

## Case Study 8

### Criminalisation law reform in the Netherlands

General Information about Case Studies 6/7/8. These studies discuss tackling criminalisation of transmission & exposure in the European region.

Many countries across Europe have seen prosecutions of people with HIV for transmission, exposure or even just perceived exposure of HIV. Laws and responses have varied and are documented in the GNP+ Global Scan. Coverage of prosecutions and changes to the law can be found indexed by country at the HIV Justice Network's database. This set of three interlinked case studies looks at the very different approaches taken by people in three European countries in response to what they saw as the inappropriate use of criminal law to prosecute people with HIV for transmission-related "crimes". While each has an interesting story to tell in its own right, together they illustrate that there may be a number of different paths to tackling an issue, each with its own pitfalls and benefits.

#### General Criminalisation links:

GNP Global Criminalisation Scan: <http://criminalisation.gnpplus.net/node/11>

HIV Justice Network website: <http://www.hivjustice.net>

Global HIV Law Commission: <http://www.hivlawcommission.org/index.php/working-papers?task=document.viewdoc&id=90>

UNAIDS Policy Brief:

[http://data.unaids.org/pub/BaseDocument/2008/20080731\\_jc1513\\_policy\\_criminalization\\_en.pdf](http://data.unaids.org/pub/BaseDocument/2008/20080731_jc1513_policy_criminalization_en.pdf)

Oslo Declaration on Criminalisation: <http://www.hivjustice.net/oslo/>

Aidsmap briefing on the issue: <http://www.aidsmap.com/law>

#### What was the issue?

In common with several other Western European countries, the Netherlands saw a small number of prosecutions of people with HIV for transmission or perceived exposure to HIV. From 1989 – 2005, there were 15 trials of which 14 resulted in convictions. These were all for exposure except for one possible transmission case. Charges were initially laid under existing homicide and assault laws, settling over time on an 1881 assault law (attempted/grievous bodily harm) similar to that of England & Wales (see Case Study 7). However, other STIs were not prosecuted.

#### Why was change needed?

Growing numbers of HIV legal and social activists and clinicians believed that the prosecutions were unsafe, unwarranted and counter-productive. They believed that prosecutions for perceived exposure and non-intentional transmissions did more harm than good, damaging the prevention message that everyone had personal responsibility for safer sex and deterring people with HIV from testing and accessing services.

#### How could matters be improved?

Along with other countries responding to criminalisation of HIV transmission at that time, Netherlands activists wanted to stop prosecutions for non-intentional transmission and for

exposure/perceived exposure. Like England, they were working with an old, general law but they chose to directly challenge the use of the law for these cases at all, rather than create guidance restricting its use. In this, they were more like Denmark, who faced a new HIV-specific law that they sought to change.

### **What/who were the barriers to change?**

Initially there was some reluctance from HIV groups and clinicians to engage with the criminal law, because it was such a different and unknown area. Some discussions also tended to conflate morality and the criminal law, assuming that anything which was morally wrong should be prosecuted. The Crown Prosecution Service and the Justice Department were initially unwilling to engage on the issue until confronted with a wide sectoral alliance of respected organisations.

### **How long did change take and who was involved in making the change?**

The first case was in 1989 but there was a gap, with more prosecutions starting in 2000. A newly diagnosed legal clerk at the Crown Prosecution Service, Peter Smit, took up the issue as a volunteer with the [HIV Association](#) and began action to challenge the prosecutions in court. A wider alliance was formed with [AIDS Fonds](#) (a funding and policy organisation) and the [Schorer Stichting](#) (a major HIV NGO), as well as the [STI Foundation](#), in 2002. The legal and policy work went hand in hand until prosecutions for exposure or non-intentional transmission were stopped in 2005/7.

### **How was change made?**

**Locating and creating expertise:** Although the cases were known to HIV activists, it took a former employee of the prosecution service with HIV to put together why they were both legally unfair and a threat to public health. Smit then went on to locate specialist human rights lawyers who were also criminal law barristers and who could best defend the cases and take them as far as the Supreme Court. The lawyers also published articles in legal magazines to increase understanding of how cases could be defended and ensure that prosecutions for exposure were challenged. Smit continued to work within the HIV Association, giving individual advice to defence cases and training lawyers. He also identified HIV-specialists who could act as expert defence witnesses in the criminal proceedings as counterbalance to the expert testimony produced by the prosecution service.

**Building understanding and consensus:** As in other countries, it was vital at the start to get an understanding of the issue within the key community organisations so that they fully backed it. This took discussion and consensus building but paid off in a united front between the three main HIV organisations, covering self-help, social care, prevention and policy. This took time but made them much harder to ignore or contradict. Their 2004 consensus report “Detention Or Prevention” was key in persuading the Government not to introduce a new HIV-specific law when the old one was found to be inappropriate.

**Publishing an expert report:** The “[Detention or Prevention](#)” report was produced by a heavyweight expert committee. Chaired by the legal advisor to the [Dutch Medical Association](#), its members included doctors, public health experts, lawyers, nurses and people with HIV. It went through the arguments on both sides carefully, documented the scientific realities and decided that, on balance, prosecutions did more harm than good. It took prevention issues fully into account and reiterated the doctrine of joint responsibility (both parties having responsibility for their own safety)

alongside the need for better education for the public on personal responsibility. It recommended prosecution only where there was coercion or deceit, combined with genuine risk.

**Supporting and documenting individual cases:** With Peter Smit as the central contact point, ongoing cases were documented and defence lawyers offered individual advice and training. As with England, defendants with inexperienced or unsympathetic lawyers were encouraged to switch to an experienced defender. Once one case had been successfully made it was easier to replicate defence tactics in others because of the level of coordination.

**Attention to detail and challenging assumptions:** Because the law was an old one, close attention to the broad language used offered a means of defence. A successful prosecution for exposure or non-intentional transmission needed to show that there had been both “substantial danger” and “indirect intent”. Initially, cases succeeded because a clinician was prepared to say there was substantial danger, but this was challenged with new evidence of the actual risks of one act of unprotected sex, which were far lower than the courts and public had assumed. The defence also challenged the idea that there was any intent, even indirect, to transmit the virus, arguing successfully that the person had only intended to have sex.

**Using public health arguments and clinical evidence:** The campaign to change the law used both public health arguments (to show that prosecutions for anything other than intentional transmission could have a deterrent effect on testing and seeking help, as well as stigmatising people with HIV) and emerging scientific evidence on genuine risk levels and on treatment as prevention. Because they argued on the basis of risk, rather than on proof of transmission (as in England) they did not need to go into the complexities of phylogenetic testing. They were, however, the first country to consider low viral load as a factor in assessing risk. As the Netherlands system does not use juries of members of the public, they were able to use very complex arguments in court with greater confidence that the judge would be able to follow them.

**Policy and legal challenges working together:** Throughout, Netherlands activists used both legal and policy actions, challenging the individual prosecutions one by one while also building the case against prosecutions in general with the Departments of Health and Justice. This culminated in two Supreme Court rulings confirming that the existing law was inappropriate. The Departments of Health and Justice and Interior Affairs declined to create a new law to cover the issue, largely due to the expert report ‘Detention or Prevention’, which considered criminal proceedings to be counterproductive.

### **Are there any ongoing issues?**

The HIV Association has found it necessary to keep up individual advocacy as there was an attempt to bring another case as recently as 2015. There was also a successful and highly publicised prosecution in Groningen in 2007-8 for (very unusual) intentional transmission, involving drugging men and injecting them with blood from someone with HIV. The case fell within the guidelines of the 2004 report for what might be appropriately prosecuted. This and related civil cases for damages have kept the issue alive, but the basic legal issues are settled.

### **What lessons have been learnt?**

*“Make sure that the people in your own organisation are on your side first and then find the people to challenge the issue, in courts and in the policy field” (Peter Smit).* Locating the right expertise may take time but is worth it and collaboration is difficult but gives much greater strength to your

arguments. The challenges vary between countries but paying attention to the details of the law, using a combination of public health, human rights and science always play a part and persistence pays off.

**Links** (see also cover sheet for Case Studies 6-8)

Poster from HIV Association on the Dutch Approach: <http://www.aidslaw.ca/site/wp-content/uploads/2014/02/9.Netherlands2005summary.pdf>

The expert report “Detention or Prevention”: [http://www.aidsactioneurope.org-  
www.aidsactioneurope.org/en/publication/detention-or-prevention](http://www.aidsactioneurope.org-www.aidsactioneurope.org/en/publication/detention-or-prevention)

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