

CONCEPT NOTE
SEMINAR ON THE CRIMINALISATION OF HIV NON-DISCLOSURE,
POTENTIAL EXPOSURE AND NON-INTENTIONAL TRANSMISSION
("HIV CRIMINALISATION")
BERLIN, GERMANY, 20 SEPTEMBER 2012

Background

Many individuals and organisations involved in the HIV response have been concerned about the overly-broad and poorly implemented criminal laws – HIV-specific, or general public health or physical/sexual assault statutes – applied against alleged HIV non-disclosure, potential exposure and/or non-intentional transmission ("HIV criminalisation") that are in use in many countriesⁱ

The majority of prosecutions have taken place in North America; however, the Europe and Central Asia region includes a large number of countries where prosecutions regularly take place and where policy developments rapidly occur.ⁱⁱ

Critical public health, legal and human rights concerns against overly-broad HIV criminalisation include the following.ⁱⁱⁱ

- The failure to apply standard requirements for criminal liability, involving intent, causation and proof, to people charged under these offences, resulting in:
 - Prosecutions for acts that represent no risk, or insignificant risk, of HIV transmission.
 - Prosecutions against individuals who follow HIV prevention messages, such as the use of condoms.
 - Prosecutions against individuals who have disclosed their HIV-positive status and obtained mutual consent to unprotected sex.
 - Prosecutions without adequate proof of non-disclosure, intent to harm or causation of infection.
- Selective and/or arbitrary prosecution of people from marginalised communities.
- Improper and insensitive police investigations that can result in inappropriate disclosure, loss of employment and high levels of distress.
- Application of excessive penalties to people found guilty under these offences.

Many such laws and prosecutions, and media coverage of these cases, appear to misrepresent and overstate HIV-related risks and harms, contributing to increasing HIV-related stigma and perpetuating myths about HIV. Important scientific developments, including the impact of treatment on infectiousness^{iv} and improved life expectancy^v are rarely taken into account. In turn, this may be deterring people with undiagnosed HIV from wanting to know their HIV status.^{vi}

These laws and prosecutions are also having a negative impact on people aware they are living with HIV by creating confusion and fear over rights and responsibilities under the law, creating and sustaining disincentives to disclose HIV-positive status to sexual partners, and creating and sustaining disincentives to disclose HIV-related risk behaviours to healthcare professionals.^{vii}

In recent years, however, and in response to increased advocacy and attention to the above mentioned concerns, a growing number of countries, notably those in Western Europe, including Denmark, Norway and Switzerland, are beginning to re-assess their laws and policies.^{viii}

However, despite signs of progress there continue to be problematic developments within Europe, such as Romania's new HIV-specific criminal statute implemented in October 2011,^{ix} and new prosecutions setting legal precedent for further prosecution under existing laws in Belgium in July 2011.^x In addition, many jurisdictions, throughout Europe and Central Asia continue to inappropriately prosecute people living with HIV for non-disclosure, alleged exposure and non-intentional transmission.^{xi}

In an effort to support positive change, the Joint United Nations Programme on HIV/AIDS (UNAIDS) undertook a project aimed at identifying the latest and most critical medical and scientific data, as well as legal and human rights

concepts, that should inform a more appropriate application of criminal law to HIV non-disclosure, exposure and transmission.^{xii}

These activities included:

- the preparation of background^{xiii} and technical papers^{xiv} on current laws and practice as well as medical and scientific developments regarding the criminalisation of HIV non-disclosure, exposure and transmission;
- an Expert Meeting of leading scientists, medical practitioners and legal experts convened on 31 August to 2 September 2011 in Geneva to interrogate these issues and generate policy recommendations^{xv};
- a High Level Policy Consultation held on 14-15 February 2012 in Oslo that provided officials in the areas of public health, criminal justice and civil rights an opportunity to consider and discuss options available to countries to better ensure that application of the criminal law to HIV non-disclosure, exposure and transmission serves justice without jeopardising public health objectives and fundamental human rights.^{xvi}

On the eve of the High Level Policy Consultation, a group of individuals and organisations from civil society around the world came together to create the Oslo Declaration on HIV Criminalisation.^{xvii} The Declaration provides a roadmap for policymakers and criminal justice system actors to ensure a linked, cohesive, evidence-informed approach to produce a restrained, proportionate and appropriate use of the criminal law, if any, to cases of HIV non-disclosure, potential exposure and non-intentional transmission.

The meeting will be an opportunity for participants who are less aware to learn more about this issue, and to connect with advocates and experts from across Europe who are engaged or in fighting inappropriate HIV criminalisation. It will bring together policymakers, lawyers, researchers, and activists.

Seminar organisers and partners

The seminar is co-organised and supported by the European AIDS Treatment Group (EATG), Deutsche AIDS-Hilfe (DAH), the International Planned Parenthood Federation (IPPF) and the HIV in Europe Initiative.

The seminar will take place in Berlin on the eve of EATG's 20th Anniversary General Assembly (GA). It will provide a platform for discussion over EATG and DAH's policy papers on HIV non-disclosure, potential exposure and non-intentional transmission. DAH will also share lessons learned from broad stakeholder involvement in developing its policy. IPPF through its partner organisations in Sweden and elsewhere in northern Europe will share its experience in advocating law and policy reform on this issue.

Edwin J Bernard, EATG member and co-ordinator of the HIV Justice Network, an international network of individuals and organisations working to end inappropriate HIV criminalisation is leading the organisation of the seminar.^{xviii}

Rationale and target audience

Although advocacy and information exchange on the issue of HIV criminalisation took place during the International AIDS Conference in Washington DC in July 2012 (AIDS 2012)^{xix}, the focus was primarily on the United States itself, where HIV-specific laws in at least 32 US states represent a major public health and human rights crisis.^{xx} Consequently, this seminar will not only provide linkages to, and follow-up from, AIDS 2012, but also a regional forum focused primarily on Europe and Central Asia.

The target audience is primarily HIV advocates (e.g. EATG members, activists, researchers, clinicians, journalists/bloggers) working to improve HIV policy throughout Europe and Central Asia. It is expected that attendees will become increasingly informed on this issue, and be able to take their new knowledge into their own fields of work. As this is truly an inter-disciplinary issue, engaging attendees from a cross-section of different backgrounds and various community groups, this will ensure a wide dissemination of the ideas shared at the workshop.

Most of the seminar will take place in English - the exception being one of the four afternoon workshops which will take place in German.

Intended outcomes

Intended outcomes include:

- Connecting local and European/Central Asian HIV advocates and policymakers with little understanding of HIV criminalisation with advocates and experts who are already working in the field.
- Better understanding of the latest scientific, medical and legal evidence and concepts relevant to HIV non-disclosure, exposure and transmission through dissemination of latest UNAIDS guidance.
- Better understanding of linkages between advocating against punitive laws and policies aimed at people living with HIV and punitive laws and policies to key populations in Europe

- Exchanges and discussions for advocates and policymakers on best practices relating to the use of the criminal law; guidelines to circumscribe current legal frameworks; and alternatives to the criminal law in the context of HIV non-disclosure, exposure and transmission.
- Support for more informed, nuanced dialogue at country and regional (Europe/Central Asia) level for evidence-informed and rights-based application of the criminal law, if any, in the context of HIV non-disclosure, exposure and transmission.
- Identifying gaps in evidence, open questions and topics that require further discussion and work, leading to a work plan and funds allocation for collaboration for activities in 2013 and beyond (e.g. further advocacy-relevant research/further targeted advocacy) by EATG, DAH, IPPF and other stakeholders in the seminar (e.g. UNAIDS, UNDP, HIV in Europe, HIV Justice Network).
- Event documentation via press release (linking to position papers), written meeting report (and video of key parts of the meeting, produced by the HIV Justice Network) for broad dissemination via seminar stakeholders websites and networks.

Specific questions to keep in mind during the entire day (to be discussed in the final plenary session)

- At the personal level, how can we become (better) informed champions within our communities? (e.g. partnerships, critical reflection about stigma within our communities, building consensus with new alliances)
- What specific research and programme gaps exist in your context, which need to be filled in order to strengthen collective action?
- At the policy level, what can be done to minimise the harm of criminalization? (E.g. cross-border collaboration between countries, advocacy for and development of prosecutorial guidelines, police sensitisation efforts, media training etc.)
- What can Europe contribute to and learn from global efforts to strengthen collective action against criminalization?
- What are the gaps in expertise that we need to cultivate/ strengthen knowledge sharing on to support efforts (e.g. expert witness testimonials, prosecutorial guidelines, reforming ancient laws, effective advocacy to prevent new laws etc)

ⁱ UNAIDS/UNDP. [Policy Brief: Criminalization of HIV Transmission](#). Geneva, July 2008; Open Society Institute. [Ten Reasons to Oppose the Criminalization of HIV Exposure or Transmission](#). 2008; IPPF, GNP+ and ICW. [Verdict on a Virus](#). 2008; RFSU, RFSL and HIV Sweden. [HIV, Crime and Punishment](#). December 2011; [Oslo Declaration on HIV Criminalisation](#), February 2012.

ⁱⁱ UNAIDS. [Criminalisation of HIV Non-disclosure, Exposure and Transmission: Background and Current Landscape](#). Geneva, 2012a; Global Network of People Living with HIV (GNP+) [The Global Criminalisation Scan Report 2010: Documenting trends, presenting evidence](#). Amsterdam, 2010.

ⁱⁱⁱ UNAIDS (2012a). *Op cit*.

^{iv} Vernazza P et al. [Les personnes séropositives ne souffrant d'aucune autre MST et suivant un traitement antirétroviral efficace ne transmettent pas le VIH par voie sexuelle](#). Bulletin des médecins suisses 89 (5), 2008. [English translation. (including translator's affidavit) [HIV-positive individuals not suffering from any other STD and adhering to an effective antiretroviral treatment do not transmit HIV sexually](#)]; Swiss AIDS Federation. [Advice Manual: 'Doing without condoms during potent ART'](#) January 30, 2008; Cohen MS. [Prevention of HIV-1 Infection with Early Antiretroviral Therapy](#). N Engl J Med. 2011 365:493-505.

^v Lewden C and the Mortality Working Group of COHERE. Time with CD4 count above 500 cells/mm³ allows HIV-infected men, but not women, to reach similar mortality rates to those of the general population: a 7-year analysis. 17th CROI, San Francisco, abs 527, 2010. (Reported on [Aidsmap.com](#)); Van Sighem A et al. Life expectancy of recently diagnosed asymptomatic HIV-infected patients approaches that of uninfected individuals. 17th CROI, San Francisco, abs 526, 2010. (Reported on [Aidsmap.com](#)); The Antiretroviral Cohort Collaboration. [Life expectancy of individuals on combination therapy in high-income countries: a collaborative analysis of 14 cohort studies](#). The Lancet 372: 293 – 299, 2008.

^{vi} UNAIDS (2012a) *Op cit*.

^{vii} E.g. Mykhalovskiy E [The problem of "significant risk": Exploring the public health impact of criminalizing HIV non-disclosure](#). Social Science & Medicine, 2011; Bourne A, Dodds C, Weait M. [Responses to criminal prosecutions for HIV transmission among gay men with HIV in England and Wales](#). Reproductive Health Matters 17(34):135–145, 2009; Menadue D. The impact of the criminalisation issue on HIV-positive people. In: Cameron S and Rule J (Eds), [The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality](#). Sydney, NAPWA, 2009.

^{viii} Bernard EJ. [Getting tough on criminalisation](#). HIV Treatment Update 210, Winter 2012.

^{ix} Sens Positiv. [Knowingly transmitting HIV is a criminal offence in Romania](#). 17 June 2011.

^x Bernard EJ. [Belgium: First criminal conviction under poisoning law, advocates caught unawares](#). Criminal HIV Transmission, 13 June 2011.

^{xi} For the most up-to-date information, see [criminalhivtransmission.blogspot.com](#) and subscribe to tweets of daily news reports of arrests and prosecutions from the HIV Justice Network at [@hivjusticenet](#)

^{xii} UNAIDS. [Report of the Expert Meeting on the Scientific, Medical, Legal and Human Rights Aspects of Criminalisation of HIV Non-disclosure, Exposure and Transmission, 31 August- 2 September 2011.](#) Geneva, February 2012c. The updated UNAIDS guidance will be published by December 1st 2012.

^{xiii} UNAIDS (2012a). *Op cit.*

^{xiv} UNAIDS. [Criminalisation of HIV Non-disclosure, Exposure and Transmission: Scientific, Medical, Legal and Human Rights Issues.](#) UNAIDS, Geneva, February 2012b.

^{xv} UNAIDS. [Report of the Expert Meeting on the Scientific, Medical, Legal and Human Rights Aspects of Criminalisation of HIV Non-disclosure, Exposure and Transmission, 31 August- 2 September 2011.](#) Geneva, February 2012c.

^{xvi} A meeting report is currently in preparation; for video of the opening session, see: Strub S. [UNAIDS' Michel Sidibé: 'I was shocked'](#) POZ Blogs, February 15, 2012.

^{xvii} At time of writing, over 1100 individuals and organisations from almost 90 countries have supported this document. See hivjustice.net/oslo.

^{xviii} See [HIV Justice Network](#) website for more information.

^{xix} See, for example, latest news at [HIV Justice Network](#)

^{xx} See [Positive Justice Project](#) website for more information.