



Regional Dialogue: Africa

3-4 August 2011, Pretoria, South Africa

FACT SHEET: HIV and Criminal Law

The criminal law has been used as part of national responses to HIV in many African countries. Some countries use the criminal law directly by targeting the behaviour of People Living with HIV or AIDS (PLHIV) through for example, passing provisions which criminalise exposure to or infection with HIV or the compulsory HIV testing of sexual offenders. The direct use of the criminal law is seen as a strategy to stop further infections and to punish those who deliberately transmit the virus. In some instances, criminal law provisions, although not directly targeting PLHIV, may indirectly impact on responses to HIV. Although the purposes of criminalising such behaviours may not be rooted in stopping new HIV infections, these laws have a direct impact on the ability to provide services to at risk populations and therefore undermine prevention efforts.

Criminal laws which target the behaviour of PLHIV

A large number of countries across Africa criminalise HIV transmission in their HIV laws or in penal codes. Since 2005 around 14 countries in West and Central Africa have passed new laws criminalising HIV transmission. In East and Southern Africa 86.7 % of countries have similar laws. Similarly, many countries have passed new laws providing for the compulsory testing of sexual offenders. In East and Southern Africa 36.4 % of countries have laws requiring persons accused or convicted of sexual offences to be tested for HIV. In the Southern African Development Community (SADC) 6 countries require harsher sentences to be imposed on HIV positive sexual offenders. The use of the criminal law in this context can undermine prevention efforts by deterring those at risk from being tested for HIV, promoting fear and stigma and creating jurisprudence that places sexual responsibility exclusively with PLHIV.

Progress:

- Following extensive advocacy, the final draft of the Southern African Development Community Model law on HIV/AIDS excluded any reference to the creation of a new statutory offence criminalising HIV transmission.

Challenges:

- *Developing normative guidance which ensures the criminal law is used appropriately within the context of HIV.* In West and Central Africa, the N'djamena Model Law recommends the creation of a new offence to criminalise HIV transmission. Advocacy is needed for the adoption of new normative guidance which promotes the appropriate use of existing criminal law in responding to HIV transmission cases.

- *Advocacy for new approaches to responding to harmful HIV-related behaviour.* Advocacy is needed to review and repeal new laws which criminalise a wide range of sexual behaviour by PLHIV. Renewed advocacy efforts are needed to promote public health approaches to preventing new HIV infections.

Criminal laws which indirectly target behaviours carrying a risk of HIV infection

Many African countries use the criminal law to target certain forms of consensual sexual behaviour which is regarded as unacceptable within that community. This use of the criminal law can have an indirect impact on responses to HIV. For example, a review of the laws in East and Southern Africa found all but 1 country (Madagascar) made sex work illegal. The same study found that 78.9 % of countries criminalised homosexuality and a number of recent high profile prosecutions on the continent have demonstrated that such laws are being vigorously enforced. Finally, despite HIV transmission through intravenous drug use being an emerging epidemic in Kenya, Mauritius, South Africa, and the United Republic of Tanzania 68.8 % of countries in Southern and East Africa have laws which place barriers on harm reduction. The use of the criminal law in this manner results in barriers which hinder groups at risk of HIV from accessing services. For example, the continued criminalisation of same sex relationships prevents the distribution of condoms in prisons. Likewise, the criminalisation of drug use means that service providers are unable to provide users with access to clean needles.

Progress:

- In the new HIV law in Mauritius, provision is made for drug users to obtain a range of HIV prevention services, such as accessing clean needles without penalty even though drug use is criminalised.

Challenges:

- *Advocating for legislative reform on issues such as the decriminalisation of homosexuality, sex work and drug use.* Although extensive advocacy and some litigation has taken place, legal reforms on these three issues have not occurred. New legal strategies are required to develop support for laws which facilitate public health responses to at risk populations.

Primary Sources

- AIDS and Human Rights Research Unit, 2007. *Human Rights Protected: Nine Southern African Country Reports on HIV/AIDS and the Law*, University of Pretoria, Pretoria, South Africa.
- *HIV/AIDS and Human Rights in Southern Africa*. 2009. AIDS and Rights Alliance of Southern Africa, Windhoek, Namibia.
- UNAIDS, 2010. *UNAIDS Report on the global AIDS epidemic*, Geneva, Switzerland.
- UNAIDS, 2011. *Country Snapshots in East and Southern Africa*, Pretoria, South Africa.

Contact:

UNDP | Eastern and Southern Africa | Regional HIV/AIDS Practice Leader | Tilly Sellers | +27 11 603 5091 | tilly.sellers@undp.org
UNAIDS | Eastern and Southern Africa | Director, Regional Support Team | Sheila Tlou | +27 11 519 6930 | tlous@unaids.org