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# Mujeres Adelante

Daily newsletter on women's rights and HIV - Melbourne 2014

# Special report:

## Beyond Blame: Challenging HIV Criminalisation

*The best role the law can play is in creating a supportive environment for people in private to govern their own conduct.* [Hon. Michael Kirby, former Justice of High Court of Australia]

**Working to end the overly broad criminalisation of HIV non-disclosure, exposure and transmission was the focus of the 'Beyond Blame: Challenging HIV criminalisation' pre-conference on Sunday, 20 July 2014.<sup>1</sup>**

**T**he meeting was opened by Hon David Davis, the Minister of Health of Victoria, Australia, who, in a surprise announcement, shared that the Victorian government would *...amend Section 19 A of the Crimes Act, a 21 year old provision, criminalising intentional transmission of a serious disease, including HIV.*

At a follow-up session in the Human Rights Networking Zone on Monday, 21 July, Paul Kidd of Living Positive Victoria, a member of the Legal Working Group, welcomed the announcement, recognising it as a success of their advocacy efforts. However, he cautioned that there is not much clarity on what the Minister meant in terms of the amendment.

*We welcome the announcement, which has been a long time coming. However, we would not like for the amendment of the law to result in a broadening of the law to other medical conditions.*

Globally, more than 50

countries have HIV-specific laws, but only about 25 of these have used criminal statutes to prosecute people living with HIV for transmission, exposure or non-disclosure. Some countries, and in particular some states in the US have even used general endangerment and terrorist laws to prosecute people living with HIV. In terms of prosecutions, the US have had the most prosecutions, followed by Canada. The Nordic countries, including Sweden, Norway, Finland and Denmark, as well as Australia and New Zealand, are not far behind in regards to the number of people prosecuted.

There was consensus during the pre-conference that the criminalisation of HIV transmission, exposure and non-disclosure affects women disproportionately. According to Jessica Whitbread of ICW, criminalisation of HIV transmission, exposure and non-disclosure interacts with women's sexual and reproductive rights, as the majority of people living with HIV are women who continue to be at disproportionate risk of sexual transmission of HIV, and have been prosecuted for vertical transmission of HIV. She explained that these laws are often enacted to keep women 'safe' from HIV, but have proven to exacerbate women's vulnerability to HIV, stigma and violence. Thus, advocacy related to criminalisation of HIV transmission, exposure

and non-disclosure should not be seen as a peripheral issue, but should be embraced as an essential HIV prevention intervention.

Jessica also explained that women are disproportionately exposed to violence before they become infected, and this is related to women becoming infected, however, they are also disproportionately affected by violence after becoming being diagnosed.

*The prosecution of women under laws that criminalise HIV exposure, transmission or non-disclosure is a structural form of violence.*

Laurel Sprague of the Sero Project (US) shared some of the research findings and explained that they have found that HIV criminalisation creates a 'disabling' legal environment for HIV prevention, instead of an 'enabling' environment.

*People living with HIV experienced a strong sense of vulnerability, as they could not anticipate what behaviour would land them in court, due to the arbitrary application of the law and the overly broad nature of the provisions ... The law does not make people feel protected as it is intended to do. People living with HIV fear false accusation and feel that they would not get a fair trial. Instead of creating an enabling legal environment, individuals feel they should hide from law as it would single them out. This leaves individuals who already need human rights protection due to the stigma still attached to HIV, feeling and being incredibly vulnerable.*

In developing advocacy strategies and messages, a process of critical reflection by advocates on their own journeys to identify what convinced them to become opponents of criminalisation is crucial; as advocates should challenge their personal biases so to avoid reinforcing ideas of *who*

**...should be embraced as an essential HIV prevention intervention...**

is worthy of prosecution and *who* is a victim. As messaging around criminalisation and gender puts pressure on women to play the role of ‘*victims*’ and ‘*advocates*’, there is also a need to dispel the image of women as ‘*victims*’, as it is disempowering.

Re-emphasising that the responsibility of HIV prevention should not only be placed on the diagnosed person, work still needs to be done with people living with HIV and gay communities to ensure they are better informed about the dangers of criminalisation, and speak about shared roles and responsibilities for HIV prevention.

Participants emphasised that work on HIV criminalisation is not peripheral to other HIV work, rather it is integral HIV prevention work as criminalisation of HIV transmission, exposure and non-disclosure increase stigma and make it difficult to access HIV-related services.

During the pre-conference, alternatives to using a punitive criminal justice system to address transmission, exposure and non-disclosure explored included the Australian and Swedish use of the public health system as an ‘*alternative to criminalisation*’, which has received divergent support from activists.

Several countries in Europe and Canada have also taken measures to consider advances in science, such as evidence that the consistent and correct use of condoms and uninterrupted treatment adherence resulting in an undetectable viral load lowers risk of transmitting HIV in the application of laws that criminalise HIV transmission, exposure and non-disclosure.

In Sweden, a statement by scientists and medical experts

to present the science of HIV and how criminalisation does not take into consideration recent scientific evidence, such as how the use of condoms and uninterrupted adherence to treatment lower the risk of transmission. Prosecutorial guidelines in England and Wales also recognise advancements in science and recommend that the judiciary take this into consideration when dealing with similar cases.

While there has also been

in January, a nurse living with HIV was arrested and sentenced to 3 years imprisonment for exposing a 2-year old child to HIV, while trying to inject the child with a syringe as a part of her duties.

Following this case, the Ugandan parliament passed the HIV/AIDS Prevention and Control Act in May 2014. This Act criminalises ‘*attempted*’ and ‘*wilful*’ transmission of HIV with a five year imprisonment term, provides for the mandatory testing of pregnant women, and permits healthcare workers to forgo

...HIV criminalisation creates a ‘*disabling*’ legal environment for HIV prevention...



some progress with the complete suspension or modernisation of laws in the global north, countries in the south, mostly in Africa, have increasingly been including problematic provisions in existing laws or enacting HIV-specific laws over the past decade. Uganda is the most recent country in Africa to pass an HIV-specific law. Dora Kiconco, of the Uganda Network on Law, Ethics and HIV/AIDS (UGANET) shared their harrowing experience in Uganda over the past 6 months since the Speaker of Parliament delivered on her promise to give the Ugandan people a Christmas present by passing the Anti-homosexuality Act in December 2013. Shortly thereafter,

confidentiality and to unilaterally disclose a patient’s positive status to an ‘*at-risk*’ partner or household member. Dora concludes:

*If the President assents to this law, it will be a tragedy for those of us responding to HIV in this environment as people who are already vulnerable to HIV may be prosecuted disproportionately. In our context, so many people are already living with HIV. This law creates room for mothers to be prosecuted for transmitting HIV to their children. People who may still be getting to terms with their status and not ready to disclose may be arrested for not disclosing or healthcare workers may disclose their status before they are ready to do so.*

The participants also learned about how lawmakers can make a difference in reforming problematic laws by engaging with US Senator Matt MacCoy of Iowa, who was instrumental in the reform of Iowa’s criminal statute, which provided that people living with HIV have to mandatorily disclose to a



sexual partner or be held criminally responsible and risk imprisonment for 25 years. A campaign to educate lawmakers and the media, as well as convening of community forums, contributed to the success and convincing the public and lawmakers to support the effort.

The session at the Human Rights Zone ended with an outline of what the panellists plan to do beyond the pre-conference to make the situation better. There was commitment to continue advocating for the repeal of Section 19A in Australia; to use what was learned during the conference to enhance advocacy efforts; to continue to convene opportunities for activists to meet and share on this subject; facilitate dialogue between and education of people living with HIV to know their rights and risks, as well as to take the lead in reform efforts.

In Uganda, activists will continue to lobby the President not to assent the Act to law, and to raise awareness of the implication of the law, especially for women.

*I want to continue the process with positive women to ensure that women understand issues of power dimension in the context of criminalisation.*

[Lillian Mworeko, ICW EA]

Senator MacCoy committed to continuing work on getting more people prosecuted under the statues out of prison and getting them off the sex offender registry. He will also look at how prosecutorial guidance can support efforts in Iowa.

*We will also work on cultivating solidarity, inclusion and support for repeal of criminalisation statutes by the gay community.*

In light of both successes and remaining gaps, Paul Kidd concludes:

*It is a complicated, long, slow process, but I think we will ultimately get to turn the tide around. We are on the verge of making progress and I am proud to be part of this movement.*

**Footnote:**

1. The pre-conference was hosted by the HIV Justice Network, AIDS and Rights Alliance for Southern Africa (ARASA), Canadian HIV/AIDS Legal Network, Global Network of People living with HIV, International Community of Women living with HIV, Sero project, UNAIDS and members of the HIV Legal Working Group of Australia (Living Positive Victoria, the Victorian AIDS Council, the National Association of People Living with HIV Australia (NAPWHA), and the Australian Federation of AIDS Service Organisations (AFAO) with financial support from the Victorian Department of Health. A video of the pre-conference will be posted on [www.hivjustice.net](http://www.hivjustice.net) after the conference.

*Felicita is with ARASA.*

...advocates  
should  
challenge their  
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## Seen out and about

