



**IN THE HIGH COURT OF MALAWI**

**ZOMBA DISTRICT REGISTRY**

**CRIMINAL APPEAL NUMBER 36 OF 2016**

**(Being Criminal Case Number 95 of 2016 before the Second Grade Magistrate Court  
Sitting at Machinga)**

**IN THE MATTER OF CONSTITUTIONAL CHALLENGE OF SECTION 192 OF THE  
PENAL CODE**

**-AND-**

**IN THE MATTER OF CRIMINAL APPEAL BY EL (A FEMALE ADULT) OF C/O  
Messrs. John Tennyson & Associates, Private Bag 79 Mzuzu (for the purposes of protecting  
the identity of the Appellant in these public records)**

**EXPERT AFFIDAVIT**

I, Michaela Clayton, [REDACTED] Namibia, make OATH and  
STATE as follows:

1. **THAT** the facts deposed to in this affidavit are true and correct, and save where the context indicates otherwise, are within my personal knowledge. To the extent that I rely on information received from others, I believe that such information is true and correct. I respectfully submit


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that I am by my training and experience duly qualified to express the view and opinions that I express in this affidavit.

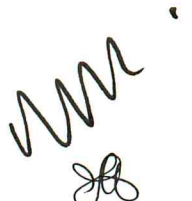
2. **THAT** this affidavit is focussed on addressing what the impact is of laws that are applied to criminalise HIV transmission and exposure. This is to address the question of whether the application of the criminal law is or can be an effective response in an effort to prevent the spread of HIV.
3. **THAT** I address the following topics:
  - 3.1. My qualifications and expertise.
  - 3.2. International and regional recommendations against overbroad criminalisation of HIV transmission and exposure and against criminalisation of vertical transmission.
  - 3.3. The absence of any impact of criminal laws on preventing HIV transmission.
  - 3.4. The negative impact of these criminal law in undermining HIV-prevention efforts.
  - 3.5. Approaches that are evidenced to prevent the spread of HIV.

#### **QUALIFICATIONS AND EXPERTISE**

4. **THAT** I am the Director of the AIDS and Rights Alliance for Southern Africa (ARASA), a regional partnership of civil society organisations working together to promote a human rights based response to HIV/AIDS and TB in Southern Africa.
5. **THAT** I am a human rights lawyer who has worked on HIV/AIDS and human rights issues in Namibia, and subsequently regionally and internationally since 1989.
6. **THAT** I hold a BA and LLB (1985) from the University of Cape Town, South Africa.

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7. **THAT** I was one of the founding lawyers of the Legal Assistance Centre (LAC) in Namibia, where I established the AIDS Law Unit to provide a legal service to people living with HIV and AIDS.
8. **THAT** whilst at the LAC I assisted in the drafting of the majority of Namibian sectoral HIV policies as well as in the drafting of the Namibian National HIV/AIDS Policy.
9. **THAT** in 2002 I initiated the establishment of ARASA as a project of the LAC, which has subsequently grown into an independent NGO with partners in all of the SADC countries.
10. **THAT** I participated in the revision of the International Guidelines on HIV/AIDS and Human Rights (2002) and in the drafting of the ILO Guidelines on Using the ILO Code of Practice and Training Manual for Labour Judges and Magistrates (2005) as well as the UNAIDS, UNHCHR Handbook on HIV and Human Rights for National Human Rights Institutions (2007).
11. **THAT** I have been a member of a number of UNAIDS expert consultations on HIV and human rights related issues and has consulted for UNAIDS, UNHCHR and the ILO.
12. **THAT** I serve on several regional advisory bodies including the SADC Technical Advisory Committee on HIV/AIDS. I am also a member of the International Advisory Group on Universal Access and co-chair of the UNAIDS Reference Group on Human Rights.
13. **THAT** I was the recipient of the 2009 Human Rights Watch and Canadian AIDS Legal Network International Award for Action on HIV/AIDS and Human Rights.
14. **THAT** my curriculum vitae is attached at “C1”.

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**RECOMMENDATIONS AGAINST OVERBROAD CRIMINALISATION AND  
CRIMINALISATION OF VERTICAL TRANSMISSION**

15. **THAT** The Joint United Nations Programme on HIV/AIDS (UNAIDS) states that “The overly broad application of criminal law to HIV non-disclosure, exposure and transmission raises serious human rights and public health concerns.”
16. **THAT** since 2008, UNAIDS has advised that the application of the criminal law should be limited to cases of “intentional transmission (i.e. where a person knows his or her HIV-positive status, acts with the intention to transmit HIV, and does in fact transmit it)”
17. **THAT** UNAIDS has further expressed concern regarding “the continued application of the criminal law ... to cases involving unintentional HIV transmission, non-disclosure of HIV status, or exposure to HIV where HIV was not transmitted.”
18. **THAT** UNAIDS reasoning on the inappropriateness of the application of the criminal law in these cases includes the following:
- 18.1. Absent actual transmission of HIV, the harm of HIV exposure is not significant enough to warrant criminal prosecution.
- 18.2. The determination of whether the risk of HIV transmission from a particular act is significant should be informed by the best available scientific and medical evidence.
- 18.3. Intent to transmit HIV cannot be derived solely from knowledge of positive HIV status.
19. **THAT** UNAIDS advises that vertical transmission (the transmission of HIV from a mother to a child) should be “explicitly excluded from the possibility of criminal prosecution.”

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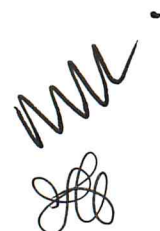
20. **THAT** at the 38<sup>th</sup> Plenary Assembly Session, the Southern Africa Development Community (SADC) Parliamentary Forum adopted a Motion against the Criminalisation of HIV Transmission, Exposure and Non-Disclosure. The motion acknowledges that specific criminal laws on HIV transmission, exposure and non-disclosure may be harmful to HIV treatment efforts and to infringe on human rights.

### **NO EFFECT ON INCAPACITATION, REHABILITATION OR DETERRENCE**

21. **THAT** it is my considered expert opinion ( based on research findings as well as various literature) that applying criminal law to HIV risk behaviour has not been shown to incapacitate, rehabilitate or deter offenders for the following reasons:

21.1. There is no evidence that imprisoning offenders will incapacitate persons from transmitting HIV. HIV risk behaviours are prevalent in prisons, and most prison systems continue to reject the introduction of evidence-informed prevention measures such as condoms and sterile injecting equipment and fail to undertake measures to reduce the prevalence of rape and other forms of sexual violence.

21.2. There is little evidence to suggest that criminal penalties for conduct that transmits or risks transmitting HIV will “rehabilitate” a person to avoid future conduct that carries the risk of HIV transmission. Most cases of HIV transmission are related to sexual activity and/or drug use – human behaviours that are complex and very difficult to change through the instrument of criminal penalties. Nor do many prisons provide rehabilitation programmes around behaviour that transmits HIV. Individual behaviour change is more likely to result from interventions such as counselling and support for behaviour change, as well as measures that address underlying reasons for engaging in activities that risk HIV transmission.

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21.3. There is no scientific data supporting the claim that criminal prosecution, or the threat thereof, has any appreciable effect in encouraging disclosure to sexual partners by people living with HIV or deterring conduct that poses a risk of transmission. Vagueness in the applicable legal provisions reduces any possible deterrent effect of the laws on the prohibited conduct. In addition, most HIV transmissions appear to be caused by people who are not aware of their HIV status, suggesting that using criminal law to deter transmission-risk behaviour will be largely ineffective.

### **IMPACT ON UNDERMINING HIV PREVENTION EFFORTS**

22. **THAT** to the extent that evidence of the effect of laws criminalising HIV transmission, exposure and non-disclosure have been measured, the effect has largely been negative in rendering HIV treatment and prevention strategies more difficult to implement.
23. **THAT** there is enough evidence that suggests that applying criminal law to HIV transmission could discourage people from getting tested and finding out their HIV status, as lack of knowledge of one's status could be the best defence in a criminal lawsuit.
24. **THAT** likewise, it is my considered expert opinion that applying criminal law to HIV exposure or transmission may increase stigma and discrimination.
25. **THAT** Applying these laws, except in very limited circumstances of malicious and intentional transmission, reinforces the stereotype that people living with HIV are immoral and dangerous criminals, rather than, like everyone else, people endowed with responsibility, dignity and human rights.
26. **THAT** the introduction of HIV-specific criminal offences, as well as individual criminal prosecutions against people living with HIV for conduct that transmits or risks transmitting HIV, has often been accompanied by inflammatory and ill-informed media coverage or

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commentary by high-profile figures such as prosecutors, government officials, or legislators. The stigma exacerbated by this rhetoric can only discourage people from coming forward to seek HIV testing and counselling and from talking openly and honestly about AIDS.

27. **THAT** prosecutions for HIV transmission or exposure also spread myths and misinformation about how HIV is (and is not) transmitted. In some jurisdictions, serious criminal charges have been laid against HIV positive people for activities such as biting, spitting or scratching, despite evidence that the risk of HIV transmission in this fashion is extraordinarily small (and in some cases, non-existent).
28. **THAT** in other jurisdictions, the adversarial justice system has encouraged prosecutors to make sweeping and highly inaccurate statements about the risk of HIV transmission, when this risk is often minimal, including for people with HIV on effective antiretroviral treatment and without sexually transmitted infections. Such prosecutions and statements not only undermine efforts to educate the public about HIV, but further engender fear of people living with HIV.
29. **THAT** in a number of cases, the confidentiality of medical records kept by health professionals or counsellors has been breached in the attempt to establish someone's HIV status during a criminal prosecution.
30. **THAT** healthcare providers and counsellors may also be compelled to give evidence on confidential medical consultations and persons' HIV status.
31. **THAT** these breaches of confidentiality may reduce the willingness of HIV-positive people to discuss risk behaviours with counsellors, agree to HIV testing and counselling, or seek treatment of other sexually transmitted infections that increase the risk of HIV transmission.

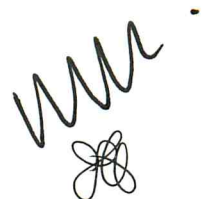


32. **THAT**, while women and girls are disproportionately vulnerable to HIV infection, the application of criminal law to HIV transmission and exposure is likely to be used to disproportionately prosecute women more than men for three likely reasons:

32.1. Because they engage with the health system more often (including during pregnancy and childbirth), women are typically more likely to find out about their positive HIV status before their male partners – particularly as governments move towards provider-initiated HIV testing and counselling in antenatal settings.

32.2. Women are therefore more likely to be blamed by their intimate partners, their partners' families, and their communities for “bringing HIV into the home” than men, and this can result in eviction, ostracism, loss of property and inheritance, and loss of child custody.

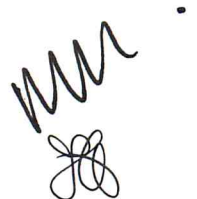
32.3. For millions of women living with HIV/AIDS – but often denied access to family planning, reproductive health services, or medicines that prevent mother-to-child transmission of HIV – this effectively makes pregnancy, wanted or not, a criminal offence. There are many more effective ways to prevent mother-to-child transmission of HIV, beginning with supporting the rights of all women to make informed decisions about pregnancy and providing them with sexual and reproductive information and services, preventing HIV in women and girls in the first place, preventing unwanted pregnancies, and providing effective medication to prevent mother-to-child transmission of HIV to HIV-positive women who wish to have children.

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## WHAT WORKS FOR EFFECTIVE PREVENTION OF HIV TRANSMISSION

33. **THAT** there is enough evidence that suggests that a combination of education, persuasion and social support pursued in traditional public health interventions has been demonstrated to be an effective strategy to prevent the spread of HIV. To the extent criminalization in any manner detracts from the attention to or funding for measures that do work, it hurts HIV control.
34. **THAT** human rights-based approaches to HIV are the most-effective response.
35. **THAT** broad criminalization of HIV exposure and transmission threatens rights-based responses to HIV that empower people to avoid infection or live successfully with HIV.
36. **THAT** Human rights emphasize the dignity – including the sexual freedom – of all people, and provide the conditions in which they can make healthy, responsible and safe choices about their health and their lives. These conditions include the right to full and accurate information, to the tools and technologies for comprehensive HIV prevention, and to the right to make responsible choices about intimate behaviours such as consensual sex and reproduction.

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CONCLUSION

37. **THAT** criminalization of HIV exposure or transmission is a complex issue, however criminalization is unlikely to prevent new infections or reduce women's vulnerability to HIV. In fact, it may harm women rather than assist them, and may negatively impact both public health and human rights. Generally, it is therefore an unjust and ineffective public policy. The obvious exception involves cases where individuals purposely or maliciously transmit HIV with the intent to harm others. In these rare cases, existing criminal laws can be used.

Sworn by the above deponent

At Windhoek, Namibia this 15<sup>th</sup> day of December 2016

MICHAEL


Sworn at WINDHOEK,

In the county of NAMIBIA .

On 15 DECEMBER 2016 .



Before me,



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Solicitor, Officer of the Court or other person entitled to administer Oaths.

BEFORE ME:



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COMMISSIONER FOR OATHS

FRANZISKA ANTOINETTE HANCOX  
PRACTISING ATTORNEY  
4 KÖRNER STREET WINDHOEK  
REPUBLIC OF NAMIBIA

