

Background:

Between 1989-2009 Canada has had a total of 104 cases and 98 criminal charges laid in relation to HIV non-disclosure¹. As an AIDS service organization, we are concerned with the number of cases that have been brought forward regarding HIV non-disclosure and have developed the below policy outlining our position on the issue by examining the arguments for and against the criminalization of HIV non-disclosure.

AIDS Calgary Policy:

AIDS Calgary Awareness Association is the largest AIDS Service organization in Alberta. We believe in harm reduction, human rights and the promotion of education, advocacy and prevention efforts pertaining to the transmission of HIV. Therefore AIDS Calgary opposes the criminalization of HIV transmission and/or exposure. The exception to this includes proven purposeful or malicious transmission of HIV with intent to harm and in these rare cases we encourage that existing criminal laws can and should be applied. A more appropriate and effective response to those who knowingly or unknowingly transmit HIV would be to utilize current public health procedures and programs.

Arguments for the Criminalization of HIV Non-disclosure Include:

Deterrence:

Those in favor of criminalization believe that the application of the law will effectively deter individuals from committing further acts of transmission.

Rehabilitation:

Those in favor of rehabilitation believe that incarceration will enhance prevention efforts, and assist in the rehabilitation of those who have knowingly spread HIV.

Complications surrounding HIV disclosure:

Those in favor of criminalization believe that they have the right to protection from those who may be unwilling or unable to disclose their HIV status through the utilization of the criminal justice system.

Stigma & Discrimination:

Those in favor of criminalization believe that the use of the law will assist in the protection of the general public, including those who may be marginalized.

¹ HIV Non-Disclosure and the Criminal Law: Establishing Policy Options for Ontario. Ontario HIV Treatment Network, 2010. <http://www.catie.ca/pdf/Brochures/HIV-non-disclosure-criminal-law.pdf>

Arguments against the criminalization of HIV non-disclosure:

Deterrence:

There is no evidence to support the claim that criminalization is an effective deterrent for individuals. This is especially true in the first few months of infection, as the individual most likely does not know they are carrying the virus². To prosecute people living with HIV would directly contradict efforts to prevent HIV transmission by encouraging safer sexual practices, voluntary HIV testing, and voluntary disclosure³.

Rehabilitation:

Placing people living with HIV in prison is only going to enhance the risk of HIV transmission to others. Prisons often do not provide access to harm reduction supplies such as condoms, regular testing and syringes. Appropriate rehabilitation would include access to current information, counseling services and safer sex and drug use equipment. Available data shows no difference in behaviour between places where laws criminalizing HIV transmission exist and where they do not³. (UNAIDS)

Complications surrounding HIV disclosure:

The courts “have not clearly defined in law what counts as a significant risk of HIV transmission¹. There are no specific laws regarding HIV exposure or transmission. Therefore it is up to interpretation on what significant risk is. This is decided upon by individual courts and judges. There have been charges laid in cases where evidence would state that there was no “significant risk” (i.e. vaginal intercourse with a condom).

There are complications surrounding disclosing your HIV status, some which may include: An individual may not know their HIV status, the person living with HIV may have taken appropriate precautions (i.e. condom use), they may not have the mental or emotional capacity to disclose (i.e. disability, under the influence of drugs or alcohol, etc.), or they may not disclose due to fear of violence, discrimination or other serious negative consequences. The available evidence shows that most people living with HIV who know their status take steps to prevent transmitting HIV to others³.

Stigma and Discrimination:

The handling of charges laid and the inconsistency in the sentencing handed down has led to sensationalism, promoted fear and ignorance in the community about how HIV transmission happens. Additionally, poor media coverage has also created

² 10 Reasons to oppose the Criminalization of HIV exposure of transmission: Open Societies Foundation. Retrieved 2011 from:

http://www.soros.org/initiatives/health/focus/law/articles_publications/publications/10reasons_20080918

³ UNAIDS Policy Brief Criminalization of HIV Transmission. Retrieved 2011 from:

http://data.unaids.org/pub/basedocument/2008/20080731_jc1513_policy_criminalization_en.pdf

further stigma as it often paints those undergoing prosecution as immoral and highly dangerous individuals. It has also shown a complete disregard to the confidentiality rights that someone living with HIV should be entitled to. Prosecutions and convictions are likely to be disproportionately applied to members of marginalized groups, such as sex workers, men who have sex with men, culturally diverse individuals and people who use drugs. We are also concerned that with the issues of stigma and discrimination and fear of prosecution that this will create yet another reason people do not get tested for HIV.

Conclusion:

We recommend an approach whereby there is universal access to prevention and public health measures. We believe in a approach where individuals are counselled and educated on how best to engage in safer sex and are given the tools to do so. There is a need to educate the broader community beyond those living with HIV about the risks of engaging in unprotected sex and to ensure a sense of personal responsibility. We cannot assume anything about our sexual partners' history and as individuals have to take the steps needed to protect ourselves. If there continues to be cases where we are criminalizing HIV non-disclosure we recommend the development and use of universal guidelines to criminalize that is based on scientific and evidence based information about transmission.

These considerations are compiled from the following sources:

1. Open Society Institute. (www.soros.org). 10 Reasons to Oppose the Criminalization of HIV Exposure or Transmission, 2008.

This resource focuses on criminalization as a human rights issue with arguments particularly related to the developing world; however, this focus can also be interpreted in a Canadian context.

2. HIV Non-Disclosure and the Criminal Law: Establishing Policy Options for Ontario, 2010.

In reviewing the 104 criminal cases in the instances of HIV related convictions, specific patterns around criminalization were discovered. For instance, three inconsistencies outlined included, “inconsistencies in evidence, inconsistencies in how courts have interpreted the legal text and inconsistencies in actual decisions”. Overall, the key issue reviewed related to the idea of “significant risk”. The majority of individuals interviewed found the lack of clarity frightening, disempowering and “not fair”.

3. Ontario Working Group on Criminal Law and HIV Exposure, 2010. (Ontario Aids Network). (www.ontarioaidsnetwork.on.ca)

Many injustices are found in the criminalization process. For example, violation of privacy, the potentially harmful effect on the individual’s well-being through discrimination, as well as the potential for an individual to lose their home or place of employment due to conviction. One key issue involves the lack of clarity around what “significant risk of serious bodily harm” includes. Due to a lack of universal guidelines, the potential for wrongful criminalization of PLWH is high, which also contributes to the stigmatization and furthers the marginalization of PLWH. One solution involves the development of “prosecutorial guidelines”, which will “assist Crown Counsel in making decisions and... promote high standards and consistency in how criminal cases are handled”.

4. UNAIDS Policy Brief on Criminalization of HIV Transmission, 2008. (www.unaids.org)

This report directly correlates to criminalization of HIV as a global human rights issue. UNAIDS supports the criminalization of HIV transmission only in the instances of clear intention, where the HIV virus is actually transmitted, and that current criminal laws are sufficient to deal with such rare instances. The creation and implementation of prosecutorial guidelines are a necessary next step in order to ensure fair implementation of the law. UNAIDS recognizes that the punishment of those with HIV would hinder current prevention efforts. Further to this, criminalization is likely to affect marginalized populations, and to increase the stigma and discrimination of those living with, or at risk of acquiring HIV. UNAIDS “does not support a legal obligation to disclose one’s HIV-positive status; however, they do recognize the “ethical obligation not to harm others”.

5. AIDS Committee of Toronto. Use of Criminal Sanctions as a Response to the Transmission of HIV, 1996. (www.actoronto.org)

ACT opposes the criminalization of HIV transmission and believes that the most effective means of prevention include education and the promotion of social services with a harm reduction approach. ACT acknowledges that in the specific and rare cases of intentional and malicious transmission, current laws are an appropriate response.