

10

Reasons Why
Criminalization
of HIV Exposure or Transmission
Harms Women

Copyright © 2009 by the ATHENA Network. All rights reserved.

To endorse the document or for more information, please contact:

ATHENA Network: www.athenanetwork.org

AIDS Legal Network: www.aln.org.za

ARASA: www.arasa.info

10 REASONS

Recently, laws that specifically criminalize HIV transmission and exposure have been enacted, or are pending, in parts of Africa, Asia, Latin America, and the Caribbean. At the same time, particularly in Europe and North America, existing criminal laws are increasingly being used to prosecute people for transmitting HIV or exposing others to HIV. In addition to criminalizing the transmission of HIV, these laws sometimes call for mandatory HIV testing of pregnant women, as well as for non-consensual partner disclosure by healthcare providers; further exacerbating the impact of such legislation on women.

The call to apply criminal law to HIV exposure and transmission is often driven by a well-intentioned wish to protect women, and to respond to serious concerns about the ongoing rapid spread of HIV in many countries, coupled with the perceived failure of existing HIV prevention efforts. While these concerns are legitimate and must be urgently addressed, closer analysis reveals that criminalization does not prevent new HIV transmissions or reduce women's vulnerabilities to HIV. In fact, criminalization harms women rather than assists them, while negatively impacting on both public health needs and human rights protections.

10 REASONS

10 Reasons to Oppose the Criminalization of HIV Exposure or Transmission, a document released in December 2008 by a broad coalition of HIV & AIDS, human rights, and women's organizations, provides ten reasons why criminalizing HIV exposure or transmission is generally an unjust and ineffective public policy. This document further expands on one of these ten reasons, by detailing how applying criminal law to HIV exposure or transmission – far from providing justice to women – endangers and further oppresses women.

Applying criminal law to HIV

exposure or transmission does nothing to address the epidemic of gender-based violence or the deep economic, social, and political inequalities that are at the root of women's and girls' disproportionate vulnerability to HIV. On the contrary, for the 10 reasons identified below, criminalization is likely to heighten the risk of violence and abuse women face; strengthen prevailing gendered inequalities in healthcare and family settings; further promote fear and stigma; increase women's risks and vulnerabilities to HIV and to HIV-related rights violations; and have other negative outcomes for women.

10 REASONS

1 *Women will be deterred from accessing HIV prevention, treatment, and care services, including HIV testing:*

Many women fear violence and rejection associated with disclosure and an HIV positive diagnosis. The criminalization of HIV transmission or exposure may generate additional obstacles to healthcare for women. Prevailing stigma, discrimination and other violations of rights, including the lack of assured confidentiality, already pose a barrier to HIV prevention and testing services. The fear of an HIV positive diagnosis and the potential of subsequent prosecution is already discouraging pregnant women from accessing antenatal care, for fear that they will test positive and be exposed to abuse. Criminalizing HIV exposure or transmission also potentially undermines the effectiveness of child health, maternal health and perinatal HIV transmission programs, as women may choose not to access these services, due to fear. Thus, women are essentially being prevented from accessing available treatment and care services, for themselves or their children.

2 *Women are more likely to be blamed for HIV transmission:*

Women are often the first to know their HIV positive status; particularly as governments move towards provider-initiated HIV testing and counseling in pre-natal settings. Thus, women are more

10 REASONS

likely to be blamed by health staff, by their intimate partners, their partners' families, and their communities for *'bringing HIV into the home'*. This blame and stigma can result in eviction, ostracism, abandonment, loss of property and inheritance, and loss of child custody. Laws criminalizing HIV exposure or transmission would only provide another tool to oppress women. This is especially true insofar as apportionment of blame is still an important part of both customary and formal legal systems in relation to divorce and inheritance.

3

Women will be at greater risk of HIV-related violence and abuse:

While violence increases women's risks of HIV transmission, women's HIV-positive diagnosis also increases the risks of violence. The fear of violence deters women from disclosing their HIV status. Research indicates that young positive women are ten times more likely to experience violence and abuse than their HIV negative counterparts. There are also increasing reports of women being killed by their partners for *'bringing HIV into the family'*. Criminalizing HIV exposure or transmission is likely to increase incidences of violence and abuse against positive women, as women may feel forced to disclose their positive HIV status to avoid prosecution, while risking violence and abuse at the hands of partners and family.

6

10 REASONS

4 *Criminalization of HIV exposure or transmission does not protect women from coercion or violence:*

Sexual violence and rape, including marital rape, place women worldwide at risk of HIV transmission. Laws against sexual violence, where they exist, are often poorly enforced. Similarly, government policies and guidelines that call for providing sexual violence survivors with necessary medical treatment, including emergency contraception to prevent pregnancy and post-exposure prophylaxis to prevent contracting HIV, are often not implemented. Criminalization of HIV exposure and transmission does not protect women from sexual violence and rape, nor from unwanted pregnancy. Instead, it will increase women's risk of '*secondary criminalization*', as rape survivors who have been infected with HIV could be found potentially liable for prosecution of HIV exposure and transmission.

5 *Women's rights to make informed sexual and reproductive choices will be further compromised:*

The patriarchal context of society undermines the power of many women to make informed choices, including sexual and reproductive choices. As a result, women are often not in a position to negotiate the conditions of sex, including whether or not to engage in sex, as well

10 REASONS

as to negotiate condom use. Women also often have limited access to sexual and reproductive health and rights information to inform their choices, and to access non-discriminatory and unbiased sexual and reproductive healthcare services. Criminalization of HIV exposure or transmission may further limit women's ability to choose whether or not, how, when and with whom to engage in sex – as well as to choose whether or not to have children – due to the risk of being prosecuted for exposing and/or transmitting HIV to a partner and/or child. Further, criminalization undermines the promotion of sexual and reproductive health and rights of HIV positive women.

⑥ *Women are more likely to be prosecuted:*

Since women are more likely to know their HIV status, they are also more likely to be prosecuted for HIV exposure and transmission, since knowledge of one's HIV positive status is often a necessary element for prosecution. At the same time, women are least likely to have access to legal services and, thus, a fair trial. The burden of proof and the biased application of the law further increase women's risks of being charged, prosecuted and found 'guilty' of HIV exposure or transmission.

10 REASONS



Some women might be prosecuted for mother-to-child transmission:

Some laws criminalizing HIV transmission or exposure are drafted broadly enough to include transmission during pregnancy or breastfeeding. For millions of women living with HIV – but often denied access to family planning, reproductive health services, or medicines that prevent perinatal transmission of HIV – this effectively makes pregnancy, intended or not, a criminal offense. Further, it is increasingly recognized that in many middle and low-income settings, breastfeeding is the best option for child survival and well-being, despite the possibility of HIV transmission. There are many more effective ways to prevent perinatal transmission of HIV, beginning with supporting the rights of all women to make informed decisions about pregnancy and providing them with sexual and reproductive information and services; preventing HIV in women and girls in the first place; preventing unwanted pregnancies among all women; and providing effective medication and healthcare services to prevent perinatal transmission for HIV positive women who wish to have children or who are pregnant.

10 REASONS

8

Women will be more vulnerable to HIV transmission:

Existing barriers limiting women's access to information, resources and services, including gender inequalities and inequities, will be compounded by the fear of prosecution for HIV exposure or transmission. The gendered access to health information and services, combined with the fear of being criminalized for exposing or transmitting HIV to someone, will place women in an even lesser position of power to negotiate conditions of sex, as negotiating condom use may be perceived as *'proof'* of knowledge of an HIV positive diagnosis.

9

The most 'vulnerable and marginalized' women will be most affected:

'Vulnerable and marginalized' women, such as women in same-sex relationships, and women sex workers and drug users, often lack adequate access to HIV prevention, testing, treatment, care, and support services, primarily as a result of their existing *'criminalized'* status. The criminalization of HIV exposure and transmission is likely to further stigmatize already *'criminalized'* women and to constitute yet another barrier to healthcare and other services by posing a threat of double prosecution

10

10 REASONS

– prosecution for engaging in ‘*criminal behavior*’ and for HIV exposure or transmission.



Human rights responses to HIV are most effective:

Now, more than ever, greater attention to human rights is needed in the response to the global HIV epidemic. Criminalizing HIV exposure and transmission compromises human rights, undermines public health initiatives, and increases especially women’s risks and vulnerabilities.

10 REASONS

Rather than responding to HIV by creating fear through criminalization, human rights emphasize protecting the dignity – including the sexual rights – of all people, and create conditions in which people can make free and informed choices about their health and their lives.

These conditions include:

- the right to unfettered information, to the tools and technologies of HIV prevention; and to the right to make informed decisions about intimate matters, such as sex and sexuality, as well as pregnancy;
- freedom from all forms of violence, from assaults on bodily integrity, from marital rape and

- all forms of sexual coercion;
- freedom from arbitrary arrest, detention, and prolonged incarceration under laws criminalizing sex work, drug use, and same-sex relationships;
- equal access to property and inheritance, so that women are not driven into poverty and higher HIV vulnerability by the death of their spouse or through dissolution of marriage.

When conditions such as these are met – when all people have equal control over their sexual lives and are in the position to make free and informed decisions about all forms of HIV prevention options – the criminalisation of HIV exposure or transmission will be a thing of the past.

10 REASONS

The ‘10 Reasons Why Criminalization of HIV Exposure or Transmission Harms Women’ was drafted by Dr. Johanna Kehler of the AIDS Legal Network (ALN), Michaela Clayton of the AIDS & Rights Alliance for Southern Africa (ARASA), and Tyler Crone of the ATHENA Network; under the auspices of, and in collaboration with, the ATHENA Criminalization and HIV – Implications for Women Working Group. Additional Working Group members include (institutional affiliations for identification purposes only):

Aziza Ahmed, Program on International Health and Human Rights, Harvard School of Public Health, USA

Laura Bisailon, University of Ottawa, Canada

Amandine Bollinger, Salamander Trust, UK

Maria de Bruyn, Ipas, USA

Dr. Lorena Di Giano, Argentine Network of People Living with HIV/AIDS, Argentina

Jennifer Gatsi, Namibia Women’s Health Network, Namibia

Fiona Hale, Salamander Trust, UK

Coco Jervis, Treatment Action Group, USA

Ralf Jürgens, OSI Law and Health Initiative, Canada

Tamil Kendall, University of British Columbia, Canada, and Balance, A.C., Mexico

Abimbola Onigbanjo, Center for the Right to Health, Nigeria

Leah Auma Okeyo, World Pulse, Kenya

Elisa Slattery, Center for Reproductive Rights, USA

Lucy Stackpool-Moore, IPPF, UK

10 REASONS

Marion Stevens, Health Systems Trust, South Africa

**Martha Tholanah, Network of Zimbabwean Positive Women (NZPW+),
Zimbabwe**

Belinda Tima, UK

Dr. Alice Welbourn, Salamander Trust, UK

The authors gratefully acknowledge the Law and Health Initiative of the Open Society Institute Public Health Program for its valuable input and continuous support around the development of this document.

We also like to express our thanks to OXFAM International, and the Open Society Institute International Harm Reduction Development Program for their financial support.

Though impossible to mention all by name, we wish to express our gratitude to all the many contributing individuals and organizations for their valuable inputs. Special thanks to all who participated in the July 2009 consultation in Cape Town, the September 2009 virtual Southern African consultation with ARASA members, the October 2009 consultations in Moscow, and the November 2009 consultation in Vienna. Special thanks also to Silvia Petretti and Sophie Strachan of Positively Women; Moono Nyambe of GNP+; and Cécile Kazatchkine and Sandra Chu of the Canadian HIV/AIDS Legal Network.

The following organizations endorse this document

