In Switzerland, two different non-HIV-specific statutes can be applied to HIV exposure or transmission. Art. 231 of the Penal Code allows the prosecution of anyone who spreads “intentionally or by neglect a dangerous transmissible human disease” without the need of a claimant. Disclosure of HIV-positive status and/or consent to unprotected sex does not prevent the offence, in effect criminalising all unprotected sex by people with HIV.

In addition, art. 122 (relating to grievous bodily harm) can be used to prosecute HIV transmission after unprotected sexual intercourse without disclosure. In that case, disclosure and consent are a defense, and a claimant is required. We do not wish to eliminate art. 122, but we oppose how prosecutors have been using this article.

Art. 231 is not a specifically HIV/AIDS aimed legislation but has survived as an old article of the Swiss Penal Code adopted at the end of the 1940s in order to fight the propagation of syphilis among sex workers. At that time, the Swiss Penal Code allowed the punishment of the transmission committed with harmful intention.

Despite the significant scientific progress in the field of antiretroviral therapy (ART) massively decreasing the risk of transmission (EKAF statement, 2008) and the decrease of HIV seen nowadays in western countries as a chronic infection, a significant number of cases, in Switzerland, still come before the courts as a result of this article, sometimes used in connection with art. 122.

On the international level, it is recognized that the criminalization of HIV exposure and non-intentional transmission goes against all preventive efforts and places the whole responsibility on HIV-positive people. This was also identified in a special report presented at the UN Human Rights Council in Geneva in June 2010.1

The EKAF adopted a long-term and multipronged strategy to modify the application of article 231 in the courts as well as to change the wording of the article, in order to incriminate only HIV transmission committed with harmful intention.

We have identified three main components in this strategy:

**The Evidence: why the law is problematic**

By supporting and participating in studies, publications and research, the EKAF is trying to achieve a comprehensive knowledge of all aspects of the problematic use of art. 231 in order to support, with scientific evidence, the necessity of a change in the law.

The so-called “Swiss Statement”2 from the EKAF in 2008, widely discussed during AIDS 2008 in Mexico City, in regard to the non-transmissibility of HIV under ART was a major step in creating awareness not only within the scientifc community, but also in courts and among prosecutors, that today a person living with HIV cannot be automatically considered infectious.

**The Law: changing its application**

The EKAF also supported all efforts to change the interpretation and application of art. 231 before the Swiss courts, notably encouraging a special- transmision debate. This is why it was successful following the publication of the “Swiss Statement”. In early 2009, an HIV exposure case was appealed in Geneva and finally dismissed in early 2009 after both prosecutor and judge took the Statement into account. However, in the absence of an appeal to a higher court, this case does not yet constitute binding case-law for courts in Switzerland’s other cantons.

**The Political Process: change the law**

Given the many pitfalls that can occur in the Swiss political and legislative process, it is very difficult to erase an article from the Penal Code. In most countries, historically, Penal Codes tend to grow, adding more and more articles over time. In order to avoid this issue, EKAF opted for a solution that leads for the modification of the article, leaving only intentional transmission as a criminal offence.

The modification of art. 231 of the Swiss Penal Code is now accepted in the draft of a new Law on Epidemics. The EKAF continues to engage in the debate on this topic by collaborating with partners (NGOs etc.) in order to sustain the necessary political pressure to modify the art. 231 of the Penal Code, foreseen in the Law on Epidemics. The EKAF also regularly wrote to or attended meetings with political leaders in order to keep the issue at a certain level of visibility.

The new Law on Epidemics should be discussed before Parliament next year. If it passes, this will automatically change the text of the community, only intentional transmission as a criminal offence.

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2 http://www.ekaf.ch