CRIMINALISATION OF HIV/AIDS IN SOUTHAFRICA: A CRITICAL LOOK AT THE
CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT
ACT 32 OF 2007

BY

BARNABAS NDAWULA

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SUPERVISOR: PROF. NARNIA BOHLER-MULLER
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I wish to sincerely thank Professor Narnia Bohler-Muller, my supervisor, for her untiring guidance and patience. This study would have been impossible without her, my gratitude is bottomless. I also thank Ms Dawn Prinsloo for helping me through the maze of reports, books and journals, Ms Catherine Akurut for helping with the editing, lastly I thank my family especially my wife, Carol, for all the support rendered during the past year of study.
SUMMARY

Human Immuno Virus (HIV) and Acquired Immuno Deficiency Syndrome (AIDS) have formed part of the South African landscape since the first report in 1983\(^1\) and today South Africa is reported to be the country with the highest number of people living with HIV/AIDS in the World\(^2\). This state of affairs, in combination with South Africa’s high sexual crime rate resulted in a general public out-cry with calls for the government and the legislature to enact laws to stem the spread of HIV/AIDS\(^3\). Government and the legislature finally responded by way of promulgating the criminal law (sexual Offences and related matters) Amendment Act\(^4\) (hereinafter the sexual Offences Act). The Sexual Offences Act *inter alia* provides for the compulsory testing of alleged offenders of sexual crimes\(^5\).

This treatise will show that chapter five of the sexual Offences Act, indirectly criminalises HIV/AIDS, and that this is not desirable. It will be submitted that the criminalisation of HIV is against the stated UNAIDS policy\(^6\) and is a deterrent to public health methods of curbing the epidemic, while at the same time exacerbates the spread of the epidemic by forcing people who are HIV positive not to openly come out. It will be argued in the use of criminal law against the transmission of HIV creates stigma and is also an attack on individual human rights. The study will also show that the supposed marginalised persons, such as women and children are not protected by the use of criminal law in the prevention of HIV transmission, contrary to the arguments of the proponents of those who support the use of criminal law. The study will show that far from protecting these marginalised groups of people, criminalisation of HIV transmission, does in fact hurt them.

It is finally submitted in this treatise that South Africa should repeal all provisions in its law that directly or indirectly criminalises HIV/AIDS transmission and instead follow both

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\(^4\) Act 32 of 2007.
\(^5\) Chapter Five.
the UNAIDS policy and the South African development corporation (SADC) Model Law on HIV and AIDS.
CHAPTER ONE

SETTING THE SCENE

1.1 INTRODUCTION

The first reported case of HIV/AIDS in the West was detected in the United States of America in the State of California in 1981.\(^7\) Since then the disease has taken on global proportions and is to be found on every continent in the world. Even as the epidemic has taken on global proportions, so has the fight to curb its rampant spread. The United Nations Organisation (UN) has put the fight against the spread of HIV/AIDS at the forefront of its global public health policies\(^8\) and the eradication of HIV/AIDS is featured as crucial if the projected millennium goals are to be realised.\(^9\) Africa has hitherto borne the brunt of this pandemic with 75% of all cases reported in Africa, the majority of which in sub-Saharan Africa.\(^10\) Worse still, Southern Africa as a sub-region is and remains in the eye of the AIDS storm: 34% of all AIDS deaths in the world occur in this region while the Republic of South Africa shares with India the dubious title of having the highest number of HIV positive persons at 5.5 million.\(^11\)

With the above circumstances prevailing, countries in the region have felt the need to embark on policies aimed at reversing this rather alarming state of affairs. In line with this the Southern Africa Development Co-operation (SADC) treaty was amended in 2001 to include a commitment to combat HIV/AIDS and other deadly communicable diseases as one of the objectives of the organisation.\(^12\) In July of 2003 the SADC heads of state adopted a declaration known as HIV/AIDS Strategic Framework (2003- 2007), which has as its objective to reduce the number of individuals living with HIV/AIDS.\(^13\) In

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\(^12\) SADC treaty (2003) art 5(1) (i).
pursuing these objectives there has been a growing perception that criminal law must be included in the structural response to HIV/AIDS in the sub-region.\textsuperscript{14}

This perception has been entrenched by the increasingly high incidences of sexual violence cases along with calls for “tough” government action.\textsuperscript{15} The call for criminalisation\textsuperscript{16} has been greatly fuelled by the high level of sexual violence in the region, especially rape which is known to increase the chances of transmission.\textsuperscript{17} High numbers of sexual violence cases are reported in most Southern African countries, with South Africa alone logging 39,262 reported cases in 1999.\textsuperscript{18} Between April 2003 and March 2009, 403,794 sexual violence cases were reported.\textsuperscript{19}

In view of the above factors, commentators perceive criminal law as a regulatory tool that could influence behaviour change and promote the goal of HIV prevention.\textsuperscript{20} In South Africa there has been a call for tough action. The legislature and the executive have been called upon to take appropriate action that endorses the use of the coercive power of the state to deal with those wilfully or negligently transmitting HIV/AIDS.\textsuperscript{21} This call has not entirely fallen on deaf ears and in the final analysis the Republic of South Africa did introduce HIV specific legislation in the form of sections 29 to 32 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act.\textsuperscript{22}

Proponents of the use of criminal law to criminalise the transmission of HIV/AIDS contend that it prevents conduct that is likely to transmit HIV; educates the public on activities that are likely to spread HIV; and reinforces social norms against behaviour that carries the risk of infection. The relevance of such legal intervention, it is argued,

\begin{itemize}
\item \textsuperscript{14} Eba “the criminalization of HIV transmission or exposure in SADC countries” in Viljoen & Precious (eds) \textit{Human Rights Under Threat} (2007) 14.
\item \textsuperscript{15} Eba “The criminalization of HIV” in Viljoen & Precious (eds) \textit{Human Rights Under Threat} 14.
\item \textsuperscript{16} The concept of criminalisation shall be considered in chapter 3 of this study.
\item \textsuperscript{17} Dunkek \textit{et al} Gender based violence relationship power and risk of HIV infection among women attending ante natal clinics in South Africa 22 (1992).
\item \textsuperscript{19} South African Police Crime Statistics (2009)
\item \textsuperscript{20} Eba “The criminalization of HIV transmission” in Viljoen & Precious (eds) \textit{Human Rights Under Threat} 14.
\item \textsuperscript{21} South African Law Reform Commission 5\textsuperscript{th} \textit{Interim Report} 16.
\item \textsuperscript{22} Act 32 of 2007.
\end{itemize}
lies with its primary functions of incapacitation and deterrence. Given this background, it would appear that the course taken by the South African government was not only inevitable but also appropriate. However, one may wonder whether the applying of criminal law to HIV/AIDS transmission in offences of a sexual nature, thereby indirectly criminalising its transmission, is actually a well thought through policy and whether the state was not misadvised and rushed to appease the loud voices of the proponents of this policy in order to calm public hysteria. It has been noted that the need to calm public agitation is a great driving force and is used as rationale to adopt HIV specific legislation around the world. Kirby in his article “The ten commandments” made the following remarks:

“There will be calls for law and order and a war on AIDS. Beware of those who cry out for simple solutions, for [in] combating HIV/AIDS there are none. In particular, do not put faith in the enlargement of the criminal law.”

The UN, via its UNAIDS body, specifically calls upon all states not to enact any criminal laws that are HIV/AIDS specific and also calls upon those governments that have made such promulgations to repeal them forthwith. The UNAIDS policy is one of total non-criminalisation of HIV transmission based on extensive research. As this study shall subsequently show - and in its camp it has an array of researchers, scholars, activists and public health experts - the criminalisation of HIV/AIDS transmission is at best of no value and at worst has the effect of reversing the gains already made in the fight against the pandemic.

The two opposing positions highlighted above are the genesis of the problem in this study. The said problem may be stated as follows: Can criminal law legislation play a positive role in the control and ultimate eradication of the spread of HIV/AIDS, or is such legislation detrimental to the gains made in the fight against the spread of the scourge?

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26 Kirby 30.
28 Some of these leading opinions shall be featured as this study progresses.
This study shall proceed on the hypothesis that criminal law is not an appropriate tool in the fight against HIV/AIDS transmission and at best only tends to render nugatory any advances made by the public health sensitisation approach, while at the same time creating more stigma and prejudice.

The study has the following objectives:

1. To show that the wider international community is averse to the criminalisation of the transmission of HIV/AIDS and the UN specifically calls upon all nations not to promulgate HIV/AIDS specific laws that criminalise transmission.

2. To show that the Criminal Law (Sexual Offences and Related Matters Amendment) Act 32 of 2007 (herein after referred to as the Sexual Offences Act) in sections 28 to 32 contains HIV/AIDS specific legislation contrary to the UNAIDS policy.

3. To embark on a comparative study of HIV/AIDS criminalisation around the world, including a discussion of the SADC Model Law on HIV/AIDS.

4. To prove that the Sexual Offences Act cannot achieve any positive results with regard to the fight against the spread of the scourge, nor can it live up to its stated objectives.

5. To recommend the UNAIDS policy as the better approach to the fight against the AIDS scourge.

6. To conclude that criminal law is not an effective tool in the fight against the transmission of HIV/AIDS.

1.2 METHODOLOGY

In order to achieve the objectives of the study, existing criminal law which contains legislation that is HIV/AIDS specific is critically analysed, as well as relevant case law and general pre- and post-litigation procedure arising from the said criminal law. The purpose is to determine the actual efficacy of the law and the impact, if any, that it has on the criminal law and social landscape. By doing this it will be possible to identify the
trends followed by the enforcement agencies and the courts when dealing with HIV related offences.

Keeping in mind that the Sexual Offences Act has been in existence for barely two years, it will be necessary to invite into this study an analytical and comparative survey of reports, articles, position papers, journals, books and other publications, including data from grass roots research, by various scholars, both local and international. Of particular interest will be an investigative study of similar laws promulgated by other countries and the impact these have had on transmission of HIV trends. The purpose hereof is to provide a pointer or indication of the potential impact the Sexual Offences Act is likely to have in South Africa over time if left as it is.

1.3 OUTLINE OF CHAPTERS

The research develops as follows through the chapters:

**Chapter one** is an introductory chapter setting out the problem statement, its exposition, a contextualisation of the problem, the hypothesis, objectives and methodology of the research.

**Chapter two** sets out and analyses the Sexual Offences Act, in particular sections 29 to 32 that contain HIV specific legislation. Included in this chapter is a study of the origins of this legislation and the apparent mischief that the legislature aimed at curbing within the social context of the law.

**Chapter three** traces the history of criminalisation of HIV/AIDS transmission and considers the views of both the proponents and opponents of criminalisation. The chapter also critically considers the pros and cons of such criminalisation and finally presents the position taken by the United Nations through UNAIDS.

**Chapter four** compares the South African position to the global context of international human rights law.
Chapter five contains a comparative study of the criminalisation of HIV/AIDS transmission in other countries and regions namely; USA, Canada, UK, East Africa, West Africa, and the SADC region.

Chapter six is the final chapter of the study containing the conclusion and recommendations.
CHAPTER TWO

DEVELOPMENT OF THE LAW IN SOUTH AFRICA

2.1 Introduction

By 1999 the state of the HIV/AIDS pandemic in South Africa, and the general public out-cry for government to do something about it, resulted in the government decision to take positive steps in the form of legislation aimed at curbing the spread of HIV. Of note is that at this time incidences of sexual crimes such as rape and, indecent assault were not only on the increase, but were cited as a particularly effective medium for the transmission of HIV. The call was for government to come up with a suitable response which ensures that victims’ rights take precedence over the rights of offenders. Government did go ahead to mandate the South African Law Commission to conduct a study and come up with suitable recommendations. The Report contained a number of recommendations, which called for the amendment of the law in order to inter alia include the compulsory testing of persons charged with sexual offences.

This chapter addresses these legal developments in South Africa, and explores the social context within which this law was promulgated. Included is an examination of the mischief that the legislature intended to prevent through its enactment of new law. In setting the scene for the examination of this law, the concept of criminalisation is also analysed.

30 At 9.
31 Ibid.
33 At 92.
2.2 HIV/AIDS Legislation

On 16 December 2007 the Criminal Law (Sexual Offences And Related Matters) Amendment Act\textsuperscript{34} came into operation. This Act is comprehensive and is a codification of all sexual offences in the Republic. However, this study shall limit itself to those aspects of the law that provide for the compulsory HIV testing of alleged sex offenders. The Act pronounces itself follows:

“To comprehensively and extensively review and amend all aspects of the laws and implementation of the laws relating to sexual offences and to deal with all legal aspects of or relating to sexual offences by-

- Providing the South African Police Service with new investigative tools when investigating sexual offences or other offences involving the HIV status of the perpetrator;
- Providing certain services to certain victims of sexual offences, inter alia to minimise, or as far as possible to, eliminate secondary traumatisation, including affording a victim of certain sexual offences a right to require that the alleged perpetrator be tested for his or her HIV status and the right to receive Post Exposure Prophylaxis in certain circumstances…”

Chapter 5 of the Act deals with our area of interest in this study. The heading of this chapter reads thus:

“SERVICES FOR VICTIMS OF SEXUAL OFFENCES AND COMPULSORY HIV TESTING OF ALLEGED OFFENDERS.”

Part one of Chapter 5 in section 27 deals with various definitions, while section 28 provides for services for victims relating to Post Exposure Prophylaxis (PEP) and compulsory HIV testing of alleged offenders.

Section 28(1) reads as follows:

“If a victim has been exposed to the risk of being infected with HIV as the result of a sexual offence having been committed against him or her, he or she may-

\textsuperscript{34} Act 32 of 2007.
(a) Subject to sub section (2)-

(i) Receive PEP for HIV infection at a public health establishment designated from time to time by the cabinet member responsible for health by notice in the gazette for that purpose under section 29, at state expense and in accordance with the states prevailing treatment norms and protocols;

(ii) Be given free medical advice surrounding the administering of PEP prior to the administering thereof, and

(iii) Be supplied with a prescribed list containing the names addresses and contact particulars of accessible public health establishments contemplated in section 29(1) (a) and

(b) Subject to section 30, apply to a magistrate for an order that the alleged offender be tested for HIV at state expense.

(2) Only a victim who-

(a) lays a charge with the south African police Services in respect of an alleged sexual offence; or

(b) reports an incident in respect of an alleged sexual offence in the prescribed manner at a designated health establishment contemplated in sub section (1) (a) (i), within 72 hours after the alleged sexual offence took place, may receive the services contemplated in sub section (1) (a)."

Sub section (3) goes ahead to provide for the importance of the victim receiving PEP treatment within the 72 hours after the alleged sexual offence and accessing the relevant medical advice and care, This follows the laying of a charge or the making of a report.

Section 29 provides for the establishment of designated health care units by the Minister in charge for purposes of providing PEP treatment. The said health centre details are published in the Government Gazette, hence formalising the designation.

Part two of chapter 5 deals with a situation where an application for compulsory HIV testing of an alleged offender is brought by the victim. This is provided for in sections 30 to 31.

Section 30 (1) (a) reads as follows;
Within 90 days after the alleged commission of a sexual offence any victim, may apply to a magistrate, in the prescribed form for an order that-

(i) The alleged offender be tested for HIV and that the results thereof be disclosed to the victim or interested person, as the case may be, and to the alleged offender, or

(ii) The HIV test results in respect of the alleged offender, obtained on application by a police official as contemplated in section 32 be disclosed to the victim or interested person as the case may be.”

Part (b) requires that where an application is brought by an ‘interested person’ such person must have the consent of the victim unless the victim is below 14 years of age, is unconscious or is mentally disabled.

Section 31 deals with the consideration of the application by a magistrate and issuing of an order. Section 31 (1) states that,

(1) The magistrate must, as soon as practicable, consider the application contemplated in section 30, in chambers and may call for such additional evidence as he or she deems fit, including oral evidence or evidence by affidavit, which must form part of the record of the proceedings.

(2) (a) For the purpose of the proceedings the magistrate will consider evidence for and on behalf of the alleged offender if, to do so, will not give rise to any substantial delay.”

Part three of chapter 5 deals with the application for compulsory HIV testing of an alleged offender by an investigating officer. This is specifically provided for by section 32(1). Subsections (2) and (3) set out the grounds upon which the application may be based, and the action the magistrate may take. These are similar to the provisions of section 31.

Part four of chapter 5 provides for the execution of orders relating to compulsory testing for HIV. Section 33 provides for the execution of an order for testing and the issuing of a warrant of arrest. Subsection (1) reads:

“(1) As soon as an order referred to in section 31(3) or section 32(3) has been handed to an investigating officer-
(a) The investigating officer must request any medical practitioner or nurse to take two prescribed blood specimens from the alleged offender, and the investigating officer must make the alleged offender available or cause such person to be made available for that purpose;

(b) The medical practitioner or nurse must take two prescribed body specimen from the alleged offender;

(c) The investigating officer must deliver the body specimens to the head of a public health establishment designated in terms of section 29 or to a person designated in writing by the head of such establishment

(d) The head of the establishment or the person referred to in paragraph (c) must-

   (i) Perform one or more HIV tests on the body specimens of the alleged as are necessary to determine the presence or absence of HIV infection in the alleged offender…”

Section 33(3) empowers the magistrate to issue an arrest warrant if there is reason to believe that the alleged offender will not comply with the order to have the test done. Section 38 (2) goes a step further by creating a specific offence:

“An alleged offender who, in any manner whatsoever, fails or refuses to comply with or avoids compliance with, or deliberately frustrates any attempt to serve on himself or herself, an order of court that he or she be tested for HIV, is guilty of an offence and is liable on conviction to a fine or imprisonment for a period not exceeding three years.”

The above provisions of the Act are obviously HIV/AIDS specific. In particular sections 30, 32, and 33 provide for the compulsory testing of the alleged offender, while section 34 and 38(2) create an offence and provide for the arrest of non-compliant alleged offenders.

A closer look at the provisions of the law, from section 27 to 39, shows that once a prima facie case of sexual assault has been established by the magistrate, an alleged offender really has no say in the matter, and his views as to whether he should be tested or not are not of primary consideration. It is this compulsory, coercive and mostly arbitrary approach to the testing of the alleged offender that is of utmost interest in this study. This especially in view of the fact that these tests consist of the most private intrusion to the human being and, secondly, that they are for a social disease which
society abhors and which may lead to ostracism and stigmatisation. The concepts of human rights and social stigma do seem to raise a red flag here, but, these issues shall be dealt with in subsequent parts of this study.

The abovementioned legislation, like all criminal law, is created with the aim of curbing some form of mischief or other. What, therefore, is the nature of the mischief that this law intended to curb? To find an appropriate answer to this question we need, first of all, to explore the social context within which this law was conceived.

2.3 Social factors that influenced the promulgation of the Act

Since AIDS was first reported in 1983, South Africa has moved from the epidemic being restricted to a few hundred cases – mostly among men who have sex with men (MSM) and persons receiving unsafe blood transfusions - to an estimated 5,700,000 people living with HIV by the year 2007. HIV prevalence in the age range 15 to 49 moved from less than 0.1% in 1990 to over 20% by the end of 2007. This makes South Africa the country with the highest number of people living with HIV in the world. The situation is made even grimmer by the number of AIDS-related deaths, where the estimated number of deaths due to AIDS from 1999 to 2007 moved from less than 100,000 annually to more than 400,000.

Below is a graphic representation of the HIV/AIDS situation in South Africa from 1999 to 2007:

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41 At 4.
43 UNAIDS/WHO Factsheet 4.
Estimated number of adults and children living with HIV (source: UNAIDS/WHO 2008)

<table>
<thead>
<tr>
<th></th>
<th>2001</th>
<th>2007</th>
</tr>
</thead>
<tbody>
<tr>
<td>Adults(15+) and children</td>
<td>4 700 000</td>
<td>5 700 000</td>
</tr>
<tr>
<td>Low estimate</td>
<td>4 000 000</td>
<td>4 900 000</td>
</tr>
<tr>
<td>High estimate</td>
<td>5 500 000</td>
<td>6 600 000</td>
</tr>
<tr>
<td>Adults(15+)</td>
<td>4 600 000</td>
<td>5 400 000</td>
</tr>
<tr>
<td>Low estimate</td>
<td>3 900 000</td>
<td>4 700 000</td>
</tr>
<tr>
<td>High estimate</td>
<td>5 300 000</td>
<td>6 200 000</td>
</tr>
<tr>
<td>Children(0-14)</td>
<td>150 000</td>
<td>280 000</td>
</tr>
<tr>
<td>Low estimate</td>
<td>120 000</td>
<td>230 000</td>
</tr>
<tr>
<td>High estimate</td>
<td>190 000</td>
<td>320 000</td>
</tr>
<tr>
<td>Adult rate (15-49) (%)</td>
<td>16.9</td>
<td>18.1</td>
</tr>
<tr>
<td>Low estimate</td>
<td>14.3</td>
<td>15.4</td>
</tr>
<tr>
<td>High estimate</td>
<td>19.9</td>
<td>20.9</td>
</tr>
<tr>
<td>Women(15+)</td>
<td>2 700 000</td>
<td>3 200 000</td>
</tr>
<tr>
<td>Low estimate</td>
<td>2 300 000</td>
<td>2 800 000</td>
</tr>
<tr>
<td>High estimate</td>
<td>3 200 000</td>
<td>3 700 000</td>
</tr>
</tbody>
</table>

HIV prevalence among young people 2007

<table>
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<tr>
<th></th>
<th>Male</th>
<th>Female</th>
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<tbody>
<tr>
<td>Prevalence among 15-24 year olds</td>
<td>4.0</td>
<td>12.7</td>
</tr>
<tr>
<td>Low</td>
<td>1.7</td>
<td>9.1</td>
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### HIV prevalence among young people

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<tr>
<th></th>
<th>2001</th>
<th>2002</th>
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<th>2006</th>
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<tr>
<td>High</td>
<td>4.8</td>
<td>4.4</td>
<td>15.5</td>
<td>16.9</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### Estimated number of deaths due to AIDS

<table>
<thead>
<tr>
<th></th>
<th>2001</th>
<th>2007</th>
</tr>
</thead>
<tbody>
<tr>
<td>Adults and children</td>
<td>180 000</td>
<td>350 000</td>
</tr>
<tr>
<td>Low estimate</td>
<td>130 000</td>
<td>270 000</td>
</tr>
<tr>
<td>High estimate</td>
<td>250 000</td>
<td>420 000</td>
</tr>
</tbody>
</table>

Estimated adult HIV (15-49) prevalence %, 1990-2007

0 = Low estimate

5 = Average HIV prevalence

10 = High estimate
The nature of HIV/AIDS prevalence has some salient features. It is reported that by the end of 2006 half of all deaths in South Africa and 71% of all deaths among those aged between 15 and 49 were caused by AIDS. Another telling feature is that women make up 57% of those living with HIV in South Africa. It is also documented that women in violent relationships or who have domineering male partners are 50% more likely to contract HIV than those who are not in abusive relationships. In addition to this, studies have shown a definite relationship between the spread of HIV and sexual violence. A 2006 Interpol study revealed that a woman is raped in South Africa every 17 seconds, not including child rape victims, and 13% of women aged between 15 and

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45 UNAIDS/WHO Factsheet 5.
49 have been victims of physical abuse at some point in their marriage or partnership,\textsuperscript{48} while, one in four men in South Africa admit they have committed rape.\textsuperscript{49}

In light of the bleak HIV/AIDS statistics and the apparent unchecked spread of the virus, a general outcry began and picked up momentum.\textsuperscript{50} Of particular note was that the government was being called upon to check the spread of this scourge, and the crime statistics on sexual violence were especially highlighted to government as one of the leading causes of the spread of the disease. In 2004 UNAIDS made the following observation in South Africa:

“Violence and HIV are linked on three levels: direct transmission through rape, indirect transmission due to childhood trauma and fear of the threat of violence. Women in violent relationships often do not feel comfortable negotiating sex and therefore are at risk of contracting HIV because they fear the consequences of talking about condom use.”\textsuperscript{51}

Against this background, the out-cry was not only for government to do something about the growing epidemic, but for the use of criminal law to punish certain harmful HIV-related behaviour, due to the high incidence of sexual violence cases. There were also calls for the protection of victims of sexual assault in order to avoid any secondary trauma. These calls for tough action were generally directed to the executive and the legislature to take appropriate steps, namely the use of the coercive power of the state to deal with those who wilfully or negligently transmit HIV/AIDS.\textsuperscript{52}

In South Africa, the enquiry into the need for a statutory offence aimed at harmful HIV-related behaviour was undertaken as a result of mounting public concern and calls by political parties to the legislature to respond to the growing AIDS epidemic.\textsuperscript{53}

\textsuperscript{49} South African Medical Research Council Sexual Offences Bill and HIV.
\textsuperscript{51} WOMANKIND Worldwide Clouds over the rainbow nation 2.
\textsuperscript{52} Eba in Viljoen & Precious (eds) Human Rights Under Threat 15.
2.4 Government action

The South African Law Reform Commission (SALRC)\(^{54}\) was detailed by the Justice Portfolio Committee\(^{55}\) to investigate the possible enactment of legislation for the compulsory HIV testing of sexual offenders.\(^{56}\) The SALRC report cites mounting public concern as the background of its commissioning/study.\(^{57}\) High incidences of rape and other sexual offences, coupled with the growing prevalence of HIV in the country, were noted as contributors to the public calls for the criminalisation of harmful HIV-related behaviour. The report cited and \textit{inter alia} relied on a study by Leelarc Madlak,\(^{58}\) which observed that anthropological research in 1995 found that teenagers in the KwaZulu Natal area displayed an attitude of wanting to spread HIV in what seemed to be a type of coping strategy for dealing with the reality of a deadly and growing epidemic in their Province. The study further showed that behaviour such as sexual violence against women and children may be linked to the growing AIDS epidemic.

The second reason for the commissioning of this report was the prevalence of rape and other sexual offences in South Africa.\(^{59}\) At the time of the study statistics by the South African Police Services (SAPS) showed 30,756 cases of rape, attempted rape and statutory rape. The report also noted that the existence of a dangerous myth that sex with a virgin or a young girl will either cure or prevent AIDS had stimulated an increase in child sexual exploitation.\(^{60}\)

The third reason cited was the high prevalence of HIV/AIDS in South Africa.\(^{61}\) At the time it was noted that South Africa had one of the fastest growing epidemics in the world. Although no conclusive statistics were available at the time, partial reliance was made on the results of the ninth National HIV Survey of women attending antenatal

\(^{54}\) SALRC.
\(^{55}\) SALC \textit{fourth interim report on aspects of the law relating to AIDS: Compulsory testing of persons arrested in sexual offence cases} (1999).
\(^{56}\) At 4.
\(^{57}\) At 9.
\(^{58}\) At 9-15.
\(^{59}\) At 7.
\(^{60}\) At 8.
\(^{61}\) At 9.
clinics of the Public Health Services in the country in the months of November and October 1998.\footnote{According to the Department of Health in February 1999 22.8\% of women were testing positive compared to 17\% in 1997 showing a frightening increase of 33.8\% in prevalence levels in just one year.}

The Commission arrived at the conclusion that there was a need for statutory intervention to provide for the compulsory HIV testing of arrested persons in sexual offence cases. This intervention was deemed necessary in light of women’s vulnerability to widespread sexual violence amidst the increasing prevalence of HIV and in the absence of institutional or other victim support measures.\footnote{SALC \textit{fourth interim report} v-vi.}

Still under the mandate of the Justice Portfolio Committee, the SALRC came up with a Report on Sexual Offences in 2002.\footnote{SALC \textit{fifth interim report}.} The core purpose of this report was the need for an offence aimed specifically at harmful HIV-related behaviour in cases of non-consensual sexual intercourse.\footnote{At 91.} This was the fifth Interim report on aspects of the law relating to AIDS. The Commission concluded that public health measures, such as public awareness campaigns, were insufficient to deal with the situation where people were deliberately putting others at the risk of HIV infection. The Commission opined that the criminal law undoubtedly has a role to play in protecting the community and punishing those who transgress.

The Commission also noted in the discussion paper that although non-consensual intentional or negligent exposure or transmission of HIV could be prosecuted under one of the common law crimes of murder, culpable homicide, rape, assault, and/or attempts to commit these crimes, the common law crimes did not seem to provide effective redress in the case of harmful HIV/AIDS related behaviour.\footnote{At 91.}

The Commission therefore recommended that criminal sexual activity compounded by deliberate or reckless exposure should be subject to criminal sanction.\footnote{At 92.} Two opinions were put forward: firstly, to introduce practical measures to ensure successful prosecution of harmful HIV related behaviour in terms of existing common law crimes,
or secondly, to create a separate offence specifically criminalising harmful HIV related activity in the context of the commission of a sexual offence.

2.4.1 The Bills

Following the studies and reports above, legal draftsmen were detailed to come up with the relevant changes to the law which culminated into the presenting of two crucial Bills:

(a) Compulsory HIV Testing of Alleged Sexual Offenders Bill.\textsuperscript{68}

This Bill aimed to:

"provide for a speedy procedure by which a victim of an alleged sexual offence may apply for the compulsory HIV testing of the alleged offender; and for the disclosure of the test results to the victim and the alleged offender and to provide for matters incidental thereto".

Section 3(1) (a) of the Bill provided for an application to the magistrate by the victim or interested party for an order that an alleged offender be tested for HIV. This application had to be submitted within 50 days after the alleged commission of the offence.

Section 4 (2) (a), (b) and (c) provided that a magistrate, upon establishing a \textit{prima facie} case, must order the testing of the alleged offender for HIV. Section 5 provides that such order must be executed within 60 days of the alleged commission of the offence. Section 11(2) (n) made it an offence, punishable on conviction by a fine or six months imprisonment, if the alleged offender declined to be tested.

In the memorandum on the objects of the Bill\textsuperscript{69} it is stated that the purpose of the Bill is to provide for a speedy and uncomplicated mechanism whereby the victim of a sexual offence can apply to have an alleged offender tested for HIV, and to have information regarding the test results disclosed to the victim.

The objects of the Bill are stated to be in adherence to the recommendations of the South African Law Reform Commission’s fourth interim report\textsuperscript{70} where the report noted the vulnerability of women and children to HIV infection as a result of rape and other

\textsuperscript{68} B10- 2003 was gazetted as number 25029 on 21\textsuperscript{st} February 2003.

\textsuperscript{69} At 4.

\textsuperscript{70} SALC Aspects of the Law Relating to AIDS Project 85.
sexual offences. The Commission had then concluded that there was a need for legislative intervention to provide for the compulsory HIV testing of alleged offenders in sexual offence cases at the instance of the victim.

Secondly, the Bill allowed for a victim to apply for compulsory testing of an alleged offender to establish whether or not they have been exposed to this life-threatening condition.

(a) Criminal Law (Sexual Offences And Related Matters) Amendment Bill

This Bill was presented in the National Assembly after consideration of the Compulsory HIV Testing of Alleged Sexual Offenders Bill, and the Criminal Law (Sexual Offences and Related Matters) Amendment Bill. Following from this it is clear that the Bill had a wider ambit and did not provide for issues only relating to sexual offences and HIV. However for purposes of this paper, only provisions related to the compulsory HIV testing of alleged offenders are of interest.

The Bill was tabled in order to:

“comprehensively and extensively review and amend all aspects of the laws and implementation of the laws relating to sexual offences and to deal with all legal aspects of or relating to sexual offences in a single statute by-

Providing certain services to certain victims of sexual offences, inter alia to minimise or as far as possible eliminate secondary traumatisation, including affording a victim of certain sexual offences the right to require that the alleged perpetrator be tested for his or her HIV status and a right to receive Post Exposure Prophylaxis in certain circumstances….”

The Preamble notes that women and children are particularly vulnerable and are more likely to become victims of sexual offences, and that South African common law and statutory law does not provide adequate and effective protection to victims of sexual offenders, thereby exacerbating their plight through secondary victimisation and traumatisation.

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74 At 2 para 12.
The objects of this legislation\textsuperscript{75} are stated as to afford complainants of sexual offences the maximum and least traumatising protection that the law can provide; to introduce measures which seek to enable the relevant organs of state to give full effect to the provisions of the Act; and to combat and ultimately eradicate the relatively high incidence of sexual offences committed in a number of ways by taking the steps laid down in parts (a) to (g) of the objectives. For purposes of this study the relevant provision is that stated in part (g):

“Providing certain services to victims of sexual offences, including affording victims of sexual offences the right to receive Post Exposure Prophylaxis in certain circumstances…”

In the substantive part the Bill provides for compulsory testing of alleged offenders of sexual offences\textsuperscript{76} and the execution of an order or warrant of arrest of an alleged offender for purposes of having them tested.\textsuperscript{77} Section 38 creates offences and prescribes punishments. An offence is specifically created for an offender who deliberately frustrates any attempts to be tested. It carries a prison sentence of up to three years.

The Bill was the final draft upon which the Act\textsuperscript{78} was finally promulgated and the provisions of the Bill in sections 27 to 40 are in tandem with those of the Act in chapter 5. It is noteworthy that none of the Bills in their objects, purpose or preamble specifically refer to the criminalisation of conduct that may lead to exposure and/or transmission of HIV. This position is carried through and maintained in the Act. As to whether or not the provisions in the Act amount to criminalisation in one form or other of such conduct is a matter to be dealt with in subsequent chapters of this study. The question that need be addressed at this point is what mischief did the legislators aim at preventing by enacting this law?

\textsuperscript{75} At 9.
\textsuperscript{76} Sections 28 to 32.
\textsuperscript{77} Sections 33 to 34.
\textsuperscript{78} Act 32 of 2007.
2.5 The mischief

Mischief in law is defined as any harmful action, ill consequence, danger, detriment, injurious conduct, *maleficum*, wrong, injustice or transgression.\(^{79}\) The purpose of any criminal legislator is to enact a law that prevents some sort of mischief, wrongdoing, injustice or detriment or danger which may occur either by an act or an omission.\(^{80}\) In the case of the present Act, what detriment, danger or injustice were the legislators trying to prevent with respect to chapter 5 of the Act?\(^{81}\) The answer to this question is easily discernable from the memorandum to the two Bills\(^{82}\) tabled as a precursor to the Act.

Bill B10-2003 specifically states in its memorandum that the purpose of the Bill is to provide for a speedy and uncomplicated mechanism for having alleged sexual offenders tested for HIV on application by the victim.\(^{83}\) In the objects of the Bill\(^{84}\) it is stated that the benefit to the victim/complainant of the speedy compulsory testing for HIV of the alleged offender, is that knowledge of the alleged offender’s sero status enables victims/complainants to make life decisions for themselves and the people around them. It is also beneficial to their psychological state to have a degree of certainty regarding their exposure to a life-threatening disease. The Bill also states that this intervention is necessary in the light of women’s particular vulnerability to sexual violence amidst the increasing prevalence of a nationwide HIV/AIDS epidemic.

The Criminal Law (Sexual Offences And Related Matters) Amendment Bill\(^{85}\) in its explanatory note\(^{86}\) item 12 states that the Bill is to provide for certain services to certain victims of sexual offences, *inter alia* to minimise or as far as possible eliminate secondary traumatisation, including affording a victim access to PEP treatment following an HIV test. The Preamble refers to the need to give adequate protection to victims of sexual offences to avoid exacerabating their plight through secondary traumatisation.

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\(^{80}\) Encyclopaedia Britannica *Criminal law*.
\(^{81}\) Act 32 of 2007.
\(^{82}\) B50B-2003 and B10-2003.
\(^{83}\) B10-2003 at 4.
\(^{84}\) At 5.
\(^{85}\) B50B-2003.
\(^{86}\) At 2.
Following from the above, and the final position of the Act\(^{87}\) in chapter 5 thereof, it is clear that the mischief the law aimed at preventing is the danger of secondary psychological traumatisation that the victim is likely to suffer as a result of the very real possibility of having been exposed to HIV infection. Secondly, the law aims at curbing the spread of HIV to vulnerable groups given the extent of the pandemic and the potential for transmission during assaults of a sexual nature. It is also arguable, in light of section 32, that the Sexual Offences Act has as one of its objectives the use of an alleged offenders' HIV positive status as an aggravating factor for purposes of seeking a more severe sentence in the event of a conviction.

It is important to note that although the South African Law Reform Commission in its fifth interim report\(^{88}\) advised against legislating an offence that specifically criminalises transmission of HIV, the legislature still went ahead to do just this in section 32 of the Sexual Offences Act. The reason for this can be found in the memorandum to the objectives of the Compulsory HIV Testing of Alleged Sexual Offenders Bill\(^{89}\) which refers to the Law Commission's fourth interim report,\(^{90}\) where the law commission noted the vulnerability of women and children to being infected with HIV in the event of a sexual crime and hence the need for compulsory testing for HIV to avoid secondary traumatisation. This position in the report was in turn the consequence of the general out-cries for government to come up with a solution to rampant sexual crime and the rapidly spreading epidemic.\(^{91}\)

### 2.6 Conclusion

This chapter has analysed the law as laid down in chapter 5 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act\(^{92}\) and briefly traced its origin. The chapter also examines the social context within which this law was developed and the factors that influenced its development. Lastly, consideration was given to the mischief

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\(^{87}\) Act 32 of 2007.

\(^{88}\) SALC Fifth Interim Law Report on Aspects of the Law Relating to AIDS.

\(^{89}\) B10-2003.

\(^{90}\) South African Law Commission Fourth Interim report on Aspects of The Law Relating to AIDS.

\(^{91}\) SALC Fourth Interim Law report

\(^{92}\) Act 32 of 2007.
that this law aims at preventing through criminalisation of transmission. Discussion as to the efficacy of the law is dealt with in chapter four below.
CHAPTER THREE

THE CRIMINALISATION OF HIV/AIDS

3.1 Introduction

As mentioned, the central concern of this study is the criminalisation of HIV/AIDS transmission. In order to proceed, it is therefore necessary to answer the question: what is criminalisation? According to Black’s Law Dictionary, criminalisation is the act or an instance of making a previously lawful act criminal, classically by passing a statute. In criminology, criminalisation is the process by which behaviour and individuals are transformed into crimes and criminals. Previously legal acts may be transformed into crimes by legislation or judicial decision. A crime may be defined as an act or omission or a state of affairs which contravenes the law and which may be followed by prosecution in criminal proceedings with the attendant consequence following conviction being punishment.

The function of the criminal law is largely to set the parameters within which the criminal justice system operates. There are two aspects to this. The first is that the criminal justice system is a tool of social control representing the agglomeration of powers, procedures and sanctions which transcend the criminal law. The second is that it acts as a guide to the citizen indicating the limits of legitimate activity on his or her part and predicting the consequences of contravention of the law. Michael Allen states that the criminal law is a reflection of corporate or social morality. The wrongdoing which the criminal law seeks to punish is that which threatens the fundamental values upon which a society is founded. The criminal sanction thus operates as a form of social control, both punishing the offender and reasserting the mores of that society.

This chapter will trace the history of the criminalisation of HIV/AIDS transmission and consider the views of the proponents for and opponents to criminalisation. The chapter will also critically consider the pros and cons of such criminalisation and finally present
the ultimate preferred position of the United Nations through UNAIDS and the views of leading academics and activists.

3.2 The Move to Criminalise HIV/AIDS Transmission

Tierney\textsuperscript{97} noted that the rationale for the criminalisation of HIV transmission internationally is to calm passionate cries from the general public for governments to take positive steps in stemming the spread of the disease. In order to appreciate the legal reasoning behind the criminalisation of HIV transmission, it is relevant to look at past decisions regarding the criminal transmission of sexually transmittable diseases. The movement towards criminalisation of transmission of potentially harmful sexually transmitted diseases goes back to the case of \textit{R v Clarence}\textsuperscript{98} in Australia in the 19\textsuperscript{th} century. In this case the husband, who knew he had gonorrhoea, had sex with his unsuspecting wife and passed it on to her. Clarence was charged with inflicting grievous bodily harm. Clarence was convicted and subsequently appealed the decision. Stephen J (as he then was) imported the notion that fraud would not vitiate consent unless it was with regard to the nature of the act or the identity of the person. This argument was almost a century later accepted in English courts.\textsuperscript{99}

In the case of \textit{R v Lineka}\textsuperscript{100} the reasoning of the decision has assumed renewed importance with the rise in HIV-related prosecutions because most of these cases, like \textit{Lineka}, involve allegations of fraud that are not unlike those in \textit{Clarence}, which means that fraud would not vitiate the consent unless it was fraud as to the nature of the act or the identity of the person.\textsuperscript{101} In the leading New Zealand case of \textit{R v Mwai}\textsuperscript{102} the court relied on the reasoning in \textit{R v Clarence}. In \textit{Mwai} the defendant, who was HIV positive and knew it, had sex with five women without disclosing his status. Two of the women became HIV positive. Little attention was given to the failure of the defendant to disclose

\textsuperscript{97} Tierney “Criminalising the sexual transmission of HIV: An international analysis 1992 (15) Hastings International and Comparative Law Review.
\textsuperscript{98} (1889) LR 22 QBD 23.
\textsuperscript{100} [1995] QB 250.
\textsuperscript{102} [1995] 3NZLR 149.
his HIV status and on appeal it was argued that the defendant could not control the virus and therefore did not fail in his legal duty. This essentially means that like in *Clarence* the defendant had no duty to disclose his HIV status, and since he was not in control of whether the virus is transmitted or not he had no further legal duty to discharge. He would only be guilty of fraud if he had deceived the complainants as to his true identity or the nature of the act they were to indulge in.

Another leading case in the move towards the criminalisation of HIV transmission is the Canadian case of *R v Cuerrier*: 103 The accused who was HIV positive was charged with assault after he had unprotected sex with two women without disclosing his HIV status to either of them. The Supreme Court held that Cuerrier’s failure to disclose his HIV status amounted to fraud. It was noted by the court that the complainants consent to sexual activity could be vitiated by fraud if an accused failed to disclose his or her HIV status dishonestly, and this dishonesty had the effect of exposing the complainant to a significant risk of bodily harm. This later requirement was clearly met by the risk of engaging in unprotected sex, while the proper use of condoms could reduce harm sufficiently so that there was no significant risk of bodily harm. According to this view, unprotected sex could give rise to criminal liability, whereas protected sex would not create any criminal liability even where the parties involved were clearly aware of their HIV positive status. The court also added a requirement that the prosecution establish that an accused either knew or ought to have known that his or her fraud actually induced the complainants consent to have unprotected sex. The court further argued that deception or dishonesty about one’s HIV status or another sexually transmitted infection could constitute fraud. This position essentially cast aside the position in *R v Clarence* above, which needed fraud to be related to the nature of the act and the identity of perpetrator. The position in *Cuerrier* was therefore that any form of fraud would effectively vitiate consent.

In England the leading case is that of *R v Dica*. 104 The accused had unprotected sex with several women without informing them of his HIV status. He was charged with

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assault. He was convicted after the trial judge ruled that it was open to the jury to find the defendant guilty partly on the basis that knowledge of his health status by the women was not relevant since they had no capacity to consent to the serious harm of HIV infection. On appeal, the defendant argued that the women knew of his condition but consented to having unprotected sex with him. The court of appeal overruled *Clarence*, holding that a victim’s consent to sex was not necessarily consent to the possible consequential risk of contracting HIV/AIDS, but did concede that consent could provide a defence to the charge of inflicting grievous bodily harm. The issue of consent was therefore wrongly withdrawn from the jury and Dica’s conviction was overturned. This approach suggests that a person who is aware that he or she is HIV positive and recklessly transmits HIV to another person may be guilty of an offence, but the issue will depend largely on the facts of each case. The Court of Appeal also observed that:

“The problem of criminalising the consensual taking of risks like these include the sheer impracticability of enforcement and the haphazard nature of its impact. The process would undermine the general understanding of the community that sexual relationships are pre-eminently private and essentially personal to the individuals involved in them. And if adults were to be liable to prosecution for the consequences of taking known risks with their health, it would seem odd that this should be confined to risks taken in the context of sexual intercourse, while they are nevertheless permitted to take risks inherent in so many other aspects of every day life.”

The *Dica* case raised a number of other arguments in the Court of Appeal which impact on criminalisation of transmission of HIV in general. These shall however be dealt with later in the chapter.

As noted in the preceding chapter, the epicentre of the HIV/AIDS pandemic is Sub-Saharan Africa, with the bulk of the brunt being borne by Southern Africa and particularly South Africa. The early legal issues regarding HIV status tended to be more about discrimination and the rights of HIV positive persons. With increased awareness and greater public outcry owing to the high levels of sexual violence (as cited in chapter 2) a move towards state intervention in the form of legislation that is HIV specific
occurred in the form of The Sexual Offences Act. The courts also heard a limited number of prosecutions related to reckless HIV related behaviour.

By 2007 Botswana,\textsuperscript{106} Malawi,\textsuperscript{107} Zambia,\textsuperscript{108} and Tanzania\textsuperscript{109} had provisions in their penal codes which make it an offence to expose others to a disease dangerous to life. Although none of the new provisions specifically target HIV infection it is clear that HIV is included as a disease dangerous to life. The provisions generally classify the offence as a misdemeanour. The position in Lesotho was different. In 2003 The Sexual Offences Act\textsuperscript{110} was introduced. Articles 2 and 3 of this Act make it unlawful to commit the sexual act when a person knows or has reasonable grounds to believe that they are HIV positive and they do not disclose this to their partner prior to having sexual intercourse. The accused may be sentenced to death upon being found guilty. The Sexual offences Act article 32 VII also provides for compulsory HIV testing. This Act was put to the test in the case of \textit{R v Mothilbili Makara}.\textsuperscript{111} The accused was found guilty of raping his 11 year old daughter and infecting her. The High Court looked to the Sexual Offences Act for determination of an appropriate penalty under article 32(7).\textsuperscript{112} The accused was accordingly sentenced to death. In Zimbabwe, there have been a few cases related to HIV/AIDS. The Magistrate’s court in Mbare, Harare, denied bail to a woman allegedly deliberately infected her husband, although the High Court overturned the decision in 2006.\textsuperscript{113} In terms of legislation, Zimbabwe has the Sexual Offences Act\textsuperscript{114} which in part V deals with the prevention and spread of HIV/AIDS, and creates criminal liability for any person who has unprotected sex whilst aware of their HIV positive status. This law also provides for a prison sentence of up to 20 years where an HIV positive person is convicted of rape or sodomy.

\textsuperscript{106} S 184 of the Penal code of Botswana.
\textsuperscript{107} S 192 of the Penal code of Malawi.
\textsuperscript{108} S 183 of the Penal code of Zambia.
\textsuperscript{109} S 174 of the Penal code of Tanzania.
\textsuperscript{110} Act 3 of 2003.
\textsuperscript{111} Criminal Sentence 9 of 2004.
\textsuperscript{112} Which provides that when a person is infected with HIV and had reasonable knowledge at time of infection they shall be given the death penalty.
\textsuperscript{114} Act 8 of 2001.
In South Africa, early HIV related cases were mostly confined to the rights of persons living with HIV/AIDS. The cases tended to take on a civil nature. The cases that bordered on criminal liability tended to be with regard to the HIV status of a convicted felon. For instance, in *S v Cloete* a prisoner was granted early release due to his HIV condition. The court was of the view that his condition made continued service of the sentence harsher. By this time, calls for government to come up with a more comprehensive criminal solution for the spread of HIV/AIDS, especially in light of the increasing prevalence of crimes such as rape and sexual assault, were on the increase. Eventually, the legislature did consider the Criminal law (Sexual Offences and Related Matters) Amendment Bill which was promulgated into law on 20 May 2007.

It is noteworthy that at about the time of the fifth interim report of the South African Law Reform Commission (SALRC), the High Court in *S v Nyalungu* found the accused guilty of attempted murder for raping a woman while knowing he was HIV positive. The court agreed with the Law Commission’s proposal that the common law was sufficiently wide enough to cover cases of this nature and that there was no need for HIV specific legislation.

### 3.3 The Case for Criminalisation

The general argument for criminalisation is that the epidemic continues to spread in spite of the present preventative methods that have been put in place. Therefore there is a need to look elsewhere, in this case the criminal law, for an urgent solution. Proponents of the use of criminal law to address HIV argue that it prevents conduct that is likely to transmit HIV/AIDS, in this case conduct such as having unprotected sex with a multiplicity of partners or the sharing of needles. This approach educates the public on activities likely to spread HIV and reinforces social norms against behaviour that carries the risk of HIV infection. It is further argued that the relevance of criminal law lies in

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115 Hoffman v South African Airways [2001] SA 1 (CC); Minister of Health and Others v Treatment Action Campaign and Others [2002] 5 SA 721 (CC), and Memory Mashando Magida v The State SC 515/04 unreported.
118 [2005] JOL 13254 (T).
its functions of deterrence and incapacitation. Incapacitation operates by way of imprisonment of HIV positive individuals who expose others to the risk of HIV infection, and thus prevents them from causing harm to the general population during the length of their imprisonment.\textsuperscript{120} It is noteworthy however, that imprisonment of HIV positive persons may in fact have the undesired effect of exposing fellow inmates to the disease.

With regard to deterrence, criminal law increases the cost of engaging in illegal behaviour and as a result prevents people from pursuing prohibited activities. It is argued that the likelihood of detection and the severity of the punishment would modify individual behaviour.\textsuperscript{121} Another leading argument in favour of criminalisation is that such laws would help protect those who have difficulty protecting themselves. Women are particularly singled out as persons who lack the power to insist on condoms or faithfulness from their partners and thus need this protection.\textsuperscript{122}

In Cameroon, health officials support laws criminalising the transmission of HIV/AIDS. It is seen as a form of protection for HIV negative people that could also limit the spread of the disease. Carno Tchuani, head of planning, monitoring and evaluation at the National Committee to Combat AIDS (CNCS) in the Littoral province is of the view that wilful transmission cannot be left unpunished as such acts go against the efforts undertaken to limit the spread of HIV/AIDS.\textsuperscript{123}

In Uganda advocates for the criminalisation of transmission of HIV, and reckless behaviour likely to lead to infection, have marked some success with the introduction of the Uganda HIV and AIDS Prevention Control Bill,\textsuperscript{124} which is currently before Parliament and is highly likely to be passed. This Bill is draconian and provides for the criminalising of intentional transmission of HIV/AIDS.\textsuperscript{125} The nature of this Bill has drawn a lot of international condemnation in light of its apparent disregard for human

\textsuperscript{120} Lazzarini et al “Evaluating the impact of criminal laws on HIV risk behaviour” 2002 Journal of Law Medicine and Ethics (30) 249.
\textsuperscript{121} At 250.
\textsuperscript{124} Uganda HIV and AIDS Prevention and Control Bill 2009.
\textsuperscript{125} Clause 40 (i).
3.4 The Case against Criminalisation

In spite of the arguments put forward by proponents for criminal sanction, there is an overwhelming response that is strongly opposed to the criminalisation of the transmission of HIV/AIDS. On World AIDS day 2009, AIDS Rights Alliance of Southern Africa (ARASA) issued a press release responding to current trends towards criminalising HIV transmission and exposure. The release stated that human rights and AIDS activists are raising concerns about the implication of these laws, especially for women’s risks and vulnerabilities, and calls for a rights-based approach in the response to HIV/AIDS transmission. The release also states that criminalising HIV exposure or transmission far from providing justice for women rather endangers and further oppresses women. It is submitted that over twenty-one organisations endorsed a document which opposes laws that criminalise HIV exposure or transmission, arguing that women continue to be disproportionately infected and affected by HIV/AIDS. More than half of all people infected by HIV/AIDS are women and they continue to be at high risk of infection and related rights abuses. Thus any response to HIV/AIDS should take into account the effects that the pandemic - and responses to it - have upon women in light of their vulnerability. It is thus likely that women are more probably going to be the greater victims of prosecution given the gendered societal implications of the laws that criminalise transmission and exposure.

Johanna Kehler states that criminalising HIV transmission is indeed ‘bad policy’ as it threatens human rights and harms women. A call to apply criminal law may be well intentioned, but it does nothing to address gender-based violence or the deep economic, social and political inequalities that are at the root of women and girls’

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128 At 1-3.

129 Director AIDS Legal Network.
disproportionate vulnerability to HIV infection.\textsuperscript{130} Michaela Clyton\textsuperscript{131} argues that laws which criminalise HIV exposure and transmission will further victimise and oppress women and these laws will aggravate the risk of violence and abuse, reinforce gendered inequalities, promote fear and stigma and ultimately increase women’s risks to HIV infection and related abuses.\textsuperscript{132}

In a pamphlet headed “Ten reasons why criminalisation of HIV exposure or transmission harms women”,\textsuperscript{133} the authors\textsuperscript{134} categorically state that criminalisation does not prevent new HIV transmissions, nor does it reduce women’s vulnerability to HIV transmission. In fact, criminalisation harms women rather than assisting them, while negatively impacting on both public health needs and human rights protections. The ten reasons as to why criminalisation harms women are listed:

1. Women will be deterred from accessing HIV prevention treatment and care services including HIV-testing.

2. Women are more likely to be blamed for HIV transmission.

3. Women will be at greater risk of HIV-related violence and abuse.

4. Criminalisation of HIV exposure or transmission does not protect women from coercion or violence.

5. Women’s rights to make informed sexual and reproductive choices will be further compromised.

6. Women are more likely to be prosecuted.

7. Some women might be prosecuted for mother-to-child transmission.

8. Women will be more vulnerable to HIV transmission.

\textsuperscript{130} ARASA at 1.
\textsuperscript{131} Director ARASA.
\textsuperscript{132} ARASA at 1.
\textsuperscript{133} Bernard Criminal HIV Transmission (2009) \url{http://www.criminalhivtransmission.blogspot.com} (accessed on 17-12-2009).
\textsuperscript{134} Clyton, Kheler and Tyler Crone of the ATHENA network.
9. The most vulnerable and marginalised women will be most affected.

10. Human rights responses to HIV are most effective.

In October and November of 2007 UNAIDS and UNDP hosted a consultation to discuss the apparent trend of criminalisation of HIV transmission by Governments as a tool to combat the spread of AIDS. The participants expressed concern over the number of people charged even where no real risk of transmission exists. These moves to create criminal legislation were stated as clearly ineffective by Justice Michael Kirby who noted that there was a new wave of highly ineffective laws criminalising HIV transmission. At the same session, Justice Edwin Cameron noted that applying criminal law to HIV transmission has a heightened role in stigmatising HIV and is ineffective. The preferred approach would be to employ public health strategies in order to advance HIV prevention. It was also noted that criminal proceedings may compromise basic civil rights such as the right to privacy, especially among the most vulnerable groups such as women.

Matthew Weait in his book *Intimacy and Responsibility: the Criminalisation of HIV Transmission* examines the concepts of harm, risk, recklessness, consent and responsibility, and strongly suggests that the criminal law is ill-equipped to understand these concepts pragmatically. He argues that if the primary purpose of criminal law is to prevent onward transmission then it has more potential to do harm than good. He then concludes that the best way to promote a more authentic and socially beneficial approach to the meaningful practice and expression of responsibility is to decriminalise the reckless transmission of HIV/AIDS.

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136 At 1.
137 Judge of the High Court of Australia.
138 Currently Justice of the Constitutional Court of South Africa and leading HIV/AIDS legal scholar.
139 UNAIDS Criminalisation of HIV 2.
140 Senior lecturer in law and legal studies at Birkbeck College, University of London.
Justice Edwin Cameron writes in the preface to Weait’s book\textsuperscript{143} that his premise is that criminal law and criminal justice should be used for the public good rather than as a means of becoming reparations for particular individuals. If Weait’s argument is correct, then we must question criminal laws that may discourage people from HIV-testing or from being candid about their sexual history when confiding in health care workers. We must question whether it is good to impose criminal liability when media coverage is often sensational and inaccurate with the effect of demonising persons infected with HIV and marking them as potential aggressors. We must question whether such laws acknowledge the difficulties infected women face when risking violence and expulsion from the home, given the difficulty in negotiating safe sex.

Cameron maintains that we must question the public good that comes from ascribing sole responsibility for transmission (such as laws do) to the person infected with the virus, thus attenuating the partners duty for avoiding responsibility, especially in an epidemic where every person should be aware of the risks involved in unprotected sex. The above comments by Justice Cameron aptly summarise both Weait’s arguments against criminalisation and those put forward by the different views that have been considered above.

In Uganda the UN Secretary-General’s Special Envoy on AIDS in Africa, Elizabeth Mataka, cautioned Uganda against a proposed Bill on HIV/AIDS. She advised that Uganda should refrain from laws that criminalise the transmission of HIV as this would limit the number of people seeking voluntary counselling and testing for fear of being arrested.\textsuperscript{144} In Cameroon, in reaction to a Bill that proposes life imprisonment for anyone wilfully transmitting HIV, Sean Marie Talom\textsuperscript{145} states that they (the organisation) were strongly opposed to the idea of penalising the wilful transmission of HIV particularly due to the difficult issue of proving that an act was intentional or not. It also removes responsibility from persons who are HIV negative and this would be counter-productive. It was also noted that such a law would worsen the widespread stigma and

\textsuperscript{143} Weait Intimacy and Responsibility.
\textsuperscript{144} All Africa.com Uganda: Criminalising HIV/AIDS could lead to further spread of the epidemic – UN Envoy http://allafrica.com/stories/pritable/200912020747.html (accessed on 17-12-2009).
\textsuperscript{145} Co-ordinator of Reseau Ethique Droit et sida (REDS). A network of ethics, rights and HIV/AIDS organisations.
discrimination against HIV positive people. The above views against criminalisation finally bring us to the ultimate position taken by the world’s global leader on HIV/AIDS policy, the UNAIDS.

3.5 UNAIDS Policy Brief\textsuperscript{146}

In its introduction,\textsuperscript{147} the UNAIDS Policy Brief (2008) observes that although criminal law is being applied in some countries to those who transmit or expose others to HIV infection, there exists data indicating that the broad application of criminal law to HIV transmission will achieve neither criminal justice nor prevent HIV transmission. Rather, such application risks undermining public health and human rights. The Brief notes that the two main reasons given for criminalising HIV transmission are: to punish harmful conduct by imposing criminal penalties and secondly, prevent HIV transmission by deterring or changing risk behaviour. It is then pointed out that these two objectives are not met through criminalisation of transmission, except in the rare case of intentional HIV transmission.\textsuperscript{148}

On punishing harmful conduct it is pointed out that intentional malicious acts are rare in the HIV context and that evidence shows that persons who are aware of their positive status do take preventative measures to avoid transmitting the virus to others.\textsuperscript{149} It further advises that criminal prosecution is not warranted where a person has disclosed his or her HIV positive status to a partner; where a partner is already aware through some other means that the person is HIV positive; or where precautions for safe sex are in place. Such conduct would not be reckless and prosecution would only serve to directly contradict efforts to prevent HIV transmission by encouraging safer sexual practices, voluntary HIV testing and voluntary disclosure.\textsuperscript{150} It also notes that such onward transmission takes place soon after a person has acquired HIV when his or her infectiousness is high and before he or she suspects that they are positive.

\textsuperscript{147} At 1.
\textsuperscript{148} At 2.
\textsuperscript{149} Brunnell et al Changes in sexual risk behaviour and risk of HIV transmission after antiretroviral therapy and preventions In rural Uganda (2006).
\textsuperscript{150} UNAIDS Policy Brief 3.
On miscarriage of justice, the Policy Brief advises that criminal liability should not be extended to reckless conduct. Such a broad application, it is argued, could expose large numbers of people to possible prosecution without their being able to foresee their liability for such prosecution. There is also likelihood that marginalised people - such as sex workers and men who have sex with men (MSM) - would be disproportionately targeted owing to stigma and prejudice. Therefore, the broad use of criminal law creates a real risk of increasing stigma and discrimination against people living with HIV/AIDS, thus drawing them further away from HIV prevention, treatment, and care and support services. Miscarriage of justice may also occur in establishing who transmitted HIV to whom, especially where both parties have had more than one sexual partner.\(^1\)

On the issue of prosecution of transmission of HIV, the policy brief notes that there is no data demonstrating that the threat of criminal sanctions significantly changes or deters the complex sexual and drug-using behaviours which may result in HIV transmission.\(^2\) Available data shows no difference in behaviour between places where laws criminalising HIV transmission exist and where they do not.\(^3\)

UNAIDS also notes that using criminal law beyond cases of intentional transmission could actually undermine effective HIV prevention efforts as follows:

i. It could discourage HIV testing since ignorance of one’s status might be perceived as the best defence in a criminal lawsuit. Testing and treatment are vital because people who receive a positive diagnosis usually change their behaviour to avoid transmitting and also take ARVs which reduces infectiousness and the likelihood of onward transmission.

ii. It places illegal responsibility for HIV prevention exclusively on those already living with HIV and dilutes the public health message of shared responsibility for sexual health between sexual partners. People may (wrongly) assume

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\(^1\) At 4.
\(^2\) Ibid.
their partners are HIV negative because they have not disclosed and did not use protective measures.

iii. It could create distrust in relationships with health services professionals and researchers, and impede the provision of quality care and research as people may fear that information regarding their HIV status will be used against them in a criminal case.

On the issue of women and girls it is noted that although women are generally more vulnerable and in many societies there is a desire to punish the men who infect them. Ironically, applying criminal law broadly to HIV transmission may result in women being disproportionately prosecuted. Women usually get to know their HIV status before their partners due to their access to medical facilities such as during antenatal care, and are thus often blamed for bringing HIV into the relationship. For fear of violence women may choose not to disclose their positive status or negotiate safer sex, thus leaving them open for prosecution owing to non-disclosure for valid reasons. It is submitted that laws against gender-based violence may work better in these circumstances.

3.6 Conclusion

Although the alarming spread of the HIV/AIDS may be used as justification for the criminalisation of transmission of the disease, it is clear that the proponents for criminalisation are indeed treading on thin ice in comparison to the case against criminalisation. Besides obviously dismissing the reasons advanced for criminalisation, the advocates against criminalisation clearly show that rushing to create criminal legislation is an adventure that should not be undertaken without due consideration of the facts that passing HIV specific criminal legislation can: further stigmatise persons living with HIV; provide a disincentive for HIV testing; create a false sense of security among people who are HIV negative; and rather than assisting women by protecting them against HIV infection, impose on them an additional burden and risk of violence or discrimination. In addition, there is no
evidence that criminal laws specific to HIV transmission will make any significant impact on the spread of HIV or on halting the epidemic.

Having concluded as above, the next task is to find out where South Africa stands in terms of its HIV specific criminal legislation in the global context.
CHAPTER FOUR

ANALYSIS OF HIV SPECIFIC LEGISLATION IN SOUTH AFRICA

4.1 Introduction

HIV/AIDS-specific statutes or legislation are statutes that specifically criminalise knowingly exposing others to HIV infection.\(^{154}\) HIV/AIDS-specific criminal laws have been lauded as the solution to most of the problems related to the use of traditional criminal law offences to prosecute HIV exposure and/or transmission. These laws are considered fair to the accused as they specify in advance which acts are prohibited and generally do not require intention to transmit the virus or actual transmission and hence remove the burden of the prosecution in establishing *mens rea* and causation.\(^{155}\)

This Chapter explores Chapter five of the Criminal Law (Sexual Offences and Related Matters) Amendment Act\(^ {156}\) in order to determine whether the contents of this Chapter constitute the criminalisation of transmission of HIV/AIDS. The chapter shall also critically analyse the provisions of this law in the global context, specifically in terms of whether it is in adherence to the stated UNAIDS position and to what extent this law may help to prevent the spread of HIV/AIDS, if at all.

4.2 HIV/AIDS Specific Legislation

Sections 28, 30, 32 and 33 of the Sexual Offences Act provide for the compulsory HIV-testing of persons charged with sexual offences that may have exposed the victim to possible infection. Failure to comply with an order for compulsory testing carries a penalty in the form of a prison sentence of up to three years and/or a fine.\(^ {157}\) With regard to HIV/AIDS, the Act also provides for the provision of the post-exposure prophylaxis treatment (PEP) and care for victims in terms of sections 28(1) and 28(2).

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\(^{156}\) Act 32 of 2007.

\(^{157}\) Section 38.
For further analysis sections 28 and 32 of the Sexual Offences Act shall be considered. Section 28 provides as hereunder:

“28 (1) If a victim has been exposed to the risk of being infected with HIV as the result of a sexual offence having been committed against him or her, he or she may—
(a) subject to subsection (2)—
(i) receive PEP for HIV infection, at a public health establishment designated from time to time by the cabinet member responsible for health by notice in the Gazette for that purpose under section 29, at State expense and in accordance with the State’s prevailing treatment norms and protocols;
(ii) be given free medical advice surrounding the administering of PEP prior to the administering thereof; and
(iii) be supplied with a prescribed list, containing the names, addresses and contact particulars of accessible public health establishments contemplated in section 29(1)(a); and
(b) subject to section 30, apply to a magistrate for an order that the alleged offender be tested for HIV, at State expense.
(2) Only a victim who—
(a) lays a charge with the South African Police Service in respect of an alleged sexual offence; or
(b) reports an incident in respect of an alleged sexual offence in the prescribed manner at a designated health establishment contemplated in subsection (1)(a)(i), within 72 hours after the alleged sexual offence took place, may receive the services contemplated in subsection (1)(a).
(3) A victim contemplated in subsection (1) or an interested person must—
(a) when or immediately after laying a charge with the South African Police Service or making a report in respect of the alleged sexual offence, in the prescribed manner, be informed by the police official to whom the charge is made or by a medical practitioner or a nurse to whom the incident is reported, as the case may be, of the—
(i) importance of obtaining PEP for HIV infection within 72 hours after the alleged sexual offence took place;
(ii) need to obtain medical advice and assistance regarding the possibility of other sexually transmitted infections; and
(iii) services referred to in subsection (1); and
(b) in the case of an application contemplated in section 30, be handed a notice containing the prescribed information regarding the compulsory HIV testing of the alleged offender and have the contents thereof explained to him or her.”

158 Section 28.
Section 32 provides as follows:

“32. (1) An investigating officer may, subject to subsection (2), for purposes of investigating a sexual offence or offence apply in the prescribed form to a magistrate of the magisterial district in which the sexual offence or offence is alleged to have occurred, in chambers, for an order that—
(a) the alleged offender be tested for HIV; or
(b) the HIV test results in respect of the alleged offender, already obtained on application by a victim or any interested person on behalf of a victim as contemplated in section 30(1) (a) (i), be made available to the investigating officer or, where applicable, to a prosecutor who needs to know the results for purposes of the prosecution of the matter in question or any other court proceedings.
(2) An application contemplated in subsection (1) must—
(a) set out the grounds, on the strength of information taken on oath or by way of solemn declaration, in which it is alleged that a sexual offence or offence was committed by the alleged offender; and
(b) be made after a charge has been laid, and may be made before or after an arrest has been effected, or after conviction.
(3) If the magistrate is satisfied that there is prima facie evidence that—
(a) a sexual offence or offence has been committed by the offender; and
(b) HIV testing would appear to be necessary for purposes of investigating or prosecuting the offence, the magistrate must, in the case of an application contemplated in subsection (1)(a), order that the alleged offender be tested for HIV in accordance with the State’s prevailing norms and protocols, including, where necessary—
(i) the collection from the alleged offender of two prescribed body specimens; and
(ii) the performance on the body specimens of one or more HIV tests as are reasonably necessary to determine the presence or absence of HIV infection in the alleged offender, and that the HIV test results be disclosed in the prescribed manner to the investigating officer or, where applicable, to a prosecutor who needs to know the results for purposes of the prosecution of the matter in question or any other court proceedings and to the alleged offender, if the results have not already been made available to such offender as contemplated in section 30(1)(a)(i).
(4) An order contemplated in subsection (3) must be made in the prescribed manner and handed to the investigating officer.
(5) The investigating officer must, as soon as is reasonably practicable, after an application has been granted in terms of subsection (3), inform the alleged offender by handing to him or her a notice containing the information as prescribed and, if necessary, by explaining the contents of the notice.”

159 Section 32.
The question therefore is whether the Act in the aforementioned sections actually amounts to HIV-specific criminal legislation. The answer to this is in the affirmative in as far as the Act provides for the compulsory HIV testing of an alleged offender under court order, which if avoided amounts to a criminal offence. Compulsory testing for HIV is generally regarded as an invasion of privacy and an abuse of basic human rights.\footnote{Office of the UN High Commissioner for Human Rights and The Joint United Nations Programme on HIV/AIDS \textit{HIV/AIDS and Human Rights: International Guidelines} (1998).} HIV testing once made compulsory in this manner ceases to be the life saving step advocated for by public health messages and rather constitutes a self-incriminating exercise that provides the state with fundamental proof for potential prosecution. It thus follows - as has been argued by opponents of criminalisation of HIV transmission in Southern Africa - that criminalisation of HIV transmission will deter people (especially those from the marginalised groups) from seeking HIV testing and care.\footnote{Eba “Pandora’s box” 42} International guidelines on HIV/AIDS and human rights produced by the office of the UN High Commissioner for Human Rights and UNAIDS, which are endorsed by most Southern African countries,\footnote{At 43.} warns that

“People will not seek HIV related counselling, testing, treatment and support if this could mean facing discrimination, lack of confidentiality and other negative consequences… Coercive public health measures drive away the people most in need of such services and fail to achieve their public health goals of prevention through behavioural change, care and health support.”\footnote{Office of the UN Commissioner for Human Rights \textit{Guidelines} 4.}

The point here is that once HIV testing is tied to legal coercion, irrespective of the circumstances, then people who would ordinarily seek voluntary testing will begin to look at HIV testing as something that is related to crime and thus be less eager to test. To illustrate this point Ian Dwyer reports that 1,200 less people were tested in an Australian state a month after the introduction of a law criminalising HIV transmission.\footnote{Dwyer “legislating AIDS away: The limited role of legal persuasion in minimizing the spread of the Human Immuno deficiency virus” 1993 (9) \textit{Journal of Contemporary Health Law and Policy}.}
According to the UNAIDS Policy Brief,\textsuperscript{165} where a violent offence such as rape or other sexual assault or defilement has resulted in transmission of HIV, or created a significant risk of transmission, the HIV positive status of the offender may be considered an aggravating factor in sentencing only if he or she knew that he or she was HIV positive prior to committing the crime. The justification, in part, for compulsory testing under the Act\textsuperscript{166} is that given the high prevalence of HIV/AIDS and the related danger of transmission/exposure during the commission of a sexual crime, it is necessary to test the alleged offender for HIV with a view to determining whether Post-Exposure Prophylaxis (PEP) should be administered. Whereas this is well intentioned and may even be helpful in some cases, this argument is not very well thought through and falls short of justifying compulsory testing. This is because alleged offenders may test negative for HIV/AIDS when they are in the 'window period' (before sufficient antibodies are visible in the blood to give a positive result), yet at this point they are highly infectious.\textsuperscript{167}

This negates the argument that testing gives the concerned authorities an informed opinion on whether to administer PEP or not. The right approach should be that all victims of sexual crimes be advised to undergo an HIV test and also be educated on the value of PEP, which should then be administered irrespective of the sero status of the alleged offender. It is especially crucial to administer PEP immediately because it has a limited period of time within which it can be effective, namely 72 hours from the time of suspected transmission.\textsuperscript{168}

Besides, what would happen in the event of mistaken identity, where the wrong alleged offender is tested and found negative or where the alleged offender cannot be timeously apprehended? To add to this, the process for conducting the compulsory test is lengthy and time-consuming which time, as pointed out above, is of the essence in the administering of PEP. In view of the above factors it is clear that the necessity of knowing the alleged offender’s sero status prior to administering PEP is overrated and

\begin{footnotes}
\item UNAIDS UNAIDS Policy Brief (2008).
\item Act 32 of 2007.
\item UNAIDS Policy Brief 3.
\end{footnotes}
in fact defeatist in light of protecting the victim from possible infection or secondary trauma. Both secondary trauma and possible infection should be combated by the immediate administration of PEP. The only other purpose that the compulsory testing of an alleged offender would serve is the use of his HIV positive results as an aggravating factor to seek a stronger penalty upon conviction. If this is the purpose then the UNAIDS Guidelines provided in the Policy Brief must be considered.\textsuperscript{169}

With regard to section 28 above, one of the objectives of the Sexual Offences Act set out in the long title/preamble, as noted in chapter two, is to provide for compulsory testing of an alleged sexual offence perpetrator and to provide the victim of the crime with Post exposure prophylaxis where necessary. It is submitted that the purpose of such testing is, first, to give the victim peace of mind as she will be in a better position to determine whether she was exposed to HIV during the alleged offence, secondly, to enable her to make decisions as to whether to take medication to prevent HIV transmission, and to empower her make decisions regarding the protection of her sexual partner and others against HIV infection.\textsuperscript{170} The principle purpose of this section, therefore, is to reduce the secondary victimisation and traumatisation of victims.

Section 28 is not likely to achieve its stated objective as compulsory testing of alleged offenders will not ultimately assist many victims of sexual violence to learn of and deal with their own HIV status following the assault. As noted above, it is the HIV status of the victim that should be of concern and testing the perpetrator does not determine the HIV status of the victim in view of the fact that most people only develop detectable antibodies within three months of infection.\textsuperscript{171}

That said, the Act’s HIV specific legislation, in the main, is in concert with the UNAIDS policy which advises on the dangers of miscarriage of justice if the law extends criminal liability beyond cases of deliberate or intentional HIV transmission to reckless conduct.\textsuperscript{172} The Policy Brief also states that where a sexually violent offence has resulted in the transmission of and/or exposure to HIV/AIDS, then the HIV status of the

\textsuperscript{169} See Chapter 3 of the UNAIDS Guidelines.
\textsuperscript{172} UNAIDS Policy Brief 3.
offender upon conviction may be legitimately considered an aggravating factor. On the provision of PEP, the Act is in line with humanitarian guidelines and the UNAIDS Policy that advocate for this kind of care in order to avoid secondary trauma and also to enable victims of the disease to live normal, useful and stigma-free lives.\(^\text{173}\) Furthermore, HIV testing before the expiry of three months may not be of any use as the result would not be conclusive in any way. Still, as already noted above, persons can transmit HIV while in the “window period”\(^\text{174}\) yet a test done at this point may give a negative reading thus lulling the victim into a false sense of security. The emphasis here should be on the victim receiving immediate medical treatment irrespective of the HIV status of the alleged offender. This being the case it becomes inconsequential to the wellbeing of the victim as to whether the alleged offender is HIV positive or not. In which case there seems no discernable benefit to the victim in securing an order for compulsory testing of the alleged offender. This in effect does away with the stated objective that testing the alleged offender would be of benefit to the victim.

Further, section 28 of the Sexual Offences Act can only be invoked where the victim lays a charge within 72 hours of the crime being committed. This may defeat the broader purpose of the Act in view of the fact that studies have shown that the majority of victims do not immediately report crimes of a sexual nature.\(^\text{175}\) This would mean that most victims of sexual assault and similar crimes would not benefit from the provisions of this section of the Act.

Research has also shown that children, who are victims of sexual crimes, do not immediately disclose these abuses, with most of them doing so after many years have elapsed.\(^\text{176}\) This means that the section 28 of the Act will be of no benefit to such victims, even as it will not assist any other persons who choose not to disclose these abuses.


\(^{175}\) Rohers “Implementing the Unfeasible compulsory HIV testing for alleged sexual offenders” 2007 (22) *South African Crime Quarterly* 29.

\(^{176}\) At 29.
In terms of section 32 of the Sexual Offences Act, the purpose of compulsory testing is to gather evidence for the prosecution of an offence. This evidence can only serve one purpose and that is to seek a higher sentence should the alleged offender be found HIV positive and guilty of the crimes he has been accused of. UNAIDS suggests that the HIV status of the accused may only be used as an aggravating factor if he was, at all material times, aware of his status, and this should be done under non HIV specific laws. In light of this, section 32 seems almost redundant except where its sole purpose is to criminalise HIV transmission, by punishing the transmission thereof, in which case it is undesirable as it amounts to the criminalisation of HIV transmission.

It has also been submitted that the Sexual Offences Act imposes a range of statutory obligations on the investigating officer, some of which do not form part of the core function of investigating criminal offences, such as advising the victim of the availability of the process of testing the alleged offender. Past experience has shown that the Police Services are ill-equipped for this kind of function and as a result the victims will not benefit in the long run.

With regard to the procedural aspect, section 30(4) of the Sexual Offences Act requires the application for compulsory testing to be handed to the magistrate who under section 31 has the authority to decide on whether or not such test may be conducted. The section provides as follows;

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31. (1) The magistrate must, as soon as is reasonably practicable, consider the application contemplated in section 30, in chambers and may call for such additional evidence as he or she deems fit, including oral evidence or evidence by affidavit, which must form part of the record of the proceedings.
(2) (a) For the purpose of the proceedings contemplated in subsection (1), the magistrate may consider evidence by or on behalf of the alleged offender if, to do so, will not give rise to any substantial delay.
(b) Evidence contemplated in paragraph (a) may be adduced in the absence of the victim, if the magistrate is of the opinion that it is in the best interests of the victim to do so.
(3) If the magistrate is satisfied that there is prima facie evidence that—
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177 UNAIDS Policy Brief.
178 SA Crime Quarterly 30.
179 Ibid.
(a) a sexual offence has been committed against the victim by the alleged offender;
(b) the victim may have been exposed to the body fluids of the alleged offender; and
(c) no more than 90 calendar days have lapsed from the date on which it is alleged that the
offence in question took place, the magistrate must—
(i) in the case where the alleged offender has not been tested for HIV on application by a police
official as contemplated in section 32, order that the alleged offender be tested for HIV in
accordance with the State’s prevailing norms and protocols, including where necessary— 180

Under the above section the magistrate has in essence become an investigator and is
working together with the investigating officer. This gives rise to the question of judicial
impartiality and the possibility of a constitutional challenge as the 1996 Constitution
requires judicial impartiality. 181

From a constitutional point of view compulsory testing amounts to an infringement of
one’s constitutional right to privacy. 182 This right - like all rights - may be limited in
certain circumstances. 183 in S v Makwanyane 184 Chaskalason J explained what should
be considered where competing rights are at stake:

“The limitation of constitutional rights for a purpose that is reasonable and necessary in a
democratic society involves the weighing up of competing values, and ultimately an assessment
based on proportionality… In the balancing process, the relevant considerations will include the
nature of the right that is limited, and its importance to an open and democratic society based on
freedom and equality; the purpose for the which the right is limited and the importance of that
purpose to such society; the extent of the limitation, its efficacy, and particularly where the
limitation has to be necessary, whether the desired ends could reasonably be achieved through
other means less damaging to the right in question”. 185

Following this reasoning, when it comes to compulsory testing under the Act, the rights
of the alleged offender and the interests of the victim must be balanced. In view of the
fact that there is no assurance that the compulsory testing of an alleged offender will in
fact contribute to the wellbeing of the victim, as argued above, then it is not possible to
honestly justify the infringement of the alleged offender’s rights.

180 Sexual Offences Act section 31.
182 Section 14.
183 Section 36 (the ‘limitation clause).
184 [1995] (6) BCLR 665 CC.
185 At 708 C-F.
4.3 Conclusion

Chapter 5 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act has HIV specific legislation under sections 28 to 34, sections 28 and 32 are especially undesirable as they in fact amount to criminalisation of HIV transmission and section 28 in particular has no discernable benefit to the victim, the purpose for which it was initially enacted.

The aspect of compulsory testing of alleged offenders runs the risk of delivering the wrong message with regard to voluntary testing and the associated benefits, in addition to the fact that it infringes on the alleged offenders constitutional right to privacy. It is thus submitted that these two sections should be repealed in line with the UNAIDS policy on criminalisation of HIV.186

That aside, the legislation is still very much within the guidelines of the UNAIDS Policy and is in fact commendable for its provision of universal access of PEP to victims of violent sexual crimes. The Act also continues to rely on traditional crimes such as rape and sexual assault, and has not created any specific HIV/AIDS crime. This too is in line with the UNAIDS187 position.

Ultimately the hope is that South African criminal law will not fall victim to the wave of criminalisation of transmission and reckless behaviour that seems to be overwhelming in other countries on the continent and beyond.

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187 UNAIDS Policy Brief 1 and 5.
CHAPTER FIVE

CRIMINALISATION OF HIV TRANSMISSION: A GLOBAL SURVEY

5.1 Introduction

A wave of criminalisation of HIV transmission and HIV specific legislation has slowly but surely begun to cover the globe.\textsuperscript{188} In the previous chapter this study considered the South African position and the way in which HIV/AIDS specific criminal legislation is taking root in the county’s criminal law statutes albeit, at this point, without directly criminalising reckless HIV transmission and thus still in line with the UNAIDS Guidelines. However, the fact that HIV specific legislation is taking root would require a certain measure of caution to be adopted in order to prevent this tendency from moving towards criminalising transmission and reckless HIV related behaviour, which is not only contrary to UNAIDS policy but, as noted in Chapter 3 of this study, is considered to be a disincentive to the campaign against the spread of HIV/AIDS as undertaken by the public health sector.

This chapter takes a closer look at other jurisdictions where HIV specific criminal legislation and criminalisation in general has taken root and discusses the effect of these developments with a view to showcasing the possible outcomes of criminalisation should South Africa opt to go down that road to the full extent.

5.2 North America

According to the global criminalisation scan, Canada has an estimated 67,000 people living with HIV and has to date prosecuted 91 persons for HIV related offences, of which 63 have been convicted.\textsuperscript{189} The applicable law in Canada is the Criminal Code of Canada.\textsuperscript{190} The Code does not have HIV specific laws but, prosecution has been initiated under the following provisions that already exist in the statute, namely, common

\textsuperscript{189} GNP+ Global criminalisation scan- Canada http://www.gnpplus.net/criminalisation/index.php?option=com_content&task=view&...... (accessed on 18-01-2010).
\textsuperscript{190} Criminal Code of Canada
nuisance; criminal negligence causing bodily harm; murder; attempted murder; assault; assault causing bodily harm; aggravated assault; sexual assault; sexual assault causing bodily harm; and aggravated sexual assault. The Canadian Supreme Court rulings of *R v Cuerrier* and *R v Williams* clarified the law with regard to HIV related intentional transmission. The position is that there exists a legal duty to disclose HIV positive status to sexual partners before having sexual intercourse which would pose a significant risk of transmission, including anal or vaginal sex without a condom. Unprotected sexual intercourse without disclosure and consent to risk of HIV transmission is fraudulent. Under the above sections, HIV exposure without disclosure is enough to prosecute. Canada was also the first country to prosecute mother-to-child transmission in 2005, and the first to prosecute someone for murder as a result of sexual HIV transmission without disclosure in 2008.

The case of *Cuerrier* in particular has set a strong precedent in this regard. In this case the accused had sex with two women without disclosing his HIV positive status. The Canadian Supreme Court held that Cuerrier’s failure to disclose his HIV status could constitute fraud which would vitiate any consent. The court per Cory, Major, Bastarache and Binnie JJ held that a complainant’s consent to sexual activity could be vitiated by fraud if an accused failed to disclose his HIV positive status dishonestly, and this dishonesty had the effect of exposing the complainant to a significant risk of bodily harm. This risk was met by engaging in unprotected sex.

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191 Section 180.
192 Sections 219-221.
193 Section 229.
194 Section 239.
195 Section 265.
196 Section 267.
197 Section 268.
198 Section 271.
199 Section 272.
200 Section 273.
203 GNP+ Global Criminalisation scan Canada 1.
204 Para. 3.
The Canadian approach could be viewed as a primary example of the use of existing criminal laws to prosecute HIV related crimes without recourse to stigma ridden HIV specific legislation. That said, criminalisation - even by the Canadian method – continues to cause stigma and discrimination as noted by Glenn Betteridge.\textsuperscript{206} Betteridge points out that although photographs and stories of persons charged with HIV-related crimes abound in the media, what is never reported are the challenges of living with HIV/AIDS, and the complexities of sexual relationships and disclosure.

By the end of 2009 the number of people prosecuted for HIV related offences in the United States of America (USA) stood at 345 of which 205 were convicted.\textsuperscript{207} The USA is made up of different States each with different criminal and public health statutes. The maximum sentences possible are 25 years imprisonment for HIV exposure in the State of Iowa or the death penalty in the State of Missouri. Thirty-six States have prosecuted HIV positive individuals for criminal exposure and/or transmission. Only twenty-eight States have specific HIV public or criminal law statutes. California, Kansas, Maryland, Oklahoma, South Dakota and Washington have laws that only criminalise HIV exposure with intent. Missouri law allows for the death penalty if transmission is proved as a result of HIV exposure without disclosure. The military courts have court marshalled more than thirty HIV positive individuals for having unprotected sex without disclosure and almost all have been convicted.\textsuperscript{208}

In a recent example of manipulative abuse of the law, resulting from criminalisation of HIV transmission, the Macomb county prosecutor, Eric Smith, in the State of Michigan decided to charge an HIV positive individual as a bio-terrorist simply because he is living with HIV/AIDS. This kind of precedent would mean that anyone in Michigan with any infectious disease could be prosecuted.\textsuperscript{209}

The State of Texas had up to the end of 2009 convicted fifteen people for HIV related criminal offences. There are no HIV specific statutes in Texas, but existing laws have

\textsuperscript{206} Global Health Correspondent.  
\textsuperscript{207} GNP+ Criminalisation scan USA http://www.gnpplus.net/criminalisation/index.php?option=com_content&task=view&... (accessed on 18-01-2010).  
\textsuperscript{208} GNP+ Criminalisation Scan USA 1.  
\textsuperscript{209} At 2.
been successfully utilised to prosecute. The Texas Court of Appeal (3rd District) upheld the conviction of an HIV positive man charged with using his penis and semen as a deadly weapon during a rape and murder trial.\textsuperscript{210} In 2008, an HIV positive Texas man was sentenced to 35 years in prison for harassing a public servant with a deadly weapon after spitting on a police officer. Although the Centre for Disease Control (CDC) has never recorded a case of HIV transmission through the exchange of saliva, the man was charged with assault because his saliva was deemed to be a deadly weapon.\textsuperscript{211} This case also points at the potential dangers of criminalising HIV in any circumstances and constitutes a strong reason for law makers to avoid this route.

5.3 Australia

As at the end of 2009, the state or territory of Victoria in Australia has had ten cases of HIV transmission prosecuted, with four convictions.\textsuperscript{212} The applicable law under which these prosecutions were instituted is the Health Act\textsuperscript{213} and the specific offence is infecting other persons.\textsuperscript{214} Prosecution has also been carried out under the Crimes Act,\textsuperscript{215} and the specific offences are causing serious injury intentionally\textsuperscript{216} and causing serious injury recklessly.\textsuperscript{217} During the same period, the state of New South Wales has had two convictions from two prosecutions. The law under which HIV prosecutions may proceed is the Public Health Act\textsuperscript{218} where a person who knows that he or she has a sexually transmittable medical condition is guilty of an offence if he or she engages in sexual intercourse without disclosing to his or her partner and where the partner has not voluntarily agreed to take the risk.\textsuperscript{219}

\textsuperscript{210} GNP+ Criminalisation scan USA-Texas.
\textsuperscript{212} GNP+ Criminalisation scan Australia Victoria.
\textsuperscript{213} The Health Act (1958).
\textsuperscript{214} Section 120.
\textsuperscript{215} The Crimes Act (1958).
\textsuperscript{216} Section 17
\textsuperscript{217} Section 19 a (2).
\textsuperscript{218} Public Health Act (1991).
\textsuperscript{219} Section 13.
5.4 Europe

Switzerland has an estimated 13,000 people living with HIV and has prosecuted over thirty persons with twenty convictions for HIV transmission. The applicable law is the Swiss Penal Code, articles 122 and 231. Article 122 criminalises grievous bodily harm and intentional injury with a penalty of up to five years in prison. Article 231 criminalises the spreading of human disease and carries a penalty of five years in prison. The first HIV transmission prosecution was heard in 1998 and the number has since exceeded thirty. Most of the defendants have been male citizens of Switzerland unlike cases in other European countries.

Denmark has an estimated 5,000 people living with HIV and has prosecuted twelve people for HIV related offences, of which two were convicted. Charges have been brought under the Danish Penal Code, though the initial prosecutions in 1993 were not successful because the Danish Supreme Court found that section 252 of the Penal Code did not provide for HIV transmission. In 2001 the section was amended to include HIV. The section provides that:

"(1) Any person who, for the purpose of gain, or who purely wantonly or in a similar reckless manner, exposes the life or physical ability of others to impending danger shall be liable to imprisonment for a term not exceeding four years.

(2) The same penalty shall apply to any person who wantonly brings about danger that some one be infected with a fatal and incurable disease."

Italy has prosecuted three people and convicted all under the crimes of aggravated bodily harm, homicide and attempted homicide. There is no HIV specific law.

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221 Swiss Penal Code.
222 GNP+ Criminalisation of HIV transmission IN Europe --- Switzerland.
223 GNP+ Criminalisation of HIV transmission in Europe – Denmark.
Germany has at least three convictions under the German Criminal Code\textsuperscript{227} sections 223, 224, 226 and 229. These sections are, however, not HIV/AIDS specific. Exposing another person to HIV infection has been held to carry a sentence of up to 10 years imprisonment.\textsuperscript{228}

In the United Kingdom (UK) there have been four prosecutions and four convictions under the Offences Against the Person Act,\textsuperscript{229} sections 18 and 20. Section 18 provides for wounding with intent to do grievous bodily harm and section 20 is deals with inflicting bodily injury with or without a weapon. All cases have involved male defendants who had engaged in heterosexual intercourse and the charges were based on actual transmission. In the UK only actual transmission is punishable and the maximum sentence is life imprisonment.\textsuperscript{230}

5.5 Africa

Africa has possibly experienced the biggest wave of criminalisation of HIV transmission. Rebecca Wexler\textsuperscript{231} notes that criminalisation legislation reached fever pitch in the aftermath of a United States funded action for the West Africa region HIV/AIDS project (AWARE-HIV/AIDS) meeting in N'djamena Chad in 2004.\textsuperscript{232} West African parliamentarians drafted what is known as the N'djamena African Model Law. This model law broadly requires HIV status disclosure to a spouse or regular sexual partner within six weeks of diagnosis. It permits mandatory testing of pregnant women, their spouses and rape victims where necessary to solve a marital dispute. The model law also creates the offence of wilful transmission pertaining to those who transmit the virus through any means with full knowledge of their HIV status. The law does not distinguish between those who intend to do harm and those whose behaviour can be categorised as reckless or negligent and therefore raises questions on culpability of individuals who might not be aware of their HIV positive status. This model law has been the basis of at

\begin{itemize}
  \item \textsuperscript{227} The German Criminal Code
  \item \textsuperscript{228} GNP+ Criminalisation of HIV transmission in Europe – Germany
    \url{http://www.gnpplus.net/criminalisation/germany.shtml} (accessed on 18-01-2010).
  \item \textsuperscript{229} 1861.
  \item \textsuperscript{230} GNP+ Criminalisation of HIV transmission in Europe – United Kingdom
    \url{http://www.gnpplus.net/criminalisation/uk.shtml} (accessed on 18-01-2010).
  \item \textsuperscript{231} Global Health Correspondent.
  \item \textsuperscript{232} Diplomatic Courier \textit{Criminalisation of HIV}. 
\end{itemize}
least nine West African and Central African states modifying their domestic HIV legislation.\textsuperscript{233}

Of particular note in the surge of criminalisation of HIV transmission is the Ugandan case in East Africa. The Ugandan Parliament introduced and is considering two Bills of pertinent interest: The HIV and AIDS Prevention and Control Bill\textsuperscript{234} and the Anti Homosexual Bill.\textsuperscript{235}

The HIV and AIDS Prevention and Control Bill clearly criminalises the intentional transmission of HIV\textsuperscript{236} and provides that any person who wilfully and intentionally transmits HIV to another person commits an offence and upon conviction shall be liable to life imprisonment. The Bill also states that a person who is aware of their HIV positive status and fails to observe instructions on treatment and prevention commits a criminal offence.\textsuperscript{237} The Bill also criminalises any wilful breach of any provision relating to safe sex procedures.\textsuperscript{238} It also criminalises misleading statements or information regarding curing, preventing or controlling HIV/AIDS.\textsuperscript{239} Lastly, the Bill states that any person who obstructs or prevents any activity related to the implementation of this Act in any manner commits an offence.\textsuperscript{240}

This Bill has generally caused an international outcry for its harshness and disregard of international conventions and human rights guidelines.\textsuperscript{241} For purposes of this study, reaction against the Bill’s criminalisation clauses shall briefly be considered. Critics of the Bill were led under the umbrella of Human Rights Watch (HRW).\textsuperscript{242}

With regard to wilful transmission, HRW observes that there was no need for clause 40 as it only serves to duplicate the Ugandan Penal Code\textsuperscript{243} and is contrary to international

\begin{itemize}
  \item \textsuperscript{233} At 1.
  \item \textsuperscript{234} The HIV and AIDS Prevention and Control Bill (2009).
  \item \textsuperscript{235} The Anti Homosexual Bill (2009).
  \item \textsuperscript{236} Clause 41.
  \item \textsuperscript{237} Clause 3.
  \item \textsuperscript{238} Clause 42.
  \item \textsuperscript{239} Clause 44.
  \item \textsuperscript{240} Clause 43.
  \item \textsuperscript{241} OHCR and UNAIDS \textit{International Guidelines on HIV/AIDS and Human Rights} (2006).
  \item \textsuperscript{243} 120 of 1950.
\end{itemize}
HIV/AIDS and human rights guidelines, which preclude specific offences against wilful transmission of HIV/AIDS. HRW noted that because the transmission must be wilful and intentional, thereby making ignorance an effective defence for the required state of mind, the criminalisation of transmission may act as a deterrent for individuals to seek testing. Feasibility of prosecution is also limited by the inability to clearly establish who has infected whom. HRW reiterates the international position that such a law demonises HIV positive persons and further fuels stigma and discrimination.

With regard to clause 3 of the HIV and AIDS Prevention and Control Bill, HRW is of the view that such a provision is overly broad and violates the fundamental rights of individuals to make choices concerning their own health - for instance, if a patient forgot to take their dose of medication they could be criminally liable under the wording of the clause. Clauses 43 and 44 are also overly broad and vague. The recommendation is that these provisions be redefined specifically and clearly to protect fundamental human rights and to avoid selective and possibly prejudicial prosecution.

The second Bill that warrants note in Uganda is the Anti Homosexual Bill. The relevance of this Bill to the current study lies in the provisions of clause 3 thereof. This clause creates the offence of ‘aggravated homosexuality’, including activity by serial offenders or those who are HIV positive. The Bill requires compulsory testing for a person charged under the section. This Bill has also drawn international criticism and in a press release by the Centre for Human Rights, University of Pretoria, the Bill was condemned and it was advised that the Ugandan Parliament should not adopt it because it violates the Uganda Constitution and Uganda’s international and regional human rights obligations. Central to the argument is that the Bill will undermine efforts at HIV/AIDS prevention and will serve to inhibit voluntary testing for HIV/AIDS. It is

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245 At 3.
246 Cameron, Burris & Clayton HIV is a virus not a crime: Ten reasons against criminal statutes and criminal prosecutions 2008 (11) Journal of the international AIDS Society http://www.joasociety.org/content/11/1/7 (accessed on 10-12-2009) and UNAIDS Policy Brief.
247 2009.
248 2009.
argued that the design of the Bill will have a negative impact on HIV prevention among men who have sex with men (MSM).\textsuperscript{250}

The Bill is further offensive in purporting to expunge the effect of international law obligations already undertaken by Uganda rendering them null and void under clause 18 of the Bill.

The international outcry created by the two Bills has finally put pressure on the Ugandan government to reconsider their promulgation into law, and on the 14 January 2010 the President of Uganda, Yoweri Museveni, indicated that he will not back a Bill that would impose the death sentence for ‘aggravated homosexuality’, and that foreign policy interests need also be taken into consideration when debating the Bills.\textsuperscript{251}

5.5.1 Southern Africa Development Corporation (SADC) Region

The SADC region is made up of the following countries in Southern Africa and part of Central Africa: Zimbabwe, Botswana, Zambia, Malawi, Mozambique, Tanzania, Namibia, Angola, DRC Congo, Swaziland and Lesotho South Africa and Mauritius. The SADC treaty\textsuperscript{252} in article 5(1) (i) urges for the creation of a uniform HIV/AIDS policy. Subsequently, the member states through their Parliamentary Forum came up with a model law to be followed by all members as a foundation for HIV/AIDS legislation in the region. This law is known as the Model Law on HIV/AIDS in Southern Africa (hereafter referred to as the Model Law).\textsuperscript{253}

This Model Law, very unlike the one in West Africa as seen above, does not in any way call for the criminalisation of HIV, but advocates for a more humane approach to combating the epidemic, which position it sets out in its Preamble:

*“Aware of the potential role of legislation in addressing the spread and effects of HIV and AIDS; Recognising the importance of a human rights-based and gender-sensitive approach, and the involvement of those vulnerable to and living with HIV, in adopting effective legislation;*

\textsuperscript{250} Para. 6.  
\textsuperscript{252}SADC Treaty (1992 as amended 2001).  
Fully aware that many states in Southern Africa have already taken or are taking legislative and other steps to address the epidemic;
Accepting that model legislation may serve a useful role as a yardstick for legislative review and may inspire further legislative reform;
Acknowledging that model legislation builds on best practices in the region and elsewhere;
Acknowledging the urgent need to continue our legislative reform efforts in specific areas such as family law, inheritance and property law, children’s and women’s rights and sexual offences;
We, members of SADC PF, adopt the following Model Law on HIV in Southern Africa as a guide to legislative efforts on HIV-related issues in Southern Africa”254

Following up on the humane approach, the Model Law lists the following objectives:

“The Model Law aims to:
(a) provide a legal framework for the review and reform of national legislation related to HIV in conformity with international human rights law standards;
(b) promote the implementation of effective prevention, treatment, care and research strategies and programmes on HIV and AIDS;
(c) ensure that the human rights of those vulnerable to HIV and people living with or affected by HIV are respected, protected and realised in the response to AIDS; and
(d) to stimulate the adoption of specific measures at national level to address the needs of groups that are vulnerable or marginalised in the context of the AIDS epidemic.”255

This law lays emphasis on education in Part Two, section 4 thereof. Member states are enjoined to promote public awareness on the nature of HIV/AIDS, its causes and modes of transmission.256 This part of the law also calls upon schools, Institutions and health care facilities to participate in awareness campaigns.257 In addition, governments are called upon to sensitise communities on dangerous cultural practices that need be avoided, such as, early marriages, widow inheritance and female genital mutilation (FGM).258

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254 Model Law Preamble.
255 Section 1.
256 Section 4.
257 Section 5.
258 Section 8.
Part two, Chapter Two, of the Model Law calls upon the member states to ensure the prevention of mother-to-child transmission of HIV by availing good antenatal care and the relevant treatment.\footnote{Section 9.}

Chapter Three, deals with prevention methods and calls upon governments to ensure availability of condoms for both sexes;\footnote{Section 10.} to take special prevention steps for marginalised and vulnerable groups; and to ensure preventative methods for sex workers, drug users and homosexuals.\footnote{Section 11.} Chapter Four calls for universal HIV testing, which must be voluntary, anonymous and confidential. Governments are also called upon to ensure the availability of free testing centres and must make counselling services available.\footnote{Section 13.}

Part Four of the Model Law provides for general non discrimination of persons living with HIV and advocates for the protection of persons living with HIV. It provides for legal redress where a person is discriminated against because of their HIV status.\footnote{Section 17.} The law ensures every person’s right to privacy and confidentiality with regard to their HIV status, and the rights to sexual and reproductive health care, education, work, social security and retirement.\footnote{Sections 18-23.}

Chapters Two and Three provide for the protection of children and women living with HIV. Children should have a right to health care education and should be protected under all international conventions that provide for child protection.\footnote{Section 24.} Women should not be marginalised and should be protected from violence.\footnote{Section 27.}

In Part Four of the Model Law governments are enjoined to create offences and penalties for breach of confidentiality and unlawful disclosure,\footnote{Section 43.} as well as for failure to comply with the correct methods of administering testing and counselling.
Lastly, the Model Law stipulates that all legislation with regard to HIV which does not conform to the provisions of the model Law should be considered null and void. Section 48 provides as follows:

“48. Relationship with other laws
Where the provisions of this Model Law or any valid regulation made hereunder are inconsistent with the provisions of any other law, the provisions of this Model Law or such regulation shall prevail.”

This Model Law endorses the anti-criminalisation of HIV/AIDS and is in line with the recommendations of UNAIDS in that it advocates for HIV prevention methods in the form of education, protection of women and other marginalised groups from violence, and also advocates for laws that would reverse stigma such as its anti-discrimination provisions in sections 17 to 23. Furthermore, the provisions of section 48 outlaw any laws inconsistent with the Model Law such as legislation that criminalises HIV exposure and/or transmission. This section would mean that the current provisions in sections 28 to 39 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act are in fact null and void for being inconsistent with the Model Law, since they criminalise HIV.

In commenting on the Model Law, ARASA points out that:

“It is heartening to note that the final version of the SADC model law does not contain provisions on criminalisation of HIV transmission, largely as a result of strong lobbying on behalf of ARASA and other non-governmental organisations (NGOs) in the region.”

ARASA however notes that despite the International Guidelines on HIV/AIDS and Human Rights, countries continue to develop a range of criminal provisions to respond to HIV and AIDS. Close to 50% of SADC countries have introduced legislation which creates specific offences for the wilful transmission of HIV and provides for harsher sentences for sexual offenders.

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268 S 48.
269 UNAIDS policy brief.
271 At 26.
Many of these new criminal laws are poorly drafted and couched in broad terms, lowering the standards of proof and widening the net of liability in a way that is legally unacceptable. There is some indication in Botswana\textsuperscript{272} that the courts have chosen to narrow the scope of the criminal law provisions, where appropriate. They have however held that HIV testing of sexual offenders is constitutional.

5.6 Conclusion

The abovementioned brief survey of the global criminalisation of HIV related acts brings to light two salient arguments: the first is that intentional HIV transmission and related reckless behaviour can be and has been successfully prosecuted under pre-existing criminal law, thus negating the need for HIV specific criminal laws. Secondly, HIV specific criminal legislation, in spite of its upsurge, is not the internationally preferred direction to take and there is no clear advantage for its application as opposed to traditional criminal law. The anti-criminalisation proponents have in Uganda’s HIV and Anti Homosexual Bills good examples of how increased criminalisation in the HIV arena may lead to outright abuse of both universally recognised human rights and accepted international legal norms. On the other hand the SADC Model Law on HIV is a preferable framework upon which countries in Africa, and especially Southern Africa, should build their HIV laws.

The relevance of this chapter to the South African lawmaker is to highlight, through existing examples, the preferred position of not criminalising HIV related matters in light of the likely adverse consequences and unfavourable international reaction, and also to illustrate that traditional criminal laws are in fact adequate for addressing HIV related crime without the unwanted result of stigma and discrimination. The chapter also highlights the SADC Model Law on HIV, which serves as a reminder to South Africa upon which foundation it, should build its HIV related laws.
CHAPTER SIX

CONCLUSIONS AND RECOMMENDATIONS

6.1 Introduction

“The haste to criminalise the risk of AIDS transmission ignores the failure of previous attempts to control venereal disease, as well as the considerable jurisprudential and public health problems that would arise.”

The statement above captures the central argument of this study and is in line with the best international scholarly research and advise, which forms the basis of the UNAIDS Policy Brief on the Criminalisation of HIV/AIDS. In spite of this, however, there are a growing number of countries opting to use criminal law to fight the spread of HIV/AIDS and are introducing HIV specific statutes as a weapon against the spread of the epidemic. Criminalisation is an ill-advised course of action and, as pointed out by UNAIDS in its introductory statement to the policy brief, there is no data indicating that the broad application of criminal law to HIV transmission will achieve either criminal justice or prevent HIV transmission.

Rebecca Wexler, writing in the Diplomatic Courier, notes that there is no evidence to support the theory that criminalisation of HIV transmission either alters behaviour or controls transmission rates. She cites a commentary in the Journal of the American Medical Association where it was pointed out that not a single study to date has effectively proven that the threat of criminal prosecution influences condom use.

This treatise has sought to show that in spite of the alarming rate at which HIV/AIDS is spreading globally, applying criminal law to try and curb this spread is in fact the

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275 At 1.
276 Global Health Correspondent.
wrong way to go about it as it is ultimately counterproductive and will only worsen an already dire state of affairs.

The study concludes that sections 28 and 32 in Chapter Five of the Criminal Law (Sexual Offences and Related Matters) Amendment Act\textsuperscript{279} contain HIV specific legislation and are thus undesirable in the fight against HIV/AIDS transmission. This chapter will also provide recommendations for an alternative approach to fighting the spread of HIV/AIDS in South Africa.

6.2 Conclusions

While the rest of the world was coming to terms with the reality of HIV/AIDS, South Africa was in a state of denial.\textsuperscript{280} No significant efforts were made to educate people on how to avoid contracting HIV/AIDS, and what the general population received was, at best, mixed messages.\textsuperscript{281} As a result the epidemic spread to the point where South Africa has the highest HIV prevalence in the world.\textsuperscript{282} Given this critical state of affairs - and also in light of the soaring sexual crime rates, criminal law was looked at as the probable tool to employ in the curbing of the epidemic.\textsuperscript{283} The reality is, however, that public health methods and strategies had not been employed and the President Mbeki\textsuperscript{284} era - when action should have been taken - has been referred to as one best characterised by its litany of errors in HIV/AIDS policy and for its failure to rise to the challenge that the epidemic posed for South Africa.\textsuperscript{285}

Unfortunately, as noted earlier in this study, the application of criminal law has no known benefit in the fight against the spread of HIV/AIDS and in light of this fact sections 28 and 32 of the Criminal Law (Sexual Offences and Related Matters)
Amendment Act\textsuperscript{286} serve no purpose and are in fact more likely to deter voluntary testing for HIV. Further, in light of the criminal context of testing under the Act, there is a likelihood that such testing will only serve to promote stigma.

It is therefore the conclusion of this study that sections 28 and 32 of the Act\textsuperscript{287} are undesirable in light of the overwhelming arguments against HIV/AIDS specific criminal legislation and should forthwith be repealed.

It is also the conclusion of this study that South Africa should not seek to use criminal law in the fight against the spread of HIV/AIDS, although criminal liability may be brought to bear in cases of intentional transmission of HIV. But this must be done within the ambit of traditional criminal law offences, such as assault, aggravated assault, sexual assault, rape, murder and attempted murder. A case in point is Canada, where proposals to amend the Canadian Criminal Code to create HIV specific offences were rejected by Parliament, but, in spite of this, Canada has seen successful in prosecuting intentional HIV transmission through the judicial interpretation of traditional criminal offences.\textsuperscript{288}

6.3 Recommendations

Having come to the conclusion that the HIV specific legislation is not an effective tool in the fight against the spread of HIV/AIDS, the question that goes begging is: which tools can then effectively be used to fight the epidemic?

To answer this question the UNAIDS Policy Brief on the criminalisation of HIV transmission has proposed a number of recommendations for governments, civil society and International partners.\textsuperscript{289} UNAIDS recommends as follows:

1. Governments are advised to abide by international human rights conventions on equal and inalienable rights, including those related to health, education and social protection of all people including people living with HIV.

\textsuperscript{286} Act 32 of 2007.
\textsuperscript{287} The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.
\textsuperscript{289} UNAIDS policy Brief Criminalisation of HIV transmission (2008) 6.
2. Governments should repeal HIV specific criminal laws, laws directly mandating disclosure of HIV status and other laws which are counterproductive to HIV prevention treatment, care and support efforts, or which violate the human rights of people living with HIV and other vulnerable groups.

3. Governments should apply general criminal law only to the intentional transmission of HIV, and audit the application of general criminal law to ensure it is not used inappropriately in the context of HIV.

4. Redirect legislative reform, and law enforcement towards addressing sexual and other forms of violence against women, and discrimination and other human rights violations against people living with HIV and people most at risk of exposure to HIV.

5. Significantly expand access to proven HIV prevention programmes, support voluntary counselling and testing of couples, voluntary disclosure, and ethical partner notification.

6. Ensure that civil society, including women’s and human rights groups, representatives of people living with HIV and other key populations, is fully engaged in developing and/or reviewing HIV laws and their enforcement.

7. Promote gender equality in education and employment, provide age appropriate sexual and life skills education to children and adolescents, and enact and enforce laws to promote women’s rights to property, inheritance, custody and divorce so women can avoid and leave relationships that place them at risk to HIV.

8. Civil society is advised to monitor proposed and existing laws and advocate against those which inappropriately criminalise HIV transmission and impede provision of effective HIV prevention, treatment, care, and support services.

9. Civil society should advocate for laws against sexual and other violence; support services for those who experience such violence, as well as HIV-related discrimination.
10. Engage with the media to ensure that coverage of such issues is proportionate and well informed, explaining the difficulties of disclosing HIV status and reiterating the shared responsibility for sexual health.

11. International partners are advised to support research on the impact of HIV related laws on public health and human rights, and to support governments to expand proven HIV prevention programmes including positive prevention, reduce stigma and discrimination against people living with HIV and other marginalized groups, and instigate appropriate law reform to end gender inequality and violence.

In South Africa, specifically, there is a need for intensive education campaigns to eradicate HIV/AIDS related myths such *inter alia* as the myth maintaining that sexual intercourse with a virgin can protect and cure persons from HIV/AIDS.s²⁹⁰ Political leaders and prominent citizens should therefore come out with one clear voice and message on how to prevent HIV/AIDS transmission through behavioural change. The South African government need also follow the provisions of the SADC Model Law on HIV and AIDS in order for it to steer a legislative course that is in line with the widely accepted international guidelines on HIV related legislation.

In order to move beyond an era of complacency and denial, and to embrace the fight against HIV/AIDS, the South African government should make informed decisions and show leadership in following accepted research and methods of controlling the spread of HIV/AIDS as this will ultimately have the desired positive impact on curbing the spread of the epidemic.

Finally to echo the words of President Nelson Mandela written in the foreword of the book *HIV/AIDS in South Africa*²⁹¹ experience in a number of countries has taught that HIV infection can be prevented through investing in information and life skills development for young people. In addition, promoting abstinence, safe sex and ensuring early treatment of sexually transmitted diseases would ensure that especially

²⁹⁰ SLC Fifth Interim report.
the youth have access to voluntary and confidential HIV/AIDS counselling and testing services.

We need to break the silence, banish stigma and discrimination and ensure inclusiveness within the struggle against HIV/AIDS as those who are infected with this terrible disease do not want stigma, they want love.
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