



## Call for “Zero Tolerance” of Violence

The Global Aids Alliance [GAA] has added its voice to the growing list of those calling for more decisive action to address violence against women and children as a key risk factor for HIV infection.

In a recent report entitled “*Zero Tolerance: Stop the Violence Against Women and Children, Stop HIV/AIDS*”, the GAA points out that violence of all kinds is central to the HIV/AIDS epidemic. Women who have experienced violence may be up to three times more likely to acquire HIV, and women who are living with HIV have more lifetime experience of violence than those who are not.

The GAA cautions that unless a fully-funded, comprehensive approach is taken, it will not be possible to address the twin epidemics of violence and HIV and AIDS. The report makes a number of recommendations regarding funding, noting that funding must be used more wisely by integrating violence against women and children into existing programming. One way to do this would be

to reserve 10% of all HIV/AIDS budgets (those of donors and national governments alike) for programmes to address violence against women and children.

The GAA report further proposes a comprehensive framework for eradicating violence against women and children, consisting of six pillars:

### Political Commitment and Resource Mobilisation

Many of the conditions that perpetuate violence against women and HIV/AIDS – such as economic injustice, inequitable gender norms, inadequate health, education and legal infrastructures – are large systemic problems. An immediate infusion of sufficient and predictable financial, technical and human resources is necessary to address these problems. Political commitment must occur at the country, international and civil society levels. The international commitment should include creation of a Global Task Force on Violence Against Women and Children, consisting amongst others of UN agencies, donor and affected country governments, and civil society organisations.

### Legal and Judicial Reform

Countries should immediately enact and enforce legislation criminalising all forms of violence against women and children, and legally mandate appropriate training for judicial professionals. The document identifies disturbing gaps in the legal systems of the countries with the highest HIV/AIDS prevalence, including Swaziland, Botswana, Lesotho and South Africa.

### Health Sector Reform

Comprehensive reform of the health sector is needed to ensure that violence against women and children is an essential element

of universal access to care. This includes the incorporation of violence prevention and treatment into national health strategies. Securing reliable forensics and laboratory facilities for provision of medico-legal services for sexual assault is also important.

### Community Mobilisation for Zero Tolerance

Except in situations of armed conflict, almost all violence occurs at the family and interpersonal levels. Communities themselves must therefore be engaged in efforts to eradicate violence.

The fifth and sixth pillars identified by the report are *mass marketing for social change* (i.e. widespread campaigns aimed at eradicating tolerance of violence and modifying harmful gender norms) and *education sector reform* (for example, incorporating gender and violence training throughout the education sector for professional certification).

The report also includes a number of case studies illustrating innovative practices, some of these drawn from the African context. It concludes with this compelling statement:

*“Leaders of all nations committed themselves, at the 2006 UN General Assembly Special Session on HIV/AIDS, to bold action to stop violence against women and children. Now, action is needed to make good on this promise and establish a norm of zero tolerance toward violence. To stop HIV/AIDS, we must stop the violence against women and children.”*

Global AIDS Alliance 

‘Iminyango’ is the isiZulu word for ‘doors’. This title is derived from the following explanation for the intersection between gender-based violence and HIV/AIDS, given by a survivor of domestic violence (who had also contracted HIV from her abusive partner):

“Gender-based violence happens behind closed doors and HIV is killing women behind those closed doors. The solution is to break down those doors.”



# Keeping the Lid on Pandora's Box:

## Criminalising HIV Transmission or Exposure in South Africa

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### Introduction

Given the fact that Southern Africa forms the epicentre of the AIDS pandemic, it is significant that a number of countries in this region have recently adopted legislation criminalising HIV transmission or exposure or are moving towards this step. There are three major factors that support the perception of criminal law as an important constituent of the structural response to HIV and AIDS in the Southern African context. These factors are the high HIV prevalence rate, the high incidence of sexual violence and calls for 'tough' governmental action.

Proponents of criminalising HIV transmission/exposure further argue that this measure prevents behaviour that is likely to transmit HIV, educates the public on such activities and reinforces social norms against 'high-risk' conduct. Criminal law increases the cost of engaging in illegal behaviour and, as a result, prevents people from pursuing prohibited activities. Both the likelihood of detection and the severity of punishment are believed to modify individual behaviour. Therefore, it is expected that the use of criminal law to punish certain harmful HIV-related conduct will deter people from engaging in the prohibited behaviour.

This article addresses the question of whether the criminal law does indeed have a significant role to play in addressing the HIV and AIDS pandemic in Southern Africa, paying specific attention to vulnerable and marginalised groups such as women.

### Overview of Criminal Law Measures for Prosecution of HIV Transmission or Exposure

#### Traditional Criminal Offences

All Southern African countries have in their criminal law offences that could be used for prosecuting HIV transmission/exposure.

#### Murder

Generally, three elements are required to secure a conviction of murder, namely

conduct, causation and a state of mind (intention). The purposeful mind will be established when the person, aware of his or her positive sero-status, acted with the actual intent to cause the death of the victim. The problem with establishing intent is that most people are not aware of their HIV status. The hurdle of causation is that it is difficult to establish that the HIV infection was contracted from the accused, especially when the victim has had multiple sexual partners, multiple sources of infection, or belong to groups that are considered at higher risk of infection. Also, prosecution for murder requires the death of the victim while death from HIV infection is unlikely to occur until years after the act of transmission.

#### *Manslaughter (culpable homicide)*

Conduct, causation and state of mind similarly are necessary for the offence of manslaughter to be proved. Unlike murder, manslaughter (or culpable homicide) does not require proof of intent to kill, but rather negligence. The main problem with this is that it leaves the jury or judge with the onus to decide how a 'reasonable person' in the circumstances of the accused/defendant should have acted, resulting in the risk of prejudice and selective enforcement.

#### *Assault*

The prosecution of HIV transmission or exposure under the offence of assault has the advantage that it does not require the death of the victim. The prosecution must establish that the accused was aware of their HIV-positive sero-status and knew or believed that their conduct could transmit HIV.

#### *Attempted Murder*

Attempted murder also demands the proof of a purposeful or knowing state of mind. Therefore, the prosecution will have to show that the accused/defendant acted with the purpose and intent of infecting another.

The obstacles emerging from the application of traditional criminal law offences to HIV transmission/exposure reveal the truth that these offences were not developed with HIV in mind. Common law offences are unfair to the accused, formidable for the prosecution to prove and as a result ill-suited to play any effective role in the context of HIV.

Traditional criminal law offences have rarely been used in Southern Africa to prosecute HIV transmission/exposure. If there really was an urgent need for the criminal law to play a pronounced role, such offences could have been expected to be used more often. This lack of prosecution has been explained by invoking the difficulties in securing a conviction for HIV transmission/exposure under the traditional criminal offences. However, one would then have expected that other crimes that are easier to establish (some of which are examined below) would be used to target these acts.

#### Prosecution of HIV Transmission or Exposure under Offences Prohibiting Exposure to Diseases

A number of countries (for example, Malawi and Zambia) have provisions in their public health and penal legislation that criminalise exposure to diseases. (None specifically refer to HIV; instead, they target 'sexually transmitted diseases' or 'venereal diseases'.) The state must prove the likelihood of infection and a wilful or negligent state of mind on the part of the accused. Similar to the traditional criminal offences, proving knowledge of HIV status is difficult where intention is required. Where negligence is required, 'the reasonable person' fiction could also lead to unfair results.

Prosecution of HIV Transmission or Exposure under HIV-Specific Legislation Zimbabwe and Lesotho have adopted specific legislation criminalising HIV transmission/exposure, and South Africa and Swaziland have developed draft legislation including such provisions.\* The Sexual Offences Act of Zimbabwe has a provision on the 'deliberate transmission of

HIV', while the other countries make it a rape for an HIV-infected person to have sexual intercourse without informing their partner of their sero-status. Despite these variations, the provisions of HIV-specific legislation are generally articulated around knowledge of HIV infection, prohibited sexual conduct and consent of the victim.

#### *Knowledge*

HIV transmission/ exposure laws provide for criminal liability only where the accused knows his or her HIV infection. The Sexual Offences Act of Zimbabwe and Lesotho clearly indicate the necessity to establish the knowledge of infection. While these statutes require knowledge of infection, they are not clear as to what amounts to knowledge of infection. Does actual knowledge refer to an HIV positive test? Or does it also include a clinical diagnosis of AIDS by a physician specialising in infectious diseases?

#### *Prohibited Conduct*

These statutes refer to 'sexual act', 'act which causes penetration', 'anything' without providing more information about these activities. These expressions are vague and too broad. For instance, they could include in their scope an act such as mutual masturbation, which carries no or very low risk of HIV transmission.

#### *Consent of the victim and/or use of protection*

HIV transmission statutes consider the consent of the victim and/or the use of protection an affirmative defence to the crime or an element of the crime. The Sexual Offence Act 2003 of Lesotho, for instance, only requires the disclosure of HIV positive status and the consent of the victim for a person to avoid prosecution. It does not take into account the fact that the sexual acts may not carry a 'significant risk of infection' (sec 3). Therefore, an accused who informs the victim of their HIV-positive status and engages in a sexual act without protection with the victim's consent, would not be guilty of a crime. This provision fails to promote the message of safe sex.

It appears that Southern African HIV transmission statutes fail to fulfill the hopes of fairness, clarity and efficiency. They include nebulous and confusing expressions instead of providing precision about the prohibited conduct, thereby failing to realize the promise of impartiality for the accused.

#### *Criticism of the Use of Criminal Law*

A complex mixture of social, biological, legal or economic factors contributes to

marginalise groups such as commercial sex workers, women, men who have sex with men and people living with HIV/ AIDS, and render them more vulnerable to HIV infection or to stigma and discrimination. Due to their situation of vulnerability and/or marginalisation, members of these groups are likely to perceive or experience the criminalisation of HIV transmission or exposure in a way that might be different to that of other members of the community.

Impact Resulting from Content and Enactment of Criminal Law Measures  
The first potential result is that the criminalisation of HIV transmission could undermine public health interventions targeting vulnerable and marginalised groups. A preliminary requirement for the prosecution of individuals for HIV transmission/ exposure is the knowledge of their (positive) HIV status. Opponents of criminalisation have argued that it will deter people from seeking HIV testing. The second potential result is that it could increase the vulnerability of certain categories of people. Due to routine testing at ante-natal clinics in several Southern African countries, women are usually the first to know about their HIV-positive status. The only way these HIV-positive women can avoid prosecution is to disclose their HIV-positive status to their partners. However, studies in Southern Africa and elsewhere reveal that following disclosure of their HIV status to their partners, women face negative outcomes ranging from physical abuse to abandonment. Women would therefore be 'trapped' between the fear of abusive reaction from their partners following disclosure of their status and the potential prosecution and conviction for HIV transmission/exposure.

Impact Resulting from Enforcement of Criminal Law Measures  
The impact arising from the enforcement of criminal law measures is that there is a potential for human rights violations. For example, to prove its case under HIV transmission/exposure offences, the prosecution generally needs to access confidential information about the health of the accused. Furthermore, it has also been argued that fears and prejudices have tainted sentences for criminal HIV exposure, which have typically been longer than those for comparable crimes.

#### *Conclusion*

Let us revisit the initial question: does the criminal law have any significant role to play

in addressing the HIV and AIDS pandemic in Southern Africa? The analysis in this article reveals that all the criminal law mechanisms that have been adopted for the prosecution of HIV transmission/ exposure raise more difficulties than they provide solutions – that they open a "Pandora's box" of problems. This paper therefore submits that the criminalisation of HIV transmission is not the answer to addressing the HIV pandemic in Southern Africa.

#### *Recommendations*

What should instead be done? HIV prevention messages should focus on promoting a culture of responsibility for all members of society, infected or uninfected, about avoiding unsafe sex. Southern African countries should consider introducing some of these programmes and furthermore develop and strengthen 'risk-reducing' programmes. They should also promote a supportive and enabling environment for women, children and other vulnerable groups by addressing underlying prejudices and inequalities through community dialogue, especially designed social and health services and support to community groups.

The author presented an extended version of this article, entitled "The Pandora's Box: The criminalization of HIV transmission or exposure and its potential or actual impact on marginalized and vulnerable groups – A Southern African perspective" at the XVI International AIDS Conference held in Toronto, Canada from 13-18 August 2006. It will also be published by the Centre for Human Rights, University of Pretoria.

#### *\* Editor's note:*

The provisions criminalising HIV transmission/exposure have not been included in the most recent version of the South African Sexual Offences Bill. Instead, the Department of Justice and Constitutional Development has been tasked with conducting further research on this issue.

# PROFILE: KwaZulu-Natal Intersect Coalition

Three *Intersect* coalitions were founded in South Africa in 2002 by Sally Fisher, an AIDS activist and community worker, in KwaZulu-Natal, the Eastern Cape and the Western Cape provinces. The objective of the *Intersect* coalitions is to link the gender-based violence and HIV/AIDS sectors through common action with the aim of changing the social environment. Given that one of the major problems in addressing HIV/AIDS has been identified as a lack of awareness among women and girls, the *Intersect* model proposes to use the vast networks of established organizations within the women's movement to raise awareness of HIV and bring their full weight to the struggle to end the scourges of HIV/AIDS and violence against women and girls.

One of the *Intersect* initiatives in KwaZulu-Natal [KZN] has been to conduct research in Phoenix, Umlazi, Wentworth, Mandini and Pietermaritzburg to gauge the levels of public awareness about the link between HIV and gender-based violence and to get a sense of available resources. The results of the research were used to develop guidelines for an Integrated Training Manual on gender-based violence and HIV/AIDS. The coalition has also undertaken campaigns such as "Break the Cycle - Break the Silence", aimed at creating public awareness and reducing the stigma around both gender based violence and HIV/AIDS.

During the recent Sixteen Days of Activism Campaign it was decided that the KZN *Intersect* would stage a "Six Weeks of Activism" campaign, with a different theme for every week. The six themes for the six weeks made it easier for the coalition's task teams in partnership with other stakeholders to highlight the themes, raise awareness and monitor the process.

The Campaign on Six Weeks of Activism on No Violence against Women

and Children started in the 1<sup>st</sup> week of November, and ran until 10 December 2006. The six themes were rape, women and disabilities, legislation, domestic violence and femicide, HIV and AIDS and human rights. This campaign highlighted many of the challenges currently experienced in the different regions of the province, including -

- More counselling centres and trained care workers are needed;
- A greater focus on public education and awareness campaigns, including education for families where there are survivors of rape and information for women and girls on the procedures following rape such as reporting cases and post-exposure prophylaxis (PEP);
- Get more men on board to challenge stereotypical thinking on rape.
- Need programs at schools.
- Training for service providers on legislation, including on the Sexual Offences Bill;
- Training on the link between gender violence and HIV and AIDS.

The *Intersect* coalition has held a few focus groups on the PEP Preparedness Programme. These focus groups aimed to educate and raise awareness on PEP. *Intersect* has also been sponsored by Amnesty International London to print more PEP pamphlets for distribution in order to make this vital information more broadly available to women and girls. A series of workshops and information sessions on the PEP Preparedness Program in KZN are also being planned in partnership with VSO (Voluntary Service Overseas).

The work of the KZN *Intersect* Coalition has again emphasized the value of networking. Working as a coalition or network helps to highlight women's human rights issues, provides additional resources and assists with educational workshops.

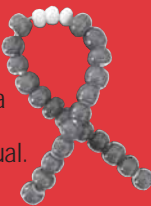
Having all the role-players present provides the perfect platform to contextualize the problems at hand. Everyone can give their respective input so that all the "cracks" in the system can be covered. More importantly, when activities are conducted in partnership, it greatly increases their overall impact.

For more information: see

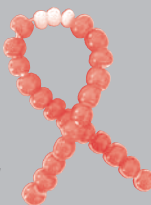
[www.intersectworldwide.org/kzn.html](http://www.intersectworldwide.org/kzn.html).

Contact Cookie Edwards at

[kznetwork@prvaw.org.za](mailto:kznetwork@prvaw.org.za) to obtain a copy of the Integrated Training Manual.



In December 2006, the provincial coordinator of the KwaZulu-Natal *Intersect* Coalition, Cookie Edwards, received the International Service Human Rights Award for the defence of the human rights of women at the House of Commons in Westminster, UK. Congratulations!



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