

# The Global Commission on HIV and the Law: People Living with HIV

*HIV and the Law: Risks, Rights and Health* is a July 2012 report by the Global Commission on HIV and the Law. The Commission was an independent body of experts and respected statespersons established by United Nations Development Programme to address the ways in which human rights abuses, stigma, and discrimination fuel the global HIV epidemic. The Commission set out to examine where and how these abuses were occurring and to consider how legal reforms—through new legislation, better enforcement of existing law, and court decisions—could slow the spread of HIV and reduce its impact.

The Commission conducted an eighteen month process of research, consultation, analysis, discussion, and decision-making. They held regional dialogues in seven global regions and collected **written and oral submissions from over 1000 individuals and organizations**, more than 700 of whom included people living with, or directly affected by HIV and AIDS.

*The report is an important tool for civil society groups, particularly those working with populations at high risk of HIV. This briefing paper highlights the report's findings about people living with HIV. It offers information and language that may be useful for advocacy, campaigning, and lobbying.*

## Key Report Findings Regarding the Rights of People Living with HIV (PLHIV)

73% of countries reviewed by UNAIDS have “passed legislation to outlaw discrimination based on HIV” (page 15). But these are “often ignored, laxly enforced or aggressively flouted” due to “lack of resources, political chaos or interpretations of religion” (page 17).

- ▶ Laws in most of the 123 countries prohibiting discrimination include language that specifically protects at least some key populations (page 15). When these laws are not enforced, HIV-related discrimination contributes to the mistreatment of people who are already the targets of racist, sexist, classist, ageist, homophobic, transphobic, and xenophobic discrimination. And it adds to the degradation of people who use drugs or engage in sex work.

In over 60 countries, it is a crime to expose another person to HIV or transmit it. Although the stated purpose of such laws is to “promote public health or morality” or protect women from HIV, no evidence suggests that these laws have any positive effect whatsoever on public or individual health (page 20).

- ▶ Instead, AIDS service organizations report that laws like these are destructive. Far from empowering or motivating PLHIV to protect their partners and themselves from exposure, these laws engender fear of prosecution in PLHIV that “isolates them and discourages them from getting tested, participating in prevention and treatment programmes or disclosing their status to partners” (page 20).

Criminalizing HIV exposure or transmission pits the criminal justice system against the public health system—wasting the resources of both, causing confusion, and harming HIV prevention and treatment (page 20).

- ▶ For example, the *Model Law on STI/HIV/AIDS for West and Central Africa* of 2004 says that it is illegal for PLHIV to fail to disclose their HIV status to partners before sex, and if they fail to take active precautions to prevent transmission. This formula undermines a number of vital public health messages:

- Both partners are responsible for protecting themselves and each other.
- Disclosure can be incredibly difficult for a number of reasons (including fear, especially among women, that it may elicit violence, abandonment, or eviction from the home).
- Some sex acts carry very little or no risk of transmission.
- Individuals taking daily antiretrovirals treatment have almost no chance of transmitting HIV.

Since one cannot knowingly expose someone to HIV if one has not been tested, such sanctions also **discourage HIV testing**, and they stigmatize PLHIV as dangerous and untrustworthy.

Charges under such laws are most often brought when a relationship ends badly and one partner accuses the other of transmitting HIV. Lack of documentation almost invariably makes it impossible to determine who transmitted HIV to whom and testing for this is both expensive and inconclusive. Despite this, courts generally do not assume the defendant’s innocence and instead require him or her to prove lack of culpability. This violates established human rights and widely held judicial standards.

HIV criminalization laws are incorrectly applied to acts that do not transmit HIV and “are often applied to those who are already considered inherently criminal” (page 23).

- ▶ For example, an African-American, mentally ill, homeless man spat at a police officer in Texas who was arresting him. “The jury was persuaded that his saliva was a deadly weapon, and he got a thirty-five year sentence” (page 22). Similarly, an HIV positive sex worker in Louisiana (U.S.)

was convicted of offering to perform oral sex on a male customer. As a man receiving oral sex, the customer would have faced almost no HIV risk. But the prosecution argued that the sex worker's offer constituted a potential death threat to the customer and she received a ten-year prison sentence. In several European countries, "migrants and asylum seekers have been disproportionately represented among those prosecuted for HIV transmission and exposure" (page 23).

The rare cases of malicious intent to transmit HIV can be prosecuted under existing laws against assault, homicide, and bodily harm. Recognizing this, some countries have repealed their HIV-specific criminal laws or revised them accordingly (pages 24–25).

- ▶ After extensive lobbying by a "coalition of people living with HIV, medical experts and legal professionals", the Danish government suspended its HIV criminalization law in 2011 and appointed a "working group to consider its revision or outright repeal, based in new scientific evidence" (page 24). Finland and Norway are taking similar steps, and Mauritius has revoked its criminalization of HIV transmission altogether. Guinea, Togo, and Senegal have revised their respective HIV criminalization laws so they only apply to "exceptional cases of intentional transmission" (page 25).

## Actions the Report Recommends (pages 19 and 25)

To create an effective, sustainable HIV response consistent with human rights obligations, countries must:

- ▶ Repeal punitive laws, enact protective laws, and promote human rights in all their national HIV policies, strategies, plans, and programs. Specifically, repeal laws that criminalize HIV transmission, exposure, or failure to disclose HIV status,

and any legislation that can be used to prosecute mother to child transmission. "Model laws" or codes used as the basis for such laws must be withdrawn and discarded, or amended to protect human rights.

- ▶ Pass and enforce protective laws that explicitly prohibit discrimination based on actual or perceived HIV status, and safeguard the constitutionally guaranteed rights of PLHIV.
- ▶ Prohibit law enforcement authorities from prosecuting HIV non-disclosure or exposure unless they meet the standard for prosecution under general criminal law. Require a high standard of evidence and proof for such prosecutions. Prohibit the use of criminal law to prosecute private consensual sexual activity, because doing so violates human rights and is destructive to public health goals and investment.
- ▶ Review the convictions of those who have been successfully prosecuted to date for HIV exposure, non-disclosure, and transmission. Such convictions must be set aside, the accused immediately released if incarcerated, and the charges expunged from all criminal and sex offender records.
- ▶ Support an enabling environment for equitable law enforcement and public access to mechanisms for filing complaints, pursuing legal remedies and appealing judgments when necessary. The legal system must also ensure that public health services (including health education) are not discriminatory, ensure confidentiality, and provide their services to all PLHIV, those at risk of HIV, and other key populations.
- ▶ Be held accountable by donors, civil society, and others for national human rights commitments. Non-governmental actors should also create, fund, and implement rights-based policies and initiatives to advance law reform and enforcement, including educational efforts to decrease stigma as it affect families, communities and workplaces.

## How You Can Use the Report

This report provides concrete precedents and examples you can use as evidence when advocating to government and other influential organizations, the media, civil society organizations, and the general public. Because of the report's legitimacy as an official UN document, these case studies and the statements made about them are important tools to support your advocacy, campaigning, and lobbying.

### 1. Campaign against national laws criminalizing HIV exposure and transmission.

As noted above, a coalition in Denmark persuaded the government to suspend and re-evaluate its HIV criminalization law. In the U.S., advocacy networks, national associations, and other groups are campaigning for passage of a law that would prohibit HIV-specific criminalization. Working with public health authorities and AIDS service organizations, **advocates in England and Wales** collaborated with the Crown Prosecution Service to develop guidelines clarifying how their law on HIV transmission can and cannot be applied. Revision of these guidelines has slowed the number of arrests considerably.

On the eve of a 2012 UNAIDS *High Level Policy Consultation on the Science and Law of the Criminalisation of HIV Non-disclosure, Exposure and Transmission*, an international group of civil society advocates released the “**Oslo Declaration on HIV Criminalisation**,” outlining which countries with criminalization laws must be held accountable. Advocates globally are working in their own countries to demand reform on this issue.

### 2. Demand access to affordable, accessible, and confidential legal services so people can seek redress when their rights are violated (page 18).

Human rights are best protected when people know what rights they have, can register complaints without fear of retribution, and can afford to pursue legal action if redress is not forthcoming. These three elements are vital, as is the education of “health care workers, legal professionals,

employers and trade unionists and school faculties” about the rights of PLHIV. This education can decrease stigma and prevent violations before they occur. Putting public and private sector policies in place that clearly affirm PLHIV rights is also critical to preventing such violations (page 18).

### 3. Consider Legal Action to Challenge Discrimination Against PLHIV.

Legal challenges to discrimination against PLHIV have been successful in several countries. Complainants have brought suits for infringement of HIV-specific protections (where they exist) and also for disability-based discrimination generally (since disability laws are often interpreted to cover actual or perceived HIV infection). The U.S. Supreme Court, for example, ruled that PLHIV are protected under the Americans with Disabilities Act. “Some courts have invoked the rights to livelihood and equality in hiring” as well as “constitutional guarantees of dignity and equality” as grounds for upholding the rights of PLHIV experiencing discrimination in employment, housing, access to health care, public accommodations such as public schools, restaurants, swimming pools, etc. (page 17).

## “Sound Bite” Quotes

One benefit of this report is that it simply and eloquently frames key arguments we make as we advocate for change in existing policies. These are listed below as sound bites that organizations can use in their own documents or when talking to the media. Citing the Global Commission on HIV and the Law may add credibility for audiences who are less receptive to such arguments.

- ▶ “Court actions and legislative initiatives, informed by fairness and pragmatism, can help nations shrug off the yoke of misconceived criminalisation” (page 9).

- ▶ “By dividing populations into the sick and the healthy or the guilty and the innocent, criminalisation denies the complex social nature of sexual communities and fractures the shared sense of moral responsibility that is crucial to fighting the epidemic” (page 20).
- ▶ “In much of the world, it is a crime to expose another person to HIV or to transmit it. Fundamentally unjust, morally harmful, and virtually impossible to enforce with any semblance of fairness, such laws impose regimes of surveillance and punishment on sexually active people living with HIV, not only in their intimate relations and reproductive and maternal lives, but also in their attempts to earn a living” (page 20).
- ▶ “Arresting HIV positive people for seeking pleasure and intimacy is a defeatist and cynical response to the failure of nations to confront the epidemic” (page 25).

### Open Society Public Health Program

The Public Health Program of the Open Society Foundations aims to build societies committed to inclusion, human rights, and justice, in which health-related laws, policies, and practices reflect these values and are based on evidence. The program works to advance the health and human rights of marginalized people by building the capacity of civil society leaders and organizations, and by advocating for greater accountability and transparency in health policy and practice.

For more information, see: [www.opensocietyfoundations.org](http://www.opensocietyfoundations.org).