



# The Sentinel

Volume 2, 2015

*The official newsletter of the Human & Social Development and Special Programmes of the SADC Parliamentary Forum.*

## Criminalisation of HIV transmission opposed





# Message from the Secretary General

**Dr Esau Chiviya**

Welcome to another issue of *The Sentinel*, the newsletter of the Sexual Reproductive Health and Rights (SRHR) programme, which falls under the Human and Social Development and Special Programmes of the SADC Parliamentary Forum. One of the things we do at SADC Parliamentary Forum is to provide a platform for the exchange of ideas by SADC Parliamentarians and other stakeholders on sometimes difficult and contentious issues that affect the citizens of the SADC Region. The aim is to enable our Parliamentarians to tap into the best evidence and facts around issues so that they play their mandated roles on the basis of sound evidence. As the SADC Region and indeed the whole world work towards halting and reversing HIV and AIDS, a variety of approaches have been considered. Perhaps none of these approaches has generated so much debate than criminalisation of willful HIV transmission and exposure. Bearing in mind the highly polarised nature of the debate around this issue, we organised a workshop for our Parliamentarians, human rights activists and legal experts to exchange views on the matter. The idea was to stimulate debate and generate counterfactual evidence that can better guide us all as we respond to HIV and AIDS in our region. The ensuing debates during this workshop were candid, factual and enlightening. In this edition, we present some of the most compelling ideas that were shared during this workshop. I wish to thank all those who worked hard to organise this engagement. Indeed, we are encouraged by the frank and vigorous debates that took place. I would also like to thank all the presenters and resource persons for relevant and well-researched presentations. The challenges that face our region are indeed many and well-documented. I would like to thank ARASA for financially supporting the hosting of the joint session at which the issues covered in this newsletter were discussed. Enjoy reading.

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### The Sentinel

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# Judge cautions against criminalising of HIV transmission

Staff Writer

**A** top Judge has said that Parliamentarians have a sacred duty to enact laws that are informed by science, research, are humane and that serve public good and public health.

Addressing Parliamentarians gathered in Botswana to discuss criminalization of HIV transmission and exposure, Botswana's High Court Judge Prof Key Dingake noted that law was far from being a panacea for all ills.

"It (law) can be a force for good and it can also be a force for bad. For as long as we know that then we know what kind of law to enact," he said.

Noting that Parliaments were extremely powerful institutions, Judge Dingake said as such Parliaments had an obligation to pass laws that are rational.

"Parliaments can infuse rationality in public discourse in order to bring down the walls of prejudice," he said.

Recognizing that HIV and AIDS remained the leading causes of death globally with Sub Saharan Africa being the epicenter of the HIV and AIDS epidemic, Judge Dingake declared that the days when some people denied the link between HIV, health, human rights and the law were over.

"The link is too plain to contest. That



**CONCERNED:** Botswana's High Court Judge Prof Key Dingake (PhD).

notwithstanding, it seems to me that this SADC Region suffers from a double burden: the burden of the epidemic itself and also the epidemic of bad laws," he said and told his captive audience they had it within their power to alter the situation.

Stressing that constitutions of the countries of the SADC Region mandate MPs to pass laws for the good order and governance of their countries, the Judge said whereas most countries had beautiful constitutions, enforcement remained a major challenge, making some constitutions "promissory notes mere pieces of paper."

Citing the Global Commission's report

on HIV and AIDS of July 2012, Judge Dingake concurred that the legal environment and law could play an important role in effecting the promise of good public order, good public health, while the judiciary could generate jurisprudence to uphold the rights of people infected and affected by HIV and AIDS, particularly key populations at risk of HIV exposure.

He said that the problem in countries where there was a paucity of legislation was that the judiciary tended to be overwhelmed.

"The result is that judges risk being lawmakers when they are not supposed to be the primary lawmakers. It is because there is insufficient legislation to also deal with a societal problem that is great."

He explained that whereas judges were not lawmakers ordinarily, they were "special lawmakers" through a process of interpretation and developing the law.

Judge Dingake submitted that the time had come for the three arms of the state: the Executive, the Legislature and the Judiciary to be partners "in the enterprise of enforcing human rights, not in an oppositional manner."

After all, he reasoned, the three arms were all concerned about rights.

● see *Judge p.4*



● *Judge from p.3*

Judge Dingake dwelt at length on both arguments of the debate on whether to use criminal law as a tool to criminalize HIV transmission and as to whether that serves any purpose.

“A survey of the literature globally suggests that arguments in favour of criminal punishment against persons found guilty of transmitting HIV are grounded on deterrence. It has been argued that given the fatal and debilitating effects of HIV, the law should probably punish those who willfully and recklessly transmit it,” he noted.

He said those who subscribed to the philosophy of an eye for an eye maintained that punishment could serve as an effective deterrent.

“Consequently those who support criminalization of HIV transmission argue that criminalization can curb the spread of HIV by reducing new infections.”

Nevertheless, the Judge said HIV presents unique evidential problems relating to proof of criminal transmission.

“This is because not all transmissions can be criminally culpable. For example, due to specific characteristics of HIV and AIDS such as the long period of incubation, it is not easy to prove causation and fault of HIV transmission.”

Another crucial difficulty to successful prosecution of HIV transmission related cases under general criminal law lay in the defense of consent.

“In cases of consensual sex, it is difficult to prove deliberate intention to transmit HIV.”

Turning to those who argue to the contrary, the Judge said there were people who argued that criminal law as a tool to stop the spread of HIV is ineffective.

“It has been argued that criminal sanctions intensify rather than reduce the spread of HIV because it encourages

people to avoid HIV testing. The obvious reason for so doing being that knowledge of the HIV status could have implications for criminal liability when the time comes. As a result many people will not be able to know their status, which is crucial to HIV prevention,” the Judge reasoned.

He expressed the considered view that fear of testing could create an environment of unsafe sexual activities between partners.

“Research has also shown that punishing HIV transmission may have adverse public health consequences.”

He said the problematic nature of criminalization of HIV transmission became evident when one looked at mother-to-child transmission.

“Criminalization could have the double effect of discouraging testing and driving away pregnant women from assessing health care providers for fear of criminal sanctions. This would hamper efforts at reducing mother-to-child transmission of HIV which are more successful in a context where voluntary HIV testing and public education are critical.”

He said research had also revealed that when people became more preoccupied with criminalization of HIV transmission, the people who suffered legally were the marginalized that were often discriminated against.

“If we insist that (criminalization) is the way to go, we must answer difficult questions of proof; proving that an accused person was HIV positive at the time of the alleged offence, as well as proving who infected who and when.”

He wondered why governments would want to spend so much resources trying to answer such questions before the judges.

He added that in a sexual relationship the one blamed for transmitting HIV would most likely be the one who first learnt of his/her status. Not necessarily

the one who was first infected.

“Even if the accused person was infected first, it could very well be a third party who actually infected his/her sexual partner. To prove guilt, scientific evidence of transmission by the accused person is required and this requires deployment of resources by the State. It implies that Judges could be unable to attend to more pending issues.

“Is that what you want us to spend time doing?” he asked, stressing that there was no blanket argument around criminalization of HIV transmission.

He said some experts would concede that the use of criminal law in the context of HIV could be legitimate where there was actual and significant harm intentionally caused to another.

Be that as it may, the Judge said most constitutional criminal law experts were increasingly concerned – having regard to scientific and medical evidence – about the negative impacts of overly broad criminalization of HIV transmission.

“Most experts now recognize that the discovery and subsequent use of anti-retroviral therapy has resulted in the need to recharacterise HIV infection, thus significantly altering the level and degree of harm caused by HIV transmission. Although HIV infection remains a serious lifelong chronic health condition, it has become manageable for the majority of those on antiretroviral therapy.”

In light of the foregoing, the Judge said that the manner in which legislators must proceed is to have regard to the public good, more prudent utilization of resources and for human rights.

In an impassioned plea and to rapturous applaud, he said: “For Judges there can be no finer moment than to bring down the walls of prejudice tumbling down to mother earth if we can. All that we plead as partners, is lay the foundation for us to deliver justice to our people.”



# Call to ensure resources benefit all SADC citizens

## Staff Writer

The speaker of the National Assembly of Botswana, Hon. Gladys Kokorwe, has called on Parliamentarians to ensure that the SADC Region's vast natural resources meaningfully benefit the citizens of the region.

Hon Kokorwe made this call when she welcomed scores of Parliamentarians from the SADC Region who gathered for the Standing Committee meetings at the SADC Parliamentary Forum in Gaborone, Botswana on May 27, 2015.

Noting that the Southern Africa Development Community (SADC) has set industrialization as a priority towards enhancing the use of the region's natural and other resources for development, Hon. Kokorwe underscored the importance of adding value to raw materials.

"The use of beneficiation in a region endowed with vast mineral resources can no longer be ignored and must continue to be high on the agenda of SADC," she said.

She recalled that the SADC Parliamentary Forum Standing Committee on Food, Agriculture, Natural Resources and Infrastructure recently bemoaned the fact that the Southern African Region was failing to raise enough revenue to ensure sustainable development despite vast mineral resources due to poor management of its resources.

"The benefit of citizens arising from the natural resources is minimal in most countries and in fact citizens, especially those living in mining commu-



***SPEAKING OUT:** Speaker of the Parliament of Botswana, Hon Gladys Kokorwe speaks at the start of the workshop in Botswana.*

nities, are disadvantaged in that their lives are often, disrupted as a result of the industrial activity," she said.

She stressed that there was need to constantly develop, review or implement laws and policies to ensure that the SADC Region's citizens benefit from the exploitation of the regions resources.

"In this regard, the role of Parliamentarians in ensuring that relevant legislation is enacted and policies developed, and in overseeing implementation by

the Executive, cannot be over-emphasized."

On a sad note, Hon Kokorwe noted that the SADC Parliamentarians were meeting at a time when it was becoming increasingly apparent that the SADC Region was unlikely to attain targets set in the SADC Protocol on Gender and Development or those that relate to the Millennium Development Goals.

She, nevertheless, exhorted the region's Parliamentarians not to tire in the quest for gender equity and equality while supporting gender responsive budgeting.

"I am pleased to note that the SADC Parliamentary Forum and its collaborating partners continue to prioritize gender issues."

Noting that members of the SADC Parliamentary Forum's Standing Committee on Human and Social Development and Special Programmes were set to tackle the contentious issue of criminalization of willful HIV transmission and exposure, Hon Kokorwe encouraged the Parliamentarians to familiarize themselves with the medical evidence related to "the usefulness or otherwise of criminal law, as an effective response to HIV."

She reiterated Botswana's commitment towards supporting the work of the SADC Parliamentary Forum. She said her Parliament would gladly have hosted the meetings of the Standing Committees but could not do so because of Parliamentary Committee meetings that were being held at the same time.

● see **RESOURCES** p.6



# Lawyers oppose criminalisation of HIV transmission, non-disclosure

Staff Writer

The manager in charge of the HIV and Law Unit at the Zimbabwe Lawyers for Human Rights (ZLHR), Adv. Tinashe Mundawarara, has said that his organisation opposes a section of Zimbabwe's Criminal Code which criminalises HIV transmission, exposure and non-disclosure, saying the section is "too wide, draconian and objectionable".

Adv. Mundawarara said Section 79 of the Criminal Code was so wide and arbitrary as to make violation of the guarantee of the protection of the law a real possibility. He said the section dealt with a real risk or possibility of infecting another and so it was worrying that "notwithstanding all this uncertainty and meaninglessness, the period of imprisonment was fixed at 20 years".

He said the section threw citizens in a quandary with no certainty as to whether they should they have sex or not.

"Should they use condoms when the possibility existed that they may not be effective? What kind of lectures should they take their partners through before indulging? Was it reasonable to expect people to go through lectures before a

sexual encounter? All these questions arose legitimately but were in not answered," he said.

"Further, this piece of legislation penalised a conjectural likelihood that the person indulging, if HIV positive, was criminalised by the use of the words, 'risk or possibility.' This was unlawful. An Act could not create an offence based on surmise and conjecture."

The view of the ZLHR was this provision invaded the rights of citizens contained in the Constitution. Adv. Mundawarara said negative media coverage could increase stigma for both the complainant and the accused.

He gave the example of inflammatory headlines such as 'AIDS Spreader approaches Constitutional Court' which he said entrenched prejudice against people living with HIV.

He said criminalisation of HIV transmission would discourage people from disclosing their status. It would also breach doctor-patient confidentiality in that medical practitioners could be compelled to bring evidence to court regarding the medical records (and in particular HIV status) of their patients.

According to Adv. Mundawarara there had been instances in which the law had been used vindictively or for revenge. It has also been observed that some the law enforcement agents in some SADC countries were giving more weight to the evidence of the party who first reported the case to the police station without necessarily fully investigating the authenticity of the report.

"This rule was both dangerous and unfair in cases of HIV transmission since it was usually not clear who infected whom."

Adv. Mundawarara said with HIV no longer a death sentence thanks to advances in medical science, the world was moving towards de-criminalisation.

"SADC policy makers could lead in-country efforts for policy change by doing away with criminalisation of HIV through the repeal of HIV specific legislation. The general criminal law could be used to deal with cases of wilful transmission of HIV. Further, the application of these general criminal laws should be predicated on the clear legal proof of the elements of foreseeability, intent, causality and consent."

## ● RESOURCES from p.5

"We, however, remain at your disposal to consider future requests to collaborate in hosting activities of the SADC Parliamentary Forum," she said.

The Standing Committee meetings where held at Phakalane Golf Estate in Botswana and Parliamentarians deliberated on three major issues: natural resources revenue, gender responsive budgeting and criminalization of willful HIV exposure and transmission in

the SADC Region.

In the past these meetings have been held back to back with the Plenary Assembly Session of the SADC PF, the supreme policy organ of the SADC PF. This was the first time that they were held separately and ahead of the 37th Plenary Assembly Session scheduled for July 2015 in Durban, South Africa.

Typically, Standing Committee Meetings afford Members of Parliament an opportunity to discuss in depth sectorial

issues such as food, agriculture, natural resources, infrastructure development, regional integration, HIV & AIDS, gender equality, youth development and democracy and governance.

Reports from these meetings are presented to the Plenary Assembly for policy formulation and endorsement ahead of implementation. During these meetings resource people made presentations on various issues and themes to enable Members of Parliament to appreciate issues and take informed decisions.



# Criminalising HIV transmission and exposure unlawful – SALC

Staff Writer

Criminalisation of HIV transmission and exposure may be unlawful by both common law standards of review and in terms of human rights law, a legal expert has said.

Ms Annabel Raw, who works for the Southern Africa Litigation Centre (SALC) said criminalisation of HIV transmission, exposure and non-disclosure was fraught with rights violations which were not justifiable to be permitted under law.

She said there were people who believed that criminalisation would deter transmission of HIV and control the spread of the virus, promote responsible behaviour or rehabilitate offenders, or to protect innocent persons from harm.

She said there was no evidence of a deterrent effect of criminalisation on onward transmission. Many studies had shown that the actual existence of these specific laws on the books had no deterrent effect, and the knowledge of an existence of such a law had no effect on the decision whether or not to use condoms.

There was evidence that criminalisation and stigma drove the epidemic by causing a low uptake of or poor adherence to prevention and treatment services.

“Extensive studies aimed at assessing the possible positive impact that criminalisation could have – including reducing partners, increased abstinence, condom use – found no rationality in HIV criminalisation,” she said.

She said the Kenyan High Court on 18 March 2015, in the AIDS Law Project case declared the criminalising provi-



*Ms Annabel Raw, of the Southern Africa Litigation Centre (SALC).*

sion under the HIV and AIDS Prevention and Control Act, 14 of 2006, unconstitutional.

Ms Raw said in order to hold someone liable for wilful transmission of HIV, one of the elements to be established beyond reasonable doubt included proving two aspects of foreseeability: awareness of HIV-positive status or the possibility thereof and knowledge or awareness of possibility of one’s infectiousness.

“Inevitably, this would require obtaining access to the accused’s medical records and/or calling as a witness the healthcare professional who delivered the results of the HIV antibody test and/or counselled the accused pre and or post-testing. Aside from the problematic public health implications of co-opting the healthcare system into criminal prosecution in this way, this (is) clearly a violation of the accused’s privacy, including the right to privacy as to one’s health status.”

She said human rights violations could arise from proving timing and direc-

tion of infection (that is to say that the alleged victim was not in fact the one who transmitted the virus).

“In principle, establishing the timing and direction of infection would require the highly invasive process of contacting everyone the complainant had sexual relationships with before testing HIV positive. This meant privacy violations of the most intimate aspects of the lives of all persons possibly involved and related to the case.”

Arguing from the perspective of a human rights lawyer and a public interest litigator, Ms Raw said the legal provisions that criminalised HIV transmission and exposure were fraught with unlawfulness that exposed them to common law review and constitutional challenge. She saw little prospect of such laws surviving judicial scrutiny on those grounds.

From a purely legal perspective, viewing persons living with HIV as human beings and patients before imposing on them a criminal identity would serve states’ best interests in many ways.



# “Law can be an enabler or an impediment in HIV response”

## Staff Writer

The law can be a good tool in terms of creating an enabling environment for an effective response of HIV but it can also be an impediment depending on how it is applied, an expert has said.

Ms Michaela Clayton, the Director of ARASA, said this when she provided an overview on criminalizing HIV transmission and exposure in the SADC Region to members of the standing committee of the Human Development and Special Programme of the SADC Parliamentary Forum.

“Good laws in place that help us respond to HIV are those that, for example, outlaw discrimination while bad laws aggravate the impact of the HIV epidemic.”

Ms Clayton reminded the delegates about some of the commitments that some governments had made over the years in response to HIV.

These include the 2001 Declaration of Commitment on HIV/AIDS; the 2006 Political Declaration on HIV/AIDS; the 2011 Political Declaration on HIV/AIDS; as well as international guidelines on HIV and Human Rights.

She drew the attention of the delegates to a series of policy guidelines given to countries by the UNAIDS and UNDP on criminalization of HIV.

“A 2008 Policy Brief recommended that countries limit criminalization to intentional transmission and avoid the introduction of HIV specific laws – rather apply general criminal offenses in a way that is consistent with international human rights obligations,” she said.

Ms Clayton stressed that those opposed to criminalization of HIV transmission were not suggesting that those running around and willfully infecting other people with HIV should go scot free or at there should be no come back for them. Rather, their argument is that using criminal law to respond to HIV is futile.

“We should avoid introducing HIV specific laws but rather apply general criminal offences.”

Ms Clayton said criminalization was particularly objectionable because of its propensity to disproportionately affect women.

She said recent developments in the treatment and management of HIV now warrant reconsideration of criminal law application. Not only does effective HIV treatment reduce deaths and extend life, but effective HIV treatment - especially that which reduces one’s viral load to undetectable levels – significantly reduces the risk of HIV transmission to negligible levels.

Ms Clayton said the new thinking was that since HIV was no longer a “death sentence which is going to reduce one’s life expectancy significantly and has become more of a chronic, manageable disease,” people should not be charged with attempted murder “because it is no longer attempted murder.”

According to Ms Clayton the Global Commission on HIV and the law has also reiterated the need to use general law to deal with people who willfully and intentionally spread HIV. She warned that enacting HIV specific laws would be unnecessary and counterproductive. Accordingly, the SADC Model Law on HIV for Southern Afri-



*Ms Michaela Clayton, the Director of ARASA.*

ca does not provide for criminalization of HIV transmission and/or exposure or non – disclosure.

“Out of the 15 SADC Member states, Angola, Botswana, DRC, Madagascar, Mozambique, Tanzania and Zimbabwe have enforced HIV-specific laws,” she said.

Her view was that the SADC Region’s Parliamentarians were under pressure to be seen to be responding to HIV, to prevent new infections and to protect those vulnerable to becoming infected, especially women.

● see *LAW* p.9





# Zambia pins hopes on more education, less stigma - MP

Staff Writer

The Republic of Zambia believes that increasing AIDS – related knowledge among the general population and ending stigma on people living with HIV are more effective strategies in halting and reversing HIV and AIDS than criminalization of HIV transmission.

Lawmaker Hon Gertrude Imenda told fellow Parliamentarians and other stakeholders gathered in Gaborone, Botswana that there were no specific laws that criminalize willful transmission of HIV in Zambia. Instead the country was exerting its energy on improving access to high quality health services including the treatment of sexually transmitted infections (STI's), increase in HIV counseling and testing services as well as the management of opportunistic infections.

“There is no mention in Zambian policy documents of any intention to criminalize the willful transmission of HIV,” Hon Imenda said.

She said Zambia was aware of the ongoing debate around criminalization of HIV willful transmission, with one school of thought holding that criminalizing would act as a deterrent and another arguing that doing so would be



Zambia's Parliamentarian Hon Gertrude Imenda.

counter productive.

“One proposal has been to enact HIV/AIDS specific laws, while the other one has been to utilize already existing laws to hold persons accused of willfully infecting others with diseases,”

including HIV, criminally liable,” she said.

Hon Imenda said in Zambia existing legislation including the Penal Code; the Public Health Act; and the Anti – Gender Based Violence Act No. 1 of 2011 could be used for purposes of prosecution.

“Various provision of the Penal Code, Chapter 87 of the Laws of Zambia could be used to prosecute any case relating to willful infection of HIV.”

Although nobody had been successfully prosecuted for transmitting HIV in Zambia, Hon Imenda said there had been instances in which the courts had used an accused person's HIV positive status in cases of defilement or rape, to stiffen sentences meted out. Hon Imenda said Zambia was aware of the argument that criminalization of willful transmission of HIV would fan stigma and discrimination while negatively affecting women as they were usually the first to know their HIV status.

“Further, the enactment of legislation that specifically criminalize willful infection of HIV/AIDS may have a lot of negative impacts, especially when it comes to proving intention in the courts of law.”

## ● LAW from p.8

Ms Clayton said there was no evidence to show that criminalization reduces HIV. On the contrary it removes people from mainstream society and confines them in high risk environments like prisons.

Given that most prisons are overcrowding and the fact that many governments do not provide con-

ditions in prisons, prisons are very high risk places in terms of HIV transmission.

She said criminalization would deter people from testing, create a false sense of security and create distrust between people living with HIV and health care providers.

“It contributes to stigma and further stigmatizes people living with HIV

as potential criminals and a threat.”

Ms Clayton said criminalization had a negative impact on women who are often the first to know their status since they go to antenatal clinics.

She noted that where criminalization had been embraced there had been instances of selective and unfair application, with men who have sex with men, sex workers and injecting drug users bearing the brunt.





*Dr. Manasa Dzirikure (center), the Senior Technical Advisor /Programme Manager for Vulnerable Children (OVC) and Youth Development at the SADC Secretariat urges SADC Member States to invest in the youth or lose out.*

# Parliaments urged to invest in the youths or miss out on dividends

Staff Writer

An official with the SADC Secretariat has challenged the region's Parliamentarians to ensure that their governments invest mightily in their young people or reap the proverbial whirlwind.

“Three quarters of our populations in SADC are below the age of 35 years. They are either children or the youths; children being those below the age of 18 and the youths being those aged between the age of 15 and 35 years,” Dr. Manasa Dzirikure, the Senior Technical Advisor /Programme Manager for Vulnerable Children (OVC) and Youth Development at the SADC Secretariat said.

He said in contrast to most European countries in which the majority of the population was made up of people

practically in their dotage, Africa had a huge population of young people.

“This huge population of young people that we have is actually a window of opportunity for us to capitalize on so that we realize rapid socioeconomic growth and development,” he told scores of Parliamentarians who were meeting for meetings of Standing Committees of the SADC Parliamentarians in Botswana recently.

He warned that unless African governments invest in young people by giving them good education, skills and opportunities, the young people might not become productive adults that are able to earn income and spend it.

Dzirikure said it was estimated that the SADC Region had a population of almost 258 million people that generate a gross Domestic Product of 471, 1 US\$

billion. Of these people, 215 million were below the age of 35.

“Nineteen million of these below the age of 35 are orphans, either because they have lost one or both parents. Millions others - because we do not have proper statistics, monitoring and evaluation systems - are youths who are vulnerable.”

He said HIV and AIDS, poverty and conflict were among the main causes of vulnerability among children and the youths.

“In some of our (SADC) member states that are worst affected by HIV like Lesotho, Swaziland, Zambia, Zimbabwe and a few others, sixty percent (60%) of orphans are due to AIDS – related deaths. That means out of every 10 orphans, six are as a result of AIDS.”



He revealed that in the Democratic Republic of Congo (DRC), the number of orphans was estimated to be approximately four million due to other causes than HIV and AIDS.

Dzirikure said unemployment in the region had assumed “pandemic” proportions.

“The majority of our youths are on the streets and we have many street children, constituting a serious threat to peace and security in our region.”

Additionally, he said, there was a huge mismatch between education and skills development and what the world economy needed.

Statistics from South Africa show that youths in conflict with the law constitute thirty-six (36%) of the country’s prison population aged sixteen (16) years and below according to the President’s Reports of 2008.”

“Sixty-nine percent of people detained by the police are between 18 and 35 years. Ninety percent (90%) of our children with disabilities are not in school,” he said.

With respect to tertiary enrollment, Dzirikure said data showed that only about seven percent of people who made it to tertiary institutions were youths.

“Thirty – three percent (33%) of children under five years of age are stunted and their mental capabilities are compromised. They risk becoming adults that are mentally challenged. They may not be insane, but their ability to think is compromised. It might look like a problem in childhood but it’s actually a problem in the long term,” he said to muffled sounds of “hear, hear”.

Dzirikure said the tragedy was that

the multitudes of the region’s vulnerable children were poised to blossom into “adults and parents that are vulnerable who bear vulnerable children.”

“We are trapped in a cycle.”

Turning to school enrollment, Dzirikure said data showed that about seventeen percent (17%) of the region’s children drop out of school in or before second grade of primary school.

“In some of our countries, eighty percent (80%) of children that are supposed to be in secondary school are not in school.”

Added to this, because of low access to family planning services and contraceptives, forty percent (40%) of pregnancies that occur in the region are reported “unwanted” with some countries that include Mozambique reporting more than fifty percent (50%) of children being married.

“In Angola statistics show that fifty-seven percent (57%) of adolescents have already given birth by the time they turn 18 years of age and they are not married.”

Dzirikure said although many SADC Member states had beautiful policies and programmes to address the plight of children and the youths, implementation remained a major challenge.

“Some of the reasons for lack of implementation include the fact that some of our programmes are vertical, sector-oriented, piecemeal, largely donor-driven, time-bound with conditions and plagued by a lot of duplication of efforts.”

“As a result many countries were failing to provide children with adequate service,” he said.

According to Dzirikure, the lack of

friendly services for children and vulnerable youths prevents many from seeking help, care and support. He gave the often-cited example of health care providers lampooning young people who present with sexually transmitted infections over how they got infected.

“Sometimes the young people are stigmatized. The environment is not conducive. Millions of children are falling through the cracks even where services are available. The workforce is overstretched, the service delivery systems overstretched, research very poor while monitoring and evaluation systems are weak. At the end of the day we hardly know that is happening.”

He said there was need for more focus on vulnerable children and youths, as well as for a common understanding of vulnerability.

In response to the plight of vulnerable children, the SADC Secretariat has come up with a strategy dubbed ‘comprehensive care and support for orphans, vulnerable children and youth in SADC’.

“We no longer want a piece meal approach. We want certain services to be identified and provided in a comprehensive manner. That is why we have come up with a minimum package of services.”

He said the package seeks to ring-fence children so that they do not fall through the cracks. Members of Parliaments should familiarize themselves with the minimum package of services so that they can use it to advocate and hold stakeholders to account to ensure implementation.

“Children must be at the center of everything we do; not objects of charity,” he concluded.



# MP's says criminalization of HIV transmission not based on evidence

Staff Writer

A Parliamentarian from Botswana has advised against knee-jerk responses to HIV and AIDS and argued that there is nothing to be gained from criminalization of HIV transmission.

The Honorable Duma Boko, the leader of the Umbrella for Democratic Change of Botswana, said although his country was also affected by HIV and AIDS, it had responded to the epidemic “in ways that are not the very best in terms of the outcomes envisioned.”

The Harvard – trained lawyer said the issue of criminalization of HIV transmission in Botswana had been “somewhat smuggled” into the country’s legislation through two main routes: first through criminalization in rape cases of an HIV positive status.

“What the law has tended to do is when a person is convicted of rape, the court orders that the person be tested for HIV for purposes of determining what sentence should be meted out,” he said.

Hon Boko explained that the minimum sentence for rape was ten (10) years in Botswana. If an accused person was HIV positive but was unaware of his or her status, the position was that the person be sentenced to fifteen (15) years in prison. If the person tested positive and it was established that they were aware of their HIV positive status, they could be jailed for a minimum of twenty (20) years.

“If you look at it, it has nothing to do with the fact of transmission because that is something that would have to be established by other evidence. The only evidence that is sought and relied on upon conviction, is the evidence of the status of the convict. That is why I say when that happens, what is criminalized is the HIV positive status of the individual rather than whether there



*The Honorable Duma Boko, (center) a Member of Parliament in Botswana.*

has been any transmission of HIV,” he argued.

According to Hon Boko, the second route via which criminalization of HIV transmission had been “smuggled” into the Botswana legislation had been through a controversial requirement for HIV positive people to make caregivers and others with whom they share certain facilities or utensils, know their status.

“That act (of non-disclosure) is deemed criminal,” he stated.

He revealed that when the debate around criminalization of HIV status began in Botswana, the country’s former Attorney-General acknowledged that the country’s response to HIV and AIDS in this regard had not been informed by any evidence advising government to take that route.

While refraining from speculating as to what would then likely happen in Botswana in light of the former Attorney-General’s admission, Hon Boko noted that when dealing with emotive issues such as HIV and AIDS, politicians were wont to respond “in a decid-

edly populist manner” and to ignore the weight of evidence.

“They want to be seen to be responding in a manner that evokes more emotions than substance and sense. The result, often, is to criminalize even when there is no evidence to show that criminalization achieves any positive outcome or even when there is evidence that criminalization defeats the ends that are envisaged.”

He postulated that criminalization of HIV transmission would be counter-productive as it would dissuade people from knowing their HIV status.

“It would make sense for a person to refuse to know their status so that if at any point issues arise there would be absolutely no way in which one can say they were aware because they never tested.

So rather than encourage people to be tested and be aware of their status, what the legislation would do is to encourage them not to test to avoid the risk of criminal prosecution. That would defeat the very purpose we want to achieve,” he submitted.



# MP says Malawi sees no good in criminalizing HIV transmission

Staff Writer

A Parliamentarian from Malawi has stated that her country subscribes to the view that criminalizing willful transmission of HIV might jinx efforts to halt and reverse the epidemic.

Presenting her country's stance on criminalization of willful transmission at a meeting held in Gaborone, Botswana, the Honorable Dr. Jessie Kabwila said criminalization might be counter productive.

"There is no evidence that using criminal law to respond to HIV is effective in protecting public health. Some evidence exists that it may, in fact, cause harm," Hon Kabwila said.

She said criminalizing HIV transmission could discourage some people from getting tested "since ignorance of HIV status may be a defense."

Noting that testing enables people to know their status to be able to take better care of themselves and those around them, Dr. Kabwila said criminalizing HIV transmission would also stop some people from accessing treatment, care and support.

According to Dr. Kabwila, Malawi is one of the countries significantly affected by HIV and AIDS, with approximately 1,060,000 people known to be living with HIV. Of these people, about 147 000 are children.

"This high disease burden has evidently slowed down development efforts as most resources are diverted to the health sector leaving the other equally important sectors inadequately supported," she explained.

She cited retrogressive cultural practices as among the key drivers of the HIV and AIDS epidemic in Malawi. Multi-

ple and concurrent sexual partners perpetuated by "men of economic (high) standing and even those construed as influential, having several sexual partners as a sign of machismo, popularity potency, virility and manhood" were other drivers.

"These attitudes, beliefs and values militate against contemporary preventive philosophies such as 'zero – grazing', or 'one – love' where persons are expected to be faithful to only one partner of their choosing in marriage or otherwise."

The outspoken lawmaker said many parents in her country considered sexual issues as taboos, leaving young people to learn about sex through experimentation, interaction with often clueless peers or from initiation rituals which exposed them to risk of contracting HIV.

The above-mentioned challenges not-

withstanding, Dr. Kabwila said Malawi's HIV and AIDS National Response was working. She cited the HIV and AIDS prevalence rate which declined from 14% in 2014 to 10, 6% in 2014; greater accessibility to ART services and a drop in new HIV infections as success stories in Malawi's response to the epidemic.

On the legislative front, the Malawi Law Commission had developed the HIV Prevention and Management Bill in 2008. Although still in draft form, the Bill sought, inter alia, to provide an institutional framework for effective regulation of the prevention and management of HIV and AIDS in Malawi.

"The Bill is a remedy that will effectively support the HIV and AIDS response as well as provide for the rights and obligations of persons living with or affected by HIV and AIDS in the country," Dr. Kabwila explained.



**TRAILBLAZER: Outspoken Malawi lawmaker Dr Jessie Kabwila.**



# MP says Zim for rethink on criminalisation of HIV infection

Staff Writer

A Parliamentarian from Zimbabwe says her country believes that countries that are working towards halting and reversing HIV should use the SADC Model Law on HIV while promoting dialogue on HIV and the law with all key stakeholders to generate a common understanding of the impact of inappropriate laws and practices in HIV mitigation.

Calling on the scaling up of access to prevention, testing, care and support for people living with HIV (PLHIV), Hon Jasmine Tofa said Zimbabwe remained convinced that the SADC Model Law should be the basis and guidelines for any meaningful deliberations HIV-related matters.

She said laws that criminalise HIV transmission in Sub Sahara Africa gained currency at the turn of the 21st Century with more than 20 African countries criminalising ‘wilful’ HIV exposure or transmission in a desperate attempt to stem new HIV infections.

She said as one of the countries severely affected by HIV and AIDS, Zimbabwe had over the years crafted policy and legislation (among other methods) to respond to the epidemic.

“A number of policies were put in place at the onset of the 21st century which have culminated in the HIV prevalence declining by 50% between 2001 and 2013. These policies and laws include the National AIDS Transition Fund Act of 2000 (AIDS Levy), National Aids Council (NAC) Act of 2000, Statutory Instrument (SI) 205 of 2014 for HIV and AIDS in the workplace (replacing SI 202 of 1998), National Anti-retroviral Treatment (ART) guidelines and the Zimbabwe National Strategic Plans I and II.”

Hon Tofa said although Zimbabwe did not have an outright HIV and AIDS Act,



*Zimbabwean Parliamentarian Hon Jasmine Tofa says the SADC Model Law on HIV is a good guide for countries responding to HIV and AIDS in the SADC Region.*

criminalisation of wilful HIV transmission was provided for under Section 79 of the Criminal Law (Codification and Reform) Act [chapter 9:23] (operationalised in 2006).

She said various stakeholders that include civil society, Parliamentary Committees on Health and HIV/AIDS had held discussions on the provisions of Zimbabwe’s law and juxtaposing it with best practices that can be considered to deal with the scourge of wilful transmission of HIV/AIDS.

“The underlying thread of the presentations made by the stakeholders has been that, on the surface, laws that criminalise HIV exposure or transmission may appear logical and progressive but

upon closer analysis, these laws are retrogressive as they promote stigma and discrimination, and hence run contrary to fundamental public health goals and to stemming the advance of HIV in the communities.”

Hon Tofa said although criminalisation may have had noble intentions when it was mooted and introduced, there was growing evidence to show that criminal law had been inappropriately used as a tool to manage the epidemic.

“Specifically, the criminalisation of wilful transmission has not led to significant reversals in the spread of the disease.”

● see *RETHINK* page 15



# Namibia says criminalization would drive HIV epidemic underground

## Staff Writer

The Republic of Namibia does not plan to pass an HIV – specific law criminalizing willful transmission of HIV as doing so would further stigmatize and marginalize people living with HIV, according to a Parliamentarian.

Namibian Parliamentarian Hon Faustina Caley said this when she spoke during a meeting of the Standing Committee on Human and Social Development and Special Programmes of the SADC Parliamentary Forum which took place in Gaborone, Botswana.

She explained that Namibia had a number of policies and legal instruments meant to combat and reduce HIV. These include: the Combating of Rape Act No. 8 of 2000; the Criminal Procedure Act No. 25 of 2004; the National Policy on HIV/AIDS of 2007; the National Strategic framework for HIV and AIDS response in Namibia (2010 – 2020).

“Namibia does not have a specific law that criminalises willful transmission of HIV. Cases of such a na-



*Namibian Parliamentarian Hon Faustina Caley*

ture when they arise are dealt with under the Criminal Procedure Act No. 25 of 2014,” Hon Caley explained.

She said under exiting laws, Namibia regards willful transmission of HIV as attempted murder.

“A person who willfully infects another and is proven beyond reasonable doubt could be charged with one of the following crimes in Namibia: murder,

culpable homicide, assault with intent to cause grievous bodily harm, attempted murder or attempted assault where the accused intended to infect the other person but did not succeed in doing so,” she said.

Stressing that successfully prosecuting anyone for placing another at risk of HIV infection was “very difficult,” Hon Caley said criminalization would further marginalize vulnerable groups that include sex workers.

“A criminalization law could sabotage efforts to encourage voluntary testing for HIV because many people would not want to know their status for various reasons one being fear of persecution,” she said.

Noting that HIV was normally transmitted through consensual sex between parties who may not be aware of their HIV status, Hon Caley said criminalization would make all positive people potential criminals.

“There is no crime involved in consensual sex. HIV is a public health issue not a criminal law issue.”

## ● *RETHINK from page 14*

She said following the development of the SADC Model Law on HIV / AIDS, Zimbabwe’s Ministry of Health and Child Care and the National AIDS Council, had opened progressive discussions with Parliament and the political leadership on the prospects of reviewing the nation’s legislative environment germane to HIV and AIDS interventions.

The MP said there was a general consensus in Zimbabwe that the epidemic was on a downward trend following the introduction of ART in 2004.

“Zimbabwe has recorded legislative success stories of the AIDS Levy (National AIDS Transition Fund), establishment of NAC, National ART guidelines, reviewing of the statutory instrument on HIV and AIDS in the workplace and very little on the criminalisation and wilful transmission of the epidemic. Several programmatic interventions are generally acknowledged for the impressive drop in HIV and AIDS incidence, and prevalence and they are proof of what has worked in Zimbabwe.”

Quoting UNAIDS (2008), she said: “There is no data indicating that the

broad application of criminal law to HIV transmission will achieve either criminal justice or prevent HIV transmission. Rather, such application risks undermining public health and human rights ...”

She urged countries to review and strengthen existing polices and legislation, guidelines and standards that impinge on effective and efficient implementation of the national response in respect of the human rights of all people infected or affected by HIV.



# Tanzania law criminalises HIV transmission - MP

Staff Writer

A Parliamentarian from the United Republic of Tanzania has explained that her county – after wide consultation – passed a law that criminalises willful and intentional transmission of HIV.

Hon Stella Manyanya said the HIV and AIDS (Prevention and Control) Act of 2008 was passed in the hope that it would deter people from intentionally spreading HIV.

Under this law any person who willfully and intentionally transmits HIV to another person in Tanzania commits an offense, and upon conviction shall be liable to life imprisonment.

Anyone who breaches provisions related to safety procedures can also be fined and or imprisoned for up to three months. Negligent health care facilities can also be fined heavily.

“When the law was enacted it was openly debated by various stakeholders including the media,” she said.

Hon Manyanya tried to appeal to the emotions of scores of Parliamentarians and other stakeholders who met in Botswana to discuss criminalization on the HIV transmission.

“Is there a possibility of one deliberately transmitting HIV? If the answer is ‘yes’, how? If so, suppose you were among those victims, how would you feel?” she asked the delegates.

She argued that the issue of human rights was nettlesome in the context of HIV and AIDS.

“Who are supposed to get the rights: the victims or those who transmit HIV? The world is in a dilemma. We are in a very complicated situation whereby we are trying to combat this disease while at the same time we have people with different understanding of approaches,” she said.

While admitting that law was not a panacea to societal ills, Hon Manyanya said her country’s view was that law can be a deterrent.

Her view was that the law could protect people from others who intentionally spread HIV.



*Hon Stella Manyanya of the United Republic of Tanzania says her country’s HIV and AIDS (Prevention and Control) Act of 2008 was passed in the hope that it would deter people from intentionally spreading HIV.*







*Hon Bonisile Mngometulu, a Senator from the Kingdom of Swaziland speaks about Swaziland's position.*

# Swaziland says criminalization of HIV transmission fuels stigma

Staff Writer

The Kingdom of Swaziland is convinced that existing criminal laws can and should be used to punish people who willfully transmit HIV.

Presenting her country's position on the contentious issue of criminalization of wilful HIV transmission, exposure and non-disclosure, Hon Bonisile Mngometulu, a Senator, said in light of the foregoing, the Kingdom of Swaziland would not enact HIV-specific laws.

She argued that given the fact that HIV was one of many diseases that could be transmitted like Hepatitis B and Syphilis, criminalizing its transmission would be tantamount to passing a dis-

criminative law targeting people living with HIV.

Senator Mngometulu said that in a region in which multitude concurrent sexual relationships were known to exist, it would not be easy to prove who infected who or when.

"In a multitude of concurrent sexual partnership, how do you tell between your partners who infected you? How does one prove beyond reasonable doubt in a court of law that, indeed, one was infected during the last sexual encounter?" she asked.

She said international guidance on HIV and human rights, supported by evidence, did not recommend the use of criminal law in response to HIV. Rath-

er, she noted, that guidance calls on member states to review criminal law to ensure that it is not inappropriately used in the context of HIV and that it does not target vulnerable key populations.

Elsewhere, experts against criminalisation of wilful HIV transmission and nondisclosure have argued that taking such a route would discourage some people from testing for HIV.

Others have raised concerns over the enactment of overly-broad HIV-specific laws as well as inappropriate application of general criminal law offences to HIV nondisclosure, exposure and transmission. Other concerns have been related to selective application and enforcement of such laws.





*South African Parliamentarian Hon Shaik Emam.*

# No HIV-specific law in South Africa - MP

**Staff Writer**

**A** South African Parliamentarian has said that his country has not enacted HIV-specific legislation, despite having the highest HIV prevalence globally.

Hon Shaik Emam, said instead, South Africa uses the criminal law system, in line with guidelines suggested by the Joint United Nations Programme on

HIV/AIDS (UNAIDS).

“UNAIDS further recommends that governments that already have HIV-specific criminal legislation in place should repeal these, as well as laws that directly mandate the disclosure of HIV status. This is on the premise that HIV-specific laws are counterproductive to HIV prevention, treatment, care and support, and they violate the human rights of people living with HIV,”

the outspoken MP said.

Turning to the legal implications of HIV transmission, the lawmaker dealt at length on the definition of three terms normally brought up each time people try to apply the law in matters related to HIV transmission. These are deliberate, reckless and accidental.

● *see SOUTH AFRICA p.19*



● **SOUTH AFRICA** from p.18

He stressed that these terms and their definitions were not linked to any particular country or legal system but served to depict the complexity of HIV criminalisation.

“Deliberate transmission refers to ‘intentional transmission of HIV from one person to the other.’ This offence is considered to be serious because it relates to grievous bodily harm, hence it is punished harshly before the court of law. To this end, some cases have involved HIV positive and negative people who have used needles or other implements to deliberately infect others with HIV,” he explained.

He said intentional transmission also takes place when a negative partner has an active desire to become infected with HIV. On the other hand, reckless transmission refers to infection as a result of carelessness from the other partner causing the other to be HIV positive.

He gave the example of one partner who, while aware of his or her status, practices unprotected sex with a negative partner but does not discuss the status and the risks of HIV infection.

“Accidental transmission mainly refers to the partner who passes the virus – unknowingly, either through unprotected sex or syringe sharing. It also refers to one partner getting infected as per the failure of condom use and this is purported to be the most common way that HIV is said to be passed on in cases that have been presented before courts in some countries,” he said.

Hon Emam said the prevalence of HIV and AIDS and its implications on the health, legal and socio-economic aspects of society had prompted legal debate on the criminalisation of the wilful infection of HIV.

“To this end, there are two interna-

tional approaches which deal with HIV infections: the approach that promotes non-coercive measures and an approach which promotes coercive measures. The approach advocating a non-coercive approach entails providing people with education and information, including promoting voluntary testing, counselling and anti-discriminatory legislation.”

According to the MP, the approach which advocates coercive measures uses HIV specific criminal laws, quarantine and isolation. He explained that in the context of deliberate or intentional HIV transmission, South Africa uses Common Law which is defined as “a combination of commonly accepted traditions, principles and judicial decisions as well as case precedents”.

“Given that South Africa has unprecedented HIV incidences, including a notable prevalence of sexual violence; it uses the existing laws with provisions regarding HIV transmission in respect of the criminal law.”

He explained that South Africa’s Criminal Law Amendment Act employs the concept of minimum sentencing for serious crimes when committed. Section 51(1) of that Act prescribes a sentence of life imprisonment for any person convicted of an offence referred to in Part 1 of Schedule 2. According to Part 1 Schedule 2 of the Act, it is an offence for a person to have committed a crime of rape, whilst knowing that he or she is HIV positive at the time the offence is committed.

“The Sexual Offences Act is within the framework of South Africa’s Constitution in that it underscores human dignity and privacy; however it empowers the Court of law to order for compulsory HIV testing in pursuit of justice. For example, the victim or interested party acting on behalf of the victim may make an application for the HIV testing of an alleged sex of-

fender.”

He said there had been a few instances in South Africa where the criminal law was used to prosecute the deliberate or intentional transmission of HIV.

Hon Emam said South Africa’s Portfolio Committee on Justice one requested the Minister of Justice to institute an inquiry on the wilful transmission of HIV. The Minister requested the Southern Africa Litigation Centre (SALC) to conduct a comprehensive inquiry and make recommendations on whether to adopt wilful transmission of HIV or existing law to punish deliberate transmission of HIV.

He said it was conceded that most countries which had enacted HIV specific laws were unable to reduce prevalence and that applying criminal law to HIV exposure or transmission would not reduce the spread of HIV and would undermine HIV prevention efforts.

It was also noted that applying criminal law to HIV exposure or transmission would promote fear and stigma. Far from providing justice to women, it would endanger and further oppress. It was noted that laws criminalising HIV exposure and transmission tended to be drafted and applied too broadly, unfairly, selectively and ineffectively

Hon Emam said SALC concluded its study by stating that an HIV-specific statutory offence or offenses would have no or little practical utility and that such a move would infringe people’s right to privacy to an extent that would not be justifiable.

He concluded that although South Africa had the highest HIV prevalence and sexual violence remained a concern, the country held the view that that criminalisation of HIV is counterproductive and reverses gains made in preventing further HIV transmission and mitigating its effects.



# CAMERA EYE

