

# HIV JUSTICE NETWORK

## A Note to Criminal Defence Lawyers

People living with HIV who face criminal charges or other punitive measures for breastfeeding, chestfeeding<sup>1</sup> or comfort nursing<sup>2</sup> require a vigorous defence based on principles of justice and human rights, good public policy, and accurate science. Criminal prosecutions related to presumed HIV exposure are all-too-often driven by stigma, misinformation, and the desire to protect a child from exaggerated risk.

This Toolkit provides materials to support lawyers and advocates. With respect to breastfeeding cases, the following lines of arguments may contribute to a solid defence strategy.

### **Pretrial detention**

For a defendant living with HIV, the consequences of pretrial detention can be particularly harsh, including interruptions to medication and medical care, and heightened risks to personal safety due to HIV-related stigma. Detention can have further harsh consequences for a parent who is breastfeeding or is separated from young children or other dependants.

### **Justice and human rights**

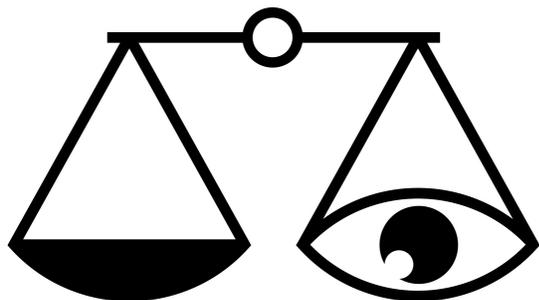
In most legal systems, criminal sanctions are the strongest formal means of condemnation. Criminal prosecution, therefore, should be a measure of last resort, reserved for sufficiently blameworthy behaviour. A preliminary question with respect to any prosecution related to breastfeeding should be whether, as a matter of principle, criminalisation is justifiable.

International recommendations advise against the use of criminal law with respect to HIV where there is no actual transmission.

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<sup>1</sup> Chestfeeding is a gender-neutral term for feeding a baby milk from the chest. It is often used by transgender and non-binary parents.

<sup>2</sup> The term comfort nursing refers to putting an infant/child to the breast for the purpose of soothing them as opposed to for feeding. An infant who is comfort nursing will consume much less milk than a baby who is nursing for nutrition. A woman who is not lactating may put an infant to her breast to soothe it, such that the baby is sucking but not receiving any milk.



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People living with HIV enjoy sexual and reproductive rights, including the right to have children and to receive comprehensive information regarding sexuality and reproduction. Any limitations on rights must be provided for by law that is clear and accessible; must not be applied in a manner that is arbitrary, unreasonable, or discriminatory; and it must be “necessary” to a pressing public or social need. In many jurisdictions, HIV-specific laws are ambiguous and poorly drafted, often without regard for the best available scientific evidence. Penalties are not commensurate with the actual seriousness of the alleged offence. In some jurisdictions, general (i.e., non-HIV-specific) criminal offences have been applied in ways not originally contemplated by legislators.

Mental culpability (*mens rea*) cannot be presumed because a person living with HIV breastfed or comfort nursed a child. Infant feeding guidelines recommend breastfeeding to parents living with HIV unless formula is acceptable, feasible, affordable, sustainable, and safe (AFASS). Decisions regarding infant feeding are complex and are influenced by many factors including culture, accessibility of information and support, past experience with infant feeding, and place of residence. Intent to transmit HIV would be difficult to sustain with respect to infant feeding.

The best interests of the child must be considered. Separating a breastfeeding child from the parent or imprisoning the child with the parent usually has significant negative ramifications for the child.

## Good public policy

Punitive laws, policies and practices against people living with HIV and other key populations<sup>3</sup> have been found to have a negative impact on public health. In addition to increasing stigma and misinformation about HIV transmission, punitive approaches undermine trust in healthcare providers and social support services. Fear of surveillance, judgement and punishment may deter parents from seeking information and support with respect to their infant feeding and children rearing choices.

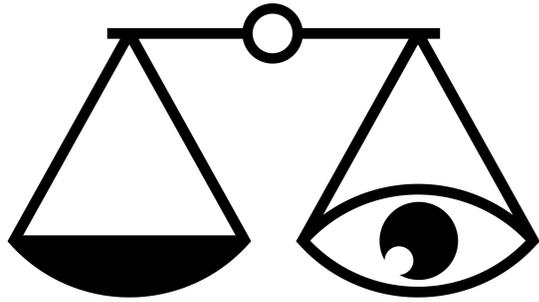
In matters of maternal and child health, punitive approaches seldom produce good outcomes.

## Accurate science

Which acts occurred? How many times? Under what circumstances? These details will be essential to an informed assessment of the possibility of HIV transmission.

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<sup>3</sup> “Key populations” include sex workers, gay men and other men who have sex with men, transgender people, people who consume drugs, and people in prisons and other enclosed settings. Globally, these populations are particularly vulnerable to and disproportionately affected by HIV due to certain risk behaviors, marginalization, and structural factors such as stigma, discrimination, violence, human right violations, and criminalization.



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The science of HIV transmission risk through breastmilk is not as robust as that regarding sexual transmission, due to ethical and practical limitations with respect to conducting such research.

Antiretroviral treatment greatly reduces viral load and the risk of HIV transmission through breastmilk but does not eliminate the risk.

## Disproportionate impact

The HIV epidemic has disproportionately affected people and communities who are socially and economically marginalized, as well as communities disproportionately subjected to the criminal justice system. HIV-related criminal charges may be more likely against sex workers, people who use drugs, people living in poverty, migrants, and people who experience racism. These same groups often also have the least access to reliable information and support, as well as to legal information and legal representation.

**HJN may be able to support your defence of a person living with HIV. Please contact us at [info@hivjustice.net](mailto:info@hivjustice.net) or [breastfeeding@hivjustice.net](mailto:breastfeeding@hivjustice.net).**