

POSITION PAPER ON THE CRIMINALIZATION OF HIV NON-DISCLOSURE

Position Statement

The criminal law is an ineffective and inappropriate tool with which to address HIV exposure. HIV/AIDS is an individual and public health issue first and foremost, and should be addressed as such. All legal and policy responses to HIV/AIDS should be based on the best available evidence, the objectives of HIV prevention, care, treatment and support, and respect for human rights.

Rationale

The increasing number of criminal charges that are being laid each year in Canada, and in particular in Ontario, in cases of non-disclosure of HIV-positive status have raised alarm bells amongst people living with HIV (PHAs) as well as organizations working with and advocating for the rights of PHAs and others affected by HIV/AIDS. There is little, if any, evidence to suggest that criminal prosecutions for non-disclosure of HIV-positive status will offer any significant benefits in terms of HIV prevention. On the other hand, there is strong reason to believe that these criminal prosecutions could have negative effects, including hindering HIV testing and access to services, spreading misinformation about HIV, increasing stigma and discrimination associated with HIV, and invasions of privacy.

The Ontario Working Group on Criminal Law and HIV Exposure has come together to oppose the expansive use of the criminal law with respect to issues of HIV exposure. We support a comprehensive evaluation of how Canada's criminal law is being applied within Ontario with respect to HIV-related issues. We advocate for sound policy responses to HIV prevention and transmission based on the best available evidence, the objectives of HIV prevention, care, treatment and support, and respect for the human rights of all.

Background

In Canada, PHAs have a legal duty to disclose their HIV status before engaging in activities that pose a "significant risk" of transmitting HIV; failing to do so can result in criminal prosecution.¹ To date over 60 people have been criminally charged and the number of charges per year has increased since the year 2000. Some PHAs have been convicted of serious criminal offences, such as aggravated assault, sexual assault and criminal negligence causing bodily harm. In addition, the privacy of many people has been invaded and highly personal information has been publicly divulged during police investigations, trials and through the sensational media coverage that these cases often receive.

Key Points

HIV/AIDS is an individual and public health issue, and a human rights issue. Criminal charges do little or nothing to stem the spread of HIV, but do divert resources and attention away from the policies and initiatives that have been proven to reduce HIV transmission and improve the lives of PHAs (e.g., education, testing, support services, access to safer sex and harm reduction materials, and programs to address stigma, discrimination, poverty and violence).

Most PHAs practice safer sex and/or disclose their status. It is everyone's responsibility, whether they know their HIV status or not, to ensure that HIV and other sexually transmitted

¹ The leading case on this issue in Canada is *R. v. Cuerrier*, [1998] 2 S.C.R. 371, which was decided by the Supreme Court of Canada in 1998.

infections are not transmitted. Criminalization disproportionately places the responsibility for preventing HIV transmission on PHAs.

The use of the criminal law as a response to non-disclosure fails to acknowledge the significance of factors such as awareness about HIV, homophobia, sexism, racism, HIV stigma and discrimination, and other social determinants of health that impact on an individual's ability to take HIV prevention precautions and/or to disclose their status.

Relying on the criminal law to prevent HIV transmission is based on faulty assumptions about the efficacy of this approach and does not address complex factors associated with unsafe HIV behaviours. The criminalization of non-disclosure may ultimately prove counterproductive in efforts to contain the spread of HIV. We know anecdotally that it has impacted some people's willingness to access testing and has driven people "underground," reducing their willingness to access broader health care services.

Criminal charges for non-disclosure of HIV-positive status increase stigmatizing attitudes in the general public by portraying PHAs as "potential criminals" and may foster prejudice and discrimination against PHAs. In addition, given the biases and lack of awareness about HIV/AIDS among some police, prosecutors, judges and correctional institutions, the criminal justice system is not the appropriate venue for addressing HIV exposure.

The criminalization of non-disclosure of HIV-positive status undermines the human rights of PHAs, including their sexual and reproductive health rights and rights to privacy, equality and security of the person. These violations are unjustified.

There is no reason to single out HIV exposure for criminal prosecutions while allowing public health mechanisms to address other communicable diseases. Interventions aimed at preventing the spread of HIV should be health and human rights based, and based on a principle of "least intrusive, most effective".

Using the criminal law to address issues of HIV exposure may have disproportionate impacts on specific groups. To date, and to our knowledge, these include racialized men and newcomers to Canada, aboriginal women, prisoners, and people in contact with law enforcement. Moreover, obligations to disclose HIV status could result in violence against some PHAs, especially sex workers and women in abusive relationships.

Some PHAs may be unable to disclose their HIV-positive status for reasons of mental illness, significant cognitive or psychological impairment, or a reasonable apprehension of harm. Criminal prosecutions do not respond to this reality or prevent further exposures in these circumstances.

Action

We advocate for sound national, provincial and local policy responses to issues relating to HIV prevention and transmission. We therefore support a review of Canada's present criminal law and its application with respect to HIV exposure. This policy review must take into account the best available evidence on HIV/AIDS, the primary objectives of HIV prevention, care, treatment and support, and respect for the human rights of all. This policy review should be directed towards changing the problematic situation described above.

We also advocate for the exploration and development of alternatives to criminal charges as the means to address issues of HIV exposure and/or non-disclosure. These alternative responses should address the individual, environmental and social contexts in which these exposures occur.