

CHAPTER 14

Criminal law
and procedure

14.1	Why is criminal law important?	316
14.2	What is criminal law?	317
	<i>How does the State charge a person with a crime?</i>	317
14.3	The rights of accused people	318
14.3.1	Can an accused person be forced to take an HIV test?	318
14.3.2	Can an accused person apply for bail?	319
14.4	Sentencing and the rights of guilty people	320
14.5	Criminal law and vulnerability to HIV/AIDS	321
14.5.1	The definition of rape	321
14.5.2	Changes to the law around rape and HIV/AIDS	322
	<i>A new definition of rape</i>	322
	<i>Compulsory testing of accused rapists</i>	322
	<i>Bail and sentencing</i>	323
14.5.3	Sodomy.....	324
14.5.4	Commercial sex work.....	325
14.6	Criminal law and harmful HIV-related behaviour	327
14.6.1	Using the criminal law?	327
14.6.2	Murder and culpable homicide	328
	<i>How do we show that the accused acted unlawfully?</i>	329
	<i>How do we show that the accused acted intentionally?</i>	330
	<i>What if the accused acted negligently?</i>	330
14.6.3	Assault.....	331
	<i>Can a person who aims to infect someone</i> <i>be charged with assault?</i>	331
14.6.4	Should a new criminal law be written to stop harmful HIV-related behaviour?	332
14.6.5	Can the criminal law help to stop the spread of HIV?	334

14.7	HIV/AIDS discrimination leading to criminal acts	336
14.8	Conclusion	337
	Talking points.....	338
	References and resource materials.....	340



Criminal law is important for HIV and AIDS for a number of reasons:

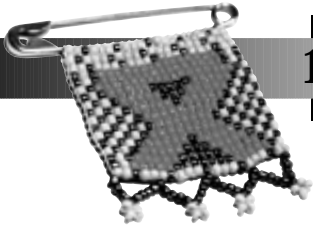
- Some crimes (like rape and sexual abuse) can make a person more vulnerable to HIV.
- Questions are often asked about whether a person can be criminally charged for harmful HIV-related behaviour – in other words, behaviour that may pass on HIV to another person, such as having unsafe sex.
- People living with HIV or AIDS experience discrimination, abuse of rights and physical assault. For example, Gugu Dlamini an AIDS activist from KwaMashu was beaten to death after announcing that she was HIV positive at a World AIDS Day rally in 1999.

This chapter starts off by looking at the criminal law, and the rights of people who are accused of and sentenced for crimes that are linked to HIV/AIDS. Then we take a look at crimes in our criminal law, to see:

- How criminal law can make people more vulnerable to HIV and AIDS.
- How criminal law can be used in cases of harmful HIV-related behaviour.
- How criminal law can protect people living with and affected by HIV or AIDS from abuse.



The kind of situation that you may have to give advice on.



For more on different kinds of law, see 3.2 on page 53.

For more on the Constitution and Bill of Rights, see Chapter 4 on page 63.

The criminal law is a set of rules and procedures that the State sets down to **regulate** our behaviour. The criminal law allows the State to punish us or to threaten to punish us for not obeying these rules and procedures. The threat of punishment is also used to prevent behaviour that society does not want to happen.

Our criminal law comes from **common law** and from **statute law**. Our statute law is always changing as new crimes are created and as old Acts are repealed (scrapped). But our common law has been largely unchanged over the centuries. All law must now follow the **Constitution**, and most of our criminal laws are in line with the **Bill of Rights**.

How does the State charge a person with a crime?

In criminal law, the State prosecutes (charges) a person for performing an **illegal** act. To prosecute a person, the State must show that there is a law that a person has broken:

- A statute law, eg the *Sexual Offences Act*, or
- A common law, eg theft, murder, rape.

The State must also use the general principles of criminal law to show that the accused person is guilty of committing the crime they are charged for.

If the State proves that a person committed the crime 'beyond a reasonable doubt', then a judge or magistrate can send that person to prison or give the person a fine.

THEFT

The law says you may not remove property without the owner's permission. If you take your neighbour's television, the State can prosecute you for theft. If you are convicted, the magistrate or judge can make you pay for the cost of the television and make you spend time in jail.

EXAMPLE





14.3

The rights of accused people

For more on the rights of accused people in the Bill of Rights, see 4.9 on page 83.

People who are accused of a crime have rights. These are explained in the Bill of Rights of the new Constitution and in other laws, eg the *Criminal Procedure Act*. The State cannot punish people just because somebody has claimed that they are criminals.

In South Africa, any person charged with a crime has the right to be **presumed** innocent. That person remains innocent until proved to be guilty 'beyond a reasonable doubt' – in other words, an accused person must be treated as if they are innocent.

14.3.1 CAN AN ACCUSED PERSON BE FORCED TO TAKE AN HIV TEST?

A person charged with a crime also has:

- A right to **privacy**.
- A right to freedom and security of the person.
- In most situations, a right not to be forced to give bodily evidence (eg a blood sample or hair) without their **consent**.

But our Criminal Procedure Act makes an exception (special rule) when the sample can be used to prove that a crime was committed.



EXAMPLES

SAMPLES NEEDED TO PROVE CRIMES

- A sample of semen can prove that the accused person committed the crime of rape.
- A sample of blood may be able to show that a person was drunk while driving home.



KEY POINT

SALC INVESTIGATION INTO HIV TESTING FOR ACCUSED RAPISTS

In early 2001, the *South African Law Commission (SALC)* recommended that a person who has been the victim of a sexual crime should be able to apply to a magistrate to have the accused tested for HIV and the result told to him/her if:

- There is a possibility that blood or semen was transferred during the sexual crime,
- Not more than 50 days have passed from the date when the crime took place, and
- The person accused of committing the crime has been arrested or charged.

For the SALC documents, see References and resource materials on page 340.

Public hearings have since been held on the issue, and we expect the Department of Justice to issue regulations allowing for HIV testing of sexual offenders in 2003.

14.3.2 CAN AN ACCUSED PERSON APPLY FOR BAIL?

All accused people have the right to apply for bail, and most accused people will be granted bail. But new criminal laws say that in some very serious crimes, it is hard to get bail.

For example, the *Criminal Procedure Second Amendment Act* says that where an accused is charged with rape and the accused rapist knew that he was HIV positive or had AIDS at the time of the rape, it is more difficult to get bail. In this case, the accused rapist must show good reasons why it is in the interests of justice that he is given bail. If he cannot show this, he will not be given bail.

For more on the testing of sexual offenders and bail procedures, see 14.5.2 on page 322.



In this case, the traffic officer doesn't need the motorist to consent to a blood test – drinking and driving is a criminal offence.



If a person has been found guilty in a criminal trial, the judge or magistrate decides what punishment that person should get. This is called 'sentencing'. In deciding on a sentence, a judge or magistrate must look at possible mitigating or aggravating circumstances, that will affect the harshness of the sentence.

IMPORTANT TERMS



A **mitigating factor** is something that a guilty person can show to help explain his/her actions and ask for a lesser sentence.

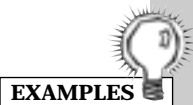
An **aggravating factor** is something the State shows that makes the guilty person's crime even more serious and is used to argue for a harsher sentence.

It is not a crime to have HIV and therefore the **HIV status** of an accused should not affect their guilt. But a person's HIV status may affect the sentence that is given.

The *Criminal Law Amendment Act of 1997* says that if a rapist knew that he was HIV positive or had AIDS at the time of the rape, he will be sentenced to life imprisonment.

For more details on rape, see 14.5.1 on page 321.

AGGRAVATING AND MITIGATING FACTORS



A guilty person's HIV status may be relevant as an **aggravating factor** if he committed a crime that included a risk of HIV transmission (eg rape) and it can be shown that he knew or believed that he had HIV.

A guilty person's HIV status may be relevant as a **mitigating factor**, if it helps to explain the crime that he committed. For example, Joe committed fraud because he needed extra money to pay his medical bills.

In cases where a person's HIV status has no connection to their crime, magistrates and judges will have to decide for how long they want to sentence:

- A person with HIV who may be ill, or may become more seriously ill as a result of imprisonment.
- A person with HIV or AIDS who may need medical care.
- A person with AIDS who will need to be near their family, friends and support groups.

Some crimes increase a person's vulnerability to HIV/AIDS. For instance, a person may be infected with HIV through a criminal act such as rape or sexual abuse. As South Africa has one of the highest rates of rape and child abuse in the world, this is one of the ways that women and girl children get infected. Rape is a violent act, which means that there will probably be tearing or bleeding. It also means that the rapist is unlikely to wear a condom. So, the risk of getting HIV from rape can be high.

Other crimes put people at risk in more indirect ways – like the laws that make sex work a crime. This makes it very difficult to reach sex workers with HIV education and prevention programmes. Criminal laws that **marginalise** groups of people can put those people at higher risk of HIV infection.

In this section, we look at three examples of how the criminal law affects HIV prevention work, and sometimes puts people more at risk of HIV infection:

- Rape
- Sodomy
- Commercial sex work.

14.5.1 THE DEFINITION OF RAPE

The legal definition of rape is:

“ A man having unlawful and intentional sexual intercourse with a woman, without her consent. ”

CHARGING A HUSBAND FOR RAPE

The Domestic Violence Act says that sex with any woman against her wishes is rape. This means that a wife can prosecute her husband for rape. If a husband has sex with his wife without her consent, she can make a charge of rape against him at the closest police station.



RAPE

- David forces Sandra to have sex with him even though she says no. This is rape.
- Phumla and Vusi are married. Phumla wants Vusi to wear a condom. She is afraid that he might get angry. She refuses to have sex without a condom, but Vusi forces her to do this. This is rape.



The crime of rape has been criticised for many reasons mainly because it is very narrowly defined:

- For women, this means that the crime is only committed when a man inserts his penis into a woman's vagina. Any other acts committed against women are not rape, but indecent assault.
- For men, it means that sex between two men without consent is not rape. In the past, **non-consensual** sex between two men could be prosecuted as either **sodomy** or indecent assault. But the old common law crime of sodomy prevented sex between men even with their consent, and the Constitutional Court recently declared this to be **unconstitutional** (see 14.5.3 on page 324). So, at the moment this means that non-consensual sex between men can no longer be prosecuted as sodomy. It can only be prosecuted as assault or indecent assault.



EXAMPLES

INDECENT ASSAULT

In our law, it is indecent assault and not rape if a man:

- *Penetrates a woman's anus without her consent.*
- *Inserts his finger or even a bottle into a woman's vagina without her consent.*
- *Forces a woman to have oral sex with him.*
- *Has sex with another man without his consent.*

14.5.2 CHANGES TO THE LAW AROUND RAPE AND HIV/AIDS

A new definition of rape

See Introducing this manual on page vii for more on recent development from the SALC.

The South African Law Commission is investigating changes to the *Sexual Offences Act*, including the crime of rape. They have suggested changes to the definition of rape to include:

- Failing to disclose things like, for example, your HIV status in a consensual relationship – this means if one partner doesn't tell the other about his/her HIV infection, this can be rape.
- Various acts of sexual penetration – this means that rape doesn't only happen when the penis penetrates the vagina, but can include anal penetration, and the use of objects and fingers. It means that a man can also be raped.
- A situation where there is a **coercive circumstance** – this means that the person who is raped doesn't have to show that they did not consent. The court will look at the circumstances to see if there was force and pressure involved.

For SALC documents, see References and resource materials on page 340.


EXAMPLES

COERCIVE CIRCUMSTANCES

- There is actual force or a threat of physical force, eg when Thuli's partner Johannes says that he will beat her son if she does not have sex with him.
- There is an abuse of power, eg when Nkuleleko tells women who apply for a house at the Local Council where he works that he will put their name on the list if they have sex with him.
- A person is drunk or has taken drugs, and doesn't know what is happening.

Compulsory testing of accused rapists

For more on the testing of accused people, see 14.3.1 on page 318.

Another recommendation made by the South African Law Commission is that a person arrested for having committed a sexual offence should be forced to have an HIV test, if it is requested by the victim and ordered by a magistrate. We expect this to become law in 2003.


KEY POINTS

REASONS FOR COMPULSORY TESTING FOR SOME SEXUAL OFFENCES

- To give a woman who has been raped some peace of mind.
- To assist a woman to make decisions about whether to take **post-exposure prophylaxis** (such as AZT) to reduce the possible risk of HIV infection.

For more on post-exposure prophylaxis, see 1.4.3 on page 15.

Bail and sentencing

New criminal laws set down harsher bail conditions and sentences for rape:

- If the State can show that a person accused of rape knew that he had HIV or AIDS at the time of the rape, it will be especially hard for him to get bail.
- If the State can prove that a convicted rapist knew he had HIV or AIDS at the time of the rape, the rapist will get a life sentence.
- Two convictions of rape now carry the possibility of a sentence of life imprisonment.

A new definition of rape should help both women and men to protect themselves from rape, and also from HIV and AIDS. The harsh bail and sentencing laws aim to stop people from committing rape. Also, the possibility of HIV testing of the sexual offender may help a rape survivor to take steps to prevent HIV infection after a rape.



THE RIGHT TO REFUSE UNSAFE SEX OR ANY SEX

- *By strengthening the right of a woman to decide when and who she has sex with, the law protects her autonomy. It gives her more power to say “no” to unsafe sex.*
- *Educational campaigns directed at men to make them aware that women have the right to refuse sex will reduce the risk of HIV transmission.*

These laws aim to give all people, especially women, more power in their sexual relations, and so to limit the spread of HIV and AIDS.



SUMMARY: NEW DEVELOPMENTS IN THE LAW ON RAPE AND HIV/AIDS

- *Accused rapists who knew that they had HIV or AIDS will not get bail easily.*
- *Rapists who knew that they had HIV or AIDS will get life sentences.*
- *The laws around rape may soon change to be wider and to include more acts.*
- *A new law to allow testing of sexual offenders may be introduced in 2003.*

For more details on women and rape, see 8.5 on page 192.

14.5.3 SODOMY

To find the SALC documents, see References and resource materials on page 340.

For more on discriminatory laws and the implementation of laws against lesbians and gay men, see 10.2 on page 229.

The common law crime of sodomy made all anal sex between men a crime, with or without consent. This crime affected not only gay men, but all men who had sex with other men. Unprotected anal sex carries a high risk of HIV infection. While men were prosecuted for having sex with each other, it was difficult for men to be open about their sexual practices. As a result, health workers did not reach all men in education programmes.



SODOMY UNCONSTITUTIONAL

In *NCGLÉ and the SAHRC v Minister of Justice and the Attorney General of the Witwatersrand* (1998), the Constitutional Court decided that sodomy was unconstitutional because:

- *It discriminated against people on the basis of their sexual orientation.*
- *It was a violation of the right of all people to privacy.*



PROBLEMS WITH SODOMY AND RAPE LAWS

- The *criminalisation* of sodomy made it more difficult for gay men to protect themselves from HIV infection.
- The legal definition of rape is discriminatory because it excludes forced sex between men.

14.5.4 COMMERCIAL SEX WORK

Commercial sex work means earning an income from sex, for example through prostitution.

Under the Sexual Offences Act, some activities linked with sex work are still illegal.



ILLEGAL SEX WORK ACTIVITIES

- Keeping a brothel
- Soliciting a prostitute or a client
- Earning a living from commercial sex work.



CHALLENGING THE SEXUAL OFFENCES ACT

This law could now be declared unconstitutional because it:

- Interferes with a person's right to freedom of association, and freedom of trade, occupation and profession.
- Violates a person's right to privacy (eg when the police raid a house).
- The SALC are investigating the decriminalisation of sex work.

See *Introducing this manual* on page iv for a recent case law on commercial sex work.

To find the SALC documents, see *References and resource materials* on page 340.

People involved in commercial sex work are very vulnerable to HIV/AIDS, and need to be protected.



EXAMPLES

VULNERABILITY OF SEX WORKERS

- Because prostitution is illegal, sex workers are afraid to demand that their clients use condoms.
- If sex workers are assaulted or raped by a client, they are scared to go to the police because they can also be charged for doing illegal work.

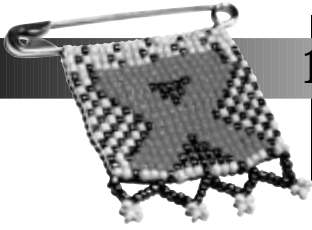
The South African Law Commission (SALC) is investigating the decriminalisation of sex work and is working on a discussion document on commercial sex work. But until sex work is no longer a crime, it will be difficult to organise effective HIV/AIDS prevention among sex workers.

To find the SALC discussion documents, see References and resource materials on page 340.

If sex work was made legal, it would be much easier to control the spread of HIV. HIV/AIDS prevention among sex workers could be organised, and both sex workers and their clients would benefit from the legalisation of sex work.



Sex workers are vulnerable to abuse because commercial sex work is still a crime.



There has been a lot of media attention given to what we call ‘harmful HIV-related behaviour’ – behaviour that is likely to put another person at risk of getting HIV.

HARMFUL SEXUAL BEHAVIOUR

EXAMPLE



When a person who knows they have HIV has unsafe sex with another person without telling them that they are HIV positive or using a condom to protect their partner.

This raises a number of important questions:

- Can our existing criminal law be used to charge a person with harmful HIV-related behaviour?
- Should new criminal laws be written to deal with harmful HIV-related behaviour?
- Can we use the criminal law in this way to stop the spread of HIV?

14.6.1 USING THE CRIMINAL LAW?

Can a person with HIV who is believed to have aimed to infect someone, be charged with a crime?

This is an issue that causes a lot of argument and differences of opinion all over the world. It raises difficult and new questions of law.

AIDS service organisations, and organisations of people living with HIV and AIDS, are generally opposed to attempts to use the criminal law in this way. This is because there are many social reasons why people with HIV may sometimes have unsafe sex. Fear, denial, **prejudice** and ignorance all contribute to HIV transmission, even after a person has found out about their HIV status.

There are various crimes in our law (eg murder, attempted murder, assault) that could be used to charge a person with different kinds of harmful HIV-related behaviour, like :

- Deliberately trying to infect another person with HIV.
- Negligently infecting another person with HIV.
- Deliberately exposing another person to HIV.

In South Africa, there have not yet been any criminal cases where a person has been convicted for deliberately passing on HIV. It is therefore difficult to say whether a crime like attempted murder could be proved ‘beyond a reasonable doubt’ (the test for proving a crime). There has, however, been a civil law case on HIV infection.



CASE

ATTEMPTED MURDER CASE WITHDRAWN

In 1998, a woman from Newcastle in KwaZulu-Natal laid a charge of attempted murder against a man who she accused of having unprotected sex with her on a “daily basis” for three months – even though he knew that he had HIV.

The man was arrested and formally charged, and an investigation was started by the police. The woman eventually withdrew the charges, after difficulties experienced by the police in preparing the case.



CASE

SUCCESSFUL CIVIL LAW CLAIM FOR DAMAGES

In *Venter v Nel* (1997), a young woman was awarded damages of over R300 000 by the Supreme Court in Durban because she had been infected with HIV by someone who knew his HIV status. The judge said:

“It is obviously an extremely serious matter for her. It strikes at the very heart of her life ... The anguish must be gross.”



EXAMPLES

DIFFICULTIES OF PROVING SOMEONE IS GUILTY OF A CRIME

For a person to be convicted of a crime, the State would have to show all of these things:

- *The accused person knew they had HIV or should have known.*
- *The person knew how HIV was transmitted and that, without taking precautions, the sex partner could become infected with HIV and die.*
- *The person intentionally or negligently went ahead and had unprotected sex.*
- *A link can be shown between the accused’s actions and the HIV infection of the victim.*

14.6.2 MURDER AND CULPABLE HOMICIDE

Murder is defined as:

“The unlawful and intentional killing of another human being.”

For a person to be prosecuted for this crime, the State must show that the accused committed all of the elements (parts) of murder.

According to our general principles of criminal law, to show that the accused acted in a way that was unlawful, the State needs to show that the accused person's behaviour:

- Caused the unlawful result, and
- Was unjustified (there was no lawful reason to allow it).

How do we show that the accused acted unlawfully?

It is usually quite easy to show that an accused person's behaviour caused a certain result – for example: when X stabs Y in the heart, and Y dies as a result of the stabbing.

DIFFICULTIES IN PROVING THE TRANSMISSION OF HIV

It is difficult to show that the accused person infected the other person:

- *Just because the accused person tests HIV positive, it does not mean that he/she will pass on HIV to every person he/she has sex with.*
- *Just because the victim tests HIV positive does not mean that this person was infected by the accused person. Most people do not know their HIV status and so if they have had more than one partner, it may be difficult to know when the virus was transmitted.*

The accused person's act must cause the result – with murder, this is the killing of another person:

- *This means that the victim must be dead before the accused can be charged.*
- *It may take many years for the victim's HIV infection to lead to illness and death, and important evidence may be lost over the years.*

The State also needs to show that there was no justification (legal reason) for the accused's act. Common justifications are reasons like self-defence or consent.

JUSTIFICATIONS

- *X stabs Y, but if Y first threatened X's life with a gun, X may be justified in stabbing Y because X was acting in self defence.*
- *A doctor is justified in cutting Y with a scalpel because Y has consented to having an operation.*



EXAMPLES

It is unlikely that an accused person will be able to use the fact that the victim consented to sex, as a way of excusing their behaviour, because:

- If the victim consented to have sex, but didn't know that the accused has HIV, this was not **informed consent**.
- If the victim consented to have sex, knowing that the accused had HIV, our law says this is not **valid consent** – this is because our law does not allow us to consent to serious injury or to being killed.

How do we show that the accused acted intentionally?

People usually understand intention as 'deliberately aiming to do something'. However, the law defines 'intention' more widely to include cases where a person sees that there is a possibility of something happening, but carries on with their behaviour anyway – for example: seeing the possibility of transmitting HIV.



WHAT THE STATE NEEDS TO PROVE

A person:



- Knew he had HIV, and
- Knew or saw that there was a possibility that his behaviour would pass on HIV, and
- Carried on with the behaviour (eg had unsafe sex).

This raises a number of problems:

- It may be very hard for the State to show that the accused person had the necessary intention.
- People who know that there is even a small possibility of passing HIV (eg when a person living with HIV has oral sex) may be found to have 'intention' in the eyes of the law.
- It may be hard to decide which behaviour carries a risk of HIV infection.

What if the accused acted negligently?

Culpable homicide is defined as:

 *the unlawful and negligent killing of another person.* 

Where the accused person passed on HIV because they were negligent (careless), they can be charged with culpable homicide. As with murder, to prove the crime of culpable homicide the victim must have died from the harmful HIV-related behaviour.





EXAMPLES

NEGLIGENCE

- There is a reasonable possibility of harm, eg there is a risk that their behaviour can pass on HIV.
- There are ways to prevent the harm, eg by having safer sex with a condom.
- The accused person does not see this harm and does not take steps to prevent the harm.

14.6.3 ASSAULT

Assault is defined as:

 the unlawful and intentional application of force to another person, or threatening that person with an application of force. 

The ‘application of force’ is defined in many ways, so that almost any harm caused to another person is seen as an assault – for example: where X forces Y to drink a harmful substance, the law will say that X has assaulted Y. So, if the accused person does something which causes HIV to be passed on to another person, the accused can be charged with an assault.

Can a person who aims to infect someone be charged with assault?

It may be easier to charge a person accused of harmful HIV-related behaviour with assault because the death of the victim is not needed to prove the crime. But, just like with murder, there are the same difficulties with proving other elements of the offence, like intention and unlawfulness (see 14.6.2 on page 328).

SUMMARY OF POSSIBLE CHARGES

A person who deliberately infects another person can be charged with one or more of these crimes:

- Murder
- Culpable homicide
- Assault
- Attempted murder or assault, where they intend to infect someone but do not manage to achieve this.

Remember: with harmful HIV-related behaviour, it is very difficult to prove the various elements that make up these crimes.



KEY POINTS

**EXAMPLE**

For case-study examples for discussion, see Talking points on page 338.

For more on criminal charges, see 17.7 on page 425.

**GUIDELINES**

For contact information, see R8 on page 483.

A POSSIBLE CRIMINAL CHARGE

Yashica and Roy are having an affair, although both are married to other people. Yashica applies for a life assurance policy and finds out that she has HIV. She is very angry and blames Roy for infecting her as he had many girlfriends before her.

She wants to make a charge against him for attempted murder. The police advise her that she will only be successful if she can show that it was Roy who infected her, and not her husband or any of her other sexual partners. It may be very difficult to show this, especially if Roy and her husband both have HIV.

GIVING ADVICE TO SOMEONE WHO WANTS TO TAKE LEGAL ACTION:

1. Counsel the client and find out what he/she believes are the facts of the case.
2. If the client has been infected as a result of a crime such as rape, then help him/her to make criminal charges against the person responsible.
3. If the client believes he/she has been infected during a consensual sexual relationship, offer to mediate with his/ her partner if this is appropriate or possible.
4. Get advice from an organisation, such as the AIDS Law Project or the AIDS Legal Network.

14.6.4 SHOULD A NEW CRIMINAL LAW BE WRITTEN TO STOP HARMFUL HIV-RELATED BEHAVIOUR?

Some countries have tried to write new criminal laws as one way of stopping harmful HIV-related behaviour.

**EXAMPLE**

CUBA

In Cuba, repressive laws are used to isolate people with HIV or AIDS. These laws have taken away people's rights to privacy, dignity and freedom of association.

In Southern Africa too, we often hear calls to charge people who ‘spread’ HIV with a crime. The South African Law Commission was recently asked to look into the possibility of making a new criminal law to prosecute harmful HIV-related behaviour.

The main reasons for this are because:

- It may be difficult to use our existing common law crimes to prosecute harmful HIV-related behaviour.
- A new crime may scare people from behaving in a way that can pass on HIV to others.
- It may protect women, who are believed to be more at risk of being infected deliberately or negligently by their male partners.

***PROBLEMS WITH A NEW CRIMINAL LAW
AIMED AT HARMFUL HIV-RELATED BEHAVIOUR***

- *The criminal law is not always the best way to control or police human conduct, especially voluntary sexual behaviour. For many years, sex work has been illegal. Before that sodomy and sex across the colour line were criminal. But this has not stopped people from deciding how they want to live and behave.*
- *A new criminal law will make all people with HIV possible criminals.*
- *A new criminal law may encourage discrimination against groups of people who are wrongly believed to practise unsafe sex, eg prostitutes and gay men.*
- *A new crime may in fact harm more than help women. More women know their HIV status than men because many women are tested when they are pregnant. So, if a man has sex with a woman and she knows she has HIV but does not tell him, she could be charged with deliberately spreading the disease. But we have seen that, if she does tell him, she is vulnerable to either being assaulted or being deserted. So a woman may be charged under this kind of new crime, even though the man could be the one who actually infected her.*
- *A new crime may discourage people from being tested for HIV. If knowing your HIV status can lead to you being prosecuted for harmful HIV-related behaviour, then many people may decide not to find out their HIV status.*



14.6.5 CAN THE CRIMINAL LAW HELP TO STOP THE SPREAD OF HIV?

The criminal law may have a specific role to play in stopping people from harmful behaviour linked to HIV/AIDS. But we should not think that the criminal law will help to stop the spread of HIV.

REASONS WHY THE CRIMINAL LAW IS NOT A GOOD WAY OF STOPPING HIV TRANSMISSION

- *HIV is hardly ever deliberately 'spread' by any person or group. HIV is mainly transmitted through consensual sexual intercourse where both partners don't know their HIV status.*
- *The HIV epidemic is largely a public health issue and not a criminal law issue. It should be dealt with through public health methods and programmes.*
- *Using the criminal law to prosecute people can discourage people from being open about HIV and AIDS, and drive the epidemic underground. The more secret the disease, the more difficult it is to deal with the problems of control and prevention.*
- *Criminal laws against harmful HIV-related behaviour can work against HIV/AIDS education by suggesting that a person does not need to protect him/herself because the law will take care of this.*



This is why most countries and international organisations like the United Nations Joint Programme on AIDS (UNAIDS) recognise that reducing the transmission of HIV needs a response based on the principles of public health care, not a criminal law 'solution'.

HOW THE CRIMINAL LAW APPROACH CAN BACKFIRE

Richard lives in Harare. He has heard the Government in Zimbabwe is writing a law which will allow people with HIV to be jailed for having sex. He thinks he might have HIV, but he decides not to have an HIV test. He is scared that he might be punished if he has HIV.



EXAMPLE

Because he has not gone for an HIV test, Richard does not get any counselling. He does not find out that there are simple precautions that he can take that will prevent HIV transmission.

Richard transmits HIV to his wife because the law makes him scared to find out his HIV status.

See Introducing this manual on page vii for more on the SALC.

The South African Law Commission Project Committee on HIV/AIDS has made an extensive investigation into this question. In June 2001, it published a report that recommended that there should not be a new criminal law for harmful HIV-related behaviour because:

- It may harm more than help people vulnerable to infection, like women.
- It may make discrimination against people living with HIV or AIDS worse.
- It may harm our public health efforts to stop the spread of HIV.

However, the SALC Project Committee responsible for reviewing the Sexual Offences Act have since recommended that failing to disclose things like, for example, your HIV status in a consensual sexual relationship should be seen as rape. Their report was handed to the Minister of Justice in 2002.



14.7

HIV/AIDS discrimination leading to criminal acts

For more on discrimination and HIV/AIDS, see 2.5 – 2.7 from page 40 onwards.

For more on violence against women living with HIV or AIDS, see 8.7 on page 198.

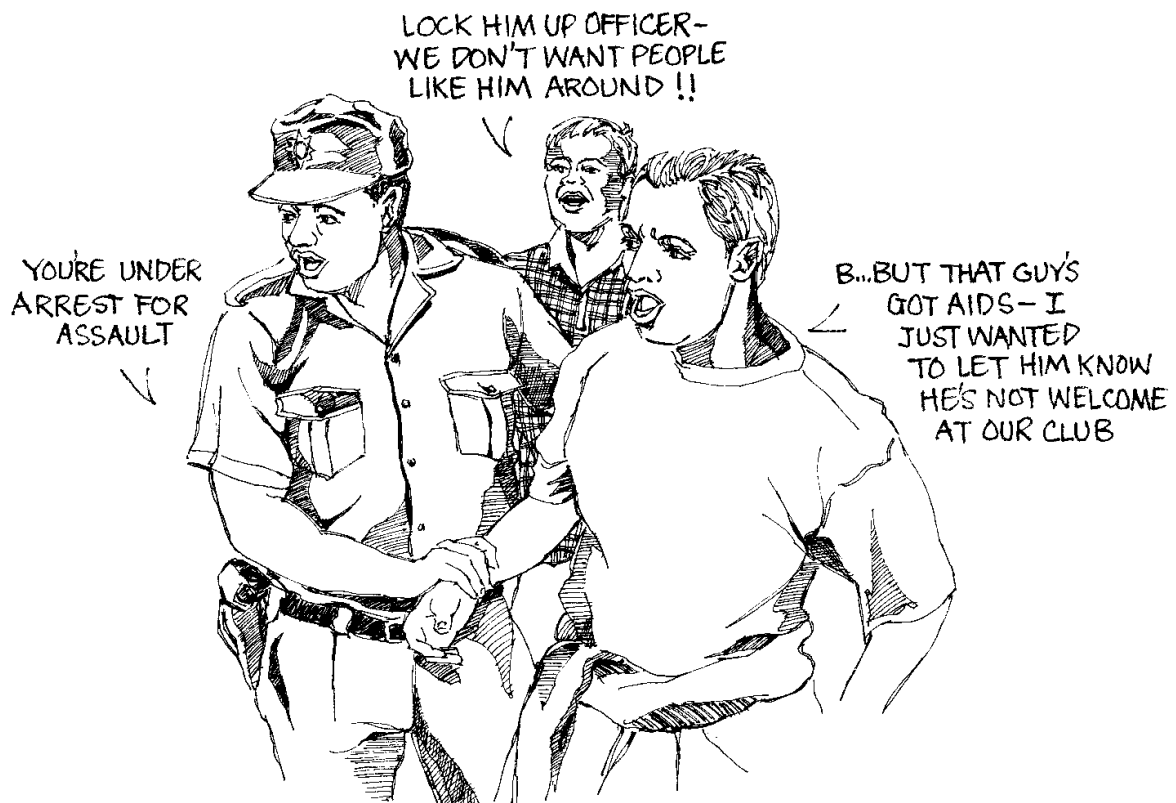
For more on taking action against discrimination, abuse and violence, see 17.6 – 17.8 from page 422 onwards.

For contact details of organisations to assist you, see R8 on page 483.

People living with HIV or AIDS often face discrimination, prejudice and human rights abuses in their daily lives – for example:

- Gugu Dlamini, an HIV/AIDS activist, was beaten to death for publicly disclosing her HIV status.
- A woman was murdered by her husband for being HIV positive.
- If a health care worker takes a sample of blood from a person by force or without consent, the health care worker commits an assault.

In all of these incidents, a crime has been committed, and this could lead to charges of murder or assault. It is important to take action against people responsible for discrimination, violence and abuses as a way of sending a strong message to the community that it is unacceptable to threaten, assault or kill people living with or affected by HIV or AIDS.



Taking action against abusers will send a strong message to communities that violence and discrimination will not be tolerated.



The behaviour of people who have unsafe sex despite knowing that they have HIV, is clearly wrong. It endangers others, and may cause emotional and physical suffering to another person.

But the criminal law is not the best solution for dealing with this situation. It is slow and carries the risk of **unfair discrimination** against people with HIV or AIDS.

Using the criminal law may have the negative effect of making people with HIV afraid to go to hospitals, to tell their friends and to tell their lovers. Most people do not want to expose their loved ones to HIV, but may still want to keep their HIV status private. So, the criminal law risks driving people with HIV underground. The effect of this would be even more infections.

THE BEST WAY TO SLOW DOWN THE NUMBER OF NEW HIV INFECTIONS



- *Educate everyone about HIV and AIDS.*
- *Convince people about the need to have safer sex.*
- *Campaign for sexual rights and against violence against women and children.*
- *Make sure that the law protects everyone equally.*



Talking points



POSSIBLE ANSWERS TO 1

THEMBA AND VINCENT

Themba had no intention to hurt Vincent. Their sex was always consensual, and both knew about the risk of HIV transmission. However, he may be charged with culpable homicide if Vincent dies, if it could be shown that he should have known about his HIV infection.

VUYO AND PEGGY

Peggy has been careless, but has committed no crime unless Vuyo dies. Then she could be charged with culpable homicide as she should have known that even a single sexual act can transmit HIV. She may even be charged with attempted murder if a court decides that she should have warned Vuyo or used precautions because she knew that she could infect him.

MANNY

Manny has tried to harm others. Depending on what happens, it may be possible to charge him – for example: with murder or attempted murder, or assault or attempted assault.

1 THREE CASE STUDIES

Discuss the three case studies below. Decide when you think a person can be criminally punished for having sex, and when they cannot.

Themba and Vincent are lovers. Neither of them has had an HIV test, because Themba and Vincent don't think that they have HIV. But sometimes Themba also has sex with other men. After a while, Vincent has an HIV test and finds out he has HIV.

- *Can Themba be charged with a crime?*

Vuyo and Peggy had sex once. It was Vuyo's first time. Peggy knew she had HIV, but didn't think about the risk of transmitting it to Vuyo.

- *Can Peggy be charged with a crime?*

Manny finds out that he has HIV. He is very angry. He does not tell any of his lovers, and tries to transmit HIV by continuing to have unprotected sex.

- *Can Manny be charged with a crime?*

2 How can we reduce the rate of violent crimes against women, especially crimes which may transmit HIV? Is Parliament doing the right thing in:

- *Passing tougher laws on bail and sentencing?*
- *Considering legislation on testing accused rapists for HIV?*
- *Changing the rape laws?*



3 Does the criminal law on sex work stop sex work from happening, and so help to stop the spread of HIV/AIDS?

- *Or does it mean that sex work is less visible and continues to take place under unsafe and unprotected conditions?*

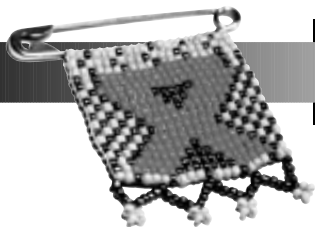
4 How effective do you think the criminal law can be in helping to prevent HIV transmission?

- *What other methods do you think can be effective?*

5 Thuli is an HIV/AIDS educator. She is wearing a shirt with a red ribbon on it in the kombi going home from work. People in the kombi start to taunt her and tell her that she is “a prostitute bringing HIV into the area”. Thuli is afraid so she keeps quiet.

She gets out of the kombi close to her home, but on her way there one man follows her shouting abuse at her. Just before she reaches her house, he grabs her and slaps her across the face. He says that, if he sees her in that T-shirt again, he will beat her so badly she will not be able to walk again.

- *How can we stop this kind of behaviour?*



References & resource materials

LAWS

Arms and Ammunition Act, No 75 of 1969.

Compulsory HIV Testing of Alleged Sexual Offenders Bill (expected to promulgated as an Act in 2003).

Constitution of the Republic of South Africa Act, No 108 of 1996.

Criminal Law Amendment Act, No 105 of 1997.

Criminal Procedure Act, No 51 of 1977.

Criminal Procedure Second Amendment Act, No 85 of 1997.

Domestic Violence Act, No 116 of 1998.

Sexual Offences Act, No 23 of 1957.

POLICY DOCUMENTS

UNAIDS International Guidelines on HIV/AIDS and Human Rights, January 1997.

CASES

NCGLE and Others v Minister of Justice and Others, 1999 (1) SA 6 (CC).

Venter v Nel, 1997 (4) SA 1014 (D).

S v Jordan and Others 2001 (10) BCLR 1055 (T).

Jordan and Others v S and Others 2002 (11) BCLR 1117 (CC).

REPORTS, MANUALS AND OTHER USEFUL MATERIALS

AIDS Law Project (ALP) and Lawyers for Human Rights: HIV/AIDS and the Law: A Trainer's Manual (First Edition), July 1997.

AIDS Law Project/Centre for Study of Violence and Reconciliation, Preventing HIV After Rape, 2002.

AIDS Legal Network: ALQ – The AIDS Legal Quarterly (quarterly magazine).

Black Sash and Education & Training Unit: Paralegal Manual (Update Edition), January 2001.

SALC (South African Law Commission): Adult Prostitution: Issue Paper 19 (Project 107), 2002.

SALC: Aspects of the Law Relating to HIV/AIDS, First Interim Report, Disposable Syringes, Needles and other Hazardous Material; Universal Work Place Infection Control Measures (Universal Precautions); National Compulsory Standard for Condoms; Regulations relating to Communicable Diseases and the Notification of Notifiable Medical Conditions; National Policy on HIV Testing and Informed Consent, February 1997.

SALC: Sexual Offences Report (Project 107), December 2002.

SALC: Simplification of Criminal Procedure, Fifth Interim Report, and Sixth Interim Report (Project 73), 2002.

SALC: Report on The Application of the Bill of Rights to Criminal Procedure, Criminal Law and the Law of Evidence and Sentencing (Project 73), 2002.

SALC: The Need for a Statutory Offence Aimed at Harmful HIV-Related Behaviour, Fourth Interim Report (Project 85), November 2000.

SALC: The Need for a Statutory Offence Aimed at Harmful HIV-Related Behaviour, Fifth Interim Report (Project 85), June 2001.

UNAIDS: Criminal Law, Public Health and HIV Transmission: A Policy Options Paper, June 2002.

UNAIDS: Sex work and HIV/AIDS, Technical Update, June 2002.s

WEBSITES

AIDS Law Project: www.alp.org.za

AIDS Legal Network: www.redribbon.co.za/legal

South African Law Commission: www.law.wits.ac.za/salc/salc.html

