To be, or not to be - Denmark's HIV-specific law

April 4, 2011 By Edwin Bernard

Something is not-so-rotten in the state of Denmark. In February, Denmark's Justice Minister Lars Barfoed announced the suspension of Article 252 of the Danish Criminal Code - the so-called 'HIV law' - pending an inquiry by a government working group to consider whether the only HIV-specific criminal law in Western Europe should be revised or abolished.

Denmark prosecuted its first case in 1993, but the Danish Supreme Court found in 1994 that the wording of the existing law ("wantonly or recklessly endangering life or physical ability") did not provide a clear legal base for conviction. The phrase "fatal and incurable disease" was added in 1994, and HIV was singled out as the only cause of a "fatal and incurable disease" that could be prosecuted under this law in 2001.

According to GNP+'s Global Criminalisation Scan there have been at least 18 prosecutions since 1993, more than half of which involved non-Danish nationals, including seven people of African origin. There have been at least eleven convictions for either sexual HIV exposure or transmission. At least one of the remaining cases failed due to the accused committing suicide.

Minister Barfoed's announcement came about as a result of a Parliamentary question from opposition Unity MP, Per Clausen on behalf of the Parliamentary Legal Committee.

"The Minister should state whether the Ministry [of Justice] will consider changing or eliminating the special clause in the legislation that criminalizes [HIV-positive individuals for] unprotected sex with uninfected [individuals] in light of the significantly improved treatment options for HIV-positive people, in particular since treatment is able to reduce the risk of infection to

[near] zero.”

In his reply, Minister Barfoed explains the history of the legislation and then quotes the Danish Health Protection Agency’s take on HIV’s ’risk’ and ’harm’.

“Modern combination therapy reduces HIV in the blood by more than 99% during the first weeks of treatment, whereby patients’ general condition improves. The strongly reduced amount of HIV in blood and tissue fluids also greatly reduces the risk of transmission from an HIV-positive person on antiviral therapy. This greatly reduced risk is difficult to quantify but considering the risk to be near zero is a theory that some doctors have put forward, but there is no national or international consensus that about this…The life-expectancy of someone with HIV is no different from the age- and gender-matched background population. HIV is, in other words, not in itself fatal if treated in time; medication taken regularly; and there are otherwise no complications from other diseases, etc. Timely treatment is now so effective and well tolerated, that 85-90% of patients can live normal lives if they take

> their medication daily. It is the 5-10% of patients who are diagnosed late who still experience a substantial excess mortality and morbidity. [However] HIV is still incurable."

He goes on to say that the law as it is currently written - casting HIV as a life-threatening condition and criminalizing unprotected sex by a person with HIV - appears to be obsolete and that the working group must consider whether to amend, or totally rewrite, Article 252.

Minister Barfoed's move was immediately welcomed by the main HIV organization in Denmark, AIDS-Fondet (Danish AIDS Foundation). In their press release AIDS-Fondet notes that it has been working on changing the law for years and very much welcomes this development:

> We hope this suspension is the beginning of the end of the so-called HIV Criminal Law. This criminal provision is in itself a barrier to prevention, and there has also long been a need for the improved treatment of HIV-people to be reflected in the Penal Code, says Henriette Laursen, AIDS-Fondet's director.

AIDS-Fondet is now working hard behind-the-scenes to persuade the Danish Government not to simply rework the law, but to abolish it altogether by avoiding singling out HIV.

They are specifically asking the working group to consider making only the intentional transmission of a serious communicable disease a criminal offence, as recommended by UNAIDS, and to focus instead on supporting people with HIV (diagnosed and, even more importantly for public health, undiagnosed) to access comprehensive prevention, counselling, testing, treatment, care and support services.

If you work for a non-governmental or community-based organization that cares about criminalization, AIDS-Fondet would really like your help. Last week, they sent out a sign-on letter which begins:

We would like to share with you the good news that last month the Danish Justice Minister suspended Article 252 of the Danish Penal Code used to prosecute people living with HIV for ’wanton or reckless’ exposure or transmission of HIV. This is the only criminal statute in Western Europe that singles out HIV as “a fatal and incurable disease.”

The law is undergoing revision and a working group is currently considering whether to amend, or totally rewrite, Article 252.

To help this process along, the Danish AIDS Foundation is seeking your endorsement of a letter to the Danish Minister of Justice and the Danish Minister of Health who are leading the working group comprising representatives from the Ministry of Interior, Ministry of Health, the National Board of Health and the Prosecutor General.

By signing, you help:

- in congratulating the Ministers on their recent decision to suspend the Danish Penal Code that criminalises HIV exposure and transmission
- to ensure that during the revision process the Danish Government takes into due consideration whether the particular section singling out HIV should exist in the Penal Code at all.

It is our hope that a successful revision of the Danish Penal Code will allow for other countries to follow suit.

If your organization wishes to endorse the letter, please send an email to laura@aidsfondet.dk and include the NAME OF YOUR ORGANIZATION and COUNTRY before 29th April 2011. Your help is very much appreciated!

(You can read the full text of the letter at the bottom of this post, or download it as a pdf here.)

Importantly, what happens in Denmark doesn't just stay in Denmark. If the Danes make the right decision and repeal their HIV-specific criminal law, this could have a profound effect on criminalization policy all around the world, including in the United States.

After all, an important recommendation in the *National HIV/AIDS Strategy* is that:

State legislatures should consider reviewing HIV-specific criminal statutes to ensure that they are consistent with current knowledge of HIV transmission and support

public health approaches to preventing and treating HIV.

This recommendation was endorsed and reinforced last month by the National Alliance of State and Territorial AIDS Directors (NASTAD), a highly-respected organization of public health officials that administer state and territorial HIV prevention and care programmes throughout the US.

The take-home message of the NASTAD statement is clear: repeal HIV-specific criminal laws because:

HIV criminalization undercuts our most basic HIV prevention and sexual health messages, and breeds ignorance, fear and discrimination against people living with HIV.

To parapahrase South Africa's Justice Edwin Cameron - who argued in his excellent 2009 article for Norwegian newspaper, Dagbladet, "that by applying its own discriminatory legislation, Norway in effect exports stigma," - by abolishing its own HIV-specific law, Denmark in effect would lead the world by exporting rational, public health-based policy.

Dear Minister of Justice, Mr. Lars Barfoed and Minister of Health, Mr. Bertel Haarder

We, the undersigned, non-governmental and community-based organisations, national and regional networks working on HIV and AIDS congratulate you on your wise decision to suspend section 252 (2) and (3) of the Danish

Penal Code on HIV and AIDS.

The remarkable progress in treatment options for people living with HIV that allows for the possibility of a normal life expectancy, and greatly reduces the possibility of exposing others to HIV is certainly a good reason to reconsider the law on HIV and AIDS.

However, in your important work on the revision of the Danish law, we strongly urge you to consider whether the particular section in the Penal Code that relates specifically to HIV exposure or transmission should exist at all. HIV exposure or transmission should not be singled out for special consideration as a criminal offence but should be treated in the same manner as other serious communicable diseases.

Punitive laws on HIV and AIDS undercut basic HIV prevention and sexual health messages and are

ineffective in reducing the spread of HIV. Since HIV mainly spreads from persons not aware of their HIV status, such laws only fuel ignorance, fear, stigma and discrimination against people aware they are living with the virus. We strongly believe such laws are counterproductive since they lessen the likelihood that individuals will learn their HIV status and access treatment.

In our opinion, consistent with rational, public health-based policy, only intentional transmission of a serious communicable disease should be criminalised. In addition, we strongly suggest that the Danish Government support efforts that emphasise shared responsibility for HIV prevention and the importance of providing comprehensive prevention and care services for people living with HIV to help reduce the risk of transmission to others.

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