

**S 53(2)
OF THE
BILL**

MARRIAGES BILL



REPEAL SECTION 79

**STOP
CRIMINALISATION
OF HIV**

**CSOs in
support of the
Marriages Bill**

**HIV criminalisation is unjust.
It violates human rights and
threatens Zimbabwe's HIV
response.**

When it comes to HIV criminalisation, Zimbabwe has the highest rate of prosecutions in sub-Saharan Africa and the sixth highest globally.

What is "HIV criminalisation?"

HIV criminalisation is the unjust application of criminal laws against people living with HIV on the sole basis of their HIV status. This includes the use of HIV-specific criminal laws as well as general criminal provisions as applied to HIV transmission, potential or perceived exposure and non-disclosure of an individual's HIV-positive status.

What does the law in Zimbabwe currently say?

Section 79 of the Criminal Law (Codification and Reform) Act – Chapter 9:23] states as follows:

"Deliberate transmission of HIV

(1) Any person who-

(a) knowing that he or she is infected with HIV; or
(b) realising that there is a real risk or possibility that he or she is infected with HIV;

intentionally does anything or permits the doing of anything which he or she knows will infect, or does anything which he or she realises involves a real risk or possibility of infecting another person with HIV, shall be guilty of deliberate transmission of HIV, whether or not he or she is married to that other person, and shall be liable to imprisonment for a period not exceeding twenty years.

(2) It shall be a defence to a charge under subsection (1) for the accused to prove that the other person concerned—

(a) knew that the accused was infected with HIV; and
(b) consented to the act in question, appreciating the nature of HIV and the possibility of becoming infected with it."

**Section 79 is over broad and
open to unjust application.
3 key features of section 79
show why.**

1 The words "deliberate transmission" are misleading

Section 79 is not only limited to cases of deliberate and intentional transmission of HIV. It has also been applied to cases where:

- no actual HIV transmission occurred;
- there was no proof that the accused person was the one who caused the transmission of HIV;
- the accused had no intention to infect the other person with HIV;
- there is not even proof of intentional conduct;
- exposure to HIV is merely assumed; and
- the accused's acts pose no real risk of HIV transmission.

2 The offence can apply to "any conduct"

Section 79 has been applied to **sexual conduct** such as consensual sexual intercourse between married adults. But also to **non-sexual conduct**, like breastfeeding.

3 People who don't know their HIV-status can be convicted

People who have never had an HIV test or who don't know they are HIV-positive can be convicted merely if there is a "reason to believe" that they might be HIV-positive.

A person who doesn't know they are HIV+ can go to prison for 20 years if a court merely assumes that they exposed someone to HIV, even if there is no actual HIV-transmission, no intent, and not even any proof that their conduct even posed a realistic risk of transmitting HIV.

Someone who is on HIV treatment and takes precautions like using a condom during sex can also be convicted under section 79.



Why should we reform the law?

Section 53(2) of the Marriage Bill 2019 repeals section 79 of the Criminal Code. There are 6 main reasons why this is an important and positive reform:

1. Section 79 is vague and overbroad



The African Commission on Human and Peoples' Rights and the UN Special Rapporteur on the Right to Health have both said section 79 is vague and overbroad.

The principle of legality requires that criminal laws must be clear and precise so that ordinary people can know what conduct is prohibited. Vague and over-broad laws offend this principle.

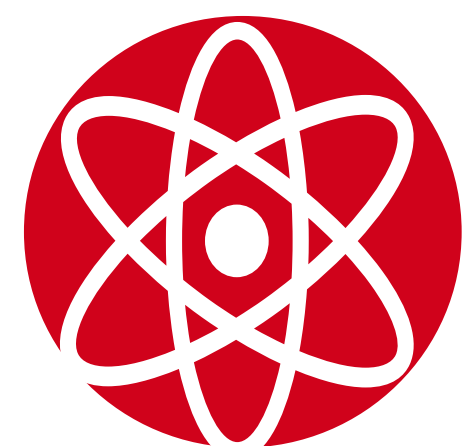
2. HIV criminalisation violates human rights and increases HIV stigma



Section 79 violates human rights of people living with HIV to equality, freedom from discrimination, privacy, human dignity, health, liberty, and the right to a fair trial, amongst others.

HIV criminalisation increases stigma and discrimination against people living with HIV. This is particularly so because prosecutions are often accompanied by highly stigmatising and inaccurate media reporting.

3. HIV criminal laws are unscientific



Section 79 (like most HIV criminal laws) is frequently applied in unjust ways contrary to the science of HIV. Courts, lawyers and prosecutors often do not understand HIV transmission dynamics, do not enjoy access to adequate expert evidence, and are prone to the same prejudice and misinformation that drives stigma in communities.

4. HIV criminalisation does not prevent HIV

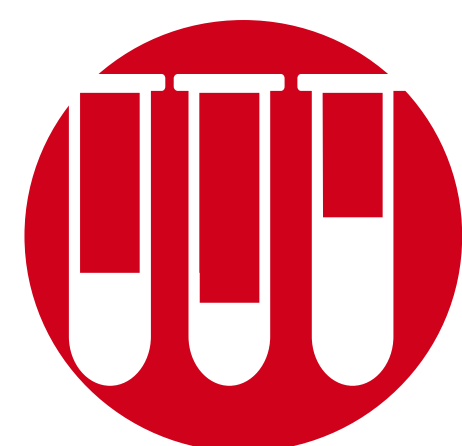


Nowhere in the world has it been shown that HIV criminalisation actually prevents HIV or deters people from conduct likely to spread HIV. HIV criminalisation simply does not work.

5. HIV criminalisation is a proven barrier to HIV testing, treatment and prevention



HIV criminalisation inhibits people from disclosing their HIV-status. Knowing that someone finding out about your HIV-status could make you vulnerable to criminal prosecution, actually makes it harder to disclose by increasing the risks of disclosure.



HIV criminalisation may drive people away from HIV-testing. Studies show that HIV criminal laws drive people away from voluntary HIV testing because of the stigma that the laws perpetuate and because people believe that if they don't know their status, they can't be prosecuted.



HIV criminalisation makes it harder for patients to trust healthcare workers and access the right advice and support. Studies show that HIV criminal laws draw the healthcare system into the criminal justice system and breach that place of privacy and confidentiality.



By increasing stigma and driving people away from testing and healthcare services, HIV criminalisation may therefore also prevent or delay people from accessing HIV treatment. Effective HIV treatment not only allows people living with HIV to lead longer, healthier lives, but also prevents HIV transmission.

6. The law is harmful to women



Section 79 has been disproportionately applied against women living with HIV.

Women are usually the first to know of their HIV status and are vulnerable to being falsely blamed for bringing HIV into the relationship.

Women living with HIV are also vulnerable to violence and abuse in intimate relationships and the threat of prosecution only increases that vulnerability.

What do the experts say?

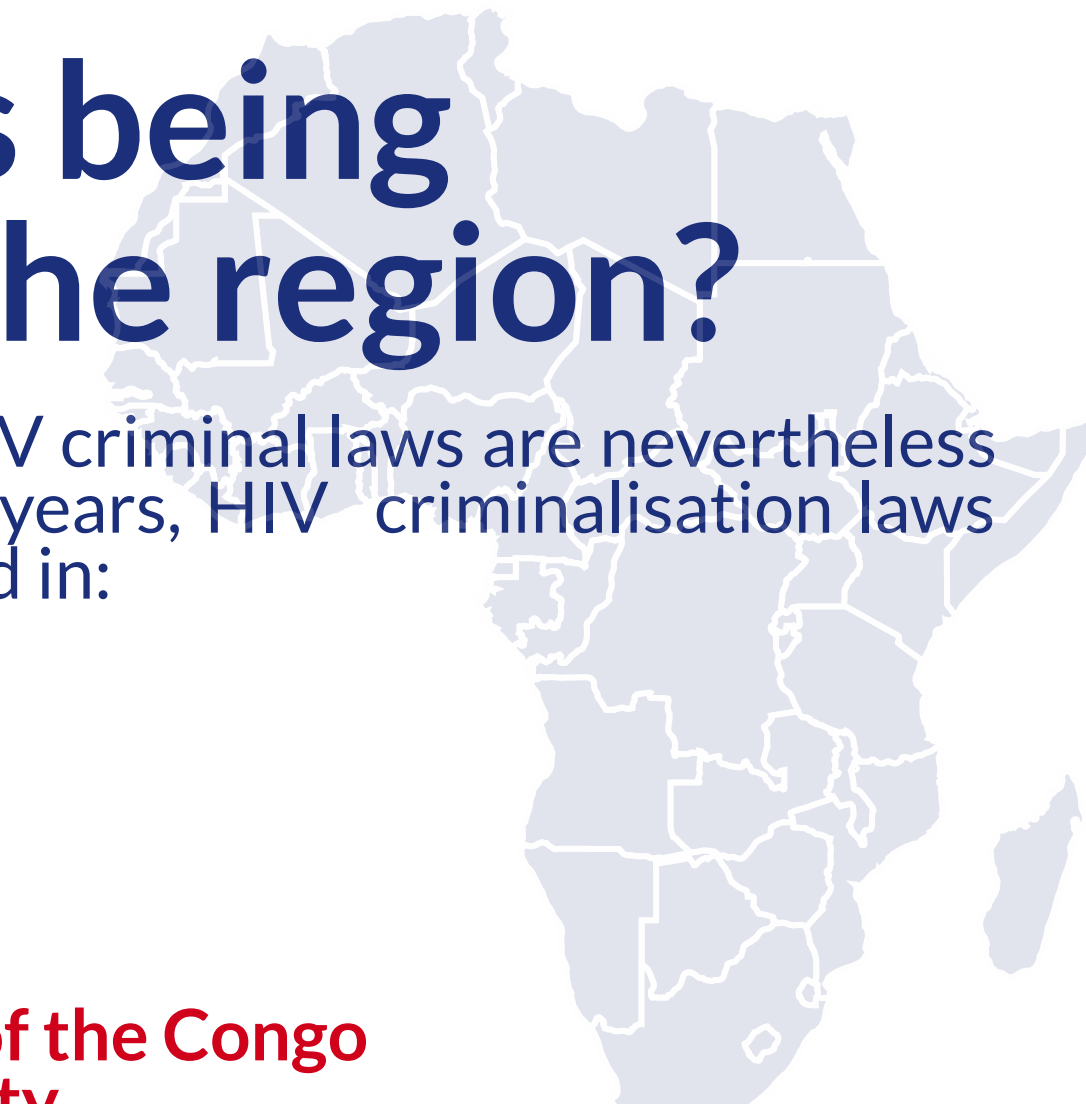
Public health and human rights experts across the world do not support HIV criminalisation and have recommended the repeal of HIV-specific and other overbroad laws criminalising HIV exposure and transmission. This includes institutions such as:

- UNAIDS
- The World Health Organisation
- The United Nations Development Programme (UNDP)
- The Global Commission on HIV & the Law
- The African Commission on Human and Peoples' Rights
- The UN Special Rapporteur on Health
- The UN Office of the High Commissioner for Human Rights
- United Nations Committee on Economic, Social and Cultural Rights
- The UN Committee on the Elimination of Discrimination Against Women
- Southern Africa Development Community Parliamentary Forum

How are laws being reformed in the region?

Efforts to address outdated HIV criminal laws are nevertheless gaining momentum. In recent years, HIV criminalisation laws have been rejected or reformed in:

- South Africa
- Sierra Leone
- Liberia
- Kenya
- Malawi
- The Democratic Republic of the Congo
- The East African Community



#RepealSection79

By enacting section 53(2) of the Marriage Bill 2019 and repealing section 79 of the Criminal Code, Parliament will modernise and humanise Zimbabwe's HIV response and remove a critical legal barrier to HIV prevention, treatment and care, in line with the Constitution.

In an extraordinarily rare instance where someone living with HIV is found to have intentionally and maliciously acted to transmit HIV to another person and has, in fact, transmitted HIV to them, it is not necessary for Parliament to develop HIV or disease-specific laws.

Provided that all elements of the offence are proven beyond reasonable doubt, including that there is sufficient evidence to prove who infected whom, it is feasible that such an act can be punished under existing, general offences.