

Background Paper

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Criminalisation of HIV Non-Disclosure, Exposure and Transmission: Background and Current Landscape

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on the Science and Law of Criminalisation
of HIV Non-Disclosure, Exposure and Transmission

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Table of Contents

I. Introduction	5
II. Global overview of laws and prosecutions relating to HIV non-disclosure, exposure and transmission	6
HIV-specific statutes	6
General criminal laws.....	7
Most active countries (new HIV-specific criminal statutes)	7
Most active countries (law enforcement)	7
III. Content and scope of laws	8
HIV-specific statutes	9
United States	9
Singapore.....	10
Bermuda	10
Australia	10
Denmark	10
General criminal laws.....	10
Canada	11
United States	11
Sweden	11
Austria.....	12
Switzerland	12
France.....	12
Norway.....	12
Netherlands.....	12
Germany	13
United Kingdom	13
Australia.....	13
Italy	13
Finland	14
New Zealand.....	14
Range of behaviours prosecuted	14
Consensual sex	14
Biting, spitting and other “body fluid assault”	14
Vertical transmission.....	14
Sex work	14
Consensual sharing of drug-injecting equipment.....	15
Blood donation	15
IV. Recent developments	15
North America	15
United States	15
Canada	16
Europe	16
Australia and New Zealand.....	17
Elsewhere	17
V. Key elements of judicial and political reasoning	18
Judicial reasoning	18
Deterrence	19
Incapacitation	20
Rehabilitation	20
Achieving justice through retribution/restitution	20
Political reasoning for enacting HIV-specific laws.....	21
Public health and safety.....	21

Financial incentives.....	21
Responding to individual egregious cases.....	21
Responding to public opinion.....	21
Following the example of prosecuting countries.....	22
VI. Potential unintended impacts of laws and prosecutions.....	22
Potential disincentive to disclose HIV-positive status to sexual partners.....	22
Potential disincentive to disclose HIV-related risk behaviours to healthcare professionals.....	23
Potential negative impact on sexual and reproductive rights.....	23
Potential negative impact on human rights.....	23
Potential to increase HIV-related stigma.....	24
Potential to overstate risks.....	24
Potential to create a false sense that HIV is someone else's problem.....	24
Potential to provide a further disincentive to know one's HIV status.....	25
VII. Law enforcement issues.....	25
Potential for selective and arbitrary prosecutions.....	25
Selective prosecution of HIV.....	25
Arbitrary prosecution of people with HIV.....	25
Potential for inappropriate/insensitive police investigations and media reporting.....	26
VIII. Prosecution issues.....	27
Proof of (non) disclosure.....	28
Proof of exposure.....	28
Proof of transmission.....	29

I. Introduction

1. Since 1987, when prosecutions¹ were first initiated and HIV-specific criminal statutes enacted in the United States², increasing numbers of countries around the world have applied existing criminal laws and/or created HIV-specific criminal statutes to prosecute people living with HIV who have, or are believed to have, put others at risk of acquiring HIV.³
2. Most criminal cases have been framed by prosecutors and media as being cases of “deliberate” or “intentional” HIV transmission when, in fact, the majority have involved neither intent nor transmission.⁴
3. The use of the criminal law in this way is of concern in the following areas:
 - (a) Effectively treating sex between adults, in the absence of disclosure of known HIV-positive status, as a physical or sexual assault despite the absence of intent to harm;
 - (b) Prosecuting consensual sex even when there was prior disclosure of HIV-positive status, the alleged exposure posed a very low risk of HIV infection, and/or HIV transmission did not occur;
 - (c) Applying harsh prison sentences to alleged HIV “exposure” during non-consensual acts that pose very little or no risk of HIV infection, e.g. biting, spitting or scratching;
 - (d) Applying increased prison sentences to people living with HIV who are convicted of sex work, even when there is no evidence that they have intentionally or actually put their clients at risk of HIV; and
 - (e) Applying the criminal law to vertical transmission of HIV during pregnancy, delivery or via breastfeeding.
4. Additional concerns include:
 - (a) Enactment of overly-broad HIV-specific laws;
 - (b) Inappropriate application of general criminal law offences to HIV non-disclosure, exposure or transmission;
 - (c) Selective law enforcement that appears to mainly target members of vulnerable or marginalised populations;
 - (d) Potential miscarriages of justice in terms of proof and causality; and
 - (e) Potential negative public health impacts of a criminal justice approach to HIV prevention.
5. To provide guidance in light of these concerns, the Secretariat of the Joint United Nations Programme on HIV/AIDS (UNAIDS Secretariat) commissioned a policy options paper in 2002⁵; held an international consultation in 2007⁶; and, with the United Nations Development Programme (UNDP), issued the *Policy Brief: Criminalization of HIV Transmission* in 2008⁷.
6. The 2008 Policy Brief calls on governments to limit the application of criminal law to actual cases of intentional transmission, i.e. where a person knows his or her HIV-positive status, acts with the intention to transmit HIV, and does in fact transmit it.⁸ The Policy Brief established the threshold for criminal liability at “intentional HIV transmission” in order to ensure that only truly blameworthy cases were subject to prosecution and to avoid the overly-broad application of the criminal law that might undermine public health goals and human rights.⁹

7. Nonetheless, many jurisdictions – notably in high-income countries – continue to prosecute people living with HIV in a manner and according to standards that appear to discount:
 - (a) The realities of living with HIV;
 - (b) The nature of HIV exposure and transmission risks;
 - (c) Public health approaches to HIV prevention and treatment;
 - (d) Scientific limitations of proving who infected whom; and
 - (e) The possible broader collateral harm of a criminal justice approach to HIV, including creating disincentives to know or to disclose one's HIV positive status, thus hindering efforts to achieve universal access to prevention, treatment, care and support when universal access is the stated goal of governments and others trying to roll-back the HIV epidemic.¹⁰
8. As it appears from available reports that the jurisdictions most active in prosecuting HIV-related non-disclosure, exposure and transmission are within high-income countries, this background paper – and the expert meeting for which it has been produced – will focus primarily on the practices in these countries. The paper will review the application of criminal law to HIV non-disclosure, exposure and transmission both in terms of the achievement of justice and public health goals. It is hoped that this initial attention to countries that prosecute the most will also explicate the issues for those that have not yet begun to prosecute.¹¹

II. Global overview of laws and prosecutions relating to HIV non-disclosure, exposure and transmission

9. Given the lack or inadequacy of systems to track HIV-related (or other) prosecutions in most places, it is not possible to determine the actual number of arrests and prosecutions for every country in the world. Arrests, prosecutions, and plea agreements that are not appealed are often not recorded in established legal search databases. Thus, much of what is known about individual cases comes from media reports, and obtaining accurate information can be challenging – even more so in countries where such information is not freely available. Reported cases, through court reporting or the media, therefore, appear to be illustrations of what may be a more widespread, but generally undocumented, use of criminal law against people with HIV.¹²
10. The Global Network of People Living with HIV (GNP+) published a report on global laws and prosecutions for HIV non-disclosure, exposure and transmission in July 2010¹³ drawing on new and existing surveys. The report concluded that:
 - (a) At least 600 individuals living with HIV in some 24 countries have been convicted under HIV-specific or general criminal laws, with the greatest numbers of reported cases occurring in North America.¹⁴
 - (b) In the past decade, prosecutions using existing HIV-specific statutes or general criminal laws appear to have been increasing in high-income countries.¹⁵
 - (c) Also, in the past decade, new HIV-specific criminal statutes have been enacted, notably in sub-Saharan Africa and parts of Asia and Latin America, although relatively few prosecutions appear to have taken place in these regions.¹⁶

HIV-specific statutes

11. At least 63 countries have jurisdictions with HIV-specific criminal statutes, although just 17 of these countries appear to have prosecuted individuals under

these laws.¹⁷ At the turn of the 21st century, no country on the African continent had an HIV-specific criminal statute. It is now the region with the most countries with HIV-specific criminal statutes (27), followed by Asia (13), Latin America (11), and Europe (9).¹⁸ The rapid spread of new HIV-specific criminal statutes in the west and central region of Africa is primarily the result of a so-called “model law” developed and disseminated by Action for West Africa Region–HIV/AIDS (AWARE–HIV/AIDS).¹⁹

General criminal laws

12. Most reported prosecutions have taken place using existing general criminal laws, most commonly variants of physical or sexual assault statutes. Europe is the region with the most number of countries (21) that have reportedly used general criminal laws, followed by Asia (9), Africa (4), Latin America (3), North America (2) and Oceania (2).²⁰ Notably, the United States and Canada account for the vast majority of reported prosecutions,²¹ while three European countries – Sweden, Austria and Switzerland – appear to represent more than half of the total convictions in Europe.²²

Most active countries (new HIV-specific criminal statutes)

13. Since 2007, at least 12 jurisdictions – Burkina Faso²³, Cape Verde²⁴, Chad²⁵, China (Gansu province)²⁶, Congo²⁷, Democratic Republic of Congo²⁸, Equatorial Guinea²⁹, Kenya³⁰, Mauritania³¹, Nigeria (Lagos state)³², Singapore³³ and Tanzania³⁴ – have enacted or implemented new laws that criminalise HIV non-disclosure, exposure and/or transmission.

14. New laws are currently proposed or under discussion in many more countries or jurisdictions. These developments appear to be mostly taking place in Africa, including Botswana, Cameroon, Cote d’Ivoire, Comoros, Gambia, Ghana, Liberia, Malawi, Mozambique, Uganda, and Zambia.³⁵ HIV-specific statutes are also being considered in Laos³⁶, Trinidad and Tobago³⁷, and the United States.³⁸

Most active countries (law enforcement)

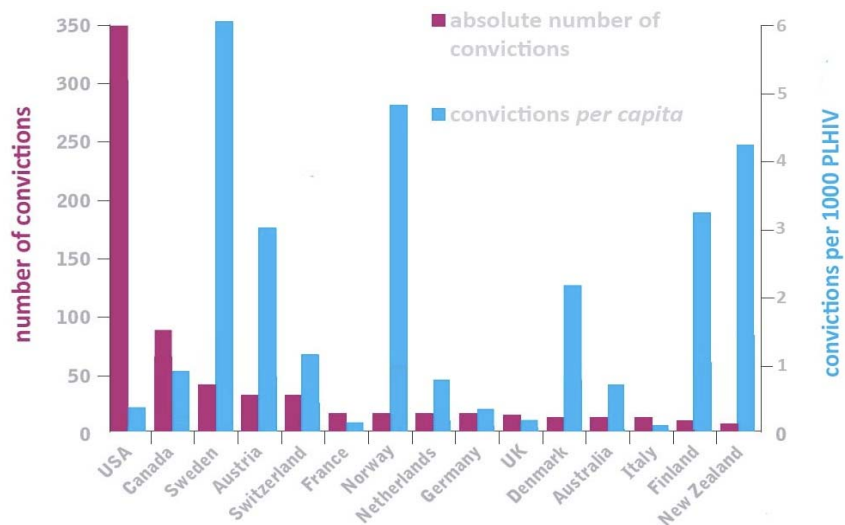


Figure 1: Countries with the greatest number of known convictions/highest ratio of convictions per 1000 people living with HIV³⁹

15. Figure 1 includes all countries with six or more reported convictions, ranked in order of absolute number of convictions. The two countries of North America account for the vast majority of both past and current cases, with documentation of current cases averaging one a week in the United States (US) and one a month in Canada over the past two years.⁴⁰ However, because systems and individuals are not in place to accurately track the number of actual prosecutions, pleas, convictions, and acquittals in a number of these countries, Figure 1 should be viewed as a map of a terrain that is only partially known.
16. Countries not included in this figure because five or fewer convictions have been reported include: Angola, Azerbaijan, Belarus, Belgium, Burkina Faso, Bermuda, Brazil, Cameroon, Cyprus, Czech Republic, Estonia, Georgia, Greece, Hungary, Maldives, Malta, Poland, Romania, Singapore, Spain, Suriname, and South Korea, Taiwan, Turkey, Togo, Ukraine, and Zimbabwe.⁴¹ The above observation about the completeness of reported data also applies here.
17. The US appears to have prosecuted more people living with HIV for sexual and non-sexual exposure or transmission than any other country in the world. At least thirty-four US states have applied HIV-specific criminal statutes or general criminal laws to HIV non-disclosure, exposure or transmission, with a reported national total of at least 350 prosecutions.⁴²
18. A list of arrests and prosecutions from January 2008 to 31 May 2011, although not exhaustive, provides a broad snapshot of the current situation in the United States.⁴³ The majority of the 124 cases listed involved either cases of adults having sex, in the absence of disclosure of known HIV-positive status, with no apparent intent to harm, or conduct that posed no significant risk of HIV transmission (i.e. spitting, biting).⁴⁴ Although the outcomes of some cases remain unknown, the known convictions and sentences often involved severe penalties, including prison terms that reached 25 years or more, even when no transmission of HIV occurred.⁴⁵
19. As of early 2010, 96 prosecutions – of 91 individuals – had been reported in Canada, of which 59% resulted in confirmed convictions, either by trial on the merits or through a guilty plea.⁴⁶ Of the 57 cases which resulted in conviction, only 23% involved an allegation that HIV was actually transmitted.⁴⁷ In the cases of conviction, 88% resulted in a prison term.⁴⁸ Sentences have varied widely from “house arrest”⁴⁹ to 49 years imprisonment,⁵⁰ although the majority of sentences range from two to eight years.⁵¹ In 2009, a Canadian man was convicted on two counts of first-degree murder for having unprotected sex with, and failing to disclose his HIV status to, two women who later died of AIDS-related cancers.⁵² He was classified as a “dangerous offender” in August 2011 and faces indefinite jail time.⁵³

III. Content and scope of laws

20. Although many HIV-specific laws include elements qualifying intent, such as “wilful”, “knowing” or “deliberate”, these terms are usually not well defined, potentially leading to prosecutions where arguably the defendant had no intent to expose another to, or transmit, HIV. General criminal laws most often use the terms “recklessness” or “negligence” which have specific legal meanings, though these meanings can vary from country to country and jurisdiction to jurisdiction.⁵⁴

21. Some HIV-specific laws obligate a person with HIV to disclose their status to their sexual partner prior to sex regardless of the risk of HIV exposure or protective measures taken.⁵⁵ Some HIV-specific laws, and most general criminal laws, provide that knowledge of a partner's HIV status (usually via disclosure) is treated as equivalent to "consent" and thus can be an affirmative defence⁵⁶ to an HIV-related exposure or transmission charge.
22. Proponents of HIV-specific criminal laws say such laws are needed to minimise the possibility that courts will over-extend or inappropriately apply general criminal laws.⁵⁷ On a practical level, HIV-specific criminal laws make it more feasible to obtain convictions, because laws can be written which do not require proof of actual transmission, injury, causation or intent.⁵⁸
23. Opponents of HIV-specific criminal laws, including UNAIDS, object to criminal laws singling out people living with HIV, because such laws and prosecutions contribute to stigma and discrimination, arguably undermining HIV prevention, treatment and care efforts.⁵⁹ UNAIDS and the Office of the United Nations High Commissioner for Human Rights (OHCHR) have recommended since 1996 that States should not create or enforce HIV-specific criminal laws because of fear that they may lead to this stigmatisation and because these cases do not readily reflect general criminal justice principles of legal culpability. "Clearly and legally establish[ed]" elements of culpability, including foreseeability, intent, causality and (non)consent are not consistently met in these cases.⁶⁰ HIV-specific statutes have also been criticised for being poorly drafted, vague about the circumstances under which someone should be prosecuted, and not reflective of the rapidly changing body of scientific knowledge about HIV epidemiology, prevention and treatment.⁶¹

HIV-specific statutes

24. Many HIV-specific statutes – particularly those in the United States – do not reflect up-to-date scientific information of HIV-related risk and harm, and do not require a guilty state of mind nor (in cases of alleged HIV transmission) proof of causality.

United States

25. Thirty-four US states and two US territories have HIV-specific criminal statutes, many of which are vague, inconsistent with HIV science, and/or overly-broad.⁶² Rather than criminalising the actual transmission of HIV, most of these statutes criminalise behaviour that may or may not (and in some cases *definitely does not*) risk HIV transmission.⁶³ Some outlaw practices that carry no significant risk of HIV transmission (e.g. sharing sex toys, spitting, performing oral sex)⁶⁴; and others criminalise non-disclosure of known HIV-positive status, regardless of whether or not a condom or other effective risk-reduction methods were used by the HIV-positive partner.⁶⁵ The HIV-specific criminal statute of the US state of Arkansas is illustrative⁶⁶:

It is a class A felony for a person who knows that he or she has tested positive for HIV to expose another to HIV (1) through the parenteral transfer of blood or blood products or (2) by engaging in sexual intercourse, cunnilingus, fellatio, anal intercourse, *or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body*, without first having informed the other person of the presence of HIV. The emission of semen is not required. [emphasis added]

26. Few other high-income countries have enacted or used HIV-specific statutes to prosecute people living with HIV who have, or are believed to have, put others at risk of acquiring HIV, relying instead on general criminal laws. Those that have adopted HIV-specific criminal laws are listed in chronological order based on when the statute was implemented.⁶⁷

Singapore

27. Singapore updated its Infectious Diseases Act in 1992 to specifically criminalise unprotected sex without disclosure of one's HIV-positive status.⁶⁸ There have been three reported investigations and two prosecutions, all since 2005.⁶⁹ Only one, in 2008, resulted in a conviction and prison sentence.⁷⁰ The same year, Singapore reportedly amended its public health law to make it a crime for a person with HIV who is unaware of the fact, but has "reason to believe" he or she could be infected to have sex without informing a sexual partner of the possible risk, or else to take "reasonable precautions" to protect the partner.⁷¹ The maximum penalty for breaking either of the laws was increased to ten years in prison.⁷²

Bermuda

28. Bermuda passed an HIV-specific law in 1993 which criminalises people living with HIV who have sex that "involves contact between any part of his body and any part of the body of another person" that is "capable of resulting in the transfer of body fluids to that other person" without first disclosing their HIV status.⁷³ The maximum sentence for this "sexual assault" is 20 years imprisonment.⁷⁴ There have been five prosecutions and three convictions, with one acquittal and one case currently before the courts – amongst an HIV-positive population of around 200.

Australia

29. In 1993, the Australian state of Victoria specified HIV as the only "very serious disease" in terms of Section 19A of the Crimes Act (1958) which provides that: "A person who, without lawful excuse, intentionally causes another person to be infected with a very serious disease is guilty of an indictable offence" and faces a maximum of 25 years imprisonment.⁷⁵ It is the only jurisdiction in Australia to have an HIV-specific law after New South Wales repealed its own HIV-specific criminal statute in 2007.⁷⁶ Half of all known prosecutions (15/30) in Australia have taken place in Victoria.⁷⁷

Denmark

30. Denmark prosecuted its first HIV-related case in 1993⁷⁸, but the Supreme Court found in 1994 that the law at the time (wantonly or recklessly endangering life or physical ability⁷⁹) was too vague to provide a clear legal basis for conviction.⁸⁰ A subsection was added in 1994 criminalising exposure to a "fatal and incurable disease"⁸¹, and a government order in 2001 specified that the law applied only to HIV.⁸² In February 2011, Denmark announced the suspension of its HIV-specific criminal statute. Prior to its suspension, at least 18 prosecutions had been reported, with at least ten involving non-Danish nationals, including seven people of African origin.⁸³

General criminal laws

31. General criminal laws can be applied to a wide variety of acts involving potential or actual HIV exposure, and to HIV transmission. However, in an attempt to fit the "harm" of non-disclosure, exposure or transmission into current legal

definitions, many jurisdictions appear to have inappropriately characterised the risks and/or harm of these acts in some cases. (For a detailed analysis, see the paper on *Criminalisation of HIV non-disclosure, exposure and transmission: scientific, medical, legal and human rights issues.*)

32. The 14 high-income countries from **Figure 1 (above)** that use general criminal laws are described below in order of the number of known convictions for HIV non-disclosure, exposure or transmission under these laws.

Canada

33. Canada has used a wide variety of existing criminal laws to prosecute HIV exposure or transmission,⁸⁴ with charges including: assault (maximum prison sentence 5 years),⁸⁵ sexual assault (10 years),⁸⁶ assault causing bodily harm (14 years),⁸⁷ aggravated assault (14 years),⁸⁸ sexual assault causing bodily harm (14 years),⁸⁹ aggravated sexual assault (life),⁹⁰ attempted murder (life),⁹¹ and murder (life).⁹²
34. The number of prosecutions increased substantially following a 1998 Supreme Court ruling (*R v. Cuerrier*) that held that, if an HIV-positive person does not disclose his or her status before engaging in otherwise consensual sexual conduct that poses a “significant risk” of HIV transmission, then the partner’s consent is invalid, thereby rendering the sex an assault.⁹³ However, “significant risk” has not been clearly or consistently defined,⁹⁴ and prosecutions for non-disclosure prior to oral sex⁹⁵ and sex with condoms⁹⁶ have taken place. As a result, substantial confusion amongst people living with HIV, healthcare workers and legal practitioners exists regarding when the duty to disclose arises.⁹⁷

United States

35. In several states in the United States without HIV-specific laws (and even in some states with these laws), variations of assault or homicide laws have been used to prosecute a wide variety of sexual and non-sexual HIV exposure or transmission.⁹⁸
36. Reckless endangerment statutes are commonly used to prosecute HIV-positive persons based on alleged non-disclosure of their status prior to consensual sex. Typically, “reckless endangerment” is defined as recklessly engaging in conduct which places or may place another person in danger of death or serious bodily injury.⁹⁹ Prosecutions have also taken place using statutes criminalising assault¹⁰⁰, attempted murder¹⁰¹, aggravated prostitution¹⁰², bioterrorism¹⁰³ and terroristic threats.¹⁰⁴

Sweden

37. In Sweden, HIV exposure and transmission are prosecuted using crimes against “life and health” laws, including: inflicting “bodily injury”¹⁰⁵, “gross assault” (if it “constituted a mortal danger or whether the offender inflicted grievous bodily harm or severe illness or otherwise displayed particular ruthlessness or brutality”)¹⁰⁶ or “creating danger to another” (if, through “gross carelessness [a person with HIV] exposes another to mortal danger or danger of severe bodily injury or serious illness”)¹⁰⁷. Consent to unprotected sex by the uninfected partner following disclosure does not negate the offence if transmission occurs.¹⁰⁸ Condom use in the absence of disclosure may limit the possibility of being prosecuted.¹⁰⁹

Austria

38. Austria makes it a crime to intentionally or negligently “commit an act likely to cause the danger of spreading an infectious disease”.¹¹⁰ Disclosure of HIV-positive status prior to sex is not a defence, and transmission does not have to occur.¹¹¹ Although there have been prosecutions of people with HIV for oral sex and sex with condoms¹¹², the Ministry of Justice issued a clarifying statement, prior to the Vienna International AIDS Conference in 2010, saying that these acts were no longer criminal offences. It also provided the opinion that, where a person with HIV has an undetectable viral load due to effective antiretroviral therapy, unprotected sex is not a criminal offence; but it went on to say that this opinion was not binding on the courts.¹¹³

Switzerland

39. Switzerland relies on two different non-HIV-specific laws (often used together) to prosecute either HIV exposure or transmission. Article 231 of the Swiss Criminal Code allows for prosecution for HIV exposure or transmission, without the need for a complainant, of anyone who attempts to, or in fact “deliberately spreads a dangerous transmissible human disease.”¹¹⁴ Disclosure of HIV-positive status and/or consent to unprotected sex does not negate the offence, in effect criminalising all unprotected sex by people with HIV.¹¹⁵ Alternatively, Article 122 enables prosecution, as a grievous bodily harm offence, of failing to disclose one’s HIV positive status prior to unprotected sex.¹¹⁶ Unlike Article 231, disclosure is an affirmative defence.¹¹⁷

France

40. The first cases in France were prosecuted under “poisoning”¹¹⁸, “administration of dangerous substances”¹¹⁹ and/or bodily harm laws¹²⁰. The poisoning law is rarely used, as it requires an intent to kill.¹²¹ Although HIV exposure may also be subject to criminal sanctions, most convictions have been for HIV transmission. In 2010, a man was convicted for HIV transmission under the lesser offence of administering substances dangerous to life provided in the French penal code.¹²²

Norway

41. Paragraph 155 of the Norwegian Penal Code, an infectious disease law enacted in 1902, appears to criminalise unprotected sex by HIV-positive individuals even if their partners have been informed of their status and consents to having sex. Both “wilful” and “negligent” exposure and transmission are liable to prosecution, with a maximum prison sentence of six years for “wilful” exposure or transmission and three years for “negligent” exposure or transmission.¹²³ This provision is known as the “HIV paragraph” since it has only ever been used to prosecute sexual HIV exposure or transmission.¹²⁴

Netherlands

42. The Netherlands began prosecutions in 1989¹²⁵ under existing homicide and assault laws¹²⁶. Following two initial convictions, a further thirteen prosecutions with twelve convictions occurred between 2000 and 2005.¹²⁷ A 2005 Supreme Court ruling closely examined scientific evidence of risk of HIV transmission during sex and found that the per-act risk of unprotected sex does not create a “considerable chance” of transmission and used such findings to substantially narrow the scope of the law to only cases of intentional HIV exposure or transmission.¹²⁸

Germany

43. Germany uses bodily injury and aggravated assault laws (German Penal Code Articles 223¹²⁹ and 224¹³⁰) to prosecute HIV exposure and transmission. A Federal Supreme Court decision in 1988 found that unprotected sex without disclosure was attempted bodily injury. Consent to the risk following disclosure is an affirmative defence.¹³¹

United Kingdom

44. Prosecutions in the United Kingdom take place under existing general assault laws.¹³² Two sections of the Offences Against the Person Act 1861¹³³ relating to “grievous bodily harm” can be used to prosecute the transmission of HIV and other serious sexually transmitted infections (STIs) in England, Northern Ireland and Wales: Section 18 (for allegations of intentional transmission)¹³⁴ and Section 20 (for allegations of reckless transmission).¹³⁵ It is also possible to be charged with “attempted intentional transmission”.¹³⁶ Consent to the risk of transmission is a defence, and depends – in almost all cases – on prior disclosure of HIV status to the complainant. An undetectable viral load on antiretroviral therapy and/or the appropriate use of a condom will, according to recently updated Crown Prosecution Service Guidelines, make an allegation of recklessness harder to prove.¹³⁷
45. The Scottish common law offence of “culpable and reckless conduct” allows for prosecutions for the reckless transmission of any serious disease and has been used for HIV alone, as well as for HIV and hepatitis C together.¹³⁸ HIV exposure can be, and has also been, prosecuted.¹³⁹ It remains unclear whether disclosure in the absence of condoms is a legitimate defence to accusations of “culpable and reckless conduct”.¹⁴⁰ Scottish law does not recognise consent as a defence to an assault charge¹⁴¹; and in the absence of an HIV transmission case in Scotland where consent has been used as a defence, it is unclear whether the law would take a similar approach to cases relating to reckless conduct. However, the use of a condom in the absence of disclosure would be a defence even if transmission subsequently occurred.¹⁴²

Australia

46. All eight jurisdictions in Australia are able to prosecute alleged sexual HIV transmission using a variety of laws, including causing a serious or grievous bodily disease¹⁴³, causing grievous bodily harm¹⁴⁴, causing serious harm or injury¹⁴⁵, or endangerment.¹⁴⁶ Two states of mind are generally considered culpable, namely recklessness¹⁴⁷ and intention.¹⁴⁸ A 2011 Victoria Court of Appeal ruling now suggests that informed consent to risk of HIV infection is a defence to reckless or intentional conduct endangering a person with HIV.¹⁴⁹ Notably, HIV prosecutions are on the rise: no case before 1997 resulted in a conviction, but there have been at least 14 successful prosecutions since then.¹⁵⁰

Italy

47. Italy uses bodily harm¹⁵¹, aggravated bodily harm¹⁵² and culpable homicide laws¹⁵³ to prosecute both HIV exposure and transmission. Case law has established that non-disclosure before unprotected sex is considered to be *dolus eventualis* (indirect intention) – which is more or less equivalent to the standard of culpability characterised as “recklessness” in common law systems.¹⁵⁴

Finland

48. Finland uses assault laws¹⁵⁵ to prosecute both HIV exposure and transmission. Condom use and disclosure may limit the possibility of being prosecuted, but case law has not established acceptable levels of risk, nor established that consent to unprotected sex via disclosure is an affirmative defence.¹⁵⁶

New Zealand

49. Prosecutions for HIV exposure and transmission can take place in New Zealand¹⁵⁷ under the following laws: “criminal nuisance”¹⁵⁸; “wounding with intent”¹⁵⁹; and “wilfully infecting with a disease”¹⁶⁰. Prosecutions can also occur under the legal “duty of persons in charge of dangerous things”.¹⁶¹ A New Zealand court has ruled that failure to disclose a known HIV-positive status to a sexual partner is not criminally sanctionable if a condom is used during vaginal intercourse or oral sex.¹⁶²

Range of behaviours prosecuted

50. The criminal law has been applied in the context of potential or actual HIV exposure and transmission in the following circumstances.

Consensual sex

51. Most prosecutions worldwide have been of cases where both parties have consented to sex, but where the party with a known HIV-positive status has allegedly not disclosed his/her HIV status. In the majority of these cases, HIV transmission did not occur; rather, the complainant partner was allegedly exposed to the risk of acquiring HIV. In the minority of cases in which the complainant partner later tested HIV-positive, proof that the defendant intended to harm and/or was the source of the infection has often been less than definitive.

Biting, spitting and other “body fluid assault”

52. Although jurisdictions in Europe and Australia have on occasion prosecuted individuals with HIV for biting others¹⁶³, most prosecutions for alleged HIV exposure via biting, spitting and/or scratching have taken place in Canada and the United States, where prosecutions for other types of “body fluid assault” usually committed against law enforcement officers via exposure to saliva, blood, urine or faeces, also occur.¹⁶⁴

Vertical transmission

53. Prosecutions of a woman who exposes or passes HIV to her baby during pregnancy, birth or breastfeeding are known to have taken place in Austria¹⁶⁵, Canada¹⁶⁶, Sweden¹⁶⁷ and the United States¹⁶⁸. In France¹⁶⁹ and the United States¹⁷⁰, men have also been found criminally liable for vertical transmission.

Sex work

54. Both female and male HIV-positive sex workers can be prosecuted for engaging in, or offering, sexual services to clients even if the acts pose little or no risk of transmission. Although cases have recently been reported in Australia¹⁷¹, Azerbaijan¹⁷², Canada¹⁷³, and South Korea¹⁷⁴, the United States regularly enforces HIV-specific laws criminalising individuals who engage in sex work whilst HIV-positive.¹⁷⁵ At least twelve US states have HIV-specific statutes imposing enhanced penalties for sex work offences (most of these states mandate HIV testing following a first conviction for sex work),¹⁷⁶ and since

cases can be prosecuted under attempt or solicitation theories, no evidence of a completed offense is necessary for conviction.¹⁷⁷

Consensual sharing of drug-injecting equipment

55. The consensual use of non-sterile injecting equipment without disclosure of HIV-positive status is against the law in certain jurisdictions,¹⁷⁸ although few prosecutions, if any, are thought to have ever taken place.

Blood donation

56. Some jurisdictions have statutes specifically criminalising a person with HIV, regardless of knowledge of HIV status, who donates blood, although prosecutions are rare.¹⁷⁹ Prosecutions using general laws have also been reported.¹⁸⁰

IV. Recent developments - The following is a non-exhaustive list of recent policy and legal developments:

North America

57. New HIV-specific criminal statutes focused on “body fluid” assault or risk have recently been enacted in Nebraska and proposed in British Columbia.¹⁸¹

United States

58. In September 2011, California Congresswoman Barbara Lee introduced H.R. 3053, the REPEAL HIV Discrimination Act. This proposed legislation would require a review of all federal and state laws, policies, and regulations regarding the criminal prosecution of individuals for HIV-related offenses. If passed, it would provide funding appropriations for a review of HIV-specific state and federal criminal laws; the production of human rights-informed best practice guidance; and ultimately recommendations for changes to federal laws and policies that are inconsistent with such guidance.¹⁸²
59. The impetus for this legislation came from the United States' first National HIV/AIDS Strategy (NHAS) published in June 2010. The NHAS notes that “[i]n 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.”¹⁸³ The NHAS also directs the Department of Justice and the Department of Health and Human Services to address HIV-specific criminal laws and to develop resources and assistance plans to assist states in reviewing and reconsidering their laws.
60. The US National Alliance of State and Territorial AIDS Directors (NASTAD) released a statement in March 2011 supporting the Strategy's recommendations. As a member of the Positive Justice Project – a campaign launched in September 2010 and headed by the Center for HIV Law and Policy¹⁸⁴ – NASTAD stated that it “supports efforts to examine and support level-headed, proven public health approaches that end punitive laws that single out HIV over other STDs and that impose penalties for alleged nondisclosure, exposure and transmission that are severely disproportionate to any actual resulting harm.”¹⁸⁵
61. The Positive Justice Project is the first coordinated, multi-organisational and cross-disciplinary national effort in the United States to combat HIV-related stigma and discrimination against people with HIV by the criminal justice

system. Its primary focus is the repeal of laws that create HIV-specific crimes or which increase criminal penalties for people with HIV based solely on their HIV-positive status.¹⁸⁶ In August 2011, its recommendation to the President's Advisory Council on HIV/AIDS (PACHA) to include addressing HIV criminalisation as a key action in implementing the NHAS in the coming year was unanimously accepted.¹⁸⁷ Also in the same month, the Positive Justice Project and its partners secured commitments from federal public health officials to create new resources and a dedicated web site featuring new analysis of HIV transmission routes and risks.

Canada

62. In July 2011, an Ottawa judge held that HIV is "no longer an automatic death sentence" in his rejection of attempted murder charges against a man accused of exposing his sexual partners to HIV.¹⁸⁸ Justice David Wake of the Ontario Court of Justice declared that death from HIV is a "possible consequence" but not an "inevitable consequence or even a probable consequence" of testing positive for HIV. This is a clear departure from decision in other cases in Canada and demonstrates an increasing reliance on the latest scientific understanding of HIV when considering these criminal cases. In August 2011, a Winnipeg judge held that spitting in the face of a police officer, when known to be HIV-positive, cannot be considered an aggravated assault as alleged by the Crown. Justice Deborah McCawley wrote in her decision that "the best evidence available... is that the risk of transmission was low to negligible. The Crown has not established beyond a reasonable doubt that the risk of serious bodily harm was significant."¹⁸⁹
63. In Ontario, a campaign for prosecutorial guidelines was launched in September 2010¹⁹⁰ with some commitment in March 2011 from Ontario's Attorney General to draft such guidance.¹⁹¹ Following two judgment reversals in provincial appeal courts, the Supreme Court of Canada will revisit the 1998 *Cuerrier* decision¹⁹² in early 2012 when it hears the cases of *R. v. Mabior* and *R. v. DC*.¹⁹³ This may establish new tests for "significant risk of serious harm" as it relates to non-disclosure of HIV status prior to sex.

Europe

64. In February 2011, Denmark's Minister of Justice announced the suspension of Article 252 of the Danish Criminal Code, the only HIV-specific criminal statute in Western Europe, and established a working group to consider whether the law should be revised or abolished.¹⁹⁴ In March 2011, 122 civil society organisations from around the world signed a letter of support congratulating the Minister on his recent decision. The letter stressed the importance that during the revision process the Danish Government should carefully consider whether the particular section singling out HIV should exist in the Penal Code at all.¹⁹⁵ Justice Edwin Cameron of the Constitutional Court of South Africa added his support in an editorial published in Denmark's leading broadsheet newspaper, *Politiken*, in June 2011.¹⁹⁶ In August, just prior to a general election, a majority of MPs thought the law should be abolished.¹⁹⁷
65. In 2010, a similar official committee was created in Norway to inform the ongoing revision of Section 155 of the Penal Code, which criminalises the wilful or negligent infection or exposure to communicable disease that is hazardous to public health. The committee will deliver its findings in 2012.¹⁹⁸

66. In Switzerland, efforts are underway to revise Article 231 of the Penal Code, which allows for the prosecution of anyone who allegedly spreads “intentionally or by neglect a serious transmissible human disease”. This provision has only been used to prosecute people living with HIV.¹⁹⁹ A draft Law on Epidemics currently being discussed by the Swiss Federal Parliament had removed much of the overly-broad provisions of Article 231, leaving only intentional exposure or transmission as a criminal offence. A revised version of the Draft Law on Epidemics which had added “simple intention” and “negligence” and created an obligation to disclose was criticised by civil society and the Swiss Federal Commission for AIDS-related issues (EKAF).²⁰⁰ Following a recent submission by EKAF to the Health Commission of the Swiss Parliament, much of the original wording has been restored, making only exposure or transmission of a serious disease spread with “malicious, unscrupulous or selfish motives” a criminal offence in the most recent version of the Draft Law on Epidemics is enacted.²⁰¹
67. Belgium recently had its first successful prosecution under poisoning laws, surprising advocates who had assumed that the general law could not be applied to HIV exposure or transmission, because two previous attempts had failed.²⁰²
68. Civil society advocacy against laws and prosecutions exists in most European countries, including in Eastern Europe. In November 2010, advocates in Ukraine were successful in removing the obligation to disclose from their country's HIV-specific law.²⁰³ However, Romania recently passed a new HIV-specific criminal statute, to be implemented on 1 October 2011, which provides that: “Transmission of a venereal disease by sexual intercourse, by sex between same-sex persons or acts of sexual perversion by a person who knows they suffer from such disease shall be punished with imprisonment for 1-5 years. Acquired immunodeficiency syndrome transmission - AIDS - by a person who knows they are suffering from this disease is punishable by imprisonment for 5-15 years. If the offense results in death of the victim, the punishment is imprisonment from 7 to 15 years.”²⁰⁴

Australia and New Zealand

69. The Australian Federation of AIDS Organisations (AFAO) recently produced a discussion paper/advocacy kit on *HIV, Crime and the Law in Australia: Options for Policy Reform* which provides an extensive and detailed overview regarding the current (and past) use of criminal and public health laws in eight Australian states and territories; a systematic examination of the impact of such prosecutions; and possible strategies towards policy reform.²⁰⁵
70. Following two high profile cases in New Zealand in 2009²⁰⁶, in March 2011, the prosecution of a Wellington man accused of not disclosing his HIV-positive status prior to unprotected sex with his female partner, who subsequently tested HIV-positive, was abandoned because police were unable to trace the complainant.²⁰⁷

Elsewhere

71. In September 2011, a Special Select Committee set up to consider an HIV-specific criminal law in Guyana announced that such a law was unnecessary and that rare cases of intentional transmission could be prosecuted using the general criminal law.²⁰⁸

72. UNAIDS has recommended that, as a step towards curbing the overly-broad and vague provisions of most HIV-specific criminal statutes recently enacted in Africa, lawmakers clearly delineate the circumstances that should not attract criminal liability.²⁰⁹ These include situations that arise out of or relate to:
- (a) An act that poses no significant risk of HIV transmission;
 - (b) A person living with HIV who was unaware of his or her HIV infection at the time of the alleged offence;
 - (c) A person living with HIV who lacked understanding of how HIV is transmitted at the time of the alleged offence;
 - (d) A person living with HIV who disclosed his or her HIV-positive status to the sexual partner or other person before any act posing a significant risk of transmission occurred (or honestly believed the other person was aware of his/her status through some other means);
 - (e) A person living with HIV who took reasonable measures to reduce the risk of transmission, such as practising safer sex through using a condom or other precautions to avoid higher risk acts;
 - (f) A person living with HIV who did not disclose his or her HIV status because of a well-founded fear of serious harm by the other person;
 - (g) Where sexual partners previously agreed on a level of mutually acceptable risk; or
 - (h) The possibility of transmission of HIV from a woman to her child before or during the birth of the child, or through breastfeeding of an infant or child.
73. In the past year, at least three African countries —Guinea, Togo and Senegal— have revised their existing HIV-related legislation or adopted new legislation that restrict the use of the criminal law to cases of intentional transmission of HIV.²¹⁰
74. However, the first successful prosecution for HIV transmission under existing poisoning laws recently took place in Congo. The prosecution is controversial, because it happened whilst an HIV-specific law, adopted by parliament in December 2010, was waiting to be enacted. The HIV-specific criminal statute lists the circumstances in which criminal law cannot be applied to HIV transmission, and limits criminal liability to “intentional and deliberate” HIV transmission.²¹¹
75. In Kenya, the AIDS Law Project is challenging the criminalisation provisions of Section 24 of the HIV and AIDS Prevention and Control Act as being vague and discriminatory.²¹² However, it lost initial arguments to suspend the law. The case remains ongoing.²¹³

V. Key elements of judicial and political reasoning

Judicial reasoning

76. The criminal law is most often used to reflect a society's standards for unacceptable behaviour which society deems harmful. By setting standards and punishing offenders, the criminal law attempts to serve four functions²¹⁴:
- (a) It **deters** individuals from engaging in harmful behaviour for fear of prosecution and incarceration.
 - (b) It accomplishes **retribution**, and sometimes **restitution**, to victims and to society as a whole, thus achieving **justice**.
 - (c) It **incapacitates** people who have engaged in harmful behaviour from doing further harm by imprisoning them.

- (d) It **rehabilitates** people, during this period of incapacitation, so as to help them not do further harm once they leave prison.²¹⁵
77. Before examining the individual rationales for using the criminal law, in the context of HIV, it should be noted that:
- (a) Most HIV transmission takes place during sex between two adults who choose to have sex, neither of whom is aware that one of them is living with HIV.²¹⁶
 - (b) People unaware they are living with HIV are more than twice as likely as those who know their HIV positive status to engage in HIV-related sexual risk-taking behaviours.²¹⁷
 - (c) Most HIV-positive people aware of their status, do not want to^{218 219 220 221 222 223} – and in fact do not – transmit HIV.²²⁴
78. Consequently, this leads to the question as to whether the criminal law can have an impact on the wider HIV epidemic. As Burris and colleagues note: "If the prime task of prevention is to shift the at-risk population in the direction of having safer sex with fewer partners, detecting, punishing and incapacitating a handful of bad actors is not a wise use of prevention resources."²²⁵
79. On an individual level, does using criminal law actually *deter* significant numbers of people with HIV from behaving in ways that might put others at risk of infection?²²⁶ Does it *incapacitate* convicted offenders so they cannot continue putting others at risk? Does it *rehabilitate* by encouraging them to change permanently the problematic behaviour in question? Although there are understandably strong moral arguments to punish people who are aware they are HIV-positive for placing others at risk of acquiring HIV, the answer to these questions, from available studies, appears to be no.

Deterrence

80. The deterrence rationale of using the criminal law to address potential or actual HIV exposure or transmission is that it serves public health by preventing individuals from engaging in behaviour that may place others at risk of infection either through the fear of punishment (should their behaviour be detected) and/or through sending a message that engaging in such behaviour is morally wrong.²²⁷ There is, however, a lack of definite evidence relating to the impact of the criminal law in deterring people with HIV from exposing others to the virus.
81. Studies from the UK, Canada and the United States have found several reasons why the deterrence rationale of the criminal law is not well-suited to HIV non-disclosure, exposure and/or transmission. The first is that few people with HIV are actually aware of their duties under the law, and most of those who are aware already disclose and/or practice safer sex.^{228 229 230 231}
82. In jurisdictions where general criminal laws, rather than HIV-specific laws, are used to prosecute HIV exposure and transmission, people living with HIV who are aware of their duties under the law may not necessarily understand which specific behaviours violate those laws and act accordingly since the prohibited behaviour is often not clearly defined.^{232 233 234} The studies also found that sexual behaviour is difficult to change through fear of punishment or opprobrium. Despite the concern of some people with HIV in these studies that they could face criminal liability for their actions, they described the difficulty of sustaining HIV disclosure and/or practising safer sex in all sexual settings.^{235 236 237}

Incapacitation

83. The incapacitation rationale of using the criminal law to address potential or actual HIV exposure or transmission is that it serves public health by imprisoning, and thus separating from society for a period of time, people living with HIV who have placed others at risk of HIV infection. In order to be an effective public health tool, incapacitation would then require reduced possibilities of HIV exposure or transmission within prison settings because, on release, health problems created in prison ultimately become problems for the community as a whole.
84. From a safety and public health perspective, however, incapacitation appears to do little to prevent (and may actually increase) the risk of HIV transmission, because HIV risk behaviours such as sexual violence, unprotected sex, tattooing and/or the sharing of drug injecting equipment are prevalent in prisons around the world.²³⁸ Harm minimisation measures to reduce the risk of HIV exposure – for example, access to condoms and/or sterile injecting or tattooing equipment – are widely misunderstood and are inconsistently provided²³⁹ or are simply not available in prisons.²⁴⁰ Consequently, most prisons are places where both people living with HIV and those who are uninfected are seriously curtailed in their ability to exercise control over HIV exposure.²⁴¹

Rehabilitation

85. The rehabilitation rationale of using the criminal law to address potential or actual HIV exposure or transmission is that it serves public health by changing the behaviour of people who have been found guilty and that they will no longer put others at risk following their release from prison.
86. There are no studies regarding the effectiveness of rehabilitation on reducing HIV transmission. In a number of cases, individuals have been prosecuted more than once for behaviour that risked exposing their sexual partners to HIV following their release from prison. Evidence of such recidivism can be seen in recent media reports from Australia, Canada, the United Kingdom and the United States.²⁴² In practice, rehabilitation specifically to prevent the risk of further HIV transmission is seldom, if ever, a goal of programmes that may be offered in some prison settings.²⁴³

Achieving justice via retribution/restitution

87. In the absence of clear evidence regarding the impact of the above rationales, achieving justice via imprisonment (i.e. retribution) and/or financial compensation to victims (i.e. restitution) remains the strongest argument for using criminal law in cases of HIV exposure or transmission.
88. To achieve justice in the context of criminal prosecution, however, there generally needs to be evidence of intent to do harm and an act that causes or could cause harm. Retribution against those who had no intent to do harm and did not engage in an act that caused harm is arguably unjust. Furthermore, concern over the unintended negative impacts of laws and prosecutions calls for an appropriate balance between justice for individual complainants and broader public policy considerations.²⁴⁴
89. Such balance may be best achieved by limiting the application of the criminal law to only the most blameworthy behaviour, marked by intent to transmit and actual transmission.²⁴⁵ Other law, such as tort law, may be a more appropriate tool by which individuals can "right a wrong" or "set matters right".²⁴⁶

Political reasoning for enacting HIV-specific laws

90. In addition to a genuine belief that laws specifically criminalising HIV non-disclosure, exposure or transmission will protect individual safety and public health, there may be a variety of reasons why law-makers decide to introduce and enact HIV-specific criminal statutes. For example, law-makers can be influenced by public opinion following a particularly egregious case; perceptions of widespread intentional transmission; and/or be required to pass laws to receive federal funding for HIV-related services. Although this paper focuses on high-income countries, political reasoning in low-income countries is also briefly discussed below.

Public health and safety

91. In 1987, when the first wave of HIV-specific criminal statutes were passed in the United States, “public health law was an all-but abandoned field.”²⁴⁷ Uncertainty existed about how best to apply compulsory powers to reduce the impact of the HIV epidemic on mainstream society. Using the criminal law to deter and punish individuals who were thought to be “spreading AIDS”²⁴⁸ was one of a number of options under consideration. Others included compulsory HIV testing and the detention and isolation of people living with HIV.^{249 250} Based on these general approaches, politicians continue to propose and enact HIV-specific criminal statutes (or sentencing enhancements for people with HIV) on the grounds of public health and safety.²⁵¹

Financial incentives

92. In 1990, the US Government enacted legislation stipulating how federal funds were to be used for HIV prevention, treatment and care efforts nationwide. The Ryan White Comprehensive AIDS Resources Emergency Act of 1990 (the CARE Act) included a provision requiring the Chief Executive of the state seeking funds to determine that the state’s criminal laws were adequate “to prosecute any HIV infected individual” who:
- (a) Donates “blood, semen, or breast milk”;
 - (b) Provides a used “hypodermic needle” and “intends... to expose another” to HIV; and/or
 - (c) “[E]ngages in sexual activity if the individual knows that he or she is infected with HIV and intends, through such sexual activity, to expose another to HIV.”
93. These laws, it said, need not apply if there has been “prior informed consent” to the risk of HIV transmission.²⁵² By 1998, at least 29 states had HIV-specific criminal statutes, with a third of those states enacting laws in the previous two years.²⁵³

Responding to individual egregious cases

94. Public and policymaker perceptions regarding the threat of widespread intentional transmission by malicious individuals were greatly influenced by the story of “Patient Zero”, a key figure in Randy Shilts’ bestselling 1987 book about the AIDS epidemic, *And the Band Played On*.²⁵⁴ The “AIDS avenger/monster” myth has since been the impetus for new HIV-specific statutes in both the United States²⁵⁵ and elsewhere, including in sub-Saharan Africa.²⁵⁶

Responding to public opinion

95. The AWARE–HIV/AIDS “model” law was primarily conceived as protective legislation for people living with HIV.²⁵⁷ South African Constitutional Court Justice Edwin Cameron notes that statutes criminalising “wilful transmission”

were added as a response to demands from women's groups²⁵⁸ that they be legally protected from partners who refuse to wear condoms and/or practise safe or no sex. According to Cameron, "the model law for Africa...was intended as a beneficial intervention to protect people with HIV: its provisions on criminalisation...were added almost as an afterthought."²⁵⁹

96. Another aspect of the public opinion response is the specific targeting of healthcare workers. For instance, criminal HIV statutes in Mauritania, Mali and Guinea Bissau specifically punish medical practitioners who may be "accomplices" in HIV exposure or transmission cases, and Madagascar doubles the penalty for HIV transmission if committed by a healthcare worker.²⁶⁰ These provisions appear to be a reaction to widespread media reports of healthcare workers in Libya who had allegedly infected children with HIV in a hospital setting.²⁶¹

Following the example of prosecuting countries

97. Many nations look to others for examples of laws and legal practise as they fashion their laws. For example, when proposing new HIV-specific criminal statutes for Guyana, Everall Franklin, a member of parliament, told the National Assembly that "nations, including the US and Australia, have passed laws making the wilful spread of HIV a criminal offence."^{262 263}
98. Judicial decisions from other countries can also influence law and policy making. For example, the Sexual Offences Act of Lesotho No 29 of 2003²⁶⁴ effectively translates into law the finding of the Canadian Supreme Court in *Cuerrier*. Under the Lesotho Sexual Offences Act, sexual intercourse by an HIV-positive person without disclosure is tantamount to an unlawful sexual act conducted under "coercive circumstances" which may be punishable by death.²⁶⁵

VI. Potential unintended impacts of laws and prosecutions

99. As awareness of the issues discussed above has increased, so has international concern regarding the potential unintended impacts of the overly-broad use of the criminal law to HIV non-disclosure, exposure and/or transmission.^{266 267 268 269 270 271}
100. Broadly at issue is whether applying the criminal law to individual cases of potential or actual HIV exposure or transmission does more harm than good in terms of its impact on justice, public health and human rights. Obtaining clear evidence about the unintended public health and/or human rights impact of the use of the criminal law to address potential or actual HIV exposure or transmission is challenging. There are few empirical data and some of the evidence provided is necessarily anecdotal. Further research is urgently required.

Some evidence of unintended public health, sexual, reproductive and human rights impact on people living with HIV – There is evidence that people living with HIV have been negatively impacted in the following ways:

Potential disincentive to disclose HIV-positive status to sexual partners

101. Some studies suggest that fear of prosecution affects a HIV-positive person's willingness to disclose their HIV-positive status to sexual partners, with implications for what happens both during and after sexual encounters. Researchers from the UK observed that some HIV-positive gay men reacted to

the fear of criminal justice system involvement by not disclosing their HIV-positive status prior to sex that risked HIV exposure.²⁷² An earlier US study also found that some HIV-positive gay men reported not disclosing their HIV status to sexual partners due to fear of the potential legal repercussions. The investigators noted that this was an "unexpected" finding.²⁷³ There are negative public health repercussions should such behaviour be widespread. A sexual partner who wrongly believes that he or she is with an HIV-negative person may be more inclined to engage in higher-risk sexual activities. In addition, should a person living with HIV be too afraid to disclose their HIV-positive status to a partner following potential exposure (for example, condom breakage) this might also lead to their sexual partner failing to access post-exposure prophylaxis (PEP).

Potential disincentive to disclose HIV-related risk behaviours to healthcare professionals

102. Despite the ethical obligation of doctors and other healthcare professionals to maintain confidentiality, legal mechanisms such as search warrants and court orders can allow for confidentiality to be breached. This may reduce the likelihood of honest and open discussions between people living with HIV and healthcare professionals regarding their sexual behaviour, reducing opportunities for sexual health screening and support to reduce HIV-related risk-taking. A 2009 essay examining the impact of prosecutions on people living with HIV in several Australian states reported that confidence in patient confidentiality had fallen due to fears that information could be obtained by the police and used to prosecute sexual risk-taking behaviour.²⁷⁴

Potential negative impact on sexual and reproductive rights

103. There is evidence from the United States that some public health departments in some states (e.g. Arkansas²⁷⁵, Michigan²⁷⁶, Missouri²⁷⁷, Mississippi²⁷⁸) are using fear of prosecution (sometimes based on an inaccurate characterisation of the law²⁷⁹) to prevent people with HIV from unprotected sex, even with the informed consent of partners. The Mississippi client acknowledgment form that explicitly restricted the reproductive choices of HIV-positive persons (indicating "the necessity of not causing pregnancy or becoming pregnant,") was withdrawn in late 2010. Advocates have also recently persuaded Missouri to withdraw its form.²⁸⁰

Potential negative impact on human rights

104. People living with HIV have all of the same human rights as everyone else including the rights to: privacy; freedom from arbitrary, discriminatory or capricious use of law (including the criminal law); and the right to a fair trial, including the presumption of innocence until proven guilty.²⁸¹
105. However, countries have great discretion in choosing which acts warrant criminal prosecution. In the law and case law of the European Court of Human Rights, this discretionary power is referred to as "the margin of appreciation".²⁸² For the use of the criminal law to be considered arbitrary or an infringement of human rights, it has to be shown to be unreasonable and disproportionate.²⁸³
106. HIV-specific criminal statutes raise human rights concerns on the basis of the acts subject to punishment, the manner by which investigations are conducted, selective enforcement against marginalised individuals (e.g. sex workers, immigrants, women²⁸⁴), the media portrayal of the accused, and the severity of sentencing. The experiences of HIV-positive people amplify these concerns.²⁸⁵

107. A recent report by the United Nations Special Rapporteur on the Human Right to Health notes that "legal sanctions...often undermine... the realisation of the right to health. The criminalisation of HIV/AIDS transmission also infringes on many other human rights, such as the rights to privacy, to be free from discrimination and to equality, which in turn impacts the realisation of the right to health."²⁸⁶

No clear evidence of positive or negative public health impact

108. In recent years, a growing number papers, monographs and policy documents have raised concerns about how using the criminal law to address potential or actual HIV exposure or transmission might undermine HIV prevention efforts.²⁸⁷
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109. As previously noted, since such laws can only target those people living with HIV who have been tested and diagnosed, it is argued that using the criminal law to address potential or actual HIV exposure or transmission focuses disproportionate attention and resources on a relatively small number of individuals. They suggest that these significant personal and financial resources could be more productively used to expand evidence-informed and human rights-based HIV prevention efforts, including Positive Health, Dignity and Prevention.²⁹⁶ They also suggest that using the criminal law to address potential or actual HIV exposure or transmission might be also counterproductive, including due to:

Potential to increase HIV-related stigma

110. While it is difficult to empirically prove that laws and prosecutions for potential or actual HIV exposure or transmission have had a direct impact on worsening HIV-related stigma, this is a common assertion because they appear to characterise people living with HIV as criminal, "toxic" and/or lacking in moral character. When such laws are enacted and/or enforced, this suggests that the State is encouraging or condoning such stigma.²⁹⁷

Potential to overstate risks

111. Prosecuting individuals for behaviour that is unlikely to lead to HIV infection (e.g. when using condoms, when an individual has a low or undetectable viral load or is on successful antiretroviral therapy with a low or undetectable viral load); very unlikely to lead to HIV infection (e.g. biting, oral sex); or extremely unlikely to result in HIV infection (e.g. spitting, and throwing urine or faeces) may perpetuate popular misconceptions about HIV-related risk, as well as fuel HIV-related stigma.²⁹⁸

Potential to create a false sense that HIV is someone else's problem

112. Laws and prosecutions that create the perception that the burden of responsibility for HIV prevention is only carried by the person aware s/he is living with HIV contradicts the necessary public health message of shared responsibility during consensual sex. Shared responsibility, where both partners in a sexual relationship take measures to reduce the risk of HIV transmission/acquisition, is a critical part of the public health response to HIV due to the high prevalence of undiagnosed HIV as well as the recognition that disclosure of known HIV-positive status is not possible in all circumstances.

Potential to provide further disincentive to know one's HIV status

113. The prospect of facing stigma and discrimination can contribute to some people's reluctance to get tested for HIV, and the possibility of criminal sanctions may function as an additional disincentive. For example, a recent UK survey of 19 "high risk" gay men at three sexual health clinics found that, of 18 who were aware of prosecutions, 4 stated that fear of prosecution was one of the specific reasons they had declined an HIV test.²⁹⁹

VII. Law enforcement issues

114. Whether and how the law is enforced can have a significant impact on the human rights of individuals living with HIV. Case report analysis indicates the potential for selective and arbitrary arrests and prosecutions, as well as the inappropriate and insensitive police handling of arrests and investigations, with subsequent stigmatising media coverage.³⁰⁰

Potential for selective and arbitrary prosecutions

Selective prosecution of HIV

115. The very existence of *HIV-specific* criminal statutes strongly suggests that laws and policies are selective when choosing which infectious disease (and, therefore, whose behaviours) to criminalise, resulting in what has been characterised by commentators as a "viral underclass."³⁰¹

116. In the US, there have been very few criminal cases for exposing sexual partners to sexually transmitted infections (STIs) other than HIV.³⁰² The most recent cases on record where a defendant's STI status was considered as part of the crime involve sexual assault cases where the STI is considered an aggravating factor in sentence enhancements.³⁰³ Most cases of non-disclosure, exposure to, and transmission of STIs are handled as torts in civil court.

117. Even in countries without HIV-specific criminal laws, people with HIV have been prosecuted far more often than people with more common and potentially more infectious diseases. An analysis of prosecutions in Austria, Sweden, Switzerland and the UK found that, although the same laws had been used to prosecute people with other diseases,³⁰⁴ these prosecutions were extremely rare.³⁰⁵ Similarly, as of 31 December 2010, there had been two prosecutions in Canada involving genital herpes and one each involving hepatitis B and C, but 120 cases involving HIV.³⁰⁶

Arbitrary prosecution of people with HIV

118. Epidemiological^{307 308} and social science studies^{309 310 311 312} indicate that, whilst most people living with HIV do their utmost to prevent new infections, there are still many more cases of people with HIV who are not practising safer sex and/or not disclosing their HIV-positive status than are being arrested and prosecuted. Case report analysis suggests a number of patterns regarding how and why some individuals come to the attention of the criminal justice system:

(a) **Individuals already under the purview of public health:** Jurisdictions with strong public health systems to address individuals with HIV, identified as being likely to place others at risk – such as Australia³¹³, Canada³¹⁴ and Sweden³¹⁵ – occasionally resort to the criminal justice system when all other approaches appear to have failed.

(b) **Individuals already under the purview of the criminal justice system:**

Especially prevalent in the US, a defendant may be arrested for allegedly committing a misdemeanour, such as being drunk and disorderly, or failing to stop their automobile at a red light. However, once their HIV-positive status is known to the police, they can be subsequently charged with an unrelated HIV-related felony. This can occur, for example, if someone resists arrest and uses the threat of HIV via spitting³¹⁶; unintentionally spits on an arresting officer³¹⁷; exposes the arresting officer to their blood following injuries sustained following resisting arrest³¹⁸; or if the officer discloses the arrestee's HIV-positive status to a next-of-kin (often a sexual partner) who had previously been unaware of the arrestee's HIV status.³¹⁹

(c) **Prisoners:** Individuals in the US already incarcerated for previous unrelated offences have been subject to additional criminal liability for HIV exposure if enforcement officers already know that the prisoner is HIV-positive.³²⁰

(d) **Sex workers:** Many jurisdictions in the US have sex worker-specific HIV criminal statutes that impose felony penalties for sex workers who are HIV-positive.³²¹ Convictions for violation of prostitution statutes are normally misdemeanours but are increased to felonies based on HIV-positive status.³²² In some states, if sex workers are arrested on sex work-related charges, they must be tested for HIV, which can be used to charge a sex worker under an HIV-specific statute in the future. HIV transmission is not required, nor is it required that an act that could transmit HIV occur for conviction.³²³ In Europe, Austria appears to have prosecuted a high number of female sex workers using general criminal laws.³²⁴

119. However, the vast majority of cases – in the US and all other high-income countries – originate from people (primarily heterosexual women) who turn to law enforcement after they have ended a relationship. In many high-income jurisdictions – where heterosexual transmission is not the source of a concentrated epidemic – an inordinate number of heterosexual men have been prosecuted. In particular, migrant heterosexual men from countries where HIV is endemic³²⁵ and/or those with mental illness³²⁶ seem particularly prone to prosecution.³²⁷ Although allegations have been made by some communities of racism or xenophobia, which are often inflamed by racialised media reporting,³²⁸ no firm conclusions can currently be made as to whether this is an accurate perception, and if so, why this is the case.

120. Nevertheless, HIV advocates have noted that a disproportionate focus on heterosexual men and/or economically and socially disadvantaged individuals creates concern over access to justice. Such individuals are least engaged in the broader “HIV community” (where legal and rights literacy is higher than in the general population) and often have no access to a defence lawyer with experience in HIV-related criminal case. This subsequently leaves them more vulnerable to prosecution (or to plead guilty even if a more informed defence lawyer would have been able to defend them).³²⁹

Potential for inappropriate and insensitive police investigations and media reporting

121. Law enforcement representatives have an obligation to conduct investigations sensitively and appropriately. However, lack of police familiarity with HIV³³⁰

and/or with how laws relate to HIV exposure or transmission may complicate the proceedings for all parties involved.

122. In some jurisdictions, law enforcement agencies routinely issue press releases or advise local media in other ways about the investigation of complaints for alleged criminal HIV exposure or transmission. This encourages members of the public who may have had sexual contact with the accused to both undertake HIV antibody testing and to contact police.³³¹ Although, in some cases, media reports may justifiably serve as public health announcements, in others these reports may constitute “fishing expeditions” for further complainants, which may be especially unethical where there has been no initial complainant.³³²
123. Police and media need to consider balancing the need to disclose such information with the need to protect privacy, including of those who are not accused (such as a partner and/or children) and whose HIV status might be inferred by association.³³³ They should also consider the possibility that disclosing this information may violate the right of the accused to a fair trial.³³⁴
124. A 2009 report from Terrence Higgins Trust (THT) in the United Kingdom³³⁵ indicated that the scope and approach to investigations of alleged criminal transmission in England and Wales went beyond what the law intended. The report, which led to the creation of formal standards for how to investigate HIV-related criminal allegations of HIV exposure or transmission,³³⁶ found that although there were some examples of good practice – including offering post-exposure prophylaxis (PEP) promptly to a complainant who had just been potentially exposed to HIV, and taking action to prevent inappropriate disclosure of an accused's HIV status in the community – much was found to be lacking, including:
 - (a) Poor police understanding of HIV, leading to inappropriate management of cases;
 - (b) Lack of clarity among police officers about the law as it relates to HIV exposure and transmission, and what is, and what is not, an offence;
 - (c) Lack of understanding regarding privacy of medical information;
 - (d) Unnecessarily long and drawn-out investigations, ranging between 4 and 12 months for cases that did not result in prosecution, and between 6 and 34 months for those that did; and
 - (e) Difficulties in reconciling the realities of HIV transmission with the requirements of the charge under general English assault law. Notably, the report pointed out that “police are having to manage cases brought under a law never designed for such scientific complexity” and that the police “repeatedly misinterpreted the strength of their scientific evidence”.

VIII. Prosecution issues³³⁷

125. HIV-related criminal cases are complex and require an up-to-date understanding of:
 - (a) Why and when non-disclosure may not mean an intent to deceive or harm;
 - (b) HIV-related risk in alleged HIV exposure cases; and
 - (c) Scientific evidence relating to proof of transmission in alleged HIV transmission cases.
126. Obtaining proof beyond a reasonable doubt of alleged HIV non-disclosure, exposure or transmission is an extremely complex undertaking. There is an ethical imperative for lawmakers and the criminal justice system to bear this in

mind, especially since irreparable damage may be done to individuals caught up in investigations and prosecutions that are based on unfounded beliefs about the quality and reliability of the evidence.

127. Problematic aspects of seeking to prove a defendant guilty of criminal HIV exposure or transmission include:
- (a) Accepting guilty pleas (often incentivised via a reduction in sentencing) prior to a full examination of the evidence;
 - (b) Difficulties in securing unbiased evidence about whether disclosure of an HIV-positive diagnosis took place or not; and
 - (c) Difficulties in interpreting “expert witness” statements for each side of the case that may contradict each other, for example, regarding whether a condom was used and/or whether the defendant was infectious (enough) during the alleged act(s); or was, in fact, the source of the complainant's infection.

Proof of (non) disclosure

128. Almost all sexual HIV exposure or transmission cases are brought to trial because complainants claim that they were not explicitly informed of the HIV-related risk during otherwise consensual sexual activity. Regardless of whether there are HIV-specific laws requiring disclosure, or general or HIV-specific laws allowing disclosure of HIV status prior to sex as an affirmative defence, the issue of disclosure often figures prominently in how cases are resolved.

129. It is not uncommon for a complainant and defendant to disagree about whether or not disclosure took place. This does not necessarily indicate that one of them is intentionally lying, because “communication regarding sexual encounters is often complex, with both verbal and non-verbal elements, with many assumptions made and many things left unsaid.”³³⁸ However, courts have tended to find the complainant the more credible witness, possibly due to a lack of understanding of the complexities around safe and beneficial disclosure³³⁹, but also possibly because people with HIV are stigmatised.

130. Given the difficulty of conflicting testimony, how the burden of proof is placed can be significant for the defendant. Experts convened by WHO Europe have noted that in some jurisdictions “the onus is on the prosecution to prove the absence of consent on the part of the complainant; the burden of proving consent does not lie on the defendant. There needs to be a clear understanding of this important point on the part of police, prosecutors, the defence bar, and courts (both judges and juries).”³⁴⁰ However, despite this position, in many jurisdictions consent (via disclosure) is an affirmative defence, meaning that the defendant has burden of proving disclosure, and therefore informed consent.³⁴¹ Further analysis of proof of (non) disclosure issues can be found in the “Proof” section of the paper on *Criminalisation of HIV non-disclosure, exposure and transmission: scientific, medical, legal and human rights issues*.

Proof of exposure

131. Where HIV exposure is criminalised (usually as a result of non-disclosure of HIV-status prior to unprotected sex), evidence in determining that the defendant was, in fact, “infectious enough” to cause “harm” is often not required (where HIV-specific statutes, or case law, criminalise activities that pose no, negligible or low risk of HIV exposure). In cases that require such proof, the full complement of factors that can affect the risk of HIV exposure are rarely fully explored by the court, which typically relies on a single expert witness (usually

on behalf of the prosecution) who may present varying quality of testimony regarding the risks of the behaviours in question, resulting in wide variations in standards of acceptable risk. Further analysis of proof of exposure issues can be found in the “Risk” and “Proof” sections of the paper on *Criminalisation of HIV non-disclosure, exposure and transmission: scientific, medical, legal and human rights issues*.

Proof of transmission

132. Few jurisdictions explore, if transmission is alleged, the full complement of evidence in determining that the complainant was actually infected by the defendant. Often this is due to statutes or case law not requiring such proof as evidence of guilt, although responsibility for infection (if it has occurred) is often assumed. Even in jurisdictions that require such proof, evidentiary weaknesses and limitations of scientific evidence regarding proof that the defendant infected the complainant are rarely fully investigated, understood or examined in court. Further analysis of proof of transmission issues can be found in the “Proof” section of the paper on *Criminalisation of HIV non-disclosure, exposure and transmission: scientific, medical, legal and human rights issues*.

¹ Bernard EJ. The evolution of global criminalisation norms: the role of the United States. In: *HIV and the Criminal Law*, London, NAM, 2010.

² Sullivan SK and Feldman MC. Imposing criminal liability on those who knowingly transmit the AIDS virus: a recommendation for legislative action. *U. Dayton L. Rev.* 13 (3): 489-509, 1987.

³ Global Network of People Living with HIV (GNP+). *The Global Criminalisation Scan Report*, Amsterdam, 2010.

⁴ *Ibid.* pp 6-9.

⁵ UNAIDS. *Criminal Law, Public Health and HIV Transmission: A Policy Options Paper*. Geneva, 2002.

⁶ UNAIDS/UNDP. *Summary of Main Issues and Conclusions: International Consultation on the Criminalization of HIV Transmission*. Geneva, 2007.

⁷ UNAIDS/UNDP. *Policy Brief: Criminalization of HIV Transmission*. Geneva, 2008.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ 2011 Political Declaration on HIV/AIDS: Intensifying our Efforts to Eliminate HIV/AIDS. U.N. Doc. A/65/L.77.

¹¹ As noted by Justice Edwin Cameron of South Africa, the practice of high-income countries can and does have an impact on policy in the rest of the world. See Cameron E. Public Lecture at 1st Annual Symposium on HIV, Law and Human Rights. Toronto, June 12-13, 2009.

¹² Since 2007, global monitoring and reporting of individual arrests, prosecutions, newly proposed HIV-specific criminal laws and civil society responses has been archived in the blog *Criminal HIV Transmission* (criminalhivtransmission.blogspot.com). In 2008, the Global Criminalisation Scan website (www.gnpplus.net/criminalisation) was launched to document HIV-related criminal laws and prosecutions worldwide.

¹³ GNP+. *Op. cit.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ Bernard EJ. Where HIV is a crime, not just a virus: a global ranking of prosecutions for HIV non-disclosure, exposure and transmission. (THAF0201) XVIII International AIDS Conference, Vienna, July 2010.

¹⁸ *Ibid.*

¹⁹ Pearshouse R. Legislation Contagion: The Spread of Problematic New HIV Laws in Western Africa. *HIV/AIDS Policy & Law Review* 12 (2/3), 2007.

²⁰ Bernard (XVIII International AIDS Conference) *Op. cit.*

²¹ *Ibid.*

²² GNP+. *Op. cit.*

²³ Sanon P et al. Advocating Prevention over Punishment: The Risks of HIV Criminalization in Burkina Faso. *17 Reprod Health Matters* 146, 2009.

²⁴ Pearshouse. *Op. cit.*

²⁵ *Ibid.*

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- ²⁶ [Anonymous]. NW Province Requires HIV Carriers to Inform Partners. *Xinhua News*, 2 December 2009. (http://news.xinhuanet.com/english/2009-12/02/content_12577854.htm, accessed 4 November 2011)
- ²⁷ Severin A. La justice condamne un homme qui transmet le SIDA à sa femme [Justice condemns a man who gives his wife AIDS]. *Inter Press Service News Agency*, 2 March 2011. (http://ipsinternational.org/fr/_note.asp?idnews=6403, accessed 4 November 2011).
- ²⁸ Pearshouse. *Op. cit.*
- ²⁹ Violante V. Third world should help HIV sufferers, not punish them: judge. *The Canberra Times*, 16 July 2008 (Archived at: <http://criminalhivtransmission.blogspot.com/2008/07/africas-criminal-hiv-transmission-laws.html>, accessed 4 November 2011).
- ³⁰ [Anonymous]. Kenya: Unease Over New HIV Transmission Law, *PlusNews*, 12 December 2008 (<http://www.plusnews.org/Report.aspx?ReportId=81943>, accessed 4 November 2011).
- ³¹ Pearshouse. *Op. cit.*
- ³² Odeh O. In Lagos It's 10 Years Imprisonment for People who Infect others with HIV. *Daily Independent*, 10 November 2010 (<http://allafrica.com/stories/201011110665.html>, accessed 4 November 2011).
- ³³ Bennett S. HIV Ignorance Is No Defense in Singapore Plan to Curb Risky Sex. *Bloomberg*, 11 February 2008 (<http://www.bloomberg.com/apps/news?pid=newsarchive&sid=auBh4JRNu5k>, accessed 4 November 2011).
- ³⁴ [Anonymous]. In depth: Crime and Punishment: Criminalisation and HIV. *PlusNews*, 1 December 2008 (<http://www.plusnews.org/InDepthMain.aspx?InDepthID=77&ReportID=81756>, accessed 4 November 2011).
- ³⁵ GNP+ *Op. cit.*; *Ibid.*
- ³⁶ [Anonymous]. Laos Legislators Debate HIV/AIDS Law. *Deutsche Presse-Agentur*, 24 June 2010 (http://www.monstersandcritics.com/news/health/news/article_1565871.php/Lao-legislators-debate-HIV-AIDS-law, accessed 4 November 2011).
- ³⁷ [Anonymous]. Judge's call for legislation gets AG response. *Trinidad Express*, 17 June 2011 (http://www.trinidadexpress.com/news/Judge_s_call_for_legislation_gets_AG_response-124051134.html, accessed 4 November 2011).
- ³⁸ Multiple jurisdictions in the US have legislators who annually introduce proposed HIV-specific criminal laws, most of which are not enacted. In April 2011, Senate Bill 1809 (S.B. 1809) was defeated in the Illinois Senate. The proposed bill would have amended the current legislation by requiring a specific intent to infect an individual with HIV in order to prosecute offenders, changing the definition of criminal transmission to only include activities that actually transmit HIV and exempts a person from prosecution if they used a condom. The revised legislation also required prosecutors to prove they have a valid reason to suspect that the offender has committed the crime before they can gain access to HIV-related health records. Although defeated, the bill will be re-called and reassessed before resubmission to the Senate. See H.B. 1809, 97th Gen. Assemb., (Ill. 2011) *available at* <http://www.ilga.gov/legislation/97/SB/PDF/09700SB1809lv.pdf>. (accessed 4 November 2011). In May 2011 the Nebraska Legislative passed Bill 226 making it a Class IIIA felony for a person knowingly infected with HIV to assault a public safety officer with a bodily fluid in the eyes, mouth or skin. The bill also authorized the judge to grant an order to collect evidence to prove that the bodily fluids were infected with HIV. Legis. B. 226, 102nd Leg., 1st Sess. (Neb. 2011), *available at* <http://nebraskalegislature.gov/FloorDocs/Current/PDF/Intro/LB226.pdf>. (accessed 4 November 2011). In March 2011, the Governor of Utah signed House Bill 324, which became effective in May 2011. H.B. 324 allows victims of alleged sexual abuse to request that their alleged offender be tested for HIV. Previously, only convicted sex offenders could be subjected to an HIV test. H.B. 324, 2011 Gen. Sess., (Utah 2011), *available at* <http://le.utah.gov/~2011/bills/hbillenr/hb0324.pdf>. (accessed 4 November 2011). On June 23, 2011 House Bill 1618 was passed to the Pennsylvania Senate for review. Under H.B. 1618, it is a second degree felony for any person to cause a law enforcement officer, whom they know is a law enforcement officer, to come into contact with bodily fluids (blood, seminal fluid, saliva, urine or feces) that they knew, had reason to know or should have known were infected with HIV. See H.B. 1618, 195th Gen. Assemb., (PA 2011), *available at* <http://www.legis.state.pa.us>. (accessed 4 November 2011).
- ³⁹ Adapted from data in GNP+ *Op. cit.*; Center for HIV Law and Policy. *Ending and Defending Against HIV Criminalization*, Vol 1: State and Federal Laws and Prosecutions, Fall 2010; and Mykhalovskiy E., Betteridge G. and McLay D. *HIV non-disclosure and the criminal law: Establishing policy options for Ontario*. Toronto, 2010. (with additional unpublished data provided by Glenn Betteridge)
- ⁴⁰ Positive Justice Project. *Prosecutions for HIV Exposure in the United States 2008-2011*; Bernard (XVIII International AIDS Conference) *Op. cit.*
- ⁴¹ GNP+ *Op. cit.*; *Criminal HIV Transmission Op. cit.*
- ⁴² Center for HIV Law and Policy *Op. cit.*
- ⁴³ Positive Justice Project. *Op. cit.*
- ⁴⁴ Center for HIV Law and Policy. *Op. cit.*
- ⁴⁵ Positive Justice Project. *Op. cit.*
- ⁴⁶ 11% of cases resulted in acquittal at trial, 19% of cases was unknown based on available data

sources and the remaining 10% of cases were in progress at time of publication. GNP+ North America (NA). Criminalization of HIV Exposure: Canada. pp 2-3, 2010.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ O'Connor K. Woman with HIV Gets House Arrest. Toronto Sun, 20 November 2009, (<http://www.torontosun.com/news/torontoandgta/2009/11/20/11837006.html>, accessed 4 November 2011).

⁵⁰ [Anonymous]. HIV-Positive Man Gets 49 Years in Prison. Vancouver Sun, 8 April 2008, (<http://www.canada.com/vancouver/news/story.html?id=8dcfee0d-a973-4340-944c-414ead835c21>, accessed 4 November 2011).

⁵¹ GNP+NA. *Op. cit.*

⁵² Brown B. Guilty Verdict in Hamilton HIV Murder Case. Toronto Star, 4 April 2009 (<http://www.thestar.com/article/613920>, accessed 4 November 2011).

⁵³ [Anonymous]. HIV killer ruled dangerous offender. CBC News, 2 Aug 2011.

(<http://www.cbc.ca/news/canada/story/2011/08/02/hiv-offender-aziga.html>, accessed 4 November 2011).

⁵⁴ In a Model Penal Code used by jurisdictions of the United States a "person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation." Model Penal Code § 2.02 (2)(c). "A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation." Model Penal Code § 2.02 (2)(d). Both the Australian Model Criminal Code and Australia's Criminal Code Act of 1995 define recklessness in a similar manner. "A person is reckless with respect to a circumstance if: (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk. A person is reckless with respect to a result if: (a) he or she is aware of a substantial risk that the result will occur; and (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk. (3) The question whether taking a risk is unjustifiable is one of fact. (4) If recklessness is a fault element for a physical element of an offense, proof of intention, knowledge or recklessness will satisfy that fault element." Criminal Law Officers Comm. of the Standing Comm. of Attorneys-Gen., Model Criminal Code Chapters 1 & 2 General Principles of Criminal Responsibility Division 5 Part 5.4 (1992), available at [http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/vwFiles/MCLOC_MCC_Chapter_1_and_2_Report.pdf/\\$file/MCLOC_MCC_Chapter_1_and_2_Report.pdf](http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/vwFiles/MCLOC_MCC_Chapter_1_and_2_Report.pdf/$file/MCLOC_MCC_Chapter_1_and_2_Report.pdf) (accessed 4 November 2011). See also Criminal Code Act §3 Div. 5 Part 5.4, available at http://www.austlii.edu.au/cgi-bin/sinodisp/au/legis/cth/consol_act/cca1995115/sch1.html?stem=0&synonyms=0&query=reckless.

(accessed 4 November 2011). Under these codes "[a] person is negligent with respect to a physical element of an offense if his or her conduct involves: (a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and (b) such a high risk that the physical element exists or will exist; that the conduct merits criminal punishment for the offense. *Id.* at Part 5.5.

⁵⁵ An example of an HIV disclosure law, from Michigan, United States. (Mich. Comp. Laws Ann. §333.5210 "A person who knows he/she has been diagnosed as having AIDS or AIDS-related complex (ARC) or who knows she he/she is infected with HIV, and who engages in sexual penetration with another person without having first informed the other person that he/she has AIDS/ARC/HIV, is guilty of a felony. "Sexual penetration" means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body. Emission of semen is not required." Center for HIV Law and Policy *Op cit.*

⁵⁶ An affirmative defence places the burden of proof (of consent/disclosure) on the defendant (the accused party).

⁵⁷ Hermann DH. Criminalizing Conduct Related to HIV transmission, 9 St. Louis U. Pub. L. Rev. 351, 369, 1990.

⁵⁸ *Ibid.*

⁵⁹ UNAIDS/UNDP. (2008) *Op cit.*

⁶⁰ OHCHR/UNAIDS. The International Guidelines on HIV/AIDS and Human Rights. (2006 Consolidated Version), Geneva, 2006.

⁶¹ McArthur JB. As the tide turns: the changing HIV/AIDS epidemic and the criminalization of HIV exposure. Cornell Law Review 94 (3): 707-42, 2009.

⁶² Center for HIV Law and Policy. *Op cit.*; Lambda Legal, Chart of HIV criminal statutes (updated July 2010).

⁶³ See, e.g., Mich. Comp. Laws Ann. § 333.5210 (A person who knows that he or she has AIDS, or who knows that he or she is infected with HIV, and who engages in “sexual penetration” with another person without having informed the other person that he or she has HIV/AIDS, is guilty of a felony); Fla. Stat. Ann. § 384.24(2) (If a person who knows he or she has HIV has sexual intercourse with any other person, it is a felony unless the other person was informed of his or her HIV status).

⁶⁴ In South Carolina, it is a crime for a person who knows he or she is infected with HIV to engage in prostitution with another person. S.C. Code Ann. § 44-29-15(2). Prostitution includes “sexual activity” involving sex toys. S.C. Code Ann. § 16-15-375(5). In Tennessee, there have been prosecutions under the HIV transmission law, Tenn. Code Ann. § 39-13-109(2) (prohibiting someone who has HIV from transferring bodily fluids to another person in a manner that poses significant risk of HIV infection), for spitting. See, e.g. Cop Exposed To HIV During Fight With Suspect. 4 September 2009 (<http://www.wreg.com/wreg-cop-exposed-hiv,0,2931543.story>, accessed 4 November 2011).

⁶⁵ Galletly CL and Pinkerton SD. Conflicting messages: how criminal HIV disclosure laws undermine public health efforts to control the spread of HIV. *AIDS Behav.* 10(5):451-61, 2006. For example, Louisiana’s HIV-specific criminal law, first enacted in 1987 and revised in 1993, specifies that it is “unlawful for any person to intentionally expose another to HIV through sexual contact or through any means or contact”, which includes (including “spitting, biting, stabbing with an HIV contaminated object, or throwing of blood or other bodily substances”). La. Rev. Stat. Ann. § 14:43.5. The maximum prison sentence is ten years. La. Rev. Stat. Ann. § 14:43.5(E)(1). A 1993 appeal found that “expose” in the statute means risking infection, rather than actual transmission. *State v. Roberts*, 844 So. 2d 263, 272 (La. Ct. App. 2003).

⁶⁶ ARK. CODE ANN. § 5-14-123

⁶⁷ Unless otherwise noted, information and data are taken from Bernard (NAM) *Op cit.* which incorporates information from GNP+ *Op cit.* and *Criminal HIV Transmission Op cit.*

⁶⁸ Singapore, *Infectious Diseases Act 1977* Chapter 1937(1) (1992).

⁶⁹ Singapore, *Infectious Diseases Act 1977* Chapter 1937(3) (1992).

⁷⁰ Bennett S. Singapore Jails Man with HIV for Performing Oral Sex on Youth. Bloomberg, 15 July 2008 (<http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aRDZCKjq49n8&refer=healthcare>, accessed 4 November 2011).

⁷¹ Bennett S. HIV Ignorance is no Defense in Singapore Plan to Curb Risky Sex. Bloomberg, 11 February 2008 (<http://www.bloomberg.com/apps/news?sid=auBh4JRNu5k&pid=newsarchive>, accessed 4 November 2011).

⁷² Kaiser Daily HIV/AIDS Report. Singapore’s Parliament Approves Measure That Addresses Spread of HIV Through Unsafe Sex. 24 April 2008 (http://www.kaisernetwork.org/daily_reports/rep_index.cfm?DR_ID=51720, accessed 4 November 2011). The original sentencing under the 1992 legislation was a maximum of \$10,000 fine and two years’ jail sentence, see: Chieh LH. Ignorance is no excuse for infecting others. *Straights Times*, 28 September 2007 (<http://www.asiaone.com/Health/News/Story/A1Story20070928-27554.html>, accessed 4 November 2011).

⁷³ Bermuda, *Criminal Code Act* § 324 (2011).

⁷⁴ Bermuda, *Criminal Code Act* § 323 (2011).

⁷⁵ *Crimes Act 1958* (Vic) s 19a (Austl.).

⁷⁶ Woodroffe M. Criminal transmission of HIV in Australia. In Cameron S and Rule J (eds), *The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality*. Sydney, NAPWA, 2009.

⁷⁷ Cameron S. *HIV, Crime and the Law in Australia: Options for Policy Reform*. Australian Federation of AIDS Organisations, Sydney, 2011.

⁷⁸ Nyambe M. Criminalisation of HIV Transmission in Europe. GNP+ Europe/THT, 2005.

⁷⁹ Danish Criminal Code § 252(a) (2011).

⁸⁰ *Denmark*, Global Criminalisation Scan, http://www.gnpplus.net/criminalisation/index.php?option=com_content&task=view&id=90&Itemid=42 (last updated Jan 19, 2009).

⁸¹ Danish Criminal Code § 252(b) (2011).

⁸² Denmark, Government Order No. 547 (2001).

⁸³ *Denmark*, Global Criminalisation Scan. *Op. cit.*

⁸⁴ Elliott R. *Criminal law and HIV/AIDS: Final Report*. Canadian HIV/AIDS Legal Network, Montreal, 1996.

⁸⁵ Canada Criminal Code, R.S.C. 1985, c. C-46 § 265 (“without the consent of another person, he applies force intentionally to that other person, directly or indirectly”).

⁸⁶ *Ibid.* § 271

⁸⁷ *Ibid.* § 267

⁸⁸ *Ibid.* § 268

⁸⁹ *Ibid.* § 272

⁹⁰ *Ibid.* § 273

⁹¹ *Ibid.* § 239

⁹² *Ibid.* § 229. See also Chu SKH & Elliott R. *Man Convicted of First Degree Murder Sets Disturbing Precedent*. 14 *HIV/AIDS Policy & Law Review* 42, Toronto, 2009..

- ⁹³ R. v. Cuerrier, [1998] S.C.R. 371 (Can.). See also Elliott R. After Cuerrier: Canadian Criminal Law and the Non-Disclosure of HIV-Positive Status. Canadian HIV/AIDS Legal Network, Montreal, 1999.
- ⁹⁴ See R. v. Nduwayo (no legal duty to disclose HIV-status if condoms were used); R v. Imona-Russell (duty to disclose if sex was “unprotected”); R. v. Mabior, 2008 MBQB 201 (Can. Man.) (disclosure of HIV status required even with condom use if viral load is detectable), *reversed by* R. v. Mabior, 2010 MBCA 93 (Can. Man. C.A.) (no duty to disclose if condom used or undetectable viral load); R. v. Mekonnen, 2009 ONCJ 643 (Can. Ont.) (disclosure required even with condom use); R. v. Wright, 2009 BCCA 514 (Can. B.C.) (case-by-case analysis).
- ⁹⁵ See R v. Aziga, (4 April 2009), Hamilton CR-08-1735 (convicting on aggravated sexual assault charge based on unprotected oral sex).
- ⁹⁶ See, e.g., R. v. Mekonnen, 2009 ONCJ 643 (Can. Ont.) (deciding that vaginal intercourse with a condom but without HIV disclosure is an aggravated sexual assault, without considering evidence of risk of HIV transmission); R. v. Mabior, 2008 MBQB 201 (Can. Man.) (requiring disclosure of HIV status even with condom use if viral load is detectable), *reversed by* R. v. Mabior, 2010 MBCA 93 (Can. Man. C.A.) (reversing lower court conviction).
- ⁹⁷ Mykhalovskiy E. The problem of “significant risk”: Exploring the public health impact of criminalizing HIV non-disclosure. *Social Science & Medicine* (2011), doi:10.1016/j.socscimed.2011.06.05
- ⁹⁸ Center for HIV Law and Policy. *Op. cit.*
- ⁹⁹ Model Penal Code § 211.2 (1985). For example, in Colorado reckless endangerment is exposing another to a “substantial risk of serious bodily injury” and a conscious disregard of a substantial and unjustifiable risk. Reckless endangerment statutes do not require proof of purpose or intent to transmit HIV, nor does it matter if HIV is actually transmitted as long as there was a “risk” of transmission. Colo. Rev. Stat. § 18-3-208 (2004).
- ¹⁰⁰ See, e.g. Brock v. State 555 So. 2d 285 (Ala. Crim. App. 1989) (HIV-positive inmate was convicted of first-degree assault when he bit a police officer); State v. Christian, No. 07 JE 9, 2007 WL 4696853 (Ohio Ct. App. Dec. 28, 2007) (HIV-positive man convicted of nine counts of felonious assault for exposing his sexual partner to HIV).
- ¹⁰¹ See, e.g. State v. Stewart, 18 S.W.3d 75 (Mo. Ct. App. 2000) (HIV-negative man was convicted of attempted murder and sentenced to life imprisonment for injecting his son with HIV-positive blood); State v. Smith, 621 A.2d 493 (N.J. Super. Ct. App. Div. 1993) (HIV positive inmate who was found guilty of attempted murder for biting a corrections officer).
- ¹⁰² See, e.g. Tenn. Code Ann. § 39-13-516 (2010) (Class C felony, punishable by three to fifteen years, for HIV-positive person to engage in prostitution). Approximately 39 women have been charged for this crime in the state. Stambaugh JJ. HIV-positive Knoxville woman a walking felony. *Knoxnews.com*, 30 June 2009 (<http://www.knoxnews.com/news/2009/jun/30/hiv-positive-knoxville-woman-a-walking-felony>, accessed 5 November 2011).
- ¹⁰³ See, e.g. Mich. Comp. Laws Ann. § 750.200h(g) (2004) (defining “harmful biological substance” as a bacteria, virus, or other microorganism or a toxic substance derived from or produced by an organism that can be used to cause death, injury, or disease in humans, animals, or plants.); People v. Odom, 740 N.W.2d 557 (Mich. Ct. App. 2007) (inmate spit at correctional officers with HIV in his blood, charged under state bioterrorism law).
- ¹⁰⁴ Center for HIV Law and Policy. *Op. cit.*
- ¹⁰⁵ Brottsbalken [BrB] [Criminal Code] 3:5 (Swed.) (maximum sentence of two years).
- ¹⁰⁶ *Ibid.* 3:6 (maximum sentence of ten years).
- ¹⁰⁷ *Ibid.* (maximum sentence of two years).
- ¹⁰⁸ Bernard (NAM) *Op. cit.* Northern Europe. (<http://www.aidsmap.com/Western-Europe/page/1444983>, accessed 5 November 2011).
- ¹⁰⁹ HIV Nordic. Q&A: HIV and the criminal code in Nordic countries, Oslo, 2010.
- ¹¹⁰ Strafgesetzbuch [StGB] [Penal code] § 178-179.
- ¹¹¹ Bernard (NAM). *Op. cit.* Western Europe. (<http://www.aidsmap.com/Northern-Europe/page/1444965/> accessed 5 November 2011).
- ¹¹² Österreichische AIDS-Hilfe. [Austrian AIDS Foundation] Rechtsprechungsanalyse zu den §§ 178, 179 StGB: Beurteilungszeitraum: 2002-2003. February, 2005.
- ¹¹³ International AIDS Society. Statement on Austrian Laws Impacting People Living with HIV/AIDS (PLHIV) from AIDS 2010, GNP+ and ICW. Geneva, 12 July 2010.
- ¹¹⁴ Schweizerisches Strafgesetzbuch [StGB] [Criminal Code] RS 311.0, art. 231 (Switz.)
- ¹¹⁵ Tribunal federal [TF] [Federal Supreme Court] Oct. 27, 2004, Arrêts ddu Tribunal federal suisse [AFT] IV 1 (Switz.) (A person who transmits HIV through unprotected sexual relations is also guilty of propagating a human disease. The consent of the partner does not rule out a finding that the elements of the offence have been met, and does not render the act lawful.); S v. Procureur, Chambre penale [ACJP] [Court of Justice Penal Division] Feb. 23, 2009 (Switz.) (when a party is aware of his or her partner’s infection, it does not preclude a conviction on art. 231 because the statute protects public health).
- ¹¹⁶ Schweizerisches Strafgesetzbuch [StGB] [Criminal Code] RS 311.0, art. 122 (Switz.)
- ¹¹⁷ Tribunal federal [TF] [Federal Supreme Court] Oct. 27, 2004, Arrêts ddu Tribunal federal suisse [AFT] IV 1 (Switz.) (holding that the HIV-positive partner cannot be found guilty of inflicting serious

bodily harm through unprotected sex if the other partner has given informed consent); *S v. Procurer*, Chambre penale [ACJP] [Court of Justice Penal Division] Feb. 23, 2009 (Switz.) (when a party is aware of his or her partner's infection, there cannot be a conviction for art. 122).

¹¹⁸ Code Penal [C. pen] art. 221-5 (Fr.) (to make an attempt on somebody's life by using or giving any product which can lead to death is a poisoning).

¹¹⁹ Code Penal [C. pen] art. 222-15 (Fr.) (providing prejudicial substances which impair someone's physical or psychical integrity).

¹²⁰ Code Penal [C. pen] art. 223-1 (Fr.) (exposing directly somebody to immediate death risk or injuries which would lead to disability or severe handicap resulting from a deliberate breach of a specific safety or caution rule dictated by law).

¹²¹ See Cour de cassation [Cass.] [supreme court for judicial matters] crim., July 2, 19989, Bull. Crim., No. 98-80529 (Fr.) (mere knowledge of the deadly nature of the administered substance is insufficient to establish homicidal intent). The court is also split on whether spreading HIV constitutes "poisoning" at all. Conseil National du Sida, Comments on the Criminal Classification of the Sexual Transmission of HIV 6 (2006), available at <http://www.aidslaw.ca/EN/lawyers-kit/documents/2.Conseilnationaldusidacomment.pdf>.

¹²² See Condamné pour avoir transmis le VIH à sa compagne, 26 August 2010, <http://www.liberation.fr/societe/0101654197-condamne-pour-avoir-transmis-le-vih-a-sa-compagne>.

¹²³ See Norway, Global Criminalisation Scan, http://www.gnpplus.net/criminalisation/index.php?option=com_content&task=view&id=67&Itemid=42 (last updated June 21, 2009).

¹²⁴ Norway, General Civil Penal Code of 1902 § 155 (2011) (Any person who believes he or she has a contagious disease that is hazardous to public health and wilfully or negligently infects or exposes another person to the risk of infection shall be criminally liable. He or she will be imprisoned for a maximum of six year if the offence was committed wilfully and maximum three years if the offence was committed negligently). See also Norway, Global Criminalisation Scan. *Op. cit.*

¹²⁵ See Netherlands, Global Criminalisation Scan, http://www.gnpplus.net/criminalisation/index.php?option=com_content&task=view&id=68&Itemid=42 (last updated Jan. 19, 2009).

¹²⁶ Netherlands Criminal Code § 300-303

¹²⁷ See Netherlands, Global Criminalisation Scan. *Op. cit.*

¹²⁸ HR 18 januari 2005, Criminal Section no. 02659/03 IV/SB. (Neth.).

¹²⁹ Strafgesetzbuch [StGB] [Penal Code], Nov. 13, 1998, Bundesgesetzblatt [BGBl.] 3332, § 223 (Whoever physically abuses or damages the health of another person will be punished with imprisonment for up to five years or with a fine).

¹³⁰ Strafgesetzbuch [StGB] [Penal Code], Nov. 13, 1998, Bundesgesetzblatt [BGBl.] 3332, § 224 (committing bodily injury through administration of poison or other substances dangerous to health brings a maximum sentence of ten years in prison).

¹³¹ See Germany, Global Criminalisation Scan, http://www.gnpplus.net/criminalisation/index.php?option=com_content&task=view&id=85&Itemid=42 (last updated Nov. 2, 2009).

¹³² See Weait M. (2005) 'Knowledge, Autonomy and Consent: *R v Konzani*', *Criminal Law Review*, (Oct), pp. 163-72; Weait, M. (2005) 'Criminal Law and the Sexual Transmission of HIV: *R v Dica*', *Modern Law Review*, 68(1), pp. 120-133.

¹³³ Offences Against the Person Act, 1861, 24 & 25 Vict., 100, § 18, 20 (Eng.)

¹³⁴ *Ibid.* § 18 ("Whosoever shall unlawfully and maliciously by any means whatsoever wound or cause any grievous bodily harm to any person ...with intent, ... to do some ... grievous bodily harm to any person... shall be guilty of an offence, and being convicted thereof shall be liable ... to imprisonment for life.").

¹³⁵ *Ibid.* § 20 ("Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanour, and being convicted thereof shall be liable ... to imprisonment ... for not more than five years.").

¹³⁶ According to The Crown Prosecution Service, a person can be convicted of trying to infect another person even if HIV is not transmitted. "If the prosecution can prove that the defendant intended sexually to transmit an infection to a person but failed to do so, a charge of attempting to commit Section 18 may be brought." The Crown Prosecution Service (CPS), Intentional or Reckless Sexual Transmission Of Infection. July 2011.

(http://www.cps.gov.uk/legal/h_to_k/intentional_or_reckless_sexual_transmission_of_infection_guidance/index.html - Sexual, accessed July 13, 2011). Thus far, there have been no cases of attempted intentional transmission of HIV in the UK. National AIDS Trust. Police Investigation of HIV Transmission: A Guide for People Living with HIV in England, Wales & Northern Ireland. London, May 2011.

¹³⁷ The CPS guidelines, updated in July 2011, includes the following legal guidance: "52. Evidence that the suspect 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 suspect was reckless. 53. Where someone who is HIV+ is receiving treatment, one of the effects is a reduction of the amount of the virus in their system (in some cases this may result in an undetectable viral load). In these circumstances, the prospect of the infection being transmitted to another is potentially significantly reduced. It may be argued that taking medication may, in some circumstances, be as effective a safeguard as, for example, the use of a condom in reducing risk and therefore negating recklessness. Prosecutors should take great care with such cases however, as medical opinion on the reduction of the risk of infection is not settled, and evidence of the actual taking of medication in accordance with medical instructions may not be as clear-cut as evidence of the use of other safeguards such as condoms." CPS. *Op. cit.*

¹³⁸ Roberts M. HIV Crimes – Lawyers' Views. BBC News, 18 Sept. 2006 (<http://news.bbc.co.uk/2/hi/health/5348350.stm>, accessed 5 November 2011). According to Scottish lawyer Donald Findlay, who defended a Scottish man who infected his girlfriend from HIV, "In Scotland, the charge is culpable and reckless conduct. If you know that you have HIV, you know that it can be transmitted through sexual intercourse and that it is obviously damaging to the health of the person who catches it and you have unprotected sex, that alone is reckless, which would make it culpable.". See also *United Kingdom of Great Britain*, Global Criminalisation Scan, http://www.gnpplus.net/criminalisation/index.php?option=com_content&task=view&id=85&Itemid=42 (last updated July 11, 2010).

¹³⁹ An estimated 3 prosecutions to date. *United Kingdom of Great Britain*, Global Criminalisation Scan. *Op. cit.*

¹⁴⁰ According to Findlay, "If you are HIV positive, have told your partner and they consent to unprotected sex, I still think you have committed a crime under Scottish law. I could not rule out the possibility of a prosecution.". Roberts. *Op. cit.*

¹⁴¹ According to Findlay, "Whether the partner in the sexual act knows and consents is a moot point because you cannot, in Scottish law, consent to an assault." Roberts. *Op. cit.*

¹⁴² Chalmers J. HIV convictions exceptional in UK. BBC News Online, 7 February 2007. (http://news.bbc.co.uk/2/hi/uk_news/scotland/edinburgh_and_east/6338777.stm, accessed 5 November 2011).

¹⁴³ *Crimes Act 1958* (Vic) s 19(a) (Austl.) ((1) A person who, without lawful excuse, intentionally causes another person to be infected with a very serious disease is guilty of an indictable offence. (2) Penalty: Level 2 imprisonment (25 years maximum))

¹⁴⁴ *E.g.*, *Crimes Act 1900* (NSW) s 35(2) (Austl.) ("A person recklessly causes grievous bodily harm to any person is guilty of an offence.");

¹⁴⁵ *E.g.*, *Criminal Code Act* (NT) s 181 (Austl.) ("Any person who unlawfully causes serious harm to another is guilty of a crime and is liable to imprisonment for 14 years."); *Criminal Code Act 1899* (Qld) s 317 (Austl.) ("Any person who with intent to do grievous bodily harm or transmit a serious disease to any person is guilty of a crime, and is liable to imprisonment for life.")

¹⁴⁶ *E.g.* *Criminal Law Consolidation Act 1935* (SA) s 29 (Austl.) ("(1) Where a person, without lawful excuse, does an act or makes an omission: (a) knowing that the act or omission is likely to endanger the life of another; and (b) intending to endanger the life of another or being recklessly indifferent as to whether the life of another is endangered; that person is guilty of an offence."); *Crimes Act 1958* (Vic) s 22 (Austl.) ("A person who, without lawful excuse, recklessly engages in conduct that places or may place another person in danger of death is guilty of an indictable offence. Penalty: Level 5 imprisonment (10 years maximum))")

¹⁴⁷ Woodroffe M. Criminal Transmission of HIV in Australia. In: NAPWA *Op. cit.* (recklessness will be proven when a person knew they were HIV-positive but decided to engage in unprotected sexual intercourse).

¹⁴⁸ See, e.g., *R v Reid* [2006] QCA 202 (Austl.) (intention proved by showing Reid taunted the complainant with the fact that he had been diagnosed as HIV-positive as a result of sexual contact with Reid).

¹⁴⁹ *Neal v The Queen* [2011] VSCA 172 (15 June 2011)

¹⁵⁰ Cameron S. (AFAO) *Op. cit.*

¹⁵¹ Art. 582 Codice penale [C.p.] (It.) (who inflicts a bodily injury on another that causes a physical or mental sickness to the injured person; prison term is three months to three years.)

¹⁵² Art. 583 Codice penale [C.p.] (It.) (bodily harm is aggravated if it results in an illness that endangers the life of the other party or the harm causes a permanent weakening of a sense or a bodily organ; prison term is three to seven years).

¹⁵³ Art. 589 Codice penale [C.p.] (It.) (whoever causes the death of another person shall be imprisoned for six months to five years.). See also *Italy*, Global Criminalisation Scan, http://www.gnpplus.net/criminalisation/index.php?option=com_content&task=view&id=76&Itemid=42 (last updated Dec. 14, 2009) (outlining case of man who was convicted of culpable homicide for giving HIV to his wife who subsequently died).

¹⁵⁴ Bernard (NAM). *Op. cit.* Southern Europe (<http://www.aidsmap.com/Southern-Europe/page/1444976>, accessed 5 November 2011).

¹⁵⁵ The Criminal Code of Finland, Chapter 21, Sections 5 (Assault) and 6 (Aggravated Assault)

¹⁵⁶ HIV Nordic *Op. cit.*

¹⁵⁷ As of 2005, six men had been prosecuted. *New Zealand*, Global Criminalisation Scan, http://www.gnplplus.net/criminalisation/index.php?option=com_content&task=view&id=244&Itemid=47 (last updated Dec. 2, 2008).

¹⁵⁸ Crimes Act 1861 § 145 (N.Z.) (Prohibiting “any unlawful act...he knew would endanger the lives, safety, or health of the public, or the life, safety, or health of any individual.” Prison term is maximum 1 year.)

¹⁵⁹ *Ibid.* § 188 (Prison term of maximum 14 years for those that “with intent to cause grievous bodily harm to any one, wounds, maims, disfigures, or causes grievous bodily harm to any person.” Prison term of maximum 7 years for those that “with intent to injure anyone, or with reckless disregard for the safety of others, wounds, maims, disfigures, or causes grievous bodily harm to any person.”)

¹⁶⁰ *Ibid.* § 201 (“Every one is liable to imprisonment for a term not exceeding 14 years who, wilfully and without lawful justification or excuse, causes or produces in any other person any disease or sickness.”)

¹⁶¹ *Ibid.* § 156 (“Every one who has in his charge or under his control anything...which, in the absence of precaution or care, may endanger human life is under a legal duty to take reasonable precautions against and to use reasonable care to avoid such danger...”)

¹⁶² See *New Zealand Police v. Dalley* (2005) 22 CRNZ 495

¹⁶³ See *R v Barry* [1989] unreported, QLD CCA (Austl.) (HIV-positive man sentenced to 12-months in prison for smearing faeces on police officer); Oberhardt M. HIV Man Jailed for Biting Police. *The Courier Mail*, 16 Jan. 2008 (<http://www.couriermail.com.au/news/queensland/hiv-man-jailed-for-biting-police/story-e6freoof-111115335833>, accessed 5 November 2011). The trial judge noted that “there are now diseases in the community which are spread like this”; Bernard (NAM) *Op. cit. Southern Europe*, (<http://www.aidsmap.com/Southern-Europe/page/1444976/>, accessed 14 July 2011) report of a man convicted for three years for biting police officer.

¹⁶⁴ See, e.g., *Nash v. State*, 881 N.E.2d 1060 (Ind. Ct. App. 2008) (HIV-positive defendant was sentenced to six years imprisonment for battery by body waste for throwing his urine and feces on a nurse in his detention facility); HIV-positive man charged with spitting on officer. *Fort Wayne Sentinel*, June 11, 2002, at 4A (a 37-year-old HIV-positive man was charged with battery by bodily waste for spitting on a confinement officer); *State v. Roberts* 844 So. 2d 263, 265-69 (La. Ct. App. 2003) (HIV-positive man was convicted for intentionally exposing the complainant to HIV through both having sex with her as well as biting her).

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¹⁶⁷ A woman who had unprotected sex with her husband and gave birth to two children without disclosing her HIV-positive status was convicted of attempted aggravated assault and sentenced to two years and six months in prison. Neither her husband nor her children were infected. Oscarsson M. *Lillemor vill ge hiv ett ansikte [Lillemor wants to give HIV a human face]* *Sydsvenskan.se*, 9 May 2010. (<http://www.sydsvenskan.se/kultur-och-nojen/article869098/Lillemor-vill-ge-hiv-ett-ansikte.html>, accessed 5 November 2011).

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¹⁶⁹ AFP. 2 ans ferme pour avoir transmis le VIH. [2 years in prison for transmitting HIV] *Le Figaro*, 11 Dec. 2009. (<http://www.lefigaro.fr/flash-actu/2009/11/12/01011-20091112FILWWW00666-5-ans-ferme-pour-avoir-transmis-le-vih.php>, accessed 5 November 2011).

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¹⁷³ [Anonymous]. Ontario woman pleads guilty to sexual assault and criminal negligence for failing to disclose HIV status. *HIV/AIDS Policy & Law Review*, p42, 14 (1), May 2009.

¹⁷⁴ 19-year old woman who had sex with 20 men after learning of HIV status was arrested by Korean police, but court refused to issue arrest warrant and suggested she should be sent to the hospital for treatment. [Anonymous]. *S Korea HIV Carrier Caught*. *The Straits Times*, 26 Oct. 2010. (archived at <http://criminalhivtransmission.blogspot.com/2010/10/south-korea-court-refuses-arrest.html>).

¹⁷⁵ Center for HIV Law and Policy. *Op. cit.*

¹⁷⁶ See, e.g. Tenn. Code Ann. § 39-13-516 (2010) (class C felony, punishable by three to fifteen years in prison for an HIV-positive person who knows her/his status to engage in acts of prostitution); Colo. Rev. Stat. § 18-7-205.7 (2004) (class 5 felony punishable by up to three years in prison and/or a \$1,000 fine for a person who is aware of her/his HIV-positive status to perform, offer to perform, or agree to perform any act of penile-vaginal sex, oral sex, masturbation, or anal sex in exchange for money or any other thing of value).

¹⁷⁷ At least thirty-nine women have been convicted of aggravated prostitution in Tennessee under its HIV-specific sex work statute: Tenn. Code Ann. § 39-13-516, § 40-35-111. A person commits aggravated prostitution when, knowing that such person is infected with HIV, the person engages in sexual activity as a business or in a house of prostitution or loiters in a public place for the purpose of being hired to engage in sexual activity. Actual transmission of HIV is not a required for prosecution. Violation of this statute is a class C felony punishable by three to fifteen years imprisonment and a possible fine of up to \$10,000. See Stambaugh *Op. cit.*

¹⁷⁸ For example, while Canada allows for prosecutions for HIV exposure via both the consensual use of non-sterile injecting equipment and consensual sex, but has only prosecuted the latter, Fiji only criminalises transmission via the consensual use of non-sterile injecting equipment: there are no laws against sexual transmission. See [Anonymous]. No laws on HIV. Fiji Times, 21 April 2008. (<http://www.fijitimes.com/story.aspx?id=86942>, accessed 5 November 2011).

¹⁷⁹ See, e.g., Mo. Rev. Stat. §§ 191.677(1)(1), 558.011 (it is a Class B felony, carrying a sentence of five to fifteen years, for an HIV-positive person to donate any blood, blood products, organs, sperm or tissue, unless the donation is for medical research); Ohio Rev. Code Ann. §2927.13 (it is a felony, punishable by up to eighteen months imprisonment, for an HIV-positive person to donate or sell her/his blood, plasma, or any other blood product); see generally Center for HIV Law and Policy. *Op. cit.*

¹⁸⁰ In March 2010 a court in Thessaloniki, Greece found a 42-year old man guilty of "bodily injury through serial negligence" and "violation of measures imposed by the authority responsible for the spread of disease from deliberate negligence" because he unknowingly donated HIV-positive blood that ultimately resulted in the infection of several blood recipients. The court stated that the man – who was undiagnosed at the time – was culpable because he had not disclosed that he had previously had sex with a sex worker. He was sentenced to 33 months imprisonment, suspended for three years. Athens News Agency. Θεσσαλονίκη - Κατάδικη 42χρονου αιμοδότη που μόλυνε με τον ιό του AIDS ένα κοριτσάκι κι έναν ηλικιωμένο [Thessaloniki: Sentencing 42 year-old donor infected a one year-old girl with the AIDS virus] 9 March 2010. (<http://www.google.com/hostednews/epa/article/ALeqM5jKqM-p8gj1i73dc92TR-6TU2XDQ>, accessed 5 November 2011).

¹⁸¹ See L.B. 226, Neb. Leg. (Neb. 2011); Tracy Sherlock, *New B.C. Bill Would Help Workers Exposed to Bodily Fluids*, The Vancouver Sun, June 1, 2011.

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¹⁸³ The White House Office of National AIDS Policy. National HIV/AIDS Strategy for the United States, July 2010. Available at: <http://www.whitehouse.gov/sites/default/files/uploads/NHAS.pdf> (Accessed 9 June 2011)

¹⁸⁴ Positive Justice Project. Initiatives. The Center for HIV Law & Policy. (Accessed July 12, 2011), available at <http://www.hivlawandpolicy.org/public/initiatives/positivejusticeproject>.

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(<http://news.nationalpost.com/2011/07/14/hiv-infection-not-a-death-sentence-judge/>, accessed 5 November 2011).

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suspension of HIV-specific law, asking for its abolition. Criminal HIV Transmission, 31 May 2011. (<http://criminalhivtransmission.blogspot.com/2011/03/denmark-deadline-april-29th-endorse.html>, accessed 5 November 2011).

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