

# where hiv is a crime, not just a virus

A new resource, *HIV and the criminal law*, has just been published by NAM. Its author, former *HTU* editor *Edwin J Bernard*, also presented on the issue at the recent International AIDS Conference in Vienna. Here he provides *HTU* with an update on an issue of concern to many readers.

Since 1987, when prosecutions in Germany, Sweden and the United States were first recorded,<sup>1</sup> an increasing number of countries around the world have applied existing criminal statutes or created HIV-specific criminal laws to prosecute people living with HIV who have – or are believed to have – put others at risk of acquiring HIV.

Most of the prosecutions have been for consensual sexual acts, with a minority for behaviour such as biting and spitting.

In the majority of these cases, HIV transmission did not occur; rather: someone was exposed to the risk of acquiring HIV without expressly being informed by the person living with HIV that there was a risk of HIV exposure.

In the cases where someone did test positive for HIV, proof that the defendant intended to harm them and/or was the source of the infection has often been less than satisfactory.

South Africa's openly HIV-positive Constitutional Court judge, Justice Edwin Cameron, called for a global campaign against criminalisation at the 17th International AIDS Conference in Mexico City in 2008, declaring: "HIV is a virus, not a crime."

Two years later, the discussion for people working in the HIV sector has moved on from a debate about whether such laws and prosecutions are good or

bad public policy to one on how to turn the tide and mitigate the harm of criminalisation. Most of them advocate, in the long term, for decriminalisation of all acts other than clearly intentional HIV transmission.

This, however, is a debate that many people outside the HIV sector have yet to even start.

## A global picture

For the first time we now have a good picture of what is happening globally, thanks to the Global Criminalisation Scan,<sup>2</sup> an initiative of the Global Network of People Living with HIV (GNP+). Its report on global laws and prosecutions<sup>3</sup> was published in July to coincide with the 18th International AIDS Conference in Vienna.

It found that at least 600 individuals, in more than 40 countries, have now been convicted of HIV exposure or transmission, with the greatest numbers of cases occurring in the United States and Canada. Many prosecutions have also taken place in Western Europe.

Although 63 countries now have at least one jurisdiction with HIV-specific criminal laws (including 27 in Africa and 13 in Asia), only 17 of these countries appear to have prosecuted anyone under them. The majority of prosecutions took place using general laws such as assault, sexual assault, grievous bodily harm or attempted murder.

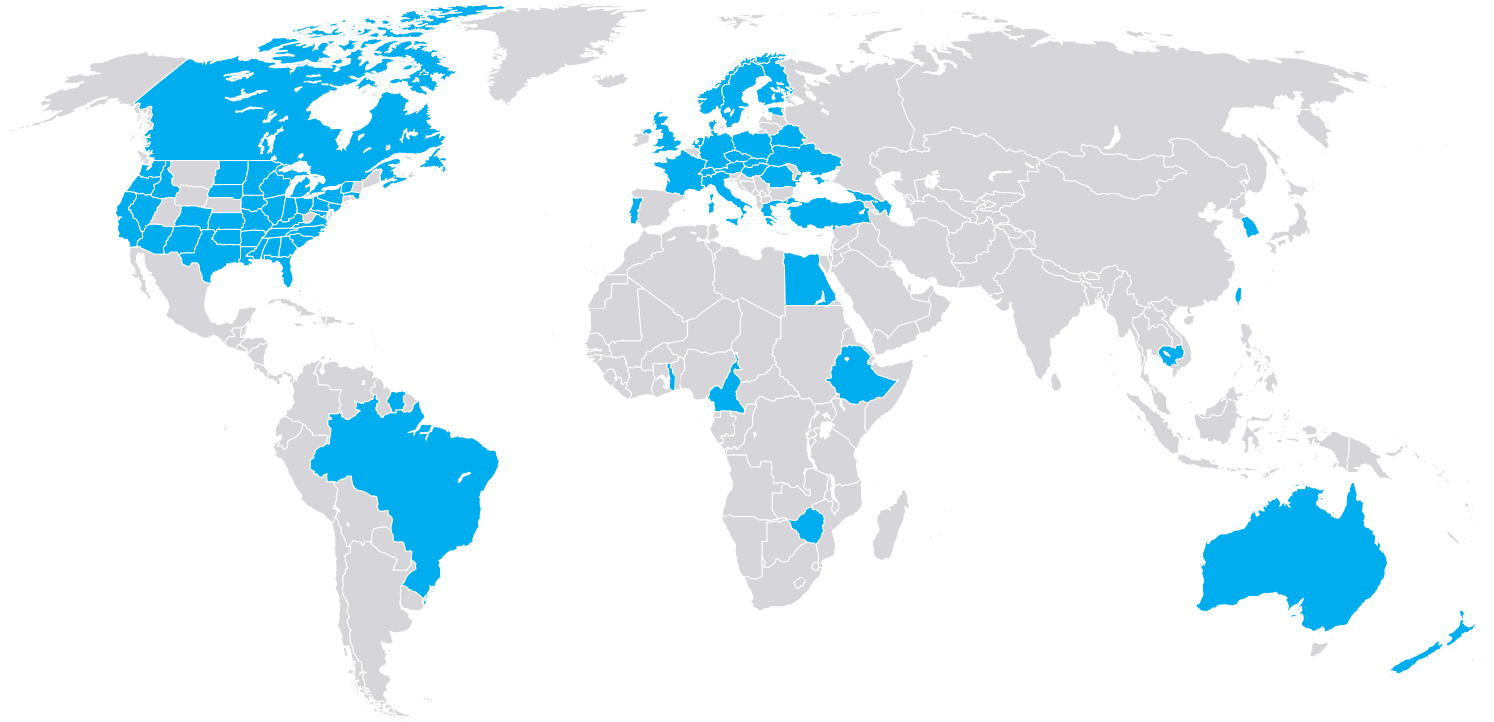
In the past decade, the number of jurisdictions where prosecutions have – or could – take place has grown, although the exact reasoning behind new laws or a first prosecution using existing laws is often varied and complex.<sup>4</sup>

The GNP+ report finds that new HIV-specific laws continue to be enacted, notably in sub-Saharan Africa. It also notes that when HIV-specific laws have been enacted, the enthusiasm for prosecutions has increased, notably in north America, western Europe and Oceania (which includes Australia, New Zealand, and islands in the Pacific Ocean). What's especially worrying is that in many countries these laws have been framed but prosecutions have not yet taken place – as if they are lying in wait for a suitable test case.

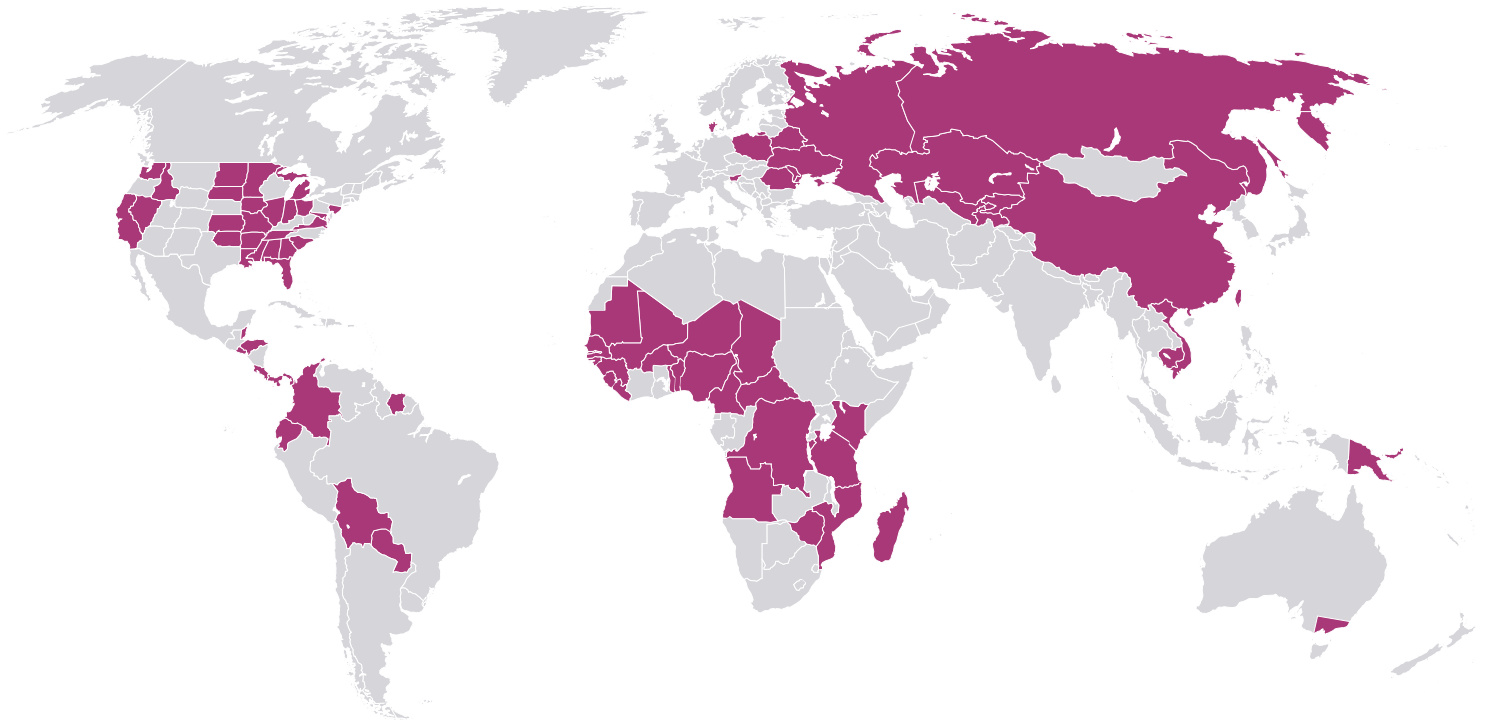
All these laws and prosecutions seem to be motivated by the need to find someone to blame for the continued HIV epidemic.

"It is stigma, rooted in the moralism that arises from the sexual transmission of HIV, that too often provides the main impulse behind the enactment and enforcement of these laws," comments Edwin Cameron.

Concern about prosecutions was initially raised by civil society organisations, but is now shared by the Joint United Nations Programme on HIV/AIDS (UNAIDS) and the United Nations Development Programme (UNDP).<sup>5</sup>



**Countries where prosecutions have taken place under general or HIV-specific laws: 41 (20% of countries globally)**



**Countries with HIV-specific criminal laws in at least one jurisdiction: 63 (29% of countries globally)**

These bodies are especially worried about the prosecution of people with HIV for exposure or transmission during otherwise consensual sex when there was no intention to harm; during assaults such as spitting and biting which carry negligible risk of transmission; and from a mother to her baby.

### Debate without data

The debate regarding the wisdom and effectiveness of legal sanctions, then, is primarily a moral and ethical one; there are few data to back up either side. Yet in order to make sound policy decisions about the use of the criminal law, understanding its impact is crucial.

The debate actually covers two distinct but interlinked issues that often get confused: public health (i.e. whether laws and prosecutions affect HIV prevention, for good or bad) and human rights (whether the rights of people living with HIV are unfairly affected by laws and prosecutions, relative to the uninfected majority's right for protection from HIV).

Considering the public health argument that a principal reason for criminal sanctions is to deter people with HIV from exposing others to their virus,<sup>6</sup> there are no studies showing that this works.<sup>7</sup> Other studies suggest that laws and prosecutions may unintentionally do more harm than good.<sup>8</sup>

In the absence of such hard data, prosecution proponents assert that the criminal law should be a reflection of society's moral code: claiming that punishing non-disclosure of known HIV-positive status when an individual exposes their partner to HIV is morally warranted.<sup>9</sup>

At present, the uninfected majority seems to agree with this – even, or sometimes especially, if they belong to the groups most affected by HIV. For instance, a majority of the 8152 gay men surveyed in the 2006 Gay Men's Sex Survey agreed with prosecution, even though few thought that prosecutions would help reduce the transmission of HIV.<sup>10</sup> It is

also clear from media coverage of proposed new HIV-specific criminal laws in sub-Saharan Africa<sup>11</sup> and continued prosecutions under existing laws in Canada<sup>12</sup> that there are lawmakers and editorial writers – as representatives of the uninfected majority – who believe that such laws and prosecutions are warranted and necessary.

Although such points of view often come from the privileged position of never having had to deal with the difficulty of disclosing one's HIV-positive status<sup>13</sup> to sexual partners, it should be noted that one-in-five gay men living with HIV in the 2006 Gay Men's Sex Survey agreed with criminal prosecutions too.<sup>14</sup>

Ultimately, the public health argument can be used by either side in the criminalisation debate, but is a side issue: prosecutions are essentially about a clash of rights and responsibilities between the accused and the complainant – one in which stigma has burdened the HIV-positive person with all the responsibilities and handed all the rights to the person initially assumed to be HIV-negative.

### Simply unjust

A satellite meeting prior to the 2010 International AIDS Conference was co-organised by NAM, GNP+ and the Canadian HIV/AIDS Legal Network.<sup>15</sup>

One thing discussed was the paucity of data on any public health impact criminal laws and prosecutions might have.

Although research continues, notably in Australia, Canada, the United Kingdom and United States, Susan Timberlake of UNAIDS said that we may never know for certain whether legal sanctions are in fact a disincentive to taking an HIV test, nor whether they deter or exacerbate HIV-related risk behaviour, increase or reduce disclosure of HIV-positive status to sexual partners, or create a false sense of security for people at risk of HIV.

Nevertheless the meeting heard a great deal of concern regarding the

enforcement of these laws, and in particular the potential for unfair treatment of people living with HIV by the criminal justice system.

"It is simply unjust," argued Yusef Azad of the National AIDS Trust (NAT) at the satellite meeting. "It is selecting a small group of people to be the scapegoats for a collective failure of action."

Although the evidence base may be anecdotal, he said, concerns about the impact on marginalised groups, about miscarriages of justice due to ignorance about HIV and about the law's potential to fuel HIV stigma ought to make lawmakers think twice before they turn people with HIV into criminals.

Such arguments are finally reaching influential ears. A recent report by Anand Grover, the United Nations Special Rapporteur on the Human Right to Health,<sup>16</sup> concluded that "the public health goals of legal sanctions are not realised by criminalisation. In fact, they are often undermined by it, as is the realisation of the right to health."

Susan Timberlake told the satellite meeting that it was now a "corporate priority" of UNAIDS to "remove punitive laws, policies, practices, stigma and discrimination that block effective responses to HIV".

Along with UNDP, UNAIDS has formed the Global Commission on HIV and the Law, which will focus on how laws and law enforcement can support, rather than block, effective HIV responses.<sup>17</sup> Part of its remit is to examine all the evidence on the impact of laws and prosecutions for HIV exposure and transmission; it is to issue a report in December 2011.

### How is the UK doing?

When a nineteenth-century law – the *Offences Against the Person Act 1861* (used in England and Wales, and potentially in Northern Ireland) – was first used in England to find Mohammed Dica guilty of reckless HIV transmission in 2003, the HIV sector was caught



unawares; the Labour government had previously recommended against prosecutions, and it was believed that the Act could not be used to prosecute HIV transmission.<sup>18</sup>

Although, to date, a total of 14 'reckless' transmission prosecutions have reached the courts in England and Wales (with eleven convictions), Lisa Power from Terrence Higgins Trust (THT) told the AIDS 2010 satellite meeting that many more individuals – possibly

hundreds – have been arrested and investigated (often with similarly rigorous investigation into the life of the complainant).

Scottish law is different. It focuses on behaviour (whereas English law focuses on the result of such behaviour), so exposing others to the risk of HIV transmission ('HIV exposure'), can, and has, also been prosecuted.<sup>19</sup> There have been four prosecutions and three convictions in Scotland.

Although prosecutions came to the United Kingdom relatively late compared with other countries in western Europe, a co-ordinated and tightly collaborative HIV sector response, led by THT and NAT (but which has included almost every HIV non-governmental organisation in the country, including NAM) has managed to provide lessons for many other countries in terms of clarifying the circumstances of prosecutions and reducing the flow of cases reaching court.

England and Wales was the first country in the world to have prosecutorial guidelines (produced by the Crown Prosecution Service in 2008<sup>20</sup>) and police guidance (produced by the Association of Chief Police Officers in 2010<sup>21</sup>), both developed with extensive consultation with the HIV sector.

Advocates in Canada – where non-disclosure before even protected sex can be considered sexual assault and non-disclosure before oral sex has been charged as attempted murder – are currently attempting to achieve something similar.<sup>22</sup>

We were also one of the first countries to highlight evidential issues around the difficulties of proving that the accused infected the complainant(s),<sup>23</sup> which has resulted in many cases being dropped and at least three individuals being acquitted; and to provide written guidance for healthcare workers,<sup>24</sup> and for individuals living with HIV.<sup>25</sup>

Nevertheless, concluded Power, “shit still happens”. She explained that, although fewer cases are reaching the courts and police investigations are taking less time to conclude than in the past, the number of allegations may actually be increasing.

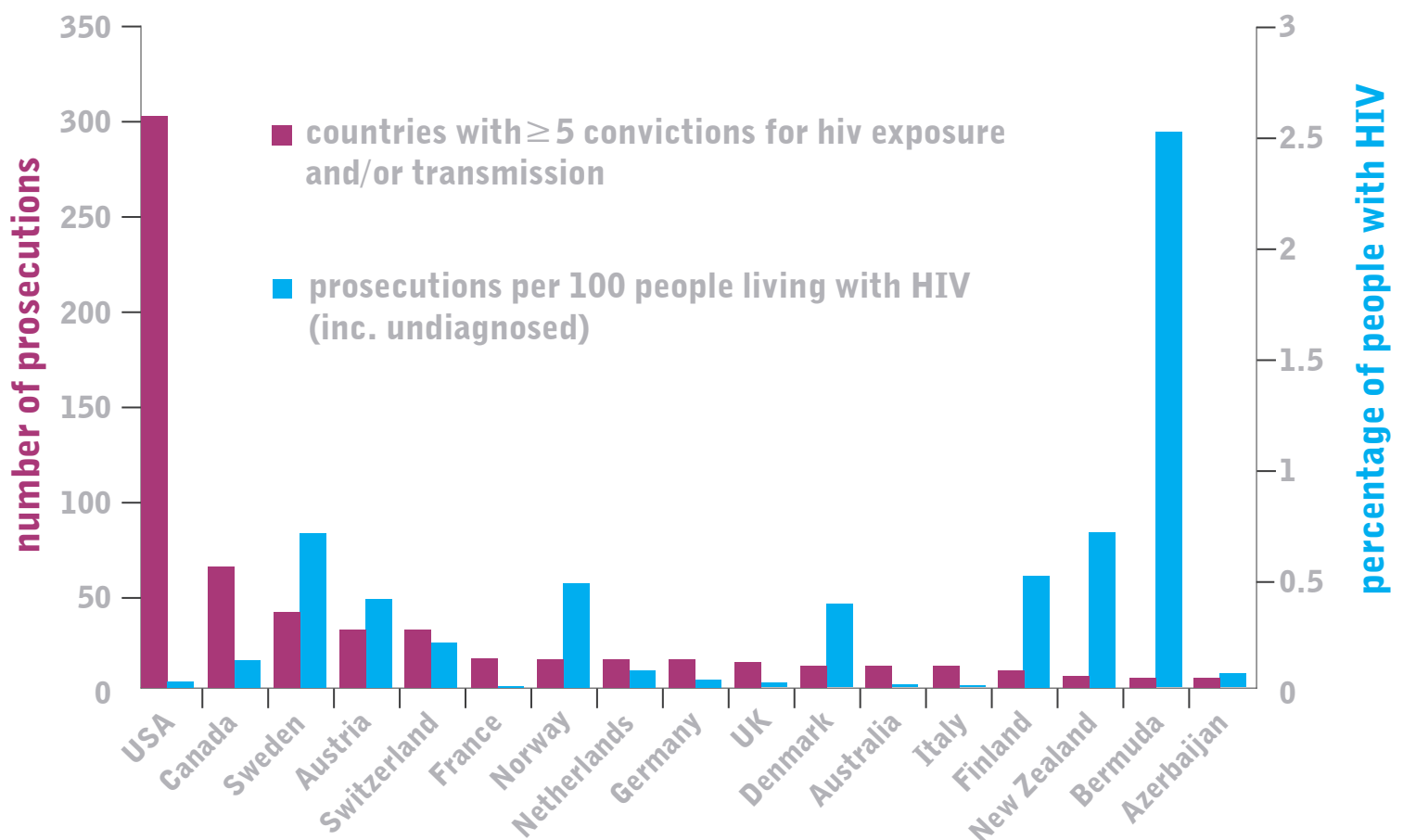
**World rankings**

The United Kingdom comes tenth in the GNP+ global criminalisation ranking according to the total number of convictions obtained by the end of 2009. Looking at it another way – based on the number of prosecutions per number of people living with HIV – the United Kingdom ranks 16th in the world.<sup>26</sup>

The data for the ‘top 15’ in terms of number of prosecutions looks rather different from the top 15 in terms of prosecutions per person living with HIV. Thus, although the 300+ convictions in the USA are shocking, as a proportion of its huge HIV-positive population – the biggest in the world outside Africa and India – it only comes thirteenth.

Tiny Bermuda, on the other hand, with only an estimated 200 people with HIV, has prosecuted 2.5% of them. Apart from Bermuda, the “disproportionate prosecutors” are the Scandinavian countries, New Zealand, Austria (where the figure given is out of date and almost certain to be an underestimate) and, to a lesser extent, Canada and Switzerland.

This also doesn’t tell the whole story in terms of which countries are slackening off the prosecution of HIV, and which show a new enthusiasm for it. Prosecutions have slowed or stopped in the UK (for reasons cited above), the Netherlands and Switzerland, and have been expressly rejected by the governments of South Africa and Mauritius. Countries to watch out for are Malta (two prosecutions since 2005, representing 1% of its positive population), Poland (two since 2008), Singapore (one in 2008) and South Korea (one in 2009).



### Yes, we do – criminalisation in the USA

HIV-specific laws were drafted in the United States earlier in the AIDS epidemic when life expectancy was poor. Reflecting moral panic and poor understanding of HIV transmission risks, their impact is still felt within its borders today. At AIDS 2010, I presented an analysis of criminal cases of non-disclosure, exposure or transmission in the United States during a two-year period, 2007 to 2009, and identified 82 cases of arrest or prosecution.<sup>27</sup>

Just over half of all cases occurred in eight states, all of which had an HIV-specific law: Arkansas, Florida, Illinois, Michigan, Missouri, Ohio, South Carolina and Tennessee.

Three-quarters of cases occurred in the 25 states with HIV-specific laws. Half the cases involved unprotected sex without disclosure but no alleged HIV transmission, and a quarter of all reported cases involved spitting, biting or scratching – activities which pose no risk of HIV transmission.

There is light at the end of the tunnel, however. During AIDS 2010 it was revealed<sup>28</sup> that the Obama administration's new National HIV/AIDS Strategy,<sup>29</sup> released a week earlier, included recommendations for states to review their "HIV-specific criminal statutes to ensure that they are consistent with current knowledge of HIV transmission and support public health approaches to preventing and treating HIV".

"In many instances," the Strategy report notes, "the continued existence and enforcement of these types of laws run counter to scientific evidence about routes of HIV transmission and may undermine the public health goals of promoting HIV screening and treatment."

Catherine Hanssens, Executive Director of the Center for HIV Law and Policy in New York told the *Michigan Messenger*, "It is the first truly meaningful official statement on the issue of criminalisation

and the role of civil rights in addressing the HIV epidemic, and reflects both the advocacy of HIV civil rights advocates who consistently prioritised the issue, and the willingness of ONAP (Office of National AIDS Policy) staff to respond substantively and decisively."

Hanssens and other HIV and civil rights advocates in the United States are cautiously optimistic that such recommendations will translate into further action.

She hopes the recommended state reviews will "produce findings that HIV-specific criminal laws and prosecutions contravene prioritised public health goals; subject people with HIV to irrational, exceptionalist treatment and punishment solely on the basis of their known HIV status, and also consequently represent a violation of federal anti-discrimination laws created to protect those affected by HIV."

### Exporting criminalisation to Africa

The United States doesn't just have some of the most draconian laws against HIV transmission – it also exports them.

The US has long been a global leader in creating and enforcing HIV-specific laws, including the export of laws to Africa. Until recently, its international development agency, USAID, funded the creation and widespread adoption of a 'model law' that includes definitions of 'wilful HIV transmission' that are vague and overly broad. They allow prosecutions for non-disclosure and HIV exposure – even from a mother to her infant.<sup>30</sup>

The N'Djamena model law was, ironically, conceived as human rights legislation. One of its intentions was to protect the rights of women when it came to sexual assault and rape, and many organisations for women with HIV in Africa, such as the Society for Women and AIDS in Africa – Ghana, actively lobbied for it.<sup>31</sup> However, it has been suggested that HIV-specific criminal laws may, in fact, threaten the health and human rights of women and girls, especially as such laws can place women

in a difficult situation once they learn of their HIV status.

It is ironic that, of the seven (out of a total of eleven) prosecutions in Africa where we know the gender of the accused, six were women.<sup>32</sup> At least 18 of the 27 countries in Africa that have introduced HIV-specific laws were directly influenced by this model law<sup>33</sup> and a further 8 of the 16 countries globally that are currently debating new HIV-specific criminal laws are in sub-Saharan Africa.

North America and western Europe have traditionally been the countries that jailed people who pass on HIV. We are starting to see prosecutions outside these regions, however, and it would be paradoxical if some countries started adopting prosecution as a policy just as others started to see its drawbacks.

The renewed urgency with which bodies like UNAIDS and UNDP are looking into the use of the criminal law against people with HIV is to be welcomed, and comes none too soon if we are to avoid a new wave of unjust prosecutions in the world's high-prevalence countries. ■

- NAM has recently published an extensive new resource, *HIV and the criminal law*, written by Edwin J Bernard. You can read it online at [www.aidsmap.com/law](http://www.aidsmap.com/law). A print edition will also be available. Contact NAM on 020 7840 0050 or at [info@nam.org.uk](mailto:info@nam.org.uk) for more information on ordering it.

- Videos of the AIDS 2010 satellite meeting on the criminalisation of HIV exposure and transmission can be viewed online at: [www.aidsmap.com/page/1444486](http://www.aidsmap.com/page/1444486).

- Edwin's blog on Criminal HIV transmission can be seen at <http://criminalhivtransmission.blogspot.com>.