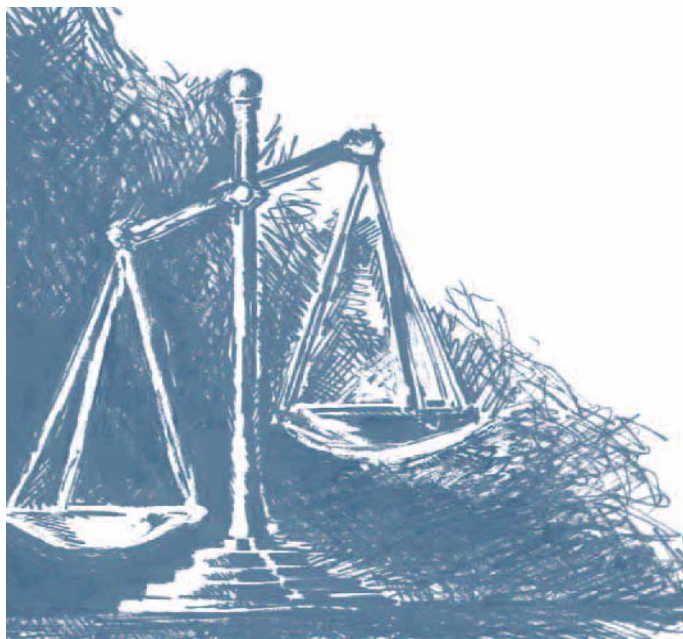


ISSUES PAPER

CRIMINALISATION OF HIV NON-DISCLOSURE, EXPOSURE AND TRANSMISSION

HIGH-LEVEL POLICY CONSULTATION

OSLO, NORWAY
14 – 15 February 2012



Note: This Issues paper is aimed at informing the discussion at the High Level Policy Consultation on the Science and Law of Criminalisation of HIV Non-disclosure, Exposure and Transmission, 14-15 February 2012, Oslo, Norway. Each section of the Issues paper is related to specific items on the agenda of the Policy Consultation (see references in brackets).

This Issues paper synthesises general considerations concerning issues raised by the criminalisation of HIV non-disclosure, exposure and transmission and is derived from the following documents: (a) Criminalisation of HIV Non-disclosure, Exposure and Transmission: Background and Current Landscape; (b) Criminalisation of HIV Non-disclosure, Exposure and Transmission: Scientific, Medical, Legal and Human Rights Issues; (c) Report of the Expert Meeting on the Scientific, Medical, Legal and Human Rights Aspects of Criminalisation of HIV Non-disclosure, Exposure and Transmission; and (d) the UNAIDS/UNDP Policy Brief on Criminalisation of HIV Transmission. These documents will be provided to participants at the Consultation.

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This paper articulates key issues that should be taken into consideration for policy orientation and formulation regarding the criminalisation of HIV non-disclosure, exposure and transmission and does not necessarily represent the decisions or the stated policy of the UNAIDS Secretariat or any of the UNAIDS Cosponsors.

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EXECUTIVE SUMMARY

1. Across the world, many countries and legal jurisdictions have adopted HIV-specific laws or invoked general criminal law to prosecute individuals who allegedly fail to disclose their HIV status prior to sexual relations (HIV non-disclosure), expose others to HIV (HIV exposure), and/or transmit HIV to others (HIV transmission). Although the exact number of initiated and completed prosecutions for HIV non-disclosure, exposure and transmission is unknown, the *Global Network of People Living with HIV* has identified some 600 known convictions for HIV non-disclosure, exposure or transmission, the great majority of which have taken place in high income countries.¹
2. Though this number may seem relatively low in light of the millions living with HIV, it has been argued that many of these prosecutions have involved vague and poorly-drafted laws, have resulted in serious miscarriages of justice, and have had an impact broader than that on the individuals involved. Being the subject of sensationalist media coverage, these cases have often resulted in widespread misinformation and confusion among the public about HIV, and have fuelled stigma and discrimination against people living with HIV.
3. Over the years, many advocates, human rights and public health experts, and people living with HIV have voiced their concerns about the nature and impact of the criminalisation of HIV non-disclosure, exposure and transmission. Legal criticism against these laws and practices points to the facts that they are often not informed by evidence relating to HIV, disregard generally applicable criminal law principles, and have resulted in disproportionately harsh sentences in several cases. Public health concerns relate to the facts that there is no evidence that the criminal law is an effective tool for HIV prevention, while there is some indication that fear of prosecution discourages people from getting tested for HIV or disclosing their HIV status.²
4. To provide guidance on addressing these concerns, the Joint United Nations Programme on HIV/AIDS (UNAIDS) commissioned a policy options paper in 2002³; held an international consultation in 2007⁴; and, with the United Nations Development Programme (UNDP), issued the *Policy Brief: Criminalization of HIV Transmission* in 2008⁵. Meanwhile, there have been serious developments in science and medicine relating to HIV. Principally, it has become clear that ever-improving and available treatment has transformed HIV infection from a “death sentence” to a chronic manageable health condition. Findings from recent studies have also confirmed the strong impact of HIV treatment on reducing the risk of HIV infection.⁶ These facts, together with the concerns expressed above, have led a number of countries to review their laws and practices regarding the criminalisation of HIV non-disclosure, exposure and transmission (e.g. Denmark, Finland, Guinea, Norway, Switzerland and the United States of America).⁷

¹ Global Network of People Living with HIV, *The global criminalisation scan report 2010: Documenting trends, presenting evidence*, 2010. Available at http://www.gnpplus.net/images/stories/Rights_and_stigma/2010_Global_Criminalisation_Scan.pdf.

² See, among others, O’Byrne P “Criminal Law and Public Health Practice: Are the Canadian HIV Disclosure Laws an Effective HIV Prevention Strategy?” *Sexual Research and Social Policy*, 2011, DOI 10.1007/s13178-011-0053-2; and also O’Byrne P, Bryan A, and Woodyatt C “Criminal Prosecutions for HIV Status Nondisclosure and HIV Prevention: Preliminary Results from an Ottawa-Based Gay Men’s Sex Survey” *Journal of the Association of Nurses in AIDS Care* (In Press).

³ 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.

⁴ UNAIDS & UNDP *Summary of Main Issues and Conclusions: International Consultation on the Criminalization of HIV Transmission*, 2007. Available at

http://www.unaids.org/en/media/unaids/contentassets/documents/priorities/20080919_hivcriminalization_meetingreport_en.pdf

⁵ UNAIDS & UNDP *Criminalization of HIV Transmission: Policy Brief*, 2008. Available at

http://data.unaids.org/pub/basedocument/2008/20080731_jc1513_policy_criminalization_en.pdf.

⁶ See Cohen MS “Prevention of HIV-1 Infection with Early Antiretroviral Therapy” *New England Journal of Medicine* 2011 365:493-505. <http://www.nejm.org/doi/full/10.1056/NEJMoa1105243>.

⁷ For more information on recent positive developments relating to criminalisation of HIV non-disclosure, exposure and transmission, see EJ Bernard and R Bennett-Carlson *Criminalisation of HIV Non-disclosure, Exposure and Transmission: Background and Current Landscape and also UNAIDS “Countries questioning laws that criminalize HIV transmission and exposure”* 26 April 2011, available at <http://www.unaids.org/en/resources/presscentre/featurestories/2011/april/20110426criminalization/>.

5. In this context, UNAIDS held an Expert Meeting on 31 August to 2 September 2011 that brought together legal, scientific and medical experts to reflect on how to ensure that the law is appropriately informed by the latest scientific and medical developments relating to HIV. The meeting confirmed that it is vital that countries review their laws and law enforcement practices regarding criminalisation of HIV non-disclosure, exposure and transmission to ensure that any application of the criminal law is limited to truly blameworthy cases while supporting evidence-based and effective public health strategies against HIV.
6. To achieve these aims, criminal laws and prosecutions in the context of HIV should appropriately delineate the notions of risk, harm, intent, defences and penalties and ensure that their definitions, application and interpretation are informed by the best available scientific and medical evidence relating to HIV. They should also conform with general principles of criminal law, including foreseeability, proportionality, and proof beyond reasonable doubt.
7. Thirty years into the HIV epidemic, the knowledge, science, medicine and programmes now exist to halt and rolled back the epidemic.⁸ It is critical that the role of the criminal law be defined to achieve justice where appropriate, while supporting these developments. This is particularly important in the present context where the world's governments have committed to reaching universal access to HIV prevention, treatment, care and support in order to achieve zero new HIV infections, zero discrimination, zero AIDS-related deaths.⁹

This paper provides considerations to assist governments and civil society partners to best achieve justice and support public health efforts by reforming the criminal law in relation to HIV and/or invoking alternatives to it through:

- a) assessing whether the application of criminal law is informed by the latest scientific and medical evidence relating to HIV transmission, prevention and treatment;
- b) assessing whether HIV non-disclosure, exposure and transmission are treated comparably to similar risks and harms, or singled out for unwarrantedly harsh treatment;
- c) assessing whether any law and practices that criminalizes HIV nondisclosure, exposure and transmission appropriately applies standard criminal law principles regarding intent, harm, risk, proof and penalties;
- d) ensuring that prosecutorial guidelines are developed and applied so as to limit prosecutions to truly blameworthy cases and to give clear guidance to the law enforcement community and the public on the reach and scope of the law in this area;
- e) sensitisation of police, prosecutors, judges and the media regarding the real nature of risks, harms, intent and proof, according to relevant science and medicine, as well as the harm of stigma and discrimination in the context of HIV; and
- f) enhancing alternative approaches to criminalisation, such as expanded HIV prevention programmes, including programmes that enable people living with HIV and others to avoid HIV transmission, intensive counselling and support for behaviour change, and other public health approaches with full due process protections.

GENERAL CONSIDERATIONS REGARDING CRIMINALISATION OF HIV NON-DISCLOSURE, EXPOSURE AND TRANSMISSION (SESSIONS 1 & 2)

1. Since the early years of the HIV epidemic, many countries, particularly high-income countries, have prosecuted individuals under the criminal law (either HIV-specific or general criminal law) for HIV

⁸ See UNAIDS *Global report: UNAIDS report on the global AIDS epidemic 2010*, 2010. Available at http://www.unaids.org/documents/20101123_GlobalReport_em.pdf.

⁹ United Nations General Assembly *Political Declaration on HIV/AIDS: Intensifying our efforts to eliminate HIV/AIDS*, June 2011, A/RES/65/277. Available at http://www.unaids.org/en/media/unaids/contentassets/documents/document/2011/06/20110610_UN_A-RES-65-277_en.pdf.

non-disclosure, exposure and/or transmission. The application of the criminal law to HIV is done in the name of criminal justice goals (e.g. retribution, deterrence, incapacitation and rehabilitation) and/or public health goals (HIV prevention). The majority of prosecutions have occurred in North America, Western Europe, and Australia and New Zealand.¹⁰

2. In recent years, many developing countries have adopted HIV-specific laws that criminalise HIV non-disclosure, exposure and/or transmission, though few appear to have begun to prosecute under them to any significant degree.¹¹ Both in high-income and in developing countries, exact numbers of initiated and completed prosecutions are unknown due to difficulties in tracking such prosecutions. However, some 600 convictions have been identified worldwide.¹² Though this number could be considered relatively small, there is concern that many of these cases have involved miscarriages of justice for the individuals involved and have had wider social impact through sensationalist media coverage that has spread misinformation and stigma about HIV and people living with HIV.
3. Over the years, UNAIDS and many others involved in the response to HIV have raised public health, legal and human rights concerns regarding laws and practice in the area of criminalisation of HIV non-disclosure, exposure and transmission.¹³ These concerns relate to:
 - a) laws that are vague about exactly what conduct will be subject to prosecution;
 - b) prosecutions for acts that represent no risk, or insignificant risk, of HIV transmission;
 - c) prosecutions that do not appear to be based on an evidence-informed understanding of how HIV is (and is not) transmitted or the latest scientific developments regarding HIV prevention and treatment;
 - d) prosecutions of individuals who have used condoms or practiced other forms of safer sex, in line with public health messages on HIV prevention;
 - e) singling out HIV for criminal prosecution and harsh penalties when other similar conditions/harms are not subject to comparable treatment by the criminal law;
 - f) failure to apply standard requirements for criminal liability, such as intent, causation and proof, to people charged under these offences;
 - g) application of excessive penalties to people found guilty; and/or
 - h) risk of selective enforcement of the law against members of marginalised communities.¹⁴
4. In some jurisdictions, people have been convicted and sentenced to long prison terms for spitting, biting and other behaviours that pose no risk of transmitting HIV.¹⁵ People have also been convicted in cases where they used condoms or practiced forms of sex that cannot or are highly unlikely to transmit HIV or when they had an undetectable or very low viral load rendering them virtually or actually non-infectious.¹⁶ Others have been convicted for failing to disclose their HIV status even

¹⁰ Global Network of People Living with HIV (2010), *The Global Criminalisation Scan Report 2010: Documenting trends, presenting evidence*. Available at http://www.gnpplus.net/images/stories/Rights_and_stigma/2010_Global_Criminalisation_Scan.pdf.

¹¹ For instance, in sub-Saharan Africa, some 20 countries have passed HIV-specific criminal statutes in the last 5 years. See Eba P (2008), "One Size Punishes All: A critical appraisal of the criminalisation of HIV transmission", *AIDS Legal Quarterly* Sept-Nov 2008. Available at <http://www.aln.org.za/downloads/ALQ%20Criminalisation.pdf>. See also International Planned Parenthood Federation, GNP+ and ICW (2008), *Verdict on a Virus: Public Health, Human Rights and Criminal Law*. Available at <http://www.ippf.org/NR/rdonlyres/D858DFB2-19CD-4483-AEC9-1B1C5EBAF48A/0/VerdictOnAVirus.pdf>.

¹² See Global Network of People Living with HIV (2010), *The Global Criminalisation Scan Report 2010: Documenting trends, presenting evidence*. Available at http://www.gnpplus.net/images/stories/Rights_and_stigma/2010_Global_Criminalisation_Scan.pdf

¹³ For an overview of these concerns, see UNAIDS *Criminal Law, Public health and HIV transmission: A policy options paper*, 2002, pp 23-27. Available at http://data.unaids.org/publications/IRC-pub02/jc733-criminallaw_en.pdf.

¹⁴ GNP+ and Terrence Higgins Trust (2005) *Criminalisation of HIV transmission in Europe: A rapid scan of the laws and rates of prosecution for HIV transmission within signatory States of the European Convention of Human Rights*. Available at <http://www.gnpplus.net/criminalisation/rapidscan.pdf>

¹⁵ See Center for HIV Law and Policy, *Prosecutions for HIV Exposure in the United States, 2008–2012*, Available at <http://www.hivlawandpolicy.org/resources/view/456>.

¹⁶ As above.

though they have not transmitted HIV or posed any risk of transmitting HIV.¹⁷ HIV non-disclosure, exposure and transmission are treated in many jurisdictions as serious offences, with penalties from one to more than twenty years, while similar risks and harms are treated as less serious attracting much lower sentences. Prosecutors and courts lay charges of “murder/manslaughter”, “attempted murder/manslaughter”, “assault with a deadly weapon” and “terroristic acts”, even though, with treatment, HIV infection has become a chronic manageable health condition.¹⁸ Such use of the criminal law raises issues of injustice and disproportionality, spreads misinformation that contradicts public health messages and strategies, and is often based on, and fuels, stigma against people living with HIV.

5. Successes and gains in the global response to HIV have been made possible by approaches informed by science, public health and human rights. Any application of the criminal law in the context of HIV should, to the highest degree possible, serve justice and protect the public health. Serving justice involves identifying individuals who are truly blameworthy under standard criminal law parameters and applying proportionate sanctions in accordance with the nature of their acts. Serving the public health involves basing legal analysis and outcomes on the best scientific evidence of what specific acts pose a significant risk of HIV transmission, what actual harms result from HIV infection, and which HIV prevention, treatment, care and support strategies work against HIV and should therefore be supported (not undermined) by the law.
6. In an attempt to provide guidance on how to best address these challenges, UNAIDS and UNDP issued a *Policy Brief on Criminalisation of HIV Transmission* (2008).¹⁹ The *Policy Brief* recognises the legitimate goal of the criminal law to achieve justice in cases involving truly blameworthy behaviour but urges governments to avoid overly-broad criminal liability that can result in injustice and create disincentives to HIV testing, disclosure of HIV status, and uptake of prevention and treatment.²⁰ The *Policy Brief* states that “[t]here are no data indicating that the *broad application* of criminal law to HIV transmission will achieve either criminal justice or prevention of HIV transmission” (emphasis added).²¹ It goes on to urge governments to limit the criminal law to cases where a person knows his or her HIV positive status, acts with the intention to transmit HIV, and does in fact transmit it.²² Thus, the *Policy Brief* sets the bar of mental state for criminal liability at a high level in an effort to limit the application of criminal law to cases where there is an intent to do harm and significant harm is actually caused.²³
7. The *Policy Brief* then lists particular cases where the law should *not* be applied. These include, among others, situations where: there is no significant risk of HIV transmission; the person did not know s/he was HIV positive or how HIV is transmitted; the person took reasonable measures to reduce the risk of transmission; the person disclosed his/her status or did not disclose because of fear of violence or other serious negative consequences.²⁴
8. The brief also urges States not to pass HIV specific laws but to use general criminal law in the rare cases where the pursuit of justice may render it appropriate. In spite of this recommendation, many HIV specific laws remain in use that are not based on science and/or are too broad in scope. Furthermore, general criminal law is being applied to a wide, ill-defined and unforeseeable range of

¹⁷ See Global Network of People Living with HIV (2010), *The Global Criminalisation Scan Report 2010: Documenting trends, presenting evidence*. Available at

http://www.gnpplus.net/images/stories/Rights_and_stigma/2010_Global_Criminalisation_Scan.pdf.

¹⁸ See Center for HIV Law and Policy, *Prosecutions for HIV Exposure in the United States, 2008–2012*, Available at <http://www.hivlawandpolicy.org/resources/view/456>.

¹⁹ UNAIDS & UNDP, *Criminalisation of HIV Transmission: Policy Brief*, 2008. Available at http://data.unaids.org/pub/basedocument/2008/20080731_jc1513_policy_criminalization_en.pdf.

²⁰ As above.

²¹ As above.

²² As above.

²³ As above.

²⁴ As above.

behaviour. Moreover, the penalties applied to HIV non-disclosure, exposure and transmission often seem disproportionate to the harm caused and/or in relation to like risks and harms.

9. Additionally, there is concern that criminalisation of HIV non-disclosure, exposure and transmission negatively impacts HIV prevention efforts. Some studies indicate that it deters people (especially those most at risk of HIV infection) from seeking HIV related services²⁵ and that it undermines patients' relationships with health care providers, since any information disclosed to health care workers about risk behaviours can be used against patients as evidence in criminal proceedings.²⁶ There is also concern that resources spent for prosecuting HIV non-disclosure, exposure and transmission cases represent an unfortunate diversion from proven HIV prevention methods, at a time when the science, tools and programmes to prevent HIV are known, but their implementation seldom receives adequate funding or attention in national responses to HIV.
10. In this context, it is critical that any criminal law response to HIV should appropriately reflect scientific and medical knowledge relating to HIV; should treat HIV proportionally to similar harms and risks; and should uphold general principles relating to criminal law, such as intent to harm another, proof beyond reasonable doubt to support a guilty verdict, and proportionality between the offence and penalty.²⁷

HARM IN THE CONTEXT OF CRIMINALISATION OF HIV NON-DISCLOSURE, EXPOSURE AND TRANSMISSION (SESSION 3)

11. The criminal law, a society's most severe sanction, should not be invoked lightly. It is justified only where it is necessary to prevent, deter and punish harm to others or to society. Where an act (or omission) and its results are harmful to others, there is clear rationale for invoking the criminal law. However, in most societies, not all actual or possible harms fall within the purview of the criminal justice system. Some harms, such as torts, may be a matter of civil law, and some behaviours considered harmful may be deterred by social, cultural or religious disapproval. In the context of HIV, the issue is whether the harm resulting from HIV non-disclosure, exposure or transmission is significant enough to constitute harm for the purpose of *criminal liability*.
12. Non-disclosure of HIV-positive status and exposure to HIV do not necessarily result in HIV transmission/infection. Some jurisdictions consider that, because an incident of non-disclosure and exposure *may* result in HIV transmission/infection, the *risk* of such harm is significant enough to warrant criminal prosecution.²⁸ Other jurisdictions apply criminal prosecutions only where actual transmission has occurred.²⁹ UNAIDS and UNDP have taken the position that it is best to limit the application of criminal law to cases where transmission has actually occurred.³⁰

²⁵ See, among others, O'Byrne P "Criminal Law and Public Health Practice: Are the Canadian HIV Disclosure Laws an Effective HIV Prevention Strategy?" *Sexual Research and Social Policy*, 2011, DOI 10.1007/s13178-011-0053-2; and also O'Byrne P, Bryan A, and Woodyatt C "Criminal Prosecutions for HIV Status Nondisclosure and HIV Prevention: Preliminary Results from an Ottawa-Based Gay Men's Sex Survey" *Journal of the Association of Nurses in AIDS Care* (In Press).

²⁶ See, among others, Mykhalovskiy E, "The problem of 'significant risk': exploring the public health impact of criminalizing HIV non-disclosure", 73 *Social Science and Medicine* 670, 2011.

²⁷ For an overview of the key scientific, medical, legal and human rights considerations that should guide policy formulation on criminalisation of HIV-non disclosure, exposure and transmission, see UNAIDS, *Report of the Expert Meeting on the Scientific, Medical, Legal and Human Rights Aspects of Criminalisation of HIV Non-disclosure, Exposure and Transmission*, 31 August – 2 September 2011.

²⁸ See, for Instance, Ind. Code Ann. 35-42-2-6(c).

²⁹ This is the case for instance in England and Wales. See Crown Prosecution Service "Legal guidance on intentional or reckless sexual transmission of infection". Available at http://www.cps.gov.uk/legal/h_to_k/intentional_or_reckless_sexual_transmission_of_infection_guidance/. And also in Papua New Guinea, see HIV/AIDS Management and Prevention Act, 2003. Available at http://www.ilo.org/wcmsp5/groups/public/@ed_protect/@protrav/@ilo_aids/documents/legaldocument/wcms_113271.pdf.

³⁰ See UNAIDS & UNDP *Criminalisation of HIV Transmission: Policy Brief*, 2008. Available at: http://www.unaids.org/en/media/unaids/contentassets/dataimport/pub/basedocument/2008/20080731_jc1513_policy_criminalisation_en.pdf.

13. Thus, there are two issues for consideration: (a) should the *risk* of HIV infection, without actual transmission, be considered harmful enough that it should be subject to criminal prosecution, and if so, how should the harm of the threat be characterised in terms of charges and penalties; and (b) how should *actual* HIV transmission be characterised in terms of charges and penalties?
14. Before the development and roll out of effective antiretroviral therapy (ART), HIV infection usually led to death due to AIDS-related illnesses. This is still the case in places where ART is not available. The association of HIV infection with death led the criminal justice system, in some jurisdictions, to characterise actual infection, or even the threat of HIV infection, as the highest possible harm. Many cases, decisions to prosecute, court rulings and media coverage of alleged HIV non-disclosure, exposure and transmission considered HIV infection a “death sentence” with some characterising an HIV-positive person’s bodily fluids – from saliva to semen – as “deadly weapons”^{31 32}. Thus, the charges laid have involved “murder”, “manslaughter”, “attempted murder/manslaughter” and “assault with a deadly weapon”.³³ Upon conviction, sentences have often been very high, being based on such characterisations.³⁴
15. However, the discovery and subsequent use of new classes of ART in the mid-to-late 1990s have resulted in a dramatic recharacterisation of HIV infection so that, where these drugs are accessible, it no longer necessarily means premature death.³⁵ Though HIV infection remains a serious, life-long, incurable health condition, for the majority of those on treatment it has become a manageable condition.³⁶ People living with HIV are able to study, work, have a family and live to an age where they may die of non-HIV related illness.
16. The fact that treatment renders HIV a chronic manageable health condition means that HIV infection can no longer be reasonably characterised as “murder”, “manslaughter”, “attempted murder/manslaughter” or “assault with a deadly weapon”, as it continues to be in some jurisdictions. Rather HIV infection should be recognised as a serious, chronic health condition and be treated equally with comparable health conditions/harms.
17. In some countries, the harm of HIV infection is being re-characterised along these lines. For example:
- In October 2010, the Manitoba Court of Appeal in Canada concurred with an expert opinion that “with the advances thus far achieved in HIV care, many, if not most, persons infected with HIV who receive and are compliant with optimal care will die of a non-AIDS cause”.³⁷
 - In February 2011, the Danish Justice Minister decided to suspend the HIV-specific law of Denmark. In support of his decision, the Minister noted that HIV can no longer be considered life threatening because, for people living with HIV in Denmark who are on treatment, HIV has become a manageable, chronic health condition.³⁸

³¹ *Campbell v. State*, No. 05-08-00736-CR, 2009 WL 2025344 (Tex. Ct. App. July 14, 2009); *Weeks v. State*, 834 S.W.2d 559 (Tex. Ct. App. 1992).

³² *Mathonican v. State*, 194 S.W.3d 59, (Tex. App. 2006) (citing *Najera v. State*, 955 S.W.2d 698, 701 (Tex. App. 1997)).

³³ See Center for HIV Law and Policy, *Prosecutions for HIV Exposure in the United States, 2008–2012*, Available at <http://www.hivlawandpolicy.org/resources/view/456>.

³⁴ As above.

³⁵ For example, the age-adjusted HIV-related death rate in the United States dropped from 17 per 100,000 people in 1995 to about five per 100,000 people by the end of the decade. US Centers for Disease Control and Prevention. “Trends in Annual Age-Adjusted Rate of Death due to HIV Disease, United States, 1987–2006”. See also Mocroft A *et al.* “Changes in the cause of death among HIV-positive subjects across Europe: results from the EuroSIDA study” *AIDS* 16(12) 1663-71, 2002.

³⁶ See, among others, Lima VD *et al.* “Continued improvement in survival among HIV-infected individuals with newer forms of highly active antiretroviral therapy” *AIDS*, Vol 21, Issue 6, pp 685-692, 2007; and CASCADE Collaboration “Determinants of survival following HIV-1 seroconversion after the introduction of HAART” *Lancet* 2003; No 362, pp 1267–1274.

³⁷ See *R v. Mabior* (CL), 2010 MBCA 93, para 142. Available at <http://www.canlii.ca/en/mb/mbca/doc/2010/2010mbca93/2010mbca93.html>.

³⁸ See Bernard EJ, “Denmark: Justice Minister suspends HIV-specific criminal law, sets up working group” 17 February 2011. Available at <http://criminalhivtransmission.blogspot.com/2011/02/denmark-justice-minister-suspends-hiv.html>.

18. Because the nature of the harm resulting from a particular act often activates the criminal law process and determines the sentencing, it is expected that a more accurate characterisation of the harm of HIV infection or exposure would translate into a more appropriate charge and a more proportionate sentence for any person who is found guilty under these statutes. This is important as analyses of sentences and penalties for HIV exposure or transmission reveal much higher penalties compared to sentences for comparable or more serious offences, such as driving under the influence of alcohol (which is arguably comparable to HIV exposure) or vehicular homicide (which is arguably a more serious offence than HIV transmission).³⁹
19. With regard to non-disclosure and exposure to HIV without transmission, it is understandable that those subject to non-disclosure or exposed to HIV would be concerned and upset, and as long as they did not know their own HIV status, fearful that they had contracted HIV. However, it is arguable that the harm of non-disclosure and exposure does not rise to a level to justify the application of the criminal law. To decide otherwise, considerably broadens the scope of the criminal law and potentially subjects many thousands more people living with HIV to its harsh sanctions.
20. Furthermore, many of the HIV exposure laws seeking to punish the harm of inducing fear (in the absence of actual HIV transmission) generally fail to examine whether the fear of HIV infection is founded in facts.⁴⁰ In torts or delicts laws where “psychological harm” may provide the basis for legal action, there is a general requirement that the fear of harm be reasonable and foreseeable, in addition to causing harm at a certain threshold.⁴¹ Simply being upset by something unpleasant or disturbing does not rise to the level of “actionable” in most tort cases, in the absence of real evidence of a risk of harm.⁴² This requirement should at the very least also apply with regard to the criminal law.
21. In light of the above elements, policy-makers and actors of the judicial system should pay specific attention to the following key points in their understanding and response to harm in the context of criminalisation of HIV non-disclosure, exposure and transmission:
- a) HIV infection is a health condition that is not yet curable, but with treatment becomes chronic and manageable, with the result that a person with HIV is can now live a near normal lifespan.
 - b) HIV infection does not necessarily prevent a person with HIV from living a full, productive and satisfying life.
 - c) HIV infection does constitute a serious health condition with physical, psychological and social consequences, and thus could be considered a harm under the criminal law in the same way that comparable health conditions would be.
 - d) Because HIV infection is a chronic treatable health condition, it is inappropriate for criminal prosecution of HIV non-disclosure, exposure or transmission to involve charges of “murder/manslaughter”, “attempted murder/manslaughter”, “assault with a deadly weapon” or “reckless homicide”.
 - e) The “harm” related to HIV non-disclosure or exposure (as opposed to HIV transmission) should not be considered significant enough to warrant prosecution under the criminal law.

³⁹ See Bernard EJ, Hanssens C, Roose-Snyder B, Scarborough S and Webber D, *Criminalisation of HIV non-disclosure, exposure and transmission: scientific, medical, legal and human rights issues*, 2011.

⁴⁰ In prosecutions where causing fear of HIV transmission appears to be the harm, the actual risk of transmission is often irrelevant, and thus convictions can be obtained even though there is no risk of transmission. In *Commonwealth v. Walker*, 836 A.2d 999 (Pa. Super. Ct. 2003), for example, the court affirmed a terroristic threat conviction for behaviour that posed no risk of HIV transmission but was accompanied by a threat to transmit HIV. The court implied that whether the victim was put in fear of infection was irrelevant; the only relevant question was whether the evidence supported the inference that the defendant “intended” to cause terror from fear of HIV infection. See discussion in section below on Risk.

⁴¹ See, e.g., *Wilkinson v Downton* [1897] 2 Q.B. 57 (establishing the tort of intentional infliction of mental shock).

⁴² See BLACK’S LAW DICTIONARY, ASSAULT (8th ed. 2004) (stating that there must be a reasonable fear of injury, the usual test applied being whether the act would induce such apprehension in the mind of a reasonable person).

RISK IN THE CONTEXT OF CRIMINALISATION OF HIV NON-DISCLOSURE, EXPOSURE AND TRANSMISSION (SESSION 3)

22. A key consideration is whether an act, such as having sex with a condom, or an omission, such as non-disclosure of known HIV-positive status prior to sex, has placed another person at such *risk of harm* that the person committing the act should be punished by criminal sanctions. Generally, in criminal prosecutions, the risk of such acts should rise to a certain level to be subject to criminal sanctions. Courts characterise this level in different ways, e.g. “significant”, “substantial,” “unjustifiable”, “serious,” or “likely”. Moreover, risk and harm are often related under legal analysis. Where the level of harm resulting from a particular act is considered very high, a lower threshold of risk may justify criminal liability.⁴³ The *Policy Brief* states that “[C]riminal law should not be applied to cases where there is no significant risk of [HIV] transmission”.⁴⁴
23. In various jurisdictions, laws and prosecutions for HIV non-disclosure, exposure and transmission often fail to take into account evidence concerning the scientific estimation of the level of risk associated with specific acts and practices relevant to HIV transmission. An analysis of court cases and practices shows that in many jurisdictions, courts have considered a wide range of acts as representing “significant”, “substantial,” “unjustifiable”, “serious,” or “likely” risk of HIV infection even though such characterisations are not supported by current scientific and medical evidence.⁴⁵ Such prosecutions have involved acts that represented no or very minimal risks of HIV infection, such as spitting, throwing of urine, non-penetrative sex, sex with a condom or sex while having an undetectable or very low viral load.
24. A comprehensive analysis of studies of HIV transmission risk estimates that the per-act risk in high-income countries for a woman who engages in unprotected vaginal intercourse with a chronically infected, untreated HIV-positive man is 0.08% (1 in 1,250).⁴⁶ The per-act risk for a man who has unprotected vaginal intercourse with a chronically infected, untreated HIV-positive woman is estimated to be 0.04% (1 in 2,500).⁴⁷ Per-act anal transmission risk during unprotected receptive anal intercourse with an HIV-positive insertive partner is estimated at 0.82% (1 in 122).⁴⁸ When the person with HIV is the receptive partner, the transmission risk is estimated at 0.06% (1 in 1,666) for the insertive partner.⁴⁹ Although these estimates vary over the course of untreated HIV infection, they indicate that, contrary to general perceptions, HIV is not that readily transmissible through sex. Another review of the risk of sexual transmission of HIV according to viral load found that the per-act of HIV transmission of 1/7900 or 0.013%.⁵⁰ As further discussed below, condom use is considered to contribute to reducing by 80% the risk of HIV transmission.⁵¹

⁴³ See *R v. Mabior* (CL), 2010 MBCA 93, paras 65-71. Available at <http://www.canlii.ca/en/mb/mbca/doc/2010/2010mbca93/2010mbca93.html>.

⁴⁴ UNAIDS & UNDP, *Criminalisation of HIV Transmission: Policy Brief*, 2008. Available at http://data.unaids.org/pub/basedocument/2008/20080731_jc1513_policy_criminalization_en.pdf.

⁴⁵ For further discussion, see Bernard EJ, Hanssens C, Roose-Snyder B, Scarborough S and Webber D, *Criminalisation of HIV non-disclosure, exposure and transmission: scientific, medical, legal and human rights issues*, 2011, pp 13-16.

⁴⁶ Boily MC *et al* “Heterosexual risk of HIV-1 infection per sexual act: systematic review and meta-analysis of observational studies” *Lancet Infectious Diseases* 9: 118-29, 2009.

⁴⁷ As above. A recent trial conducted among sero-discordant couples in several African countries found lower unadjusted per-act risks of unprotected male-to-female and female-to-male transmission during the latent phase of HIV infection (neither early infection nor late infection). The risks were at 0.0019 and 0.0010 respectively (1 to 2 cases per 1000 sexual acts). See Hughes JP *et al* “Determinants of Per-Coital-Act HIV-1 Infectivity Among African HIV-1–Serodiscordant Couples” *Journal of Infectious Diseases*, Vol 205, Iss 3, pp 358-365.

⁴⁸ Vittinghoff E *et al* “Per-contact risk of Human Immunodeficiency Virus transmission between male sexual partners” *American Journal of Epidemiology*, 150(3): 306-311, 1999.

⁴⁹ As above.

⁵⁰ Attia S *et al* “Sexual transmission of HIV according to viral load and antiretroviral therapy: systematic review and meta-analysis,” *AIDS*, 23 (2009): pp. 1397–1404. See also Canadian HIV/AIDS Legal Network “HIV non-disclosure and Canadian criminal law: antiretroviral treatment and viral load” Nov 2011. Available at <http://www.aidslaw.ca/publications/interfaces/downloadFile.php?ref=1944>.

⁵¹ Weller SC and Davis-Beaty K “Condom effectiveness in reducing heterosexual HIV transmission (Review)” *Cochrane Database of Systematic Reviews* 1 (2002). Available at <http://www.aidslaw.ca/publications/interfaces/downloadFile.php?ref=1947>. See also Canadian HIV/AIDS Legal Network “HIV 6 February 2012

25. As discussed above, the perceived harm of HIV infection is a factor in determining the level of risk that might justify criminal prosecution. Where prosecutors and courts regard the harm of HIV infection as being extremely serious, they might consider the risk of infection as being inherently significant, regardless of the actual per-act risk of transmission. Because of this, both the actual nature of the harm of HIV infection, as discussed above, and the actual risk, as informed by science, medicine and evidence should be what is considered by prosecutors as they determine whether to bring charges and by judges as they consider the cases before them.
26. Accurate assessment of the level of risk of HIV infection from various sexual and other acts should rest primarily on medical and scientific evaluation of a complex combination of circumstances and elements that are known to influence (i.e. heighten or reduce) the risk of HIV transmission. These circumstances and elements include:
- a) the type of sexual activity: non-penetrative or penetrative (vaginal, anal, oral);
 - b) the roles of sexual partners during penetrative sex: insertive or receptive;
 - c) whether or not a male or female condom or other effective barriers to prevent HIV exposure during penetrative sex has been used correctly and consistently;
 - d) whether or not the insertive partner was circumcised;
 - e) the presence or absence of other sexually transmitted infections (STIs) in the individuals involved;
 - f) the concentration of HIV (viral load) in the bodily fluid to which the at-risk person has been exposed; and
 - g) whether or not the HIV-positive person was on antiretroviral therapy which has significantly reduced the concentration of genital secretions of HIV to non-infectious levels.
27. These elements should be understood and taken into consideration when determining whether there was sufficient level of risk to warrant the initiation of prosecution. Up-to-date knowledge of HIV science and medicine are key to this understanding. There is arguably no significant or substantial risk of transmission involved when individuals take measures recommended by public health experts to prevent HIV transmission. Thus, courts of law should not find liability for HIV non-disclosure, exposure or transmission when the person living with HIV has taken reasonable precautions to prevent transmission (e.g. used condoms or engaged in other forms of safer sex) or reasonably believed that s/he was not infectious. For instance, in the *Guidance on intentional or reckless sexual transmission of infection* adopted by the Crown Prosecution Service for England and Wales, prosecutors are advised not to press charges when there is evidence that the suspect took appropriate safeguards to prevent the transmission of infection throughout the entire period of sexual activity, including through the use of condoms.⁵²
28. Furthermore, recent evidence on the impact of treatment on the risk of HIV transmission confirms the needs to re-assess the risk posed by, and hence the criminal liability of, individuals who are on antiretroviral treatment, do not disclose their positive HIV status, and “potentially” expose a sexual partner to HIV. In 2009, the Geneva Court of Justice relied upon such evidence in its decision to acquit an individual charged with HIV exposure on the basis of expert testimony indicating that effective antiretroviral therapy significantly reduces the risk of HIV transmission.⁵³ The HPTN 052 trial results, released in early 2011, further demonstrate, with the strength of evidence from a randomised controlled trial, that antiretroviral therapy contributes to a significant reduction of the risk of HIV

non-disclosure and Canadian criminal law: condom use”. Available at <http://www.aidslaw.ca/publications/interfaces/downloadFile.php?ref=1947>.

⁵² See Crown Prosecution Service “Legal guidance on intentional or reckless sexual transmission of infection”. Available at http://www.cps.gov.uk/legal/h_to_k/intentional_or_reckless_sexual_transmission_of_infection_guidance/.

⁵³ S v. S and R, Geneva Court of Justice, 23 February 2009. Available at http://www.aidslex.org/site_documents/CR-0066E.pdf. The Manitoba Court of Appeal in Canada reached a similar conclusion when it held that there is no obligation to disclose HIV-positive status where a condom is properly used or where the HIV-positive person had an undetectable viral load. See *R v Mabior (CL)*, 2010 MBCA 93. Available at http://www.aidslaw.ca/EN/lawyers-kit/documents/5-6_MabiorCA2010-EN.pdf. 6 February 2012

transmission.⁵⁴ This study found a 96% reduction in the risk of HIV transmission within serodiscordant couples when the HIV-positive person is on effective antiretroviral therapy.⁵⁵

29. In light of the above elements, policy-makers and actors of the judicial system should pay specific attention to the following points in their response to risk in the context of criminalisation of HIV non-disclosure, exposure and transmission:
- To warrant criminal prosecution, the risks of HIV non-disclosure or exposure should be significant; the fact that the “harm” of HIV infection has been reduced from death to a chronic manageable health condition where treatment is available, argues against considering “any risk” of HIV infection as a “significant risk”.
 - Any legal concept of “significant risk” in the context of HIV should be informed by scientific, medical and epidemiological evidence.
 - Risk of transmission should *not* be considered “significant”, “substantial”, “unjustifiable”, “serious” or “likely” when there is correct use of condoms, no vaginal or anal penetrative sex, or the person living with HIV has an undetectable or very low viral load.
 - As there is no significant scientific or medical risk of HIV transmission from biting (regardless of whether or not there is blood in saliva), from scratching or hitting, or from spitting or throwing bodily fluids or excretions (such as urine and faeces), no court of law should find any legally significant risk of harm from these acts.
 - There is a need to more uniformly define the elements of “significant” or “substantial” risk in scientific and legal terms in the context of the transmission of sexually transmitted infections, including HIV, to guide the law enforcement community, as well as people living with HIV, who need to know what behaviours expose them to a risk of criminal prosecution.

STATE OF MIND IN THE CONTEXT OF CRIMINALISATION OF HIV NON-DISCLOSURE, EXPOSURE AND TRANSMISSION (SESSION 4)

30. In most criminal prosecutions, an element of the case that should be proved by the prosecution is the state of mind (*mens rea*) of the accused. Analyses of existing legal provisions and practices relating to HIV non-disclosure, exposure and transmission reveal great variety in the standards and requirements relating to state of mind across countries and jurisdictions.
31. In some jurisdictions, it is required to prove deliberate or purposeful intent to expose others to HIV, or to transmit HIV, in order to secure conviction. In other jurisdictions, it is required to prove “negligence” or “recklessness” for criminal liability for HIV non-disclosure, exposure or transmission. In other jurisdictions, there is no requirement for proving any state of mind. In such jurisdictions, once the prosecution proves the knowledge of positive HIV status and the prohibited conduct, the accused is found guilty. Such interpretation effectively creates strict liability for HIV non-disclosure, exposure or transmission.
32. Proof of intent is often the main challenge in securing a guilty verdict in HIV-related criminal cases. Strict liability, which abolishes proof of intent, facilitates prosecutions in the context of HIV non-disclosure, exposure or transmission. Aside from HIV-related cases, strict liability is virtually never applied to crimes involving adult consensual behaviour. In the US, for instance, strict liability is most commonly applied to regulatory offenses – those in which occupational safety, anti-pollution laws, or fish and gaming regulations have been violated. It is also applied to situations in which the action and related harm are viewed as so inherently dangerous or harmful (e.g. driving under the influence of alcohol or drugs, pornography involving minors) that proof of intent to harm is deemed unnecessary. Strict liability in the context of HIV non-disclosure, exposure or transmission appears to be motivated by a view that the harm resulting from HIV infection is so significant that there is no requirement for a specific intent to harm to support criminal liability (see discussion above).

⁵⁴ Cohen MS “Prevention of HIV-1 Infection with Early Antiretroviral Therapy” *New England Journal of Medicine* 2011 365:493-505. <http://www.nejm.org/doi/full/10.1056/NEJMoa1105243>.

⁵⁵ As above.

33. In the *Policy Brief*, UNAIDS and UNDP concluded that criminal liability should be limited to “cases of intentional transmission i.e. where a person knows his or her HIV-positive status, acts with the intention to transmit HIV, and does in fact transmit it”.⁵⁶ This position is consistent with that of the United Nations Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, who noted that laws criminalising HIV transmission should only be used when there is “intentional [and] malicious” transmission.⁵⁷ Setting the bar of intent high in such a way attempts to find the balance between ensuring that truly blameworthy cases are brought to justice (i.e. those who act intentionally and maliciously to harm) and avoiding widespread application of criminal prosecution to cases where there is no harmful intent.
34. A key point of contention in the discussion of *mens rea* and HIV criminal prosecutions is whether a state of mind below the threshold of “intentional” should be sufficient for criminal liability. While courts define these terms in different ways, general definitions for other levels of criminal state of mind might include:
- Knowingly*- the person acts with the knowledge that harm is nearly certain to occur (acts in a certain way with the knowledge that HIV transmission is near-certain).⁵⁸
 - Recklessly*- the person is aware of, but disregards, a substantial, unjustifiable risk of harm (acts in a certain way with the knowledge of substantial risk that is consciously disregarded).
 - Negligently*- the person was not, but should have been, aware of a substantial, unjustifiable risk that harm would occur (i.e. *ought* to have known that his/her conduct poses a substantial risk).⁵⁹
35. People living with HIV may have sex without disclosing their status for many reasons including: they do not think there is a risk, are not informed of the nature of the risks involved and/or do not know how to measure them; they assume that the partners consent to (unprotected) sex is an acceptance of the risk of exposure to HIV; they rightly think there is virtually no risk because they are using condoms or are on treatment; they fear abandonment, rejection or violence upon disclosure; and they rightly or wrongly think that their HIV status is known or presumed by their sexual partner. Consequently, lack of disclosure cannot be assumed to reflect an intent to do harm.

36. In light of the above elements, policy-makers and actors of the judicial system should pay specific attention to the following key points in their understanding and response to state of mind in the context of criminalisation of HIV non-disclosure, exposure and transmission:
- To avoid possible miscarriage of justice and unfair application of the criminal law, prosecution of alleged harms that occur in the context of consensual intimate relationships should require that the State prove the intention to cause harm – a culpable mental state.
 - Intent to harm and/or to transmit cannot be presumed or solely derived from knowledge of positive HIV status and/or failure to disclose HIV status.
 - Intent to transmit cannot be presumed or solely derived from intent to engage in unprotected sex or have a baby without taking steps to prevent mother to child transmission of HIV.
 - Proof of intent to cause harm in the context of HIV non-disclosure, exposure or transmission should at the least involve the following elements: (i) knowledge of positive HIV status; (ii) purposeful action that poses a significant risk of transmission; and (iii) knowledge that the alleged action posed a significant risk of transmission.
 - Active deception regarding positive HIV status can be considered an element in establishing the required state of mind but is not necessarily dispositive on the issue. The context in which the

⁵⁶ UNAIDS and UNDP (2008) *Criminalisation of HIV Transmission: Policy Brief*. Available at http://www.unaids.org/en/media/unaids/contentassets/dataimport/pub/basedocument/2008/20080731_jc1513_policy_criminalisation_en.pdf.

⁵⁷ Grover A *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, United Nations Human Rights Council, Fourteenth Session (A/HRC/14/20), 27 April 2010.

⁵⁸ It is worth noting that in some jurisdictions “knowing” and “intentional” are treated as similar state of mind. This is the case for instance in South Africa. See South African Law Commission *Fifth Interim Report on Aspects of the Law relating to AIDS: The Need for a Statutory Offence Aimed at Harmful HIV-Related Behaviour*, Project 85, 2001, pp 137-138. Available at <http://www.info.gov.za/view/DownloadFileAction?id=123790>

⁵⁹ These definitions are adapted from Model Penal Code, § 2.02, General Requirements of Culpability.

- deception occurred, including the mental state of the person living with HIV, should be assessed.
- f) No prosecution can proceed, for failure to prove the required state of mind, if the defendant:
- did not know his/her positive HIV status;
 - did not know how HIV is transmitted;
 - reasonably believed the other person had consented to the risk;
 - feared violence or other significant harm if s/he disclosed;
 - took reasonable measures to reduce risk by practicing safer sex (such as use of condoms for anal or vaginal sex, or by not engaging in anal or vaginal sex); or
 - reasonably believed that his/her treatment rendered him/her non-infectious.

DISCLOSURE, CONSENT AND OTHER DEFENCES IN THE CONTEXT OF CRIMINALISATION OF HIV NON-DISCLOSURE, EXPOSURE AND TRANSMISSION (SESSION 4)

37. Defences accepted to date in laws and court cases relating to HIV non-disclosure, exposure and transmission vary between countries and jurisdictions. Accepted defences include:
- a) disclosure of HIV-positive status;
 - b) consent to the risk and/or harm by the person exposed;
 - c) use of condoms or the practice of other safer sex methods to reduce the risk of HIV infection; and
 - d) an undetectable viral load.
38. In some jurisdictions, these elements are alternative defences, while in others, they are considered cumulative, meaning that several or all of them should exist for a person to avoid criminal liability. Though generally referred to as defences, these elements are in some jurisdictions part of the offence itself. Where these elements are part of the offence, the burden of proof lies on the prosecution, which should establish that the defendant failed to perform the required act, such as disclosing his/her positive HIV status, using a condom or obtaining the consent of the sexual partner.

Disclosure and consent as defences

39. Criminalisation of HIV non-disclosure, exposure and transmission has transformed knowledge of one's HIV status and the disclosure of it into a central feature of criminal law. As discussed above, in several jurisdictions and countries, non-disclosure of one's HIV-positive status prior to a sexual act or any act that carries any risk of HIV infection is sufficient to incur criminal liability, regardless of any other elements, such as actual risk, the intent to cause harm, and whether HIV was transmitted. Such laws or provisions are generally referred to as "HIV disclosure laws" as they rely on disclosure or the lack thereof as the sole determinant of criminal liability. In other countries, disclosure of HIV status is considered either an element of the crime or a defence available for the person accused.
40. Disclosure of one's positive HIV status is a personal decision that is affected by many factors, including denial, gauging trust, fear of rejection, and threat of violence. In certain situations, disclosure may lead to threats to physical safety, especially where there is unequal power in a relationship. In this regard, the requirement of disclosure may affect women disproportionately, as they are more likely to be subject to abandonment, abuse, violence and stigma if they reveal their HIV status.⁶⁰
41. The emphasis on an obligation to disclose suggests that many people and legal systems consider that there is a moral duty to disclose one's HIV status prior to sex. This view considers that those who agree to have sex without knowing their partner's HIV-positive status are not making informed decisions based on full knowledge. Some courts have characterised failure to disclose as "false

⁶⁰ See Athena Network "10 Reasons why criminalisation of HIV transmission harms women", 2010. Available at <http://www.athenanetwork.org/assets/files/10%20Reasons%20Why%20Criminalisation%20Harms%20Women.pdf>. This document discusses, among others, the harm that women face in having their HIV status disclosed, including that HIV-positive women are ten times more likely to experience violence.

pretences” or “fraud”. In some jurisdictions, this fraud is considered to vitiate consent resulting in a charge of “sexual assault”.⁶¹

42. Disclosure of positive HIV status carries many implications for both the positive person and the sexual partner. On the one hand, it can be argued that a person should have all material facts on which to base his/her consent to sex with another person. However, unless unequal power relations exist, the HIV negative person also has it within her/his power to take steps to protect him or herself from exposure and transmission, without certain knowledge of a partner’s HIV positive status (e.g. use a condom, avoid certain sexual acts).
43. On the other hand, the HIV-positive person has a right to privacy concerning his/her HIV status and should not be required to relinquish that right where s/he poses no significant risk of harm, that is, if the HIV-positive person is using condoms, not engaging in penetrative sex, or has an undetectable or very low viral load. Legally, the issue is whether positive HIV status is a relevant material fact in cases where there is no significant risk of harm requiring disclosure.
44. The law and the criminal justice system should appropriately delineate the conditions under which disclosure may be warranted. Given that the criminal law is reserved for acts that cause harm, it would seem that the requirement of disclosure of HIV status should depend on the level of risk or harm relating to certain acts. In Canada, several courts decisions have found in favour of this argument, although the exact nature of the level of the risk required to mandate disclosure remains unclear. In 2010, the Manitoba Court of Appeal in Canada held that there is no obligation to disclose HIV-positive status where a condom is properly used or where the HIV-positive person had an undetectable viral load.⁶² This decision is on appeal before the Supreme Court of Canada (hearing scheduled for February 2012).
45. It would seem that a blanket requirement of disclosure is not appropriate. Disclosure should not be required in circumstances where individuals engage in acts that carry no or minimal risk of HIV infection (e.g. non-insertive mutual masturbation or penetrative sex with a condom). Furthermore, any requirement of disclosure, under the criminal law, should take into account factors such as fear of violence and other concerns relating to physical safety, as well as the fact that disclosure can take various forms, including implicit or coded disclosure.
46. In terms of HIV prevention strategies and messages, the response to HIV has demonstrated that effective HIV prevention cannot be achieved by reliance on disclosure of HIV status. A significant number of those who are HIV-positive do not know it. Those who are recently infected, and thus most likely not to know that they are positive, are often very infectious. Due to stigma, self-stigma and discrimination, many HIV positive people are afraid or ashamed to disclose their status.⁶³ Thus, sending a message that disclosure is something that can be required, and relied upon, undermines prevention messages of individual and shared responsibility for sexual health and may create a false sense of security in the population resulting in more risky behaviour. Public health messages and campaigns should emphasise individual and shared responsibility and discourage people from relying on disclosure of HIV-positive status.
47. Consent is closely associated with disclosure. It refers to the acceptance by the sexual partner of the risk of HIV infection posed by a particular sexual or other act. Although under general criminal law in a number of jurisdictions, consent to harm does not prevent the possibility of criminal prosecution, it is very relevant in the context of criminalisation of HIV non-disclosure, exposure and transmission.

⁶¹ See, for instance, *Her Majesty The Queen v. Henry Gerard Cuerrier* [1998] 2 S.C.R. 371. Available at <http://scc.lexum.org/en/1998/1998scr2-371/1998scr2-371.pdf>.

⁶² *R v Mabior (CL)*, 2010 MBCA 93. Available at http://www.aidslaw.ca/EN/lawyers-kit/documents/5-6_MabiorCA2010-EN.pdf.

⁶³ See Brenner BG *et al* “High rates of forward transmission events after acute/early HIV-1 infection,” *Journal of Infectious Diseases* 2007; 195: 951–959, and also Marks G *et al*, “Estimating sexual transmission of HIV from persons aware and unaware that they are infected with the virus in the USA” *AIDS* 2006, 20: 1447–1450. According to this U.S. study, up to 70% of new infections are acquired from people who are undiagnosed.

Failing to recognise consent as a defence would subject all individuals living with HIV to the possibility of prosecution for HIV exposure or transmission including those in sero-discordant relationships where one partner's positive status is known by the other partner.

Use of condoms or the practice of other safer sex methods as defences

48. An extensive body of research has established that, although not 100% effective in preventing HIV infection, the consistent and correct use of male and female condoms provides a high level of protection.⁶⁴ A review of studies on the effectiveness of condoms found that condoms contribute to reducing the risk of HIV transmission by 80%.⁶⁵ In addition to condoms, other safer sex methods and practices can eliminate or significantly reduce the risk of HIV infection during sex. These include, but are not limited to, various forms of non-penetrative sexual relations.
49. The use of condoms and safer sex are central themes in HIV prevention messages. As a result, prosecution for HIV non-disclosure, exposure and transmission against individuals who use condoms or other safer sex practices would be contrary to public health messages and inherently unfair as it allows for the prosecution of individuals who follow public health advices and messages.

Undetectable or very low viral load as defences

50. As described above, the results of the HTPN 052 study have confirmed a 96% reduction in HIV transmission within discordant couples when the HIV-positive person is on effective treatment.⁶⁶ This evidence should be appropriately reflected in the legal and judicial response to HIV, including with regard to the appropriateness of effective antiretroviral treatment as a defence to charges of HIV non-disclosure, exposure and transmission. Given the strength of the evidence, failing to recognise effective HIV treatment and undetectable or very low viral load as defences runs contrary to current evidence-informed HIV prevention messages and could contribute to confusion among people living with HIV.

51. In light of the above elements, policy-makers and actors of the judicial system should pay specific attention to the following key points in relation to disclosure, consent and other defences in the context of criminalisation of HIV non-disclosure, exposure and transmission:
- Because the risk of HIV transmission can be made negligible by many means, including through consistent and correct use of condoms, by non-penetrative sex and by having, because of treatment, an undetectable or very low viral load; because privacy is a human right; and because disclosure may place an HIV-positive individual at risk of physical, mental or social harm, the criminal law should not impose a blanket requirement for disclosure of positive HIV status nor should non-disclosure alone be the basis for criminal prosecution.
 - Disclosure should be considered a defence to charges of HIV transmission.
 - Accurate and evidence-informed belief that one has reduced risks of transmission to a negligible level or disclosure of positive HIV status (whether explicit or reasonably implicit) should preclude a finding of the necessary intent to cause harm.
 - Since sex carries with it a variety of health risks, and since undiagnosed, and therefore unknown infection with HIV and other sexually transmitted infections cannot be disclosed, public health campaigns and the criminal law should emphasise the need for all sexually active individuals to take steps to protect themselves from HIV and other sexually transmitted infections.

⁶⁴ See, among others Weller SC and Davis-Beatty K "Condom effectiveness in reducing heterosexual HIV transmission (Review)" *Cochrane Database of Systematic Reviews* 1 (2002). Available at <http://www.aidslaw.ca/publications/interfaces/downloadFile.php?ref=1947>; and French PP et al. Use-Effectiveness of the Female Versus Male Condom in Preventing Sexually Transmitted Disease in Women. *Sexually Transmitted Diseases*, 30(5):433-439, 2003.

⁶⁵ Weller SC and Davis-Beatty K "Condom effectiveness in reducing heterosexual HIV transmission (Review)" *Cochrane Database of Systematic Reviews* 1 (2002). Available at <http://www.aidslaw.ca/publications/interfaces/downloadFile.php?ref=1947>. See also Canadian HIV/AIDS Legal Network "HIV non-disclosure and Canadian criminal law: condom use". Available at <http://www.aidslaw.ca/publications/interfaces/downloadFile.php?ref=1947>.

⁶⁶ Cohen MS. "Prevention of HIV-1 Infection with Early Antiretroviral Therapy" *New England Journal of Medicine* 2011 365:493-505. <http://www.nejm.org/doi/full/10.1056/NEJMoa1105243>.

PROOF IN THE CONTEXT OF CRIMINALISATION OF HIV NON-DISCLOSURE, EXPOSURE AND TRANSMISSION (SESSION 4)

52. For an individual to be found guilty of an offence relating to HIV non-disclosure, exposure or transmission, a number of elements of the alleged crime must be proven, as they would be for any crime. These include: (a) proof of intent to do wrong; (b) proof of acting on that intent by engaging in prohibited conduct; and (c) proof that the conduct caused the intended or foreseeable harm.
53. While proof of intent and proof of engaging in a prohibited conduct rely mainly on factual evidence, proof of causation, especially in relation to HIV transmission is increasingly based on evidence derived from medical and scientific methods. In jurisdictions that prosecute HIV transmission (as opposed to HIV non-disclosure or exposure), for individual A to be found guilty of HIV transmission to individual B, the prosecution has to establish that A (and not someone else) actually transmitted HIV to B.
54. HIV phylogenetic analysis can be an important tool to support or refute the hypothesis that individual A infected individual B.⁶⁷ HIV phylogenetic analysis uses computational tools to estimate how closely related the samples of HIV taken from two individuals (e.g. complainant and defendant) are likely to be in comparison to other samples. However, phylogenetic analysis is not “HIV fingerprinting”, and it cannot prove with the same sort of certainty as human genetic “fingerprinting” that A infected B.⁶⁸ HIV phylogenetic analysis does not eliminate the possibility that a third party may have passed HIV to someone else who then infected the complainant. Thus, phylogenetic analysis cannot prove that A infected B on its own, but it can be an important piece of information when combined with other evidence, such as the sexual histories and previous partners of the parties.
55. On the other hand, HIV phylogenetic analysis can provide strong evidence that an individual *cannot* have been the source of HIV infection in another person. Where the samples are not closely related with a high degree of confidence, this is evidence that the defendant could *not* have infected the complainant. Consequently, there is enough reasonable doubt to allow the prosecution to drop the charges, or for the judge to recommend to the jury that they acquit. Thus, experts in virology note that relying on phylogenetic analysis alone can only be considered “safe” in criminal HIV transmission cases when it is used to *exonerate* the accused.⁶⁹
56. The direction of infection (that is, who was infected first and then transmitted HIV to the other person) is often *assumed* in criminal cases based on who tested HIV-positive first. Such assumptions can mean that the police and/or prosecution fail to examine the possibility that the complainant infected the defendant rather than the other way around, or as stated above, other sexual partners were responsible for the complainant’s infection.
57. A number of jurisdictions that routinely use phylogenetic analysis as evidence in criminal cases – notably England and Wales, and Sweden – have now established that all sexual partners of the complainant(s), prior to their testing HIV-positive, should be considered potential sources of the HIV infection. In these countries, cases where past partners cannot be traced to provide samples for testing, or where the samples from past partners are also closely related to the complainant(s), have resulted in acquittal⁷⁰, dismissal⁷¹ or abandonment.⁷²

⁶⁷ Learn GH and Mullins JI *The Microbial Forensic Use of HIV Sequences*, 2003. Available at: <http://www.hiv.lanl.gov/content/sequence/HIV/COMPENDIUM/2003/partI/Learn.pdf>.

⁶⁸ Abecasis AB “Science in court: the myth of HIV fingerprinting” *The Lancet Infectious Diseases* 11 (2): 78 - 79, 2011.

⁶⁹ Pillay D *et al.* “HIV phylogenetics: criminal convictions relying solely on this to establish transmission are unsafe” *British Medical Journal* 335: 460 – 461, 2007.

⁷⁰ Carter M. “Prosecution for reckless HIV transmission in England ends with not guilty verdict”. Aidsmap.com, 9 August 2006.

⁷¹ “HIV-Positive Doc Gets Jail for Sex”, THE LOCAL, 21 June 2010 available at <http://www.thelocal.se/27366/20100621/>.

⁷² Bernard EJ. “UK: HIV transmission case dropped against gay Doncaster man. Criminal HIV Transmission”, 19 May 2010. 6 February 2012

58. Another element of proof in the context of HIV non-disclosure, exposure and transmission has been the use of evidence on viral load and CD4 count to establish the *timing* of HIV transmission. These might be useful elements when considered along with other factual and scientific evidence, but there is serious concern about the reliability of using viral load and CD4 count to estimate when someone was infected or how long they have been living with HIV.⁷³ CD4 counts and viral load levels can vary considerably depending on the stage of HIV infection and whether the person is on effective antiretroviral therapy or not. There is also a great deal of individual variability in these measures at different stages of HIV infection. Therefore, no firm conclusions can be drawn from such data. It is important that these limitations be appropriately highlighted in court cases.
59. A further tool that may be used as an element of proof is the Recent Infection Testing Algorithm or RITA test. It should be understood, however, that though these tests are important for estimating HIV incidence rates at the population level, they have serious limitations in establishing timing of transmission in the context of individual court cases.⁷⁴
60. Investigations in the context of cases of HIV non-disclosure, exposure and transmission generally focus on securing medical records that would normally be subject to heightened privacy protection. In proving their case, prosecuting authorities obtain, through warrant or subpoena, relevant records of diagnoses, viral load trends, and a medical history that may include other sexually transmitted infections, as well as health care providers' records about behavioural changes recommended to the defendant. However, because the use of medical records by the criminal justice system may decrease trust in the privileged nature of the relationship between patients and health care providers, care should be taken that this is not done without good cause.⁷⁵
61. In light of the above elements, policy-makers and actors of the judicial system should pay specific attention to the following key points in their understanding and response to proof in the context of criminalisation of HIV non-disclosure, exposure and transmission:
- As for any crime, appropriate standards of proof should be applied and all elements of HIV non-disclosure, exposure and transmission (where these are criminalised) should be proved beyond a reasonable doubt.
 - HIV phylogenetic evidence alone is insufficient to establish, beyond a reasonable doubt, that one person infected another person.
 - HIV phylogenetic evidence can establish conclusively that one person *did not* infect another person, but expert administration is necessary to ensure interpretable results.
 - CD4 count, viral load and RITA evidence cannot alone establish, beyond a reasonable doubt, that the HIV infection occurred within a certain period of time.
 - Expert witnesses should make the limitations of phylogenetic analysis, RITA and other scientific evidence clear to the judge, prosecution, defence and/or jury.
 - Communications between defendants and healthcare workers, including HIV counsellors, should remain privileged to the extent afforded these communications in other legal and court contexts.
 - Healthcare workers' primary ethical and professional duty is to their patients, and blurring the lines between care provision and law enforcement can violate this duty and undermine the ability to maintain patient trust.
 - Health care providers should refuse to release a patient's HIV-related records and information in the absence of patient authorisation or a court order.

⁷³ Rodriguez B *et al* "Predictive value of plasma HIV RNA level on rate of CD4 T-cell decline in untreated HIV infection" *Journal of the American Medical Association* 296 (12): 1498-1506, 2006.

⁷⁴ See Bernard EJ *et al* *Estimating the likelihood of recent HIV infection – implications for criminal prosecution*, 2011. Available at <http://www.nat.org.uk/Media%20library/Files/Policy/2011/RITA%20Testing%20Report.pdf>.

⁷⁵ Open Society Institute. *10 Reasons to oppose the criminalisation of HIV exposure or transmission*, 2008. Available at http://www.soros.org/initiatives/health/focus/law/articles_publications/publications/10reasons_20080918/10reasons_20081201.pdf.

PENALTIES IN THE CONTEXT OF CRIMINALISATION OF HIV NON-DISCLOSURE, EXPOSURE AND TRANSMISSION

62. A key principle of the criminal law is proportionality between an offence and the corresponding penalty. In most jurisdictions, it is the most serious offences – in terms of their harmful impact on others or on society – that would, in general, attract the highest penalties. As a result, an appropriate characterisation of the actual or potential harm of HIV non-disclosure, exposure and transmission is critical to estimating the nature and level of penalties to be applied to individuals found guilty of these offences. However, in most jurisdictions, punishments imposed for HIV non-disclosure, exposure and transmission are influenced by misconceptions about the actual risk and harm of HIV infection, including the incorrect assumption that it inevitably leads to death.
63. Sentences prescribed for HIV exposure, non-disclosure or transmission vary widely among jurisdictions and countries. For example, in the US, sentences ranging from 60 days to 60 years have been documented over the period 2008-2011.⁷⁶ Analyses of sentences and penalties for HIV exposure or transmission reveal much higher penalties compared to sentences for comparable or more serious offences, such as driving under the influence of alcohol (which is arguably comparable to HIV exposure) or vehicular homicide (which is arguably a more serious offence than HIV transmission). For instance, the maximum prison sentence for vehicular homicide in the state of Georgia in the US is one year⁷⁷, whereas the maximum sentence under its HIV-specific criminal law is 20 years.⁷⁸
64. Being prosecuted in an HIV non-disclosure, exposure or transmission case carries numerous consequences, including:
- a) publicity that may reveal name, address, HIV status, sexual orientation and sexual practices;
 - b) long and time-consuming trials, including lost work time;
 - c) deprivation of liberty through imprisonment or civil detainment;
 - d) designation as a “sex offender” with its serious constraints (regularly reporting to police, public notice of sex offender status, prohibition of certain forms of occupations, restriction on places of residence, etc); and
 - e) restrictions on liberty as long as a person is considered dangerous, or without defined limits, under civil commitment or sex offender registration schemes.⁷⁹
65. The US and Canada have far-reaching sex offender registry laws. Sex offender regimes attempt to identify, publicly tag, monitor, and indefinitely control the individuals who fall within their scope. Sex offender statutes may operate without the constitutional constraints that typically apply to penal statutes, allowing legislatures to impose the constraints described above on individuals, regardless of how long ago their criminal cases were concluded.⁸⁰
66. The experience and consequences of detention also raise issues for people living with HIV. Medical confidentiality in prisons may be disregarded, by design or through negligence; and antiretroviral drugs may be dispensed too openly or, at inappropriate intervals or may not be made available at all. Detention of people living with HIV may involve a choice between stigmatising segregation from other inmates or exposure to threats of violence among a prison’s general population. Finally, the risk of onward HIV transmission in prison may be higher than in the surrounding community, due to

⁷⁶ See Center for HIV Law and Policy, Prosecutions for HIV Exposure in the United States, 2008–2012, Available at <http://www.hivlawandpolicy.org/resources/view/456>.

⁷⁷ GA. CODE ANN. § 40-6-393(c) (2011) (2nd degree vehicular homicide).

⁷⁸ GA. CODE ANN. § 16-5-60(D) (2011) (person with HIV who knowingly uses bodily fluids against a correctional officer).

⁷⁹ For instance, Nushawn Williams whose prosecution in the state of New York, USA, for statutory rape and reckless endangerment was the subject of sensationalised media coverage (in the USA and beyond) remains in custody following completion of his eleven-year prison term, pursuant to a civil commitment statute enacted after his sentencing.

⁸⁰ See, for instance, Washington State, “Department of Corrections Sex offender treatment and community protection”. Available at <http://www.doc.wa.gov/community/sexoffenders/default.asp>.

lack of effective HIV prevention and treatment in prisons, the prevalence of injecting drug use, and consensual and forced sex between inmates.

67. In light of the above elements, policy-makers and actors of the judicial system should pay specific attention to the following key points in their understanding and response to penalties in the context of criminalisation of HIV non-disclosure, exposure and transmission:
- a) Penalties for HIV non-disclosure, exposure and transmission should be proportionate to the state of mind, the nature of the conduct, and the actual harm caused in the particular case, with mitigating and aggravating factors taken into due account.
 - b) The level of risk and harm should be evaluated according to evidence, science and medicine (as discussed above).
 - c) As like harms should be treated alike, penalties for HIV nondisclosure, exposure and transmission should be treated as like harms are treated under the criminal law.
 - d) Given the high incidence of HIV transmission and HIV-related stigma in prisons, alternatives to imprisonment should be considered, e.g. fines, restitution, community service, probation and/or public health measures.

ALTERNATIVES TO OVERLY-BROAD CRIMINAL PROSECUTION FOR HIV NON-DISCLOSURE, EXPOSURE OR TRANSMISSION (SESSIONS 5 & 6)

68. Criticisms and concerns raised against the overly-broad criminalisation of HIV non-disclosure, exposure and transmission have led policy-makers, health experts and actors of the judicial system to explore, consider and adopt alternative measures, policies and practices on the issue. Existing and possible measures and/or alternatives include: (a) sensitisation of police, prosecutors and judges, (b) prosecutorial guidelines, (c) public health measures and (d) scaling up of HIV prevention and treatment programmes to address behaviours that pose a risk of HIV exposure or transmission to others. The *Policy Brief* urged governments to “issue guidelines to limit police and prosecutorial discretion in application of criminal law ... and expand programmes which have been proven to reduce HIV transmission”.⁸¹

Sensitisation of police, prosecutors and judges

69. This paper has urged that the criminal law be informed by relevant knowledge, science and medicine relating to how HIV is and is not transmitted, what constitutes effective HIV prevention, how treatment impacts health and infectiousness, and how scientific means should and should not be used to establish proof. At a minimum, it is essential that police, prosecutors and judges are sensitized with sufficient information so that their understanding of the issues appropriately informs their official conduct. Sensitisation sessions, including with people living with HIV, should be conducted in any jurisdiction where HIV nondisclosure, exposure or transmission is criminalised.

Prosecutorial Guidelines

70. Prosecutorial guidelines do not entail a total departure from criminal prosecution. Rather, they represent a mechanism by which to limit and standardise prosecutions in the context of HIV, thus protecting individuals against overly-broad, uninformed and/or unfair prosecutions. They represent a formal source of guidance to which police, prosecutors and judges can turn to appreciate if and how the law should be applied to HIV non-disclosure, exposure and transmission. Prosecutorial guidelines can help to ensure that any such prosecutions are based on the best available scientific evidence relating to HIV, uphold legal and human rights principles and are aligned to public health strategies.

⁸¹ UNAIDS & UNDP, *Criminalisation of HIV Transmission: Policy Brief*, 2008. Available at http://data.unaids.org/pub/basedocument/2008/20080731_jc1513_policy_criminalization_en.pdf.
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71. In England and Wales, where such guidelines exist, they provide guidance to prosecutors regarding which cases should and should not be subject to prosecution.⁸² The guidelines also address evidential, witness and victim care issues. For instance, the guidelines advise *against* bringing prosecutions against an individual in the following circumstances:
- When there is evidence that the accused took appropriate safeguards to prevent the transmission of STIs throughout the entire period of sexual activity, and evidence that those safeguards satisfy medical experts as reasonable in light of the nature of the STI;
 - When someone who is HIV-positive is receiving effective antiretroviral therapy so that the possibility of transmitting HIV to another person is significantly reduced.⁸³
72. Because of the critical role of the police in launching investigations that may ultimately result in prosecutions for HIV non-disclosure, exposure or transmission, it is important that the police benefit from similar guidelines. In England and Wales, guidelines have also been produced to provide clear protocols to police officers dealing with complaints, arrests, confidentiality and other sensitive issues relating to HIV.⁸⁴

Public health measures

73. In some jurisdictions and countries, public health measures are invoked to address behaviour that places others at risk of HIV infection. In these contexts, individuals living with HIV who expose others to the risk of HIV infection may be subjected to a variety of measures that increase in seriousness in proportion to perceived need. This model focuses on public health approaches and is centred on the welfare and behaviour of the individual living with HIV through an emphasis on counselling and support.⁸⁵
74. In Australia, where such a system is in place, the process is initiated when a physician contacts a public health office to express concern about a patient's behaviour. The case is referred to a panel comprised of sexual health physicians, epidemiologists and members of local organisations of people living with HIV. At "Level 1" of the procedure, the identified individual is provided with comprehensive counselling, education and support aimed at ensuring that the person understands the risk posed to others by his/her conduct. In rare cases where the least restrictive measures do not prove successful, the panel may recommend increasingly coercive measures that at the highest stages may involve isolation or detention under public health orders.⁸⁶
75. Reservations concerning public health approaches that lead to restriction of individual rights relate mainly to the following:
- a) Public health law may not offer judicial guarantees and due process protections (including judicial review of public health measures). There is indeed evidence in some jurisdictions of the use of public health measures to confine individuals for up to several months or years without due process.
 - b) Public health measures are sometimes used as an initial stage towards criminal prosecution for HIV-non disclosure, exposure or transmission. Elements from the public health process may be invoked as evidence in criminal court cases against individuals living with HIV.

⁸² See Crown Prosecution Service "Legal guidance on intentional or reckless sexual transmission of infection". Available at http://www.cps.gov.uk/legal/h_to_k/intentional_or_reckless_sexual_transmission_of_infection_guidance/.

⁸³ As above.

⁸⁴ NAT and Association of Chief Police Officers (ACPO). *ACPO Investigation Guidance relating to the Criminal Transmission of HIV*. NAT, 2010. Available at: <http://www.nat.org.uk/Our-thinking/Law-stigma-and-discrimination/Police-investigations.aspx>.

⁸⁵ Scamell D and Ward C "Public health laws and policies on the issue of HIV transmission exposure and disclosure" in National Association of People Living with HIV/AIDS *The criminalisation of HIV transmission in Australia: legality, morality and reality*, NAPWA Monograph 2009, pp 48-59. Available at <http://napwa.org.au/files/napwa%20monograph%2009.pdf>.

⁸⁶ As above. A similar graduated approach is laid out in "Persons who fail to disclose their HIV/AIDS status: Conclusions reached by an Expert Working Group", *Canada Communicable Disease Report* 2005; 31(05): 53-61, online: <http://www.phac-aspc.gc.ca/publicat/ccdr-rmtc/05vol31/dr3105a-eng.php>

- c) The use of public health measures could affect trust in the health care provider who referred a case to public health officials in the first place and in the health care system more generally.⁸⁷

HIV programmatic responses

76. Rather than focusing on the identification and punishment of those who place others at risk, HIV programmatic responses offer a framework for addressing risky HIV-related behaviour at population and individual levels. Unfortunately, in many countries, HIV programmes, services and commodities are either not sufficiently available or are not taken up because of fear, ignorance, stigma and discrimination. In the 2006 *Political Declaration on HIV/AIDS*, governments had committed to promote “a social and legal environment that is supportive of safe and voluntary disclosure of HIV status”.⁸⁸ This commitment was reiterated in the 2011 *Political Declaration on HIV/AIDS* which urges governments to address laws and policies that “adversely affect the successful, effective and equitable delivery of HIV services and consider their review”.⁸⁹ These commitments call for expanding HIV prevention messages, strategies and tools to ensure that all individuals are empowered and receive the means to protect themselves against the risk of HIV infection. As the benefit of treatment for HIV prevention is now established, specific efforts should be made to expanding voluntary testing and treatment services. Expansion of these basic programmes (i.e. HIV prevention and treatment) should be accompanied by programmes that will enable them to be effective.⁹⁰ These programmes, referred to as “critical enablers”, include, among others, programmes to reduce stigma and discrimination; train health care workers on non-discrimination, informed consent and confidentiality; and provide legal literacy and services on the rights and responsibilities of people living with HIV or vulnerable to HIV.⁹¹
77. “Positive Health, Dignity and Prevention” is a relatively new concept that provides a comprehensive framework for programmatic responses for people living with HIV. These responses protect people living with HIV from stigma and discrimination, provide them with treatment and treatment literacy, and seek to meet their psychosocial and nutritional needs.⁹² Such a framework is crucial to enable people to feel confident to come forth to get tested for HIV, to take up treatment if HIV-positive and to follow through on HIV prevention messages.

78. In light of the above elements, policy-makers and actors of the judicial system should pay specific attention to the following key points in their understanding and response to measures and alternatives to address the overly-broad criminalisation of HIV non-disclosure, exposure and transmission:
- a) Given the fact that HIV and other sexually transmitted infections involve complex human behaviour as well as scientific and medical considerations, police, prosecutors and judges

⁸⁷ For an elaboration on these concerns, see UNAIDS *Criminal Law, Public health and HIV transmission: A policy options paper*, 2002, pp 23-27. Available at http://data.unaids.org/publications/IRC-pub02/jc733-criminallaw_en.pdf.

⁸⁸ United Nations General Assembly *Political Declaration on HIV/AIDS*, A/RES/60/262, 15 June 2006, para 25. Available at http://data.unaids.org/pub/Report/2006/20060615_hlm_politicaldeclaration_ares60262_en.pdf.

⁸⁹ United Nations General Assembly *Political Declaration on HIV/AIDS: Intensifying our efforts to eliminate HIV/AIDS*, June 2011, A/RES/65/277. Available at http://www.unaids.org/en/media/unaids/contentassets/documents/document/2011/06/20110610_UN_A-RES-65-277_en.pdf.

⁹⁰ Schwartländer B et al “Towards an improved investment approach for an effective response to HIV/AIDS” *The Lancet* Vol 377, Iss 9782, 2031-2041, 2011.

⁹¹ These programmes are also recommended in the 2011 Political Declaration of HIV/AIDS endorsed by governments at the June 2011 High Level Meeting on AIDS. See United Nations General Assembly *Political Declaration on HIV/AIDS: Intensifying our efforts to eliminate HIV/AIDS*, June 2011, A/RES/65/277, para 80. Available at http://www.unaids.org/en/media/unaids/contentassets/documents/document/2011/06/20110610_UN_A-RES-65-277_en.pdf.

⁹² Rather than focusing narrowly on the sexual behaviour of people living with HIV, ‘Positive Health, Dignity and Prevention’ highlights the importance of HIV-positive individuals being at the centre of addressing their health and wellbeing, with access to the programmes and support they need, within a socio-cultural and legal context which protects from stigma and discrimination. Policies and programmes that are designed and led by people living with HIV, and treat HIV-positive people humanely and holistically – as opposed to being treated as potential vectors of transmission to be controlled via punitive measures – are likely to have a greater acceptance from people living with HIV; encourage beneficial disclosure of HIV status; and by reducing HIV-related stigma and discrimination, may have myriad beneficial effects for their partners, families and communities. See GNP+ and UNAIDS *Positive Health Dignity and Prevention: A Policy Framework*, January 2011.

should be provided with appropriate knowledge and understanding of HIV.

- b) Prosecutorial guidelines with clear definitions of intent, risk, harm and proof should be developed in every jurisdiction where the criminal law is applied to HIV non-disclosure, exposure and transmission and should guide police, prosecutors and judges.
- c) The essence of prosecutorial guidelines should be made publicly available in an accessible form to inform people living with HIV, the general public, and health care and legal service providers of what the law provides.
- d) Alternatives to criminal prosecution, such as public health measures, should be considered, though these should provide full due process and be based on clear understanding of relevant science, evidence and medicine relating to HIV.
- e) HIV prevention and treatment programmes, including the holistic approach of “Positive Health Dignity and Prevention”, should be expanded so as to enable all people, including those living with HIV to take steps to prevent HIV transmission.

Conclusion

79. Based on the considerations presented above, governments and civil society partners are urged to consider the best ways to achieve justice and support public health efforts in the context of HIV non-disclosure, exposure and transmission. Achieving these will require that they take the following steps to reform the criminal law in relation to HIV and/or invoke alternatives to it through:

- a) assessing whether the application of criminal law is informed by the latest scientific and medical evidence relating to HIV transmission, prevention and treatment;
- b) assessing whether HIV non-disclosure, exposure and transmission are treated comparably to similar risks and harms, or singled out for unwarrantedly harsh treatment;
- c) assessing whether any law and practices that criminalizes HIV nondisclosure, exposure and transmission appropriately applies standard criminal law principles regarding intent, harm, risk, proof and penalties;
- d) ensuring that prosecutorial guidelines are developed and applied so as to limit prosecutions to truly blameworthy cases and to give clear guidance to the law enforcement community and the public on the reach and scope of the law in this area;
- e) sensitisation of police, prosecutors, judges and the media regarding the real nature of risks, harms, intent and proof, according to relevant science and medicine, as well as the harm of stigma and discrimination in the context of HIV; and enhancing alternative approaches to criminalisation, such as expanded HIV prevention programmes, including programmes that enable people living with HIV and others to avoid HIV transmission, intensive counselling and support for behaviour change, and other public health approaches with full due process protections.