Canadian HIV/AIDS Legal Network

HIV/AIDS POLICY & LAW REVIEW

VOLUME 13, NUMBER 2/3, DECEMBER 2008

Legislation contagion: building resistance

The HIV/AIDS Policy & Law Review recently carried a feature article recounting the spread of problematic new HIV laws in west and central Africa.[1] It outlined less-than-model approaches in the AWARE-HIV/AIDS "model" law and described how its provisions had been replicated in many national HIV laws. At the time of writing that article, eight national HIV laws had been passed in the region.[2] Since that date, the rush to legislate HIV in west and central Africa in ways that do not accord with human rights law or policy has continued unabated.

Legislation by intuition

At the time of writing this article, 14 countries in west and central Africa have passed HIV laws.[3] All have done so since 2005. If anything, this momentum to legislate HIV in west and central Africa appears to be increasing, rather than slowing. Currently, there are HIV bills under consideration in (at least) four additional countries in that region. In addition, there are HIV bills in development in a number of jurisdictions in southern and eastern Africa.[4]

As was the case with the earlier laws, the more recent laws emulate the AWARE-HIV/AIDS "model" law to varying degrees.[5]

As with the earlier laws, there are some positive aspects to the recent laws. For example, they often

cont'd on page 5

Special Section: AIDS 2008

This issue of the *Review* includes a special section containing the most relevant presentations on legal, ethical, and human rights issues from the XVII International AIDS Conference, held in Mexico City, Mexico in August 2008.

See page 51.

Número en Tres Idiomas

Este número ha sido publicado en tres idiomas — inglés, francés y español. Esta es la primera vez que una edición de la *Revista* se publica en español. Esto es en reconocimiento al hecho que este número contiene una sesión especial sobre la Conferencia Internacional en México (ver siguiente punto). La versión en español está ubicada en el medio del ejemplar, y los bordes de sus páginas tienen un sombreado gris.

Canadian HIV/AIDS Legal Network | Réseau juridique canadien VIH/sida

AMERICAN BAR ASSOCIATION Defending Liberty Pursuing Justice

Funding for this publication was provided by UNAIDS; the Open Society Institute Public Health Program and the Law and Health Initiative, the International Harm Reduction Development Program, and Public Health Watch; and the Levi Strauss Foundation.

UNAIDS JOINT UNITED NATIONS PROGRAMME ON HIV/AIDS

OPEN SOCIETY INSTITUTE Public Health Program

LEVI STRAUSS FOUNDATION

Legislation contagion: building resistance

cont'd from page 1

provide for HIV information and education campaigns in a variety of sectors of society. In addition, they frequently guarantee the confidentiality of HIV test results.

Some laws guarantee the involvement of persons living with HIV (PLHIV) in the provision of certain services, such as outreach. Perhaps of most value, the region's HIV laws all offer progressive language to prohibit discrimination against PLHIV (although gaps in the drafting would leave a number of obvious forms of discrimination without legal redress.)

However, as will be seen, many of these national HIV laws appear to have been developed hastily, with little or no attention given to the procedural steps that encourage responsive and rational laws.

In many cases, one is left with the impression that the national HIV law is a reflection of legislator's desire to be seen to do something, rather than a reflection of what is required, what is effective and what is just. These laws often reflect approaches to HIV issues that are based on intuitive beliefs about their effectiveness, for which there is seldom any evidence.

Few policy makers appear to have enquired whether legislation as such, as opposed to other forms of government action, is required. Little or no consideration has been given to the wrongs these laws might do if administered by a less than ideal legal system. Without exception, the national laws have been adopted without reference to the well-established framework of international law and policy guidance that has been developed on the issue of how best to respond to the HIV epidemic in law.[6]

The HIV laws in west and central Africa contain a number of poorly-considered legislative provisions. Some such provisions are relatively harmless. Others, however, risk undermining "the full enjoyment of all human rights and fundamental freedoms by people living with HIV and members of vulnerable groups" that, according to the UN General Assembly, should characterize legislation, regulation and other measures to address the HIV epidemic in law.[7]

The HIV laws in west and central Africa contain a number of poorly-considered legislative provisions.

Instances of poorly-considered provisions are scattered throughout the recent HIV laws of the region. For example:

- The laws are marked by an insistence on use of the criminal law. The creation of criminal offences is the primary means to address cases of "intentional" HIV transmission and/or exposure (as discussed below.) But the criminal law is also used to address other HIV issues, ranging from the administration of contaminated blood by health care professionals (including when administered through "negligence, carelessness, clumsiness or failure to follow regulations") to the "abandonment" of PLHIV.[8] Acts of discrimination and even stigmatization are also criminal offences.[9]
- The laws contain little or no provisions addressing HIV among those who are particularly vulnerable to HIV infection. The laws rarely refer to prevention, treatment, care or support services among women, and never among men who have sex with men. In stark comparison to these omissions, a number of national laws make it illegal for sailors to embark on boats without a document from the port authority stating that they have received training on HIV.[10]
- Some of the provisions have been drafted with little consideration as to whether legislation as such is the appropriate place to reflect the policy in question. For example, an early version of the HIV Bill in Mozambique would have created a legislative obligation on all PLHIV to undertake "regular physical activity" and to "permanently raise the awareness of other people … about their obligations in all matters regarding the illness."[11]

Disclosure obligations and the "duty to warn"

In many cases, the recent HIV laws establish overly-broad disclo-

sure requirements for PLHIV on their spouses or sexual partners. Frequently, the laws give health care practitioners a "duty to warn" spouses or sexual partners with little or no direction as to how to exercise this power.

For example, the law of Cape Verde requires disclosure to a spouse or sexual partner as soon as possible and within six weeks of diagnosis and gives health care professionals a broad power to disclose that person's HIV status.[12] The law of the Democratic Republic of the Congo simply states that the PLHIV must "immediately inform" their spouse and sexual partners.

The law of Burkina Faso establishes that the PLHIV must inform his or her spouse or sexual partner of his or her HIV status "without delay" and where the PLHIV does not voluntarily inform their spouse or sexual partner, healthcare professionals "must ensure that disclosure takes place" ["*doivent veiller à ce que l'annonce se fasse*"].[13]

The *International Guidelines on HIV/AIDS and Human Rights* recommend that a health care professional *may*, where he or she considers that counselling has failed to achieve the appropriate behavioural changes by the PLHIV, *and* a real risk of HIV transmission to the partner(s) exist, disclose to the partners. Importantly, the International Guidelines recommend disclosure with certain safeguards, such as giving the PLHIV reasonable advance notice and concealing the identity of the PLHIV (if practicable).[14]

Compulsory HIV testing

Frequently, the recent HIV laws provide a number of exceptions to the principle that HIV testing should be voluntary. The language of these provisions is often drawn from the AWARE-HIV/AIDS "model" law's own enumeration of situations where HIV testing is compulsory.[15] Recent HIV laws frequently provide for compulsory testing on charges of rape and "HIV infection" (or attempted infection) or "to resolve a marital dispute."[16]

Again, these laws ignore the detailed guidance available to legislators. The UNAIDS/World Health Organization policy statement on HIV testing clearly states:

> The conditions of the '3 Cs', advocated since the HIV test became available in 1985, continue to be underpinning principles for the conduct of HIV testing of individuals. Such testing of individuals must be:
>
> - Confidential;
> - Be accompanied by counselling;
> - Only be conducted with informed consent, meaning that it is both informed and voluntary.[17]

Criminalization of HIV transmission or exposure

All the recent HIV laws in west and central Africa create offences of HIV transmission or exposure.[18] While the wording of these offences varies between countries, the provisions are characterized by startling imprecision in their formulation.

Frequently, the HIV laws in the region establish an offence of "wilful transmission."[19] However, when "wilful transmission" is defined, it is defined in ways that do not require deliberate intention, i.e., the desire to transmit the virus to another person. Rather, "wilful transmission" is defined as transmission of HIV "through any means by a person with full knowledge of his/her HIV/AIDS status to another person."[20]

In other words, these laws deem a desire to infect another person (the mental element of the crime) on the part of the PLHIV from two elements that are not actually determinative of a deliberate intention: (a) that the PLHIV knew his or her status; and (b) that transmission occurred.

With regard to the HIV law of Burkina Faso, the version of the Bill that was circulated immediately prior to adoption had no fewer than four distinct articles criminalizing "voluntary transmission."[21] These provisions overlap in some of the conduct they criminalize, although each contain differences in terminology and differences in the conduct they would criminalize, resulting in a law that is profoundly confusing.[22]

What is to be done?

Amend existing laws

Although the challenges may be greater in situations where laws have been recently adopted, there always exists the possibility of amendments. For people and organizations working on issues related to HIV and human rights, this will require a long and taxing effort to roll-back some of these laws. As a matter of urgency, some of the more egregious provisions of certain national laws must be amended. Such work is difficult, but by no means impossible.[23]

While most countries have provisions in their HIV laws that should be removed or changed, certain countries with profoundly problematic provisions in their HIV laws appear open to the possibility of amendment. The examples of Sierra Leone

and Guinea are discussed below. Interestingly, at a UNAIDS-convened meeting in Dakar, Senegal in April 2008, both countries were among those that stated their openness to amending and improving their HIV laws.[24]

Sierra Leone's HIV law is an obvious one to focus on. The wording of the offence of "HIV transmission" explicitly criminalizes mother-to-child transmission (MTCT). According to one provision, a PLHIV who is aware of his or her infection must "take all reasonable measures and precautions to prevent the transmission of HIV to others and in the case of a pregnant woman, the foetus."

To roll-back some of these laws will require a long and taxing effort.

According to another provision, a PLHIV who is aware of his or her infection must not knowingly or recklessly place another person ("and in the case of a pregnant woman, the foetus") at risk of becoming infected with HIV, unless that person knew of the fact and voluntarily accepted the risk of being infected.[25]

First, this provision would violate the right to medical treatment with voluntary informed consent. In addition to being a human right, informed consent to undergoing antiretroviral therapy to reduce MTCT is important because the treatment may affect the health of the pregnant woman.[26]

Second, the Sierra Leonean law does not specify what "all reasonable measures and precautions" would include. Indeed, it is not at all clear that such "measures and precautions" are sufficiently articulated and understood by health care professionals and pregnant women in a way that makes it is appropriate to apply criminal sanctions for a departure from those "measures and precautions." To cite just one example, would HIV transmission that occurred during breastfeeding attract criminal liability?[27]

Third, fear that giving birth in a health care facility could expose women to criminal liability risks driving women away from health care facilities and, particularly, maternity care. Fourth, it is highly doubtful that criminal punishment of a mother could be in the best interests of her newly-born child.

It is worth noting that, while the criminalization of MTCT is explicit in the case of Sierra Leone, the criminal law offences of "intentional" HIV transmission or exposure in a considerable number of HIV laws in the region could have exactly the same effect.[28]

Another country whose HIV law obviously needs amendment is Guinea. For example, the Guinean law specifically forbids providing HIV/AIDS education to children under 13 years old. There is no rational justification for restricting children's access to health education in this way. Rather, comprehensive education programs that provide complete, factual, and unbiased information about HIV prevention (including information about the correct and consistent use of condoms) are crucial in for adolescents and young adults.

Rather than establish legislative barriers to scientifically-accurate and age-specific education and information in educational settings, the law should establish a positive obligation on the relevant ministries to provide access to health education.

The Guinean law also mandates HIV testing before marriage.[29] There is little evidence that mandatory pre-marital HIV testing has any effect on reducing rates of HIV. The supposed effectiveness of mandatory HIV testing before marriage rests on a number of false assumptions.

First, the approach assumes that HIV testing is accurate, when reports of false positives and false negatives indicate otherwise.

Second, a negative test does not preclude the possibility of infection. Testing may occur during window periods when HIV antibodies cannot be detected, and a partner may become infected *after* the HIV test takes place, and indeed after the marriage takes place. Pre-marital testing may thus create a false sense of security that married people do not need to be concerned about HIV infection.

Third, the policy assumes that the individuals getting married have not already exposed their partners to the virus.

Improving Bills before they come laws

Experience has shown that policy makers and civil society can work together to develop HIV laws in Africa that are qualitative improvements on these recent laws.[30] To assist in this process in west and central Africa, UNAIDS recently released a document containing alternative language to some of the problematic

articles in the AWARE-HIV/AIDS "model" law. The document recognized that the AWARE-HIV/AIDS "model" law is

> a positive step towards the realization of commitments made in the *Declaration of Commitment* and the *Political Declaration* and captures many elements of law that should form support for national responses to HIV. However, there are some provisions in the N'Djamena [AWARE-HIV/AIDS "model"] law which could benefit from reconsideration and revision so as to best meet two critical concerns in the response to the HIV epidemic: that of protecting public health and that of protecting human rights.[31]

Policy makers and civil society can work together to qualitatively improve HIV laws in Africa.

UNAIDS proposed alternative language on criminalization of HIV transmission or exposure that is designed to address a context in which legislators are firmly convinced that it is necessary to include an offence criminalizing HIV transmission or exposure, but where there may be opportunities to mitigate the negative effects of such provisions. The proposal would clearly remove criminal liability from those acts and scenarios where the injustice of criminal sanctions would be most manifest. It reads:

> No person shall be criminally responsible under this Act or any other applicable law where the transmission of HIV, or exposure to the risk of HIV infection, arises out of or relates to:
>
> i. an act that poses no significant risk of HIV infection;
>
> ii. a person living with HIV who was unaware of his or her HIV infection at the time of the alleged offence;
>
> iii. a person living with HIV who lacked understanding of how HIV is transmitted at the time of the alleged offence;
>
> iv. a person living with HIV who practiced safer sex, including using a condom;
>
> v. a person living with HIV who disclosed his or her HIV-positive status to the sexual partner or other person before any act posing a significant risk of transmission;
>
> vi. a situation in which the sexual partner or other person was in some other way aware of the person's HIV-positive status;
>
> vii. a person living with HIV who did not disclose his or her HIV status because of a well-founded fear of serious harm by the other person; or
>
> viii. the possibility of transmission of HIV from a woman to her child before or during the birth of the child, or through breastfeeding of an infant or child.[32]

As noted above, there are a number of African jurisdictions with draft bills under consideration at the moment. These represent opportunities for sensible and sensitive law reform. Again, such a task is difficult but not impossible. For example, the Liberian HIV Bill that passed the lower house of that country's parliament in September 2008, and which is currently being debated in the upper house, is a marked improvement on any other law in the region.[33]

Conclusion

HIV legislation is inherently sensitive and the problems found in national HIV laws are, all too often, predictable. In order to avoid the types of problems that recur in west and central Africa's HIV laws, it's crucial to adopt a more sensitive and thoughtful approach to HIV legislation.

Without doubt, certain legislatures must be encouraged to revisit particularly egregious provisions in their national laws. Further, as the momentum towards adopting HIV legislation shows no signs of slowing, both policy-makers and civil society organizations must cast a more critical eye over their HIV bills.

People and organizations working in countries that are currently developing HIV legislation must actively engage in the drafting process by informing themselves of the content of the bills and proposing amendments.

National legislative responses to HIV in west and central Africa — and elsewhere — would be improved if people involved in making HIV laws answered some preliminary questions, including:

- What are the current gaps in the national response to the epidemic that must be filled?
- Is law reform required to fill the gaps, or is it some other form of action (e.g., a regulation, a policy, or a budget) that is missing?

- Is an "omnibus" HIV law necessary, or is amendment of existing laws (e.g., public health law, employment law, anti-discrimination laws) appropriate?
- What are the existing recommendations regarding law reform from organizations such as UNAIDS and the Office of the High Commissioner for Human Rights (OHCHR)?
- What evidence exists that similar approaches to HIV issues from other countries have worked?
- Are there any potential unintended negative consequences from law reform? How can these be avoided?
- Once law reform has taken place, what additional steps (e.g., regulations, trainings, support for legal representation) will be needed for the law reform to make a meaningful difference in the lives of those it purports to benefit?

A failure to ask these sorts of questions will mean more poorly-considered and hastily-adopted national laws which, in their worst provisions, breach states' human rights commitments towards people living with and vulnerable to HIV infection. Asking such questions may help ensure that HIV laws are effective, responsive and just.

– Richard Pearshouse

Richard Pearshouse (rpearshouse@aidslaw.ca) is Director of Research and Policy at the Canadian HIV/AIDS Legal Network.

[1] R. Pearshouse, "Legislation contagion: the spread of problematic new HIV laws in Western Africa", *HIV/AIDS Policy & Law Review* 12(2/3) (2007): 1–11.

[2] At that stage, Benin, Burundi, Guinea, Guinea-Bissau, Mali, Niger, Togo and Sierra Leone and Burundi had passed national HIV laws. The article referred to in the previous endnote discussed the laws in all of these countries except Burundi.

[3] Since the first article covering these developments (see the first endnote above), Cape Verde, Chad, Mauritania, Equatorial Guinea, Burkina Faso and the Democratic Republic of the Congo have passed HIV laws.

[4] At the time of writing, Senegal, Cote d'Ivoire, Liberia and Gambia are all at various stages of developing HIV laws. Outside west and central Africa, Mozambique, Uganda and Malawi are also at various stages of the legislative process. These lists are non-exhaustive.

[5] For example, Cape Verde and Mauritania follow the "model" law closely.

[6] See, for example, UNAIDS/OHCHR, *International Guidelines on HIV/AIDS and Human Rights*, 2006 Consolidated Version, at http://data.unaids.org/Publications/IRC-pub07/jc1252-interngуidelines_en.pdf; UNAIDS, Inter-Parliamentary Union and United Nations Development Programme, *Taking Action against HIV — Handbook for Parliamentarians*, 2008, at http://data.unaids.org/pub/Manual/2007/20071128_ipu_handbook_en.pdf.

[7] United Nations General Assembly, *Political Declaration on HIV/AIDS,* Res/60/262, 2 June 2006.

[8] For example, Mauritania's law "On the prevention, care and control of HIV/AIDS," No. 2007.042, (2007), art. 23, 25 and 26. In criminalizing "negligence, carelessness, clumsiness or failure to follow regulations" of health care professionals, the Mauritanian law follows the AWARE-HIV/AIDS "model" law closely.

[9] For example, Mauritania's law establishes a criminal offence of discrimination (with a minimum period in prison of one month): see art. 22. With respect to the criminalization of stigmatization, the HIV law of the Democratic Republic of the Congo establishes that "all behaviour tending to deliberately discredit, scorn or render ridicule towards a person living with HIV and AIDS [sic], his or her sexual partners, children or parent, on the basis of his or her HIV serostatus, real or presumed" is liable for a criminal offence carrying a minimum sentence of a month in prison. Such behaviour is undoubtedly objectionable, but inappropriate for a criminal offence. Instead, HIV laws might (appropriately) criminalize vilification (sometimes called "incitement to hatred").

[10] See, for example, Mauritania's law "On the prevention, care and control of HIV/AIDS," No. 2007.042, (2007), art. 6. In this, the Mauritanian law follows the AWARE-HIV/AIDS "model" law closely.

[11] Mozambique's "Bill on Defending Human Rights and the Fight against the Stigmatisation and Discrimination of People living with HIV and AIDS" (2008), art. 7. The Bill is currently under revision and it is not clear what will happen to this provision.

[12] Art. 22. In this, as in its other text, the law of Cape Verde follows the AWARE-HIV/AIDS "model" law closely.

[13] Art. 7 and 8.

[14] See International Guidelines, guideline 3(g).

[15] Article 18 of the AWARE-HIV/AIDS "model" law provides for compulsory HIV testing "when a person is indicted for HIV infection or attempts to infect another person with HIV"; when a person is indicted for rape; "when determining HIV status is necessary to solve a matrimonial conflict"; in the case of organ, cell or blood donations; or "when a pregnant woman undergoes a medical checkup." For an unknown reason, the provision establishing compulsory testing of pregnant women in pre-natal care appears in the English version of the model law, but not the French version.

[16] See, for example, Cape Verde's law No. 19/VII/2007, art. 15; Mauritania's law "On the prevention, care and control of HIV/AIDS," No. 2007.042, (2007), art. 15; Burkina Faso's HIV law, art. 19(2).

[17] UNAIDS/WHO, *Policy Statement on HIV Testing*, 2004, p 2.

[18] It is worth noting that the current version of the HIV Bill in Côte d'Ivoire does not contain an offence of HIV transmission or exposure.

[19] See, for example, the Democratic Republic of the Congo's HIV law (2008), art. 43.

[20] See, for example, Mauritania's law "On the prevention, care and control of HIV/AIDS", No. 2007.042, (2007), art. 1. In this, the Mauritanian law follows the AWARE-HIV/AIDS "model" law closely.

[21] It appears that the law was adopted without changes from the form of the Bill described here.

[22] Art. 20 establishes that "Every person who is aware they are infected with HIV and who deliberately has unprotected sex with an partner who is not informed of their HIV status, including if that person is HIV positive, is guilty of a crime of voluntary transmission and punished according to the Penal Code"; art. 22 establishes "Whoever, voluntarily, by whatever means, transmits substances infected with HIV, is guilty of voluntary transmission of HIV"; art. 26 establishes "Anyone who is aware of their HIV infection and who does not take necessary and sufficient precautions for the protection of his or her partners, incurs penal sanctions." The article then establishes the sanctions as a fine of 100,000 to 1,000,000 CFA francs (about $290 to $2,900), if no transmission occurs, or attempted homicide if transmission occurs; art. 27 then repeats the wording of art. 22 in the first paragraph. The second paragraph addresses accomplices to the offence in the first paragraph, while the third paragraph states that those responsible for an act of voluntary transmission or accomplices to the same are to be punished in conformity with the Penal Code.

[23] For example, at time of writing, revisions to improve the national HIV law of Togo are being considered.

[24] See UNAIDS et al., *Capacity Building Workshop on Human Rights and Gender in HIV Legal Frameworks — Final Report,* 2008. Copy on file with the author.

[25] See "The Prevention and Control of HIV and AIDS Act (2007)" [Sierra Leone], art. 21(a) and (b).

[26] See Centre for Reproductive Rights, *Pregnant Women Living with HIV/AIDS: Protecting Human Rights in Programs to Prevent Mother-to-Child Transmission of HIV*, Briefing Paper, 2005, at www.reproductiverights.org/pdf/pub_bp_HIV.pdf.

[27] According to some studies, breastfeeding may be responsible for one-third to one-half of HIV infections in infants and young children in Africa (K.M. De Cock et al, "Prevention of mother-to-child HIV transmission in resource-poor countries — translating research into policy and practice," *JAMA* 283 (2000): 1175–1182.) At

the same time, according to current UN recommendations, infants should be exclusively breastfed for the first six months of life to achieve optimal growth and health (WHO, *New Data on the Prevention of Mother-to-Child Transmission of HIV and Their Policy Implications: Conclusions and Recommendations,* 2001).

[28] "Wilful transmission" is defined in art. 1 of the AWARE-HIV/AIDS "model" law as transmission of HIV "through any means by a person with full knowledge of his/her HIV/AIDS status to another person." Taking into account the definition of "HIV transmission" also in art. 1, the phrase "through any means" could extend to a mother who transmits HIV to a child, including *in utero* or during labour and delivery. Countries that have replicated this approach in their national laws thus risk criminalizing MTCT.

[29] "Law on prevention, care and control of HIV/AIDS" (No. 2005-25) [Guinea], art. 2 and 28.

[30] For example, criminal law sanctions in the HIV Bill of Mauritius were removed from the eventual law. See Mauritius "HIV and AIDS Act" (2006) and International Planned Parenthood Federation, Global Network of People Living with HIV, and International Community of Women Living with HIV/AIDS, *Verdict on a Virus: Public Health, Human Rights and Criminal Law,* 2008, p. 36.

[31] UNAIDS, *UNAIDS Recommendations for Alternative Language to Some Problematic Articles in the N'Djamena Legislation on HIV (2004)*, 2008, p. 1, at http://data.unaids.org/pub/Manual/2008/20080912_alternativelanguage_ndajema_legislation_en.pdf. The author was involved in the development of this document.

[32] UNAIDS, *UNAIDS recommendation,* p. 17.

[33] See J. Fahngon, "New AIDS law calls for confidentiality," *The News,* 4 September 2008, online at http://allafrica.com/stories/printable/200809040848.html.