Criminal Law, Public Health and HIV Transmission:

A Policy Options Paper

Joint United Nations Programme on HIV/AIDS

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UNAIDS/02.12E (English original, June 2002)
ISBN 92-1973-167-6

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Geneva, Switzerland
June 2002

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Executive summary

A number of cases have been reported in which people living with HIV have been criminally charged for a variety of acts that transmit HIV or risk transmission. In some cases, criminal charges have been laid for conduct that is merely perceived as risking transmission, sometimes with very harsh penalties imposed. Some jurisdictions have moved to enact or amend legislation specifically to address such conduct. The issue has also received public and academic commentary.

These developments raise the question of whether criminal laws and prosecutions represent sound policy responses to conduct that carries the risk of HIV transmission. Individual cases, and accompanying media coverage, may prompt public calls for such a response. But there are few simple solutions to such a complex problem, and a rush to legislate should be avoided in favour of careful consideration. To assist in the development of sound public policy, this paper:

- proposes some principles that should guide thinking about, and development of, law and policy on the question of criminal law and HIV/AIDS;
- identifies a number of public policy considerations that states should take into account when making decisions about the use of the criminal law;
- considers the alternative to criminalization presented by public health laws;
- discusses if and how the criminal law might be justifiably applied, considering in particular:

  (a) whether HIV-specific legislation is warranted;

  (b) which acts that transmit HIV or carry the risk of transmission could be subject to criminal sanctions;

  (c) what degree of mental culpability should be required to impose criminal sanctions;
- concludes with recommendations to governments, police, prosecutors, judges and public health authorities regarding the appropriate use of criminal sanctions and coercive public health measures.

Guiding principles

In developing policy regarding the use of criminal sanctions or coercive measures under public health legislation, government officials and the judiciary should be cognizant of a number of principles:

- the best available scientific evidence regarding modes of HIV transmission and levels of risk must be the basis for rationally determining if, and when, conduct should attract criminal liability;
- preventing the transmission of HIV should be the primary objective and this, rather than any other objective, should guide policy-makers in this area;
- any legal or policy responses to HIV/AIDS, particularly the coercive use of state power, should not only be pragmatic in the overall pursuit of public health but should also conform to international human rights norms, particularly the principles of non-discrimination and of due process;
- state action that infringes on human rights must be adequately justified, such that policy-makers should always undertake an assessment of the impact of law or policy on human rights, and should prefer the ‘least intrusive’ measures possible to achieve the demonstrably justified objective of preventing disease transmission.

Policy considerations

There are a number of policy considerations that should be taken into account in determining criminal law policy in relation to HIV/AIDS. Firstly, policy-makers must consider the functions of the criminal law, and assess whether, and to what extent, criminalization will contribute to the objective of preventing HIV transmission. Secondly, policy-makers must weigh other public policy factors that might mitigate against the use of criminal sanctions.

Functions of criminal law

Criminal sanctions are perceived as serving four primary functions. The first is to incapacitate the offender from harming anyone else during the term of their imprisonment. The second is to rehabilitate the offender, enabling him/her to change his/her future behaviour so as to avoid harming others. The third is to impose retribution for wrongdoing—to punish for the sake of punishing. The fourth function is to deter the individual offender and others from engaging in the prohibited conduct in the future.

But it is not clear that these functions will make any significant contribution to preventing HIV transmission, and they offer, at best, a limited basis for resorting to the criminal law as a policy response to the epidemic.

Firstly, imprisoning a person with HIV does not prevent them from spreading the virus, either through conjugal visits or through high-risk behaviour with other prisoners. Evidence indicates that prisons are often settings in which high-risk behaviour is common, in part because of lack of access to means of prevention such as condoms or clean drug-injection equipment.

Secondly, there is also little evidence to suggest that criminal penalties will 'rehabilitate' a person such that they avoid future conduct that carries the risk of transmitting HIV. Sexual activity and drug use are complex human behaviours highly resistant to blunt tools such as fines or imprisonment. Other approaches are more likely to support longer-term behavioural change.

Thirdly, imposing punishment for its own sake can only be justified for conduct that is morally blameworthy, so a criminal law based on this objective could only legitimately apply to a subset of cases of HIV transmission or exposure. Whatever the merits of imposing criminal penalties as retribution, it must be understood that this is unrelated to the primary objective of preventing the transmission of HIV. Appealing to a desire for retribution in making policy runs the risk of appealing to prejudice and reinforcing discrimination, particularly in the context of the heavy stigma that already often surrounds HIV/AIDS and those individuals or groups associated with it.

Fourthly, it is unclear whether criminal sanctions will, in practice, act as a significant deterrent to behaviour that may result in HIV transmission. However, any effect is likely to be limited, again to a subset of cases. If reasoned judgement is outweighed by less rational considerations (such as desire, fear or addiction), or if a moral concern for the welfare of others has not already prompted a change in behaviour, then it is unlikely that a legal prohibition will have much additional effect. Finally, drug use and sexual activity persist even in the face of possible prosecution but, when prosecuted, are driven underground, hindering HIV prevention and access to appropriate care, treatment and support.

Other public policy considerations

Policy-makers should weigh other considerations that highlight the need for caution. Firstly, there may be a number of difficulties in proving certain required elements of an offence beyond a reasonable doubt in order to obtain a conviction, such as: whether

the accused knew of their HIV-positive status, and of the means of HIV transmission, at the time of the alleged offence; that it was the accused who actually infected the complainant; or that the HIV-positive person did not disclose their status to the complainant. Record-keeping regarding HIV testing and counselling may be inadequate or non-existent in some settings, and most often there will be no witnesses to an encounter between the accused and the complainant.

Secondly, policy-makers must also consider the potential impact of criminalization on public health initiatives:

- Introducing HIV-specific criminal laws, or inflammatory media coverage or statements by public figures regarding individual prosecutions, contributes to the stigma surrounding HIV/AIDS and people living with the disease as 'potential criminals' and as a threat to the 'general public.'
- Similarly, the inappropriate, overly-broad use of the criminal law also risks spreading misinformation about how HIV is transmitted, resulting in very serious charges and sentences where there is no significant risk of transmission.
- Furthermore, if the person who knows their HIV-positive status is exposed to possible criminal prosecution, policy-makers must assess whether any effect the criminal law has in deterring risk activity could ultimately be outweighed by the harm it does to public health by deterring HIV testing.
- Criminalizing risky conduct by a person living with HIV/AIDS could undermine their confidence in counsellors if the information that people living with HIV/AIDS discuss with a counsellor is not protected from search and seizure by police and prosecutors. Compromising confidentiality may also have an effect not just with respect to HIV, but also on the willingness to seek treatment of other sexually transmitted diseases, the presence of which increases the risk of HIV transmission.
- Criminalizing could create a false sense of security among people who are (or think they are) HIV-negative, because some may expect that the existence of criminal prohibition for 'other' (i.e., HIV-positive) people reduces the risk of unprotected sex. This could undermine the public health message that everyone should take measures to reduce or avoid activities/behaviour that could increase their risk of HIV transmission.

Thirdly, given the stigma that still surrounds HIV and the persistence of HIV-related discrimination, there is a risk that criminal sanctions will be directed disproportionately at those who are socially, culturally and/or economically marginalized. Policy-makers must ensure that the law is not used to target or punish people simply because of their HIV-positive status, their sexual orientation, their work as prostitutes, their use of illegal drugs, or other disfavoured status such as being a prisoner (or ex-prisoner) or immigrant.

Fourthly, for women and men with limited ability to disclose their HIV status and/or to take precautions to reduce the risk of transmission, invoking the criminal law as a response to HIV-risking activity may not ultimately serve to protect. Rather, it may impose an additional burden on those who are doubly disadvantaged by HIV infection (with its attendant social and economic costs) and by their vulnerability to violence or other abuse.

Finally, policy-makers must be concerned about the potential for intrusion into personal privacy, through the possible loss of confidentiality of counselling or health records or the publicity of court proceedings. It should be considered whether other alternatives can achieve the objectives said to be served by criminalization while being less intrusive of people's privacy.

Policy options

In the light of the guiding principles and policy considerations outlined, policy-makers should examine alternatives to criminalization for preventing HIV transmission. Public health laws are an alternative that should be considered. If, on balance, the use of public health powers can achieve the objectives said to be served by criminalization, while doing less damage to public health initiatives and other important interests (such as rights to non-discrimination, due process, and privacy), then resorting to the criminal law may be unnecessary and unjustified.

Public health law as an alternative

Policy-makers need to consider how interventions under public health laws, in comparison to criminal law approaches, can achieve public health goals:

- Criminal law is better suited to punishing than are public health laws, but in an area of already considerable stigma and discrimination, great care must be taken to avoid letting the desire for retribution in individual cases determine public policy, particularly if there are other important, competing policy considerations.
- With respect to the goal of rehabilitation, there is greater scope for flexibility in interventions under public health legislation. Rather than responding simply with prosecution and punishment, public health powers could be used to support individuals in avoiding conduct that may result in HIV transmission, by addressing possible underlying circumstances such as addiction or domestic violence.
- In extreme cases, public health legislation offers coercive interventions that are preferable to, and more effective than, criminal prosecution in achieving the goal of incapacitation. Invoking public health powers could result in the detention of an individual who persists in conduct that places others at risk, if less intrusive measures fail, and in the placement of the individual in a setting with less high-risk activity than a prison (and thus, where appropriate health care services are available, better serving the goal of rehabilitation).
- Finally, public health interventions may not only be better tailored to the individual's circumstances than the blunt tool of a criminal prosecution; they may also become increasingly coercive, if necessary, while still allowing for a more careful balancing of individual liberty and public health protection.

As with criminal laws, care must be taken to ensure that public health laws (particularly their more coercive aspects), are not misused. Keeping in mind the guiding principle of 'least intrusive, most effective,' graduated interventions are recommended in the exercise of public health powers, with coercive measures, such as detention, used only as a last resort. Furthermore, there must be safeguards to ensure that such powers are not misused and are applied in a fashion consistent with fundamental human rights principles, norms and standards.

Applying the criminal law: questions to consider

Remembering the guiding principles identified above, policy-makers must address at least three major questions in determining the parameters of criminalization:

- Should HIV-specific legislation be enacted instead of using general offences?
- Which acts should be subject to criminal prohibition?
- What degree of mental culpability should be required for criminal liability?

Should HIV-specific legislation be enacted instead of using general offences?

Enacting HIV-specific criminal statutes could lead to a clearer definition of what is prohibited than leaving it to courts to decide how traditional offences apply to HIV transmission/exposure, and minimize the possibility that courts over-extend or inappropriately apply the law, with harmful consequences such as those identified above. However, there are also many arguments against HIV-specific statutes. They may be unnecessary, given existing criminal offences. Furthermore, it could simply add to possible charges laid, thereby undermining the possible benefit of a carefully drafted statute. It would also not likely have any additional deterrent effect beyond that arising from prosecutions under traditional criminal offences. Most importantly, it would single out people living with HIV/AIDS as potential criminals, contributing to stigma and discrimination and undermining other HIV prevention and care efforts. The United Nations *HIV/AIDS and Human Rights International Guidelines* advise against HIV-specific offences.

Which acts should be subject to criminal prohibition?

In situations where criminalization is deemed an option, in defining the conduct that might be criminally prohibited, it makes more sense to target conduct that creates a risk of transmission, rather than just in cases where transmission actually occurs. The law must also be clear about the degree of risk of HIV transmission that will be captured by the criminal law. Considering the guiding principles and policy considerations outlined above, only conduct that carries a 'significant' risk of HIV transmission may legitimately be criminalized. Extending the criminal law to actions that pose no significant risk of transmission would:

- trivialize the use of criminal sanctions;
- impose harsh penalties disproportionate to any possible offence;
- discriminate against the accused person on the basis of his or her HIV status, rather than focusing on his or her conduct;
- not advance the primary objective of preventing HIV transmission; and
- actually undermine HIV prevention efforts by perpetuating the misperception that the conduct in question must carry a significant risk of transmission because it has been targeted for criminal prosecution.

Sound data regarding the risk levels of various activities should guide the determination of what is considered a 'significant' risk of HIV transmission for the purposes of criminal liability. The principle of restraint in the use of coercive measures suggests that the criminal law be most appropriately used with regard to those acts that truly carry the highest risk of transmitting HIV, rather than those that carry a low or negligible risk.

Conduct that involves the risk of HIV transmission may be either coercive (e.g. rape, stabbing with a needle) or may be an activity to which the participants are ostensibly consenting (e.g. consensual sex, sharing injection equipment). How should the law treat these?

Since physically assaultive conduct is criminal in itself, regardless of whether it carries any risk of HIV infection, the HIV status of the offender is irrelevant in determining whether or not a crime has been committed. If the offender's HIV-positive status is to be treated as an 'aggravating' factor because there was an additional risk of harm, then this must be based on solid evidence that such an additional significant risk existed. More serious charges and harsher penalties cannot be based solely on the

fact that an accused is HIV-positive. In the absence of any such evidence, this would amount to unjustifiable discrimination.

Applying the criminal law to ostensibly consensual activity that carries the risk of HIV transmission (e.g. sex, sharing injection equipment) is more complicated. The question here is the meaning of 'consent.' Sexual activity, with any partner, always carries some risks of lesser or greater harm, whether it be unwanted pregnancy or disease. Unlike the case of coerced sex, which should attract criminal liability, a person engaging in non-coercive sex does not need to know the HIV status of the sexual partner in order to make meaningful choices. He or she may choose not to engage in certain sexual acts so as to avoid the higher degree of risk such acts would pose, may choose to take preventive measures to lower the risk to a level they find acceptable (e.g. condom use), or may choose to engage in unprotected sex, aware that a risk of HIV transmission may exist.

If a person knows of his/her partner's HIV-positive status when agreeing to participate in some risky activity, then, in the absence of coercion, there is no justification for criminal charges against the HIV-positive person.

But should it be a criminal offence for a person who knows they are HIV-positive to obtain a partner's 'consent' for conduct that involves the risk of HIV transmission by deceit—that is, actively misrepresenting the fact that she/he is HIV-negative? Should criminal liability extend further, to cases of simple non-disclosure of HIV-positive status to the other person who is participating in an activity that puts him/her at risk of infection? This policy paper suggests that criminal sanctions may be applied to cases of deceit, but that mere non-disclosure of HIV-positive status should not amount to a criminal offence.

It is a question of balancing between guiding principles. Respecting people's autonomy means that, as a general rule, the state should not interfere with someone's decision to engage in activity in which they risk harm to themselves (such as unprotected sex). But dishonesty that could cause serious harm undermines autonomous decision-making.

Penalizing deliberate deceit is aimed at furthering the objective of preventing HIV transmission through the deterrent effect (if any) of punishing the person who actively misleads a partner in order to get their 'consent' for risky activity. In the absence of some justification or excuse, it is conduct that may be characterized as morally blameworthy, and therefore deserving of punishment through criminal sanctions.

But should the law go further and criminalize the HIV-positive person who engages in ostensibly consensual activity without disclosing his or her status? In other words, should the criminal law impose a positive obligation to disclose HIV infection? Unlike the case of deliberate deceit, in the case of simple non-disclosure the partner of the HIV-positive person has not been misled into basing choices on willful misinformation. While promoting respect for autonomy might justify criminal penalties for deliberate deceit, it is a weaker argument for criminalizing mere silence.

Since having a criminal law requiring disclosure of HIV infection would fall most heavily upon those whose circumstances already make it difficult to disclose. At the very least, if the law were to extend this far, any duty to disclose HIV infection should be qualified: the law should recognize that criminal liability could be avoided by taking precautions to reduce the risk of transmission (e.g. by practising safer sex).

Whether the law is limited to criminalizing deceit or whether it is extended further to criminalize non-disclosure, given the adverse consequences of disclosure for the HIV-positive person, criminal sanctions should only apply to cases where the conduct poses a significant risk of HIV transmission. This adequately respects the autonomy of sexual partners of people living with HIV, and satisfies the important objective of preventing the spread of HIV, while taking into account the risks of disclosure and the possibility of alternative means of reducing the chance of transmission.

Indeed, allowing the HIV-positive person to avoid criminal liability by taking precautions is good public policy: criminalizing the HIV-positive person who, although she/he does not disclose his/her HIV status, actually practises safer sex or otherwise seeks to reduce the risk of transmission, would be directly counter-productive to the very goal of preventing further transmission. Some courts have recognized the importance of restricting the criminal law to cases where there was truly a 'significant risk' of HIV transmission; and it has also been suggested that taking precautions such as condom use could be considered to lower the risk of HIV transmission sufficiently that no criminal liability should arise for not disclosing one's seropositive status.

What degree of mental culpability should be required for criminal liability?

The criminal law must define not only the conduct that is prohibited, but also when that conduct is culpable and when it is innocent. Culpability is a question of the state of mind of the accused person at the time they engaged in the prohibited conduct. Where to draw the line for criminal culpability is not always clear, and will partly depend upon the seriousness of the wrongdoing. The criminal law recognizes different degrees of mental culpability, and not all of them will justify criminal prosecution and punishment in all circumstances.

In general, the law recognizes three levels of mental culpability: intention, recklessness, and negligence (usually 'gross' negligence is required for criminal, as opposed to civil, liability). While cases of intentional transmission of HIV are relatively rare, clearly such a degree of mental culpability is, however, the most included in the scope of the criminal law. Whether the criminal law should extend to reckless or negligent conduct in the context of HIV transmission/exposure is more questionable, and a number of factors must be considered:

- the degree of risk that should be legally defined as 'unjustifiable', such that running that level of risk could amount to criminal recklessness;
- when conduct amounts to a 'substantial deviation' from the level of careful conduct that is expected of the ordinary, reasonable person, such that it can be considered criminally negligent.

Lowering the threshold for criminal liability below the intentional transmission of, or exposure to, HIV raises a concern about the potential for bias and prejudice to enter into the interpretation and application of the criminal law if liability rests on such difficult and loosely-defined concepts.

Regardless of which level of mental culpability is deemed sufficient to impose liability, basic principles of fairness in the criminal law would require that, at a minimum, the accused person who engages in activity that transmits HIV or risks transmission must be aware of their HIV status before any criminal liability could arise.

Furthermore, the requirement of a 'guilty mind' suggests that, in order to be held criminally liable, the HIV-positive person should understand both that HIV is a communicable disease and how it may be transmitted—that is, he/she must understand that his or her conduct carried a risk of causing personal injury by infecting another person. It is unfair to criminally punish a person who has no knowledge that their conduct risks harm to another, unless they can be said to be 'grossly negligent' in not being aware of this risk. On a pragmatic level, this reinforces the need for caution in the use of the criminal law, so as not to prosecute conduct that carries no significant risk of transmission. On an ethical level, it also highlights the need for restraint by avoiding criminalization where the individual does not appreciate the fact that their conduct carries a risk. In such circumstances, the objective of preventing HIV transmission calls for education, not prosecution.

Recommendations

This paper presents numerous recommendations aimed at informing the development of sound public policy in the area of criminal law and HIV/AIDS, such as the following:

- protect against discrimination and protect privacy;
- address underlying causes of vulnerability to HIV infection and risk-related activities;
- ensure access to good-quality HIV testing, counselling and support for risk reduction;
- ensure access to anti-HIV treatment following exposure;
- repeal or amend laws that impede HIV prevention, care, treatment and support;
- use coercive measures as a last resort;
- set parameters on the use of criminal law to avoid its over-extension;
- ensure safeguards against misuse of public health laws and powers;
- establish prosecutorial guidelines to avoid misuse of criminal law;
- provide legal support and services;
- ensure the right to counsel;
- educate judiciary, police, prosecutors and defence lawyers;
- ensure fairness in the conduct of proceedings;
- protect the confidentiality of medical/counselling information;
- protect confidentiality during legal proceedings.

1. Background

> *AIDS makes us angry. But in law we must be rational. We must take as our guiding principle for law something more than the creation of a response to a dangerous epidemic. We must look for effective and just laws that contribute to slowing the spread of AIDS[1].*
>
> *It is trite to say that law cannot be a panacea for all social ills. Before invoking the rough instrument of the criminal law we must be sure that it will have some impact on the problem at hand. We must also be satisfied that, on balance, the use of criminal law will not be counter-productive, and that it will not do more harm than good[2].*

Over the last 15 years, a number of cases have been reported in which people living with HIV have been criminally charged for a variety of acts that result in HIV transmission or carry the risk of transmission. In some cases, criminal charges have been laid for conduct that is merely perceived as risking transmission, sometimes with very harsh penalties imposed. Numerous jurisdictions have moved to enact or amend legislation specifically to address such conduct. The issue has also received considerable academic commentary.

These developments require states to examine whether criminal laws and prosecutions represent sound policy responses to conduct that carries the risk of HIV transmission. Individual cases, and accompanying media coverage, may prompt public calls for such a response. But it is important to keep in mind the following caution:

> *There will be calls for 'law and order' and a 'war on AIDS'. Beware of those who cry out for simple solutions, for [in] combating HIV/AIDS there are none. In particular, do not put faith in the enlargement of the criminal law[3].*

In order to be sound, policy must be developed through careful consideration of 'the big picture.' Decision-makers have a responsibility to guard against the proliferation of what Justice Kirby has dubbed "a new virus—HUL—for highly useless laws"[4]. In the interests of promoting the development of sound public policy, this paper:

- proposes some principles that should guide thinking about, and development of, law and policy on the question of criminal law and HIV/AIDS;
- assesses the strength of the four primary justifications for invoking the criminal law;
- identifies a number of public policy considerations that states should take into account when making decisions about the use of the criminal law;
- considers the alternative to criminalization presented by public health laws;
- discusses if and how the criminal law might be justifiably applied, considering

  (a) whether HIV-specific legislation is warranted;

  (b) which acts that transmit HIV or risk transmission could be subject to criminal sanctions;

  (c) what degree of mental culpability should be required to impose criminal sanctions;

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[1]Hon Justice Michael Kirby. HIV and Law — A Paradoxical Relationship of Mutual Interest. Paper presented at IUVDT World STD/AIDS Congress, Singapore, 22 March 1995 [emphasis added]. Available on-line at www.fl.asn.au/resources/kirby/papers/.

[2]Holland W (1994) HIV/AIDS and the Criminal Law. *Criminal Law Quarterly*; 36(3): 279 at 316.

[3]Hon. Justice Michael Kirby, High Court of Australia. The Ten Commandments. [Australian] *National AIDS Bulletin*, March 1991: 30-31.

[4]Hon. Justice Michael Kirby. The New AIDS Virus-Ineffective and Unjust Laws. *Journal of Acquired Immune Deficiency Syndromes* 1988; 1: 304-312.

- concludes with recommendations to governments, police, prosecutors, judges and public health authorities regarding the appropriate use of criminal sanctions and coercive public health measures.

2. Guiding principles

In developing policy regarding the use of criminal sanctions or coercive measures under public health legislation, government officials and the judiciary should be cognizant of a number of principles, as follows:

Best available evidence should be the basis of policy

The best available scientific evidence regarding modes of HIV transmission and levels of risk must be the basis for rationally determining if, and when, conduct should attract criminal liability. "As in any area of the law, it is essential to base legal responses (if they are to be effective) upon a good empirical understanding of the target to which it is hoped the law will attach.... AIDS laws must not be based upon ignorance, fear, political expediency and pandering to the demand of the citizenry for 'tough' measures.... Good laws, like good ethics, will be founded in good data"[5].

Prevention of HIV must be the primary objective of the policy of criminalization

Any legal or policy response must take into account the fact that preventing the spread of HIV is the single most important objective. This does not mean that all other considerations must give way. The point is simply that other objectives of invoking the criminal law must be secondary. Criminal law policy must not sacrifice HIV prevention in pursuit of other goals.

Policy must respect human rights

"Several years of experience in addressing the HIV/AIDS epidemic have confirmed that the promotion and protection of human rights constitute an essential component in preventing transmission of HIV and reducing the impact of HIV/AIDS"[6]. Any legal or policy responses to HIV/AIDS, particularly the coercive use of state power, should not only be pragmatic in the overall pursuit of public health but should also conform to international human rights norms.

In particular, the principle of **non-discrimination and equality**, and the principle of **due process**, must be respected. Special attention should be given to these human rights norms when crafting legislation or policy related to HIV/AIDS, in the light of past and ongoing discrimination and stigma against people living with HIV/AIDS, against groups and individuals vulnerable to HIV/AIDS, and against groups or individuals commonly perceived as affected by the disease.

The Universal Declaration of Human Rights[7], which amounts to binding customary international law on all nations, states:

> **Article 1:** All human beings are born free and equal in dignity and rights.
>
> **Article 2:** Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

[5]Kirby. HIV and Law—A Paradoxical Relationship of Mutual Interest, supra.

[6]Office of the United Nations High Commissioner for Human Rights and the Joint United Nations Programme on HIV/AIDS. *HIV/AIDS and Human Rights International Guidelines*. New York and Geneva: United Nations, 1998: para 72. See also: Dwyer J, "Legislating AIDS Away: The Limited Role of Legal Persuasion in Minimizing the Spread of HIV." *Journal of Contemporary Health Law and Policy* 1993; 9: 167.

[7]Universal Declaration of Human Rights, UN General Assembly Resolution 217 A(III), U.N. Doc. A/810 (adopted 10 December 1948) [hereinafter UDHR].

Article 7: All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 9: No one shall be subjected to arbitrary arrest, detention or exile.

Article 10: Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11: Everyone charged with a penal offence has the right to be presumed innocent until proven guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

In addition, those states that are parties to the International Covenant on Civil and Political Rights also have legally binding obligations under that treaty that reinforce the basic principles set out in the Universal Declaration with respect to the right to equality before the law and the right to due process if charged criminally[8].

The *HIV/AIDS and Human Rights International Guidelines*, produced by UNAIDS and the UN High Commissioner for Human Rights, are a useful source of guidance for policy-makers in ensuring that policies respect legally binding human rights obligations. Two of the Guidelines speak directly to the issue at hand:

Guideline 3: *States should review and reform public health laws to ensure that they adequately address public health issues raised by HIV/AIDS, that their provisions applicable to casually transmitted diseases are not inappropriately applied to HIV/AIDS and that they are consistent with international human rights obligations.*

Guideline 4: *States should review and reform criminal laws and correctional systems to ensure that they are consistent with international human rights obligations and are not misused in the context of HIV/AIDS or targeted against vulnerable groups.*

Respect for human rights mandates, among other things, that people living with HIV/AIDS not be subjected to criminalization or other coercive measures solely on the basis of their HIV status. The World Health Organization has concluded "there is no public health rationale to justify isolation or quarantine based solely on the fact that a person is suspected or known to be HIV-infected"[9]. Laws and policies regarding HIV transmission/exposure should not single out HIV for particular attention as opposed to other, similarly communicable diseases. To do so would be not only to directly stigmatize HIV/AIDS and people living with HIV/AIDS (and those groups associated with HIV/AIDS in the public consciousness), but would also run counter to the principle of equality before the law. Applying coercive measures to people simply on the basis of their HIV status violates the right to equal protection before the law and

[8]In particular, see the following Articles of the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (1966) [hereinafter ICCPR]: Article 2 (equal entitlement to rights without discrimination); Article 9 (freedom from arbitrary arrest or detention; rights to know reason for arrest, trial within a reasonable period of time, etc); Article 10 (right of any detained person to be treated with humanity and respect for dignity); Article 14 (right to equality before the law, right to fair trial, right to be presumed innocent, rights to minimum guarantees of fairness and due process without discrimination, right to review of conviction and sentence by higher tribunal, etc); Article 15 (right not to be held guilty for any act or omission that was not a criminal offence at the time committed); and Article 26 (right to equality before the law and to equal protection of the law).

[9]World Health Organization. Social Aspects of AIDS Prevention and Control Programmes. WHO Special Programme on AIDS, Geneva, 1 December 1987, WHO/SPA/GLO/97.2; World Health Assembly, 45th Session (1992). Global Strategy for Prevention and Control of AIDS. Resolution WHA 45.35, 14 May 1992. This principle has been widely recognized in many settings. By way of example, see: UN Commission on Human Rights. "The protection of human rights in the context of human immunodeficiency virus (HIV) and acquired immunodeficiency syndrome (AIDS)." Resolutions of 3 March 1995 (U.N. Doc. RES/HS/95/124) and 4 March 1994 (Resolution 1994/49); *Handbook for Legislators on HIV/AIDS, Law and Human Rights*. Geneva: UNAIDS and Inter-Parliamentary Union, 1999 (at pp. 45-46); "The Law and HIV/AIDS in Kenya," in *AIDS in Kenya: Socioeconomic Impact and Policy Implications* (S Forsythe & B Rau eds), Family Health International/AIDSCAP, 1996; Namibian HIV/AIDS Charter of Rights (1 December 2000) (via www.lac.org.na); "AIDS & HIV Charter," AIDS Consortium, South Africa (via www.aidsconsortium.org.za); Charter of Persons with HIV/AIDS, National AIDS Authority, Cambodia (undated); Council of Europe, Committee of Ministers. Recommendation No. R (89) 14 on the Ethical Issues of HIV Infection in the Health Care and Social Settings (Oct. 24, 1989), 41 International Digest of Health Legislation 39 (1990); "AIDS Prevention & Control," National Health Plan (1996-2001), Ministry of Health, Union of Myanmar.

freedom from discrimination[10], as well as the right to liberty of movement[11], the right to liberty and security of the person[12], the right to freedom of assembly[13], and the right to freedom from cruel, inhuman or degrading treatment or punishment[14].

Similarly, government officials (including those with responsibilities for justice, corrections and health), legislators, judges, legal and health professionals, the media and community leaders should not contribute to the stigmatization of HIV/AIDS and people infected or affected by the disease, as to do so ultimately undermines public health. Accordingly, care must be taken to avoid inflammatory and/or discriminatory language in discussions of a controversial issue such as the criminalization of HIV transmission/exposure.

Policy-makers should also consider that the relevance or utility of criminal sanctions (or other quasi-criminal, coercive measures) as a response to the HIV/AIDS pandemic is generally limited. Criminalizing HIV transmission/exposure might be presented by some as "getting tough" in the "fight against AIDS." But, in reality, such measures are likely to do little overall to stem the spread of HIV: "Laws and public policies on HIV/AIDS will have only a minor part to play in the reduction of the spread of the virus. Do not put too much faith in coercive laws as a means of stopping the spread"[15].

Aside from the risk of infringing human rights, such approaches may also be of detriment, on a macro level, to public health, by diverting resources and attention away from policies and initiatives such as: HIV/AIDS education; access to the means of protecting against infection; access to testing, treatment and support services; and remedies for the root causes of vulnerability to HIV infection (e.g. poverty, violence, discrimination and substance use). As the HIV/AIDS and Human Rights *International Guidelines* note:

> *One aspect of the interdependence of human rights and public health is demonstrated by studies showing that HIV prevention and care programmes with coercive or punitive features result in reduced participation and increased alienation of those at risk of infection. In particular, people will not seek HIV-related counselling, testing, treatment and support if this would mean facing discrimination, lack of confidentiality or other negative consequences. ... [C]oercive public health measures drive away the people most in need of such services and fail to achieve their public health goals of prevention through behavioural change, care and health support*[16].

Infringements of human rights must be adequately justified

Sometimes policy-makers invoke public health considerations as justification for laws, policies or practices that negatively affect human rights, such as liberty. In some cases, such human rights restrictions are justifiable. But in some cases they are not. The Universal Declaration of Human Rights provides that:

> *In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society*[17].

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[10] *International Guidelines*, supra; UDHR, Articles 1, 2 and 7; ICCPR, Articles 2, 14 and 26; UN Commission on Human Rights. Resolutions 1995/44 (3 March 1995) and 1996/43 (19 April 1996); UN Human Rights Committee. General Comment No. 18 (37). Official Records of the General Assembly, Forty-fifth Session, Supplement No. 40 (A/45/40), vol. 1, Annex VI A.

[11] *International Guidelines*, supra at para 105.

[12] *International Guidelines*, supra at para 110; UDHR, Article. 3; ICCPR, Article 9.

[13] UDHR, Article 20; ICCPR Articles 21 and 22.

[14] UDHR Article 5; ICCPR Article 7; *International Guidelines*, supra at paras 129-131.

[15] Kirby. The Ten Commandments, supra.

[16] *International Guidelines*, para 74; J Dwyer. "Legislating AIDS Away: The Limited Role of Legal Persuasion in Minimizing the Spread of HIV." *Journal of Contemporary Health Law and Policy* 1993; 9: 167.

[17] UDHR, Article 29(2).

Specifically with regard to the deprivation of liberty, the International Covenant on Civil and Political Rights (ICCPR) states that:

> *No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law*[18].

With respect to right to liberty of movement, the ICCPR states that this right "shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant". The same protections apply to restrictions on the right to freedom of association with others under the ICCPR[20].

Coercive measures should be used sparingly and as a last resort. "The challenge our society faces is to use the available measures sufficiently to restrict the spread of AIDS [sic: HIV], without going so far as to stifle individual freedoms"[21]. State action to prevent the transmission of disease should operate on the principle that the 'least intrusive' measures possible to achieve the demonstrably justified objective are always to be preferred, so as to minimally impair valuable rights and interests. These requirements under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights are reflected in the *HIV/AIDS and Human Rights International Guidelines*:

> *Under international human rights law, states may impose restrictions on some rights, in narrowly defined circumstances, if such restrictions are necessary to achieve goals, such as public health... In order for restrictions on human rights to be legitimate, the state must establish that the restriction is... [b]ased on a legitimate interest, as defined in the provisions guaranteeing the rights; [and] proportional to that interest and constituting the least intrusive and least restrictive measure available and actually achieving that interest in a democratic society, i.e. established in a decision-making process consistent with the rule of law*[22].

It is essential, therefore, that policy-makers engage in a "human rights impact assessment" of law and policy in relation to HIV/AIDS, aimed at protecting public health. Such an assessment would include at least the following steps[23]:

- identify how the policy may affect human rights, through consultations with community-based groups, nongovernmental organizations, public health and other professionals, community leaders, and people infected and affected by HIV/AIDS;
- determine if the objective to be achieved through the policy is compelling, with clearly and narrowly defined public health goals;
- evaluate how effective the policy may be in achieving public health goals, including in comparison to other possible policies;

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[18]ICCPR, Article 9(1).

[19]ICCPR, Article 12(3).

[20]ICCPR, Article 22(2).

[21]R Friedman. The Application of Canadian Public Health Law to AIDS. *Health Law in Canada* 1988-89; 9: 49 at 49.

[22]*International Guidelines*, para. 82.

[23]This process is drawn from the work of a variety of leading experts in the field of human rights and health policy. In particular, see: Gostin L, Lazzarini Z, *Human Rights and Public Health in the AIDS Pandemic*. New York: Oxford University Press, 1997 (pp. 57-67). Additional information may be found in: Gostin L, Mann J, Towards the development of a human rights impact assessment for the formulation and evaluation of health policies. (1994) *Health and Human Rights: An International Quarterly Journal* 58-81; and *AIDS, Health and Human Rights: An explanatory manual*. François-Xavier Bagnoud Center for Health and Human Rights & International Federation of Red Cross and Red Crescent Societies (Cambridge, MA and Geneva: Harvard School of Public Health), 1995 (pp. 39-47).

- assess whether the policy is properly tailored to the objective, in the sense that it is neither over-broad (affecting more people than necessary) nor under-inclusive (affecting some, but not all, of the people it should), and that it is non-discriminatory, and that it does not target individuals or groups, based on prejudice or stereotypes;

- examine the significance of the policy's infringement of human rights, by considering: the nature of the human right affected, the degree to which policy infringes the right, the frequency and scope of the infringement, and the duration of the infringement;

- determine whether the policy is the least restrictive way to achieve the compelling public health objective; and

- if the policy is found to be the most effective, least restrictive option, then ensure that its application occurs on a case-by-case basis (rather than blanket rules applicable to an entire class of people), and is based on a 'significant risk' of harm to others, as well as applied through a procedure that is fair.

Following these steps for assessing potential policies can help avoid unjustifiable infringements of human rights—a goal that is not only desirable in and of itself, but also benefits overall public health because it is a policy approach that does not reinforce misinformation, stigma and discrimination related to HIV/AIDS.

3. Policy considerations

There are a number of policy considerations that should be taken into account in determining criminal law policy in relation to HIV/AIDS. Firstly, policy-makers must consider the objectives of resorting to the criminal law and assess whether, and to what extent, criminalization will achieve those objectives. Secondly, policy-makers must weigh other public policy factors that might mitigate against the use of criminal sanctions.

Objectives of criminalization

Incapacitation

Imprisoning those convicted of crimes is said to incapacitate the offender for the length of their imprisonment, preventing them from harming others. Yet this argument is weak in the context of HIV transmission. Imprisoning the person with HIV who has exposed someone to the risk of infection does very little, if anything, to prevent this harm during the period of incarceration.

It may, in fact, have the opposite effect. There is considerable and mounting evidence that prisons are environments in which high-risk behaviour is common[24]. Far from reducing HIV transmission, imprisonment may have the opposite effect. Furthermore, prisons are not entirely separate from outside communities. Prisoners may receive conjugal visits from partners. In most cases, those serving prison sentences will eventually be released into the community. Risky activities within prisons may contribute to further transmission outside. Prison health issues cannot be separated from the protection and promotion of community health.

Rehabilitation

As noted previously, preventing HIV transmission must be the primary objective in considering the use of coercive measures. Enabling individuals to change their future behaviour so as to reduce the risk of HIV transmission is therefore of critical importance in achieving that goal. But it is uncertain whether imposing criminal penalties for past conduct that transmits, or risks transmitting, HIV can further this objective to any significant degree.

It is contested whether criminal prosecutions and penalties serve any significant rehabilitative function for any significant portion of offenders. Specifically in relation to HIV-risking behaviours, few or no data are available to support the claim that criminal penalties *per se* for HIV transmission/exposure will 'rehabilitate' the offender such that they avoid such conduct in the future. This may particularly be the case for most cases of HIV transmission relating to sexual activity and/or drug use—human behaviours that are complex and very difficult to change through blunt tools such as criminal punishments. Long-term changes in behaviour are more likely to result from other, non-coercive interventions (e.g. counselling and support, addressing the underlying reasons for engaging in risky activities).

Retribution

A principal justification for criminalizing certain conduct is that it deserves punishment because it is morally blameworthy; society appropriately imposes penal sanctions on those who engage in such conduct. This is punishment for punishment's sake, after an offence is committed. This justification for criminal sanctions is not concerned with deterring the offender or others from the prohibited conduct. Retribution has nothing to do with protecting the public health by preventing HIV transmission or risky behaviour; it is about punishing past conduct deemed blameworthy.

[24]See: Jürgens R, HIV/AIDS in Prisons: Final Report. Montreal: Canadian HIV/AIDS Legal Network & Canadian AIDS Society, 1996 (via: www.aidslaw.ca), and references cited therein.

Invoking the criminal law for retribution is only justifiable in those cases where the conduct is clearly morally blameworthy and therefore deserving of punishment. Therefore, the state of mind of the accused person is necessarily relevant. It is the 'guilty mind' directing the prohibited conduct that is really the focus of punishment. Where there is no 'guilty mind,' and hence no moral culpability, criminal sanctions cannot be justified on the basis that punishment is morally deserved. Criminal law generally recognizes different degrees of mental culpability, and not all of them will justify criminal prosecution and penalties. Where to draw this line is not always clear, and will partly depend upon the seriousness of the wrongdoing. (See below for a discussion of which level of mental culpability should be required for criminal liability in the case of HIV transmission or exposure.)

Deterrence

Another argument in favour of criminalization is that it will serve to deter people from conduct that transmits, or risks transmitting, HIV. Unlike the argument based on retribution, deterrence is clearly motivated by public health concerns, since the goal of invoking the criminal law is to prevent future conduct that risks resulting in HIV transmission. But the theoretical importance of this justification for criminalizing risky conduct is unlikely to be matched by any significant deterrent effect in practice.

> *Probably the most important goal of the criminal law in the context of a disease epidemic is deterrence. The best that can be hoped for is that the threat of criminal sanctions will prevent people from taking unreasonable risks that could transmit the virus. The criminal law is not a likely vehicle for deterring such behaviour. In most cases where the criminal law has been used against [people with HIV] there was no motive or advance planning. Spontaneous behaviour driven by human anguish, despair or passion is difficult to prevent*[25].

In those circumstances where reasoned judgement is already outweighed by other, less rational considerations (such as desire, fear or addiction), "adding further reflective considerations such as laws or moral maxims is singularly unsuccessful. The fact that reason has already failed suggests that further reason will not fare any better"[26]. For the handful of people who feel no moral concern for the welfare of others, it is doubtful whether a legal prohibition on conduct that causes or risks harm to others is likely to have any additional deterrent effect. There is also no reason to believe that criminalizing risky sexual or needle-sharing practices will have any significant general deterrent effect in preventing HIV transmission.

> *We cannot be very sanguine about the use of criminal law to compel changes in human sexual behaviour. Realistically, criminal law is likely to be of minimal significance in influencing conduct: other factors, such as fear of infection, are likely to be of greater effect in influencing sexual practices*[27].

Policy makers should acknowledge the lessons of history, which show that prohibiting alcohol and other drugs, consensual sex, or prostitution has never succeeded in preventing these behaviours, and that the harm that follows from stigmatizing them and driving them underground has been greater than any harm (or supposed harm) of the activities themselves[28].

[25]Gostin L, "The Politics of AIDS". *Ohio State Law Journal* 1989; 49: 1017.

[26]Gillett G, AIDS: "The Individual and Society. In: Legal Implications of AIDS". Auckland: Legal Research Foundation, 1989, at 107.

[27]Holland W, HIV/AIDS and the Criminal Law. *Criminal Law Quarterly* 1994; 36(3): 279 at 316.

[28]See: Brandt AM, *No Magic Bullet*: *A Social History of Venereal Disease in the United States Since 1880* (2d ed). New York: Oxford University Press, 1987.

The *United Nations HIV/AIDS and Human Rights International Guidelines* recommend that:

- *criminal prohibitions on sexual acts between consenting adults in private be reviewed, with the aim of repeal;*
- *adult sex work involving no victimization be decriminalized;*
- *states consider legalizing needle/syringe exchange programmes; and*
- *criminal laws applicable to these activities not be allowed to impede the provision of HIV/AIDS prevention and care services*[29]*.*

Broader policy considerations

In addition to considering the possible objectives of invoking the criminal law to deal with HIV transmission/exposure, other public policy factors should be taken into account.

Difficulties with proof

The utility (if any) of criminal prosecution will be hindered by the difficulty of proving certain required elements of an offence beyond a reasonable doubt in order to obtain a conviction. The exact elements that will have to be proved will depend on how an offence is defined in domestic legislation. For example, would criminal penalties apply only in the case of actual transmission of HIV, or also to acts that carry the risk of transmitting the virus, whether or not transmission actually occurs? This issue is addressed in more detail below (see 'Policy options').

But, at the very least, the burden would (and should) be on the prosecution to prove that the accused was HIV-positive at the time of the offence. Depending on the circumstances of HIV testing and record-keeping, it may be difficult to prove this conclusively. As a result, some have suggested compulsory HIV testing for those accused of acts transmitting HIV or risking transmission.

But, testing a person for HIV without their consent, on the basis of a criminal accusation, raises serious human rights concerns associated with liberty, security of the person and privacy. Most obviously and immediately, such a practice would violate bodily integrity to obtain information about a person's health status—information that should, as a general rule, be subject to strict confidentiality. International law recognizes these rights as fundamental human rights[30]. But there are other human rights consequences that may follow for the person who tests HIV-positive or is perceived (even if incorrectly) as HIV-positive. In many settings, the stigma and discrimination may be severe (and, in some cases, may extend even to loss of livelihood, denial of services, rejection by family, community ostracism, or even physical violence).

Aside from these human rights concerns, imposing compulsory testing on persons accused of HIV transmission/exposure, after the acts that are alleged to have transmitted or risked transmitting the virus, will be of little benefit. Testing after the fact will not conclusively prove that the accused was HIV-positive at the time of the offence; it will only establish the accused's HIV status at the time of the test. In the vast majority of cases, such testing is likely to happen weeks, months or possibly even years after the incident that allegedly resulted in someone being infected or exposed to the risk of infection. Unless it can be proved beyond a reasonable doubt that, in the interim, the accused has not been exposed to the risk of

[29] *International Guidelines*, Guideline 4, paras. 29(b),(c),(d).

[30] UDHR, Articles 3 and 12; ICCPR, Articles 7, 9 and 17.

infection (with all the attendant invasions of privacy that would be involved in investigating this possibility), then testing them at this much later stage will not answer the question of whether they were HIV-positive at the time of the alleged offence. The possibility of the accused person having been infected after the alleged offence is higher if she or he has engaged in multiple high-risk activities and/or has done so in a setting where there is a high prevalence of HIV.

Similarly, if the law requires actual transmission of HIV as part of a criminal offence, in many cases it would be difficult to prove conclusively that it was the accused's actions that actually caused the complainant's HIV infection. For example, in many cases it will be impossible to prove beyond a reasonable doubt that the complainant was HIV-negative at the time of the offence and that it was the accused person who infected them.

Even if the law does not require actual transmission for there to be a criminal offence, but rather covers conduct that carries the risk of transmission, it would be unjust (as explained below) to impose a criminal penalty if the complainant knew of the accused's HIV-positive status when consenting to the risky activity (e.g., unprotected sexual intercourse). So the prosecution would need to prove beyond a reasonable doubt that the accused did not disclose their HIV infection to the complainant. To have any other rule would offend the presumption of innocence, which is guaranteed by international human rights norms[31].

Furthermore, the activities that transmit, or risk transmitting, HIV will generally occur in private without third-party witnesses. Furthermore, the communication regarding sexual encounters is often complex, with both verbal and non-verbal elements, with many assumptions made and many things left unsaid. So it will be difficult in many cases to conclusively prove what was or was not said by the participants regarding:

- their own HIV status;
- the extent of their knowledge about their own HIV status and that of their partner;
- their level of knowledge about how HIV is, and is not, transmitted; and
- the levels of risk to which each participant will consent.

Possible detrimental effect on public health initiatives

Policy-makers must also consider the potential impact of criminalization on public health initiatives. "A wise nation would consider whether in [prosecuting individuals who put others at risk of contracting HIV] we advance the public health.... If, on the other hand, criminalization serves to undermine our overall public health response to the HIV epidemic, then we must seriously question whether the gains from criminalization are worth it"[32].

(1) Reinforcing HIV/AIDS-related stigma

The introduction of HIV-specific criminal legislation, and/or individual criminal prosecutions against people with HIV for risky conduct, is often accompanied by inflammatory and ill-informed media coverage. This may contribute to misinformation about HIV and its transmission, and contributes to the stigma surrounding HIV infection and people living with

[31]UDHR, Article 11; ICCPR, Article 14(2). Strictly speaking, the prosecution must legally bear the burden of proving a lack of disclosure on the part of the HIV-positive accused. Nonetheless, the threat of criminal prosecution also raises a fear for people living with HIV: "If I were accused, how could I prove my partner knew of my HIV status?" The legal niceties of the burden of proof may not always be fully understood or respected in the real world of the courtroom, and assumptions and prejudices about people with HIV/AIDS, particularly if they belong to certain groups that face discrimination, may place a de facto burden on the accused person to prove that they did, in fact, disclose their HIV infection to the complainant.

[32]Dalton HL, "Criminal Law," in: S Burris et al., eds. *AIDS Law Today: A New Guide for the Public*. New Haven: Yale University Press, 1993: at 255.

HIV/AIDS as 'potential criminals' and as a threat to the 'general public'. As one court stated in 1985, "AIDS is the modern-day equivalent of leprosy"[33]. Unfortunately, the stigma surrounding HIV/AIDS, and the discrimination that it engenders, remain very real today[34].

(2) Spreading misinformation about HIV/AIDS

Inappropriate, overly-broad use of the criminal law also risks spreading misinformation about how HIV is transmitted. For example, in numerous jurisdictions, serious criminal charges have been laid against HIV-positive people (and inordinately stiff sentences imposed) for biting, spitting or scratching, despite the evidence that the risk of HIV transmission in this fashion is extraordinarily small at most (and, in some cases, completely non-existent). Such prosecutions undermine crucial efforts to educate the public about HIV and how it is, and is not, transmitted. Criminal law has been described as "society's ultimate weapon," meaning that it "must be an instrument of last resort"[35]. Deploying it for cases where there is little or no risk of HIV transmission sends a dangerously misinformed message to the public at large, reinforcing inaccurate impressions of the communicability of HIV, which fosters fear, stigma and discrimination and makes HIV-prevention education more difficult.

(3) Disincentive to HIV testing

Any effect the criminal law has in deterring risk activity could ultimately be outweighed by the harm it does to public health in deterring HIV testing. As noted above, "people will not seek HIV-related counselling, testing, treatment and support if this would mean facing discrimination, lack of confidentiality and other negative consequences.... [C]oercive public health measures drive away the people most in need of such services and fail to achieve their public health goals of prevention through behavioural change, care and health support"[36]. If the person who knows their HIV-positive status is exposed to possible criminal prosecution, this could be a disincentive to getting tested.

Is it inconsistent to claim, on the one hand, that the threat of criminal sanctions will not deter risky behaviour but, on the other hand, that it will deter people from getting tested for HIV? There are few data available to answer this question. However, it must be remembered that engaging in unprotected sex and sharing drug-injection equipment are qualitatively different activities than deciding to undergo HIV testing and then following through on that decision. In many cases, risky sex or the sharing of injection equipment happens without much foresight or deliberation. Furthermore, these activities are motivated by complex human urges or needs (including, sometimes, addiction). Finally, these activities often occur in circumstances where:

- the judgement of one or more participants is impaired (e.g., by the use of alcohol or other drugs);
- one partner has limited control over whether precautions are taken to reduce the risk of transmission of HIV or other STIs (e.g., women unable to insist upon condom use); or
- taking precautions may be too time-consuming or otherwise increase the risk of detection of activity that the participants wish to keep secret or private (e.g., the need to inject drugs quickly and furtively because their possession, or the possession of injection equipment, is illegal).

In contrast, HIV testing is necessarily a more calculated decision that requires

[33]South Florida Blood Service Inc. *vs* Rasmussen, 467 So.2d 798 at 802 (Fla Dist Ct App 1985).

[34]GM Herek et al. HIV Related Stigma and Knowledge in the United States: Prevalence and Trends, 1991-1999. *American Journal of Public Health* 2002, 92: 371-377.

[35]Law Reform Commission of Canada. *Our Criminal Law*. Ottawa: Minister of Supply and Services Canada, 1976.

[36]*International Guidelines*, supra para. 74.

considerably more effort and planning—confronting fears about a positive result and its consequences, visiting a testing site (which may require considerable travel time and expense in some settings), setting up an appointment with a health-care provider, and waiting (and, if necessary, returning) for results.

While it is uncertain that the threat of criminal prosecution will be a significant factor in making decisions about safer sex or needle-sharing in the 'heat of the moment,' the limited evidence available suggests that concern about the negative consequences of testing HIV-positive will, for many people, indeed be a factor in deciding whether to seek testing. For example, some evidence indicates that concern over the confidentiality of test results leads some people to prefer anonymous HIV testing where this is available, as opposed to a testing regime that creates an official record of a person's HIV-positive test result that is disclosed to government health authorities[37]. Furthermore, if the counter-balancing chief benefit of HIV testing is accessing treatment, then this is a non-existent or exceedingly limited benefit for the majority of the world's population living with HIV/AIDS, for whom treatments are often simply unaffordable.

(4) Hindering access to counselling and support

What is the impact of criminalizing risky conduct by people living with HIV/AIDS on their access to support systems such as counsellors? Implementing changes in risk behaviour may be difficult, particularly in circumstances of poverty, the threat of violence from a partner, or addiction. Emotional, spiritual or financial support is often necessary to avoid further risk activities and/or to disclose HIV infection. Invoking the criminal law may undermine access to such support.

If continued risky behaviour is discussed with a physician, spiritual adviser, or counsellor, what use can be made of that information? Will the confidentiality of counselling sessions be sacrificed by prosecutors seizing counsellors' notes in a search for evidence of criminal activity to be used against the HIV-positive person, or by judicial orders compelling counsellors to testify about 'confidential' discussions? Legal protection for the confidentiality of health information or communications to various professionals or other support workers varies across jurisdictions. Compromising confidentiality may also have an effect, not just with respect to HIV, but also on the willingness to seek treatment for other sexually transmitted infections, the presence of which increases the risk of HIV transmission.

(5) Creating a false sense of security

Creating a category of 'other' people who are the sole focus of criminal sanctions may create a false sense of security among people who are (or think they are) HIV-negative, encouraging risky behaviour on their part.

These statutes may create a false expectation that the existence of a criminal law has eliminated any danger from engaging in unprotected sex. To the extent public health policy states everyone should assume their partners are infected and should take measures accordingly, that policy is undermined by the false belief that criminal statutes have helped reduce the risk[38].

[37]For examples of some such data, see: I Hertz Picciotto et al. HIV Test-Seeking Before and After the Restriction of Anonymous Testing in North Carolina. *American Journal of Public Health* 1999; 86: 1446-1450; T Hoxworth et al. Anonymous HIV testing: does it attract clients who would not seek confidential testing? AIDS Public Policy Journal 1994; 9: 182-189; S Kegeles et al. Many people who seek anonymous HIV-antibody testing would avoid it under other circumstances. *AIDS* 1990; 4: 585-588; A Bindman et al. Multistate Evaluation of Anonymous HIV Testing and Access to Medical Care. *The Journal of the American Medical Association* 1999; 280: 1416-1420; D Hirano et al. Anonymous HIV Testing: The Impact of Availability on Demand in Arizona. *American Journal of Public Health* 1994; 84: 2008; and numerous other earlier studies (references to which can be found in the above-cited publications). It should be noted that the bulk of the available reported data on willingness to test is drawn from industrialized countries (particularly the United States), and the conclusions drawn from the data in some of these studies are disputed. It must also be acknowledged that these data do not directly capture the possible impact of criminalization on willingness to get tested; rather, they indicate that concern about a possible negative consequence, such as loss of confidentiality and, presumably, the consequences of stigma and discrimination that may follow, does represent a disincentive to getting tested for HIV.

[38]Hernandez JF in Closen ML et al. Criminalization of an Epidemic: HIV-AIDS and Criminal Exposure Laws. *Arkansas Law Review* 1994; 46: 921 at 971.

Risk of selective prosecution

Another policy consideration is the potential for discriminatory use of the criminal law. Given the stigma that still surrounds HIV and the persistence of HIV-related discrimination, there is a risk that criminal sanctions will be directed disproportionately at those who are socially and/or economically marginalized. There is concern, particularly with the enactment of a HIV-specific criminal law, that individuals belonging to disfavoured, minority groups would be targeted for prosecution and/or would face biased judges or juries.

If states are to invoke the harshness of criminal sanctions in response to conduct that risks transmitting HIV, they must ensure that those accused are not being punished simply for being HIV-positive, or because of their sexual orientation, their work as prostitutes, their use of illegal drugs, or other disfavoured status such as being a prisoner (or ex-prisoner) or immigrant. We must resist "the compelling temptation to join the crowd in the ritual disease-avoidance activities of branding and shunning and locking up"[39].

Gender inequality and criminalization

Imposing criminal sanctions for conduct that transmits HIV or risks transmission would be unjust in circumstances where the HIV-positive person's options to avoid that harm, or risk of harm, either by disclosing to a partner and/or by taking precautions to reduce the risk of transmission, are limited. This is an issue that is of particular relevance to HIV-positive women.

"In most societies, the lower social and economic status of women reduces their ability to insist upon male sexual fidelity and to negotiate safe sex.... In some instances, a wife's mere suggestion that her husband use a condom can provoke physical abuse.... What is the purpose of handing out condoms to women if they have no power within a sexual relationship to negotiate for the use of the condom" [40].

Gender inequality is a barrier to women having the power to protect themselves against HIV infection. Therefore, the desire to impose criminal prohibitions on risky behaviour with a view to protecting women against HIV infection by their partners is understandable. But the implications of gender inequality must also be considered from another vantage point in any discussion of criminalizing HIV transmission or exposure. The effect of invoking the criminal law against women living with HIV/AIDS must also be taken into account.

Some research has shown disturbing levels of physical violence against people living with HIV/AIDS following disclosure[41], including for HIV-positive women at the hands of partners[42]. For women (and men) whose ability to disclose their HIV status and/or to take precautions to reduce the risk of transmission is limited, invoking the criminal law as a response to HIV-risking activity may not ultimately serve to protect, but rather may impose an additional burden on those who are doubly disadvantaged by HIV infection (with its attendant social and economic costs) and by their vulnerability to violence or other abuse.

Invasions of privacy

Finally, states should also consider the potential for intrusion into personal privacy. As already noted, the privacy of 'confidential' records kept by health professionals or

[39]McGinnis JD, Law and the Leprosies of Lust: Regulating Syphilis and AIDS. *Ottawa Law Review* 1990; 22: 49-75 at 51.

[40]Dhaliwal M, Creation of an Enabling and Gender Just Legal Environment as a Prevention Strategy for HIV/AIDS amongst Women in India. *Canadian HIV/AIDS Policy & Law Newsletter* 1999; 4(2/3): 86-89 (via: www.aidslaw.ca or at www.hri.ca/partners/lc/unit/women-hiv.shtm. See also: UNAIDS. *Gender and HIV/AIDS: Taking stock of research and programmes*. Geneva & New York: UNAIDS, 1999.

[41]Zierler S et al., Violence victimization after HIV infection in a US probability sample of adult patients in primary care. *American Journal of Public Health* 2000; 90: 208-215.

[42]North RL, Rothenberg KH, Partner notification and the threat of domestic violence against women with HIV infection. *New England Journal of Medicine* 1993; 329: 1194-1996; Rothenberg KH et al., Domestic violence and partner notification: implications for treatment and counseling of women with HIV. *Journal of the American Medical Women's Association* 1995; 50: 87-93; Rothenberg KH & Paskey S, The risk of domestic violence and women with HIV infection: implications for partner notification, public policy, and the law. *American Journal of Public Health* 1995; 85: 1569-1576.

counsellors could be lost in the search for evidence. In addition, criminal prosecutions are public proceedings, and the HIV-positive status of the accused would become widely reported. Some might argue that this is necessary to achieve the deterrent effect of the criminal law. However, states must examine whether this outweighs the harm of invading privacy and of fueling HIV/AIDS-related stigma and discrimination, and whether such public attention is desirable or justifiable if there are other alternatives that can achieve the objectives said to be served by criminalization, while being less intrusive of people's privacy.

Conclusion regarding use of criminal law as a policy

"The behaviours sought to be controlled or punished are highly engrained, intimate and deeply human activities. Coercive state action is a particularly crude tool to use in changing in these behaviours. Each of the usual rationales for the criminal law—retribution, incapacitation and deterrence—appear ill-suited to deal with a disease epidemic." [43]

For the reasons set out above, the retributivist and deterrent functions of criminal law offer the strongest arguments in favour of using the criminal law to address conduct that transmits, or risks transmitting, HIV. However, even those arguments offer only qualified support for criminalization as the policy approach, and might justify only a limited use of the criminal law. Furthermore, there are other considerations that policy-makers should weigh.

As has been outlined, any such legislation must be carefully drafted to avoid unjustifiably infringing on human rights. People living with HIV/AIDS have a right to non-discrimination and to equality before the law. Similarly, policy-makers must avoid basing laws on stereotypes or prejudices about groups commonly associated in the public mind with HIV/AIDS, such as sex workers, gay men and other men who have sex with men, injecting drug users, or immigrants (in some contexts), who also have the human right to non-discrimination and to equality. Policy-makers should also consider the negative effect that criminal legislation may have on the human right to privacy (by opening the door to wide-ranging investigation into many people's private sexual conduct) or on the right to bodily integrity (by authorizing compulsory HIV testing)—rights that are recognized in international law as human rights. An ill-conceived resort to the criminal law may also result in other injustices, such as imposing the burden of criminal sanctions upon those people living with HIV/AIDS (and, in particular, women) whose ability to disclose their status or avoid risky behaviours is circumscribed. What is required is a 'human rights impact assessment' of any proposed criminal law to determine, through careful consideration, whether the proposal may do more harm than good to basic human rights.

On the broader level of public health, it is also not clear that criminalization is the best policy approach. Policy-makers must consider, in light of the best evidence that is available, what the impact of criminalization as government policy may be on HIV prevention efforts or on access to care, treatment and support. Counter-balanced against any limited effect the law may have in deterring a person who knows he or she is HIV-positive from engaging in risky behaviours without disclosure, policy-makers must consider the impact that such prosecutions may have on people's willingness to get tested in the first place—a key element of effective HIV prevention strategies. Furthermore, the ill-considered use of the criminal law to address circumstances involving little or no risk of transmission will not only trivialize the seriousness of the law itself, and result in injustices through harsh penalties, disproportionate to the gravity of the punished conduct, but will also reinforce misinformation and stigma related to HIV/AIDS, further hindering HIV prevention efforts.

Overall, while the use of the criminal law may be warranted in some circumstances, it is not clear that this is always the best response. Furthermore, where it is used, it should be as a measure of last resort, and should be carefully circumscribed to avoid unnecessarily and unjustifiably infringing upon important human rights norms and undermining other important public policy objectives such as preventing HIV/AIDS and ensuring access to care, treatment and support for those infected and affected by the disease.

[43] Gostin, supra at 1019, 1041, 1056.

4. Policy options

Public health law as an alternative to criminalization

"One reason people tend to accept uncritically criminalization of HIV is that they do not compare it to other possible methods of dealing with the problem"[44]. But to protect and promote the public health, states need not always rely upon criminal law. Rather, policy-makers need to examine other alternatives for preventing HIV transmission in the light of the guiding principles and range of policy considerations outlined above. Public health laws are an obvious alternative that should be considered.

Elements of public health laws

While public health laws vary from jurisdiction to jurisdiction, with respect to transmissible diseases, their three primary functions are to:

- classify transmissible diseases, specifying which legal provisions apply to which diseases;
- impose legal duties on certain people (e.g. physicians) to identify, report and treat diseases; and
- grant powers to public health officials to be exercised in the prevention and treatment of diseases.

At the most coercive extreme, public health laws take on a quasi-criminal character. Health officials may have the power to compel examination and medical treatment of people suspected of being infected with a transmissible disease. They may also order an infected person to conduct themselves in such a manner as to avoid, or reduce the likelihood of, infecting others. An example would be an order prohibiting a HIV-positive person from having unprotected sex and/or ordering that person to disclose his or her HIV infection to sexual partners. Depending on the legislation in question, breaches of such public health orders could result in penalties such as fines or imprisonment; or such orders could be backed up by court orders, with similar penalties for breaching a court-issued order. Health officials also generally have the power to detain a person if this is demonstrably justified as necessary to prevent the transmission of disease (generally and preferably in a health-care setting, although again legislation and practice may vary across jurisdictions). The law may authorize the use of the state's police powers to enforce detention orders by public health officials.

Public health law *vs* criminal law

Four primary objectives, theoretically served by the criminal law, were identified above: retribution, rehabilitation, incapacitation and deterrence. Criminal law measures to achieve those objectives should be subject to a human rights impact assessment, as outlined. If, on balance, the use of public health powers can achieve those objectives, while doing less damage to public health initiatives and other important interests (such as rights to non-discrimination and privacy), then resorting to the criminal law may be unnecessary and unjustified. Therefore, policy-makers need to consider how public health interventions can achieve these goals.

- **Retribution**

There is no question that criminal law is certainly better suited than public health laws for punishing and publicly denouncing objectionable conduct. But unless great care is taken, rather than imposing a justifiable penalty as a consequence for wrong behaviour,

[44]Bobinski MA in Closen et al., supra at 969.

retribution may amount to seeking revenge, opening the door further to social prejudices and misinformation. People with HIV/AIDS are often seen as being to blame for their own infection and punished for who they are as much as for what they have done. Discrimination and stigma already undermine efforts to prevent HIV transmission.

- **Rehabilitation**

Public health powers are better suited to achieving the goal of rehabilitation (in the sense of enabling individuals to avoid conduct that risks HIV transmission). "Although rehabilitation may be a goal of [criminal justice system] agencies, their principal purpose is to control and punish illegal behaviour. In contrast, public health agencies have a largely ameliorative role"[45]. Interventions by public health workers or other support workers can be tailored to fit an individual's specific circumstances, such as a fear of domestic violence that may prevent a HIV-positive woman from disclosing her status to her partner or practising safer-sex.

- **Incapacitation**

In extreme cases, public health legislation offers coercive interventions that are preferable to, and more effective than, criminal prosecution in achieving the goal of incapacitation. For reasons already noted above, imprisoning a person with HIV may well increase (and not decrease) the likelihood of infecting others. If public health powers are involved, an individual who persists in conduct that places others at risk could, if less intrusive measures fail, be detained in a setting where less high-risk activity occurs than in a prison, and where appropriate health-care services are available and the goal of rehabilitation is better served.

- **Deterrence**

If preventing HIV transmission is the primary goal, then the most important consideration in shaping legal responses must be their impact on risky behaviour. Public health interventions are more flexible, and can be better tailored to the individual's circumstances than the blunt tool of a criminal prosecution. Different approaches may be adopted for those whose ability to take precautions is limited (for reasons of mental illness, for example) or for those who resist taking precautions. Increasingly coercive measures can be adopted if less coercive measures fail. Public health orders may have some deterrent effect on the specific individuals to whom they apply, and can be directed at prohibiting certain conduct while preserving the person's liberty in other respects.

If public-health orders are enforceable by the courts and police, it is unclear whether the threat of a criminal prosecution will have any significant effect in modifying behaviour. The public nature of criminal prosecutions may yield a greater deterrent effect in general, although experience suggests that the activities accounting for most HIV transmission are highly resistant to change and persist in the face of criminal prohibitions. Interventions by public health officials, which are more tailored to an individual's life circumstances, may ultimately be more effective in achieving changes in behaviour.

What these considerations suggest is that "[i]n the very small number of cases where involuntary measures are reasonably and demonstrably essential, the use of carefully controlled involuntary public health measures is generally to be preferred over criminal sanction"[46].

Preventing the misuse of public health laws and powers

Public health laws, particularly in their more coercive aspects, are subject to the same misuse as criminal laws. The United Nations has cautioned against the inappropriate

[45]Hammett T et al., Stemming the Spread of HIV among IV Drug Users, their Sexual Partners, and Children: Issues and Opportunities for Criminal Justice Agencies. *Crime and Delinquency* 1991; 37: 101 at 102.

[46]National Advisory Committee on AIDS, "*HIV and Human Rights in Canada*". Ottawa: The Committee, 1992.

application of provisions in public health laws that may be suited for casually communicable and often curable diseases, but not for HIV/AIDS[47]. Keeping in mind the guiding principle of 'least intrusive, most effective,' graduated interventions are recommended in the exercise of public health powers, with coercive measures such as detention used only as a last resort, and with necessary safeguards to ensure that such powers are not misused and are applied in a fashion consistent with fundamental human rights norms such as those set out in the *UDHR* and the *ICCPR*.*The HIV/AIDS and Human Rights International Guidelines* provide that:

> *Public health legislation should ensure that people not be subjected to coercive measures such as isolation, detention or quarantine on the basis of their HIV status. Where the liberty of persons living with HIV is restricted, due process protection (e.g. notice, rights of review/appeal, fixed rather than indeterminate periods of orders and rights of representation) should be guaranteed[48].*

Applying the criminal law: Which approach? Which acts? Which states of mind?

Given the points noted above, in situations where criminalization is deemed an option, public health measures should be exhausted first before resorting to criminal sanctions. However, any application of the criminal law should be informed by the guiding principles outlined at the outset, namely: preventing HIV transmission is the primary objective; decisions should be based on the best available evidence; respect for human rights; and infringements of human rights require adequate justification.

Guided by these principles, policy-makers must address at least three major questions in determining the parameters of criminalization:

- Should HIV-specific legislation be enacted instead of using general offences?
- Which acts should be subject to criminal prohibition?
- What degree of mental culpability should be required for criminal liability?

HIV-specific legislation *vs* application of general offences

Two different approaches to criminalization are possible. The first approach is to apply existing criminal law offences (e.g. assault, criminal negligence causing harm, endangering public health, etc.) to conduct that transmits HIV or risks transmission. Depending on the law in a given jurisdiction, this might be an offence found in a criminal or penal code, or might be found in a separate public health statute. The appropriate offence would depend upon the conduct in question and the provable mental state of the accused. Such an approach means that prosecutorial initiative and judicial interpretation of traditional criminal offences, in response to specific complaints, will shape the contours of the criminal law's application to HIV transmission/exposure.

The second approach is to enact legislation that specifically prohibits and penalizes, as an offence under either criminal or public health statutes, certain specified conduct that transmits or may transmit HIV. This approach means that criminalization is at the initiative of legislators (which may or may not be in response to particular cases), and the contours of the law are more directly defined.

[47] UNAIDS and IPU, *Handbook for Legislators on HIV/AIDS, Law and Human Rights*. Geneva: UNAIDS, 1999: at 45.

[48] *International Guidelines*, Guideline 3, para 28(d).

Examples of both approaches are found across legal systems and in both developing and industrialized countries. The approach of enacting HIV-specific criminal statutes has been particularly common in various jurisdictions in the United States, following the 1988 report of a presidential commission[49]. This has not, however, prevented the use of other pre-existing offences as well.

In contrast:

- proposals to amend the Canadian Criminal Code to create HIV-specific offences have been rejected (indeed a previous section prohibiting the transmission of 'venereal disease' was repealed in 1985), and the development of criminal law in relation to HIV transmission/exposure has proceeded through judicial interpretation of traditional offences[50].
- In the United Kingdom, there is no unified penal code, and there is currently no HIV-specific statute; recent proposals for law reform in the area of criminal law, consent, and offences against the person do not appear to single out HIV for specific treatment[51].
- In Australia, there is considerable variance between states: both criminal and public health HIV-specific offences have been enacted in some states; in others, criminal law is only partly codified, with common law offences remaining in effect.
- In South Africa, the Law Commission has recommended against creating a specific offence aimed at "AIDS-related behaviour"[52].
- In Sweden, there is no HIV-specific criminal offence; the public health statute provides for coercive measures including compulsory isolation orders, if necessary, after trying to obtain voluntary compliance[53].
- The Philippines imposes criminal penalties for knowingly or negligently infecting another person "in the course of the practice of his/her profession through unsafe and unsanitary practice or procedure", but does not otherwise specifically address HIV in its criminal law, and breaching the express obligation on any person with HIV to disclose his/her status to a spouse or sexual partner "at the earliest opportune time" does not carry any apparent penalty[54].
- Malawi's penal code contains an offence relating to negligent conduct likely to spread a disease endangering life[55].
- Argentina's penal code include a broadly-worded offence against public health of "propagating a dangerous and contagious illness", but does not single out HIV/AIDS[56].

[49]Report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic. US Government Printing Office, 1988.

[50]Elliott R, Criminal Law and HIV/AIDS: Final Report. Montreal: Canadian HIV/AIDS Legal Network & Canadian AIDS Society, 1997 (via www.aidslaw.ca).

[51]Law Commission. Consent in the Criminal Law (Consultation Paper No. 139). London: HMSO, 1995; Law Commission. Violence: Reforming the Offences against the Person Act, 1861 (consultation document). 1998.

[52]South African Law Commission. Fifth Interim Report on Aspects of the Law Relating to AIDS: The Need for a Statutory Offence Aimed at Harmful HIV-Related Behaviour (April 2001) (via: www.law.wits.ac.za/salc/salc.html).

[53]Communicable Diseases Act, SFS 1988: 1472.

[54]Philippine AIDS Prevention and Control Act of 1998, Republic Act No 8504, ss. 12 & 34.

[55]Correspondence from MM Katopola, Office of the Law Commission of Malawi, 7 February 2000.

[56]Código Penal de la República Argentina, Art. 202 (per original text of Law No. 20771) (via: www.codigos.com.ar).

- Mexico's federal penal code makes it an offence for a person who knows she or he has a "venereal disease or other grave illness" to "risk infection" of another person though sexual relations or other means of transmission, without express reference to HIV/AIDS[57].

There are two primary arguments in favour of enacting HIV-specific criminal statutes:

- There is a potential for defining the prohibited conduct and punishment within the law rather than leaving this task to the courts in their interpretation of whether and how traditional offences apply to HIV transmission/exposure.
- A carefully drafted statute could minimize the likelihood of judicial mis-definition of the criminal law, avoiding judicial waywardness resulting in the over-extension and inappropriate application of the law (and the attendant harms).

However, many arguments against the implementation of HIV-specific statutes have been raised.

- Firstly, such statutes may be unnecessary. Existing criminal offences may be adequate in addressing conduct that is legitimately criminalized.
- Secondly, creating a new offence could compound the problem of criminalization, if a new criminal charge is treated by prosecutors as an addition to traditional criminal law charges. The benefit of a carefully and tightly drafted statute in preventing the misuse of the criminal law would be squandered unless such a statute also expressly ousts the applicability of other offences.
- Thirdly, a HIV-specific statute would not have any additional deterrent effect over and above the deterrent effect (such as it may be) of criminal prosecution under traditional criminal offences.
- Fourthly, and most significantly, the process of enacting such legislation could be damaging and single out people with HIV/AIDS as potential criminals. Contributing to the stigma associated with HIV/AIDS would (further) deter HIV testing, undermine education efforts, and impede access to counselling and support services that would promote changes in behaviour to reduce the risk of HIV infection.

The United Nations' *International Guidelines on HIV/AIDS and Human Rights* recommend that:

> *Criminal and/or public health legislation should not include specific offences against the deliberate and intentional transmission of HIV but rather should apply general criminal offences to these exceptional cases. Such application should ensure that the elements of foreseeability, intent, causality and consent are clearly and legally established to support a guilty verdict and/or harsher penalties*[58].

Defining the prohibited conduct

There are three important considerations in determining which physical acts may appropriately fall within the purview of the criminal law as it relates to conduct that transmits HIV/AIDS. The guiding principles and the policy considerations noted above suggest the answers to these questions.

[57]Código penal federal, Article 199bis (via: www.cddhcu.gob.mex/leyinfo/11/216.htm).

[58]*International Guidelines*, Guideline 4, para 29(a).

(1) Transmission *vs* exposure

Should criminal liability exist only where conduct actually results in HIV transmission, or should it extend to some conduct that risks transmitting HIV even if, in a given case, there is no actual transmission? Since preventing HIV transmission is the primary objective, it makes most sense for the law to target conduct that creates a risk of transmission, rather than imposing criminal penalties only in those cases where the risk actually materializes.

(2) Degree of risk

The degree of the risk of HIV transmission must also be considered in determining the physical acts to which the criminal law may apply. A consideration of the guiding principles, the rationales for criminalization, and the other relevant policy considerations strongly suggests that only conduct that carries a 'significant' risk of HIV transmission is legitimately the target of the criminal law. To extend the criminal law to actions that pose no significant risk of transmission is unwarranted, for a number of reasons:

- it trivializes the seriousness of criminal sanctions—society's harshest response to objectionable conduct;
- assuming the accused had the mental culpability that deserves punishment, it imposes a penalty disproportionate to the offence, harsher than that deserved by the offender;
- it discriminates against the accused person on the basis of his or her HIV status, rather than focusing on his or her conduct;
- it does not advance the primary objective of preventing HIV transmission, since the conduct in question carried no significant risk of transmission;
- it actually undermines the objective of preventing HIV transmission by perpetuating the misperception that the conduct must carry a significant risk of transmission because it has been targeted for criminal prosecution.

In determining what constitutes a 'significant' risk of HIV transmission for the purposes of criminal liability, again states should be guided by the basic principles. Law and policy must rely on sound data regarding risk levels of various activities. Similarly, the principle of restraint in the use of coercive measures suggests that the criminal law is most appropriately used with regard to those acts that truly carry the highest risk of transmitting HIV, rather than those that carry a low or negligible risk.

(3) The nature of the conduct: coercive *vs* consensual

Coercive conduct

Conduct that risks transmitting HIV may be either coercive (e.g. rape, stabbing with a needle) or may be activity to which the participants are consenting (e.g. consensual sex, sharing injection equipment).

Physically assaultive conduct is criminal in itself, regardless of whether it carries any risk of HIV infection. Coerced participation in risky behaviour is not 'consensual' and should (where not already the case) be treated as criminal behaviour, not because the offender is HIV-positive, but because their conduct is coercive, violating their partner's autonomy and physical and mental integrity.

It is the assaultive conduct, not the HIV status of the offender, that is relevant in determining whether or not a crime has been committed. Criminalizing an offender on the basis of their HIV status, and not their conduct, would violate the right to non-discrimination. In some cases, the fact that the offender is HIV-positive may appropriately be considered an 'aggravating' factor because the conduct carried an additional risk of harming the victim of the assault by causing HIV infection. But not all assaultive conduct carries any significant risk of HIV transmission, and care must be taken to ensure that the criminal law is not misused in

response to assaultive conduct by HIV-positive individuals. Good law must be based on good evidence. More serious criminal charges (or harsher penalties), on the basis of an offender's HIV-positive status, cannot be justified in the absence of solid proof that the assaultive conduct carried a significant risk of transmitting the virus. A sexual assault causing trauma that increased the risk of infection could legitimately be treated as a more serious criminal offence. But an extreme charge such as 'aggravated assault' or 'attempted murder' for conduct such as biting or spitting by a HIV-positive person is unwarranted, for the aforementioned reasons relating to potential over-extension of the criminal law.

Consensual conduct: deceit and non-disclosure

Applying the criminal law to consensual activity that carries the risks of HIV transmission (e.g. sex, sharing injection equipment) is more problematic. The criminal law's ultimate concern is to prevent a person from harming others. In the absence of such a compelling reason, there is no justification for criminalizing consensual activity, as this infringes upon the right to privacy, to liberty, and to security of the person. Yet even the objective of preventing harm must be weighed against respect for each person's bodily autonomy; the right to liberty includes the right to risk harm to one's own self. Under what circumstances, if any, should the criminal law be applied to consensual conduct that risks transmitting HIV?

The question here is the meaning of "consent." Certainly the individual who is aware of a partner's HIV infection and, with that knowledge, engages in sexual or needle-sharing activity that risks transmission, is consenting to that risk of harm, even if there is a very significant risk. There is no justification for criminalizing the HIV-positive person whose partner consents to running this known risk. While the primary objective of invoking the criminal law must be to prevent HIV transmission, respect for autonomy dictates that the criminal law should have no role to play when individuals knowingly decide to engage in activities that risk their health. To do so would mean that people could not consent to engage in a whole host of other activities (e.g. sporting activities, medical procedures) in which they run a risk of harm.

But the more difficult question is whether a person consents to engage in risky behaviour if they are unaware of their partner's HIV infection (and perhaps believe their partner to be HIV-negative). At one end of the spectrum, coercion makes participation in risk activities non-consensual by definition, regardless of whether or not there is knowledge of HIV infection, and the imposition of criminal penalties is warranted. At the other end of the spectrum, full knowledge of risk makes participation clearly consensual, and there is no justification for criminalization.

At what point along the spectrum is it justified to invoke the criminal law where a person has less than 'full' knowledge? Should it be a criminal offence for a person who knows they are HIV-positive to obtain a partner's 'consent' to conduct that risks transmitting HIV by deceit—that is, actively misrepresenting the fact that he/she is HIV-negative? Should criminal liability extend further, imposing a positive obligation to disclose HIV infection to the other person who is 'consenting' to engage in activity that puts them at risk? It is suggested that criminal sanctions may be applied to cases of deceit, but that mere non-disclosure of HIV-positive status should not amount to a criminal offence.

Again, it is a question of balancing between guiding principles. Respect for autonomy means that, as a general rule, the criminal law should not be so paternalistic as to interfere with someone's decision to engage in activity in which they risk harm to themselves (e.g. unprotected sex). However, dishonesty that may result in serious harm undermines autonomous decision-making. In this sense, it is similar (although by no means identical) to coercion. This suggests that deliberately deceiving someone as to the risk of harm of engaging in a certain course of conduct (e.g. unprotected sex) may properly be criminalized. Prohibiting and penalizing deliberate deceit is also aimed at furthering the objective of preventing HIV transmission through the deterrent effect (such as it may be) of threatening punishment for actively misleading partners to secure 'consent' for risky activity. Finally, it is conduct that, in the absence of some justification or excuse, may be characterized as morally blameworthy, and therefore deserving of punishment through criminal sanctions.

However, in the absence of deceit, should the law criminalize the HIV-positive person who engages in an apparently consensual risky activity without disclosing his or her status? In other words, should the criminal law impose a positive obligation to disclose HIV infection? Sexual activity, with any partner, always carries some risk of lesser or greater harm, be it unwanted pregnancy or disease. Unlike the case of coerced sex, which should attract criminal liability, a person engaging in non-coercive sex does not need to know the HIV status of the sexual partner in order to make meaningful choices. He or she may choose not to engage in certain sexual acts so as to avoid the higher degree of risk they pose, may choose to take preventive measures to lower the risk to a level they find acceptable (e.g. condom use), or may choose to engage in unprotected sex, aware that a risk of HIV transmission may exist. Furthermore, unlike the case of deliberate deceit as to a partner's HIV status, in the case of simple non-disclosure he or she has not been misled into basing choices on wilful misinformation. While promoting respect for autonomy might justify criminal penalties for deliberate deceit, it is a weaker argument for criminalizing mere silence.

While the person who does not know his or her partner's HIV status does not, by virtue of this, lose their ability to make autonomous decisions about risky activities, the HIV-positive person may well be inhibited from choosing to disclose their HIV status, particularly if they face the possibility of violence. A rule of mandatory disclosure of HIV infection would fall most heavily upon those whose circumstances compound the difficulties of disclosure. At the very least, any duty to disclose must be qualified by recognizing that the alternative of taking precautions to reduce the risk of transmission should suffice to avoid criminal liability.

Whether the law is limited to criminalizing deceit or whether it is extended further to criminalize non-disclosure, given the adverse consequences of disclosure for the HIV-positive person, criminal sanctions should only apply to cases where the conduct poses a significant risk of HIV transmission. This adequately respects the autonomy of sexual partners of people living with HIV, and satisfies the important objective of preventing the spread of HIV, while taking into account the risks of disclosure and the possibility of alternative means of reducing the chance of transmission. Indeed, allowing the HIV-positive person to avoid criminal liability by taking precautions is good public policy, because to criminalize the HIV-positive person who, although she/he does not disclose, actually practises safer sex or otherwise seeks to reduce the risk of transmission, would be directly counter-productive to the very goal of preventing further transmission. In a decision directly considering the question of criminal liability for not disclosing HIV infection before unprotected sex, the Supreme Court of Canada has recognized the importance of restricting the application of the criminal law to cases where there was truly a "significant risk" of HIV transmission, and has also suggested that taking precautions such as condom use could be considered to lower the risk sufficiently that no criminal liability should arise for not disclosing HIV infection[59].

Defining mental culpability

While the criminal law (whether codified or determined by judicial interpretation) must define the conduct that is prohibited, it must also determine when that conduct is culpable and when it is innocent. Culpability is a question of the state of mind of the accused person at the time they engaged in the prohibited conduct.

(1) Levels of mental culpability

Where to draw the line for criminal culpability is not always clear, and will partly depend upon the seriousness of the wrongdoing. The criminal law recognizes different degrees of mental culpability, and not all of them will justify criminal prosecution and punishment in all circumstances.

[59] R v Cuerrier [1998] 2 SCR 371 (Supreme Court of Canada).

In general, the law recognizes three levels of mental culpability:

- **Intent:** From a legal perspective, a person *intentionally* commits a crime either when it is his or her *purpose* to commit it, or if he/she *knows* with some certainty that his or her conduct will bring about the prohibited result. The exact characterization of the degree of certainty required may vary across jurisdictions, even within jurisdictions sharing the same basic legal tradition.
- **Recklessness:** A person is criminally *reckless* when he or she foresees that his or her conduct may cause the prohibited result but, nevertheless, takes a deliberate and unjustified risk of bringing it about. In other words, in order to be reckless, a person must be aware that their conduct carries a risk of harm, and *unjustifiably* run that risk. While reckless conduct is sometimes prohibited and punished with the weight of criminal law, this is not always the case. This will depend on how the offence is defined.
- **Negligence:** As a general rule, a person must either intentionally or recklessly commit an offence in order to be found guilty. Ordinarily, conduct that is merely negligent is not subject to criminal sanction (although it may attract civil liability). In a few circumstances, negligent conduct may attract criminal liability. In such cases, the person is deemed blameworthy and deserving of punishment because they failed to be aware of the possible harm from their conduct. However, even in such cases, generally it is *gross* negligence, and more than mere, ordinary negligence, that must be proved in order for the individual in question to be judged guilty of a crime. In other words, the conduct must markedly deviate from the ordinary care that would have been exercised by a 'reasonable person.'

Cases of *intentional* transmission of HIV are relatively rare; it is not often that someone engages in risky behaviour (e.g. unprotected sex) for the *purpose* of infecting someone else, or with the certain *knowledge* that their conduct will transmit the virus. Such a degree of mental culpability is, however, the most clearly included in the scope of the criminal law.

Whether the criminal law should extend to *reckless* or *negligent* conduct in the context of HIV transmission/exposure is more questionable, and a number of factors must be considered:

- the degree of risk that should be legally defined as *unjustifiable*, such that running that level of risk could amount to criminal recklessness;
- when conduct amounts to a *substantial deviation* from the level of careful conduct that is expected of the ordinary, reasonable person, such that it can be considered criminally negligent.

Lowering the threshold for criminal liability below the *intentional* transmission of, or exposure to, HIV raises a concern about the potential for bias and prejudice to enter into the interpretation and application of the criminal law if liability rests on such difficult and loosely-defined concepts.

> There is, however, a significant risk that bias and arbitrariness will infect the process whenever *recklessness* is the applicable mental element in AIDS cases.... Concepts like *recklessness* and *negligence* assume a common psychology, a common set of concerns, a common way of viewing the world. However, one of the realities spotlighted by the HIV epidemic is that we don't always identify successfully with one another, or comprehend the lived experience of people very different from ourselves. Especially when sexual risk-taking is at issue, there is palpable risk that jurors will bring to the evaluative process pre-existing images of and attitudes towards the groups most closely identified with AIDS.... There is a risk that jurors will be predisposed to see HIV-positive defendants as *abnormal*, *deviant* and *reckless*[60].

(2) Principle of material awareness

Regardless of which level of mental culpability is deemed sufficient to impose liability, the *principle of material awareness* is fundamental in criminal law: in order to be held liable for a crime, a person must have understood the material character of his or her conduct. The person who does not understand the nature of his/her conduct cannot be said to have the *guilty mind* necessary for criminal penalties.

> It would be unfair to punish a person on the basis of mere ignorance. Further, it is unrealistic to expect the criminalization of HIV transmission to modify the behaviour of an individual who is unaware of their infection. If knowledge [of HIV infection] is not required to constitute the offence, the shadow of criminal liability would hang over the head of every person who has not received a negative HIV test result[61].

What it also suggests is, in order to be held criminally liable, the HIV-positive person must understand both that HIV is a communicable disease and how it may be transmitted—that is, he/she must understand that his or her conduct carried a risk of causing personal injury by infecting another person. Whether the criminal law is applied to HIV transmission/exposure by enacting specific legislation or by judicial application of ordinary offences, it is unfair to criminally punish a person who has no knowledge that their conduct risks harming another, unless they can be said to be grossly negligent in not being aware of this risk. Yet

> [u]nfortunately, the bare fact that a person has been informed of his [or her] HIV status does not mean that he [or she] received adequate risk-reduction counselling, or any counselling at all. Absent such counsel, provided at a time and in a manner well calculated to promote understanding, we cannot be confident that the accused even knew, for example, which sex acts are risky and which are relatively safe[62].

A great deal of misinformation and misunderstanding about the transmission of HIV persists. On a pragmatic level, this reinforces the need for caution in the use of the criminal law, so as not to contribute to such confusion by prosecuting conduct that carries no significant risk of transmission. On an ethical level, it also highlights the need for restraint by avoiding criminalization where the individual does not appreciate the fact that their conduct carries a risk; in such circumstances, the objective of preventing HIV transmission calls for education, not prosecution.

[60]Dalton HL, "Criminal Law." In: S Burris et al. *AIDS Law Today: A New Guide for the Public*. New Haven: Yale University Press, 1993, at p. 250.

[61]Turner A, Criminal Liability and AIDS. *Auckland University Law Review* 1995; 7: 875-895: at 889.

[62]Dalton, supra at p. 251.

5. Conclusion and recommendations

"The haste to criminalize the risk of AIDS transmission ignores the failure of previous attempts to control venereal disease, as well as the considerable jurisprudential and public health problems that would arise" [63].

In the preceding sections, this paper has outlined some guiding principles and numerous policy considerations that policy-makers should bear in mind when considering the issue of criminalizing HIV transmission and/or exposure. It has also identified a possible alternative to the use of the criminal law, and identified some key questions to be addressed in examining this question. The recommendations that follow are put forward to inform the development of sound public policy in this area.

Facilitating HIV prevention, care, treatment and support

Protect against discrimination and protect privacy

States should enact or strengthen laws that protect people living with HIV/AIDS and other disabilities, as well as other vulnerable groups, from discrimination, as well as laws that protect privacy and confidentiality[64].

Address underlying causes of vulnerability to HIV infection and risk activities

As recommended by the United Nations, "States, in collaboration with and through the community, should promote a supportive and enabling environment for women, children and other vulnerable groups by addressing underlying prejudices and inequalities through community dialogue, specially designed social and health services and support to community groups"[65].

Ensure access to HIV testing, counselling, and support for risk reduction

States should ensure access to HIV testing, accompanied by pre- and post-test counselling, to enable people to determine their HIV status, a critical component of preventing further transmission. States should also ensure access to understandable information about how to protect against HIV transmission, accompanied by the economic, social and personal supports necessary to avoid conduct that risks HIV transmission.

Ensure access to anti-HIV treatment following exposure

States should ensure that at least those persons exposed to possible HIV infection through assault or occupational injury should have free, rapid access to anti-HIV post-exposure prophylaxis, as well as counselling and support.

Repeal or amend laws that impede HIV prevention, care, treatment and support

As recommended by the United Nations, states should review, with the aim of repeal or amendment, laws prohibiting sexual acts between consenting adults in private, laws prohibiting sex work that involves no victimization, and laws prohibiting measures such as needle/syringe-exchange that can reduce the harms (including HIV infection) associated with illicit drug use[66].

[63]Gostin L, The Politics of AIDS: Compulsory State Powers, Public Health and Civil Liberties. *Ohio State Law Journal* 1989; 49: 1017.

[64]*International Guidelines*, Guideline 5.

[65]*International Guidelines*, Guideline 8.

[66]*International Guidelines*, Guideline 4, para 29 (b-d).

Use of criminal or coercive public health laws

Use coercive measures as a last resort

Public health laws and policies should provide for interventions in individual cases to prevent HIV transmission that: are appropriate to a disease such as HIV/AIDS that is not casually communicable and has no cure; protect confidentiality of the individual living with HIV/AIDS to the greatest extent possible; are flexible and can be adapted to address the individual's circumstances related to ongoing risky behaviour; take a graduated approach that employs coercive measures only after less intrusive measures have proven ineffective; and incorporate procedural safeguards to avoid the misuse of such powers in violation of human rights. Criminal prosecutions, as the most coercive and stigmatizing of measures, should be reserved for those cases where public health interventions have not succeeded in achieving the objective of preventing further HIV transmission. Protocols should be developed to ensure coordination between public health officials, law enforcement and prosecutors based on this principle of a graduated approach.

Set parameters on the use of criminal law

Should states decide to invoke the criminal law, the following parameters for its use are suggested:

(1) No HIV-specific legislation

As already recommended, "Criminal and/or public health legislation should not include specific offences against the deliberate and intentional transmission of HIV but rather should apply general criminal offences to these exceptional cases. Such application should ensure that the elements of foreseeability, intent, causality and consent are clearly and legally established to support a guilty verdict and/or harsher penalties"[67].

(2) Prohibited conduct and excluding liability

- The criminal law may appropriately be extended to conduct that not only results in actual transmission of HIV, but that exposes others to a significant risk of infection. Criminal sanctions should not apply to acts that pose no significant risk of transmitting HIV.
- Criminal charges applicable to coercive, assaultive conduct should be appropriately applied to cases where the accused is HIV-positive. More serious charges or harsher penalties against an HIV-positive accused must be justified on the basis of the best available scientific evidence regarding the risk of transmission posed by the assault, rather than simply the HIV infection of the accused.
- Criminal charges should not apply to an HIV-positive person for conduct that poses a risk of transmission if the partner at risk is aware of the other individual's HIV-positive status, regardless of the degree of risk involved.
- Criminal sanctions may be appropriate in the case where consent to engage in risky activity is obtained by deliberate deceit regarding HIV status. It is recommended that criminal sanctions not be applied for the mere non-disclosure of HIV-positive status.
- Whether by statute or by judicial determination, the law should expressly recognize that there is no criminal liability for HIV transmission or exposure when
  - the conduct in and of itself carries no significant risk of transmitting HIV, regardless of whether the conduct is assaultive or consensual;
  - there has been disclosure of HIV infection to another person exposed to the risk of infection and the person consents to engage in the conduct carrying the risk, regardless of the degree of risk involved; or

[67] *International Guidelines*, Guideline 4, para 29(a).

- the HIV-positive person has taken precautions to reduce the risk of transmission such that it is no longer significant, regardless of whether they have misrepresented or simply not disclosed their HIV status.

(3) Mental culpability

- The criminal law may appropriately be applied to those who intentionally or recklessly transmit HIV or expose others to a significant risk of infection, as in these cases the person is aware that their conduct risks harming another. However, criminal liability for negligent transmission or exposure should be avoided, given the absence of this awareness, and the persistence of misinformation about modes of transmission and levels of risk.
- Criminal liability should not be imposed on any person unless it is proved, in accordance with the applicable standard of proof in that jurisdiction's criminal law, that the person knew he/she was infected with HIV, and that he/she knew the conduct of which they are accused posed a significant risk of transmitting the virus.

Legal proceedings

✓ Ensure safeguards against misuse of public health laws and powers

States should enact laws and develop policies and protocols that prevent the misuse of public health laws and powers, ensuring that: people are not subjected to coercive measures solely on the basis of their HIV status; that protections for due process exist where the liberty of people living with HIV is infringed, such as objective criteria for assessing the risk of harm the person poses to others, the right to notice of any order restricting liberty, the right to legal representation, the right to subject the coercive exercise of public health powers to appeal or judicial review, and fixed rather than indeterminate periods of orders.

✓ Establish prosecutorial guidelines to avoid misuse of criminal law

States should establish guidelines for prosecutors to prevent inappropriate criminal prosecutions and to guide prosecutorial conduct during proceedings, so as to avoid publicity that may prejudice a trial, breach the confidentiality of the accused's HIV status, expose the accused to stigma and discrimination before having been convicted of any offence, and undermine public health efforts by contributing to widespread misconceptions about how HIV may be transmitted[68].

✓ Provide legal support and services

States should implement and support legal services that will educate people affected by HIV/AIDS about their rights, provide free legal services to defend and enforce those rights, and develop expertise on HIV-related legal issues.

✓ Ensure the right to counsel

Lawyers should not refuse to represent a person because of their HIV status, as this amounts to discrimination and unprofessional conduct. Persons living with HIV/AIDS have the same right to counsel as all others.

✓ Educate judiciary, police, prosecutors and defence lawyers

States must ensure the sensitization of the judiciary to issues related to HIV/AIDS, including through judicial education and the development of judicial materials, as recommended by the United Nations[69]. This education must also happen for all personnel involved in the

[68]See, e.g.: McColgin DL & Hey ET "Criminal Law," in: D Webber, ed. *AIDS and the Law* (3rd ed). John Wiley & Sons, Inc: New York, 1997 (as supplemented).

[69]*International Guidelines*, Guideline 1, para 21(d).

criminal justice system (police, prosecutors, defence lawyers, and jurors). That education must include a basic understanding of HIV and how it is, and is not, transmitted. Where necessary, courts hearing cases in which information regarding the HIV status of a party is relevant and admissible should request, and admit into evidence, current, accurate and objective medical information regarding HIV/AIDS.

Ensure fairness in the conduct of proceedings

States must ensure clear policies and protocols ensuring that the conduct of legal proceedings is not tainted by misinformation about HIV/AIDS and bias towards people living with HIV/AIDS, so as not to prejudice the right to a fair trial and perpetuate misconceptions about HIV/AIDS. HIV-positive defendants in criminal or public health proceedings should be treated the same as any other defendant, and "[n]o unusual safety or security precautions should be employed"[70], such as gloves, masks or restraints, or permitting counsel or court personnel to stand back from a HIV-positive defendant. Discriminatory courtroom proceedings also include prejudicial and inflammatory questioning and, in the case of trials by jury, courts should have and use the power to hear proposed evidence outside the presence of the jury and make preliminary rulings as to whether such evidence is admissible.

Protect the confidentiality of medical/counselling information

So as to minimize the potentially detrimental impact on access to counselling and support services which assist in avoiding risky behaviour, details of the accused person's communications to a health-care professional, spiritual adviser or other counsellor should be legally inadmissible in a prosecution for a criminal or public health offence.

Protect confidentiality during legal proceedings

"People living with HIV/AIDS should be authorized to demand that their identity and privacy be protected in legal proceedings in which information on these matters will be raised"[71]. States should ensure that laws and policies governing the conduct of legal proceedings include provisions for courts to protect the confidentiality of the accused by ordering the use of a pseudonym for proceedings, sealing the court record of proceedings, permitting proceedings *in camera*, imposing a publication ban on details that would identify the accused, and imposing prohibitions on court personnel from disclosing information ordered to be kept confidential.

[70] American Bar Association. Policy on AIDS and the Criminal Justice System 1 (adopted by ABA House of Delegates, 7 February 1989).

[71] *International Guidelines*, Guideline 5, para 30(c).

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The Joint United Nations Programme on HIV/AIDS (UNAIDS) is the leading advocate for global action on HIV/AIDS. It brings together eight UN agencies in a common effort to fight the epidemic: the United Nations Children's Fund (UNICEF), the United Nations Development Programme (UNDP), the United Nations Population Fund (UNFPA), the United Nations International Drug Control Programme (UNDCP), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the World Health Organization (WHO), the International Labour Organization (ILO) and the World Bank.

UNAIDS both mobilizes the responses to the epidemic of its eight cosponsoring organizations and supplements these efforts with special initiatives. Its purpose is to lead and assist an expansion of the international response to HIV on all fronts: medical, public health, social, economic, cultural, political and human rights. UNAIDS works with a broad range of partners—governmental and NGO, business, scientific and lay—to share knowledge, skills and best practice across boundaries.

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High-profile criminal cases and proposed or enacted legislation in various countries raise the question of whether criminal laws and prosecutions represent sound policy responses to conduct that transmits or risks transmitting HIV. There are few simple solutions to such a complex problem. Rather than a rush to judgement or legislation, it requires careful reflection by judges, legislators and policy-makers, so as to avoid the adoption of ill-informed and counter-productive laws and policies that do little to help prevent the spread of HIV and may undermine both human rights and effective HIV prevention, care, treatment and support.

To assist in the development of sound public policy, this document:

- proposes principles that should guide thinking on the question of criminal law and HIV/AIDS;
- identifies a number of public policy considerations that States should take into account when making decisions about the use of the criminal law;
- considers the alternative to criminalization presented by public health laws
- discusses if and how the criminal law might be justifiably applied; and
- concludes with recommendations to governments, police, prosecutors, judges and public health authorities regarding the appropriate use of criminal sanctions and coercive public health measures.

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