

10 reasons why criminalization of HIV exposure or transmission is bad public policy

Recent years have seen an increase in the number of prosecutions for HIV exposure or transmission, particularly in Europe and North America. In parts of Africa, Asia, Latin America and the Caribbean, legislators have created new HIV-specific criminal offences, and prosecutions are on the rise.

The push to apply criminal law is often driven by the wish to respond to serious and legitimate concerns about the ongoing rapid spread of HIV in many countries, coupled by what is perceived to be a failure of prevention efforts. These concerns are legitimate and need responses. However, a closer analysis of the complex issues raised by criminalization of HIV exposure or transmission reveals that criminalizing is unlikely to prevent new infections and may have many potential adverse consequences for both public health and human rights.

This document provides ten reasons why applying criminal law to HIV transmission is an unjust and ineffective public policy, except in cases where individuals purposely or maliciously transmit HIV with the intent to harm others, in which case existing criminal laws are sufficient. Rather than introducing laws criminalizing HIV exposure and transmission, countries need to reform laws and policies that stand in the way of evidence-informed prevention and treatment efforts, including providing justice to women.

1. Applying criminal law to HIV exposure or transmission does nothing to reduce the spread of HIV.

Policy makers sometimes argue that applying criminal law to HIV exposure or transmission can reduce the spread of HIV by incapacitating or rehabilitating particular offenders, or by deterring others from transmitting HIV.

In fact, applying criminal law to HIV risk behavior has never been shown to incapacitate, rehabilitate, or deter offenders.

Incapacitation: In order to slow the spread of the HIV epidemic, vast numbers of people would have to be incapacitated from having sex, sharing syringes, or engaging in other risk behaviors, which no HIV-specific criminal law could possibly do. Indeed, imprisoning a person with HIV does not even prevent that individual from spreading HIV. HIV risk behaviors are prevalent in prisons, and most prison systems continue to reject introduction of evidence-informed prevention measures such as providing access to condoms and sterile injecting equipment and undertaking measures to reduce the prevalence of rape and other forms of sexual violence.

[T]here is no evidence that criminal laws specific to HIV transmission will make any significant impact on the spread of HIV or on halting the epidemic. Therefore, priority must be given to increasing access to comprehensive and evidence-informed prevention methods in the fight against HIV/AIDS.

– Excerpts from the conclusions of the 1st Global Parliamentary Meeting on HIV/AIDS, Manila, Philippines, 28-30 November 2007

Rehabilitation: There is little evidence to suggest that criminal penalties for conduct that transmits or risks transmitting HIV will “rehabilitate” a person such that they avoid future conduct that carries the risk of transmitting. Most cases of HIV transmission are related to sexual activity and/or drug use – human behaviors that are complex and very difficult to change through the blunt tool of criminal penalties. Individual behavior change is more likely to result from interventions such as counseling and support for behavior change, as well as measures that address underlying reasons for engaging in activities that risk HIV transmission.

Deterrence: Most people living with or at risk of HIV already believe it is morally right to protect others, and do their best to be safe. In any case, it is unlikely that criminal sanctions will act as a significant deterrent to behavior that may result in HIV transmission, for a number of reasons including:

- during the time when there is the greatest risk of HIV transmission (the first months following infection), most people do not know their HIV status, limiting the preventive value that any criminal offence could have
- most people who test positive for HIV substantially reduce any behavior that would transmit HIV, particularly if they receive good-quality voluntary counseling and testing.

There is no scientific data supporting the claim that criminal prosecution, or the threat thereof, has any appreciable effect in encouraging disclosure to sexual partners by people living with HIV or deterring conduct that poses a risk of transmission.

2. Applying criminal law to HIV risk behavior can actually undermine HIV prevention efforts, not least by deterring people from seeking HIV testing.

Applying criminal law to HIV transmission could discourage people from getting tested and finding out their HIV status, as lack of knowledge of one's status could become perceived as the best defense in a criminal law suit. Indeed, in jurisdictions with HIV-specific criminal laws, HIV testing counselors are often obliged to caution people that getting an HIV test will expose them to criminal liability if they find out they are HIV-positive and continue having sex. These same counselors are sometimes forced to provide evidence of a person's HIV status in a criminal trial. This interferes with the delivery of health care and frustrates efforts to encourage people to come forward for testing.

Other unintended consequences of applying criminal law to HIV transmission include:

Creating a false sense of security: Placing responsibility exclusively on people living with HIV for transmitting the virus dilutes the public health message that everyone should practice safer behaviors, regardless of their status, and that sexual health is a shared responsibility between sexual partners. People may (wrongly) assume their partner is HIV negative because they have not disclosed, and thus not take measures to protect themselves from HIV infection.

Creating distrust in relationships between HIV-positive people and their care providers: Using criminal law could create distrust in relationships between HIV-positive people and their health care providers, as people may fear that information regarding their HIV status may be used against them in the criminal justice system. This could impede the provision of quality treatment and care.

3. Applying criminal law to HIV transmission promotes fear and stigma.

Nearly thirty years of combating AIDS has reinforced the importance of breaking the silence around the epidemic, talking openly about HIV, and encouraging people to live positively. Applying criminal law to HIV transmission does the opposite. It reinforces the stereotype that people living with HIV are dangerous criminals, rather than people endowed with dignity and human rights.

The introduction of HIV-specific criminal laws, as well as individual criminal prosecutions against people with HIV for conduct that transmitted or risked transmitting HIV, has often been accompanied by inflammatory and ill-informed media coverage or commentary by high-profile figures such as prosecutors, government officials, or legislators. This rhetoric can only discourage people from coming forward to seek HIV tests and talk openly and honestly about AIDS.

Prosecutions for HIV transmission or exposure also spread myths and misinformation about how HIV is (and is not) transmitted. In some jurisdictions, serious criminal charges have been laid against HIV-positive people for activities such as biting, spitting, or scratching, despite the evidence that the risk of HIV transmission in this fashion is extraordinarily small at most (and in some cases, completely non-existent). Such prosecutions not only risk undermining efforts to educate the public about HIV, but further engender fear of people living with HIV.

Tragically, it is stigma that lies primarily behind the drive to criminalization. It is stigma, rooted in the moralism that arises from sexual transmission of HIV, that too often provides the main impulse behind the enactment of these laws.

Even more tragically, such laws and prosecutions in turn only add fuel to the fires of stigma. Prosecutions for HIV transmission and exposure, and the chilling content of the enactments themselves, reinforce the idea of HIV as a shameful, disgraceful, unworthy condition.

- Justice Edwin Cameron, South Africa, 2008

4. Instead of providing justice to women, applying criminal law to HIV transmission endangers and further oppresses them.

Policy makers, and indeed some women’s groups, sometimes support the application of criminal law to HIV transmission for the reason that it might protect women and girls from HIV infection. Many women acquire HIV in marriage and other intimate relationships, including where rape and sexual coercion has occurred. These women deserve justice.

However, applying criminal law to HIV transmission does nothing to address the economic, social, and political marginalization that are at the root of gender-based violence and women’s HIV vulnerability. On the contrary, these laws are likely to be used to prosecute women more often than men. There are at least three reasons why this is so:

The concerns of women’s organizations that are pushing for criminal law approaches to HIV need to be addressed clearly and positively. In particular, action needs to be taken against domestic violence and women’s subordination.

– Member of Parliament Priscilla Misihairabwi-Mushonga, Zimbabwe, 2007

More likely to know their status: Because they engage with the health system more (including during pregnancy), women are typically more likely to know their HIV status than men—particularly as governments move towards provider-initiated HIV testing and counseling in pre-natal settings. To avoid the risk of being prosecuted for exposing their partner to HIV, women who test HIV-positive would have to protect their partner by disclosing their HIV status, refusing to have sex, or insisting on condom use. However, for many women these are not realistic options. Each of them carries the risk of violence, eviction, disinheritance, loss of their children, and other severe abuses. The combination of more routine forms of testing (particularly during pregnancy) and criminalization of HIV transmission or exposure thus gives women an impossible choice: either to risk violence by trying to protect their partner, or to risk prosecution by failing to do so.

More likely to be blamed for HIV: Women are already routinely blamed for bringing HIV into families, and criminal laws would only provide another tool to oppress them. Women are more likely to be blamed by their intimate partners and by their communities for “bringing HIV into the home” than men, and this can result in eviction, ostracism, and loss of property and inheritance. This is especially true insofar as apportionment of blame is still an important part of both customary and formal legal systems in East and Southern Africa in relation to divorce and inheritance.

Mother-to-child transmission: Some laws criminalizing HIV transmission or exposure are drafted broadly enough to capture women who transmit HIV to a child during pregnancy or breastfeeding. For millions of women living with HIV/AIDS—and often denied access to family planning, reproductive health, or medicines that prevent mother-to-child transmission of HIV—this effectively makes pregnancy, wanted or not, a criminal offense. There are many more effective ways to prevent mother-to-child transmission of HIV, beginning with preventing HIV in mothers in the first place, preventing unwanted pregnancies among HIV-positive women, and

providing effective medication to prevent mother-to-child transmission of HIV to HIV-positive women who wish to have children.

Criminalization also is not a sure way of protecting women from coercive or violent behavior, such as rape, that can transmit HIV. Indeed, many countries that already have strong anti-rape laws fail to enforce them. Instead of additional, ineffective HIV-specific laws that will be used against them, women have a human right to timely, effective, and aggressive prosecution of all forms of gender-based violence. It is ironic and tragic that countries that fail to effectively prosecute gender-based violence are proposing HIV-specific criminal laws as a way of appearing sensitive to the needs of women.

5. Laws criminalizing HIV exposure and transmission are drafted too broadly and often punish behavior that is not blameworthy.

Many laws criminalizing HIV exposure and transmission are poorly drafted, capturing behavior that society has no interest in punishing and placing innocent people at risk of prosecution. For example, some criminal laws require that people with HIV inform “all sexual contacts” of their status, meaning they could be jailed for not revealing their HIV status before kissing someone or engaging in other behavior that carries no risk of HIV transmission.

Other criminal laws include pregnant women in their reach by punishing any act that a person with HIV can “reasonably foresee” will transmit HIV to another. This means that getting pregnant while living with HIV could be grounds for imprisonment.

Still others criminalize any “omission” that results in HIV transmission, meaning that failure to get an HIV test and learn one’s status could be a criminal offense—without any inquiry into whether HIV testing was even available. Such over-breadth is further evidence that criminal laws against HIV transmission or exposure are not drafted with public health and human rights in mind.

In countries such as South Africa where there are still high levels of discrimination against people living with HIV, a specific law criminalizing HIV transmission can never be implemented. HIV would be pushed underground. Criminalization would defeat attempts to encourage testing and voluntary disclosure. It will also further perpetrate stigma, creating a parallel society of “us” and “them”.

Policy makers must maintain sanity. We are the ones who have been elected to provide leadership and need to make decisions in the best interest of everyone in society, regardless of their HIV status.

– Member of Parliament Henrietta Bogopane-Zulu, South Africa, 2007

6. No matter how they are drafted, laws criminalizing HIV exposure and transmission are often applied unfairly, selectively, and ineffectively.

Not surprisingly, where HIV-specific criminal provisions exist, only a tiny fraction of actual cases of HIV exposure or transmission will ever be prosecuted. The immense discretion and unpredictability in which cases are prosecuted makes it virtually inevitable that prosecutions will be arbitrary and unjust.

Risk of selective or arbitrary prosecution: Given the stigma that still surrounds HIV and the persistence of HIV-related discrimination, it is likely that criminal sanctions will be directed disproportionately at those who are socially and/or economically marginalized. For example, in one jurisdiction a homeless man living with HIV was sentenced to 35 years in prison because he spat at the officer who had been arresting him for disorderly conduct. Several other cases suggest that criminal law is invoked in sensational circumstances, sometimes in relation to immigrants, foreigners or sex workers, and occasionally in response to emotional media campaigns.

Likelihood of conviction without sufficient evidence: Proving that an accused person was HIV-positive at the time of an alleged offence, as well as proving who infected whom, is a serious challenge. In a sexual relationship, the one blamed for transmitting HIV will most likely be the one who first learned of her status, not the one who was first infected. Even if the accused person was infected first, it could have been a third party who infected her sexual partner. To prove guilt, scientific evidence of transmission by the accused person is required. In recent years, where resources exist (and this is not the case in the majority of developing countries), prosecutors handling cases of HIV transmission increasingly have resorted to “phylogenetic testing,” which seeks to establish a genetic relationship between the HIV viruses of the two parties, in attempting to prove the defendant was the source of the complainant’s infection and to rule out other possible sources of infection. However, such technical evidence, and its limitations, has not been well understood by police, prosecutors, defense lawyers, courts or the media, nor is it necessarily well understood by people living with HIV or HIV organizations. As a result, there is considerable potential for a conviction without sufficient evidence.

Invasions of privacy: There is concern that the confidentiality of medical records kept by health professionals or counselors could be breached in the attempt to establish someone’s HIV status during a criminal prosecution. Breaching confidentiality may reduce the willingness of HIV-positive people to discuss risk behaviors with counselors, agree to an HIV test, or seek treatment of other sexually transmitted diseases that increase the risk of HIV transmission.

7. There are better ways to punish behavior that truly is blameworthy.

A frequent reason advanced by policy makers for criminalizing HIV transmission or exposure is that people who transmit HIV under certain circumstances deserve to be punished, because their behavior is morally wrong and harmful. Indeed, criminal law is society's principal means of punishing morally blameworthy behavior.

The application of criminal law, however, requires the presence of a "guilty mind" or acting with the purpose to harm another person—which is, in the case of HIV transmission, highly exceptional. The use of criminal sanctions cannot be justified when an HIV-positive person does not know their status, takes risk-reducing measures (such as using a condom), cannot reasonably have used such risk-reducing measures, has consensual sex with someone who is aware of their HIV status, and many other circumstances. Applying criminal law in such cases would have all the negative impacts discussed above, such as unfair prosecutions and undermining efforts to prevent and treat HIV through testing, counseling, open discussion of the epidemic, and other proven responses. In short, criminalization is inappropriate and potentially dangerous in the overwhelming majority of cases of HIV transmission or exposure.

In those cases where the application of criminal law may be appropriate, existing laws that are not specific to HIV are sufficient to punish those who act with the purpose of transmitting HIV. For example, laws against sexual assault, endangerment, and criminal negligence can and have been applied to HIV transmission or exposure. In applying these non-HIV-specific laws, however, care must be taken to ensure they are not applied too broadly.

Failing to apply criminal law to HIV transmission or exposure does not mean that individuals who know they have HIV do not have a moral responsibility to take all reasonable measures to protect others when they engage in behavior that can transmit HIV, either by taking precautions or by disclosing their HIV status when the circumstances make it possible for them to do so without risk of violence. Conversely, people who do not know their HIV status have a responsibility to protect themselves and others from infection where circumstances allow.

8. Laws criminalizing HIV exposure and transmission sidestep the real challenges of HIV prevention.

Support for the application of criminal law to HIV exposure and transmission tends to occur in places where there is insufficient progress, political will, and resources to provide proven and effective HIV-prevention services to all who need them. In some countries, governments are reluctant to implement effective and human rights-based HIV prevention measures that may be controversial and resource-intensive—such as scaling up HIV testing and counseling, improving reproductive health care, and establishing harm reduction programs—yet want to appear to be “doing something.” Applying criminal law to HIV transmission, along with other punitive measures such as denying residence to people living with HIV or punishing risk behaviors such as sex work and drug use—provides a politically expedient substitute. This approach effectively blames people living with and at risk of HIV rather than rising to the real challenges of HIV prevention.

This tactic particularly fails women, for whom criminal law is a poor substitute for the enactment and enforcement of laws and policies that address their social and economic subordination as well as gender-based violence. In some countries, women may even support the application of criminal law against HIV exposure and transmission, because they have come to see it as the only thing their governments are willing to do to address HIV. Yet the cost of applying criminal law may be less attention to measures that truly make a difference in curbing the epidemic, such as:

- Comprehensive HIV/AIDS education
- Integration of HIV prevention services into reproductive health care
- Access to HIV testing, treatment and support services
- Access to condoms, sterile syringes, and other proven methods of reducing HIV among those who are sexually active or inject drugs
- Programs that address some of the root causes of vulnerability to HIV infection, such as poverty, violence, discrimination, and substance use.

Mauritius decided not to criminalize exposure to HIV or even HIV transmission. Legislators realized that legislation criminalizing 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. The main reason for not criminalizing HIV transmission was however the concern about detrimental impacts on public health and the conviction that it would not serve any preventive purposes. Criminalization would have created more problems than solving them. Therefore, 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.

– Rama Valayden, Attorney General and Minister of Justice and Human Rights of the Republic of Mauritius, 2007

Particularly in resource-poor countries that are currently introducing HIV-specific criminal legislation, allocating limited resources to prosecutions, rather than to prevention measures that work and to programs to deal with the underlying issues, such as domestic violence and women’s subordination, represents a misuse of resources and a betrayal of public health and human rights.

9. Rather than introducing laws criminalizing HIV exposure and transmission, legislators must reform laws that stand in the way of HIV prevention and treatment.

The law can be a powerful tool in addressing HIV—if it is used to empower vulnerable groups and guarantee their access to services, not to punish them and drive them further to the margins of society. In most countries, removal of legal barriers to HIV prevention, treatment, care and support would be a positive step for legislators to take in addressing the epidemic. Laws that prohibit discrimination against people living with HIV, provide redress against violence, and guarantee equal access to HIV services are also needed.

Instead of applying criminal law to HIV transmission, governments should expand programmes which have been proven to reduce HIV transmission while protecting the human rights both of people living with HIV and those who are HIV negative.

- UNAIDS Policy Brief: Criminalization of HIV Transmission, 2008

Lawmakers can also work to reform laws that stand in the way of HIV prevention. For example, many of those at highest risk of HIV—especially people who use drugs, sex workers, and men who have sex with men—are driven from HIV services by the fear of arrest under anti-drug, anti-prostitution, and anti-sodomy laws. Punitive approaches to drug use, sex work, and homosexuality fuel stigma and hatred against socially marginalized groups, pushing them further into hiding and away from services to prevent, treat, and mitigate the impact of HIV and AIDS.

Instead of passing more criminal laws, legislators should:

- Remove legal barriers to women's equality and pass laws protecting women's rights to be free from violence and discrimination
- Remove legal barriers to condoms and comprehensive sex education, needle and syringe programs, effective drug dependence treatment (including opioid substitution therapy with methadone and buprenorphine) and other evidence-informed strategies designed to reduce HIV risk
- Enact comprehensive anti-discrimination laws that protect people living with HIV and AIDS or at risk of infection
- Address laws and police practices that criminalize vulnerable groups such as sex workers and men who have sex with men, and drive them from effective HIV-prevention services
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- Involve community voices and scientific experts in the lawmaking process, to ensure that HIV legislation is based on the best evidence rather than misguided fears and stigma

Decriminalization, not more criminalization, is what is needed.

- Justice Michael Kirby, 2007

10. Responses to HIV should be based on human rights, including sexual rights.

Now, more than ever, greater attention to human rights is needed in the response to the global HIV epidemic. Broadly criminalizing HIV exposure and transmission flies in the face of human rights.

Rather than trying to stop HIV by force or fear, human rights emphasize the dignity—including the sexual freedom—of all people, and provide the conditions in which they can make healthy choices about their health and their lives.

These conditions include the right to unfettered information, to the tools and technologies and HIV prevention, and to the right to make choices about intimate behaviors such as consensual sex and pregnancy.

They include freedom from violence, from assaults on bodily integrity, from marital rape and all forms of sexual coercion.

They include freedom from arbitrary arrest, detention, and prolonged incarceration under laws criminalizing sex work, drug use, and sodomy.

Society's obligation is not to condemn, but to create conditions in which safe behavioral choices become rational and desirable. The blunt use of HIV-specific criminal statutes and prosecutions does the opposite.

- Scott Burris & Edwin Cameron, 2008

They include equal access to property and inheritance, so that women are not driven into poverty and higher HIV vulnerability by the death of their spouse or dissolution of marriage.

When conditions such as these are met—when all people can control their sexual lives and make informed decisions about all forms of HIV prevention—proposals to criminalize HIV transmission will be a thing of the past.

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