



# Country Assessment 2009

December 2009



Network of Zambia People  
Living with HIV/AIDS (NZP+)



GLOBAL NETWORK OF  
PEOPLE LIVING WITH HIV



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# Zambia

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# Acronyms

<b>ARV</b>	Antiretroviral
<b>CSO</b>	Civil Society Organisation
<b>DFID</b>	United Kingdom's Department for International Development
<b>GIPA</b>	Greater Involvement of People Living with HIV and AIDS
<b>GCS</b>	Global Criminalisation Scan
<b>GNP+</b>	Global Network of People Living with HIV
<b>GTF</b>	Governance and Transparency Fund
<b>HRC</b>	Human Rights Count!
<b>IEC</b>	Information, education and communication
<b>ICW</b>	International Community of Women Living with HIV/AIDS
<b>MIPA</b>	Meaningful Involvement of People Living with HIV and AIDS
<b>MSM</b>	Men who have sex with men
<b>NACA</b>	National Agency for the Control of AIDS
<b>NCSP</b>	National Civil Society Platforms
<b>NGO</b>	Non-Governmental Organisation
<b>NSF</b>	National HIV/AIDS Strategic Framework
<b>NZP+</b>	Network of Zambian People Living with HIV
<b>NYNETHA</b>	Youth Network on HIV/AIDS in Nigeria
<b>PLHIV</b>	People Living with HIV
<b>PMTCT</b>	Prevention of Mother-To-Child Transmission
<b>SACA</b>	State Agency for the Control of AIDS
<b>SADC</b>	Southern African Development Community
<b>SRHR</b>	Sexual Reproductive Health Rights
<b>STIs</b>	Sexually Transmitted Diseases
<b>TALC</b>	Treatment Action Literacy Campaign
<b>UNAIDS</b>	Joint United Nations Programme on HIV/AIDS
<b>UNGASS</b>	United Nations General Assembly Special Session on HIV/AIDS
<b>WAC</b>	World AIDS Campaign
<b>ZARAN</b>	Zambia AIDS Law Research and Advocacy Network
<b>ZINGO</b>	Zambia Interfaith Networking Group on HIV/AIDS

# Acknowledgements

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The Criminalisation Scan is one of five evidence-gathering tools being implemented through the HIV Leadership through Accountability programme. The programme is funded by UKaid from Department for International Development (DFID) from the Governance through Accountability Fund. The programme combines specific HIV evidence-gathering tools, national AIDS campaigns and targeted advocacy to achieve Universal Access to prevention, treatment, care and support. For more information about the HIV Leadership through Accountability programme please visit [www.hivleadership.org](http://www.hivleadership.org).



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# Global Criminalisation Scan

## Summary

Although there are no known prosecutions specific to HIV transmission in Zambia to date, the government may be considering developing criminalisation legislation. All respondents felt that it may be possible to use current laws to prosecute exposure to or transmission of HIV or other STIs.

## Narrative Report

### Introduction

Through the HIV Leadership through Accountability program a collaboration between the Global Network of People Living with HIV/AIDS (GNP+), the World AIDS Campaign (WAC), national networks of PLHIV and national Civil Society platforms, the Network of Zambian People Living with HIV/AIDS (NZP+) is implementing evidence collecting tools by and for PLHIV. Elaborated by GNP+ and its partners, the tools aim to strengthen the evidence in four key areas:

- Stigma and discrimination: The People Living with HIV Stigma Index
- The level of involvement of people living with HIV: The GIPA Report Card
- Documenting and analyzing human rights violations against PLHIV: Human Rights Count!
- Documenting and analyzing current experiences in criminalization of HIV transmission: The Global Criminalization Scan.

The Global Criminalization Scan is an international tool used in documenting laws, judicial practices and case studies around the criminalization of HIV transmission. The Global Criminalization Scan is an initiative of GNP+ and partner organisations which was developed after a realization that prosecutions for 'alleged' HIV transmission were on the increase, and many countries were considering introducing new legislation relating to HIV transmission.

The aims of the Criminalization Scan are:

- To collect and keep up to date information on national or state level laws criminalizing the transmission of or exposure to HIV transmission;
- To provide an easily accessible 'clearing-house' of resources, research, and initiatives on the subject;
- To provide a platform for advocacy initiatives.



# Zambia

## Methods

Data was collected by respondents who completed the standard Global Criminalisation Scan questionnaire. Target respondents included, HIV and AIDS organisations, government departments (Ministries of Justice or Public Health or the equivalent), UN country representatives, government officials, and others deemed to be working on the issues. Telephone calls were made to identify and elicit the support of respondents in completing questionnaires and to clarify incomplete and unclear responses.

The research comprised a survey and analysis of the extent and nature of national laws involving the criminalisation of the transmission of HIV. The research involved the following activities:

- Creating a list of potential contacts from various sources;
- Sending out a questionnaire to all of those on the contact list and tabulating results;
- Following these up with phone calls, emails, etc;
- Tabulating results; and
- Conducting analysis based on results of the survey.

The questionnaire is divided into five sections:

**SECTION 1:** About Criminalisation of HIV transmission - factual information about rates of convictions and prosecutions, where applicable;

**SECTION 2:** The Law - information of the laws used, where applicable;

**SECTION 3:** Who has been prosecuted? - Information about the people being prosecuted: gender, mode of transmission, nationality and occupation at the time of prosecution;

**SECTION 4:** Other issues: The media, policy/ campaigns and advocacy;

**SECTION 5:** The organisations completing the questionnaire - details of respondents and organisations working in this area.

NZP+ emailed or delivered questionnaires to the following organizations:

- Transparency International
- Zambia Law Development Commission (ZLDC)
- Women in Law of Southern Africa (WLSA)



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- Zambia AIDS Law Research and Advocacy Network (ZARAN)
- UNAIDS – Country Office
- Human Rights Commission (HRC) [www.hrc.org](http://www.hrc.org), [hrc@zamtel.zm](mailto:hrc@zamtel.zm)
- Law Association of Zambia (LAZ)
- Ministry of Justice/Attorney General’s Office
- Non Governmental Organisations Coordinating Council (NGOCC)

The following four organisations responded to the questionnaires:

- Zambia Law Development Commission (ZLDC)
- Zambia AIDS Law Research and Advocacy Network (ZARAN)
- Human Rights Commission (HRC) [www.hrc.org](http://www.hrc.org), [hrc@zamtel.zm](mailto:hrc@zamtel.zm)
- Law Association of Zambia (LAZ)

Please note that the staff member of ZARAN who completed the survey is not the same person who carried out the data analysis.

## Results

In general, little solid information was available on Criminalisation issues surrounding HIV transmission. Most respondents felt that in the absence of any “HIV legislation” or prosecutions, it was difficult for them to comment on such a matter.

### Section One: Criminalisation of HIV

It was agreed that, to date, there have been no known or reported prosecutions or convictions for HIV transmission in Zambia. Some respondents felt that it might be possible to prosecute individuals for transmission of HIV and other sexually transmitted infections (STI’s) under the Penal Code (two interviewees) or the Public Health Act (one respondent).

Some respondents reported that there were calls from a cross-section of stakeholders for people to be prosecuted for transmission of HIV in order to stem the spread of the virus. This was especially so in cases of sexual assault.

### Section Two: The Law - legislation criminalising HIV transmission or exposure

Whilst this had not been tested in a court of law, respondents suggested that the following provision in the Penal Code could be used in HIV transmission cases:





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## **Penal Code Act (Volume 7 Chapter 87):**

### Negligent Act likely to cause infection:

183. Any person who unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, is guilty of a misdemeanour.

Anecdotal evidence supported the claim by half the respondents that the government is considering developing legislation specific to criminalisation of HIV transmission, citing the Attorney General as having made the remark “in passing” at a ZARAN workshop.

Respondents speculated that if a law were to be drafted, the driving forces behind it would be in relation to rape and domestic abuse cases. One respondent added a comment that states wishing to criminalise the transmission of HIV should refer to the SADC Model Law in order to minimise the damage that criminalisation has on HIV issues.

## Section Three: Prosecutions

Respondents were not able to cite any details of prosecutions; it appears that none have occurred so far.

One respondent noted that HIV infection of defendants in the high number of defilement (child sexual abuse) cases could be seen as an “aggravating factor”, leading to harsher sentences.

For further reading on defilement cases, particularly in the context where sex with a minor is believed by some men to be a way to cure their own HIV infection, see: *Suffering in Silence: The Links between Human Rights Abuses and HIV Transmission to Girls in Zambia*. Human Rights Watch New York, Washington, London, Brussels.

<http://www.hrw.org/reports/2003/zambia/zambia1202-06.htm>

## Section Four: the media

It was felt by respondents that there is little media coverage of the issue of criminalisation of transmission of HIV in Zambia.

ZARAN has led debate on policy in this area, with public education through published articles and TV discussions.

The Human Rights Forum run by the Human Rights Commission and UNAIDS has covered the topic of criminalization of HIV transmission in the media.



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The following resources were listed:

- The Zambian Network of PLHIV and the Global Network of PLHIV at <http://www.gnpplus.net/criminalisation/>
- UNAIDS Publications <http://www.unaids.org/en/>

## Section Five: activities of the respondent organisations

Respondents are involved in the following activities relating to criminalization of transmission of or exposure to HIV:

<b>ZARAN</b>	Campaign with its partners on criminalisation.
	Draft paper on criminalisation.
	Legislative Audit.
	Research into the corpus of laws and how it can address the problem
<b>Zambia Law Development Commission</b>	Participation in legislative reform.
<b>Law Association of Zambia</b>	Training of stakeholders, discussion forums, investigations and research.
<b>Human Rights Commission</b>	<a href="http://www.hrc.org">www.hrc.org</a> , <a href="mailto:hrc@zamtel.zm">hrc@zamtel.zm</a>

No respondent was involved in legal or practical support to potential defendants.

Other suggested parties with interest in this issue included

- NZP+,
- ZINGO (Zambia Interfaith Networking Group on HIV/AIDS),
- TALC (Treatment Action Literacy Campaign),
- NAC (National HIV/AIDS/STI/TB Commission), and
- SALC (Southern Africa Litigation Centre).

## Broader issues around Criminalisation

ZARAN provided some extra information on legal issues pertinent to people living with HIV (PLHIV).

- It is illegal for men to have sex with men, and sodomy laws have been used to block condom distribution in prisons.



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- Recreational drug use is illegal; needle exchange programmes are not provided. Respondents thought that they would be illegal.
- There are no legal restrictions on PLWHA entering or staying in Zambia.

## Conclusions

It appears that, so far, there have been no legal cases involving prosecutions for transmission of HIV in Zambia. However, prosecutions may be possible under existing law, in particular the Penal Code and the Public Health Act. The increasing rate of transmission of HIV during sexual assaults of children has become a public issue in Zambia. These attacks are often a misguided attempt to cure the assailant's HIV infection.

If Zambia chooses to introduce HIV specific legislation, as is speculated, one respondent suggested that the country should follow the SADC model law.

There is also need for a wider information campaign for the general public as well as civil society. ZARAN has been engaged in TV discussions, radio programs and publications on the topic. ZARAN has also had a workshop for civil society to explain the implications of criminalisation of HIV transmission. However, more players need to get engaged in this process.

## Follow-up activities

- NZP+ will engage government and in particular members of parliament to broaden understanding of the legal and policy implications of criminalisation in HIV transmission cases;
- NZP+ will work with others to promote laws that offer a protective environment for PLHIV;
- NZP+ will advocate against the introduction of HIV specific legislation for use in HIV transmission cases;
- NZP+ and others will work to promote prevention messages to stem the spread of HIV transmission.

## Appendix 1

### Excerpt from ZARAN Law Review 2009

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#### Penal Code CAP 87, Section 183- Negligent act likely to spread infection

*‘Any person who unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, is guilty of a misdemeanour.’*

#### Comments on Section 183:

The Section addresses the conducting of unlawful and/or negligent acts that lead to or are likely to lead to the spread of infection dangerous to life.

In Zambia, the majority of transmission of HIV cases is through sexual relations and usually between consenting adults.

The drawback in the use of the word ‘unlawfully’ is that it is restrictive. Sexual relations, for example, between two consenting adults of the opposite sex are not unlawful. This section likely applies only to instances of defilement (Section 138-139), rape (Section 132), indecent assault (section 137), unnatural offences (Section 155), harmful cultural practice (Section 157), indecent practices between persons of the same sex (Section 158) and/or incest (Section 159). It does not cover marital rape, which is not considered unlawful in Zambia.

In the other scenario, which arises through the use of the word ‘negligently’, this too presumes, in the HIV context, that, among other things, every person engaging in sexual intercourse is aware of their HIV status; which is not always the case.

If an HIV-positive person engages in unsafe sex with another person without taking precaution, and is aware of his or her HIV-positive status but still fails to take precaution, such as use of a condom, he or she would be guilty of a misdemeanour under the Section on account of negligently doing an act likely to spread a disease dangerous to life. The problem though would be proving that the accused person knew his or her HIV-positive status.

A defence to the foregoing scenario would be that the other party, by not insisting on safe sex, consented to the risk involved with unprotected sex and has only themselves to blame.



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In jurisdictions with similar criminal provisions, the act of negligence has been extended by the courts of law to lactating mothers who, knowing their HIV-positive status, have still gone on to breast feed their babies and passed HIV to them.

The other notable feature of the Section is the part stating that conducting of an act likely to spread an infection is punishable as a misdemeanour and not an offence. A misdemeanour, unless otherwise stated, is punishable by a reasonable fine or imprisonment not exceeding two years or both. Any one therefore charged under this Section for transmitting the HIV shall, on conviction, be fined or sentenced to imprisonment not exceeding two years. This is relatively light compared to certain jurisdictions such as the United States where one can be imprisoned for up to fifty years for wilful transmission of HIV.

### **General Comments on Criminalization:**

Zambia's Penal Code contains several common law statutes that could theoretically be used for intentional HIV transmission cases. These include: Section 199 (Manslaughter), Section 200 (Murder), Section 215 (Attempted Murder), Sections 247-248 (Assault), Section 229 (Grievous Harm), Section 238 (Unlawful Acts Causing Harm). Using these existing and/or common laws may, however, pose proof problems and may not incorporate sufficient criminal penalty, i.e., term of imprisonment. In any event, before crafting new legislation dealing with HIV transmission, it is recommended that existing criminal laws be analyzed to determine how, if at all, they can be used to address the issue.

### **International example**

In 1998, Dr. Richard Schmidt was sentenced to fifty years imprisonment by a USA court for injecting his ex-lover with HIV-positive blood as revenge for her having ended their relationship.

Recently (May 2008), an HIV-positive man in the US (Dallas, TX) was sentenced to 35 years in prison for spitting on the face and in the eyes and mouth of a police officer. The man, who knew he was HIV-positive and even boasted about the fact after he spit, was convicted under an assault statute. The specific charge was of assault with a deadly weapon; the deadly weapon being his saliva.

### **International Guidelines**

The UNAIDS in its recommendations to legislators advocates against specific criminal legislation for the transmission of HIV. This it states as being retrogressive to the fight against the spread of HIV as it will only lead to stigma and discrimination against persons with HIV/AIDS.



# Global Criminalisation Scan

## **Recommended legislative interventions**

From the foregoing discussion, it can be seen that coming up with legislation that specifically criminalises the transmission of HIV has a lot of negative challenges especially when it comes to proving intention.

Section 183, in its present form, is sufficient for Zambia's needs as it does not expressly target HIV but all infectious diseases. In terms of content, it is recommended that the provision be retained but modified and no other provision be enacted that will specifically criminalise the transmission of HIV.

Specifically, the terms "unlawfully" and "negligently" should be removed and replaced with "wilfully" and "intentionally" or, at the very most, "recklessly." Substitution of "wilful" for "unlawful" would allow for acts that might not fall under the category of "unlawful" (such as marital rape) to be prosecuted under this section if an infectious disease is transmitted. Additionally, by using the word "reckless", the problems of negligence aren't necessarily an issue. Reckless can be viewed as a state of mind where the offender knew of his or her status and/or should have known due to sexual promiscuity, medical examinations, obvious physical symptoms, etc. but failed to act cautiously.

The sanction to be meted out against the perpetrators should be amended. Firstly, the wilful spread of diseases infectious to life should be classified as an felony and not a misdemeanour. Secondly, after classifying it as an felony, it should carry with it the punishment of imprisonment of not less than ten years, allowing for more in situations that warrant an upward departure.

Other human rights concerns identified within the Penal Code include the fixing of criminal responsibility at eight years of age (Juveniles Act fixes at under 19; customary law up until puberty; Constitution defines child as under 15 years); the need to strengthen sections relating to trade or detention of persons as slaves (especially important in terms of sexual abuse of young girls); section 69, setting three years imprisonment as punishment for publishing insulting or defamatory material about the President; lack of specific legislation criminalizing domestic violence; see Sexual Offences and Gender Violence Bill (2006), drafted by the Women in Law and Development in Africa, Zambia (WILDAF); addressing customary law that is discriminatory and prohibiting such laws; reality that many domestic abuse cases are tried in local courts according to customary law and therefore are not punished adequately – Penal code should address specific jurisdiction of these crimes.

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# Notes



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