Criminalization of HIV Transmission

In some countries, criminal law is being applied to those who transmit or expose others to HIV.¹ There are no data indicating broad application of criminal law to HIV transmission achieves criminal justice or prevents HIV transmission. Rather, such application risks undermining public health and human rights. UNAIDS and UNDP urge 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.

Criminal law should not be applied to cases where there is no significant risk of transmission or where the person:

- did not know 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 transmission risk, such as practising safer sex through using a condom or other precautions; or
- agreed 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 intentional transmission;

- issue guidelines to limit police and prosecutorial discretion in application of criminal law (e.g. by clearly and narrowly defining “intentional” transmission);² and

- ensure any application of general criminal laws to HIV transmission is consistent with their international human rights obligations.³

Where a violent offence (e.g. sexual assault or defilement) has resulted in or created a significant risk of HIV transmission, the HIV-positive status of the offender is a legitimate aggravating factor in sentencing only if the person knew s/he was HIV positive at the time of the offence.

Alternatives to criminal law

Instead of criminalization, governments should expand programmes proven to reduce HIV transmission while protecting the human rights both of people living with HIV and those who are HIV negative.⁴ These include providing HIV prevention information, support and commodities; increasing access to voluntary (as opposed to mandatory) confidential HIV testing and counselling;⁵ and addressing HIV-related stigma and discrimination. Prevention programmes should include positive prevention which helps people living with HIV to avoid transmitting HIV to others, to voluntarily disclose their positive status in safety, to avoid acquiring other sexually transmitted infections, and delay HIV disease progression.

Governments should also strengthen and enforce laws against sexual and gender-based violence; improve the efficacy of criminal justice systems in investigating

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³ 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.


⁵ See International Guidelines on HIV/AIDS and Human Rights Guideline 3 (b) and Guideline 5 22()).
and prosecuting sexual offences, and support women's equality and economic independence. These are the most effective means of protecting women and girls from HIV and should be given the highest priority.

Such public health and legislative measures are necessary for States to realize their commitment to halt and begin to reverse the spread of HIV by 2015.\(^8\)

**Discussion**

The two main reasons advanced for criminalization are to punish harmful conduct and to prevent HIV transmission. Except for intentional transmission, criminalization does not serve these goals.

**Punishing harmful conduct**

In cases of intentional transmission, the person's mental state, behaviour, and the resulting harm justifies punishment. Such malicious acts are rare, and the available evidence shows most people living with HIV who know their status take steps to prevent transmitting HIV to others.\(^7\)

Criminal prosecution is not otherwise warranted. For example, if a person has disclosed his or her HIV-positive status to a partner (who can consent freely to sex); or takes steps to reduce the risk of HIV transmission, his/her actions indicate the person did not intend to transmit HIV. To prosecute in such situations would 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.\(^8\) 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 the possible consequences, such as discrimination or violence of a positive diagnosis. In such cases, people are unknowingly transmitting HIV and should not face criminal prosecution.

**Concerns about miscarriage of justice**

Extending criminal liability beyond intentional to reckless HIV transmission should be avoided. Such broad application could expose many people to possible prosecution without their being able to foresee liability for such prosecution. Prosecutions and convictions are likely to increase stigma and discrimination against people living with HIV, and be disproportionately applied to members of marginalized groups, such as sex workers, men who have sex with men, and people who inject drugs.\(^9\) These groups are often “blamed” for transmitting HIV, despite insufficient access to prevention programmes, or the ability to negotiate safer behaviours with their partners due to their marginalized status.\(^10\)

**Prevention of HIV transmission**

Available data show no differences in behaviours between places where laws criminalizing HIV transmission exist and where they do not.\(^11\) Using criminal law beyond cases of intentional transmission could actually undermine HIV prevention efforts:

- It could discourage HIV testing, since ignorance of one’s status might be perceived as the best defence in a criminal law suit. HIV testing and referral to treatment are vital for prevention because people who receive a positive diagnosis usually change their behaviour to avoid transmitting HIV and because antiretroviral therapy reduces the likelihood of onward HIV transmission.\(^12\)

- It places legal responsibility for prevention exclusively on those living with HIV and dilutes the public health message of shared responsibility for sexual health between sexual partners.\(^13\)

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\(^8\) Millennium Development Goal 6 UN General Assembly Resolution 55/2, Article 19.

\(^7\) For example, see Marks G et al (2003) “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.


\(^9\) op cit 1 GN+ Europe and Terrence Higgins Trust (2005).


Disclosure and partner notification

Some countries impose a legal obligation to disclose one's HIV positive status to sexual partners or others, such as health-care workers. UNAIDS and UNDP do not support such an obligation. 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 with HIV status.

However, all people have the ethical obligation not to harm others. Governments should provide programmes for HIV-positive people that empower them to practice safer sex and/or voluntarily disclose their status in safety.

The International Guidelines on HIV/AIDS and Human Rights advises that public health legislation should authorize, but not require, that health professionals decide whether to inform their patients' sexual partners of the patient's HIV status. Such decisions should only be made if:

- 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 partner notification.
- 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 possible.
- Follow up is provided to ensure support to those involved, as necessary.

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

Mother-to-child transmission

The risk of HIV transmission from a HIV-positive mother to her child during pregnancy, delivery or via breastfeeding is significantly reduced when the mother and child are given antiretroviral treatment. In 2007 only an estimated 34% of pregnant HIV-positive women in need were receiving such treatment.

Some countries have enacted or are considering legislation which criminalizes mother to child transmission. This is inappropriate because:

- everyone has the right to have children, including women living with HIV;
- 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 treatment in order to avoid criminal prosecution violates the ethical and legal requirements that medical procedures be performed only with informed consent; and
- often, HIV-positive mothers must breastfeed, because they lack breast milk substitutes or clean water to prepare formula substitutes.

Public health measures 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, and that women and their infants are protected from violence and discrimination related to their HIV status.

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14 See Guideline 3.20 (g).
16 Article 16 of the Universal Declaration of Human Rights.
It could create distrust in relationships with health professionals and researchers and impede quality care and research, if people 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 punish the men who have infected women and girls. In many societies, women and girls are particularly vulnerable to HIV due to cultural norms which sanction multiple partnerships for men, sexual and gender-based violence, and discrimination in education and employment which makes it difficult for women to leave relationships which place them at risk of HIV. Reports indicate many women have acquired HIV in marriage and other intimate relationships, including where rape has occurred.

Yet criminalization 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 and thus, are blamed for “brining 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. Women may face prosecution as a result of their failure to disclose for valid reasons.

Recommendations

For Governments

- Repeal HIV-specific criminal laws, laws directly mandating disclosure of HIV status, and other laws counterproductive to HIV prevention, treatment, care and support efforts, or which violate the human rights of people living with HIV and other vulnerable groups.

- Apply general criminal law only to the intentional transmission of HIV, and audit its application to ensure it is not used inappropriately in the context of HIV.

- Redirect law reform and enforcement towards addressing sexual and gender-based violence, discrimination and other human rights violations against people living with, or most at risk of, HIV.17

- Significantly expand access to proven HIV prevention programmes and voluntary testing and counselling, and support voluntary disclosure and ethical partner notification.

- Ensure civil society, including women's and human rights groups, representatives of people living with HIV and other key populations, are engaged in developing and/or reviewing HIV laws and their enforcement.

- Promote gender equality in education and employment, and enact and enforce laws to promote women's rights to property, inheritance, custody and divorce.

For civil society

- Monitor proposed and existing laws and advocate against those which inappropriately criminalize HIV transmission and impede effective HIV prevention, treatment, care and support.

- Advocate for laws against sexual and gender based violence.

- Organize legal support and HIV-prevention services for people living with HIV and other vulnerable groups.

- Engage with the media to ensure that coverage of such issues is proportionate and well-informed, explaining the difficulties of disclosing HIV status and reiterating the shared responsibility for sexual health.

For international partners

- Support research on the impact of HIV-related laws on public health and human rights.

- Support governments to expand proven HIV prevention programmes, reduce HIV related stigma and discrimination, instigate appropriate law reform, and end gender inequality and violence.