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South African Law Commission Report on Criminalisation of HIV Transmission

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Premier Helen Zille is once more raising the spectre of criminalising HIV transmission. This is an old debate. In 2001, the South African Law Reform Commission considered the matter and concluded that current legislation is sufficient to deal with intentional transmission of HIV. The report was submitted to the Minister of Justice in terms of the South African Law Commission Act, 1973 (Act 19 of 1973). The committee received a range of expert submissions. It was chaired by Justice Edwin Cameron.

Below is the Commission's summary (with footnotes ommitted).

SOUTH AFRICAN LAW COMMISSION

Project 85

FIFTH INTERIM REPORT ON ASPECTS OF THE LAW RELATING TO AIDS

April 2001
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SUMMARY

Background
1. This Report is the last in a series of Interim Reports under the Commission's broad investigation into aspects of the law relating to AIDS. The preceding Reports dealt with certain health-related issues (First Interim Report); pre-employment HIV testing (Second Interim Report); HIV and discrimination in schools (Third Interim Report); and compulsory HIV testing of persons arrested in sexual offence cases (Fourth Interim Report).

Scope of this Report
2. This Report deals with harmful (i e unacceptable) sexual behaviour by persons with HIV or AIDS that could transmit HIV or expose others to HIV, current measures available to address such behaviour, and whether there is a need for statutory intervention. The recommendations cover only consensual sexual activity. Transmission of or exposure to HIV can also occur during non-consensual sexual acts such as rape. The need for further measures in the latter regard will be dealt with under the Commission's investigation into sexual offences.

Source of enquiry
3. The enquiry was undertaken at the request of the Parliamentary Justice Portfolio Committee. The request was made against the background of public concern and pressure for appropriate action regarding deliberate or knowing transmission of HIV infection. This came about largely in response to a number of widely publicised incidents of deliberate transmission of HIV, accompanied by the very real concern that mostly women and young girls are being exposed to HIV infection in this manner.

Three possible options for dealing with the issue

4. During the course of the investigation the Commission identified the following three possible options for responding to the Justice Portfolio Committee's request:

- Codification of common law crimes

  Deliberate conduct in the form of deliberate transmission of or exposure to HIV would already be liable to prosecution under the existing common law crimes of murder, assault, assault with the intent to do grievous bodily harm, rape or indecent assault. Negligent conduct would be liable to prosecution under existing law if HIV is transmitted and the victim died as a result of this. It may however be that HIV-related behaviour is difficult to prosecute successfully under these crimes. This would be due mainly to the specific characteristics of HIV as a disease: Its long incubation period and its invisibility may present problems with regard to proof of causation and fault. Aspects regarding consent could further encumber prosecutions. Some believe that it may be necessary to codify the common law to eliminate these difficulties or some of them. This approach would not entail creating any additional, new offence, but would put into statutory form what is already illegal. Such codified HIV-specific offences would then be a clear confirmation of the existing common law position. Codification might also provide an opportunity for the creation of presumptions to deal with current perceived difficulties in the application of the common law.

- Criminalising behaviour not hitherto criminal

  The second option stems from the fact that our common law contains three distinct omissions: There are no crimes of negligent injury; of deliberately exposing another to danger short of assault; or of negligent endangerment (exposure). In this regard the following possibilities arose:

  - The creation of HIV-specific measures requiring the disclosure of their HIV status by all persons with HIV before engaging in certain sexual activities. Whether disclosure would always be required - even if preventive measures (eg a condom) were used - is a controversial point.

  - The creation of an HIV-specific offence/s targeting negligent transmission of HIV; or negligent transmission of and negligent exposure to HIV. This could be limited to cases where the perpetrator had actual knowledge of
    his or her HIV infection.

  - Maintaining the present position

    Maintaining the present position would mean that persons with HIV who transmit HIV to others or expose others to HIV may under certain circumstances be prosecuted under the existing common law crimes.

Public consultation and deliberation

5. The Commission in January 1999 published a discussion document (Discussion Paper 80) for public comment. At that stage the Commission was not sufficiently convinced to make preliminary recommendations for legislative intervention and the question was left open for debate. Strong comments were received both opposing and supporting legislative intervention and it became necessary to discuss further with a wide range of experts the dilemmas faced by the Commission. Again consensus was not reached. However the strong momentum of opinion amongst a wide range of experts, representing diverse interests, was against legislative intervention.

Position in comparable legal systems

6. In none of the comparable legal systems referred to in the Report (Canada, the United States of America, the United Kingdom, Australia, Zimbabwe and Namibia) have HIV-specific criminal offences relating to consensual sexual acts

recently been created on a national level. In systems where there have been such attempts (Canada, the United States and Namibia) they were controversial and met with public opposition which led to their abandonment. In Zimbabwe, where draft legislation introducing HIV-specific criminal offences has apparently been under consideration since 1994, no enactment has as yet been passed.

Guiding principles

7. The background material in this Report and the divergent responses and perspectives from commentators and experts bear evidence to the complexity of the issues. In seeking a solution the Commission was guided by the following principles:

- Respect for the human rights and interests of all concerned.
- The primary objective of the creation of an HIV-specific statutory offence/s should be HIV prevention and the protection of the uninfected.
- Legislative intervention should be rationally and scientifically based and not emotionally motivated.

Conclusion

8. The Commission concluded that statutory intervention is neither necessary nor desirable. It is of the view that arguments against intervention override arguments supporting such step. Moreover, the Commission believes that strong indications from the entire process of research and deliberation weigh against statutory intervention and that recommending new legislation under these circumstances would not be principled.

9. Major reasons for this conclusion are the following:

- Lack of evidence that offences are occurring in regard to which statutory intervention along the lines envisaged is necessary
- There is no scientific, empirical or even informal evidence that the behaviour to be targeted is occurring to such an extent that the creation of an HIV-specific statutory offence/s is necessary. This may indicate that in practice there is no need for additional punitive measures, and that a change to the law would therefore probably be based (without denying that real instances of dangerous conduct occur) on general fears, anxieties and "urban legends" about alleged wilful or negligent behaviour by persons with HIV.
- An HIV-specific statutory offence/s will have no or little practical utility
  The Commission believes this to be the case in view of the following:
    - An array of common law crimes exists which could be utilised against harmful HIV-related behaviour.
    - It is doubted whether the creation of an HIV-specific statutory offence/s could minimise the difficulties associated with the application of the common law crimes. Such an offence will indeed bring its own problems - not the least of which will relate to the burden of proof and constitutional issues. The common law crimes would first have to be more extensively applied in practice and shown to be inadequate before a need for a statutory offence/s can be determined.
    - A statutory offence/s could add to the problems an overburdened criminal justice system is currently experiencing.
    - There are few or no prosecutions under existing criminal measures. Will complainants come forward to utilise an HIV-specific statutory offence? This seems doubtful. The enactment of such offence/s might thus be largely of symbolic value.
    - The codification of existing common law crimes may, in addition, have the effect of promoting

"exceptionalism" in dealing with HIV and AIDS.

- The social costs entailed in creating an HIV-specific statutory offence/s are not justified
The decision to criminalise implies a cost to society and the individual involved. The benefits and social gains to be obtained from the successful prevention or reduction of the conduct in question have to be commensurate with this cost. Otherwise a decision to criminalise cannot be constitutionally justified. The Commission is of the opinion that the social costs inherent in the creation of an HIV-specific offence are not justified:

    - This would be the case especially as regards the creation of a new additional offence targeting negligent behaviour. Negligence in the HIV/AIDS context would involve an individual who is not aware that he or she has HIV and in this state of ignorance unknowingly transmits HIV or exposes another to HIV. The Commission is convinced that where the majority of persons in South Africa with HIV are unaware of their HIV status and where there are insufficient resources for the widespread HIV testing that would be required to enable a change of behaviour, it is not just and right that persons who are ignorant of their health status (but ought perhaps ideally to know that they are infected), should be punished. In effect such individuals would be punished for their failure to know their HIV status - which may lie outside their control.

    - Additional important factors related to the social costs of creating an HIV specific statutory offence include the following: It is generally believed that such offence/s would be counter productive to public health efforts to curb the spread of the disease; would entrench further discrimination and stigmatisation of persons with HIV; and would drain away scarce resources from the most effective HIV prevention programmes such as targeted education campaigns, condom distribution initiatives, and the provision of voluntary, accessible testing, counselling and medical treatment.

    - An HIV-specific statutory offence/s will infringe the right to privacy to an extent that is not justified
The transmission of or exposure to HIV in the context of consensual sexual relationships involves the most intimate aspects of human interaction. The enforcement of an HIV-specific offence will call for inquiry into the medical histories and sexual affairs of both the accused and his or her sexual partner/s. The Commission is of the opinion that such infringement of privacy is not justified in circumstances where the creation of an HIV-specific offence is not based on evidence establishing a need for such offence/s; where such offence/s may serve no purpose additional to the existing common law offences; and would have no impact on diminishing or preventing the spread of HIV.

Recommendation

10. The Commission recommends that the present legal position be maintained.

11. In concert with this recommendation, the Commission identifies a pivotal need for the development of practical mechanisms by government departments to utilise effectively the existing common law crimes in cases of harmful HIV-related behaviour; and to encourage a culture of responsibility regarding HIV status.
These mechanisms may include:

- Making the public aware of applicable common law crimes coupled with the assurance that our existing law will indeed be used in respect of harmful HIVrelated behaviour.

- Introducing practical measures to establish a standard of policing, investigation and prosecution that would ensure successful prosecutions of harmful HIVrelated behaviour under the existing law.

- Maintaining and improving public health measures relating to awareness about HIV and its prevention, and public access to HIV testing and counselling. Such activities should be aimed at encouraging a culture of responsibility.

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