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Criminal Law and HIV/AIDS

Public Health Laws & Conduct that Risks Transmitting HIV

As opposed to criminal prosecutions, do public health laws offer better alternatives for dealing with situations where an HIV-positive person does not take precautions to prevent infecting others? If so, how should those interventions be approached? Are public health powers subject to misuse, like the criminal law?

This is one of a series of eight info sheets on
Criminal Law and HIV/AIDS.

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One reason people tend to accept uncritically the criminalization of HIV is that they do not compare it to other possible methods of dealing with the problem.

- MA Bobinski, 1994

The Elements of Public Health Laws

Public health laws differ in each province, but all serve three primary functions:

- They classify transmissible diseases and specify what rules apply to each.
- They impose obligations on infected persons to seek medical treatment, and a duty on some other persons (doctors, teachers, etc) to report suspected cases of infection.
- They grant health authorities wide powers to be exercised for the protection of public health. At their most coercive, these laws are *quasi-criminal*. Health officials may compel examination and medical treatment of people suspected of having a transmissible disease, and generally may order infected persons to conduct themselves so as to avoid infecting others. For example, a public health official might issue an order prohibiting an HIV-positive person from having unprotected sex and/or ordering them to disclose their HIV infection to partners. In every province, health authorities have the power to detain people (generally in a health-care setting) to prevent the spread of transmissible diseases.

Public Health Powers versus Criminal Prosecutions

Proponents of criminalizing HIV-positive individuals whose activities risk infecting others argue that this is required to punish and denounce objectionable conduct, to rehabilitate offenders, to prevent harm to others by incarcerating the infected person, and to deter both the specific offender and the public generally from engaging in similar conduct in the future. Which of these goals are important? Can public health laws achieve the same thing while doing less overall harm to public health initiatives?

Punishing and denouncing

Public health interventions do not have punishment as their goal, although criminal sentences do. But is punishing people who risk infecting others the most important objective? Punishment is only justified where it is deserved, so this argument only justifies prosecutions in cases where conduct is clearly morally blameworthy. Criminal sentences are usually reserved for those who intentionally or recklessly harm others; only a handful of HIV-positive people actually attempt to infect others or recklessly disregard the safety of others.

But punishment is often about seeking revenge, which opens the door further to social prejudices and misinformation. People with HIV/AIDS are often seen as blameworthy for their own infection, especially if they are gay, sex workers, or injection drug users. People are often punished for who they are as much as for what they have done. But discrimination and stigma toward communities affected by HIV/AIDS already harm efforts to prevent HIV transmission. An approach that invokes the state's power to punish rather than addresses the reasons why people engage in risk activities, makes this problem worse. When misguided moralizing and scapegoating have already worsened the HIV/AIDS epidemic, can we afford to let a desire for punishment dominate public policy?

Rehabilitating and restraining

Public health powers are better suited than criminal sentences for "rehabilitating" people who place others at risk of HIV infection. Changes in sexual or drug-using behaviour are more likely if we address the reasons why someone engages in risky sex or shares needles, rather than put them in prison. Also, imprisoning someone with HIV may well increase, not decrease, the likelihood of infecting others. Since there is less access to condoms in prisons, and no access to clean needles, unsafe sex and sharing injection equipment is more common "inside."

Deterring similar conduct

Ultimately, if preventing the spread of HIV is the most important objective, then deterring people from risky sex or sharing needles must be the priority. Public health interventions are more flexible and can be better tailored to the individual circumstances of the person with HIV/AIDS than the blunt tool of the criminal law. Increasingly coercive interventions can be adopted if less coercive and punitive measures fail. Different approaches may be adopted for those whose ability to take precautions is limited (for reasons of mental illness, for example) or for those who resist taking precautions. Also, in-person contact with a public health worker is more likely to result in changes in behaviour than the more remote, generalized possibility of criminal prosecution. And if a given person is not deterred from risky sex or sharing needles by a public health order and the threat of imprisonment for breaching that order, then it is unlikely they will be any more deterred by the threat of criminal

sanctions. While highly publicized criminal prosecutions and sentences might arguably be more significant in deterring others from similar conduct, history shows that sex and injection drug use, the two activities accounting for most HIV transmission, are not likely to be deterred by legal prohibitions.

Conclusion

On balance, public health interventions offer a better response to risk activity by HIV-positive people than the criminal law. They offer more flexibility and are more likely to be effective. Individualized interventions, which protect the confidentiality of those affected, are also less likely to contribute to misinformation about HIV and how it is transmitted, and less likely to further stigmatize all people with HIV/AIDS as "potential criminals" and "dangers to public health" in the public mind.

Preventing the Misuse of Public Health Powers

Several provinces have developed, or are developing, policies and protocols for managing public health interventions in cases of persons who risk transmitting HIV to others. The general consensus is that interventions should be the least invasive, least restrictive, reasonably available and likely to be effective.

These policies also recognize the need for proper safeguards to prevent the misuse of public health powers, since these can be used to infringe individual liberty and privacy (such as prohibitions on certain sexual activity, orders to disclose HIV-positive status, or detention orders), and the exercise of these powers may be different in each health unit. Guidelines for health officials in determining appropriate interventions have been proposed, and it has been recommended that prosecutors should consult with public health officials before laying criminal charges, which should be a last resort. Public health orders (for example, to refrain from sex, or to detain someone) should be time-limited and automatically reviewed by an appeal board. People subject to such orders should be guaranteed the right to a lawyer, and in the case of detentions, public health officials should be required to prove beyond a reasonable doubt that detention is required to prevent a person from conduct that risks infecting others with a transmissible disease.

For more information, see R Elliott. *Criminal Law and HIV/AIDS: Final Report*. Montréal: Canadian HIV/AIDS Legal Network & Canadian AIDS Society, 1997. Copies of the report and the info sheets are available on the Network website at www.aidslaw.ca or through the Canadian HIV/AIDS Clearinghouse (tel: 613 725-3434, email: aids/sida@cpha.ca). Reproduction of this info sheet is encouraged, but copies may not be sold, and the Canadian HIV/AIDS Legal Network must be cited as the source of this information. For further information, contact the Network (tel: 514 397-6828; fax: 514 397-8570; email: info@aidslaw.ca). **The Legal Network cannot provide legal advice. Ce feuillet d'information est également disponible en français.**

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