

Criminalization of HIV: Beyond Canada and Back

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Canadian HIV/AIDS Legal Network		Réseau juridique canadien VIH/sida
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About the Canadian HIV/AIDS Legal Network

The Canadian HIV/AIDS Legal Network (www.aidslaw.ca) promotes the human rights of people living with and vulnerable to HIV/AIDS, in Canada and internationally, through research, legal and policy analysis, education, and community mobilization. The Legal Network is Canada's leading advocacy organization working on the legal and human rights issues raised HIV/AIDS.



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Criminal & Public Health Law

The starting point in Canada ... a *presumptive* role for criminal law in HIV prevention

- “It is right and proper for **Public Health authorities** to be concerned that their struggles against AIDS should not be impaired. Yet the **Criminal Code** does have a role to play. Through **deterrence** it will protect and serve to encourage honesty, frankness and safer sexual practices. If the application of the Criminal Code **really does impede** the control of AIDS it will be for **Parliament to determine** whether the protection afforded by the Code should be curtailed in the interests of controlling the plague solely by public health measures.” – Mr Justice Cory, *R v Cuerrier* (1998)

Public Policy Foundations

Public health

- special responsibility of **government**
- focus on health of **populations**
- addresses the **relationships** between the state and the population
- provision of **population-based services** grounded on the scientific methodologies of public health (e.g., epidemiology, biostatistics)
- powers of **coercion** to protect community
- practiced in the **public interest**

Public Policy Foundations

Criminal law

- special responsibility of **government**
- focus on safety of **community, including prevention** (incapacitation, rehabilitation, deterrence, *retribution*)
- action at individual level
- addresses the **relationships** among individuals, enforced by state
- powers of **coercion** to protect community
- practiced in the **public interest**

England & Wales

***Offences Against the Person Act, 1861* makes criminal ...**

- **intentional transmission of HIV (section 18)**
 - *unlawfully and maliciously by any means whatsoever wound or cause any grievous bodily harm to any person, ... with intent*
- **reckless transmission of HIV (section 20)**
 - *unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person*
 - approx. 10 convictions to date; significant and sensational media attention

England & Wales

Multi-sectoral engagement in attempt to respond to social, health and legal issues raised by criminalisation

- researchers
- non-governmental organizations
- legal academic community
- health care sector
- Crown Prosecution Service

England & Wales

Research on public health / behavioural impact of criminalization virtually non-existent

- few relatively small qualitative studies of people living with HIV/AIDS
- C Dodds & P Keogh, *Intl Jour STD & AIDS* 2006; 17:315-318. Concern among PLWHAs focused on:
 - criminalization undermines notion of shared responsibility for preventing HIV transmission
 - criminalization exacerbates stigma associated with HIV, with potential negative impact upon health of PLWHAs, increased difficulty of disclosure

England & Wales

Crown Prosecution Service Consultation (2006)

- Purpose: Develop policy guidance to assist prosecutors in deciding whether to prosecute cases involving intentional and reckless transmission.
- Motivation: “Particular epidemiology” of HIV – i.e., disproportionately African and gay male – and potential for discrimination in prosecution as raised by community.
- Public Interest Test: Prosecution unless public interest factors tending against prosecution clearly outweigh those in favour.

England & Wales

Crown Prosecution Service Consultation (2006)

- Public interest factors identified for input:
 - defendant's reliance on medical / clinical advice
 - defendant's limited ability to insist on condom use
 - context of sexual behaviour regarding assumption of risk
 - defendant's age, vulnerability and understanding of nature of HIV infection
 - other relevant factors

England & Wales

British HIV Association & Department of Health consulting on range of legal and ethical issues in light of criminalisation

- confidentiality and disclosure of patient information
- content of counselling / support for HIV positive people
 - availability of post-exposure prophylaxis
 - criminal liability
 - referral to specialist legal advice and peer support
- dealing with police enquiries

Public Health Law Challenge

Questions for us to take up in our work

1. What are the public health impacts of the criminal law?
2. What is the *appropriate* role for the criminal law and authorities in HIV prevention?
3. What is the *appropriate* role for public health law and personnel in HIV prevention?
4. Where are the points of engagement between criminal law and public health law (and those who work in each system)?
5. What resources (e.g., research, staffing, training, policy, infrastructure) are need to minimize HIV transmission and the health impacts of criminal law?