

The criminal law and HIV/AIDS

- with specific reference to sex work and
the law

Marlise Richter

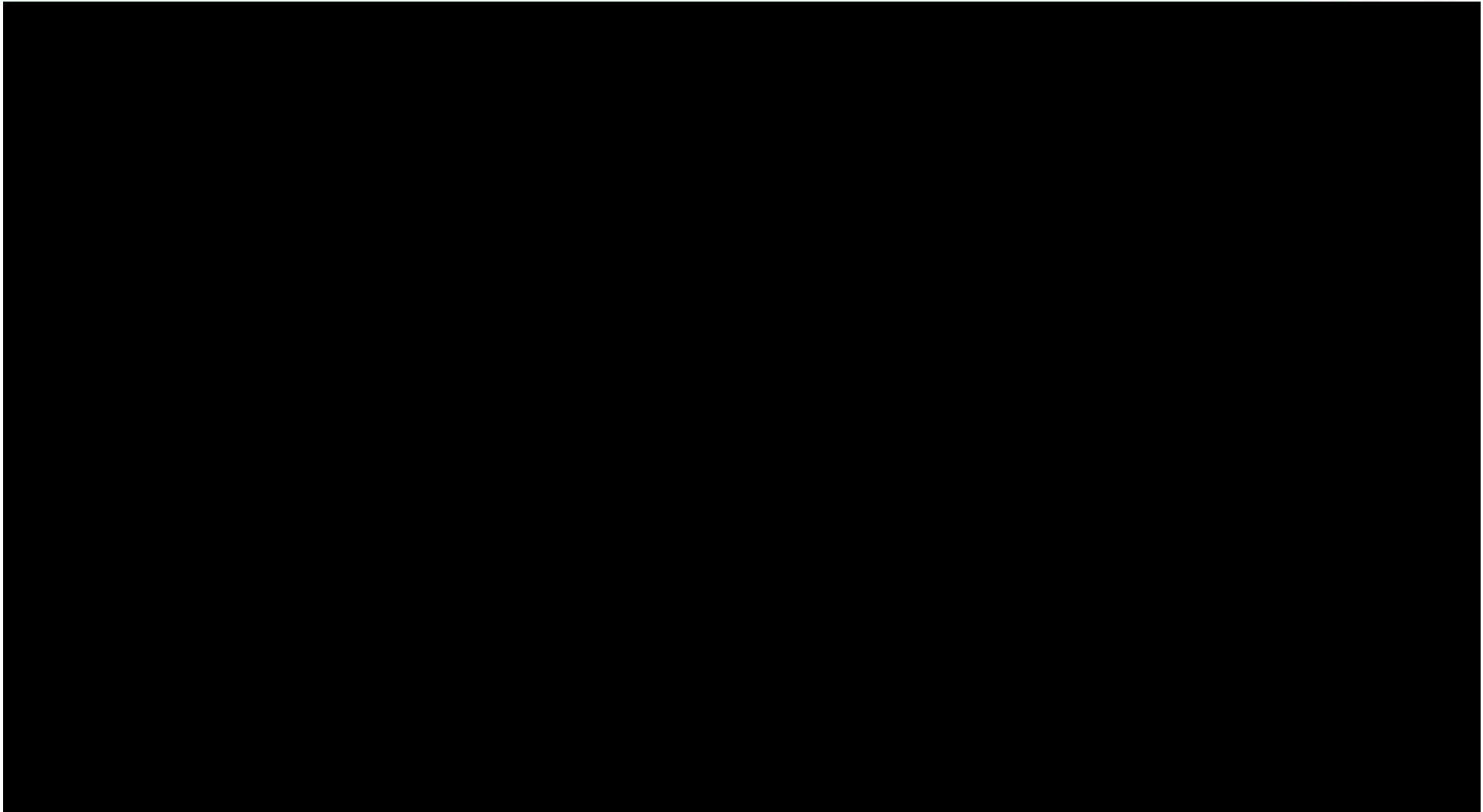
Southern African HIV Clinicians Society

2nd Biennial Conference

Cape Town

25 Sept 2014









Some Facts

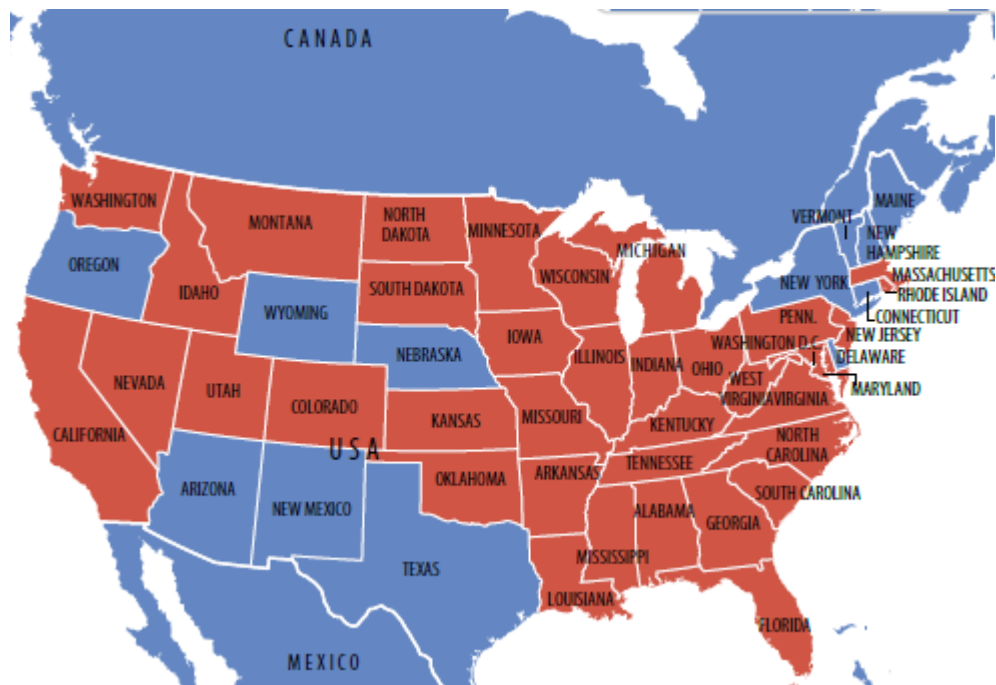
- As of 2010, at least 600 people living with HIV in 24 countries had been convicted of criminal transmission of HIV, either through general laws relating to assault or through HIV-specific legislation.
- At least 9 HIV-positive individuals in the US have been sentenced for spitting with sentences ranging from 90 days to 25 years
- Texas – HIV transmission cases have been brought to court under aggravated assault laws whereby a person “intentionally, knowingly, or recklessly... uses or exhibits a deadly weapon as part of an assault”. Saliva of an HIV infected person is considered a deadly weapon.



CRIMINALISING A VIRUS

Criminalising HIV transmission and exposure:
HIV-specific laws and HIV-specific provisions
in laws in select regions

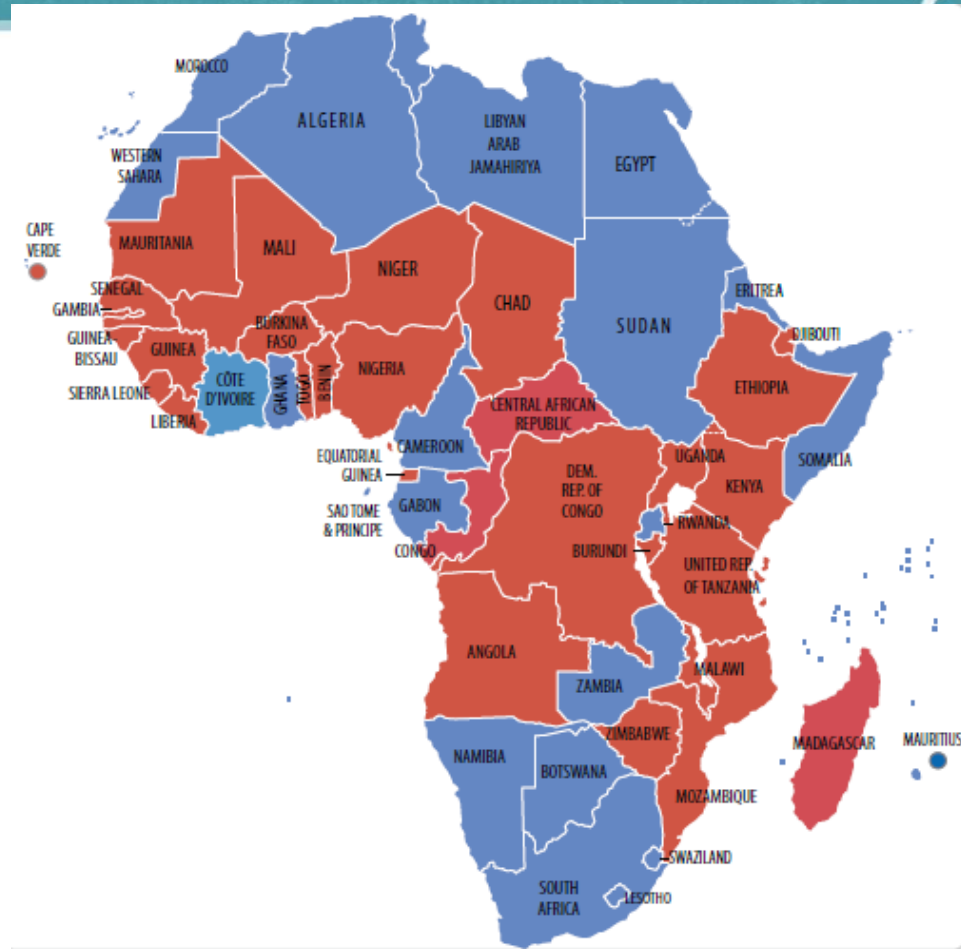
-  laws criminalising HIV transmission and exposure
-  no such laws



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Criminalise unsafe sex - Zille

November 9 2011 at 11:46am
By SIPOKAZI FOKAZI

Premier Helen Zille is so worried about the spread of HIV and its cost to the government that she wants men who have multiple sexual partners and refuse to use condoms to be charged with attempted murder.


Zille told a wellness summit hosted by the provincial health department in Newlands on Tuesday that it was time the government shifted its exclusive focus from treating diseases to preventing them and promoting wellness.

But Aids activists slammed Zille's remarks as "careless and misleading", warning that criminalising HIV/Aids infection went against international guidelines and would create an incentive for people not to get tested.

Zille said HIV treatment alone cost the provincial government close to R2 billion a year. She said shifting the emphasis to prevention would free up more resources for unpreventable conditions which were often seriously underfunded because of the "burden of disease".

While increasing wellness required the state to meet people's rights, it also required individuals to take responsibility for their lives and avoid preventable conditions such as certain types of diabetes, hypertension, obesity and cholesterol, and those linked to abuse of substances such as tobacco, alcohol and drugs.





“Criminalization is ineffective. Laws and prosecutions do not stop the spread of HIV. There is no correlation between the existence of these laws and the drop in HIV infections.

Criminalization places blame on one person instead of supporting shared responsibility for sexual health. These laws are not helping us to reach those at risk or to end stigma and discrimination. They are not helping us to build the kind of inclusive societies that we want to build or to support greater human dignity.

- Michel Sidibé (2012)

Ending overly broad criminalization of HIV non-disclosure, exposure and transmission: Critical scientific, medical and legal considerations



GLOBAL COMMISSION ON
HIV and the LAW

RISKS, RIGHTS & HEALTH

JULY 2012



POLICY BRIEF

Criminalization of HIV Transmission

Introduction

In some countries, criminal law is being applied to those who transmit or expose others to HIV infection.¹ There are no data indicating that the broad application of criminal law to HIV transmission will achieve either criminal justice or prevent HIV transmission. Rather, such application risks undermining public health and human rights. Because of these concerns, UNAIDS urges governments to limit criminalization to cases of

- did not disclose his or her HIV-positive status because of fear of violence or other serious negative consequences;
- took reasonable measures to reduce risk of transmission, such as practising safer sex through using a condom or other precautions to avoid higher risk acts; or
- previously agreed on a level of mutually acceptable risk with the other person.

The Case Against Criminalization of HIV Transmission

Scott Burris, JD
Edwin Cameron, MA

CRIMINAL LAW HAS BEEN INVOKED THROUGHOUT THE HIV epidemic to deter and punish transmission. The public health community has not favored its use, but neither has it taken a vigorous stand against it. Meanwhile, governments continue to adopt HIV-specific criminal laws, and individuals with HIV continue to be prosecuted under general criminal law. Criminal law cannot in this area draw reasonable lines between criminal and noncriminal behavior, nor prevent HIV transmission. For women, it is a poor substitute for policies that go to the roots of subordination and gender-based violence. The use of criminal law to address HIV infection is inappropriate except in rare cases in which a person acts with conscious intent to transmit HIV and does so.

Criminalization Policies


“Criminalization of HIV” takes the form of HIV-specific criminal statutes and the application of general criminal law (such as assault) to exposure to or transmission of HIV. More than 25 years after the first description of AIDS, criminalization has become a facet of policy throughout the world.¹ Recently, criminalization reached a new pitch in a “model HIV law” crafted by West African parliamentarians assisted by the US-funded Action for West Africa Region HIV/AIDS Project (AWARE-HIV/AIDS). Since its debut in N’Djamena, Chad, in 2004, the law’s criminalization provisions have been enacted in 9 countries. The N’Djamena

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Arguments against using the criminal law in relation to HIV

- Criminalisation increases stigma
- Encourages the believe that safe sex is the responsibility of people with HIV, and not a shared concern
- Law has little effect on people's sexual behaviour
- Inhibits HIV-testing
- Women will face a greater risk of prosecution as they more often know their status through attending health clinics more frequently



“Public health interventions including voluntary testing, outreach, and training of peer leaders are backed by evidence of effectiveness in promoting disclosure or safer sex. In contrast, no evidence supports criminalization of HIV transmission as an HIV prevention tool. [...]

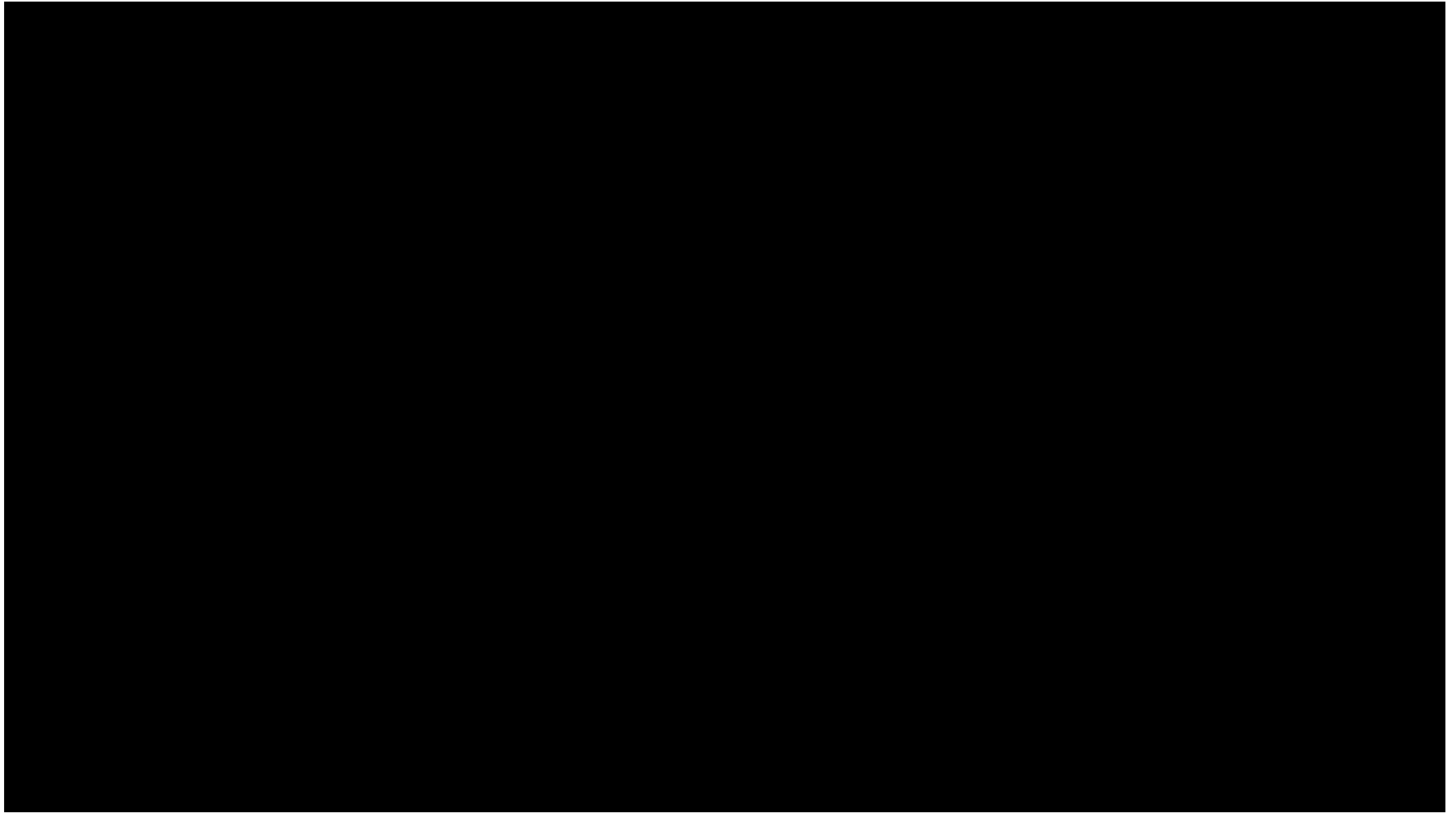
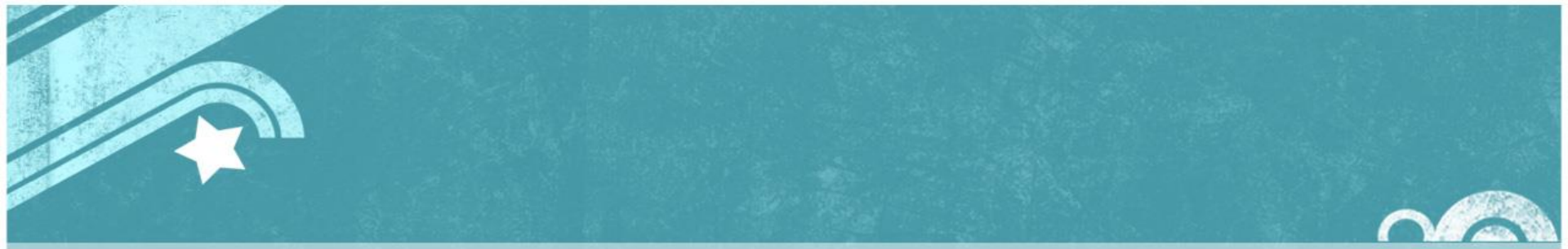
The use of criminal law to address transmission of HIV is inappropriate except in cases in which it can be shown that a person acted with the conscious intent to transmit HIV and in fact does so. For such cases, the existing criminal law suffices; no HIV-specific statute is needed.”

- Burris & Cameron (2008)

The background is a solid teal color with several decorative elements. In the top-left corner, there are concentric circles and a small star. A large, stylized white star is positioned to the left of the main title. The title itself is in a bold, black, sans-serif font. Below the title, there are two horizontal lines with a diagonal hatched pattern. At the bottom-left corner, there are more decorative circular patterns.

Sex work, HIV and the criminal law

Why decriminalisation of sex work saves lives





Current situation

- All aspects of sex work are criminalised in South Africa
- Sex worker access to health care services is limited – discrimination/prejudice by health care workers (Nairne, 1999 & 2000)
- Unequal power relations between sex workers and their (male) clients create barriers to practising safer **sex** (Pauw & Brener, 2003)



Current situation



- In studies in 1998, HIV prevalence rates amongst different sex worker groups were between 45% - 69% (Rees et al., 2000; Williams et al., 2003)

High levels of violence against sex workers:

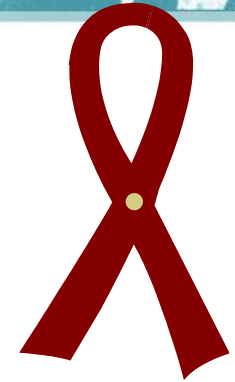
- Almost one-third of sex workers in study in Hillbrow reported they had had sex against their will in the last six months. (RHRU, Sociology of Work Unit of the University of the Witwatersrand & Vrije University Amsterdam, 2002)
- In a study in Cape Town, 12% of street based sex workers had been raped by a police man (Gould & Fick, 2008)
- Research on the World Cup 2010 and sex work: 5% of sex workers report being raped or physically assaulted by a policeman in the last month (Richter et al, 2010)

What effect does criminalisation of sex work have on sex workers?

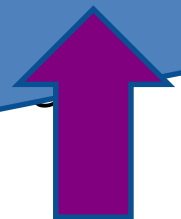
- Increases stigma of profession
- Limits access to health care, legal and social services
 - Access safer sex education?
 - Access to condoms?
 - Access to STI/HIV testing and treatment?
 - Mobilisation?
- Increase exploitation and abuse of sex workers by clients, partners, brothel-owners, pimps and the police
 - Barriers to legal recourse
- Sex workers often have no choice but to live in dangerous, squalid conditions – these conditions attract social and criminal ills
- May force sex workers to relocate often – social disintegration
- ‘Condoms as evidence’ practice by police reduces likelihood of sex workers carrying condoms


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 - Barriers to legal recourse
- Sex workers often have no choice but to live in dangerous conditions – these conditions attract social stigma
- May force sex workers to risk their health
- 'Condoms as evidence' – sex workers carrying condoms



Increase the risk of contracting HIV





FACTS
ABOUT
SEX WORKERS
AND THE MYTHS THAT HELP SPREAD HIV
THE LANCET series on HIV and sex workers

Misconceptions about sex workers hinder effective HIV prevention programmes

THE MYTH IS...



BUT THE TRUTH IS...



THE IMPACT BEING...



All sex workers are women

FALSE



Sex workers may be male, female, transgender or non-transgender and from diverse backgrounds⁷



Heterogeneity of epidemics across various groups⁷



Male sex workers are all gay

FALSE



Often male sex workers with male clients don't identify as gay or bisexual and have female intimate partners⁵



Heterosexual identity in male sex workers represents increased risk among their non-paying female partners⁵



Transgender female sex workers face the same risk of HIV as male sex workers

FALSE



Transgender women have distinct biological HIV risks from male sex workers or non-transgender women⁶



Transgender female sex workers demonstrate about **1.5 times** the risk of HIV compared to male sex workers⁶



Sex work is not a real job

FALSE



Sex work is officially recognised as an occupation in Brazil, entitling sex workers to labour rights³



Community empowerment among sex workers reduced the odds of HIV by **32%**³



Sex workers won't use condoms

FALSE



Greater success in condom uptake has been reported in sex workers than any other affected population²



Condom promotion in South Africa has reduced HIV in sex workers by more than **70%**²



Criminalising sex work prevents HIV spread

FALSE



Police harassment forces hurried transactions which jeopardise condom negotiation^{1,4}



One third of sex workers don't carry condoms as they are used as evidence of illegal sex work^{1,4}

THE HIV BURDEN

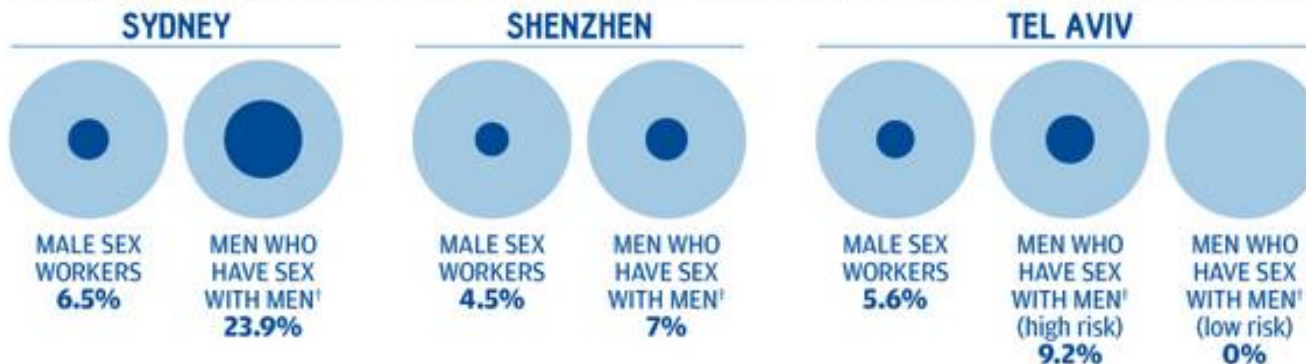
Sex workers have higher burdens of HIV, although epidemics are reflective of, and impact on, surrounding adult populations.

HIV PREVALENCE

WORLDWIDE



EPIDEMIOLOGICAL TRENDS AMONG MALE SEX WORKERS AND OTHER MEN WHO HAVE SEX WITH MEN[†] VARY BY REGION



[†]men with no history of sex work who have sex with men



HOW MUCH COULD HIV INFECTIONS BE AVERTED?*

**DECRIMINALISING
SEX WORK**



33-46% reduction¹

**SAFER WORK
ENVIRONMENTS**



21-45% reduction¹

**SCALE-UP OF
ANTI-RETROVIRAL THERAPY**



9-34% reduction¹

**ELIMINATION OF
SEXUAL VIOLENCE**



17-20% reduction¹

*modelled potential improvements in reducing HIV among female sex workers and clients within a decade

Read the full series at www.thelancet.com/series/HIV-and-sex-workers

National Strategic Plan for HIV Prevention, Care and Treatment for Sex Workers



Leveraging a Public Health & Human Rights Approach for HIV and Sex Work programming in South Africa



IN WOMEN'S MONTH
WE REMEMBER

Desiree
39-YEAR OLD
MOTHER OF ONE
RAPED &
DECAPITATED
CHATSWORTH,
DURBAN

Kleintjie
19-YEARS OLD
STABBED
TO DEATH
KENILWORTH,
CAPE TOWN

FEMALE SEX WORKERS ARE 18 TIMES MORE LIKELY TO BE MURDERED THAN OTHER WOMEN

The criminal law makes sex workers vulnerable to violence, abuse and murder

DECRIMINALISE SEX WORK NOW!

SEX WORKER HELPLINE 0800 60 60 60



South African National Sex Workers' Union (SANSWU) is a registered trade union. It is a member of the South African Federation of Unions (SAFUD) and the South African Labour Congress (SALC).



Conclusion

- The use of the criminal law in matters of adult, consensual sex has facilitated the transmission of HIV and other STIs, and has compounded the stigma and discrimination against already-marginalised groups, and persecution against them
- Policy and laws based on public health evidence, and the countering of punitive and moralistic attitudes to sex, are key components to mitigating the on-going effects of HIV/AIDS.

Sources

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- Sean Strub ‘HIV IS NOT A CRIME’ 2011 Film edited by Leo Herrera/HomoChic
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<http://www.opensocietyfoundations.org/voices/south-africa-sex-workers-make-law-work-them>
- HIV and sex workers, The Lancet, July 22, 2014
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- Avert "Criminal Transmission of HIV"
http://www.avert.org/criminal-transmission-hiv.htm#footnote42_29katn8

SAVE TAC, SAVE LIVES



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NOW MORE THAN EVER!**

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