UNAIDS issued recommendations that include alternative ways of phrasing some provisions in the N'Djamena model law to make them more precise.[72] In the past few years Guinea, Togo and Senegal have revised their HIV-related legislation or adopted new laws that restrict the use of criminal law to the exceptional cases of intentional transmission.[73] The Finnish Expert Group on HIV has also recently initiated efforts to change the law to avoid policies that reinforce HIV-related stigma and discrimination.[74] Denmark and Norway are considering revision or repeal.[75] In 2011, Guyana's Parliamentary Select Committee rejected a bill calling for the criminalisation of HIV.[76] And Mauritius revoked criminalisation of HIV transmission.[77]

Arresting HIV-positive people for seeking pleasure and intimacy is a defeatist and cynical response to the failure of nations to confront the epidemic. The sad case of Sarah Jane Porter (see discussion earlier in the chapter) raises many questions not even approached by the criminalisation response to HIV. Was her son's father aware of his HIV status and, if so, why did he persuade her to have unprotected sex and why did she consent? Why did she deny her illness and shy away from treatment? Why was she passive in defending herself in court? How can women—and men—be empowered to take care of themselves and others?

RECOMMENDATIONS

To ensure an effective, sustainable response to HIV that is consistent with human rights obligations:

2.1. Countries must not enact laws that explicitly criminalise HIV transmission, HIV exposure or failure to disclose HIV status. Where such laws exist, they are counterproductive and must be repealed. The provisions of model codes that have been advanced to support the enactment of such laws should be withdrawn and amended to conform to these recommendations.

2.2. Law enforcement authorities must not prosecute people in cases of HIV non-disclosure or exposure where no intentional or malicious HIV transmission has been proven to take place. Invoking criminal laws in cases of adult private consensual sexual activity is disproportionate and counterproductive to enhancing public health.

2.3. Countries must amend or repeal any law that explicitly or effectively criminalises vertical transmission of HIV[78]. While the process of review and repeal is under way, governments must place moratoria on enforcement of any such laws.

2.4. Countries may legitimately prosecute HIV transmission that was both actual and intentional, using general criminal law, but such prosecutions should be pursued with care and require a high standard of evidence and proof.

2.5. The convictions of those who have been successfully prosecuted for HIV exposure, non-disclosure and transmission must be reviewed. Such convictions must be set aside or the accused immediately released from prison with pardons or similar actions to ensure that these charges do not remain on criminal or sex offender records.