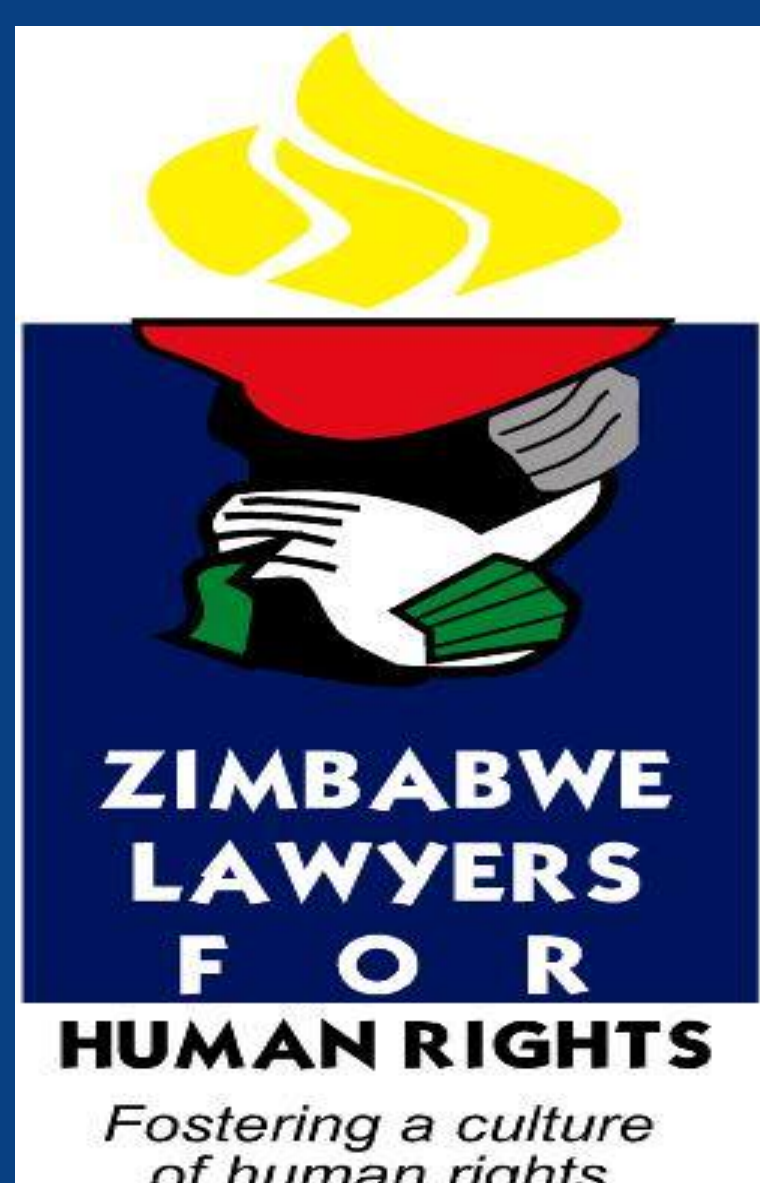

A Call to End HIV Criminalisation in Zimbabwe



**HIV JUSTICE
WORLDWIDE**

A. Introduction

This is a Policy Brief by Zimbabwe Lawyers for Human Rights (ZLHR) and HIV Justice Worldwide.

The Brief explains the concept of “HIV criminalisation” and the HIV-related criminal law in Zimbabwe. It describes why it is necessary for the law to be reformed, including why the law violates human rights and is outdated in the light of compelling scientific developments.

This Brief is based on ZLHR’s extensive experience working on HIV criminalisation in Zimbabwe, including comprehensive case analysis, and HIV Justice Worldwide’s international and regional data and knowledge.

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.

2019 data from HIV Justice Worldwide indicates that Zimbabwe has the highest rate of prosecutions relating to HIV criminalisation in sub-Saharan Africa and the sixth highest globally.



B. Why do HIV criminal laws exist?

HIV criminalisation is a global phenomenon. In many parts of the world, these laws were enacted at a time when HIV treatment through antiretroviral therapy (ART) was not widely available and not as effective as it is today. Like in Zimbabwe, many countries looked to the criminal law with the hope that punishing behaviour that spreads HIV would be an effective way to prevent HIV.

In some countries, these laws were also enacted with the stated intention to protect women and vulnerable populations from becoming infected with HIV.

Today, many of these laws remain on the books despite that so much has changed.

What has changed?

As is explained in more detail below –

- ART is safer, more effective and more accessible today. People living with HIV can live long and productive lives.
- There is also a growing body of evidence that shows that these laws do not prevent HIV.
- In fact, HIV criminalisation has been shown to be a barrier to encouraging behaviours that do prevent HIV, including accessing voluntary HIV testing, prevention and treatment services.
- HIV criminalisation in Africa has also not protected women but instead been applied against women living with HIV, exacerbating stigma and vulnerability to abuse.

HIV criminalisation does not make sense in today’s context.

C. What does the law in Zimbabwe say?

Zimbabwe’s HIV criminal law is contained in section 79 of the Criminal Law (Codification and Reform) Act – Chapter 9:23]. The section provides:

"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."

Four key features of section 79 must be noted to understand how the offence is excessively broad and open to unjust application:

1. The words “deliberate transmission” are misleading

The title implies that the criminal law applies only to cases where a person living with HIV intentionally does something with the aim of infecting another person with HIV and does in fact infect them with HIV.

But the content of the law and how it has been applied is actually much broader.

Section 79 has been applied to:

- cases where no actual HIV transmission occurred;
- cases where there is no proof that the accused person was the one who caused the transmission of HIV;
- cases where the accused had no intention to infect the other person with HIV; and
- cases where there is not even proof of intentional conduct.

Arguably, the criminalised conduct should in the very least be something that objectively carries a “real risk or possibility” of HIV transmission.

But, all publicly available cases indicate that courts have not considered this issue at all. And people have in fact been convicted for conduct that poses a scientifically minimal or negligible 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 access to an HIV test or who don’t know they are HIV-positive can be convicted for HIV transmission (and possibly HIV-exposure) if there is merely a “reason to believe” that they might be HIV-positive.

4. 20 years' imprisonment

In short, it is possible that a person who isn’t even aware of their HIV-positive status 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 sexual intercourse can similarly be convicted under section 79.

Case Study: Samukelisiwe Mlilo^[1]

Samukelisiwe Mlilo is a woman living with HIV who was charged with criminal HIV transmission under section 79 of the Zimbabwe Criminal Code.

Like many women, Ms Mlilo learnt of her HIV status during her pregnancy when accessing antenatal care. In the beginning, it was difficult for her to accept her HIV status. She described how her abusive home environment made it difficult to disclose her diagnosis to her husband at first:

“We were always fighting. He became violent and was physically abusive. This made it difficult for me to disclose my status.”

She however did disclose her diagnosis to her husband and they reached a decision together on measures they would take to prevent HIV transmission to the child. Their relationship continued and her husband supported the child despite ongoing physical abuse.

The following year, Samukelisiwe Mlilo reported her husband’s abuse to the police. She sought a protection order from her husband and separated from him. Ms Mlilo discovered that she was pregnant with her husband’s second child shortly after their separation. Her husband accused her of being unfaithful and denied the child was his. He continued to harass her despite the protection order. It was then that her husband reported Ms Mlilo to the police for “deliberate transmission of HIV” to him, claiming that she had failed to disclose her HIV-status.

Ms Mlilo was unrepresented during her trial. She was convicted of deliberate transmission and sentenced to imprisonment, leaving behind her breastfeeding infant and other children.

“There was no one to take care of my children. Truthfully, it was an extremely difficult time,” she said.

Further to the consequences of her conviction, Samukelisiwe Mlilo suffered social ostracisation and abuse following sensational press coverage.:

“It was difficult, especially when the case was covered in the papers. I could not work. I could not face my co-workers. I requested for emergency leave which was denied. ... People were calling me names. It was indeed a difficult time.”

ZLHR assisted Samukelisiwe Mlilo to appeal her conviction and sentence.

Samukelisiwe Mlilo’s case illustrates that prosecution of these crimes creates a disincentive for people to get tested and to know their HIV-status:

“I found myself in this situation because the law requires women to be tested when presenting for antenatal care. If I had not been a woman, I would not have been tested. I would have just gone untested like my husband and not know my status,” she said.

D. Why is it necessary to reform the law?

Section 79 of the Criminal Code should be repealed for 6 key reasons:

1. The law is vague and over-broad

In Zimbabwe, as in most countries, the principle of legality requires that criminal laws must be sufficiently clear and precise so that ordinary people are able to know what conduct is prohibited. Vague and over-broad laws offend the principle of legality.

In 2016, Zimbabwe's Constitutional Court in *Mpofu and Mlilo v the State* CCZ 08/13 (15 June 2016) considered that section 79 was sufficiently precise.

However, the Court did not consider expert evidence on the nature and variability of HIV transmission risk or empirical evidence showing how these laws are ineffective in preventing HIV transmission. Had the Court fully appreciated these facts, its decision may have been different.

In fact, section 79 of the Criminal Code has been specifically cited by both the African Commission on Human and Peoples' Rights and the UN Special Rapporteur on the Right to Health as an example of over-broad HIV criminalisation.[2]

2. HIV criminalisation violates human rights and increases HIV stigma

Section 79 threatens the 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. This deeply undermines the country's efforts to fight stigma and educate citizens about HIV.

3. HIV criminal laws are not applied in line with science

HIV criminal laws across the world and in Zimbabwe have been applied in unjust ways because 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.

The World Health Organisation has stated that the cumulative effect of these laws is that they "may actually increase rather [than] decrease HIV transmission." [3]

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

Studies show that HIV criminal laws not only fail to prevent HIV transmission, but actually drive HIV stigma and make efforts to prevent and treat HIV harder.

This is for a number of reasons.

- **HIV criminal laws don't make disclosing your HIV-status any easier.** Disclosing your HIV status to a sexual partner is a difficult and complex process but studies show people living with HIV generally believe it is the right thing to do.[4] Knowing that someone finding out about your HIV-status could make you vulnerable to criminal prosecution and imprisonment, actually makes it harder to disclose by increasing the risks of disclosure.
- **HIV criminalisation may drive people away from HIV-testing.** Ensuring that people living with HIV know about their status is the first step to addressing HIV. Studies from the USA, Australia, the UK and Canada show that the existence of HIV criminal laws drive people away from voluntary HIV testing both 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.[5]
- **HIV criminalisation makes it harder for patients to trust healthcare workers and access the right advice and support.** An important tool in HIV prevention is to ensure that people living with HIV can access the right information and support to know how to prevent HIV. People living with HIV need to be able to talk to healthcare workers in full trust and confidentiality to receive advice, information and support to know how to take care of ourselves and others. Studies show that HIV criminal laws draw the healthcare system into the criminal justice system and breach that place of privacy and confidentiality.[6]
- **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

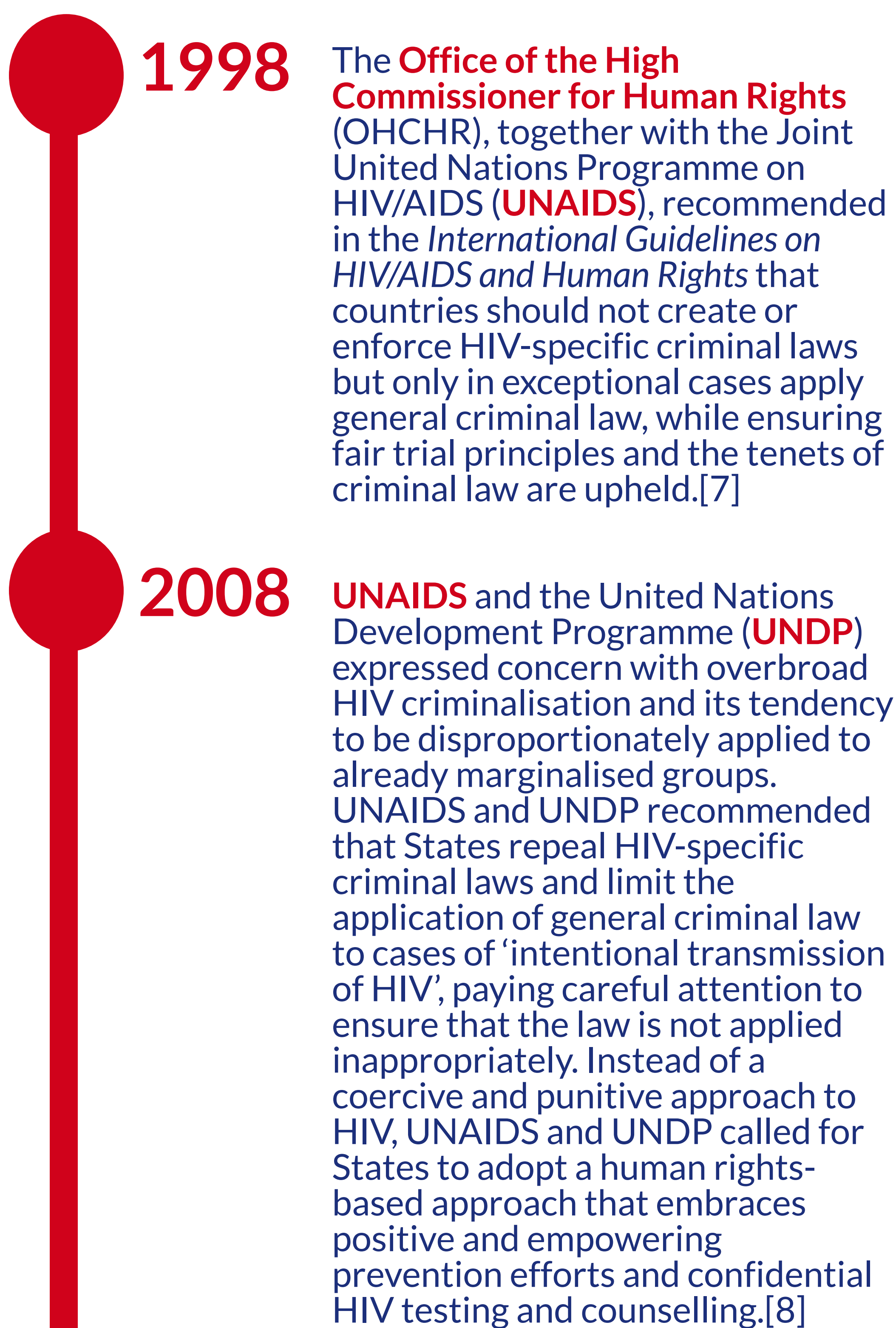
In Zimbabwe, as in many African countries, HIV criminal laws have been disproportionately applied against women living with HIV.

Women are usually the first to know of their HIV status, often due to accessing testing during antenatal care. Being the first to test positive, women may be 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.

E. What do the experts say?

Public health and human rights experts across the world do not support HIV criminalisation.



F. How are laws being reformed in the region?

While there exist many bad laws across the world, efforts to address outdated HIV criminal laws are nevertheless gaining momentum. In the African region, some key milestones of progress are noted below.



- 2001** In **South Africa**, the Law Commission rejected HIV criminalisation stating that “statutory intervention is neither necessary nor desirable”.[15]
- 2008** A Model Law on HIV in Southern Africa developed by the **Southern Africa Development Community** Parliamentary Forum (SADC-PF) rejected HIV criminalisation.[16]
- 2011** **Sierra Leone** passed legislation to limit the scope of an HIV criminal law by explicitly recognising a number of defences.[17]
- 2012** The **East African Community** HIV and AIDS Prevention and Management Act rejected coercive and criminalising approaches to HIV.[18]
- 2015** In **Kenya**, the High Court held that an HIV criminalising law was unconstitutional for, amongst others, being vague and overbroad.[19]

Member states of **SADC** unanimously adopted a motion calling on member states to consider rescinding and reviewing laws on HIV exposure, transmission and non-disclosure and reiterated the critical role of Parliamentarians in enacting laws that are human rights-affirming and evidence-based.
- 2016** The **Malawi** High Court held that the application of a general public health law to prosecute HIV exposure had violated fair trial rights and questioned the constitutionality of the law.[20]
- 2017** The Malawi Parliament rejected HIV-specific criminal laws proposed in new HIV legislation. The HIV Act that was passed endorsed a human-rights based approach to HIV.[21]
- 2018** The **Democratic Republic of the Congo** repealed a law criminalising HIV.

G. How can science guide the reform of section 79?

The scientific community’s understanding of HIV transmission, treatment and prevention has advanced significantly since section 79 was enacted.

In June 2018, at the International AIDS Conference in Amsterdam, a group of twenty eminent scientists from across the world (including from sub-Saharan Africa) released the first ever global “Expert Consensus Statement on the Science of HIV in the Context of Criminal Law” (Expert Consensus Statement).[22]

With the objective to limit unjust prosecutions and convictions, the Expert Consensus Statement analyses the best available scientific and medical research data on HIV transmission, treatment effectiveness and forensic evidence, described in a way that enables application in legal contexts.

The Statement provides insight on three broad themes that have a critical impact in assessing section 79 of the Criminal Code:

1. Understanding the risk of HIV transmission

In many court cases, scientific understandings of HIV and of the possibility of HIV transmission have been ignored and misinterpreted. The risk of HIV transmission is often grossly exaggerated and courts have not appreciated the complexity of HIV transmission dynamics. Courts may, for example, assume transmission risk where there is very little or no transmission risk at all, for example, in conduct such as spitting, biting, or sexual intercourse where a person either uses a condom or has an undetectable viral load.

The Expert Consensus Statement explicitly states that its purpose is not to inform public health messaging but rather to clarify scientific evidence of *absolute risk* in individual acts as should be applicable in criminal cases.

The Statement clarifies that, in fact, “HIV is not easily transmitted’ being a ‘relatively fragile virus”. For example, in sexual intercourse, the Statement describes the per-act possibility of transmission as zero to low, with estimates ranging from 0% to 1.4% per act. The possibility of transmission per act will vary from that figure depending on the absence or presence of intervening factors. For example, correct condom use prevents HIV transmission. Where an individual living with HIV is on effective treatment, their HIV viral load will be reduced, which in turn reduces the possibility of HIV transmission: “a reduced or ‘undetectable’ viral load decreases or eliminates the possibility of HIV infection”.

Section 79 of the Criminal Code is a blunt instrument in the face of how variable and complex HIV transmission risk is. In a context where expert evidence is seldom led in court and defendants often lack effective legal representation, there is a strong risk and reality of unjust convictions of people whose conduct in fact poses no realistic risk of transmission.

2. Understanding the harm of HIV

The Expert Consensus Statement describes that "huge changes" have been achieved in the outlook for people living with HIV over the years.

The natural course of untreated HIV is described as varying widely from person to person but that "antiretroviral therapies dramatically reduce HIV-associated disease progression":

"Although HIV causes an infection that requires continuous treatment with antiretroviral therapy, people living with HIV can live long, productive lives including working, studying, travelling, having relationships, having and raising children, and contributing to society in various ways."

The Statement refers to research showing that in some sub-populations, ongoing clinical care (in places where people have reliable access to effective treatment) have shown some people living with HIV are even living longer than their HIV-negative counterparts.

In this light, a punitive approach to HIV prevention is more inappropriate than ever.

3. Understanding issues of evidence and proof

The Statement considers the immense difficulty in proving beyond reasonable doubt that HIV transmission in fact occurred between two individuals.

In many court cases, it is simply assumed that the accused transmitted HIV to the complainant by the mere fact that the complainant was the first to report to the police, or that the accused was the first to find out about their HIV-positive status. The Expert Consensus Statement stresses that these circumstances do not prove HIV transmission between two people, nevermind who infected whom.

It states that available medical and scientific information, including an individual's viral load, CD4-count, or even phylogenetic analysis where available, have limited and highly qualified value as evidence to prove transmission.

In all cases which ZLHR has analysed, courts have never assessed any expert evidence to prove the direction or timing of HIV transmission between the accused and complainant under section 79 of the Criminal Code. Courts and prosecutors simply assume transmission on the basis of both parties being HIV-positive.

It is very difficult to reliably prove transmission between two people.

H. What about cases of malicious and deliberate transmission?

The HIV Justice Network's global audit of hundreds of cases across the world reveals only a handful of cases where any malice, purpose or plan to transmit HIV was revealed on the part of the accused. Such cases are extremely rare.

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. If the Government is concerned to ensure that legal recourse exists to address such an extraordinary case, prosecutorial guidelines could be developed. These should be consistent with human rights-based approaches to HIV and the criminal law, up-to-date with the latest understandings of HIV and transmission dynamics, ensure that the right to a fair trial and proof beyond a reasonable doubt is upheld, and recognise the propensity of this area of law to spread misinformation and stigma.

Summary & conclusion

Section 79 of the Criminal Code is a threat to Zimbabwe's HIV response and to the rights, security and dignity of people living with HIV, particularly women living with HIV.

When understanding the science of HIV transmission and examining how the offence has been applied, it is clear that the offence is vague and over-broad. As a result, it is being applied in a way that is unjust and discriminatory.

Section 79 will not prevent HIV transmission. Instead, it spreads stigma and misinformation and risks driving people away from HIV testing and treatment.

The provision should be repealed.

The repeal of section 79 will contribute to enhancing Zimbabwe's HIV response in line with a human rights-affirming approach to HIV that is mandated by the Constitution and recommended by public health and human rights experts internationally and regionally.

Endnotes

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ABOUT ZIMBABWE LAWYERS FOR HUMAN RIGHTS

Zimbabwe Lawyers for Human Rights (ZLHR) is a not for profit human rights organisation whose core objective is to foster a culture of human rights in Zimbabwe as well as encourage the growth and strengthening of human rights at all levels of Zimbabwean society through observance of the rule of law. ZLHR is committed to upholding respect for the rule of law and the unimpeded administration of justice, free and fair elections, the free flow of information and the protection of constitutional rights and freedoms in Zimbabwe and the surrounding region. It keeps these values central to its programming activities. ZLHR is a membership organization consisting of over 200 legal practitioners and law students with an interest in, and affinity for, human rights protection and promotion drawn from around Zimbabwe. Membership is steadily increasing.

For more information, please visit: www.zlhr.org.zw/

ABOUT HIV JUSTICE WORLDWIDE

HIV JUSTICE WORLDWIDE is a global coalition that campaigns to abolish criminal (and similar) laws, policies and practices that regulate, control and punish people living with HIV based on their HIV-positive status. HIV JUSTICE WORLDWIDE has 92 members including national, regional, and international organizations working on HIV criminalization around the globe. The Steering Committee comprises ten legal, human rights and people living with HIV global, regional and national networks: AIDS Action Europe, AIDS-Free World, AIDS and Rights Alliance for Southern Africa (ARASA), Canadian HIV/AIDS Legal Network, Global Network of People Living with HIV (GNP+), HIV Justice Network, International Community of Women Living with HIV (ICW), Positive Women's Network - USA, Sero Project, and the Southern Africa Litigation Centre. HIV Justice

Network serves as the HIV JUSTICE WORLDWIDE Secretariat.
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