

AIDS Calgary believes it is more appropriate to deal with recalcitrant HIV infected persons who willfully endanger others under public health legislation. Interventions by public health officials to effect changes in risk behaviours are flexible, protect confidentiality and help facilitate health protection and promotion.

Where the liberty of recalcitrant persons is restricted due to their illegal behaviour due process protections must, of course, be observed.

Prosecution under criminal law will be appropriate in some cases however penal institutions do not offer appropriate counselling and treatment for recalcitrant HIV infected persons and may be a setting with unusual risks for infected persons and others.

AIDS Calgary believes the law should not include specific offences against the deliberate and intentional transmission of HIV, but rather general criminal offences should be applied to these exceptional cases. However, AIDS Calgary does not object to the law observing that the deliberate and intentional transmission of HIV is included in general Criminal offences.

Interventions for Persons Living with HIV who are unwilling or unable to protect themselves and others.

AIDS Calgary believes that when persons living with HIV behave in recalcitrant ways which risk infecting others then the interventions should *first* strive for beneficial behaviour change. Such conduct-based interventions should *balance* respect for the persons' individual rights with the powers to protect others contained in public health law and with the ultimate possibility of prosecution under the Criminal Code.

Tailored interventions, by public health officials, to effect changes in risk behaviours, are called for, accompanied by the full range of counselling and support available. Under public health law the most coercive intervention would be detention in a health care facility. If the range of less intrusive interventions prove ineffective so that more coercive actions involving detention or criminalization are required, then full due process protections must be in place, including mechanisms to terminate interventions which can no longer be proven valid.

AIDS Calgary believes that protocols for intervening with persons who are unwilling or unable to protect others from the risk of infection should be based on such persons' conduct, not on their HIV status. Treating these persons under public health services legislation rather than under criminal law is appropriate, allowing for flexibility, protection of confidentiality, and a focus on health protection and promotion.

Further, AIDS Calgary believes that the criminal code should not include specific offences against the deliberate and intentional transmission of HIV, but rather the existing laws should be applied to these exceptional cases only after other harm reduction interventions have failed.

These considerations are compiled from the following sources:

1. **Canadian HIV/AIDS Legal Network (www.aidslaw.ca)** "Criminal Law and HIV/AIDS: Final Report, by Richard Elliott. November 1999.
2. **CRHA "A Guide for Public Health Practitioners in Alberta For Persons living with a communicable disease who are unwilling or unable to protect themselves and others" April 2001.**
3. **AIDS Calgary, Briefing Document #29 "HIV and Disclosure and Confidentiality**

Introduction to the Issue

The issue here is specifically how AIDS Calgary (and other ASOs) should deal with recalcitrant persons, or persons who are unwilling or unable to protect themselves and others, and what their obligations and duties are in regards to such persons. The CRHA is in the process of developing a policy or guide on this issue (#2 above), but there is absolutely no mention of the role of ASOs in the scheme they are currently proposing. Thus, in light of the lack of regulation or legislation in this area for ASOs, a position must be taken to ensure consistent and uniform action.

There are basically three general ways such persons can be dealt with: either through the criminal law, through public health law, or through a combination of both. In Canada, as in many other common law jurisdictions, both the criminal law and public health law are being utilized.

Due to the decision of the Supreme Court of Canada in *R. v. Cuerrier* in 1998, such persons may now be criminally liable if they do not disclose their HIV status before engaging in behaviors that involve the risk of HIV transmission. The court concluded that Cuerrier's non-disclosure of his HIV-positive status could constitute fraud for the purposes of aggravated or sexual assault.

The report done by Richard Elliott for the Canadian HIV/AIDS Legal Network (#1 above) provides a thorough analysis of this issue, as well as provides a variety of positions put forward by various organizations and groups:

Public Health law

The powers contained in Public health law generally include the authority, by Public Health Orders, to compel the examination and/or medical treatment of persons suspected of being infected with a transmissible disease, and the power to order infected persons to conduct themselves so as to avoid infecting others. All jurisdictions grant health authorities powers of detention to prevent the spread of transmissible diseases. The precise powers, and the diseases to which they apply, vary by jurisdiction.

Isolation or Detention

Isolation, whether disease- or behavior-based, is a uniquely serious form of deprivation of liberty because it can be utilized against a competent and unwilling person without criminal conviction. It fully restricts the personal liberty of a rational adult, not out of concern for that person's welfare, but out of concern for the welfare of others.

Conduct versus Status-Based Detention

The inappropriateness of isolating or detaining people with HIV/AIDS solely on the basis of their serostatus is widely recognized. However, what remains within the purview of public health legislation is the power to detain persons on the basis of conduct that risks infecting others, a measure that some authors have characterized as "conduct-based quarantine."

Detention in a Hospital

Where public health statutes provide for the detention of an infected person who contravenes orders issued to prevent the transmission of disease, some statutes specify (and it would be ordinary practice) that the individual in question is to be detained in a hospital. The focus is on the promotion of health. Ontario's Chief Medical Officer of Health invoked this in 1990, taking the clear position that it is more appropriate to detain such individuals in a health-care setting than in prison. The Report concludes that the effects of detention are still not clear nor necessarily satisfactory.

Public Health Responses in Canada

The Report shows that in at least four provinces, an attempt has been made to critically examine the use of public health measures as a response to risky conduct:

- In Ontario, a working group of the Ontario Advisory Committee on HIV/AIDS released a consultation paper on Reducing HIV Transmission by People Who Are Unwilling or Unable to Take Appropriate Precautions in September 1995. A final policy paper was to be released in 1997.
- In Montreal, a protocol for public health interventions has been developed and a pilot project is being undertaken to assist in the management of cases involving persons who pose a risk of HIV transmission.
- In British Columbia, a policy was adopted in 1993.
- In Manitoba, the second draft of Guidelines for Reducing HIV Transmission by People Who Are Unwilling or Unable to Take Appropriate Precautions was released on 13 April 1996.

Canada - Royal Society of Canada

In 1988, the Royal Society indicated that procedural protections in the application of coercive public health measures are constitutionally mandated. The Charter guarantees the right to liberty and security of the person, and the right not to be deprived thereof except in accordance with the "principles of fundamental justice" (s 7). Similarly, the HIV-positive individual subject to public health orders restricting liberty has the right not to be arbitrarily detained (s 9) and, upon detention, the rights to be informed of the reason therefore, to retain and instruct counsel, and to be released if the detention is not lawful (s 10).

In addition, noting 1987 amendments to the British Columbia Health Act providing for detention of a person "likely to, willfully or carelessly or because of mental incompetence, expose others to the disease or the agent," the Society pointed out that it is unjustifiably harsh and possibly unconstitutional to detain people without treatment based merely on a probability of potential future harm: "Detention 'until no longer infectious' may well be cruel and unusual treatment" prohibited by s 12 of the Charter.

United Nations

Guidelines being developed conclude that:

- Public health law should ensure people are not subjected to coercive measures such as isolation, detention or quarantine on the basis of their HIV status. Where the liberty of persons living with HIV is restricted due to their illegal behavior, due process protections (eg, notice, rights of review/appeal, fixed rather than indeterminate periods of orders, rights of representation, etc.) should be guaranteed.
- Criminal (or public health) law should not include specific offenses against the deliberate and intentional transmission of HIV, but rather should apply general criminal offenses to these exceptional cases. Such application should ensure that the elements of foreseeability, intent, causality and consent are clearly and legally established to support a guilty verdict and/or harsher penalties.

United States

In the United States, similar procedural safeguards have been proposed, and the Washington State Public Health Department has adopted a program to deal with "unwilling or unable" persons that, like its Canadian counterparts, operates on the premise that public health actions must always opt for "the least restrictive intervention that will result in beneficial behavior change."

Washington State Public Health Department

The Washington State Public Health Department's program for "behaviors endangering public health" requires a credible report of such behavior from an identifiable person (i.e. no anonymous reports are accepted). The program defines three levels of public health response, to be applied sequentially:

- 1st level: "order to test" for HIV with counseling, including instruction on minimum safety standards;
- 2nd level: "order to cease and desist" from specified behaviors;

- 3rd level: "detention order" for up to 90 days of "intensive counseling" in a non-jail facility. This order requires prior judicial review and has never been used.

American Civil Liberties Union

The ACLU set out the due process requirements that should be established for the application of coercive public health measures:

- the person must pose a "substantial threat of infection to others and is unable or unwilling to behave or to control him/herself so as to not expose other persons to the danger of infection"; and
- isolation is necessary and is the least restrictive measure under the circumstances.

Furthermore, the ACLU took the position that isolation is permissible only if all less restrictive alternatives (such as intensive education, mental health and drug rehabilitation services) have been exhausted, and full "due process" is observed. If imposed, isolation should be time-limited, with the state being required to again prove the basis for isolation if the order is to be renewed upon expiration. In addition, during the isolation period, the person isolated should be able to request a hearing at which s/he could prove that s/he no longer requires isolation. Finally, isolation should be in a hospital setting with access to family, counsel and the press, as well as access to medical care and supportive education and counseling.

Conclusions

If preventing transmission is the primary goal, the primary basis for developing legal responses must be their impact on risky behavior. The relative deterrent effects of public health and criminal laws are a matter of considerable debate. Public health orders may have some deterrent effect specific to the individuals to whom they apply, and can be directed at prohibiting certain conduct while preserving an individual's remaining liberty. If such orders are already enforceable by a court, it is unclear whether the threat of criminal prosecution will further contribute significantly to modifying behavior. The public nature of criminal prosecutions may yield a greater deterrent effect in general, although experience demonstrates that the activities accounting for most infection - sex and injection drug use - are highly resistant to change and persist in the face of legal prohibition. More tailored interventions, accompanied by counseling and support, may ultimately be more effective in achieving changes to such behavior.

Prosecution under criminal law will be possible in certain cases, but the penalties generally available under the criminal code seem inappropriate. Penal institutions do not offer appropriate counseling and treatment for HIV-infected persons and may be a setting with unusual risks for infected persons and others. It would be more appropriate to deal with HIV-infected persons who willfully endanger others under public health legislation rather than under criminal law. However, even the use of such measures in rare individual cases should be done only under the full protection of due process, and if necessary, the law should be amended to that effect.

Public health laws offer an alternative to criminal law in situations involving HIV transmission/ endangerment. Indeed, in the vast majority of cases, their use is preferable to the use of the criminal law. Interventions by public health officials to effect changes in risk behaviors are more flexible, protect confidentiality better, are more consistent with a health protection and promotion focus.

However, there is sufficient concern about the use of coercive, quasi-criminal public health powers that this Report recommends the implementation of procedural safeguards, including protocols for handling difficult cases, so as to ensure a consistent, fair response that accords with sound public health policy. In particular, the following principles should apply:

- any intervention should be the "least intrusive, most effective" option;
- more coercive interventions should only be adopted after less coercive alternatives have been unsuccessfully attempted;

- before infringing personal liberty, there should be a clear danger that a person's conduct carries a substantial risk of harm to others;
- any coercive public health measures should carry full due process protections; and
- there must be a mechanism in place to automatically terminate any coercive intervention (such as detention) unless its continued validity can be established.

The Report concludes that, in general, criminalization is not a desirable response to HIV transmission/ endangerment, for three reasons:

- **There are limited arguments in favor of criminalization:**
 - Generally, the deterrent function is emphasized, however, in practice, there is widespread agreement that criminalization will have no significant deterrent effect on the practices that account for the vast majority of infections.
 - Imposing criminal liability on an objective test of negligence runs a greater risk that biases about HIV/AIDS, sex, sexual orientation, and drug use, will facilitate findings of guilt.
 - Punishing past conduct is unrelated to the more important goal of promoting public health.
- **There are valid public policy arguments against criminalization;**
 - Criminal prosecutions will be impractical in many cases because of evidentiary difficulties.
 - Criminalization is likely to have a deterrent effect on voluntary HIV testing. In addition, criminalization will frustrate efforts at education, counseling and support that can result in behavior change.
 - Criminalization stigmatizes all people with HIV, and those associated in the public mind with the disease, as potential criminals.
 - Criminalization undermines the message that all people are responsible for protecting themselves against HIV infection.
 - Criminalization could lead to selective prosecution of sex workers, injection drug users, prisoners, and gay men, particularly if an HIV-specific criminal offence was enacted.
 - Criminalization risks unduly infringing on the privacy of many sexual relations.
- **Public health measures offer a preferable alternative.**
 - Direct interventions by public health officials are likely to have as much (perhaps even more) deterrent effect in most cases than the vague threat of criminal prosecutions.
 - Acknowledges that HIV/AIDS is a health issue, not a question of crime.
 - Public health interventions may be more appropriately tailored to specific situations and to individuals who are unable or unwilling to take precautions.
 - Unlike a criminal prosecution, public health interventions may progress from least coercive to more coercive if and as necessary to change HIV-risking behavior.
 - The most coercive use of public health powers is detention, which is envisioned from the outset as detention in a health-care facility, as opposed to incarceration in a correctional facility where conditions are likely inadequate for the HIV-positive inmate.
 - Coercive public health measures can and should be exercised in accordance with protocols ensuring procedural safeguards comparable to those afforded by a criminal proceeding.