

UN Human Rights Council, 19th session
Thematic Panel Discussion on HIV/AIDS and Human Rights

Statement by Canadian HIV/AIDS Legal Network

“The criminalization of HIV non-disclosure, exposure and transmission”
Geneva — Tuesday, 20 March 2012

Dear Madam President, High Commissioner, Executive Director Sidibé and distinguished panellists:

Thank you for the opportunity to contribute this panel discussion today. The Canadian HIV/AIDS Legal Network is a non-governmental organization in Special Consultative Status with the Economic and Social Council and has made key contributions over the years to the elaboration and promotion of the *International Guidelines on HIV/AIDS and Human Rights*, produced by UNAIDS and the Office of the High Commissioner for Human Rights and welcomed repeatedly by this Council and by its predecessor, the Commission on Human Rights.

There are many human rights challenges that must be tackled in order to respond effectively to the ongoing, twinned pandemics of HIV and of HIV-related human rights abuses. In the brief time available to us today, we wish to highlight one phenomenon of growing global concern and relevance.

The epidemic of **overly broad criminalization of HIV non-disclosure, exposure or transmission** has:

- led to unjust prosecutions and convictions;
- resulted in cruel punishments that shock the conscience of reasonable observers;
- fuelled misinformation, fear, stigma and prejudice about HIV and people living with HIV; and
- undermined efforts at HIV prevention and access to care, treatment and support for people living with HIV.

We draw to your attention the recent *Oslo Declaration on HIV Criminalisation*, adopted last month by civil society groups on the eve of a global High-level Policy Consultation on the subject, convened by the Government of Norway and UNAIDS.¹ As noted in that Declaration, now endorsed by many organizations and experts from across the globe, a growing body of evidence suggests that the overly broad use of the criminal law to address HIV risk behaviour is doing more harm than good in its impact on public health and human rights.

We recognize there is a limited role for criminal law in those rare instances in which people transmit HIV with malicious intent. Yet in many countries, in both the global North and the global South, criminal laws are being drafted, enacted and enforced much more broadly — usually with disregard for the available scientific evidence about the negligible or very low risks in many cases that are nonetheless criminalized and often harshly, disproportionately punished. In turn, such laws and prosecutions further perpetuate the very misinformation, fear and stigma in which they are rooted.

We wish to give you just one example, drawn from our own domestic context, to illustrate the urgent need for legislators, judges and prosecutors to return to reason, science and human rights principles as the underpinnings of sound public policy.

In Canada, more than 140 prosecutions have now been brought against people living with HIV for alleged non-disclosure of HIV-positive status to a sexual partner, largely under a poorly-defined and inconsistently applied legal test requiring disclosure before activities posing a “significant risk of serious bodily harm.” Overwhelmingly, it has been people with HIV who have been prosecuted under this law. Canada has the dubious distinction of the second highest absolute number of prosecutions, after the United States.

¹ *Oslo Declaration on HIV Criminalisation*, 13 March 2012, online: <http://www.hivjustice.net/oslo/oslo-declaration/>.

Yet prosecutors continue efforts to expand the scope of criminalization even further. Last month, in a pair of key appeals that will determine the parameters of our national law for years to come, two provincial Attorneys-General urged the Supreme Court of Canada to disregard the science of HIV and to dispense with any consideration of the risks of transmission in HIV-related prosecutions.² They argued, as have others in a growing number of cases, that people living with HIV must always disclose their serostatus in any sexual encounter, regardless of the risk of harm — and that if they don't, they should be subject to prosecution under the same laws and in the same fashion as those who commit rape or other forms of sexual assault.

Under such an interpretation of the law, even in those cases where there was no intent to transmit HIV, where precautions were taken to reduce dramatically the risk of transmission such that it was miniscule at most, and where HIV was not transmitted, the mere fact of not disclosing one's HIV-positive status — an identity already heavily stigmatized even without the added burden of such prosecutions publicized widely in the media — would result in a conviction for the crime of aggravated sexual assault, carrying a maximum penalty of life in prison and lifetime designation as a sex offender on a national registry. In essence, the position of the Attorneys General criminalizes people because they have HIV and remain silent about this fact, even where their conduct poses no real risk of harm to others.

The decision of our Supreme Court on this point is expected later this year. We can only hope that they listen to reasoned, principled alternatives, based on science and on a concern for the damage to public health that would flow from such an expansive use of the criminal law, as advanced before the Court by our organization and others.

Let us remember that HIV epidemics are driven to a considerable degree by undiagnosed HIV infections, not by people who know their HIV-positive status. Given the high number of undiagnosed infections, relying on disclosure by a partner to protect oneself — and prosecuting people for non-disclosure — can and does lead to a false sense of security. Furthermore, singling out HIV with specific laws or prosecutions further stigmatizes people living with HIV and those affected HIV — and such stigma is one of the greatest barriers to testing, to treatment and to disclosure, and hence ultimately to achieving the UNAIDS goals of “zero new infections, zero AIDS-related deaths and zero discrimination.”³

We therefore urge the following:

- Member States should repeal any HIV-specific criminal laws, in accordance with UNAIDS recommendations.⁴
- Where general criminal laws can be, or are being, used for HIV-related prosecutions, the exact nature of the rights and responsibilities of people living with HIV under the law should be clarified, ideally through prosecutorial and police guidelines, produced in consultation with all key stakeholders — including people living with HIV, community-based AIDS organizations and legal and scientific experts — to ensure that police investigations are appropriate and that the law is not misapplied and overused.
- Any prosecutions must be informed by the most up-to-date HIV-related science and medical information, and should be consistent with both public health goals and international human rights obligations.

The misuse of the criminal law will not only produce injustice, as has already been amply demonstrated, it will also undermine the effectiveness of measures to prevent the further spread of HIV and to ensure care, treatment and support for those living with HIV, thereby ultimately also undermining public health. We cannot let effective national responses to HIV be undermined by ill-considered and ill-advised public policy that will, ultimately, serve the aims of neither justice nor health.

² For more information regarding the appeals in the cases of *R. v. Mabior* and *R. v. D.C.*, visit www.aidslaw.ca/stopcriminalization.

³ UNAIDS. *Getting to Zero: 2011-2015 Strategy*. Geneva, December 2010, online: <http://www.unaids.org/en/resources/presscentre/featurestories/2010/december/20101230unaidsin2011/>.

⁴ UNAIDS/UNDP, *Policy brief: Criminalization of HIV Transmission* (2008), online: http://www.aidslex.org/site_documents/CR-0017E.pdf.