HIV criminalisation and legal issues in the context of HIV sero-discordancy

7th International Workshop on HIV & Women
Seattle, February 2017

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Acknowledgements and key sources

- HIV Justice Network
- Canadian HIV/AIDS Legal
- UNAIDS
Clarification of issues and focus on HIV criminalisation

Variety of legal issues affecting HIV-discordant couples

- HIV sero-status disclosure and partner notification
- Right to marry and to have children (forced abortion/sterilisation)
- Criminalisation of HIV non-disclosure, exposure and transmission
Overview

1. What is HIV criminalisation?
2. HIV criminalisation, a global challenge
3. Serious problems of HIV criminalisation
4. Modernisation and abolition: Global efforts to end HIV criminalisation
5. Way forward against HIV criminalisation
What is HIV criminalisation?

The nature of acts or omission criminalised

• Non disclosure of HIV positive status

• Exposure to HIV

• Transmission of HIV

Overly broad HIV criminalisation
What is HIV criminalisation?

The nature and scope of laws used to criminalise HIV

- General criminal law offences
- Public health legislation
- HIV-specific offences
Why is criminal law being used in context of HIV?

- Irrational fear and stigma
- Frustration with high levels of new HIV infections
- Claims to protect women and girls
- Moral (punishment)
- Criminal law as an effective tool
HIV criminalisation: a global challenge
HIV criminalisation laws globally in 2016

E Bernard & S Cameron, Advancing HIV Justice 2, HJN & GNP+, 2016
# Criminalisation of MTCT in Africa

<table>
<thead>
<tr>
<th>Country</th>
<th>Criminalisation of applicable to MTCT</th>
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<tbody>
<tr>
<td>Angola (Arts 14 &amp; 15)</td>
<td>Yes</td>
</tr>
<tr>
<td>Benin (arts 27)</td>
<td>No (specific to sex)</td>
</tr>
<tr>
<td>Burkina Faso (Arts 20, 22 &amp; 26)</td>
<td>Yes (art 22)</td>
</tr>
<tr>
<td>Burundi art 42</td>
<td>Yes</td>
</tr>
<tr>
<td>Cape Verde Art 30</td>
<td>Yes</td>
</tr>
<tr>
<td>CAR (arts 34, 35, 37, 38 &amp; 39)</td>
<td>Yes (arts 37 &amp; 38)</td>
</tr>
<tr>
<td>Chad (arts 54&amp; 55)</td>
<td>Yes</td>
</tr>
<tr>
<td>Congo (arts 41 &amp; 42)</td>
<td>No (excluded by art 42)</td>
</tr>
<tr>
<td>Cote d'Ivoire (arts 48 to 51)</td>
<td>No (excluded by art 51)</td>
</tr>
<tr>
<td>DRC (art 45)</td>
<td>Yes</td>
</tr>
<tr>
<td>Guinea (arts 34, 35, 36 &amp; 37)</td>
<td>No (excluded by art 37)</td>
</tr>
<tr>
<td>Guinea Bissau (art 37)</td>
<td>Yes</td>
</tr>
<tr>
<td>Kenya (sect 24)</td>
<td>Yes</td>
</tr>
<tr>
<td>Liberia (secs18(27)(a) &amp; 18(27)(b))</td>
<td>No (18(27)(b)(viii))</td>
</tr>
<tr>
<td>Madagascar (art 67)</td>
<td>Yes</td>
</tr>
<tr>
<td>Mali (art 37)</td>
<td>Yes</td>
</tr>
<tr>
<td>Mauritania (art 23)</td>
<td>Yes</td>
</tr>
<tr>
<td>Mozambique (art 52)</td>
<td>Yes</td>
</tr>
<tr>
<td>Niger (arts 39 &amp; 40)</td>
<td>Yes (arts 39 &amp; 40)</td>
</tr>
<tr>
<td>Senegal (art 36 )</td>
<td>No (excluded by art 36)</td>
</tr>
<tr>
<td>Sierra Leone (secs 37(1) &amp; 37(2))</td>
<td>No (excluded by sec 37(2)(g))</td>
</tr>
<tr>
<td>Tanzania (sec 47)</td>
<td>Yes. Sec 47</td>
</tr>
<tr>
<td>Togo (art 61)</td>
<td>No (excluded by art 61)</td>
</tr>
<tr>
<td>Uganda (secs 41 &amp; 43)</td>
<td>Yes (secs 41 &amp; 43)</td>
</tr>
</tbody>
</table>

P Eba, HIV-specific legislation in sub-Saharan Africa, 2015
Known HIV criminalisation prosecutions

HIV-specific criminal laws
General laws
Both HIV-specific and general laws

E Bernard & S Cameron, Advancing HIV Justice 2, HJN & GNP+, 2016
Serious problems of HIV criminalisation

Disregard for science of HIV

- Prosecutions for biting or spitting
- Criminalisation of non-disclosure in absence of actual exposure or transmission
- Prosecutions in spite of condom use or low/undetectable viral load
Serious problems of HIV criminalisation

Disregard for legal and justice principles

• No mental culpability
• No proof
• Disproportionate penalties
• Legal uncertainty
• Risk of selective enforcement
Serious problems of HIV criminalisation

Negative impact on HIV response

– Delay/deter HIV testing and treatment (limited evidence)
– Fear to speak openly with health care workers
– Confusion among PLHIV and health providers

Serious problems of HIV criminalisation

Consequences on the lives of people living with HIV (the case of Samukelisiwe Mlilo, Zimbabwe)

https://www.youtube.com/watch?v=9buM4xnjR Yc
Re-considering HIV criminalisation: Key scientific and medical developments

• **Harm of HIV transmission**
  – Stronger evidence of ART efficacy against HIV-related mortality and morbidity
  – HIV infection as a chronic, manageable health condition

• **Risk of HIV infection**
  – Stronger understanding of routes of HIV infection
  – Strong evidence on condom effectiveness
  – HTPN 052: effectiveness of ART in reducing risk of transmission
  – Partner study: no linked HIV transmission undetectable viral load

• **Proof of HIV transmission**
  – Better understanding of merits and limitations of phylogenetic evidence and other scientific methods of proof in context of HIV
  – No use of such methods in HIV criminalisation cases in Africa
Challenging HIV criminalisation: Law reform in Iowa

- Initiated in 2009
- Led by civil society
- Amendments introduced in 2013 and new law passed in 2013
- Law is no longer HIV specific and takes into account intent, risk, and actual transmission
Law reform: Restricting HIV criminalisation in Guinea

Article 37 : Nul ne peut être poursuivi ni jugé aux termes de cette ordonnance pour transmission du VIH ou pour exposition au VIH lorsque :

a) le VIH a été transmis par une mère contaminée à son enfant avant la naissance de celui-ci, pendant l'accouchement ou au cours de l'allaitement ;

b) l'acte ayant entraîné ladite transmission ou exposition ne posait a priori aucun risque significatif de transmission du VIH ;

c) la PVVIH ne connaissait pas son statut sérologique positif au moment de l'acte ayant entraîné ladite transmission ou exposition ;

d) ladite transmission ou exposition a eu lieu lors d'un rapport sexuel a priori protégé protection assurée à travers l'usage du préservatif pendant toute la durée du rapport par exemple ;

e) la PVVIH a informé son ou sa partenaire sexuel(le) de son statut sérologique avant l'acte comportant un risque significatif de transmission du VIH et ayant entraîné ladite transmission ou exposition ;

f) le ou la partenaire sexuel(le) connaissait le statut sérologique positif de la PVVIH avant l'acte comportant un risque significatif de transmission du VIH et ayant entraîné ladite transmission ou exposition.
Law reform: Ending criminalisation of MTCT of HIV in Sierra Leone

ACT
Supplement to the Sierra Leone Gazette Vol. CXLII, No. 69
dated 3rd November, 2011

Signed this 14th day of September, 2011.

DR. ERNEST BAI KOROMA,
President.

No. 11
2011
Sierra Leone


Being an Act to establish the National HIV and AIDS Commission to be responsible for making policies for the prevention, management and control of HIV and AIDS, to provide for the treatment, counselling, support and care of persons infected with, affected by or at risk of HIV and AIDS and for other related matters.
Constitutional challenge: HIV criminalisation unconstitutional in Kenya

“It is our view and we so hold that section 24 of the HIV and AIDS Prevention and Control Act, No. 14 of 2006 does not meet the principle of legality which is a component of the rule of law. The said section is vague and overbroad and lacks certainty especially with respect to the term “sexual contact”… To retain that provision in the statute books would lead to an undesirable situation of the retention of legislation that provides for vague criminal offences which leave it to the court’s subjective assessment whether the defendant is to be convicted or acquitted.”

High Court of Kenya, 18 March 2015
Effective Lawyering in Malawi

• Prosecution and conviction of WLHIV for breastfeeding
• No HIV transmission reported.
• Lawyer in Malawi supported by SALC led appeal before High Court
• Affidavit by medical expert was instrumental in successful outcome
Global guidance against HIV criminalisation

- Result of 2-year process
- Restrict criminal law to truly blameworthy cases
- Uphold criminal justice principles
- Use best scientific and medical evidence
Global guidance against HIV criminalisation

- Harm
- Risk
- Intent
- Defences
- Proof
Scientific statements against HIV criminalisation

Consensus statement

Canadian consensus statement on HIV and its transmission in the context of criminal law

Mona Louthy MD FRCP MPH, Mark Tyndall MD FRCP, Rupert Kaul MD FRCP PhD, Cather

CONSENSUS STATEMENT

Sexual transmission of HIV and the law: an Australian medical consensus statement

Mark Boyd, David Cooper, Elizabeth A Crock, Michelle L Giles, Andrew Grulich, Sharon R Lewin, Trent Yanwood

Abstract

Introduction: Criminal cases involving human immunodeficiency virus (HIV) transmission or exposure require that courts correctly comprehend the rapidly evolving science of HIV transmission and the impact of an HIV diagnosis. This consensus statement, written by leading HIV clinicians and scientists, provides current scientific evidence to facilitate just outcomes in Australian criminal proceedings.

Australian states and territories have criminal laws that may be applied in cases of alleged human immunodeficiency virus transmission and, in some jurisdictions, exposure. Noted are these laws and their effects; they generally relate to causing grievous bodily harm, serious injury or grievous bodily disease, or to endangerment by exposure to the risk of infection. There have been at least 38 Australian criminal prosecutions for HIV transmission and/or exposure.

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CONSENSUS STATEMENT

Canadian consensus statement on HIV and its transmission in the context of criminal law

Mona Louthy MD FRCP MPH, Mark Tyndall MD FRCP, Rupert Kaul MD FRCP PhD, Cather

INTRODUCTION: A poor appreciation of the science related to HIV transmission can lead to an overly broad use of the criminal law against individuals living with HIV in cases of HIV transmission.

METHOD: To promote an evidence-informed application of the law in Canada, a team of six Canadian medical experts on HIV and transmission led the development of a consensus statement on HIV sexual transmission, HIV transmission associated with being and spiking, and the natural history of HIV infection. The statement is based on a literature review of the most recent and relevant scientific evidence (current as of December 2013) regarding HIV and its transmission. It has been endorsed by >70 additional Canadian HIV experts and the Association of Medical Microbiology and Infectious Disease Canada.

RESULTS: Scientific and medical evidence clearly indicate that HIV is difficult to transmit during sex. For the purpose of informing the

Risk of HIV transmission from patients on antiretroviral therapy: A position statement from the Public Health Agency of Sweden and the

Scandinavian Journal of Infectious Diseases

ISSN: 0036-5541 (Print) 1659-1980 (Online) Journal homepage: http://www.tandfonline.com/loi/infd19

Recommandations de mission sexuelle en France

International du Sida le 16 février 2016

NATIONAL DU SIDA 16 FEVRIER 2016

Les personnes séropositives ne souffrent d’aucune autre MST et suivant un traitement antirétroviral efficace ne transmettent pas le VIH par voie sexuelle
Implications for people living with HIV

- Risk of prosecution is a serious concern
- Know the law on HIV criminalisation
- Access to ART for prevention, treatment and avoiding criminalisation!
- Seek support/advice from HIV organisations including legal support on criminalisation
- Discuss these issues with health care provider
- Engage in efforts against criminalisation
Where do we go next: Renewed efforts to end HIV criminalisation

- Support efforts to **end criminalisation to end AIDS**
- Use recent evidence including **UNAIDS 2013 guidance and scientific statements** to stimulate further modernisation/law reform
- **Scientists and clinicians** can play key roles – national and global levels
- Civil society coalition – HIV Justice Worldwide
- Support **legal services and empowerment** of people living with HIV to address overly broad criminalisation

E Bernard & S Cameron, Advancing HIV Justice 2 HJN & GNP+, 2016