critical actors in the response.

In the Political Declaration on HIV (2006), governments agreed that the way to deal with the epidemic and to protect human rights was to make 'prevention of HIV infection the mainstay of national responses to the pandemic' and they pledged 'to promote a social and legal environment that is supportive of and safe for voluntary disclosure of HIV-status'.⁴⁸ Criminal sanctions create the opposite of such an environment.

Alternatives to criminalization of HIV transmission or exposure are often hard work because they challenge long-standing social taboos and inequities, yet they also can protect both public health and human rights. Three key principles are:

1. **To do what works on a much larger scale.** Getting HIV prevention, treatment, care and support programmes to those most vulnerable to infection and to those already

infected should be the focus of our global energies. But governments still have not expanded prevention programmes (including PMTCT) nor have they ensured anywhere near the necessary coverage of vulnerable and at risk populations – women, young people, men who have sex with men, drug users and sex workers.⁴⁹

2. **Reduce HIV vulnerability and risk.** For women and girls, this means governments need to protect them through law and social change programmes from gender inequality and violence, including sexual violence inside and outside marriage. All too few governments pass marital rape laws or seriously enforce laws against domestic violence, rape and early marriage. Nor are there sufficient laws or programmes to empower women and girls in educational and economic terms to help them become less vulnerable to HIV.
3. **Empower people living with HIV.** In many parts of the world, people living with HIV still stand to lose everything (family, job, home, community) and thus have every incentive to avoid getting tested, disclosing their status, or engaging in any behaviour that might reveal their status, such as safer sex. People living with HIV must have the knowledge, means and support to know their status and know how to avoid infecting others and avoid contracting any other infections. This includes being protected from stigma and discrimination so that they can be open about their status or about practicing safer sex.

resources

- UNAIDS (2008). Policy Brief Criminalization of HIV Transmission.

WHAT LAWS AND STRATEGIES SHOULD REPLACE CRIMINALIZATION?

“All strategies, to be effective, need to take a holistic view of how HIV affects all our lives – and really need to have the fully informed involvement of those most affected by these issues at their heart.”

Alice Welbourn, ICW, UK, 2008

There are clear arguments from a health and human rights perspective about why the application of the criminal law to HIV is doing more harm than good. The most effective strategies will always be those that are relevant to local context and need, and will be informed by the issues and priorities of people living with HIV. In so doing, they will be more effective in preventing HIV and in promoting public health.

People living with HIV are heterogeneous and represent a cross section of all sectors of society. Issues of race, ethnicity, gender, orientation, age, language, and vulnerability will all affect how effective initiatives need to be tailored. Information and support around issues such as safer sex, having children and safer injecting use should be available in all settings including medical centres, treatment delivery sites, family planning clinics, home-based care programmes and community centres. Specifically tailored information and support based on the realities of people living with HIV needs to be provided at places where particular key vulnerable populations meet and explicit information should be developed that can inform the choices that people living with HIV (and their sexual partners) make.

Suggested strategies and alternatives to criminalization will be most effective when implemented in combination, and include:

Strategy One: Create a protective and enabling legal environment

Too often HIV legislation is inherently insensitive and has led to simplistic laws driven by prejudice rather than evidence. Many of the laws that are being used to prosecute HIV transmission and exposure are negating – not promoting – human rights. Legislators, advocates and activists alike should adhere to the

guidelines that exist to ensure that human rights principles underpin legislation.⁵⁰ In so doing, the law should protect the human rights of all, including people living with HIV and those most vulnerable to HIV, which covers all civil and political, economic, social and cultural rights. This should ensure the right to privacy, confidentiality, informed consent, voluntary disclosure, and facilitate equitable access to services.

Strategy Two: Meaningfully involve people living with HIV

People living with HIV must be involved in the decisions relating to their lives. Too often laws, policies, management decisions, and health service delivery priorities are determined without the meaningful involvement of people living with HIV. In accordance with the Greater Involvement of People Living with HIV/AIDS (GIPA) Principle,⁵¹ the active engagement of people living with HIV in determining their own unique prevention reality is key to ensuring relevance, efficacy and applicability.

Strategy Three: Initiate, scale up and make positive prevention a reality in all national HIV responses

Historically, traditional prevention efforts have frequently reached out only to those who are HIV negative. This is clearly

of crucial importance, yet it ignores the needs, and important role, of those who are HIV-positive. The HIV prevention agenda needs to keep pace with new and dynamic demands of the epidemic – and this includes responding to the reality of treatment access, the increasing number of sero-discordant relationships and the importance of addressing the specific issues and rights of people living with HIV.

Responsibility for safer and responsible sexual behaviour, and for preventing HIV transmission, should lie with everyone irrespective of known and/or perceived HIV-status. Positive prevention encompasses a broad set of principles and actions that empower people living with HIV to have the knowledge and power to manage their health and have healthy lives.⁵² This should include the following elements: treatment literacy and nutrition; sexual and reproductive health; avoiding other sexually transmitted or opportunistic infections; and the realization of rights to a productive, satisfying and enjoyable life. Positive prevention should be envisaged as part of a broader sexual and reproductive health strategy and included as a component of comprehensive HIV prevention initiatives.

Promoting a culture of shared responsibility (and not one of blame and criminality) could also improve communication and equality within relationships. HIV programmes should deliver a comprehensive package of inclusive messages which could also act as a model for stigma reduction.

Strategy Four: Promote a stigma free and empowering environment

Campaigns and initiatives based on acceptance, awareness, compassion and understanding can be more effective than those based on punishment or exclusion in promoting public health and human rights. Too often interventions are based on fear (of criminal prosecution or of disease transmission) rather than on pillars of positive living, sexual pleasure, hope and empowerment. Initiatives should instead include better programmes for counselling and supporting disclosure as part of broad-based programmes on stigma and discrimination. They should also include advocacy to enable the enactment of anti-discrimination laws to protect the rights of everyone including people living with HIV.

Strategy Five: Adopt long-term strategies to address underlying inequalities

Too often laws undermine the real offence – for example the violation of women’s rights – by focusing on the HIV-status of the offender. This could be seen as an ‘easy target’ rather than dealing with much deeper and long-term issues such as gender imbalances, racism, xenophobia or homophobia. Long-term investment should be made to tackle the underlying inequalities that perpetuate vulnerability to HIV. This would better enable advocates, lawyers and policy makers to address the demand for the criminalization of HIV transmission or exposure and more effectively promote both public health and human rights.

“Efforts aimed at curbing the spread of HIV/AIDS have a greater chance of success in a climate of openness and education than in one of prohibition and punishment.”

Grace Tikembenji Malera,
Deputy Director for Legal
Services, Malawi Human
Rights Commission, 2007⁵³

ASK AN EXPERT

10 REASONS WHY CRIMINALIZATION IS A BAD IDEA Edwin Cameron, Justice of the Supreme Court, South Africa

Today, one of the most serious issues in the AIDS epidemic is the use of criminal statutes and criminal prosecutions against HIV transmission.

Such laws are increasingly wide in their application, and frightening in their effects. They aggressively attack rational efforts to lessen the impact and spread of the epidemic and are creating a crisis in HIV management and prevention efforts.

So what lies behind this increasing trend of criminalization? What is the rationale for such laws?

HIV is a fearsome virus, and its effects are potentially deadly. The justification is that public officials should be able to invoke any available and effective means to counter its spread. African lawmakers and policy-makers, in particular, have good reason to look for strong remedies. Many African countries face a massive epidemic with agonising social and economic costs and therefore reversing the spread of HIV is vital. However, I

believe these reasons are entirely counter-productive and they need to be challenged, rationally, powerfully and systematically.

1. **Criminalization is ineffective** as in the majority of cases, the virus spreads when two people have consensual sex, neither of them knowing that one has HIV.
2. **Criminal prosecutions are a misguided substitute** for measures that really protect those at risk of contracting HIV. The focus should be on ending deaths, stigma, discrimination, and suffering.
3. **Far from protecting women, criminalization victimises, oppresses and endangers them.** In Africa most people who know their HIV-status are female. The material circumstances in which many women find themselves – especially in Africa – make it difficult and often impossible for them to negotiate safer sex, or to discuss HIV at all. These provisions will hit women hardest, and will expose them to assault, ostracism and further

stigma. They will become more vulnerable to HIV, not less.

4. **Criminalization is often unfairly and selectively enforced.** Prosecutions and laws single out already vulnerable groups – like sex workers, men who have sex with men and, in European countries, black males.
5. **Criminalization places blame on one person** instead of responsibility on two. For nearly three decades the universal public information message has been that no one is exempt from it. So the risk of HIV (or any sexually transmitted infection) must now be seen as an inescapable facet of having sex. It is inappropriate and unfair to place all the blame on the person with HIV.
6. **Such laws are difficult and degrading to apply.** This is because they intrude on the intimacy and privacy of consensual sex. No one suggests that a person knowing they have HIV, who sets out intending to infect another, and achieves their

aim, ought to escape prosecution. But in cases where there is no deliberate intention, the categories and distinctions of the criminal law become fuzzy and incapable of offering clear guidance.

7. **Many of these laws in existence are extremely poorly drafted.** Partly because it is difficult to prove an offence that involves consensual sex, and because of the difficulties of applying the categories of the criminal law, many of these laws end up being a 'hodge-podge' of confused legislative intent and bad drafting.
8. **Criminalization increases stigma.** It is stigma that makes those at risk of HIV reluctant to be tested; it is stigma that makes it difficult, often impossible, for them to speak about their infection; and it is stigma that continues to hinder access to the life-saving ART therapies that are now increasingly available. Such laws and prosecutions in turn only add fuel to the fires of stigma.

9. **Criminalization is a blatant deterrent to testing.** Across Africa, the life-saving drugs that suppress the virus and restore the body to health are becoming increasingly available. But why should any woman in Kenya want to find out her HIV-status, when her knowledge can only expose her to risk of prosecution? The laws are not just a war on women. They are a war on all people with HIV, and they constitute an assault on good sense and rationality in dealing with the epidemic.
10. **Criminalization assumes the worst about people with HIV,** and in doing so it punishes vulnerability. Evidence shows that countries with human rights laws that encourage the undiagnosed to test for HIV do much better at containing the epidemic than those that have adopted punitive and moralistic strategies, including those relying on the criminal law as a sanction.

In light of all of this, the clear goal should be to fight against stigma, against discrimination, and against criminalization – and to fight for justice, good sense, effective prevention measures and for access to treatment.

MAURITIUS: WORKING IN HARMONY – LOBBYING FOR BETTER LAWS IN MAURITIUS

Mauritius: HIV and AIDS Preventive Measures Act 2006. The act provides measures for the control and prevention of the propagation of HIV by (a) making available HIV testing facilities; (b) the registration of those facilities; (c) the testing of donated blood; (d) the counselling of persons affected with HIV or AIDS; and (e) a system of syringe and needle exchange.

It is possible to make a difference and to engage policy makers to enact laws based on sound human rights principles and approaches, and this example from Mauritius shows how.

Although Mauritius has a relatively low HIV prevalence the virus has spread mainly among people who use drugs. According to UNAIDS, exposure to non-sterile injecting equipment is the most important factor for HIV infection in Mauritius.⁵⁴ Injecting drug use was the cause of the highest number of new HIV infections: 92% in 2005 and 85.2% in 2006.⁵⁵ As a result, an HIV bill was in the pipeline as the Minister of Justice and the Minister of Health were pressured by civil society,

which wanted to introduce a Needle Exchange Programme. When it came to drafting the law, it became apparent that the bill would include a provision for the prosecution for the ‘wilful transmission of HIV’.

In response to this, the AIDS and Rights Alliance of Southern Africa (ARASA) and Prevention Information et Lutte Contre le SIDA (PILS) organized a workshop with civil society, parliamentarians, state law officials and others in Mauritius about human rights and the disadvantages of the criminalization of HIV transmission. They discussed the real impact of such laws on women and other vulnerable groups and why – despite the intention behind the law appearing good – it actually constitutes bad public policy. ARASA assisted local NGOs with drafting submissions on the proposed laws that they can use to engage with parliamentarians and parliamentary sub-committees and to submit as formal submissions on the law. Local partners continued to lobby parliament and as a result of this the bill was adjusted. The act was passed in December 2006.⁵⁶

Key elements of the act include an emphasis on confidentiality and human rights, guaranteeing that

people living with HIV have equal rights to employment and health care. It also makes it illegal to impose HIV testing as a pre-condition for employment or continued employment, and it includes penalties for HIV discrimination. It also includes specific details about harm reduction and needle exchange. In the period from December 2006 to March 2007 more than 2,000 syringes were exchanged.⁵⁷

However, there are challenges. To date no one has used this law to claim reparation in a case of discrimination even though these cases exist. According to Nicolas Ritter, the Director of PILS, “no one is, for the moment, willing to go public while going to court.” PILS is working with people living with HIV to help them know their rights and to feel empowered to realize them.

While civil society still has some concerns about the act and would like to see it improved further, the consultation and advocacy was able to ensure that the criminal prosecution of ‘wilful transmission’ and other particularly detrimental clauses (such as compulsory disclosure) were removed before the bill was passed.

10

WHY MUST WE ACT NOW?

It takes time to advocate for good strategies and laws – and for that advocacy to lead to law reform and an environment which helps prevent HIV transmission. In the meantime, in countries where laws that criminalize HIV transmission or exposure already exist and are being utilized, efforts should focus on mitigating the stigma and discrimination that such legislation and resulting investigations and prosecutions can cause.

- **To prevent new laws being passed.** Passing new legislation is a long and drawn out process and it will be more effective to lobby policy and law makers to ensure that laws on the criminalization of HIV transmission or exposure are not put into place. We must also strengthen existing HIV prevention efforts.
- **To advocate the repeal of existing HIV specific laws.** In countries that already criminalize the transmission of HIV, evidence should be collected to document the impact of these laws and the evidence should be used to advocate for legal reform and repeal the laws specific to the criminalization of HIV transmission or exposure.
- **To raise awareness about the specific laws to ensure that people living with HIV are familiar with the legal situation in their country.** In countries where prosecutions are already taking place, there is an urgent need to act to support people living with HIV who may not be aware of these laws nor their rights to legal representation. This is especially true for young people living with HIV who may have only recently been diagnosed and may be largely unaware of their rights in regard to the law and their rights generally.
- **To promote and protect the rights of people living with HIV and advocate for more legal and other psycho-social support services.** Working with and sensitizing the police, health staff, the judiciary and the media should be an important aspect of legal advocacy. This should also include supporting people living with HIV during their experiences with law enforcement and the media.
- **To ensure that when criminal laws are applied they focus on the offence and not HIV-status.** In most cases (for example during the prosecution itself or in the media coverage) the HIV-status of the perpetrator is highlighted, when it should be irrelevant. Advocates, police and lawyers alike should ensure that it is the act itself that is the focus, not an individual's HIV-status.
- **To mitigate the impact of these laws where they are already being applied.** Some strategies include:
 1. Improving access to prevention services for marginalized groups, including harm reduction.
 2. Advocating for guidelines or clarity about the meaning of the laws.
 3. Assisting people living with HIV to know their rights and responsibilities, and to understand the implications of the legal framework in which they live.
- 4. Advocating for a supportive and stigma-free environment to promote voluntary disclosure and providing counselling services for newly diagnosed people.
- 5. Sensitizing police so that they are informed about the science and realities of HIV as well as the potential emotional and social impacts of an investigation.
- 6. Building closer relationships between community support organisations and the police (in advance of cases).
- 7. Identifying local lawyers and effective legal support services who can represent and provide appropriate and reliable legal advice for people charged with HIV transmission or exposure.
- 8. Providing appropriate legal services or referrals and other emotional support for people who find themselves involved in a criminal investigation relating to HIV.
- 9. Exploring possibilities of mediation or settlement options instead of a criminal prosecution.
- 10. Improving the human rights of persons in detention.

resources

- UNAIDS. Legal Aspects of HIV/AIDS – A guide for legal and policy reform
- International Community of Women Living with HIV/AIDS Criminalization webpage <http://icw.org/node/354>

ANNEX 1: TABLE OF COUNTRIES AND LAWS WHERE HIV TRANSMISSION OR EXPOSURE HAS BEEN CRIMINALISED AND OTHER LAWS RELATING TO HIV VULNERABILITY

Country	Countries that have enacted specific laws to criminalize HIV transmission or exposure ¹	Countries where non-specific HIV laws have applied to HIV transmission or exposure ¹	Countries considering or proposing laws to criminalize HIV transmission or exposure; or with unconfirmed data and seeking additional information ^{1,x,s}	Countries where same sex activities between consenting adults is prohibited ²	Countries where sex work ('prostitution') is deemed 'illegal' ³	Countries which impose coercive or compulsory treatment for people who use drugs and/or the death penalty is applied for drug offences ⁴
Afghanistan						
Albania						
Algeria						
Andorra						
Angola						
Antigua and Barbuda						
Argentina ^x						
Armenia						
Australia						
Austria						
Azerbaijan [*]						
Bahamas [§]						
Bahrain						
Bangladesh						
Barbados						
Belarus						
Belgium						
Belize						
Benin						
Bermuda						
Bhutan						
Bolivia ^x						
Bosnia and Herzegovina						
Botswana						
Brazil						
Brunei						
Bulgaria						
Burkina Faso [*]						
Burundi						
Cambodia [§]						
Cameroon						
Canada						
Cape Verde						
Central African Republic						
Chad						
Chile ^x						
China						
Colombia ^x						
Comoros						
Congo (Brazzaville)						
Congo Democratic Republic of the [*]						
Costa Rica ^x						
Côte d'Ivoire						
Croatia						
Cuba ^x						

Country	Countries that have enacted specific laws to criminalize HIV transmission or exposure ¹	Countries where non-specific HIV laws have applied to HIV transmission or exposure ¹	Countries considering or proposing laws to criminalize HIV transmission or exposure; or with unconfirmed data and seeking additional information ^{1 x §}	Countries where same sex activities between consenting adults is prohibited ²	Countries where sex work ('prostitution') is deemed 'illegal' ³	Countries which impose coercive or compulsory treatment for people who use drugs and/or the death penalty is applied for drug offences ⁴
Cyprus						
Czech Republic						
Denmark						
Djibouti						
Dominica						
Dominican Republic						
East Timor (Timor Timur)						
Ecuador ^x						
Egypt						
El Salvador ^x						
Equatorial Guinea						
Eritrea						
Estonia						
Ethiopia						
Fiji						
Finland						
France						
Gabon						
Gambia, The						
Georgia						
Germany						
Ghana						
Greece						
Grenada						
Guatemala ^x						
Guinea						
Guinea-Bissau						
Guyana						
Haiti						
Honduras ^x						
Hungary						
Iceland						
India						
Indonesia [*]						
Iran						
Iraq [*]						
Ireland						
Israel						
Italy						
Jamaica						
Japan						
Jordan						
Kazakhstan						
Kenya						
Kiribati						
Korea, North						
Korea, South						
Kuwait						
Kyrgyzstan						
Laos						
Latvia						

Country	Countries that have enacted specific laws to criminalize HIV transmission or exposure ¹	Countries where non-specific HIV laws have applied to HIV transmission or exposure ¹	Countries considering or proposing laws to criminalize HIV transmission or exposure; or with unconfirmed data and seeking additional information ^{1 x §}	Countries where same sex activities between consenting adults is prohibited ²	Countries where sex work ('prostitution') is deemed 'illegal' ³	Countries which impose coercive or compulsory treatment for people who use drugs and/or the death penalty is applied for drug offences ⁴
Lebanon						
Lesotho						
Liberia						
Libya						
Liechtenstein						
Lithuania						
Luxembourg						
Macedonia, Former Yugoslav Republic of						
Madagascar						
Malawi						
Malaysia						
Maldives						
Mali						
Malta						
Marshall Islands						
Mauritania						
Mauritius						
Mexico ^x						
Micronesia, Federated States of						
Moldova						
Monaco						
Mongolia						
Montenegro						
Morocco						
Mozambique						
Myanmar (Burma)						
Namibia						
Nauru						
Nepal						
Netherlands						
New Zealand						
Nicaragua ^x						
Niger*						
Nigeria						
Norway						
Oman						
Pakistan						
Palau						
Panama ^x						
Papua New Guinea [§]						
Paraguay ^x						
Peru ^x						
Philippines [§]						
Poland						
Portugal						
Qatar						
Romania						
Russia						
Rwanda						
Saint Kitts and Nevis						
Saint Lucia						

Country	Countries that have enacted specific laws to criminalize HIV transmission or exposure ¹	Countries where non-specific HIV laws have applied to HIV transmission or exposure ¹	Countries considering or proposing laws to criminalize HIV transmission or exposure; or with unconfirmed data and seeking additional information ^{1 x §}	Countries where same sex activities between consenting adults is prohibited ²	Countries where sex work ('prostitution') is deemed 'illegal' ³	Countries which impose coercive or compulsory treatment for people who use drugs and/or the death penalty is applied for drug offences ⁴
Saint Vincent & The Grenadines						
Samoa						
San Marino						
Sao Tome and Principe						
Saudi Arabia						
Senegal						
Serbia						
Seychelles						
Sierra Leone						
Singapore						
Slovakia						
Slovenia						
Solomon Islands						
Somalia						
South Africa §						
Spain						
Sri Lanka						
Sudan						
Suriname						
Swaziland						
Sweden						
Switzerland						
Syria						
Taiwan						
Tajikistan						
Tanzania						
Thailand §						
Togo						
Tonga						
Trinidad and Tobago						
Tunisia						
Turkey						
Turkmenistan						
Tuvalu						
Uganda						
Ukraine						
United Arab Emirates						
United Kingdom						
United States of America						
Uruguay x						
Uzbekistan						
Vanuatu						
Vatican City						
Venezuela x						
Vietnam §						
Western Sahara						
Yemen						
Zambia						
Zimbabwe						

1 Data is incomplete at time of printing and has been taken from different sources. For Europe, the information was taken from 'Criminalisation of HIV Transmission in Europe' <http://www.gnppus.net/criminalisation/rapidscan.pdf>. For African countries which have instated or are contemplating N'Djamena Model Laws, see NAM's aidsmap news at <http://www.aidsmap.com/en/news/8250DD99-C534-4C29-A078-EDF602FB615.asp> and for other reported cases/incidents, see Criminal HIV Transmission blogspot at <http://criminalhivtransmission.blogspot.com/>. The map will be updated with the results from the GNP+ Criminalisation Scan in 2009.

x Additional sources include Edgar Carrasco, Director Human Rights, ACCSI, data prepared 2007, from Universitas Freiburgensis www.unifr.ch/odp/1/derechoopenalley.htm. § unconfirmed data under review. 2 Data from the International Lesbian and Gay Association (ILGA) and Amnesty International: http://www.ilga.org/statehomophobia/ILGA_State_Sponsored_Homophobia_2008.pdf; Amnesty International Report 2008, at <http://threport.amnesty.org/en/regions/middle-east-and-north-africa/morocco-and-western-sahara>. 3 Data from the US State Department. This column has been shaded in male or female adult (generally 18yr but a few exceptions) 'prostitution' has been categorised as illegal, and where penalties can be imposed under the law. It has not been possible to differentiate between different aspects of sex work that are criminalisation (for example sex, solicitation, the transaction etc) because the data is not currently available. 4 Data taken from the International Harm Reduction Association's report, Global State of Harm Reduction 2008 at <http://www.ihra.net/Assets/582/1/GSHRFULLReport.pdf>; the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA)'s European Legal Database on Drugs at <http://eldd.emcdda.europa.eu/html.cfm/index5174EN.html>; and the Drug Policy Alliance Network (DPAN) at <http://www.drugpolicy.org>. * Any country that has laws that do not fully criminalise aspects related to HIV vulnerability but have some elements have not been shaded in the table but have been shaded slightly darker on the map.

ENDNOTES

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ORGANIZATIONS PROVIDING INFORMATION AND ADVOCACY SUPPORT:

AFRICA

AIDS Legal Network (South Africa):
www.aln.org.za

AIDS Rights Alliance for Southern
Africa (ARASA): www.arasa.info

AMERICAS

American Civil Liberties Union –
AIDS Project: www.aclu.org

Canadian HIV/AIDS Legal Network:
www.aidslaw.ca

Gestos (Brazil): www.gestospe.org.br

ASIA AND THE PACIFIC

Asia Pacific Network of People Living
with HIV APN+: www.apnplus.org

Australian Federation of AIDS
Organisations (AFAO):
www.afao.org.au

Lawyers Collective (India):
www.lawyerscollective.org

National Association of People Living
with HIV/AIDS Australia:
www.napwa.org.au/

Naz Foundation (India):
www.nazindia.org

EUROPE

African HIV Policy Network (UK):
www.ahpn.org

European Legal Database on Drugs:
www.eldd.emcdda.europa.eu/html.
cfm/indexEN.html

National AIDS Trust (UK):
www.nat.org.uk

Terence Higgins Trust (UK):
www.tht.org.uk

INTERNATIONAL

Amnesty International:
www.amnesty.org/en/health-and-
human-rights

The ATHENA Network:
www.athenanetwork.org

Global Network of People Living with
HIV/AIDS (GNP+): www.gnpplus.net

Human Rights Watch (HRW):
www.hrw.org

Interagency Coalition on AIDS and
Development (ICAD):
www.icad-cisd.com

International Community of Women
Living with HIV/AIDS (ICW):
www.icw.org

International Planned Parenthood
Federation (IPPF): www.ippf.org

Joint United Nations Programme on
HIV/AIDS (UNAIDS): www.unaids.org

Open Society Institute (OSI):
www.soros.org

Panos Global AIDS Programme:
www.panosaid.org

The People Living with HIV Stigma
Index: www.stigmaindex.org

United Nations Development
Programme (UNDP): www.undp.org

United Nations Population Fund
(UNFPA): www.unfpa.org

World AIDS Campaign:
www.worldaidscampaign.org

THE INTERNATIONAL PLANNED PARENTHOOD FEDERATION (IPPF)

IPPF is a global service provider and a leading advocate of sexual and reproductive health and rights for all. It is a worldwide movement of national organizations working with and for communities and individuals.

IPPF works towards a world where women, men and young people everywhere have control over their own bodies, and therefore their destinies. A world where they are free to choose parenthood or not; free to decide how many children they will have and when; free to pursue healthy sexual lives without fear of unwanted pregnancies and sexually transmitted infections, including HIV. A world where gender or sexuality are no longer a source of inequality or stigma. We will not retreat from doing everything we can to safeguard these important choices and rights for current and future generations.

THE GLOBAL NETWORK OF PEOPLE LIVING WITH HIV (GNP+)

GNP+ is a global network for and by people living with HIV. Its overall aim is to improve the quality of life of people living with HIV. Its work is based on a policy platform that promotes global access to HIV care and treatment, ending stigma and discrimination, and greater and more meaningful involvement of people living with HIV in decisions that affect their lives and their communities.

THE INTERNATIONAL COMMUNITY OF WOMEN LIVING WITH HIV/AIDS (ICW)

ICW is the only international network run for and by HIV-positive women. Its purpose is to promote the many voices of women living with HIV and advocate for changes that improve their lives. The work of ICW is framed by a human rights strategy that focuses on three areas: gender equity; access to care, treatment and support; and the right to meaningful involvement in all decisions that affect the lives of women living with HIV.



International Community of
Women Living with HIV/AIDS (ICW)

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“HIV is a virus, not a crime. That fact is elementary, and all-important. Too often law-makers and prosecutors overlook it.”

Edwin Cameron, Justice of the Supreme Court, South Africa, 2008

“For the foreseeable future we will never have an AIDS-free world, but because of it we should have found a new way to live and to love – becoming wiser and richer because of it. HIV must be embraced, not feared.”

Nono Simelela, Director of Technical Knowledge and Support, IPPF, UK, 2008

“AIDS makes us angry. But in law we must be rational. We must take as our guiding principle for law something more than the creation of a response to a dangerous epidemic. We must look for effective and just laws that contribute to slowing the spread of AIDS.”

Michael Kirby, Justice of the Supreme Court, Australia, 1995