

Breastfeeding defence

Defence Toolkit For: Lawyers, paralegals & advocates

The Allegation: HIV exposure or transmission through breastfeeding, chestfeeding or comfort nursing

Take action! Provide a vigorous defence. Inform. Educate. Protect.

Criminal prosecutions related to presumed HIV exposure via breastfeeding are all-too-often driven by stigma, misinformation, and the desire to protect a child from an exaggerated risk. People living with HIV therefore require a vigorous defence based on principles of justice and human rights, good public policy and accurate science.

Inexperienced with respect to HIV? Start here.

[HIV and AIDS - Basic facts \(UNAIDS\)](#)

[Stigma and HIV \(AVERT\)](#)

[HIV disclosure \(NAM\)](#)

Key facts

- The possibility of transmitting HIV through breastfeeding/chestfeeding without antiretroviral treatment is approximately 15%. ART treatment greatly lowers the possibility of HIV transmission.
- According to WHO (2023), a pregnant person living with HIV whose viral load is suppressed within four weeks of delivery is at low risk of transmitting HIV to their infant. WHO recommends breastfeeding/chestfeeding for those taking ART treatment.
- Prosecutions are driven by HIV stigma, misinformation, and misguided ideas of child protection.
- Decisions regarding infant feeding are influenced by culture, accessibility of information and support, past experience with infant feeding, and place of residence.
- Punitive approaches seldom produce good outcomes in maternal and child health.

A note to criminal defence lawyers

The following lines of arguments may contribute to a solid defence strategy.

Case preparation checklist

- HIV status and ART treatment of the accused
 - If the accused is living with HIV, their viral load is relevant to the possibility of HIV transmission to the infant. The risk is greatly reduced with a suppressed viral load.
- duration of feeding
 - The more breastmilk the infant consumes, the greater the risk of acquiring HIV. A single instance of breastfeeding for example, is very different than multiple feedings per day over several months.
- elements of the specific offence
 - Different legal provisions have been used to prosecute people living with HIV for breastfeeding.
- mental culpability/intent
 - Why your client was breastfeeding/chestfeeding the child and their knowledge with respect to HIV and breastmilk may be relevant to the case.
- public policy arguments against criminalisation of breastfeeding, chestfeeding and/or comfort nursing
 - This is a complex issue and there are strong arguments against applying the criminal law.

HIV and breastfeeding/chestfeeding

Infant feeding choices are complex and personal. Breastmilk contains excellent nutrition, antibodies and immune cells, and has been shown to have widespread physical and psychological development benefits for children. There are HIV reservoirs in breastmilk, however, that can result in HIV transmission.

The transmission risk depends on viral load and treatment, the length and intensity of breastfeeding (i.e., quantity of milk consumed), the presence of inflammation, and whether preventative treatment is provided to the infant (i.e., HIV medications given to the child to prevent them from acquiring HIV).

[Affidavit provided to the Malawi High Court from Dr R. Bland concluding that in her expert opinion the risk of HIV transmission to the child after a single exposure to breast milk from a woman on ART is “infinitesimally small”. \(Criminal Appeal No. 36 of 2016\)](#)

[List of journal articles on breastfeeding and HIV transmission](#)

Justice and Human Rights

[Affidavit provided to the Malawi High Court from Michaela Clayton concluding in her expert opinion that HIV criminalisation was unlikely to prevent new infections or reduce women’s vulnerability to HIV but could harm women and negatively impact both public health and human rights. \(Criminal Appeal No. 36 of 2016\)](#)

[Landmark ruling of Zomba High Court in Malawi overturning criminal conviction for HIV exposure through breastfeeding. \(E.L., Criminal Appeal No. 36 of 2016\)](#)

[Ruling of High Court of Zimbabwe finding that the legislature did not intend that breastfeeding by HIV-positive women be criminalised and accused did not appreciate that her conduct could result in HIV transmission. \(Semba, CRB RMW 95/14, 2015\)](#)

[The threat lives on: How to exclude expectant mothers from prosecution for mere exposure of HIV to their fetuses and infants. Shahabudeen K. Khan. \(63 Clev. St. L. Rev. 429 \(2015e\)](#)

ACTION

Contact Us

HJN actively campaigns against the criminalisation of people living with HIV for breastfeeding, chestfeeding or comfort nursing.

If you are aware of a case of someone living with HIV facing criminal prosecution in relation to breastfeeding, chestfeeding or comfort nursing, please contact us at breastfeeding@hivjustice.net.

ACTION

Advocate for uninterrupted access to HIV treatment

Antiretroviral treatment must be taken consistently in order to be effective. If your client is in prison or another closed setting, advocate for their uninterrupted access to HIV treatment from arrest to release, and for other medical needs such as nutritional supplements, tuberculosis testing and treatment, prevention and treatment of sexually transmitted infections, and opioid substitution therapy. HIV-related medical needs are another reason to avoid pre-trial detention and custodial sentences, whenever possible.

If the infant is in prison with the parent, the infant may also require medication and nutritional supplementation. Advocate for alternatives to imprisonment and expert paediatric medical care.

A note about mothers vs others

The majority of the women who have faced criminal prosecution in relation to breastfeeding or comfort nursing have been charged in relation to feeding *another person's child* (referred to as third-party breastfeeding or cross-feeding). Often, these women have been employed as caregivers.

Third-party breastfeeding or cross-feeding is not uncommon in various regions and cultures.

Where the accused would not have faced criminal prosecution in relation to the feeding/nursing had they not been living with HIV, criminal prosecution can not be justified unless there is an intent to transmit and actual transmission.

ACTION

Feedback

We'd appreciate your feedback on this Action Toolkit! Please take a moment to complete this [short survey](#).