

# Regional Issue Brief:

## CRIMINAL LAW AND HIV

For the Africa Regional Dialogue  
of the Global Commission on HIV and the Law

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**GLOBAL COMMISSION ON HIV AND THE LAW**  
UNDP, HIV/AIDS Practice  
Bureau for Development Policy  
304 East 45th Street, FF-1180, New York, NY 10017  
Tel: (212) 906 5132 | Fax: (212) 906 5023

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## **Global Commission on HIV and the Law**

UNDP, HIV/AIDS Practice

Bureau for Development Policy

304 East 45th Street, FF-1180, New York, NY 10017

Tel: (212) 906 5132 | Fax: (212) 906 5023

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## Africa Regional Advisory Group, Global Commission on HIV and the Law

United Nation Development Programme (UNDP)	Béchir N'Daw
African Council of AIDS Service Organisations (AFRICASO)	Innocent Laison
Enda-Santé	Daouda Diouf
HIV/AIDS Alliance	Baba Goumbala
National Empowerment Network of People Living with HIV/AIDS in Kenya (NEPHAK)	Nelson Otwoma
AIDS and Rights Alliance of Southern Africa (ARASA)	Michaela Clayton
Swaziland National Network of People Living with HIV and AIDS (SWANNEPHA)	Thembi Nkambule
Eastern Africa National Networks of AIDS Service Organisations (EANNASO)	Olive Mumba
Centre for Health, Human Rights and Development (CEHRUD)	Moses Mulumba
African Union Commission (AUC)	Dr.Benjamin Djoudalbaye
African Sex Workers Alliance (ASWA)	Kyomya Macklean
Joint United Nations Programme on HIV/AIDS (UNAIDS)	Wayne Gill
United Nations Development Programme (UNDP)	Catherine (Kitty) Grant
Southern African Litigation Centre (SALC)	Priti Patel
African Men for Sexual Health and Rights (AMSHer)	Joel Nana
Regional Psychosocial Support Initiative (REPSSI)	Lynette Mudekunye
United Nations Office on Drugs and Crime (UNODC)	Brian Tkachuk
Researcher: Ghent &Wits University	Marlise Richter

## Abbreviations

AIDS	Acquired Immune Deficiency Syndrome
DRC	Democratic Republic of Congo
ESA	East and Southern Africa
HIV	Human Immunodeficiency Virus
NGO	Non-Governmental Organisation
SADC	Southern African Development Community
SALRC	South African Law Reform Commission
UN	United Nations
UNAIDS	Joint United Nations Programme on HIV and AIDS
WCA	West and Central Africa



# 1. Introduction

The criminal law has been used as part of national responses to HIV in several African countries. Some countries use the criminal law directly by targeting the behaviour of people living with HIV through, for example, passing provisions which criminalise exposure to or infection with HIV or the compulsory HIV testing of sexual offenders. It has been argued that the direct use of the criminal law is a strategy to stop further HIV infection and to punish those who deliberately transmit the virus to others. In some instances, criminal law provisions, although not directly targeting persons living with HIV, may have an indirect impact on responses to HIV. For example, criminalising sex work or men who have sex with men may hinder the delivery of HIV prevention and care services to such populations.

This Issue Brief describes the international law guidance on the use of the criminal law in relation to HIV, regional standards on HIV and the criminal law, approaches used by governments throughout the continent and concludes with a critique of these approaches. Appendix A includes a list of all HIV-related laws in Africa that criminalise HIV transmission or exposure.



## 2. International human rights norms on the use of the criminal law to respond to HIV

The international guidance on HIV and human rights does not recommend the use of criminal law in responses to HIV. The International Guidelines on HIV and Human Rights issued by the Office of the High Commissioner on Human Rights and the Joint United Nations Programme on HIV and AIDS (UNAIDS) provide in Guideline 4 that states should review and reform their criminal law to ensure that it is not inappropriately used in the context of HIV, and it does not target vulnerable populations. These guidelines recommend further that specific HIV offences should not be introduced and advocate the use of existing general criminal offences.<sup>1</sup> There is both a public health and human rights rationale for this approach:

*“Many countries have specific criminal offenses for the intentional exposure or transmission of HIV. The existence of these offenses has little impact on the spread of the virus. . . . Such laws divert the attention and resources from measures which do make a difference in curbing the epidemic, and can in fact be counterproductive because of the danger of further stigmatizing alienated groups, already treated as outsiders by society. By placing blame on one party, the criminal law undermines public campaigns aimed at placing responsibility for adopting preventive measures on both parties engaging in risky behavior.”<sup>2</sup>*

The International Guidelines provide further that if HIV-specific offences are created they should exclude criminal liability for situations where a person living with HIV:

- (a) was unaware of his/her HIV status;
- (b) there is no significant risk of transmission;
- (c) the sexual partner has given informed consent to the sexual act; and/or
- (d) precautions are taken to significantly reduce the risk of HIV transmission.<sup>3</sup>

The UNAIDS Handbook for Legislators on HIV/AIDS, Law and Human Rights provides that where consideration is being given to the introduction of a new HIV-specific criminal offence, the following, should be considered. The new offence ought to:

- be generic and not HIV specific, i.e. it should apply to all sexually transmitted infections;
- deal with evidentiary issues such as proof of a causal link between the sexual act and the ‘victim’s’ infection with HIV;
- be limited to deliberate or intentional acts;
- be applicable only where there is a significant risk of transmission and the modes of transmission that are criminalised should be specified; and
- be described in a way that does not prevent governments from offering needle exchange programmes.<sup>4</sup>

The International Guidelines also state that the criminal law should not act as a barrier to the effective implementation of HIV prevention programmes, and this can be ensured by:

- (i) reviewing and repealing crimes such as sodomy and sex work;
- (ii) decriminalising adult sex work, which involves no victimisation; and
- (iii) reforming laws relating to drug use so as to facilitate needle exchange programmes without criminal sanction.<sup>5</sup>

Furthermore Guideline 8 of the International Guidelines provide that populations which are criminalised are especially vulnerable to HIV infection and special measures should be taken to ensure that they have access to HIV prevention and care programmes:

1 Eba P (2009), *HIV specific legislation in Africa: Are human rights concerns addressed?*, Centre for Human Rights, University of Pretoria, South Africa

2 UNAIDS (1999), *Handbook for Legislators on HIV/AIDS. Law and Human Rights*, Geneva, Switzerland

3 Eba P (2009), *HIV specific legislation in Africa: Are human rights concerns addressed?*, Centre for Human Rights, University of Pretoria, South Africa

4 UNAIDS (1999), *Handbook for Legislators on HIV/AIDS. Law and Human Rights*, Geneva, Switzerland

5 Office of the High Commissioner for Human Rights & UNAIDS (2006), *International Guidelines on HIV/AIDS and Human Rights*, available at [www.unaids.org](http://www.unaids.org), Guideline 8.

*“States should support the implementation of specially designed and targeted HIV prevention and care programmes for those who have less access to mainstream programmes due to language, poverty, social or legal or physical marginalization, e.g. minorities, migrants, indigenous peoples, refugees and internally displaced persons, people with disabilities, prisoners, sex workers, men having sex with men and injecting drug users.”<sup>6</sup>*

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<sup>6</sup> Ibid.



### 3. Regional human rights norms on the use of the criminal law to respond to HIV

Currently, there are two different approaches which influence legal approaches to the use of the criminal law in responding to HIV in Africa. Firstly, in West and Central Africa (WCA) the N'Djamena Model Law specifically recommends the creation of a new offence to criminalise HIV transmission. This is coupled with mandatory disclosure of a person's HIV status to their spouse, sexual partner and doctor within six weeks of diagnosis. Ironically, this model law, agreed to in N'Djamena, Chad, in 2004,<sup>7</sup> has as its primary aim the protection of human rights of persons living with HIV and outlaws discrimination. However it states that laws ought to be passed providing for:

- the criminalisation of the wilful transmission of HIV. This is the transmission of HIV 'through any means by a person with full knowledge of his/her HIV/AIDS status to another person'.<sup>8</sup> In other words the Model Law sets a low standard for the circumstances in which a person will have committed a crime as it only requires knowledge of HIV status and not that the individual acts intentionally or wilfully. This also casts the net of liability very widely as it includes mothers who may transmit HIV to their children even though they participated in a prevention of mother-to-child transmission programme or a person who uses safer sex practices but nevertheless infects their partner with HIV;<sup>9</sup>
- the criminalisation of exposure of HIV.<sup>10</sup> This should provide that it is a crime for an HIV-positive person to have unprotected sexual intercourse without disclosing their HIV status to their sexual partner;
- pregnant women to undergo mandatory HIV testing during antenatal care;<sup>11</sup>
- compulsory HIV testing to settle marital disputes;<sup>12</sup> and
- mandatory disclosure of HIV status.<sup>13</sup>

The N'Djamena Model Law is also silent on key issues such as the importance of decriminalising sex work, men who have sex with men and access to needle exchange programmes.<sup>14</sup>

Secondly, in East and Southern Africa (ESA) regional guidance does not promote the use of the criminal law. The East African Community's *HIV and AIDS Prevention and Management Bill*, drafted in 2010, is silent on the issue of the criminalisation of HIV transmission or exposure.<sup>15</sup> It is possible to argue that the omission of any reference to the criminal law in the Bill is a clear indication that the drafters did not want to promote the introduction of HIV-specific offences in the region. Furthermore Article 37 of the Bill obliquely refers to criminalised populations by placing an obligation on governments to promote and protect the health of vulnerable groups.<sup>16</sup> Vulnerable groups are defined very broadly so as to include those that have "special needs" or those who would face "poorer outcomes if their needs are not specially addressed." This includes people who inject drugs.<sup>17</sup> The Southern African Development Community's (SADC) Model Law on HIV and AIDS for Southern Africa, drafted in 2008 also does not expressly deal with the creation of a new criminal offence. However in Article 19(2) it states that "people living with or affected by HIV shall have the right to family including the right to marry and procreate. Their HIV status alone shall not

7 Weait M (2012), *The criminalisation of HIV exposure and transmission: A global review*, Working Paper prepared for the Global Commission on HIV and the Law, UNDP, New York, USA

8 Article 36, N'Djamena Model Law

9 Canadian 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*, available at <http://www.aidslaw.ca/publications/interfaces/downloadFile.php?ref=1530> [accessed on 31 January 2012]

10 Article 27, N'Djamena Model Law

11 Article 18, N'Djamena Model Law

12 Ibid.

13 PlusNews (2008), *Crime and Punishment: Criminalisation of HIV*, Johannesburg, South Africa

14 Canadian 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*, available at <http://www.aidslaw.ca/publications/interfaces/downloadFile.php?ref=1530> [accessed on 31 January 2012]

15 It is not entirely clear whether this is because most East African countries (Kenya, Rwanda and Tanzania) already have laws criminalising HIV or whether this was to ensure that the Bill was consistent with human rights norms. See *Development of the East African Community HIV and AIDS Prevention and Management Bill 2010*, available at <http://kelinkkenya.org/wp-content/uploads/2010/10/Advocacy-Information-Pack-Print-Version.pdf> [accessed on 3 February 2012]

16 Article 39(1), The East African Community HIV and AIDS Prevention and Management Bill, 2010.

17 Article 1, *ibid.*

constitute a valid reason to oppose their marriage.”<sup>18</sup> In other words, sexual activity by people living with HIV is not prohibited. Furthermore Article 28(2) recommends:

*“The [Ministries responsible for health, gender and/or women affairs] in collaboration with and key national and local stakeholders, must develop and implement strategies, policies and programmes that respect, protect and fulfil the human rights of women and girls in the context of HIV. With the aim of promoting gender equality and the full enjoyment by women and girls of their human rights, these strategies, policies and programmes shall address issues such as:*

*(a) ...*

*(b) the sexual and reproductive rights and responsibilities of women and men, including women’s right to refuse sex and the right and ability to negotiate safer sex and the right to access health and reproductive services independently;*

*(c) men’s responsibilities to take equal responsibility for sexual and reproductive health and outcomes and to avoid rape, sexual assault and domestic violence, inside and outside marriage.”*

Furthermore the SADC Model law places an obligation on governments to take all relevant measures to provide access to affordable anti-retroviral therapy for all persons including those who are members of vulnerable groups.<sup>19</sup> It identifies sex workers, sexual minorities and people who inject drugs as vulnerable or marginalised groups.<sup>20</sup>

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18 SADC Parliamentary Forum (2008), *Model Law on HIV and AIDS in Southern Africa*, available at [http://www.justice.gov.za/vg/hiv/docs/2008\\_Model-Law-on-HIV-in-Southern-Africa.pdf](http://www.justice.gov.za/vg/hiv/docs/2008_Model-Law-on-HIV-in-Southern-Africa.pdf) [accessed on 2 February 2012]

19 Article 36(1), The East African Community HIV and AIDS Prevention and Management Bill, 2010.

20 Article 1, *ibid.*

# 4. Criminalisation of HIV transmission or exposure in Africa

Very few African countries have followed the guidance on HIV and the criminal law in the International Guidelines on HIV and Human Rights. Instead, there has been a spurt of new HIV laws which criminalise a range of activities by persons living with HIV ranging from wilfully infecting others to not disclosing their HIV status to their sexual partner (See *Table 1*). There are also draft laws criminalising HIV transmission or exposure in the Cameroon, Comoros, Côte d'Ivoire, Malawi, Swaziland, Uganda and Zambia.

**Table 1**

Country	HIV Law	Year
Angola	Law 8/04 on HIV and AIDS, Section 15	2004
Benin	Law No 2005-31 on Prevention, Care and Control of HIV/AIDS in the Republic of Benin, Article 33	2006
Burkina Faso	Law 030-2008 Governing HIV/AIDS and the Protection of the Rights of Persons Living with HIV/AIDS, Article 20	2008
Burundi	Law 1/018 of 12 May 2005 on the Legal Protection of People Infected with HIV and of People Suffering from AIDS, Article 42	2005
Cape Verde	Law No 19/VII/2007	2007
Chad	Law 019/PR/2007 on Measures to Fight HIV/AIDS and to Protect the Rights of Persons Living with HIV/AIDS, Article 55	2007
Djibouti	Law 174/An/07/5 , Articles 18-21	2007
Democratic Republic of Congo	Law 08/011 of 14 July 2008 for the Protection of People Living with HIV and those Affected, Art 45	2008
Equatorial Guinea	Law No 3/2005 on Prevention and Fight Against Sexually Transmitted Diseases, HIV/AIDS and the Defense of Human Rights of Infected Individuals	2006
Guinea	Law on Prevention, Care and Control of HIV/AIDS (No 2005-25), Articles 35 and 36	2005
Kenya	HIV and AIDS Prevention and Control Act	2006
Madagascar	Law 2005-040 on the Fight against HIV/AIDS and the Protection of Rights of People Living with HIV , Article 67	2006
Malawi	Draft HIV and AIDS (Prevention and Management) Bill, proposed in s43 and 44	2008
Mali	Law No 06-028 for the Prevention, Care and Control of HIV/AIDS, Article 37	2006
Mauritania	Law on the Prevention, Management and Control of HIV/AIDS, 2007.042	2007
Mozambique	Act on Defending Rights and the Fight Against the Stigmatisation and Discrimination of People Living with HIV and AIDS, 2008, Article 52	2009
Niger	Law No 2007-08 on the Prevention, Management and Control of HIV/AIDS, Articles 39-41	2007
Senegal	Law No 06/2009 on HIV and AIDS, Article 36	2010
Sierra Leone	The Prevention and Control of HIV and AIDS Act 8 of 2007, Article 21	2007
Tanzania	The HIV and AIDS (Prevention and Control) Act 2008, Section 47	2008
Uganda	HIV and AIDS Prevention and Control Bill No 5 of 2010, proposed in clauses 39 & 41	2010
Zanzibar	HIV and AIDS Prevention and Control Bill, proposed in clause 45	2010

Source: Compiled by Catherine Grant, consultant for the Africa Dialogue of the Global Commission on HIV and the Law; on file with the author

## 4.1 Countries which have criminalised HIV transmission and/or exposure

A large number of countries across Africa criminalise HIV transmission or exposure in their HIV laws. A smaller number have amended their penal codes to create either an HIV-specific offence or one dealing with sexually transmitted infections. *Table 2* below shows that of the 38 countries on which there is information; 29 have new laws which in some way criminalise HIV transmission or exposure. Seven countries have draft laws and two countries have resisted public pressure on parliaments to introduce such laws. Most of these laws are found in West Africa where 15 countries have adopted provisions criminalising HIV transmission or exposure in their new HIV laws.

**Table 2: Laws criminalising HIV transmission or exposure in Africa<sup>21</sup>**

	Southern Africa	East Africa	Central Africa	West Africa	North Africa
<b>Countries which have HIV specific laws criminalising HIV transmission</b>	Angola Lesotho Madagascar Malawi Mozambique Swaziland Zambia Zimbabwe	Burundi Comores Kenya Rwanda Tanzania Uganda	Central African Republic Congo DRC	Benin Burkina Faso Cameroon Cape Verde Côte d'Ivoire Equatorial Guinea Guinea Guinea-Bissau Mali Niger Senegal Sierra Leone Togo	Chad Djibouti Liberia Mauritania
<b>Countries which have resisted pressure to introduce new laws criminalising HIV transmission or exposure</b>	Mauritius South Africa				

Source: Cameron, S and Reynolds, L (2010), *The Global Criminalization Scan Report: Documenting trends, presenting evidence*, Global Network of People Living with HIV (GNP+), Amsterdam, Netherlands

There are also some new laws which are not HIV-specific but which could be used to prosecute persons living with HIV for wilful infection. For example, in Botswana, section 184 of the *Penal Code Amendment Act* makes it an offence to "unlawfully or negligently" perform any act which he/she knows or believes could spread a disease which is "dangerous to life."<sup>22</sup>

The laws take a range of different approaches when fault or liability exists. Some countries require deliberate or wilful action on the part of the person living with HIV whereas others only require exposure to HIV. This approach is in line with international guidelines. However, where countries have statutes that have been very broadly worded they are inconsistent with international law as they result in the criminalisation of a wide range of negligent or reckless acts by persons who may even be unaware of their HIV status.

### Case studies: Liability for wilful infection

#### Kenya

Section 26 of the *Sexual Offences Act*<sup>23</sup> states:

*'(1) Any person who, having actual knowledge that he or she is infected with HIV or any other life threatening sexually*

<sup>21</sup> Countries in italics only have draft laws

<sup>22</sup> Act No. 5 of 1998

<sup>23</sup> Act No. 3 of 2006 available at [http://www.chr.up.ac.za/undp/domestic/docs/legislation\\_40.pdf](http://www.chr.up.ac.za/undp/domestic/docs/legislation_40.pdf) [accessed on 1 February 2012]

transmitted disease intentionally, knowingly and wilfully does anything or permits the doing of anything which he or she knows or ought to reasonably know –

(a) will infect another person with HIV or any other life threatening sexually transmitted disease;

(b) is likely to lead to another person being infected with HIV or any other life threatening sexually transmitted disease;

(c) will infect another person with any other sexually transmitted disease,

shall be guilty of an offence, whether or not he or she is married to that other person, and shall be liable upon conviction to imprisonment for a term of not less fifteen years but which may be for life.<sup>24</sup>

## **Zimbabwe**

Section 79 of the *Criminal Law (Codification and Reform) Act*, criminalises intentional conduct and those who suspect they are HIV-positive but are undiagnosed.<sup>25</sup> It provides:

“(a) Any person who knowing that he or she is infected with HIV; or

(b) realising that there is a real risk or possibility that he or she is infected with HIV; intentionally does anything or permits the doing of anything which he or she knows will infect, or does anything which he or she realises involves a real risk or possibility of infecting another person with HIV, shall be guilty of deliberate transmission of HIV, whether or not he or she is married to that other person. And shall be liable to imprisonment for a period not exceeding twenty years.”

## **Case studies: Liability for exposure to HIV**

### **Guinea**

The crime of “wilful HIV transmission” in Article 35 of the *Law on Prevention, Care and Control of HIV/AIDS* in Guinea is very broad and does not require the actual transmission of HIV provided there is the intent to transmit HIV. The crime exists regardless of “(i) whether the person knew she or he had HIV or was aware of the risk of transmission; (ii) the actual risk of transmission associated with the activity; (iii) whether the person living with HIV disclosed to the other person or the other person was aware in some way of the HIV infection; (iv) whether the person took any steps to reduce the risk of transmission (e.g., condom use, other safe practices, cleaning of drug injecting equipment); and (v) whether in the circumstances the person living with HIV had control over the degree of risk (e.g., use by husband or partner of a condom).”<sup>26</sup>

## **Case studies: Liability for negligent or reckless exposure to HIV**

### **Madagascar**

Article 67 of the *Law on the Fight against HIV/AIDS and the Prevention of the Rights of People Living with HIV* contains a very broad provision which criminalises acts which occur due to amongst others carelessness “transmission of HIV by recklessness, carelessness, inattentiveness, negligence or in violation of regulations, the offender shall be punished with imprisonment from 6 months to 2 years and a fine of from 100,000 ariary to 400,000 ariary. The penalty shall be doubled if the act was committed by a health worker or a traditional healer.”<sup>27</sup>

Table 3 shows that in a survey of seven West African countries only one (Guinea-Bissau) did not criminalise exposure to HIV. Furthermore, four out of the seven countries (Guinea, Mali, Sierra Leone and Togo) criminalise pregnant HIV-positive women who expose their children to the risk of HIV infection. In these countries a woman can be criminally charged for not taking steps to prevent HIV transmission to her unborn baby.<sup>28</sup> In Togo, the *Law on the Protection of People with Respect to HIV/AIDS*<sup>29</sup> provides that it is an offence for any person living with HIV to have unsafe sex. This is regardless of whether they have disclosed their HIV status to their sexual partner. It has been argued that this makes pregnancy by women living with HIV an offence.<sup>30</sup> In a written submission to the African Regional Dialogue of the

24 Similar provisions also exist in section 24 of the *HIV and AIDS Prevention and Control Act*, No. 14 of 2006.

25 Weait M (2012), *The criminalisation of HIV exposure and transmission: A global review*, Working Paper prepared for the Global Commission on HIV and the Law, UNDP, New York, USA

26 Canadian 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*, available at <http://www.aidslaw.ca/publications/interfaces/downloadFile.php?ref=1530> [accessed on 31 January 2012]

27 Article 67, *Law 2005-040 on the Fight against HIV/AIDS and the Protection of Rights of People Living with HIV*.

28 PlusNews (2008), *Crime and Punishment: Criminalisation of HIV*, Johannesburg, South Africa

29 Act No. 2005-012

30 Article 13, *ibid*. See also Canadian AIDS Legal Network (2007), *A human rights analysis of the N'Djamena model legislation on AIDS and HIV-specific legislation*



Global Commission on HIV and the Law, the impact of their 2006 HIV law on breastfeeding women in the Central African Republic was described:

*“... the law applies to anyone who, by recklessly exposing others by his act or activity, knowingly causes the transmission to others of the HIV infection. This consequently implies that mothers can no longer breastfeed their children (whilst if they do not, the child is malnourished or dies, and this is considered as an abuse), whether or not they have been screened by the Mother and Child Transmission Prevention programme.”<sup>31</sup>*

**Table 3: Offences relating to exposure or wilful transmission of HIV in West Africa**

	Exposing others to HIV is a crime	Wilfully transmitting HIV to others is a crime	Mothers transmitting HIV to their children is a crime
Benin	X		
Guinea	X	X	X
Guinea-Bissau		X	
Mali	X	X	X
Niger	X		
Sierra Leone	X		X
Togo	X	X	X

Source: Canadian 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*, available at <http://www.aidslaw.ca/publications/interfaces/downloadFile.php?ref=1530>

A number of countries link criminal liability to disclosure obligations. In other words, there is a legal obligation to disclose a person's HIV status and failure to do so results in criminal liability. This inverts the international guidance which requires disclosure of HIV status to operate as a defence. In countries with disclosure obligations, failure to inform sexual partners results in a crime having been committed.

## Examples of disclosure requirements

### Angola

The *Law on HIV and AIDS* (2004) provides in section 14 that persons living with HIV who are aware that they are living with HIV should both disclose their HIV status and use condoms during sex:

*“Persons infected with HIV shall:*

- adopt a responsible sexual behaviour;*
- adopt habits and behaviour which limits the possibility of infecting others;*
- use condoms when having sexual relations;*
- inform the persons with whom they have or intend to have sexual relations of their status;*
- inform the health personnel who attend to them of their situation so that services are administered adequately and appropriate biosecurity measures are taken;*
- inform their spouses or sexual partners about their status.”<sup>32</sup>*

### Tanzania

Section 21(1)(a) of the *JOV and AIDS (Prevention and Control Act)*, 2008 provides that any person who is aware that

*in Benin, Guinea, Guinea-Bissau, Mali, Niger, Sierra Leone and Togo*, available at <http://www.aidslaw.ca/publications/interfaces/downloadFile.php?ref=1530> [accessed on 31 January 2012]

31 From the submission of Réseau Centrafricain des personnes vivant avec le VIH/SIDA, Central African Republic, for the Africa Regional Dialogue, Global Commission on HIV and the Law, 3–4 August 2011, Pretoria, South Africa

32 AIDS and Rights Alliance of Southern Africa (2007), *HIV/AIDS and Human Rights in SADC*, Windhoek, Namibia

they are HIV positive must “immediately inform his spouse or sexual partner of this fact.”

A limited number of laws include defences to wilful transmission or exposure of HIV. Table 4 below compares defences to HIV transmission or exposure offences. It shows, firstly, that in many countries drafters of the legislation did not include defences to these offences. Secondly, where defences are included they are extremely limited.

### Case studies of defences which can be raised to wilful transmission or exposure laws

#### Mozambique

Article 52 (Voluntary transmission of HIV) of the *Act on Defending Rights and the Fight against Stigmatisation and Discrimination of People Living with HIV/AIDS* (2009) allows for the defence of “voluntary transmission”:

“1. Any person who, knowing his/her positive serological state, transmits HIV to another person, shall be punished with a prison term higher than two and up to eight years.

2. It is not a voluntary transmission when the carrier of HIV did not violate the right to care, or there is no significant risk of infection.”

#### Uganda

A draft Bill allows for the defences of consent to transmission or exposure to HIV if there is (a) disclosure of the HIV-positive person’s status or (b) use of “a condom or other reliable protective measure ... used during penetration.”<sup>33</sup>

**Table 4: Defences to the wilful transmission or exposure to HIV offences**

	No defences provided	Defence of no significant risk of infection existed	Defence of consent to the risk of the sexual act obtained	Defence of precautions to reduce the risk of exposure to HIV were taken
Benin	X			
Guinea	X			
Guinea-Bissau	X			
Kenya			X	X
Madagascar	X			
Mali	X			
Mozambique		X		
Sierra Leone			X	
Swaziland		X		
Tanzania			X	

Source: Canadian 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*, available at <http://www.aidslaw.ca/publications/interfaces/downloadFile.php?ref=1530> & AIDS and Rights Alliance of Southern Africa (2007), *HIV/AIDS and Human Rights in SADC*, Windhoek, Namibia

In most instances these new laws provide harsh sentences for persons convicted for wilful transmission or exposure of HIV to others. Tables 5 and 6 reflect examples of the sentences that can be imposed in both the West and Southern Africa. The sentences in Southern Africa being generally much longer than those that can be imposed in West Africa. Furthermore, in one Southern African country, Lesotho, the death penalty may be imposed for knowingly infecting another with HIV.

**Table 5: Sentencing of persons convicted of wilful transmission of exposure in Southern Africa**

33 <http://www.ngopulse.org/article/uganda%E2%80%99s-hiv-aids-bill-human-rights-faux-pas> [accessed on 27 January 2012]



Country	Sentencing of sexual offenders if unaware of HIV status	Sentencing of sexual offenders if aware of HIV status
Botswana	15 years	Life imprisonment with corporal punishment
DRC	Not applicable	Life imprisonment
Lesotho	10 years (first offender) Life imprisonment (repeat offender)	Death penalty
Namibia	Not applicable	15 years
South Africa	Not applicable	Life imprisonment
Zimbabwe	20 years	20 years – life imprisonment

Source: AIDS and Rights Alliance of Southern Africa (2009), *HIV/AIDS and Human Rights in SADC*, Windhoek, Namibia

**Table 6: Sentencing of persons convicted of wilful transmission of exposure in West Africa**

	Crime of wilful transmission	Crime of exposure to HIV	Penalty
Benin		X (unprotected sex without disclosure)	5 years + 1 million Francs
Guinea	X		5 years + 1 million Francs
Mali	X (equated to attempted murder)		Sentencing in terms of the Penal Code
Niger	X		Sentencing in terms of the Penal Code
Togo	X		5 years, if it results in HIV infection – life imprisonment

Source: Canadian 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*, available at <http://www.aidslaw.ca/publications/interfaces/downloadFile.php?ref=1530>

Despite the plethora of new HIV transmission or exposure laws in Africa there have been very few prosecutions or convictions.<sup>34</sup> Reports exist of successful prosecutions in South Africa,<sup>35</sup> Botswana,<sup>36</sup> Zimbabwe<sup>37</sup> and Burkina Faso.<sup>38</sup>

## Case study of a prosecution

### Zimbabwe

In 2008 a woman was prosecuted for “deliberately infecting another person” even though her partner did not test positive and she was on anti-retroviral treatment at the time. Furthermore her partner did not want to participate in the prosecution. She was convicted and sentenced to 5 years imprisonment which was wholly suspended.<sup>39</sup>

## 4.2 Countries which have not directly criminalised HIV transmission and/or exposure or where there is advocacy against this approach

Two countries have managed to resist public pressure to create a new HIV-specific crime and in others civil society is galvanising against such reforms. In Malawi and Uganda, civil society is advocating for the removal of clauses

34 Weait M (2012), *The criminalisation of HIV exposure and transmission: A global review*, Working Paper prepared for the Global Commission on HIV and the Law, UNDP, New York, USA

35 Cameron E (2006), *Legal and human rights responses to the HIV/AIDS epidemic*, Volume 1, Stellenbosch Law Review 48

36 AIDS and Rights Alliance of Southern Africa (2007), *HIV/AIDS and Human Rights in SADC*, Windhoek, Namibia

37 Cameron E, Burris S, & Clayton M (2009), *HIV is a virus not a crime: Ten reasons against criminal statutes and criminal prosecutions*, Journal of the International AIDS Society, Vol 11(7) 1

38 Sancon P, Wilen JM, Smith J, & Galvao, J (2009), *Advocating prevention over punishment: The risks of HIV criminalisation in Burkina Faso*, Vol 17(34) Reproductive Health Matters, 146

39 Cameron E, Burris S, & Clayton M (2009), *HIV is a virus not a crime: Ten reasons against criminal statutes and criminal prosecutions*, Journal of the International AIDS Society, Vol 11(7) 1

criminalising HIV infection and exposure in draft HIV legislation.<sup>40</sup> Furthermore, in Kenya although laws have been passed criminalising HIV transmission there are moves to have the implementation of such laws suspended through both advocacy and litigation.<sup>41</sup>

### **Case study: Using litigation to end the criminalisation of HIV transmission laws**

In a written submission to the Africa Regional Dialogue of the Global Commission on HIV and the Law it was reported that the law firm of Nchogu, Omwanza and Nyasimi Advocates is representing AIDS Law Project and has started a constitutional petition to the High Court in Nairobi which is aimed at challenging the legality and constitutionality of section 24 of the *HIV and AIDS Prevention and Control Act* of 2006. The basis of the claim is the Act does not meet the constitutional threshold that the average person in Kenya should be able to determine precisely what behaviour is criminalised and subject to prosecution under Kenyan law.<sup>42</sup>

*"They create a false sense of security amongst the general public. This reduces the rates of HIV testing. These sections are being challenged in the high court, especially the problems of the definitions. It is difficult for the average person in the street to know what is criminalized."*<sup>43</sup>

In Mauritius, parliament dropped the idea of criminalising the wilful transmission or exposure to HIV after a campaign from civil society that they would lodge a constitutional challenge against any such new law. Parliament also accepted that the negative public health impact of such an approach outweighed any benefits. Rama Valayden, Attorney-General and Minister of Justice and Human Rights, reported:

*"Legislation criminalising HIV exposure and/or transmission would not be able to withstand a constitutional challenge, because of the difficulties with proof, the likely vagueness of the definition of exposure, and the risk of selective prosecution ... Mauritius decided to put its resources where they are most likely to have a positive impact on reducing the spread of HIV: increased funding for HIV testing and counselling and for evidence-informed prevention measures."*<sup>44</sup>

In South Africa, following pressure placed on parliament to create a new HIV-specific offence, the Minister of Justice and Constitutional Development referred the matter to the South African Law Reform Commission (SALRC) to investigate. This body recommended that a new HIV-specific crime was not required as existing laws were sufficient to prosecute harmful HIV-related behaviour. The SALRC justified this approach on the basis that there was no evidence of the need to create a new offence to deal with harmful HIV-related behaviour:

*"There is no scientific, empirical or even informal evidence that the behaviour is occurring to such an extent that the creation of HIV-specific statutory offences is necessary. This may indicate that in practice there is no need for additional punitive measures, and that a change to the law would therefore probably be based, without denying the real instances of dangerous behaviour that do occur, on fears, anxieties and 'urban legends' about alleged willful or negligent behaviour by persons with HIV."*<sup>45</sup>

40 Coalition of Non-Governmental Organisations, Donors, Multilateral Organisations and Faith-Based Organisations (2010), *Brief Position Paper on Malawi Draft HIV Bill*, available at [http://www.poz.com/articles/uganda\\_bill\\_criminilization\\_1\\_20176.shtml](http://www.poz.com/articles/uganda_bill_criminilization_1_20176.shtml) [accessed on 2 February 2012]

41 Danish Institute for Human Rights (2008), *Criminalisation of HIV transmission: Which way forward for Kenya?* and in a submission of Nchogu, Omwanza and Nyasimi Advocates, Kenya, for the Africa Regional Dialogue, Global Commission on HIV and the Law, 3–4 August 2011, Pretoria, South Africa

42 From the submission of Nchogu, Omwanza and Nyasimi Advocates, Kenya, for the Africa Regional Dialogue, Global Commission on HIV and the Law, 3–4 August 2011, Pretoria, South Africa

43 From the submission of Omwanza Ombati, Nchozu, Omwanza and Nyasimi Advocates, Kenya, for the Africa Regional Dialogue, Global Commission on HIV and the Law, 3–4 August 2011, Pretoria, South Africa

44 <http://www.aidsmap.com/The-legislation-contagion-of-the-NDjamena-model-law/page/1442068/> [accessed on 2 February 2012]

45 South African Law Reform Commission, Project 85 (2001), *Fifth Interim Report on Aspects of the Law Relating to AIDS: The need for a statutory offence to deal with harmful HIV-related behaviour*, available at [http://www.justice.gov.za/salrc/reports/r\\_prj85\\_harmb\\_2001apr.pdf](http://www.justice.gov.za/salrc/reports/r_prj85_harmb_2001apr.pdf) [accessed on 1 February 2012]. Also see Cameron E (2006), *Legal and human rights responses to the HIV/AIDS epidemic*, Volume 1, Stellenbosch Law Review 48

# 5. The indirect use of the criminal law to respond to HIV in Africa

## 5.1 Countries which have criminalised men who have sex with men, sex work and activities which reduce the risk of HIV transmission during drug use

Many African countries use the criminal law to target certain forms of consensual sexual behaviour, such as homosexuality. Although in this instance the criminal law is not being used to try and punish or outlaw harmful HIV-related behaviour it can have a direct impact on HIV prevention and care services. In many instances this is because vulnerable groups are unable to access such services for fear of being identified and prosecuted for their criminal conduct. International guidance on HIV and human rights requires governments to take steps to decriminalise such activities, whilst both international and regional guidance requires governments to ensure that prevention and care services reach these groups.

A review of 21 countries in Eastern and Southern Africa showed that only four did not criminalise homosexuality, namely, Angola, Madagascar, Rwanda and South Africa (see *Table 7* below). A similar situation exists in West Africa where men who have sex with men are criminalised in the Cameroon, Gambia, Ghana, Guinea, Liberia, Libya, Nigeria, Senegal and Togo.<sup>46</sup> Furthermore, in some African countries including Sudan, Somalia, Mauritania, and Nigeria the death penalty can be imposed for homosexual activity.<sup>47</sup>

**Table 7: Countries in East and Southern Africa where sodomy is illegal**

Countries where sodomy is illegal	Countries where sodomy is not criminalised	Countries on which information was not available
Botswana Burundi Comoros DRC Lesotho Malawi Mauritius Namibia Seychelles Swaziland Tanzania Uganda Zambia Zanzibar Zimbabwe	Angola Madagascar Rwanda South Africa	Ethiopia Kenya

Source: UNAIDS (2011), *Country Snap Shots of Laws and Policies that Support or block access to HIV Prevention, Treatment, Care and Support*, Pretoria, South Africa

### Case study: Penal codes which criminalise lesbian, bi-sexual, gay and transgender sex

#### SENEGAL

Article 319:3 of the *Penal Code* (1965) provides that any person who commits “an improper or unnatural act with a person of the same sex will be punished by imprisonment of between one and five years and by a fine of 100,000 to

46 Bruce-Jones E & Itaboraphy LP (2011), *State sponsored homophobia: World survey of laws criminalising same-sex acts between consenting adults*, International Lesbian, Gay, Bi-sexual, Transsexual and Intra-sexual Association, Brussels, Belgium

47 Breyer C & Baral S (2011), *MSM, HIV and the law: The case of Gay, Bisexual and other Men who have Sex with Men*, Working Paper prepared for the Global Commission on HIV and the Law, UNDP, New York, USA

1,500,000 francs.”<sup>48</sup>

## TANZANIA

Section 154 of the *Penal Code* (1945), as amended by the *Sexual Offences Special Provisions Act* (1998) provides that:

“(1) Any person who- (a) has carnal knowledge of any person against the order of nature” commits an offence and is “liable to imprisonment for life and in any case to imprisonment for a term of not less than thirty years.”<sup>49</sup>

Likewise sex work is criminalised throughout the continent. A 2011 UNAIDS review of countries in East and Southern Africa revealed that only one country, Madagascar, did not criminalise sex work (see *Table 8* below).

**Table 8: Countries in East and Southern Africa where sex work is illegal**

Country	Sex work is illegal
Angola	Yes
Botswana	Yes
Burundi	No information
Comoros	No information
DRC	No information
Eretria	No information
Ethiopia	No information
Kenya	Yes
Lesotho	Yes
Madagascar	No
Malawi	Yes
Mauritius	Yes
Mozambique	Yes
Namibia	Yes
Rwanda	Yes
Seychelles	Yes
South Africa	Yes
Swaziland	Yes
Tanzania	Yes
Uganda	Yes
Zambia	Yes
Zanzibar	Yes
Zimbabwe	Yes

Source: UNAIDS (2011), *Country Snap Shots of Laws and Policies that Support or block access to HIV Prevention, Treatment, Care and Support*, Pretoria, South Africa

Although historically the primary determinant of the epidemic in sub-Saharan Africa has been heterosexual sex and transmission through injecting drug use has been limited, it is becoming an important vector of the epidemic

48 Bruce-Jones E & Itaboraphy LP (2011), *State sponsored homophobia: World survey of laws criminalising same-sex acts between consenting adults*, International Lesbian, Gay, Bi-sexual, Transsexual and Intra-sexual Association, Brussels, Belgium

49 Ibid.

in Africa.<sup>50</sup> However, very few countries have laws which facilitate needle exchange programmes. A UNAIDS review of countries in East and Southern Africa showed that of the 21 countries on which there was information only five – Madagascar, Mauritius, South Africa, Tanzania and Zanzibar reported having laws which protected people who use drugs.<sup>51</sup>

Finally, given the vulnerability of men who have sex with men, sex workers and people who use drugs to HIV, international and regional guidance requires states to take special steps to ensure that they can benefit from HIV programmes. However, very few African countries have taken such steps. As stated above, same sex activities, sex work and drug use are criminalised across the continent and although some of the new HIV laws refer to such groups they do not provide any special protection for members of such groups who access services. *Table 9* below shows the situation in West Africa, where rather than protecting vulnerable groups, in Benin it is permissible to subject them to compulsory medical treatment and in Togo sex workers can be subjected to compulsory HIV testing.

**Table 9: Prevention and care obligations towards members of vulnerable populations in West Africa**

<b>Benin</b>	Compulsory medical care for people at elevated risk of HIV including sex workers, men who have sex with men and people who use drugs. Unclear as to whether this implies compulsory HIV testing
<b>Guinea</b>	No provisions relating to vulnerable populations
<b>Guinea-Bissau</b>	State must provide voluntary counselling and testing to groups at increased risk of HIV infection
<b>Mali</b>	No provisions relating to vulnerable populations
<b>Niger</b>	The law does not use the terminology of vulnerable groups. The state must promote voluntary counselling and testing amongst persons with risky HIV-related behaviour including <i>“pregnant women and their partners, future married couples, the partners of HIV infected people, the parents of infected children as well as the children of infected parents.”</i>
<b>Sierra Leone</b>	No provisions relating to vulnerable populations
<b>Togo</b>	Periodic mandatory testing of sex workers for HIV and sexually transmitted diseases

Source: Canadian 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*, available at <http://www.aidslaw.ca/publications/interfaces/downloadFile.php?ref=1530>

## 5.2 Countries which have taken steps to ensure that the indirect use of the criminal law does not impact access to HIV prevention and care services

There are a limited number of examples on the continent of steps taken to prevent the introduction of repressive legislation on homosexuality, limit the impact of the criminal law on sex workers and to address the HIV prevention needs of people who use drugs.

### Case studies: successful attempts to resist the introduction of laws outlawing same sex activity

#### RWANDA

The *Penal Code* in Rwanda is silent on the issue of whether same sex is illegal. In November 2009 the parliament considered an amendment which would result in the criminalisation of consensual same-sex acts, relationships and outreach to the gay and lesbian community. Following a successful advocacy campaign the Minister of Justice condemned international reports that his government intended to criminalise homosexual acts, saying that sexual orientation was *“a private matter not state business.”* Subsequently Article 217 dealing with same sex activity was withdrawn from the parliamentary agenda.<sup>52</sup>

50 Csete J et al (2009), *Lives to save: PEPFAR, HIV, and injecting drug use in Africa*, Lancet 373: 2006-2007

51 UNAIDS (2011), *Country Snap Shots of Laws and Policies that Support or block access to HIV Prevention, Treatment, Care and Support*, Pretoria, South Africa

52 Ramsey R (2011), *African sexual minorities and gender variant resources: Rwanda*, University of Calgary, Calgary, Canada, available from <http://www.ucalgary.ca/sw/ramsay/africa/rwanda.htm> [accessed on 8 May 2012]

## UGANDA

In 2009 the Anti-Homosexuality Bill was introduced in the Ugandan parliament. This highly repressive piece of legislation increased the potential penalties that could be imposed on persons convicted of same sex activities. It also outlawed community outreach to the lesbian and gay community by requiring the mandatory reporting of all “known homosexuals” and provided for the death penalty for those found guilty of “aggravated homosexuality.” Following extensive advocacy from both within Uganda and the international community, in May 2011 the Bill was removed from the parliamentary agenda.<sup>53</sup>

### Case study: Using the courts to stop police officers harassing sex workers

## SOUTH AFRICA

In the case of *Sex Worker Education and Advocacy Task Force v Minister of Safety and Security*<sup>54</sup> a non-governmental organisation (NGO) applied for an order interdicting the police in Cape Town, South Africa from arresting sex workers simply to harass, punish or intimidate them. The Court held that when a police officer arrests someone they must do so with the purpose of having the arrested person prosecuted. In this case as it was clear that the sex workers were being arrested as a harassment tactic and the police were aware that it was highly unlikely that any of them would ever be prosecuted the court granted the interdict preventing the police from making any arrests of sex workers unless prosecutions would follow.

### Case study: Using HIV laws to facilitate access to needle exchange programmes

## MAURITIUS

Section 14 of the *HIV and AIDS Act* (2006) provides:

“(1) Subject to this section, an institution or non-governmental organisation may supply, syringes and needles to any person dependent on a dangerous drug.

(2) The Permanent Secretary may, after consultation with the Medical Council and Dental Council, and subject to the approval of the Commissioner of Police, prescribe medical institutions or nongovernmental organisation for the purposes of subsection (1).

(3) Where an institution or non-governmental organisation is satisfied that a person is dependent on a dangerous drug and requires the supply of new syringes or needles as part of a therapy, it may, with the consent of that person, register him according to the procedures established by it.”<sup>55</sup>

53 BBC News, Africa, *Uganda anti-gay bill 'shelved by parliament'*, 13 May 2011, available at <http://www.bbc.co.uk/news/world-africa-13392723> [accessed on 9 May 2012]

54 2009 (2) SACR 417 (WCC), South Africa

55 *The HIV and AIDS Act*, No. 31 of 2006 (Mauritius)



## 6. THE PUBLIC HEALTH IMPACT OF THE USE OF THE CRIMINAL LAW IN RESPONDING TO HIV AND AIDS IN AFRICA

### 6.1 Public health impact of the criminalisation of HIV transmission or exposure

Most of the provisions criminalising HIV transmission or exposure in Africa are contained within HIV laws which aim at protecting the rights of persons living with HIV. These are public health laws which create frameworks for the national response to the epidemic. Although there is limited literature which sets out the rationale for such legislative approaches, it appears that protecting public health is one of the key motivations for this coercive response. Written submissions to the Africa Regional Dialogue of the Global Commission on HIV and the Law from the Democratic Republic of Congo (DRC) and Uganda summed up the public health concerns of parliamentarians:

*"HIV infection is most often the result of a dissolute life and people with HIV are potentially dangerous people who may not hesitate to spread the disease ....Under these conditions, it is not surprising that all statutes that have been submitted with the goal of suppressing the behaviour described above were adopted, with the ostensibly legitimate aim of protecting the public."<sup>56</sup>*

And:

*"The Ugandan Parliament had one main objective: To create criminal penalties for intentional transmission of HIV. This included criminal liability against the failure to disclose status to one's partner and failure to use a condom in a sexual encounter where one knows their status."<sup>57</sup>*

Other arguments included the public perceptions surrounding HIV:

*"People want it, 70 % of people surveyed said there should be criminalisation but we must work with these attitudes"<sup>58</sup>*

A further reason articulated at the Africa Regional Dialogue was:

*"Legislatures feel that there is a lacuna that they would like to respond to, that of rich men who are transmitting HIV. Advocacy is not blind to this issue. We ask does HIV specific criminal law work? We agree that there are a few people out there causing harm but we have much to lose."<sup>59</sup>*

Nevertheless the public health value of laws criminalising HIV transmission and exposure has been questioned by many. Cameron, Burris and Clayton argue:

*"First, criminalisation is ineffective. These laws and prosecutions don't prevent the spread of HIV. In the majority of cases, the virus spreads when two people have consensual sex, neither of them knowing that one (who may be in the early, highly infectious stage during and soon after seroconversion) has HIV. That will continue to happen, no matter what criminal laws are enacted, and what criminal remedies are enforced. Criminalisation will not stand in the way of the vast majority of HIV transmissions."<sup>60</sup>*

Furthermore UNAIDS has submitted that these laws divert attention and resources from measures, which make a public health difference in curbing the epidemic. In this context coercion is a crude tool to promote behaviour change.<sup>61</sup> Similar views were expressed in the written submissions to the Africa Regional Dialogue of the Global Commission on HIV and the Law:

*"The Bill (in Uganda) would bring about issues of selective prosecution; it targeted the very few Ugandans who knew their status and in the circumstances, would increase stigma and discrimination in our communities as PLWHA will be regarded as potential criminals. Women would be indiscriminately harassed given their low social status;<sup>40</sup>*

56 From the submission of Avocats au Ruban Rouge, DRC, for the Africa Regional Dialogue, Global Commission on HIV and the Law, 3–4 August 2011, Pretoria, South Africa

57 From the submission of UGANET, Uganda, for the Africa Regional Dialogue, Global Commission on HIV and the Law, 3–4 August 2011, Pretoria, South Africa

58 From the submission of Olivier Okakessema, Avocats au Ruban Rouge, DRC, for the Africa Regional Dialogue, Global Commission on HIV and the Law, 3–4 August 2011, Pretoria, South Africa

59 From the submission of Dora Kiconc Musinguzi, UGANET, Uganda, for the Africa Regional Dialogue, Global Commission on HIV and the Law, 3–4 August 2011, Pretoria, South Africa

60 Cameron E, Burris S, & Clayton M (2009), *HIV is a virus not a crime: Ten reasons against criminal statutes and criminal prosecutions*, Journal of the International AIDS Society, Vol 11(7) 1

61 UNAIDS (1999), *Handbook for Legislators on HIV/AIDS. Law and Human Rights*, Geneva, Switzerland



*the bill would open room for gross human rights violence. Forced disclosure as a blanket requirement will lead to abandonment and abuse as women are usually blamed for bringing the virus as they usually know first. In our societies, women cannot easily negotiate sex nor condom use, yet failure to use one while they know their status will warrant such a woman's punishment for intentional transmission of the HIV virus. In addition, the bill would break down families or render them more vulnerable through vicious HIV/AIDS litigation between parents and thus tear their lives apart.”<sup>62</sup>*

And:

*“This is not only an impossible offence to prove but is also a backlash against the efforts of combating transmission of HIV. In fear of being seen as potential criminals, people shy away from testing which is the major starting point in combating transmission. Apart from that, the law put in danger the lives of specific groups such as women who, due to the nature of their roles in the community, find themselves forced to test for HIV before others. This provision also targets other vulnerable and already discriminated groups such as commercial sex workers who may be seen, labelled or targeted as HIV transmission conduits. It is evidently clear based on this analysis that this provision serves no good purpose within the law.”<sup>63</sup>*

Furthermore, these approaches undermine broader public health measures which aim at promoting individual responsibility for HIV prevention. This can in turn have unintended consequences including: it could deter persons at risk from being tested; result in the targeting of vulnerable populations such as men having sex with men; and heighten the unequal power relationships between men and women.<sup>64</sup>

### **Civil society perspectives on the responsibility for preventing new HIV infections**

*Wilful transmission laws on their own do not prevent new HIV infections. What is required is the taking of personal responsibility for one's health, having access to education, counselling and condoms. It is strongly argued that the responsibility could not simply rest with persons living with HIV who know their status but with everyone, including those that are HIV-negative.”<sup>65</sup>*

## **6.2 Public health impact of the criminalisation of same sex activities**

HIV prevention and care services appear to be less effective where same sex activity is criminalised or punished – fear of criminal sanctions acts as a barrier to men accessing such services.<sup>66</sup> This is reflected in the significantly higher rates of HIV infection amongst men who have sex with men in repressive legal environments. *Table 10* below shows that in six African countries where sodomy is illegal the HIV prevalence rate amongst men who have sex with men is generally double that of the rate in the general population.

**Table 10: Comparison between HIV prevalence in men who have sex with men and the general population in countries where sodomy is illegal**

Country	% HIV prevalence in men who have sex with men	% HIV prevalence in general male population
Ghana	25 %	1.67 %
Kenya	15.2 %	7.6 %
Malawi	21.4 %	11.4 %
Tanzania	12.4 %	5.88 %
Zambia	32.9 %	15.72 %

Source: Godwin J (2010), *Legal environments, human rights and HIV responses among men who have sex with men and transgender people in Asia and the Pacific: An agenda for action*, UNDP, APCOM, Bangkok, Thailand

62 From the submission of UGANET, Uganda, for the Africa Regional Dialogue, Global Commission on HIV and the Law, 3–4 August 2011, Pretoria, South Africa

63 From the submission of the Legal Aid Clinic, University of Dar-es-Salaam, Tanzania, for the Africa Regional Dialogue, Global Commission on HIV and the Law, 3–4 August 2011, Pretoria, South Africa

64 AIDS and Rights Alliance of Southern Africa and Open Society Initiative of Southern Africa (2007), *Report of a Civil Society Consultative Meeting on the Criminalisation of Wilful Transmission of HIV*, Windhoek, Namibia

65 Ibid.

66 Breyer C & Baral S (2011), *MSM, HIV and the law: The case of Gay, Bisexual and other Men who have Sex with Men*, Working Paper prepared for the Global Commission on HIV and the Law, UNDP, New York, USA

Furthermore, service providers are reluctant to provide services to populations committing illegal acts as by doing so they may themselves be committing the crime of aiding and abetting.<sup>67</sup> The public health impact of the continued criminalisation of men who have sex with men on both service providers and users was articulately described by participants at the Africa Regional Dialogue:

*"The continued existence of these laws had made it impossible for the establishment of LGBT rights organizations in Northern Nigerian states with Sharia laws. Consequently, where there are organizations willing to provide services to MSM in these states, people are afraid to come out and access these services for the fear of being caught by men of the Sharia Law Enforcement Agencies called HISBAH."*<sup>68</sup>

*"MSM are vulnerable to blackmail. Activists face arrest if they work with LGB, for example, in Malawi and Zimbabwe. There is a lack of programming for MSM in most of these countries. This group is now in hiding. It is very difficult to reach MSM with prevention messages and services..... Homophobia is being promoted by policy makers, community and religious leaders. This result in increased cases of violence and deaths of within this group."*<sup>69</sup>

*"I represent a gay organization ..... the criminalisation of sex between men impedes services. We were witnesses of this event, we went with a man of 22 who was HIV positive, we went to the clinic to get care for him but we found his neighbour who knew that he was gay she shouted 'I don't take care of gay guys and the law is against you and you are going to die.'" <sup>70</sup>*

A further public health implication is the inability to provide condoms within prisons as has been shown by research in the SADC. In a 2009 study it was shown that of the 11 countries in the region where sex between men was illegal only three were distributing condoms to male prisoners (see *Table 11* below).<sup>71</sup>

**Table 11: Access to Condoms in prisons within the SADC**

Country	Sex between men not illegal	Sex between men is illegal	Condoms provided to prisoners
Angola	X		Condoms provided
Botswana		X	Condoms not provided
DRC		X	Condoms not provided
Lesotho		X	Condoms not provided
Madagascar	X		Condoms provided
Malawi		X	Condoms not provided
Mauritius		X	Condoms provided by NGOs
Mozambique		X	Condoms not provided
Namibia		X	Condoms not provided
South Africa	X		Condoms are provided
Swaziland		X	No information
Tanzania		X	Condoms not provided
Zambia		X	Condoms provided but not always available in practice
Zimbabwe		X	Condoms are provided

Source: AIDS and Rights Alliance of Southern Africa (2009), *HIV/AIDS and Human Rights in SADC*, Windhoek, Namibia

67 Ibid.

68 From the submission of Queer Alliance, Nigeria, for the Africa Regional Dialogue, Global Commission on HIV and the Law, 3–4 August 2011, Pretoria, South Africa

69 From the submission of Dunker Kamba, Malawi, for the Africa Regional Dialogue, Global Commission on HIV and the Law, 3–4 August 2011, Pretoria, South Africa

70 From the submission of Eric Arnold Fopossi, ADEFHO, Cameroon, for the Africa Regional Dialogue, Global Commission on HIV and the Law, 3–4 August 2011, Pretoria, South Africa

71 AIDS and Rights Alliance of Southern Africa (2007), *HIV/AIDS and Human Rights in SADC*, Windhoek, Namibia

### 6.3 Public health impact of the continued criminalisation of sex work

Sex workers are at high risk of HIV infection. It has been argued that the illegal nature of sex work provides many opportunities for the abuse by public authorities such as police officers who use their 'discretion' in arresting, detaining and punishing sex workers. These practices in turn have a direct impact on public health interventions with sex workers since accessing HIV and health services may mean identification as a sex worker and possible criminal sanctions.<sup>72</sup> The lived experiences of sex workers trying to survive on the streets were described in a number of submissions to the Africa Regional Dialogue, of which one stated the following:

*"In Mozambique it is not very clear what is legal or illegal. Sometimes there is illegal detention and you are humiliated. I was detained when there was a summit in Mozambique. I spent 7 days in prison ..... the judge said why are you here and I told him I was loitering, I need money for my child ,,,, we are used by the police we go to cemeteries and beach and have sex without a condom. Sometimes we are beaten up by the police."*<sup>73</sup>

### 6.4 Public health impact of the continued criminalisation of interventions to reduce HIV transmission during drug use

HIV can be transmitted by people who use drugs sharing needles and other injecting drug equipment. Public health interventions which provide access to clean needles have been shown to be highly effective ways of reducing HIV amongst this population.<sup>74</sup> In environments where the law does not facilitate access to such services there is evidence that the fear of police action increases the risks of HIV exposure by drug users.<sup>75</sup> For example, people who inject drugs avoid carrying sterile injection equipment, as the possession of it may be used by police as evidence of drug use, or drug users may inject drugs quickly to avoid detection, dispose of syringes improperly or go to places where needles can be reused.<sup>76</sup> The public health problems facing Africa regarding HIV transmission through drug use were described in a submission to the Africa Regional Dialogue:

*"We are sitting on a time bomb. Today we need to face the reality that drugs are available. One billion dollars of heroin is passing through West Africa on its way to Europe. It is young persons who are sitting in prisons as they are IDUs. Drug users want treatment but there are no services. Women who use drugs and who are infected with HIV they face stigma and discrimination. Persons using drugs are criminal they are sent to prison but not given care or treatment. There are drugs in prison. They are denied access to ARVs. They are not offered HIV testing as they say they are not compus mentus. The use of needles is criminalised so they hide or share needles."*<sup>77</sup>

72 From the submission of the Gays and Lesbians of Zimbabwe, Zimbabwe, for the Africa Regional Dialogue, Global Commission on HIV and the Law, 3–4 August 2011, Pretoria, South Africa. This submission provided further that the discourse on same-sex sexuality is dominated by hate speech at all levels, including the highest executive level. The Zimbabwean President, Robert Mugabe is known for comparing gays and lesbians to pigs and dogs. Police Harassment is a daily occurrence, homophobia exacted by religious and traditional leaders is deemed normal.

73 From the submission of Mickey Meji, ASWA, Mozambique, for the Africa Regional Dialogue, Global Commission on HIV and the Law, 3–4 August 2011, Pretoria, South Africa

74 Chiu J and Burris S (2011), *Punitive Drug Law and the Risk Environment for Injecting Users: Understanding the Connections*, Working Paper prepared for the Global Commission on HIV and the Law, UNDP, New York, USA

75 Rhodes T et al (2006), *Street Policing, Injecting Drug Use and Harm Reduction in Russian City: A Qualitative Study of Police Perspectives*, Journal of Urban Health: Bulletin of the New York Academy of Medicine (Vol 83. No 5)

76 Chiu J and Burris S (2011), *Punitive Drug Law and the Risk Environment for Injecting Users: Understanding the Connections*, Working Paper prepared for the Global Commission on HIV and the Law, UNDP, New York, USA

77 From the submission of Ogunrombi Adeoli, Youth RISE for reducing drug related harm, Nigeria, for the Africa Regional Dialogue, Global Commission on HIV and the Law, 3–4 August 2011, Pretoria, South Africa

## 7. HUMAN RIGHTS IMPLICATIONS OF THE USE OF THE CRIMINAL LAW IN RESPONDING TO HIV IN AFRICA

The International Guidelines on HIV and Human Rights provide that the use of the criminal law should be limited and, where possible, existing offences should be used to prosecute wilful transmission of HIV. Despite this, Africa has seen a second epidemic of HIV laws which criminalise a wide range of activities by persons living with HIV. Since 2008, there has been a renewed advocacy focus on repealing or suspending the implementation of laws criminalising HIV transmission or exposure. However, these efforts have had limited impact in repealing existing laws or in halting efforts by governments to introduce new ones.

The International Guidelines require new offences to be limited to deliberate or intentional acts yet, based on the N'Djamena Model Law, many of the new HIV Acts in WCA have included provisions which criminalise exposure to HIV and even mother-to-child transmission of HIV.<sup>78</sup> In many instances the laws are poorly drafted and there is no legal clarity on the nature of the obligations that they impose. For example, in a written submission from Kenya to the Africa Regional Dialogue of the Global Commission on HIV and the Law, concern was expressed regarding the interpretation of the wilful transmission law:

*"According to this section, a person who is aware of being infected with HIV must inform 'in advance any sexual contact' of this fact. But the law does not say what 'any sexual contact' is. For instance, is it holding hands? Kissing? Or only more intimate forms of exploratory contact? Or does it apply only to penetrative intercourse? Nor does it say what 'in advance' means. No transmission is required and no intent is required making it extremely difficult for the average (Kenyan) person to determine precisely what behaviour is subject to prosecution. It also mocks the whole essence of criminal law which is to punish the state of mind that precipitates criminal conduct."*<sup>79</sup>

These laws significantly impact on human rights gains in many areas. Furthermore, they are counterproductive because they further stigmatise alienated groups, already treated as outsiders by society.<sup>80</sup> One of the most significant human rights issues posed by the over-criminalisation of HIV is its impact on women. Women are at greater risk of being investigated and prosecuted for the spread of HIV as they are often the first to be tested through ante-natal testing programmes. As a result they are accused of bringing HIV into the home. Where failure to disclose HIV status is a component of legal liability, many women may wish to disclose but are fearful of doing so because of the threat of violence. These issues were clearly articulated in a number of written submissions to the Africa Regional Dialogue:

*"The research highlights how the vague language in the legislation criminalizing HIV and AIDS poses the reality of prosecution of women even where they may be victims of social and culturally imposed practices that have been passed on generation to generation and most often misrepresented and abused by their relatives. The culture of widow inheritance is widely practiced in many communities in Kenya. Traditionally the practice was intended to provide social and economic security for widows and their children after the death of the husband. But the concept has been misunderstood and has been abused. Some people have taken advantage of this, forcing women to be inherited as a pre-condition to having access and use of matrimonial property. Those who do not comply are disinherited and evicted from their homes along with the children. In fear of this reality, the majority of the women, despite the knowledge of having contracted HIV during their marriage, are forced to accept these advances. The prevailing stigma relating to HIV discourages women from disclosing their status as this may expose them to physical and emotional abuse by relatives. The existence of an HIV specific legislation on intentional transmission further exposes these widows to an even greater risk of imprisonment upon conviction ... Kenyan women are more often than not the first to discover their HIV status and are therefore more likely to be prosecuted by these laws that criminalize HIV and AIDS."*<sup>81</sup>

And:

*"Laws are discriminatory and have a negative effect on women. Women are the first to know their HIV status through*

78 Weait M (2012), *The criminalisation of HIV exposure and transmission: A global review*, Working Paper prepared for the Global Commission on HIV and the Law, UNDP, New York, USA

79 From the submission of Nchogu, Omwanza and Nyasimi Advocates, Kenya, for the Africa Regional Dialogue, Global Commission on HIV and the Law, 3–4 August 2011, Pretoria, South Africa

80 UNAIDS (1999), *Handbook for Legislators on HIV/AIDS*. Law and Human Rights, Geneva, Switzerland

81 From the submission of Federation of Women Lawyers – Kenya, for the Africa Regional Dialogue, Global Commission on HIV and the Law, 3–4 August 2011, Pretoria, South Africa

*PMCT so they are the ones that would be charged. Women can't negotiate condom use due to negative cultural practices such as wife inheritance. If Africa is to advance it must protect the vulnerable.*<sup>82</sup>

Despite international and regional guidance on the importance of taking special measures to ensure that members of vulnerable or marginalised groups are able to access HIV services, very little has been done to achieve this objective on the continent. As a result, most countries are hiding behind the veil of the criminal law and ignoring the needs of such populations. This is despite the existence of good practice such as for example, the Mauritius HIV and AIDS law of 2006 which provides for access to clean needles for drug users to prevent HIV transmission even though drug use itself is criminalised.<sup>83</sup> Resultantly, participants at the Africa Regional Dialogue reported numerous human rights abuses at the hands of the police, health care workers and other community members:

*"We can bury our heads in the sand and say there are no MSM in Africa. This is false. MSM are citizens of our nations. HIV is a disease that knows no morals. The Uganda anti-homosexuality bill was going to make all HIV prevention for MSM illegal. The East African Bill discussed whether to include MSM in it to prevent transmission. One study in Kampala showed sex workers a prevalence of 33 %, MSM had a rate of 13 %. Yet the consensus in the East African Bill was that we can't include these people. Uganda Commission admitted there were MSM. Activists went to protest at the international meeting regarding HIV and they were arrested and prosecuted. We must remember this is a science and we are citizens. The state has a duty to respond to health issues. We can't solve HIV if we do not include MSM in laws and policies."*<sup>84</sup>

*"We are not human. If we can't organise then they can't get funding for service provisions by sex workers. In 2010 sex workers in Zimbabwe marched. We were asked to leave. We were denied our right to freedom expression. We ask the question - why are sex workers not included in the NSP? We do not have data on prevalence rate in sex workers. Sex workers are stopped from claiming their fundamental rights. There is no comprehensive approach when sex workers are left out of the NSP."*<sup>85</sup>

*"We want to be recognized as people before the law. We call for the decriminalisation of sex workers. We have labour laws to protect employees ..... sex work is illegal so can't get PEP or other health services. We need decriminalisation of sex work and to get our work recognized. There should be a law to protect us. We get paid on the hour. We are claiming protection. It is time to engage us and make us part of the solution. You can't get to zero tolerance without recognizing sex workers, transgender and IDUs."*<sup>86</sup>

82 From the submission of Grace Maingi-Kimani, FIDA, Kenya, for the Africa Regional Dialogue, Global Commission on HIV and the Law, 3–4 August 2011, Pretoria, South Africa

83 AIDS and Rights Alliance of Southern Africa (2007), *HIV/AIDS and Human Rights in SADC*, Windhoek, Namibia

84 From the submission of Samuel Matsikure, GALZ, Zimbabwe, for the Africa Regional Dialogue, Global Commission on HIV and the Law, 3–4 August 2011, Pretoria, South Africa

85 From the submission of Sian Maseko, Sexual Rights Centre, Zimbabwe, for the Africa Regional Dialogue, Global Commission on HIV and the Law, 3–4 August 2011, Pretoria, South Africa

86 From the submission of Mickey Meji, ASWA Mozambique, for the Africa Regional Dialogue, Global Commission on HIV and the Law, 3–4 August 2011, Pretoria, South Africa



## 8. CONCLUSION

It has been argued that legal responses to the criminalisation of harmful HIV-related behaviour should amongst others be:

- Based on the best available scientific evidence regarding transmission modes and risk must be the basis for rationally determining if, and when, conduct should attract criminal liability;
- Aimed at preventing transmission of HIV; and
- Conform to international human rights norms.<sup>87</sup>

If applied to Africa, these principles appear to be largely lacking in legal approaches to HIV transmission on the continent. Firstly, legislation throughout the continent has not been based on the latest scientific evidence. For example, very few laws recognise the 'significant risk of HIV infection' defence despite evidence of low transmission rates when a sexual partner is on anti-retroviral treatment or taking pre-exposure prophylaxis. Furthermore, particularly in West Africa, the net of liability has been inexplicably widened to include pregnant women, persons who were unaware of their HIV status or those who do not use safer sex. In many instances, wilfulness is not required and the legal focus has shifted to negligent behaviour. In the context of gender inequality, this approach simply criminalises women of child-bearing age. Secondly, there is no evidence that these laws have in and of themselves had any impact on reducing the rate of new HIV infections. Sub-Saharan Africa remains the region most affected by HIV in the world. Criminal statutes, even those which can impose the death penalty, appear to have undermined rather than strengthened public health interventions, particularly in relation to vulnerable populations such as men who have sex with men, sex workers and drug users. Thirdly, the new laws do not conform to international human rights norms even though they were introduced after it had become clear in other parts of the world that criminalisation did not reduce HIV transmission rates<sup>88</sup> and after international guidance became available on how to craft such laws to ensure harmful HIV-related behaviour was outlawed rather than merely prohibiting sexual activity by persons living with HIV.

Given the low rates of prosecutions and convictions on the continent, it appears that the primary value of these laws is symbolic. These provisions sit side by side with prohibitions on discrimination against persons living with HIV and demonstrate an on-going dichotomy between protection and punishment. The legacy of such laws reflects a failure to deal with the deep roots of stigma and discrimination. Although on a certain level societies wish to end discrimination, they are unable to accept the reality that persons living with HIV have the right to be sexually active, procreate and be part of a family. These laws also fail to reflect the responsibility on society as a whole to prevent new HIV infections.

### **Persons living with HIV and civil society perspective on sexual responsibility**

*"People living with HIV/AIDS testified to the complexity of taking responsibility. Like others they want their partners to love them for who they are – people infected with a virus. It is very difficult when they disclose their HIV status and ask their partners to protect themselves and they refuse. This type of rejection affects people deeply ... it was agreed that defining individual responsibility is complex. In this context of joint responsibility it was felt that the law should not seek to only regulate the behaviour of persons who are HIV-positive."<sup>89</sup>*

Finally, even though the criminal law is not being used directly against people engaged in same sex activities, sex work or drug use, it undoubtedly acts as a barrier preventing such populations from accessing HIV prevention and care services.

87 AIDS and Rights Alliance of Southern Africa and Open Society Initiative of Southern Africa (2007), *Report of a Civil Society Consultative Meeting on the Criminalisation of Wilful Transmission of HIV*, Windhoek, Namibia

88 Weait M (2012), *The criminalisation of HIV exposure and transmission: A global review*, Working Paper prepared for the Global Commission on HIV and the Law, UNDP, New York, USA

89 AIDS and Rights Alliance of Southern Africa and Open Society Initiative of Southern Africa (2007), *Report of a Civil Society Consultative Meeting on the Criminalisation of Wilful Transmission of HIV*, Windhoek, Namibia





