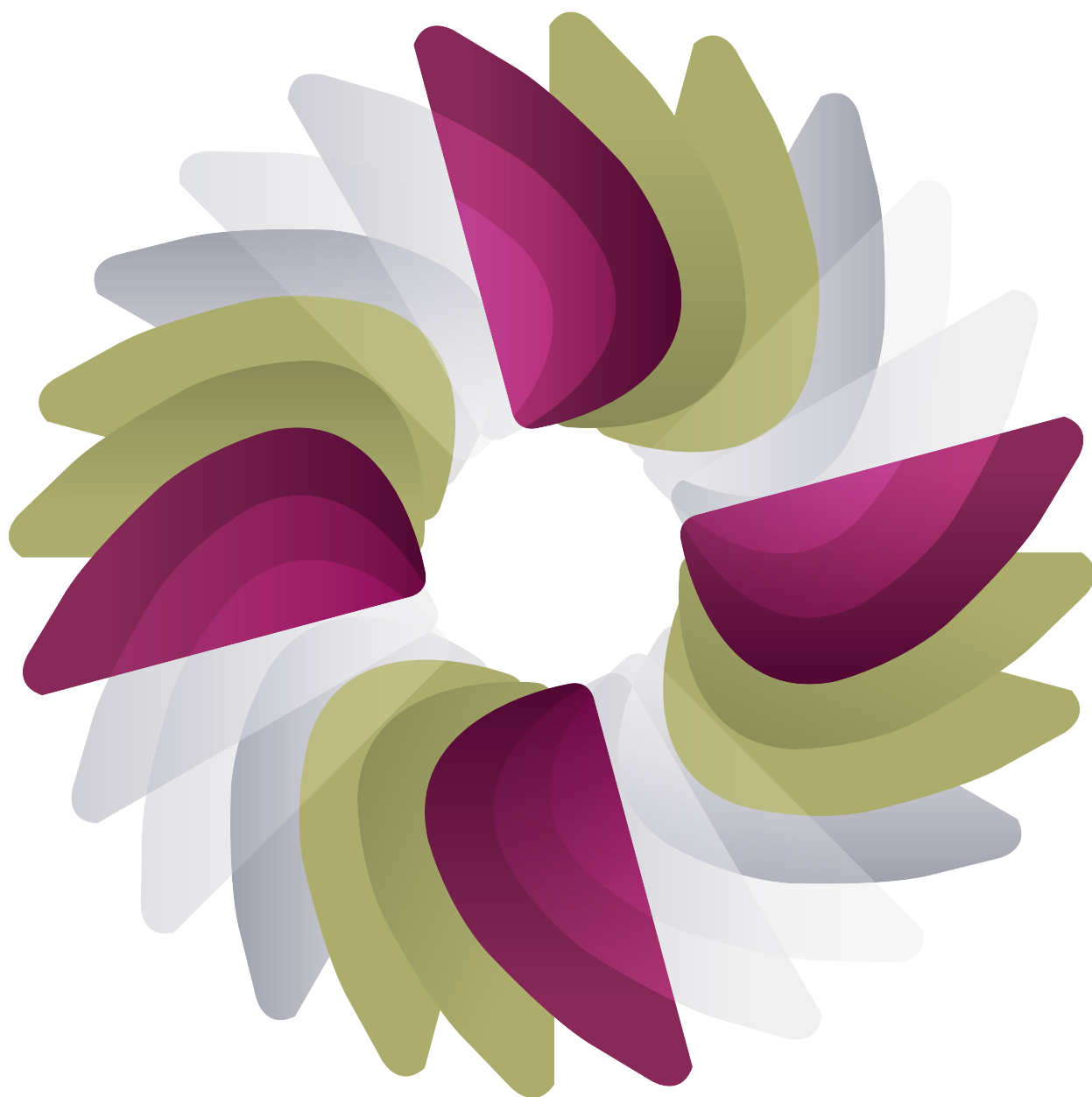


ADVANCING HIV JUSTICE 2

BUILDING MOMENTUM IN GLOBAL ADVOCACY AGAINST HIV CRIMINALISATION



Together we can make
**HIV JUSTICE
WORLDWIDE**
a reality

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FOREWORD



Edwin Cameron

Since the beginning of the HIV epidemic, 35 long years ago, policymakers and politicians have been tempted to punish those of us with, and at risk of, HIV. Sometimes propelled by public opinion, sometimes themselves noxiously propelling public opinion, they have tried to find in punitive approaches a quick solution to the problem of HIV. One way has been to use HIV criminalisation – criminal laws against people living with HIV who don't declare they have HIV, or to make potential or perceived exposure, or transmission that occurs when it is not deliberate (without “malice aforethought”), criminal offences.

Most of these laws are appallingly broad. And many of the prosecutions under them have been wickedly unjust. Sometimes scientific evidence about how HIV is transmitted, and how low the risk of transmitting the virus is, is ignored. And critical criminal legal and human rights principles are disregarded. These are enshrined in the *International Guidelines on HIV and Human Rights*. They are further developed by the UNAIDS guidance note, *Ending overly-broad criminalisation of HIV non-disclosure, exposure and transmission: Critical scientific, medical and legal considerations*. Important considerations, as these documents show, include foreseeability, intent, causality, proportionality, defence and proof.

The last 20 years have seen a massive shift in the management of HIV which is now a medically manageable disease. I know this myself: 19 years ago, when I was dying of AIDS, my life was given back to me when I was able to start taking antiretroviral medications. But despite the progress in HIV prevention, treatment and care, HIV continues to be treated exceptionally for one over-riding reason: stigma.

The enactment and enforcement of HIV-specific criminal laws – or even the threat of their enforcement – fuels the fires of stigma. It reinforces the idea that HIV is shameful, that it is a disgraceful contamination. And by reinforcing stigma, HIV criminalisation makes it more difficult for those at risk of HIV to access testing and prevention. It also makes it more difficult for those living with the virus to talk openly about it, and to be tested, treated and supported.

For those accused, gossiped about and maligned in the media, investigated, prosecuted and convicted, these laws can have catastrophic consequences. These include enforced disclosures, miscarriages of justice, and ruined lives.

HIV criminalisation is bad, bad policy. There is simply no evidence that it works. Instead, it sends out misleading and stigmatising messages. It undermines the remarkable scientific advances and proven public health strategies that open the path to vanquishing AIDS by 2030.

In 2008, on the final day of the International AIDS Conference in Mexico City, I called for a sustained and vocal campaign against HIV criminalisation. Along with many other activists, I

hoped that the conference would result in a major international pushback against misguided criminal laws and prosecutions.

The *Advancing HIV Justice* reports show how far we have come. This second iteration of these important progress reports documents how the movement against these laws and prosecutions – burgeoning just a decade ago – is gaining strength. It is achieving some heartening outcomes. Laws have been repealed, modernised or struck down across the globe – from Australia to the United States, Kenya to Switzerland.

For someone like me, who has been living with HIV for over 30 years, it is especially fitting to note that much of the necessary advocacy has been undertaken by civil society led by individuals and networks of people living with HIV.

Advancing HIV Justice 2 highlights many of these courageous and pragmatic ventures by civil society. Not only have they monitored the cruelty of criminal law enforcement, acting as watchdogs, they have also played a key role in securing good sense where it has prevailed in the epidemic. This publication provides hope that lawmakers intending to enact laws propelled by populism and irrational fears can be stopped. Our hope is that outdated laws and rulings can be dispensed with altogether.

Yet this report also reminds us of the complexity of our struggle. Our ultimate goal – to end HIV criminalisation using reason and science – seems clear. But the pathways to attaining that goal are not always straightforward. We must be steadfast. We must be pragmatic. Our response to those who unjustly criminalise us must be evidence-rich and policy-sound. And we can draw strength from history. Other battles appeared “unwinnable” and quixotic. Think of slavery, racism, homophobia, women’s rights. Yet in each case justice and rationality have gained the edge.

That, we hope and believe, will be so, too, with laws targeting people with HIV for prosecution.

Edwin Cameron

Constitutional Court of South Africa

ABOUT THIS REPORT

The aim of *Advancing HIV Justice 2* is to provide a progress report of achievements and challenges in global advocacy against HIV criminalisation. We hope it will be useful for individuals and organisations working to end or mitigate the harm of HIV criminalisation around the world, as well as for others with an interest in HIV and human rights issues.

The report was created through a collaborative effort between the HIV Justice Network and the Global Network of People living with HIV (GNP+) that included:

- A desk review of materials relating to HIV criminalisation laws, cases, social science and advocacy (including, but not limited to, the HIV Justice Network website, Facebook group and Twitter account; the GNP+ Global Criminalisation Scan website; the Global Commission on HIV and the Law website; PubMed; and AIDS 2014 programme.)
- Systematically contacting individuals and organisations engaging with the HIV Justice Network and GNP+ for further information in countries where laws, cases and/or advocacy had taken place but where details were unclear.
- An internal and external review process that included key organisations working in this area including the Canadian HIV/AIDS Legal Network, Sero Project, UNAIDS and UNDP.
- A number of drafts that were initially co-written by Edwin Bernard and Sally Cameron, with the final version overseen and finalised by Edwin Bernard.

The data and case analyses in this report covers a 30-month period, 1 April 2013 to 30 September 2015. This begins where the original *Advancing HIV Justice*¹ report – which covered the 18-month period, 1 September 2011 to 31 March 2013 – left off.

All cases – with the exception of those in Russia and Belarus – were analysed by cross-referencing those recorded on the HIV Justice Network website with those documented by civil society organisations keeping records in their own countries, supplemented with data provided to the HIV Justice Network via private message.

Cases in Russia and Belarus were collated retrospectively in March 2016 by a Russian-speaking consultant, based on data published by the Supreme Court of the Russian Federation and the Investigative Committee of the Republic of Belarus, respectively, supplemented by Russian-language media reports.

LIMITATIONS OF THE DATA AND ANALYSIS

Obtaining accurate information on HIV-related cases can be challenging – even more so in countries where such information is not freely available. Given the lack, or inadequacy, of systems to track HIV-related criminal cases in most jurisdictions, it is not possible to determine an exact number for every country in the world. Much of what is known about individual cases comes from media reports, and often the outcome of a reported arrest, or the legal disposition of a criminal case remains unknown.

Other limitations that may favour case reporting in one jurisdiction, country or region compared with another, include: the role and ‘effectiveness’ of public health offices in pursuing partner notification; whether or not individuals and communities rely on the criminal justice system to manage HIV-related disputes; accessibility to information including through the media and case records; and the existence of civil society organisations working on and/or monitoring the issue.

Therefore, our data should be seen as an illustration of what may be a more widespread, but generally undocumented, use of the criminal law against people with HIV.

Similarly, despite the growing network of advocates and organisations working on HIV criminalisation, it is not possible to document every piece of advocacy, some of which takes place behind the scenes and is therefore not publicly communicated.

This report, therefore, represents only the tip of the iceberg: each piece of information is a brief synopsis of the countless hours and many decisions individuals and agencies have dedicated to advocacy for HIV justice.

REFERENCE

- 1 See: www.hivjustice.net/advancing

1. GLOBAL OVERVIEW



1.1 INTRODUCTION

HIV criminalisation is a growing, global phenomenon that is seldom given the attention it deserves considering its impact on both public health and human rights, undermining the HIV response.¹

The Global Commission on HIV and the Law,² UNAIDS,³ the UN Special Rapporteur on the Right to Health⁴ and the World Health Organization,⁵ amongst others, have raised concerns regarding the harm inherent in the unjust application of criminal law in the context of HIV on both public health and human rights grounds.



See 2.1 'Building global consensus' in *Chapter 2: From consensus building to global action* for further information.

In many instances, HIV criminalisation laws are exceedingly broad – either in their explicit wording, or in the way they have been interpreted and applied – making people living with HIV (and those perceived by authorities to be at risk of HIV) extremely vulnerable to a wide range of human rights violations.⁶

Many allow prosecution for acts that constitute no or very little risk by failing to recognise condom use or low viral load or by criminalising spitting, biting, scratching or oral sex. These laws – and their enforcement – are often based on myths and misconceptions about HIV and its modes of transmission.⁷

1.1.1. WHAT DO WE MEAN BY 'HIV CRIMINALISATION'?

HIV criminalisation describes the unjust application of the criminal law to people living with HIV based solely on their HIV status – either via HIV-specific criminal statutes, or by applying general criminal laws that allow for prosecution of unintentional HIV transmission, potential or perceived exposure to HIV where HIV was not transmitted, and/or non-disclosure of known HIV-positive status. Such unjust application of the criminal law in relation to HIV is (i) not guided by the best available scientific and medical evidence relating to HIV, (ii) fails to uphold the principles of legal and judicial fairness (including key criminal law principles of legality, foreseeability, intent, causality, proportionality and proof), and (iii) infringes upon the human rights of those involved in criminal law cases.

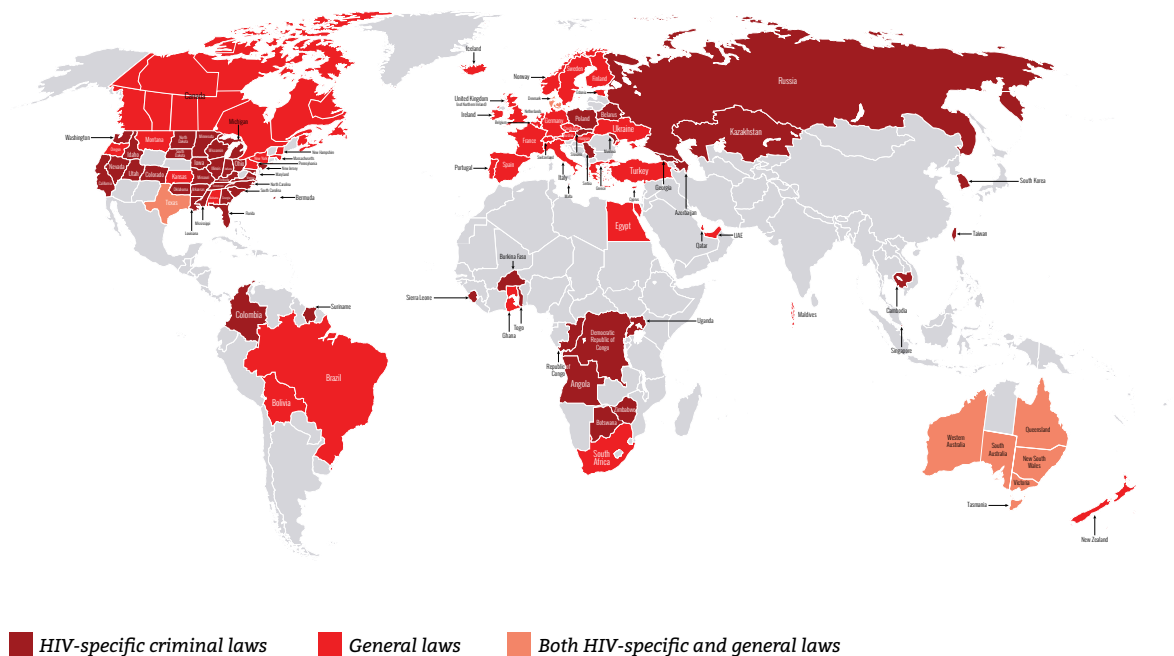
1.3 HOW MANY COUNTRIES HAVE PROSECUTED PEOPLE WITH HIV?

Prosecutions for HIV non-disclosure, potential or perceived exposure and/or unintentional transmission have now been reported in **61 countries**.

This total increases to **105 jurisdictions** when individual US states and Australian states/territories are counted separately.

Of the 61 countries, 26 applied HIV criminalisation laws, 32 applied general criminal or public health laws, and three (Australia, Denmark⁹ and United States) applied both HIV criminalisation and general laws.

1.3.1 MAP 2: WHERE PROSECUTIONS HAVE EVER TAKEN PLACE (AS OF APRIL 2016)



To see the full size map, [click here](#)

1.4 WHERE HAVE PROSECUTIONS RECENTLY TAKEN PLACE?

Our analysis of recent prosecutions covers a 30-month period: April 2013 to October 2015.

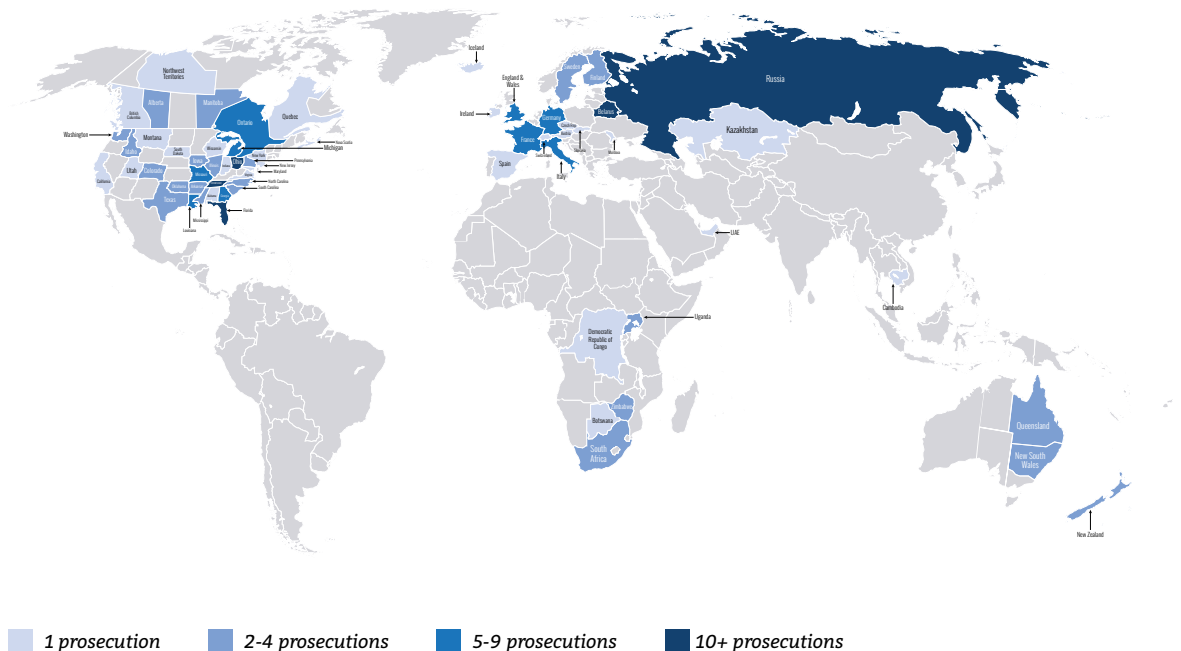
We found reports of at least¹⁰ 313 arrests, prosecutions and/or convictions in 28 countries.

Of note, we are now able to include data on reported prosecutions in Belarus and Russia,¹¹ which are likely to have been taking place at least since the enactment of a Belarusian public health law in 1993¹² and a Russian HIV criminalisation law in 1995.¹³

The highest number of cases during this period were reported in:

- Russia (at least 115)
- United States (at least 104)
- Belarus (at least 20)
- Canada (at least 17)
- France (at least 7)
- United Kingdom (at least 6)
- Italy (at least 6)
- Australia (at least 5)
- Germany (at least 5).

1.4.1 MAP 3: WHERE PROSECUTIONS HAVE RECENTLY TAKEN PLACE (DATA TO THE END OF OCTOBER 2015)



To see the full size map, [click here](#)

1.5 FOCUS ON HIV CRIMINALISATION IN SUB-SAHARAN AFRICA

Where there was no HIV criminalisation at the start of the 21st century, 30 sub-Saharan African countries have now enacted overly broad and/or vague HIV-specific criminal statutes.

Most of these statutes are part of omnibus HIV-specific laws that also include protective provisions, such as those relating to non-discrimination in employment, health and housing. However, they also include a number of problematic provisions such as compulsory HIV testing and involuntary partner notification, as well as HIV criminalisation.¹⁴

During the period covered by this report four countries in sub-Saharan Africa passed new HIV criminalisation laws: Botswana,¹⁵ Côte d'Ivoire,¹⁶ Nigeria¹⁷ and Uganda.¹⁸ When Nigeria's Senate passed the *Sexual Offences Bill* in June 2015, 13% of all people living with HIV in the world became potentially unjustly criminalised.

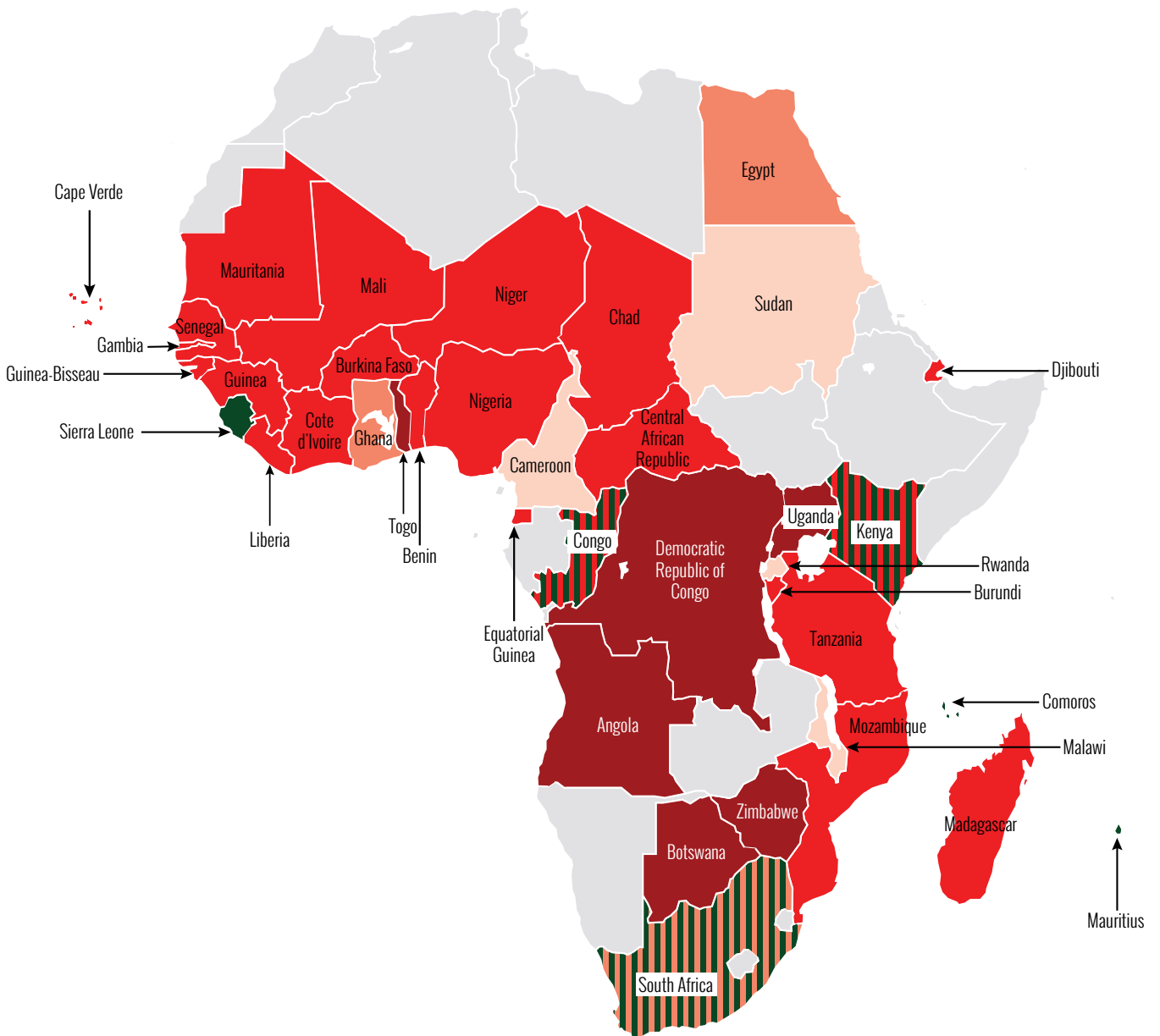
Very few countries in Africa are now unaffected by problematic HIV criminalisation laws. The rise of reported prosecutions in Africa during this period (in Botswana,¹⁹ South Africa,²⁰ Uganda,²¹ and especially Zimbabwe²²), along with the continuing, growing number of HIV criminalisation laws on this continent, is especially alarming.

Although the continent's highest HIV-prevalence country, South Africa, thoroughly examined and rejected the idea of passing an HIV-specific criminal law in 2001,²³ only two other countries have firmly rejected HIV criminalisation: Mauritius in 2007²⁴ and Comoros in 2014.²⁵

The legal environment relating to HIV criminalisation has improved in a small number of countries in sub-Saharan Africa, most notably in Kenya.

On 18 March 2015, Kenya's High Court ruled that its HIV criminalisation provision – Section 24 of the *HIV Prevention and Control Act 2006* – was unconstitutional because it was vague, overbroad and lacking in legal certainty, particularly in respect to the term 'sexual contact'. The Court also found it contravened Article 31 of the *Kenyan Constitution* which guarantees the right to privacy because the law created an obligation for people with HIV to disclose their status to their 'sexual contacts', with no corresponding obligation for recipients of such sensitive medical information to keep it confidential.²⁶

1.5.1 MAP 4: DETAILED MAP OF AFRICA (DATA TO THE END OF 2015)



- HIV-specific criminal laws, reported arrests/prosecutions
- HIV-specific criminal laws, no reported prosecutions
- Reported arrests/prosecutions using general laws
- HIV-specific criminal laws proposed
- Improved legal environment for criminalisation
- No reported HIV-specific criminal laws or arrests/prosecutions, or no data

1.7 USING SCIENCE AS AN ADVOCACY TOOL

Studies showing that effective HIV antiretroviral therapy significantly reduces HIV transmission risk has led to a definitive change in HIV prevention strategy.²⁸

The 2013 UNAIDS guidance note deals specifically with this issue and makes recommendations for avoiding prosecution – or for recognising as a defence – in cases of low viral load and/or effective HIV treatment.²⁹

Increased knowledge about reduced infectiousness due to antiretroviral therapy has led to advocacy that resulted in a number of jurisdictions revising or revisiting their criminal laws or prosecutorial policies relating to HIV criminalisation, although progress has been frustratingly slow.³⁰

The Netherlands was the first country to consider low viral load as a factor in HIV risk in 2005, resulting in the essential decriminalisation of all but intentional exposure or transmission.³¹ Following the ‘Swiss statement’, published in January 2008,³² a growing number of courts, government ministries and prosecutorial authorities have accepted antiretroviral therapy’s impact on reducing the risk of both HIV exposure and transmission.

These include: Geneva Court of Justice, Switzerland (2009); Austrian Ministry of Justice (2010); Manitoba Court of Appeal, Canada (2010); Denmark Ministry of Justice (2011); Crown Prosecution Guidance for England and Wales (2011); Crown Office and Procurator Fiscal Service Guidance for Scotland (2012); the Court of Appeal for Skåne and Blekinge, Sweden and Swedish Ministry of Health and Social Affairs (2013); and the Supreme Court of Iowa (2014).³³

1.8 BUILDING MOMENTUM IN GLOBAL ADVOCACY AGAINST HIV CRIMINALISATION

Together we can make
**HIV JUSTICE
WORLDWIDE**
a reality

This report shows that we are, indeed, building momentum in global advocacy against HIV criminalisation, to ensure a more just, rational, evidence-informed criminal justice response to HIV that will benefit both public health and human rights.

And yet, despite the many incremental successes of the past few years, much more work is required to strengthen advocacy capacity.

This is why we launched HIV Justice Worldwide in April 2016.³⁴ We want to enhance the capacity

of advocates (People Living with HIV networks, organisations, communities and individuals) to challenge and influence the decision makers within their communities and on a national and regional basis, to prevent or stop unjust use of criminal laws against people living with HIV, and to influence creation of fairer laws.³⁵

We also need to be aware that HIV criminalisation does not exist in vacuum, and is often linked to punitive laws and policies that impact sexual and reproductive health and rights,³⁶ especially those aimed at sex workers and/or men who have sex with men and other sexual minorities.³⁷

Scientific advances alone will neither 'end AIDS' nor end HIV criminalisation. Although the impact of antiretroviral therapy on infectiousness is an important advocacy tool, it must be remembered that many people with HIV do not have access to treatment (or are unable to achieve an undetectable viral load when on treatment) and that everyone has a right to choose not to know their status and/or start treatment and should not be stigmatised nor considered 'second class citizens' should they wish to delay diagnosis or antiretroviral therapy.³⁸

And, bearing in mind the stigma faced by those with, for example, hepatitis C,³⁹ and concerns over the sexual transmission of the Ebola⁴⁰ and Zika⁴¹ viruses, as we move forward to eliminate – or modernise – HIV criminalisation laws, we must ensure that our work does not inadvertently lead to the further criminalisation of other communicable and/or sexually transmitted infections.⁴²

REFERENCES

- UNAIDS. *On the Fast-Track to end AIDS: 2016-2021 Strategy*. Geneva, 2016; IAPAC. *Guidelines for Optimizing the HIV Care Continuum for Adults and Adolescents*. 2015.
- Global Commission on HIV and the Law. *HIV and the Law: Rights, Risks and Health*. New York, 2012.
- UNAIDS. *Policy brief: Criminalization of HIV Transmission*. August 2008; UNAIDS. *Ending overly-broad criminalisation of HIV non-disclosure, exposure and transmission: Scientific, medical and legal considerations*. Geneva, 2013.
- Grover A. *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*. June 2010.
- WHO. *Sexual health, human rights and the law*. June 2015.
- Global Commission on HIV and the Law. *HIV and the Law: Rights, Risks and Health*. New York, 2012; Grover A. *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*. June 2010; WHO. *Sexual health, human rights and the law*. June 2015.
- UNAIDS. *Criminalisation of HIV Non-Disclosure, Exposure and Transmission: Background and Current Landscape*. Geneva, 2012.
- UNAIDS. *The Gap Report*. Geneva, July 2014.
- Denmark created an HIV-specific criminal law in 2001 when the Supreme Court found that the general law could not be used; this HIV-specific criminal law was suspended in 2011. Between 2001 and 2011, Denmark was one of the top ten countries in the world for prosecutions per capita of people with HIV. See: GNP+. *Global Criminalisation Scan: Denmark*. Last updated 11 October 2012.
- See *About this report* to understand why numbers of cases can only be estimated.
- See *About this report* to understand how we obtained these data and their limitations.
- See: www.hsph.harvard.edu/population/aids/BELARUS.htm
- See: www.hsph.harvard.edu/population/aids/russianfed.aids.95.pdf; www.aidslaw.ru/en/liability; and (in Russian, with cases) www.rospravosudie.com/law/Статья_122_УК_РФ. For an English language news report of an HIV-related prosecution, see: Moscow Times. *Russian Man Sentenced for Giving Girlfriend HIV*. 19 May 2015.
- Eba PM. *HIV-specific legislation in sub-Saharan Africa: A comprehensive human rights analysis*. African Human Rights Law Journal, Vol. 15, No. 2, pp. 224-262, 2015.
- Bernard EJ. *Botswana's draconian Public Health Bill approved by Parliament, BONELA will challenge it as unconstitutional once President signs into law*. HIV Justice Network, 5 April 2013.
- This law limits criminal liability to acts involving a significant risk of HIV transmission.
- Bernard EJ. *Nigeria: Senate passes law criminalising HIV non-disclosure, exposure and transmission with vague and overly broad statutes*

- in the Sexual Offences Bill*. HIV Justice Network, 4 June 2015.
- 18 Bernard EJ. *Uganda: Parliament passes 'deeply flawed' HIV law, takes 'giant leap backwards': urge President Museveni to veto*. HIV Justice Network, 14 May 2014.
- 19 Dube M. *Zim woman in Botswana court for breastfeeding neighbour's baby*. Africa Review, 11 October 2013.
- 20 In 2013, South Africa successfully prosecuted alleged criminal HIV transmission as attempted murder despite no evidence of intent to harm. Read the judgment, Phiri-v-SA, from the High Court of South Africa at www.scribd.com/doc/175017571/Phiri-v-S-A-400-2012-2013-ZAGPPHC-279-8-August-2013. A second attempted murder prosecution along with allegations of rape in 2014 was characterised by lawyers working for Section 27 as doing a disservice to rape survivors and to people with HIV. See: www.dailymaverick.co.za/opinionista/2014-10-14-criminalising-hiv-transmission-stigmatises-hiv-rather-than-shows-concern-for-rape/#.VFyymYelK-9
- 21 Barton A. *Ugandan nurse Rosemary Namubiru faces three years in prison, while charge against her remains misreported, misunderstood*. Science Speaks, 19 May 2014.
- 22 Four prosecutions were reported during the report period, with a further two reported in the first months of 2016. See: *HIV Justice Network: Zimbabwe cases*
- 23 TAC. *South African Law Commission Report on Criminalisation of HIV Transmission*. April 2001.
- 24 Bernard EJ. *Legal and policy alternatives to HIV criminalisation: community-level and societal approaches*. HIV Justice Network, 4 November 2012.
- 25 UNAIDS. *New law in the Comoros strengthens protection for people living with HIV*. Geneva, 24 July 2014.
- 26 AIDS Law Project. *Judgment on Section 24 of the HIV and AIDS Prevention and Control Act*. 31 March 2015.
- 27 Australia, Victoria (repealed); Greece (repealed); Honduras (improved); Kenya (challenged); Switzerland (improved); United States, Armed Forces (improved); United States, Iowa (improved); United States, New York (improved); United States, Tennessee (improved) and Zimbabwe (challenged).
- 28 See e.g. Pebody R. *HIV treatment as prevention*. NAM, 2014.
- 29 UNAIDS. *Ending overly-broad criminalisation of HIV non-disclosure, exposure and transmission: Critical scientific, medical and legal considerations*. Geneva, 2013.
- 30 Vernazza PL et al. *HIV is not transmitted under fully suppressive therapy: The Swiss Statement – eight years later*. Swiss Medical Weekly, DOI:10.4414/smw.2016.14246. 29 January 2016.
- 31 van Kouwen W et al. *Supreme Court of the Netherlands, Criminal Division. HIV Transmission: Criminalisation*. The Journal of Criminal Law, Vol. 70, No. 6, pp. 485-489, 2006.
- 32 Vernazza P et al. *Les personnes séropositives ne souffrant d'aucune autre MST et suivant un traitement antirétroviral efficace ne transmettent pas le VIH par voie sexuelle*. Bulletin des médecins suisses, Vol. 89, Issue 5, 2008.
- 33 Bernard EJ. *"One shouldn't convict people for hypothetical risks": developments in criminal law following increased knowledge and awareness of the additional prevention benefit of antiretroviral therapy*. Abstract TUPE308. AIDS 2014, Melbourne, Australia.
- 34 See: www.hivjusticeworldwide.org
- 35 See: www.hivjustice.net/topic/alternatives/supportive-laws-and-policies
- 36 WHO. *Sexual health, human rights and the law*. June 2015.
- 37 See e.g. Ahmed A et al. *Criminalizing consensual sexual behaviour in the context of HIV: Consequences, evidence, and leadership*. Global Public Health, Vol. 6, No. S3, 2011; Baskin S et al. *Criminal laws on sex work and HIV transmission: Mapping the laws, considering the consequences*. Denver Law Review, Vol. 93, 2016.
- 38 See e.g. Newman CE. *Appreciating doubts about HIV medicine*. Journal of the International AIDS Society, Vol. 18, 2015; EATG/NAM. *Community consensus statement on the use of antiretroviral therapy in preventing HIV transmission*. 2014.
- 39 Owen G. *An 'elephant in the room'? Stigma and hepatitis C transmission among HIV-positive 'serosorting' gay men*. Culture, Health & Sexuality, Vol. 10, Issue 6, pp. 601-610, August 2008.
- 40 Eba P. *Ebola and human rights in west Africa*. The Lancet, Vol. 384, No. 9960, pp. 2091-2093, 13 December 2014.
- 41 Mansuy JM et al. *Zika virus: high infectious viral load in semen, a new sexually transmitted pathogen?* The Lancet Infectious Diseases, Vol. 16, No. 4, p. 405, 2016; Deckard DT et al. *Male-to-Male Sexual Transmission of Zika Virus – Texas, January 2016*. Morbidity and Mortality Weekly Report, Vol. 65, Issue 14, pp. 372-374, 15 April 2016.
- 42 For example, the Positive Justice Project Steering Committee Guiding Principles (2015) state: "Proposals to modernize laws should not create more serious crimes related to exposure to or transmission of a specific disease or significantly increase the scope of penalties for any individual on the basis of a particular health condition or disease." See: www.hivlawandpolicy.org/resources/guiding-principles-eliminating-disease-specific-criminal-laws-positive-justice-project

2. FROM CONSENSUS BUILDING TO GLOBAL ACTION

In order to understand what we are working to achieve, the global movement against HIV criminalisation needs to understand the problem, and share values and principles before going on the journey to find real, lasting solutions.

This chapter highlights the key international policy documents that have helped to define the problem of HIV criminalisation, as well as those which led to advocacy and action.

2.1 BUILDING GLOBAL CONSENSUS

Guidelines and research to build global consensus and help us understand why HIV criminalisation is a problem, as well as to help frame our values and principles, have been produced by a number of key multilateral agencies working on HIV.

These include recommendations and guidance produced by the:

- Office of the United Nations High Commissioner for Human Rights (OHCHR)
- Joint United Nations Programme on HIV/AIDS (UNAIDS)
- Global Commission on HIV and the Law
- World Health Organization (WHO).

2.1.1 OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS (OHCHR)

In 1998, OHCHR published, together with UNAIDS, the first global recommendations on HIV criminalisation. The *International Guidelines on HIV/AIDS and Human Rights* recommended that countries should neither create nor enforce HIV-specific criminal laws. Instead, countries should use existing laws ensuring that “the elements of foreseeability, intent, causality and consent [are] clearly and legally established to support a guilty verdict and/or harsher penalties.”¹

In 2010, Anand Grover, serving as the UN Special Rapporteur on the Right to Health, issued a report stating that “the public health goals of legal sanctions are not realized by [HIV] criminalization. In fact, they are often undermined by it, as is the realization of the right to health.” He added that HIV criminalisation “also infringes on many other human rights, such as the rights to privacy, to be free from discrimination and to equality, which in turn impacts upon the realization of the right to health.”²

In 2016, OHCHR once again revisited HIV criminalisation through a sexual and reproductive health and rights lens when it stated that “States must reform laws that impede the exercise of the right to sexual and reproductive health. Examples include laws criminalizing abortion, HIV non-disclosure, exposure and transmission, consensual sexual activities between adults or transgender identity or expression.”³



2.1.2 JOINT UNITED NATIONS PROGRAMME ON HIV/AIDS (UNAIDS)

In 2002, UNAIDS published a paper that described the various policy considerations involved in HIV criminalisation, offering some guiding principles for legislators.⁴ In 2008, UNAIDS convened an international consultation⁵ and along with the United Nations Development Programme (UNDP), subsequently issued a policy brief that advised governments to repeal existing HIV-specific criminal laws and not to pass new laws.⁶

The brief argued that a human-rights approach to HIV – as opposed to a retributive and coercive approach – would benefit public health. It noted that existing assault or homicide laws could still be used to prosecute “exceptional cases of intentional transmission”, which was defined as “wilful and knowing behaviour with the purpose of transmitting the virus”.⁷

2.1.3 GLOBAL COMMISSION ON HIV AND THE LAW

The Global Commission on HIV and the Law was an independent body convened by UNDP on behalf of UNAIDS to examine the key legal and human rights issues confronting the AIDS response, including HIV criminalisation. The Commission’s report, published in July 2012, included a chapter describing how HIV criminalisation creates a regime of surveillance and punishment, undermining HIV testing efforts and driving people living with HIV away from lifesaving HIV services.⁸ Specifically, it recommended that:

- Countries must not enact laws that explicitly criminalise HIV transmission, HIV exposure or failure to disclose HIV status. Where such laws exist, they are counterproductive and must be repealed. The provisions of model codes that have been advanced to support the enactment of such laws should be withdrawn and amended to conform to these recommendations.
- Law enforcement authorities must not prosecute people in cases of HIV non-disclosure or exposure where no intentional or malicious HIV transmission has been proven to take place. Invoking criminal laws in cases of adult private consensual sexual activity is disproportionate and counterproductive to enhancing public health.
- Countries must amend or repeal any law that explicitly or effectively criminalises vertical transmission of HIV. While the process of review and repeal is under way, governments must place moratoria on enforcement of any such laws.
- Countries may legitimately prosecute HIV transmission that was both actual and intentional, using general criminal law, but such prosecutions should be pursued with care and require a high standard of evidence and proof.
- The convictions of those who have been successfully prosecuted for HIV exposure, non-disclosure and transmission must be reviewed. Such convictions must be set aside or the accused immediately released from prison with pardons or similar actions to ensure that these charges do not remain on criminal or sex offender records.⁹

2.1.4 WORLD HEALTH ORGANIZATION (WHO)

In October 2006, the WHO Regional Office for Europe convened a technical consultation on the criminalisation of HIV and other sexually transmitted infections¹⁰ that identified urgent need for further collaborative action. This was subsequently undertaken by UNAIDS and UNDP in their 2008 international consultation and policy brief.

In June 2015, WHO produced a report that added further weight to the body of evidence supporting arguments that HIV criminalisation does more harm than good to the HIV response, “fuelling stigma, discrimination and fear, and discouraging people from getting tested for HIV, thus undermining public health interventions to address the epidemic.”¹¹

In particular, WHO highlights that: “Women are particularly affected by these laws since they often learn that they are HIV-positive before their male partners do, since they are more likely to access health services. Furthermore, for many women it is either difficult or impossible to negotiate safer sex or to disclose their status to a partner for fear of violence, abandonment or other negative consequences, and they may therefore face prosecution as a result of their failure to disclose their status. Criminal laws have also been used against women who transmit HIV to their infants if they have not taken the necessary steps to prevent transmission. Such use of criminal law has been strongly condemned by human rights bodies.”

2.2 FROM CONSENSUS TO ACTION

The global movement to end HIV criminalisation was born in the summer of 2008, on the final day of the International AIDS Conference in Mexico City, when Justice Edwin Cameron gave a powerful speech entitled ‘HIV is a virus not a crime’ that called for a sustained international pushback against “misguided criminal laws and prosecutions”. Led by international civil society, with the support of UNAIDS and UNDP, the movement has produced a number of key documents, as well as websites and other advocacy tools, to help us move from consensus to action.

These include:

- *10 Reasons to Oppose the Criminalization of HIV Exposure or Transmission*
- *Verdict on a Virus*
- *10 Reasons Why Criminalization of HIV Transmission Harms Women*
- *Global Criminalisation Scan and Global Advocacy Agenda*
- *Oslo Declaration on HIV Criminalisation*
- UNDP follow-up on the Global Commission on HIV and the Law’s recommendations
- UNAIDS guidance note: *Ending overly-broad criminalisation of HIV non-disclosure, exposure and transmission: Scientific, medical and legal considerations*
- HIV Justice Worldwide

2.2.1 10 REASONS TO OPPOSE THE CRIMINALIZATION OF HIV EXPOSURE OR TRANSMISSION, 2008

Following concerns highlighted during a 2007 civil society meeting in Southern Africa convened by the AIDS and Rights Alliance for Southern Africa (ARASA) and the Open Society Initiative of Southern Africa (OSISA)¹², the Open Society Foundations (OSF) worked with global experts and advocates to create this groundbreaking document, available in nine languages.¹³ It was also the basis for Justice Edwin Cameron's powerful closing plenary at the 17th International AIDS Conference in Mexico City, in August 2008, in which he called for "the start of a campaign against criminalisation."¹⁴

The '10 Reasons to oppose the criminalisation of HIV exposure or transmission':

1. *Criminalising HIV transmission is justified only when individuals purposely or maliciously transmit HIV with the intent to harm others. In these rare cases, existing criminal laws can and should be used, rather than passing HIV-specific laws.*
2. *Applying criminal law to HIV exposure or transmission does not reduce the spread of HIV.*
3. *Applying criminal law to HIV exposure or transmission undermines HIV prevention efforts.*
4. *Applying criminal law to HIV exposure or transmission promotes fear and stigma.*
5. *Instead of providing justice to women, applying criminal law to HIV exposure or transmission endangers and further oppresses them.*
6. *Laws criminalising HIV exposure and transmission are drafted and applied too broadly, and often punish behaviour that is not blameworthy.*
7. *Laws criminalising HIV exposure and transmission are often applied unfairly, selectively and ineffectively.*
8. *Laws criminalising HIV exposure and transmission ignore the real challenges of HIV prevention.*
9. *Rather than introducing laws criminalising HIV exposure and transmission, legislators must reform laws that stand in the way of HIV prevention and treatment.*
10. *Human rights responses to HIV are most effective.*

2.2.2 VERDICT ON A VIRUS, 2008

Verdict on a Virus, published in December 2008, is based on the voices of leading legal and judicial experts, UN advisors and people living with HIV, providing detailed examples and analysis from around the world. It was co-produced by the International Planned Parenthood Federation (IPPF), the International Community of Women Living with HIV (ICW) and the Global Network of People Living with HIV (GNP+).

IPPF subsequently created a global campaign against HIV criminalisation entitled 'Criminalize Hate, Not HIV',¹⁵ featuring 'Behind Bars', an online collection of real life stories of people affected by HIV criminalisation, illustrating the personal and professional dilemmas faced by doctors, lawyers, parliamentarians, researchers and advocates.¹⁶

Through their Global Criminalisation Working Group, ICW supports women living with HIV become agents of change in their communities, inside and outside of the courtroom. The ICW's position on HIV criminalisation was formalised in November 2015 with an issue paper singling out the concerns that specifically relate to women living with HIV.¹⁷

See 2.2.4 below for GNP+'s work on HIV criminalisation.

2.2.3 10 REASONS WHY CRIMINALIZATION OF HIV TRANSMISSION HARMS WOMEN, 2009

In 2009, the ATHENA Network (ATHENA) – a global network of individual and institutional members at the forefront of ensuring the centrality of gender equality and human rights in the HIV response – published its own *10 Reasons...* focusing specifically on women. Available in eight languages, it affirms that the protection and advancement of women’s rights are required for effective HIV responses, and that HIV criminalisation – far from providing justice for women – endangers and further oppresses them.¹⁸

2.2.4 GLOBAL CRIMINALISATION SCAN AND GLOBAL ADVOCACY AGENDA, 2010-15

GNP+’s Global Criminalisation Scan documents HIV-related laws, judicial practices, case studies and media reports, providing a broad overview of laws and prosecutions in some 200 jurisdictions.¹⁹ Commencing with Europe and Central Asia in 2005,²⁰ by 2010 the Scan had expanded globally.²¹ In 2012, it expanded further to include information on other laws and regulations that further impede effective responses to HIV. It continues to be regularly updated, often in a joint collaborative effort with the HIV Justice Network.

GNP+’s work on HIV criminalisation led to the issue becoming a key part of the *Global Advocacy Agenda (2013-2015)*, a tool to help networks of people living with HIV articulate the advocacy issues of most significance.²² Its call to action, issued in December 2012, stated, in part:

**We are angry that our human rights are increasingly being violated.
We are faced with involuntary testing, forced sterilisation and
being treated as criminals because of our HIV status...**

2.2.5 OSLO DECLARATION ON HIV CRIMINALISATION, 2012

A group of civil society advocates from around the world, came together in Oslo, Norway, on 13 February 2012 to create the *Oslo Declaration on HIV Criminalisation* which provides a succinct ten-point roadmap for policy makers and criminal justice system actors to ensure a linked, cohesive, evidence-informed approach to HIV and the criminal law.²³

The Declaration is available in eight languages and was endorsed by 1750 supporters from almost 120 countries, highlighting the continuing growth of the global movement against HIV criminalisation. It was the first official document of the HIV Justice Network,²⁴ which monitors laws and prosecutions, as well as advocacy against them, links people together, and creates advocacy tools.

2.2.6 UNDP FOLLOW-UP ON THE GLOBAL COMMISSION ON HIV AND THE LAW'S RECOMMENDATIONS

UNDP – working in partnership with the UNAIDS Secretariat, UN agencies, governments, civil society and donors – monitors and participates in activities to implement the findings and recommendations of the Global Commission's report. These efforts include:

- Collaborating with people living with HIV and key populations and supporting their efforts to work with governments and international organisations to advocate for law reform at the national and international level, including by supporting national dialogues on HIV and the law and organising training programmes on access to legal services.²⁵
- Developing tools to assist people living with HIV, key populations, judges, lawyers and parliamentarians to undertake law and policy reform, including tools to assess the HIV-related legal and human rights environment and to reform harmful criminalisation laws and policies.²⁶
- Strengthening access to justice and legal empowerment for people living with HIV and key populations, including by providing training, detailed information about legal aid networks and platforms to report violations.²⁷
- Supporting judicial education on HIV-related legal and human rights issues, for example by convening regional dialogues for judges and magistrates to discuss the complex legal and human rights issues posed by the HIV epidemic and to discuss effective strategies to ensure courts can make informed decisions on HIV-related legal and human rights issues.
- Developing materials to assist judges and lawyers confronted with specific types of HIV-related cases, including a database with case law and judgements, legislation and bills, national, regional and global guidance documents, treaties and protocols.²⁸

UNDP also maintains the Global Commission's website, which includes updates on implementation of the report's recommendations.²⁹

2.2.7 UNAIDS GUIDANCE NOTE: ENDING OVERLY-BROAD CRIMINALISATION OF HIV NON-DISCLOSURE, EXPOSURE AND TRANSMISSION: SCIENTIFIC, MEDICAL AND LEGAL CONSIDERATIONS, 2013

Commencing in 2011, the UNAIDS Secretariat undertook a major project involving research, evidence-building and policy dialogue that resulted in the development of an important new guidance note that included detailed recommendations to end overly broad HIV criminalisation with reference to scientific, medical, legal and human rights considerations.³⁰

Following on from this process, the UNAIDS Secretariat provided support to country stakeholders including governments, parliaments and civil society on approaches to responding to HIV criminalisation based on the 2013 guidance note. UNAIDS has worked to disseminate the guidance note at international, regional and national meetings involving judges, parliamentarians, civil society and other stakeholders.

To further advance global efforts to challenge HIV criminalisation, the UNAIDS secretariat together with UNDP plan to support renewed and strategic engagement in key areas that could enable a breakthrough towards ending HIV criminalisation, namely:

- A global scientific statement to help engage scientists, clinicians and other healthcare workers in the issue, and ensure that laws and prosecutions take into account up-to-date HIV-related science.

- Support to civil society-led action mechanisms, such as HIV Justice Worldwide (*see 2.2.8. below*) to support efforts by civil society in specific high risk regions and countries where overly broad HIV criminalisation has occurred or may occur.³¹

2.2.8 HIV JUSTICE WORLDWIDE

HIV Justice Worldwide³² is an initiative made up of global, regional and national civil society organisations – most of them led by people living with HIV – who are working together to build a worldwide movement to end HIV criminalisation. All of the founding partners have worked individually and collectively on HIV criminalisation for a number of years. The founding partners are:

- AIDS and Rights Alliance for Southern Africa (ARASA)
- Canadian HIV/AIDS Legal Network
- Global Network of People Living with HIV (GNP+)
- HIV Justice Network
- International Community of Women Living with HIV (ICW)
- Positive Women’s Network – USA (PWN-USA)
- Sero Project (SERO).

The initiative was launched at a meeting in March 2016 in Brighton, UK – the home of the HIV Justice Network – funded by a grant from the Robert Carr civil society Networks Fund provided to the HIV Justice Global Consortium.³³ Representatives of Amnesty International, ICW, the International HIV/AIDS Alliance, National AIDS Trust (NAT), UNAIDS and UNDP also participated in some of the meeting, and are supportive of the initiative.

The initiative allows the partners to:

- Avoid duplication by bringing together the many existing resources on this issue, sharing information and co-ordinating advocacy efforts.
- Build broader consensus amongst People Living with HIV networks, civil society, policymakers, key scientists/clinicians, criminal justice actors and funders that ‘ending AIDS’ will not happen unless we put an end to HIV criminalisation.
- Create new energy and action, ‘riding the wave’ of recent advocacy successes, pushing for commitment to change at the highest level.
- Develop and strengthen much-needed civil society capacity to ensure continued advocacy against HIV criminalisation, and to sustain this capacity in order to further advocate against related punitive laws, policies and practices aimed at people living with HIV and which impede the HIV response.



HIV JUSTICE WORLDWIDE founding partners and some of their supporters in Brighton, 24 March 2016.

Back row L-R: Rhon Reynolds (GNP+), Edwin J Bernard (HIV Justice Network), Jessica Whitbread (ICW), Boyan Konstantinov (UNDP), Patrick Eba (UNAIDS), Sean Strub (SERO).

Front row L-R: Julian Hows (GNP+), Sylvie Beaumont (HIV Justice Network), Cécile Kazatchkine (Canadian HIV/AIDS Legal Network), Naina Khanna (PWN-USA) and Michaela Clayton (ARASA).

REFERENCES

- 1 OHCHR/UNAIDS. *The International Guidelines on HIV/AIDS and Human Rights*. Guideline 4: 21a, Geneva, 1998. Consolidated, 2006.
- 2 Grover A. *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*. June 2010.
- 3 OHCHR. *General Comment No. 22 (2016) on the Right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*. 4 March 2016.
- 4 Elliott R. *Criminal Law, Public Health and HIV Transmission: A Policy Options Paper*. UNAIDS, 2002.
- 5 UNAIDS/UNDP. *International Consultation on the Criminalization of HIV Transmission: Summary of main issues and conclusions*. Geneva, 2008.
- 6 UNAIDS. *Policy brief: Criminalization of HIV Transmission*. August 2008.
- 7 UNAIDS. *Policy brief: Criminalization of HIV Transmission*. August 2008.
- 8 Global Commission on HIV and the Law. *HIV and the Law: Rights, Risks and Health*. Chap. 2, p. 20 'Punishing Vulnerability: Criminalisation of HIV Transmission, Exposure and Non-Disclosure'. New York, 2012.
- 9 Global Commission on HIV and the Law. *HIV and the Law: Rights, Risks and Health*. Chap. 2, p. 20 'Punishing Vulnerability: Criminalisation of HIV Transmission, Exposure and Non-Disclosure'. New York, 2012.
- 10 WHO Europe. *Report of the WHO European Region Technical Consultation, in collaboration with the European AIDS Treatment Group (EATG) and AIDS Action Europe (AAE), on the criminalization of HIV and other sexually transmitted infections*. Copenhagen, 16 October 2006.
- 11 WHO. *Sexual health, human rights and the law*.

- June 2015.
- 12 ARASA/OSISA. *Report on the ARASA/OSISA Civil Society Consultative Meeting on the Criminalisation of the Wilful Transmission of HIV*. Johannesburg, South Africa, 11-12 June 2007.
 - 13 Jürgens R et al. *10 Reasons to Oppose Criminalization of HIV Exposure or Transmission*. Open Society Foundations, December 2008.
 - 14 Cameron E. *Criminal statutes and criminal prosecutions in the epidemic: help or hindrance?* Abstract FRPLO103. 17th International AIDS Conference, Mexico City, 2008.
 - 15 See: www.hivandthelaw.com
 - 16 See: www.hivandthelaw.com/perspectives/real-stories
 - 17 ICW. *Criminalization of Women Living with HIV: Non-Disclosure, Exposure and Transmission*. 26 November 2015.
 - 18 Kehler J et al. *10 Reasons Why Criminalization of HIV Exposure or Transmission Harms Women*. ATHENA Criminalization and HIV – Implications for Women Working Group, ATHENA Network, 2009.
 - 19 See: www.gnpplus.net/criminalisation/node/11
 - 20 GNP+/THT. *Criminalisation of HIV transmission in Europe: A rapid scan of the laws and rates of prosecution for HIV transmission within signatory States of the European Convention of Human Rights*. 2005.
 - 21 See: www.gnpplus.net/criminalisation/node/11
 - 22 GNP+. *People Living with HIV Global Advocacy Agenda 2013-2015*. 2012.
 - 23 See: www.hivjustice.net/oslo
 - 24 See: www.hivjustice.net
 - 25 See e.g. Information on national dialogues in Brazil: www.hivlawcommission.org/index.php/follow-up-stories/280-series-of-dialogues-in-brazil-culminates-with-a-national-dialogue-on-hiv-and-the-law-in-niteroi-rio-de-janeiro; training programme on access to legal services for people living with HIV in Eastern Europe and Central Asia: www.hivlawcommission.org/index.php/follow-up-stories/215-hiv-and-the-law-protecting-the-rights-of-people-living-with-hiv-in-ukraine
 - 26 See e.g. Legal Environment Assessments; Compendium of Judgments, HIV, Human Rights and the Law: www.hivlawcommission.org/index.php/africa-follow-up-activities/237-compendium-of-judgment-for-judicial-dialogue-on-hiv-human-rights-and-the-law-in-east-and-southern-africa
 - 27 See e.g. The Regional HIV/AIDS Legal Network (for Eastern Europe and Central Asia): www.hiv-legalaid.org/en/ China, etc.
 - 28 See e.g. Legal database - HIV and law in Africa: undp.unteamworks.org/node/489404; information about judicial fora in Africa in 2015: www.hivlawcommission.org/index.php/africa-follow-up-activities/456-2nd-meeting-of-the-african-regional-judges-forum-on-hiv-human-rights-and-the-law; and in 2013: www.hivlawcommission.org/index.php/africa-follow-up-activities/244-judicial-officers-to-apply-the-law-in-promoting-the-realization-of-zero-discrimination-against-plhiv-in-eastern-and-southern-africa.
 - 29 See: www.hivlawcommission.org/index.php/implementation-of-report
 - 30 UNAIDS. *Ending overly-broad criminalisation of HIV non-disclosure, exposure and transmission: Scientific, medical and legal considerations*. Geneva, 2013.
 - 31 This support could include actions such as convening regional or national dialogues on HIV criminalisation, sharing of best practices on the issue, issuing of statements, support to advocacy and other support as may be deemed appropriate by regional and national stakeholders, particularly civil society. Approaches to in-country support will be informed by UNDP et al. *Preventing and Responding to HIV Related Human Rights Crises: Guidance for UN Agencies and Programmes* (2014).
 - 32 See: www.hivjusticeworldwide.org
 - 33 The HIV Justice Global Consortium has been funded for three years (2016-2018) and comprises: ARASA, Canadian HIV/AIDS Legal Network, GNP+, HIV Justice Network, Sero Project and PWN-USA.

3. BUILDING THE CASE AGAINST HIV CRIMINALISATION



The last few years have seen increasing interest among researchers in the area of HIV criminalisation and a push into new areas of enquiry to examine the impacts of the unjust application of criminal law.

Increasingly research is showing that instead of delivering a public health benefit, HIV criminalisation is a poor public health strategy. Understanding the potential negative impact of HIV criminalisation on public health is critical to making informed policy decisions.

The most commonly cited rationale of the criminal law is to deter morally unacceptable behaviour through fear of punishment. Burriss and colleagues were the first to explore whether US laws that criminalised HIV non-disclosure had the impact that the lawmakers intended. Their research, published in 2007, found that such laws had no effect on disclosure or risk-taking behaviour.¹

Recent research has delivered findings in a number of key areas. The synopses below describe research by leading academics who continue to investigate diverse themes of social and legal theory in order to better understand the impacts of HIV criminalisation.

3.1 TESTING

Advocates concerned about the public and individual health impacts of HIV criminalisation have long argued that it deters HIV testing, which in turn limits access to treatment and care. That supposition is largely based on the experience of grass roots organisations,² with limited examples of empirical social science research to date.³

In 2014, a US-based study made a welcome contribution to existing literature. People considered at high risk of acquiring HIV living in states with HIV-specific statutes were found to be no more or less likely to report HIV testing than those in other states. However, HIV testing decreased following media coverage of HIV cases. The application of criminal laws had a negative impact on HIV testing rates among those most at risk of HIV infection, and consequently the study concluded that such laws are a threat to public health.⁴

3.2 DISCLOSURE

Laws obligating disclosure of known HIV-positive status to sexual partners are absolute, based on the assumption that such an obligation is always necessary, practical, reasonable and a viable HIV prevention strategy. That is not necessarily the case. The following recent research extends our understanding of issues associated with obligations to disclose known HIV-positive status prior to sex.

- A Canadian study found that most HIV-positive people disclose their HIV status before sex with a partner who is HIV-negative or of unknown status. However, disclosure remains fraught with

- emotional pitfalls complicated by personal histories of previously misread cues and having to negotiate a stigmatised status. HIV criminalisation creates a public expectation that people with HIV will disclose to their sexual partners, while simultaneously making disclosure a more difficult and risky practice. The study concluded that heightened pressure of criminal sanction on decision-making about disclosure does not address difficulties in safer sex negotiation and is unlikely to result in enhanced prevention.⁵
- Despite having been counselled at the time of HIV diagnosis on the legal situation in England and Wales regarding prosecutions for reckless HIV transmission, most people with HIV in this UK study were unable to accurately describe under what specific circumstances disclosure may serve as a defence to charges of reckless HIV transmission. Respondents frequently described their own ethical position in place of an accurate description of the law. The study suggests that the inability to recall legal disclosure obligations may result from patients experiencing information overload immediately after diagnosis. People with HIV are bound by laws they do not understand, so those laws cannot accurately inform their behaviours.⁶

3.3 SEXUAL BEHAVIOUR

A US study comparing the sexual behaviour of gay men living in states with or without HIV-specific criminal laws found very little variation by state, suggesting that legislation has a minimal impact on their sexual behaviours. Nevertheless, they found that HIV criminalisation may undermine public health because men who believed they lived in a state with such laws were slightly more likely to have sex without a condom, which the authors suggest may be due to a false sense of security – expecting disclosure or protection from the law.⁷

3.4 HEALTH CARE PRACTICE

HIV criminalisation has the potential to adversely affect relationships between healthcare workers and patients and makes those in affected communities wary of medical services.

- An analysis of all studies published to mid-2013 examining the public health impact of HIV criminalisation across Canada, the UK and the US concluded that HIV-related criminal laws either failed to influence, or for a minority increased, STI testing avoidance, unprotected anonymous sexual contacts, and avoidance of health care because respondents did not feel safe speaking with health professionals. The study suggests HIV-related criminal laws compromise public health and other clinicians' abilities to establish therapeutic relationships, to evaluate medication effects and viral suppression, to provide accurate information about prevention, and to detect and treat STIs.⁸
- A study from Canada found HIV criminalisation negatively impacts nursing practice as public health nurses endeavour to control information about the limits of confidentiality at the outset of HIV post-test counselling. Individual practice varies as nurses pragmatically balance ethical and professional concerns. Some intentionally withhold information about the risk of subpoena, while others talk to clients about confidentiality in ways that focus on the risk of harm associated with criminalisation. Practice variation illuminates a direct relationship between the criminal justice system and healthcare.⁹
- A second Canadian study found that public health nurses' traditional counselling practices prioritising client care and risk reduction are in conflict with HIV criminalisation. The anticipation that medical and public health records could be used as evidence in court is affecting public health nurses' reasoning and documentary practices during HIV post-test

- counselling. There are real concerns that notes will be misinterpreted and given a legal significance contrary to their original purpose, as well as a fear that the practitioner's professional competence would be attacked.¹⁰
- A US study also found that HIV criminalisation is rendering disclosure counselling difficult and potentially compromising trust between healthcare workers and patients. Counsellors' understanding of the up-to-date science of HIV transmission risk also conflicts with the need to inform clients to disclose before any kind of sex to avoid prosecution – even when condoms are used or they have a low viral load. The study concludes that it is not only difficult for counsellors to determine when to discuss legal obligations during the counselling process, but exactly how to discuss them without undermining therapeutic relationships.¹¹

HIV CRIMINALIZATION: A PHYSICIAN'S PERSPECTIVE



US physician, Dr Wendy Armstrong's, first person account of the prosecution of one of her patients is a rare published work about HIV criminalisation by a practicing HIV medical practitioner. *HIV Criminalization: A Physician's Perspective* walks the reader through Dr Armstrong's experience which begins with the treatment of her patient over several years, including working through his specific issues with treatment adherence. It describes Dr Armstrong's involvement with the patient within the safety of her office "where patients could talk frankly ... about their fears and joys, about their personal lives and sexual practices, their bodies and their symptoms". The sanctity of that space is shattered by the arrival of a subpoena requiring Dr Armstrong to testify in criminal proceedings against her patient. Dr Armstrong laments the loss of physician-patient privilege, describing her journey back from the trial at which she gave evidence about her clinic sessions with her patient as "feeling a sense of betrayal I haven't felt in my professional life". She notes that many of her colleagues have since confirmed they too have had criminal prosecutions invade their patient relationships. Dr Armstrong argues that criminalisation laws have the potential to corrupt the physician-patient relationship – undermining "a powerful tool in the armamentarium" to address the HIV epidemic.¹²

3.5 INEQUALITY - RACE AND GENDER

Despite rhetoric about HIV criminalisation protecting women, analysts and researchers have found it is not the case. The criminal justice system fails to adequately address gendered experience of HIV risk during HIV criminal trials. Moreover, it marks vulnerable women for prosecution, including women whose partners ignore their requests to practice safer sex and women prosecuted for exposing or transmitting HIV to their baby.¹³ Similarly, prosecutions have disproportionately impacted racial minorities, including people of colour in the United States.¹⁴

- The tendency to position women who become infected with HIV as 'victims' obscures the complex realities of gender and sexual practice. An Australian study considers how heterosexual women living with HIV make sense of their HIV acquisition, challenging the victim-culprit binary. None of the women interviewed presented themselves as 'victims' in any straightforward sense or placed the blame squarely on the men who likely infected them,

including men who had not disclosed. Instead, the women's narratives revealed themes of "mutual vulnerability" and far more ambivalent allocations of responsibility.¹⁵

- A US study found an uneven application of HIV criminalisation laws in the state of Michigan. Relative to HIV prevalence in these groups, black men and white women had a comparatively greater risk of conviction than white men or black women. White women were observed to have the greatest conviction rate of any group analysed, suggesting they may face a particular burden under these laws. Many of the white women convicted were especially disadvantaged by issues such as poor mental health, substance abuse and homelessness. Contrary to expectations, a comparatively low risk of conviction was observed for men with male partners compared to men with female partners.¹⁶

3.6 MORALISING JUSTICE: ZERO DETERRENCE, REAL HARMS

Justifications for HIV criminalisation include deterring harmful practices and/or punishing malicious behaviour. In fact, there is little evidence for either. The following studies suggest that prosecutions undermine public health by sensationalising what it means to live with HIV, obscuring or ignoring scientific evidence about transmission risk, and increasing HIV-related stigma.

- A US study found that to justify a conviction or secure a more severe punishment at sentencing, prosecutors and judges often argued that HIV infection was a death sentence; that HIV is a deadly weapon; and that HIV-positive people are homicidal threats. Such powerful narratives are persistent, despite effective HIV antiretroviral therapies and fewer than 7% of cases actually involving alleged infection. Even in cases where judges relied primarily on public safety arguments, medical evidence was rarely invoked in the adjudication of cases. The study concludes that enforcement of HIV disclosure laws is driven neither by medical concerns nor public health considerations, but reflects pervasive, moralising narratives that frame HIV as a moral infection which must be forbidden and punished.¹⁷
- A Canadian study found that most people living with HIV believed HIV criminalisation has unfairly shifted the burden of proof so that people with HIV are held to be guilty until proven innocent and gave disgruntled partners a legal weapon to wield regardless of the facts. They noted that the onus falls especially unjustly on women living with HIV whose male partners can ignore their wishes regarding condom use. Many respondents reported a heightened sense of uncertainty, fear or vulnerability impacting personal security and particularly on negotiating potential romantic and sexual interactions.¹⁸
- Although HIV criminalisation laws were originally intended to stop the spread of HIV (by assuming that the threat of punishment will encourage HIV disclosure), three related US studies found no evidence that general deterrence influences participants' recommendations to punish fictional offenders. Instead, there was strong support for retribution and also an aim to prevent the person from reoffending, particularly if their actions were associated with considerable harm. The study suggests that the general public is likely to endorse HIV criminalisation as fair and credible if used to punish actions that cause considerable harm. While it may not be possible to gain public support for a sweeping elimination of HIV criminalisation laws, a realistic advocacy agenda may involve arguments for limiting statutes and prosecutions to egregious cases where considerable harm is caused.¹⁹
- Sero Project's US study assessed current attitudes about HIV-related issues and tested messages that might be used to educate the general public and gain support for advocacy to modernise or repeal HIV criminalisation statutes. The study found most respondents had misperceptions

about transmission risks, including believing HIV was easily acquired through saliva. Most were completely unaware of HIV criminalisation. Lack of awareness about HIV risk, treatment and criminalisation caused respondents to presume current HIV-specific laws must exist for valid reasons. Notably, when a small amount of simply stated critical analysis was provided, almost three-quarters of respondents agreed there should not be special laws that treat people with HIV differently. The study suggests there is great opportunity to change public opinion but that messaging needs to be simple, easy to understand and to the point. Information that current laws are inconsistent with scientific knowledge had considerable resonance, as did messaging that HIV laws unintentionally discourage testing, obtaining treatment and voluntary disclosure. Messages about civil liberties were found to be least effective.²⁰

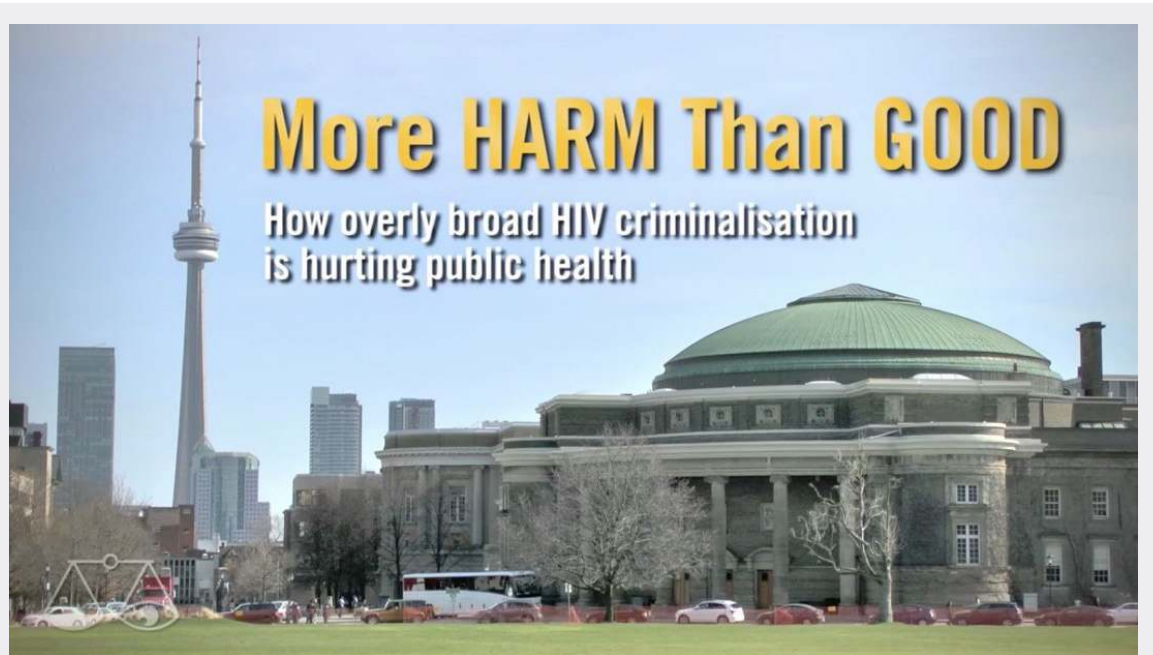
3.7 FILLING THE GAPS IN THE RESEARCH AGENDA

Legal scholar and expert, Matthew Weait suggests that, while important, rights-based arguments are an insufficient basis for advocacy, with legal scholarship and research having an important role to play. Policy-makers, legislators and those responsible for the interpretation and enforcement of law must base their HIV response not on populist morality but on the strong evidence base provided by three decades of clinical, scientific and social research.²¹

Meanwhile, social science researcher Carol Galletly and colleagues ask whether “after more than 25 years one has to wonder if researchers and advocates might be simply ‘preaching to the choir’”. While advocates may not like the systems within which HIV criminalisation exists and is enforced, and may vehemently disagree with such laws, advocacy will benefit from applying more time to understanding the systems and beliefs that allow HIV criminalisation to endure.²²

Finally, a 2013 meeting of international experts recommended the following approaches to future studies:

- Explore novel analytical and methodological approaches, including a deeper engagement with socio-legal studies and criminology.
- Conduct intervention research, including exploration of the processes and outcomes of interventions that offer alternatives to criminalisation and/or seek to prevent HIV transmission.
- Conduct research on social, structural, behavioural and cultural factors that underpin and drive HIV criminal prosecutions, including the rationale, role and experience of complainants and of police and prosecutors.
- Continue to research the implications of criminalisation for those who work in HIV prevention and in therapeutic, clinical and support services for people living with HIV.
- Conduct media research, particularly given that media is an important source of public information about the HIV criminalisation.²³



MORE HARM THAN GOOD

The HIV Justice Network's *More Harm Than Good* is a 30 minute documentary filmed at an international meeting on HIV prevention and criminal law in Toronto in April 2013.²⁴ The film provides a concise summary of the studies undertaken prior to this date showing how HIV criminalisation undermines public health approaches to HIV and is an excellent tool for advocates wanting to provide a clear, sophisticated analysis of key criminalisation reform arguments.²⁵

REFERENCES

- Burris S et al. *Do Criminal Laws Influence HIV Risk Behavior? An Empirical Trial*. Arizona State Law Journal, Temple University Legal Studies Research Paper No. 2007-03, 2007.
- See e.g. Jeffreys J 'Sex work: criminalisation and control' in Cameron S & Rule J (eds) *The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality*. National Association of People Living with HIV/AIDS, 2009.
- See e.g. O'Byrne et al. *Nondisclosure Prosecutions and Population Health Outcomes: Examining HIV Testing, HIV Diagnoses, and the Attitudes of Men Who Have Sex with Men Following Nondisclosure*. Biomedical Central, 1 February 2013; Sero Project. *The Sero Project: National Criminalization Survey Preliminary Results*. 25 July 2012; Sero Project. *HIV Criminalisation Discourages HIV Testing, Creates Disabling and Uncertain Legal Environment for People with HIV in U.S.* Press release, 25 July 2012; Whitlock GG et al. *Why do men who have sex with men and who are at high risk of HIV infection, decline HIV testing?* International Journal of STD & AIDS, Vol. 24, No. 6, 503, June 2013.
- Lee S G. *Criminal law and HIV testing: empirical analysis of how at-risk individuals respond to the law*. Yale Journal of Health Policy, Law and Ethics, Vol. 14, No. 1, pp. 194-238, Winter 2014.
- Adam B et al. *HIV disclosure as practice and public policy*. Critical Public Health, Vol. 25, No. 4, 2015.
- Phillips M & Schembri G. *Narratives of HIV: measuring understanding of HIV and the law in HIV-positive patients*. Journal of Family Planning and Reproductive Health Care, published online ahead of print, 2015.
- Horvath KJ et al. *Men who have sex with men who believe that their state has a HIV criminal law report higher condomless anal sex than those who are unsure of the law in their state*. AIDS & Behavior, first online: 16 January 2016.
- O'Byrne P et al. *HIV criminal prosecutions and public health: an examination of the empirical research*. Medical Humanities, Vol. 39, No. 2, pp. 85-90, December 2013.
- Sanders C. *Discussing the Limits of Confidentiality: The Impact of Criminalizing HIV Nondisclosure on Public Health Nurses' Counselling*. Public Health Ethics, Vol. 7, Issue 3, pp. 253-260, November 2014.
- Sanders C. *Examining public health nurses' documentary practices: the impact of criminalizing HIV non-disclosure on inscription styles*. Critical

- Public Health, Vol. 25, No. 4, 2015.
- 11 French M. *Counselling anomie: Clashing governmentalities of HIV criminalisation and prevention*. Critical Public Health, Vol. 25, No. 4, 2015.
 - 12 Armstrong W. *HIV Criminalization: A Physician's Perspective*. Center for HIV Law and Policy Website.
 - 13 Prosecutions of women who expose or pass HIV to their baby during pregnancy, birth or breastfeeding are known to have taken place in Austria, Canada, Sweden, and the United States.
 - 14 Newman E. *HIV Criminalization Laws Disproportionately Punish People of Color*. Beta, 4 February 2016.
 - 15 Persson A. "I don't blame that guy that gave it to me": *Contested discourses of victimisation and culpability in the narratives of heterosexual women infected with HIV*. AIDS Care: Psychological and Socio-medical Aspects of AIDS/HIV, Vol. 26, Issue 2, 2014.
 - 16 Hoppe T. *Disparate risks of conviction under Michigan's felony HIV disclosure law: An observational analysis of convictions and HIV diagnosis, 1992-2010*. Punishment and Society, Vol. 17, No. 1, pp. 73-93, January 2015.
 - 17 Hoppe T. *From Sickness to Badness: The Criminalization of HIV in Michigan*. Social Science & Medicine, Vol. 10, pp. 139-147, January 2014.
 - 18 Adam B et al. *Impacts of Criminalization on the Everyday Lives of People Living with HIV in Canada*. Sexuality Research and Social Policy, Vol. 11, Issue 1, pp. 39-49, March 2014.
 - 19 Woody A et al. *Motivations for Punishing Someone Who Violates HIV Nondisclosure Laws: Basic Research and Policy Implications*. Analyses of Social Issues and Public Policy, November 2014.
 - 20 Sero Project. *HIV Criminalization: Attitudes and Opinions of the American Public*. Presentation to the Democratic Attorneys General Association Spring Policy Conference, 7 May 2015.
 - 21 Weait M. *Unsafe law: health, rights and the legal response to HIV*. International Journal of Law in Context, Vol. 9, No. 4, pp 535-564, December 2013.
 - 22 Galletly C et al. *Criminal HIV exposure laws: Moving forward*. AIDS Behaviour, Vol. 18, pp. 1011-1013, 2014.
 - 23 Mykhalovskiy E et al. *The Public Health Implications of Criminalizing HIV Non-Disclosure, Exposure and Transmission: Report of an International Workshop*. 2014.
 - 24 See: www.hivjustice.net/moreharm/
 - 25 In addition, Patrick O'Byrne and colleagues at the University of Ottawa have reviewed all studies published to date on the public health impact of HIV criminalisation, which summarises all of the studies included in the documentary, as well as others not mentioned. O'Byrne P et al. *HIV criminal prosecutions and public health: an examination of the empirical research*. Medical Humanities, Vol. 39, No. 2, pp. 85-90, December 2013.

4. TARGETED ADVOCACY - EXAMPLES OF GOOD PRACTICE

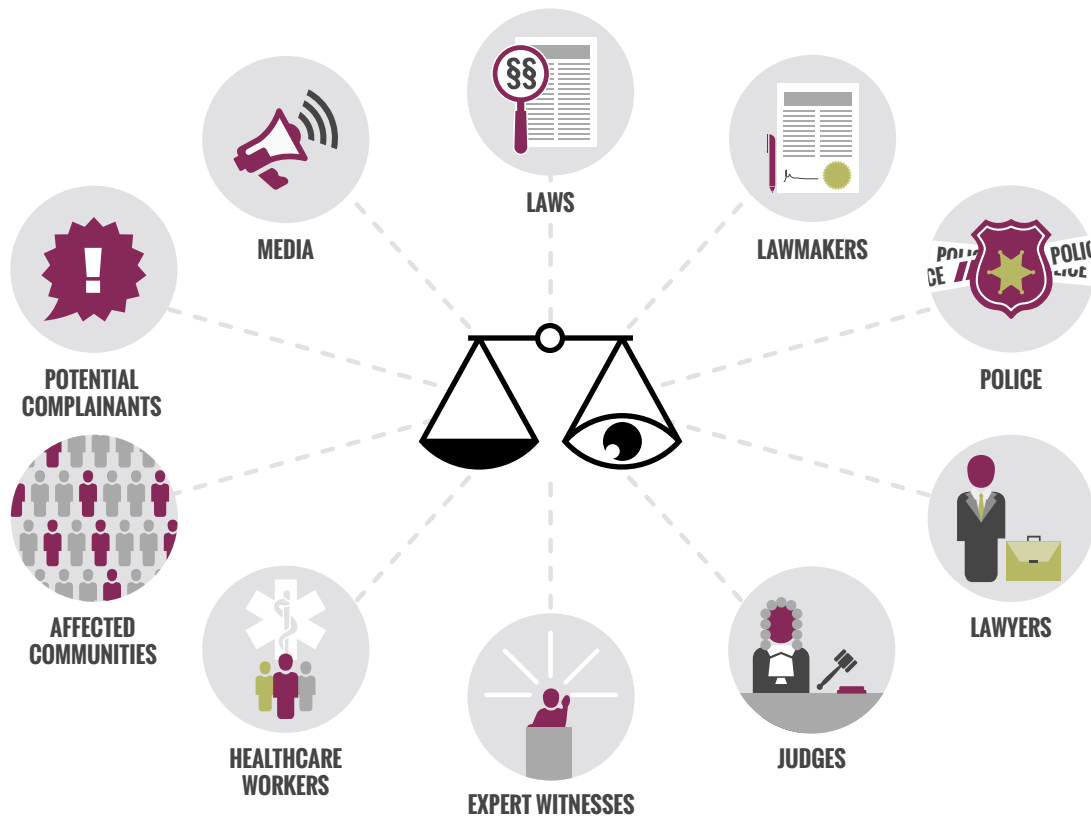


Over the past few years, important and promising developments in case law, law reform and policy have taken place in many jurisdictions around the world using a number of different strategies.

As the examples in this chapter will show, there is no clear formula to achieving a successful advocacy strategy to end the inappropriate use of the criminal law to regulate and punish people living with HIV.

One key component, however, is the meaningful involvement – and ideally leadership – of people living with HIV, both as individuals and as part of wider networks.

Another key component is understanding context. In many places there is a complex variety of laws, policies and practices that also intersect with unique social, epidemiological and cultural contexts. HIV criminalisation is a complex issue that does not exist in a vacuum. Consequently, this requires a detailed, nuanced understanding of both the problem and the proposed solution in order to identify the most appropriate advocacy targets with the most impact.



Advocacy targets against HIV criminalisation. Although law- and policy-makers and criminal justice actors are obvious targets, healthcare workers and scientists (especially those who serve as expert witnesses) as well as affected communities, media and even potential complainants, can also make an important difference. Advocacy targeting these different areas may work best when used in combination.

4.1 UNITED STATES: UNDERSTANDING THE TARGET AUDIENCE

In order to better understand what strategies and arguments will have an impact on specific advocacy target(s), it helps to know not only what the target audience is thinking, but also what might change their minds.



As highlighted in the previous chapter (3.6 ‘Moralising justice: zero deterrence, real harms’ in *Building the case against HIV criminalisation*), a recent survey of a representative sample of the US public by the Sero Project tested messaging that might gain support for advocacy to modernise or repeal US HIV criminalisation statutes.

It found that most respondents were completely unaware of HIV criminalisation and therefore presumed current laws must exist for valid reasons.

However, once they were briefly informed about the laws, the ways they are inconsistent with current scientific knowledge, and that they appear to discourage testing, treatment and open, honest discussion about HIV – harming individual and public health – they were much more open to the idea that laws should be changed.¹

4.2 FRANCE: UNDERSTANDING THE PROBLEM, WORKING TOWARDS SOLUTIONS

In April 2015, following extensive research into the law, nature of complaints and prosecutions, and their impact, the French National AIDS Council (known by its French acronym, CNS) issued an updated *Opinion* on the criminalisation of sexual exposure and transmission of HIV in France.²³

Aware of the fact that the approach and recommendations originally issued by the CNS in 2006⁴ no longer addressed current challenges, the Council formed an ad hoc commission in order to assess both the legal framework and societal and health consequences of HIV criminalisation in France.

The aim of the updated *Opinion* was to contribute to thinking on HIV criminalisation beyond the polarised debate between opponents and supporters of legal action. Its recommendations are targeted at public authorities, stakeholders in the fight against HIV, and the sexually active population as a whole. It aims to reduce the prosecution risk to which people living with HIV are exposed, improve the way offences are dealt with by the criminal justice system when court proceedings are instituted, and to limit any negative effects on prevention policies.

The Council’s recommendations, most of which are still to be implemented, are summarised in the table below.

NO.	OBJECTIVES	RECOMMENDATIONS	COMPETENT AUTHORITIES AND/OR RECOMMENDATION TARGETS
1	Contribute to better information for judges	Promote initial and continuing education of magistrates judges and future magistrates judges on HIV related issues	French National School for the Judiciary (École nationale de la magistrature)
2	Bolster the quality of police investigations	Promote training actions of police officers and future officers on HIV related issues	Ministry of the Interior
3	Prevent reoffending, enable the integration and reintegration of convicted people and improve their support	Apply alternatives to custodial sentences	Ministry of Justice
4	Promote the prevention of the risk of prosecution	Contribute to a better understanding of legal issues by the people and communities concerned	HIV/AIDS associations
		Support actions aiming to provide information on the legal rights and responsibilities of people living with HIV	Ministry of Health French National Institute for Health Prevention and Education (INPES)
		Promote actions to fight stigmatisation and discrimination towards people living with HIV and prevention actions towards the general population	Ministry of Health, Regional Health Agencies (ARS), French National Institute for Health Prevention and Education (INPES) Other competent ministries HIV/AIDS associations

4.3 TARGETING LAWS

4.3.1 AUSTRALIA: REPEALING VICTORIA'S HIV-SPECIFIC CRIMINAL LAW

In a triumph of strategic advocacy, Australia's only HIV-specific criminal law was repealed on 28 May 2015. Section 19A of the *Victorian Crimes Act* made it a criminal offence to intentionally transmit a 'very serious disease', defined only as HIV. The section carried a maximum 25-year prison sentence, making it one of the most serious crimes in Victoria.

The law was enacted in 1993, following a number of cases in which blood-filled syringes were used in armed robberies and a high-profile case in which a prison officer (in another state) was stabbed with a hypodermic syringe. Although the law was supposedly passed to deal with such incidents, in practice it has been applied exclusively against people accused of sexual transmission of HIV.

Only a handful of cases have ever been prosecuted (none successfully) but people accused of reckless transmission or endangerment have often been charged under or threatened with section 19A during police interrogations. Moreover, Section 19A was stigmatising and counterproductive.

The repeal of Section 19A is a nod to international anti-criminalisation advocacy efforts, the results of which are not always easy to measure. Victoria's advocacy stems from the first ever HIV criminalisation pre-conference meeting at the 2010 International AIDS Conference held in

Vienna which brought together advocates to discuss work being done in different parts of the world. That meeting, organised by the Canadian HIV/AIDS Legal Network, the Global Network of People Living with HIV (GNP+) and NAM (who hosted the HIV Justice Network), was the inspiration for a joint anti-criminalisation advocacy project by Living Positive Victoria and the Victorian AIDS Council.

Initial advocacy focused on the development of prosecutorial guidelines (similar to those in England and Wales) but following the announcement that Melbourne would host the 2014 International AIDS Conference, advocacy shifted gear to argue for the repeal of 19A. Advocates considered that by focusing on a law that was manifestly out of step with best practice, they could use the conference and an impending state election to make political headway.

Armed with a solid evidence base, particularly recent reports by UNAIDS⁵ and the Global Commission on HIV and the Law⁶ criticising HIV-specific laws, advocates developed a policy brief, assembled a strong coalition of supporting agencies and began lobbying both government and opposition political parties. Considerable effort was applied to the development of strategic media messaging and ways of engaging with AIDS 2014 conference delegates.

At the 'Beyond Blame' HIV criminalisation pre-conference meeting prior to AIDS 2014 (see box below), the Victorian Health Minister gave an opening address, during which he made an unexpected announcement: a commitment to "amend section 19A to make it non-discriminatory". While vague regarding the exact nature of what an 'amendment' might mean, it was a stunning moment in which it became apparent that advocacy had indeed generated buy-in from government. Advocacy continued, including arming protesters marching during AIDS 2014 with T-shirts and banners reading '#REPEAL 19A', that made the evening news. Advocates then publicly called on the government to clarify why they were talking about 'amendment' rather than 'repeal'.

Behind the scenes, advocates continued to use every possible social event and reception to buttonhole politicians and push their case, highlighting the goodwill that an announcement would generate on the international stage. Finally, on the last full day of the conference, the opposition Labor Party committed to full repeal of section 19A within a year if elected.⁷ It is unclear how the ruling party would have carried out their amendment because the Labor Party was elected to government. Within five months, the "dated and anachronistic"⁸ section 19A was gone.⁹

Advocacy to further limit HIV-related prosecutions using other laws in Victoria – including recklessly causing serious injury, conduct endangering persons and procuring sexual penetration by fraud – continues.¹⁰



BEYOND BLAME: CHALLENGING HIV CRIMINALISATION AT AIDS 2014

In July 2014, 150 anti-HIV criminalisation activists from all over the world came together at ‘Beyond Blame: Challenging HIV Criminalisation’, a pre-conference meeting preceding AIDS 2014. The meeting provided a valuable opportunity for critical reflection and discussion among world leaders in civil society advocacy to address HIV criminalisation.¹¹

Hosted by a number of Australian agencies (Australian Federation of AIDS Organisations, Living Positive Victoria, National Association of People Living with HIV Australia and Victorian AIDS Council/Gay Men’s Health Centre), the meeting also drew considerable support from the AIDS and Rights Alliance of Southern Africa, Canadian HIV/AIDS Legal Network, Global Network of People Living with HIV, HIV Justice Network, International Community of Women Living with HIV, Sero Project and UNAIDS.^{12 13}

The meeting opened with a surprise announcement by the Victorian Minister of Health that Australia’s only HIV-specific criminal law (Section 19A) would be “amended” (See above). The announcement was followed by a keynote address by the Honourable Michael Kirby, former Justice of the High Court of Australia and a member of the Global Commission on HIV and the Law.

‘Beyond Blame’ included inspiring presentations about recent advocacy and reform in Iowa (US) by Senator Matt McCoy, and Sero Project’s Sean Strub and Nick Rhoades. HIV Justice Network’s Edwin Bernard presented on developments in criminal law given increased knowledge of the prevention benefits of antiretroviral therapy. Patrick Eba (UNAIDS) and Dora Kiconco Musinguzi (Uganda Network on Law, Ethics and HIV/AIDS) spoke about the urgent need to focus efforts in the global South. Workshops focused on advocacy messages, science and alternatives to a punitive criminal justice approach.

4.3.2 KENYA: SUCCESSFULLY CHALLENGING THE LAW AS UNCONSTITUTIONAL

In November 2010, the Kenyan Government announced that Section 24 of the *HIV and AIDS Prevention and Control Act 2006* would be operationalised the following month.

Section 24 provided that a person who is aware of being infected with HIV shall not, knowingly and recklessly, place another person at risk of becoming infected with HIV unless that other person knows that fact and voluntarily accepts the risk of being infected. It also stated that a person with HIV must take all reasonable measures and precautions to prevent the transmission of HIV to others; and inform, in advance, any sexual contact or person with whom needles are shared of that fact. Failure to do so would result in imprisonment (up to seven years) or a fine, or both.¹⁴

The AIDS Law Project decided effective advocacy required a legal intervention. In April 2011, it sought an interlocutory court order to stop operation of Section 24. The judge found the petition raised such “sufficiently weighty issues for consideration by the Court” that it should be sent before the Chief Justice to appoint a bench of three judges to hear the petition. However, the section remained in operation until those proceedings could be concluded. In November 2011, the Centre for Reproductive Rights joined the proceedings as ‘friends of the court’ (*amicus curiae*).

At the High Court hearing, held in October 2014,¹⁵ the AIDS Law Project argued that the term ‘sexual contact’ was vague and could be interpreted to include kissing, holding hands, or exploratory sexual contact as well as penetrative intercourse, and it would be left to the subjective views of the prosecutor, police or the court to determine its intention.

It also argued that the law had been used to ascertain a sexual partner’s HIV status from a medical practitioner without the person’s consent or involvement. That risk of unwarranted disclosure of confidential information breached the affected person’s privacy.

Further, they argued that the law was likely to promote fear and stigma as it imposed a stereotype that people living with HIV were immoral and dangerous criminals, and this would negate efforts being made to encourage people to live openly about their HIV status.¹⁶

On 18 March 2015, the High Court of Kenya ruled that Section 24 was unconstitutional because it was vague, overbroad and lacking in legal certainty particularly in respect to the term ‘sexual contact’.

The court reaffirmed two principles: that no one should be punished under a law unless it is sufficiently clear to enable them to know what conduct is forbidden before committing an act; and no one should be punished for any act not clearly ascertainably punishable when the act was done as espoused under the Constitution.¹⁷

The court further held that Section 24 contravened Article 31 of the *Kenyan Constitution* which guarantees the right to privacy. The court found the law created an obligation for people with HIV to disclose their status to their ‘sexual contacts’, with no corresponding obligation for recipients of such sensitive medical information to keep it confidential.¹⁸

It is worthy of note that the decision was made following ongoing efforts by KELIN (Kenya Ethical and Legal Issues Network) and UNDP to increase judicial sensitisation on matters of health and human rights.

The AIDS Law Project continues to discuss the judgement amongst partners and others in their networks to ensure greater understanding of the rationalisation for their legal strategy and a shared understanding of the harms of HIV criminalisation.

However, Section 26 of the *Sexual Offences Act (2006)*, another overly broad HIV criminalisation statute, remains in force, although there have been no reported prosecutions to date.¹⁹

4.3.3 SWITZERLAND: SUSTAINED EFFORTS BRING ABOUT LAW REFORM

Sustained efforts by Swiss anti-HIV criminalisation campaigners have borne significant results. In 2007, the Swiss Government decided to revise the Swiss *Law on Epidemics* because of concerns Switzerland was not well-placed to deal with global epidemics, such as severe acute respiration syndrome (SARS) and H1N1. HIV campaigners saw an opportunity and began lobbying for an amendment to remove or modify the impact of Article 231 of the *Swiss Criminal Code*, one of two laws that had been used to prosecute dozens of people living with HIV for exposure or transmission,²⁰ sometimes alongside Article 122, serious assault.²¹

Article 231 allows for prosecution of anyone who attempts or does “deliberately spread a dangerous transmissible human disease”, i.e. a person can be charged whether or not transmission occurs. No intention to transmit HIV is required. Disclosure and/or consent by a partner is not a defence. Consequently all unprotected sex by people with HIV can be prosecuted, regardless of risk.²²

In 2010, the government introduced the draft Bill into parliament. Unhappy with the bill, HIV campaigners lobbied for changes. In 2011, a revision of the *Law on Epidemics* began, with several Swiss HIV NGOs (including Groupe sida Genève and Aids-Hilfe Schweiz) working closely with the Swiss Federal Commission for Sexual Health to lobby for laws consistent with the UNAIDS position criminalising only malicious and intentional HIV transmission. However, it was not until the National Council’s final vote that a last-minute amendment tabled by Green MP Alec von Graffenried saw campaigners’ core aim of decriminalising unintentional HIV transmission or exposure achieved.²³ Swiss law then required that the revised law be put to a popular vote.²⁴ In September 2013, the Swiss *Law on Epidemics* was passed, replacing the old *Epidemics Act*. Under the new *Epidemics Act* the transmission of a dangerous human disease is only prosecutable if the perpetrator acted with malicious intent.²⁵

The importance of consistent advocacy is particularly apparent, given that the last-minute amendment was passed 116 votes to 40. During the long campaigning period, different arguments were made to appeal to MPs across the political spectrum. Those on the right often responded best to the notion of an individual’s responsibility to protect their own sexual health while those on the left responded better to public health arguments. The (somewhat theoretical) argument that public health law is inappropriate to deal with private criminal matters also appealed to legislators, many of whom have a legal background or are practising lawyers.

Lobbying of parliamentarians both inside and outside parliament was reinforced by new court decisions and by scientific research on the effect of treatment on transmission risk and the harms of living with HIV. Efforts were also made to lobby the head of health departments at a regional level, who were then able to communicate their support for the change to colleagues at a national level.²⁶

“I am delighted my amendment was successful. We can still prosecute for malicious, intentional transmission of HIV. But I expect those cases will be very rare. What has changed is that now people living with HIV – which these days is a manageable condition – will be able to go about their private relations without the interference of the law. They can access medical services without fear. All the evidence suggests that this is a better approach for public health.”

Alec von Graffenried, MP

Switzerland²⁷

The new law came into effect in January 2016. However, despite this, and a 2013 Swiss Federal Supreme Court ruling that HIV transmission may no longer be automatically considered a serious assault under article 122 and could be prosecuted as a common assault under article 123,²⁸ there were two prosecutions for alleged HIV transmission using article 122 in February 2016.²⁹

4.3.4 UNITED STATES: MULTI-YEAR EFFORTS LEAD TO MODERNISATION OF IOWA'S HIV DISCLOSURE LAW

It may have taken five years but persistent advocacy in Iowa led to significant modernisation of the state's HIV-specific criminal law in 2014.

Lobbying, which began in 2009, was led by a broad coalition of activists spearheaded by Community HIV/Hepatitis Advocates of Iowa (CHAIN) supported by Sero Project and Lambda Legal alongside Randy Mayer, Chief of the Bureau of HIV, STD, and Hepatitis for the Iowa Department of Public Health.³⁰

In February 2013, two state Senators, Matt McCoy and Steve Soddors, proposed sweeping changes³¹ to Iowa's 1998 HIV-specific statute which provided for 25-year prison sentences and lifetime sex offender registration for anyone convicted of HIV non-disclosure, regardless of actual risk, intent or actual transmission. There had been at least 25 prosecutions and 15 convictions under this law.³²

The new law garnered support from health care professionals, HIV advocacy groups, law enforcement and the Iowa Office of the Attorney General as well as from local media.³³ In May 2014, Senate File 2297 was passed unanimously.³⁴ The result was the new *Contagious or Infectious Disease Transmission Act* (Iowa Code 709D).³⁵

The law is no longer HIV-specific, and includes a tiered sentencing system that takes into consideration whether there was intent to infect another person, whether there was any significant risk of transmission, and whether transmission occurred.

More controversially,³⁶ the law includes a number of other infectious diseases – hepatitis, meningococcal disease, and tuberculosis – in order to make the statute's classification of infectious diseases consistent with other parts of the Iowa code.³⁷

Sustained grass roots community organising as well as broad stakeholder involvement, including engagement of public health and community leaders, and community and mainstream media support were key to the success of law reform in Iowa, an advocacy model that is now being replicated throughout the United States.³⁸

4.3.5 ZIMBABWE: CONSTITUTIONAL CHALLENGE STILL AWAITING DECISION

Zimbabwe has the highest number of reported prosecutions in Africa. The first known successful prosecution in Zimbabwe took place in 2008, although it is believed more than 20 prosecutions had previously been attempted. At least six men and four women have now been prosecuted.

Although Zimbabwe's HIV-specific criminal statute is called "deliberate transmission of HIV", it can be applied across a wide range of variables that involve neither deliberate nor actual transmission of HIV. It is a crime for anyone who realises "there is a real risk or possibility" that he or she might have HIV to do "anything" that the person knows will involve "a real risk or possibility of infecting another person with HIV."³⁹

Zimbabwe Lawyers for Human Rights (ZLHR) has challenged Section 79 in the Constitutional Court for being unconstitutionally vague and overly broad on behalf of two applicants, Pitty Mpfu and Samukelisiwe Mlilo, both of whom were convicted in 2012. Arguments were heard in February 2015 and a ruling is overdue.⁴⁰

Ms Mlilo was found guilty of 'deliberately' infecting her husband with HIV and faces up to 20 years' imprisonment despite there being no proof that she infected her husband. She claims she had disclosed her status to him following her diagnosis during pregnancy, and that her husband only made the complaint in revenge for her own complaint of gender-based violence following the breakdown of their marriage. In fact, Ms Mlilo may have been infected by her husband.⁴¹

Her case is also featured in a 15 minute documentary produced by ZLHR, *Alone But Together – Women and Criminalisation of HIV Transmission: The story of Samukelisiwe Mlilo* as the centrepiece of a campaign against overly broad HIV criminalisation, called 'HIV on Trial – a threat to women's health'.⁴²

4.4 TARGETING LAWMAKERS

4.4.1 SADC REGION: PARLIAMENTARY FORUM ADOPTS MOTION ON HIV CRIMINALISATION

Key agencies and members of parliament from across southern Africa came together in Botswana in May 2015 to interrogate HIV criminalisation in the Southern African Development Community (SADC) region. Convened by the AIDS and Rights Alliance for Southern Africa (ARASA) and the SADC Parliamentary Forum's Human and Social Development and Special Programmes Standing Committee, it was attended by parliamentarians from Botswana, Democratic Republic of Congo, Lesotho, Malawi, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.⁴³

The meeting included expert presentations on the latest science and evidence-based thinking to educate parliamentarians so that they may lead, advocate and legislate on the basis of evidence rather than emotions.⁴⁴

In November 2015, the Plenary Assembly of the SADC Parliamentary Forum Resolution considered, took note of, and unanimously adopted a motion on HIV criminalisation, moved by Hon. Duma Boko of Botswana and seconded by Hon. Dr. Emamam Immam of South Africa. Members expressed concern that specific laws on HIV transmission, exposure and non-disclosure may not only be harmful to successful HIV prevention and care but may also infringe on human rights.

The motion reaffirmed the obligations on SADC Member States to respect, protect, fulfil and promote human rights in all endeavours undertaken for the prevention and treatment of HIV; reiterated the critical role of Parliamentarians in enacting laws that support evidence-based HIV prevention and treatment interventions that conform with regional and international human rights frameworks; and called on Member States to consider rescinding and reviewing punitive laws specific to the prosecution of HIV transmission, exposure and non-disclosure.⁴⁵

4.5 TARGETING POLICE

4.5.1 UNITED KINGDOM: POLICE TRAINING AND GUIDANCE TO TACKLE HIV-RELATED STIGMA

In 2010, the National AIDS Trust (NAT) worked with the Association of Chief Police Officers (ACPO) to support the development of guidance to help support police when investigating allegations of criminal HIV transmission in England and Wales. Police officers were provided with basic facts about HIV and given advice on how to deal with complaints in a fair and sensitive manner.⁴⁶

They followed this initial work with an investigation into police training and policies on HIV, issuing a 2012 report highlighting that most were outdated and stigmatising, and providing a number of recommendations, including:

- Police constabularies across the UK must review their materials and ensure they are up-to-date and accurate.
- Police should receive training about HIV, so that misconceptions about the virus and how it's passed on can be addressed.
- Police should also receive information about how to treat people living with HIV sensitively and appropriately.⁴⁷

In 2013, NAT created a resource called *HIV: A Guide for Police Forces*. The guidance includes information about how HIV is and is not transmitted, what to do if you are exposed to HIV, how to respond to someone with HIV, and information about investigating allegations of criminal HIV transmission. It was revised in June 2014 to include other blood-borne viruses.⁴⁸

Police have responded well to the guidelines and it is hoped that this will result in improved practice from the police across the country.⁴⁹

4.6 TARGETING LAWYERS

4.6.1 UNITED STATES: EDUCATING PROSECUTORS ON HIV AND THE CRIMINAL LAW

In November 2013, the Association of Prosecuting Attorneys (APA) and the Center for HIV Law and Policy (CHLP) held a National Prosecutors Roundtable on 'HIV Criminalization Law and Policy'.

This was the first national roundtable of prosecutors convened to review current approaches to HIV-related criminal laws and to consider best practices going forward. The purpose of the meeting was to consider the relevance, viability, and fairness of HIV criminalisation laws and policies in light of the current science about HIV transmission and treatment.⁵⁰

“The mere fact that the APA has undertaken to rethink HIV criminalization is a testament to that organization’s enlightened approach to the prosecutorial function and the over-arching responsibility of prosecutors to seek justice....For [the National Association of Criminal Defense Lawyers], as an organization that has led the fight against overcriminalization and to ensure adequate mens rea requirements in all criminal statutes, the fight to end HIV criminalization must be among the association’s highest priorities.”

Norman L. Reimer, Executive Director

National Association of Criminal Defense Lawyers⁵¹

Since then, APA and CHLP have held a number of continuing education webinars on HIV science for prosecuting attorneys.⁵²

4.7 TARGETING JUDGES

4.7.1 REGIONAL JUDICIAL DIALOGUE SUPPORTS JUDGES TO BECOME LEADERS IN THE HIV RESPONSE

In June 2013, UNAIDS, UNDP and the International Commission of Jurists brought together more than 30 judges from the highest national courts of 16 countries in Asia and the Pacific to discuss the role of the judiciary in responding to HIV.⁵³

The meeting was an opportunity to launch a new resource, *Judging the epidemic: A judicial handbook on HIV, human rights and the law*⁵⁴ published by UNAIDS, which provides updated information on the latest scientific developments on HIV as well as key human rights and legal considerations to assist and guide judges’ HIV-related work.

“In cases dealing with HIV, we have the opportunity to make evidence-informed findings and to apply the highest principles to which our legal systems aspire. That is what this handbook is about. And that is why I am so proud to contribute to it.”

Justice Edwin Cameron, Foreword to Judging the epidemic⁵⁵

Based on international legal and human rights standards, the handbook contains examples of decided cases from different jurisdictions, good-practice advice and judicial rulings on HIV-related issues, and includes an entire chapter on the criminal law and HIV non-disclosure, exposure and/or transmission.

Later in 2013, UNDP, UNAIDS, the Judicial Training Institute and KELIN convened the first ever dialogue on HIV, human rights and the law for Eastern and Southern Africa. The meeting, which was held in Nairobi, Kenya, and included judges, magistrates, lawyers, civil society groups and people living with HIV from various African countries, discussed stigma, discrimination, criminalisation, human rights and law.⁵⁶

4.8 TARGETING EXPERT WITNESSES

4.8.1 CANADIAN CONSENSUS STATEMENT: COLLECTIVE EXPERT OPINION ON HIV-RELATED RISK AND HARM

In May 2014, six distinguished Canadian HIV scientists and clinicians co-authored the *Canadian consensus statement on HIV and its transmission in the context of criminal law*.⁵⁷ This effort was born out of the belief that the application of criminal law to HIV non-disclosure was being driven by a poor appreciation of the science of both HIV as a chronic manageable disease, and its risks of transmission.

Aimed squarely at the criminal justice system and informed by HIV community, public health and human rights concerns, the consensus statement was based on a review of the most relevant, reliable, and up-to-date medical and scientific evidence. It sets out in clear, concise, and understandable terms a collective expert opinion about HIV sexual transmission, transmission associated with biting and spitting, and HIV as a chronic manageable condition.

One key area of consensus described in the statement is that, contrary to the Supreme Court's interpretation, both vaginal and anal sex with a condom pose a *negligible* possibility of transmission, whether or not the HIV-positive partner has a low viral load. In fact, "[w]hen used correctly and no breakage occurs, condoms are 100% effective at stopping the transmission of HIV". In addition, the statement notes that "evidence suggests that the possibility of sexual transmission of HIV from an HIV-positive individual to an HIV-negative individual via unprotected [i.e. condomless] vaginal intercourse approaches zero when the HIV-positive individual is taking antiretroviral therapy and has an undetectable viral load."

Importantly, the consensus statement does not employ the risk categories traditionally used in public health, which often describe activities from "high risk to no risk". Knowing that these descriptors can contribute to an exaggerated sense of risk when taken out of context, Canadian experts described the per-act possibility of HIV transmission through sex, biting, or spitting along a continuum from "low possibility to negligible possibility to no possibility of transmission". These unique categories better reflect that so-called "risky" activities "carry a per-act possibility of transmission that is much lower than is often commonly believed." Also noteworthy is that the conclusions in the statement expressing scientific consensus are strong and relatively free of conditions.

More than 75 HIV scientists and clinicians Canada-wide have since endorsed the statement, agreeing that "[they] have a professional and ethical responsibility to assist those in the criminal justice system to understand and interpret current medical and scientific evidence regarding HIV."⁵⁸

4.9 TARGETING HEALTHCARE WORKERS

4.9.1 CANADA: PRACTICAL LEGAL GUIDE FOR NURSES PROVIDES SUPPORT AND GUIDANCE IN A CHALLENGING LEGAL ENVIRONMENT

In May 2013, the Canadian Association of Nurses in AIDS Care (CANAC) in partnership with CATIE (Canadian AIDS Treatment Information Exchange) published a guide that aimed to address some of the realities and complexities faced by nurses and others who provide care to people living with HIV in Canada.

“This guide was primarily developed to support nurses who provide care to people living with HIV in Canada and offer some guidance on how to meet professional standards when dealing with non/disclosure in nursing practice. Guidance may not provide a definitive answer or indicate a correct course of action in a given circumstance. However, nurses should be aware that existing legal, ethical and professional frameworks can be relied upon to respond in a professionally sound manner to key questions and concerns.”

Patrick O’Byrne and Marilou Gagnon, co-authors⁵⁹

Covering everything from record keeping, confidentiality, viral load and safer sex to search warrants, subpoenas and testifying in court, the guide offers practical advice to HIV nurses and helps clarify their professional obligations regarding issues around HIV (non) disclosure and the criminal law.⁶⁰

4.9.2 SWEDEN: PROVIDING CLEAR GUIDANCE ON HIV RISK ALLOWS CLINICIANS TO INDIVIDUALISE THEIR ADVICE REGARDING A PATIENT’S DUTY TO DISCLOSE

In Sweden, the *Communicable Diseases Act* requires people with diagnosed HIV to disclose in any situation where someone might be placed at risk *and* to also use condoms. However, Swedish law does not allow a disclosure defence to allegations of HIV exposure or transmission, and people with HIV can be (and are) prosecuted for having consensual condomless sex even when there was prior disclosure of HIV-positive status and agreement of the risk by the HIV-negative partner.

Following the launch of a 2011 campaign by the civil society partnership of RFSU (the Swedish Association for Sexuality Education), HIV-Sweden and RFSL (the Swedish Federation for Lesbian, Gay, Bisexual and Transgender Rights),⁶¹ a number of key policy shifts have been achieved.

In October 2013, the National Board of Health and Welfare, part of the Swedish Ministry of Health and Social Affairs, clarified under what circumstances the obligation to disclose under the *Communicable Diseases Act* may not apply.⁶² This was in response to the publication of what has since been called the ‘Swedish statement’ by the Public Health Agency of Sweden and the Swedish Reference Group for Antiviral Therapy.⁶³

The ‘Swedish statement’ summarises the latest research and knowledge on the risk of HIV transmission from people on suppressive treatment, with a focus on the risk of sexual transmission. Consequently, clinicians can now individualise how they counsel their patients, including when the duty to inform is appropriate, but they cannot officially advise against condom use even for those on fully suppressive treatment.

However, in September 2014, an opportunity to modernise the application of the law was lost when the Supreme Court announced it would not grant leave to appeal a case to test the ‘Swedish statement’ and instead reiterated its 2004 ruling that only sex with a condom could prevent a prosecution for ‘HIV exposure’ (as reckless endangerment).⁶⁴

In September 2015, the civil society partnership launched a new campaign to revise the *Communicable Diseases Act* so that the duty to inform for people living with HIV would no longer apply.⁶⁵ They argued that since over 90% of people living with diagnosed HIV in Sweden have an undetectable viral load, and therefore do not place their partners at risk, it is finally time to

remove the duty to inform. The majority of political parties in the Swedish parliament appear to support this idea.⁶⁶

4.10 EMPOWERING AFFECTED COMMUNITIES

4.10.1 CANADA: HOW TO HAVE SEX IN A POLICE STATE - ONE APPROACH

In March 2015, a new bilingual resource produced by an anonymous collective of people living with HIV and their allies was released online to support people living with HIV in Canada.⁶⁷ This document includes a list of suggestions gathered by people living with HIV to help to protect their communities and themselves against harmful police and government interference, such as:

- Avoid all HIV or STI tests at clinics where your real name is recorded.
- If you are arrested on a charge unrelated to HIV, do not tell the police your HIV status, or anything else without a lawyer.
- If disclosing is not possible, maintaining a low viral load and using condoms are the only way to comply with the law.
- The less information the state has on you the harder it will be for them to develop a criminal or public health case against you.
- If you come into contact with public health officials who are doing ‘contact tracing’ tell them that you do not know the names of anyone you have had sex with. This collection of information by public health could later lead to potential criminal charges, a public health order, or other consequences.
- If your HIV status is already recorded by public health, and you test positive for another sexually transmitted infection (STI), you could be asked to meet with a public health nurse. The nurse may ask you to give them the names of people whom you have had sexual contact with. Never give names or contact information of other people to public health. Public health could contact them and notify them of your HIV status and that person could press charges if you have not disclosed to them.
- When going to a community organisation, AIDS Service Organization or healthcare provider always ask any counsellor, nurse, doctor, social worker, peer worker, or other support worker how, why, and under what circumstances they are professionally required to document their interactions with you, and if this data can be used to identify you.

4.10.2 UNITED STATES: FIRST NATIONAL HIV IS NOT A CRIME CONFERENCE



The first-ever national HIV is Not a Crime conference was held in Iowa in June 2014. Co-ordinated by Sero Project and organised by a coalition of HIV, LGBT and social justice groups, it worked to unite advocates and provide practical training with an emphasis on grassroots organising to enable activists to better advocate for criminalisation reform in their home states.⁶⁸

Conference discussions formed a powerful and inspiring platform for

action, movement-building, and social change. Key themes included recognition that HIV criminalisation is part of broader criminal and social justice struggles. There was broad consensus that HIV criminalisation laws are rooted in homophobia, racism, and other forms of social injustice, and anti-criminalisation work must reflect the nuances and diversities of positive people's communities and life experiences. The conference stressed a powerful and inspiring theme of interconnectedness, with great interest in exploring meaningful collaborations grounded in mutual respect, commonalities and shared values.⁶⁹

The second HIV is Not a Crime conference will take place in Alabama in June 2016. This time, co-organisers Sero Project and Positive Women's Network – USA will also emphasise movement building with other decriminalisation and criminal justice reform groups. The June conference is more suitably called a training academy and will include advocates and their allies working to end HIV criminalisation across the United States as well as in neighbouring Canada and Mexico.⁷⁰

4.11 TARGETING POTENTIAL COMPLAINANTS

4.11.1 CANADA: 'THINK TWICE' VIDEO CAMPAIGN

In November 2014, AIDS ACTION NOW! (AAN) launched a new phase of a targeted social marketing campaign that features 42 short videos from members and allies of Toronto's LGBT community.⁷¹

'Think Twice' asks HIV-negative and untested gay, bi, queer and trans men to reconsider pressing charges for HIV non-disclosure (where there was no alleged HIV transmission) when they discover that a sexual partner has not disclosed their HIV-positive status before sex.

The first part of the campaign targeted Crown Prosecutors since they play a pivotal role in driving criminal prosecutions. Since December 2012, the 'Think Twice' campaign has also focused on another key advocacy target – potential complainants. This new phase of the 'Think Twice' campaign focuses specifically on gay, queer, and trans men and other men who have sex with men, due to a change in community norms in the past few years that has resulted in an increase in the numbers of men going to the police to lay charges against other men living with HIV.⁷²

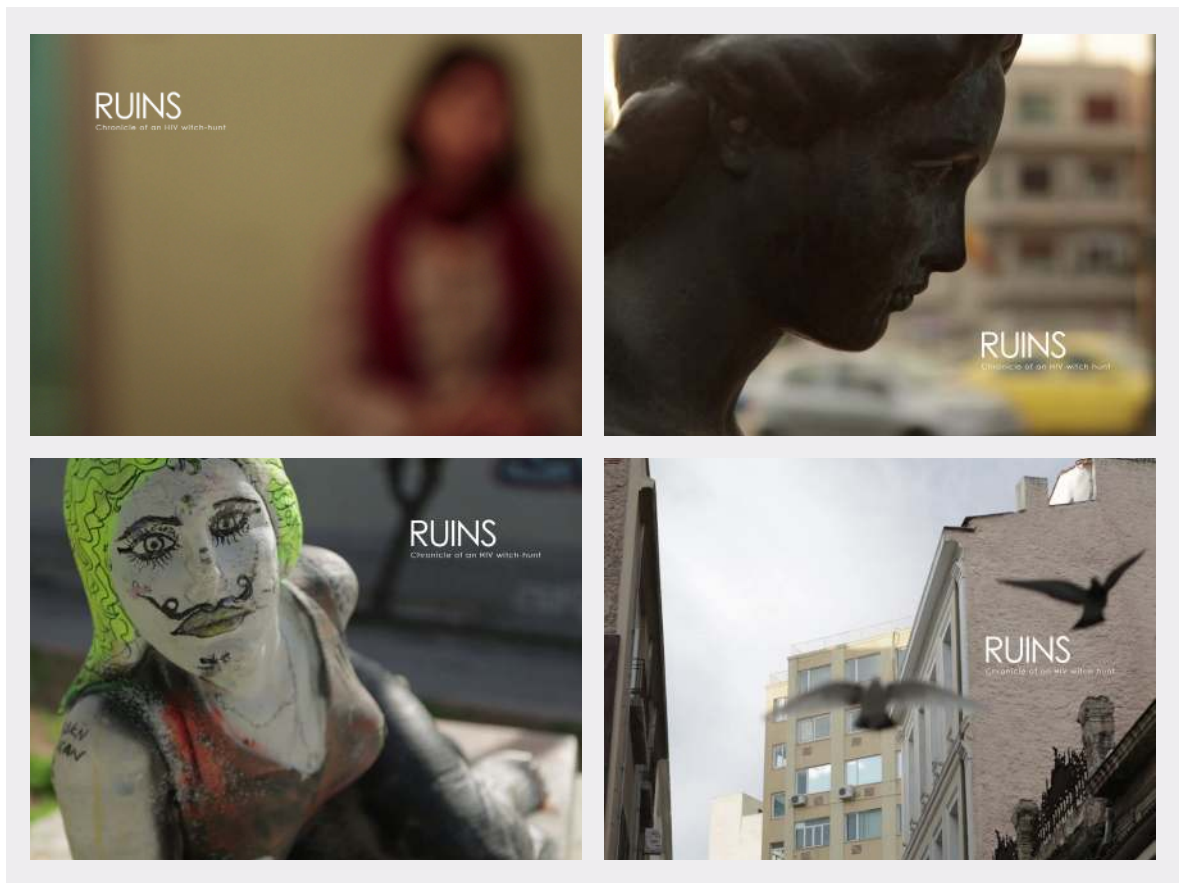
According to the Canadian HIV/AIDS Legal Network, while the majority of cases in Canada are against men who have sex with women, an increasing number of gay men and other men who have sex with men are being charged and prosecuted in Canada.

For this latest phase of the 'Think Twice' campaign, AAN placed an open call for gay, queer, bi and trans men, and their allies, to make a video that answered the question: 'In 45 seconds what would you say to gay men to convince them to think twice before going to the police when a sex partner hasn't disclosed to them?'

The videos – along with the website www.thinktwicehiv.com – were launched in November 2014 at Toronto's Buddies in Bad Times theatre.⁷³

4.12 TARGETING MEDIA

4.12.1 RUINS: CHRONICLE OF AN HIV WITCH-HUNT



Director Zoe Mavroudi worked with a small but dedicated production team to develop the powerful documentary, *Ruins: Chronicle of an HIV witch-hunt*. It tells the story of the women who were detained by the Greek police, forcibly tested, charged with a felony, imprisoned and publicly exposed for living with HIV.

Zoe's documentary highlights the human rights abuses that can happen to poor, disenfranchised people scapegoated for an HIV epidemic for which the State itself is responsible – because it ignored the harm reduction needs of people who inject drugs or sell sex. *Ruins* is now available to watch online (with subtitles in English, Finnish, French, German, Italian, Polish, Russian, Spanish and Swedish).⁷⁴

The online release of this film has provided an opportunity to support the women by donating towards their legal costs. Donations generated by *Ruins* have been allocated to support the various court cases in which the persecuted HIV-positive women are involved, their legal defence, the lawsuits some of them have filed against the Greek authorities, and the case in the European Court of Human Rights. Funds generated through private donations and screenings in Greece and abroad are allocated to an account handled by Union Solidarity International (USI), a UK-based not-for-profit company that builds networks of trade unions and progressive activists around the world, promoting their causes through the use of new media. Together with Unite the Union, USI donated the seed funding that made the production of the film possible.



OUTRAGE HIV JUSTICE FILM FESTIVAL

In the lead-up to AIDS 2014 in Melbourne, Australia, the Outrage HIV Justice Film Festival screened ten films from seven countries over three days along with director Q&As and panel discussions, shining a spotlight on HIV injustices.⁷⁵

Curated by HIV Justice Network co-ordinator, Edwin Bernard, the film festival was presented in partnership with ACMI (Australian Centre for the Moving Image), Victorian AIDS Council and Living Positive Victoria. The film festival focused on four themes: Women's Injustices; Challenging HIV Criminalisation; Australian Responses to HIV Injustices; and Activism Against HIV Injustices.⁷⁶

HIV criminalisation-related films shown at the festival included *Ruins* (Greece, 2013); *More Harm Than Good* (UK, 2013); *Positive Women: Exposing Injustice* (Canada, 2012); *HIV Criminalization Face-Off* (US, 2012); *HIV is Not a Crime* (US, 2011); and *How could she go on living as if it weren't there* (Sweden, 2010).⁷⁷

4.12.2 CONSENT: FEMINIST SCHOLAR CONSULTATION AND DOCUMENTARY FILM

The Canadian HIV/AIDS Legal Network has been exploring the implications of using sexual assault law to prosecute HIV non-disclosure cases, given the marked differences between the types of conduct that are typically referred to as sexual assault (including rape) and HIV non-disclosure cases. This analysis is demonstrating that the use of sexual assault law in the HIV non-disclosure context – where the sexual activity is consensual other than the non-disclosure – is a poor fit and can ultimately have a detrimental impact on sexual assault law as a tool to advance gender equality and renounce gender-based violence.

In April 2014, the Legal Network convened leading feminist scholars, frontline workers, activists and legal experts for a groundbreaking dialogue on the (mis)use of sexual assault laws in cases of HIV non-disclosure. The conclusions of the dialogue demonstrated this approach both over-extends the criminal law against people living with HIV and threatens to damage hard-won legal definitions of consent aimed at protecting women's equality and sexual autonomy.⁷⁸

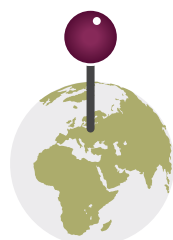
To share this analysis and spur further discussion, the Legal Network, together with Goldelox Productions, produced the short film *Consent: HIV non-disclosure and sexual assault law* in 2015.⁷⁹ The film has its premiere in June 2015 at the Legal Network's 6th Symposium on HIV, Law and Human Rights.⁸⁰ The 28-minute film features eight experts in HIV, sexual assault and law. Their commentary raises many questions about HIV-related legal developments in Canada. Clearly, the advocacy agenda to oppose the overly broad criminalisation of HIV non-disclosure must include feminist allies and address the use of sexual assault law to prosecute alleged non-disclosure.

REFERENCES

- 1 Sero Project. *HIV Criminalization: Attitudes and Opinions of the American Public*. Presentation to the Democratic Attorneys General Association Spring Policy Conference, 7 May 2015.
- 2 The CNS April 2015 *Opinion* and recommendations, updating their initial 2006 opinion, is available (in French only) at: www.cns.sante.fr/spip.php?article526
- 3 An English language version of the *Opinion* as well as a full length analysis on which the *Opinion* and subsequent recommendations were made, is currently still in press. These will be made available at: www.cns.sante.fr (Personal communication with Michel Celse, Conseiller-expert, CNS).
- 4 CNS. *Opinion on Criminalization for the Sexual Transmission of HIV*. 27 April 2006.
- 5 UNAIDS. *Ending overly-broad criminalisation of HIV non-disclosure, exposure and transmission: Critical scientific, medical and legal considerations*. Geneva, 2013.
- 6 Global Commission on HIV and the Law. *HIV and the Law: Rights, Risks and Health*. New York, 2012.
- 7 Riley B. *Victorian opposition commits to removing 19A within 12 months*. Star Observer, 24 July 2014.
- 8 Willingham R. *Rarely used HIV law to be repealed by Victorian government*. The Guardian, 14 April 2015.
- 9 Kidd P. *Repealing Section 19A: How we got there*. HIV Justice Network, 28 May 2015.
- 10 Kidd P. *Danger! Danger! Criminal endangerment offences are an obstacle to the HIV response*. 2015 Australasian HIV & AIDS Conference, Brisbane, 17 September 2015.
- 11 Hikuam F. *Beyond Blame: Challenging HIV Criminalisation*. Mujeres Adelante, 23 July 2014.
- 12 The meeting was financially supported by the Victorian Department of Health and UNAIDS.
- 13 HIV Justice Network. *Beyond Blame: Challenging HIV Criminalisation - A pre-conference meeting for AIDS 2014*, 1 October 2014.
- 14 GNP+. *Global Criminalisation Scan: Kenya*. Last updated 25 November 2015.
- 15 High Court of Kenya. *Aids Law Project v Attorney General & 3 others [2015] eKLR*. 2015.
- 16 AIDS Law Project. *Case Analysis: Section 24 of the HIV and AIDS Prevention and Control Act Kenya: Reviewing AIDS Law Project V Attorney General & Another*. 2015.
- 17 AIDS Law Project. *Judgment on Section 24 of the HIV and AIDS Prevention and Control Act*. 31 March 2015.
- 18 KELIN & UNDP have been holding regional Judicial Dialogues on HIV, Human Rights and the Law since 2013. See: www.kelinkenya.org/2015/08/kelin-undp-kenya-undertake-the-first-county-dialogue-on-hiv-human-rights-the-law-in-homa-bay-county/
- 19 Section 26 of the *Sexual Offences Act* states: Any person who, having actual knowledge that he or she is infected with HIV or any other life threatening sexually transmitted disease intentionally, knowingly and wilfully does anything or permits the doing of anything which he or she knows or ought to reasonably know (a) will infect another person with HIV or any other life threatening sexually transmitted disease; (b) is likely to lead to another person being infected with HIV or any other life threatening sexually transmitted disease; (c) will infect another person with any other sexually transmitted disease, shall be guilty of an offence, whether or not he or she is married to that other person, and shall be liable upon conviction to imprisonment for a term of not less fifteen years but which may be for life.
- 20 The Positive Council. *Yes to the Epidemics Act: discrimination in penal cases against people with HIV eliminated*. 23 September 2013.
- 21 Bernard EJ. *Switzerland: New study examines every criminal prosecution; finds Swiss law discriminatory*. HIV Justice Network, 24 September 2009.
- 22 The Positive Council. *Yes to the Epidemics Act: discrimination in penal cases against people with HIV eliminated*. 23 September 2013.
- 23 Bernard EJ. *Switzerland: New Law on Epidemics only criminalising intentional transmission passed in lower house*. HIV Justice Network, 9 March 2012.
- 24 Bernard EJ. *Switzerland: New Law on Epidemics delayed due to referendum, change in HIV law still likely*. HIV Justice Network, 24 January 2013.
- 25 The Positive Council. *Yes to the Epidemics Act: discrimination in penal cases against people with HIV eliminated*. 23 September 2013.
- 26 Bernard EJ. *Switzerland: New handbook for parliamentarians on effective HIV laws includes case study and interview with Green MP Alec von Graffenried*. HIV Justice Network, 4 February 2014.
- 27 Bernard EJ. *Switzerland: New handbook for parliamentarians on effective HIV laws includes case study and interview with Green MP Alec von Graffenried*. HIV Justice Network, 4 February 2014.
- 28 Bernard EJ. *Switzerland: Swiss Federal Supreme Court rules that criminal HIV exposure or transmission is no longer necessarily a serious assault*. HIV Justice Network, 5 April 2013.
- 29 Bernard EJ. *Switzerland: Two (alleged) HIV transmission convictions this month despite many positive changes in law*. HIV Justice Network, 22 February 2016.
- 30 The Des Moines Register. *It's time to rethink Iowa's HIV sex law*. 8 February 2013.
- 31 Iowa Legislature Senate File 215.
- 32 GNP+. *Global Criminalisation Scan: Iowa*. Last updated 17 September 2014.
- 33 The Des Moines Register. *It's time to rethink Iowa's HIV sex law*. 8 February 2013.
- 34 One Iowa. *Iowa is First State to Reform HIV Criminalization Statute*. 3 June 2014.
- 35 See full text at: www.legis.iowa.gov/docs/code/709D.pdf
- 36 The Center for HIV Law and Policy. *Statement in Response to Iowa Bill SF 2297 and the Criminalization of HIV, Hepatitis, Meningococcal Disease and Tuberculosis*. 1 May 2014.
- 37 One Iowa. *Iowa is First State to Reform HIV Criminalization Statute*. 3 June 2014.

- 38 Gowans A. *New HIV transmission law makes Iowa model for nation*. The Gazette, 3 June 2014.
- 39 GNP+. *Global Criminalisation Scan: Zimbabwe*. Last updated 9 September 2015.
- 40 See: www.scribd.com/doc/255897788/Mpofu-Mlilo-vs-State-Constitutional-Court-of-Zimbabwe-Harare-Case-SC96-12-and-340-12#scribd
- 41 Mhofu S. *Zimbabwe Woman Fights Conviction of Deliberately Transmitting HIV*. Voice of America News, 2 August 2012.
- 42 Bernard EJ. *Zimbabwe: HIV-specific criminal law on trial; ZLHR launches campaign highlighting impact of overly broad HIV criminalisation on women*. HIV Justice Network, 17 February 2015.
- 43 See: ARASA Facebook page. 27 May 2015.
- 44 ARASA. *ARASA and SADC PF Human and Social Development and Special Programmes Regional Standing Committee Meeting on Criminalisation of HIV exposure and transmission*. 27 May 2015.
- 45 See: www.parlzim.gov.zw/senate-hansard/senate-hansard-01-march-2016-vol-25-no-29
- 46 See: www.nat.org.uk/HIV-in-the-UK/Key-Issues/Law-stigma-and-discrimination/Police-investigations.aspx
- 47 National AIDS Trust. *NAT report reveals police training and policies on HIV are outdated and stigmatising*. 18 June 2012.
- 48 National AIDS Trust. *HIV: A guide for police forces*. June 2014.
- 49 Glanville P. *Improving police training and tackling the fear of HIV*. National AIDS Trust, 30 June 2014.
- 50 Reimer NL. *A Lamentable Example of Overcriminalization: HIV Criminalization*. The Center for HIV Law and Policy, December 2013.
- 51 Reimer NL. *A Lamentable Example of Overcriminalization: HIV Criminalization*. The Center for HIV Law and Policy, December 2013.
- 52 See: www.hivlawandpolicy.org/news/hiv-and-law-how-infectious-virus-a-webinar-prosecuting-attorneys
- 53 UNAIDS. *Eminent Judges unite to address HIV, human rights and the law*. 5 June 2013.
- 54 UNAIDS. *Judging the epidemic: A judicial handbook on HIV, human rights and the law*. Geneva, 2013.
- 55 UNAIDS. *Judging the epidemic: A judicial handbook on HIV, human rights and the law*. Geneva, 2013.
- 56 UNDP Kenya. *Eminent African Judges Dialogue on HIV related stigma and Discrimination*. 2013.
- 57 Loutfy M et al. *Canadian consensus statement on HIV and its transmission in the context of criminal law*. Canadian Journal of Infectious Diseases and Medical Microbiology, Vol. 25, Issue 3, pp. 135-140, May-June 2014.
- 58 Bernard EJ. *Canada: More than 70 scientific experts sign on to consensus statement on HIV transmission risks in the context of criminal law*. HIV Justice Network, 2 May 2014.
- 59 O'Byrne P et al. *HIV criminalization and nursing practice*. Aporia: The Nursing Journal, Vol. 4, Issue 2, pp. 5-34, 2012.
- 60 Bernard EJ. *Canada: new guide offers practical advice to HIV nurses and clarifies professional obligations regarding HIV and the criminal law*. HIV Justice Network, 23 May 2013.
- 61 See: www.hivandthelaw.com/campaign/what-can-you-do/success-stories/sweden-0
- 62 Bernard EJ. *Sweden: Court of Appeal acquits 'HIV exposure' case, recognises National Board of Health and Welfare endorsement of 'Swiss statement', Minister for Social Affairs will consider reviewing application of law*. HIV Justice Network, 29 October 2013.
- 63 Albert J et al. *Risk of HIV transmission from patients on antiretroviral therapy: a position statement from the Public Health Agency of Sweden and the Swedish Reference Group for Antiviral Therapy*. Scandinavian Journal of Infectious Diseases, Vol. 46, Issue 10, pp. 673-677, 2014.
- 64 Bernard EJ. *Sweden: Supreme Court refuses to rule on treatment's impact on HIV risk even as a second Court of Appeal judgement recognises latest science*. HIV Justice Network, 25 September 2014.
- 65 See (in Swedish): www.expressen.se/debatt/avskaffa-hiv-positivas-informationsplikt/
- 66 Personal correspondence with Andreas Berglöf, Programme Officer - Public Policy and Advocacy, RFSU, September 2015.
- 67 See: www.howtohavesexinapolicestate.tumblr.com/
- 68 See: www.hivisnotacrime.com
- 69 The Center for HIV Law and Policy. *Advocates Speak: A Snapshot of Voices and Perspectives from Grinnell*. 27 March 2014.
- 70 Sero Project/PWN-USA. *Second HIV Is Not a Crime Conference, 'a national training academy' for HIV criminalisation advocates, announced for June 2016*. 12 November 2015.
- 71 See: www.thinktwicehiv.com
- 72 AAN. *Think Twice campaign Phase Two: Calling all men who fuck men*. 29 November 2012.
- 73 Bernard EJ. *Canada: Social media campaign 'Think Twice' uses video to ask gay men to reconsider pressing charges for HIV non-disclosure*. HIV Justice Network, 23 November 2014.
- 74 See: www.ruins-documentary.com/en/
- 75 See: www.acmi.net.au/film/past-film-programs/film-archive-2014/outrage-hiv-justice-film-festival-2014/
- 76 Bernard EJ. *Outrage HIV Justice Film Festival debuts at AIDS 2014 in Melbourne, first ever film festival to focus on HIV criminalisation*. HIV Justice Network, 30 June 2014.
- 77 With the exception of 'How could she...' all the films are available to view online at: www.hivjustice.net/site/videos/
- 78 Symington A. *What does consent really mean? Rethinking HIV non-disclosure and sexual assault law – Meeting report, April 24-26, 2014, Toronto*. Canadian HIV/AIDS Legal Network, 2016.
- 79 See: www.consentfilm.org
- 80 Dawson P. *Legal issues front and centre in Toronto last week*. Positive Lite, 25 June 2015.

5. KEY DEVELOPMENTS, BY COUNTRY



COUNTRY (STATE)	LAW	KEY PROVISIONS	NUMBER OF KNOWN PROSECUTIONS (YEAR OF FIRST AND MOST RECENT CONVICTION)	ADVOCACY TYPE AND IMPACT
5.1 AUSTRALIA (VICTORIA)	Section 19A of the <i>Crimes Act 1958</i> (Vic) established the criminal offence of ‘intentionally causing a very serious disease’ – with ‘very serious disease’ defined exclusively to mean HIV infection. It had a maximum penalty of up to 25 years’ imprisonment (20 years for attempt), equivalent to that prescribed for very serious crimes including rape, armed robbery and aggravated burglary.	The only HIV-specific criminal offence in Australia treated intentional HIV transmission as inherently more serious than other forms of violence, reinforcing stigma; suggesting that people living with HIV were inherently dangerous; and was never used in the circumstances for which it was originally enacted (the deliberate transmission of HIV by a blood-filled syringe).	The only known conviction under 19A occurred in 2009. Michael John Neal, a 50-year-old gay man, was charged with two counts of intentional transmission and 14 counts of attempted intentional transmission under 19A. He was acquitted of the intentional transmission counts and found guilty on eight counts of attempted intentional transmission (five of which were overturned on appeal). On appeal, the final sentence in Neal was seven years for the first count, plus 18 months each for the remaining two counts (ten years total). ¹	The HIV Legal Working Group was formed in 2010 by the two largest HIV organisations in Victoria. After failing to obtain prosecutorial guidelines, it focused on repealing 19A as a clear advocacy target linked to AIDS 2014. The group developed a policy brief setting out the case for repeal and sought dialogue with both parties in the months before the conference. During the conference both the ruling and opposition parties publicly supported repeal, which finally took place under the former opposition government in May 2015.
5.2 BOTSWANA	<i>Public Health Act, 2013</i> – Clause 116 (1) – mandating HIV disclosure to all potential sexual partners or care givers and allowing prosecution for placing another at risk.	A person aware they are living with HIV must “take all reasonable measures and precautions to prevent the transmission of HIV to others” and “not place another person at risk of becoming infected with HIV.” Defences include taking “reasonable measures and precautions” and disclosure in advance any sexual contact or care giver or person with whom sharp	In 2008, a man was acquitted of HIV exposure charges due to lack of a specific law. In 2013, a woman was charged under the new law for exposing a neighbour’s infant to HIV via breastfeeding. Outcome of the case is unknown. ² BONELA (Botswana Network on Ethics, Law and HIV/AIDS) has reported a dramatic rise in people seeking legal advice (as both potential	Civil society advocacy led by BONELA resulted in a postponement of debates on the draft Bill, enabling some politicians to argue that the Bill should be withdrawn altogether. BONELA and a coalition of international organisations sent strong submissions to President Khama. UNAIDS also wrote to the Minister of Health. Despite this, the Bill was passed by Parliament in April 2013 and signed into law by President

COUNTRY (STATE)	LAW	KEY PROVISIONS	NUMBER OF KNOWN PROSECUTIONS (YEAR OF FIRST AND MOST RECENT CONVICTION)	ADVOCACY TYPE AND IMPACT
		instruments are shared.”	complainants and defendants) since the law was passed. ³	law by President Khama in September 2013.
5.3 BRAZIL	In April 2015, legislation proposing to add individuals who “transmit and infect consciously and deliberately others with the AIDS virus. [sic]” to the list of heinous crimes – which currently includes murder, extortion, rape, child exploitation and spreading an epidemic that results in death –with a penalty of imprisonment from two to eight years, and fine, was presented to Parliament. ⁴	The bill was in response to a moral panic due to media reports earlier in the year of a gay ‘barebacking’ subculture where anonymous interviewees alleged that some men were deliberately passing on HIV to unsuspecting partners. ⁵ Defences are unclear, as the proposed amendment uses the terms ‘consciously and deliberately’ without further elaboration.	At least five reported prosecutions under general laws. First in 1995. Most recent in 2011. ⁶ Exact number of convictions unclear.	Interventions from UNAIDS, the Ministry of Health, former President Fernando Henrique Cardoso, and press releases from three Brazilian civil society organisations – ABIA (Brazilian Interdisciplinary AIDS Association), RNP+ (National Network of People Living with HIV) and GIV (Group to Encourage Life). Despite public debate, proposed law continues to be considered by Parliament.
5.4 CANADA	<i>Criminal Code of Canada</i> . Sexual assault (s. 271); Sexual assault causing bodily harm (s. 272); Aggravated sexual assault (s. 273); Attempted murder (s.239) and Murder (s.229).	Canada primarily uses sexual assault law to prosecute HIV non-disclosure where there is a “realistic possibility of transmission of HIV”. A 2012 Supreme Court ruling found that the duty to disclose is only exempted when both a condom is used and the person with HIV also has a low viral load. This poor appreciation of HIV risk by the Supreme Court allows for prosecutions for acts that HIV experts argue do not result in a “realistic possibility of transmission of HIV.”	First prosecution in 1989. At least 180 prosecutions including one for murder ⁷ and one for attempted murder. ⁸ Most recent prosecution in April 2016. ⁹	The Canadian HIV/ AIDS Legal Network is the lead national organisation working to limit the negative consequences of HIV criminalisation in Canada by intervening in proceedings before Canadian courts and providing support to defence attorneys and people living with HIV; engaging relevant policy-makers to attempt to develop evidence-informed guidance for police and prosecutors; helping community-based HIV organisations to understand the legal landscape; and providing comment and assistance to journalists reporting on this issue. They have also produced two films highlighting the impact on women living with HIV. A range of other civil society stakeholders

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				<p>– including leading scientists, nurses and other healthcare providers, social scientists and academics – are also working in a number of ways to try to measure and/or limit the impact of the criminal law on both public health and human rights. Of note, the Canadian consensus statement (see 4.8.1) is already having some impact. In Autumn 2015, in a case of non-disclosure in Ontario, involving condomless anal sex with an undetectable viral load, the Crown invited the judge to enter an acquittal after hearing the medical expert’s evidence. The medical expert who testified in this case is one of the 76 experts who endorsed the Canadian consensus statement. The accused was acquitted.¹⁰</p>
<p>5.5 CZECH REPUBLIC</p>	<p>No HIV-specific law, but a 2005 Supreme Court ruling confirmed that any condomless sex (including oral sex) by a person living with HIV can be prosecuted as “spread of infectious diseases”. In addition, condomless anal sex can be prosecuted as “attempted grievous bodily harm”.</p>	<p>People with HIV who have condomless sex are considered to be criminals, as there is no defence for consent following disclosure of one’s HIV-positive status. The law also treats anal sex more harshly than vaginal or oral sex.</p>	<p>Five prosecutions since 1988, all of gay men. As well as ongoing public health-initiated cases in Prague,¹¹ the most recent conviction took place in May 2015: a gay man living with HIV was sentenced to six years in prison for attempted grievous bodily harm. The case was based on a number of accusations of oral sex together with one disputed accusation of condomless anal sex, and another of continuing with anal sex for one second after a condom had burst.¹²</p>	<p>The Czech AIDS Society has been providing legal support. In June the Society filed an extraordinary appeal to the Czech Supreme Court based on the facts that (a) the court did not check the level of viral load of the client, and (b) the actual risk of HIV transmission in the above situations was close to zero. In August 2015, the Court suspended the judgment pending its final decision.¹³</p>

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<p>5.6 DEMOCRATIC REPUBLIC OF CONGO</p>	<p><i>Law 08/011 (2008). Article 45: “Est puni de cinq à six ans de servitude pénale principale et de cinq cent mille francs Congolais d’amende, quiconque transmet délibérément le VIH/SIDA.”</i> (Whoever wilfully transmits HIV/AIDS will be punished by five to six years in prison and a fine.)</p>	<p>The law is vague and overly broad, with no definitions of wilful transmission and no defences.</p>	<p>None reported.</p>	<p>UNDP convened a National Dialogue which brought together government and civil society members for unprecedented levels of discussion and collaboration on HIV, human rights and law. It was agreed that Article 45 should be repealed. A monitoring committee is working with the Justice Department to follow through with this work.¹⁴</p>
<p>5.7 FRANCE</p>	<p>Administration of harmful substances causing physical or psychological harm to another person. Law could theoretically apply to other infectious diseases but in practice has only ever been applied to HIV.</p>	<p>Any person who knows they have HIV and who has condomless sex with an uninfected partner, and who acts with knowledge of this risk, may be prosecuted, regardless of whether or not the virus is transmitted. Condoms are currently the only defence to a transmission charge. Disclosure is neither required nor a defence. However, all prosecutions have been initiated as a result of alleged non-disclosure.</p>	<p>There have been 23 reported prosecutions from 1998 to 2014, of which seven occurred in 2014. A number of cases are ongoing in 2016.</p>	<p>French National AIDS and Viral Hepatitis Council (Conseil national du sida et des hépatites virales, CNS) undertook extensive research into the law, nature of complaints and prosecutions, and their impact, and issued a report, opinion and recommendations in April 2015.¹⁵</p>
<p>5.8 GERMANY</p>	<p>Bodily injury and aggravated assault laws established following a 1988 Federal Supreme Court decision that condomless sex without prior disclosure was attempted bodily injury.</p>	<p>Until recently, courts always considered that HIV non-disclosure prior to condomless sex meant that the defendant “considered acceptable” that their partner would acquire HIV. This concept, of <i>dolus eventualis</i>, is much closer to the common law definition of ‘recklessness’ than to malicious intent.</p>	<p>At least 40 since 1988, with ongoing cases in 2016.</p>	<p>A 2015 ruling by the District Court of Aachen challenged a longstanding 1988 Supreme Court ruling that condomless sex without prior disclosure is always a reckless act. In this case they found that the defendant was negligent, and gave him a suspended sentence. This suggests that future cases in Germany may require more detailed examination of both medical and</p>

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<p>5.9 GREECE</p>	<p><i>Public Health Decree 39A</i> which allowed forced HIV testing of suspected sex workers, drug users and undocumented migrants.</p>	<p>The law was a politically expedient way to capitalise on xenophobia and HIV stigma during a politically unstable period. It was primarily used discriminately against the most marginalised people – women who use drugs who may also engage in transactional sex – as part of a moral campaign.</p>	<p>At least 32 women in 2012 and 2013. The Group of Lawyers for the Rights of Refugees and Migrants provided pro bono legal assistance to the women involved in the mass arrest. In April 2014, a Greek court ruled two women had been unlawfully detained and made the lowest possible award of €10 for each day that they had been held in pre-trial detention.¹⁷</p>	<p>scientific evidence as well as the state of mind of the defendant.¹⁶</p> <p>Following initial repeal in May 2013, the law was reinstated. Advocacy involved local and international condemnation, and screenings worldwide of the documentary <i>Ruins: Chronicle of a witch-hunt</i> to raise awareness and legal defence funds. The law was repealed again in April 2015, but trust in the Greek public health system, and the lives of the women prosecuted, has been irreparably harmed. At least 12 of the women have filed lawsuits before the European Court of Human Rights for inhuman and degrading treatment. Arguments have been filed from both sides but, as of yet, the case has not yet been heard.¹⁸</p>
<p>5.10 KENYA</p>	<p><i>HIV and AIDS Prevention and Control Act (2006)</i> – Section 24. Section 24(1) of the Act required a person aware they are living with HIV to “take all reasonable measures and precautions to prevent the transmission of HIV to others” and to “inform, in advance, any sexual contact or persons with whom needles are shared” of their HIV-positive status. Subsection (2) prohibited “knowingly and recklessly, placing another person at risk of becoming infected with</p>	<p>The law was vague and overbroad. In addition, under section 24(7), it contravened privacy rights by allowing a medical practitioner who becomes aware of a patient’s HIV-positive status to inform anyone who has sexual contact with that patient.</p>	<p>At least one conviction in 2014, plus additional HIV-related prosecutions under Kenya’s <i>Sexual Offences Act</i>.¹⁹</p>	<p>IN 2010, AIDS Law Project sought a court order to prevent Section 24 from being operationalised. In March 2015, the Kenyan High Court ruled that Section 24 was unconstitutional, and suspended the law. The High Court ruling focused on the absence of a definition for “sexual contact”, holding that it is impossible to determine what acts were prohibited. It also found the provision does not meet the standards for a justifiable limitation of the constitutional right to privacy.²⁰ However, the <i>Sexual Offences Act (2006)</i> still contains a vague and overly broad HIV</p>

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	<p>HIV". Contravention of these provisions was a criminal offence punishable by imprisonment for up to seven years, and/or a fine.</p>			<p>criminalisation statute.</p>
<p>5.11 MALAWI</p>	<p>Existing: <i>Penal Code</i> – Section 192 states that “any person who unlawfully or negligently commits does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be guilty of a misdemeanor.”</p> <p>Proposed: <i>HIV and AIDS Management Bill, 2013</i> – §43 “A person who deliberately or recklessly infects another person with HIV commits an act of grievous harm.”</p>	<p>The proposed <i>HIV and AIDS Management Bill</i> contains a number of problematic provisions including mandatory testing of sex workers (but this is no longer proposed for pregnant women). It also makes HIV transmission a more serious criminal act than provided for in Section 192. However, defences would include non-disclosure due to reasonable fear of consequences; reasonable measures to reduce the risk of infection; or a previously agreed mutually acceptable risk.</p>	<p>Section 192 was used in 2009 to prosecute eleven women who were presumed to be sex workers and who were tested for HIV without their knowledge or consent. In 2015, mandatory HIV testing was found to be unconstitutional. Their sentences are currently under review.²¹</p>	<p>Lawyers for Human Rights, Southern Africa Litigation Centre and Open Society Initiative for Southern Africa challenged the mandatory testing and prosecution of the eleven women on the grounds of being unreasonable and a violation of their rights to privacy, equality, dignity and freedom from cruel, inhuman and degrading treatment. Blantyre High Court found in their favour.</p> <p>Civil society supported by UNDP and UNAIDS recommended against language on HIV criminalisation and mandatory testing for pregnant women in the proposed <i>HIV and AIDS Management Bill</i>. Draft law revised multiple times.^{22 23}</p>
<p>5.12 MEXICO (VERACRUZ)</p>	<p>Article 158 of the <i>Criminal Code of Veracruz State</i> passed in July 2015:²⁴ “Whoever suffers from a sexually transmitted infection or other serious illness and willfully exposes another person will receive six months to five years in prison and a fine up to fifty days’ wages. A judge will make the necessary arrangements for the protection of public health.”</p>	<p>This ‘wilful exposure’ statute is vague and overly broad. Neither the actual acts, state of mind, nor defences are specified.</p>	<p>No reported prosecutions.</p>	<p>Veracruz civil society under the name Multisectoral HIV/ AIDS Group, are currently working with Mexico’s National Human Rights Commission to challenge the law as unconstitutional.</p>

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<p>5.13 NEPAL</p>	<p>Proposed: <i>Offenses against Public Interest, Health, Safety, Facilities and Morals</i> – §103 ‘Prohibition of transmission HIV’. Criminalises anyone “aware of knowledge of one’s own positive HIV or Hepatitis B status”, who “purposefully or knowingly commits acts that would transmit Hepatitis B or HIV” via sex or blood donation. Penalty for acts with intent is up to ten years in prison and a fine; without intent up to three years and a fine.</p>	<p>The law is vague. It criminalises any act that “would” transmit HIV or hepatitis B either through blood donation or via “sexual contact without precautionary measures in place” as well as “caus[ing] entry of blood, semen, saliva, or other bodily fluids into the body of another.” Disclosure (and agreement to engage in sex) and/or “precautionary measures” are defences.</p>	<p>N/A</p>	<p>Local advocates, including human rights journalists, are sensitising parliamentarians to the notion that such laws do more harm than good to public health.²⁵</p>
<p>5.14 NIGERIA</p>	<p><i>Sexual Offences Bill</i> – Section 24 (Deliberate transmission of HIV or any other life threatening sexually transmitted disease); and Section 39 (Intentional and unlawful acts), passed in June 2015.²⁶</p>	<p>Overly broad and vague. Under Section 24, “intentionally, knowingly and willfully” doing “anything” which “he or she knows or ought to reasonably know” ... “is likely to lead to another person being infected with HIV” ... “shall be guilty of an offence, whether or not he or she is married to that other person, and shall be liable, upon conviction, to imprisonment for a term of not less than twenty years but which may be enhanced to imprisonment for life.” No defences are available. In addition, under Section 39, fraud vitiating consent to sex occurs when a person “intentionally fails to disclose to the person in respect of whom an act which causes</p>	<p>None known, although two states, Enugu (2005) and Lagos (2007), already have HIV-specific criminal statutes.</p>	<p>Following analysis of text of law by the HIV Justice Network,²⁷ UNAIDS secretariat alerted their Nigerian country office, who convened an urgent meeting of key national stakeholders. A key outcome was the convening of a technical group by the National AIDS Control Agency to review and suggest revisions to the law consistent with UNAIDS recommendations. Discussions are ongoing.²⁸</p>

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		<p>penetration is being committed, that he or she is infected by HIV or any other life-threatening sexual transmissible.” No defences are available.</p>		
5.15 NORWAY	<p><i>Norwegian Penal Code</i> – Paragraph 155. “Any person who, having sufficient cause to believe that he is a bearer of a generally contagious disease, wilfully or negligently infects or exposes another person to the risk of infection shall be liable to imprisonment for a term not exceeding six years if the offence is committed wilfully and to imprisonment for a term not exceeding three years if the offence is committed negligently.”</p>	<p>Criminalises all condomless sex by people living with HIV, regardless of risk, even if disclosure occurs.</p>	<p>There have been 17 prosecutions. First in 1999.²⁹ The most recent was the high profile case of activist Louis Gay in 2013, but the charges were eventually dropped following lack of evidence.³⁰</p>	<p>Following publication of the Norwegian Law Commission’s findings in 2012, advocacy has focused on garnering political support for law reform as well as a more nuanced understanding of risk in the era of ART.^{31 32}</p>
5.16 SWEDEN	<p>The <i>Communicable Diseases Act</i> obliges people living with HIV to disclose before sex. A 2004 Supreme Court ruling established that only sex with a condom can prevent a prosecution for HIV ‘exposure’ (as reckless endangerment) or transmission (as grievous bodily harm).</p>	<p>Disclosure is required in any situation where someone might be placed at risk but disclosure is not a defence to exposure or transmission allegations. Therefore all condomless sex by people living with HIV is potentially a crime.</p>	<p>At least 60 since the first prosecution in 1988. The last reported conviction was in December 2015.³³</p>	<p>Following a 2011 campaign to review the application of the criminal law relating to HIV by the three main civil society organisations focused on HIV, sexual health and human rights, the Public Health Agency of Sweden and the Swedish Reference Group for Antiviral Therapy issued the ‘Swedish statement’ on sexual HIV risk in 2013. This has impacted a few lower court judgments, and allowed clinicians to individualise how they counsel their patients, although the Supreme Court still considers condoms to be the only way to</p>

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				<p>avoid an HIV exposure prosecution.</p> <p>However, there is growing political interest in revising the obligation to disclose in the <i>Communicable Diseases Act</i> for people living with HIV, since more than 90% of those diagnosed are on fully suppressive treatment.³⁴</p>
5.17 SWITZERLAND	<p>Article 231 of the <i>Swiss Criminal Code</i> – Spreading of human diseases. “Anyone who intentionally spreads a dangerous transmittable human disease shall be punished with prison from one month up to five years. If the offender has acted out of a mean attitude, the punishment will be penitentiary up to five years. If the offender has acted out of negligence, the punishment shall be prison or he/she shall be liable to a fine.”</p>	<p>Until it was revised in January 2016, this non-HIV-specific law had been used exclusively to prosecute people living with HIV who had condomless sex, regardless of risk. Disclosure and/or consent by a partner is not a defence. It was often used together with Article 122 (grievous bodily harm).</p>	<p>At least 40, between 1990 and 2013. Following a gap, two convictions took place in February 2016 under Article 122.³⁵</p>	<p>Sustained efforts between clinicians, HIV NGOs and key parliamentarians since 2007 resulted in a number of significant outcomes, starting with the ‘Swiss statement’ (2008) which led to courts recognising that suppressive ART is a defence to condomless sex. Courts also recognised that HIV is no longer necessarily a serious disease.³⁶ The long <i>Law on Epidemics</i> revision process finally resulted in a new law, which came into effect in January 2016, which only criminalises malicious, intentional transmission.³⁷</p>
5.18 UGANDA	<p><i>HIV Prevention and Control Act</i>, passed in July 2014.³⁸ Section 41: Attempted transmission of HIV. “A person who attempts to transmit HIV to another person commits a felony.” Maximum five years in prison and/or a fine. Section 43: Intentional transmission of HIV. “A person who wilfully and intentionally</p>	<p>Vague and overly broad. Defences are either disclosure and/or proof that “protective measures were used during penetration.”</p>	<p>A nurse living with HIV, Rosemary Namubiru, was convicted in May 2014 for negligently exposing a child to HIV during a needle stick injury. The case was seen as a test for public support of the provisions in the <i>HIV Prevention and Control Act</i>. She was released for term served in November 2014.³⁹</p>	<p>Despite many years of intensive debate and strong local and international advocacy, including by the Ministry of Health, the law was passed in 2014. However, a broad coalition of civil society organisations is now exploring a legal challenge to the law.⁴⁰ A related law, the <i>Anti Homosexuality Act</i>, signed into law by President Museveni in February 2014, and which included life in</p>

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	<p>transmits HIV to another person commits an offence.” Maximum ten years in prison and/or a fine.</p>			<p>prison for ‘aggravated homosexuality’ for a man with HIV who had sex with another man, was overturned by the Constitutional Court in August 2014 on technical grounds.⁴¹</p>
<p>5.19 UNITED KINGDOM (ENGLAND & WALES)</p>	<p><i>Offences Against the Personal Act, 1861</i> (OAPA, 1861): Section 18, ‘intentional transmission’ and Section 20, ‘reckless transmission’.</p>	<p>Grievous bodily harm law created more than 150 years ago is unsuited to deal with sexual transmission of disease, despite prosecutorial and police guidance limiting the scope of the law.</p>	<p>There have been 25 HIV-related prosecutions, plus one each for hepatitis B and herpes. First successful prosecution in 2003. Most recent conviction in 2015.⁴² At least one case is ongoing in 2016.</p>	<p>The publication of a scoping paper by the Law Commission to decide whether to consider reforming the way sexual transmission of infection is prosecuted in England and Wales provided impetus for a number of HIV-related organisations to respond, requesting that the law be limited only to intentional transmission of a serious infection.⁴³ The Law Commission published its findings in November 2015, recommending no change for HIV/STI prosecutions in England & Wales, pending a wider review.⁴⁴</p>
<p>5.20 UNITED STATES (OVERVIEW)</p>	<p>The United States has a long history of enacting both HIV-specific criminal laws and prosecuting people living with HIV under these and general laws.⁴⁵</p>	<p>Thirty-two states and two US territories explicitly criminalise HIV exposure through sex, shared needles or, in some states, exposure to “bodily fluids” that can include saliva. At least 35 states have singled out people who have tested positive for HIV for criminal prosecution or enhanced sentences, either under HIV-specific criminal laws or under general criminal laws governing crimes such as assault, attempted murder or reckless endangerment.⁴⁶</p>	<p>At least 38 states as well as the US Federal Government (via military court-martials) are known to have prosecuted at minimum 1000 HIV-positive individuals for alleged HIV non-disclosure, potential HIV exposure or alleged transmission. Penalties range markedly across states ranging from a \$100 fine to imprisonment of up to 30 years in Arkansas. In addition, Missouri law allows for the death penalty if transmission is</p>	<p>In recent years, advocacy has advanced in many states thanks to the emergence of state and national HIV legal and policy networks, including the Positive Justice Project⁴⁸ as well as networks of people living with HIV, many of whom are supported by the Sero Project.⁴⁹ This advocacy has led to federal recognition that HIV criminalisation laws require modernisation.⁵⁰ Nationally, this has resulted in guidance from the Department of Justice, a number of attempts to pass the REPEAL HIV Discrimination Act</p>

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			<p>proven as a result of HIV exposure without disclosure.</p> <p>In addition, military courts have court-martialled at least 25 HIV-positive individuals for having condomless sex (with or without disclosure) and almost all have resulted in a conviction.⁴⁷</p>	<p>in Congress, and resolutions against HIV criminalisation by political and public health organisations.^{51 52 53} Nevertheless, bills have recently been proposed in a number of states, including Alabama, Michigan, Missouri, Rhode Island and Texas. All of these bills have so far been prevented from becoming law due to the concerted efforts of local and national advocates and organisations.</p>
<p>5.20.1 UNITED STATES (ALABAMA)</p>	<p>HB 50 (2015). As proposed would have amended § 22-11A-21 of Alabama’s <i>Criminal Code</i> to allow for increased penalties for exposure or transmission of a sexually transmitted infection from a class C misdemeanour (punishable by up to three months in jail and a \$500 fine) to a class C felony (punishable by up to ten years in prison).⁵⁴</p>	<p>The law is vague and overly broad. There are no defences.</p>	<p>None reported under § 22-11A-21.</p>	<p>AIDS Alabama and a coalition of organisations and advocates came together to oppose the bill. They were supported by national legal and advocacy networks and organisations. Testimony before the House Judiciary Committee killed the bill.^{55 56}</p>
<p>5.20.2 UNITED STATES (ARMED FORCES)</p>	<p>Article 128 of the <i>Uniform Code of Military Justice (UCMJ)</i> – aggravated assault.</p> <p>Prosecutions have also taken place for failing to follow safe-sex orders and for conduct prejudicial to good order.</p>	<p>Military service members living with HIV have been convicted of aggravated assault in cases in which HIV status has been disclosed and their sexual partner consents, as well as in cases in which condoms are used. Even attempting to have condomless consensual sex can and has been prosecuted as aggravated assault.</p>	<p>First prosecution 1987.⁵⁷ No numbers known. Most recent cases in 2015.⁵⁸</p>	<p>In December 2013, the US Senate passed the <i>National Defense Authorization Act</i> which aimed to reform the military’s HIV-related policies, including HIV-related prosecutions. In parallel, two cases reached US Court of Appeals for the Armed Forces (CAAF) in 2015 that severely limits the use of Article 128 for future prosecutions although another part of the ruling potentially opens the door to the use of a lesser charge – assault consummated</p>

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				by a battery – for future allegations of HIV non-disclosure. ⁵⁹ Advocacy is being led by Sero Project’s Lieutenant Colonel Ken Pinkela, who is appealing his own conviction under Article 128. ⁶⁰
5.20.3 UNITED STATES (IOWA)	Under Iowa’s previous HIV-specific law, § 709C (1998) a person committed ‘criminal HIV transmission’ if they were diagnosed HIV-positive and engaged in intimate contact with another person. “Intimate contact” was defined as the intentional exposure of the body of one person to a bodily fluid of another person in a manner that could result in HIV transmission. ⁶¹	The law was vague and overbroad. The only defence was consent to the risk of HIV exposure, by the person living with HIV specifically disclosing their status prior to any sex. Neither actual risk, nor use of risk reduction methods (including condoms and/or low viral load), nor state of mind were taken into consideration until the Supreme Court ruled in <i>State v Rhoades</i> in June 2014, two weeks after the 1998 law had been modernised. ⁶²	At least 25 since 1998. The last prosecution under the old law was in 2013. However, there have been three prosecutions (two of which may or may not be HIV-related) under the modernised statute, since 2014, including a high profile HIV case in August 2015. ⁶³	Five years of lobbying, initiated by grass roots CHAIN organiser, Tami Haught, and supported by national organisations led to a greater sensitisation of the problems of Iowa’s law. ⁶⁴ The unjust prosecution and conviction of Iowan Nick Rhoades also helped garner media and political support for reform. After an initial bill failed in 2013, a groundswell of public, political and media support in 2014 led to Iowa becoming the first state to substantially reform its HIV-specific statute based on scientific and legal principles.
5.20.4 UNITED STATES (MICHIGAN)	SB 1130 (2014) proposed to add hepatitis C virus to the existing HIV disclosure law, § 14.15 (5210), despite the fact that hepatitis C is rarely sexually transmitted.	The existing HIV disclosure law is already overly broad and criminalises non-disclosure before “penile-vaginal sex, oral sex, anal sex, and any other intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of another person’s body. The emission of semen is not required.” The use of condoms or other protection is not a defence.	At least 61 HIV-related convictions since 1997. Last known conviction in March 2016. ⁶⁵ No known hepatitis C-related prosecutions.	Local and national advocates highlighted the problems of adding hepatitis C to Michigan’s HIV-disclosure law and organised a letter writing campaign to the senator who proposed it. ⁶⁶ It was passed by the Senate in December 2014 but did not progress further.
5.20.5 UNITED STATES (MISSOURI)	HB 1181 (2015) added the text “intentionally projecting saliva at another person”	The proposed law would have criminalised exposure to the saliva of a	At least 38 under §191.677 since 1998. Most recent reported conviction was in	Swift advocacy by local chapters of both the ACLU and Human Rights Campaign, ⁶⁹ and Missouri-based

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	to Missouri’s HIV-specific criminal statute §191.677, “relating to prohibited acts for individuals knowingly infected with HIV”.	person living with HIV through “intentional project[ion]” although HIV cannot be transmitted by saliva. The existing HIV-specific law is already overly broad and unscientific. ⁶⁷	July 2015, when a man who grossly exaggerated his sexual exploits “to make his partner jealous” was sentenced to 30 years for two counts of perceived HIV exposure without disclosure. ⁶⁸	HIV advocate Aaron Laxton, meant that HB 1181 was not even heard by the Civil and Criminal Proceedings Committee and did not proceed. Advocacy to modernise §191.677 continues.
5.20.6 UNITED STATES (NEW YORK)	HIV ‘exposure’ cases are prosecuted as ‘reckless endangerment in the first degree’, a felony punishable by up to seven years in prison.	Previous rulings had established that perceived HIV exposure without prior disclosure of known HIV-positive status creates “a grave risk of death”.	There have been at least seven prosecutions since 1997, including for biting, as “aggravated assault with a dangerous instrument”, although this case was overturned in 2012. ⁷⁰	In February 2015, the New York Court of Appeals affirmed a lower court ruling reducing charges brought by the District Attorney’s Office in Onondaga County, New York, against a young black man living with HIV for allegedly engaging in consensual sex without disclosing his HIV status to his sex partner. ⁷¹ The Court found that the defendant’s consensual sex did not meet the legal standards for the more serious charge. The decision noted: “Here, there is no evidence that defendant exposed the victim to the risk of HIV infection out of any malevolent desire for the victim to contract the virus, or that he was utterly indifferent to the victim’s fate.” ⁷²
5.20.7 UNITED STATES (RHODE ISLAND)	H 5245 (2015) – ‘Criminal Transmission of HIV’ would have criminalised people living with HIV who engage in sex without disclosure, as well as sex work, blood donation and needle sharing.	The law was vague and overly broad. Anyone aware they are living with HIV and who engages in “vaginal, anal, or oral” sex “without first informing that person of his/her HIV infection” is guilty of a crime subject to a maximum 15 years in prison and/or a fine. There was no other defence.	N/A	Public health and medical experts as well as people living with HIV and key local LGBT and HIV organisations testified before the Rhode Island House Judiciary Committee strongly opposing the proposed law, killing the bill. ⁷³

COUNTRY (STATE)	LAW	KEY PROVISIONS	NUMBER OF KNOWN PROSECUTIONS (YEAR OF FIRST AND MOST RECENT CONVICTION)	ADVOCACY TYPE AND IMPACT
<p>5.20.8 UNITED STATES (TENNESSEE)</p>	<p>There are a number of HIV-specific laws in Tennessee, including exposure to HIV via intimate contact. Under Tenn. Code Ann. § 39-13-516 sex work whilst HIV-positive is considered ‘aggravated prostitution’. This is a felony punishable by up to 15 years in prison. Conviction also requires registration as a violent sex offender for a minimum of ten years.⁷⁴</p>	<p>A conviction for sex work not involving HIV is a misdemeanour, punishable by no more than a six-month sentence and/or a \$500 fine, whereas an HIV-positive defendant faces up to 30 times the penalty for the same offence. Tennessee law does not require actual physical contact for a conviction.</p>	<p>In 2009, 39 women were on the sex offender register because they had previously been convicted of aggravated prostitution. Date of first prosecution is unknown. Between 2000 and 2010, there were 27 prosecutions for aggravated prostitution in Nashville alone.⁷⁵ The most recent reported conviction was in 2013.⁷⁶</p>	<p>Following sympathetic media reporting on the unjust impact the aggravated prostitution law was having on women living with HIV, in 2015 the Tennessee legislature enacted <i>Senate Bill 1160</i>, which allows a person who is mandated to comply with the requirements of sex offender registry, based solely upon a conviction for aggravated prostitution, to petition the sentencing court for termination of the registration requirements based on the person’s status as a victim of: a human trafficking offense, a sexual offense, or domestic abuse.⁷⁷</p> <p>Advocacy in 2016 will focus on modernising the language of Tennessee’s HIV-specific law criminalising HIV exposure through intimate contact.</p>
<p>5.20.9 UNITED STATES (TEXAS)</p>	<p>SB 779 (2015) proposed to amend the state <i>Health and Safety Code</i> to allow for confidential HIV test results to be subpoenaed during grand jury proceedings.</p>	<p>This would have been HIV criminalisation by the back door. Revealing the results of an HIV-positive test to a grand jury would potentially bias criminal proceedings, and compromise privacy and confidentiality.</p>	<p>At least 26 prosecutions, first in 1993, under old HIV-specific law, then under general law since 1995. Most recent reported conviction, in August 2013: a Zimbabwe migrant pleaded guilty to ‘knowingly’ transmitting HIV to four women, received a 120-year prison sentence.⁷⁸</p>	<p>A broad coalition of national and local civil society organisations lobbied to defeat the bill.⁷⁹</p>
<p>5.21 ZIMBABWE</p>	<p><i>Criminal Law (Codification And Reform) Act</i> [Chapter 9:23] Act</p>	<p>The law is vague and overly broad. A wide range of variables are</p>	<p>The first known successful prosecution in Zimbabwe took</p>	<p>Zimbabwe Lawyers for Human Rights (ZHLR) challenged Section 79 in the</p>

COUNTRY (STATE)	LAW	KEY PROVISIONS	NUMBER OF KNOWN PROSECUTIONS (YEAR OF FIRST AND MOST RECENT CONVICTION)	ADVOCACY TYPE AND IMPACT
	23/2004: Section 79 'Deliberate transmission of HIV'.	possible that involve neither being deliberate nor actually transmitting HIV.	place in 2008, although it is believed that more than 20 prosecutions had previously been attempted. At least seven men and four women have been prosecuted, the most recent in March 2016. ⁸⁰	<p>Constitutional Court for being vague and overly broad on behalf of two applicants, Pitty Mpofu and Samukelisiwe Mlilo, both of whom were convicted of "deliberate transmission of HIV" in 2012. Arguments were heard in February 2015 and a ruling is overdue.⁸¹</p> <p>ZHLR also launched a campaign against overly broad HIV criminalisation, called 'HIV on Trial – a threat to women's health', highlighting the case of Ms Mlilo who features in a short documentary, <i>Alone But Together – Women and Criminalisation of HIV Transmission: The story of Samukelisiwe Mlilo</i>.⁸²</p>

REFERENCES

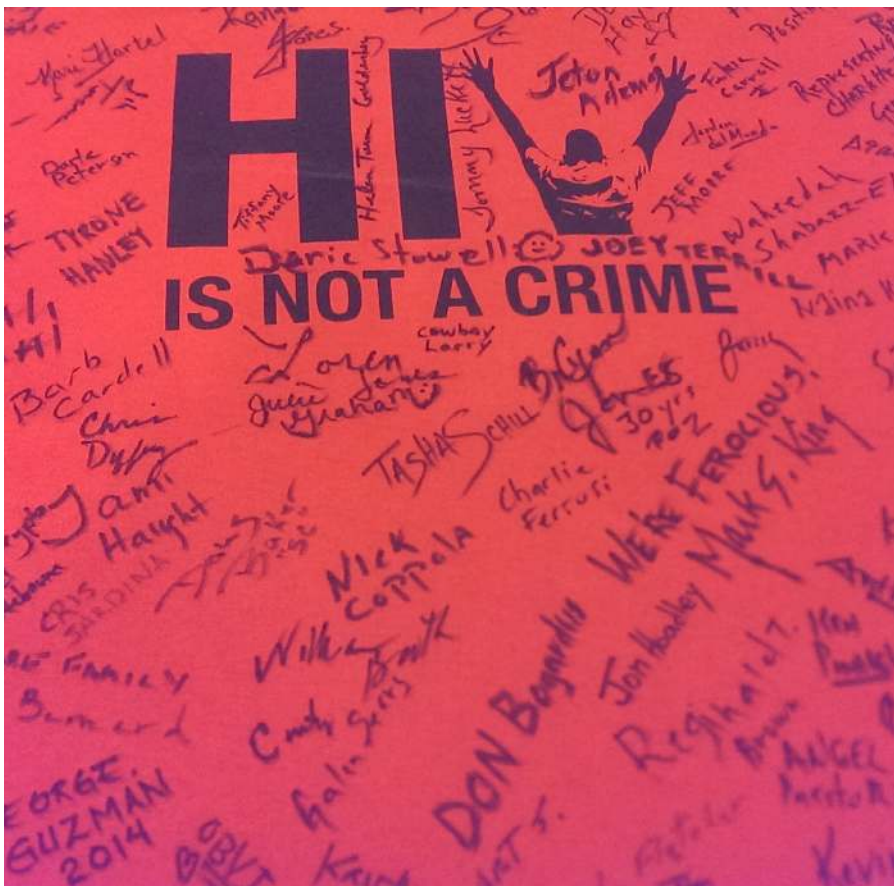
- Living Positive Victoria/Victorian AIDS Council. *Policy Brief: Repeal of Section 19A*. 8 July 2014.
- GNP+. *Global Criminalisation Scan: Botswana*. Last updated 15 September 2014.
- BONELA. *HIV willful transmission [allegations] on the rise*. 15 January 2015.
- Draft Bill No. 198/2015, an amendment to Article 1 of Law No. 8072 of July 25, 1990 was presented to Parliament by the populist Congressman, Pompeo de Mattos.
- Bernard EJ. *Brazil: HIV-specific criminal law introduced amid media frenzy and moral panic over 'barebacking' gay subculture*. HIV Justice Network, 27 March 2015.
- GNP+. *Global Criminalisation Scan: Brazil*. Last updated 27 April 2012.
- Bernard EJ. *Canada: Man found guilty in double-murder trial for sexual HIV transmission*. HIV Justice Network, 5 April 2009.
- Turcotte B. *Boone found guilty of attempted murder in HIV trial*. DailyXtra, 29 October 2012.
- See (in French): www.lanouvelle.net/Faits-divers/Justice/2016-04-15/article-4499435/Affaire-Tshibamba-Muntu-%3A-la-suite-fixee-en-juin/1
- Personal correspondence with Cecile Kazatchkine, Canadian HIV/AIDS Legal Network.
- For the latest updates on these cases, see: www.change.org/p/european-commission-stop-the-persecution-of-people-with-hiv-in-the-czech-republic
- Personal correspondence with Robert Hejzak, Board Chair and Jakub Tomšej, lawyer.
- Personal correspondence with Robert Hejzak, Board Chair and Jakub Tomšej, lawyer.
- Program on Global Health and Human Rights, Institute for Global Health, University of Southern California. *Mid-term Evaluation Report: Strengthening Regional and National Legislative Environments to Support the Human Rights of LGBT People and Women and Girls affected by HIV and AIDS in Sub-Saharan Africa*. 4 February 2015.
- The April 2015 opinion and recommendations, updating their initial 2006 opinion, is available (in French only) at: www.cns.sante.fr/spip.php?article526. For English language summary see interview with CNS President, Patrick Yeni, at: www.hivjustice.net/news/france-patrick-yeni-president-of-the-national-aids-council-interviewed-about-their-recent-work-on-hiv-criminalisation-in-france/
- See (in German): magazin.hiv/2015/03/24/bewaehrungsstrafe-fuer-hiv-uebertragung/
- Personal correspondence with Zoe Mavroudi, director of Ruins.

- 18 Personal correspondence with Zoe Mavroudi, director of Ruins.
- 19 KELIN. *Punitive laws and practices affecting HIV responses in Kenya*. 2014.
- 20 AIDS Law Project. *Case Analysis: Section 24 of the HIV and AIDS Prevention and Control Act Kenya: Reviewing AIDS Law Project v Attorney General & Another*. 2015.
- 21 Meerkotter A et al. *Malawi High Court rules that mandatory HIV testing is unconstitutional*. South Africa Litigation Centre, 20 May 2015.
- 22 Mwale J. *Malawi: 'Hiv & Aids Bill Not Ready for Presentation to Parliament'*. AllAfrica, 4 September 2014.
- 23 IrinNews. *Possible criminalisation of wilful HIV infection*. 1 February 2005.
- 24 El Daily Post. *Prison time for HIV? It's possible in Veracruz*. 6 August 2015.
- 25 Bernard EJ. *Nepal: Draft criminal code prohibiting infectious disease transmission singles out people with HIV and hepatitis B*. HIV Justice Network, 3 November 2014.
- 26 See: www.scribd.com/doc/267639198/Nigeria-Sexual-Offences-Bill-2013
- 27 Bernard EJ. *Nigeria: Senate passes law criminalising HIV non-disclosure, exposure and transmission with vague and overly broad statutes in the Sexual Offences Bill*. HIV Justice Network, 4 June 2015.
- 28 Personal correspondence with Patrick Eba, Senior Human Rights and Law Adviser, UNAIDS.
- 29 GNP+. *Global Criminalisation Scan: Norway*. Last updated 6 February 2014.
- 30 See: www.louisgay72.blogspot.no/
- 31 See (in Norwegian): www.utrop.no/Nyheter/Innenriks/27847
- 32 See (in Norwegian): www.aftenposten.no/helse/Vil-ikke-lenger-straaffe-HIV-positiv-som-er-under-behandling-7804247.html
- 33 See (in Swedish): www.unt.se/uppland/uppsala/hiv-smittad-kvinna-doms-for-oskyddat-sex-4015050.aspx
- 34 Personal correspondence with Andreas Berglöf, Programme Officer - Public Policy and Advocacy, RFSU.
- 35 Bernard EJ. *Switzerland: Two (alleged) HIV transmission convictions this month despite many positive changes in law*. HIV Justice Network, 22 February 2016.
- 36 Bernard EJ. *Switzerland: Swiss Federal Supreme Court rules that criminal HIV exposure or transmission is no longer necessarily a serious assault*. HIV Justice Network, 5 April 2013.
- 37 Bernard EJ. *Switzerland: New handbook for parliamentarians on effective HIV laws includes case study and interview with Green MP Alec von Graffenried*. HIV Justice Network, 4 February 2014.
- 38 Bernard EJ. *Uganda: Parliament passes 'deeply flawed' HIV law, takes 'giant leap backwards': urge President Museveni to veto*. HIV Justice Network, 14 May 2014.
- 39 Bernard EJ. *Uganda: 'HIV nurse' Rosemary Namubiru loses conviction appeal, but still released from prison after almost a year*. HIV Justice Network, 28 November 2014.
- 40 Personal correspondence with Patrick Eba, Senior Human Rights and Law Adviser, UNAIDS.
- 41 BBC. *Uganda court annuls anti-homosexuality law*. 1 August 2014.
- 42 NAT. *Table of cases of people charged with Grievous Bodily Harm under Section 20 of the Offences Against the Person Act 1861, for reckless sexual transmission of serious infections in England and Wales*. Last updated July 2015.
- 43 See e.g. www.nat.org.uk/media/Files/Policy/2015/Law_Commission_OAPA_scoping_NAT_response.pdf and www.hivjustice.net/?p=3056
- 44 Bernard EJ. *UK: Law Commission considers HIV criminalisation in great depth, but recommends no change for HIV/STI prosecutions in England & Wales, pending a wider review*. HIV Justice Network, 9 November 2015.
- 45 The Center for HIV Law and Policy. *Positive Justice Project: State and Federal Laws and Prosecutions*. 'HIV Criminalization Fact Sheet', Vol. 1, 2nd Edition, Winter 2015.
- 46 The Center for HIV Law and Policy. *Positive Justice Project: State and Federal Laws and Prosecutions*. 'HIV Criminalization Fact Sheet', Vol. 1, 2nd Edition, Winter 2015.
- 47 GNP+. *Global Criminalisation Scan: United States of America*. Last updated 6 February 2014.
- 48 See: www.hivlawandpolicy.org/initiatives/positive-justice-project
- 49 See: www.seroproject.com
- 50 Office of National AIDS Policy. *The National HIV/AIDS Strategy: Updated to 2020*. July 2015.
- 51 Department of Justice. *Best Practices Guide to Reform HIV-Specific Criminal Laws to Align with Scientifically-Supported Factors*. 2014.
- 52 Bernard EJ. *US: REPEAL HIV Discrimination Act reintroduced by Congresswoman Barbara Lee even as some US states propose new HIV-specific criminal laws*. HIV Justice Network, 20 April 2015.
- 53 See: www.hivlawandpolicy.org/resources/collection-statements-leading-organizations-urging-end-criminalization-hiv-and-other
- 54 Edgemon E. *After HIV-positive pastor's confession, lawmaker wants tougher penalties for knowingly exposing others to STDs*. AL.com, 2 March 2015.
- 55 See: www.hivlawandpolicy.org/news/positive-justice-project-steering-committee-voices-strong-opposition-alabama-bill-increase
- 56 Moseley B. *House Bill Would Make it a Crime to Knowingly Infect Someone with an STD*. Alabama Political Reporter, 7 April 2015.
- 57 The New York Times. *Soldier with AIDS virus to be imprisoned for sexual contacts*. 4 December 1987.
- 58 As well as *Pounding* (www.armytimes.com/story/military/crime/2015/01/20/colonel-court-martial-hiv/22047147/) Gutierrez and Pinkela were heard before the US Court of Appeals for the Armed Forces in 2015.
- 59 Bernard EJ. *US: Court of Appeals for the Armed Forces acknowledges per-act sexual HIV exposure risk, limiting future military prosecutions for HIV non-disclosure as aggravated assault*. HIV Justice Network, 25 February 2015.
- 60 See: www.change.org/p/secretary-of-the-army-john-mchugh-review-al-an-innocent-soldier-s

- wrongful-conviction?recruiter=73234119 and www.justiceforkenpinkela.blogspot.com
- 61 The Center for HIV Law and Policy. *Positive Justice Project: State and Federal Laws and Prosecutions*. Vol. 1, 2nd Edition, Winter 2015.
 - 62 Bernard EJ. *US: Iowa Supreme Court rejects 'theoretical' HIV risk, reverses 'HIV exposure' conviction*. HIV Justice Network, 16 June 2014.
 - 63 Gruber-Miller S. *More charges for man accused of spreading HIV*. Iowa City Press-Citizen, 25 August 2015.
 - 64 See also this interview with Iowa's Tami Haught on building a broad law reform coalition: www.hivjustice.net/feature/interview-with-iowas-tami-haught-on-building-a-broad-law-reform-coalition
 - 65 Scarbrough A. *White Cloud man pleads 'no contest' in AIDS case*. Mason County Press, 22 March 2016.
 - 66 Oaks J. *This Kahn-not happen: Michigan mulls Hep C criminalization*. HIV Prevention Justice Alliance, 17 November 2014.
 - 67 GNP+. *Global Criminalisation Scan: Missouri*. Last updated 27 April 2012.
 - 68 Friedrich M. *Dexter man gets 30 years in HIV-exposure case*. Standard Democrat, 23 July 2015.
 - 69 Miller H. *Missouri House Committee holds hearing on bill which criminalizes people living with HIV*. Human Right Campaign, 9 April 2015.
 - 70 Bjerck S. *A Free Man: David Plunkett Finally Released and Speaks to Housing Works*. The Body, 6 August 2012.
 - 71 See: www.hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/People v. Williams 02.19.15.pdf
 - 72 See: www.hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/People v. Williams 02.19.15.pdf
 - 73 Ahlquist S. *Experts agree: Criminalizing HIV transmission a 'backwards step'*. RI Future, 25 February 2015.
 - 74 The Center for HIV Law and Policy. *Positive Justice Project: State and Federal Laws and Prosecutions*. Vol. 1, 2nd Edition, Winter 2015.
 - 75 Galletly CL et al. *Charges for criminal exposure to HIV and aggravated prostitution filed in the Nashville, Tennessee Prosecutorial Region 2000-2010*. AIDS and Behavior, Vol. 17, Issue 8, pp. 2624-2636, DOI: 10.1007/s10461-013-0408-1. October 2013.
 - 76 The Chattanooga. *Woman Who Tells Undercover Officers She Has HIV Charged With Aggravated Prostitution*. 24 June 2013.
 - 77 See: wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB1160
 - 78 White T. *Midland man pleads guilty to knowingly transmitting HIV virus*. Midland Reporter-Telegram, 28 August 2013.
 - 79 See: www.hivlawandpolicy.org/news/a-bill-allow-criminal-courts-access-hiv-test-results-fails-texas
 - 80 Mapuranga S. *Man gets 10 years for deliberately infecting wife with HIV*. Newsday, 1 March 2016.
 - 81 See: *Alone But Together - Women and Criminalisation of HIV Transmission: The story of Samukelisiwe Mlilo*
 - 82 Bernard EJ. *Zimbabwe: HIV-specific criminal law on trial; ZLHR launches campaign highlighting impact of overly broad HIV criminalisation on women*. HIV Justice Network, 17 February 2015.



“We want to enhance the capacity of advocates (People Living with HIV networks, organisations, communities and individuals) to challenge and influence the decision makers within their communities and on a national and regional basis...”



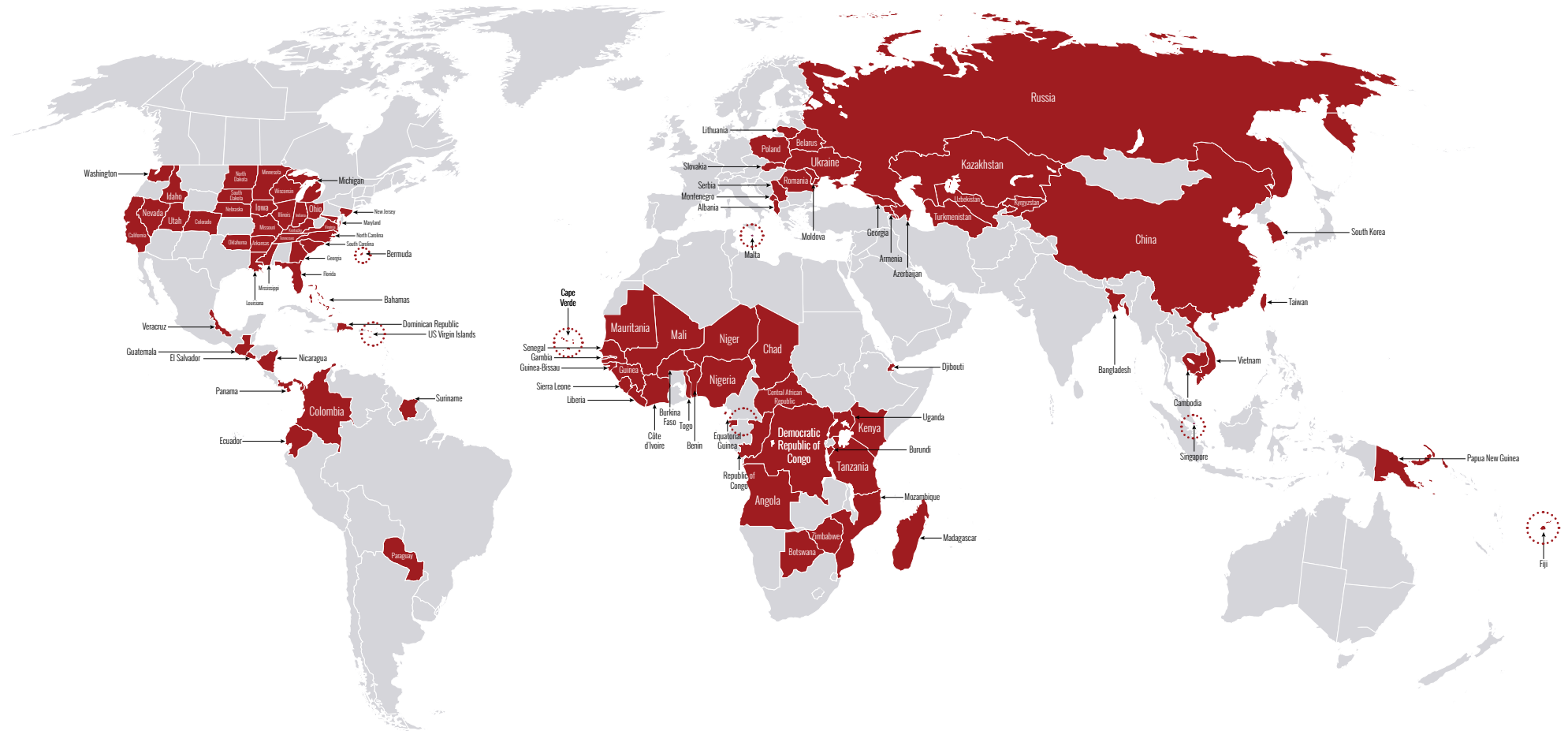


“...we are, indeed, building momentum in global advocacy against HIV criminalisation, to ensure a more just, rational, evidence-informed criminal justice response to HIV that will benefit both public health and human rights.”



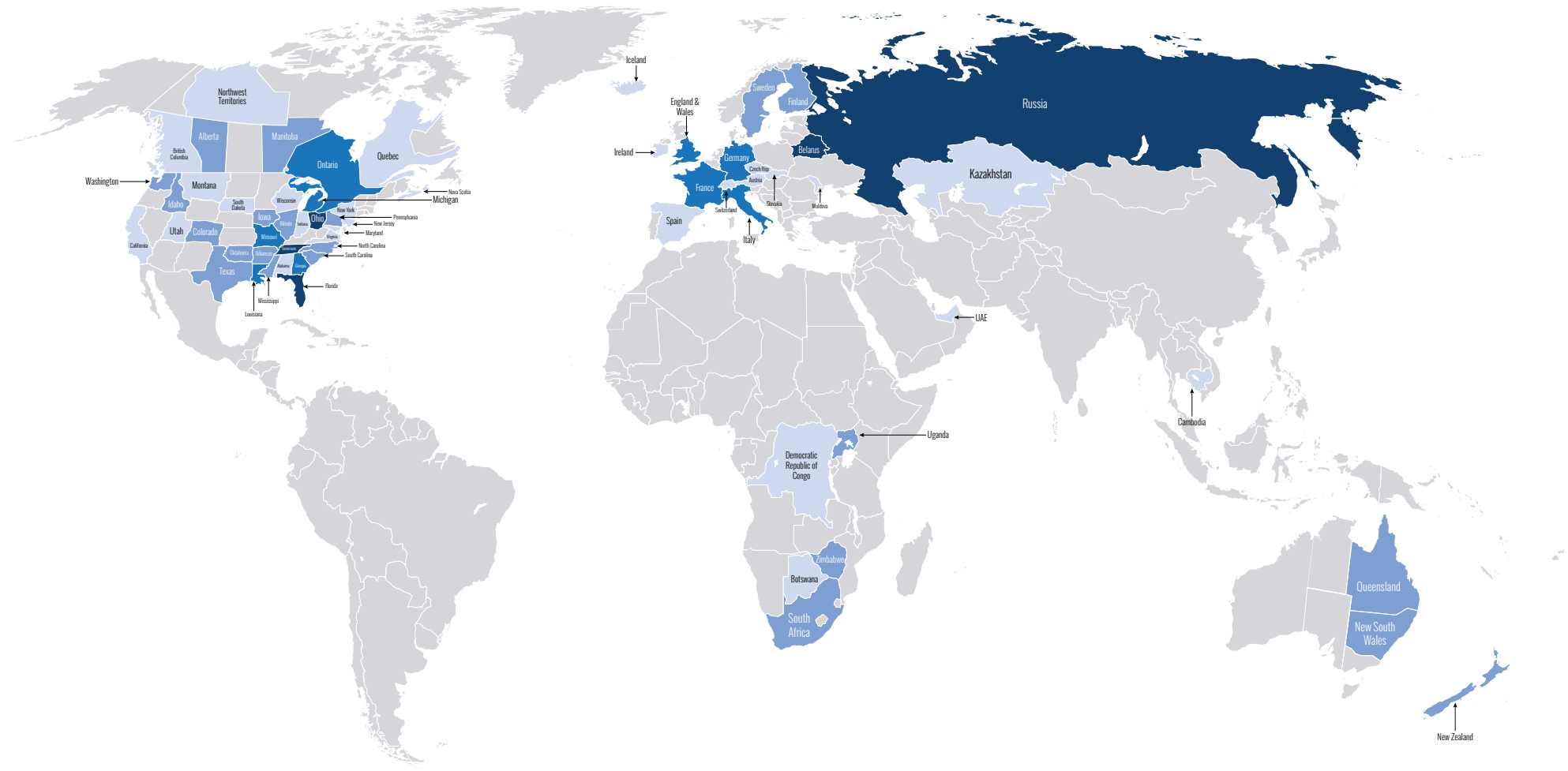
APPENDIX 1: GLOBAL MAPS

MAP 1: WHERE HIV CRIMINALISATION LAWS EXIST (AS OF APRIL 2016)



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MAP 3: WHERE PROSECUTIONS HAVE RECENTLY TAKEN PLACE (DATA TO THE END OF OCTOBER 2015)

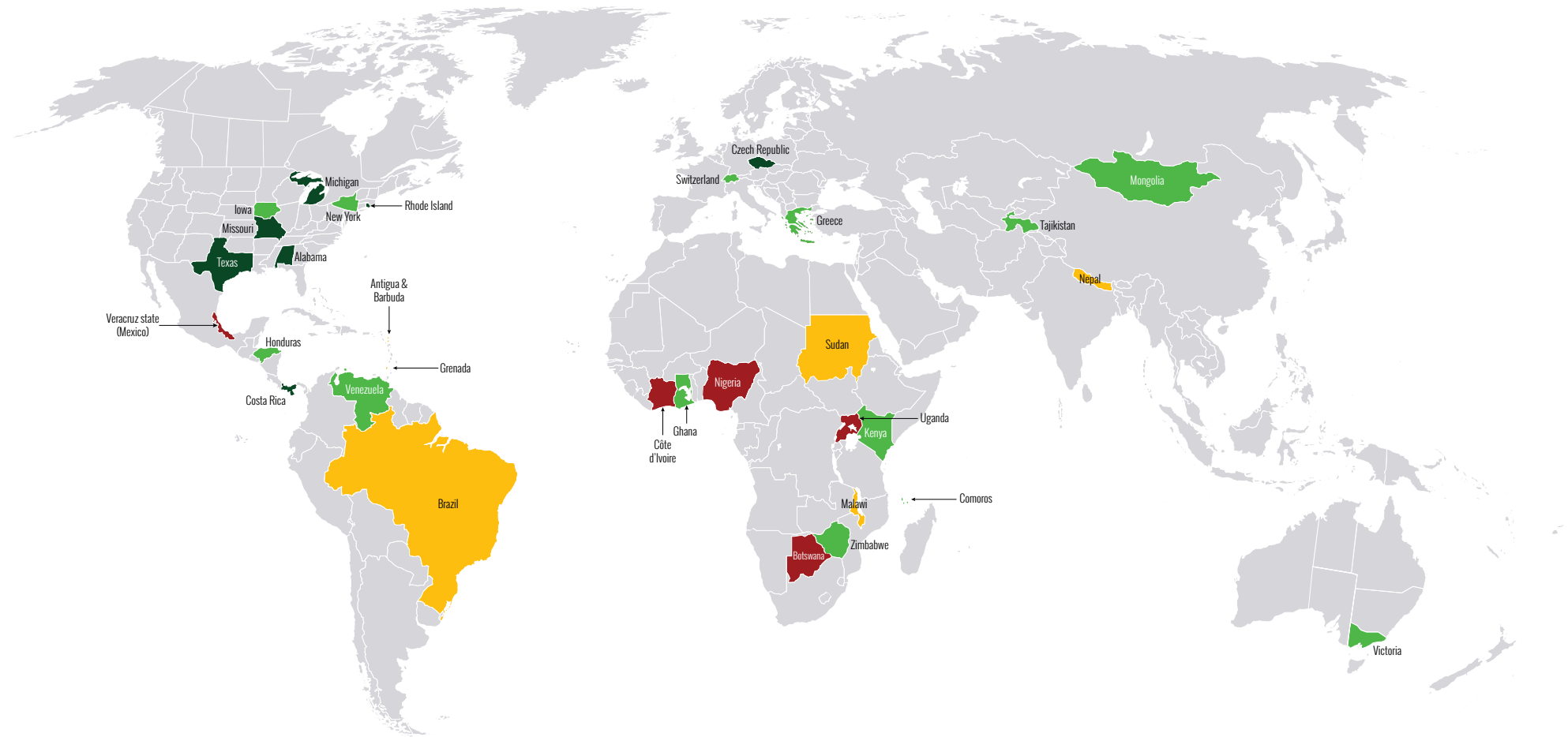


1 prosecution 2-4 prosecutions 5-9 prosecutions 10+ prosecutions



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MAP 5: HIV CRIMINALISATION LAWS ENACTED, PROPOSED, DEFEATED AND IMPROVED LEGAL ENVIRONMENTS (2013-2015)



■ HIV-specific criminal laws enacted
 ■ HIV-specific criminal laws proposed and defeated
 ■ HIV-specific criminal laws proposed
 ■ Improved legal environments



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