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HIV CRIMINALISATION – SUMMING UP

Expert Meeting on UNAIDS
Geneva
31 August – 2 September 2011

The Hon. Michael Kirby AC CMG

UNAIDS

EXPERT MEETING ON THE SCIENTIFIC, MEDICAL, LEGAL AND HUMAN RIGHTS ASPECTS OF THE CRIMINALISATION OF HIV NON-DISCLOSURE, EXPOSURE AND TRANSMISSION

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CONTEXT, METHODOLOGY AND PURPOSE

Context of meeting: This meeting, of 50 participants, has gathered in Geneva in a room of provocative decor, to address a disturbing problem.

The problem is the growing tendency in many countries, particularly in developed jurisdictions, to adopt new and special laws to criminalise conduct related to the transmission of the human immuno-deficiency virus (HIV) from one person (inferentially infected with HIV) to another (inferentially not infected but put at risk). The laws so far adopted have included provisions that address the successive chronological phases of the foregoing conduct, namely:

- * The *non-disclosure* by the first party of the fact, or possibility, of having HIV infection;
- * The *exposure* of the second party to the risk of infection (whether or not that risk is fulfilled; and

* Former Justice of the High Court of Australia (1996-2009); one-time Commissioner of the WHO Global Commission on AIDS (1988-92); member, UNAIDS Reference Group on Human Rights (2003-); Commissioner, UNDP Global Commission on HIV and the Law (2010-).

- * The *transmission* of HIV from the first person to the second, so that the second person is thereby rendered HIV positive and subject, in certain contingencies, to suffer the end stages of HIV if untreated, namely acquired immuno-deficiency syndrome (AIDS).

In many, perhaps most, countries, self-evidently, acquisition of HIV is in some circumstances, an extremely serious development for the health of the person concerned. There is, as yet, no therapeutic cure to expel HIV entirely from the body of a person who has become infected. Nor is there a vaccine to treat those already infected or to prevent persons who are uninfected from becoming infected. Every year, according to UNAIDS, approximately 2.6 million persons are newly infected with HIV. Accordingly, preventing the spread of HIV is a major objective of the world community, expressed through the United Nations bodies with the primary responsibility to respond to the epidemic: UNAIDS (the joint programme), WHO and UNDP.

In the UNAIDS expression of its strategy in 2011, *Getting to Zero*, the primary accepted objective is the radical reduction, and eventual elimination, of new HIV infections. In such circumstances, it is not wholly surprising that politicians, administrators and some health officials should support the adoption of a strategy of criminalising those who do not reveal their HIV status to a sexual or drug sharing partner; who put that partner at risk of infection; or actually transmit the virus to an uninfected person, potentially with dire consequences. If the objective is to reduce new infections, is it not just and appropriate to attempt to alter human behaviour by imposing on these three relevant moments of decision a criminal sanction for those who do not disclose their status;

who expose others to the risk; and who actually transmit the virus to uninfected persons?

Given the vast range of conduct which, in any society, is rendered criminal by legal provisions, is it not reasonable to treat these three steps as potentially criminal, both to protect the uninfected and also society as a whole, and to help to control and render more responsible the conduct of those who have the potential to infect, and so harm, others. If we impose criminal sanctions by law upon those in possession of a loaded pistol, is there not an analogy in the case of a person who is infected, knows of such infection and nonetheless acts in an irresponsible way in relation to others?

These are the questions that the experts came together in Geneva to discuss. The questions have been considered in many earlier meetings; in national and international documents; and in academic, health care, legal and political circles over the 30 year history of the epidemic. However, the issue has become more relevant and urgent in recent years because of a proliferation of new laws and the advent of an increasing number of relevant cases before national courts. These are the circumstances in which, with the support of UN agencies and the Government of Norway, this expert meeting convened.

Methodology: The meeting adopted and observed a methodology that has been followed by the relevant UN agencies, since the advent of HIV/AIDS:

- * *Empirical:* It based its approach to the issues for decision on empirical data concerning the legal regimes in force in many

countries. The participants had available to them two working papers on the subjects for examination:

- One on *background and current landscape and legal provisions and practices and epidemiological facts*; and
- The other on *scientific, medical, legal and human rights issues*.

The foregoing papers gave the participants a unique overview, particularly of the legal developments occurring both in developed and developing countries. In the latter, especially in Central Africa, the N'Djamena Model Code, introduced by foreign advisers, has spread rapidly and been adopted in many African jurisdictions. Although the Code has several beneficial provisions (including for access to care and treatment and protection for discrimination) it also introduces transmission offences. Surprisingly perhaps, the factual data before us disclosed that the countries with the highest incidence of criminal prosecutions of persons for transmission offences were advanced developing countries with comparatively low per capita infections and high levels of income, awareness of HIV and social tolerance. These included Sweden, Norway, Finland, Denmark and New Zealand. In many instances, prosecutions for transmission offences have been brought for risk exposure without infection; for transmission by heterosexual intercourse although the main vector of HIV in such societies has been amongst homosexual men; and often in circumstances involving immigrant accused allegedly infecting or exposing local women;

* *Multi-disciplinary*: The expert meeting included specialists in relevant sciences, technologies and medical knowledge; experts in

the social and political sciences; legal academics and legal practitioners, including prosecutors and judges;

- * *Positive people:* From the beginning of the UN response to HIV, the foundation Director of the Global Programme on AIDS of WHO (Jonathan Mann) insisted on participation in all policy discussions of people living with HIV and AIDS (PLWHAs). This approach is aimed to ensure the input of perspectives from persons on the front line of the epidemic. In the present expert meeting, about a fifth of the participants identified as PLWHAs;
- * *International:* The participants came from many international agencies and several countries in the developed world. This was because of the focus of the discussion was on developments in richer countries. There were no participants from the global south who were not otherwise working with international agencies. Given the N'Djamena Code and the importance of the issues discussed for developing countries, the absence of participants or observers from developing countries was understandable but perhaps unfortunate. At the very least, there is a need for developing countries to learn from the experiences of developed countries in relation to the epidemic of criminalisation, before developing countries were tempted to go down the same track;
- * *Diversity:* Although there was a wide range of expertise at the meeting, so that diverse points of view were on the table, some participants felt that it would be desirable, in future meetings, to have participants who could speak directly and affirmatively of the need for criminalisation of HIV transmission. Such opinions certainly exist in the countries represented at the meeting. In default of a committed advocate of this persuasion, Professor Mark Wainberg of McGill University in Canada expressed forcefully what

he understood to be the viewpoint of advocates for criminalisation of transmission. Some simply reflect their traditional religious and sexual morality. But others voice a widespread community opinion as to the justice and potential efficacy of criminalisation strategies. The participants also noted the comparative lack of governmental representatives, including officials who will necessarily have a large role to play in future legal strategies on the topic.

COMMON GROUND

During intensive discussions over three days, much common ground emerged in the debate:

- * *Ineffective laws:* Laws to criminalise transmission will ordinarily only be effective if the person at whom they are targeted is aware of what HIV is; of its usual modes of transmission; and of the fact that the person is infected or may quite possibly be so; and is conscious (at least in a general way) of the sanctions imposed for transmission offences. According to the materials provided to the meeting, most people who infect others with HIV or put them at risk and fail to disclose their HIV status, are unaware of their own status at the time of such conduct. Overwhelmingly, the objective of their conduct is related to identity as a sexual (or drug using) being and the pursuit of pleasure and satisfaction. It is not, as such, deliberately to infect another person with the virus;
- * *Counter-productive:* There was widespread recognition that, to some extent at least, infection offences can have a counter-productive consequence from the point of view of reducing the incidence of HIV:
 - ❖ It may increase the stigma and fear about HIV prevalent in society;

- ❖ It may discourage those who may be infected from taking the test to discover their HIV status, given that notice of a positive status can become an important ingredient in liability to a serious criminal offence;
 - ❖ It may thereby divert attention from the truly important strategic objective which is rolling out anti-retroviral drugs (ARVs) to those who are infected;
 - ❖ It may discourage candour in discussions with medical practitioners and health officials; and
 - ❖ It may result in more convictions of HIV positive persons and their imprisonment in circumstances where there may be no ARVs and in places where there is a heightened risk of the spread of HIV.
- * *Harm reduction:* As Professor Scott Burris, of Temple University, USA, observed, the criminalisation strategy involves a departure from the basic approach of harm reduction rather than criminal or traditional public health sanctions. It has been strategy of harm reduction, mostly in developed countries, that has helped reduce the spread of HIV. Not criminalisation and penalisation. There was a fair degree of acceptance that, viewed solely from the point of view of preventing the further spread of HIV, expensive, problematic criminal prosecutions with enhanced punishment of imprisonment as a goal was not a very effective contributor to an HIV containment strategy.
- * *Law's own doctrines:* Nevertheless, the participants learned of the traditional operation of the criminal law; its role to express and sanction seriously harmful and wrongful conduct; and its general provisions, some of which may be invoked in the HIV transmission context. The objectives of criminal law are many but include

retribution for wrongdoing and a response to serious circumstances of moral blameworthiness. This was a point made by Dr. Matthew Weait (Birkbeck College UK). This is also the context, in developed countries, in which the operation of criminal law must be understood. Moreover, it must also be appreciated that there are actors in the criminal justice system who are independent of executive government in the exercise of their discretions and powers. They are not obliged to fulfil their functions solely by reference to public health strategies. At least this is so where the legislature has omitted specifically to so provide. The relevant officials (prosecutors and judges) will act to give effect to the overall objectives of the criminal law. Those objectives have their own dynamic. In social terms, they exist to maintain public order by diverting individual and social conflict into public trials in the independent courts brought on behalf of society as a whole. The symbolic role of the criminal law in upholding proper social conduct is thus the background against which the advocacy of public health experts and human rights advocates must be understood in the current context.

REASONS FOR REVIVED ATTENTION

The 2006 and 2008 policy documents: In 2006, the Office of the High Commissioner for Human Rights and UNAIDS convened a revision meeting to reconsider the *International Guidelines on HIV/AIDS and Human Rights*. A major purpose of the revision was to update the original guidelines to take into account the human rights consequences of advances in therapeutic drug developments, notably the development of ARVs. However, the 2006 meeting also endorsed Guideline 4. This read:

“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 those exceptional cases. Such applications should ensure the elements of foreseeability, intent, causality and consent are clearly and legally established to support a guilty verdict and/or harsher penalties.”

One consequence of the rapid adoption in many African countries of N’Djamena Model Code on HIV and AIDS after 2007 was a further meeting of experts addressed to the growing number of countries adopting specific HIV transmission offences. This meeting heard reports of a growing number of prosecutions for specific or general infection offences. Thus, at the first Global Parliamentary Meeting on HIV/AIDS, organised by the International Parliamentary Union (IPU), conclusions were adopted which accepted that “the use of criminal law may be warranted in some circumstances, such as in cases of intentional transmission of HIV or as an aggravating factor in cases of rape and defilement”. However, the IPU recommended that:

“Before rushing to legislate ... we should careful consideration to the fact that passing HIV-specific criminal legislation can further stigmatise persons living with HIV; provide a disincentive to HIV testing; create a false sense of security among people who are HIV negative; and rather than assisting women by protecting them against HIV infection, impose on them an additional burden and risk of violence or discrimination.”

Notwithstanding these resolutions, which reinforced the thrust of the original public health strategies urged by the UN, it was necessary in August 2008, for UNAIDS to convene a fresh expert meeting to address the criminalisation of HIV transmission. The outcome of that meeting, *Policy Document: UNAIDS, Criminalisation of HIV Transmission* (August 2008) was before the present expert meeting. It urged states to:

- * Avoid introducing HIV-specific laws and instead apply general criminal law to cases of intentional transmission;
- * Issue guidelines to limit police and prosecutorial discretion in the application of the criminal law; and
- * Ensure any application of general criminal laws is consistent with international human rights obligations (particularly rights to privacy; to the highest attainable standard of health; freedom from discrimination; equality before the law; and liberty and security of the person).

The present expert meeting had before it records of all of the previous attempts to help chart an effective strategy taking into account both public health and criminal law perspectives and the legitimate role which each consideration plays in a society facing the risks of HIV transmission. It was the proliferation of specific laws, contrary to the thrust of earlier recommendations and reports of a significant increase in the numbers of prosecutions that occasioned the present meeting and its return to the foregoing topics.

The 2011 consultation: The overall general features of this consultation may be identified as follows:

- * *Anxiety about re-opening:* Some participants (notably Scott Burris and Ralf Jürgens) admitted to anxiety that, convening the present expert meeting, might be seen as an attempt to make it easier, or more acceptable, for developed countries to adopt and prosecute criminal law offences when the thrust of the earlier positions advocated by UNAIDS was hostile to that strategy. Those of this opinion asked what had changed since the 2008 policy document.

Should the 2011 expert meeting not simply reinforce and re-adopt the language and recommendations of the 2008 document?

* *A fatal flaw in 2011?:* The answer which was given to the foregoing question was the suggestion that there had been serious flaw in the logic of the previous guidance notes adopted by UNAIDS, addressed to this topic. In particular, it was pointed out:

- The reference to the invocation of the general law, as a legal strategy which was legitimate and permissible, overlooked the fact that, in most jurisdictions, the general law which was relevant was highly ambiguous and typically capable of adaptation to prosecution for many circumstances of HIV transmission. Thus, in many instances of the general law, the content of the requirement of ‘intention’, as an ingredient of the offence, was very vague. It was not always clear whether it was confined to a positive desire to infect another person? Or included circumstances where the accused was aware of the reasonable consequences and possibilities of his or her conduct. Or was recklessly indifferent to those consequences, so that the law would infer intention. It was pointed out that necessarily, intention is an ingredient to a criminal offence but one which must usually be left to inference from all the facts and circumstances of the case.
- As well, at least in common law countries, the general law offence of “assault” was not confined to striking or actually harming an individual. In the common law, that was the separate offence of “battery”. The offence of “assault” was sufficiently constituted by putting another person in fear of an act of violence or intrusion upon that person’s body. The criminal law had a legitimate role to protect victims from being

put in fear. It was not confined to cases involving being actually harmed. This was the fundamental reasoning behind the “exposure” offence in cases of HIV. A discovery that a sexual partner was HIV positive and, in that state, had engaged in unprotected sexual intercourse with another person, was conduct under the general law that might put the subject in fear of physical harm. On this basis, it could conceptually constitute the general law offence of ‘assault’. Actual transmission would not be required. In fact, in many instances, weeks or months might go by when the complainant was uncertain, and in a state of doubt and fear, as to whether or not infection had been established. Against such risks, the general criminal law might provide available offences that, from the viewpoint of public health, could be unsuitable or undesirable for prosecution but from the viewpoint of legal doctrine be understandable and orthodox.

* *New developments?:* As well, there were several new developments that were thought to warrant re-examination of the conclusions reached in the 2006 and 2008 deliberations about infection offences. Amongst those mentioned at the expert meeting were:

- The rapid spread of the N’Djamena Model, adopting HIV specific criminal offences of transmission;
- The increasing reports of prosecutions for transmission offences, particularly in developed countries;
- The arrival of ARVs, which if properly administered can reduce the levels of the virus in those receiving ARVs to undetectable or virtually undetectable levels, so as effectively

to remove the risks of transmitting the virus to third persons whilst remaining under such treatment;

- The disproportionality of the punishments imposed, as recorded in the working papers provided to the expert meeting (for example, prison terms of 25 years for the extremely low risk offence of and HIV positive person spitting at a public official) suggested a need to re-visit the particular issue of criminal prosecution and punishment;
- *Scientific developments:* Reports on DNA analysis, phylogenic testing and the RITA technology may now increase the possibility of determining which of potentially a number of persons actually infected a complainant with HIV; but at a very considerable cost that would be beyond the resources of all but the wealthiest of countries;
- *Prosecutorial guidelines:* These have been adopted in several countries (including the UK) to reduce the incidence of undesirable or unsuitable criminal prosecutions and to confine those prosecutions to cases involving clear moral blameworthiness where the general offence can be established.

The 2011 High Level Policy Meeting: A purpose of the expert consultation is to provide information and reportage to a proposed high level meeting on HIV transmission offences, to be convened by UNAIDS in late November 2011. This too will be supported by the Government of Norway. Inevitably, that high level meeting, if convened under the auspices of UNAIDS, will focus its attention on the aspects of HIV transmission which are of the greatest concern to UNAIDS. These include the potential impediments that over-wide criminal offences or

prosecutions occasion to public health strategies designed to increase the effectiveness of the HIV response and reduce the obstacles.

It is possible that UNAIDS, expressing its perspective from an epidemiological and public health viewpoint, will simply reinforce, and re-state, at the high level meeting, the substance of the recommendations contained in the 2008 policy document. However, at least it will now do so with the advantage of the 2011 expert consultation. And with the opportunity to reflect upon the input of experts, stimulated by the two very detailed working papers that were produced for the expert meeting based on recent experience in the field of infection offences. At the very least, it will be necessary for the high level meeting to take into account the suggested 'fatal flaws' in the earlier policy recommendations and the new developments that have occurred since 2008 which may have consequences for the ongoing strategies urged in the earlier documents.

SOME GENERAL CONCLUSIONS

What follows are simply some reflections of my own on a number of general conclusions that appear to follow from the 2011 expert consultation. These are wholly personal. They do not replace the policy document that will be produced, in due course, by UNAIDS, founded on its reflection on the expert observations offered during this meeting. Nevertheless, it may be useful, before we depart, to have at least one participant's list of general considerations that may reflect some measure of common ground amongst the experts.

Criminal law insignificance: From the standpoint of an epidemic which is a daily reality for more than 30 million people living with HIV; which has claimed as many deaths; involves huge expenditures; which

faces problems of procuring ongoing funding for ARVs; and which expands by 2.6 million persons each year, the debates about criminalisation of transmission represent something of a side show.

Serious, worrying and expensive as criminal proceedings may be for those caught up in them, they do not constitute a major feature of the global response to HIV as it continues to unfold. Criminal prosecutions are still rare and costly. Their outcomes are often unclear. They tend to be slow to come to resolution. The evidence offered in them is frequently uncertain and controversial. And their impact on the minds of accused persons and people more generally is problematic and highly disputable.

In these circumstances, the significance of transmission offences for the overall mission of UNAIDS and of other concerned UN agencies should not be exaggerated. The fact that there have been few prosecutions so far under the N'Djamena Code may simply reflect the consideration that in developing countries, where the epidemic is at its height, the resources for criminal prosecutions are few. The priorities that governments have to address are many. They are generally more urgent. In this sense, criminalisation offences can sometimes be perceived as a luxury for developed countries for responding to particular individual and social movements within their populations, of only peripheral significance for the overall global strategy to combat and turn around HIV and AIDS.

Egregious wrongdoing: Nevertheless, Professor Weait's observation about the general role of criminal law being to address 'serious moral wrongdoing' remains valid. It has always been accepted

by UN reviews of this subject. At least in cases of egregious and deliberate conduct to infect other persons with HIV, it may be legitimate, in all societies, to respond with criminal prosecutions followed, upon conviction, by appropriate punishment but which will take into account the HIV status of the convicted offender. The provision of offences for doing harm to other human beings in society will generally be broad enough to include such instances of deliberate infection.

Furthermore, there have been some reported cases (albeit rare) where individuals, upon learning of their HIV status, set about wilfully to respond to their anger at their discovery of their own status, by attempting to infect others. Generally speaking, however, empirical research shows that most persons, upon learning of an HIV positive status, and being conscious of its serious health consequences, take precautions in most circumstances to try to reduce the risks they pose to others. This observation may need reconsideration in the context of the arrival of ARVs and the growing conviction in some quarters, erroneous as it may be, that 'AIDS is over'.

Resulting concerns: From the foregoing, it can be acknowledged that there are still a number of legitimate resulting concerns that deserve the attention of a just society:

- * The vagueness of general criminal offences and their wide potential ambit, to call forth large prosecutorial discretions and large judicial sentencing discretions;
- * The need to contain specific offences and the prosecution of general offences to avoid action based on extremely low risk or no risk conduct as a subject to criminal process. This will include offences for HIV positive accused such as biting, spitting or

throwing faeces at others. The gross over-reaction in the trial and punishment for such (virtually no risk) conduct demands immediate responses to remove such offences or prosecutions for such conduct or to deal with them as minor infractions of public order rather than serious offences involving real risks to third parties;

- * Whilst the criminal law and public health law have certain different objectives in society, a major objective of all societies must be to encourage individuals who may be infected or at risk of HIV infection voluntarily to undergo HIV testing. And not to impede that initiative, so far as possible. That step is universally demonstrated to be a significant first step towards self-protection and societal protection. Any expression or application of the criminal law which diminishes the chances of HIV testing is highly undesirable for the society concerned and for the individual and those with whom that individual has sexual or drug sharing relationships. To this extent, the discretions of public officials concerned in the criminal law should be exercised in a way that is, as far as possible, supportive of testing and not discouraging of that initiative;
- * The disparities and disproportionate decision-making in the context of criminal law, revealed during these expert deliberations, demand effective responses by law makers and other public officials with the responsibility of making relevant decisions;
- * The media coverage of HIV crimes often leaves a lot to be desired. It often promotes ignorant assumptions that have no scientific basis. Quite frequently it has failed to keep pace with the advances in science, notably the increasingly low risk of HIV transmission in the case of HIV positive persons on ARV treatment. This consideration is specially relevant to prosecutions for exposure offences which may rarely be justifiable. Founding

criminal prosecutions on ignorant or irrational beliefs or assumptions about dangers of non-existent infections is a misuse of the criminal law. It performs no worthwhile social purpose in fact;

- * By the same token, the evidence presented to the expert meeting demonstrates that the general awareness of HIV and its features, which was partly present in developed countries in the first generations impacted by the epidemic, is not now so widespread. There is more ignorance amongst the current generation of young persons and there is a large need for all societies to promote knowledge and awareness of HIV and of the importance of preventing its spread and promoting the use of safer sex and safer drug using activity. Putting it bluntly, the expenditure of scarce funds in increasingly difficult economic circumstances upon educational strategies is likely to be of far greater benefit to society than the large expenditures that are inevitably involved in criminal prosecutions of isolated instances that represent poor value for money in protecting the public interest and specifically in helping to deter and reduce the further spread of HIV.

Reducing the HIV myths: Amongst the matters that need to be known in society, and the myths that need to be dispelled, are the following (revealed during the expert meeting):

- * The myth that only serious offenders ever get prosecuted under the criminal laws;
- * The myth that a single sexual encounter is likely to infect a 'victim' with HIV;
- * The myth that having unprotected sex is as risky as playing Russian roulette with a loaded pistol;

- * The myth that HIV positive people represent a type of ‘terrorist’ carrying a lethal weapon against which society must radically protect itself;
- * The myth that HIV inevitably results in AIDS and inevitably leads to death;
- * The myth that it is easy for a sexual partner or drug user to tell others of a known HIV status;
- * The myth that every failure to tell others of known or possible HIV status constitutes an evil, selfish and thoroughly blameworthy act;
- * The myth that science can always tell with speed and accuracy who has infected another with HIV;
- * The myth that science can now identify with speed and accuracy exactly when a person was infected with HIV; and
- * The myth that the criminal justice system protects the innocent and only results in the conviction of the seriously guilty.

Prosecutions for actual infections: By definition, if a prosecution is brought for the actual infection of a complainant, any beneficial effect of ARVs has not prevented infection. Consequently, either another person is responsible for transmission or the accused did not maintain the ARV therapy or has become a victim of a remote or ‘freak’ possibility that may exclude the essential criminal intention. Science may throw light on the actual risks of infection. At least in developed countries, it may be available to reduce the risks of wrongful prosecutions. It is urgent in all such cases to bring the most up-to-date scientific knowledge about HIV, ARVs and real risks of infection to the attention of prosecutors, defence lawyers and judges. This will involve not only evidence in particular cases but improvements in judicial and legal education, so that the

myths about infection offences may be dispelled by up-to-date knowledge and evidence.

Intention and inference: By definition, most criminal offences require proof of a wrongful act and a concurrent wrongful intention. At least this is so in most common law countries. Because intention depends upon processes, normally unspoken, in the mind of the accused person, absent a reliable admission or confession, it is usually necessary for the decision-maker to infer intention from statements or conduct of the accused. This was acknowledged in the English law in medieval times when it was accepted that ‘the devil himself knoweth not the mind of man’.

Accordingly, it is no answer to the existence of criminal offences (general or specific) that penalising intentional transmission of HIV, to say that it is difficult or impossible to know the exact intention of the accused at the relevant time. This is a task that is commonly assigned to trial decision-makers. In common law countries, it is often the province of lay juries of citizens, to whom is attributed the safety of numbers and the wisdom of ordinary common sense. The fact that discovering intention may sometimes be controversial and even contestable does not mean that it cannot be achieved. Usually, juries and judges draw inference of the wide range of fact.

In most cases of sexual intercourse or drug equipment sharing, the *immediate* intention is sexual or drug use identity and satisfaction. It is not, as such, to pass a virus. But if a person is aware of his or her own infected status, an inference may be available in some circumstances that the accused knew or believed that passing the virus was a natural

and reasonable consequence of the conduct which the person engaged in and therefore intended or was recklessly indifferent about. The content of intention will differ depending on the expression of the offence and the state of the local law. It may range between the necessity of proof of an affirmative purpose to infect another person with HIV; through intention to have unprotected sexual intercourse/drug use knowing that that carried a risk of HIV; through to reckless indifference as to the risk of infection; or engaging in unreasonable conduct resulting in infection.

Civil law and common law. Much of the discussion in the working papers presented to the expert group concerned the state of the law in common law countries, whether defined in criminal codes (as in most countries of the Commonwealth of Nations) or in the common law or specific statutes (as in the United Kingdom, some parts of Australia and of the United States of America).

For any global consideration of the issue of intention in criminal law, in this or any context, it is essential that decision-makers should have available to them a thorough analysis of the provisions of relevant penal codes and prosecutorial practice applicable in civil law jurisdictions. It should not be assumed that the approach to intentional infection with HIV is the same in civil law as in common law countries.

Increasing complainants: One empirical consideration that was borne out by the expert meeting was the contemporary increase in the number of complainants, to police, prosecutors and other public authorities, of alleged wrongdoing on the part of persons said to be guilty of infection offences of non-disclosure; exposure; and HIV infection. The

reason for the increase in the number of such complainants needs to be examined and understood. So do the features of the prosecutions undertaken to date, which appear, anecdotally, disproportionately to concern the conduct of HIV positive immigrants and refugees, often of cultural and ethnic backgrounds different from that of the general population.

Public health experts might say that, in a country with a mature HIV presence well known and publicised for decades, all persons engaged in penetrative sexual intercourse; casual sex; intercourse with sex workers; shared injecting drug use and other risky behaviour should be aware of the risks and take personal responsibility for their own safety by preventative and protective measures. They should not rely on others. However, this does not appear to be a common assumption of complainants, prosecutors and decision-makers, at least in many cases of heterosexual intercourse in developed countries. Hence the increasing numbers of transmission complaints and prosecutions. Consideration needs to be given in those countries to alternatives to a prosecution strategy including public health measures; non-prosecution opportunities to victims to express their grievances; and general community education of the risks to which people are still exposed to HIV in circumstances of unprotected sexual and drug using activity.

Science, education and dialogue: In particular, efforts need to be stepped up to enhance greater awareness on the part of relevant decision-makers about the science of ARVs, the technology of phylogenics and other DNA analysis; and the enhancement of prosecutorial, judicial and community education about modes and risks of transmission and the ongoing dangers to the individual of unprotected

activities for which each individual must assume at least partial responsibility for self-protection.

The consideration of transmission offences, and the directions in which they are travelling both in developed and developing countries, needs to be on the agenda for the forthcoming international IAC conference in Washington DC, 2012. Preferably, this should be done with the advantage of the outcome of the high level meeting that will follow this consultation. And with the benefit of the report of the UNDP Global Commission on HIV and the Law, due for presentation at the United Nations Headquarters in New York in December 2011.

FAMOUS LAST WORDS

As usual, in a dialogue of this kind, there were notable interventions that will be remembered by the participants a long time from now and far from Geneva:

- * Mark Wainberg's presentation of a God-fearing, district attorney, prosecuting infection offences in Texas, was only partly offered in jest. To some extent, it reflected the strong feelings that lie behind those who favour criminal prosecution of such offences and who kindle often disproportionate fear of HIV positive people that now goes beyond available scientific knowledge;
- * Matthew Weait demanded our own sense of proportion amongst the experts by declaring that, in the world's eyes, HIV infection prosecutions constitute, basically, a "bourgeois concern";
- * Susan Timberlake, whose marvellous work prepared us for this dialogue, candidly admitted to a typographical error of 'pubic' health; but then declared that it might not have been a typographical error after all;

- * Dr. Brian Gazzard raised mirth when he declared that he was about to “make a critical comment about someone for the first time in my life”;
- * Alison Nichol confessed to a recurring dream of “an English Bobbie in the bedroom”; when Lisa Power declared that that was where the state and its Bobbies should keep out of;
- * Lisa Power revealed her own artistic sense by proclaiming that her unintelligible and apparently confused chart of the progress of police action in such cases was ‘a thing of beauty’;
- * Ralf Jürgens proclaimed that the experts were themselves suffering from an epidemic of documents and their societies from an epidemic of law;
- * Myron Cohen unveiled his relativity formula which asserted that medicos, on the basis of the experts, speak for 1.5 minutes saying what lawyers invariably take seven minutes to say. Perhaps I have borne this out in these remarks;
- * Ryan Peck was the first person we have ever heard in the United Nations meeting to use the “f” word. But then, given the subject matter of the dialogue, it might have been entirely appropriate to the context.

The experts record their appreciation to UNAIDS for bringing them to an intensive and well focused dialogue. To the Government of Norway for supporting and following up the discussions. To Jan Beagle, Mariangela Simao, Susan Timberlake and the UNAIDS team must go thanks for the efficient organisation and conduct of the meeting. And now we part our ways but leave behind our praise and thanks for all the work that UNAIDS performs in keeping the world focused on the ongoing

challenge of HIV/AIDS. And for insisting on nothing less than a strategy that will get us to zero, despite all the difficulties and impediments: including the one that has preoccupied us in this meeting.
