

ADVANCING HIV JUSTICE

A PROGRESS REPORT ON ACHIEVEMENTS AND CHALLENGES
IN GLOBAL ADVOCACY AGAINST HIV CRIMINALISATION



1. ACKNOWLEDGMENTS

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We would especially like to acknowledge the tireless work of advocates around the world challenging laws, policies and practices that inappropriately regulate and punish people living with HIV, without whom this report would not have been possible.

The Global Network of People Living with HIV (GNP+) and the HIV Justice Network gratefully acknowledge the financial contribution of UNAIDS.

PUBLISHED BY:

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Design: Kieran McCann, NAM (kieran@nam.org.uk)

Suggested citation: Global Network of People Living with HIV (GNP+) and HIV Justice Network. *Advancing HIV Justice: A progress report of achievements and challenges in global advocacy against HIV criminalisation*. Amsterdam/London, 2013.

2. FOREWORD

Ever since the HIV epidemic began, there have been those who want to address HIV – and people living with HIV – with punitive approaches. One of these approaches has been the application of criminal laws against people living with HIV for non-disclosure, exposure and transmission. Most of these laws, and the prosecutions under them, have been overly broad. That is, they disregard scientific evidence about HIV and/or ignore critical criminal law principles, including foreseeability, intent, causality, proportionality, defence and proof. For those prosecuted and convicted, these laws result in miscarriages of justice and lives ruined. For the HIV epidemic, these prosecutions send out misleading and discriminatory messages, undermining proven public health strategies.

The overly broad criminalisation of HIV non-disclosure, exposure and transmission is one of the most perverse forms of HIV-related discrimination, and one of the hardest to get rid of. For years, civil society, particularly people living with HIV, have led efforts against this injustice. *Advancing HIV Justice* represents another courageous and powerful attempt by civil society to monitor and bring to light the disproportionate and heavy hand of the criminal law against people living with HIV, as well as the positive developments where law makers and judges have seen reason and rolled back, or altogether dispensed with, the prosecution of people living with HIV.

Many laws criminalising HIV non-disclosure, exposure and transmission were put in place due to ignorance about how HIV is transmitted and what sort of harm it causes. Fear of HIV and discrimination against people living with HIV are almost palpable in many of these laws and in the sentences that result from prosecution. When people are convicted for acts that did not, or could not, cause HIV transmission and given years and years in prison, clearly something is deeply wrong. Not only is an individual destroyed, but also a community becomes confused and fearful about the right and the wrong things to do in the context of HIV.

This document scans the current situation, the good developments and the bad; details the many initiatives by independent experts, governments, the United Nations and civil society; describes the latest research and its findings in terms of prosecutions and convictions and the social impact of these on the HIV response and people's behaviour. Most importantly, it powerfully demonstrates that civil society advocacy on this issue is not only alive – it goes from strength to strength.

The HIV epidemic and the response to it is rapidly evolving. After 30 years of experience, we have more and better science with which to tackle HIV. We see new infections dropping where people are given the information, services and modalities they need. We see people on treatment living normal lifespans. We see that treatment reduces infectiousness by 96%. We know what works – solid HIV prevention programmes, the widespread roll-out of treatment, and serious efforts to reduce stigma and discrimination. Criminalisation does not work. It may be necessary where an individual intentionally transmits HIV to another, but beyond such rare cases, it does more harm than good.

UNAIDS is calling for universal access to HIV prevention, treatment care and support. It is calling for the normalisation of HIV testing and an end to HIV discrimination. We can overcome HIV. But we must do it with reason, science and solidarity – not with the criminal law. *Advancing HIV Justice* takes us one step closer.

Susan Timberlake

Chief, Human Rights and Law Division

UNAIDS Secretariat

June 2013

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4. ACRONYMS

- AIDS** Acquired Immunodeficiency Syndrome
- APN+** Asia-Pacific Network of People Living with HIV
- ARASA** AIDS and Rights Alliance of Southern Africa
- BASHH** British Association for Sexual Health and HIV
- BHIVA** British HIV Association
- BONELA** Botswana Network on Law and AIDS
- CAP+** China Alliance of People Living with HIV/AIDS
- CRN+** Caribbean Regional Network of People Living with HIV
- EAC** East African Community
- EANNASO** East Africa National Networks of AIDS Service Organizations
- HAART** Highly active antiretroviral therapy
- HIV** Human Immunodeficiency Virus
- IPPF** International Planned Parenthood Federation.
- KEELPNO** Hellenic (Greek) Centre for Disease Control
- LGBT** Lesbian, gay, bisexual and transgender
- MANET+** Malawi Network of People Living with HIV/AIDS
- MSM** Men who have sex with men
- NAFOPHANU** National Forum of PLHA Networks in Uganda
- NAP+** Network of African People Living with HIV
- NEPWHAN** Network of People Living with HIV and AIDS in Nigeria
- NGO** Non-government organisation
- PLHIV** People living with HIV (including people living with AIDS)
- PJP** Positive Justice Project
- REDLA+** Red Latino Americana de personas viviendo con VIH/SIDA
- REDLACTRANS** Red Latinoamericana y del Caribe de Personas Trans
- RedTraSex** Red de Mujeres Trabajadores Sexuales de Latinoamérica y el Caribe
- RFSL** Swedish Federation for Lesbian, Gay, Bisexual and Transgender Rights
- RFSU** Swedish Association for Sexuality Education
- STI** Sexually transmissible infection
- UGANET** Uganda Network on Law, Ethics and HIV/AIDS
- UNAIDS** Joint United Nations Programme on HIV/AIDS
- UNDP** United Nations Development Program
- USAID** United States Agency for International Development
- USAID-AWARE** Action for West Africa Region on HIV/AIDS (USAID programme)
- VAC/GMHC** Victorian AIDS Council/Gay Men's Health Centre

5. INTRODUCTION

“These laws undermine current HIV testing and prevention priorities and must reflect current medical and scientific knowledge and accepted approaches. We are fighting an epidemic, and we must have laws that are rational, holistic, and truly human rights-based.”

United States Congresswoman Barbara Lee, member of the Global Commission on HIV and the Law¹

Prosecutions of people living with HIV who have, or are believed to have, put others at risk of acquiring HIV continue to occur in many countries around the world under outdated or overly broad HIV-specific criminal statutes or the inappropriate application of a wide range of general criminal laws.²

These laws and prosecutions are often perceived to be about deterring or punishing malicious, intentional HIV transmission when, in fact, the vast majority of cases have involved neither malicious intent nor transmission.³

Such laws and prosecutions for alleged HIV non-disclosure, potential or perceived exposure and non-intentional transmission (‘HIV criminalisation’) are of concern in the following ways:⁴

- Prosecuting consensual sex between adults even when there was prior disclosure of HIV-positive status,⁵ or, in the absence of disclosure, the alleged exposure posed a very low risk of HIV infection,⁶ and/or HIV transmission did not occur.⁷
- Effectively treating sex between a person living with HIV and an HIV-negative partner as a physical or sexual assault in the absence of disclosure of known HIV-positive status, regardless of whether there was any malicious intent to harm.⁸
- Applying harsh prison sentences to alleged HIV “exposure” during non-consensual acts that pose very little or no risk of HIV infection, e.g. biting, spitting or scratching.⁹
- Applying increased prison sentences to people living with HIV who are convicted of sex work, even when there is no evidence that they have intentionally or actually put their clients at risk of acquiring HIV.¹⁰
- Applying the criminal law to vertical transmission of HIV during pregnancy or via breastfeeding.¹¹

In July 2012, the Global Network of People Living with HIV (GNP+) and the HIV Justice Network presented an analysis of trends in global HIV criminalisation at the 19th International AIDS Conference in Washington DC. The presentation included a ranking of law enforcement ‘hot spots’ based on HIV prevalence and cumulative known arrests and prosecutions in these jurisdictions (Figures 1 and 2).

During the 18-month period covered by this report (September 2011 to March 2013), no reported arrests or prosecutions took place in Bermuda, the Czech Republic, Denmark, Hungary or Malta. However, arrests and prosecutions have continued in these other ‘hot spots’: Austria; Australia;¹² Canada; Finland; New Zealand; Norway; United States;¹³ Singapore; Sweden; and Switzerland.

LAW ENFORCEMENT HOT SPOTS: TOP 30 JURISDICTIONS*

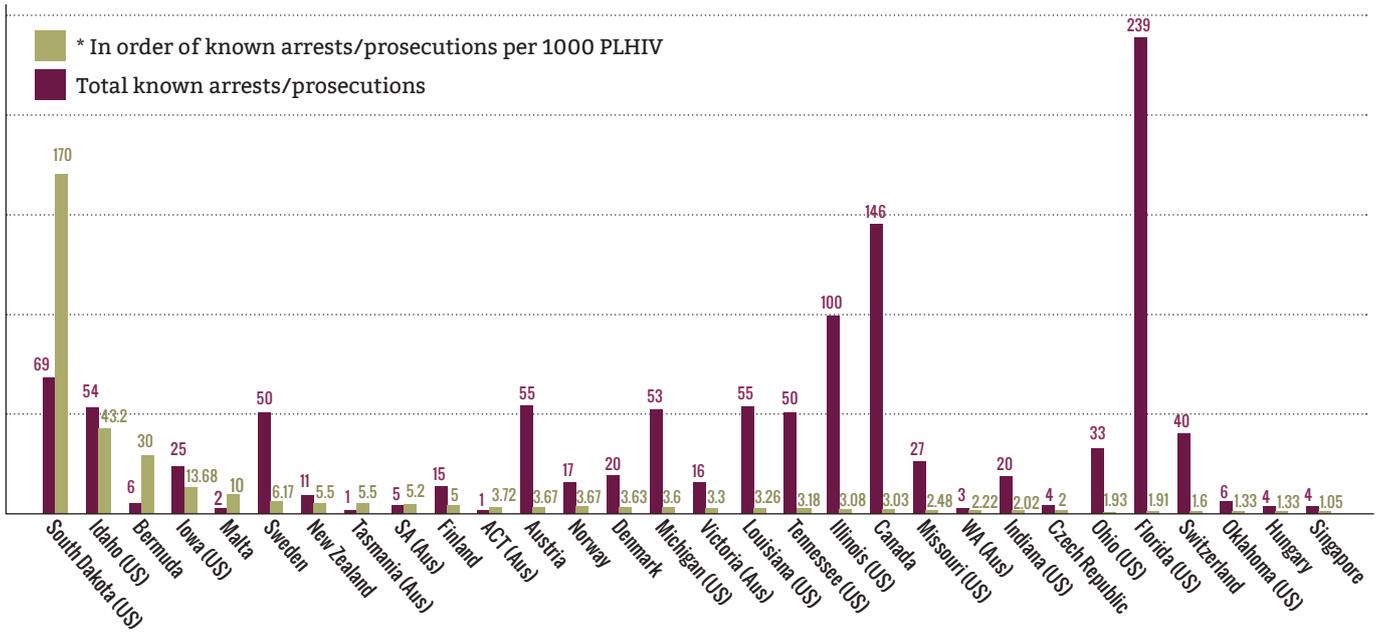


Fig 1: Top 30 jurisdictions for HIV criminalisation, based on known arrests/prosecutions per 1000 PLHIV and including absolute numbers of known arrests/prosecutions (data are cumulative, and were correct as of July 2012)

LAW ENFORCEMENT HOT SPOTS

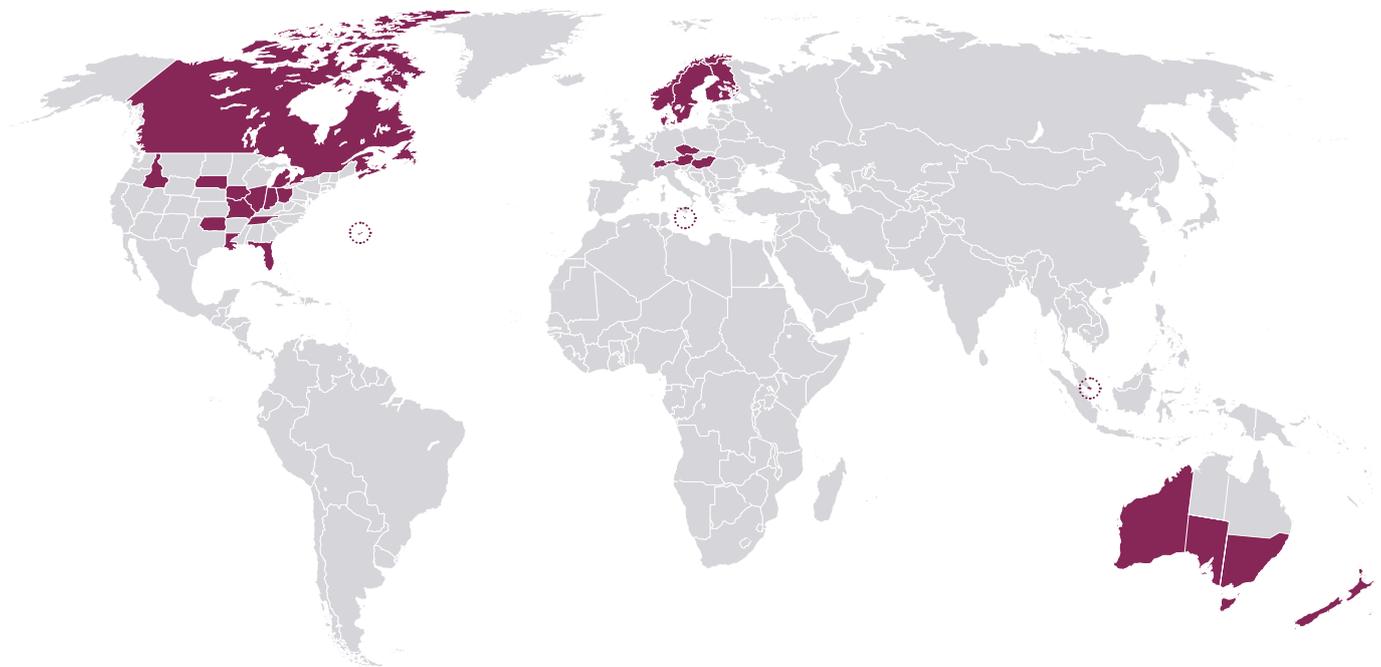


Fig 2: Law enforcement hot spots based on known arrests/prosecutions per 1000 PLHIV (data are cumulative, and were correct as of July 2012)

During this period, arrests and prosecutions have additionally been reported in: Colombia; Ghana; Greece; Germany; India; Maldives; Taiwan; United Kingdom;¹⁴ and Zimbabwe.¹⁵

Over the past decade, numerous national and international agencies have undertaken measures to increase understanding of and address HIV criminalisation through the commissioning of research, co-ordination of meetings, development of policy guidance, and publication of reports and other web-based resources.¹⁶

More recently, important global summaries of the state of HIV criminalisation have been published, including those by the Global Network of People Living with HIV (GNP+) in 2010¹⁷ and those produced for the Global Commission on HIV and the Law¹⁸ and UNAIDS¹⁹ in 2011.

Consequently, as a growing body of evidence suggests HIV criminalisation harms public health and human rights, the international movement against overly broad HIV criminalisation continues to strengthen.

The period covered by this report has seen significant international activities focused on evidence- and consensus-building, and advocacy, against HIV criminalisation, including: the Global Commission on HIV and the Law process and report (2010-2012);²⁰ a major project led by UNAIDS (2011-2013);²¹ the launch of IPPF's 'Criminalize Hate, Not HIV' website (December 2011);²² the Oslo Declaration on HIV Criminalisation (February 2012);²³ and the update and re-launch of both GNP+'s Global Criminalisation Scan website (September 2012)²⁴ and the HIV Justice Network's website and newsletter (November 2012).²⁵

However, despite these activities, inappropriate and overly broad new laws aimed at punishing and controlling people living with HIV continue to be proposed and/or enacted in Botswana,²⁶ Dominican Republic,²⁷ Germany (Saxony-Anhalt²⁸), Uganda²⁹ and the United States (Arizona³⁰ and Kansas³¹).

In addition, two important processes greatly anticipated by advocates working to end inappropriate HIV criminalisation produced disappointing results. In October 2012, the Supreme Court of Canada ruled that individuals who know they are HIV positive are liable to criminal prosecution for aggravated sexual assault if they do not disclose this fact prior to sex that may risk a "realistic possibility of transmission of HIV", stating that the duty for an HIV-positive individual to disclose can be exempted, but only when a condom is used and the individual also has a low viral load.³² The ruling was severely criticised as a "major step backwards for public health and human rights" by a coalition of civil society interveners in the two cases under appeal.³³

The same month, after spending almost two years examining every aspect – ethical, legal, medical, social and scientific – of the use of the criminal law to punish and regulate people with communicable diseases (with a specific focus on HIV) the Norwegian Law Commission recommended that Norway continues to essentially criminalise all unprotected sex by people living with HIV regardless of the actual risk and regardless of whether or not there was intent to harm. The only defence written into the suggested draft law is for the HIV-negative partner to give full and informed consent to unprotected sex that is witnessed by a healthcare professional.³⁴

The Norwegian national association of people living with HIV argued that such an approach "would undermine Norway's international responsibility to participate in a common front to

combat HIV in the world” and recommended that “the Government and Parliament reject the choice of the majority’s conclusions in this area and remove the particular provisions of the Criminal Code”.³⁵

Nevertheless, as this report will show, important and promising developments in case law, law reform and policy have taken place in many other jurisdictions, most of which came about as a direct result of advocacy from individuals and organisations working to end the inappropriate use of the criminal law to regulate and punish people living with HIV.

In addition, as highlighted in this report, advocacy continues unabated in Canada and Norway – as it does in many countries around the world – to ensure a more just, rational, evidence-informed criminal justice response to HIV that will benefit both public health and human rights.

ABOUT THIS REPORT

The aim of *Advancing HIV Justice* is to provide a progress report of achievements and challenges in global advocacy against HIV criminalisation during the 18 month period, September 2011 to March 2013. Prior to September 2011, reports were produced for the Global Commission on HIV and the Law, and for UNAIDS, that summarised developments in this area. Prior to these comprehensive reports, the 2010 Global Criminalisation Scan report had previously provided an overview of laws, prosecutions and advocacy. However, *Advancing HIV Justice* is the first report to focus primarily on advocacy. We hope it will be useful for individuals and organisations working to end or mitigate the harm of HIV criminalisation around the world, as well for others with an interest in HIV and human rights issues.

Given the lack or inadequacy of systems to track HIV-related (or other) prosecutions in most places, it is not possible to determine the actual number of arrests and prosecutions for every country in the world. Much of what is known about individual cases comes from media reports, and obtaining accurate information can be challenging – even more so in countries where such information is not freely available. Reported cases, through court reporting or the media, therefore, should be seen as illustrations of what may be a more widespread, but generally undocumented, use of criminal law against people with HIV.

This report was created through a collaborative effort between the Global Network of People living with HIV (GNP+) and the HIV Justice Network that included:

- A desk review of online materials relating to HIV criminalisation advocacy (including, but not limited to, the HIV Justice Network website, Facebook group and Twitter account; the Global Criminalisation Scan website; the Global Commission on HIV and the Law website; IPPF’s ‘Criminalize Hate, Not HIV’ website’; and the AIDS 2012 programme).
- Contacting individuals and organisations in countries where advocacy had taken place but where details were unclear for further information.
- An internal and external review process that included organisations working in this area (IPPF, Sero Project and UNAIDS).³⁶

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- 3 *Ibid*; see also <http://www.hivjustice.net/site/cases/>
- 4 Full references to these cases can be found in: UNAIDS. *Criminalisation of HIV Non-Disclosure, Exposure and Transmission: Background and Current Landscape*. Geneva, 2011.
- 5 Such prosecutions can and do take place in Austria, Norway, Sweden and Switzerland. See, for example, the case of Louis Gay in Norway, who was prosecuted for HIV exposure via oral sex despite having disclosed his HIV-positive status: <http://louisgay72.blogspot.com>
- 6 Few jurisdictions currently take into account up-to-date scientific knowledge of the risk of HIV acquisition, and even within the same jurisdictions, outcomes of criminal cases rely on individual judges making very different rulings about similar HIV risks. For example, although one judge in Austria found a 17-year-old boy guilty of HIV exposure for receiving unprotected oral sex without disclosing his HIV-positive status to his 16-year-old girlfriend, and noted that the outcome would have been the same if he had used a condom (*HIV-Infizierter verurteilt*. Orf.at, 5 March 2012) another Austrian judge found a 46-year-old woman not guilty of HIV exposure for receiving unprotected vaginal sex because she was on effective antiretroviral therapy (Mösender M. *Ungeschützter Sex: Freispruch für HIV-Positive*. Der Standard, 1 June 2012.)
- 7 In the minority of cases in which the complaining partner later tested HIV positive, proof that the defendant was the source of the infection is often not required and/or is not definitive.
- 8 Although many HIV-specific laws include elements quantifying intent, such as "wilful", "knowing" or "deliberate", these terms are usually not well defined, potentially leading to prosecutions where arguably the defendant had no intent to expose another to, or transmit, HIV. General criminal laws most often use the terms "recklessness" or "negligence", which have specific legal meanings, though these meanings can vary from country to country and jurisdiction to jurisdiction.
- 9 Although jurisdictions in Europe and Australia have on occasion prosecuted individuals with HIV for biting others, most prosecutions for alleged HIV exposure via biting, spitting and/or scratching have taken place in Canada and the United States.
- 10 Both female and male HIV-positive sex workers can be prosecuted for engaging in, or offering, sexual services to clients even if the acts pose little or no risk of transmission. Although cases have recently been reported in Australia, Azerbaijan, Canada and South Korea, the United States regularly enforces HIV-specific laws criminalising sex work whilst HIV positive.
- 11 Prosecutions of women who expose or pass HIV to their baby during pregnancy, birth or breastfeeding are known to have taken place in Austria, Canada, Sweden, and the United States. In France and the United States men have also been found criminally liable for vertical transmission.
- 12 There have been reports of arrests or prosecutions in three states: New South Wales, Queensland and Victoria.
- 13 There have been reports of arrests or prosecutions in 25 states: California, Colorado, Florida, Georgia, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Utah and Virginia. For an overview of recent US cases see: <http://www.hivlawandpolicy.org/resources/view/456>
- 14 There have been reports of arrests or prosecutions in both England and Scotland.
- 15 To read more detail about many of these cases, see: <http://www.hivjustice.net/site/cases/>
- 16 Important published work to date includes UNAIDS' *Criminal Law, Public Health and HIV Transmission: A Policy Options Paper* (2002) and the UNAIDS/UNDP *Criminalization of HIV transmission Policy Brief* (2008); Global Criminalisation Scans in 2005, 2008 and 2010 by the Global Network of People Living with HIV (GNP+); *Verdict on a Virus* (2008) by the International Planned Parenthood Federation, International Community of Women Living with HIV/AIDS, and GNP+; *Ten Reasons to Oppose the Criminalization of HIV Exposure or Transmission* by the Open Society Foundations (2008); *10 Reasons Why Criminalisation of HIV Exposure or Transmission Harms Women* by the ATHENA Network (2009); and Grover A. *2010 Report to the Human Rights Council of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*. United Nations General Assembly, 27 April 2010.
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- 20 Available at: <http://www.hivlawcommission.org/>
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- 36 ARASA and UNDP were also invited to comment but were unable to respond in time.

6. BUILDING THE GLOBAL EVIDENCE BASE



Globally, the criminalisation of HIV non-disclosure, exposure and transmission remains an area that is under-researched. The issue appears to be of little interest to governments, with most countries lacking formal systems for identifying HIV prosecutions in the way that other crime statistics (e.g. murder, assault, domestic violence) are recorded and analysed. It is rare to find records describing how specific cases come to be considered for prosecution, the rationale and construction of prosecution and defence arguments, or the specific evidence presented. Analyses of prosecutions across time have only recently begun to emerge from the work of law and social science academics and other non-government organisations.

Monitoring local, national and international developments regarding laws and prosecutions that criminalise HIV non-disclosure, potential or perceived exposure and transmission is vital to building an evidence base about what is actually occurring and its impact. During the period covered by this report, a number of important initiatives contributed to increased understanding of the global impact of HIV criminalisation. These are described below.

6.1 GLOBAL COMMISSION ON HIV AND THE LAW

“In much of the world it is a crime to expose another person to HIV or to transmit it, especially through sex. Fundamentally unjust, morally harmful, and virtually impossible to enforce with any semblance of fairness, such laws impose regimes of surveillance and punishment on sexually active people living with HIV, not only in their intimate relations and reproductive and maternal lives, but also in their attempts to earn a living.”

*HIV and the Law: Rights, Risks and Health*³⁷

Between 2010 and 2012, the Global Commission on HIV and the Law (the Commission) undertook extensive dialogue and consultation to gain a clearer picture of the impact of laws on HIV. Its report, *HIV and the Law: Rights, Risks and Health*, published in June 2012, provides a global analysis of the way HIV responses across the globe are undermined by punitive and over-reaching legal environments.³⁸

The Commission’s process was strong, including:

- Regional dialogues to ensure participation and inclusion of affected communities and law- and policy-makers. Testimony was received from more than 700 people most affected by HIV-related legal environments from 140 countries.
- A Technical Advisory Group of diverse experts to identify evidence and build consensus.
- A Commission comprising senior, high level authorities to add insight and authority to the Commission’s findings and recommendations.

The Commission added to the evidence base on HIV criminalisation in a number of ways. It commissioned two research-based working papers: ‘The Criminalisation of HIV Exposure and Transmission: A Global Review’³⁹ and ‘Criminalisation and the Moral Responsibility for Sexual

Transmission of HIV'.⁴⁰ It also heard testimony on HIV criminalisation from policy analysts and people living with HIV, including some who had been caught up in HIV-related criminal trials.⁴¹

The Commission included HIV criminalisation as one of six major themes addressed in its report,⁴² with chapter two outlining the evidence of overly broad HIV criminalisation and its detrimental impact globally. It makes recommendations for the reform of legal systems to address inappropriate prosecutions and improve HIV responses.

BOX 1: GLOBAL COMMISSION ON HIV AND THE LAW: HIV CRIMINALISATION RECOMMENDATIONS

To ensure an effective, sustainable response to HIV that is consistent with human rights obligations:

- 2.1.** Countries must not enact laws that explicitly criminalise HIV transmission, HIV exposure or failure to disclose HIV status. Where such laws exist, they are counterproductive and must be repealed. The provisions of model codes that have been advanced to support the enactment of such laws should be withdrawn and amended to conform to these recommendations.
- 2.2.** Law enforcement authorities must not prosecute people in cases of HIV non-disclosure or exposure where no intentional or malicious HIV transmission has been proven to take place. Invoking criminal laws in cases of adult private consensual sexual activity is disproportionate and counterproductive to enhancing public health.
- 2.3.** Countries must amend or repeal any law that explicitly or effectively criminalises vertical transmission of HIV. While the process of review and repeal is under way, governments must place moratoria on enforcement of any such laws.
- 2.4.** Countries may legitimately prosecute HIV transmission that was both actual and intentional, using general criminal law, but such prosecutions should be pursued with care and require a high standard of evidence and proof.
- 2.5.** The convictions of those who have been successfully prosecuted for HIV exposure, non-disclosure and transmission must be reviewed. Such convictions must be set aside or the accused immediately released from prison with pardons or similar actions to ensure that these charges do not remain on criminal or sex offender records.

Since publication of the report, the United Nations Development Program (UNDP), which served as Secretariat to the Commission, has undertaken an ambitious follow-up programme in collaboration with other UN organisations and civil society partners. Follow-up activities include: law review and reform; national dialogues for action planning for law reform; sensitisation of judiciary and parliamentarians; increasing access to justice including through capacity development of national human rights institutions and legal services; and religious leader and media sensitisation.⁴³

6.2 UNAIDS: HIV CRIMINALISATION PROJECT

“I can tell you that during the last UNAIDS Board meeting, the stories told by two people living with HIV, who were prosecuted for exposing another to HIV, upset me a great deal. These stories showed me clearly that the criminal law is not the solution to the HIV problem. ... We must ask ourselves, why do punitive responses to HIV persist when we are making so much progress? ... These laws fuel stigma. They damage efforts to prevent, treat and care for HIV. They remove incentives for people to get tested. And they undermine public trust in health care providers.”

Michel Sidibé, Executive Director of UNAIDS⁴⁴

Commencing in 2011, the UNAIDS Secretariat undertook a major project involving research, evidence-building and policy dialogue on HIV criminalisation. The project aimed to ensure that any application of criminal law in the context of HIV achieves justice and does not jeopardise public health objectives.

The project comprised:

- The development of background⁴⁵ and technical papers⁴⁶ on current laws and practises, as well as recent medical and scientific developments relevant to HIV criminalisation;
- An Expert Meeting in Geneva, Switzerland (31 August to 2 September 2011) bringing together leading scientists, medical practitioners and legal experts to consider the latest scientific and medical facts about HIV to be taken into account in the context of criminalisation; to explore how to best address harm, risk, intent, proof, and sentencing; and to consider alternative responses to criminalisation, in light of scientific and medical advances⁴⁷; and
- A High Level Policy Consultation in Oslo, Norway (14 -15 February 2012) that gathered policy-makers, experts in HIV science, medicine and human rights and members of civil society, including people living with HIV, from around the world to discuss options and recommendations for addressing overly broad HIV criminalisation.⁴⁸

This process has resulted in the development of a new Guidance Note, published in May 2013, that includes detailed recommendations aimed at ending overly broad HIV criminalisation with reference to scientific, medical, legal and human rights considerations.⁴⁹

6.3 GNP+: GLOBAL CRIMINALISATION SCAN

“Many countries are using criminal laws to prosecute people living with HIV who are either accused of not disclosing their HIV status to their partners and/or who potentially expose them to HIV. ... Such laws and prosecutions do not recognise the role that stigma, discrimination, and gender-based and homophobic violence against people living with HIV play in decisions about disclosure. HIV criminalisation as well as laws that criminalise key populations ... have a direct, negative impact on the human, sexual and reproductive rights of people living with HIV and key populations, and doubly so for members of criminalised key populations who are also living with HIV.”

People Living with HIV Global Advocacy Agenda⁵⁰

In 2012, the Global Network of People Living with HIV (GNP+) completed its most recent global scoping of HIV criminalisation laws and prosecutions, and was able to collect data from most countries in the world. The web-based Global Criminalisation Scan (the Scan) documents laws,

judicial practices, case studies and media reports, providing a broad overview of laws and prosecutions in some 200 jurisdictions.⁵¹

GNP+ has worked on HIV criminalisation with international and local partners since 2005, when it partnered with Terrence Higgins Trust (UK) to develop a rapid scan of EU countries, designed to investigate anecdotal evidence that people were being prosecuted for HIV non-disclosure, exposure and transmission. That work produced the first-ever report to consolidate information about prosecutions across jurisdictions. Extended in 2008 to include countries in the Asia Pacific, Latin America and North America regions, it was expanded again in 2009 to include Africa and the Caribbean. In 2010, the Scan was formalised into the first global report of its kind.⁵²

The 2012 electronic edition of the Scan has expanded on its previous exclusive focus on HIV criminalisation to include information on laws and regulations that further impede effective responses HIV, including:

- Criminalisation of same sex sexual relations;
- Prohibition of harm reduction measures in the context of injecting drug uses, imposing coercive or compulsory treatment for people who use drugs and applying the death penalty for drug offences;
- Prohibition of commercial sex work; and
- Restricting or denying entry/stay/residence or requiring deportation of HIV-positive non-nationals.

The process of collecting Scan data includes efforts to build anti-criminalisation advocacy capacity, including through the participation of many state-based agencies as well as networks of people living with HIV. Over the period of time that the Scan has been in existence this has included: the Asia Pacific Network of people living with HIV/AIDS (APN+); the Caribbean Network of people living with HIV/AIDS (CRN+); GNP+ North America; people living with HIV regional networks in Central, East and West Africa; Red Latino Americana de personas viviendo con VIH/SIDA (REDLA+); as well as the Terrence Higgins Trust, which provided data for Europe and Central Asia.⁵³

6.4 'CRIMINALIZE HATE, NOT HIV' CAMPAIGN

'Criminalize Hate, Not HIV' is part of a growing global campaign to raise awareness about the impact of the criminal law on national responses to HIV. It argues for an evidence-based approach to HIV prevention that does not increase the stigma surrounding HIV and protects the human rights of people living with HIV. The campaign, which builds upon the partnership that created *Verdict on A Virus*,⁵⁴ was launched at the 18th International AIDS Conference in Vienna in July 2010 and is managed by the International Planned Parenthood Federation (IPPF).

The campaign asks:

- Governments to redouble their prevention efforts and focus on what really does work.
- Policy makers and journalists not to sensationalize the lives of people living with HIV but rather involve them and let them tell their story.
- People living with HIV to inform themselves of their rights and know what the law says and how it could affect them.

- The wider community to share responsibility for actions that may lead to the transmission of HIV and other STIs.
- Everyone to know their HIV status.

In December 2011, IPPF launched a new online tool, www.hivandthelaw.com, available in English, French and Spanish, to support people living with HIV, campaigners and activists around the world in their own work on HIV prosecutions. As well as providing information about HIV criminalisation and its impact on public health and human rights worldwide, it includes sections highlighting global advocacy.

The website also contains a collection of interviews that expose the effect HIV criminalisation is having on people's working and private lives and illustrate the personal and professional dilemmas faced by doctors, lawyers, parliamentarians, researchers and advocates. Among them is the testimony of a woman living with HIV from New Zealand who was a prosecution witness against her former partner. She is now an advocate against HIV criminalisation.

“Criminalization is multi-faceted, it not only affects the person arrested, but his/her family and community...The stigma and discrimination affects the offender and the victims alike. Everybody suffers...I've heard many arguments against the criminalization of HIV. And in the Pacific Islands I've witnessed at first-hand how criminalizing HIV was the worst thing to do... With the benefit of age and wisdom, I believe that all people need to take responsibility for their own sexual health and have access to safe sex resources. I do not support criminalizing people with HIV. The stigma and discrimination is already heavy to bear, let alone adding the burden of being a criminal as well...I would support 'stopping' the rare individual that shows disregard for their sexual partners. At the same time, I would also advocate full psychological and mental health support of that person, and help with behaviour modification.”

Marama Pala, New Zealand⁵⁵

6.5 HIV JUSTICE NETWORK

“The HIV Justice Network website is a comprehensive resource that helps advocates around the world contextualize their work within a global movement, facilitates communication and exchange of ideas and resources amongst advocates, and alerts us to emerging trends and ideas that can inform our work. The Network also has a spirit of generosity and co-operation, driven by the genuine commitment and passion of its creators and members, which encourages and facilitates criminalization reform efforts at all levels.”

Sean Strub, Executive Director, Sero Project⁵⁶

The HIV Justice Network (the Network) is a global information and advocacy hub for individuals and organisations working to end the inappropriate use of the criminal law to regulate and punish people living with HIV. Its mission is to collate, create and disseminate information and resources enabling individuals and communities to effectively advocate against criminal prosecutions for HIV non-disclosure, potential or perceived exposure and non-intentional transmission.

In November 2012, the Network launched a new website and newsletter.⁵⁷ Funded by the Monument Trust,⁵⁸ it builds on the work of the Network's co-ordinator, Edwin J Bernard, whose earlier criminalhivtransmission.blogspot.com has been incorporated into the site.

Reporting in ‘real time’, the Network’s website serves as a mechanism to monitor international developments regarding HIV criminalisation and the way criminal justice actors and the media deal with individual cases. It is the first international resource to effectively centralise information not only about HIV criminalisation laws, policies and law enforcement, but also the growing global advocacy movement against HIV criminalisation.

The newsletter also aims to further the Network’s mission by providing a means to connect local, national, regional and global stakeholders, sharing information and resources to allow for targeted research and discussion of key issues, and identification of best practice models.

Taken together, the Network’s website, newsletter, and other activities – including a Facebook discussion group⁵⁹ and video production⁶⁰ – provide a range of practical information and resources to enable advocacy, empowerment and challenge through persuasive and pragmatic policy development and effective communication strategies.

BOX 2: THE OSLO DECLARATION ON HIV CRIMINALISATION

“A growing body of evidence suggests that the criminalisation of HIV non-disclosure, potential exposure and non-intentional transmission is doing more harm than good in terms of its impact on public health and human rights. A better alternative to the use of the criminal law are measures that create an environment that enables people to seek testing, support and timely treatment, and to safely disclose their HIV status.”

Points 1 and 2 of the Oslo Declaration on HIV Criminalisation⁶¹

Concerned about the inappropriate and overly broad use of criminal law to regulate and punish people living with HIV, a group of civil society advocates from around the world came together in Oslo, Norway, on 13 February 2012 to create the Oslo Declaration on HIV Criminalisation (the Declaration).

The Declaration provides a succinct ten-point roadmap for policy makers and criminal justice system actors to ensure a linked, cohesive, evidence-informed approach regarding the appropriate use of the criminal law, if any, to cases of HIV non-disclosure, potential exposure and non-intentional transmission.

The Declaration also encourages policymakers to review their own laws and policies and take all steps necessary to achieve the best possible outcomes in terms of justice and protection of public health, in order to support effective national responses to HIV and uphold international human rights obligations.

To date, almost 1700 individuals and organisations from 117 countries have supported the Declaration (now available in seven languages),⁶² strongly suggesting that advocacy against HIV criminalisation is now a global phenomenon.

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7. GENERATING PERSUASIVE SOCIAL SCIENCE



Judges, parliamentarians and policy makers who dismiss arguments about the harmful social impact of HIV criminalisation often claim that there is not enough evidence to support such assertions. This does not mean that such evidence cannot be found. Instead, they reflect the reality that, until recently, limited effort had been applied to the collection and analysis of evidence for or against criminalisation of HIV non-disclosure, exposure or transmission.

The limited research undertaken during the last decade has generally shown that laws which criminalise HIV non-disclosure, exposure and transmission are ineffective, inappropriately targeted and violate human rights. Such evidence is a critical tool for persuading the general public, public servants and parliamentarians to modify the inappropriate use of punitive laws.

Social science research is vital to advocacy because it provides evidence of what is occurring in the community. As well as detailing people's attitudes, beliefs and actions, it reveals the difference between assertions about the effect HIV laws and prosecutions will have and their actual impact.

Recently, researchers have undertaken (localised) research which identifies different ways that prosecutions exacerbate social inequities and are undermining HIV prevention efforts, including reducing willingness to disclose HIV status, increasing anxiety among people living with HIV, decreasing access of those with increased risk practices to public health facilities, and the 'normalised' application of criminal laws to cases of 'exposure' carrying negligible risk.

Over the past 18 months, a number of papers were published that are important both in terms of their methodology and findings. These include the following.

7.1 UNDERSTANDING THE IMPACT OF HIV CRIMINALISATION IN CANADA

Two studies from Ontario highlight how Canada's approach to HIV non-disclosure, and media reports of such prosecutions, may be negatively impacting public health and human rights.

A study by Patrick O'Byrne and colleagues, '**Nondisclosure Prosecutions and Population Health Outcomes: Examining HIV Testing, HIV Diagnoses, and the Attitudes of Men Who Have Sex with Men Following Nondisclosure**', was designed to examine HIV testing, HIV diagnoses, and the attitudes of men who have sex with men following media reports about a local non-disclosure prosecution in Ottawa, Canada. The authors reviewed trends in HIV testing and HIV diagnoses from 2008 through to 2011 in Ottawa. They then explored the attitudes and beliefs of local men who have sex with men (MSM) about HIV, HIV prevention, HIV serostatus disclosure, non-disclosure prosecutions, and public health.

Although the study found that HIV testing and HIV diagnoses among MSM did not change in a statistically significant way after the media reports, a subgroup of 27 men (12 HIV positive, 15 HIV negative) expressed concerns over the belief that the local public health department openly shares

“Social science research is vital to advocacy because it provides evidence of what is occurring in the community. As well as detailing people’s attitudes, beliefs and actions, it reveals the difference between assertions about the effect HIV laws and prosecutions will have and their actual impact.”

information about people living with HIV with the police. Some HIV-positive participants stated that this caused them to not access public health department services. Consequently, the authors conclude that non-disclosure prosecutions are likely to undermine HIV prevention efforts.⁶³

A second study, by Barry Adam and colleagues, ‘**How criminalisation is affecting people living with HIV in Ontario**’, found that arrests and prosecutions and their resulting media coverage have created a climate of anxiety amongst people living with HIV, affecting views on when disclosure is necessary and disclosure practices, as well as shaping health professionals’ messages.

The study concludes by suggesting that HIV criminalisation has unfairly shifted the burden of proof so that people living with HIV are considered guilty until proven innocent, and can be caught in difficult he-said/(s)he-said situations. It also suggests disgruntled partners now have access to a legal weapon regardless of facts, and that women whose male partners ignore their wishes regarding safer sex are particularly vulnerable to prosecution.⁶⁴

7.2 UNDERSTANDING THE IMPACT OF HIV CRIMINALISATION IN THE UNITED STATES

A number of studies from the United States highlight how HIV-specific criminal statutes throughout the country are negatively impacting public health goals, as well as highlighting specific problematic practices in individual states.

Preliminary results of the **Sero Project’s National Criminalisation Survey**, announced at the 19th International AIDS Conference in Washington DC, included the responses of 2076 people living with HIV. The survey demonstrated that criminal prosecutions are impacting on people’s experience of HIV in a number of ways:

- Twenty eight per cent of respondents worried ‘a few times’ about being falsely accused of non-disclosure under their state’s HIV laws, while another 9% said they worried ‘frequently’. The study also found that only 21% of respondents trusted that the legal system would provide a fair hearing if they faced criminal charges for allegedly failing to disclose their HIV-positive status to sex partners. This suggests that criminal prosecutions have created a hostile legal environment for people living with HIV.
- Almost half of respondents (49.6%) said it was ‘very’ or ‘somewhat’ reasonable for people to avoid HIV testing in order to avoid the possibility of prosecution. Twenty five per cent of respondents said at least one person had told them they did not want to get tested because of fear of prosecution. This suggests that fear of prosecution is having an impact on the willingness to know one’s HIV status.
- Although the majority of respondents (73%) stated they had been informed about the existence of criminal laws when they received their HIV-positive test result, most respondents did not understand their legal obligations. Sixty three per cent reported they were unsure whether there was a law requiring HIV disclosure before sex. In an analysis of nearly 200 open-ended responses

about why people with HIV did or did not disclose their status, criminal laws were cited as a reason by only five people, and only one named the law as the only reason for disclosure.⁶⁵

PhD candidate Trevor Hoppe's study, **'Controlling Sex in the Name of Public Health'**, considered use of Michigan's HIV disclosure law and its intersection with public health laws which task health officials with investigating and managing people who are termed a 'health threat to others' (for allegedly not disclosing their HIV-positive status prior to sex).

Based on interviews with local health officials responsible for managing so-called 'health threat' cases, Hoppe considered both their formal and informal management techniques. Formal techniques involve health officials in a minority of jurisdictions actively cross-referencing epidemiological surveillance technologies such as HIV testing and contact tracing in order to identify potential 'health threat' cases. Informal techniques were characterised by third-party phone reports received by health officials from local residents who accuse others in their community.

Hoppe found that local health officials' interpretation of 'health threat' and understanding of the law varied. While previous studies have demonstrated that laws criminalising HIV non-disclosure may be counterproductive for public health, Hoppe's study indicates for the first time how public health institutions themselves may contribute to and facilitate enforcement of Michigan's problematic HIV disclosure law. Further, Hoppe shows that stigma and fear often drive community members to police HIV-positive neighbours' disclosure practices.⁶⁶

Carol Galletly and colleagues at the Center for AIDS Intervention Research at the Medical College of Wisconsin surveyed 479 New Jersey residents living with HIV about the New Jersey law that requires HIV-positive individuals to disclose their status to sexual partners.

In the article **'New Jersey's HIV Exposure Law and the HIV-Related Attitudes, Beliefs, and Sexual and Seropositive Status Disclosure Behaviors of a Sample of Persons Living with HIV'**, Galletly and colleagues argue that the law does not seem to be effective as an HIV prevention tool. Although 51% of study participants reported knowledge of the law, there was no difference between those aware and unaware of the law in terms of HIV disclosure, risky sex, and condom use. In fact, most of the participants reported complying with the letter of the law for the previous year regardless of whether they were aware of the law.

They conclude that criminalising non-disclosure of HIV serostatus does not reduce sexual risk behaviour and although HIV disclosure laws do not appear to increase stigma, they are also not likely to reduce HIV transmission.⁶⁷

A second study by Carol Galletly, co-authored by Zita Lazzarini, **'Charges for Criminal Exposure to HIV and Aggravated Prostitution Filed in the Nashville, Tennessee Prosecutorial Region 2000-2010'**, examined court records of all HIV-related criminal cases in Nashville, Tennessee, between January 2000 and December 2010. In total, 27 cases of persons charged with violating Tennessee's HIV-specific criminal law and 25 cases of persons charged with 'aggravated prostitution' (offering or engaging in sex work following an HIV-positive diagnosis) were identified. While only three cases alleged transmission, penalties were sometimes significant (up to five years' incarceration).

The study revealed that a significant proportion (41%) of ‘HIV exposure’ cases related to very low-risk activities, mostly involving defendants who were resisting arrest, intoxicated or agitated. Of the ‘aggravated prostitution’ cases, 52% involved women offering oral sex, which carries a negligible risk of HIV transmission. From the case descriptions, many accused appeared to have substance abuse or mental health problems, and many were already known to police (including their HIV-positive status). They concluded that HIV laws were inappropriately being used to respond to nuisance behaviour and that prosecution did not address addiction/mental health issues and consequent likely recidivism.⁶⁸

7.3 UNDERSTANDING THE IMPACT OF HIV CRIMINALISATION ON HEALTHCARE WORKERS IN THE UNITED KINGDOM

The qualitative research study by Catherine Dodds, Matthew Weait and colleagues, **‘Keeping Confidence: HIV and the criminal law from service provider perspectives’**, explores perceptions of HIV criminalisation among those providing support, health and social care services for people with HIV.

The study was based on focus groups with both clinical and community service providers. It found that, although many had a basic understanding of the conditions that could lead to a prosecution, there remained significant confusion about the technical legal meaning of ‘recklessness’ and the specific precautionary behaviours that would provide a sufficient defence (including the relevance of use of condoms, undetectable viral load and disclosure).⁶⁹

There were also instances where participants’ understanding of the law was guided more by common sense and morality than a firm understanding of the law. Some stated they lacked confidence in managing the issue with service users. The study identified a lack of professional access to information, support and legal advice and makes recommendations to support service providers in this area.⁷⁰

BOX 3: INFORMATION AND GUIDANCE FOR HEALTHCARE WORKERS IN THE UNITED KINGDOM

In January 2013, the British HIV Association (BHIVA) and the British Association for Sexual Health and HIV (BASHH) released an updated position statement: **‘HIV Transmission, the Law and the Work of the Clinical Team’** providing clinicians with information and guidance on managing many of the issues highlighted in the ‘Keeping Confidence’ study.

Covering the legal situation in two United Kingdom jurisdictions – England and Wales, and Scotland – the document sets out the roles and responsibilities of health care professionals when caring for individuals living with HIV. It also suggests ways to achieve a confidential environment in which extremely sensitive matters relating to HIV-related risk and HIV status disclosure to third parties can be frankly and fully discussed.

Of note, the guidance clearly states that healthcare professionals “must be mindful of their duty not to work beyond their expertise in legal matters. For people living with HIV, advice must include the routes of HIV transmission and how to prevent transmission, with information about safer sexual practices, the use of condoms and suppression of viral load. Advice must be given in a non-judgmental way.”⁷¹

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8. CHALLENGING NEW LAWS



Since 2010, at least four African countries – Congo, Guinea, Senegal and Togo – have revised their existing HIV-related legislation or adopted new legislation that restrict use of criminal law to cases of intentional transmission of HIV.⁷² In September 2011, Guyana’s Government firmly rejected a new HIV-specific criminal law.⁷³

Unfortunately, new laws criminalising HIV non-disclosure, exposure and/or transmission continue to be proposed and introduced in countries around the world: a practice that is disappointing given the growing evidence base and consensus of international agencies that such laws are counterproductive to HIV prevention efforts and generally fail to deliver ‘justice’.

This section, providing concrete examples of the types of legislation considered and community advocacy to address both the content of those laws and the process of their development, reveals a number of intersecting issues which will continue to inform the rollout of future laws addressing HIV non-disclosure, exposure and transmission.

At its most fundamental, the development of laws addressing HIV must involve HIV-affected communities. However, this mandate is complicated by the complexity of ‘HIV criminalisation’ and the reality that many government and non-government agencies around the world are at different points in developing their understanding of and positions on this issue, which are informed by cultural experiences but also by opportunity to engage with specific evidence and develop arguments and understanding.

This development of ideas is not a simple continuum. While some conflict has arisen amongst organisations representing people living with HIV about whether or not HIV criminalisation laws are desirable, in other parts of the world advocates debate whether expanding HIV-specific laws to include a broader list of diseases (potentially reducing HIV-related stigma) is an effective response.

8.1 BOTSWANA

In December 2012, civil society was alarmed to learn that a new Public Health Bill was to be debated by Botswana’s Parliament. The Bill contained some beneficial provisions including prohibiting pre-employment HIV testing and workplace discrimination, and allowing HIV testing without parental consent for young people aged 16 and over.

However, the Bill also contained damaging provisions allowing medical practitioners to test for HIV without patients’ consent, to force patients to be HIV tested, and to test patients before deciding whether or not to carry out non-urgent procedures. The Bill would further increase doctors’ powers by allowing them to disclose patients’ HIV status to their sexual partners.⁷⁴

The Bill also introduced a vague and overly broad HIV criminalisation statute:

“Unfortunately, new laws continue to be proposed and introduced in countries around the world: a practice that is disappointing given the growing evidence base and consensus of international agencies that such laws are counterproductive to HIV prevention efforts and generally fail to deliver ‘justice’.”

Clause 116 (1) A person who is aware of being infected with HIV or is carrying and is aware of carrying HIV antibodies shall:

- (a) take all reasonable measures and precautions to prevent the transmission of HIV to others;
- (b) inform, in advance, any sexual contact or care giver or person with whom sharp instruments are shared, of that fact; and
- (c) not place another person at risk of becoming infected with HIV.⁷⁵

Community advocates, led by the Botswana Network on Law and AIDS (BONELA), began urgent action arguing for the Bill to be withdrawn not only because its content was problematic but also because there had not been an appropriate development process. Interventions included efforts to speak to politicians, press releases, media interviews and making explanatory information available on BONELA’s website, as well as websites of partner organisations including the AIDS and Rights Alliance of Southern Africa (ARASA).⁷⁶

These interventions led to a postponement of the debates on the draft Bill in December 2012, which enabled some politicians to argue that the Bill should be withdrawn altogether. During this time, UNAIDS also wrote to the Minister of Health calling on national health authorities and stakeholders to reconsider the many problematic provisions in the draft Bill.

However, in March 2013, the Bill was passed by Parliament essentially unchanged. BONELA sent a strongly worded letter to President Khama and plans to approach the High Court to challenge the offending clauses as unconstitutional.⁷⁷ In addition, a coalition of national and international organisations sent a letter to President Khama urging him to refer the Bill back to Parliament for reconsideration.⁷⁸

BOX 4: UNDERSTANDING WHY HIV-SPECIFIC CRIMINAL LAWS CONTINUE TO BE PROPOSED AND ENACTED IN AFRICA

Two studies presented at the 19th International AIDS Conference in Washington DC in July 2012 help shed some light on why policy makers in Africa continue to propose and enact HIV-specific criminal statutes.

For **‘The intention may not be cruel and inhumane but the impact may be: stigma and the proposed HIV legislation in Malawi’**, Lucy Stackpool-Moore and colleagues interviewed ten members of the Malawi Special Law Commission on HIV and AIDS in 2010-11, in order to understand their motivations for recommending HIV criminalisation provisions. The Commission had been appointed in 2006 to develop a legislative framework for the national HIV response and produced a report in 2007

that recommended criminalising “deliberate, reckless or negligent acts or omissions that are likely to infect another person with HIV”.⁷⁹ When asked about their work, the Commissioners unanimously cited HIV criminalisation as one of the most controversial aspects of the proposed legal framework. Among the Commissioners, eight supported HIV criminalisation although acknowledging that it was a “thorny” issue. Of note, most Commissioners cited reasons relating to retribution and “justice” for deliberate infection as the main reason for proposing criminal sanctions for HIV exposure and transmission, as opposed to considering the law to be a deterrent in order to benefit public health. However, several Commissioners also noted that there would be difficulties with enforcement of such a law.

The researchers suggest that the responses indicate an implicit motivation to include the problematic provision because of the symbolic power of the criminal law for four key reasons:

- Agency and escalated responsibility of people living with HIV to prevent HIV transmission;
- Protection for people who are HIV-negative;
- Retribution for people in response to ‘deliberate’ HIV-transmission; and
- Framing of HIV in terms of death and illness (even though antiretrovirals are available in Malawi).

The researchers conclude by noting that the proposed HIV legal framework in Malawi straddles a tension between intention and impact – the desire to enact a law to protect human rights and strengthen the national response to HIV, while potentially taking away those rights from certain groups and fuelling HIV-related stigma.⁸⁰

A study by postdoctoral research fellow, Daniel Grace, ‘**This is not a law: the politics and protest of legislating HIV/AIDS through model laws**’, also presented at the 19th International AIDS Conference in Washington DC, outlined preliminary findings from research undertaken in 2010 and 2011 to better understand the development and rollout of Africa’s problematic ‘model HIV laws’.⁸¹

The USAID-AWARE-funded *N’Djamena* “model” law on STI/HIV/AIDS for West and Central Africa contains 37 articles addressing prevention, care and treatment of HIV/AIDS. However, the *N’Djamena* law also included statutes criminalising HIV exposure and transmission and failure to disclose HIV status. Although the *N’Djamena* law was modified in several jurisdictions, its application in 15 countries has meant the introduction of broad and vague HIV-related criminal laws between 2005 and 2010 across west and central Africa. Other countries have draft legislation pending.

The analysis maps the path of the legislation’s development, adoption and implementation and also interventions to modify its impact. It also investigates how these laws came to be drafted and enacted without the knowledge of key actors in HIV law and development, and the ongoing consequences of that omission. It raises questions about the use of the language of ‘best practice’ to leverage quick outcomes at the expense of community and stakeholder participation. Grace’s work has shed light on this unnerving chapter in HIV development history and outlines lessons for the future.⁸²

8.2 CHINA

Reports in early 2012 suggested imminent changes to an HIV-specific law in China's Guangxi Zhuang autonomous region through the introduction of a new AIDS Prevention and Control Act to be debated and approved over some six months. Guangxi province has the second-highest number of people living with HIV of all provinces in China.

The draft law reportedly included the abolition of anonymous HIV testing (already adopted in Yunnan) and also the requirement for people diagnosed with HIV to tell their partners of their status within 30 days of their test results becoming known, otherwise health workers would inform their partners.^{83 84} The proposal triggered a strong response from advocates and academics,^{85 86} and 'the online community raged'.^{87 88}

Tianxiagong (Justice for All), a Nanjing-based non-government organisation and China Alliance of People Living with HIV/AIDS (CAP+) petitioned the Ministry of Health and the China Centre for Disease Control and Prevention to stop promotion of real-name testing nationwide. The media also provided supportive coverage.⁸⁹

The Government next moved to clarify the intended change regarding HIV testing, with the Director of the National Centre for AIDS and Sexually Transmitted Diseases Control and Prevention saying anonymity should be available for initial testing/screening, with real names only necessary for confirmation testing.⁹⁰

The 'draft' law was in fact a document being considered for development into a formal bill that may be passed into law. It appears community lobbying has stopped further development of the proposed bill and real-name testing/compulsory partner notification has not been introduced.⁹¹ Instead, the Guangxi Zhuang Autonomous Region AIDS Prevention and Control Measures (2005) remains in force.⁹²

8.3 DOMINICAN REPUBLIC

In June 2011, the President of the Dominican Republic enacted Law No. 135-11, known as the Law on HIV/AIDS, updating an existing law (Law 55-93) in order to increase the rights of people living with HIV.⁹³

Although the law included many progressive articles,⁹⁴ it also included two statutes criminalising HIV non-disclosure and 'intentional spread' of HIV, namely:

Article 78: Duty to inform sexual partners. Any person who, knowing their HIV seropositivity does not report their HIV status to their sexual partner, shall be punished by imprisonment of two to five years.

Article 79: Transmission of HIV intentionally. Any person who, by any means, spreads HIV intentionally to another shall be punished by imprisonment of twenty years.⁹⁵

The inclusion of those two articles created community concern. Although there was agreement that intentional transmission is unacceptable some commentators expressed concern about how the law would identify 'intentional' transmission and the type (or lack) of evidence to be used, given that HIV disclosure prior to sex takes place in private.⁹⁶

It is important to note that the process to develop the new law was the result of multi-sectoral involvement and included consensus of government, community and other stakeholders. However, as argued by International HIV/AIDS Alliance representative, Javier Hourcade Bellocq, the fact that Law 135-11 was developed including participation and consultation is not enough ... “as if these ways of doing things were an end in itself, an explanation or justification for a negative result”.⁹⁷

Work continues, with community advocates mobilising to address the problematic articles.⁹⁸ Efforts have included the following:

- Circulating petitions⁹⁹ and engaging with decision makers¹⁰⁰ to request urgent amendment of the law, arguing it violates the Constitution and international treaties signed by the Dominican Republic.
- Publishing a series of online articles by key correspondents and promoting discussion in online forums,¹⁰¹ including Twitter, leveraging a campaign of international solidarity that included letters to embassies of the Dominican Republic in neighbouring countries.
- Spanish and English press releases by organisations that comprise the International HIV/AIDS Alliance in Latin America and the Caribbean and their strategic partners (REDLACTRANS and RedTraSex) to coincide with World AIDS Day 2012.¹⁰²
- A letter to the President of the Dominican Republic by a coalition of regional networks, NGOs and grassroots groups, arguing that articles 78 and 79 undermine HIV prevention efforts, promote stigma and discrimination, and are at odds with international best practice.¹⁰³

The breadth of the response has moved Dominican agencies to reiterate the goodwill that initiated this law reform, the multi-sector consensus that preceded it, and the importance of a locally led response.¹⁰⁴ The Government has been receptive, continuing to work with key community agencies, and appointing a committee to consider the issue. Reports on their deliberation are pending.

8.4 NICARAGUA

In December 2012, Nicaragua’s new HIV Act (No. 820) was passed, replacing a 1996 Act. The new law includes 34 articles in eight chapters, none of which criminalise HIV non-disclosure, potential or perceived exposure or transmission. The Act is a success for advocates who responded with vigour to the proposed Article 27, “criminalising HIV transmission”.¹⁰⁵

The process of the law’s development was very consultative, initially triggering heated exchanges among community organisations, some of which supported criminalisation, arguing that failing to do so would promote irresponsibility.¹⁰⁶ The process of development then included information sharing and discussion, with “many twists and turns in the community and the Ministry of Health”.¹⁰⁷

8.5 NIGERIA

Nigeria does not currently have a national HIV-specific criminal law,¹⁰⁸ although it came close with a draft bill proposed in 2012. The HIV and AIDS Anti-Discrimination Act was drafted to include a section criminalising HIV:

Any person, having known his/her seropositive status, deliberately transmits the HIV directly or indirectly shall be guilty of an offence and, upon conviction be sentenced up to twelve months imprisonment or fine of up to N500,000 or both.¹⁰⁹

In December, civil society advocates met with the Chairman of the Senate Committee on Health to argue that Section 31 should be redrafted. Subsequently, in February 2013, the National Agency for the Control of AIDS held a two-day stakeholders forum, aiming to harmonise state anti-discrimination laws and also to ensure that the law reflected international human rights conventions and standards. Although many at the meeting proposed retaining the draft criminalisation statute, HIV civil society organisations, led by the Network of People Living with HIV and AIDS in Nigeria (NEPWHAN), advocated for its removal – and their arguments prevailed.

In addition, the draft was expanded to extend anti-discrimination laws beyond the workplace to include school, correctional institutions, religious institutions, and society at large.¹¹⁰ Although the proposed law may require further drafting before it is passed, the efforts of civil society have been shown to be essential to the development of supportive and enabling HIV laws.

8.6 UGANDA

In late 2009, a group of more than 50 Ugandan and international organisations and individuals released a report criticising many of the provisions of the 2008 HIV and AIDS Prevention and Control Bill.¹¹¹ That early advocacy resulted in the removal of a criminal penalty for the transmission of HIV from mother to child through breastfeeding.¹¹²

Still under consideration by Parliament, the current version of the Bill includes a number of problematic provisions. It mandates HIV testing for pregnant women and their partners, victims of sexual offences, those charged with a sexual offence, people convicted of drug use, and those convicted of ‘prostitution’. It also permits disclosure of HIV status by a medical practitioner if a person “poses a clear and present danger” to “a person in close and continuous contact including but not limited to a sexual partner” or when a person is believed to pose a risk of HIV transmission to their partner and fails to disclose despite “reasonable opportunity”.¹¹³

In addition, the Bill contains two statutes relating to HIV criminalisation:

Section 39: Any person who wilfully and intentionally transmits HIV to another person commits an offence, and on conviction shall be liable a fine of not more than two hundred and forty currency points or to imprisonment for a term of not more than ten years or both.

Section 41: A person who attempts to transmit HIV to another person commits a felony and shall on conviction be liable to a fine of not more than twelve currency points or imprisonment of not more than five years or both.¹¹⁴

Agencies are particularly alarmed about the ‘attempt to transmit’ provisions but are also concerned about the way ‘wilful’ and ‘intentional’ may be interpreted, and how courts will prove which member of a couple was infected first.¹¹⁵

Advocacy co-ordinated by the Uganda Network on Law, Ethics and HIV/AIDS (UGANET), continues to argue that unfavourable clauses must be completely removed and that Uganda must assent to

the East African Community (EAC) HIV & AIDS Prevention and Management Act which contains provisions meant to supersede Ugandan law.¹¹⁶

BOX 5: EAST AFRICAN COMMUNITY HIV AND AIDS PREVENTION AND MANAGEMENT ACT

Notable among recent legislative developments on the African continent is the passing of the East African Community HIV and AIDS Prevention and Management Act on 23 April 2012. This regional legislation seeks to protect the rights of people living with HIV and harmonise regional legislation and policy on the prevention and treatment of HIV.¹¹⁷ It would supersede national HIV and AIDS laws in Burundi, Kenya, Rwanda, Tanzania and Uganda once assented to by each country's Head of State.¹¹⁸

The regional law has been welcomed by HIV advocates in these countries. Unlike existing laws in Burundi, Kenya and Tanzania, and the proposed law in Uganda, it does not contain an HIV-specific criminal statute or allows for mandatory HIV testing.¹¹⁹

"This [regional] Bill has a human rights approach to HIV as a major component, and criminalization was never its intention. We expect countries to use this Bill as a template for their legislation and we will lobby towards that end," said Joyce Abalo, a programme officer at the East Africa National Networks of AIDS Service Organizations (EANNASO).¹²⁰

8.7 UNITED STATES

8.7.1 Arizona

In January 2013, an Arizona politician introduced a Bill (HB 2218) which aims to make it a felony to intentionally expose others to HIV or other sexually transmitted diseases:

13-1412 Unlawful exposure to the human immunodeficiency virus or a sexually transmitted disease

- A. It is unlawful for a person who knows he is infected with the Human Immunodeficiency virus or a sexually transmitted disease to knowingly do any of the following:
1. Engage in sexual intercourse or sodomy with another individual with the intent to expose that individual to the virus or disease.
 2. Sell or donate one's own blood, blood products, semen, tissue, organs or other bodily fluids with the intent to expose the recipient to the virus or disease.
 3. Share with another individual a hypodermic needle or syringe, or both, for the introduction of drugs or any other substance into, or for the withdrawal of blood or bodily fluids from, the other individual's body with the intent to expose another person to the virus or disease.¹²¹

'Sexually transmitted disease' is defined as including chlamydia, genital herpes, gonorrhoea, syphilis, chancroid, granuloma inguinale, lymphogranuloma venereum and trichomonas.¹²² The Bill has been referred to the House Judiciary Committee.

A number of academics have publicly described the Bill as both a potential disincentive for people to get tested and unworkable because of difficulties with proof.¹²³ Agencies such as Housing Works¹²⁴ and The Sero Project have begun to get the word out to encourage advocacy against the Bill.

8.7.2 Washington state

A Washington politician has proposed expanding the state's law that criminalises intentional HIV transmission.¹²⁵ The current law, which has been applied three times since its enactment in 1998, notably carrying a penalty of up to life imprisonment, reads:

- (1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:
- (a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death; or
 - (b) Administers, exposes, or transmits to or causes to be taken by another, poison, the **human immunodeficiency virus**, or any other destructive or noxious substance; or
 - (c) Assaults another and inflicts great bodily harm.¹²⁶

The Bill proposes that the law be changed to include any disease that is dangerous or deadly. The change is motivated by a desire to remove stigma associated with HIV by ensuring the law applies to all communicable diseases. The Bill would also change the legal definition of poison to include fluids infected with a dangerous disease, regardless of how it is transmitted.

The Executive Secretary of the Washington Association of Prosecuting Attorneys has said that, despite the broader language, a large increase in cases is unlikely because the law requires intent to cause serious harm or death.¹²⁷ The Bill also removes an exception for HIV from a law that criminalises knowingly infecting another person with an STI without his or her consent, a gross misdemeanour that can result in up to one year in prison.

Although community advocates, including Lifelong AIDS Alliance and the American Civil Liberties Union, had previously expressed support for the proposed changes,¹²⁸ a coalition of civil society organisations successfully lobbied to have the Bill withdrawn from this session with the expectation that a new version will be introduced next year after further consultation with stakeholders.

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9. ADVOCATING FOR LAW REFORM



Non-government agencies and organisations of people living with HIV continue to advocate for the development of laws that uphold, and the repeal of laws that undermine, the human rights of people living with HIV.

Law reform is frequently a cumbersome process involving the establishment of relationships, the development of partnerships, and the formulation of evidence into arguments good enough to convince disparate politicians with a watchful eye on the views of the electorate.

Over the past 18 months, numerous agencies developed strategies to argue for the reform of laws criminalising HIV non-disclosure, exposure and/or transmission.

Their work included: the development of media strategies to better educate the general public; community forums to increase understanding among key stakeholders; meetings with politicians and public servants to ensure they were informed of current evidence; development of networks to broaden the lobby base (including drawing clinicians into the fold); and the commissioning and publishing of evidence, including testimony from some who had been prosecuted. In some locales, their advocacy has produced impressive results. In others, the process continues.

9.1 DENMARK

In February 2011, Denmark suspended Article 252 of the Criminal Code pending an inquiry by a government working group to consider whether the only HIV-specific law in western Europe should be revised or abolished.¹²⁹

There had previously been at least 20 prosecutions and at least 15 convictions for either sexual HIV exposure or transmission under Article 252, including two as recently as 2008.¹³⁰ In August 2012, a man living with HIV who had previously been found guilty under the statute had his case reviewed due to the law's suspension. He was subsequently acquitted and his prison sentence was reduced to six months based only on his conviction for other, drug-related, offences. The courts are now in the process of reviewing all HIV-related criminal cases from 2007¹³¹ when the law was suspended because the National Board of Health informed the Ministry of Justice that HIV was no longer a "life-threatening and incurable disease" as required by Danish law. The National Board of Health cited data from a 2007 Danish cohort study, which found that for people living with HIV in Denmark who are on treatment, HIV had become a manageable, chronic health condition.¹³²

The working group confirmed in November 2011 that the legal basis for the current statute no longer existed and recommended its repeal. Although they suggested wording for a new law that would criminalise HIV non-disclosure unless "suitable protection" was used and recommended that the current maximum sentence of eight years in prison should be reduced to two years, no new law has been enacted to date.¹³³

Of note, civil society advocacy, led by NGO AIDS-Fondet and the Danish people living with HIV organisation, HIV-Dansmark, played an important part in the suspension of Article 252. Following publication of the 2007 data on life expectancy, they developed a strategy to persuade the Government that scientific advances had made the law obsolete. Once the law had been suspended, it focused its advocacy on ensuring that no new law replaced it. The advocacy campaign covered a range of activities including:

- Building networks of supportive medical HIV specialists and parliamentarians;
- Writing and placing articles in national newspapers in co-operation with parliamentarians and HIV clinicians;
- Meeting with, and writing to, ministers, parliamentarians and the National Board of Health;
- Organising a national conference with a panel debate on decriminalising HIV with parliamentarians in attendance; and
- Connecting with international networks working on the same issues and collecting signatures from 122 organisations from all over the world, endorsing a letter to the Minister of Justice and the Minister of Health congratulating the ministers on their decision to suspend the Danish Penal Code and asking them to consider no replacement following its repeal.¹³⁴

9.2 NORWAY

A 1902 infectious disease law, Paragraph 155 of the Norwegian Penal Code, is often referred to as ‘the HIV paragraph’ as it has primarily been used to prosecute potential or perceived HIV exposure or transmission. There is neither a consent nor a ‘safer sex’ defence, potentially criminalising all sex by people with HIV.¹³⁵

Although a new penal code was adopted in 2005 that added a ‘safer sex’ defence and a consent defence for co-habiting couples, it was not enacted due to criticism by many HIV and human rights groups in Norway and internationally as being overly draconian and hypocritical given Norway’s internationally recognised role as a defender of international human rights.¹³⁶

Advocacy by the civil society organisations HIV Norway and HIV Manifesto resulted in political pressure leading to the Norwegian Government creating a Law Commission in December 2010. The Commission consisted of twelve members including medical and legal practitioners, scientists and academics with backgrounds in sexuality, ethics and human rights, as well as representatives from HIV Norway and HIV Manifesto.

However, the Commission’s recommendations, as detailed in their October 2012 report, disappointed advocates. The majority of the Commission proposed criminalising sex without a condom regardless of whether actual exposure or transmission occurs. The only defence written into the suggested draft law would be for the HIV-negative partner to give full and informed consent to unprotected sex that is witnessed by a healthcare professional.¹³⁷

The members of the Commission have divided opinions on whether the person-to-person transmission of infection should be covered by a special penal provision as is the case at present (section 155 of the 1902 Penal Code). One member proposes that this penal provision be repealed and that no new provision be added to the 2005 Penal Code, and that the provision already adopted in the 2005 Penal Code not enter into force.

The 11 other members find it clearly most appropriate to have a separate penal provision on direct and

“Law reform is frequently a cumbersome process involving the establishment of relationships, the development of partnerships, and the formulation of evidence into arguments good enough to convince disparate politicians with a watchful eye on the views of the electorate.”

indirect person-to-person transmission of serious communicable diseases, including through sexual intercourse. This is proposed in the draft of section 237 on transmission of infection in the 2005 Penal Code. A separate provision of this nature makes it possible to introduce, in the text of the statute, impunity in cases where responsible behaviour has been displayed in terms of communicable disease control, and to establish rules for when consent will exempt a person from criminal liability. It is proposed that the threat of criminal prosecution should target the act of transmitting a communicable disease that causes significant harm to body or health, as well as blameworthy conduct that results in exposure of another person to the risk of being infected with such a disease.¹³⁸

Advocacy continues to influence the law reform process. In January 2013, Nye Pluss, the newly formed Norwegian national association of people living with HIV, published a strong rebuttal of the Commission’s report.¹³⁹

Also notable is the influence of Nye Pluss co-founder, Louis Gay, who went public in November 2011 with his arrest and prosecution. Although transmission had been alleged, phylogenetic analysis ruled out his virus as the source of the complainant’s infection. Yet, even after the complainant withdrew his complaint, Louis continued to be prosecuted for potential HIV exposure via oral sex. The trial was originally scheduled for October 2012, but was postponed and re-scheduled for February 2013. The day of the trial, the prosecutor finally withdrew and dismissed the case due to lack of evidence.¹⁴⁰

In April 2012, Conservative MP Bent Høie, leader of the Standing Committee on Health and Care Services, raised the issue of HIV criminalisation in the Norwegian Parliament specifically citing Louis’s case.¹⁴¹ And in July 2012, Høie and another prominent and influential Labour MP, Håkon Haugli, publicly stated that they were in favour of no replacement for Paragraph 155.¹⁴²

A final outcome is expected in 2014. If both political parties support Høie and Haugli’s positions, there is likely to be a parliamentary majority that could ignore the Commission’s recommendations and, instead, repeal Paragraph 155 (and its 2005 replacements) and pass no new law at all.

9.3 SWEDEN

The Swedish Communicable Diseases Act requires people with diagnosed HIV to both disclose their status and to use condoms. In addition, Sweden is one of several countries in western Europe – including Austria, Finland, Norway, and Switzerland – where people with HIV can be (and are) prosecuted for having consensual unprotected sex even when there was prior disclosure and agreement of the risk by the HIV-negative partner. Sweden uses the general criminal law for these prosecutions. In total there have been at least 50 prosecutions under both or either laws – from a relatively small HIV population of approximately 5,000.¹⁴³

Since 2010, RFSU (the Swedish Association for Sexuality Education), RFSL (the Swedish Federation for Lesbian, Gay, Bisexual and Transgender Rights) and HIV-Sweden (the Swedish organisation for people living with HIV) have worked on a joint advocacy project, funded by the International Planned Parenthood Federation (IPPF) Innovation Fund, which aimed for the following outcomes:

- A review of both the Communicable Disease Act and the application of the general criminal law to HIV non-disclosure, exposure and transmission.
- An endorsement by Sweden of the 2008 UNAIDS Policy Brief on the criminalisation of HIV transmission.
- A renewed, clear focus of Sweden's National HIV Policy on a human rights-based approach to HIV prevention, care, support and treatment, and sex education.¹⁴⁴

The project included a variety of advocacy and media strategies that aimed to:

- Educate and inform politicians in government and parliament as well as other policy makers.
- Increase awareness amongst politicians and policy makers on the negative impact of criminalisation on HIV prevention and the human rights of people living with HIV.
- Win support within political parties for a review of Swedish criminal and public health legislation, as well as regulations and practices.¹⁴⁵

In October 2012, two articles commemorating 30 years of HIV in Sweden in *Svenska Dagbladet* suggested that public and political opinion had been positively impacted by the advocacy project, which ended in December 2012. The article noted that a majority of Swedish MPs would now like to revise both the Communicable Diseases Act and the criminal law.¹⁴⁶ Although divisions remain within both the coalition Government and the leading opposition parties, advocates remain hopeful that change will be forthcoming by the end of 2013.

9.4 SWITZERLAND

Switzerland applies two different non-HIV-specific laws (either or both of which may be used) to prosecute either HIV exposure or transmission. Article 231 of the Swiss Criminal Code allows for prosecution of anyone who attempts to, or in fact “deliberately spreads a dangerous transmissible human disease”. Disclosure and/or consent by the HIV-negative partner to unprotected sex is not a defence, potentially criminalising all unprotected sex by people with HIV regardless of risk.

In February 2009, the Geneva Court of Justice quashed an HIV exposure conviction under Article 231 after hearing expert testimony from one of the authors of the Swiss Federal AIDS Commission's statement regarding the lack of infectiousness of individuals on effective treatment and accepting that the risk of HIV exposure during unprotected sex from a person undergoing successful antiretroviral therapy is so low that it is only hypothetical.¹⁴⁷ However, this does not impact upon prosecutions in Switzerland's other 25 cantons.

In 2011, an opportunity arose to modify or repeal Article 231 during the revision process of the Law on Epidemics. Several Swiss HIV NGOs, including Groupe sida Genève and Aids-Hilfe Schweiz worked closely with the Swiss Federal AIDS Commission (now renamed The Swiss Federal Commission for Sexual Health) to lobby for a statute that was consistent with the UNAIDS position of criminalising only malicious and intentional HIV transmission.

In March 2012, the Swiss Federal Assembly's National Council (lower house) passed a revised Law on Epidemics with a last-minute amendment by Green MP Alec von Graffenried that would only criminalise the intentional spread of a communicable disease.¹⁴⁸ The revised Law on Epidemics will now be put to a popular vote in September 2013.¹⁴⁹

Article 122 of the Swiss Criminal Code is also used to prosecute HIV exposure or transmission following unprotected sex without disclosure (as a serious assault).¹⁵⁰ In March 2013, the Swiss Federal Supreme Court ruled that HIV exposure or transmission may no longer be automatically considered a serious assault due to improved outcomes in life-expectancy on antiretroviral therapy. The ruling now imposes a duty on lower courts to determine in every case brought before them whether or not the exposure or transmission now qualifies as common assault under article 123 rather than serious assault under article 122.¹⁵¹

9.5 UNITED STATES

Thirty-four US states and two territories have HIV-specific criminal statutes, many of which are vague, require no intent to cause harm, are inconsistent with HIV scientific knowledge, and/or overly broad. Rather than criminalising HIV transmission, most of these statutes criminalise behaviour that may or may not (and in some cases definitely does not) risk HIV transmission. Some outlaw practices that do not carry a significant risk of harm (e.g. sharing sex toys, spitting, performing oral sex); and others criminalise non-disclosure of known HIV-positive status, regardless of whether or not a condom or other risk-reduction methods are used.¹⁵²

In several US states without HIV-specific laws (and even in some states with such laws), reckless endangerment statutes and other variations of assault, homicide or anti-terrorism laws continue to be used to prosecute a wide variety of potential sexual and non-sexual HIV exposure or transmission situations.¹⁵³

The past 18 months have seen increasing efforts to increase the domestic evidence base. These include:

- **'State-by-State Criminal Laws Used to Prosecute People with HIV'** (Center for HIV Law and Policy) catalogued state laws used to prosecute people living with HIV for exposure or transmission offences. The chart identifies the type of behaviour criminalised, which states and territories have HIV-specific criminal statutes and/or general STI criminal statutes, whether convictions trigger sex offender registration, and whether general felony statutes have been used to prosecute individuals with HIV.¹⁵⁴
- **'Prosecutions and Arrests for HIV Exposure in the United States, 2008–2013'** (Center for HIV Law and Policy and the Positive Justice Project) mapped 156 prosecutions of people for HIV exposure or transmission against state laws to provide an illustrative example of United States prosecutions between 2008 and 2013. The chart lists specific offences, outlining which states and territories have HIV-specific criminal statutes, general STI criminal statutes or general felony statutes, and whether there is sex offender registration. The chart also outlines what type of behaviour is criminalised, including prosecutions for biting and spitting, where exposure/transmission is unlikely or not possible.¹⁵⁵
- The **Sero Project Freedom of Information (FOI) strategy** included the filing of more than 2000 FOI requests with local prosecutors throughout the United States in an effort to uncover the number of charges that have been filed under states' HIV-specific statutes. That process

uncovered more than 1000 charges to date. The FOI process revealed that few states have centralised records, which required filing in individual counties and prosecutorial districts. Systems of record keeping are inconsistent between jurisdictions so work is underway to encourage advocates to undertake state-based analysis. Responses have been made available to independent researchers and to several media organisations.¹⁵⁶

- **‘Comparative Sentencing on HIV Criminalisation in the United States’** (Center for HIV Law and Policy) compares US sentencing schemes for HIV exposure/ transmission laws with sentencing provisions for laws punishing drink driving, reckless endangerment and vehicular homicide. The chart demonstrates that punishments for HIV exposure are often more severe despite acts of HIV exposure frequently including minimal or low risk of harm.¹⁵⁷

The Positive Justice Project (PJP), founded in September 2010, and co-ordinated by the Center for HIV Law and Policy, is a national coalition of organisations and individuals, including people living with or at greatest risk of HIV, those who have been arrested or prosecuted, medical and public health professionals, community organisers, advocates, attorneys, law enforcement, sex workers, social scientists and others working to end HIV criminalisation in the United States.¹⁵⁸

The PJP engages in federal and state policy advocacy, resource creation, support of local advocates and attorneys working on HIV criminal cases, and educating, organising and mobilising communities and policy makers in the United States.

Prior to the creation of the PJP, community advocacy and lobbying had helped ensure that the 2010 National HIV/AIDS Strategy (NHAS) included recommendations for states to review HIV-specific laws, which it notes, “run counter to scientific evidence about routes of HIV transmission and may undermine the public health goals of promoting HIV screening and treatment”.¹⁵⁹

Since PJP’s creation, much has been achieved by its members – working collaboratively as well as individually – in terms of creating a broader recognition of the problems of HIV criminalisation in the United States, including:

- In March 2011, the **National Alliance of State and Territorial AIDS Directors** released a statement supporting both the PJP and the NHAS recommendations, noting that: “HIV criminalization undercuts our most basic HIV prevention and sexual health messages, and breeds ignorance, fear and discrimination against people living with HIV.”¹⁶⁰
- In February 2012, **Pride at Work**¹⁶¹ unanimously voted at their annual convention to recognise HIV criminalisation as an educational priority for their members and allies, marking the first time a labour organisation in the United States has addressed HIV criminalisation. It reads: “Educate our members and allies on the issues of LGBT and HIV/AIDS criminalization within the U.S. and abroad that create barriers to quality care, create stigma, and that dehumanize lesbian, gay, bisexual and transgender workers.”¹⁶²
- In July 2012, PJP produced its own consensus statement that calls on federal and state officials to modernise criminal laws and policies and to eliminate HIV-specific statutes. The statement demands that laws and practices be modernised to reflect current science and knowledge about HIV, and the standards of proof and process normally afforded individuals facing charges of a criminal offence against another.¹⁶³
- In October 2012, the **HIV Medicine Association of the Infectious Diseases Society of America**, which represents physicians, scientists and other health care professionals across the United States, issued a strong statement urging:

- “An end to punitive laws that single out HIV infection and other STIs and that impose inappropriate penalties for alleged non-disclosure, exposure and transmission;
- All state and federal policies, laws and regulations to be based on scientifically accurate information regarding HIV transmission routes and risk;
- A federal review of all federal and state laws, policies, and regulations regarding the criminal prosecution of individuals for HIV-related offences to identify harmful policies and federal action to mitigate the impact of these laws, including the repeal of these laws and policies or guidance for correcting harmful policies; and
- Promotion of public education and understanding of the stigmatising impact and negative clinical and public health consequences of criminalisation statutes and prosecutions.”¹⁶⁴
- In January 2013, the **Presidential Advisory Council on HIV/AIDS (PACHA)** passed a resolution that calls for an end to federal and state HIV-specific criminal laws and prosecutions. Amongst other things, the resolution:
 - Recommends that the Departments of Justice and Health and Human Services issue guidance and offer incentives to eliminate HIV-specific laws.
 - Recommends the development of guidelines for how to approach HIV within criminal and civil justice systems that are “consistent with the treatment of similar health and safety risks”.
 - Requests that state and federal authorities review the cases of persons convicted under such laws and overturn convictions if deemed appropriate.
 - Calls upon on the Centers for Disease Control and Prevention to “issue a clear statement addressing the growing evidence that HIV criminalization and punishments are counterproductive and undermine current HIV testing and prevention priorities”.¹⁶⁵

The Sero Project, founded in 2012, became the first national organisation primarily focused on ending inappropriate criminal prosecutions of people with HIV for non-disclosure of their HIV status, potential or perceived HIV exposure or HIV transmission. Sero’s HIV criminalisation work includes original research, raising public awareness through community education efforts and outreach to people with HIV who have been criminalised to create a network of advocates who can speak first-hand about the effects of criminalisation on their lives. This included testimony before the Presidential Advisory Council on HIV/AIDS (PACHA) of the devastating experience of five people prosecuted for HIV exposure in five different states and the mother and sister of a sixth person prosecuted.¹⁶⁶

The result of this advocacy is the growing political will to address HIV criminalisation, and attempt to repeal HIV-specific statutes on both a federal and state level.

In September 2011, California Congresswoman Barbara Lee introduced H.R. 3053, the ‘**Repeal Existing Policies that Encourage and Allow Legal HIV Discrimination Act**’, the ‘**REPEAL HIV Discrimination Act**’, or the ‘**REPEAL Act**’, which would require a review of all federal and state laws, policies, and regulations regarding the criminal prosecution of individuals for HIV-related offences.

The REPEAL Act was the first to take on the issue of HIV criminalisation in the United States, and provided incentives for states to explore repeal or reform of laws and practices that unfairly target people with HIV for consensual sex and conduct that poses no real risk of HIV transmission.

Although the REPEAL Act was not enacted, it achieved 41 co-sponsors.¹⁶⁷ The Act has since been redrafted and was re-introduced in May 2013 with bipartisan support.¹⁶⁸

Iowa recently became the first state to introduce legislation that would change its 1998 HIV-specific statute, which currently allows for 25 year prison sentences and lifetime sex offender registration to anyone convicted of HIV non-disclosure, regardless of actual risk, intent or actual transmission. There have been at least 25 prosecutions and 15 convictions under this law,¹⁶⁹ including that of Nick Rhoades, whose appeal will be heard at Iowa Supreme Court later in 2013.¹⁷⁰

Lobbying by a broad coalition of activists spearheaded by Community HIV/Hepatitis Advocates of Iowa (CHAIN) and NASTAD Chair, Randy Mayer (Chief of the Bureau of HIV, STD, and Hepatitis for the Iowa Department of Public Health) led to the February 2013 introduction of Senate File 215 by Senator Steve Sodders and Senator Matt McCoy which proposes modernising the statute.¹⁷¹

The proposed legislation takes actual HIV risk, risk reduction methods, and whether or not transmission occurred into account, and includes two states of mind – malicious intent and reckless disregard. The maximum sentence for transmission with intent would be ten years. Exposure with intent would be subject to a maximum of five years in prison. The proposals have support from health care professionals, HIV/AIDS advocacy groups, law enforcement and the Iowa Office of the Attorney General as well as from local media.¹⁷²

In March 2013, the legislation passed the State Senate's Judiciary Committee, eleven to two, picking up all seven Democrats and four of the six Republicans, demonstrating the feasibility of bipartisan support for these efforts.¹⁷³

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10. ADDRESSING LEGAL PROCESSES AND ENFORCEMENT



Policing policies, procedures and workforce cultures influence the likelihood of cases involving HIV non-disclosure, exposure or transmission proceeding to court as well as the experiences of accused and witnesses. Prosecutors influence not only whether cases proceed but also how they are run. The expertise of lawyers, judges and magistrates directly impacts the course and outcome of cases – affecting scrutiny and analysis of evidence, instructions to juries, sentencing, and future trials – through the use of precedents. While prosecutions must be ‘in the public interest’, the public interest is not always clearly defined.¹⁷⁴

In numerous settings, advocates have endeavoured to influence and improve legal processes in a number of different ways. Their work has included: lobbying for the development of strong prosecutorial guidelines limiting the application of criminal law to cases of HIV non-disclosure, exposure or transmission; undertaking community-based research on the impacts of HIV criminalisation; creating policy statements and other materials to help educate the criminal justice system on HIV-related risk, harm and proof, as well as the potential negative public health impacts of inappropriate prosecutions; and providing expert evidence to influence the outcome of individual cases (and any precedents they set).

10.1 AUSTRALIA

In Australia, state laws are applied to legal cases involving HIV non-disclosure, exposure or transmission. Criminal law prosecutions have occurred in five of eight state jurisdictions. Prosecutions under public health laws have occurred in the other three states. There has been a small but notable increase in prosecutions since 2007.

In all, 38 people are known to have been subject to prosecution (at March 2013).¹⁷⁵ Almost half of those prosecutions occurred in the state of Victoria. The reasons why remain unclear.

For some time, the Victorian AIDS Council/Gay Men’s Health Centre (VAC/GMHC) and Living Positive Victoria have worked to develop greater understanding of the predominance of Victorian prosecutions. Their efforts have been slowed by a relative disconnect between the health sector (where their expertise lies) and the legal sector (where trials are initiated and progressed). Further, the Victorian health department faced strong public criticism for their handling of a 2009 case, where it was argued the case should have been referred earlier for prosecution. Following three independent reviews, general criticism of the public health management system was shown to be largely unwarranted, with only minor amendments made. Still, the handling of cases of individuals who “place others at risk” of HIV infection continues to be politically sensitive.

In late 2011, VAC/GMHC and Living Positive Victoria secured a meeting with staff of the Office of Public Prosecutions Victoria (OPP) to begin a dialogue about prosecutions for HIV exposure and transmission. In 2012, VAC/GHMC successfully secured funding from the Legal Services Board to develop a project to inform legal practice in this area. The project, to be rolled out during 2013,

“Policing policies influence the likelihood of cases proceeding to court as well as the experiences of accused and witnesses. Prosecutors influence not only whether cases proceed but also how they are run. The expertise of lawyers, judges and magistrates directly impacts the course and outcome of cases through the use of precedents.”

will educate prosecutors on current HIV epidemiology and the rapidly developing field of HIV science and medicine. It aims to enhance the public interest by ensuring cases proceed only on the basis of the strongest available evidence.

The project will consult with prosecutors, defence counsel, and providers of expert evidence to identify knowledge gaps affecting HIV trials. It will then commission scholarly peer reviewed articles on the application of science, medicine and epidemiology in HIV trials. Training materials will be drafted and training provided to Victorian prosecutors. The project also aims to develop stronger networks between the OPP and the HIV community sector to provide prosecutors with a resource and contact point when cases arise.

10.2 CANADA

Canada primarily uses sexual assault law to prosecute alleged HIV non-disclosure. Prior to a Supreme Court ruling in October 2012, prosecutions had been based on a 1998 Supreme Court ruling (*R v. Cuerrier*¹⁷⁶) which established that non-disclosure of known HIV-positive status before engaging in conduct that poses a “significant risk” of HIV transmission is fraud which ‘vitiates’ (invalidates) consent to sex. Aggravated sexual assault charges are often used, which carry a maximum sentence of life imprisonment and registration as a sex offender.¹⁷⁷

In their October 2012 ruling (*R v Mabior*¹⁷⁸), the Supreme Court rejected the Government’s argument that there should be a blanket law requiring people with HIV to disclose regardless of the risk and reaffirmed the 1998 ruling, noting that any sexual act that risked a “realistic possibility of transmission of HIV” would be considered aggravated sexual assault if the person with HIV did not disclose prior to sex. The Court, however, stated that the duty for an HIV-positive individual to disclose could only be exempted when both a condom is used and the individual also has a low viral load. Previously, case law had meant that either condom use or low viral load were available as a defence.¹⁷⁹

A coalition of HIV and human rights organisations led by the Canadian HIV/AIDS Legal Network (the Legal Network),¹⁸⁰ which acted as interveners in the two cases, issued a statement saying it was “shocked and dismayed” at the ruling, calling the decision “a major step backwards for public health and human rights”. They noted that the court’s standard of a ‘realistic possibility’, was “an illusory limit to the criminal law [that] blatantly ignores solid science and opens the door to convictions for non-disclosure even where the risk of transmission is negligible, approaching zero”.

“Adding to continued injustice, the Court’s actions will seriously undermine public health efforts,” the interveners noted. “Criminalizing HIV non-disclosure in this way creates another

disincentive to getting an HIV test and imposes a chill on what people can disclose to health professionals and support workers.”¹⁸¹

A number of Canadian studies (cited in Section 7.1), as well as a 2011 study of healthcare workers, have all found that the lack of clarity over the duty to disclose is resulting in “anxiety [and] confusion” for people living with HIV and led to “contradictory HIV counselling advice” by healthcare workers.¹⁸²

Since the ruling, members of the coalition of interveners have been educating stakeholders on the implications of the ruling, providing a full policy analysis¹⁸³ as well as information for people living with HIV.¹⁸⁴ The Legal Network is also working to update its HIV criminalisation resource kits for defence lawyers and advocates¹⁸⁵ and for HIV healthcare workers and other service providers.¹⁸⁶

A powerful documentary produced by the Legal Network, ‘Positive Women: Exposing Injustice’, which features interviews with four women impacted by HIV criminalisation, as well as legal experts, doctors, counsellors and support workers, has been particularly successful in terms of highlighting the disproportionate impact of HIV criminalisation on women living with HIV, despite the popular notion that HIV criminalisation protects women.¹⁸⁷

Following a concerted two-year campaign by the Ontario Working Group on Criminal Law and HIV Exposure arguing that “Crown counsel does not have to prosecute people who use condoms or have a low viral load, just because they can,”¹⁸⁸ the office of the Ministry of the Attorney General met with the Ontario Working Group in January 2013 to discuss prosecutorial guidelines.

It is hoped that prosecutorial guidelines might:

- Clarify the circumstances under which prosecution is appropriate and help ensure that people living with HIV will not be prosecuted where there is no real risk of HIV transmission.
- Help ensure that criminal investigations and prosecutions are informed by a complete and accurate understanding of current medical and scientific research about HIV and the risk of HIV transmission, and take into account the social contexts of living with HIV.
- Help ensure that police and Crown Counsel handle HIV-related criminal complaints in a fair and non-discriminatory manner.
- Make clear that the law applies to all sexually transmitted infections, so that HIV is not singled out and stigmatised.

The timing of the meeting was probably influenced by the ‘Think Twice’ campaign initiated by grass roots organisation, AIDS Action Now, which asked Ontario Crown Prosecutors to ‘think twice’ about bringing future prosecutions.¹⁸⁹ A process advocating for prosecutorial guidelines is also underway in Quebec.¹⁹⁰

In February 2013, the Legal Network and HIV & AIDS Legal Clinic Ontario (HALCO) submitted a paper to the Ontario Association of Chiefs of Police Diversity Committee recommending the development of specific guidelines in relation to non-disclosure of HIV (and possibly other sexually transmitted infections), and providing concrete recommendations for police that could be addressed in a general Best Practice Manual.¹⁹¹

10.3 GERMANY

Prosecutions for HIV exposure and transmission in Germany began in the state of Bavaria, in the former West Germany, under existing bodily injury and aggravated assault laws, following a 1988 Federal Supreme Court decision that unprotected sex without disclosure was attempted bodily injury. Since then there have been at least 35 prosecutions and 28 convictions throughout Germany.

The most infamous case in Germany involved pop singer Nadja Benaissa, who was charged in February 2010 with grievous bodily harm and a further two counts of attempted grievous bodily harm for having unprotected sex with three men between 2004 and 2006 without disclosing her HIV-positive status. One of the men apparently acquired HIV from Benaissa. In August 2010, she was found guilty and given a two-year suspended sentence plus 300 hours of community service. Prior to this case, all other defendants had been male. Since Benaissa's arrest, two more women have been prosecuted.

In March 2012, Germany's umbrella HIV NGO, Deutsche AIDS-Hilfe, produced a position paper on HIV criminalisation, calling "upon the judiciary to reconsider the application of said laws and henceforth refrain from the resulting criminalisation of people with HIV".¹⁹²

In March 2013, The German National AIDS Council (an independent advisory body of the Ministry of Health consisting of experts from the fields of research, medical care, public health services, ethics, law, social sciences, and civil society) produced a consensus statement on HIV criminalisation highlighting advances in HIV science, including the impact of HIV viral load on infectiousness, and the potential negative impact of inappropriate prosecutions on public health.¹⁹³

*The risk reduction of successful antiretroviral therapy is at least comparable to the correct use of condoms...Against this background, the National AIDS Council emphasises: A criminal examination of HIV exposure or transmission related to consensual sexual intercourse must be consistent with the medical facts...Criminal proceedings regarding the transmission of HIV from consensual sexual intercourse do not contribute to HIV prevention. They can even be counterproductive in terms of the willingness of an individual to take an HIV test and in terms of open communication of sexual partners. In contrast, it is in the interest of the individual and society to increase willingness to take an HIV test.*¹⁹⁴

Deutsche AIDS-Hilfe now plans to use their position paper and this consensus statement to further educate the criminal justice system.

BOX 6: OVERCOMING HIV CRIMINALISATION TOGETHER!

In September 2012, a one-day meeting co-hosted by Deutsche AIDS-Hilfe, the European AIDS Treatment Group, the HIV in Europe initiative and the International Planned Parenthood Federation brought together HIV advocates, law and human rights experts and other concerned stakeholders – including parliamentarians, prosecutors, clinicians and representatives of UNAIDS and UNDP – to share information regarding the current legal situation in Europe and Central Asia and to explore ways to ensure a more appropriate, rational, fair and just response.¹⁹⁵

Conference contributions demonstrated that it is possible to advocate against criminal prosecutions for HIV transmission and exposure and that there are examples of successful campaigns and initiatives across Europe.

Consensus on some issues and ways forward emerged during the meeting, including:

- Educating people within the legal system about HIV – in particular, lawyers, police officers and judges – can improve access to justice for those facing prosecution.
- Scientific evidence on treatment and HIV transmission risks are commonly misunderstood. HIV agencies, amongst others, should seek to improve access to high quality information and advice on these issues.
- People living with HIV should have access to advice and support in order to encourage them to know their rights and understand the law.
- Medical professionals can play an influential role in arguing against HIV prosecutions. While many remain detached from the issue, they should all be adequately informed to provide timely and non-judgemental information on HIV criminalisation to their patients, and know how to deal with police and prosecutors should they become involved in a case.
- HIV agencies should seek to support medical professionals to understand the issues and in particular the impact on people living with HIV. They should also encourage medical professionals to participate in public debate as champions providing scientific evidence and opinion against prosecutions.
- Prosecutorial guidelines provide an approach that can limit some of the harm caused by prosecutions in situations where a change in the law is not realistic or imminent.
- The harm of individual prosecutions is exacerbated by discriminatory media coverage. HIV agencies can work with journalists by using a co-operative and consultative approach to help ensure more balanced reporting.
- There is a need for a co-ordinated approach across Europe that supports successful advocacy and facilitates the sharing of knowledge and expertise between countries.
- More advocacy resources linking to the latest research and examples of effective arguments and strategies should be developed for Europe.¹⁹⁶

10.4 GREECE

In May 2012, just prior to national elections, Greek police arrested 96 alleged female sex workers, who were unknowingly tested for HIV by doctors from the Hellenic Centre for Disease Control (KEELPNO) at the police station. The 26 women who tested HIV positive were detained and charged with illegal prostitution, as well as with the more serious felony charge of grievous bodily harm (for allegedly infecting unspecified clients with HIV). They also had their photographs and personal details published. The incident was condemned internationally, including by UNAIDS.¹⁹⁷

Although the police, media and politicians – including then health minister, Andreas Loverdos – claimed that the women were foreign-born sex workers and these actions were necessary to protect “the Greek family” from HIV, the reality was that most of the women were Greek-born drug users who may have occasionally engaged in transactional ‘survival’ sex.¹⁹⁸

Eight of the women have now been acquitted of all charges, and most of the others have been released after more than seven months in prison following a reduction in their charges to misdemeanours.¹⁹⁹ Nevertheless, a recent report from the European Centre for Disease Prevention and Control notes that: “Due to media attention in May 2012 to the HIV testing of sex workers and publication of their pictures on Greek police websites, public confidence in HIV testing procedures, particularly among key vulnerable groups, may be low and the uptake of HIV testing may be reduced.” The report also noted that: “There is no evidence that the HIV epidemic is driven by cases reported among migrants.”²⁰⁰

Positive Voice, which advocates for the rights of people living with HIV in Greece, was among several civil society groups that protested the arrests and supported the women. In collaboration with AIDS Healthcare Foundation, Positive Voice held a two-day workshop entitled ‘Greek Justice, Law and HIV/AIDS’ in Athens in December 2012 attended by lawyers, prosecutors and judges, that featured a keynote speech by The Hon. Michael Kirby, a member of the Global Commission on HIV and the Law.²⁰¹ The meeting provided education on international human rights and legal standards relating to HIV and the criminal law.²⁰²

10.5 SCOTLAND

There is no legislation that specifically criminalises sexual HIV (or other STI) transmission in Scotland (which has different laws to England and Wales). Although it is possible to prosecute alleged intentional transmission as assault, all cases so far have been for ‘reckless’ exposure or transmission under the Scottish common law offence of ‘culpable and reckless conduct’.

In May 2012, the Crown Office and Procurator Fiscal Service (COPFS) published their guidance for Scotland on ‘Intentional or Reckless Sexual Transmission, or Exposure to, Infection’.²⁰³ Scotland is only the second jurisdiction in the world to produce such guidance. It was a direct result of the Crown Prosecution Service (CPS) for England and Wales’ policy²⁰⁴ and guidance,²⁰⁵ first published in March 2008 and last updated in July 2011.²⁰⁶

Until the COPFS guidance was released, it had been unclear whether disclosure in the absence of condoms could be seen as a legitimate defence to accusations of ‘culpable and reckless conduct’ (for alleged sexual exposure or transmission), because Scottish law does not recognise consent as a defence to an assault charge. The guidance has now clarified that prosecutions “will be unlikely” if disclosure of known HIV-positive status has taken place.

Importantly, the guidance has also clarified that alleged sexual HIV exposure charges will not be filed if the accused is on treatment with an undetectable viral load and was counselled that this meant there was a low risk of transmission.

Specifically, the guidance states that prosecution will be unlikely where the following circumstances apply:

- The accused did not know that he/she was HIV positive.
- The accused did not understand how HIV is transmitted.
- The accused disclosed his or her HIV-positive status to the complainant.
- The accused took reasonable steps to reduce the risk of transmission, for example, by using recommended precautions or avoiding higher-risk acts.

- The accused was receiving treatment and had been given medical advice that there was a low risk of transmission or that there was only a negligible risk of transmission in some situations or for certain sexual acts.

It notes that prosecution will be likely where the following circumstances apply:

- The accused deliberately misled or concealed information from the complainant.
- The accused did not attempt to reduce the risk of transmission, for example by failing to take prescribed medication or by failing to follow particular medical advice.
- The complainant was particularly vulnerable in some way.
- There is evidence that the accused had intentionally embarked on a “course of flagrant conduct”.

As well as being helpful in Scotland, such guidance should also be a useful educational and advocacy tool for the many other jurisdictions globally that prosecute potential or perceived HIV exposure as well as transmission.

BOX 7: DOING HIV JUSTICE

Prior to 2012, civil society in England and Wales had previously lobbied the Crown Prosecution Service (CPS) and later the Association of Chief Police Officers (ACPO) to create the first-ever sets of prosecutorial policy²⁰⁷ and guidance,²⁰⁸ as well as police guidelines²⁰⁹ relating to HIV and the criminal law. These guidelines have not only clarified the circumstances under which prosecutions might be warranted, thereby reducing the number of cases reaching court, but their development also led to closer relationships being established between the HIV sector and the criminal justice system fostering improved advocacy and mutual understanding.

In July 2012, the HIV Justice Network produced a 30-minute educational and advocacy video documentary, ‘**Doing HIV Justice: Clarifying criminal law and policy through prosecutorial guidance**’, which demystifies the process of how civil society worked with the Crown Prosecution Service of England and Wales to create the guidelines.²¹⁰

10.6 UNITED STATES

Up to a quarter of all HIV-related prosecutions in the United States are for non-sexual potential or perceived HIV exposure, primarily through spitting or biting²¹¹ even though medical and public health experts characterise the risk of HIV transmission through spitting or biting as ‘negligible’.²¹²

Although HIV-related spitting and biting offences are sometimes included in HIV-specific criminal laws, other states have used general assault²¹³ or terrorism²¹⁴ laws to prosecute people living with HIV for these acts.

Consequently, legal and public health experts welcomed a June 2012 decision by the New York Court of Appeals to vacate the 2006 conviction and sentencing of David Plunkett, an HIV-positive man, for aggravated assault for biting a police officer. The state prosecutor argued that Plunkett had used his saliva as a “dangerous instrument” when he allegedly bit a police officer during an

altercation involving several police who were restraining him following an outburst in a medical facility. Mr Plunkett had been serving a ten-year prison term.²¹⁵

New York's highest court vacated Mr Plunkett's conviction and dismissed the aggravated assault complaint against him on the basis that his saliva, or any body fluid or part, cannot be treated as "dangerous instruments" and a basis for charging someone with aggravated assault under the laws of the state of New York. The ruling is particularly important because it makes clear that a person's health status, disability or other physical attributes should never be the basis for increased charges or sentencing.²¹⁶

Subsequently, in March 2013, the Center for HIV Law and Policy, the National Organization of Black Law Enforcement Executives and the American Association of Prosecuting Attorneys released a fact sheet on that topic, which they hope will bring law enforcement officers up to speed on the real risks of HIV they face from possible exposure to the bodily fluids of those they police.²¹⁷

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11. CONCLUSION

Advocates around the world continue to address the criminalisation of HIV non-disclosure, exposure and transmission in many different ways appropriate to their jurisdiction(s). Their work is not only varied in terms of the complex intersection of laws, policies and practices, but also in terms of their unique social, epidemiological and cultural contexts.

This report highlights some enduring recurring issues:

- Laws explicitly criminalising HIV non-disclosure, exposure or transmission continue to be enacted and implemented. It is easier – although not easy – to prevent new laws from being enacted than to repeal or modernise existing laws.
- A broad range of general criminal laws relating to murder, assault, sexual assault, poisoning, endangerment, nuisance and even terrorism continue to be inappropriately applied to instances of HIV non-disclosure, exposure or transmission. In addition, some people with HIV continue to be prosecuted for acts that include negligible or no risk of HIV infection. Evidence that includes up-to-date science regarding the risks and harms of HIV, made available at all levels of the criminal justice system, can help ensure that the application of the criminal law, if any, to allegations of HIV non-disclosure, exposure or transmission is more appropriately characterised.
- Police continue to arrest, and prosecutors continue to prosecute, people for HIV non-disclosure, exposure or transmission. More work is needed with police and justice departments to mitigate ‘knee-jerk’ reactions to the ‘threat’ of HIV, by ensuring law enforcement officials have a basic understanding of current HIV health practice, medicine, transmission risk and epidemiology.
- Prosecutions continue to proceed with individuals pleading guilty before accessing appropriate expertise (both legal and scientific) in order to examine the full circumstances of the case. It is critical that people who are accused of HIV-related crimes achieve access to justice by ensuring that they are fully resourced to understand the nature of charges and the defences available to them. It is also vital that defence lawyers are resourced to access and submit expert scientific and other evidence to ensure a fair trial of those accused.
- People found guilty of HIV-related offences continue to be given lengthy sentences that are at odds with their actions and the harms caused. Education of magistrates and judges is needed to ensure sentencing is not unduly influenced by a failure to understand current HIV health practice, medicine, transmission risk and epidemiology.

Despite the many incremental successes of the past 18 months, more work is required to strengthen advocacy capacity. HIV criminalisation is a complex issue. It entails a detailed understanding of diverse aspects of the criminal justice system; collection and analysis of evidence of the scope and impact of prosecutions across local and national boundaries; articulation and argument about complex moral and ethical issues of trust, blame and responsibility; and inclusion of HIV prevention and human rights priorities.

Development of strategies against HIV criminalisation relevant to each individual jurisdiction requires time, effort and the involvement of multidisciplinary experts. This report represents

only the tip of the iceberg: each entry a brief synopsis of the countless hours and many decisions individuals and agencies have dedicated to advocacy for greater justice. Their work is crucial to building an effective HIV response and the possibility of a world free from HIV-related stigma and discrimination.

More attention to the experiences of those who have survived HIV criminalisation is also required, as well as the impact of HIV criminalisation on the experiences of all people living with HIV. People living with HIV are central to advocacy against HIV criminalisation. They must be resourced to develop sophisticated understanding of HIV criminalisation issues and to lead conversations with their governments and with other civil society organisations that continue to advance HIV justice for all.

“It began on New Year’s Eve 2007, when I met someone through a mutual friend. We had a casual relationship. It was short and contentious. When I stopped seeing him, he kept threatening to press charges for not having initially disclosed my HIV status, and that’s exactly what he did...I spent the next two years in and out of court until I was sentenced in June 2010: ordered to serve six months in prison, and given a 15-year sex offender status. Underneath the photograph on my Louisiana driver’s license, in big red capital letters, it says “SEX OFFENDER.” ...The day after my release, I went online and started researching and finally found a name for what I was experiencing: criminalization. I found Sean Strub’s phone number on something he had written about fighting HIV criminalization and called it within 48 hours of my release from prison. I told Sean I wanted to help, that this was what I was prepared to devote my life to – abolishing HIV criminalization laws. Since then I’ve traveled to Geneva and Oslo speaking to UNAIDS about my story. I’ve joined the Positive Justice Project and the HIV Justice Network. I’ve moved to Pennsylvania to work with Sean Strub launching SERO, a nonprofit initiative combating HIV criminalization, stigma and discrimination and promoting the empowerment of people with HIV. The courts and the lawyers do not understand HIV or the science of transmission. HIV is not a crime. Criminalization laws are not prevention. In Louisiana, they’re just another way to lock up young black men. Today, I stand as a voice for people who will not or cannot speak for themselves. I am speaking for all people who don’t have the strength.”

Robert Suttle, Assistant Director, Sero Project ²¹⁸

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PUBLISHED BY:

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