



JAMAICA AIDS SUPPORT FOR LIFE

POLICY BRIEF

CRIMINALIZATION OF HIV TRANSMISSION

DECEMBER, 2018

POLICY SUMMARY

A Joint Select Committee of the Jamaican Parliament appointed to complete the review of the Sexual Offences Act (SOA) along with the Offences Against the Person Act (OAPA), the Domestic Violence Act (DVA) and the Child Care and Protection Act (CCPA) made recommendations in 2018 that a new offence be inserted in the OAPA to make it a criminal **offence for someone to ‘wilfully or recklessly infect a partner with any sexual transmissible disease that can inflict serious bodily harm to that partner’**.¹

The Committee Report noted similar offences in the Canadian Jurisdiction² and United Kingdom³ and referred case laws as influences to their findings.⁴

There is no data in the report or otherwise indicating that the specific application of criminal law to HIV transmission will achieve either criminal justice or prevent HIV transmission, the two main reasons usually advanced for criminalizing HIV transmission. Rather such proposed amendments risk undermining public health and human rights gains in the fight against the AIDS epidemic in Jamaica.

As the largest and longest-serving AIDS-focused, human rights, non-governmental organisation in the region dedicated to preserving the dignity and rights of persons living with HIV and AIDS, and those vulnerable to HIV infection, Jamaica AIDS Support for Life (JASL) takes issue with the recommendation of the Committee to introduce an HIV-specific section in the OAPA and urges the Parliament of Jamaica to:

1. Avoid introducing HIV-specific laws and instead apply the general criminal law application of section 22 of the OAPA⁵ to cases of intentional transmission;
2. Avoid extending criminal liability beyond cases of deliberate or intentional HIV transmission;
3. Consider issuing guidelines clearly indicating those considerations and circumstances that could mitigate against criminal prosecution instead of extending criminal liability to ‘recklessly infecting a partner’ such as:
 - in circumstances where an individual did not know that he or she was HIV positive
 - did not understand how HIV is transmitted;
 - disclosed his or her HIV-positive status to the person at risk (or honestly believed

¹ For the full report and composition of the Committee, see <http://japarliament.gov.jm/index.php/reports/general-reports>

² (Grievous Sexual Assault under the Canadian Criminal Code)

³ (Grievous Bodily Harm under the UK Offences Against the Persons Act)

⁴ Guerrier 1998, Maibor 2014; George Flower v R ruling 2016; R v Golding [2014]

⁵ Section 22 provides:

“whosoever shall unlawfully and maliciously wound or inflict grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanor, and being convicted thereof, shall be liable to be imprisoned for a term not exceeding three years...”

- the other person was aware of his/her status through some other means);
 - did not disclose his or her HIV- positive status because of fear of violence or other serious negative consequences;
 - took reasonable measures to reduce risk of transmission, such as practising safer sex through using a condom or other precautions to avoid higher risk acts; or
 - previously agreed on a level of mutually acceptable risk with the other person.
4. Ensure any application of the existing general criminal laws to HIV transmission is consistent with their international human rights obligations.⁶
 5. Enact anti-discrimination legislation to provide protection from discrimination on the ground of HIV status.

SITUATIONAL ANALYSIS

In 2017, there were approximately 34,000 people living with HIV in Jamaica, of which three (3) in four (4) knew their HIV status, an achievement which points to the high yield from targeted testing.

The majority of persons who were living with the virus were not on treatment: (two (2) in three (3)) and less than one (1) in five (5) persons was virally suppressed (*level of the virus in a person's body is low to the point that the risk of passing on HIV to another is reduced*). Over 1,000 persons become infected with HIV each year, with 1197 reported HIV+ in 2017; men accounted for 621 (52%) and women, 576 (48%) cases. The main sexual practices reported in 2017 among persons who tested positive for HIV were: heterosexual (900 or 75%); homosexual (82 or 7%); bisexual (31 or 3%) contact and a total of 184 (15%) persons did not state their sexual practice (s).⁷

In Jamaica, there is stigma associated with HIV and the data⁸ show that persons sometimes shy away from

seeking care and taking medication due to stigma and discrimination in the health care settings, homes, and communities. To end the AIDS epidemic, UNAIDS proposes that 90% of estimated persons living with HIV (PLHIV) **should know their status**, 90% of those who know their status **should be on treatment** and 90% of those on **treatment should be virally suppressed**.⁹

There is already an increase in the incidence of new HIV cases annually which can be attributed to the lack of provisions of adequate and accurate information through the formal system to our adolescent and young people; stigma and discrimination meted out to persons who access or attempt to access services at health facilities, and; the absence of anti-discrimination laws which provide for the protection from discrimination on the ground of HIV status.

To this end, **any proposed amendments to the OAPA and or the enactment of any HIV specific legislation creating an offence in 'knowing' one's status represent a significant deterrent to being tested for HIV infection and thereby significantly dampens our efforts towards the 90-90-90 targets.**

CRIMINALIZING HIV TRANSMISSION PUBLIC HEALTH AND HUMAN RIGHTS

The rights of women and girls

It is conceded that behind the Parliamentary efforts to amend the OAPA, SOA, DVA, and CCPA is the desire to protect our most vulnerable. However, the aims of the proposed amendment may end up doing more harm than good if the current reality is not given cogent consideration. It is a fact that in the Jamaican society, women and girls are particularly vulnerable to HIV due to cultural norms.

⁶ Adopted from the UNAIDS Policy Brief: Criminalization of HIV Transmission, 2008

⁷ The Ministry of Health / UNAIDS 2017

⁸ [Supra]

⁹ UNAIDS 90-90-90 Target

The **World Health Organization (WHO)**¹⁰ declared violence against women as a public health problem and a violation of women's human rights of urgent priority.

It is seen that there are significant inequalities between men and women in the Jamaican society which limits women's freedoms, choices and opportunities and also perpetuates their degradation.

According to **(UNAIDS, Wyatt 1992, Le Franc 1996)**, gender inequality, poverty, unequal pay for equal work and unemployment can cause many women to be economically dependent on their partners for economic stability resulting in the likelihood of them staying in violent relationships. This places women in a position of being unable to negotiate during sex and therefore powerless. More frightening is the global evidence which suggests that the experience of violence and the fear of violence can be a huge barrier to a woman disclosing her status if she is in fact HIV +.

The **2011 Report of the United Nations Special Rapporteur on Violence against Women** emphasised that although women experience many of the same forms of violence, intersection of gender, HIV status, disability, sexual identity and orientation as well as women who live in poverty can be subject to particularized and exacerbated forms of violence and discrimination.

Studies have further shown that, applying criminal law broadly to HIV transmission may result in these women being disproportionately prosecuted and thereby further marginalized. It is seen that women often learn they are HIV positive before their male partners because they are more likely to access health services and thus, are blamed for "bringing HIV into the relationship".¹¹

JASL's outreach work among the general population indicates that of the 5542 persons who got tested from January to November, 2018, 3439 (62%) were

women and 2103 (38%) were men, emphasising the disparity in health-seeking behaviour.

A Public Health Nightmare

There is no indication from the wording of the Committee Report that public health concerns were weighed equally in contemplation in order to provide a balanced outcome on the matter of criminalizing HIV transmission. One could however grasp the grounding of the Report through a thorough reading of the cited cases.

We contend that there needed to be more balance so that the public is minded that the interest of their health and wellbeing were taken into consideration with the clear need to legislate. It is imperative, that, justice must not only be done but also appear to be done, if there is to be any significant move to make criminal an act which touches and concerns the public health of a nation.

Such clear examples of consideration may be found in the dicta of **Justice Edwin Cameron of the Constitutional Court of South Africa**¹² where he discussed the ineffective nature of HIV criminalization laws and analyzes some of the negative effects that they cause.

Justice Cameron outlined:

1. The laws are misconceived and ineffective tools for preventing transmission since the majority of transmissions occur during consensual sex when neither partner is aware of their HIV status.
2. Criminalization laws are a misguided substitute for measures that are effective in preventing the spread of HIV, such as reduced stigma and greater access to testing. Additionally, criminalization prosecutions take resources and attention that should be given to treat those with HIV or AIDS.

¹⁰ See further 'The Declaration on the Elimination of Violence Against Women' which was adopted without vote by the United Nations General Assembly, 48/104 of 20 December 1993

¹¹ UNAIDS (2007) Report of the International Consultation on the Criminalization of HIV Transmission

¹² Criminalization of HIV Transmission: Poor Public Health Policy, Edwin Cameron, HIV/AIDS Policy and Law Review (2009) accessed <<https://www.hivlawandpolicy.org/resources/criminalization-hiv-transmission-poor-public-health-policy-edwin-cameron-hivaids-policy>>

3. **Contrary to many popular arguments that criminalization laws help women, they often impose harsh burdens on them. Since more women are aware of their HIV status because of prenatal healthcare sites, they are the first to be vulnerable to laws that punish individuals only after they are aware of their status.**
4. It shifts the burden of preventing transmission onto the HIV-positive sexual partner instead of recognizing that both sexual partners should be responsible for their own sexual health.
5. Many of the laws are vaguely written and difficult and degrading to apply.
6. Criminalization fuels the already rampant stigma against individuals with HIV and AIDS.
7. Criminalization laws may discourage individuals from seeking HIV testing. Since knowledge of one's HIV status can expose them to prosecution, many individuals—particularly ones who engage in risky behaviour—may be deterred from getting tested for HIV.

Overall, Cameron J. recommends a "normalization" approach—an application of normal criminal law to egregious conduct that intentionally seeks to spread HIV, while rejecting prosecutions and laws that target HIV status for exceptional treatment.¹³

In a study published in the *Canadian Medical Journal* titled 'Criminalization of HIV Transmission Maybe a Mistake'¹⁴ It was outlined that in the context of Canada, the potential to be charged with willful transmission of HIV may be a significant deterrent to being tested for HIV infection. The reasoning is that individuals who do not know that they are HIV-positive cannot logically be accused of *willfully or recklessly infecting a partner with HIV*. Therefore it is seen that the damaging

consequences may be a failure to identify as many HIV-positive people as possible and higher rates of HIV spread.

Dr. Wainberg pointed out that studies have shown that individuals who are informed that they are HIV positive will commonly desist from high-risk sexual practices, but may not do so if they are unaware of their own status.

In applying these reasoning to the Jamaican context, if testing is delayed due to the fear of prosecution of "knowing", many HIV-infected persons may not be diagnosed until at least several years after infection, thus giving the virus an opportunity to cause significant, often irreversible, damage to the immune system. This may result in life threatening opportunistic infections and death that might have been avoided had antiretroviral therapy started sooner.

EXISTING LAW

The Common Law—*Res Judicata*

It is settled law that a person could be convicted of inflicting grievous bodily harm contrary to section 22 of the Offences Against the Person Act where he was found to be 'reckless as to the risk of another person contracting a sexually transmitted disease from him through... sexual intercourse, and the other person contracted that disease through such intercourse'.

In instances of sexual assault, which has resulted in the transmission of HIV or created a significant risk of transmission, JASL shares the view that, the HIV-positive status of the offender may legitimately be considered an aggravating factor in sentencing only if the person knew that he or she was HIV positive at the time of committing the offence.

We also adopt the position in the interest of human rights, dignity and justice for all¹⁵ that if someone, knowing that he or she is HIV positive, acts with the intent to transmit HIV, and does transmit HIV, that

¹³ [Supra]

¹⁴ Mark A. Wainberg PhD by then Director of McGill University AIDS Centre Jewish General Hospital (Montréal) CMAJ 2009 Mar 17; 180(6): 688. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2653586/> accessed 13 Dec 2018

¹⁵In keeping with UNAIDS Policy Brief: Criminalization of HIV Transmission, 2008

person's state of mind, behaviour, and the resulting harm justifies punishment. Everyone has the right to privacy and should not be required by law, to reveal their HIV status, especially where it might lead to serious stigma, discrimination and possible violence.

However, global statistics shows that malicious acts in the context of HIV are rare. In fact the available evidence shows that most people living with HIV who know their status take steps to prevent transmitting HIV to others.¹⁶ It is on this basis that government should focus its efforts on strengthening HIV programmes which support voluntary counseling and testing for couples, voluntary disclosure and ethical partner notification.

In circumstances where this rarity becomes reality we are guided by the ruling and subsequent jurisprudence of the Supreme Court of Jamaica in the case of **George Flowers**¹⁷ which settled the argument as to whether intentional transmission of HIV is a punishable offence in Jamaica.

It was seen that the court in **Flowers**¹⁸, on the persuasive reasoning in **R v Mohammed Dica [2004] 3 All ER 593** which was approved by the UK Court of Appeal in **R v Konzani [2005] EWCA Crim 706** held that Mr. Flowers' offence of knowingly transmitting HIV to a number of women in Canada would have constituted an offence against the law of Jamaica if it took place within Jamaica, since he would have "inflicted" grievous bodily harm -- a crime which is dealt with in section 22 of OAPA.

¹⁶ UNAIDS Reference: For example, see Bunnell R et al (2006) "Changes in sexual risk behaviour and risk of HIV transmission after antiretroviral therapy and prevention interventions in rural Uganda" AIDS 20:85-92, and Marks G et al (2005) "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 39:446-53.

¹⁷ *Flowers, George v Director of Public Prosecution for and on behalf of the Government of Canada, the Commissioner of Correctional Services and the Attorney General of Jamaica*, 2016

¹⁸ [Supra]

It was reasoned by the court that *Dica*¹⁹ and *Konzani*²⁰ which are cases dealing with HIV transmission and the criminal law application were very persuasive authorities, the reasoning of which could very well inform or anchor similar decisions in the Jamaican context.

In fact, the Office of the Director of Public Prosecution (DPP)²¹ argued for the very point and reminded the court that section 22 of the OAPA deals sufficiently with the offence of intentional transmission of HIV or any other sexually transmitted infections (STI). The office of the DPP was of the view that such an offence did not have to form part of the Sexual Offences Act to be an offence because one must not contemplate the offence only as a sexual activity.

They emphasized that, the section, in speaking to '*causing grievous bodily harm...should be understood like any other offence where harm is inflicted by a tool. Therefore in the offence of intentional transmission of HIV, the **harm inflicted** would be **HIV** and **sex** would be **the tool used to inflict the harm.***

The significance of the judgment cannot be overstated or over-used as it provides the basic principled application and example of a law which balances the legal and public health reality of the country. The OAPA section 22 focuses the criminal elements of the intentional transmission of HIV by scrutinizing **the harm inflicted** and **the tool used to inflict such harm** without placing the burden/stigma on persons living with HIV. **Proposing that a new law explicitly be created to deal**

¹⁹ The defendant, Mohamed Dica was charged with inflicting two counts of grievous bodily harm under s 20 of the **Offences against the Person Act 1861**. The defendant was charged on the basis that while knowing he was HIV positive, he had unprotected sexual intercourse with two women who were unaware of his infection. Both women were infected with HIV.

²⁰ Feston Konzani was charged with three counts of inflicting grievous bodily harm contrary to s 20 of the **Offences against the Person Act 1861**. Konzani was HIV positive and aware of his condition. He had unprotected sexual intercourse with three complainants without informing them of his condition. Consequently, the three complainants contracted HIV.

²¹ The Director of Public Prosecutions for and on behalf of the Government of Canada
1st Respondent

with someone who knowingly and willfully transmits HIV and other STIs to a partner, serves to contradict that early position, undermine public health efforts and fuel stigma and discrimination.

Lagging Behind - Caribbean Deficiencies

It was seen that the Caribbean, including Jamaica have a far way to go in achieving order and cohesion in policy and implementation which takes into consideration public health, criminal justice and human rights concerns.

The current PANCAP findings 2018 reveal that²²:

Specific provisions for Intentional and Reckless Transmission can be found in:

- ⊙ **Belize**, sections 46.01 and 73.02 of the Criminal Code list *reckless or willful transmission* of HIV or AIDS as a criminal offence.
- ⊙ In **The Bahamas**, section 8(2) of the Sexual Offences creates an offence if the offender “...knows that he is infected... and has sexual intercourse with any other person, without disclosing the fact of the infection...”
- ⊙ In **Saint Lucia**, section 140 of the Criminal Code creates an offence if the person **knows he was infected and intentionally or recklessly** infects another

Under other general criminal law statutes:

- ⊙ **St. Vincent and the Grenadines**, under section 291 of the Criminal Code cap. 124: Unlawfully and negligently causing spread of infectious or contagious disease
- ⊙ In **Barbados**, sections 19 of the OAPA: “endangering life and safety” and section 26 “assault another occasioning harm”.
- ⊙ Trinidad and Tobago willful transmission could be prosecuted under OAPA, including sections

12, 14 and 17. There can be civil penalties under section 34.

Global Efforts

Jamaica and her sister Caribbean islands (with the exception of Haiti and Suriname) were notably absent from the **1st Global Parliamentary Meeting on HIV/AIDS in Manila, Phillipines, December 2007** where Parliamentarians from around the world gathered together to discuss the challenges of HIV.²³ The countries present took the opportunity to strengthen their efforts to reverse the epidemic, as well as the human rights violations that underpin it - inequality, discrimination, poverty and under-development.

Excerpts from the conclusions of the 1st GLOBAL PARLIAMENTARY MEETING ON HIV/AIDS Manila, Phillipines, December 2007

17. Before rushing to legislate, however, we should give careful consideration to the fact that passing HIV-specific criminal legislation can: further stigmatize persons living with HIV; provide a disincentive to HIV testing; create a false 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 or discrimination.

18. In addition, 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.

²² HIV & Human Rights in the Caribbean (Situational Analysis 2018)

²³ UNAIDS 2008: Approximately 160 parliamentarians from all parts of the world attended this meeting and adopted important final conclusions on Criminalization of HIV et al. on the last day.

RECOMMENDATIONS

Through hindsight, we believe that the conference would have set the tone for accountability and awareness for successive governments to adopt principled legislative approaches to deal with HIV/AIDS in Jamaica.

Through foresight we urge the Jamaican Parliament to:

- Revisit the recommendations made in 2007 by their sister Parliamentarians and adopt policy guidelines, legislative framing surrounding HIV, tailored to the realities of public health, human rights, dignity and justice;
- 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;
- Abide by international human rights conventions on equal and inalienable rights, including those related to health, education and social protection of all people, including people living with HIV;
- Redirect legislative reform, and law enforcement, towards addressing sexual and other forms of violence against women, and discrimination and other human rights violations against people living with HIV and people most at risk of exposure to HIV;
- Improve the efficacy of the criminal justice system in investigating and prosecuting sexual offences against women and children and support women's equality and economic independence, including through concrete legislation, programmes and services; and
- 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.

The Government of Jamaica should also:

1. Expand programmes which have been proven to

reduce HIV transmission while protecting the human rights both of people living with HIV and those who are HIV negative. This includes educating the populace about HIV, providing support and commodities to people so they can avoid exposure through practising safer behaviours; and increasing access to voluntary and confidential HIV testing and counselling;

2. Work to reduce HIV-related stigma and discrimination in public health-care facilities and the wider society that help to fuel the spread of HIV including enacting anti-discrimination legislation; and
3. Strengthen positive prevention efforts which empower people living with HIV to avoid transmitting HIV to others, to voluntarily disclose their positive status in safety, avoid new STIs, and delay HIV disease progression.

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