MINISTRY OF HEALTH & WELLNESS

NATIONAL FAMILY PLANNING BOARD

MAKING THE CASE AGAINST AN HIV-SPECIFIC CRIMINAL LAW IN JAMAICA

Legal Assessment of the Effectiveness of HIV Criminalisation Laws – From High to Low-Income Countries

NATIONAL FAMILY PLANNING BOARD

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EXECUTIVE SUMMARY

Introduction

This assessment 'Legal Assessment of the Effectiveness of HIV Criminalisation Laws-from High to Low-Income Countries' demonstrates why the enactment of an HIV-specific criminal law in Jamaica would be harmful to the national HIV response. It sets out the bases on which the recommendation for an HIV-specific criminal law should be rejected and highlights the need for public health policy considerations to centre the discussions surrounding HIV criminalisation in Jamaica. This assessment provides sufficient evidence and comparative data from which the Government of Jamaica can make an informed consideration of the issue and can confidently reject any attempt to introduce an HIV-specific criminal law.

The need for this assessment stems from the recommendation of the Joint Select Committee appointed to review the Sexual Offences Act, the Offences Against the Person Act, the Domestic Violence Act and the Child Care and Protection Act that the Offences Against the Person Act should be amended to make it a criminal offence for someone to '**wilfully or recklessly infect a partner with any sexually transmissible disease that can inflict serious bodily harm to that partner'**. In its 2018 Report, the Joint Select Committee was of the view that there was a deficiency in the law concerning the deliberate or intentional spreading of HIV and other sexually transmitted diseases. In highlighting this deficiency, the Joint Select Committee noted that this type of offence existed in other jurisdictions such as Canada and the United Kingdom.

Methodology

The assessment was conducted by reviewing and analysing (i) relevant research on HIV in the Caribbean; (ii) empirical studies on criminalisation of HIV across various countries in North America, Europe, and Africa; (iii) noted publications detailing scientific advances in the treatment of HIV; (iv) relevant local statutes, local case law, local reports relevant to HIV and the law, as well as local policies and plans relevant to the HIV response; (v) statutes, cases, and legal developments inclusive of guidelines and protocols on prosecution and investigation of HIV transmission from various jurisdictions; (vi) legal and public health analyses on the implications of HIV criminalisation on HIV prevention and care; and (vii) consensus statements, international guidelines on HIV, and developments under international human rights law.

Findings

The findings from this assessment show why the recommendation to enact an HIV-specific law should be rejected. The reasons can be summed up in three main points.

Faulty premise informed Joint Select Committee's recommendation

Firstly, the premise which informed the Joint Select Committee's recommendation is faulty. There is no deficiency in the law concerning the 'deliberate or intentional spreading of HIV and other sexually transmitted diseases'. The deliberate or intentional spreading of HIV and

other sexually transmitted diseases that can cause serious bodily harm is already an offence under section 20 of the Jamaica Offences Against the Person Act, 1864. There is also no need for a specific law that would make it a criminal offence for someone to recklessly infect another person with HIV or other sexual infection that can cause serious bodily harm because this is already an offence under section 22 of the Jamaica Offences Against the Person Act, 1864. Consequently, Jamaica's general criminal law already provides a remedy for anyone who believes that a wrong has been committed against them in this regard.

Enactment of HIV-specific criminal law does more harm than good

Secondly, any enactment of an HIV-specific criminal law to cover offences which are already covered in the general criminal law does more harm than good. Trying to enact an HIV-specific criminal law is not only harmful to the national HIV response but is likely to have other unintended consequences. The Government of Jamaica must be prepared for a huge international blowback. This conclusion is arrived at in light of the context within which the Government of Jamaica is now considering to enact an HIV-specific criminal law. In 2019, the Government of Jamaica has the benefit of information on the latest scientific advances in the treatment of HIV, of international guidelines and standards regarding the criminalisation of HIV and the treatment of people living with HIV, and of witnessing the global and regional movements against HIV criminalisation and HIV-specific criminal laws. The Government of Jamaica also has access to evidence from studies and from the experience in some jurisdictions which indicates that an HIV-specific criminal law contributes to the stigmatisation of people living with HIV and heighten the climate of fear surrounding HIV.

In considering the issue of whether to enact an HIV-specific criminal law, the Government of Jamaica must also situate itself regionally – where HIV-specific criminal laws are the exception and not the norm. Parliamentarians in the region have refused to enact HIV-specific criminal laws as seen from the recent rejection in Guyana (2011) and earlier in Trinidad and Tobago (2004). The only set of HIV-specific criminal laws in the region is found in The Bahamas (1991), Bermuda (1993), Belize (2000), and St. Lucia (2004). These laws were enacted before the greater appreciation of scientific advances in the treatment of HIV and the development of international guidelines. It is also of significance that jurisdictions to which the Joint Select Committee refer have decided against enacting an HIV-specific criminal law. In 2015, the United Kingdom rejected an attempt to introduce HIV-specific criminal laws and Canada, since December 2018, has revised its approach to HIV criminalisation in light of its acknowledgment of up-to-date scientific advances. Enacting an HIV-specific criminal law in Jamaica is, therefore, bad public policy.

This push towards an HIV-specific law without due consideration of the latest scientific advances regarding HIV treatment as recently published by the Centers for Disease Control and Prevention ('CDC') in December 2018 is problematic. The studies indicate that people with HIV who take HIV medicine as prescribed and get and keep an undetectable viral load (or stay virally suppressed) have effectively no risk of transmitting HIV to their HIV-negative sexual partners. There is no indication that the Joint Select Committee took these developments into account when making its recommendation.

Concerns about the application of the general criminal law can be remedied

Thirdly, any concern about the application of the general criminal law can be remedied. If there are concerns about the application of the general criminal law to prosecute intentional and reckless transmission of HIV and other sexual infections, this can be remedied with the careful and effective use of comprehensive prosecutorial and investigative guidelines. The use of prosecutorial and investigative guidelines to clarify the application of the general criminal law to the transmission of sexual infections is a best practice. The guidelines in the United Kingdom are often hailed in this regard.

Policy recommendations

Going forward, it must always be borne in mind that HIV and all sexual infections are first and foremost a public health issue. Consequently, the discourse on HIV criminalisation ought to place public health policy considerations at the centre. The Joint Select Committee made recommendations geared at strengthening protection of the law and increasing access to justice for persons in Jamaica. Within the context of HIV, an HIV-specific criminal law does not help to achieve this. To better protect everyone, including people living with HIV, legal and policy reform efforts must be directed towards:

(i) Clarifying the application of the general criminal law through the development of prosecutorial and investigative guidelines,
(ii) Strengthening access to justice by enacting anti-discrimination legislation, allowing for prompt and effective remedies, and providing legal support services for people living with HIV; and
(iii) Expanding the provision of services for sexually transmitted infections.

PART 1. BACKGROUND

1.1 Introduction

This assessment demonstrates why the enactment of an HIV-specific criminal law in Jamaica would be harmful to the national HIV response. It sets out the bases on which the recommendation for an HIV-specific criminal law should be rejected and highlights the need for public health policy considerations to be placed at the centre of the discussions surrounding HIV criminalisation in Jamaica.

The need for this assessment stems from the recommendation of the Joint Select Committee appointed to review the Sexual Offences Act, the Offences against the Person Act, the Domestic Violence Act and the Child Care and Protection Act that the Offences against the Person Act should be amended to make it a criminal offence for someone to '**wilfully or recklessly infect a partner with any sexually transmissible disease that can inflict serious bodily harm to that partner'**. In its 2018 Report, the Joint Select Committee was of the view that there was a deficiency in the law in relation to the deliberate or intentional spreading of HIV and other sexually transmitted diseases. In highlighting this deficiency, the Joint Select Committee noted that this type of offence existed in other jurisdictions such as Canada and the United Kingdom. The verbatim statement of the Joint Select Committee was as follows:

> **a) <u>Willfully and knowingly transmitting sexually transmitted diseases including HIV</u>**
>
> Following a recommendation made for a new offence to be inserted into the Act to deal with the case where someone willfully and knowingly transmitted HIV and/or other infections to another, your Committee acknowledged that there was a deficiency in the law in relation to the deliberate or intentional spreading of HIV and other sexually transmitted diseases. We noted that this type of offence existed in other jurisdictions such as Canada (grievous sexual assault under the Canadian Criminal Code) and the United Kingdom (grievous bodily harm under the UK Offences Against the Person Act), and referenced case law such as *Guerrier*, 1998 and *Mabior*, 2014 from Canada as well as *R. v Golding* from the United Kingdom. We also made reference to the George Flowers case involving a Jamaican who had infected a number of women with HIV while living in Canada, and fled to Jamaica, resulting in an extradition request being made to the Jamaican authorities for him to return to Canada to face charges. ***Your committee agreed that the Act should be amended to make it a criminal offence for someone to willfully or recklessly infect a partner with any sexual transmissible disease that can inflict serious bodily harm to that partner.***[1]

[1] Houses of Parliament Jamaica, Report of the Joint Select Committee Appointed to complete the review of the Sexual Offences Act along with the Offences Against the Person Act, the Domestic Violence Act and the Child Care and Protection Act (December 2018) p. 39

1.2 Background

HIV criminalisation laws were developed in the 1980s and early 1990s at the onset of the AIDS epidemic when very little was known about the disease and it was deemed a public health crisis primarily affecting already stigmatised populations. At that time, HIV criminalisation laws were considered a necessary part of the strategy to control the spread of the disease. Between the 1980s and now, scientific understanding of HIV and its transmission has advanced considerably with scientists establishing the preventive impact of antiretroviral therapy. This led in 2008 to the development of the 'Swiss Statement' by the Swiss National AIDS Commission which stated for the first time that someone on effective antiretroviral therapy was unlikely to transmit HIV. This served as a turning point for HIV criminalisation as well as for HIV prevention leading to calls for the re-characterisation of the risk and harm of HIV based on the best available scientific evidence. In the face of encouraging scientific evidence and sustained advocacy globally for the repeal and/or amendment of HIV criminalisation laws, many countries and individual states in the United States have moved to repeal or modernise existing criminalisation laws.[2]

Various international bodies, inclusive of the World Health Organization, political bodies, and United Nations' specialised agencies have expressed concern about the harmful effects of broadly criminalising the transmission of HIV.[3] These bodies and agencies have noted that, contrary to the HIV-prevention rationale that HIV criminal laws act as a deterrent and provide retribution, there is no evidence to show that broad application of the criminal law to HIV transmission achieves either criminal justice or public health goals. On the contrary, such laws (i) undermine existing public health efforts, (ii) have a disproportionate impact on vulnerable communities, (iii) fuel stigma and discrimination, and (iv) increase the risk of violence directed towards affected individuals, particularly women. Such laws increase rather than decrease HIV transmission. The key recommendation is that countries should limit criminalisation and prosecution to the rare instances of intentional or deliberate transmission of HIV and that this should be done using general criminal laws, not HIV-specific criminal laws.[4]

Parliamentarians have also collectively turned their attention to the issue of HIV criminalisation. At the First Global Parliamentary Meeting on HIV/AIDS, parliamentarians cautioned that criminal laws can undermine important public policy objectives. Careful consideration should be given to the fact that passing HIV-specific criminal legislation can further stigmatise persons living with HIV, provide a disincentive to HIV testing, create a false

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[2] Paragraph extracted from the Terms of Reference – 'Legal Assessment of the Effectiveness of HIV Criminalisation Laws-from High to Low-Income Countries' (NFPB, 2019)

[3] Global Commission on HIV and the Law, *HIV and the law: risks, rights and health* (New York: UNDP 2012); Anand Grover, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, (New York (NY): United Nations 2010) para 52 - 76; Joint United Nations Programme on HIV/AIDS (UNAIDS), United Nations Development Programme, *Policy Brief: Criminalisation of HIV transmission* (Geneva: UNAIDS 2008); First Global Parliamentary Meeting on HIV/AIDS, Manila, Philippines, 28–30 November 2007. Final Conclusions. Geneva: Inter-Parliamentary Union, 2007; Joint United Nations Programme on HIV/AIDS ('UNAIDS') *Ending overly broad criminalisation of HIV nondisclosure, exposure and transmission: critical scientific, medical and legal considerations. Guidance Note.* (Geneva 2013) ; WHO, *Sexual health, human rights and the law* (2015) p. 22 - 23

[4] ibid

sense of security among people who are HIV-negative, and rather than assisting women by protecting them against HIV infection, impose on them an additional burden and risk of violence and discrimination. The parliamentarians concluded that there is no evidence that criminal laws specific to HIV transmission will make any significant impact on the spread of HIV or on halting the epidemic. Therefore, priority must be given to increasing access to comprehensive and evidence-informed prevention methods in the fight against HIV/AIDS.[5]

1.3 Methodology

The assessment was conducted by reviewing and analysing (i) relevant research on HIV in the Caribbean; (ii) empirical studies on criminalisation of HIV across various countries in North America, Europe, and Africa; (iii) noted publications detailing scientific advances in the treatment of HIV; (iv) relevant local statutes, local case law, local reports relevant to HIV and the law, as well as local policies and plans relevant to the HIV response; (v) statutes, cases, and legal developments inclusive of guidelines and protocols on prosecution and investigation of HIV transmission from various jurisdictions; (vi) legal and public health analyses on the implications of HIV criminalisation on HIV prevention and care; and (vii) consensus statements, international guidelines on HIV, and developments under international human rights law.

[5] First Global Parliamentary Meeting on HIV/AIDS: Parliaments and Leadership in combating HIV/AIDS, Manila, Philippines, 28 – 30 November 2007

PART 2. FINDINGS

2.1 JOINT SELECT COMMITTEE'S RECOMMENDATION INFORMED BY A FAULTY PREMISE

The recommendation of the Joint Select Committee is informed by a faulty premise. In making its recommendation, Jamaica's Joint Select Committee stated that 'there was a deficiency in the law in relation to the deliberate or intentional spreading of HIV and other sexual transmitted diseases.' This statement suggests that Jamaica has no law in place to deal with the intentional and reckless transmission of HIV and other sexual infections. The Joint Select Committee was certain to point out that 'this type of offence' exists in the United Kingdom and in Canada, further suggesting that Jamaica's law is deficient in this regard. This premise is faulty in two ways. Firstly, there is no deficiency in the law in relation to the 'deliberate or intentional spreading of HIV and other sexually transmitted diseases'. The deliberate or intentional spreading of HIV and other sexually transmitted diseases that can cause serious bodily harm is already an offence under section 20 of the Jamaica Offences Against the Person Act, 1864. There is also no need for a specific law that would make it a criminal offence for someone to recklessly infect another person with HIV or other sexual infection that can cause serious bodily harm because this is already an offence under section 22 of the Jamaica Offences Against the Person Act, 1864. Consequently, Jamaica's general criminal law already provides a remedy for anyone who believes that a wrong has been committed against them in this regard. Secondly, Jamaica's general criminal law operates in similar ways to the general criminal laws of the United Kingdom and Canada to which the Joint Select Committee refer. Neither the United Kingdom nor Canada has an HIV-specific criminal law to prosecute intentional or reckless transmission of HIV and other sexual infections. Both jurisdictions, as does Jamaica, rely on their general criminal laws.

2.2 LAWS GOVERNING INTENTIONAL AND RECKLESS TRANSMISSION OF HIV IN JAMAICA

2.2.1 Intentional Transmission of HIV

Section 20 of the Jamaica Offences Against the Person Act, 1864, governs the intentional transmission of sexual infections such as HIV. Section 20 makes it an offence to unlawfully and maliciously cause grievous bodily harm to any person with the intent to cause grievous bodily harm to that person. Section 20 is similarly worded as section 18 of the UK Offences Against the Person Act, 1861, which also criminalises grievous bodily harm and which similarly governs the intentional transmission of sexual infections such as HIV. Interestingly, a section 18 offence is a rare situation. As at 2019, there has only been one successful prosecution for intentional transmission of HIV in England and Wales.[6] Jamaica's Offences Against the Person

[6] *HMA v Darryl Rowe* (2018)

Act, 1864, is modeled from the UK Offences Against the Person Act, 1861. 'Grievous bodily harm', in the UK 1861 Act and likewise the Jamaica 1864 Act, includes disease or infection if the effect on a complainant is serious enough.[7]

Jamaica's current law in section 20 of the Offences Against the Person Act, 1864, which applies to the deliberate or intentional transmission of HIV, is good law. It is good law because it provides a remedy where it is proven that anyone deliberately or intentionally causes actual and significant harm to another person. This is in line with Guideline 4 of the International Guidelines on HIV/AIDS and Human Rights which recommends that general criminal offences be applied to the exceptional cases where there is deliberate and intentional transmission of HIV.[8] The Global Commission on HIV and the Law has also recognised that the prosecution of HIV transmission where the transmission was actual and intentional, may be legitimately prosecuted.[9] UNAIDS acknowledges that the use of criminal law in the context of HIV can be legitimate where there is actual and significant harm intentionally caused to another person – where the conduct of the person living with HIV resulted in HIV transmission.[10]

2.2.2 Reckless Transmission of HIV

2.2.2.1 The Offence

At its simplest, recklessness within this context means that an accused person foresaw that the complainant might contract the infection via unprotected sexual activity but still went on to take that risk.[11] In Jamaica, the reckless transmission of HIV and other sexual infections are governed by section 22 of the Offences Against the Person Act, 1864 which makes it an offence to inflict grievous bodily harm upon any person. This was made clear in the 2016 case of *George Flowers v Director of Public Prosecutions et al*.[12] Section 22 of the Jamaica Offences Against the Person Act, 1864, is comparable to section 20 of the UK Offences Against the Person Act, 1861. In the *George Flowers* case, the Jamaican courts looked to the case development in the UK to determine what law was applicable in Jamaica. This was what the Jamaica Supreme Court had to say:

> [109] Since there is no locally decided case on the issue of transmission of sexual infections such as HIV, cases such as *R v Mohammed Dica* and *R v Konzani* would be considered to be persuasive authorities on this point. It is my view that if this issue

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[7] Law Commission of England and Wales, Report on Reform of Offences Against the Person Act, 1861, (Law Com No. 361, 2015) Chapter 6: Transmission of Disease, p. 122

[8] Office of the United Nations High Commissioner for Human Rights and the Joint United Nations Programme on HIV/AIDS, *International Guidelines on HIV/AIDS and Human Rights 2006 Consolidated Version*

[9] Global Commission on HIV and Law, *HIV and the Law: Risks, Rights and Health* (UNDP 2012) p. 25.

[10] UNAIDS *Guidance Note - Ending Overly Broad Criminalisation of HIV Non-disclosure, Exposure and Transmission: Critical Scientific, Medical and Legal Considerations* (2013) p. 12 para 13

[11] 'Intentional or Reckless Sexual Transmission of Infection: Policy for Prosecuting Cases' (Updated July 2011), Legal Guidance, Sexual offences, Violent crime, UK Crown Prosecution Service https://www.cps.gov.uk/legal-guidance/intentional-or-reckless-sexual-transmission-infection Accessed on 17 June 2019

[12] *George Flowers v The Director of Public Prosecutions For and On Behalf of the Government of Canada et al* [2016] JMFC Full 3 para 109

fell to be decided by a Court in Jamaica today, such Court would take a similar approach to their Lordships in *Dica* and *Konzani*. Accordingly, it would be open for the Court to find that a person who knows that he is infected with the HIV virus and who recklessly infects another may be guilty of inflicting grievous bodily harm contrary to section 22 of the Offences Against the Person Act. This would of course be subject to all the ingredients of the offence being established.[13]

2.2.2.2 Key Cases

The general criminal law of the UK and thereby of Jamaica did not always criminalise the reckless transmission of HIV. As explained by the Law Commission of England and Wales, historically, the reckless transmission of disease did not fall within the major offences in the 1861 Act: the view taken was that these offences existed to address crimes of violence, and therefore did not cover causing harm through consensual sexual intercourse.[14] The law, however, changed in 2003 with *R v Dica*.[15] Since *R v Dica,* the law has been that transmitting an infection can amount to the infliction of harm, and that consent to intercourse does not imply consent to that harm or the risk of it.[16] Below are the key cases informing the development of the law in Jamaica in respect of reckless transmission of HIV and other sexual infections which can cause serious bodily harm.

The *George Flowers* Case: In March 2013, the Government of Canada sought the extradition of George Flowers to face charges of aggravated sexual assault. Flowers, a Jamaican, had fled from Canada to Jamaica. The allegations were that Flowers, who was living with HIV, engaged in unprotected sexual intercourse with four women without informing them of his status. Three of the four women subsequently contracted HIV. The Minister of Justice issued the Authority to Proceed. Flowers was subsequently arrested pursuant to an extradition warrant for his arrest. He was committed to custody pending his extradition to Canada. Flowers challenged his committal to custody and applied for his release. He argued that there was no corresponding offence in Jamaica to the offence of aggravated sexual assault for which his extradition was being sought. In 2016, the Supreme Court in Jamaica decided that the acts or omissions that Flowers was accused of, for which his extradition was being sought, would have constituted an offence in Jamaica and if he had carried out those actions in Jamaica he would have inflicted grievous bodily harm in respect of the three women who contracted HIV. The Court denied his application for release and found that Flowers should be extradited to Canada in respect of the three women who contracted HIV. Flowers was extradited to Canada.

The George Flowers case made it clear that the general criminal law, in particular, section 22 being the offence of grievous bodily harm in the Jamaica Offences Against the Person Act, is sufficient to prosecute the reckless transmission of HIV.

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[13] *George Flowers v The Director of Public Prosecutions For and On Behalf of the Government of Canada et al* [2016] JMFC Full 3 para 109

[14] Law Commission Report (2015) p. 121 referencing *Clarence* (1888) 22 QBD 23

[15] *R v Dica* [2004] EWCA Crim 1103

[16] Law Commission Report (2015) p. 121

R v Dica: In *Dica*,[17] Mohammed Dica knew that he was HIV positive and had unprotected sexual intercourse with two women, both of whom contracted HIV. He did not inform the women of his status or that they were at risk of infection. Dica was charged with inflicting grievous bodily harm under section 20 of the UK Offences Against the Person Act and was convicted. *Dica* established that what must be considered is not merely whether there is consent to sexual intercourse but whether there is consent to the risk of infection.

R v Konzani: In *Konzani*,[18] Feston Konzani repeatedly had unprotected sexual intercourse with three women. Konzani knew he was living with HIV and was informed of the risks of passing on the virus. He did not inform any of the women that he was living with HIV or that they were at risk of infection. He was found to have inflicted grievous bodily harm contrary to section 20 of the UK Offences Against the Person Act. In *Konzani*, the court emphasised that the person must give 'informed consent'. This requires that the person must be informed of the other person's HIV positive status and give consent to sexual intercourse with that knowledge.

R v Golding: In *Golding,*[19] David Golding suffered from recurring genital herpes. He engaged in sexual intercourse with a partner without informing her of his condition or without informing her that she was at risk of being infected with genital herpes. The partner eventually contracted genital herpes. He was convicted of inflicting grievous bodily harm contrary to section 20 of the Offences Against the Person Act, and his conviction was upheld by the Court of Appeal. *Golding* established that transmitting genital herpes can amount to inflicting grievous bodily harm. *Golding* is of persuasive authority in Jamaica.

Following the decisions of *Dica, Konzani* and *Golding* all of which are of persuasive authority to the Jamaican courts, and following the decision in *George Flowers*, a person (called "A") will be found to have recklessly infected another (called "B") with HIV or another sexual infection and be found to have inflicted grievous bodily harm and be guilty of an offence under section 22 of the Jamaica Offences Against the Person Act if the following conditions are satisfied:

- A in fact infects B with the infection
- A was reckless as to whether such harm would be the result of A's actions
- B did not consent to the risk of being infected; and
- A did not honestly believe that B consented to that risk

It must be emphasised that, for someone to be found to have committed an offence in Jamaica, the actual transmission of the infection must take place. In the case of HIV for example, it requires the actual transmission of HIV – this actual transmission is the 'infliction of grievous bodily harm'.

Jamaica's law on reckless transmission of HIV comes close to the recommended standard from international guidance. The law is not overly broad as it does not criminalise sexual contact, risk of transmission, or exposure, and it does not explicitly criminalise the failure to disclose one's status prior to sexual intercourse. There is only an offence where transmission takes place. The application of the law, however, can be clarified to guard against prejudice towards

[17] *R v Dica* [2004] EWCA Crim 1103; See also comment on *Dica* by J Rogers, 'Criminal Liability for the Transmission of HIV' (2005) 64 (1) Cambridge Law Journal 20
[18] *R v Konzani* [2005] EWCA Crim 706
[19] *R v Golding* [2014] EWCA Crim 889

stigmatised and marginalised groups and to circumscribe what behaviour is considered reckless. This is discussed in detail in Part 3.2 of this report dealing with prosecutorial and investigative guidelines.

2.3 ENACTMENT OF HIV-SPECIFIC CRIMINAL LAW TO COVER OFFENCES ALREADY COVERED BY GENERAL CRIMINAL LAW DOES MORE HARM THAN GOOD

2.3.1 BAD PUBLIC POLICY

Enacting an HIV-specific criminal law is not only harmful to the national HIV response but is likely to have other unintended consequences. The Government of Jamaica must be prepared for a huge international blowback. This conclusion is arrived at in light of the context within which Jamaica is now considering to enact an HIV-specific criminal law. In 2019, the Government of Jamaica has the benefit of information on the latest scientific advances in the treatment of HIV, of international guidelines and standards regarding the criminalisation of HIV and the treatment of people living with HIV, and of witnessing the global and regional movements against HIV criminalisation and HIV-specific criminal laws. The Government of Jamaica also has access to evidence from studies and from the experience in some jurisdictions which indicates that an HIV-specific criminal law contributes to the stigmatisation of people living with HIV and heighten the climate of fear surrounding HIV. In considering the issue of whether to enact an HIV-specific criminal law, the Government of Jamaica must also situate itself regionally – where HIV-specific criminal laws are the exception and not the norm. ***It is also of significance that jurisdictions of the United Kingdom and Canada, to which the Joint Select Committee refer, have decided against enacting an HIV-specific criminal law. Enacting an HIV-specific criminal law in Jamaica is, therefore, bad public policy.***

2.3.2 EVIDENCE OF HARM ACROSS JURISDICTIONS - UNITED KINGDOM, CANADA, UNITED STATES, GUYANA

Proponents of an HIV-specific criminal law may argue that an HIV-specific criminal law lowers the barriers for prosecution and helps to provide legal certainty. However, the harm caused by an HIV-specific criminal law far outweighs these purported benefits. Law reform and advisory committees across several jurisdictions, inclusive of jurisdictions in the Commonwealth Caribbean, have acknowledged that an HIV-specific criminal law does more harm than good.

2.3.2.1 UNITED KINGDOM

Jamaica's Offences Against the Person Act, 1864, is derived from the UK Offences Against the Person Act, 1861. Jamaica's general criminal law is the same as that of the United Kingdom, in particular, of England and Wales. The case developments in England and Wales are of

persuasive authority to the Jamaican courts. It is significant that in 2015, the Law Commission of England and Wales, which is the statutory independent body created by the Law Commissions Act, 1965, to keep the law of England and Wales under review and to recommend reform where it is needed, grappled with this same question that the Government of Jamaica is considering now – the question of whether to enact an STI-specific or an HIV-specific criminal law to deal with the intentional and reckless transmission of HIV and other sexual infections.

Throughout 2014 and 2015, the Law Commission carried out an extensive review of the law governing the transmission of infections. The Law Commission also engaged in consultations with key stakeholders.[20] As mentioned earlier, proponents of an HIV-specific criminal law may argue that an HIV-specific criminal law lowers the barriers for prosecution and helps to provide legal certainty. In the case of UK's law which is similar to Jamaica's, these uncertainties relate to recklessness and consent and also what questions should be left to the jury.[21]

Upon conclusion of its review and after hearing all the arguments and weighing all the evidence that was presented, the Law Commission concluded that the 'weight of argument appears to us to be against creating a specific offence of disease transmission and in favour of leaving disease transmission within the scope of the core injury offences'. In other words, the Law Commission decided against the creation of an STI-specific or a dedicated offence for disease or HIV transmission, choosing instead that the law governing the transmission of sexual infections should continue to be governed by the general criminal law. Some of the reasons the Law Commission gave centred on:

1. The practical difficulty of determining the scope of this new offence
2. The stigmatising effect of a specific offence on people who have that infection
3. The impact of scientific advances regarding HIV treatment
4. The fact that certain matters are best left decided by the jury
5. An acknowledgment that in some circumstances non-disclosure of one's status is justified.

Reason 1: The practical difficulty in determining the scope of this new offence. The Law Commission pointed out that it was unclear whether a specific offence would cover the transmission of any disease by any means - or only the transmission of disease through sexual intercourse – or whether it would only cover the transmission of HIV. There were also concerns about there being an unacceptable level of fragmentation in the criminal law.

Reason 2: The stigmatising effect of an STI-specific or an HIV-specific criminal law on people who have that infection. The Law Commission accepted that the evidence about the adverse effects of criminalising disease transmission is far stronger in the case of HIV-specific offences.

[20] This was part of the broader review of the entire UK Offences Against the Person Act, 1861.

[21] See detailed discussion in Law Commission Report (2015) p. 153 – 155.

In particular, HIV-specific offences are far more likely than a general offence to contribute to stigma towards people who have that infection.[22]

Reason 3: The impact of scientific advances regarding HIV treatment. The Law Commission recommended against an STI-specific or an HIV-specific criminal law because it was of the view that, as the state of medical knowledge changes, it would be undesirable to have to continually amend legislation to take account of it.

Reason 4: Certain matters such as whether low-level risks need to be disclosed are best left decided by the jury and should not be determined in advance by the Parliament. The Law Commission questioned whether the difficulties found in marginal cases, such as whether there should be disclosure of low levels of risk, are really dependent on technical knowledge. The Law Commission reasoned that how high the risk of transmission is when a person is undergoing a given form of treatment or using a condom, is a question of medical evidence. But once that risk is assessed, whether a person is justified in exposing a sexual partner to it without informing that sexual partner is a purely moral decision, on which medical experts as such have no more expertise than anyone else. The Law Commission stated that the same is true of any other prescriptive rules which it may be desired to include in a new offence. In making such rules, the parliament will essentially be trying to decide what levels and types of risk are justifiable in different types of case. The Law Commission pointed out that this is the same decision that the jury is trying to make in individual cases under the present law. It, therefore, seems preferable to leave this decision to the jury, who will have full information about the facts of the particular case, including any medical evidence that may be relevant. The Law Commission concluded by stating: 'In short, we do not accept that the question of what risks are justifiable is an objective legal or medical decision to be codified in rules set out in advance. Such a view implies that every situation can be foreseen and provided for, that Parliament, on advice from the experts, always knows best and that the views of the jury, and still more of V (being the complainant), on what risks are acceptable can be left out of account.'[23]

Reason 5: In some circumstances, non-disclosure is justified. The Law Commission further emphasised that there are many factors of a non-medical kind that may be regarded by a jury as excusing a decision not to disclose the fact of infection, or even a decision to lie about it. In some circumstances, it is justified for a person to have not have caused a sexual partner to be informed of a sexual infection. For example, a person may fear violent reprisals from a sexual partner or exclusion from the house or community if the fact of infection becomes known. The Law Commission was quick to point out that this does not mean that non-disclosure and lying are justified in all circumstances.

2.3.2.2 CANADA

Dangerous Approach

The case law development in Canada to which the Joint Select Committee referred is not to be admired. Most recently, in June 2019, Canada's House of Commons, Standing Committee on Justice and Human Rights, published its report on the Criminalisation of Non-Disclosure of

[22] Law Commission Report (2015) p. 155 para 6.109
[23] Law Commission Report (2015) p. 156 para 6.110 - 6.112

HIV Status.[24]In this report, the Standing Committee on Justice and Human Rights pointed out that all of the witnesses who appeared as part of the Committee's study, being a vast array of witnesses, which included scientists, researchers, legal and public health experts as well as people living with HIV, all agreed that the criminalisation of people living with HIV in Canada undermines the public health objectives of encouraging all those at risk to be tested for HIV and then to receive treatment. The Standing Committee on Justice and Human Rights further referenced the *Community Consensus Statement to End Unjust HIV Criminalisation* which stated that Canada's approach to HIV criminalisation was 'unscientific, unjust and undermines public health'.[25] This Consensus Statement highlighted that Canada's approach has come under repeated criticism domestically and internationally, including from United Nations expert agencies, human rights bodies, judges, women's rights advocates, and scientists.

The Committee accepted that the laws which extended to criminalising HIV non-disclosure was a disincentive to HIV prevention, testing, and treatment and was counterproductive to the objectives set out in the UNAIDS 90-90-90 strategy regarding treatment and testing. The Committee drew attention to the fact that the HIV epidemic in Canada is driven by undiagnosed HIV infections, not by people who know their HIV status. The law disincentivised testing because it punished only those individuals who know their HIV status, and because of the fear and risk of prosecution – potentially being convicted and designated as a sex offender for life. This situation is compounded by the fact that Canada's approach to HIV criminalisation was at odds with the latest science on HIV transmission. The case of *R v Mabior*[26] to which Jamaica's Joint Select Committee referred was heavily criticised in this regard. The Standing Committee on Justice and Human Rights pointed to submissions which highlighted that *Mabior*

> Appeared to leave people open to prosecutions in a range of circumstances, including when a condom was used, or their viral load was low or undetectable. As such, the decision was widely criticised for being unfair and at odds with scientific evidence about the risks of HIV transmission; it also prompted leading Canadian scientists to speak out against the over-reach of the criminal law.

The Committee further noted that since the Supreme Court's 2012 decisions in *Mabior* and another case called *R v D.C.*, people living with HIV have been charged and prosecuted for not disclosing their status prior to engaging in sexual activities when 'there was effectively no risk of transmission.'

In *R v Mabior*,[27]Mabior was charged with aggravated sexual assault based on his failure to disclose his HIV positive status to women before having sex with them. None of the women contracted HIV. Mabior had a low viral load throughout the periods of his sexual encounter

[24] House of Commons, Standing Committee on Justice and Human Rights (JUST), *Report on The Criminalisation on HIV Non-Disclosure in Canada*, Adopted by the Committee June 11, 2019, Presented to the House June 17, 2019

[25] Canada Coalition to Reform HIV Criminalisation, *End Unjust HIV Criminalisation Community Consensus* Statement, November 2017 with endorsements updated March 2019

[26] *R v Mabior* 2012 SCC 47, [2012] 2 S.C.R. 584

[27] *R v Mabior* 2012 SCC 47, [2012] 2 S.C.R. 584

with the women. Mabior was convicted in respect of some of the charges, which were concerned with encounters where he did not use a condom and acquitted for other charges concerned with encounters where he had used a condom. ***The key principle coming from Mabior is that there is a legal obligation to disclose where one is engaged in sexual activity that poses a 'realistic possibility of HIV transmission'. However, a realistic possibility of transmission of HIV is negated if: (i) the accused's viral load at the time of sexual relations was low and (ii) condom protection was used.***

New Approach: The 2019 Recommendations and the 2018 Federal Directive

These principles from *Mabior* are outdated and are not in line with the scientific advances regarding HIV prevention and treatment. This has now been recognised by policymakers and lawmakers in Canada. In December 2018, the Attorney General of Canada issued a federal directive on HIV non-disclosure to guide federal prosecutors dealing with HIV non-disclosure cases. In this December 2018 directive, the Attorney General expressly stated that:

> …the most recent medical science shows that the risk of HIV transmission through sexual activity is significantly reduced where: the person living with HIV is on treatment; condoms are used; only oral sex is engaged in; the sexual activity is limited to an isolated act; or, the person exposed to HIV, for example, as a result of a broken condom, receives post-exposure prophylaxis;
>
> … it is not in the public interest to pursue HIV non-disclosure prosecutions for conduct that medical science shows does not pose a risk of serious harm to others.

The Standing Committee on Justice and Human Rights has also taken note of the scientific advances regarding the treatment of HIV. The Committee pointed out that:

- HIV is no longer a fatal disease, but rather a 'chronic but manageable disease'
- The antiretroviral medications are not only efficient to control the infection but can also 'mitigate and essentially eliminate the risk of HIV transmissions'
- Overall, it is much harder to transmit HIV than what was generally presumed
- Condoms are highly effective in preventing transmission and
- People who are HIV negative on HIV pre-exposure prophylaxis (or PrEp)[28] can almost completely reduce their probability of acquiring the infection.

Following these observations along with its consideration of the public health impacts of Canada's approach to HIV criminalisation, ***the Standing Committee on Justice and Human Rights recommended that Canada end prosecution for non-disclosure of an infectious disease (including HIV) save when there is actual transmission and that Canada establish a mechanism to review cases of all individuals who have been convicted for not disclosing their HIV status and who would not have been prosecuted under the new standards set out in the Standing Committee's recommendations. The Standing Committee also***

[28] The Standing Committee explicitly stated that PrEp is used when people are at very high risk of contracting HIV to prevent the acquisition of the virus and that research demonstrates that it is highly effective for HIV prevention if taken daily as prescribed.

recommended that the Government of Canada work to make anonymous testing easily accessible.

2.3.2.3 UNITED STATES

Much can be learned from the dilemma which continues to plague the United States with its experience of HIV-specific criminal laws. In 2014, the Civil Rights Division of the United States Department of Justice and the Centers for Disease Control and Prevention published an article examining HIV-specific state laws that criminalise engaging in certain behaviour before disclosing known HIV-positive status. The Department of Justice followed up on this article by providing technical guidance to states that wish to re-examine their HIV-specific criminal laws to ensure that existing policies 'do not place unique or additional burdens on individuals living with HIV/AIDS' and that these policies 'reflect contemporary understanding of HIV transmission routes and associated benefits of treatment.' The Department of Justice issued its 'Best Practices Guide to Reform HIV-Specific Criminal Laws to Align with Scientifically-Supported Factors.' While stated within the context of the United States, the following observations by the Department of Justice mirror some of the observations in Jamaica:

> "The stigma associated with HIV remains extremely high and fear of discrimination causes some Americans to avoid learning their HIV status, disclosing their status, or accessing medical care." There is no question that "HIV stigma has been shown to be a barrier to HIV testing" and the CDC has unequivocally asserted that HIV "stigma hampers prevention." Almost 1 in 6, or 15.8% of individuals, in the United States who carry the virus are unaware of it and the virus is disproportionately spread by those who are unaware of their status. In addition, "CDC data and other studies . . . tell us that intentional HIV transmission is atypical and uncommon." An important component of curtailing the epidemic is to "ensure that laws and policies support our current understanding of best public health practices for preventing and treating HIV," including re-considering whether the vast majority of HIV-specific criminal laws "run counter to scientific evidence about routes of HIV transmission and may undermine the public health goals of promoting HIV screening and treatment."[29]

Following the publication of the Guide from the U.S. Department of Justice, several states amended their laws inclusive of Colorado in 2016, California in 2017[30], Michigan[31] and North Carolina[32] in 2018, to apply up-to-date science on the risk of HIV transmission.[33]

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[29] U.S. Department of Justice, *Best Practices Guide to Reform HIV-Specific Criminal Laws to Align with Scientifically-Supported Factors* (2014).

[30] California's Health and Safety Code was amended by Senate Bill No. 239;

[31] Michigan Public Health Act 537 of 2018 amends section 5210 of Public Health Code Act 368 of 1978.

[32] North Carolina public health regulation 10A N.C. Admin. Code 41A.0202 was modernised and went into effect in January 2018

[33] See also Sally Cameron and Edwin J Bernard, Advancing *HIV Justice 3: Growing the global movement against HIV criminalisation* (HIV Justice Network, Amsterdam May 2019) p. 6 -7, 11

2.3.2.4 GUYANA

In 2011, Guyana considered whether to enact an HIV-specific criminal law to prosecute the malicious or intentional transmission of HIV. Upon conclusion of its review, consultations with the public, and conduct of oral hearings, the Special Select Committee, led by the Minister of Health, firmly decided against an HIV-specific criminal law.[34] Guyana's Special Select Committee made four key conclusions – (i) there was no need for an HIV-specific criminal law; (ii) criminalisation was counter-productive; (iii) criminal laws dealing with HIV transmission are often unfairly and selectively enforced; and (iv) criminalisation places responsibility solely on the person living with HIV.

No need for an HIV-specific criminal law: The Special Select Committee determined that there was no need for an HIV-specific criminal law because existing laws relating to assault or criminal negligence could be invoked to prosecute persons who maliciously transmit HIV with intent to harm others. A criminal law specifically related to HIV would cast all persons living with the virus as potential criminals and intensify the hysteria surrounding the virus.

Criminalisation is counterproductive: The Special Select Committee concluded that criminalisation is counter-productive because it contributes to the stigmatisation of people living with HIV which has implications for the society as a whole. There are serious repercussions for public health when constructive responses are undermined by ineffective laws. The Special Select Committee also observed that a proposed HIV-specific criminal law does not stop an individual from engaging in risky activities before or after conviction, in or out of prison. Such law will certainly reduce people's willingness to learn their status and access treatment, care, and support. The Special Select Committee expressed that the most powerful tools for promoting disclosure and safer sex are initiatives such as voluntary counseling and testing and community engagement, including with and for persons who are living with HIV.

Criminal laws are often unfairly and selectively enforced: The Special Select Committee also concluded that criminal laws dealing with HIV transmission are often unfairly and selectively enforced. Where these laws exist, they are often applied to people who are socially or economically marginalised. Women are especially more vulnerable to prosecution under such laws because they access health services more frequently than men and are therefore likely to find out their HIV status sooner. The Special Select Committee further noted that infidelity, rape, sexual coercion, and unequal power relations are among the dynamics that increase women and girls' vulnerability to both HIV infection and prosecution under such laws.

False sense of security: The Special Select Committee's fourth conclusion was that criminalisation places responsibility solely on the person living with HIV. Additionally, it may create a false expectation that the law has eliminated any danger from engaging in unprotected sex.

The Special Select Committee acknowledged that there are other issues to be addressed such as prior knowledge and consent and whether or not there was deceit or coercion, as well as

[34] *Report of the Special Select Committee of the National Assembly on the Criminal Responsibility of HIV infected individuals* (Resolution No. 129 of 2010), Presented to the National Assembly by the Chairman of the Committee, August, 2011. National Assembly of the First Session of the Ninth Parliament of Guyana (2006 – 2011)

proof of wilfulness and intent. The Special Select Committee was firm in its conclusion that an HIV-specific criminal law would undermine current efforts to address HIV and that overall, the negatives of specifically criminalising HIV exposure and transmission far outweigh the benefits. Of note, is that the Special Select Committee in its consideration of whether to enact an HIV-specific criminal law did not merely just recommend against such enactment, it went further in recommending that the (i) State take action to comply with its obligations under international human rights law; (ii) National Assembly direct legislative reform at discrimination and other human rights violations against people living with HIV and people most at risk of exposure to HIV; and (iii) National Assembly should support the government's programme to achieve HIV prevention, including programmes with people living with HIV, and support voluntary counselling and testing for couples, voluntary disclosure, and ethical partner notification.

2.3.3 CONTRARY TO LATEST SCIENTIFIC ADVANCES

2.3.3.1 Profound Impact of HIV Treatment

Over the last decade, research has shown the profound impact of HIV treatment in preventing the sexual transmission of HIV.[35] From as early as 2013, UNAIDS expressed that 'two key scientific and medical developments call for reconsidering the application of criminal law in the context of HIV. First, effective HIV treatment has significantly reduced AIDS-related deaths and extended the life expectancy of people living with HIV to near-normal lifespans.'[36] Second, effective HIV treatment has also been shown to significantly reduce the risk of HIV transmission from people living with HIV to their sexual partners.[37] The consequence of these developments is that 'effective HIV treatment has transformed HIV infection from a condition that inevitably resulted in early death to a chronic and manageable condition that is significantly less likely to be transmitted. In many countries and jurisdictions, these scientific and medical breakthroughs have led advocates, policy-makers and the judiciary to reconsider how to best apply key criminal law concepts related to risk, harm, mental culpability,

[35] Centers for Disease Control and Prevention, *Evidence of HIV Treatment and Viral Suppression in Preventing the Sexual Transmission of HIV* (December 2018) available at https://www.cdc.gov/hiv/pdf/risk/art/cdc-hiv-art-viral-suppression.pdf accessed June 30, 2019. See Appendix A for document.

[36] UNAIDS, *Guidance Note - Ending Overly Broad Criminalisation of HIV Non-disclosure, Exposure and Transmission: Critical Scientific, Medical and Legal Considerations* (2013) p. 9 referencing See Lewden C et al., 'HIV-infected adults with CD4 cell count greater than 500 cells/mm3 on long-term combination antiretroviral therapy reach same mortality rates as the general population', Journal of Acquired Immune Deficiency Syndromes, 2007, 46:72–77; Palella FJ, Jr. et al., 'Declining morbidity and mortality among patients with advanced human immunodeficiency virus infection. HIV outpatient study investigators', New England Journal of Medicine, 1998, 338:853–860; and Sanne IM et al., 'Long term outcomes of antiretroviral therapy in a large HIV/AIDS care clinic in urban South Africa: A prospective cohort study', Journal of the International AIDS Society, 2009, 12:38.

[37] UNAIDS, *Guidance Note - Ending Overly Broad Criminalisation of HIV Non-disclosure, Exposure and Transmission: Critical Scientific, Medical and Legal Considerations* (2013) p. 9 referencing Cohen MS et al., 'Prevention of HIV-1 infection with early antiretroviral therapy', New England Journal of Medicine, 2011, 365:493–505.

defences, proof, and penalties to HIV non-disclosure, exposure, and transmission.[38] ***Governments and those working in legal and judicial systems are encouraged by the authors of the Expert Consensus Statement on the Science of HIV in the context of the Criminal Law to pay close attention to the significant advances in HIV science to ensure that current scientific knowledge informs the application of the law in cases related to HIV.***[39]

2.3.3.2 The 2018 CDC Findings

In December 2018, the U.S. Centers for Disease Control and Prevention ('CDC') shared the latest evidence on the effectiveness of HIV treatment, providing greater impetus for countries to reconsider the application of the criminal law in the context of HIV.[40] The CDC's December 2018 publication, 'Evidence of HIV Treatment and Viral Suppression in Preventing the Sexual Transmission of HIV', explains that HIV treatment has dramatically improved the health, quality of life and life expectancy of people with HIV. The core message from the CDC is that **people with HIV who take HIV medicine as prescribed and get and keep an undetectable viral load (or stay virally suppressed) have effectively no risk of transmitting HIV to their HIV-negative sexual partners.**

The CDC shared that three recent studies (PARTNER, Opposites Attract, and PARTNER2) involving couples reflect similar findings to that of an earlier study (the HPTN052 clinical trial) which showed that, where an HIV-positive partner had a suppressed viral load, there were no HIV transmissions. None of the studies observed any genetically linked infections while the HIV-positive partner was virally suppressed and the couples were engaging in condomless sex and not using pre-exposure prophylaxis (PrEP). For the earlier study, viral suppression was defined as having a viral load of less than 400 copies of HIV RNA per milliliter. For the recent three studies, viral suppression was defined as less than 200 copies of HIV RNA per milliliter of blood. The three recent studies included over 500 HIV-discordant heterosexual couples, with about half having a male HIV-infected partner (PARTNER), and more than 1,100 HIV-discordant MSM couples (PARTNER2; Opposites Attract) from 14 European countries, Australia, Brazil, and Thailand. Combined, these couples engaged in over 125,000 sex acts without a condom or PrEP over more than 2,600 couple-years of observation.

The CDC shared that pooling data from all three recent studies produces a combined transmission risk estimate for condomless sex among heterosexual or MSM couples of 0.00 (0.00 – 0.14) per 100 couple-years, with the upper bound indicating a 0.14% annual risk. These data provide conclusive evidence of the power of viral suppression in preventing HIV transmission. Although statistically a non-zero risk estimate can never be completely ruled out in the mathematical sense, despite the number of observations, the CDC explained that the data indicate that the best estimate for the transmission risk is zero and that future HIV transmissions are not expected when persons with HIV remain virally suppressed. The CDC

[38] ibid

[39] Expert Consensus Statement on the Science of HIV in the context of the Criminal Law', J Int AIDS Soc. 2018 Jul; (21)7: e25161

[40] Centers for Disease Control and Prevention, *Evidence of HIV Treatment and Viral Suppression in Preventing the Sexual Transmission of HIV* (December 2018)

also emphasised that most people living with HIV will achieve an undetectable viral load within 6 months of starting ART.

2.3.3.3 Communication of Core Prevention Message

The CDC explained that the term 'effectively no risk' was selected to reflect that, while it was not possible to statistically rule out a non-zero risk, all evidence to date suggests that it is not realistically possible to sexually transmit HIV while the person with HIV remains undetectable or virally suppressed. The CDC is still working on its communication efforts. The CDC explained that message testing revealed that information about the prevention benefits of viral suppression was new and difficult to believe for many consumers, underscoring the need to deliver clear communications about this prevention strategy for consumers. The CDC has indicated that its full message testing results will soon be published to help inform additional research and communication efforts moving forward, including how to address challenges in comprehension and message acceptance.

Policymakers in Jamaica may face a similar hurdle when communicating issues relating to the scientific advances in HIV treatment and prevention. Reliance on best practices and testing to see what message and communication strategy will work, will, therefore, be crucial in raising awareness not only among the general population but also among stakeholders which include lawmakers, employers, and health care workers. How the U.S. Department of Justice has worked on its message, for example, is to rely on CDC data provided at the time and to further highlight, based on relevant data, that with testing and treatment, HIV can be managed like a chronic disease, sharing that as of 2013, a 20-year old with HIV who is on ART and is living in the United States or Canada, has a life expectancy into their early 70's, a life expectancy that approaches that of an HIV-negative 20 year old in the general population.[41]

[41] U.S. Department of Justice, *Best Practices Guide to Reform HIV-Specific Criminal Laws to Align with Scientifically-Supported Factors* (2014).

Table Showing CDC Estimates - Estimated Per-Act Probability of Acquiring HIV from an Infected Source, by Exposure Act*[42] * [43]

Types of Exposure	Risk per 10,000 Exposures
Parenteral (*administered or occurring elsewhere in the body than the mouth and alimentary canal*)	
Blood Transfusion	9,250
Needle-Sharing During Injection Drug Use	63
Percutaneous (Needle-Stick)	23
Sexual	
Receptive Anal Intercourse	138
Insertive Anal Intercourse	11
Receptive Penile-Vaginal Intercourse	8
Insertive Penile-Vaginal Intercourse	4
Receptive Oral Intercourse	Low
Insertive Oral Intercourse	Low
Other[44]^	
Biting	Negligible
Spitting	Negligible
Throwing Body Fluids (Including Semen or Saliva)	Negligible
Sharing Sex Toys	Negligible

In sum, the risk of transmission of HIV during receptive and insertive oral intercourse, even in the absence of risk reduction measures is low. In the absence of risk reduction factors, the estimated per-act probability of acquiring HIV during the following activity per 10,000 exposures is as follows: insertive penile-vaginal intercourse, 4; receptive penile-vaginal intercourse, 8; insertive anal intercourse, 11; and receptive anal intercourse, 138.

[42] Source: Centers for Disease Control and Prevention, *HIV Risk Behaviours* available at https://www.cdc.gov/hiv/risk/estimates/riskbehaviors.html accessed June 30, 2019

[43] CDC notes that factors that may increase the risk of HIV transmission include sexually transmitted diseases, acute and late-stage HIV infection, and high viral load. Factors that may decrease the risk include condom use, male circumcision, antiretroviral treatment, and pre-exposure prophylaxis. None of these factors are accounted for in the estimates presented in the table.

[44] ^CDC further notes that HIV transmission through these exposure routes (biting, spitting, etc.) is technically possible but unlikely and not well documented.

Policymakers and lawmakers continue to take note of the scientific advances regarding HIV prevention and treatment. Canada, for example, is revising its approach to HIV criminalisation. In December 2018, the Attorney General of Canada issued a federal directive on HIV non-disclosure to guide federal prosecutors dealing with HIV non-disclosure cases and in June 2019 Canada's House of Commons, Standing Committee on Justice and Human Rights made recommendations for law reform which were informed by consideration of the latest scientific advances regarding HIV prevention and treatment. [45]

If Jamaica's primary concern is HIV prevention, then the CDC data provide a strong basis on which the Government of Jamaica can shift its current focus from HIV criminalisation and direct that focus to viral suppression – ensuring that persons living with HIV are aware of their status, are on treatment, and are virally suppressed.

2.3.4 FUELS STIGMA AND UNDERMINES PREVENTION EFFORTS

Moving from a general offence for intentional and reckless transmission of HIV and other sexual infections to a dedicated or specific offence brings adverse effects. It is recognised that an HIV-specific criminal offence is far more likely than a general offence to contribute to the stigma towards people who have that infection.[46] The experience from other jurisdictions indicates that an HIV-specific offence contributes to the stigmatisation of people living with HIV and heightens the climate of fear surrounding HIV.[47] UNAIDS data confirm that irrational fears of HIV infection and negative attitudes and judgments towards people living with HIV persist despite decades of public information campaigns and other awareness-raising efforts. ***Studies on stigma and discrimination and health-seeking behaviour show that people living with HIV who perceive high levels of HIV-related stigma are 2.4 times more likely to delay enrolment in care until they are very ill.***[48]

The attempt to create an HIV-specific criminal law must be considered within the context of Jamaica's HIV response and the challenges the State currently faces in combatting stigma and discrimination. Looking closely at the wording of the analysis which informs the Joint Select Committee's recommendation, one will observe that it singles out HIV. This singling out of HIV, is itself stigmatising.[49] In October 2013, Jamaica completed its PLHIV Stigma Index which is designed as a research tool by which people living with HIV capture data on their experiences and perceptions regarding stigma and discrimination. The index provided evidence of the experience of stigma and discrimination against people living with HIV because of their HIV status, high levels of internalised stigma, and discriminatory practices in access to health services. Stigma and the fear and experience of discrimination can inhibit

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[45] House of Commons, Standing Committee on Justice and Human Rights (JUST), *Report on The Criminalisation on HIV Non-Disclosure in Canada*, Adopted by the Committee June 11, 2019, Presented to the House June 17, 2019

[46] Law Commission Report (2015) p. 156 para 6. 109

[47] See, for example, jurisdictions across the U.S.; U.S. Department of Justice, *Best Practices Guide to Reform HIV-Specific Criminal Laws to Align with Scientifically-Supported Factors* (2014).

[48] UNAIDS, *Confronting Discrimination: Overcoming HIV-related stigma and discrimination in health care settings and beyond* (2017) p. 2

[49] Edwin J Bernard, HIV Justice Network 'Decriminalising HIV – A Human Rights and Public Health Priority, Presentation at 90-90-90 Targets Workshop, July 21-22, 2018, Amsterdam

persons from getting tested, seeking and continuing treatment and care, and disclosing their status.[50] This has been recognised by the Government of Jamaica in the National HIV/AIDS Policy. Consequently, one of the principal focuses of the national HIV response is the reduction of HIV and AIDS-related stigma and discrimination.[51] Strategic Priority 3 of the National Integrated Strategic Plan for Sexual and Reproductive Health 2014 – 2019, expressly recognises that stigma and discrimination toward people living with HIV and their families continue to adversely affect testing, uptake of HIV services, adherence to ART and access to supportive services. The main outcome associated with Strategic Priority 3 is a strengthened policy and legal framework for sexual and reproductive health and HIV prevention, treatment and care services.[52] One may consider it questionable to engage in law reform which is counterproductive to the State's current efforts and core priorities in the Strategic Plan.

While studies on the impact of HIV-specific criminal laws on testing rates have not been carried out in the few Commonwealth Caribbean countries with STI-specific or HIV-specific criminal laws, it is a consistent issue across jurisdictions considering reform of HIV criminalisation laws. Some studies show a direct relationship between the presence of an HIV-specific criminal law and testing rates, while there are other studies which suggest that other factors, such as media coverage and reporting on the criminalisation law, may significantly impact whether people test for HIV.[53] ***In any event, there is an acknowledgment that the criminal law, in particular, an HIV-specific criminal law has a negative impact on HIV testing rates and this can be a serious public health threat.***

2.3.5 GOES AGAINST REGIONAL AND GLOBAL MOVEMENTS AGAINST HIV CRIMINALISATION AND HIV-SPECIFIC CRIMINAL LAWS

There is a global movement against HIV criminalisation and HIV-specific criminal laws. This is largely due to greater awareness of the scientific advances regarding HIV prevention and treatment, development of principles and standards which inform how governments should respond to people living with HIV, and the advocacy of people living with HIV and organisations working with people living with HIV. ***A review of the developments from 2015 onwards shows that HIV-specific criminal laws have been repealed in Victoria (Australia) 2015; and the Democratic Republic of Congo, 2018.[54] Laws have been modernised in Colorado (US) 2016; Switzerland 2016; California (US) 2017; Norway 2017; Belarus 2018; Michigan (US) 2018; and North Carolina (US) 2018. Proposed laws have been withdrawn in Brazil 2017; Chihuahua (Mexico) 2017; Quintana Roo (Mexico) 2017; San Luis Potosi***

[50] UNAIDS, Confronting Discrimination (2017) p. 2
[51] Jamaica National HIV/AIDS Policy 2005
[52] Jamaica National Integrated Strategic Plan for Sexual and Reproductive Health & HIV 2014 – 2019 p. 72 - 75
[53] Lee SG. 'Criminal law and HIV testing: empirical analysis of how at-risk individuals respond to the law' Yale J Health Policy Law Ethics. 2014; 14(1): 194 - 238.
[54] Section 19A of the Victoria Crimes Act 1958 which criminalised intentional transmission of disease was repealed by the Crimes Amendment (Repeal of Section 19A) Act 2015 (No. 17 of 2015); Article 45 of the Democratic Republic of Congo HIV Bill 08/011

(Mexico) 2017; Malawi 2017; Mauritius 2017 and HIV criminalisation laws have been ruled unconstitutional in Kenya 2015; Veracruz (Mexico) 2018, and in Colombia 2019.[55]

Much closer to our local context in the Commonwealth Caribbean, an HIV-specific criminal law is the exception, not the norm. Guyana is the latest country to reject an attempt to introduce an HIV-specific criminal law. As mentioned earlier in this report, in 2011, the Special Select Committee of the National Assembly on the Criminal Responsibility of HIV infected individuals, found that an HIV-specific criminal law would be counterproductive to the efforts and gains made in respect of the national HIV response.[56] Trinidad and Tobago also rejected an attempt to introduce an HIV-specific criminal law in 2004. The Offences Against the Person (Amendment) (HIV) Bill was introduced in the House of Representatives to amend the Offences Against the Person Act, 1925 so that it would be an offence to intentionally or recklessly expose another to infection with HIV. The Bill did not succeed. Consequently, there is no HIV-specific criminal law in Trinidad and Tobago.

In the Commonwealth Caribbean, the only countries where an STI-specific or an HIV-specific criminal law may be found are The Bahamas (1991),[57]Belize (2000),[58] and Saint Lucia (2004)[59]. The law in Belize and Saint Lucia criminalise the intentional and reckless transmission of HIV, while the law in The Bahamas criminalises non-disclosure.[60] ***These HIV-criminal laws were enacted before an appreciation of the developments regarding the scientific advances in the treatment of HIV and the development of international guidelines.***

2.3.6 CONTRARY TO INTERNATIONAL GUIDELINES

The enactment of an HIV-specific criminal law is contrary to the international guidelines and best practice regarding the application of the criminal law to HIV. From as early as 2006, the International Guidelines on HIV and AIDS and Human Rights called on states to review and reform criminal laws to ensure that they are consistent with international human rights

[55] See Sally Cameron and Edwin J Bernard, *Advancing HIV Justice 3: Growing the global movement against HIV criminalisation.* (HIV Justice Network, Amsterdam May 2019) p. 11- 12.

[56] *Report of the Special Select Committee of the National Assembly on the Criminal Responsibility of HIV infected individuals* (Resolution No. 129 of 2010), Presented to the National Assembly by the Chairman of the Committee, August, 2011. National Assembly of the First Session of the Ninth Parliament of Guyana (2006 – 2011)

[57] Section 8 (2) and (3) of the Sexual Offences Act, 1991 The Bahamas

[58] Sections 46.01 and 73.01 of the Criminal Code Chapter 101, Belize

[59] Section 140 of the Criminal Code of Saint Lucia 2005 Revised Laws

[60] It should be noted that Bermuda (a British overseas territory in the region) has an STI-specific law which criminalises sexual contact by a person with a sexual disease (HIV, AIDS, or hepatitis B) where that contact is capable of resulting in the transfer of body fluids to another person, without first having informing that person that one is living with a sexual disease - Criminal Code Act 1907 section 324.

obligations and are not misused in the context of HIV or targeted at vulnerable groups.[61] Guideline 4 expressly states that:

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

In 2012, the Global Commission on HIV and the Law made it clear that to ensure an effective sustainable response to HIV that is consistent with human rights obligations, countries must not enact HIV-specific laws that criminalise HIV transmission. The Global Commission on HIV and the Law pointed out that (i) HIV-specific criminal laws are not warranted, (ii) are counterproductive and (iii) are in violation of international human rights standards.[62]The UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, has also ***emphasised that the use of preexisting laws, that is, general criminal laws, provides a legal safeguard to potential victims, without unnecessarily stigmatising and further marginalising those affected by HIV within the jurisdiction.*** [63]

The UNAIDS and UNDP Policy Brief on Criminalisation on HIV Transmission affirms that states ought to avoid introducing HIV-specific criminal laws and instead apply general criminal law to cases of intentional transmission.[64] The core recommendation is that States ought to apply general criminal law only to the intentional transmission of HIV, and audit the application of general criminal law to ensure it is not used inappropriately in the context of HIV. States are encouraged to (i) redirect legislative reform, and law enforcement towards addressing sexual and other forms of violence against women; (ii) redirect legislative reform, and law enforcement, towards addressing discrimination and other human rights violations against people living with HIV and people most at risk of exposure to HIV; (iii) Significantly expand access to proven prevention programmes, and support voluntary counselling and testing for couples, voluntary disclosure, and ethical partner notification; (iv) ensure that civil society, including women's and human rights groups, representatives of people living with HIV and other key populations, is fully engaged in developing and/or reviewing HIV laws and their enforcement.

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[61]Office of the United Nations High Commissioner for Human Rights and the Joint United Nations Programme on HIV/AIDS, *International Guidelines on HIV/AIDS and Human Rights 2006 Consolidated Version* (2006)

[62] Global Commission on HIV and Law, *HIV and the Law: Risks, Rights and Health* (UNDP, 2012) at 24-25

[63] Anand Grover, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health* (New York (NY): United Nations, 2010) para 75

[64] UNAIDS, *Policy Brief: Criminalisation of HIV Transmission* (2008)

PART 3. POLICY RECOMMENDATIONS

In addressing the issue of criminalisation of HIV transmission, it is recommended that the Government of Jamaica:

- Centre public health policy considerations
- Introduce prosecutorial and investigative guidelines for intentional and reckless transmission of HIV and other sexual infections
- Strengthen access to justice and
- Expand STI services.

3.1 CENTRE PUBLIC HEALTH POLICY CONSIDERATIONS

HIV and all sexual infections are first and foremost a public health issue. The efforts of Jamaica's Ministry of Health and Wellness to prevent, treat and provide care for people living with HIV and persons at higher risk of HIV, have resulted in improved health outcomes. HIV and AIDS cases and deaths in Jamaica have been decreasing steadily over the last 10 years.[65]The AIDS mortality rate declined from 25 deaths/100,000 population in 2004, to just over 10 deaths/100,000 population in 2017. [66] This, according to the National HIV/STI Programme, represents a significant decline since the inception of universal access to ARVs in 2004. The National HIV/STI Programme has further explained that the reduction in deaths can be traced to the introduction of public access to antiretroviral treatment in 2004, the scaling up of the National Voluntary Counselling and Testing (VCT) Programme and use of rapid test kits allowing for earlier diagnosis, the availability of prophylaxis against opportunistic infections, and improved laboratory capacity to conduct investigations such as CD4 counts, viral load and Polymer Chain Reaction (PCR) tests.

HIV statistics for the year ending 2018 are not yet publicly available. However, the Ministry of Health's 2017 Epidemiology Profile indicates that approximately 34,000 persons are living with HIV in Jamaica, but an estimated 22% of these persons are unaware of their status.[67] ***This data must be read in concert with the finding across several jurisdictions that HIV epidemics are driven by undiagnosed HIV infections, not by people who know their HIV status.***[68]

Enacting an HIV-specific criminal law to cover offences that are already covered in the general criminal law is not in tandem with the State's current efforts towards eliminating HIV. It is counterproductive to achieving the UNAIDS 90 – 90 – 90 targets, where by 2020, 90% of people living with HIV in Jamaica will know their status, 90% of persons diagnosed with HIV will receive sustained antiretroviral therapy, and 90% of persons receiving antiretroviral therapy will have viral suppression. Deciding whether to make such a significant change to the law demands comprehensive consideration of the public health policy implications and at the very minimum require extensive consultations with key stakeholders. These key stakeholders

[65] Ministry of Health and Wellness Ten Year Strategic Plan 2019 - Vision for Health 2030 p. 14
[66] Ministry of Health, Government of Jamaica, National HIV/STI Programme Annual Report 2017 p. 9
[67] National HIV/STI Programme Annual Report 2017 p. 9
[68] See, for example, U.S. Department of Health and Human Services Centers for Disease Control and Prevention, *Fact Sheet: Challenges in HIV Prevention* (August 2016)

include entities leading the national HIV response at the Ministry of Health and Wellness, experts in health and HIV, people living with HIV, and civil society organisations working with people living with HIV and populations at higher risk of HIV infection.

3.2 INTRODUCE PROSECUTORIAL AND INVESTIGATIVE GUIDELINES

3.2.1 Need and Rationale

The existing general criminal law is not perfect but prosecutorial and investigative guidelines can help. The use of prosecutorial and investigative guidelines to clarify the application of the general criminal law for the prosecution of transmission of sexual infections is a best practice. The development of prosecutorial guidelines is in line with one of UNAIDS' core recommendations. UNAIDS recommends that states develop and implement prosecutorial and police guidelines to clarify, limit and harmonise any application of criminal law to HIV. The content of these guidelines should reflect relevant scientific, medical and legal considerations and these guidelines should be developed with the input of HIV experts, people living with HIV and other key stakeholders. [69] This is in line with the 2012 Oslo Declaration on HIV Criminalisation which provides that where the general law can be or is being used for HIV-related prosecutions, the exact nature of the rights and responsibilities of people living with HIV under the law should be clarified, ideally through prosecutorial and police guidelines, produced in consultation with all key stakeholders, to ensure that police investigations are appropriate and to ensure that people with HIV have adequate access to justice.[70] ***The UK's model may be seen as a best practice in its treatment of reckless transmission of sexual infections. There is scope for Jamaica to improve upon the UK's model in crafting its own prosecutorial and investigative guidelines.***

3.2.2 General Issues for Consideration

Key issues for Jamaica's prosecutorial guidelines on the intentional or reckless transmission of sexual infections include:

- Evidential Issues which include use of scientific and or medical evidence, non-cooperation by the accused and the accused allowing voluntary access to the accused's medical records, how to treat with the sexual history of the complainant and the question of whether the complainant received the infection from a third party;
- Other key issues in respect of recklessness such as how to treat with vertical transmission or maternal transmission of HIV and the fact that there is no intent on the part of law and policymakers for mothers to be prosecuted for maternal

[69] UNAIDS, *Guidance Note - Ending Overly Broad Criminalisation of HIV Non-disclosure, Exposure and Transmission: Critical Scientific, Medical and Legal Considerations* (2013) p. 6

[70] Oslo Declaration on HIV Criminalisation prepared by international civil society in Oslo, Norway on 13th February 2012

transmission of HIV, safeguards against transmitting infections, issues in respect of violence and the fear of violence and how this can legitimately inhibit disclosure;

- The treatment of sexual transmission of infection as an aggravating factor or feature of another sexual offence. Jamaica's current sentencing guidelines make it clear that aggravating factors may relate both to the offence and the offender and that there is no authoritative list of aggravating factors. One factor which is included in the illustrative lists of aggravating factors is 'an intention to commit more serious harm than actually resulted from the offence'.[71] If there is any concern about how the law should treat with a situation where a person living with a sexual infection commits a sexual offence, then there is clear authority that transmission of a sexual infection while a person is committing a sexual offence, may be treated as an aggravating factor. The proposed Prosecutorial Guidelines on Transmission of Sexual Infections for Jamaica could make provisions for this; and
- Complainant and Witness Care Issues. Given the sensitive nature of the discourse surrounding HIV and other sexual infections and the fact that transmission of a sexual infection takes place during very intimate activities, attention has to be paid to complainant and witness care. This does not take away from or negate the duty of the prosecutor to prosecute where the evidential criteria are met and where the prosecution is in the public interest. ***Jamaica's current Prosecution Protocol provides examples of how the Office of the Director of Public Prosecutions considers various factors in determining whether prosecution is likely to be in the public interest.***[72]

3.2.3 Circumscribing recklessness: The Applicable Standard

The overwhelming recommendation is that the criminalisation and prosecution of the transmission of HIV should be limited to intentional or malicious HIV transmission.[73] Where this is not achieved, the next best alternative is to ensure that the law which criminalises the reckless transmission of HIV applies the test of 'conscious disregard of a substantial risk of harm'.[74] Recklessness as a sufficient culpable mental state for HIV transmission is narrowly defined and applied only where it is established, at a minimum that there is a 'conscious disregard' in relation to acts that represent, on the basis of best available scientific and medical evidence, a significant risk of HIV transmission. A 'reckless' state of mind would, therefore, apply to a person who, although aware of a substantial risk of harm, consciously disregards it.[75]

UNAIDS highlights as good practice the way in which some jurisdictions carefully circumscribe what behaviour will be considered 'reckless'. For example, the guidance of the Crown Office

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[71] *Sentencing Guidelines for Use by Judges of the Supreme Court of Jamaica and the Parish Courts* (December 2017) Guideline 8. Aggravating factors

[72] Office of the Director of Public Prosecutions, Jamaica, *The Decision to Prosecute: A Jamaican Protocol* (April 2012) p. 17 - 22

[73] Global Commission on HIV and the Law, *HIV and the Law: Risks, Rights and Health* (2012); Oslo Declaration on HIV criminalisation (2012)

[74] UNAIDS, Overly Broad (2013) p. 23

[75] UNAIDS, Overly Broad (2013) p. 22 referencing Brody DC, Acker JR and Logan WA, *Criminal Law*, 2011

and Procurator Fiscal Service of Scotland provides that 'it is unlikely that the requisite degree of recklessness will be established [when] [t]he person infected is receiving treatment and has been given medical advice that there is a low risk of transmission or that there was only a negligible risk of transmission in some situations or for certain sexual acts.'[76]

At present, Jamaica's general criminal law applies to both intentional and reckless transmission of HIV and other sexual infections that can cause serious bodily harm. ***While the law on intentional transmission is good law, there is a need for the State to carefully circumscribe what conduct would be considered reckless. This can be achieved through the use of prosecutorial guidelines.***

3.2.4 Issues to be addressed in the application of current general criminal law governing reckless transmission

3.2.4.1 Prejudice

UNAIDS' concern with 'reckless state of mind' as a basis for criminal liability in HIV cases relates to the fact that the lack of sufficient understanding about HIV may lead prosecutors and courts to consider the risk of HIV transmission to be substantial or significant, even in circumstances where it is not. Furthermore, because of prejudices against people living with HIV— including those from marginalised and stigmatised populations (e.g. sex workers, men who have sex with men, migrants, and people who use drugs)—it is possible that in applying the test of 'conscious disregard of a substantial risk of harm' that is required to prove recklessness, prosecutors or courts may consider any sexual acts by these individuals as warranting the use of criminal law.[77]

UNAIDS' observation is useful. The Global Commission on HIV and the Law has pointed out that anti-transmission laws are often arbitrarily and disproportionately applied to those who are considered inherently criminal – both reflecting and perpetuating existing social inequalities.[78]In Jamaica, some groups are considered to be Key Populations who face a higher HIV risk when compared to the general population and have, at the same time, less access to information and services. These populations often face multiple and overlapping vulnerabilities. Some of these groups experience multiple forms of discrimination. They experience rights violation in different ways as their experiences are often shaped by how their different social identities and characteristics interact. [79] One may take it for granted that the application of the criminal law is inherently rational and neutral. When this assumption is applied within the context of HIV, it can produce dangerous outcomes. McClelland, French and others, in their study of HIV criminalisation laws in the United States have pointed out that criminal laws and courts can be 'highly irrational and contingent', and that historically,

[76] UNAIDS, Overly Broad (2013) p. 23 referencing Crown Office and Procurator Fiscal Service of Scotland, *Guidance on intentional or reckless sexual transmission of, or exposure to, infection*, p. 5.

[77] UNAIDS Overly Broad (2013) p. 23 referencing UNAIDS, *Criminal Law, public health and HIV transmission,* p. 37

[78] Global Commission on HIV and Law, *HIV and the Law: Risks, Rights and Health* (UNDP, 2012) p. 23

[79] *Legal Literacy Manual for Persons Living with HIV and Inadequately Served Populations*, Caribbean Vulnerable Communities Coalition in partnership with the Faculty of Law, University of the West Indies Rights Advocacy Project (U-RAP) prepared by Tenesha Myrie (2017) p. 22 - 23

criminal laws have been organised around regulation, control, and incapacitation of certain populations, such as people of colour, people with disabilities, people who live with forms of communicable diseases, people who live in poverty, people who are transgender, lesbian or gay, among others.

3.2.4.2 Safeguards against transmission

The UK Crown Prosecution Service Guidance on Intentional or Reckless Sexual Transmission of Infection is a good model.[80] It circumscribes what behaviour will be considered 'reckless'. The Guidance states that 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 prosecutor will be able to demonstrate that the accused was reckless. The Guidance further provides that, although infection can occur even where reasonable and appropriate safeguards have been taken, it is also of course possible that the infection took place because the safeguards and/or their usage or application were inappropriate. The prosecutor will need to take into account what the accused considered to be the adequacy and appropriateness of the safeguards adopted; only where it can be shown that the accused knew that such safeguards were inappropriate would it be likely that the prosecutors would be able to prove recklessness.[81] This Guidance presents a model for Jamaica to consider in the development of its own prosecutorial guidance, taking into consideration the 2018 CDC findings, discussed earlier in this report.

3.2.4.3 Women more vulnerable to prosecution: Violence after Disclosure and Difficulty Negotiating Safer Sex

It is acknowledged that imposing criminal sanctions for HIV transmission would be unjust in circumstances where a person living with HIV has limited options to avoid violence following disclosure or where that person has limited options to take precautions to reduce the risk of transmission. [82] The Law Commission of England and Wales expressed that in some circumstances where there is a fear of violence or exclusion from one's home, it is justified for a person to have not caused a sexual partner to be informed of a sexual infection.[83] The UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health shared that HIV-positive women are 10 times more likely to experience violence and abuse than women who are HIV-negative.[84] One of the core concerns with HIV criminalisation laws is that, as explained by the Global Commission on HIV and the Law, the law does not acknowledge that women are frequently unable to disclose their HIV status or demand the use of a condom because they fear violence, abuse or

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[80] *Intentional or Reckless Sexual Transmission of Infection: Policy for Prosecuting Cases* (Updated July 2011), Legal Guidance, Sexual offences, Violent crime, UK Crown Prosecution Service https://www.cps.gov.uk/legal-guidance/intentional-or-reckless-sexual-transmission-infection Accessed on 17 June 2019

[81] Ibid- Evidential Issues

[82] UNAIDS, *Criminal Law, Public Health and HIV Transmission: A Policy Options Paper* (2002) p. 26

[83] Law Commission Report (2015)

[84] Anand Grover, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health* (New York (NY): United Nations, 2010) para 52 - 76

abandonment by their husbands and partners. Women might also be worried that information about their status might be used as a tool for revenge or coercion.[85]

These acknowledgments are especially important within Jamaica's local context where violence against women and girls is prevalent. The recently published Women's Health Survey indicates that one in four women in Jamaica is subjected to violence from an intimate partner, including beating with a fist or object, kicking, choking, and burning.[86] Research shows that in many instances, persons living with HIV, especially women, are subjected to disturbing levels of violence after disclosing their status to their sexual partners.[87] This is compounded by the fact that women tend to have better health-seeking behavior – accessing health services earlier and more frequently, including for prenatal HIV testing. Consequently, women are more likely to find out their HIV status sooner and are often blamed for the transmission of the virus. Women are therefore more vulnerable to prosecution even when they may not be responsible for the transmission of the virus.[88] Jamaica AIDS Support for Life, one of Jamaica's leading non-governmental organisations which provides services to people living with HIV, shared that its outreach work among the general population indicates that of the 5542 persons who got tested from January to November 2018, 3439 (62%) of these persons were women and 2103 (38%) were men, emphasising the disparity in health-seeking behavior.[89] ***Prosecutorial guidelines could expressly acknowledge the vulnerability of women to prosecution and make it clear the circumstances in which prosecution ought not to be pursued.***

[85] Global Commission on HIV and Law, *HIV and the Law: Risks, Rights and Health* (UNDP, 2012) p. 23
[86] Carol Watson Williams, *Women's Health Survey 2016: Jamaica* (UN Women, 2018)

[87] Kennedy CE et al., 'Safer disclosure of HIV serostatus for women living with HIV who experience or fear violence: a systematic review', Journal of the International AIDS Society 2015 Vol. 18 (Suppl 5): 20292. Rothenberg KH and Paskey S J, 'The risk of domestic violence and women with HIV infection: implications for partner notification, public policy, and the law', American Journal of Public Health 1995; 85: 1569-1576; Dan K Kaye, 'Gender inequality and domestic violence: implications for human immunodeficiency virus (HIV)', African Health Sciences Vol. 4 (1) April 2004 67 – 70; Tenesha Myrie, *Human Rights Issues Confronted by HIV Positive Women in Jamaica* (2010), published in 2012 by Jamaica AIDS Support for Life with the support of UN Women and the European Commission p. 27 - 31

[88] WHO, *Integrating Gender into HIV/AIDS programmes in the health sector: Tool to improve responsiveness to women's needs* (2009); UNAIDS, *Report of the International Consultation on the Criminalisation of HIV Transmission* (2007)
[89] Jamaica AIDS Support for Life, *Policy Brief: Criminalisation of HIV Transmission* (2018).

3.3 STRENGTHEN ACCESS TO JUSTICE

Jamaica's Joint Select Committee was tasked with reviewing respective laws and making recommendations for the 'better administration of justice and the effective protection' of special groups, namely 'women, children, the disabled and the elderly'.[90] Ideally, the collective impact of the recommendations and the broader goal of law reform on matters concerned with sexual violence ought to be strengthening the protection of the law and securing access to justice for everyone. Within the context of HIV, an HIV-specific criminal law does not contribute to this goal. There are several steps that the State can take to better protect people living with HIV, and persons at risk of HIV inclusive of members of the special groups to which the Joint Select Committee's review was geared. ***In respect of strengthening access to justice, the State's efforts can be directed to enacting anti-discrimination legislation, allowing for prompt and effective remedies, and providing legal support services.***

The State can strengthen access to justice for persons living with HIV by enacting anti-discrimination legislation which protects against discrimination based on one's health status and which offers protection in respect to employment, education, access to goods, facilities and services and in respect of the renting or buying of property. The UK's Equality Act, 2010, offers such protection and there are ongoing efforts by various stakeholders in Trinidad and Tobago, including the Equal Opportunity Commission, to explicitly extend the protection of the Equal Opportunity Act, 2000, to persons who are discriminated against on the basis of their health status.

Access to justice for people living with HIV requires the timely resolution of matters by competent, independent and fair tribunals, timely investigation of human rights abuses, protection from abuse and harassment during legal proceedings, prompt and effective remedies, and the protection of their privacy especially when involved in legal proceedings. To this end, it is recommended that, in accordance with Guideline 11 of the International Guidelines on HIV/AIDS and Human Rights, that the State ensures effective monitoring and enforcement mechanisms to guarantee HIV-related human rights, including those of people living with HIV, their families, and communities.[91] ***Persons working in the administration of justice, such as police officers, prosecutors, and the judiciary, should be educated and trained on issues related to HIV and human rights in an effort to eliminate harmful biases and prejudicial attitudes towards people living with HIV.***

Finally, the State can strengthen protection and secure access to justice by providing legal support services to people living with HIV.

[90] See Terms of Reference of the Committee and Background to the Report as referenced in the Report of the Joint Select Committee Appointed to Complete the review of the Sexual Offences Act along with the Offences Against the Person Act, the Domestic Violence Act and the Child Care and Protection Act (December 2018) p. 1 – 3

[91] OHCHR & UNAIDS, *International Guidelines on HIV/AIDS and Human Rights* (2006) para 66

3.4 EXPAND STI SERVICES

While the discussions surrounding the recommendation of the Joint Select Committee has largely centered on HIV, key attention must be paid to the general treatment of sexually transmitted infections and the need to strengthen prevention programmes and care services. In the National Integrated Strategic Plan for Sexual and Reproductive Health and HIV 2014 – 2019, it was noted that the overall STI Programme has both benefited and lost ground in the context of the HIV Programme.[92] The HIV funding landscape shifted the focus from all STIs to HIV. This resulted in a weakened STI programme especially with respect to leadership and management at the national and sub-national levels. It was further pointed out that there have been challenges at the service delivery level, where Contact Investigators are unable to fulfil their core duties (that of locating contacts of STI patients) due to a shortage of clinicians in the primary health care system which means that Contact Investigators had to take on the roles and responsibilities of clinicians. At the time of drafting the Strategic Plan, it was indicated that the National HIV/STI Programme is in the process of reviewing and revising the STI programme – an STI technical working group is in place and an STI etiological study was commissioned in 2015.[93] ***It would be useful to determine whether the STI prevention programmes are now strengthened and if not, how they can be.***

PART 4. CONCLUSION

An HIV-specific criminal law is not in Jamaica's best interest. This assessment provides sufficient evidence and comparative data from which the Government of Jamaica can make an informed consideration of the issue and can confidently reject any attempt to introduce an HIV-specific criminal law.

[92] Jamaica National Integrated Strategic Plan for Sexual and Reproductive Health and HIV 2014 – 2019 p. 43

[93] ibid

APPENDICES

APPENDIX A

Centers for Disease Control and Prevention, 'Evidence of HIV Treatment and Viral Suppression in Preventing the Sexual Transmission of HIV', December 2018

Available at https://www.cdc.gov/hiv/pdf/risk/art/cdc-hiv-art-viral-suppression.pdf

APPENDIX B

Prosecutorial Guidelines – UK Crown Prosecution Service Guidance on Intentional or Reckless Sexual Transmission of Infection (Updated July 2011)

Available at https://www.cps.gov.uk/legal-guidance/intentional-or-reckless-sexual-transmission-infection-policy-prosecuting-cases

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