Legal Strategies Beyond the Courts

Edwin J Bernard, Global Co-ordinator,
HIV Justice Network / HIV JUSTICE WORLDWIDE
LAWYERS FOR HIV AND TB JUSTICE
Johannesburg, 22 February 2018
Alternatives to HIV criminalisation

- Positive health, dignity and prevention
- Public health approaches
- Restorative justice and/or community-based conflict resolution
- Supportive, protective, ‘enabling’ laws and policies

See: http://www.hivjustice.net/topic/alternatives/

As well as challenging HIV criminalisation through litigation and political advocacy we must also include:

- Police, judicial, expert witness and media sensitisation and training;
- Free or low-cost immediate access to adequate legal representation;
- Clear policies for healthcare workers regarding 3rd party disclosure including to the police; and
- Prosecutorial and police guidelines to limit the overly broad application of general laws to HIV non-disclosure, potential or perceived exposure and/or non-intentional transmission.
UNAIDS guidance for law enforcement

PROSECUTORIAL AND POLICE GUIDELINES

68. The 2008 UNAIDS/UNDP Policy Brief urged governments to “issue guidelines to limit police and prosecutorial discretion in application of criminal law” in the context of HIV non-disclosure, exposure and transmission.\(^{136}\) Police and prosecutorial guidelines can ensure the protection of individuals against overly broad, uninformed and/or unfair investigations and prosecutions. These guidelines can help to ensure that any police investigation or prosecution is based on the best available scientific evidence relating to HIV, upholds legal and human rights principles, treats like harms alike, and aligns with public health strategies. These guidelines should specify the acts that warrant criminal prosecutions and those that do not. They should also provide evidence-informed recommendations regarding risk, harm, mental culpability, proof and defences in relation to HIV-related criminal cases.
**Prosecutorial and police guidelines: England & Wales**

- OAPA 1861 allows for prosecution of reckless transmission and intentional exposure or transmission only.
- Importance and limitations of scientific evidence to ‘prove’ transmission, and acceptance that use of successful treatment or condoms are defences to recklessness, as well as disclosure /consent.
- Result of insistent civil society engagement with prosecution and police.
- Police guidelines (2008-10).
- Clarified law; reduced court cases; mutual understanding of science and law.
- But still we have complaints, arrests and prosecutions (8 in the past two years, including our first intentional exposure and transmission convictions) so “shit still happens”.
Intentional or reckless sexual transmission of infection: Policy for prosecuting cases

Updated 15 July 2011 | Legal Guidance, Sexual offences, Violent crime

Introduction
The Code for Crown Prosecutors
The first stage of the Code test - the evidence
The second stage of the Code test - the public interest
General propositions
Relevant offences
Intentional transmission: Section 18 Offences Against the Person Act 1861
Attempt to commit section 18
Reckless transmission: Section 20 Offences Against the Person Act 1861
Evidential issues
Public interest issues
Attempt to commit section 20 Grievous Bodily Harm
Rape
Complainant and witness care issues
Conclusion
Police guidelines (1)

- Association of Chief Police Officers (ACPO) approached to develop Investigation Guidance to complement that produced for prosecutors.
- ACPO working group established March 2009 – included police officers, representatives of the CPS and the National Police Improvement Agency, and civil society – under auspices of LGBT ACPO work stream.
- ACPO guidance published May 2010 on Police Online Knowledge Area (POLKA), hosted by the National Police Improvement Agency.
Police guidelines (2)

- HIV key facts for police
- Police investigation flowchart
- Evidential flowchart
- Initial contact via sexual health clinics: This document recommends that where third parties emerge during a police investigation whose HIV status is of interest to the police, initial contact with the individuals should be made by a sexual health clinic rather than by the police themselves.
- Communication strategy: Guidance on communication around an ongoing and completed investigation, and deals with issues of confidentiality and media relations.
HIV JUSTICE TOOLKIT

Educating Prosecutors

Prosecutors decide whether a case will proceed to court. Consequently, it is vital that they understand basic HIV science as well as the health frameworks already in place to deal with the HIV epidemic. The following section includes resources outlining advocacy for prosecutorial guidelines, and official prosecutorial policy and guidelines.

Advocating for Prosecutorial Guidelines
10 resources

Prosecutorial Guidelines
3 resources

Working with Police

Police decide whether or not an HIV-related offence has been committed, and whether a person should be arrested or charged. It is vital that police have a basic understanding of HIV science and awareness of the health systems in place to support people with HIV and those who are concerned they may have been infected.

Researching how the police work
2 resources

Police Guidelines
4 resources

http://toolkit.hivjusticeworldwide.org