

# WORKING PAPER

## Criminalisation of HIV Exposure and Transmission: A Global Review

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### 1. Key Points and Methodology

1.1 This paper attempts to summarise the global state of play as regards the criminalisation of Human immunodeficiency virus (HIV) transmission and exposure. It is not a detailed country report, though it does – of necessity – use the laws in some countries to illustrate some of the main global and regional themes.

The following are some of the key matters and issues highlighted in the paper:

- Exposure and transmission of HIV are criminalised across the globe, although there are significant differences in prosecution and conviction rates.
- There appears to be a far greater use of criminal law in wealthy countries and regions (notably Scandinavia and North America) with relatively low HIV prevalence. There is, however, no evidence to suggest that there is a correlation between the use of criminal law and low prevalence (i.e. no evidence to indicate that the use of criminal law leads to a reduction in onward transmission).
- There appears to have been an assumption that introducing new laws criminalising exposure and transmission can have beneficial public health outcomes. There is no evidence to support this and it is therefore inadequate and insufficient as a justification for the use of criminal law.
- There is evidence of widespread over-criminalisation of people living with HIV – not only through the criminalisation of both sexual and non-sexual exposure and transmission, but through broad and over-inclusive fault requirements (i.e. not just intention, but recklessness and negligence).
- There is insufficient, though in some regions increasing, recognition that undetectable viral load resulting from effective anti-retroviral treatment (ART) should be taken into account in allegations of exposure, and should, for example, defeat claims that the defendant was reckless or negligent.
- Although it is widely accepted that phylogenetic analysis evidence cannot in and of itself prove the route, timing or source of HIV transmission in a particular case, this is not universally recognised.

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- Within regions, and in countries with local criminal jurisdictions (such as the United States (US) and Australia), there exists widespread disparity and variation in the scope, reach and deployment of criminal law, resulting in inconsistency and confusion for people living with HIV.
- Women are disproportionately impacted by criminalisation provisions. This is not only because women may be more likely to know their HIV status (as a result of ante-natal testing) but because it may be more difficult for them to negotiate safer sex (something which also applies to younger people living with HIV).

## 1.2 Methodology

The brief for this background paper was to provide a review of the criminalisation of HIV exposure and transmission across the globe. To cover this complex subject in a relatively summary form, while at the same time attempting to ensure an accurate account, certain decisions were taken– both as regards research and eventual focus and content. The following summarises the comprehensive, thematic, focused approach that was taken.

- *Comprehensive.* So far as possible, the paper attempts to be comprehensive with respect to global coverage. It does this by organising most of the content regionally (Europe, North America, Africa etc.), rather than on a country-by-country or jurisdiction basis. The latter would have been impracticable given the limited space available. Specific countries, or – where they constitute separate jurisdictions, states or provinces within countries – are used as exemplars, and where they are available country and jurisdiction data are provided.
- *Thematic.* The paper seeks, where appropriate, to identify themes suggested by the data, both regionally and globally. These themes include, for example, the more frequent use of criminal law to respond to allegations of transmission and exposure in high-income countries and regions (e.g. North America and some parts of Europe, notably Scandinavia), and cross-cutting issues such as the relevance of viral load and the use / misuse of phylogenetic analysis data in prosecutions and trials.
- *Focused.* This paper was written as a contribution to a set of papers, many of which also address criminalisation directly or indirectly. It is important to recognise that the criminalisation of vulnerable groups and key populations (e.g. men who have sex with men (MSM), sex workers, people who use drugs) impedes HIV prevention and treatment efforts. This means that while this paper focuses on specifically on the criminalisation of HIV transmission and exposure, it should be read alongside other briefing papers provided for the Global Commission on HIV and the Law.

Data for the paper were drawn from a range of sources, both primary and secondary. These include:

- International human rights instruments, such as the International Covenant on Civil and Political Rights (ICCPR) and European Convention on Human Rights, and guidelines, such as the International Guidelines on HIV/AIDS and Human Rights of the Office of the High Commissioner for Human Rights (OHCHR) and the Joint United Nations Programme on HIV/AIDS (UNAIDS)
- National and state / provincial legislation and case law
- Prosecution Guidance (such as that of the Crown Prosecution Service for England and Wales)
- Available empirical research data, such as the Global Network of People Living with HIV/AIDS (GNP+) Global Criminalisation Scan
- Policy output and publications from HIV/AIDS non-governmental organisations (NGOs)
- Academic research and scholarship
- The evidence provided for the Global Commission on HIV and the Law through submissions made for the Regional Dialogues

## 2. Introduction

- 2.1 This briefing paper provides an overview of the nature and scope of HIV exposure and transmission liability across the globe. It is not, and does not purport to be, a summary or a synthesis of relevant law, still less a detailed jurisprudential analysis. Rather, it attempts to set out what the author considers to be some of the key issues confronting legislators, law enforcement agencies and courts across the world at the present time. The regions covered are Africa, Asia, Australasia, Europe, North America, and South and Central America (including the Caribbean).

- 2.2 Structuring a paper that is intended to provide a global overview of this kind poses a challenge. While there do exist differences between countries as regards (a) the structure and scope of exposure and transmission offences, (b) the degrees of fault that are necessary to establish liability, and (c) the defences that may be raised against an allegation, these differences tend to iron out and become less easy to articulate when comparing the approach to criminalisation in different regions. For example, one may contrast the laws of Sierra Leone and Malawi, Texas and Massachusetts, Bolivia and Chile or Belgium and the Netherlands by considering their finer points; but identifying whether there is anything distinctive (and if so, what this is) about the approach to criminalisation in South as opposed to North America, or in Europe as opposed to Africa not only becomes harder and in some respects difficult to carry out, but it is also fraught with methodological and political difficulties. It is also not, in this author's opinion, a particularly valuable or fruitful exercise. Criminal law serves a very distinctive function for states. More than other areas of law (such as property, family or commercial law) it articulates the sensibility, culture and values of those states.<sup>2</sup> Not only does this mean that there is little to be gained simply from identifying differences between countries (differences with a regional neighbour would never provide a sufficient reason for a state to undertake legislative reform), it means that one is bound to find differences in and between regions.
- 2.3 Given this, the paper does not focus on regional differences as such, or for their own sake. Rather, it identifies some of the most salient features of, and developments in, the law in each of the regions identified above, as well summarising at the outset some of the key themes and issues that are relevant across the world, irrespective of regional difference. In this way it is possible not only to get a sense of the state of criminalisation in the different regions; it also avoids unnecessary repetition. So, for example, liability for exposure raises a number of issues that are universally important, principal among which is the relevance and significance of viral load. It therefore makes sense to have a general discussion of this topic at the outset, and to highlight the way in which it is developing in a region that has addressed it most comprehensively (North America) and otherwise to address it briefly as necessary. The same is true for transmission liability. Proving transmission is generally undertaken, in those countries and regions with the resources to pay for it, by phylogenetic analysis evidence. It thus makes sense to address the general points up front, and then to highlight a regional jurisdiction (such as England and Wales) where the issue has been directly addressed in the courts and in prosecution policy.
- 2.4 Finally, it should be noted that there already exist a number of excellent, comprehensive and well-evidenced accounts of HIV criminalisation.<sup>3</sup> In an attempt not simply to summarise or reiterate these, the paper includes some limited critical commentary intended, as much as anything, to provoke discussion and debate. If there is one general theme that the author would ask readers to always bear in mind when considering the points made in the paper, it is this: criminal law is a blunt instrument with which states have sought to address the HIV pandemic. There exists no compelling evidence that it does good, and an increasing amount of evidence that it does harm, especially to those particularly vulnerable to infection (including MSM, women, people who use drugs, people in detention). The evidential burden should thus rest on those who are advocates of criminalisation, not on those who oppose it.

### 3. Structure

This paper is structured as follows. Sections 4 and 5 consider, respectively, some general points about, and developments with respect to, HIV exposure and transmission liability, and sections 6 to 10 address the situation and developments in the following regions: Europe, North America, Africa, South America, Asia and Australasia. Section 11 provides some concluding observations. There is, because of the differential use of the criminal law in different regions (far higher in the developed than in the developing world), an emphasis on those regions which have deployed it most.

### 4. Criminalisation: General Considerations

- 4.1 Countries across the world criminalise HIV exposure and transmission. The rationales and justifications for imposing liability have been well-rehearsed and may be summarised as follows:
- 1) Criminalisation enables the incapacitation of offenders. By incarcerating people with HIV, people in the wider community are protected from transmission and the risk of transmission.

<sup>2</sup> This is recognised by those courts, such as the European Court of Human Rights, that have a supranational jurisdiction and which give individual states a significant latitude or freedom (often referred to as a margin of appreciation) in determining what conduct should be criminalised.

<sup>3</sup> See, for example, GNP+ (2010), *The Global Criminalisation Scan Report* pp 12-13, available at [http://hivaidsclearinghouse.unesco.org/search/resources/bie\\_gnp%2B\\_criminalisation\\_report\\_2010\\_en.pdf](http://hivaidsclearinghouse.unesco.org/search/resources/bie_gnp%2B_criminalisation_report_2010_en.pdf). See also Edwin Bernard's blog: <http://criminalhivtransmission.blogspot.com/>

- 2) Criminalisation provides an opportunity for the rehabilitation of offenders. Being confronted with offending behaviour, and taking responsibility for it, will change the behaviour of people living with HIV by making them realise that what they have done is wrong.
  - 3) Criminalisation is a powerful and effective way of articulating social disapproval for conduct. Punishing people with HIV for exposure and transmission is justified because their behaviour is morally reprehensible.
  - 4) Criminalisation deters convicted individuals and others from engaging in risk-taking behaviour. The threat of punishment will prevent people with HIV from engaging in activity which carries the risk of onward transmission.
- 4.2 The weaknesses associated with these arguments have been discussed elsewhere and are not repeated here.<sup>4</sup> It is, however, necessary to reflect in a little more detail on some of the more specific, concrete and evidence-based objections against criminalising exposure and transmission before looking at the way in which criminalisation finds expression in different regions across the world.<sup>5</sup>

### 4.3 Criminalising Exposure: Specific Concerns

The arguments advanced in favour of criminalising those who expose others to the risk of HIV infection are essentially twofold. First, from a retributive perspective, it may be argued that engaging in conduct which might result in the transmission of HIV – even where this does not happen – is sufficiently culpable to warrant state punishment. It is sufficiently culpable because the potential consequence of the conduct (infection with an incurable disease) is very grave and/or because the conduct itself is sufficiently careless or thoughtless. Second, from a deterrent, consequentialist, perspective it is argued that in the absence of risk-taking behaviour (e.g. unprotected sex) HIV would not be transmitted, and so it is legitimate to proscribe on pain of punishment the behaviour itself, irrespective of any consequences. Put another way, there is a sufficiently strong public interest in censuring those who put others at risk of infection, and where it is only luck or chance that meant that HIV was not (on that particular occasion) transmitted. Both of these arguments are apparent, to a greater or lesser degree, in those studies, which have shown support for criminalisation by gay men.<sup>6</sup>

- 4.4 There is little, if any, support for criminalising exposure among HIV/AIDS organisations<sup>7</sup>, and wider political recognition<sup>8</sup> and academic concern<sup>9</sup> that it may be counter-productive. Either implicitly (by emphasising that only intentional transmission may legitimately be criminalised), or explicitly, reports and policy briefs consistently argue that criminalising exposure widens the net of criminal liability too far and has potentially adverse consequences for preventive public health efforts or at the very least does not make any positive contribution to these.<sup>10</sup>
- 4.5 It is suggested that the following arguments provide the framework for considering both the laws of those countries that criminalise exposure, and the cases that have been brought against people living with HIV under these laws.
  - ***Exposure liability elides a public health objective (prevention of onward transmission) with a criminal law logic (proscription and punishment of conduct that risks onward transmission).*** To the extent that public health law and policy should, where possible, facilitate, persuade and incentivise rather than coerce, repress and hinder, there is a strong argument that criminalising exposure is fundamentally ill-conceived.
  - ***Because it is a mode of liability that proscribes and punishes in the absence of any harmful consequence, it requires stronger justification than liability where such consequences do occur.*** It is, in other words, only justified where it satisfies the conditions associated with the principle of minimum criminalisation – a principle fundamental to

4 See, for example, UNAIDS (2002), *Criminal Law, Public Health and HIV Transmission: A Policy Options Paper*, UNAIDS: Geneva.

5 See the submission made by Edwin Bernard for the High-Income Countries Dialogue of the Global Commission on HIV and the Law.

6 See for example Dodds, C., et al (2008) *Sexually Charged: the Views of Gay and Bisexual men on Criminal Prosecution for Sexual HIV Transmission* London: Sigma Research.

7 UNDP/ UNAIDS (2007), *Summary of main issues and conclusions: International Consultation on the Criminalization of HIV Transmission*, UNDP/ UNAIDS, Geneva available at [http://www.aidslex.org/site\\_documents/CR-0069E.pdf](http://www.aidslex.org/site_documents/CR-0069E.pdf); WHO Europe (2006), *WHO technical consultation in collaboration with the European AIDS Treatment Group and AIDS Action Europe on the criminalization of HIV and other sexually transmitted infections*, Copenhagen: WHO Europe available at [http://www.aidslex.org/site\\_documents/CR-0039E.pdf](http://www.aidslex.org/site_documents/CR-0039E.pdf)

8 At the first Global Parliamentary Meeting on HIV/AIDS in 2007, parliamentarians from more than 160 countries adopted the following statement: "We have asked whether criminal laws and prosecutions represent sound policy responses to conduct that carries the risk of HIV transmission. On the one hand, it is obviously reprehensible for a person knowingly to infect another with HIV or any other life-endangering health condition. On the other hand, using criminal sanctions for conduct other than clearly intentional transmission may well infringe upon human rights and undermine important public policy objectives." See <http://www.ipu.org/splz-e/h aids07/final.pdf>.

9 For a critical review of the many exposure statutes in the US, see McArthur, J (2009), *Note: As the Tide Turns: The Changing HIV/AIDS Epidemic and the Criminalization of HIV Exposure*, Cornell Law Review, Vol. 94, 707.

10 Cameron, E, Burris, S and Clayton, M (2008), *HIV is a virus, not a crime: ten reasons against criminal statutes and criminal prosecutions*, Journal of the International AIDS Society 2008, 11:7 available at [http://www.aidslex.org/site\\_documents/CR-0023E.pdf](http://www.aidslex.org/site_documents/CR-0023E.pdf)

liberal democratic legal systems. In Professor Andrew Ashworth's terms:

*"[E]ven if it appears to be justifiable in theory to criminalize certain conduct, the decision should not be taken without an assessment of the probable impact of criminalization, its efficacy, its side-effects, and the possibility of tackling the problem by other forms of regulation and control."<sup>11</sup>*

It is precisely because there do exist side-effects of criminalising exposure (especially as regards adverse impact on HIV prevention efforts), and because there are more effective and less stigmatising methods of achieving what criminalisation is supposed (but fails) to achieve, that UNAIDS and others have recommended decriminalising exposure.

- **Not all risk-taking is the same.** Criminal courts faced with allegations of exposure are not generally interested in fine-tuned arguments about degrees of risk. Instead, liability has typically depended on the fact of exposure, not on whether the relevant conduct was high, medium or low risk. It has, for example, typically been irrelevant that defendants only engaged in insertive oral rather than insertive anal sex.<sup>12</sup> The only relevant question, and even then only in some jurisdictions, has been whether the defendant had actively minimised exposure risk through condom use. This, however, is in the process of changing. Courts are now having to confront the question of whether liability exists where the defendant's viral load was, as a result of effective treatment, undetectable at the material time. Judges and juries in alleged exposure cases are being increasingly invited to conclude that *despite* the defendant's HIV-positive status, and *despite* his engaging in unprotected sex (protection understood here as failure to deploy a mechanical barrier), he cannot be said to have exposed his partner to the risk of transmission because that risk is so low as to be inconsequential. (This argument may become even more persuasive given the recent HPTN 052 clinical trial that showed ART to be 96% effective in reducing HIV transmission in couples where one partner has HIV. For a specific example, see the discussion of Canada below).
- **People who are newly infected and undiagnosed are more infectious but may not recognise that the risk of onward transmission is increased.** If the justification for criminalising exposure is that there is a strong public interest in deterring risk-taking (and so minimising onward transmission), it is misconceived, for the following reasons. First, those most likely to transmit HIV to a partner in the absence of safer sex precautions are those who have a high viral load. Newly infected people fall into this category and yet lack the knowledge of their HIV status that would provide a reason for taking specific precautions. Put simply, deterrence-based justifications are based on the assumption that people make rational choices when confronted with the possibility of liability and punishment, but if a person lacks the requisite knowledge to be able to factor this into their behaviour and does not know that they represent a risk, it is impossible to deter them. This is not to say that a person with HIV, irrespective of their knowledge of status, may not be held morally accountable for failing to practise safer sex; but liability and punishment demand additional justification. Unless a strongly objective fault requirement is used (such as negligence, which criminalises culpable conduct and which does not demand inquiry into a person's state of mind at the relevant time), there is no basis on which a risk-taker can be legitimately punished. In making this point it should also be emphasised that this paper does not in any way endorse allocating responsibility solely to the person living with HIV. All laws that criminalise HIV provide an opportunity to prosecute more marginalised and disempowered constituencies, and that includes women, especially sex workers, people who inject and use drugs and MSM.<sup>13</sup>
- **Young people may be particularly impacted by exposure provisions.** Younger people who have been living with HIV all their lives may be disproportionately affected by provisions that criminalise exposure. This is not only the case for those younger people who do not know their status and may yet be held liable because they have in fact engaged in conduct that carries a risk of onward transmission; it arises because disparities in power relations mean that it may be harder for younger people to negotiate safer sex with partners who may be more experienced. For those children living with HIV who are entering adolescence, the very fact that their first forays into sexual experience could result in criminal charges may be thought contrary to their rights and to their psychological wellbeing.
- **People diagnosed with HIV may, despite precautions, pose a risk of infecting their partners. Where a person diagnosed with HIV takes precautions against onward transmission, they still pose a risk – however small – to their partner.** Safer sex is safer, not safe. Condoms, for example, may fail. Unless the particular legal system, either on the face of the legislation, or through clear prosecutorial guidance, specifies that people living with HIV who practise safer sex

<sup>11</sup> Ashworth, A (1999), *Principles of Criminal Law* (3<sup>rd</sup> edition) Oxford: OUP.

<sup>12</sup> In 2008 a man living with HIV was jailed in Singapore for performing oral sex on a negative partner. He pleaded guilty to exposing his partner to sex despite the infinitesimal degree of risk. Available at <http://criminalhivtransmission.blogspot.com/2008/05/singapore-man-pleads-guilty-to-hiv.html> (accessed on 24 April 2010).

<sup>13</sup> In June 2008 the Federal Court in Switzerland confirmed that a person with undiagnosed HIV could still be prosecuted if they put another person at risk of infection. See *'HIV-Übertragung nach Risikokontakten'*, Neue Zürcher Zeitung, 2 July 2008, p. 36. Also see the discussion on <http://criminalhivtransmission.blogspot.com/2008/07/switzerland-federal-court-rules-that.html> (accessed on 26 April 2010)

shall not be prosecuted, they may still be guilty of exposure offences. If the aim of exposure liability is to provide an incentive to practise safer sex, then it is arguably absurd to punish, or place at risk of investigation and prosecution, those who have responded to that incentive and who have acted responsibly.<sup>14</sup> Furthermore, and paradoxically, a criminal justice system that permits the prosecution of those who act responsibly offers no incentive to act responsibly. If a person can be prosecuted for exposure irrespective of the care she or he takes, some may choose not to take care (or at least have no legal reason to do so - there is little or no evidence that people with diagnosed HIV do not seek to minimise the risk to their partners).<sup>15</sup>

- **There is the possibility that where HIV transmission may have occurred, the criminalisation of exposure creates a disincentive to alert partners to post-exposure prophylaxis (PEP).** Where a person living with HIV exposes someone to the risk of HIV infection (either because safer sex is not practised, or because precautions fail), it may be in the person-at-risk's interest to seek PEP in order to minimise the risk of becoming infected if transmission has in fact occurred. If exposure is criminalised, the person with HIV may fear alerting his or her partner to the benefits of PEP because of the possibility of prosecution.<sup>16</sup> To the extent that there is a public health interest in minimising the number of HIV-positive people, and a specific interest in the protection of particular individuals, exposure liability has the potential to undermine, rather than further, the pursuit of these interests. This is an example of how stigma continues to drive the epidemic and creates silence.<sup>17</sup> People living with HIV need to be able to feel free to have these discussions in advance of sexual activity and also free to access these kinds of services should they require them. Fear of an HIV-positive diagnosis and the potential of subsequent prosecution is already discouraging pregnant women from accessing antenatal care, for fear that they will test positive and be exposed to abuse. Criminalising HIV exposure or transmission also potentially undermines the effectiveness of child health, maternal health and perinatal HIV transmission programmes, as women may choose not to access these services, due to fear. Thus, women are essentially being prevented from accessing available treatment and care services, for themselves or their children.<sup>18</sup>

## 4.6 Criminalising Transmission: Specific Concerns

The arguments for repealing exposure laws are relatively easy to make compared with those against the criminalisation of transmission. This is because where transmission liability is involved, a person is infected with HIV who was not infected before, and this is widely perceived to mean that such a person has been seriously harmed.<sup>19</sup> Critically, this 'harm' arises irrespective of the fault of the person alleged to have transmitted the virus (i.e. transmission may occur ignorantly, recklessly or negligently, as well as intentionally). The fact of infection, and its characterisation as a serious harm (often bolstered by sensationalist and inaccurate media coverage) has the effect of making the moral responsibility of the defendant in transmission cases less significant, and – more generally – is used as an argument against decriminalisation.

1. This consideration aside, there do exist some general matters, applicable in all jurisdictions that criminalise transmission, when considering this basis of liability. First among these is the question of whether it was in fact the defendant who infected the complainant. In jurisdictions where a person may be criminally liable for transmitting HIV to another person, the prosecution must establish to the requisite criminal standard (usually phrased as "beyond reasonable doubt" or similar) that the defendant was the cause of the harm to the complainant. Of course, in most criminal cases causation is not in issue. If person X smashes a glass in the face of person Y, there is rarely if any need

<sup>14</sup> This has been explicitly recognised in England and Wales. Guidance for prosecutors in cases of alleged transmission states: "Evidence that the defendant took appropriate safeguards to prevent the transmission of their infection throughout the entire period of sexual activity, and evidence that those safeguards satisfy medical experts as reasonable in light of the nature of the infection, will mean that it will be highly unlikely that the prosecution will be able to demonstrate that the defendant was reckless." Crown Prosecution Service for England and Wales (2008), *Policy for Prosecuting Cases Involving the Intentional or Reckless Sexual Transmission of Infection* available at [http://www.cps.gov.uk/legal/h\\_to\\_k/intentional\\_or\\_reckless\\_transmission\\_of\\_sexual\\_infection/](http://www.cps.gov.uk/legal/h_to_k/intentional_or_reckless_transmission_of_sexual_infection/)

<sup>15</sup> Marks, G, Crepaz, N et al (2006), *Estimating sexual transmission of HIV from persons aware and unaware that they are infected with the virus in the USA*, *AIDS* 20(10): 1447-50.

<sup>16</sup> There is an additional problem in this context in jurisdictions where criminal liability may be imposed for failure to assist someone in danger. In France, for example, the following is a criminal offence under 223-6 of the *Penal Code*: "Whoever, through an immediate and risk less action, can prevent a crime or an infraction against somebody's physical integrity refrains from doing so, is sentenced to five years of imprisonment and a 75000 [Euro] fine. The same sentence will apply to whoever refrains from helping someone in peril, when there is no risk neither for him/herself nor for a third person, and when he/she could have helped by acting directly or seeking for help." Thus, a person who believes they may have infected a partner (also a crime) may be criminally liable if he or she fails to prevent the crime (of transmission).

<sup>17</sup> For a comprehensive account of the relationship between criminalisation and stigma, and of an international response to this, see the submission made by Kevin Osborne, International Planned Parenthood Foundation, UK for the High-Income Countries Regional Dialogue of the Global Commission on HIV and the Law.

<sup>18</sup> See *10 Reasons Why Criminalisation of HIV Exposure or Transmission Harms Women* available at <http://www.athenanetwork.org/assets/files/10%20Reasons%20Why%20Criminalisation%20Harms%20Women.pdf>

<sup>19</sup> Weait, M. (2001). "Taking the Blame: Criminal Law, Social Responsibility and the Sexual Transmission of HIV." *Journal of Social Welfare and Family Law* 23 (4): 441-457. See also Weait, M. (2007). *Intimacy and responsibility: the criminalisation of HIV transmission*. Abingdon, Oxon ; New York, Routledge-Cavendish.

to enquire into whether X is the cause of Y's wounds. In HIV transmission cases, however, the converse may be true. The reason for this is relatively self-evident: it is simply not possible to state with certainty in the vast majority of cases that X is the cause of Y's infection. This is because although Y may *discover* his infection after establishing that X is infected, this does not mean that Y was not already infected or – where he has, or has had, multiple sexual partners – that someone else may be the source.

2. Despite these problems, prosecutors in a number of countries across the world have sought to use phylogenetic analysis evidence as a means of proving who infected whom. Put simply, phylogenetic analysis is a method that can establish whether the sub-type of HIV in the defendant's body is the same as that in the complainant's. In a number of cases involving HIV transmission, defendants have pleaded guilty after being confronted with this evidence. However, there are cases where defendants have pleaded not guilty and challenged this evidence and have been acquitted on the direction of the trial judge.<sup>20</sup> The reason for this is, as stated above, that phylogenetic analysis evidence cannot prove the timing, route or source of transmission.<sup>21</sup> The only evidential value that phylogenetic analysis evidence can have, therefore, is to exclude the possibility of transmission (which is, of course, critically important), or to support other evidence that tends towards proving guilt. Put more strongly, a defendant cannot, unless there is no possibility whatsoever that the complainant could have contracted the same sub-type from another source, know that he or she is that source; nor is it possible for the prosecution to prove that she or he is in fact the source.

## 5. Europe: General Considerations

- 5.1 Despite their long-established or (for countries of the former Soviet bloc) relatively newly acquired commitment to liberal democratic principles and the protection and promotion of human rights, countries across the region - from Finland in the north to Greece in the south, and from the United Kingdom (UK) in the west to Ukraine in the east – criminalise people living with HIV. Of the top ten criminalising countries in the world (measured by convictions per 1000 people living with HIV) eight are European.<sup>22</sup> This extensive and significant criminalisation takes the form of liability not only for transmission but for exposure, and may be imposed (depending on the country concerned) on the basis that the accused person acted intentionally, recklessly or negligently. The laws used are various: some are HIV-specific, others address the spread of disease more generally, and yet others are simply the general laws relating to fatal and non-fatal offences against the person. Punishment, depending on his/ her conduct and state of mind may be a monetary penalty and/or (more usually) a sentence of immediate imprisonment. Some, for example England and Wales, use laws that are 150 years old, and some (especially those in Eastern Europe) have only introduced laws since the millennium. In the Central Asian republics there is a degree of consistency in approach, despite differences in timelines and legislative history. Thus, Kazakhstan, Kyrgyzstan, Tajikistan and Turkmenistan all specifically distinguish in their penal provisions between HIV and other sexually transmitted infections (STIs) as far as severity of punishment is concerned. They also create specific offences for transmission that has occurred as the result of medical negligence – a consequence, at least as far as Kazakhstan and Kyrgyzstan are concerned – of failure of health and safety practice that led to a large number of avoidable infections.<sup>23</sup>
- 5.2 As with other regions across the world, the number of different jurisdictions in the region makes it impossible (and unhelpful) to generalise,<sup>24</sup> but the following examples (drawn from the different European regions) raise certain key issues and may be of particular interest and relevance.
- 5.3 There are three observations of criminalisation in this region which are perhaps worth reflecting further on. First, there appears (on the surface) to be a potential correlation between the rate of prosecutions and convictions for HIV transmission and exposure per 1000 people living with HIV and the confidence that people have in their judicial systems.<sup>25</sup> Table 1 illustrates the fact that of the sixteen regional countries for which we have data, six of the top eight as regards conviction rates are all countries in which there is high confidence, whereas this is the case for

20 See, for example, the English case of *R v Matthew Collins*, discussed in Weait, M (2007), *Intimacy and Responsibility: the Criminalisation of HIV Transmission*, Abingdon: Routledge-Cavendish, pp 32-33.

21 Abecasis, A, Geretti, A-M, et al (2011), *Science in court: the myth of HIV fingerprinting*, *Lancet Infectious Diseases*, Vo. 11 (Feb) 78-79; Bernard, E et al (2007), *HIV forensics: pitfalls and acceptable standards in the use of phylogenetic analysis as evidence in criminal investigations of HIV transmission*, *HIV Medicine*, 8, 382-387; Pillay, D and Fisher, M (2007), *Primary HIV infection, phylogenetics, and antiretroviral prevention*, *The Journal of Infectious Diseases*, 195: 924-926.

22 GNP+ (2010), *The Global Criminalisation Scan Report*, available at [http://hivaidsclearinghouse.unesco.org/search/resources/bie\\_gnp%2Bcriminalisation\\_report\\_2010\\_en.pdf](http://hivaidsclearinghouse.unesco.org/search/resources/bie_gnp%2Bcriminalisation_report_2010_en.pdf)

23 See <http://www.reuters.com/article/2008/08/05/idUSB708070> (Kyrgyzstan) and <http://uk.reuters.com/article/2007/01/19/idUKL1947574320070119> (Kazakhstan)

24 For a more detailed country by country account see <http://www.aidsmap.com/law>

25 Deffains, B and Roussey L (2011), *Confidence in judicial institutions: an empirical approach*, paper presented at ESNIE, available at [http://congres.afse.fr/docs/2011/921756roussey\\_confidence\\_in\\_judicial\\_institutions.pdf](http://congres.afse.fr/docs/2011/921756roussey_confidence_in_judicial_institutions.pdf)

only three of those countries in the bottom eight. Furthermore, low confidence exists only as regards countries in the lower half. It is possible therefore that the use of the criminal law is a function of a belief in the efficacy of the system through which it is enforced.

**Table 1:**

Convictions per 1000 PLHIV (Highest to lowest ranking, Europe and Central Asia only) <sup>26</sup>	Confidence in Judicial System	High	Medium	Low
		1	Sweden	
2	Norway			
3	Finland			
4	Austria			
5	Denmark			
6	Czech Republic			
7	Hungary			
8	Switzerland			
9	Netherlands			
10	Georgia			
11	Azerbaijan			
12	Germany			
13	Estonia			
14	UK			
15	France			
16	Italy			

5.4 The second observation, similarly speculative but also worth reflecting on, is that there appears to be a potential correlation between the degree of social trust in a country and the use of criminal law in HIV transmission and exposure cases. Table 2 illustrates this using data from the World Values Survey<sup>27</sup> and the conviction rate per 1000 people living with HIV.

**Table 2:**

Convictions per 1000 PLHIV (Highest to Lowest ranking, Europe and Central Asia only) <sup>28</sup>		Most people can be trusted	You can't be too careful
		1	Sweden
2	Norway		
3	Finland		
4	Austria		
5	Denmark		
6	Czech Republic		
7	Hungary		
8	Switzerland		
9	Netherlands		
10	Georgia		
11	Azerbaijan		

26 Data drawn from GNP+ (2010), *The Global Criminalisation Scan Report*, available at [http://hivaidsclearinghouse.unesco.org/search/resources/bie\\_gnp%2B\\_criminalisation\\_report\\_2010\\_en.pdf](http://hivaidsclearinghouse.unesco.org/search/resources/bie_gnp%2B_criminalisation_report_2010_en.pdf)

27 <http://www.worldvaluessurvey.org/>

28 Data drawn from GNP+ (2010), *The Global Criminalisation Scan Report*, available at [http://hivaidsclearinghouse.unesco.org/search/resources/bie\\_gnp%2B\\_criminalisation\\_report\\_2010\\_en.pdf](http://hivaidsclearinghouse.unesco.org/search/resources/bie_gnp%2B_criminalisation_report_2010_en.pdf)

12	Germany		
13	Estonia		
14	UK		
15	France		
16	Italy		

5.5 What Table 2 would appear to suggest is that there is a positive correlation between countries in which there is a high degree of trust and the use of the criminal law, at least on the data available, and when compared with countries where there is comparatively less use. What is particularly noteworthy is that the three highest countries in Europe as regards criminalisation rates are the three highest scoring countries with respect to trust of other people. It may be, therefore, that breach of trust (failure to disclose HIV status plus exposure or transmission) will provoke a more extreme reaction than it will in countries where there is less mutual trust between people (and where people may be less shocked at people lying or failing to tell the truth).

5.6 Thirdly, and finally, there is also an interesting relationship between development (as measured by the UNDP's Human Development Index (HDI)<sup>29</sup>, and criminalisation.

**Table 3:**

UNDP Human Development Index Ranking	Countries		Convictions per 1000 PLHIV Ranking
1	Norway	Sweden	1
2	Australia	Norway	2
3	New Zealand	New Zealand	3
4	United States	Finland	4
5	Ireland	Austria	5
6	Liechtenstein	Denmark	6
7	Netherlands	Czech Republic	7
8	Canada	Hungary	8
9	Sweden	Switzerland	9
10	Germany	Canada	10
11	Japan	Netherlands	11
12	South Korea	Georgia	12
13	Switzerland	Australia	13
14	France	Azerbaijan	14
15	Israel	Surinam	15
16	Finland	Germany	16
17	Iceland	United States	17
18	Belgium	Estonia	18
19	Denmark	UK	19
20	Spain	France	20

**Legend:**

 Data based on WVS 2005-8 corresponding to the fifth wave of the World Values Survey. This study has been carried by 57 countries all over the world.

 Data based earlier data sets (prior to 2005) corresponding to the combined file of the four waves carried out by both the EVS and WVS.

 Data based on WVS 2005-8 corresponding to the fifth wave of the World Values Survey. This study has been carried by 57 countries all over the world.

 Data based earlier data sets (prior to 2005) corresponding to the combined file of the four waves carried out by both the EVS and WVS.

<sup>29</sup> The Human Development Index is a comparative measure of life expectancy, literacy, education and standards of living for countries across the globe. It is a standard means of measuring well-being.

- 5.7 Table 3 shows (those in orange) that of the twenty countries with the highest conviction rates to date per 1000 people living with HIV, twelve are in the top twenty countries as identified in the HDI and that eight of these are European countries (Norway, Sweden, Finland, Denmark, Switzerland, Netherlands, Germany and France).
- 5.8 Taken together these three indices suggest that criminalisation – while it may indeed have a core moral or ethical dimension<sup>30</sup> – also correlates with other measures such as confidence in the legal or judicial system, with interpersonal trust, and with development and wealth. While we do not have robust statistical data to confirm or refute these hypotheses, it seems intuitively plausible that states in which the criminal law is being, or has been, used are more likely to be those where resources are available to bring prosecutions and where (which is perhaps more contentious) people see state punishment as a reasonable response to breaches of (highly valued) trust and believe that cases will be dealt with effectively. It is with these ideas in mind that we can turn to some of the key issues that have arisen across the region.

## 5.9 Scandinavia: from disproportionate and discriminatory use to positive change

Among the Scandinavian countries, only Iceland has not prosecuted (under its general criminal law) either for transmission or exposure and all the other countries have laws that provide for exposure liability. Indeed, Scandinavian countries have – taking into account the relatively low prevalence rate – contributed a disproportionately high number of criminal cases. This is especially so of Sweden, where there have been more than 50 prosecutions (90% of which have resulted in convictions) since 1992, and more than 100 people subjected to civil detention associated with the country's mandatory HIV disclosure laws.<sup>31</sup> The extensive use of criminal law has been criticised not only on its own terms, but because of evidence that it has been deployed in a discriminatory manner against certain groups of people living with HIV.<sup>32</sup> Thus, of the 18 or so prosecutions in Denmark, ten were against non-Danish nationals and seven were of African origin. (A relatively high proportion of overseas nationals, especially African migrants, have also been prosecuted in Sweden, Finland and Estonia).<sup>33</sup> Discrimination has been apparent not only in the identity of the defendants but in the diseases subject to prosecution. In Norway, for example, concern has been expressed at the use of a penal provision that in theory applies to all infectious diseases, but which in fact has only ever been applied in cases involving HIV (thus creating a *de facto* HIV exceptionalism, contrary to UNAIDS policy and best practice).<sup>34</sup>

- 5.10 Despite the hitherto aggressive approach to criminalisation in Scandinavia, there is some evidence of progressive, positive change grounded in evidence-based policy. In Denmark, for example, the relevant law<sup>35</sup> was suspended in February 2011 as a result of improved understanding about the significantly reduced risk of onward transmission when a person living with HIV is being treated successfully with ART, and because for most people on treatment life expectancy and quality of life is not significantly diminished. Notable for being one of the very few HIV-specific penal provisions in Europe and the only one outside the east, the Danish law was suspended after intense lobbying and may be repealed altogether.<sup>36</sup> In Sweden, the principal advocacy and policy organisation (HIV-Sweden) has joined forces with other interested groups in order to provide concerted and ongoing education for politicians and policy makers.<sup>37</sup> The same is true in Finland, where the Finnish Expert Group on HIV/AIDS (part of the National Institute for Health and Welfare) has recently initiated efforts to achieve legislative change, and to prevent policies that reinforce HIV-related stigma and discrimination (such as the publication of photographs of those being prosecuted).<sup>38</sup>

30 Moral and ethical dimensions related to HIV transmission and exposure are discussed in S Burris and M Weait (2011), *Criminalisation and the Moral Responsibility for Sexual Transmission of HIV*, authored for the Global Commission on HIV and the Law.

31 In 2007 the European Court of Human Rights held that Sweden had violated Article 5(1) of the European Convention of Human Rights (liberty and security of the person) as a result of the exercise of its detention policy as regards people living with HIV: *Enhorn v. Sweden* [2005] E.C.H.R. 56529/00.

32 See the proceedings of the HIV Sweden Conference on *HIV and criminal law*, Stockholm, 9 June 2009, available at [http://www.aidslex.org/site\\_documents/CR-0097E.pdf](http://www.aidslex.org/site_documents/CR-0097E.pdf)

33 <http://www.aidsmap.com/Northern-Europe/page/1444965>

34 The relevant provision is section 155 of the *Penal Code*. See the campaign to repeal this provision (the HIV Manifesto) at: [http://www.gnpplus.net/criminalisation/images/stories/document\\_westcentraleurope/manifesto-english2.pdf](http://www.gnpplus.net/criminalisation/images/stories/document_westcentraleurope/manifesto-english2.pdf). See submissions made by Jan Petter Eide, HIV Manifesto Norway and Evy-Aina Røe, HIV Norge for the High-Income Countries Dialogue of the Global Commission on HIV and the Law.

35 Article 252 of the *Danish Criminal Code*.

36 Submission made by Henriette Laursen, AIDS-Fondet, Denmark for the High-Income Countries Dialogue of the Global Commission on HIV and the Law. See also generally <http://criminalhivtransmission.blogspot.com/2011/02/denmark-justice-minister-suspends-hiv.html>.

37 Submission made by Silvia Ernhagen, Swedish Association for Sexuality Education, LGBT and HIV, Sweden for the High-Income Countries Dialogue of the Global Commission on HIV and the Law.

38 Personal communication with Sini Pasanen (on file at the Global Commission for HIV and the Law).

## 5.11 The value of prosecution guidance

In England and Wales there has been a very active lobby against criminalisation since the first case in 2003, the Crown Prosecution Service for England and Wales (CPS) issued – in consultation with a wide variety of stakeholders – policy on the prosecution of intentionally or recklessly transmitted sexual infections (including, but not limited to, HIV).<sup>39</sup> This policy requires, among other things, that there should be no prosecution unless (a) the scientific evidence supporting the allegation is sufficiently robust; and (b) the defendant knew that she or he was HIV-positive (though an expansive definition of knowledge is used, so that “wilful blindness” to the fact of infection may be sufficient). The policy also makes clear that evidence that the defendant used appropriate precautions against transmission would normally preclude a charge of reckless transmission. This official policy not only affirms the importance of condom use, but brings a greater degree of certainty to the law, which in itself may be thought to be beneficial. Complementing this prosecution guidance (which only comes into effect when deciding whether to law charges against someone) work has been undertaken with senior police officers in order to increase their knowledge and understanding of HIV.<sup>40</sup> The wide range of prosecutorial structures and processes and the various ways in which they inter-relate with both policing practices and procedures and rules of criminal evidence in different countries means that generic international guidance would be inappropriate. There is, though, no reason why the general principles that should inform the investigation and prosecution of alleged exposure and transmission cases could not – because they are universal – be developed in collaboration with relevant in-country justice ministries and others.

## 5.12 The relevance of viral load

As indicated in the introduction to this paper, there have been significant developments as regards the relevance of viral load in Europe. First, the Supreme Court of Netherlands<sup>41</sup> in 2005 ordered the retrial of a convicted man who was subsequently acquitted because the probability of infection was not sufficiently high. In reaching its conclusion, the Court indicated that a number of factors were relevant. These included the viral load of the defendant, the presence or otherwise of other transmissible STIs, the nature of the sexual contact and the number of sexual contacts between the defendant and the complainant.<sup>42</sup> This approach has received recent, and significant, support elsewhere. During the course of a recent court case in Switzerland, the question arose as to whether a person with an undetectable viral load and not suffering from an STI could be said to pose a risk of onward transmission when charged with an exposure offence. The Geneva Court of Justice, hearing the appeal of a man who had been convicted under Article 231 of the Swiss *Penal Code*<sup>43</sup> and sentenced to 18 months' imprisonment, accepted expert evidence that he posed no risk and quashed the conviction.<sup>44</sup> The testimony was based on what has become known as “The Swiss Statement”<sup>45</sup>, which – in summary – concludes that seropositive individuals do not risk transmitting HIV to a seronegative partner when (a) the seropositive partner has had undetectable HIV in the blood for at least six months, (b) there has been strict adherence to his/her ART regimen, and (c) he/she must be free of any other STIs.<sup>46</sup> Although there have been calls for further research, and despite an emphasis on the importance of continuing to use condoms even where these conditions are met,<sup>47</sup> there now exists some scientific evidence to suggest that imposing exposure liability on those who do meet the conditions may be wrong in principle.<sup>48</sup> Finally, viral load may also be relevant in the context of transmission cases. The reason for this is that

39 <http://www.cps.gov.uk/publications/prosecution/sti.html>. Submissions made by Yusef Azad, National AIDS Trust, UK and Lisa Power, Terrence Higgins Trust, UK for the High-Income Countries Dialogue of the Global Commission on HIV and the Law. The value of developing guidance and working with justice agencies is identified in the 2008 UNAIDS policy brief on criminalization available at [http://data.unaids.org/pub/basedocument/2008/20080731\\_jc1513\\_policy\\_criminalization\\_en.pdf](http://data.unaids.org/pub/basedocument/2008/20080731_jc1513_policy_criminalization_en.pdf)

40 Details of the policing guidance and documentation relating to it are available at <http://www.nat.org.uk/Our-thinking/Law-stigma-and-discrimination/Police-investigations.aspx>. See also <http://www.tht.org.uk/informationresources/publications/policyreports/policingtransmission950.pdf>

41 Supreme Court of the Netherlands, Judgment of 18 January 2005, Case Number LJN R 1860.

42 Kouwen, W. and K. Bruinenberg (2006). “HIV Transmission: Criminalisation.” *Journal of Criminal Law* 70: 487.

43 Article 231 makes it a criminal offence where someone “deliberately spreads a dangerous transmissible human disease.” Informed consent is not a defence, and exposure without transmission may also be prosecuted.

44 *S v S and R* (Geneva Court of Justice) 23/2/2009, available at [http://www.aidslex.org/site\\_documents/CR-0066E.pdf](http://www.aidslex.org/site_documents/CR-0066E.pdf)

45 Vernazza, P., B. Hirschel, et al. (2008). «Les personnes séropositives ne souffrant d'aucune autre MST et suivant un traitement antirétroviral efficace ne transmettent pas le VIH par voie sexuelle » *Bulletin des médecins suisses* 89(5): 165-69. This is available in English at [http://www.aidslex.org/site\\_documents/CR-0027E.pdf](http://www.aidslex.org/site_documents/CR-0027E.pdf)

46 Submission made by Deborah Glejser, Porte-parole Coordinatrice Communication et Mobilisation, Switzerland for the High-Income Countries Dialogue of the Global Commission on HIV and the Law.

47 UNAIDS / WHO (2008), *Antiretroviral therapy and sexual transmission of HIV*, UNAIDS/WHO: Geneva available at [http://data.unaids.org/pub/PressStatement/2008/080201\\_hivtransmission\\_en.pdf](http://data.unaids.org/pub/PressStatement/2008/080201_hivtransmission_en.pdf)

48 Gasquez, R (2009), *Pour la dépénalisation de l'exposition au VIH*, Plaidoyer 4/09, available at [http://www.aidslex.org/site\\_documents/CR-0095F.pdf](http://www.aidslex.org/site_documents/CR-0095F.pdf) (in French).

people living with HIV who know that their viral load is negligible may believe that they are not reckless in the legal sense if they engage in sex, which carries with it the risk of transmission. There are two possible situations, which may confront a court where such a person is charged with recklessly transmitting HIV. First, such a person may use a condom, but the condom fails. Second, they may choose not to use a condom. In jurisdictions where there is guidance that acknowledges the relevance of safer sex to the determination of recklessness (or its equivalent), there is an important question as to whether unprotected sex with an undetectable viral load is reckless. The CPS Guidance for England and Wales, for example, in its original (2007) version stated that:

*“Evidence that the defendant took appropriate safeguards to prevent the transmission of their infection throughout the entire period of sexual activity, and evidence that those safeguards satisfy medical experts as reasonable in light of the nature of the infection, will mean that it will be highly unlikely that the prosecution will be able to demonstrate that the defendant was reckless.”<sup>49</sup>*

The Swiss Statement was not published until after this guidance had been published, and it is clear from the context that “appropriate safeguards” was understood as the use of condoms. Subsequent to the publication of the Swiss Statement, though, the guidance was revised in such a way as to highlight the significance both of viral load and developments in testing for recency of infection. The guidance now states:

*“Prosecutors should also bear in mind that there may be varying degrees of infectiousness during the cycle of infection and during any anti-retroviral therapy. Therefore the scientific evidence is extremely helpful here and it should also include specific information on the degree of infectiousness of the suspect at the time of the alleged offence. Prosecutors should consider the need for scientific evidence namely clinical and epidemiological evidence regarding duration of infection, the possible incubation period of the infection and a strong likelihood that the suspect infected the complainant as opposed to any possibility that the complainant may have infected the suspect. The proximity of the strain(s) of infection in the complainant and suspect and the extent to which the scientific evidence supports other factual evidence in terms of when the infection was allegedly passed will be critical in helping to determine the weight that may be placed on the scientific evidence.*

*In the case of HIV transmission, new tests, known as RITA (Recent Infection Testing Algorithm) tests, are sometimes being used to assess rates of recent infection in the population, and it is possible that a RITA test result for an individual sample might be offered as evidence of the timing of infection. These tests are sometimes also known as STARHS (Serological Testing Algorithm for Recent HIV Seroconversion) tests. Prosecutors should be aware that there are limitations on the reliability of such evidence at an individual level and any claim of evidence of recency of infection should be referred to any prosecution expert witness.”*

The CPS guidance is only that – guidance – but it is to be applauded as an attempt to ensure that prosecutors are at the very least aware of the complexities involved in proving transmission, and as demonstrating a willingness to develop an evidence-based approach to the enforcement of existing law.

## 6. Australasia

- 6.1 Australasia has recorded a relatively few convictions in absolute terms (at the time of writing fifteen in Australia, seven in New Zealand) though this is a significant number given the relatively low prevalence. Despite this low number, the region is of interest for two reasons. First, New Zealand is the source of one of the more enlightened judgments in the landscape of criminalisation and, second, Australia is an object lesson in the way legal and jurisdictional complexity can result in unnecessary challenges and difficulties for people living with HIV.
- 6.2 As for the New Zealand judgment, this is the 2005 decision of the relatively humble District Court of Wellington in *New Zealand Police v Dalley*,<sup>50</sup> where the defendant was acquitted on a charge of criminal nuisance. This offence would have been made out had the judge concluded that in failing to disclose his diagnosed HIV status to his partner prior to engaging in oral and vaginal sex he failed to discharge a legal duty. The judge, however, refused to conclude that there had been such a failure. In an enlightened judgment she explained her position as follows:

*“It seems to me that most people would want to be told that a potential sexual partner was HIV-positive. There may well be a moral duty to disclose that information. There is however a difference between a moral duty and a legal duty, the legal duty in this case being to take reasonable precautions against and use reasonable care to avoid transmitting [...] HIV [...]”*

<sup>49</sup> Crown Prosecution Guidance on the prosecution of sexually transmitted infections, available at <http://www.cps.gov.uk/publications/prosecution/sti.html>

<sup>50</sup> CRI-2004-085-009168, available at: <http://www.aidslaw.ca/EN/lawyers-kit/documents/3.Dalley2005judgment.pdf>

Demonstrating the value and importance of robust expert evidence, she went on:

*"The evidence was that, so far as public health needs are concerned, the steps necessary to prevent the transmission of HIV can be met without the requirement for disclosure. In other words, the use of a condom for vaginal intercourse is considered sufficient."*

6.3 The authority of a District Court in New Zealand may be limited, but there was no appeal in that case and the words of Judge Thomas have resonated across the Commonwealth since they were uttered, providing ammunition in other Commonwealth jurisdictions (such as Canada) for advocates attempting both to establish some greater degree of rationality and consistency in the use of scientific evidence, and to establish – through expert intervention – that liability should not as a matter of principle be imposed where there is little or no risk of onward transmission, or necessarily be triggered by non-disclosure.

6.4 That rationality and consistency is something to be desired is nowhere more apparent than in the other country in the region – Australia. As is the case with New Zealand there is a relatively low HIV prevalence, a consequence of the effective prevention work undertaken by national and regional HIV/AIDS organisations. This achievement is not assisted, however, by the eight different sets of criminal laws in each of the eight state jurisdictions. These laws manifest no consistency, one of them HIV-specific, some of them imposing liability for exposure as well as transmission, some transmission only. Across the country there is variability in the scope of liability, the defences that are available and the penalties that may be imposed. There is a national population of just under 22 million and under 25,000 people living with HIV<sup>51</sup> and yet to 2010 there had been 28 recorded prosecutions and 15 convictions<sup>52</sup> (high when compared with the UK for example). Both the National Association of People with AIDS (NAPWA) and the Australian Federation of AIDS Organisations (AFAO) have been tireless in advocating for reform,<sup>53</sup> but this is an uphill struggle where the very structure of the legal system impedes consistency:

*"The patchwork of laws is . . . more complicated than some states criminalising things that others do not. In numerous instances, laws in a single jurisdiction address a particular practice as illegal or as defence. That identification and targeting of different aspects of behaviour, differentiated and multiplied across eight jurisdictions, makes for substantial variation of laws. For example, in N[ew]S[outh]W[ales], public health law requires an HIV-positive individual to disclose their status to partners before they have sex, and it is no defence if condoms or other safe [sic] sex practices are used. In Tasmania, disclosure is required before sex but also before sharing a needle . . . In Victoria, a person is required to use a condom, but it is a defence if the person becomes infected after unprotected sex if they voluntarily consented to the risk of being infected."<sup>54</sup>*

6.5 This is not just a question of housekeeping. Inconsistency is undesirable because (a) it makes it difficult to communicate with people living with HIV and others about what their responsibilities are, which in turn renders prevention work more problematic, and (b) it is contrary to the rule of law – which demands certainty, consistency and clarity as an end in itself. This criticism is not, it should be emphasised, with the Australian legal system as such. A country is entitled to organise its legal affairs as it sees fit. Rather it is a criticism that seeks to highlight the negative public health and other consequences that may flow from responding in individual and discrete ways to a common problem. If the focus of countries should be to adopt measures that contribute to the elimination of HIV, there may be value in encouraging regions and nations (where the nations concerned comprise numerous jurisdictions) to collaborate on achieving consensus on beneficial, evidence-based, law reform – and to support those organisations (such as AFAO) that are already trying to achieve this.

## 7. North America

7.1 Canada and the US have, in absolute terms, convicted more people (a disproportionate number from minority ethnic, especially African and Afro-Caribbean, communities<sup>55</sup>) for HIV exposure and transmission offences than all the other countries of the world combined. This stark fact alone is enough to justify a particular focus on these jurisdictions, where in the US individual states are responsible for both criminal legislation and its enforcement and

51 [http://www.med.unsw.edu.au/nchechrweb.nsf/resources/SurvRep07/\\$file/ASR2010-rev1.pdf](http://www.med.unsw.edu.au/nchechrweb.nsf/resources/SurvRep07/$file/ASR2010-rev1.pdf)

52 There are more cases in the pipeline at the time of writing. See <http://napwa.org.au/pl/2011/03/unlawful-intentions>

53 See the NAPWA monograph *The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality* available at The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality <http://napwa.org.au/papers/2009/the-criminalisation-of-hiv-transmission-in-australia-legality-morality-and-reality> (accessed on 10 May 2011) and the AFAO Criminalisation Toolkit available at [http://www.afaonet.org/library\\_docs/policy-DP0211\\_HIV\\_Crime\\_and\\_the\\_Law.pdf](http://www.afaonet.org/library_docs/policy-DP0211_HIV_Crime_and_the_Law.pdf) (accessed on 10 May 2011).

54 Woodroffe, M (2009), *Criminal transmission of HIV in Australia*, pp 60-73 in NAPWA monograph.

55 Submission made by Valérie Pierre-Pierre, African and Caribbean Council on HIV/AIDS in Ontario (ACCHO), Canada for the High-Income Dialogue of the Global Commission on HIV and the Law. See also, in the context of the impact on women of colour, the submission made by Women with A Vision, New Orleans, Louisiana, USA for the High-Income Dialogue of the Global Commission on HIV and the Law.

in Canada the law applies to the whole country but is subject to enforcement variation among the provinces and territories. The variety of offences in this region is staggering. Rather than attempting a comprehensive synthesis,<sup>56</sup> just three of the key features of criminalisation in this region are highlighted.

## 7.2 Non-sexual exposure

In both Canada and the US the criminal law has been, and continues to be, used against people living with HIV alleged to have exposed others to HIV through spitting, biting and other activities where the risk of infection is low or negligible (such as urinating or smearing faecal matter).<sup>57</sup> Although this may be explained partly by the early adoption of criminalisation in the US, when knowledge and understanding about HIV transmission was not as great and when a precautionary principle was being adopted more generally,<sup>58</sup> its continued deployment is illogical and indefensible (especially given the gravity of the punitive response relative to other activities and behaviours, such as dangerous driving).<sup>59</sup> It is not simply the fact that prosecutions have resulted in extended sentences of imprisonment<sup>60</sup> that is of concern, or that they have enabled HIV to be defined as a “harmful device” in the context of a bioterrorism statute<sup>61</sup> (though these, and other, individual cases are troubling enough); it is that they contribute to, and reinforce, popular misconceptions both about HIV and those who are living with it.<sup>62</sup> It would be wrong, given the absence of any co-ordinated, federal, legal policy response to HIV exposure and transmission cases (other than that emanating from the Canadian Supreme Court in that jurisdiction), to suggest that the reinforcement of ignorance is intentional; but it would arguably *not* be overstating the case to suggest that the effect of these prosecutions is both systemic and negative. This has been recognised by the National Association of State and Territorial AIDS Directors who, in March 2011, issued a statement making it clear that they

*“support level-headed, proven public health approaches that end punitive laws that single out HIV over other STDs and that impose penalties for alleged non-disclosure, exposure and transmission that are severely disproportionate to any actual resulting harm.”<sup>63</sup>*

## 7.3 Risk reduction and the consequences of jurisdictional complexity

One of the consequences of the large number of cases coming before the courts in Canada and the US, but especially in Canada (where appeals from first instance courts would appear to have been more common), is that there has been more opportunity for different issues to be argued, decided and – in some cases – clarified. Such clarification has included, in the exceptional case of Johnson Aziga, the finding that a person may be guilty of first degree murder when those they unlawfully infect die as a result of HIV-related illnesses (a conclusion that has reignited public debate on the question of disclosure).<sup>64</sup> There has also been clarification that (a) the duty of disclosure in cases of alleged aggravated sexual assault is only triggered where there is a significant risk of serious bodily harm (*R v Cuerrier* [1998] 2 SCR 371), and (b) that there is no such significant risk where there is proof of careful use of condoms and/ or an undetectable viral load (*R v Mabior* 2010 MBCA 93). It is also the case, however, that these cases turn on their facts, and the existence of autonomous provincial jurisdictions as yet unconstrained by a binding decision of the Supreme Court on the point means that other courts at the same level of authority in other provinces, have refused to affirm that an undetectable viral load necessarily precludes the need to disclose (*DC v*

56 For excellent summaries and extended accounts see GNP+ (2010), *The Global Criminalisation Scan Report*, available at [http://hivaidsclearinghouse.unesco.org/search/resources/bie\\_gnp%2B\\_criminalisation\\_report\\_2010\\_en.pdf](http://hivaidsclearinghouse.unesco.org/search/resources/bie_gnp%2B_criminalisation_report_2010_en.pdf). For the US see the American Civil Liberties Union’s annotated state-by-state guide (accurate to 2008) available at [http://www.aclu.org/files/images/asset\\_upload\\_file292\\_35655.pdf](http://www.aclu.org/files/images/asset_upload_file292_35655.pdf) and for Canada see the Canadian HIV/AIDS Legal Network’s Lawyer’s Kit available at <http://www.aidslaw.ca/EN/lawyers-kit/index.htm>.

57 Submission made by Catherine Hanssens, Center for HIV Law and Policy, USA for the High-Income Countries Dialogue of the Global Commission on HIV and the Law.

58 The first US case was in 1987, a period when children with HIV were being refused access to classrooms.

59 See footnote 53 above.

60 One of the more egregious cases is that of a Texas man who was jailed for 35 years after having spat at a police officer, his spit having been defined as a deadly weapon for the purpose of the relevant statute. See *Prison for man with HIV who spit on a police officer*, New York Times, available at <http://www.nytimes.com/2008/05/16/us/16spit.html> (accessed on 10 May 2011).

61 This was despite the dropping of the specific charge in this case. See <http://michiganmessenger.com/38455/activists-advocates-applaud-dismissal-of-bio-terrorism-charges> (accessed on 10 May 2011).

62 Research conducted by one contributor to the High-Income Countries Dialogue of the Global Commission on HIV and the Law highlights the extent to which HIV criminalisation leads some people living with HIV to experience a heightened sense of vulnerability, with high-profile cases being seen to give all people living with HIV – despite their exercise of responsibility as regards HIV exposure and transmission – a bad name. See the sSubmission made by Barry D Adam, University of Windsor and Ontario HIV Treatment Network, Canada for the High-Income Countries Dialogue of the Global Commission on HIV and the Law.

63 National Association of State and Territorial AIDS Directors, (March 2011) available at <http://nastad.wordpress.com/> See also footnote 53 above.

64 See, for example, <http://www.montrealgazette.com/news/Convicted+murder+spreading+faces+dangerous+offender+hearing/4753073/story.html> (accessed on 10 May 2011).

R 2010 QCCA 2289).<sup>65</sup> Jurisdictional complexity has also been highlighted as a problem in the US, where the fact that criminal law is a state matter has resulted in a patchwork of inconsistent provisions. At the same time, as one contributor to High-Income Countries Dialogue of the Global Commission on HIV and the Law suggests, there are a number of common themes that may be derived from them:

*"1) The requirement of intent has been lost. Many of these laws were supposedly created to provide a way to prosecute people for intentionally transmitting—or attempting to transmit—HIV. However, in practice, many of the laws simply allow the human sex drive to substitute for the intent to do harm.*

*2) An actual risk of transmission is also not required. Under many of the laws, activities that pose no risk or almost no risk are still prosecutable – among such activities are: spitting, biting and performing oral sex on someone who is HIV-negative.*

*3) While disclosure followed by consent is a defense under at least some of these laws, it is generally an affirmative defense, which means the defendant has to be able to prove that there was both disclosure and consent. In these types of intimate situations, unless a person gets his or her potential partner to sign a document before engaging in sexual relations, it is almost always going to result in a situation involving one person's word against the other.*

*4) Finally, many of these laws do not make using protection, such as a condom, a defense. So the very behavior we should be encouraging for everyone – safer sex – is not even mentioned, much less encouraged, by these laws. Instead, we send the message that a person can rely on their partner to reveal his or her HIV status and that decisions about engaging in sexual contact and/or using safer sex practices can be based on whether your partner tells you he or she has HIV."<sup>66</sup>*

## 7.4 HIV-Specific Legislation

HIV-Specific legislation was introduced in approximately half the US states not because the states concerned necessarily thought this was a good idea, but because they were obliged to in order to get federal funding for HIV and AIDS services. This critically important dimension of the US response – which resulted in the embedding of laws that were hastily conceived without an evidence-base<sup>67</sup> – subsequently found favour in Africa, as we have seen, with the US Agency for International Development (USAID)-sponsored N'Djamena Model Law (see below). Just as the provisions of the English *Offences Against the Person Act 1861* (used to prosecute cases of transmission in England and Wales to this day) found their way – with variation – through imperial political expansion to the commonwealth countries of Canada, New Zealand, India and Australia, so it is at least arguable that the economic power of the US resulted in another continent that was dependent on funding adopting versions of its laws.

- 7.5 An important initiative in the US is the recent (2011) introduction of a Bill to Congress by Representative Barbara Lee that calls for a review of all federal and state laws, policies and regulations regarding the criminal prosecution of individuals for HIV-related offences.<sup>68</sup> This Bill is significant not only as a legislative initiative, but because it calls explicitly for an evidence-based approach to law that impacts on people living with HIV. It is the most concrete example yet of a response to President Obama's National HIV/AIDS Strategy (NHAS). In the context of HIV-specific criminal laws, this Bill stated, *inter alia*, that: "[W]hile we understand the intent behind [these] laws, they may not have the desired effect and they may make people less willing to disclose their status by making people feel at even greater risk of discrimination. In some cases, it may be appropriate for legislators to reconsider whether existing laws continue to further the public interest and public health. In many instances, the continued existence and enforcement of these types of laws run counter to scientific evidence about routes of HIV transmission and may undermine the public health goals of promoting HIV screening and treatment."

## 8. South and Central America and the Caribbean

- 8.1 As elsewhere, the number of jurisdictions in this region results in a variety of responses and differences in intensity of enforcement. As far as the Caribbean region is concerned, it is apparent from the evidence provided during the Caribbean Regional Dialogue of the Global Commission on HIV and the Law that criminalisation of HIV transmission and exposure has to be understood in the context of other issues and problems, including a punitive response to

65 Submission made by Stéphanie Claivaz-Loranger, COCQ-SIDA, Canada for the High-Income Countries Dialogue of the Global Commission on HIV and the Law.

66 Submission made by Scott Schoettes, LAMBDA Legal Defence & Education Fund, USA for the High-Income Countries Dialogue of the Global Commission on HIV and the Law.

67 This continues unabated. See, for example, the passing of LB 226 (*Assault with Bodily Fluids Bill*) in Nebraska as recently as June 2011. This law potentially criminalises people living with HIV on the basis that their spit or urine in contact with the unbroken skin of another poses a risk of onward transmission. See, for example, <http://stage.nap.org/news/lb-226-spitting-bill-update/>

68 *REPEAL HIV Discrimination Act*, available at <http://www.scribd.com/doc/66386994/REPEAL-HIV-Discrimination-Act>.

homosexuality that has its origins in a Commonwealth legal inheritance, the treatment of prisoners<sup>69</sup> and poverty.<sup>70</sup> In South and Central America, evidence from the Latin America Regional Dialogue of the Global Commission on HIV and the Law suggested too that criminalisation has to be seen as part of a wider set of issues, including violations of rights (e.g. to privacy in the context of HIV status disclosure<sup>71</sup>) as well as its disproportionate impact on vulnerable populations (see evidence from Costa Rica, below). What may be said is that we really do not know enough about the law in this region. Just as with Asia (especially eastern Asia), language barriers and a focus in international policy development on Africa, Europe and North America means that our knowledge about the extent and scope of the law is relatively impeded. There have, however, been a number of notable developments, including the following:

- The Brazilian Ministry of Health's decision in 2009 to recommend cessation of prosecutions and its emphasis on the importance of psychosocial aspects of HIV, the relevance of viral load and the importance of shared responsibility for sexual health.<sup>72</sup>
- The decision of Trinidad and Tobago not to criminalise on the basis that to do so could result in a false sense of security and that criminalising could prevent engagement with the deeper underlying issues.<sup>73</sup> (This far-sighted approach is currently (June 2011) under threat after a high profile case in which a man charged with murdering his wife was instead convicted of manslaughter on grounds of provocation – the provocation being the discovery that his wife was HIV-positive. The case has led to calls from many, including a High Court Judge, for HIV-specific criminalisation and the Attorney-General has indicated that he will bring back the original Bill for discussion.)<sup>74</sup> It is also important to read Trinidad and Tobago's HIV criminalisation response against its punitive response (a maximum of 25 years imprisonment) for homosexuality and that it is a country, which bars entry to, and provides for the deportation of, homosexuals.<sup>75</sup>
- The wide reach of Articles 38 and 51 of *General Law No. 7771 on HIV/AIDS* in Costa Rica, which criminalises people living with HIV who, after diagnosis, have sex with another person without informing them of their status. The particular impact of this on prisoners was described as follows:

*"This article is much more coercive in the case of vulnerable populations such as inmates with HIV in a prison environment, where sex between men is common practice but banned in the prison law. In this situation they must protect their diagnosis but there is also a need to live their sexual life."<sup>76</sup>*

## 9. Africa

- 9.1 Africa is an exceptional region from which we may learn much about the harm, both realised and potential, of criminalisation. The submissions to the Africa Regional Dialogue of the Global Commission on HIV and the Law suggest that, in stark contrast to those from high-income countries, criminalisation of exposure and transmission is a problem that is understood as existing alongside access to justice, treatment access and discrimination, which in practice are also of immediate and pressing significance. Nevertheless, the following may be thought particularly significant and important considerations.

### 9.2 The Model HIV Law and Criminalisation

Many countries in sub-Saharan Africa have adopted HIV-specific legislation based directly or indirectly on the Model Law on STI/HIV/AIDS for West and Central Africa.<sup>77</sup> This model law, agreed in N'Djamena, Chad, in 2004, was supported by regional organisations and sponsored by USAID. Although its stated aim was the protection of the human rights of all people living with HIV, many of the versions developed by different regional countries have

69 Submission made by Maurice Tomlinson, AIDS-Free World, Jamaica for the Caribbean Regional Dialogue of the Global Commission on HIV and the Law.

70 Submission made by Father Eddy Eustache, Partners in Health, Haiti for the Caribbean Regional Dialogue of the Global Commission on HIV and the Law.

71 Submission made by Ramon Gomez Roa, MOVILH, Chile for the Latin America Regional Dialogue of the Global Commission on HIV and the Law.

72 <http://criminalhivtransmission.blogspot.com/2009/11/brasil-health-ministry-says-no-to.html>

73 Taylor-Bassoo, C (2000), *Law cannot prevent HIV*, AIDS Window 1, 2000.

74 [http://www.trinidadexpress.com/news/Wilful\\_spread\\_of\\_HIV\\_AG\\_to\\_bring\\_back\\_bill-123675094.html](http://www.trinidadexpress.com/news/Wilful_spread_of_HIV_AG_to_bring_back_bill-123675094.html)

75 Submission made by Colin Robinson, CAISO, Trinidad and Tobago for the Caribbean Regional Dialogue of the Global Commission on HIV and the Law.

76 Submission made by José Jonás Hernández Cabalcetta, ASOHIHSIDA, Costa Rica for the Latin America Regional Dialogue of the Global Commission on HIV and the Law.

77 For a comprehensive discussion and critique see Eba, P (2008), *One size punishes all: A critical appraisal of the criminalisation of HIV transmission*, ALQ (Newsletter of the Aids Legal Network) September/November 2008, available at [http://www.aidslex.org/site\\_documents/CR-0126E.pdf](http://www.aidslex.org/site_documents/CR-0126E.pdf); and Pearshouse, R (2007), *Legislation contagion: the spread of problematic new HIV laws in Western Africa*, HIV/AIDS Policy and Law Review, 12:2/3 available at <http://www.icw.org/files/AIDSLAWENGLISH.pdf>

included punitive and coercive provisions that run counter to internationally recognised best practice<sup>78</sup>, and all but one of this group of countries criminalise exposure and/or transmission<sup>79</sup>. It is not that such criminalisation exists that is of particular interest (other regions do it too), it is (a) that these laws were introduced after it had become clear in other parts of the world that criminalisation did nothing to reduce onward transmission rates, and (b) that despite little evidence of these laws being used in practice, their very existence is impeding prevention efforts.<sup>80</sup>

### 9.3 Over-criminalisation: mere suspicion, vagueness and indirect effects

The difficulties that arise from a wide variety of approaches to criminalisation (in terms of scope, breadth, fault, defences etc.) have been addressed elsewhere in this paper (see the discussion about Australia) and will not be rehearsed again here. They are, however, equally relevant in Africa where significant variation exists – not only in those countries that have adopted variations of the Model Law, but elsewhere. In Zimbabwe, for example (the first African country to create an HIV-specific offence in 1996), the current law criminalises those who suspect they are HIV-positive but are undiagnosed and who not only act deliberately but do anything that they know involves a real risk or possibility of infecting another<sup>81</sup>; in the Democratic Republic of the Congo there is not only HIV-specific legislation, but “indirect” criminalisation *via* legislation aimed at combating sexual violence and violence against children;<sup>82</sup> and in the Central African Republic the law criminalises those who do not know their HIV-positive status and may be imposed retrospectively.<sup>83</sup> The problem of vagueness (e.g. what counts as sexual contact), or disclosure of status “in advance” in the law has been highlighted as imposing significant difficulties in practice for people living with HIV in Kenya, and has been the subject of an innovative legal challenge on behalf of the AIDS Law Project.<sup>84</sup>

### 9.4 Over-criminalisation: women

One of the key issues in this region – and one about which much has been written<sup>85</sup> – is the particular impact that criminalisation has on women generally and sex workers<sup>86</sup> in particular. Where liability requires knowledge of status (which the more serious offences of intentional and reckless exposure and transmission typically do), women will be disproportionately affected because more women know their status (as a result of routine ante-natal testing). Women are therefore at greater risk of being investigated and prosecuted for the spread of HIV. They are often accused of bringing HIV into the home, and are thrown out of the home by partners and/or extended families.<sup>87</sup> Even if prosecutions are rare in fact (see below), the fear of prosecution and punishment may have an adverse impact on women’s psychological wellbeing. Where failure to disclose HIV status is a component of liability, women may wish to disclose but be fearful of doing so because of the threat of violence. They are thus caught between a rock and a hard place. Finally, the scope, generality and vagueness of many of the laws permit the criminalisation of women for exposure or transmission as regards sexual partners, but also as regards their children (though see the discussion of Sierra Leone below).

### 9.5 Criminalisation ‘in the books’ no indicator of criminalisation in practice

There have been very few reports of prosecutions and still fewer convictions across the region (fewer than ten). This, given prevalence, may be thought odd or counter-intuitive. However, if the hypothesis put forward earlier in this paper is a good one (i.e. that low prevalence and high development are correlated in some way with resort to the criminal law) then this is not surprising. Indeed, it has been noted by GNP+ in its 2010 Global Criminalisation Scan

78 These include, for example, compulsory HIV testing of sex workers and those intending to marry, restricting children’s access to HIV/AIDS educational materials, and mandatory disclosure to sexual partners.

79 It is perhaps not coincidental that criminalisation was introduced into so many national legal responses. The US (home to USAID) had, a decade earlier, obliged states there to enact criminal provisions as a condition of receiving federal HIV/AIDS funding.

80 See, generally, the ALQ (Newsletter of the Aids Legal Network) September / November 2008.

81 *Criminal Law (Codification and Reform) Act* (2004, Zimbabwe)

82 Submission made by Olivier Okakessema, Avocats au Ruban Rouge, the Democratic Republic of Congo for the Africa Regional Dialogue of the Global Commission on HIV and the Law.

83 Submission made by Maliyere Gabriel, Réseau Centrafricain des Personnes Vivant avec VIH/SIDA, the Central African Republic for the Africa Regional Dialogue of the Global Commission on HIV and the Law.

84 Submission made by Omwanza Ombati, Nchogu, Omwanza and Nyasimi, Kenya for the Africa Regional Dialogue of the Global Commission on HIV and the Law.

85 For an excellent discussion see the ALQ (Newsletter of the Aids Legal Network) September / November 2008 and Ahmed, A (2011), *HIV and Women: Incongruent Policies, Criminal Consequences*, Yale Journal of International Affairs, (Winter) 32-42 available at: <http://yalejournal.org/wp-content/uploads/2011/03/116107ahmed.pdf>

86 Submission made by Dingaani Mithi, Journalists Association Against AIDS, Malawi for the Africa Regional Dialogue of the Global Commission on HIV and the Law.

87 Submissions made by Grace Maingi-Kimani, Federation of Women Lawyers – Kenya, and Daniel Jafeth Lema, Legal AID Clinic – University of Dar Es Salaam, Tanzania for the Africa Regional Dialogue of the Global Commission on HIV and the Law.

Report that there have been no convictions in countries where the general population prevalence is higher than 16%. We might therefore anticipate infrequent use of the criminal law in the region, despite its existence.

## 9.6 Broad tests of fault

Many of the countries that criminalise exposure and transmission in the region allow liability in principle where the defendant is proven to have acted not only intentionally or recklessly, but also negligently. This degree of fault is relatively rare in European jurisdictions (though not unheard of) and extends the scope of liability significantly since it generally does not require conscious advertence to risk-taking.<sup>88</sup> It is also appears that, at least in some countries, criminalisation is being pursued despite an absence of popular consensus.<sup>89</sup>

## 9.7 Examples of good practice

There are, despite these difficulties, a number of examples of good practice in the region. For example, the South African Law Commission concluded in 2001 that there was neither benefit to be gained from, nor any justification for, an HIV-specific offence.<sup>90</sup> In Liberia, despite there being an HIV-specific law grounded in wilfulness, there is no liability for conduct where there exists “no significant risk of HIV infection”, where safer sex is practised, where there has been disclosure prior to sex (or the partner is aware by some other means), or where non-disclosure is the result of a reasonable fear of violence. In Sierra Leone, which in common with some other states had a law enabling the criminalisation of mother-to-child transmission, community efforts ensured its repeal in 2010. In Uganda, efforts have been made by UGANET to ensure changes to the *HIV Prevention and Control Bill 2011*, and the penalty of death which that Bill proposed for intentional transmission has, as a result of co-ordinated civil society intervention, been reduced to ten years’ imprisonment.<sup>91</sup> Finally, Mauritius – which had originally intended to pass a law based on the Model Law – decided after interventions from civil society groups not to criminalise even wilful transmission; and Uganda, as recently as May 2011 and after massive international pressure, abandoned plans to sentence to death persons living with HIV engaging in homosexual activity. While not an example of good practice, the shift demonstrates that nothing is inevitable, and everything may be changed if the arguments are sound.

## 10. Asia

10.1 This region comprises a massive geographical area with a wide variation in prevalence rates, both as between countries (an estimated 0.1% in China to 1.3% in Thailand) and as between the general population and key groups (it is estimated, for example, that some 35% of MSM are living with HIV in Mandalay, Myanmar).<sup>92</sup> With such a large number of sovereign states, and such a wide variety of political, cultural and religious traditions and cultures (contrast, for example, China and Japan, Thailand and North Korea), it should not be any surprise that there exists significant variation in the use of criminal law. It is, however, difficult to be as sure about the data in this region generally (and some parts of it in particular) than that from other regions across the globe. This is a consequence largely of linguistic barriers and the northern/ European / Atlantic focus of much of the funded legal and policy work in this area. It should also be noted that in an e-discussion that was undertaken as part of the Asia-Pacific Regional Dialogue for the Global Commission on HIV and the Law, criminalisation of exposure and transmission was mentioned in passing, but there was much more concern with the criminalisation of vulnerable groups.<sup>93</sup> Having said this, the following are some of the distinctive and/ or notable features of criminalisation here.

## 10.2 Positive duties

Two of the largest countries either already have (China<sup>94</sup>) or are contemplating (India<sup>95</sup>) legislation that imposes positive duties on people living with HIV – both to take active measures to prevent onward transmission (through

88 Djibouti permits prosecution of exposure or transmission through “L'imprudance, l'insouciance ou la négligence”: *Loi n°174/AN/07/5ème L portant mesures protectrices adaptées à la situation des personnes vivant avec le VIH/Sida et des groupes vulnérable*, available at <http://www.aidslex.org/site/documents/D-0031E.pdf>, and Madagascar criminalises transmission by “recklessness, carelessness, inattentiveness, or negligence”: *Law 2005-040 on the Fight Against HIV/AIDS and the Protection of Rights of People Living with HIV* (2005, Madagascar).

89 This was the case, for example, with the Malawian *HIV and AIDS (Prevention and Management) Bill* (2009), where a study of stakeholders found only 19% of people in favour of a proposal to criminalise deliberate, reckless and negligent exposure or transmission.

90 South African Law Commission (2001), *Fifth interim report on Aspects of the Law relating to AIDS: the need for a statutory offence aimed at harmful HIV-related behaviour*.

91 Submission made by Dora Kiconco Muzinguzi, UGANET, Uganda for the Africa Regional Dialogue of the Global Commission on HIV and the Law.

92 van Griensven, F and de Lind van Wijngaarden, J (2010), *A review of the epidemiology of HIV infection and prevention responses among MSM in Asia*, AIDS 24: Supplement 3, S30-S40.

93 See [http://www.hivapcop.org/sites/default/files/resource/hivapcop\\_report\\_hivandlaw\\_web.pdf](http://www.hivapcop.org/sites/default/files/resource/hivapcop_report_hivandlaw_web.pdf)

94 Decree of the State Council of the People's Republic of China, *No. 457 Regulations on AIDS Prevention and Treatment* (2006).

95 <http://www.aidsmap.com/South-and-central-Asia/page/1444923/#item1444924>

only practising safer sex, for example) as well as to disclose known HIV status. Such positive obligations are relatively rare in legal systems (partly because of obvious problems of enforcement), and demand – as a matter of justice – that people obliged to comply with them are either facilitated and supported in doing so, or excused where doing so may be difficult or impossible (as may be the case for women, or for younger people).

### 10.3 Low fault requirement and positive disclosure

Exposure and transmission are also criminalised in South-East Asia, though given the prevalence – at least in some countries and in some populations – the numbers of cases have been small. One particularly egregious law (widely criticised by UNAIDS and others) is that in Singapore (section 23 of the *Infectious Diseases Act*), where those who merely have reason to believe that they may be HIV-positive (i.e. there is no need for a positive diagnosis) commit an offence by having sex unless they have informed their partner of the possible risk or take reasonable precautions against transmission.<sup>96</sup>

## 11. Concluding Observations

In light of the preceding discussion the following observations are made.

- 11.1 First, our knowledge of the situation regarding criminalisation in some regions is much greater than in others – notably Asia and South and Central America. If there is to be a response better able to address criminalisation on a truly international and global level there needs not only to be more thorough efforts at data collection in countries and regions, and financial and logistical support where feasible for this from governments and other organisations, but that research needs to be sensitive to local conditions and – where possible – undertaken by persons living with HIV and their representatives. The testimony of those who submitted evidence to the Regional Dialogues of the Global Commission on HIV and the Law demonstrates clearly what the benefits of local knowledge, understanding and experience are, which are vital for advocacy and evidence-based policy making and legislative reform
- 11.2 Second, there are many examples across the regions of elision between criminal law and public health law. This is unhelpful. Not only does it result in criminal law being used to achieve public health goals (for which it is supremely inappropriate and for which purpose there exists no evidence of success), it results in the development of public health laws that are coercive and punitive when they should be facilitative. These ideas are expressed in the following tables:

<b>Criminal law and criminal justice process are</b>	<b>Public health interventions are</b>
<ul style="list-style-type: none"> <li>• Retrospective / backward looking</li> <li>• More coercive than facilitative</li> </ul> <p><i>are primarily concerned with:</i></p> <ul style="list-style-type: none"> <li>• Conduct and consequences</li> <li>• Individuals</li> <li>• Localised evidence</li> <li>• A particular moment (in the past)</li> </ul> <p><i>assume and are premised upon:</i></p> <p>Rationality Individual responsibility</p> <p><i>have a dominant logic informed by:</i></p> <p>Legitimate punishment</p>	<ul style="list-style-type: none"> <li>• Prospective / forward looking</li> <li>• More facilitative than coercive</li> </ul> <p><i>are primarily concerned with:</i></p> <ul style="list-style-type: none"> <li>• Motivations and behaviours</li> <li>• Populations and communities</li> <li>• Broad-base evidence</li> <li>• Process and change (now and in future)</li> </ul> <p><i>acknowledge / assume:</i></p> <ul style="list-style-type: none"> <li>• No necessary rationality</li> <li>• Shared responsibility</li> </ul> <p><i>have a dominant logic informed by:</i></p> <ul style="list-style-type: none"> <li>• Effective harm reduction</li> </ul>

- 11.3 These differences have consequences for the way in which exposure to HIV infection and its transmission tend to be comprehended, although it is important to recognise that public health law interventions have the potential to be coercive and insufficiently responsive to the difference between HIV and diseases which are more easily communicable or contagious.

96 [http://www.ilo.org/wcmsp5/groups/public/@ed\\_protect/@protrav/@ilo\\_aids/documents/legaldocument/wcms\\_117816.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_protect/@protrav/@ilo_aids/documents/legaldocument/wcms_117816.pdf)

Criminal law comprehends	Public health comprehends
<ul style="list-style-type: none"> <li>• HIV as a morally significant and harmful phenomenon affecting individuals</li> <li>• Onward HIV transmission as a discrete event, and as something to be investigated and evaluated through the application of abstract rules and principles</li> <li>• Risk-taking behaviour as culpable recklessness – the product of rational decision making for which individuals are accountable</li> <li>• Those who transmit HIV or who expose others to risk as people in need of retributive punishment and incapacitation</li> <li>• Publicity as valuable</li> <li>• Responsibility for transmission and exposure as lying with the person living with HIV</li> <li>• Coercive measures as a first resort</li> </ul>	<ul style="list-style-type: none"> <li>• HIV/AIDS as biological, social and epidemiological phenomena affecting communities and populations</li> <li>• Onward transmission as a continuing process, and as something to be prevented through education and empowerment</li> <li>• Risk-taking behaviour as something caused by ignorance, powerlessness, necessity or pleasure-seeking</li> <li>• Those who transmit disease or who expose others to risk as people in need of counselling, care, treatment and support</li> <li>• Confidentiality as valuable</li> <li>• Responsibility for transmission and exposure as shared between people living / not living with HIV</li> <li>• Coercive measures as a last resort</li> </ul>

11.4 In those countries which have made, and continue to make, use of isolation or civil detention for people diagnosed with HIV (such as Sweden), the experience of law for people in custody, if not the reason for its deployment, may not be all that different.<sup>97</sup> Moreover, it is clear that in some countries in the regions there is no necessary differentiation between what is understood to be criminal or penal law, and what might be thought of as public health, or public health-oriented law.<sup>98</sup> Of course, there may well be law makers who, despite understanding that criminal law will not necessarily achieve good public health outcomes, are still wedded to criminal law for other reasons (because, for example, it is thought to best reflect the particular country's values). The differences set out here will not necessarily persuade such law makers to change their approach, but they should give them cause to reflect critically on whether the criminal law values and objectives (as set out in these tables) are in and of themselves sufficient justification for their preferred punitive approach. The burden of proving the benefits of decriminalisation have fallen on those advocating for it, whereas there are persuasive arguments that – consistent with the principles of minimum criminalisation – that burden should fall on those who advocate for the use of punitive responses to the pandemic.

11.5 Third, it should be recognised that criminalisation continues apace and unabated, and that new laws are still being passed. Despite our knowledge and understanding of the harm of investigating, prosecuting and convicting people living with HIV (including, significantly, the reinforcement of stigma associated with HIV infection), politicians and policy makers seem still to be willing to resort to the criminal law as a legitimate and rational response to the epidemic (though in this context the initiative of US Representative Barbara Lee and her *REPEAL HIV Discrimination Bill* stands out as a significant contribution). More often than not this appears to be the result of – and so perpetuates – misinformation and prejudice. The value and importance of evidence-based policy-making and legislation should be emphasised as strongly as possible.

11.6 Fourth, the human cost and consequences of criminalisation are important to acknowledge. For as long as criminal laws exist, it will be open to some who receive an HIV-positive diagnosis to seek its enforcement against those they believe to have infected them – and this despite the fact that the vast majority of people living with HIV seek wherever possible to minimise the risk of onward transmission. This does not only impact on those against whom allegations are made, but also on those who have brought prosecutions. In this regard the words of one such complainant, who provided vivid testimony for the Asia-Pacific Regional Dialogue of the Global Commission on HIV and the Law, bear direct quotation:

*“Age and wisdom have changed my mind about this issue. At the time the case was so hyped, and drama-filled. I believed I'd be supported afterwards, I wasn't. I was so young and easily influenced by the police. I had no idea of the consequences at the time. This court case did no favours for dark-skinned men living with HIV in New Zealand. It created a stereotype that all black men with HIV were intentionally infecting large numbers of women. Yet the*

<sup>97</sup> See, for example, the case of *Enhorn v Sweden* [2005] E.C.H.R. 56529/00, para 41. For a discussion see Martin, R (2006), *The exercise of public health powers in cases of infectious disease: human rights implications*, Medical Law Review, 14(1): 132-143.

<sup>98</sup> So, for example, the Austrian *Penal Code* contains the following two provisions:  
*“S 178. Anyone who intentionally commits an act, which is likely to cause the danger of spreading a transmissible disease to human beings, has to be punished with imprisonment up to 3 years or fine up to 360 day rate, provided that the disease is certifiable.  
S 179. Anyone who negligently commits an act which is likely to cause the danger of spreading a transmissible disease to human beings, has to be punished with imprisonment up to 1 year or fine up to 360 day rate, provided that the disease is certifiable.”*

The first of these, by requiring intention, is clearly criminal; but the latter, by merely requiring negligence – and no actual transmission – is more akin to public health law.

*evidence shows there have only been a few cases. The few have made it worse for the rest of us.*<sup>99</sup>

- 11.7 Fifth, criminalisation is insidious in its effects, whether or not the criminal law is enforced extensively (as in high-income countries) or not (as in Africa). Testimony for the High-Income Countries Dialogue (from North America in particular) demonstrates the racialised dimensions of criminalisation, where a disproportionate number of people from minority ethnic communities are prosecuted, thus reinforcing negative and harmful stereotypes so fuelling HIV-related discrimination and prejudice. The Africa Regional Dialogue, in contrast, drew attention to the ways in which the position and treatment of women are adversely impacted by laws framed ostensibly at protecting people living with HIV. The Caribbean and Latin America Regional Dialogues provided evidence, too, of the ways in which people living with HIV who fall foul of criminal law in ways not related directly to HIV transmission and exposure, may be affected where prisons fail to provide the means of minimising risk (through, for example, the provision of condoms), thereby increasing the likelihood of criminal liability where sex takes place.
- 11.8 Sixth, the paper has shown how – in the absence of decriminalisation – prosecution guidance and education of criminal justice personnel can have a beneficial impact in terms of limiting, or restricting, prosecutions to the most egregious and clear-cut cases. Such guidance (as that which has been developed by the CPS, in collaboration with national HIV/AIDS NGOs and others) may not only serve as an educative tool, but – by increasing understanding of the significance of viral load and the limitations of phylogenetic analysis evidence – may serve to reduce the number of potential miscarriages of justice (arising, for example, from guilty pleas by those against whom the evidence is in fact insufficient to meet the criminal standard of proof).
- 11.9 Finally, there does appear to be some correlation between the use of the criminal law and the wealth of the nations concerned, at least in some respects. The fact that there is so little criminalisation in practice in Africa, or in Asia (at least as far as we can tell from the limited evidence) may be a consequence either of limited resources, or of an unwillingness on the part of people to come forward with complaints to law enforcement agencies. The latter explanation is intuitively compelling: the more normal HIV becomes (the case in higher prevalence countries) the less it is likely to be seen as something that is a harm that warrants state punishment. It will only be in the most egregious cases that this may not be so (though we should not forget the disproportionate impact of even the risk of being prosecuted on vulnerable groups and populations, especially women, and especially in Africa). Research should be funded as a matter of priority that seeks to explore correlations between economic, social and cultural factors and the use of criminal law, and at the ways in which decriminalisation initiatives are impacted by income disparities and inequalities.

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99 Submission made by Apihaka Mack, INA, New Zealand for the Asia-Pacific Regional Dialogue of the Global Commission on HIV and the Law.

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