

# POLICY BRIEF

## Criminalization of HIV Transmission

### Introduction

In some countries, criminal law is being applied to those who transmit or expose others to HIV infection.<sup>1</sup> There are no data indicating that the broad application of criminal law to HIV transmission will achieve either criminal justice or prevent HIV transmission. Rather, such application risks undermining public health and human rights. Because of these concerns, UNAIDS urges governments to limit criminalization to cases of intentional transmission i.e. where a person knows his or her HIV positive status, acts with the intention to transmit HIV, and does in fact transmit it.

In other instances, the application of criminal law should be rejected by legislators, prosecutors and judges. In particular, criminal law should not be applied to cases where there is no significant risk of transmission or where the person:

- did not know that s/he was HIV positive;
- did not understand how HIV is transmitted;
- disclosed his or her HIV-positive status to the person at risk (or honestly believed the other person was aware of his/her status through some other means);

- did not disclose his or her HIV-positive status because of fear of violence or other serious negative consequences;
- took reasonable measures to reduce risk of transmission, such as practising safer sex through using a condom or other precautions to avoid higher risk acts; or
- previously agreed on a level of mutually acceptable risk with the other person.

States should also:

- avoid introducing HIV-specific laws and instead apply general criminal law to cases of intentional transmission;
- issue guidelines to limit police and prosecutorial discretion in application of criminal law (e.g. by clearly and narrowly defining “intentional” transmission, by stipulating that an accused person’s responsibility for HIV transmission be clearly established beyond a reasonable doubt, and by clearly indicating those considerations and circumstances that should mitigate against criminal prosecution);<sup>2</sup> and
- ensure any application of general criminal laws to HIV transmission is consistent with their international human rights obligations.<sup>3</sup>

<sup>1</sup> For information on different countries and their legislation see Canadian HIV/AIDS Legal Network (2007) *A Human Rights Analysis of the N’djamena model legislation on AIDS and HIV specific legislation in Benin, Guinea, Guinea Bissau, Mali, Niger, Sierra Leone and Togo*, GNP+ and Terrence Higgins Trust (2005) *Criminalisation of HIV transmission in Europe: A rapid scan of the laws and rates of prosecution for HIV transmission within signatory States of the European Convention of Human Rights*. <http://www.gnpplus.net/criminalisation/rapidscan.pdf> and WHO (2006) *Report of the WHO European Region Technical Consultation, in collaboration with the European AIDS Treatment Group (EATG) and AIDS Action Europe (AAE), on the criminalization of HIV and other sexually transmitted infections*. WHO, Copenhagen

<sup>2</sup> See OHCHR and UNAIDS (2006) *International Guidelines on HIV/AIDS and Human Rights* UNAIDS Geneva Guideline 4 “Criminal and/or public health legislation should not include specific offences against the deliberate or intentional transmission of HIV, but rather should apply general criminal offences to these exceptional cases. Such applications should ensure the elements of foreseeability, intent, causality and consent are clearly and legally established to support a guilty verdict and/or harsher penalties”.

<sup>3</sup> Particularly the individual’s rights to privacy, the highest attainable standard of health, freedom from discrimination, equality before the law and liberty and security of the person (see Articles 3, 7 and 12 of the *Universal Declaration of Human Rights* and Article 12 of the *International Covenant on Economic, Social and Cultural Rights*).

Where a violent offence (e.g. rape, other sexual assault or defilement) has also resulted in the transmission of HIV or created a significant risk of transmission, the HIV-positive status of the offender may legitimately be considered an aggravating factor in sentencing only if the person knew he or she was HIV positive at the time of committing the offence.

## Alternatives to criminal law

Instead of applying criminal law to HIV transmission, governments should expand programmes which have been proven to reduce HIV transmission<sup>4</sup> while protecting the human rights both of people living with HIV and those who are HIV negative. Such measures include providing HIV information, support and commodities to people so they can avoid exposure to HIV through practising safer behaviours; increasing access to voluntary (as opposed to mandatory) confidential HIV testing and counselling;<sup>5</sup> and addressing HIV-related stigma and discrimination. Prevention programmes should include *positive prevention* efforts which empower people living with HIV to avoid transmitting HIV to others, to voluntarily disclose their positive status in safety,<sup>6</sup> avoid new sexually transmitted infections, and delay HIV disease progression.

Governments should also strengthen and enforce laws against rape (inside and outside marriage), and other forms of violence against women and children; improve the efficacy of criminal justice systems in investigating and prosecuting sexual offences against women and children, and support women's equality

and economic independence, including through concrete legislation, programmes and services. These are the most effective means by which to protect women and girls from HIV infection and should be given the highest priority.

Such public health and legislative measures are necessary for States to realize their commitments to achieve universal access to HIV prevention, treatment, care, and support by 2010,<sup>7</sup> and to halt and begin to reverse the spread of HIV by 2015.<sup>8</sup>

## Discussion

The two main reasons advanced for criminalizing HIV transmission are to:

- *punish* harmful conduct by imposing criminal penalties, and
- *prevent HIV transmission* by deterring or changing risk behaviours.

Except in the rare cases of intentional HIV transmission, applying criminal law to HIV transmission does not serve these goals.

## Punishing harmful conduct

If someone, knowing that he or she is HIV positive, acts with the intent to transmit HIV, and does transmit HIV, that person's state of mind, behaviour, and the resulting harm justifies punishment. Such malicious acts in the context of HIV are rare, and the available evidence shows that most people living with HIV who know their status take steps to prevent transmitting HIV to others.<sup>9</sup>

<sup>4</sup> For example, see Johnson WD, Holtgrave DR, McClellan WM, Flanders WD, Hill AN, Goodman M (2005) "HIV intervention research for men who have sex with men: a 7-year update" *AIDS Education Prevention* 17(6):568-89. See also Auerbach J and Coates T (2000) "HIV Prevention Research: Accomplishments and Challenges for the Third Decade of AIDS" *American Journal of Public Health* 90:1029-1032, Green EC, Halperin DT, Nantulya V and Hogle JA (2006) "Uganda's HIV Prevention Success: The Role of Sexual Behaviour Change in the National Response" *AIDS and Behavior* 10(4):335-346, Phoolcharoen W (1998) "HIV/AIDS Prevention in Thailand: Successes and Challenges" *Science* 280:1873-74

<sup>5</sup> See *International Guidelines on HIV/AIDS and Human Rights* Guideline 3 (b) "Apart from surveillance testing and other unlinked testing done for epidemiological purposes, public health legislation should ensure that HIV testing of individuals should only be performed with the specific consent of that individual" and Guideline 5 22(j) "Public health, criminal and antidiscrimination legislation should prohibit mandatory HIV testing of targeted groups, including vulnerable groups."

<sup>6</sup> See *2006 Political Declaration on HIV/AIDS* General Assembly Resolution 60/262 Article 20 paragraph 25, where governments "Pledge to promote, at the international, regional, national and local levels, access to HIV/AIDS education, information, voluntary counselling and testing and related services, with full protection of confidentiality and informed consent, and to promote a social and legal environment that is supportive of and safe for voluntary disclosure of HIV status."

<sup>7</sup> See *Political Declaration on HIV/AIDS* (2006) paragraphs 11, 15, 20, 24 and 49

<sup>8</sup> Millennium Development Goal 6 UN General Assembly Resolution 55/2, Article 19

<sup>9</sup> For example, see Bunnell R et al (2006) "Changes in sexual risk behaviour and risk of HIV transmission after antiretroviral therapy and prevention interventions in rural Uganda" *AIDS* 20:85-92, and Marks G et al (2005) "Meta-analysis of high-risk sexual behavior in persons aware and unaware they are infected with HIV in the United States: implications for HIV prevention programs" *Journal of Acquired Immune Deficiency Syndromes* 39:446-53.

In situations apart from intentional transmission, criminal prosecution is not warranted. For example, the criminal law is not appropriately applied where a person has disclosed his or her HIV-positive status to a partner (who is able to consent freely to sex); where that partner is already aware through some other means that the person is HIV-positive; or where the HIV-positive person takes steps to reduce the risk of HIV transmission (e.g. by using condoms or otherwise practising safer sex by avoiding higher risk activities). Such actions indicate that the person did not intend to transmit HIV, and that their conduct should not be considered reckless. To prosecute people in such situations would directly contradict efforts to prevent HIV transmission by encouraging safer sexual practices, voluntary HIV testing, and voluntary disclosure.

Much onward transmission takes place soon after a person has acquired HIV, when his/her infectiousness is high and before the person knows or suspects s/he is HIV positive or that s/he may be passing the virus onto others.<sup>10,11</sup> After this period, many people still do not learn their HIV status, either because they do not have access to confidential voluntary HIV testing and counselling or because they are afraid to be tested due to negative consequences, such as discrimination or violence, which might arise from a positive diagnosis.<sup>12</sup> In such cases, people are unknowingly transmitting HIV and should not face criminal prosecution.

## Concerns about miscarriage of justice

Extending criminal liability beyond cases of deliberate or intentional HIV transmission – to reckless conduct – should be avoided. Such broad application of the criminal law could expose large numbers of people to possible prosecution without their being able to foresee their liability for such prosecution. Prosecutions and convictions are likely to be disproportionately applied to members of marginalized groups, such as sex workers, men who have sex with men and people who use drugs. These groups are often “blamed” for transmitting HIV, despite insufficient access to HIV prevention information, services or commodities, or the ability to negotiate safer behaviours with their partners due to their marginalized status.<sup>13</sup> In jurisdictions where HIV transmission has been criminally prosecuted, the very few cases that are prosecuted out of the many infections that occur each year<sup>14</sup> often involve people from ethnic minorities, migrants or men who have sex with men.<sup>15</sup>

The inappropriate or overly-broad application of criminal law to HIV transmission creates also a real risk of increasing stigma and discrimination against people living with HIV, thus driving them further away from HIV prevention, treatment, care and support services.

<sup>10</sup>Brenner BG et al (2007) “High rates of forward transmission events after acute/early HIV-1 infection” *Journal of Infectious Diseases* 195: 951-59; Marks G, Crepaz N and Janssen R (2006) “Estimating sexual transmission of HIV from persons aware and unaware that they are infected with the virus in the USA” *AIDS* 20:1447-1450.

<sup>11</sup>Even of tested soon after infection, people may receive a false negative diagnosis as HIV antibodies can take up to 3 months to become evident in tests. See Fauci AS and Clifford LH (2001) “Human immunodeficiency virus (HIV) disease: AIDS and related disorders”, p. 1852–1913. In Braunwald E, Fauci AS, Kasper DL, Hauser SL, Longo DL, and Jameson JL (eds.), *Harrison’s principles of internal medicine, 15th international ed.* New York: McGraw-Hill Companies, Inc.

<sup>12</sup>WHO/UNAIDS/UNICEF (2007) *Towards universal access: scaling up priority HIV/AIDS interventions in the health sector. Progress Report.* Geneva: World Health Organization, UNAIDS and United Nations Children’s Fund; April 2007.

<sup>13</sup>For example, see Human Rights Watch (2003) *Policy Paralysis: A Call for Action on HIV/AIDS-Related Human Rights Abuses Against Women and Girls in Africa* Human Rights Watch, New York and Human Rights Watch reports cited therein; Human Rights Watch (2006) *Rhetoric and Risk: Human Rights Abuses Impeding Ukraine’s Fight Against HIV/AIDS* Human Rights Watch, New York; Human Rights Watch (2004) *Not Enough Graves: The War on Drugs, HIV/AIDS, and Violations of Human Rights in Thailand* Human Rights Watch, New York; Human Rights Watch (2003) *Injecting Reason: Human Rights and HIV Prevention for Injection Drug Users; California: A Case Study* Human Rights Watch, New York

<sup>14</sup>In the UK, for example, there have been only 15 prosecutions since 2001 compared to over 42 000 new HIV diagnoses in the same period, see [www.nat.org.uk](http://www.nat.org.uk).

<sup>15</sup>GNP+ Europe and Terrence Higgins Trust see (2005) *Criminalisation of HIV Transmission in Europe: A rapid scan of the laws and rates of prosecution for HIV transmission within signatory States of the European Convention of Human Rights* [www.gnpplus.net/criminalization/index.html](http://www.gnpplus.net/criminalization/index.html)

Establishing who transmitted HIV to who is often difficult (particularly where both parties have had more than one sexual partner) and may depend on testimony alone. People charged with HIV transmission may thus be found guilty in error.<sup>16</sup> Phylogenetic testing can only determine the degree of relatedness of two samples of HIV and cannot establish beyond a reasonable doubt the source, route or timing of infection; it is also not available in many jurisdictions and is very costly.

## **Prevention of HIV transmission**

There are no data demonstrating that the threat of criminal sanctions significantly changes or deters the complex sexual and drug-using behaviours which may result in HIV transmission. Available data show no difference in behaviour between places where laws criminalizing HIV transmission exist and where they do not.<sup>18</sup> Furthermore, using criminal law beyond cases of intentional

### **Disclosure and partner notification**

The law in some countries imposes a legal obligation to disclose one's HIV positive status to sexual partners or others, such as health-care workers. UNAIDS does not support a legal obligation to disclose one's HIV-positive status. Everyone has the right to privacy about their health and should not be required by law to reveal such information, especially where it might lead to serious stigma, discrimination and possibly violence, as in the case of HIV status.

However, all people have the ethical obligation not to harm others. Governments should provide HIV programmes for HIV-positive people that empower them to practice safer sex and/or voluntarily disclose their status in safety. This was agreed in the Political Declaration on HIV (2006) and includes government's commitments to ensure laws and programmes to protect people against discrimination and other human rights abuses based on HIV status.

To protect themselves from exposure to HIV in health-care settings, health-care workers should have access to and training on universal precautions against all blood-borne pathogens, including HIV.

The International Guidelines on HIV/AIDS and Human Rights advises that public health legislation should authorize, but not require, that health professionals decide, on the basis of each individual case and ethical considerations, whether to inform their patients' sexual partners of the HIV status of their patient.<sup>17</sup> Such a decision should only be made in accordance with the following criteria.

- The HIV-positive person in question has been thoroughly counselled.
- Counselling of the HIV positive person has failed to achieve appropriate behavioural changes.
- The HIV positive person has refused to notify or consent to the notification of his/her partner(s).
- A real risk of HIV transmission to the partner(s) exists.
- The HIV-positive person is given reasonable advance notice.
- The identity of the HIV-positive person is concealed from the partner(s), if this is possible in practice.
- Follow up is provided to ensure support to those involved, as necessary.

Particular consideration and support should be given to HIV-positive women who may not be able to disclose their status for fear of violence or other negative consequences.

<sup>16</sup>See Bernard, E et al (2007) *The use of phylogenetic analysis as evidence in criminal investigation of HIV transmission*, available at ([www.aidsmap.com](http://www.aidsmap.com)) February 2007.

<sup>17</sup>See Guideline 3 20 (g).

<sup>18</sup>Lazzarini Z, Bray S and Burris S (2002) "Evaluating the Impact of Criminal Laws on HIV Risk Behavior" *Journal of Law, Medicine and Ethics* 30:239-253, Burris S, Beletsky L, Bureson J, Case P and Lazzarini Z.(2007) "Do Criminal Laws Effect HIV Risk Behavior? An Empirical Trial" [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=913323](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=913323).

transmission could actually undermine effective HIV prevention efforts in the following ways.

- It could discourage HIV testing, since ignorance of one's status might be perceived as the best defence in a criminal law suit. This would obstruct efforts to increase the number of people accessing testing and being referred to HIV treatment, care and support. HIV testing and treatment are vital for HIV prevention because people who receive a positive diagnosis usually change their behaviour to avoid transmitting HIV and because taking antiretroviral therapy reduces infectiousness and the likelihood of onward HIV transmission.<sup>19</sup>
- It places legal responsibility for HIV prevention exclusively on those already living with HIV and dilutes the public health message of shared responsibility for sexual health between sexual partners. People may (wrongly) assume their partners are HIV negative *because* they have not disclosed, and thus not use protective measures.
- It could create distrust in relationships with health- service professionals and researchers and impede the provision of quality care and research, as people may fear information regarding their HIV status will be used against them in a criminal case.

## **The rights of women and girls**

Behind some efforts to criminalize HIV transmission is the understandable desire to prevent transmission of HIV to vulnerable women and girls and to punish the men who have infected them. In many societies, women and girls are particularly vulnerable to HIV due to cultural

norms which sanction multiple partnerships for men, sexual coercion and others forms of gender-based violence, and discrimination in education and employment which makes it difficult for women to leave relationships which place them at risk of exposure to HIV. Reports indicate many women have acquired HIV in marriage and other intimate relationships, including where rape or sexual coercion have occurred.<sup>20</sup>

Yet, ironically, applying criminal law broadly to HIV transmission may result in women being disproportionately prosecuted. Women often learn they are HIV positive before their male partners because they are more likely to access health services<sup>21</sup> and thus, are blamed for “bringing HIV into the relationship”. For many women, it is also either difficult or impossible to negotiate safer sex or to disclose their status to a partner for fear of violence, abandonment or other negative consequences.<sup>22</sup> Women may face prosecution as a result of their failure to disclose for valid reasons.

In such situations the better way to protect women from exposure to HIV is to enact and enforce laws protecting them from sexual violence, discrimination based on gender and HIV status, and inequality in employment, education, and domestic relations, including property, inheritance and custody rights.

<sup>19</sup> Vernazza P, Hirschel B, Bernasconi E and Flepp M (2008) “Les personnes séropositives ne souffrant d’aucune autre MST et suivant un traitement antirétroviral efficace ne transmettent pas le VIH par voie sexuelle.” *Bulletin des Médecins Suisses* 89 (5), Castilla J, Del Romero J, Hernando V, Marincovich B, Garcia S and Rodriguez C (2005) “Effectiveness of Highly Active Antiretroviral Therapy in Reducing Heterosexual Transmission of HIV” *Journal of Acquired Immune Deficiency Syndrome* 40(1) 96-101

<sup>20</sup> Report on the ARASA/OSISA Civil Society Consultative Meeting on the Criminalisation of the Wilful Transmission of HIV Johannesburg, South Africa, 11-12 June 2007

<sup>21</sup> UNAIDS (2007) *Report of the International Consultation on the Criminalization of HIV Transmission* forthcoming

<sup>22</sup> Asia Pacific Network of People Living with HIV/AIDS (2004) *AIDS Discrimination in Asia* APN+, Bangkok, Gielen AC, McDonnell KA, Burke JG, O’Campo P (2000) “Women’s lives after an HIV positive diagnosis: disclosure and violence” *Maternal and Child Health Journal* 4(2): 111-120



## Mother-to-child transmission

There is a 30% risk of HIV transmission from a HIV-positive mother to her child during pregnancy, delivery or via breastfeeding. This risk is significantly reduced when the mother and child are given antiretroviral treatment, but in 2007 only an estimated 34% of pregnant HIV-positive women in need were receiving such treatment.<sup>23</sup>

Some countries have enacted or are considering legislation which criminalizes mother to child transmission.<sup>24</sup>

This is inappropriate because:

- everyone has the right to have children,<sup>25</sup> including women living with HIV;
- when pregnant women are counselled about the benefits of antiretroviral therapy, almost all agree to being tested and receiving treatment;
- in the rare cases where pregnant women may be reluctant to undergo HIV testing or treatment, it is usually because they fear that their HIV-positive status will become known and they will face violence, discrimination or abandonment;
- forcing women to undergo antiretroviral treatment in order to avoid criminal prosecution for mother-to-child transmission violates the ethical and legal requirements that medical procedures be performed only with informed consent; and
- often, HIV-positive mothers have no safer options than to breastfeed, because they lack breast milk substitutes or clean water to prepare formula substitutes.

Public health measures, including counselling and social support, are more appropriate to deal with the rare cases of pregnant women or mothers with HIV who refuse treatment. Governments should ensure both parents have information and access to measures to reduce mother-to-child transmission, including access to HIV testing and treatment. Women also need effective measures to protect them and their infants from violence and discrimination related to their HIV status.

## Recommendations

### For Governments

- Abide by international human rights conventions on equal and inalienable rights, including those related to health, education and social protection of all people, including people living with HIV.
- Redirect legislative reform, and law enforcement, towards addressing sexual and other forms of violence against women,<sup>26</sup> and discrimination and other human rights violations against people living with HIV, and audit the application of general criminal law to ensure it is not used inappropriately in the context of HIV.

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