



International Community
of Women Living with HIV
Eastern Africa (ICWEA)

POLICY BRIEF

HIV Criminalisation and *Implications to HIV Programming & Response*

Policy context:

This policy brief is a result of discussions and experiences regarding the effectiveness or lack of national and global policies, regulations and laws on HIV response. This is in the context of HIV and human rights and programming for effective HIV response. Effective response means being able to meet the international community targets for testing, prevention and care. Uganda's response to HIV/AIDS pandemic has been that of openness, collective responsibility, high-level political commitment and collaboration with local and international partners. However, in 2014, Uganda passed a law, HIV and AIDS control and Prevention Act (2014). Part III, Article 43 of this Act postulates that whoever "wilfully or intentionally transmits HIV to another person commits an offence and is liable to imprisonment of up to 10 years". This provision assumes that one already knows his/her sero status to "wilfully or intentionally" transmit the virus. However, existing evidence shows that such legal criminalisation and practice may dissuade people from seeking HIV testing and other services.

What is the definition of HIV criminalisation?

HIV criminalisation is the unjust application of the criminal laws to people living with HIV based solely on their HIV status. This results from either HIV-specific criminal statutes, or applying general criminal laws that allow for prosecution of unintentional HIV transmission, potential or perceived exposure to HIV where HIV was not transmitted and/or non-disclosure of known HIV-positive status. HIV criminalization is not guided by the best available scientific and medical evidence relating to HIV. It fails to uphold the principles of legal and judicial fairness (including key criminal law principles of legality, foreseeability, intent, causality,

proportionality and proof); and infringes the human rights of those involved in criminal law cases. According to the HIV Justice Network, HIV criminalisation “is a pervasive illustration of how state-sponsored stigma and discrimination works against marginalised groups of people with immutable characteristics”. Besides “... being a human rights issue of global concern, HIV criminalisation is a barrier to universal access to HIV prevention, testing, treatment and care”. The practice is seen as discriminatory since other patients like of TB, STDs and related ailments are not criminalised for transmission¹.

Criminalisation of HIV transmission or exposure in Africa

A large number of countries across Africa criminalise HIV transmission or exposure in their HIV laws. A smaller number have amended their penal codes to create either an HIV-specific offence or one dealing with sexually transmitted infections. East African countries that have adopted provisions criminalising HIV transmission or exposure in their new HIV laws include Burundi, Kenya, Rwanda, Tanzania and Uganda². Section 171 of the Penal Code ACT 120 provides that ‘Any person who unlawfully or negligently does any act which is and which he or she knows or has reason to believe to be likely to spread the infection of any disease dangerous to life commits an offence and is liable to imprisonment for seven years’. In Uganda, seven HIV criminalization cases have been documented based on their (the case’s) status, namely false accusations and without documented key evidence, rushed judgement without adequate forensic investigations, subjective media stories that fuel stigma, relationships that have gone bad, court of public opinion that influences the judicial reasoning; and majority of the affected people are young women.

The HIV Justice Network’s review of cases in which either criminal or similar law is applied to people living with HIV based on HIV-positive status indicates existence of HIV-specific criminal statutes occurring in 29 countries, general criminal or similar laws in 37 countries, or both (the HIV specific criminal statute and the general law) in 6 countries. Such laws typically criminalise non-disclosure of HIV status to a sexual partner, potential or perceived exposure to HIV, or transmission of HIV. The human rights lens reveals issues of discrimination and social exclusion that often underlie abuse against patients. This is critical, since abuses against groups such as people living with HIV, ethnic minorities, sexual and gender minorities, people who use drugs,

1 <https://www.aidsmap.com/news/jun-2019/hiv-criminalisation>

2 <https://hivlawcommission.org/wp-content/uploads/2017/06/Africa-RIB-Criminalisation.pdf>

and people with disabilities are particularly rife in health settings. These abuses are often related to the perception of groups as deviant or in need of curative forms of “treatment,” leading to horrific abuses in psychiatric facilities, drug rehabilitation centers, detention centers for sex workers, and similar settings³. Furthermore, evidence shows that where there is absence of human rights observance and discrimination of people living with HIV (like criminalisation), prevention efforts are hampered. The relationship between HIV and human rights and how the absence of the later affects prevention is highlighted in three areas: Increased vulnerability, (- certain groups of people including women and girls are more vulnerable to contracting the HIV virus because they are unable to realize their civil, political, economic, social and cultural rights) Discrimination and stigma: (The rights of people living with HIV often are violated because of their presumed or known HIV status, causing them to suffer both the burden of the disease and the consequential loss of other rights) and thirdly, Impedes an effective response (: Strategies to address the epidemic are hampered in an environment where human rights are not respected)⁴.

Therefore, the purpose of this policy brief is to build synergies with respective government departments regarding policy implementation such that HIV interventions are well supported and synergized by government policy interventions that are not perceived as discriminatory, stigmatizing and gender insensitive so that an Eastern Africa free of HIV could be achieved.

Policy Gaps and implications

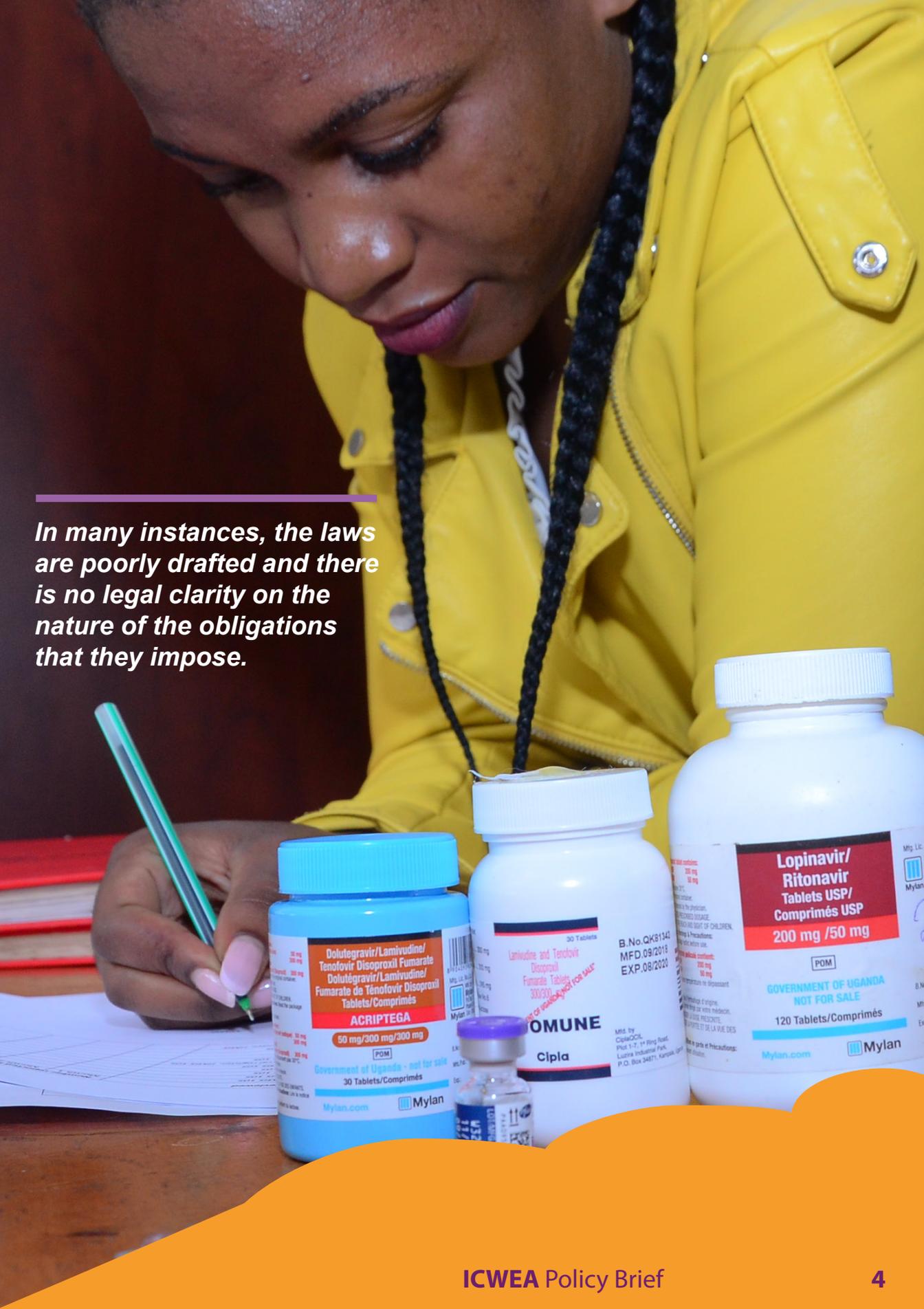
Discrepancy between policy and practice and inadequate policy implementation. Whereas the policies are in place, some are not very comprehensive; moreover, there is still a problem of inadequate implementation. UNAIDS (2006) International Guidelines on HIV/AIDS and Human Rights, especially Guideline 4 states that “Criminal and/or public health legislation should not include specific offences against the deliberate or intentional transmission of HIV, but rather should apply general criminal offences to these exceptional cases”. UNAIDS and UNDP Criminalisation of HIV Policy Brief states that “Prosecution of persons should only apply in cases on intentional transmission where a person knew of their HIV status, acts with the intention to transmit and does in fact transmit. Prosecution should not be applied where there is no significant risk of transmission or where the person did not know of their HIV status, did not understand how it is transmitted, disclosed his status to the other person at risk, did not disclose because of fear”.

Criminalisation of transmission is provided for under Sections 41 and 43 (The HIV prevention and Control ACT 2014) in Uganda on attempted and intentional transmission of HIV. Section 41 provides that “A person who attempts to transmit HIV to another person commits a felony and shall on conviction be liable to a fine of not more than twelve currency points or imprisonment of not more than five years or both”. Section 43 provides that “A person who wilfully and intentionally transmits HIV to another person commits an offence, and on conviction shall be

3 <https://www.hhrjournal.org/2013/12/human-rights-in-patient-care>

4 <https://www.ohchr.org/EN/Issues/HIV/Pages/HIVIndex.aspx>

In many instances, the laws are poorly drafted and there is no legal clarity on the nature of the obligations that they impose.



liable to a fine of not more than one hundred and twenty currency points or to imprisonment for a term of not more than ten years or to both". This is against International Guidelines on HIV/AIDS, which are against a specific law and instead support the application of general criminal laws, such as Section 171 of the Penal Code to cases of intentional transmission. Guideline 4 (21) (a) on Criminal laws and Correctional Systems provides that "... criminal and/or public health legislation should not include specific offences against the deliberate transmission of HIV, but rather general criminal offences should be applied to these exceptional cases.

Limited impact in repealing existing laws: The International Guidelines on HIV and Human Rights provide that the use of the criminal law should be limited. Despite this, Africa has seen a resurgence of HIV laws which criminalise a wide range of activities carried out by persons living with HIV. Since 2008, there has been a renewed advocacy on repealing or suspending the implementation of laws criminalising HIV transmission or exposure. However, these efforts have had limited impact in repealing existing laws or in halting efforts by governments to introduce new ones.

Misinterpretation of the wilful transmission law: In many instances, the laws are poorly drafted and there is no legal clarity on the nature of the obligations that they impose. For example, in a written submission from Kenya to the Africa Regional Dialogue of the Global Commission on HIV and the Law, concern was expressed regarding the interpretation of the wilful transmission law. Very few African countries have followed the guidance on HIV and the criminal law in the International Guidelines on HIV and Human Rights. Instead, there has been a spurt of new HIV laws which criminalise a range of activities by persons living with HIV ranging from wilfully infecting others to non-disclosure of HIV status to a sexual partner.

Increased vulnerability: Certain groups are more vulnerable to contracting the HIV virus because they are unable to realize their civil, political, economic, social and cultural rights. For example, individuals who are denied the right to freedom of association and access to information may be precluded from discussing issues related to HIV, participating in AIDS service organizations and self-help groups, or taking other preventive measures to protect themselves from HIV infection.

Discrimination and stigma: The rights of people living with HIV are often violated because of their presumed or known HIV status, leading them to suffer both the burden of the disease and the consequential loss of other rights. Stigmatisation and discrimination may obstruct their access to treatment and may affect their employment, housing and other rights. This, in turn, contributes to the vulnerability of others to infection since HIV-related stigma and discrimination discourages individuals infected with and affected by HIV from contacting health and social services. When people shy away from HIV services and information about HIV or treatment, and care and support services, it further fuels the AIDS epidemic. These elements are essential components of an effective response to AIDS. Creation of a disabling legal environment for people living with HIV, and additional barriers related to testing, treatment and disclosure of their HIV-positive status puts them at heightened risk of vigilantism and violence.

Conclusion

Legislation throughout East Africa has not been based on the latest scientific evidence. In many instances, wilfulness is not required and the legal focus has shifted to negligent behaviour. There is no evidence that these laws have in and of themselves had any impact on reducing the rate of new HIV infections. The country laws do not conform to international human rights norms even though they were introduced after it had become clear in other parts of the world that criminalisation did not reduce HIV transmission rates. These laws reflect a failure to deal with the deep roots of stigma and discrimination. These laws also fail to reflect the responsibility on society as a whole to prevent new HIV infections. Therefore, in order to improve the response of HIV and rights of people living with HIV, countries need to work together, harmonize the policy environment and implement interventions that do not only respect the rights of PLAs but are also conscious of unique challenges of particular groups of people such as women living with HIV. Interventions from both government and development partners should be supported by policy framework that contribute to a free, open society and achievement of HIV response targets of a world free of HIV and AIDS.

Policy options/ recommendations to improve the response to HIV and rights of persons living with HIV

- Civil society and other stakeholders should repeal provisions of various sections in the laws of the East African countries that criminalise HIV transmission
- The new policy provisions should provide for an environment that motivates people to go for HIV testing without considering that knowledge of their sero status could be a basis for consideration as criminals
- HIV and AIDS education and information should be engendered in all health services to enable people seek the relevant services at will and before any crisis
- The gender lens should be upheld in all HIV and AIDS policy related developments because of the unique challenges that women face in life to correct the imbalances in accessing services and reverse the infection trends that disfavour females.

FOR MORE INFORMATION



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