THE JAMAICAN NETWORK OF SEROPOSITIVES

in collaboration with Jamaicans for Justice (JFJ) &
the Jamaica Youth Advocacy Network (JYAN)

POLICY BRIEF

RE: PROPOSITION TO

CRIMINALIZE HIV TRANSMISSION

February 2019

The Jamaican Network of Seropositives (JN+)

Motion against the adoption of law to criminalize wilful HIV transmission in Jamaica

Background

The Joint Select Committee appointed to complete the review of the Sexual Offences Act along with the Offences Against the Person Act, The Domestic Violence Act and the Child Care and Protection Act, in its Report released in late 2018, made a recommendation for an amendment to the Offences against the Person Act (OAPA) to make it a criminal offence for an individual to "wilfully or recklessly infect a partner with any sexual transmissible disease that can inflict serious bodily harm to that partner".[1] The JSC notably cited HIV as an example in its statements. This recommendation for legislative amendment is currently being considered in the House of Parliament.

The Jamaican Network of Seropositives (JN+), as an organisation tasked with advocating for the rights of people living with HIV in Jamaica, is in disagreement with this legal recommendation and urges the government to refrain from introducing this law. Below are a collation of arguments in support of JN+'s position, including proposed non-discriminatory, human rights based policy recommendations of our own, and those of other key partners and stakeholders within the HIV response.

Arguments

1.0 As Jamaica AIDS Support for Life (JASL) has pointed out,[2] **this law would likely increase the stigma and discrimination against Persons Living with HIV (PLHIV**) as it is directly targeting this population. The average person will not stop to think about the real meaning and purpose of the law and will simply reduce it to HIV positive status being made a crime, and so PLHIV will be viewed as criminals. Additionally, the law runs the risk of deterring the general population

[1] Houses of Parliament Jamaica, "Report of the Joint Select Committee appointed to complete the review of the Sexual Offences Act along with the Offences Against the Person Act, the Domestic Violence Act and the Child Care and Protection Act.", 2018, p. 39.
[2] JASL, "Policy Brief: Criminalization of HIV Transmission", December 2018, p. 6.

from getting tested, because persons will be conscious of the fact that a valid defence for transmitting HIV is ignorance of their status.

2.0 It would be virtually impossible to determine what "wilful and reckless transmission" of HIV constitutes or for anyone to fully conceptualize what it means. Additionally, it is difficult to determine if someone had the explicit intention to infect and affect another person as even if they know that they are HIV+ while engaging in sexual intercourse:

2.1 They may have been ***poorly educated*** about how the virus is transmitted. For those that practice self-education, there is a lot of misinformation, myths and inaccurate information in the public domain about the transmission of HIV. We have witnessed as an organization serving PLHIV that in many instances the information on HIV was not properly or sufficiently explained or relayed to them by their healthcare officials and or other such official information providers. Accordingly, it is very likely that they could have engaged in sexual activity being unaware of the possible risk of transmitting the virus and of the measures to prevent transmission. Thus, there is significant uncertainty as to whether or not most PLHIV having unprotected sex and transmitting the virus constitute intentional transmission, as many people do not have access to adequate and accurate HIV/AIDS education and may transmit the virus unintentionally. It will be a poor use of valuable time and money to arrest and charge PLHIV for intentional transmission.

2.2 Even if you place the scenario in 2.1 under "reckless transmission", lack of knowledge and education about HIV and its transmission is not a crime. **Laws cannot stipulate that PLHIV be charged, prosecuted or imprisoned because they "carelessly" did not know to use a condom. The creation and imposition of that law would be discriminatory, unfair and unjust.** Ultimately, the law is too vague to fairly define and identify the real offenses and offenders.

3.0 There are already **other laws** in place which **sufficiently apply to extreme cases of clear wilful and reckless transmission**.

3.1 **George Flowers case:** George Flowers, a Jamaican, was charged in Canada for 12 incidents alleged to have taken place in Canada against 4 different complainants. He allegedly engaged in unprotected sexual intercourse with these women knowing that he was HIV positive and

without informing them of his positive status; 3 of the complainants subsequently contracted HIV. On March 21, 2013, the Government of Canada sought extradition from the Government of Jamaica to try Flowers in Canada.[3]

3.2 **How Flowers was prosecuted for wilful HIV transmission by virtue of committing "aggravated sexual assault".** The charges and the request for extradition were supported by the Canadian court's ability to establish Flower's actions as constituting aggravated sexual assault, which is a punishable offence under Canadian Law.[4] Evidence existed in the form of affidavits which the complainants signed to say they wouldn't have consented to sexual intercourse with Mr. Flowers had they known he were HIV positive.[5] Also, there was evidence that contained progress notes from Mr. Flower's contact with the Canadian public health department between May and October 1996 (before his sexual relations with the complainants) , which indicated that Mr. Flowers was aware of the need to wear condoms to avoid transmitting HIV.[6] Thus, "aggravated sexual assault" could be argued in Canada because consent to sex was obtained under fraudulent pretences and because Flowers failed to wear condoms while knowing that his viral load would likely cause bodily harm to the complainants.

3.3 **Applicability of the George Flowers case and other cases to Jamaican cases.** While "aggravated sexual assault" is not an offence in Jamaica, counsels for the Director of Public Prosecutions on behalf of the Canadian government, the Commissioner of Correctional Services and the Attorney General of Jamaica submitted that the conduct of Mr. Flowers is capable of falling within the scope of **Sections 20** and/or **22** of the **Offences against the Persons Act (OAPA) of Jamaica**, amounting to the offences of assault captured in clauses of grievous bodily harm and unlawfully and maliciously inflicting grievous bodily harm respectively.[7] Thus, if the Flowers case were tried in Jamaica, Flowers could have been prosecuted for wilful transmission of HIV by virtue of offences committed within section 22 of the OAPA. Similarly, in England, they have prosecuted clear cases of wilful and reckless transmission of HIV on either partial or full grounds under the equivalent law captured within their OAPA detailing

[3] Case Law: Flowers, George v. The Director of Public Prosecutions for and on behalf of the Government of Canada, JMFC Full 3 in the Supreme Court of Judicature of Jamaica 2016, p. 3.
[4] Ibid, p. 3.
[5] Ibid, p. 3.
[6] Ibid, p. 20.
[7] Ibid, p. 21; Section 22 of OAPA states: "Whosoever shall unlawfully and maliciously wound or inflict grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanor, and being convicted thereof, shall be liable to be imprisoned for a term not exceeding three years…"

grievous bodily harm as a punishable offence: see *R v. Dica,*[8] *R v. Konzani* [9] and *R v. Rowe.*[10]

3.4 The George Flowers case and the 3 aforementioned UK cases illustrate that **clear cases of intentional and reckless transmission can be dealt with under existing Jamaican laws**. Accordingly, crimes which currently exist under Jamaican criminal law are far more suitable for these cases **and the introduction of this new law is unnecessary** and, as briefly mentioned in 1.0, would only perpetuate stigma and discrimination against PLHIV due to its blatantly STI-specific nature.

4.0 A number of grey areas exist in relation to the time period between which HIV is acquired and when it is reflected in a blood test. Accordingly, **it is possible and likely that a person living with HIV could engage in unprotected sex with someone, assuming that they are negative due to a premature test result**. The law will unduly punish persons who exist within this grey area and may criminalise someone who is operating under an honest but incorrect assumption that they are not HIV positive and who is engaging in sex on that basis.

5.0 **Criminalization will not stop the vast majority of HIV transmissions**. In the majority of cases, people acquire HIV when they have consensual sex, where neither of them knows that one has HIV - Justice Edwin Cameron of the Constitutional Court of South Africa.[11] Simply put, the bulk of new infections are as a result of persons who are unaware of their HIV positive status engaging in unprotected sex.

6.0 Justice Cameron has also pointed out that criminalization laws are misguided substitutes for other HIV prevention measures that have proven to be successful in the past, e.g. reduced stigma and greater access to testing.[12] **Criminalization trials and prosecutions would divert resources and attention from these much needed prevention methods and from HIV treatment**. The efforts and resources which will be pumped into the criminalization and prosecution of PLHIV would be best applied towards aiding more of the general population to be aware of their status and towards ensuring that all PLHIV are virally suppressed.

[8] Case Law: R v. Dica, England Law Reports 2004 Volume 3, p. 1.
[9] Case Law: R v. Konzani, 2005, All England Official Transcripts (1997-2008), p. 1.
[10] Case Law: R v. Rowe, London, 1 November 2018, p. 8.
[11] JASL Policy Brief 2018, p. 3; Justice Cameron, "Criminalization of HIV Transmission: Poor Public Health Policy", 2009.
[12] Ibid.

7.0 Gender inequality, poverty, unequal pay within the same job and unemployment lead women to be economically dependent on their partners for economic stability, leaving many of them in a position where they are more likely to stay in abusive and violent relationships, according to (UNAIDS, Wyatt 1992, Le Franc 1996).[13] The law would require women to disclose their status and often they can't do so with their partners because they fear violent assault or exclusion from the home. **Criminalization would then hit women hard** and will expose them to assault, ostracism, further stigma and unfair prosecution. They will become more vulnerable to HIV, not less.

8.0 **This law would also make men who have sex with men (MSMs), sex workers and transgender persons more vulnerable**. Kandasi Levermore, the executive director of JASL, shared statistics on HIV prevalence among key populations, which she obtained from the Ministry of Health (MOH) HIV/STI/TB Unit's (HST's) Epidemiological Update Report, in her speech at the JN+ World AIDS Day Breakfast Forum held on November 30, 2018. According to the HST Unit, the HIV prevalence among the MSM population is high, at 29%; the prevalence among female sex workers (FSW) is 2%; the prevalence among transgender women is the highest at 51%.[14] Hence, these populations are known to have a higher prevalence of HIV than any other sections of the Jamaican population. In this light, these groups will unfairly become the centre of attention for wilful transmission prosecutions and will be aggressively targeted in a bid to punish and penalise those who transmit HIV.

9.0 The introduction of a wilful transmission law will ascribe blame solely to the person living with HIV and will remove all responsibility from the seronegative person who has acquired it, which will ultimately **contradict and weaken the public health message in Jamaica** geared at encouraging safe sex and using a condom all the time to protect oneself from the risk of acquiring STIs.

9.1 **The law encourages lack of responsibility regarding sexual health.** Ascribing the blame only to the person living with HIV will perpetuate the notion that safe sex is the sole responsibility and job of the person living with HIV. Persons who are seronegative will shirk their responsibility to be diligent in their sexual interactions and they will begin to expect PLHIV to voluntarily disclosure their positive status. Therefore, they will incorrectly interpret their partner's non-disclosure as confirmation of a

[13] Ibid.
[14] Wilson, "Highest Level of Condom Use among Homeless – Statistics", The Jamaica Gleaner, 1 December 2018; Skyers, "Jamaica's HIV/STI Response: Epidemiological Update" ppt. presentation, Ministry of Health HIV/STI/TB Unit, Nov. 2018.

clean bill of health and will not take the necessary steps to ensure that they are engaging in protected sex.

9.2 **Proof of the already existing lack of responsibility within the statistics.** In fact, many of the persons at risk of acquiring STIs already don't assume responsibility for protecting their sexual health as detailed in 9.1 as they don't take the measures required to practise safe sex. The Knowledge, Attitudes and Practices Behaviour (KAPB) survey conducted by the Ministry of Health (MOH) in 2017 generated condom usage statistics.[15] Survey data revealed that condom use at last sexual encounter among those engaging in multiple sex partnerships (MSP) has decreased from 63.5% in 2012 to 57% in 2017;[16] as many as 17.9% never used condoms in the last 10 sexual encounters they had; and 21% never used condoms in the last 10 times of transactional sex.[17] In 2018, the HST Unit of MOH also reported that there is only 50% condom use among adults 15-49 years old at last sex with main partner.[18] As we can see, condom usage is already lower than we'd like it to be and changing the public health message to place responsibility on PLHIV would only cause it to fall even lower.

Recommendations

10.0 We do acknowledge that human rights-based legislation can play a constructive role in the mitigation of the HIV epidemic, however, we firmly believe that the implementation of a law which will criminalize the transmission of HIV does not accomplish this goal. As our civil society partner JASL suggested, we should instead apply section 22 of the OAPA, which deals with intent to cause grievous bodily harm, to cases of intentional transmission.[19]

11.0 We urge the government to include civil society organizations working with a mandate to advocate on behalf of PLHIV, such as JN+ and JASL, human rights groups and representatives from the community of people living with and affected by HIV in all decision-making processes surrounding the development of HIV-related laws and policies. We reiterate that people living with and affected by HIV

[15] National Family Planning Board, "Strategic Prevention Framework" ppt. presentation, 13-15 November 2018.
[16] Ibid.
[17] Ibid.
[18] Skyers, "Jamaica's HIV/STI Response: Epidemiological Update" ppt. presentation, Ministry of Health HIV/STI/TB Unit, Nov. 2018.
[19] JASL Policy Brief 2018, p. 1.

must be central in all policy making processes that will impact their lives and livelihoods.

12.0 We recommend that the Committee encourage the implementation of human rights based, non-discriminatory prevention strategies in the HIV response to reduce the HIV epidemic. This should include increasing the number and range of opportunities for campaigns and programmes in a variety of settings aimed at educating the general public about HIV. These should be held in high schools, colleges and universities, community centres, hospitals, free clinics and town squares across the country.

13.0 Also, we highly suggest that resources be channelled into far-reaching HIV prevention strategies which involve the distribution of free condoms across the island targeting unconventional sites and key vulnerable populations. We recommend that these HIV awareness and prevention strategies actively work to reduce the stigma and discrimination against consenting adults who engage in certain sexual behaviours and those involved in multiple sexual partnerships. Efforts must be made to maintain an enabling and inclusive environment in healthcare settings by encouraging and sensitizing all key stakeholders, including healthcare workers, to adopt sex-positive attitudes to ensure that all people regardless of their sexual orientation, age and any other status will feel comfortable going into these spaces to get condoms and to access other healthcare necessities.

14.0 Finally, we urge that efforts be made to increase and support more initiatives aimed at reducing the stigma and discrimination faced by people living with and affected by HIV, especially in healthcare facilities, in order to improve care and support for PLHIV and increase their access to treatment. These initiatives include training and sensitizing public health employees, implementing sanctions for discriminatory practices and developing policies that promote a culture of non-discriminatory treatment and compassionate care. There should also be a strengthening of reporting and redress mechanisms and the development of a national legislative framework, through Anti-Discrimination laws and accompanying regulations, that will protect all persons, including people living with and affected by HIV, from discrimination based on their health status. Through these efforts, healthcare workers will be deterred from discriminatory behaviour and systems will be in place to hold them accountable which will ultimately reaffirm the rights of PLHIV and will foster an enabling environment to allow them to access healthcare.