

HIV/AIDS Update

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Crime and punishment

There have always been controversial issues surrounding HIV – from the ability of young people to access condoms and other sexual and reproductive health services, to a truly human rights based response for sex workers, men who have sex with men and injecting drug users. One of the most challenging issues facing the world today is the criminalization of HIV transmission.

Legislation criminalizing the deliberate or reckless transmission of HIV may at first glance appear 'logical' and a good way of preventing the onward transmission of HIV. However, looking more closely at the consequences of such legislation, it is clear that it does not serve the interests of public health. Making HIV transmission a criminal offence can remove incentives for HIV testing, undermine trust in healthcare providers, and disrupt access to HIV prevention, treatment and care, all of which increase the spread of HIV.

Prosecutions for HIV transmission have stirred up a great deal of confusion. There is a lack of understanding of scientific evidence and the legal meanings of terms such as 'harm,' 'transmission' and 'intent'. Some countries use existing laws but often these laws were not designed to deal with cases of HIV transmission. Other countries have enacted specific HIV law but these appear especially punitive.



Irrespective of the mechanism, criminalising HIV transmission has no place in a comprehensive HIV response as it deepens the stigma and discrimination faced by people living with HIV. Instead of encouraging the estimated 90% of people who remain unaware of their HIV status to seek out voluntary counselling and testing, criminalization will ensure that ignorance remains blissful. IPPF believes that there should be no legislation criminalizing HIV transmission

and alternatives to criminal law must be sought to resolve such conflicts.

This edition of the HIV Update features articles from two leading experts on criminalization. Matthew Weait gives an overview of the arguments for and against criminalization from a legal point of view (see page 2) and his article shows that IPPF's position is sound and robust. Susan Timberlake looks at the alternatives to criminalization

(see page 3) and highlights the collective role we need to play in working with communities and agencies around the world. As a rights-based organisation, advocating against the criminalization of HIV (see page 3) is a key part of our work in 2008 and beyond.

Love, Kevin

The legitimacy of criminalizing HIV transmission

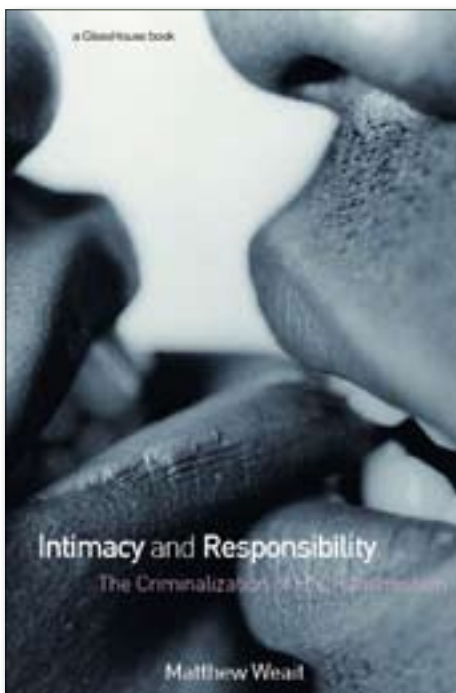
Criminal law is the most powerful mechanism a society has for expressing collective disapproval of a person's conduct and typically results in the imposition of punishment – whether that be a monetary penalty or imprisonment.

by Dr Matthew Weait, Senior Lecturer in Law and Legal Studies, Birkbeck College, University of London

The fact that a person may be deprived of their liberty for committing a crime has a number of consequences. First, the burden of proof (the standard to which the prosecution must satisfy the court that the defendant did in fact commit the offence) is high – usually 'beyond reasonable doubt', or something equivalent. Second, the benefit of any doubt must be given to the defendant; and, third, in most cases, it will be necessary for the prosecution to prove that the defendant engaged in the prohibited conduct or caused the proscribed consequence with the requisite degree of fault, either through intention, recklessness or (more rarely) negligence. Finally, it is important to recognise that the justifiable criminalization of a form of behaviour generally implies that such behaviour is of a kind that attracts general moral disgrace, and that the interest of the victim is sufficiently important for its violation to warrant public censure.

These pre-conditions for criminalization would at first glance suggest that punishing those who transmit HIV or who expose them to the risk of transmission is, in principle, morally and legally justifiable. Also, there are no practical obstacles in doing so. It is not hard to conceptualise HIV infection as such a grave harm that transmitting it to someone else, or taking the risk of transmission, justifies punishment; and it is not hard to argue that people who know their HIV positive status are doing something morally wrong if they engage in such conduct. There are, however, some very strong principled and practical reasons why these immediately straightforward justifications should be subjected to close and careful scrutiny.

First, as a general point, there is no necessary link between morally offensive conduct and its criminalization. Many if not most people think that lying is morally wrong – but lying is not, in and of itself, a criminal offence. The same is true, in most jurisdictions, of adultery. Second, even where conduct which is seen as morally wrong attracts liability, it is important to recognize that for



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

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

- If people knowingly living with HIV infection fear that they may have infected someone, they may be less likely to advise that person to seek Post-Exposure Prophylaxis (PEP) for fear that in doing so they are confessing to the commission of an offence.

“Criminalizing HIV can affect people living with HIV who are already suffering from several kinds of stigmatization and discrimination, without the intervention of the law. If the law criminalizes HIV transmission, it could lead to the total exclusion of the people living with HIV.”
Naoumi Ghizlane, Association Marocaine de Planification Familiale (AMPF)

- Those who are HIV positive but do not know for certain, or people who believe they might be, may be less willing to discover their status for fear that this knowledge could be used against them.
- Condoms are not 100% effective. Where criminal liability may be imposed merely for exposing someone to the risk of transmission, some people living with HIV (even a very small minority) may take the view that there is no point taking precautions. In the absence of a defence for appropriate condom use, such a criminal law provides no incentive to minimise onward transmission risk.

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

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

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

For further discussion of the views expressed here see Weait, Matthew *'Intimacy and Responsibility: the Criminalization of HIV Transmission'* (Abingdon: Routledge-Cavendish, 2007).

Any alternatives?

The criminalization of HIV transmission is spreading but little research has been done on why Parliamentarians pass such laws, or their effect.

by Susan Timberlake, Senior Human Rights and Law Adviser, UNAIDS

Enacting a law criminalizing HIV

transmission is a “get tough” measure. It is relatively easy to do, and in the eyes of those who do it, might punish both those who knowingly infect, and deter others from doing so. But it is a “get tough” measure on paper only. While it is valid to apply criminal sanctions to those who intentionally transmit HIV, a truly blameworthy, though rare, behaviour, such application is not straightforward. UNAIDS is concerned that any broader application, such as “reckless” or “negligent” transmission, or exposure, will set back effective national responses to HIV, as well as result in discriminatory prosecutions and miscarriages of justice.

Alternatives to criminalization of HIV transmission are more difficult to agree upon, and often challenge long-standing social taboos and inequities to protect both public health and human rights. One alternative is obvious: to do what works on a much larger scale. This means getting HIV prevention, treatment, care and support programmes

to those most vulnerable to infection and to those already infected. Yet governments have still not sufficiently expanded prevention programmes, including PMTCT, nor have they ensured anywhere near the necessary support for vulnerable and at risk populations such as: women, young people, men who have sex with men, drug users and sex workers.

Secondly, governments have not done the hard work to reduce HIV vulnerability and risk. For women and girls, this means protecting them through law and social change programmes that reduce gender inequality and violence, including sexual violence inside and outside marriage. All too few governments pass marital rape laws or seriously enforce laws against domestic violence, rape and early marriage. Nor are there sufficient laws or programmes to empower women and girls in educational and economic terms so as to protect them from relationships that threaten them with HIV infection.

Thirdly, people living with HIV are not being adequately empowered to be able to avoid the onward transmission of HIV. To do this, they must have the knowledge, means and support to know their status and how to avoid transmission. This includes being protected from stigma and discrimination so that they can be open about their status or practice safer sex. In many parts of the world, people diagnosed with HIV still stand

to lose everything (family, job, home, and community) and thus have every incentive to avoid getting tested, disclosing their status, or engaging in any behaviour that might reveal their status, such as safer sex.

To add the threat of criminal prosecution only intensifies this climate of denial, secrecy, and fear. It creates legal liability without empowering citizens to achieve what they want in the first place: to avoid contracting HIV, to avoid onward transmission and if living with HIV, to live. It creates an ‘us versus them’ mentality when HIV has taught us that we have mutual responsibility for sexual health. A human rights achievement of the HIV epidemic has been the recognition of positive people as equal and critical actors in the response. They are entitled to human rights like everyone else, not ‘objects’ to be pitied or despised, or subjects of discretionary charity.

In this ‘new age’ of criminalization of HIV transmission, people living with HIV must reassert their rights, as well as their responsibilities, and demand what they deserve. True empowerment will remove any need for the application of criminal law to HIV transmission, because there will be no cases deserving of criminal sanction; only tragic ones that could and should have been avoided, had the right support been in place.

Advocacy in action

One of IPPF’s key advocacy issues this year concerns the human rights implications of the criminalization of HIV transmission. IPPF is promoting discussion on the issues, which will culminate in a publication with key advocacy messages for World AIDS Day 2008. The publication is a joint initiative with GNP+ and ICW. The debates include:

Online discussion: On the AIDS Portal between March and September we are facilitating a series of open discussions on the impact of criminalizing HIV transmission. The discussions include contributions from lawyers, policy makers, people living with HIV and human rights advocates. You can contribute too – simply sign up to AIDS Portal at www.aidsportal.org and join the debate.

Panel debate: During a satellite session at the International AIDS Conference in Mexico there will be a debate called *Crime and Punishment: Criminalization of HIV*. This interactive session will host a number

of external speakers from UNAIDS, ICW, the African HIV Policy Network, the Naz Foundation and GNP+. It will be held from 18:30-20:30 on Tuesday 5 August and will be moderated by Kevin Osborne from IPPF. The session will address a number of key questions in determining sound HIV policy and practice, such as understanding the impact of criminalization of HIV, ‘model laws’ and the implication these laws have for young women and girls.

Publication of a key issues brief: Issues raised in the online discussion and at the satellite session will be combined with facts

and figures to provide a global snapshot. This key issues brief will answer important questions (starting with the most basic and extending to a discussion of ethics and the use of the law to try to control intimate behaviours) and will be launched by IPPF for World AIDS Day on 1st December.

In each of these debates we would like to address the critical issues and provide case studies of the criminalization of HIV transmission from different regions around the world. To do this we need your support. Please:

- contribute to the debate on the AIDS Portal;
- attend and promote the satellite session at the International AIDS Conference in Mexico;
- open up the criminalization debate within your own organisation.

We look forward to your contributions and suggestions.

The People at IPPF



Laurien Nyabienda

Executive Director of Association Rwandaise pour le Bien-Etre Familial (ARBEF)

I have been working for ARBEF for the past eight years. As the Executive Director I coordinate all the Association's activities including HIV prevention, treatment and care programmes.

My passion is helping those living with HIV - a passion which grew out of treating people who had AIDS-related illnesses when

I was a clinical medical officer. In ARBEF, in addition to coordinating voluntary counselling and testing programmes, I have been involved in designing and implementing programmes targeting youth-headed households. Many of these vulnerable children lost their parents in the genocide or to AIDS-related illnesses and

need support. Because of this programme and networking activities with other NGOs in Rwanda, ARBEF recently received the National Award for being the best Community Service Provider in Rwanda in 2007.

As the work of ARBEF contributes to improving the wellbeing of many people in Rwanda, I look forward to going to work each day and making a positive difference in another person's life.

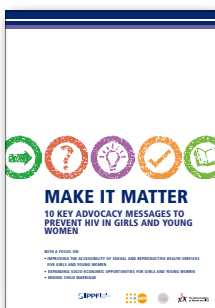
News in brief

New publications

Make it Matter

HIV prevention can work. This brand new publication by IPPF, UNFPA, Young Positives and The Global Coalition on Women and AIDS, focuses on improving access to sexual and reproductive health services for young women and girls, as well as expanding socio-economic opportunities and ending child marriage.

It is available at <http://www.ippf.org/en/Resources/Guides-toolkits/Make+it+matter.htm> or email HIVinfo@ippf.org for a printed copy.



IPPF sign-ons

Travel restrictions for people living with HIV

Dr. Gill Greer, Director General of IPPF, recently signed a letter supporting a campaign organized by ICASO for governments to end discriminatory travel restrictions on people living with HIV, which many delegates faced attending the United Nations General Assembly Special Session on HIV/AIDS in New York this June.

The N'Djamena 'model law'

IPPF has signed a letter against the problematic N'Djamena 'model law', which is being touted as a template for HIV legislation in West Africa and Central Africa. This 'model law' contains a provision criminalizing the wilful transmission of HIV and is extremely detrimental for women, who are more likely than men to be tested for HIV due to compulsory testing in antenatal clinics. For more information visit http://www.opendemocracy.net/article/5050/international_womens_day/hiv_aids

If you have any news that you would like to include in this section please contact us at HIVinfo@ippf.org

Events

29 July – 1 August 2008

Competencies Workshop for IPPF HIV focus countries and regional offices

Mexico City, Mexico

31 July – 1 August 2008

Living 2008: The Positive Leadership Summit

Mexico City, Mexico

3-8 August 2008

International AIDS Conference

Mexico City, Mexico

1 December 2008

World AIDS Day

3-7 December 2008

15th International Conference on AIDS and STIs in Africa

Dakar, Senegal

Internet resources

Terrence Higgins Trust (THT)

<http://www.tht.org.uk/informationresources/prosecutions/ourpolicyonprosecutions/>

THT is working with HIV organizations, people living with HIV and others affected by the criminalization of HIV in the UK. This website contains information on HIV criminal prosecutions in the UK and background information on the criminalization of HIV in general.

UNAIDS: Concern over criminalization of HIV transmission

http://www.unaids.org/en/KnowledgeCentre/Resources/FeatureStories/archive/2007/20071106_criminalization_HIV_transmission.asp

A report on a three-day international consultation in November 2007 to discuss the apparent worrying trend towards the criminalization of HIV transmission, highlighting the reasons why alternatives need to be sought. There are also links to related documents for those concerned about the worldwide increase of the criminalization of HIV.

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