

16<sup>th</sup> Annual Conference of the  
National HIV Nurses Association (NHIVNA)



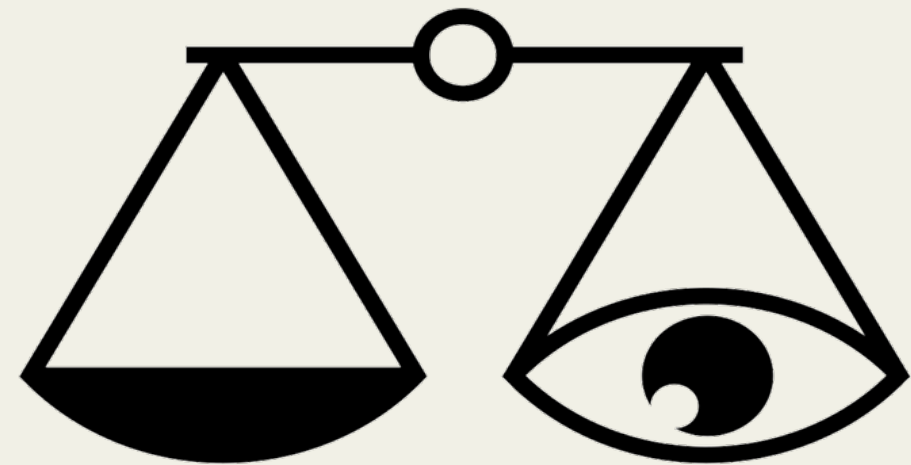
National HIV Nurses Association

**Edwin Bernard**

**HIV Justice Network**

*26-27 June 2014- City Hall, Cardiff*

# **HIV and criminalisation: a local and international perspective**



**HIV JUSTICE  
NETWORK**

**Edwin J Bernard**

Co-ordinator, HIV Justice Network

16th Annual Conference of the National HIV Nurses Association (NHIVNA), Cardiff, 27 June 2014

*16th Annual Conference of the National HIV Nurses Association (NHIVNA)*

# HIV and criminalisation: a local and international perspective

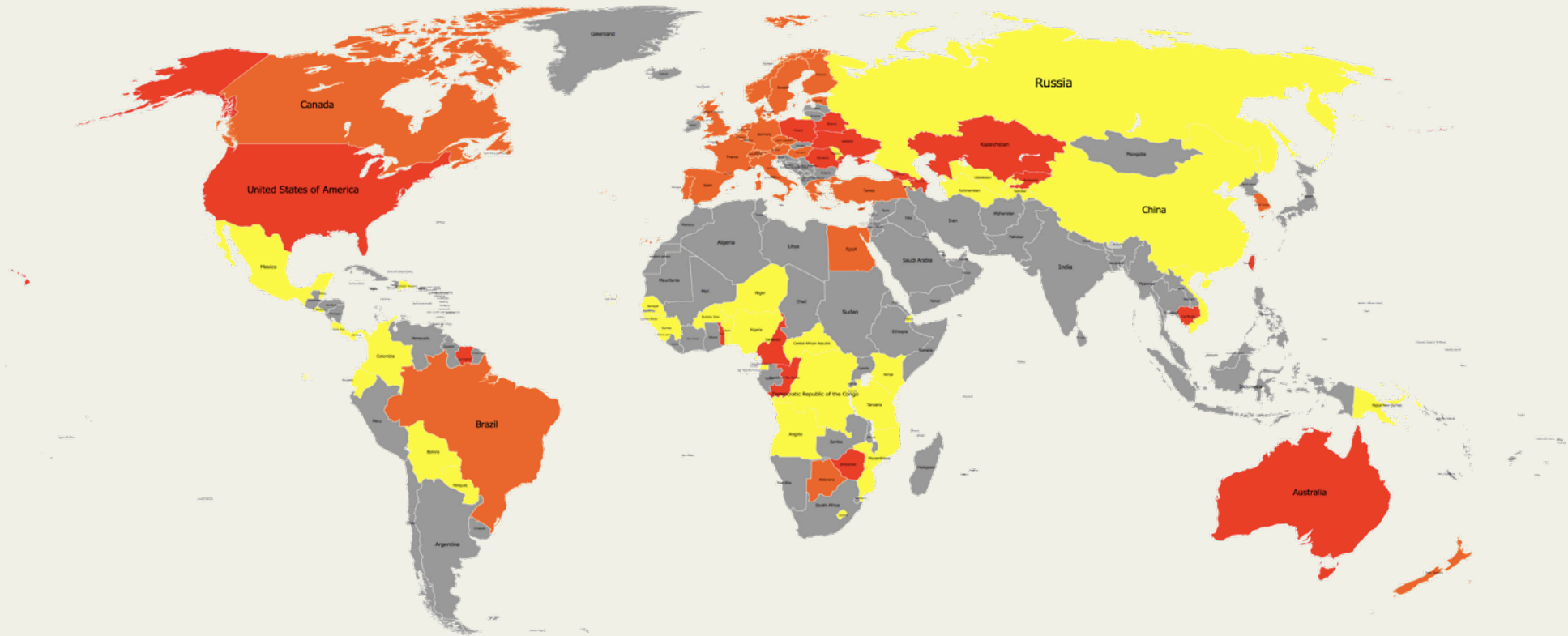


- Global overview of laws & prosecutions
- Global HIV criminalisation hot-spots
- International guidance and advocacy
- Encouraging international policy developments
- Impact on public health
- Guidance for HIV nurses in Canada
- The UK situation
- Who gets prosecuted
- Further resources

In much of the world it is a crime to expose another person to HIV or to transmit it, especially through sex. Fundamentally unjust, morally harmful, and virtually impossible to enforce<sup>34</sup> with any semblance of fairness, such laws impose regimes of surveillance and punishment on sexually active people living with HIV,<sup>35</sup> not only in their intimate relations and reproductive and maternal lives, but also in their attempts to earn a living.

P 20, *HIV AND THE LAW: RIGHTS, RISKS & HEALTH*, JULY 2012  
[WWW.HIVLAWCOMMISSION.ORG](http://WWW.HIVLAWCOMMISSION.ORG)

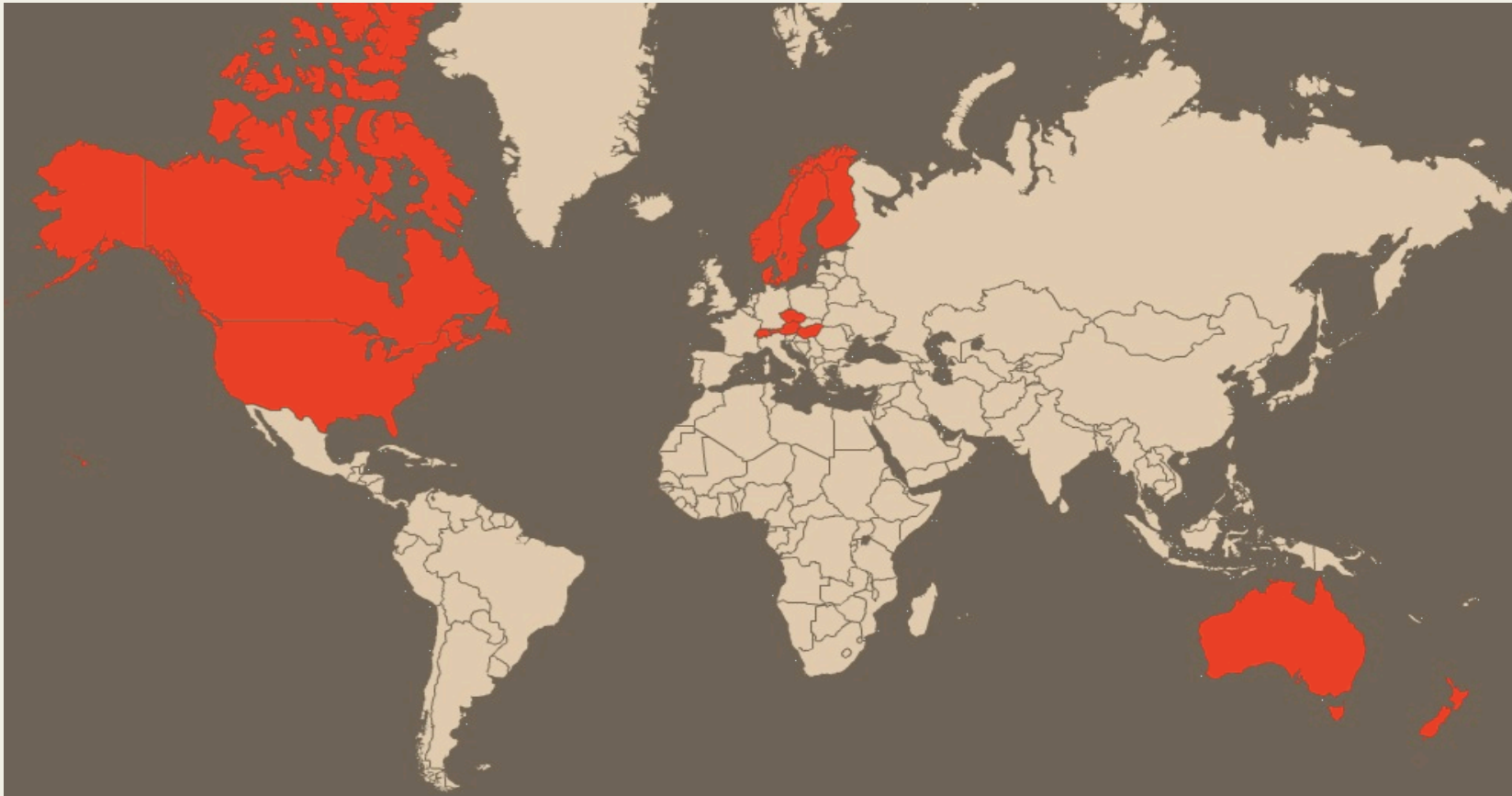
# Where we know HIV exposure / transmission is a crime...



**HIV-SPECIFIC LAWS, REPORTED PROSECUTIONS**  
**HIV-SPECIFIC LAWS, NO REPORTED PROSECUTIONS**  
**REPORTED PROSECUTIONS UNDER GENERAL LAWS**  
**NO REPORTED LAWS / PROSECUTIONS**

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# Global law enforcement hotspots



**\*BASED ON KNOWN ARRESTS/PROSECUTIONS PER 1000 PLHIV**

# UNAIDS guidance / Oslo Declaration on HIV Criminalisation

GUIDANCE NOTE | 2013

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





**OSLO DECLARATION ON HIV CRIMINALISATION**  
Prepared by international civil society in Oslo, Norway on 13th February 2012

1. A growing body of evidence suggests that the criminalisation of HIV non-disclosure, potential exposure and non-intentional transmission is doing more harm than good in terms of its impact on public health and human rights.<sup>1</sup>
2. A better alternative to the use of the criminal law are measures that create an environment that enables people to seek testing, support and timely treatment, and to safely disclose their HIV status.<sup>2</sup>
3. Although there may be a limited role for criminal law in rare cases in which people transmit HIV with malicious intent, we prefer to see people living with HIV supported and empowered from the moment of diagnosis, so that even these rare cases may be prevented. This requires a non-punitive, non-criminal HIV prevention approach centred within communities, where expertise about, and understanding of, HIV issues is best found.<sup>3</sup>
4. Existing HIV-specific criminal laws should be repealed, in accordance with UNAIDS recommendations.<sup>4</sup> If, following a thorough evidence-informed national review, HIV-related prosecutions are still deemed to be necessary they should be based on principles of proportionality, foreseeability, intent, causality and non-discrimination; informed by the most up-to-date HIV-related science and medical information; harm-based, rather than risk-of-harm based; and be consistent with both public health goals and international human rights obligations.<sup>5</sup>
5. Where the general law can be, or is being, used for HIV-related prosecutions, the exact nature of the rights and responsibilities of people living with HIV under the law should be clarified, ideally through prosecutorial and police guidelines, produced in consultation with civil society. Prosecutions are appropriate and to ensure that

Read and sign the declaration at [www.hivjustice.net/oslo](http://www.hivjustice.net/oslo)





## Encouraging policy developments (1)

- Netherlands: ‘Detention or Prevention’ (2004) led to very limited role of criminal law via Supreme Court rulings on risk (2005-7)
- Denmark: Government acknowledges reduced risk/harm, suspends HIV-specific law (2011); currently undecided on new or no law.
- Switzerland: ‘Swiss statement’ on viral load/risk leads to acquittal in Geneva (2008). Law on Epidemics revised in 2012 so only intentional communicable disease transmission a crime (2016)

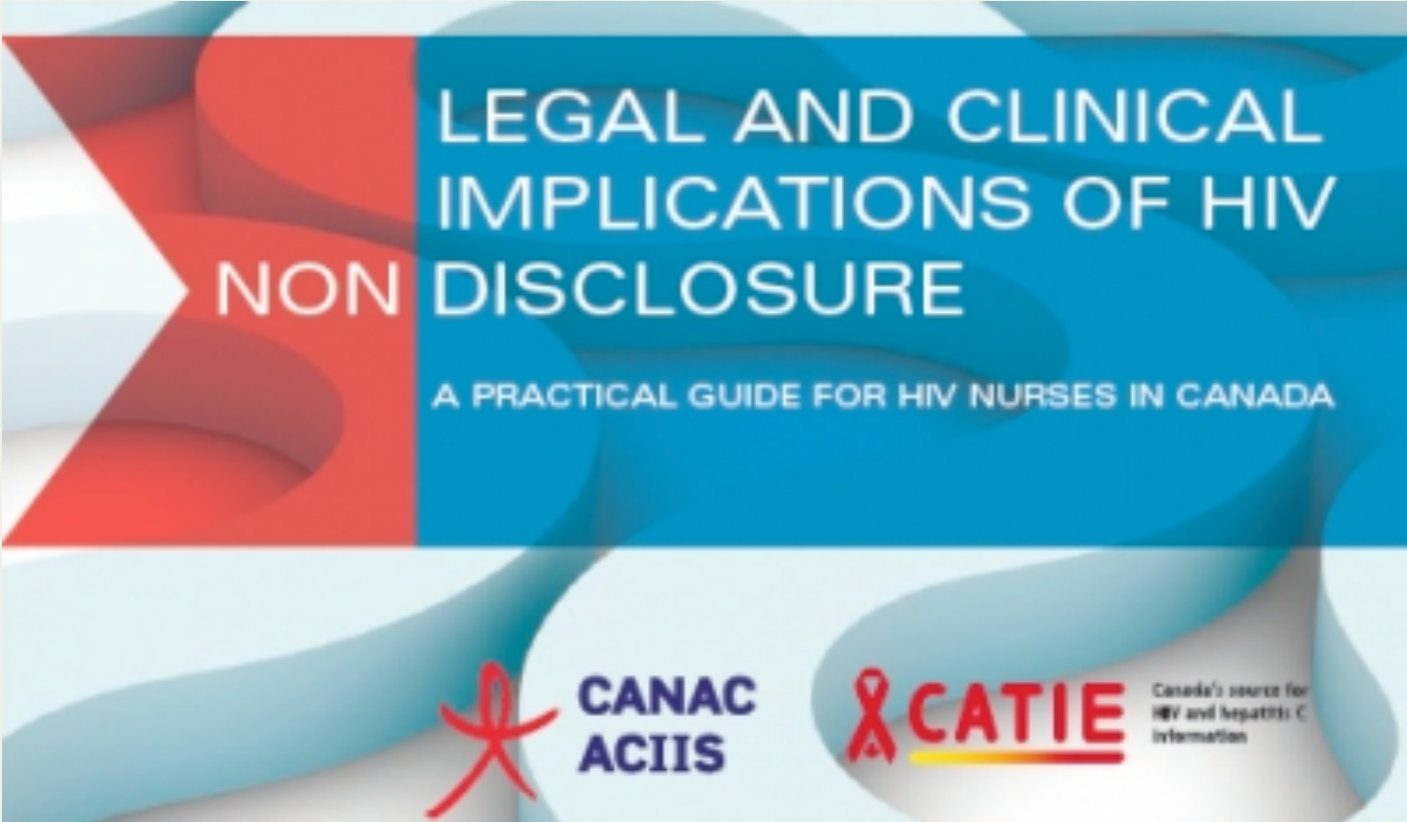




## Encouraging policy developments (2)

- Sweden: Criminal and public health law used together for most draconian approach to PLHIV in Europe. 'Swedish statement' on sexual HIV risks (2013) impacted two cases resulting in major policy shift, Government review pending.
- United States: Iowa became the first US state to 'modernise' its draconian HIV-specific criminal law in May 2014. Iowa Supreme Court recognises science.
- Canada: Criminal law and public health workshop (2013); Practical guide for HIV nurses (2013); 'Canadian consensus statement' on HIV sexual risks (2014)

# Canadian nurses guide (2013)



Download from: <http://bit.ly/hivnursescanada>

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# HIV monster

## 4 yrs for callous lover who passed virus to partner

By ALASTAIR TAYLOR

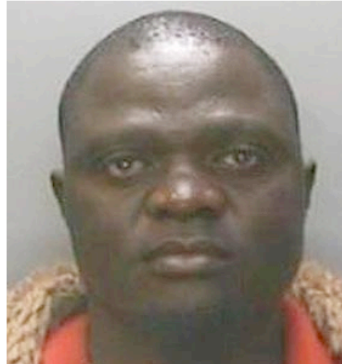
Published: 26 Jul 2011

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A CALLOUS lover who infected one woman with HIV and had unprotected sex with seven others was jailed yesterday.



# HOLS FIEND GIVES 6 GIRLS HIV

Asylum seeker's Aids timebomb at caravan park



Scare . . . Banda gave girls HIV

By NICK PARKER  
AN asylum seeker who bedded scores of girls while working at a holiday campsite has given at least six HIV.  
Caravan salesman Everson Banda, 29, left behind an Aids scare timebomb when he was sent home to Zimbabwe by immigration officials last month. He had worked illegally since 2004 at the Orchards Holiday Village near Cleaton-on-Sea, Essex — but told none of his girlfriends he was HIV positive.  
Full Story — Pages 4 & 5

# HIV TIMEBOMB



He is a dangerous man, a cold killer with a deadly secret. There is every chance there are people who don't know they have the disease who have passed it on

POLICE FEARS AS VIRUS CARRIER GETS 10 YEARS JAIL FOR GBH

# HOW MANY MORE FELL VICTIM TO HIV LOVER?



# THE AIDS ASSASSIN



'Biological GBH' leaves 8 women facing death

A MONSTER who knowingly gave two women the AIDS virus faced jail last night. Mohammed Dick's vic-  
By LUCY HAGAN  
Mitcham, South London — may have infected SIX others. Married Dick, 38, (left) was convicted of biological



## Question 1

Who can be prosecuted in England and Wales?

- A. Someone with HIV who doesn't disclose and exposes a sexual partner to the risk of transmission.
- B. Someone with any STI who doesn't disclose and exposes a sexual partner to the risk of transmission.
- C. Someone with HIV who recklessly or intentionally infects a sexual partner.
- D. Someone with any STI who recklessly or intentionally infects a sexual partner.

## Question 1 (Answer)

Who can be prosecuted in England and Wales?

- A. Someone with HIV who doesn't disclose and exposes a sexual partner to the risk of transmission.
- B. Someone with any STI who doesn't disclose and exposes a sexual partner to the risk of transmission.
- C. Someone with HIV who recklessly or intentionally infects a sexual partner.
- **D. Someone with *any STI* who recklessly or intentionally infects a sexual partner.**



## The UK situation: Law

England, Wales, NI: *Offences Against the Person Act 1861* (OAPA 1861).  
Section 20, 'reckless transmission', grievous bodily harm.

A person may be prosecuted and found guilty of reckless transmission of a sexual transmitted infection if *all* of the following apply:

- They knew they had an STI
- They understood how that STI is transmitted and that they might be infectious
- They had sex with someone who didn't know they had an STI
- They had sex without using 'safeguards' (following healthcare worker's advice)
- They are found to be only the person who could have transmitted the STI to their sexual partner(s).

Scotland: Common law offence of 'culpable and reckless conduct'.

- Exposure to HIV (without transmission) can be prosecuted.
- All prosecutions so far have concerned reckless behaviour, although the prosecution of intentional transmission is also possible.

## The UK situation: Prosecutions

- England & Wales: First prosecution and conviction for ‘reckless’ HIV transmission in Oct 2003 (Mohammed Dica).
- Since then, to our knowledge, 22 cases have gone to court, but many more investigated; one death during proceedings.
- 16 HIV convictions since 2003 (plus one hepatitis B and one herpes); 4 acquittals.
- Scotland: First prosecution and conviction for ‘culpable and reckless conduct’ Feb 2001 (Stephen Kelly) 3 HIV convictions (one of these also for Hepatitis C; and one of these also for three counts of ‘exposure’)
- England & Wales created prosecutorial (2008) and police guidance (2010) informed by science to limit overbroad application of law. Scotland followed in 2012.





## Who gets prosecuted in England & Wales?

Of 22 cases which got to court –

- 9 black African-born male heterosexual defendants (2 acquittals, one death) and 1 black Caribbean male het defendant
- 7 white European/British-born male heterosexual defendants
- 3 white male European/British-born gay defendants (2 acquittals)
- 2 white European/British-born female heterosexual defendants.

## Question 2

Who gets *disproportionately* prosecuted in England and Wales?

- A. White UK / European-born gay men
- B. African-born heterosexual men
- C. Caribbean-born heterosexual men
- D. White UK / European-born heterosexual men

## Question 2 (Answer)

Who gets *disproportionately* prosecuted in England and Wales?

- A. White UK / European-born gay men
- B. African-born heterosexual men
- C. Caribbean-born heterosexual men
- **D. White UK / European-born heterosexual men**

## Who gets prosecuted in England & Wales? (2)



Ethnic breakdown of male heterosexuals living with diagnosed HIV in UK: Total: 12,160

White: 3,872 [31.8%] – 41.2% male heterosexual defendants

Black African: 6,555 [53.9%] – 52.9% male heterosexual defendants

Black Caribbean: 581 [4.8%] – 5.9% male heterosexual defendants

Source: Yusef Azad, NAT. *The criminal law and HIV transmission: prosecution, investigation, equality*  
HIV and Racial Minorities Workshop, Department of Law and Criminology, Aberystwyth University, 30 April 2014.



## Focus on complainants

Ethnic/sexuality/gender breakdown of new HIV diagnoses in UK  
2003-2012: Total: 47,780

All MSM: 26,433 [55.3%] –13.6% complainants

All heterosexual males: 14,707 [30.8%] –9.1% complainants

All heterosexual black African women: 18,340 [38.4%] – 0%  
complainants

All heterosexual white women: 3,760 [7.9%] – 72.8% complainants

Source: Yusef Azad, NAT. *The criminal law and HIV transmission: prosecution, investigation, equality*  
HIV and Racial Minorities Workshop, Department of Law and Criminology, Aberystwyth University, 30 April 2014.



## Why the bias?

### Why is there a bias in court cases towards heterosexual white women complainants?

- Evidential reasons? – e.g. number of partners, last negative test?
- Shock/Non-acceptance of diagnosis? – NB prevention messages do not warn this group of HIV risk.
- Empowerment – better equipped to take a case forward than, say, black African women?
- Criminal justice system bias towards ‘ideal’ victim’?

Source: Yusef Azad, NAT. *The criminal law and HIV transmission: prosecution, investigation, equality*  
HIV and Racial Minorities Workshop, Department of Law and Criminology, Aberystwyth University, 30 April 2014.



## Useful resources

- BASHH/BHIVA Position statement ‘HIV transmission, the law and the work of the clinical team’  
[www.bhiva.org/documents/Guidelines/Transmission/Reckless-HIV-transmission-FINAL-January-2013.pdf](http://www.bhiva.org/documents/Guidelines/Transmission/Reckless-HIV-transmission-FINAL-January-2013.pdf)
- NAM ‘Social & legal issues for people with HIV’ / ‘Transmission of HIV as a criminal offence’  
[www.aidsmap.com/Transmission-of-HIV-as-a-criminal-offence/page/1497494/](http://www.aidsmap.com/Transmission-of-HIV-as-a-criminal-offence/page/1497494/)
- THT [www.tht.org.uk/myhiv/Telling-people/Law](http://www.tht.org.uk/myhiv/Telling-people/Law)
- NAT  
[www.nat.org.uk/Our-thinking/Law-stigma-and-discrimination/Criminal-prosecutions.aspx](http://www.nat.org.uk/Our-thinking/Law-stigma-and-discrimination/Criminal-prosecutions.aspx)
- HIV Justice Network [www.hivjustice.net](http://www.hivjustice.net)