

UNAIDS' TECHNICAL NOTE ON THE GUIDANCE FOR THE PROSECUTION OF HIV NON-DISCLOSURE IN CANADA

1. The Joint United Nations Programme on HIV/AIDS (UNAIDS) presents its compliments to the Standing committee on Justice and Human Rights of the House of Commons and welcomes the opportunity to provide a Technical Note on the criminalisation of HIV non-disclosure, exposure and transmission and its negative impact on the response to HIV. This Technical Note is based on best available public health recommendations and human rights principles relating to HIV and criminal law. It is informed by the experience and practice of UNAIDS, and best available evidence and guidance on HIV and the law, as provided in the following documents: the *Political Declaration on HIV/AIDS: Intensifying our Efforts to Eliminate HIV/AIDS*,¹ the *International Guidelines on HIV/AIDS and Human Rights*,² *Taking action against HIV and AIDS: A handbook for parliamentarians*,³ UNAIDS' *Guidance Note on ending overly broad criminalisation of HIV non-disclosure, exposure and transmission (Guidance note)*⁴ and the *Expert Consensus Statement on the science of HIV in the context of criminal law*.⁵ This Technical Note is also based on the findings and recommendations of the Global Commission on HIV and the Law.⁶
2. The Technical Note presents considerations that call for caution in relation to current criminalisation of HIV non-disclosure, exposure or transmission. In particular, it stresses that such legislation: (i) has no public health benefits; (ii) can undermine effective HIV responses in Canada; (iii) can lead to serious miscarriage of justice; and (iv) are increasingly being reviewed across the globe. In addition, this Technical Note calls for the application of general criminal law, as opposed to HIV-specific laws, only to rare cases of intentional transmission of HIV.

There is no evidence that criminalisation of HIV non-disclosure, exposure or transmission has public health benefits

3. A reason often invoked to justify laws criminalising HIV non-disclosure, exposure or transmission is that they support prevention of new HIV infections by encouraging safer sex. Proponents of such laws argue that criminalisation of HIV non-disclosure, exposure or transmission can lead to behaviour change among people living with HIV and people at risk of HIV infection. However, as noted by UNAIDS and UNDP, “*there are no data indicating*

¹ United Nations General Assembly, *Political Declaration on HIV/AIDS: Intensifying our Efforts to Eliminate HIV/AIDS*, June 2011

² UNAIDS and Office of the United Nations High Commissioner for Human Rights (OHCHR), *International Guidelines on HIV/AIDS and Human Rights, 2006 Consolidated Version*, 2006.

³ Inter-Parliamentary Union, UNAIDS and UNDP, *Taking Action Against HIV and AIDS: A handbook for parliamentarians*, 2007, available at http://data.unaids.org/pub/Manual/2007/20071128_ipu_handbook_en.pdf.

⁴ UNAIDS *Ending overly broad criminalisation of HIV non-disclosure, exposure and transmission: Critical scientific, medical and legal considerations*, 2013.

⁵ Barré-Sinoussi F. et al. (2018) 'Expert consensus statement on the science of HIV in the context of criminal law' 21 *Journal of the International AIDS Society*, 21:e25161, available at <https://onlinelibrary.wiley.com/doi/epdf/10.1002/jia2.25161>

⁶ Global Commission on HIV and the law, *Risks, rights and health*, 2012

*that the broad application of criminal law to HIV transmission will achieve either criminal justice or prevent HIV transmission”.*⁷

4. Several studies suggest that criminalisation of HIV non-disclosure, exposure or transmission is unlikely to lead to behaviour change.⁸ For instance, research conducted in the United States found that self-reported sexual behaviour among people living in a state criminalising HIV non-disclosure, exposure and transmission was no different from the behaviour of people living in a state without such a law.⁹ On the basis of these findings, the researchers concluded that “our data do not support the proposition that passing a law prohibiting unsafe sex or requiring disclosure of infection influences people's normative beliefs about risky sex”.¹⁰
5. Many public health organisations and experts, including UNAIDS, have raised concerns about the potential negative public health impact of laws specifically criminalising HIV non-disclosure, exposure or transmission.¹¹ In particular, fear of prosecution for HIV non-disclosure, exposure or transmission can deter people living with HIV, or those most at risk of HIV infection, from seeking HIV prevention, treatment, care and support services.¹² The *International Guidelines on HIV/AIDS and human rights* warn in this regard that

People will not seek HIV related counselling, testing, treatment, and support if this could mean facing discrimination, lack of confidentiality and other negative consequences ... [C]oercive public health measures drive away the people most in need of such services and fail to achieve their public health goals of prevention through behavioural change, care and health support.¹³

6. Research clearly indicates that fear of prosecution for HIV non-disclosure, exposure or transmission discourages some people from testing for HIV, talking openly to their physicians or counsellors, or disclosing their HIV-positive status.¹⁴ A study conducted in

⁷ UNAIDS and UNDP, *Policy brief on the criminalisation of HIV transmission*, 2008.

⁸ See, for instance, O’Byrne P, “Criminal law and public health practice: Are the Canadian HIV disclosure laws an effective HIV prevention strategy?”, *Sexuality Research and Social Policy*, 2012, 9(1):70–79; Z Lazzarini *et al* ‘Evaluating the impact of criminal laws on HIV risk behaviour’ (2002) 30 *J. L. Med & Ethics*; S Burris *et al*, “Do criminal laws influence HIV risk behavior? An empirical trial” *Arizona State Law Journal*, 2007; S Burris and E Cameron “The case against the criminalisation of HIV transmission” 2008 (300) *Journal of the American Medical Association*, pp 578-581.

⁹ S Burris *et al*, “Do criminal laws influence HIV risk behavior? An empirical trial” *Arizona State Law Journal*, 2007

¹⁰ *Id.*

¹¹ See, among others, UNAIDS and UNDP *Policy brief on the criminalisation of HIV transmission*, 2008; Global Commission on HIV and the Law, *HIV and the law: Risks, rights and health*, 2012 available at <http://www.hivlawcommission.org/resources/report/FinalReport-Risks,Rights&Health-EN.pdf>; E Mykhalovskiy “The problem of ‘significant risk’: Exploring the public health impact of criminalizing HIV non-disclosure”, *Social Science & Medicine*, 2011, 73:668–675; Open Society Foundations, *Ten reasons to oppose the criminalization of HIV exposure or transmission*, 2008; CL Galletly & SD Pinkerton ‘Conflicting messages: How criminal HIV disclosure laws undermine public health efforts to control the spread of HIV’ (2006) 10 *AIDS and Behavior* 451-461.

¹² *Id.*

¹³ OHCHR and UNAIDS (1998) *HIV/AIDS and human rights: International guidelines*, Guideline 4, para 96.

¹⁴ See, among others, Galletly CL and Pinkerton SD, “Conflicting messages: How criminal HIV disclosure laws undermine public health efforts to control the spread of HIV”, *AIDS and Behavior*, 2006, 10:451–461; O’Byrne P *et al.*, “Nondisclosure prosecutions and population health outcomes: Examining HIV testing, HIV diagnoses, and the attitudes of men who have sex with men following nondisclosure prosecution media releases in Ottawa, Canada”, *BMC Public Health*, 2013, 13:94.

Canada found that individuals with higher rates of unprotected penetrative sexual acts were more likely to report that criminal prosecutions for non-disclosure either (a) affected their willingness to get tested for HIV, or (b) made them afraid to speak with nurses and physicians about their sexual practices.¹⁵ This study clearly points that those most at risk of HIV are most likely to be deterred from using HIV services, including testing, even when these are available, for fear of prosecution.

7. Laws criminalising HIV non-disclosure, exposure or transmission often fail to acknowledge that the majority of new HIV transmissions are from people who do not know their HIV positive status. The very vast majority of people living with HIV take steps to avoid further transmission or do not transmit HIV through sexual intercourse, when on effective treatment. Yet, these laws are likely to reinforce stigma against people living with HIV and other people more vulnerable to HIV infection who have low access to prevention and treatment services, such as marginalised women and men.

General criminal law offences, as opposed to HIV-specific laws, are sufficient to address the rare cases of intentional transmission of HIV

8. Cases of intentional transmission of HIV, i.e. where a person knows his or her HIV-positive status, acts with intention to transmit HIV, and does in fact transmit it, are rare. HIV-specific punitive laws reinforce the stigmatisation of HIV and give a false sense of protection from HIV. UNAIDS and UNDP recommend applying general criminal law provisions that already exist in the laws of the country to deal with cases of intentional transmission of HIV, taking due account of the actual harm caused by HIV infection.¹⁶ In particular, since HIV infection is now a chronic, treatable health condition, it is inappropriate for criminal prosecution for HIV transmission to involve charges of, for example, “murder”, “manslaughter”, “attempted murder”, “attempted manslaughter”, “assault with a deadly weapon” or “reckless homicide”.¹⁷ The risk and harm related to HIV infection must be informed by the latest scientific and medical evidence related to HIV.¹⁸

Criminalisation of HIV exposure or transmission can lead to miscarriage of justice

9. The application of laws criminalising HIV non-disclosure, exposure or transmission can lead to serious miscarriage of justice and other problems relating, among others, to:
 - selective enforcement;
 - difficulty with evidence and proof;
 - infringement of confidentiality and privacy; and
 - un-informed assessment of the risk and harm of HIV infection.¹⁹

¹⁵ O’Byrne P, Bryan A and Woodyatt C, “Nondisclosure prosecutions and HIV prevention: Results from an Ottawa-based gay men’s sex survey”, *Journal of the Association of Nurses in AIDS Care*, 2013, 24(1):81–87.

¹⁶ UNAIDS and UNDP (2008) ‘Criminalization of HIV transmission: Policy brief’, available at www.unaids.org.

¹⁷ *Idem*.

¹⁸ See for example Barré-Sinoussi F. et al. (2018) ‘Expert consensus statement on the science of HIV in the context of criminal law’ 21 *Journal of the International AIDS Society*, 21:e25161.

¹⁹ See, among others, J. Kehler *et al* 10 *Reasons Why Criminalization of HIV Exposure or Transmission Harms Women*, 2009; S Burris et al “The criminalization of HIV: Time for an unambiguous rejection of the use of criminal law to regulate the sexual behaviour of those with and at risk of HIV”, *Social Science Research Network*, 2008; Global Commission on HIV and the Law, *HIV and the law: Risks, rights and health*, 2012; United Nations Human Rights

10. In many instances, including in Canada, individuals have been prosecuted for acts that carry little or no risk of HIV infection.²⁰ UNAIDS considers the prosecution of people living with HIV in these circumstances to constitute miscarriage of justice. In addition, criminalisation of HIV non-disclosure, exposure or transmission may open a floodgate to numerous claims of HIV transmission on grounds not supported by scientific evidence, which would result in overburdening the justice system. Furthermore, prosecution on those grounds will undermine public health messages relating to self-disclosure, condom use and treatment benefits.²¹
11. UNAIDS is also concerned that criminalisation of HIV non-disclosure, exposure or transmission increases violence against women and place them at higher risk of criminal prosecution.²² This is because, often, women are the first to know of their HIV status due to the routine offer of HIV testing in antenatal care settings. Other marginalised populations that have low access to HIV prevention, treatment, care and support services are also likely to be disproportionately affected by laws criminalising HIV non-disclosure, exposure or transmission, thus further aggravating their marginalisation and exclusion.

Countries across the world are reforming their laws criminalising HIV non-disclosure, exposure or transmission

12. In the past few years, many countries across the world have been re-considering or reforming their laws to remove overly broad criminalisation of HIV non-disclosure, exposure or transmission. For example, in 2013, Switzerland adopted by referendum a new law that limits criminalisation to intentional transmission of HIV. This law reform was influenced by public policy considerations and medical evidence related to the impact of treatment on the risks of HIV transmission. Other countries such as Malawi and Mauritius rejected proposals to criminalise HIV, whereas countries such as Kenya, legal provisions criminalising HIV non-disclosure, exposure and transmission were found to be unconstitutional.

Conclusion

13. Overly broad application of criminal law to HIV non-disclosure, exposure and transmission raises serious human rights and public health concerns. Therefore, UNAIDS recommends against laws criminalising HIV non-disclosure, exposure or transmission. It also recommends applying general criminal law offences in exceptional cases of intentional HIV transmission i.e. where a person knows his or her HIV-positive status, acts with intention to transmit HIV, and does in fact transmit it.
14. In addition, UNAIDS recommends that the assessment of the risk, harm and proof of HIV infection in cases of actual transmission be informed by the latest scientific and medical evidence related to HIV.

About UNAIDS

Council, *Report of the special rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, 14th Sess., U.N. Doc. A/HRC/14/20, 27 April 2010.

²⁰ UNAIDS *Ending overly broad criminalisation of HIV non-disclosure, exposure and transmission: Critical scientific, medical and legal considerations*, 2013.

²¹ *Id.*

²² J. Kehler *et al 10 Reasons Why Criminalization of HIV Exposure or Transmission Harms Women*, 2009.

The Joint United Nations Programme on HIV/AIDS (UNAIDS) is an innovative partnership that leads and inspires the world towards ending AIDS as a public health threat and achieve its shared vision of zero new HIV infections, zero discrimination, and zero AIDS-related deaths. Established in 1994 by a resolution of the UN Economic and Social Council and launched in 1996, UNAIDS' strength derives from the expertise, experience and mandate of its 11 Cosponsors (UNHCR, UNICEF, WFP, UNDP, UNFPA, UNODC, UNWomen, ILO, UNESCO, WHO, the World Bank) and the UNAIDS Secretariat.

UNAIDS strategic directions are HIV prevention; treatment, care and support; and human rights and gender equality. UNAIDS has a person-centred response to AIDS, as evidenced in the language of the 2016 *Resolution of the United Nations General Assembly on the Political Declaration for ending AIDS by 2030* and *UNAIDS 2016-2021 strategy*, both of which acknowledge that HIV is a cause and a consequence of poverty and inequality and that ending AIDS necessarily requires empowering women and girls, ending gender-based violence, ending stigma and discrimination and removing punitive laws, policies and practices that block effective responses to HIV.

Please see more at: <http://www.unaids.org/>

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