Global Criminalisation Scan

HIV Leadership through Accountability KENYA

# Country Assessment 2009

April 2010

NEPHAK say yes to life

GNP+ GLOBAL NETWORK OF PEOPLE LIVING WITH HIV

UKaid from the Department for International Development

# Kenya

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# Acronyms

| | |
|---|---|
| **AIDS** | Acquired Immune Deficiency Syndrome |
| **CBO** | Community-Based Organisations |
| **GIPA** | Greater Involvement of People Living with HIV and AIDS |
| **GNP+** | Global Network of People Living with HIV |
| **HAART** | Highly Active Antiretroviral Therapy |
| **HIV** | Human Immunodeficiency Virus |
| **KETAM** | Kenya Treatment Access Movement |
| **KENWA** | Kenya Network of Women with AIDS |
| **MAXFACTOR** | Maximising Facts on HIV/AIDS |
| **MMAK** | Movement of Men with AIDS in Kenya |
| **NEPHAK** | National Empowerment Network for People Living with HIV/AIDS in Kenya |
| **NGO** | Non-Governmental Organisation |
| **PLHIV** | People living with HIV and AIDS |
| **PMTCT** | Prevention of Mother-To-Child Transmission |
| **WAC** | World AIDS Campaign |

# Acknowledgements

We would like to thank all people living with HIV who participated in the interviews and who supported the implementation of the Criminalisation Scan.

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We are especially grateful to Charles Nzioka who led the research process and developed the final report. We trust that these findings will contribute to improving the health and quality of their lives and that of PLHIV in general.

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The Criminalisation Scan is one of five evidence-gathering tools being implemented through the HIV Leadership through Accountability programme. The programme combines specific HIV evidence-gathering tools, national AIDS campaigns and targeted advocacy to achieve Universal Access to prevention, treatment, care and support. For more information about the HIV Leadership through Accountability programme please visit www.hivleadership.org.

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## Summary

The Global Criminalization Scan, an initiative of the Global Network of People living with HIV (GNP+), is an international tool used to, amongst other things, document laws, judicial practices and case studies around the criminalization of HIV transmission.

The Criminalization Scan was undertaken in Kenya by the National Empowerment Network of People Living with HIV and AIDS in Kenya (NEPHAK) to map the use of the law or other Sanctions to prosecute people who transmit or expose others to HIV infection. The scan also explored other criminalisation measures that can impact on responses to the HIV epidemic.

The study found that Kenya has two legal instruments that relate to HIV transmission. These are the HIV and AIDS Prevention and Control Act of 2006 and the Sexual Offences Act (2006), whose sections 24 and 26, respectively, have rather broad provisions for Criminalizing deliberate or negligent transmission of HIV. Whilst both Acts have provisions aimed at protecting people living with HIV against discrimination, the sections mentioned have the potential to undermine efforts to diagnose and treat people for HIV infection. Criminalisation of HIV transmission/exposure could inhibit disclosure of HIV status and also reduce the uptake of HAART. From the information gathered, there have been no prosecutions for HIV transmission far.

In Kenya, HIV infection is rarely discussed openly for fear of the social stigma associated with HIV and AIDS. Because initiating proceedings to have another person prosecuted for HIV transmission involves disclosing HIV status, this could be a possible explanation for the Lack of prosecutions. Another reason could be the burden of proof, which is set quite high. It is also questionable whether the police department which has the responsibility of prosecuting people in such cases has the technical capacity and funding to do so successfully.

A challenge for NEPHAK and others is ensuring that the absence of Kenyan cases is based on an awareness that the effective control of HIV lies in increased knowledge and adoption of preventive practices rather than prosecutions. Whilst no prosecutions have been brought, the existence of the provisions criminalising transmission in the law leaves this a possibility.

# Kenya

# Narrative Report

## Introduction

The HIV Leadership through Accountability program is a collaboration between the Global Network of People Living with HIV (GNP+), the World AIDS Campaign (WAC), national networks of PLHIV and national civil society platforms which is implementing programmes by and for PLHIV. NEPHAK is the key partner in Kenya, working on programmes in order to strengthen the evidence in four key areas:

- Stigma and discrimination: The People Living with HIV Stigma Index
- The level of involvement of people living with HIV in national and local responses to HIV and AIDS: The GIPA Report Card
- Documenting and analyzing human rights violations against PLHIV: Human Rights Count!
- Documenting and analyzing current experiences in criminalization of HIV transmission: the Global Criminalization Scan.

The Global Criminalization Scan is an international tool used to document laws, judicial practices and case studies around the criminalization of HIV transmission. It is an initiative of GNP+ and partner organizations, developed after a realization that prosecutions for alleged HIV transmission were on the increase, and that many countries were considering introducing new legislation related to HIV transmission.

The aims of the Global Criminalisation Scan are:

- To collect and maintain up-to-date information on national or state level laws on HIV criminalisation, in particular criminalising the transmission of or exposure to HIV;
- To provide an easily accessible 'clearing-house' of resources, research, and initiatives on the subject
- To provide a platform for advocacy initiatives.

## Methodology

The data used in this report is both qualitative and quantitative and was collected via two main methods:

- Desk based research of legal databases and government websites in Kenya;
- Questionnaires were sent to networks of people living with HIV, HIV/AIDS service organisations and government officials.

10 questionnaires were sent out. The four organisations that responded to the questionnaire were:

- Network of Women with AIDS (KENWA);
- Kenya Treatment Access Movement (KETAM);
- MAXFACTOR;
- Movement of Men with AIDS in Kenya (MMAK).

Three of the organisations mentioned above provided limited information.
Additional information was sought by searching internet resources.

# Results

The following were the findings of this study based on the responses given to the questionnaires and from the desk based research.

## Section One: Criminalization of HIV Transmission

Information gathered indicates that under the law in Kenya, knowingly exposing a person or persons to HIV or deliberate transmission of HIV is an offence punishable by law. Kenya has two legal instruments that relate to HIV transmission. These are mentioned in fuller detail below.

No prosecution has yet been brought before the courts for HIV transmission and exposure.

## Section Two: The Relevant Law

The HIV and AIDS Prevention and Control Act, No. 14 of 2006 was enacted by Parliament, and came into effect on 6th March 2009. The legislations aims to provide *measures for the prevention, management and control of HIV and AIDS, protection and promotion of public health, for appropriate treatment, counselling, support and care of persons infected or at risk of HIV and AIDS infection, and for connected purposes.*

**The HIV and AIDS Prevention and Control Act, 2006**

*Part VI - Transmission of HIV*

*24. (1) A person who is and is aware of being infected with HIV or is carrying and is aware of carrying the HIV virus shall –*

*(a) take all reasonable measures and precautions to prevent the transmission of HIV to others; and*

*(b) Inform, in advance, any sexual contact or person with whom needles are shared of that fact.*

*(2) A person who is and is aware of being infected with HIV or who is carrying and is aware of carrying HIV antibodies shall not, knowingly or recklessly, place another person at risk of becoming infected with HIV unless that other person knew that fact and voluntarily accepted the risk of being infected.*

*(3) A person who contravenes the provisions and shall be liable upon conviction to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding seven years, or to both such fine and imprisonment.*

*(4) A person referred to in subsection (1) or (2) may request any medical practitioner or any person approved by the Minister under section 16 to inform and counsel a sexual contact of the HIV status of that person.*

*(5) A request under subsection (4) shall be in the prescribed form.*

*(6) On receipt of a request made under subsection (4), the medical practitioner or approved person shall, whenever possible, comply with that request in person.*

*(7) A medical practitioner who is responsible for the treatment of a person and who becomes aware that the person has not, after reasonable opportunity to do so-*

*(a) Complied with subsection (1) or (2); or*

*(b) made a request under subsection (4),*

*May inform any sexual contact of that person of the HIV status of that person.*

*(8) Any medical practitioner or approved person who informs a sexual contact as provided under subsection (6) or (7) shall not, by reason only of that action, be in breach of the provisions of this Act.*

From information provided on the official law pages of Kenya, the Sexual Offences Act 2006 was passed to address the escalating problems of sexual violence and exploitation of women in Kenya[1]. Its section 26 states:

**ACT NO.3 of 2006 – Sexual Offences Act. Section 26**

*26. (1) Any person who, having actual knowledge that he or she is infected with HIV or any other life-threatening sexually transmitted disease intentionally, knowingly and wilfully does anything or permits the doing of anything which he or she knows or ought to reasonably know –*

*(a) Will infect another person with HIV or any other life threatening sexually transmitted disease;*

*(b) is likely to lead to another person being infected with HIV or any other life threatening sexually transmitted disease;*

*(c) will infect another person with any other sexually transmitted disease, shall be guilty of an offence, whether or not he or she is married to that other person, and shall be liable upon conviction to imprisonment for a term of not less fifteen years but which may be for life.*

*(2) Notwithstanding the provisions of any other law, where a person is charged with committing an offence under this section, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct, for the purpose of ascertaining whether or not he or she is infected with HIV or any other life threatening sexually transmitted disease.*

*(3) The sample or samples taken from an accused person in terms of subsection (2) shall be stored at an appropriate place until finalization of the trial.*

*(4) The court shall, where the accused person is convicted, order that the sample or samples be tested for HIV or any other life threatening sexually transmitted disease and where the accused person is acquitted, order that the sample or samples be destroyed.*

*(5) Where a court has given directions under subsection (4), any medical practitioner*

[1] http://www.thesexualoffencesact.com/

*or designated person shall, if so requested in writing by a police officer above the rank of a constable, take an appropriate sample or samples from the accused person concerned;*

*(6) An appropriate sample or samples taken in terms of subsection (5) –*

*(a) shall consist of blood, urine or other tissue or substance as may be determined by the medical practitioner or designated person concerned, in such quantity as is reasonably necessary for the purpose of determining whether or not the accused person is infected with HIV or any other life threatening sexually transmitted disease; and;*

*(b) in the case a blood or tissue sample, shall be taken from a part of the accused person's body selected by the medical practitioner or designated person concerned in accordance with accepted medical practice.*

*(7) Without prejudice to any other defence or limitation that may be available under any law, no claim shall lie and no set-off shall operate against –*

*(a) The State;*

*(b) Any Minister;*

*(c) any medical practitioner or designated persons, in respect of any detention, injury or loss caused by or in connection with the taking of an appropriate sample in terms of subsection (5), unless the taking was unreasonable or done in bad faith or the person who took the sample was culpably ignorant and negligent.*

*(8) Any person who, without reasonable excuse, hinders or obstructs the taking of an appropriate sample in terms of subsection (5) shall be guilty of an offence of obstructing the cause of justice and shall on conviction be liable to imprisonment for a term of not less than five years or to a fine of not less fifty thousand shillings or to both.*

*(9) Where a person is convicted of any offence under this Act and it is proved that at the time of the commission of the offence, the convicted person was infected with HIV or any other life threatening sexually transmitted disease whether or not he or she was aware of his or her infection, notwithstanding any other sentence in this Act, he or she shall be liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life.*

*(10) For purposes of this section –*

*(a) the presence in a person's body of HIV antibodies or antigens, detected through an appropriate test or series of tests, shall be prima facie proof that the person concerned is infected with HIV; and*

*(b) if it is proved that a person was infected with HIV after committing an offence referred to in this Act, it shall be presumed, unless the contrary is shown, that he or she was infected with HIV when the offence was committed*

## Section Three: Who Has Been Prosecuted

From the responses received, no one in Kenya has yet been prosecuted for transmitting HIV to another person.

Respondents interviewed using the questionnaire spoke of the difficulties of successfully prosecuting 'offenders' due to the challenges of proving the offence. The respondents also questioned whether the police authorities would have the resources to carry out the necessary investigations. They doubted whether a successful prosecution would be possible in countries like Kenya where the police department is thin on resources. The absence of prosecutions for HIV transmission in Kenya was cited as an indication of an inability on the part of the police and other prosecuting bodies to deal effectively with the requirements raised in HIV criminalisation cases.

## Section Four: The Media

Evidence gathered in this study shows that the media have been influential in building public awareness on HIV and AIDS and on sensitising the public on the importance of adopting low risk sexual behaviours and practices. The mass media has also been very influential in promoting HIV prevention interventions such as Voluntary Counselling and Testing (VCT). Media coverage on criminalisation issues has, however, been limited and not systematic, but rather episodic and lacking in in-depth examination of the issues.

## Section Five: The Organisations that Completed the Criminalization Questionnaire

**Kenya Treatment Access Movement (KETAM):** KETAM is a Kenyan activist movement which aims to advocate and lobby for increased access to treatment, especially the use of anti-retroviral (ARVs) medicines for people living with HIV and AIDS.

# Kenya

**Kenya Network of Women with AIDS (KENWA):** KENWA is a NGO that assists destitute women living with AIDS in informal settlements in Kenya. It also supports children infected and affected by HIV.

**MAXFACTOR:** Maxfactor is an acronym for maximizing facts on HIV/AIDS for all the youth. The organization trains young people in income generating projects such as making red ribbons, jewellery, boutiques, belts and shoes.

**Movement of Men with AIDS in Kenya (MMAK):** This is a NGO which supports men infected and affected by HIV and AIDS in the country. The organization was established in 2001 after the declaration of HIV and AIDS as a national disaster in Kenya and on the realization that the Kenya government National HIV/AIDS Strategic Plan had no provisions for integrating and/or enhancing the involvement of men in the fight against HIV and AIDS. None of the government departments that were target responded to the questionnaire.

## Discussion

Both the questionnaires and desk-based research yielded very limited information on the issue of criminalisation. A reason for this could be the lack of prosecutions this far. However, it is interesting to note that no discussion papers were found relating to the potential impact of the criminalisation provisions in the legislation.

The implementation of measures in the HIV and AIDS Prevention and Control Act 2006 aimed at protecting HIV negative people against infection has the potential of leading to PLHIV being singled out as threats to others' health. This could result in stigmatization and the consequent negative impact faced by people living with HIV in the country.

In addition to this general problem associated with criminalising HIV transmission, there are some specific problems with the Kenyan legislation:

**The HIV and AIDS Prevention and Control Act:**

- *S24 (1a) of the HIV and AIDS Prevention and Control Act could be interpreted to criminalise pregnancy or breastfeeding for HIV+ women.*
  Since Kenyan law requires knowledge of HIV+ status in order for several different offences to be committed, including vertical transmission, women may consider that avoiding knowing their HIV status is best, and preserving this ignorance requires that the HIV testing for PMTCT not be undertaken. Thus this clause may increase the transmission to infants that it presumably seeks to deter.

- *In s24 (1b), responsibilities towards "sexual contacts" are established, but this term is not defined anywhere.*
  At present it appears that a PLHIV who kissed someone without disclosing, for example, might be in breach of the law, despite the fact that such an act poses negligible risk of transmission. Such a level of uncertainly in a legal provision is unhelpful: the extent of the duty is not clear and yet the stakes are very high, for both disclosing unnecessarily and for being prosecuted for failure to disclose.

- *In s24 (7), a medical practitioner who believes that a PLHIV has not disclosed as the practitioner feels is appropriate, may "inform any sexual contact of that person of the HIV status of that person".*
  This is at the discretion of the informing practitioner, but s24 (8) absolves them of any legal blame for doing this. If the practitioner does not understand the life circumstances of the PLHIV and their reasons for not disclosing, or does not consider these reasons adequate, they may breach doctor-patient confidentiality. This has the potential to open the PLHIV and his/her family to multiple disastrous forms of stigmatisation. It may also destroy the relationship of trust between health care provider and patient, and reduce the quality of care available, since a PLHIV may no longer feel able to risk openly discussing personal matters which might impact treatment.

**The Sexual Offence Act**

- In s26 (1), if a PLHIV *"permits the doing of anything"* that might lead to transmission, he or she commits an offence.
  It is not clear what efforts are required to prevent someone else doing something, but this is surely significant in the context of a heterosexual sexual contact in which the female partner is HIV+. Is she required to do everything possible to prevent her partner from putting his health at risk through unprotected sex with her, or is it permissible that she should just acquiesce to his demand for unprotected sex if she fears he could become violent toward her if she discloses or insists on using a condom, for instance?

- S26 (1) also requires a PLHIV not to do, or not to permit, anything *"which he or she knows or ought reasonably to know" (a) will infect another person with HIV or any other life threatening sexually transmitted disease; (b is likely to lead to another person being infected with HIV or any other life threatening sexually transmitted disease; (c) will infect another person with any other sexually transmitted disease, shall be guilty of an offence, whether or not he or she is married to that other person, and shall be liable upon conviction to imprisonment for a term of not less fifteen years but which may be for life.*

It is not clear at all what PLHIV ought "reasonably to know" about HIV, given that many people become infected without any knowledge at all, and coverage of educational interventions is patchy or non-existent in remoter communities treatment.

- *S26 (5-7) allows a "medical practitioner or designated person" to take a blood or other sample for HIV testing from an accused person, even by force and against the wishes and physical resistance of the person being tested.*
  The preceding formulation suggests that a "designated person" will not be a medical practitioner. The skills of phlebotomy needed to take blood samples safely are part of medical training; it is unclear why is it necessary to provide in the law for people who are not medical practitioners to carry out an invasive intervention such as drawing blood.

- *S26 (2-8) provide for blood samples to be taken, against the will of the accused and by force if necessary. S26(8) imposes penalties on the accused or any third party who obstructs the taking of such a sample, and subsection (7) provides that the Kenyan state, its Ministers, medical practitioners and "designated persons" be exempted from legal redress following "any detention, injury or loss caused by the taking of an appropriate sample" unless the taking was unreasonable, done in bad faith, or negligent.*
  It is not defined who will designate such people. Nowhere is there any protection for the privacy of the accused: disclosure of sero-positivity can result in calamity not only for PLHIV but for their families as well, and this omission, when compared with the extensive immunity for those involved in taking the sample, seems inexcusably thoughtless.

- *s26 (9) institutes HIV as an aggravating factor which earns a minimum sentence of 15 years for any offence committed under the Act, even if the carrier's sero-status was unknown to him or her.*
  This is surely unreasonable.

- *S26 (10b) presumes that if a PLHIV was sero-positive when tested after an alleged offence, that he/she was also sero-positive prior to the offence, unless the contrary is shown.*
  If the alleged offence is one of transmission, and it is impossible to establish HIV status of the participants before the incident to the level of legal proof, the outcome of this clause may be that one party is punished for transmitting HIV to the other when in fact the direction of transmission was the other way around. In other words, this provision presumes guilt rather than innocence, contrary to the spirit of Kenyan law.

It is noteworthy that condoms are not mentioned either in the HIV Prevention and Control Act or the Sexual Offences Act.

Some respondents felt that criminalizing HIV transmission is an intrusion into privacy and a violation of the fundamental human rights of people living with HIV.

Although there was a feeling that some measure of deterrence is required in order to discourage the deliberate spread of HIV, many respondents considered that the legal approach of criminalisation is inappropriate except in these very restricted circumstances. They argued that criminalisation of HIV exposure or transmission undermines HIV prevention strategies by promoting denial and concealment, with HIV transmission better and more safely controlled through prevention efforts, including education and availability of condoms.

## Conclusions

Currently, the deliberate transmission of HIV is a criminal offence in Kenya punishable under the Sexual Offences Act (2006) and the HIV and AIDS Prevention and Control Act (2006). These two laws, however, contain some undesirable provisions which may impede the Kenyan effort to diagnose and treat all of those in need. In some cases, clauses are so badly drafted that they could increase the harm they seek to avoid, and in one case a clause (s26 (10b) of the Sexual Offences Act) appears to predetermine the outcome of prosecutions.

Other parts of these laws provide some effective protection of the human rights of PLHIV. However, both laws contain ill-conceived provisions aimed at preventing transmission, which may produce contraventions of the rights of PLHIV and their family members.

No HIV-related prosecutions have so far taken place in Kenya. HIV infections are rarely disclosed openly in Kenya for fear of the social stigma associated with HIV and AIDS. More research would be required to find whether fear of stigma is a key reason for the lack of prosecutions this far.

Kenya is a high prevalence country. It also may be that the lack of cases coming to court shows that the Kenyan public is already aware that effective control of HIV lies in increased knowledge and availability of preventive devices such as condoms, as opposed to prosecutions and persecutions. However, even if no prosecutions are ever brought, the existence of some of these clauses in the law could scare away PLHIV and pregnant women from services which they need, and reduce uptake of HIV testing and treatment.

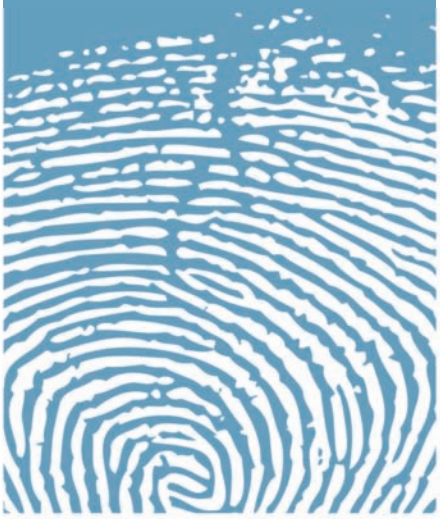
## Recommendations

More research is required into public awareness of these issues to ascertain whether the current lack of prosecution is based on informed decisions based on sound public health awareness or whether this is a result of lack of awareness of the provisions in the law. It is recommended that the be updated and methodologies developed that inquire into the level of information and understanding at country level.

As shown in the discussion above, the drafting of some of the provisions make for extremely bad and unclear law. There is need to bring the highlighted shortcomings to the attention of lawmakers. In terms of criminalisation in general, there is need to review other laws and regulations that could impact on responses to HIV, e.g. the penal code which is against prevention services for men who have sex with men (MSM), yet there is indication that this is the area where infection is occurring.

In as much as there is the possibility for a prosecution to be brought, NEPHAK and others supporting people living with HIV, need to inform of the duties and responsibilities imposed on PLHIV by law.

# Notes



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