

HIV JUSTICE WORLDWIDE welcomes the International Commission of Jurists' (ICJ) consideration of the misuse of criminal law and the detrimental impact of the criminalisation of conduct related to sexuality, reproduction, drug use and HIV. We support the development of principles to guide legal practice and law reform as a means to improve the health, equality and human rights of people living with HIV and associated populations.

This submission was prepared based on discussions that occurred during a meeting of the HIV JUSTICE WORDWIDE Steering Committee (see below) in Brighton, England in February 2019. A half-day workshop was convened to gain input from participating Steering Committee members (see below, participation indicated with an asterisk), with facilitated discussion focusing on both core and thematic questions. This process provided members with the opportunity to hear from each other and to consider their positions in relation to others', before deciding on a shared position.

The meeting focused on HIV criminalisation, noting that this frequently intersects with other issues including those being considered by ICJ. HIV criminalisation describes the unjust application of criminal law to people living with HIV based solely on their HIV status. This includes the use of HIV-specific criminal statutes or general criminal laws to prosecute people living with HIV for unintentional HIV transmission, perceived or potential HIV exposure, and/or non-disclosure of known HIV-positive status.

Given ICJ's request to limit responses to five pages, this submission focuses on ICJ's four core questions as they relate to HIV criminalisation. HIV JUSTICE WORLDWIDE would welcome the opportunity to discuss issues included in the thematic questions in more detail at a later date, should that be useful to the ICJ.

What is your interest / the interest of your organization in this work? What specific issues do you work on in relation to the proposed topics covered?

HIV JUSTICE WORLDWIDE is a global coalition that campaigns to abolish criminal (and similar) laws, policies and practices that regulate, control and punish people living with HIV based on their HIV-positive status. HIV JUSTICE WORLDWIDE has 92 members including national, regional, and international organisations working on HIV criminalisation. The Steering Committee comprises AIDS and Rights Alliance for Southern Africa, Canadian HIV/AIDS Legal Network*, Global Network of People Living with HIV, HIV Justice Network*, International Community of Women Living with HIV, Positive Women's Network – USA*, Sero Project*, AIDS Action Europe*, AIDS-Free World, and the Southern African Litigation Centre*. HIV Justice Network serves as the HIV JUSTICE WORLDWIDE Secretariat.

HIV criminalisation negatively impacts the global HIV response by undermining the human rights of people living with HIV, including by exacerbating stigma and discrimination, and impeding HIV prevention, testing, treatment, care and support. Ending HIV criminalisation is not a theoretical exercise but a necessary and pragmatic response, given the evidence showing that the application of criminal law against people living with HIV is counterproductive to efforts to end the HIV pandemic.¹ As of December 2018, at least 75 countries had laws that specifically criminalise HIV non-disclosure, exposure, or transmission, with 37 others known to have applied general criminal laws in similar cases². HIV Justice Network's most recent audit found that during the period October 2015 to December 2018, more than 900

¹ All of this evidence is available to read and download in the [HIV Justice Toolkit](#)

² Cameron S and Bernard EJ. *Advancing HIV Justice 3: Growing the global movement against HIV criminalisation*. HIV Justice Network, Amsterdam, (forthcoming, April 2019).

cases had been reported³. Of considerable concern: despite some recent advocacy gains, HIV criminalisation is not diminishing, with cases reported in 14 countries for the first time during that period.

In your view, what concepts (human rights, moral/ethical, legal, good governance, harm etc.) are helpful in understanding whether the use of criminal law is justified in the context of the select areas? Are there some areas or conduct that should never be criminalized? On what basis?

HIV criminalisation cases usually relate to a perceived risk of HIV acquisition associated with sexual activity but also to incidents of biting, spitting or breastfeeding. Prosecutions routinely include cases where no harm was intended, HIV transmission did not occur, and/or HIV transmission was extremely unlikely or not possible. Even in cases where HIV transmission is possible or alleged, HIV criminalisation demonstrates an over-reach of the criminal law to regulate, control and punish people living with HIV. This practice is contrary to established principles relating to the application of criminal laws, including:

Human Rights - The criminal law should respect and protect human rights. But it is a simplistic, false dichotomy to think that HIV criminalisation is a human rights-based response to concerns about HIV transmission or the risk thereof; in most of its manifestations not only does it not protect human rights, but it also actually infringes upon them, directly or indirectly.

HIV criminalisation undermines the human rights of people living with HIV and associated key populations. It represents a gross invasion of privacy as people living with HIV function in an environment of constant state scrutiny of their private, adult, consensual sexual behaviour: denying the right to enjoy relationships, sexual or reproductive freedom and control of one's own body. In this context, it is important to note that in many jurisdictions, criminalised sexual behaviour for an HIV-positive person includes sexual activity where recognised highly effective HIV prevention methods are used (e.g. condoms or low viral load) and/or consensual sex took place following disclosure of their HIV-positive status.

For those who come under the direct purview of the law, the consequences can be catastrophic. Investigation and/or prosecution can entail significant contravention of human rights, including loss of privacy (including from potentially prejudicial media reporting⁴) and loss of freedom through detention and incarceration. Conviction can also prompt listing on public sex offender registers, restrictions on work and travel, and deportation.

Laws are applied in a selective, arbitrary and discriminatory manner, with individuals from some marginalised populations (e.g. sex workers, transgender people, migrants, people of colour) more likely to be targeted for prosecution than others, entrenching inequality. In many jurisdictions, prosecutions are part of a larger problem of scapegoating, targeting, harassing and policing vulnerable and marginalised communities.

Further, the right to (mental and physical) health is undermined, as it is unrealistic to expect people to approach services and have frank interactions with health or social service providers in a climate of fear – including the well-founded concern that any information provided to service providers can and will be used as evidence against a person.

Moral/Ethical Standards – HIV criminalisation relies on the presumption that people with HIV are innately blameworthy. Such attitudes are often based on stigma and fear arising from a lack of knowledge about HIV, particularly current scientific evidence about the effectiveness of treatment on improved life expectancy and non-infectiousness, but also more generally about what it means to live – long-term – with HIV.

³ Ibid.

⁴ The significant media attention surrounding prosecution of people living with HIV also increases HIV-related stigma and discrimination, with far reaching effects impacting human rights. This issue is repeatedly identified in PLHIV Stigma Index reports. See the many examples of national reports at <http://www.stigmaindex.org/>.

HIV (non)disclosure remains central to moral and ethical deliberations but what is missing from most legal narratives is any understanding of the reality that HIV disclosure amongst intimate partners remains extremely difficult for many people diagnosed with HIV, as a result of entrenched stigma and fear around HIV and concerns about privacy. People do not always disclose their HIV-positive status before sex for a range of reasons. Some do not disclose knowing that their use of risk reduction strategies precludes transmission or renders it exceedingly unlikely. Others may not disclose because they are fearful of rejection, discrimination or physical violence, or they fear the repercussions of their HIV-positive status becoming widely known.

Whilst law and morality/ethics overlap, they are also distinct. In all societies there are immoral, unethical or hurtful behaviours that are not criminalised - including those which cause real harms. Some may come under the purview of civil or other types of law while others do not because, importantly, while laws should be ethical, not all unethical conduct should be illegal or criminalised. As Judge Thomas notes in the 2005 New Zealand case of Dally:

It seems to me that most people would want to be told that a potential sexual partner was HIV positive. There may well be a moral duty to disclose that information. There is however a difference between a moral duty and a legal duty.⁵

Some people may want to know a partner's HIV status but an obligation to disclose should not be legally required and punished by the use of the criminal law. As well as violating the right to privacy, requiring disclosure is counter-productive to HIV prevention efforts. Laws mandating HIV disclosure do not increase disclosure rates⁶, and HIV criminalisation fails to encourage safer sex behaviours; it may even result in greater risks⁷. Instead, the greatest likelihood of HIV-positive people disclosing their HIV status is achieved in an enabling environment, where HIV and sexual health can be discussed without fear of repercussion or reprisal. Further, we know that HIV prevention is most effective when each person takes responsibility for their own (sexual) health; there is ample evidence that HIV criminalisation encourages those who are (or believe themselves to be) HIV-negative to disclaim any such responsibility, with all responsibility for reducing HIV transmission resting entirely upon disclosure by a sexual partner with HIV.⁸

Good Governance – HIV poses a complex governance challenge⁹ as states have a responsibility to establish national responses to reduce new infections; increase uptake of treatment, care and support; and minimise the impact of HIV and its associated stigma and discrimination on those who live with the virus. Effective state responses have been driven by strong government leadership, supported by international agencies, working in partnership with health care providers, researchers, and community-based agencies. Public health systems form the cornerstone of state HIV responses, with health care practitioners serving a vital function: working at the frontline of HIV prevention efforts while they also provide essential treatment care and support. Rather than operating outside the law, these systems rely on many and varied laws, regulations and policies to promote effective public health strategies designed to maximise the effectiveness of HIV health promotion, harm minimisation, treatment, care and support. To maximise the effectiveness of public health responses, state systems have also aimed to establish a supportive legal environment, including HIV-specific privacy and anti-discrimination laws.

Concurrently, but unaligned, the criminal law may be used to intervene in particular, individual cases. It is often assumed that the use of criminal law in such cases will deliver some public health benefit: deterring people living with

⁵ Decision of District Court at Wellington CRI-2004-085-009168, New Zealand Police v Justin William Dalley, 10 August 2005

⁶ Burris S, Beletsky L, Burleson J, Case P, Lazzarini Z. Do criminal laws influence HIV risk behavior? An empirical trial. Arizona State Law Journal 2007. Temple University Legal Studies Research Paper No. 2007-03.

⁷ Global Commission on HIV and the Law. *Risks, rights and health*, 2012.

⁸ These studies are compiled in this section of the *HIV Justice Toolkit*

⁹ United Nations Special Session on HIV/AIDS: *Global Crisis – Global Action, HIV/AIDS – a governance challenge*, New York, June 2001.

HIV from putting others at risk. Instead the converse is true. There is no evidence to suggest that such blunt interventions are any more effective at changing an individual's behaviour than less heavy-handed interventions from within the health sector.⁸ In fact, HIV criminalisation can lead to states' "failure to create conditions to provide effective HIV prevention, treatment and support"¹⁰. For example, recent research has uncovered alarming practices in some states in Eastern Europe where police have been notified of a person's HIV diagnosis by health authorities after a person has sought medical advice, with police investigation of the person's relationship following, and charges resulting.¹¹ This is a gross misuse of health processes, significantly undermining efforts to encourage HIV testing.

Harm – In principle, criminal law takes into account the actual or possible harms caused by an act, but in practice HIV is over-criminalised as the result of persistent misconceptions exaggerating the risk of harm (i.e. HIV infection) and the harms of HIV. As outlined in an 'Expert consensus statement on HIV and the criminal law'¹² developed by 20 eminent international HIV experts and endorsed by the three leading HIV scientific expert organisations:

- The possibility of HIV transmission during a single act of vaginal or anal sex ranges from low to none.
- The possibility of HIV transmission during a single act of oral sex ranges from negligible to none.
- There is no possibility of HIV transmission during a single act of vaginal, anal or oral sex where an intact condom has been used correctly.
- There is no possibility of HIV transmission during a single act of vaginal, anal or oral sex when the HIV-positive partner has an undetectable viral load.
- The possibility of HIV transmission during a single act of vaginal or anal sex when the HIV-positive partner has a low viral load ranges from negligible to none.
- There is no possibility of HIV transmission through saliva, even when it contains small quantities of blood.
- The possibility of HIV transmission from biting ranges from negligible (in very unusual and extreme circumstances) to none.
- Modern antiretroviral therapies have improved the life expectancy of most people living with HIV who have regular access to them, to the point that their life expectancy is similar to that of HIV-negative people, thereby transforming HIV infection into a chronic manageable health condition.

A realistic appraisal of the 'harm' caused by HIV is frequently absent from criminal trials. This is an important issue *per se*. However it is also relevant to whether acts which may or may not have resulted in HIV transmission should come under the criminal laws' purview. As the severity of possible harm decreases, the bar for establishing actual risk of harm should be rising, yet people are regularly prosecuted for acts which include no or negligible transmission risk.

Intent – *Mens rea* is a key criminal law principle. Some HIV-specific laws do not include any reference to *mens rea*, resulting in a *de facto* strict liability law. Others may include what might appear to be an appropriate reference to 'intention' or 'wilfulness', however, these are often not defined in the law and in practice these concepts are often applied in an overly broad manner. Of considerable concern is the proliferation of offences based only on whether disclosure of known HIV-positive status took place prior to sex, without requiring any proof of a higher degree of *mens rea*, such as intent to cause or risk harm (or even a degree of recklessness as a lower threshold for culpability). Consequently, people are routinely convicted where no intention to transmit HIV has been demonstrated. An HIV Justice Network audit of hundreds of global cases over the last three years revealed only a handful of cases where any malice, purpose or plan to transmit HIV was revealed on the part of the accused, suggesting such instances are extremely rare.

¹⁰ Grover, A. *Report of the Special Rapporteur on the right of everyone to the highest attainable standard of physical and mental health*, UN Doc. A/HRC/14/20 (2010).

¹¹ Eurasian Women's Network on AIDS. *Regional HIV Criminalisation Report Eastern Europe and Central Asia*, 2017.

¹² Barré-Sinoussi, F et al. *Expert consensus statement on the science of HIV in the context of criminal law*. Journal of the International AIDS Society, 2018.

UNAIDS¹³, UNDP¹⁴ and the Global Commission on HIV and the Law¹⁵ all note, that for policy reasons, criminal law should be limited to the most blameworthy cases and never be applied in cases where an individual did not act with the intent to transmit HIV and by doing so, to cause harm. As outlined by the Global Commission:

The intent to transmit HIV cannot be presumed or derived solely from knowledge on the part of the accused of positive HIV status and/or non-disclosure of that status; from engaging in unprotected sex; by having a baby without taking steps to prevent mother-to-child transmission of HIV, or by sharing drug injection equipment.¹⁵

Proof – HIV criminalisation convictions continue to occur despite cases lacking evidence applicable to basic criminal law standards. It is this misuse of evidence that prompted 20 of the world's eminent HIV scientists to co-author a 2018 Expert consensus statement on HIV and the criminal law to lay out in very clear terms current scientific evidence related to HIV criminalisation cases.¹²

Although still all too rare, successful defence arguments have been compiled by several of our HIV JUSTICE WORLDWIDE members in the HIV Criminalisation Defence Case Compendium. Cases included those where the prosecution failed to prove there was a 'realistic possibility' of HIV transmission to establish a 'significant risk of serious bodily harm, instead relying only on evidence that a sexual act had occurred (*R v Mekonnen*, 2013 ONCA 414), failure to provide a factual basis establishing risk of transmission – for a guilty plea (*Rhoades v Iowa*, Supreme Court of Iowa, No 12-0180), and failing to provide necessary expert testimony on transmission risk (*State of Tennessee v Ingram*, 2012 Tenn. Crim. App. LEXIS 887). Unfortunately, the Compendium collects only those rare cases known to have been heard by higher courts where the defence has been successful.

Proportionality – HIV criminalisation prosecutions regularly result in sentences that are grossly disproportionate to any harms that have been caused. There are also cases where the two parties in a long-term relationship were both aware of accused's HIV-positive status, consented to sex, and the designated 'victim' does not want the accused to be prosecuted: with incarceration resulting in enormous hardship to the family unit.

What would your topline recommendations be to States on the use of criminal law in the areas you work in?
HIV JUSTICE WORLDWIDE recommends the abolition of criminal and similar laws, policies and practices that regulate, control and punish people living with HIV based on their HIV-positive status.

How do you think a set of principles will help support the work you do? How will you use them?

A set of principles authored by eminent judges and lawyers on behalf of the International Commission of Jurists will add weight to civil societies' advocacy efforts to advance the human rights of people living with HIV and associated affected communities.

In summary, criminal law should reflect certain ethical propositions and established principles but also be informed by human rights and public interest. However, the bias informing the overreach of criminal law against people living with HIV results in a pattern of prosecutions in which many of the basic principles of criminal law cannot be met. The state's intrusion into private spaces must be taken seriously given the harms caused by HIV criminalisation which continues to destroy the lives of individuals and their families, while undermining public health strategy. The criminal justice system has a notoriously poor record of delivering remedies to those who feel aggrieved. Resources would be better allocated to ensuring universal access to HIV testing, treatment, viral load testing, physical and mental healthcare, and, on an individual case level, by providing support and counselling services to potential complainants to ensure their needs are more effectively met.

¹³ UNAIDS. *Ending overly broad criminalisation of HIV non-disclosure, exposure and transmission: Critical scientific, medical and legal considerations*, 2013.

¹⁴ UNDP/UNAIDS. *Criminalization of HIV transmission Policy Brief*, 2008.

¹⁵ UNDP. *Global Commission on HIV and the Law. Risks, rights and health*, July 2018 supplement.