



# The Criminal Law, HIV and Human Rights Survey

Where are we?  
Where next?

CSF Brussels May 2010

# Aims

- Within the broad public health goal of increasing the uptake of HIV testing and treatment, and recognising that criminalisation may have an adverse impact on this
  - To build on other research (including the GNP+ Global Scan) to map accurately the scope and degree of HIV criminalisation in the WHO European Region
  - To evaluate the extent to which the criminal laws relating to the transmission of and exposure to HIV in the countries in the WHO European Region comply with the human rights guidelines promulgated by UNAIDS and found in a range of international covenants
  - To identify areas in which there may be weaknesses or failures of compliance and suggest ways of remedying this

# Current Status

- Pilot Project
  - Seven countries were asked to participate
  - Five responded (Hungary, Netherlands, Sweden, Switzerland and the UK) to a detailed questionnaire
  - Results of these were presented at HIV Europe in Stockholm 2009
  - The finalised Report, drawing on responses from participants and including additional data and material from the participant countries, and contextualising these within the broader European picture, is nearly complete

# The Aim of this Presentation

- The aim of this presentation is to
  - set out some of the key findings and issues suggested by the survey, and explored at the Stockholm meeting,
  - get feedback and initial responses from participants
  - identify the appropriate and most productive focus for future research
- Although the survey explored the broader rights context, the focus here is on criminalisation itself and issues that bear directly on this

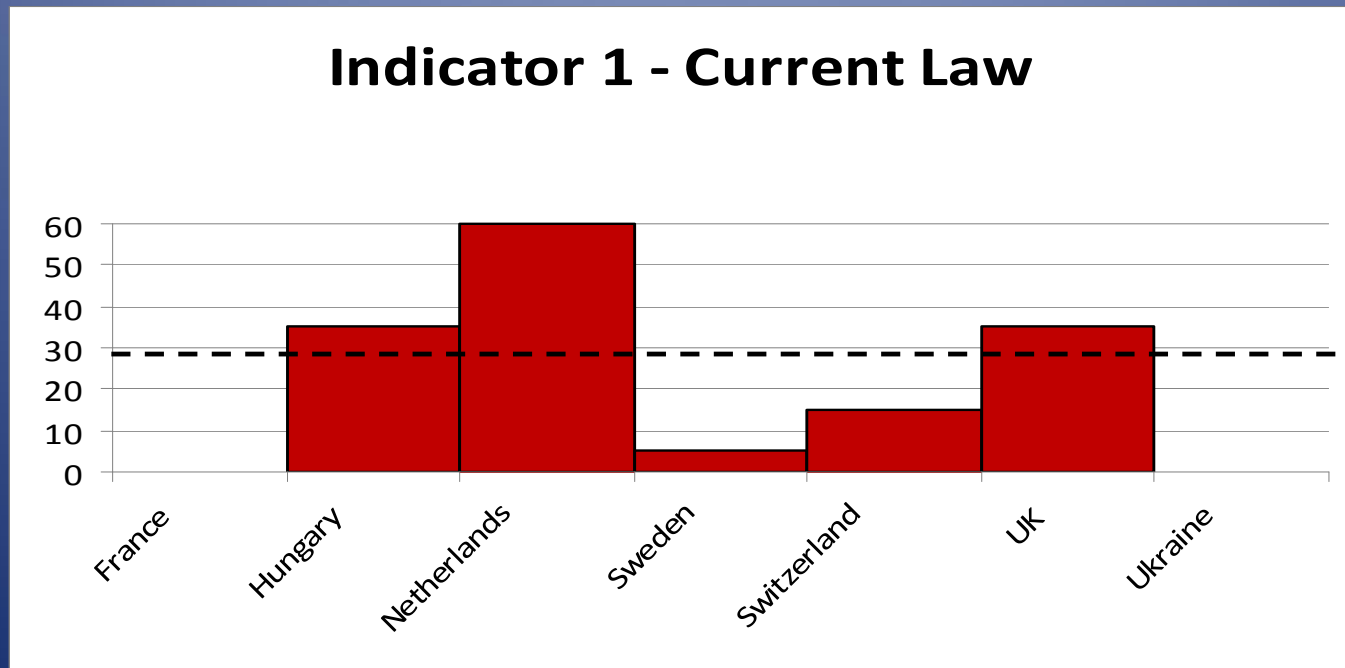
# Methodological Context and a Caveat

- Pilot survey based on the idea of a human rights audit – used by UN and its agencies as a way of determining human rights compliance
- Eight thematic areas identified, with questions used as indicators against which compliance with human rights principles could be scored
- Based on the answers, the compliance of the different jurisdictions were tabulated:

# Example: Current Legal Situation

The Current Law Thematic Area explored, inter alia,

- whether transmission and exposure were both criminalised
- what degree of criminal fault was necessary
- whether HIV was singled out in the legislation, or in prosecutions
- the number of prosecutions and convictions



# Limitations

- The survey was completed by HIV/AIDS organisations in the participating countries
- Where there were objectively verifiable data, it is relatively uncontentious to score compliance (e.g. Whether exposure was criminalised, whether negligence was a sufficient degree of fault, whether HIV was singled out for special treatment)
- However, where the RO was asked to evaluate questions relating to matters such as performance (e.g. of government, of criminal justice professionals) the subjectivity of the responses makes scoring of dubious validity / assistance
- They also risk creating unhelpful and unreliable “league tables”
- These data will not, therefore, be scored in the final report
- Instead, as here, they are simply used as valuable expert indicators of areas of real concern

## Specific Issues (1): Criminal Laws

- Provided that the requisite fault is established, the **transmission** of HIV can form the basis of a prosecution in each of the respondent countries
  - In this respect they are representative of the vast majority of the 45 countries of the WHO European region.
  - Only five countries definitely do not have such provision (Albania, Bulgaria, Luxembourg, Slovenia and the FYR of Macedonia)
- Provided that the requisite fault is established, **exposure to the risk** of transmission can form the basis of a prosecution in four of the five countries
  - In **England and Wales** this is not possible, though it is in Scotland (separate criminal justice system)
  - In the **Netherlands** there have been no prosecutions for exposure, despite the existence of legislation, since 2005 as the result of a Supreme Court Ruling
  - In **Switzerland** an appeal succeeded in 2009 on the basis that the appellant posed no risk (the Court accepting, in this particular case, the validity of the “Swiss Statement” on the infectiousness of those with negligible viral load.
- **To the extent that countries permit criminalisation of non-intentional transmission, and any form of exposure, they do not comply with UNAIDS Guidelines.**



# Prosecutions and Convictions

Country	Number of Prosecutions (that reached court)	Number of Convictions for HIV Transmission and Exposure (1)	% convictions
Hungary	4	1	25
Netherlands	15	14	93
Sweden		36 (2)	-
Switzerland	52	45	87
UK (inc. Scotland)	20	12	60

(1) In Sweden, Switzerland and the UK there have, additionally, been convictions for the transmission of gonorrhoea, HBV and HCV.

(2) The GNP+ Global Scan indicates between 50-55 prosecutions and between 50-55 convictions.

## Specific Issues (2) Investigation and Trial

- All ROs reported that it was fairly or very easy to obtain legal advice, though the quality of this varied (in one case the RO had its own legal staff)
- Scientific (phylogenetic) evidence is almost always obtained during the course of investigations
  - Though NB issues associated with this
- However, there was significant discontent with the level of knowledge and understanding of HIV among those responsible for processing cases:

## The Level of Training about Medical Aspects of HIV/AIDS

	Very Bad	Not Good	Average	Good	Very Good
<b>Police</b>	2	2	1		
<b>Prosecutors</b>	2	3			
<b>Defenders</b>	3	2			
<b>Judges</b>	2	3			

## The Level of Knowledge about Medical Aspects of HIV/AIDS

	Very Bad	Not Good	Average	Good	Very Good
<b>Police</b>	2	1	2		
<b>Prosecutors</b>	2	2	1		
<b>Defenders</b>	1	2	2		
<b>Judges</b>	1	1	3		

# Training about the Social Aspects of HIV/AIDS (including stigma and Prejudice)

	Very Bad	Not Good	Average	Good	Very Good
<b>Police</b>	1	4			
<b>Prosecutors</b>	1	3	1		
<b>Defenders</b>	1	3	1		
<b>Judges</b>	1	3	1		

# Some examples..

Modern treatments are complex but in the majority of cases reliable medication means that the medium term prognosis can be very good. Treatment however is life-long, and there are invariably adverse psychological effects. (Prosecution Counsel, *R v Adaye* 12-1-04, p11)

... as [HIV+ Witness who had had unprotected sex with the complainant] told you, “It’s private, I didn’t want to tell him. It was the first night, a private matter.” To all of us, if I may say so, it is extraordinary, but that is the promiscuous, localised, London homosexual society which we seem to be examining (Defence Counsel, *R v Collins*, 8-8-06, p61)

You may think it is a punishment in itself for their lifestyle and for their community. In some ways the risk taking beggars belief [unprotected anal and oral intercourse between men] (J Binning, *R v Collins* 07-08-06, p77)

It would be the easiest thing in the world, wouldn’t it, for him to have mentioned to any of those sexual partners, before exposing them recklessly to the risk of infection with the HIV virus, that he was in fact HIV positive but he chose not to do so (Prosecution Counsel, *R v Collins* 08-08-06, p25).

# Specific Issues (3): Punishment

- Imprisonment is an option in all jurisdictions, and those convicted are generally imprisoned
- There is wide variation in punishment within permitted maxima
  - Some evidence that non-national minority ethnic defendants receive harsher sentences
  - Most ROs indicated that prosecutions reflected the epidemiology in their countries “somewhat” or “a little”
  - There were no cases where the complainant was from a minority ethnic community and the defendant from the majority ethnic community
  - There was some evidence that minority ethnic men alleged to have infected women are more likely to be prosecuted than MSM
- In prison, experience differs widely
  - ART was generally available
  - In three of the five countries, PLWH are usually or almost always segregated

# Sentencing

UK Sentencing Guidelines Council (2008) **Assault and other offences against the person**

“no justification for considering the issues in detail or for making special provision for sentencing offenders with HIV or other infections.”

But It considered that the guideline

“should contain some reference to sentencing for an offence based on the transmission of infection or disease distinguishing the approach where the transmission was deliberate and where it was reckless and emphasising the potential significance of matters of personal mitigation.”

- However, there are some good initiatives:

**HIV/AIDS Legal Centre HIV/AIDS SENTENCING KIT (New South Wales)**

[http://www.gaylawnet.com/ezone/hiv/hiv\\_sentencing\\_kit.pdf](http://www.gaylawnet.com/ezone/hiv/hiv_sentencing_kit.pdf)

# Specific Issues (4): Impact of Media Coverage

- There was a marked divergence in the views about the impact of media coverage of HIV, and of PLWH.
- General reporting of HIV was not too heavily criticised (one RO remarking that it was positively helpful in matters relating to discrimination)
- The situation was very different as regards the reporting of criminal investigations and trials:



	Never	Almost Never	Sometimes	Usually	Always
<b>Is there accurate reporting of the risks of HIV transmission?</b>		3	2		

	Not at all	A little	Quite a lot	A Great Deal	Other
<b>Does media reporting help reduce stigma?</b>	2	2			1 (1)

**(1) It depends on what area: in the domain of criminal prosecutions, the media coverage of HIV generally does not reduce the stigma against people with HIV, since it often communicates a one-sided view. As for other areas (e.g. employment, etc.) it certainly can reduce the stigma – it always depends on the author’s intention. (an RO)**

## Media Reporting of HIV Generally

	Never	Almost Never	Sometimes	Usually	Always
<b>Are the media generally supportive of the rights of PLWH?</b>		1	4		

	Never	Almost Never	Sometimes	Usually	Always
<b>Does the media provide a positive image of PLWH</b>		1	4		

	Never	Almost Never	Sometimes	Usually	Always
Is there balanced reporting of investigations?	1	3	1		

	Never	Almost Never	Sometimes	Usually	Always
Is there balanced reporting of criminal trials		4		1	

	Never	Almost Never	Sometimes	Usually	Almost Always
Do the media identify people being investigated?	3	1			1

	Never	Almost Never	Sometimes	Usually	Always
Do the media identify people being tried?	2	2			1

## Specific Area of Concern (5): Debate, Consultation and Engagement

- In three of the five RO countries the criminalisation of HIV transmission has not been discussed by the legislature, and when it was the debate was not always well-informed
- In four of the five RO countries the UNAIDS principle of joint responsibility was not promoted in the law
- Because existing are used, there has been no discussion / consultation about the law
- In two of the five RO countries, HIV/AIDS organisations and PLWH had had no impact on the law and policy concerning HIV transmission and exposure, and in a further two only some impact

## Drivers

- A prosecution culture
- A belief that the criminal law is an effective general deterrent
- The affirmation of HIV infection as a serious harm, no different from other injuries
- Sensationalist and ill-informed media coverage of cases
- A lack of knowledge about prosecutions within jurisdiction
- Ignorance (of the science, and among CJ profs and lawyers)
- Focus on individual responsibility (blame culture)
- Desire for justice / revenge by those infected
- Failure to understand the impact of a criminal investigation
- A belief that the criminal law provides an appropriate and effective response for hurt and anger
- Laws that limit prosecutorial discretion

## Brakes

- A non-prosecution culture
- Appeal court rulings
  - On consent to risk
  - On the degree of risk
- The appropriate use of expert evidence
- Good knowledge and understanding
- Good relationships between HIV/AIDS organisations and the police
- Expert lawyers
- Focus on joint responsibility
- A recognition that prosecutions do not resolve issues
- Prosecutorial guidance



## Focus / Possible Actions

- Limiting prosecutions to the most egregious cases
- The development of prosecution guidelines (see E&W)
- More research into the absence of a deterrent effect and communicating more widely and more effectively
- A better knowledge base of when, where, and why prosecutions are happening
- Continuous / proactive liaison with journalists
- Training of criminal justice professionals
- Improving knowledge and understanding of the science of phylogenetics and its evidential limitations
- A protocol for forensic virologists
- Emphasising joint responsibility
- Support for newly diagnosed people
- Sentencing guidelines

# Questions

- What should the emphasis and priorities be?
- How do we generate participative commitment?