



ELEMENTS OF A JUST CRIMINAL LAW RESPONSE TO ALLEGATIONS OF
NONCONSENSUAL EXPOSURE TO A SERIOUS INFECTIOUS DISEASE:
A GUIDE FOR POLICY MAKERS

The following is excerpted from a proposed report that The Center for HIV Law and Policy prepared for UNAIDS following a series of meetings involving legal and scientific professionals knowledgeable in HIV law, policy and science; and government officials and policy makers from around the globe, in 2011-2012.

1. Policy-makers and criminal justice enforcement personnel should incorporate the following factors in their understanding of and response to harm from allegations of HIV non-disclosure, exposure and transmission:
 - a. HIV infection is a health condition that is not yet curable, but with treatment becomes chronic and manageable, with the result that a person with HIV can now live a near-normal lifespan.
 - b. HIV infection does not prevent a person with HIV from living a full, productive and satisfying life.
 - c. HIV infection does constitute a serious health condition with physical, psychological and social consequences, and thus could be considered a harm under the criminal law in the same way that comparable health conditions would be.
 - d. Because HIV infection is a chronic treatable health condition, it is inappropriate for criminal prosecution of HIV non-disclosure, exposure or transmission to involve charges of “murder/manslaughter”, “attempted murder/manslaughter”, “assault with a deadly weapon” or “reckless homicide”.
 - e. The “harm” related to HIV non-disclosure or exposure (as opposed to HIV transmission) should not be considered significant enough to warrant prosecution under the criminal law.

2. Policy-makers and criminal justice enforcement personnel should understand and incorporate the following aspects of risk relevant to allegations of HIV non-disclosure, exposure and transmission:
 - a. To warrant criminal prosecution, the risks of HIV non-disclosure or exposure should be significant; the fact that the “harm” of HIV infection has been reduced from death to a chronic manageable health condition where treatment is available, argues against considering “any risk” of HIV infection as a “significant risk”.
 - b. Any legal concept of “significant risk” in the context of HIV should be informed by scientific, medical and epidemiological evidence.
 - c. Risk of transmission should *not* be considered “significant”, “substantial”, “unjustifiable”, “serious” or “likely” when there is correct use of condoms, no vaginal or anal penetrative sex, or the person living with HIV has an undetectable or very low viral load.
 - d. As there is no significant scientific or medical risk of HIV transmission from biting (regardless of whether or not there is blood in saliva), from scratching or hitting, or from spitting or throwing bodily fluids or excretions (such as urine and faeces), no court of law should find any legally significant risk of harm from these acts.

3. Policy-makers and criminal justice enforcement personnel should apply the following key points in their understanding and response to state of mind in the context of criminalization of HIV non-disclosure, exposure and transmission:
 - a. To avoid possible miscarriage of justice and unfair application of the criminal law, prosecution of alleged harms that occur in the context of consensual intimate relationships should require that the State prove the intention to cause harm – a culpable mental state.
 - b. Intent to harm and/or to transmit cannot be presumed or solely derived from knowledge of positive HIV status and/or failure to disclose HIV status.
 - c. Public health records are not acceptable methods of proving an individual's knowledge of HIV status; neither these records nor personal medical records are sufficient to prove an individual's intent to harm.
 - d. Intent to transmit cannot be presumed or solely derived from intent to engage in unprotected sex or have a baby without taking steps to prevent mother to child transmission of HIV.
 - e. Proof of intent to cause harm in the context of HIV non-disclosure, exposure or transmission should at the least involve the following elements: (i) knowledge of positive HIV status; (ii) purposeful action that poses a significant risk of transmission; and (iii) knowledge that the alleged action posed a significant risk of transmission.
 - f. Active deception regarding positive HIV status can be considered an element in establishing the required state of mind but is not dispositive on the issue of intent. The context in which the deception occurred, including the mental state of the person living with HIV, should be assessed.
 - g. No prosecution can proceed, for failure to prove the required state of mind, if the defendant:
 - i. did not know his/her positive HIV status;
 - ii. did not know how HIV is transmitted;
 - iii. reasonably believed the other person had consented to the risk;
 - iv. feared violence or other significant harm if s/he disclosed;
 - v. took reasonable measures to reduce risk by practicing safer sex (such as use of condoms for anal or vaginal sex, or by not engaging in anal or vaginal sex); or
 - vi. reasonably believed that his/her treatment rendered him/her non-infectious.

4. Policy makers and law enforcement personnel should understand the relevance and complexities of disclosure and consent, and their documentation, in the context of allegations of HIV non-disclosure, exposure and transmission:
 - a. Because the risk of HIV transmission can be made negligible by many means, including through consistent and correct use of condoms, by non-penetrative sex and by having an undetectable or very low viral load; because privacy is a human right; and because disclosure may place an HIV-positive individual at risk of physical, mental or social harm, the criminal law should not impose a blanket requirement for disclosure of positive HIV status nor should non-disclosure alone be the basis for criminal prosecution.
 - b. Disclosure should be considered evidence of a lack of intent to do harm and as a defense to charges of HIV transmission.
 - c. Reasonable belief that one has reduced risks of transmission to a negligible level or disclosure of positive HIV status (whether explicit or reasonably implicit) should preclude a finding of the necessary intent to cause harm.