

28 February 2019

Attention:

Mr Tomás Carrizosa Aparicio

Magistrado auxiliar

Despacho Magistrada Cristina Pardo Schlesinger

Corte Constitucional

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**HONORABLES MAGISTRADOS  
CORTE CONSTITUCIONAL  
Bogotá D.C.**

***AMICUS CURIAE* BRIEF REGARDING:**

**ACCIÓN PÚBLICA DE INCONSTITUCIONALIDAD EN CONTRA DEL ARTICULO  
370 DE LA LEY 599 DE 2000 “Por la cual se expide el Código Penal” –  
CORRECCIÓN DEMANDA D-12883**

**INTRODUCTION**

1. I am a Justice of the Constitutional Court, South Africa’s highest court. I became infected with HIV in 1985. My HIV was medically diagnosed in December 1986. I fell severely ill with AIDS in September / November 1997. I was then privileged to gain access to anti-retroviral medications. They saved my life. Today, nearly 22 years later, I am in excellent health and lead a strong and vigorous life. With fully suppressed virus, I have no active detectable HIV levels in any of my bodily fluids and am incapable of passing on the infection.
2. My interest in the issue before your esteemed Court is deeply personal, but also professional and judicial. It is with respect and humility that I place these submissions before you.
3. My personal interest arises from my own subjective experience of stigma, humiliation, fear and isolation because of unjust and misdirected social regulation of and responses to HIV and AIDS.
4. My professional interest arises as a lawyer and a judge after thirty years of work gaining expert knowledge and stature in this field.
5. I do not address the specific statutory provisions challenged before your Court. Instead, I respectfully place before you general principles that may assist in your deliberations about those provisions. In this I have been greatly assisted by associates in this expert field. They include Ms Annabel Raw, Mr Edwin J Bernard,

Ms Mariano Fanatico, Ms Michaela Clayton, Ms Cecile Kazatchkine, Mr Sean Strub and Mr Gonzalo Aburto.

6. HIV criminalisation is the unjust application of criminal laws against people living with HIV on the sole basis of their HIV status.<sup>1</sup> This includes both (a) HIV-specific criminal laws as well as (b) general criminal provisions when applied to HIV transmission, potential or perceived HIV exposure and non-disclosure of an individual's HIV-positive status.<sup>2</sup>
7. HIV criminalisation has five key features:
  - 2.1. They fuel HIV-stigma;
  - 2.2. They are marked by a tendency to be vague and overbroad;
  - 2.3. They imperil basic human rights – including the right to a fair trial, equality, privacy, health, liberty, access to justice and gender equality;
  - 2.4. Courts have tended to overlook or misapply scientifically and medically established facts about HIV; and
  - 2.5. HIV criminalisation is deeply harmful to public health and HIV treatment and prevention efforts.

## **HIV STIGMA**

8. The enactment and enforcement of HIV criminal laws – even the threat of their enforcement – strongly increase stigma.
9. The stigmatising effects of HIV criminalisation are evidenced in highly sensational and misleading media coverage of prosecutions across the world;<sup>3</sup> some jurisdictions have studied specifically these harmful effects.<sup>4</sup>
10. HIV criminalisation reinforces the damaging idea that HIV is shameful, that it is a disgraceful contamination, thus undermining the dignity not only of those vulnerable to prosecution but of all people living with HIV.
11. And by reinforcing stigma, HIV criminalisation makes it more difficult for those at risk of HIV to access testing and prevention. It makes it more difficult for those living with the virus to talk openly about it, to disclose their HIV-positive status, and to be tested, treated and supported. For those accused, gossiped about and maligned in the media, investigated, prosecuted and/or convicted, these laws can have truly catastrophic effects.

## **OVERBROAD AND VAGUE LEGAL PROVISIONS**

12. Many HIV criminalisation laws are extremely broad and vague, thus directly affronting the principle of legality and the rule of law.

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<sup>1</sup> HIV Justice Network and the Global Network of People Living with HIV (GNP+) *Advancing HIV Justice* 2, Available at: <http://www.hivjustice.net/advancing2accessed>, p 9.

<sup>2</sup> *ibid.*

<sup>3</sup> See, for example: International AIDS Society *When HIV Is Criminalised*, Available at: <https://www.iasociety.org/Membership/IASONEVOICE/Stories/When-HIV-is-criminalized>.

<sup>4</sup> Galletly CL and Pinkerton SD “Conflicting Messages: How Criminal HIV Disclosure Laws Undermine Public Health Efforts to Control the Spread of HIV” *AIDS and Behavior* (2006) 10: 451.

13. The Joint United Nations Programme on HIV/AIDS (UNAIDS) has unequivocally called for an end to overly broad criminalisation of HIV.<sup>5</sup>
14. This is for reasons both of public health and elementary justice.
15. UNAIDS recommends that instead of applying criminal law to HIV, governments should expand proven HIV prevention programs and strengthen human rights.<sup>6</sup>
16. If the criminal law is applied, UNAIDS has urged governments to limit its use to cases of *intentional* transmission of HIV (i.e. where there is proof beyond a reasonable doubt that a person knows their HIV-positive status, acts with the intention to transmit HIV, and does in fact transmit it).
17. Despite these recommendations, in many countries laws are worded or interpreted to punish conduct even where there is no proof that HIV was transmitted but where there was only exposure.
18. Many HIV exposure crimes fail to require that there should be even a risk of transmission.
19. This has led to convictions for conduct that posed no or minimal risk of HIV transmission.
20. Mental elements of the offences are often not defined. In many cases these explicitly embrace standards of negligence or recklessness. This allows the conviction of people who have no intent to expose or transmit HIV. In some countries, overbreadth has allowed prosecutions and convictions of people living with HIV who had used precautions to protect their partners (and did not transmit HIV).
21. For example, until recent law reform, people living with HIV in Belarus and Switzerland could be charged even if they had informed their sexual partner about their HIV and even if sex was consensual.<sup>7</sup>
22. That these overbroad laws are applied amidst deep stigma and misinformation about HIV has exacerbated injustices. For example, courts have in some cases inappropriately inferred intent to transmit HIV from the mere fact that an accused person knew they had HIV.<sup>8</sup> Intent to transmit has also been inferred from an accused's omission to disclose their HIV-positive status<sup>9</sup> or to insist on the use of a condom – even in intimate circumstances where there was no risk of HIV

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5 UNAIDS *Ending Overly Broad Criminalisation of HIV Non-Disclosure, Exposure and Transmission: Critical Scientific, Medical and Legal Considerations: Guidance Note* (2013), Available at: [http://www.unaids.org/sites/default/files/media\\_asset/20130530\\_Guidance\\_Ending\\_Criminalisation\\_0.pdf](http://www.unaids.org/sites/default/files/media_asset/20130530_Guidance_Ending_Criminalisation_0.pdf).

6 UNAIDS and UNDP *Policy Brief: Criminalisation of HIV Transmission* (2008), Available at: [http://www.unaids.org/sites/default/files/media\\_asset/jc1601\\_policy\\_brief\\_criminalization\\_long\\_en.pdf](http://www.unaids.org/sites/default/files/media_asset/jc1601_policy_brief_criminalization_long_en.pdf).

7 HIV Justice Network and the Global Network of People Living with HIV (GNP+) (n 1).

8 See, for example, *People of the State of Michigan v A*, No 2009-4960 (Macomb County Ct. Mich. Cir. Ct, June 2, 2010) (USA); and *State of Kansas v Robert William Richardson*, No 100, 455 No 100, 835 (USA).

9 See, for example, LG Aachen, Urteil vom 23.03.2015 – 68 KLS 1/15 (Germany) and *Zaburoni v the Queen* [2016] HCA 12 6 April 2016 B69/2015 (Australia).

transmission. These cases ignore the fact that personal safety and other circumstances may limit an individual's power to disclose their status or to use precautions.

23. Associated with overbreadth and vagueness, risk of HIV transmission is also often wrongly assumed by courts when there is no evidence of this.<sup>10</sup>
24. What is more, studies that have measured awareness and knowledge of HIV criminal laws often show low awareness or poor understanding amongst people living with HIV. A study in the United Kingdom found that people living with HIV had poor understandings of the criminal law relevant to HIV.<sup>11</sup> Similar findings have been documented among people living with HIV who use drugs in Canada.<sup>12</sup>
25. Many, if not most, of these laws are therefore too vague to define with certainty and rationality what conduct is prohibited for people living with HIV.
26. Worldwide, courts are increasingly recognising the overbreadth of HIV criminal offences.
  - The Mexican Supreme Court in 2015 drew links between the overbreadth of the HIV criminal offence and unconstitutional human rights violations.<sup>13</sup>
  - The Kenyan High Court in 2015 similarly held that an HIV criminal law was unconstitutional for, amongst others, being vague and overbroad.<sup>14</sup>

## **HUMAN RIGHTS VIOLATIONS**

27. The application of vague and overbroad HIV criminal laws amidst high levels of stigma and misinformation about HIV threatens to implicate the right to a fair trial.
28. For example, in Malawi, a woman living with HIV was convicted of a criminal offence for breastfeeding a child (who did not acquire HIV). On appeal, the High Court held that the trial court had infringed her right to a fair trial because of its bias against her because she had HIV.<sup>15</sup>

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10 See, for example, Hastings C, Kazatchkine C and Mykhalovsky E *HIV Criminalization in Canada: Key Patterns and Trends* (2017), Available at: <http://www.aidslaw.ca/site/hiv-criminalization-in-canada-key-trends-and-patterns/?lang=en>; *Rhoades v Iowa*, Supreme Court of Iowa, No 12-0180 (USA); *R v Mekonnen* 2013 ONCA 414 (Canada) and *State of Tennessee v Ingram* 2012 Tenn. Crim. App. LEXIS 887 (USA).

11 Phillips MD and Schembri G "Narratives of HIV: Measuring Understanding of HIV and the Law in HIV-Positive Patients" *Journal of Family Planning and Reproductive Health Care* (2016) 42, 30-35. The study (at p 33) did find, however, that people living with HIV generally had a strong sense of moral ownership and ethical responsibility in relation to sexual transmission of HIV, indicating that it is moral rather than legal restrictions that influenced decision-making and sexual behaviour.

12 Patterson et al "Awareness and Understanding of HIV Non-Disclosure Case Law Among People Living with HIV Who Use Illicit Drugs in Canadian Settings" *International Journal of Drug Policy* (2017) 43, 113-121.

13 *Acción de Inconstitucionalidad 139/2015*, México, Comisión Nacional de Derechos Humanos. See, in particular, the minority opinion which held that the provision in question lacked certainty and violated the principle of legality.

14 *AIDS Law Project v Attorney General & 3 Others* [2015], eKLR, Petition No 97 of 2010.

15 *EL v the State* (unreported) The High Court of Malawi Zomba District Registry, Criminal Case No 36 of 2016.

29. UNAIDS has emphasised that to prevent unjust application of overbroad HIV criminal laws, principles of foreseeability, intent, causality, proportionality, defence and proof must be strictly observed.<sup>16</sup>
30. In addition to fair trial rights, a number of other human rights are implicated.
31. The United Nations Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health in 2010 stated that criminalising HIV transmission and exposure infringes many human rights, including the rights to privacy and equality, the prohibition against discrimination, and the right to health.<sup>17</sup>
32. The African Commission on Human and Peoples' Rights (African Commission) released a report in 2017 on HIV and human rights in the African human rights system. This similarly states that overly broad criminalisation is prone to violating human rights to liberty, security, health, privacy, access to justice and non-discrimination.<sup>18</sup>
33. Studies show that HIV criminal laws are often disparately enforced against marginalised groups and individuals who experience discrimination on bases of vulnerability that intersect with their HIV-status.
34. For example, in California, USA, HIV criminal statutes have been found to be enforced disproportionately based on race/ethnicity, sexuality and gender, with immigrants, women, black and latinx Americans being prosecuted at higher rates.<sup>19</sup>
35. In Michigan, USA, HIV disclosure laws have been disproportionately applied against black men and white women.<sup>20</sup>
36. In Canada, increased charges have been seen being brought against black men and gay men.<sup>21</sup>

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<sup>16</sup> UNAIDS (n 5).

<sup>17</sup> United Nations Human Rights Council *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Anand Grover* (2010) A/HRC/14/20, Available at: <https://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.20.pdf>, para 51.

<sup>18</sup> African Commission on Human and Peoples' Rights *HIV, the Law and Human Rights in the African Human Rights System: Key Challenges and Opportunities for Rights-Based Responses* (2017), Available at: [http://www.achpr.org/files/news/2017/12/d317/africancommission\\_hiv\\_report\\_full\\_eng.pdf](http://www.achpr.org/files/news/2017/12/d317/africancommission_hiv_report_full_eng.pdf), para 38.

<sup>19</sup> The Willisams Institute *HIV Criminalization in California: What We Know* (2017), Available at: <https://www.hivlawandpolicy.org/sites/default/files/HIV%20Criminalization%20in%20CA-%20What%20We%20Know.pdf>.

<sup>20</sup> Hoppe T "Disparate Risks of Conviction under Michigan's Felony HIV Disclosure Law: An Observational Analysis of Convictions and HIV Diagnosis, 1992-2010" *Punishment and Society* (2015) 17:1, 73-93.

<sup>21</sup> Hastings C, Kazatchkine C and Mykhalovsky E *HIV Criminalization in Canada: Key Patterns and Trends* (2017), Available at: <http://www.aidslaw.ca/site/hiv-criminalization-in-canada-key-trends-and-patterns/?lang=en>.

37. Studies in Canada have shown how racist and xenophobic characterisations of defendants have featured in media coverage of HIV-related prosecutions.<sup>22</sup> The sensationalist publicity surrounding these prosecutions can have devastating personal consequences such as loss of employment and social alienation, regardless of the outcome of the case.
38. A seemingly powerful motivation sometimes cited for enacting these laws is to protect women who in many contexts are more vulnerable to HIV.
39. It is undoubtedly true that greater protection and more secure social and economic status is needed for women, so enhancing their capacity to negotiate safe sex and to protect themselves from predatory sexual behaviours.
40. But criminal law and prosecutions will not do that. Far from protecting women, HIV criminalisation victimises, oppresses, and endangers women.
41. The ATHENA Network (a global network of national organisations and networks of women living with HIV and representative of women from populations disproportionately affected by HIV) in 2008 published a Statement detailing how the criminalisation of HIV exposure and transmission endangers and oppresses women.<sup>23</sup> The ATHENA Network stated that HIV criminalisation does nothing to address gender-based violence or the economic, social and political inequalities underlying women and girl's disproportionate vulnerability to HIV.
42. To the contrary, the Network considers HIV criminalisation likely to heighten the risk of violence and abuse women face, to strengthen prevailing gender inequalities, and promote fear and stigma.
43. Women are often the first in a relationship to know their HIV-status because of routine HIV testing when accessing antenatal care. But because of inequality in power relations, economic dependency, and high levels of gender-based violence within relationships they are less likely to be able to safely disclose their HIV-positive status to their partner.
44. Women living with HIV in Canada and the USA state that HIV criminalisation does not protect women from HIV or violence and can negatively impact the lives of women living with HIV.<sup>24</sup>
45. In Canada, civil society has expressed concern that HIV criminalisation, amongst others, increases the vulnerability of women living with HIV to abuses by exposing them to the possibility of false allegations, investigations, extortion, blackmail and criminal trials.<sup>25</sup>

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22 Mykhalovskiy E et al "Callous, Cold and Deliberately Duplicitous': Racialization, Immigration and the Representation of HIV Criminalization in Canadian Mainstream Newspapers" SSRN (2016), Available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2874409](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2874409).

23 The ATHENA Network *10 Reasons Why Criminalisation of HIV Exposure and Transmission Harms Women* (2009), available at: <http://salamandertrust.net/wp-content/uploads/2016/09/10-Reasons-English.pdf>.

24 The International Community of Women Living with HIV North America (ICW-NA) *Women and HIV Criminalization* (2015), available at: [http://toolkit.hivjusticeworldwide.org/wp-content/uploads/2018/09/Women\\_and\\_HIV\\_Criminalization-4.pdf](http://toolkit.hivjusticeworldwide.org/wp-content/uploads/2018/09/Women_and_HIV_Criminalization-4.pdf).

25 Canadian HIV/AIDS Legal Network *Women and the Criminalization of HIV Non-Disclosure* (2012), Available at: [http://www.aidslaw.ca/site/wp-content/uploads/2013/04/Women\\_crim-ENG.pdf](http://www.aidslaw.ca/site/wp-content/uploads/2013/04/Women_crim-ENG.pdf).

46. The Canadian HIV/AIDS Legal Network has described how in 2008, a woman living with HIV was charged for allegedly not disclosing her HIV positive status to her sexual partner after seeking protection from the police against domestic abuse.<sup>26</sup> He was found guilty of domestic violence but received no penalty. Her case went up to the Supreme Court of Canada where she was finally acquitted in 2012.
47. Some women living with HIV in Canada have also reported fearing counter charges if they report sexual violence to police.<sup>27</sup>
48. In 2015, the World Health Organisation (WHO) expressed concern about the adverse effect of HIV criminalisation on sexual and reproductive health and rights and women's rights in particular.<sup>28</sup>
49. In its concluding observations to the State reports of Canada in 2016<sup>29</sup> and Tajikistan in 2018,<sup>30</sup> the Committee on the Elimination of Discrimination Against Women (CEDAW Committee) expressed concerns about the violations of women's rights through HIV criminalisation and recommended reforms.
50. In 2016, the United Nations Committee on Economic, Social and Cultural Rights identified the criminalisation of HIV non-disclosure, exposure and transmission as a threat to sexual and reproductive health and rights.<sup>31</sup>
51. Finally, excessive and disproportionate sentences prescribed and imposed in many of these crimes may be a violation of the right to freedom from cruel, inhuman and degrading treatment and punishment. This is particularly so when in the case of convictions where there is no proof of intentional transmission or even a risk of transmission.
52. Prison can have dramatic impact on people living with HIV, especially where there is inadequate access to treatment and care in detention. Besides, HIV transmission is a high risk in prison settings because of a range of factors including sexual violence, drug use, and inadequate access to HIV prevention measures such as condoms.

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<sup>26</sup> Canadian HIV/AIDS Legal Network *Women and the Criminalization of HIV Non-Disclosure* (2016), Available at: <https://socialsciences.mcmaster.ca/watch-hiv/resources/additional-handouts/women-and-the-criminalization-of-hiv-non-disclosure>.

<sup>27</sup> Krüsi A "Positive Sexuality: HIV Disclosure, Gender, Violence and the Law—A Qualitative Study" *PLoS One* (2018) 13:8.

<sup>28</sup> World Health Organisation *Sexual Health, Human Rights and the Law* (2015), Available at: [http://apps.who.int/iris/bitstream/handle/10665/175556/9789241564984\\_eng.pdf;jsessionid=F4B162A4052B1BC78A0EC6B75DCC58F7?sequence=1](http://apps.who.int/iris/bitstream/handle/10665/175556/9789241564984_eng.pdf;jsessionid=F4B162A4052B1BC78A0EC6B75DCC58F7?sequence=1), p 22.

<sup>29</sup> Committee on the Elimination of Discrimination Against Women *Concluding Observations on the Combined Eighth and Ninth Periodic Reports of Canada* (2016) CEDAW/C/CAN/CO/8-9, para 42-43.

<sup>30</sup> Committee on the Elimination of Discrimination Against Women *Concluding Observations on the Sixth Periodic Report of Tajikistan* (2018) CEDAW/C/TJK/CO/6, para 39-40.

<sup>31</sup> Committee on Economic Social and Cultural Rights *General Comment No 22 (2016) on the Right to Sexual and Reproductive Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)* (2016) E/C.12/GC/22, para 40.

## MISAPPLICATION OF SCIENCE

53. The last 30 years have seen a massive shift in the management of HIV. It is now a fully medically manageable disease – as my own case shows. I have been living on medication with a fully suppressed virus for approaching 22 years.
54. But despite the progress in HIV prevention, treatment and care, HIV continues to be treated unfairly and irrationally through the criminal law.
55. Singling out HIV through criminal prosecutions is not supported by scientific evidence on HIV.
56. Thanks to immense advances in medical science, people living with HIV with adequate access to treatment live long and normal lives.
57. Importantly, HIV is a very difficult virus to transmit, even in absence of any protection such as condoms or treatment.
58. In 2018, a group of 20 HIV scientists with expertise in research, epidemiology and patient care from across the world, developed a Consensus Statement. This detailed aspects of HIV science precisely because of this concern – that the criminal law is being applied inconsistently with contemporary medical and scientific knowledge.<sup>32</sup>
59. The Consensus Statement has been endorsed by over 70 scientists from 46 countries as well as by the International AIDS Society, the International Association of Providers of AIDS Care and UNAIDS.
60. The Statement details expert consensus on a number of vital issues:
  - (a) HIV is in fact not easily transmitted from one person to another and is a relatively fragile virus. Most everyday activities carry no risk of HIV transmission. Even in sexual intercourse, the possibility of HIV transmission is often grossly overestimated in criminal law contexts. Depending on a number of variables, the per-act risk of transmission may range from zero to low, with estimates ranging from 0% to 1.4% per act.
  - (b) There is no or only negligible risk of HIV transmission through oral sex and no possibility of HIV transmission through biting and spitting. Yet across the world from Kenya to Russia, Colombia, the United Kingdom, the USA and Canada, people living with HIV continue to be charged with crimes for biting,<sup>33</sup> spitting<sup>34</sup> and oral sex.<sup>35</sup>
  - (c) The correct use of condoms prevents HIV transmission through sexual intercourse. Despite this, overbroad legislation and misinterpretation of the

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32 Barré-Sinoussi F et al “Expert Consensus Statement on the Science of HIV in the Context of Criminal Law” *Journal of the International AIDS Society* (2018) 21:17, Available at: <https://onlinelibrary.wiley.com/doi/full/10.1002/jia2.25161>.

33 See, for example, an extensive inventory of cases of biting prosecutions available at: <http://www.hivjustice.net/site/cases/?casetype=350&country=-1&from-month=-1&from-year=-1&to-month=-1&to-year=-1>.

34 See, for example, an extensive inventory of cases of spitting prosecutions available at: <http://www.hivjustice.net/site/cases/?casetype=349&country=-1&from-month=-1&from-year=-1&to-month=-1&to-year=-1>.

35 See, for example, *R v Murphy* 2013 CanLII 54139 (Canada).



science by the justice system has led to unjust convictions against people who used condoms to protect partners.

- (d) When a person living with HIV is on effective treatment, the risk of HIV transmission is significantly decreased.
- (e) Effective treatment in most cases results in an “undetectable” viral load, which eliminates the possibility of HIV transmission. While some courts have recognised this,<sup>36</sup> in a number of jurisdictions people on treatment continue to be prosecuted for HIV exposure or non-disclosure crimes.
- (f) There is immense difficulty in proving beyond reasonable doubt that HIV transmission in fact occurred between two individuals.
- (g) Contrary to assumptions often made in prosecutions, reliable inferences cannot be drawn on the route of transmission on the basis of which person was the first to test positive for HIV or based on which person brought charges against the other. 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.
- (h) Finally, while HIV remains a serious condition, there have been remarkable improvements in life expectancy and quality of life for people living with HIV due to continued improvements in treatment.
- (i) Research shows that the life expectancy of young people with HIV commencing antiretroviral therapy now approaches the life expectancy of a young person in the general population and that in some subpopulations, ongoing clinical care has shown the potential to increase life expectancy of people living with HIV even beyond their HIV-negative counterparts.
- (j) With access to quality treatment and care, “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 other ways.” While courts in Denmark have recognised since 2012 that HIV is no longer considered “life threatening”,<sup>37</sup> the overbroad use of the criminal law has led to convictions based on an unqualified assumptions of HIV being a “death sentence”.<sup>38</sup>

## **HIV CRIMINALISATION IS INEFFECTIVE AND IRRATIONAL PUBLIC POLICY**

61. In addition to unscientific applications of HIV criminal laws, HIV criminalisation is bad public health policy.

62. There is no evidence that criminalising perceived or potential exposure to or transmission of HIV helps reduce the transmission of HIV.

63. Instead, it sends out misleading and stigmatising messages and thus undermines remarkable scientific advances and proven public health strategies.

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<sup>36</sup> See, for example, B4189-03 (NJA 2004: 20), 2004 (Supreme Court of Sweden); B2152-13 (RH 2015:2), 2013 (Skåne and Blekinge Court of Appeal, Sweden); and *S v Procureur Général*, Court of Justice, Penal Division, Geneva, Switzerland February 23, 2009.

<sup>37</sup> *Prosecuting Authority v Jackie Madsen*, 7 August 2012 (Eastern High Court, Denmark).

<sup>38</sup> See, for example, *Mpofu and Miilo v the State* CCZ 08/13 (15 June 2016), Zimbabwe Constitutional Court.

64. International organisations have publicised their concerns with the negative public health impact of HIV criminalisation.
65. UNAIDS and the United Nations Development Programme (UNDP) have raised concern that overbroad HIV criminalisation threatens to increase stigma and discrimination against people living with HIV, “driving them further away from HIV prevention, treatment, care and support services”.<sup>39</sup>
66. The WHO stated that the cumulative effect of these laws is that they “may actually increase rather [than] decrease HIV transmission.”<sup>40</sup>
67. There is a growing body of empirical evidence that shows that at best these laws have no positive impact on HIV prevention efforts. Increasingly, there is evidence to show directly negative effects, quite apart from their severely stigmatising effect.
  - a. A study in the United Kingdom, Canada and several states in the USA concluded that HIV criminal laws undermine public health. Evidence indicates that for most people, HIV criminalisation appears to have no effect on sexual practices, HIV testing practices, or HIV-status disclosure. For the minority of people where these laws do impact behaviour, the effect is generally negative in corresponding with behaviour that may increase HIV-transmission such as avoidance of testing for HIV and sexually transmitted infections or increased unprotected anonymous sexual contacts.<sup>41</sup>
  - b. In the USA, further research has shown that laws that criminalising sexual behaviours for people who do not disclose their HIV-positive status disregards the efficacy of universal HIV-prevention strategies.
  - c. These laws criminalise certain conduct that is central to harm reduction efforts; and they prioritise a disclosure-based HIV transmission prevention strategy that undermines public health efforts.<sup>42</sup>
  - d. A number of studies show that HIV criminalisation compromises the therapeutic relationships between people living with HIV and healthcare workers and public health systems, making it more difficult for healthcare workers to conduct effective HIV prevention interventions.
  - e. This has been found in studies in the United Kingdom, the USA,<sup>43</sup> Australia,<sup>44</sup> and in Canada<sup>45</sup> including among women living with HIV.<sup>46</sup>

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39 UNAIDS and UNDP (n 6).

40 World Health Organisation (n 28), p 22.

41 O’Byrne PO, Bryan A and Roy M “HIV Criminal Prosecutions and Public Health: An Examination of the Empirical Research” *Medical Humanities* (2013) 39:2, 85-90.

42 Galletly CL and Pinkerton SD “Conflicting Messages: How Criminal HIV Disclosure Laws Undermine Public Health Efforts to Control the Spread of HIV” *AIDS and Behavior* (2006) 10: 451.

43 O’Byrne PO, Bryan A and Roy M (n 41).

44 Grierson J, Pitts M and Koelmeyer R *HIV Futures Seven: The Health and Wellbeing of HIV Positive People in Australia* (2013), Available at: <https://apo.org.au/node/53184>.

45 O’Byrne P et al “Nondisclosure Prosecutions and Population Health Outcomes: Examining HIV Testing, HIV Diagnoses, and the Attitudes of Men Who Have Sex with Men Following Nondisclosure Prosecution Media Releases in Ottawa, Canada” *BMC Public Health* (2013) 13: 94.

46 Patterson S et al “The Impact of Criminalization of HIV Non-Disclosure on the Healthcare Engagement of Women Living with HIV in Canada: A Comprehensive Review of the Evidence” *Journal of the International AIDS Society* (2015) 18:1, Available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4689876/>.

- f. In Belarus, where more than a hundred people living with HIV have been prosecuted recently, health professionals played a decisive role in criminal prosecutions by reporting sero-discordant couples to law enforcement authorities.<sup>47</sup>
- g. Because of this, patients will fear being open with healthcare workers for fear of exposure to prosecution and fear that confidential medical information is disclosed to investigators and prosecutors. This drives people most in need of care away from services.
- h. Several studies document that HIV criminal laws inhibit people from voluntarily accessing HIV testing, including for fear that a positive diagnosis (or knowledge of one's HIV-positive status) may expose one to prosecution.
- i. This was documented in the USA<sup>48,49</sup> including among people considered at a "high risk" of HIV,<sup>50</sup> among amongst sex workers in Australia following high profile prosecutions,<sup>51</sup> and in Canada<sup>52</sup>, including among men who have sex with men.<sup>53</sup>
- j. To the extent that HIV criminalisation may motivated to reduce or prevent HIV transmission, these laws may dis-incentivise HIV-testing. This is a grave threat to public health.
- k. The WHO has stressed the importance of ensuring a supportive policy and legal framework to promote HIV-testing.<sup>54</sup>
- l. Greater knowledge of HIV status is critical to expanding access to HIV treatment, care and support in a timely manner, and offers people living with HIV an opportunity to receive information and tools to prevent HIV transmission to others including through accessing treatment.<sup>55</sup>

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47 EWNA *Regional Criminalisation Report: Eastern Europe and Central Asia*, Report produced by EWNA on behalf of HIV JUSTICE WORLDWIDE (2017).

48 The SERO Project *National Criminalization Survey Preliminary Results* (2012), Available at: <http://toolkit.hivjusticeworldwide.org/wp-content/uploads/2017/02/Sero-Survey-Complete.pdf.pdf>.

49 Pratha SAH et al "HIV Criminalization Exacerbates Subpar Diagnosis and Treatment Across the US" *AIDS* (2017) 31:17.

50 Goo Lee, S "Criminal Law and HIV Testing: Empirical Analysis of How At-Risk Individuals Respond to the Law" *Yale Journal of Health Policy, Law and Ethics* (2014) 14:1, 194-238, Available at: <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1219&context=yjhple>.

51 Jeffreys E, Matthews K and Thomas A "HIV Criminalisation and Sex Work in Australia" *Reproductive Health Matters* (2010) 18:35, 129-136.

52 O'Byrne P "Criminal Law and Public Health Practice: Are the Canadian HIV Disclosure Laws an Effective HIV Prevention Strategy?" *Sexuality Research and Social Policy* (2012) 9:1, 70-79.

53 Kaul R et al "Prosecution of Non-Disclosure of HIV Status: Potential Impact on HIV Testing and Transmission Among HIV-Negative Men Who Have Sex with Men" *PLOS One* (2018) 13:2, Available at: <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0193269>.

54 World Health Organization *Guidance on Provider-Initiated HIV Testing and Counselling in Health Facilities* (2007), Available at:

[http://whqlibdoc.who.int/publications/2007/9789241595568\\_eng.pdf](http://whqlibdoc.who.int/publications/2007/9789241595568_eng.pdf).

55 *ibid*.

- m. Research findings indicate that knowing one's HIV-positive status corresponds with decreased HIV-transmission.<sup>56</sup> Most HIV transmission happens where the person who is HIV-positive is unaware of their status.<sup>57</sup>
- n. Further studies have documented that HIV criminalisation does not positively impact the practice amongst people living with HIV to disclose their HIV-positive status with their sexual partners, with some researchers expressing concern that increased stigma following HIV-related prosecutions may in fact make HIV-status disclosure more difficult. This includes studies in Ontario, Canada<sup>58</sup> and the USA.<sup>59</sup>
- o. Studies show that most people living with HIV *do not want to transmit HIV* and believe that either safe sex practices or disclosing their HIV-positive status to their sexual partners is the right thing to do.<sup>60</sup>
- p. A study in the USA showed that these beliefs are grounded in notions of moral responsibility, and are not enhanced by knowing whether or not the criminal law applied.<sup>61</sup><sup>62</sup>
- q. It is perhaps not surprising that criminal law would have little impact on the complex and difficult process of disclosing one's HIV-positive status.
- r. HIV status concerns intensely personal information – and disclosure may require talking openly about sex, sexual orientation, sexual acts, drug use, disease and death. These are difficult conversations further complicated by the varied contexts in which disclosure may arise.
- s. Decisions on disclosure can be impacted by many factors including HIV stigma, fear of violence<sup>63</sup> and discrimination, the physiological and psychological impact of sexual arousal, drug use or addition, fears of rejection

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<sup>56</sup> See, for example, Marks G et al "Meta-Analysis of High-Risk Sexual Behavior in Persons Aware and Unaware They Are Infected with HIV in the United States: Implications for HIV Prevention Programs" *Journal of Acquired Immune Deficiency Syndromes* (2005) 39:4, 446–453.

<sup>57</sup> See, for example, Marks G, Crepaz N and Janssen RS "Estimating Sexual Transmission of HIV from Persons Aware and Unaware that They Are Infected with the Virus in the USA" *AIDS* (2006) 20:10, 1447-1450; Hall HI, Holtgrave DR, Maulsby C "HIV Transmission Rates from Persons Living with HIV Who Are Aware and Unaware of Their Infection" *AIDS* (2012) 26:7, 893–896.

<sup>58</sup> Adam BD et al "HIV Disclosure as Practice and Public Policy" *Critical Public Health* (2015) 25:4, 388-397.

<sup>59</sup> Burris S et al "Do Criminal Laws Influence HIV Risk Behavior? An Empirical Trial" *Arizona State Law Journal* (2007) 39, 467-520.

<sup>60</sup> See Bernard E "HIV and the Criminal Law" *NAM* (2010), p 57 and studies cited therein, including Galletly CL and Dickson-Gomez DL "HIV Seropositive Status Disclosure to Prospective Sex Partners and the Criminal Laws that Require It: Perspectives of Persons Living with HIV" *International Journal of STD & AIDS* (2009) 20:9, 613–618; Siegel K, Lekas HM and Schrimshaw EW "Serostatus Disclosure to Sexual Partners by HIV-Infected Women Before and After the Advent of HAART," *Women & Health* (2005) 41:4, 63–85.

<sup>61</sup> See for example: Burris S et al "Do Criminal Laws Influence HIV Risk Behaviour? An Empirical Trial" *Arizona State Law Journal* (2007) 39, 467-520.

<sup>62</sup> Phillips MD and Schembri G "Narratives of HIV: Measuring Understanding of HIV and the Law in HIV-Positive Patients" *Journal of Family Planning and Reproductive Health Care* (2016) 42, 30-35.

<sup>63</sup> See for example Barreto D et al "HIV Disclosure Without Consent Linked to Increased Risk of Verbal and Physical Violence against Women Living with HIV in Metro Vancouver, British Columbia" *Canadian Association of HIV Research Conference Abstract* (2017), Available at: [http://regist2.virology-education.com/2017/7/hivwomen/31\\_Barreto.pdf](http://regist2.virology-education.com/2017/7/hivwomen/31_Barreto.pdf), which showed that women living with HIV in Vancouver, Canada who had their HIV status disclosed without their consent had a five-fold increase in experiencing HIV-related violence.

and breach of confidentiality, the nature of one's relationship with the person to whom one is disclosing.<sup>64</sup>

- t. By criminally sanctioning HIV-non-disclosure (for offences that either criminalise the fact of non-disclosure or HIV exposure absent consent and knowledge of the complainant) criminalisation misplaces the onus of mutual responsibility for self-protection in consensual adult sexual relationships and instead unjustly shifts the burden to HIV prevention to one person only.
- u. Finally, a number of studies illustrate that HIV criminalisation has no positive effect on sexual behaviour considered to pose a risk to HIV transmission.<sup>65</sup> To the contrary, there is a risk that the existence of HIV criminal laws creates a false sense of security as people may (wrongly) assume their partners are HIV-negative because they have not disclosed, and thus not take measures to protect themselves from HIV infection.<sup>66</sup> A 2017 study in the USA confirmed this risk, indicating that gay men who are aware that they live in a jurisdiction with an HIV-specific criminal law are more likely to have unprotected anal intercourse, presumably because of the illusion of safety that these laws create.<sup>67</sup>

68. HIV criminalisation is therefore irrational and unreasonable and harmful to public health.

69. It is undoubted that there are less restrictive and rights-affirming measures to prevent the harms of HIV. And there are abundant, effective alternatives to criminalisation.<sup>68</sup>

70. If the justification for violating the rights of people living with HIV through the use of HIV criminalisation is based on public health or HIV prevention goals, these laws have at best no positive public health impact and at worst appear to negatively impact public health.

71. This indicates that these human rights limits are unjustifiable.

72. The legal implications of this policy irrationality have been recognised by human rights bodies. For example, the UN Special Rapporteur on the on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (see para 30, above) stated that the "public health goals of legal

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64 Canadian HIV/AIDS Legal Network *HIV Disclosure to Sexual Partners: An Overview* (2012), Available at: <http://www.aidslaw.ca/site/wp-content/uploads/2014/06/Legal-Network-HIV-disclosure-to-sex-partners.pdf>.

<sup>65</sup> See, for example, Galletty CL et al "New Jersey's HIV Exposure Law and the HIV-Related Attitudes, Beliefs, and Sexual and Seropositive Status Disclosure Behaviors of Persons Living With HIV" *American Journal of Public Health* (2012) 102:11.

<sup>66</sup> Jürgens R et al "Ten Reasons to Oppose Criminalisation of HIV Exposure or Transmission" *Reproductive Health Matters* (2009) 17: 34, 163-172, Available at: [https://www.tandfonline.com/doi/pdf/10.1016/S0968-8080\(09\)34462-6](https://www.tandfonline.com/doi/pdf/10.1016/S0968-8080(09)34462-6).

<sup>67</sup> Horvath K, Meyer C and Rosser BRS "Men Who Have Sex with Men Who Believe that Their State Has a HIV Criminal Law Report Higher Condomless Anal Sex than Those Who Are Unsure of the Law in Their State" *AIDS and Behavior* (2017) 21:2, 51-58.

<sup>68</sup> See for example, Elliot R for UNAIDS *Criminal Law, Public Health and HIV Transmission: A Policy Options Paper*(2002), Available at: [http://data.unaids.org/publications/irc-pub02/jc733-criminallaw\\_en.pdf](http://data.unaids.org/publications/irc-pub02/jc733-criminallaw_en.pdf).

sanctions are not realised by criminalisation” and that these applications of the law are “generally recognised as counterproductive” to the HIV response.<sup>69</sup>

73. The African Commission on Human and Peoples’ Rights (see para 31, above) raised concern that HIV criminalisation undermines the relationships between healthcare workers and patients and increases people living with HIV’s vulnerability to scapegoating, blame and marginalisation.<sup>70</sup>
74. The Global Commission on HIV and the Law cited research from AIDS service organisations that “the threat of prosecution neither empowers people living with HIV to avoid transmission nor motivates [people] to protect themselves.”<sup>71</sup>

## **CONCLUSION**

75. In 2008, on the final day of the International AIDS Conference in Mexico City, I called for a [sustained and vocal campaign against HIV criminalisation](#). Along with many other human rights activists and people living with HIV, I hoped that the conference would result in a major international pushback against misguided criminal laws and prosecutions.
76. This hope has not been entirely disappointed. Today, the international human rights movement against these laws and prosecutions is gaining strength. Laws have been repealed, modernised or struck down across the globe – from Mexico, to several states in the USA, Malawi, Togo, Kenya and Switzerland.
77. Our colleague, the honourable Justice Michael Kirby, retired from the High Court of Australia, said “AIDS makes us angry. But in law we must be rational.”
78. HIV is now a medically manageable condition. It is a virus, not a crime, and we can and should reject interventions that suggest otherwise.
79. If the goal of HIV criminalisation is to protect people from exposure to HIV, it is a misguided substitute for measures that are proven in fact to protect those at risk of HIV.
80. These measures are effective prevention, protection from discrimination, reducing stigma, strong leadership and role models, greater access to testing and, most importantly, effective treatment.

EDWIN CAMERON  
JUSTICE OF THE CONSTITUTIONAL COURT OF SOUTH AFRICA

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69 United Nations Human Rights Council (n 17).

70 African Commission (n 18).

71 Global Commission on HIV and the Law *Risks, Rights and Health* (2012), Available at: <https://hivlawcommission.org/wp-content/uploads/2017/06/FinalReport-RisksRightsHealth-EN.pdf>, para 33.