

Understanding State Departments of Health and Corrections Collaboration

A Summary of Survey Findings — Part II and Strategic Guidance towards ending criminalization-related stigma and discrimination

Background

The National Alliance of State and Territorial AIDS Directors (NASTAD), in coordination with the Centers for Disease Control and Prevention (CDC), conducted a two-part survey assessment to: 1) understand the degree to which state health departments interact with state departments of corrections regarding prevention, care and treatment of HIV and viral hepatitis in state correctional facilities; and 2) gather information concerning health departments' awareness of any policies and practices that unjustly sanction persons living with HIV/AIDS by criminalizing exposure and/or transmission. NASTAD released the results from the first part of this assessment with Understanding State Departments of Health and Corrections Collaboration: A Summary of Survey Findings – Part I. As noted in Part I, the survey assessment aligns with the goals of the National HIV/AIDS Strategy (NHAS) and its implementation plan, which provide a road map for reducing HIV/AIDS incidence in the U.S. through the scale-up of a range of meaningful interdisciplinary approaches.

This Part II examines the issue of HIV criminalization for the purposes of strengthening a key NHAS

objective of promoting public health approaches to HIV prevention and care. In February 2011, NASTAD issued the National HIV/AIDS Strategy Imperative: Fighting Stigma and Discrimination by Repealing HIV-specific Criminal Statutes (the Strategy Imperative). As highlighted in the Strategy Imperative, the NHAS Federal Implementation Plan includes step 3.3, *Promote public health approaches to HIV prevention and care*, which states that "state legislatures should consider reviewing HIV-specific criminal statutes to ensure that they are consistent with current knowledge of HIV transmission and support public health approaches to screening for, preventing and treating HIV." The Federal Implementation Plan also includes step 3.4, *Strengthen enforcement of civil rights laws*, which requires an examination and report by the Department of Justice on HIV-specific sentencing laws and implications for people living with HIV.

HIV criminal statutes are laws that create HIV-specific crimes or which increase penalties for persons who are HIV positive and convicted of criminal offenses. As a member of the Positive Justice Project (PJP) – a national coordinated effort to address HIV criminalization – NASTAD supports

NASTAD is a national organization representing public health officials that administer state and territorial HIV/AIDS and adult viral hepatitis prevention and care programs.

NASTAD strengthens state and territory-based leadership, expertise and advocacy, and brings to bear in reducing the incidence of HIV and viral hepatitis infection and on providing care and support to all who live with HIV/AIDS and viral hepatitis. Our vision is a world free of HIV/AIDS and viral hepatitis.

level-headed, proven public health approaches that end punitive laws that single out HIV over other sexually-transmitted diseases or that impose penalties for alleged non-disclosure, exposure and transmission which are severely disproportionate to any likely or actual resulting harm. HIV criminalization has resulted in serious human rights violations, including harsh sentencing for behaviors that pose little to no risk of HIV transmission. Actions taken by the Michigan Department of Community Health in response to the discovery of policies and practices that were found to deter individuals from seeking care and treatment and potentially lead to stigmatization and prosecution, provide a clear example of what health departments can do to address policies and practices that are out of step with current knowledge of HIV transmission.

Accordingly, one of the primary goals of this survey was to learn which states have public health policies that have been (or could be) used to penalize individuals for non-disclosure, exposure or transmission of HIV, and to use the data collected to formulate preliminary guidance for health departments on ways to evaluate and modify policies and practices. The results of survey responses are discussed in greater detail below, but the data show that there is a pressing need for a review of HIV criminalization practices. In addition to the survey findings, Part II includes supplemental resources that health departments can use to review and, if needed, modify their public health policies (see the attached Guidelines to End HIV Criminalization In Public Health Practice and Sample HIV Criminalization Survey Assessment).

Since the survey was released, Congresswoman Barbara Lee (D-CA) has introduced H.R. 3053, the *Repeal Existing Policies that Encourage and Allow Legal HIV Discrimination Act* (also known as the *REPEAL HIV Discrimination Act* or the *REPEAL Act*), in the U.S. House of Representatives. The *REPEAL Act* would require a comprehensive review of federal and state laws, policies, and regulations regarding criminal prosecution under HIV-specific or HIV-related offenses. The *REPEAL Act* would also provide incentives for health departments to reform or outright repeal laws, policies and practices that target people with HIV for consensual sex and other conduct or actions which do not pose a significant risk of HIV transmission. This proposed legislation further underscores the need for action on this subject, which is why NASTAD has included the

attached Guidelines to End HIV Criminalization In Public Health Practice and Sample HIV Criminalization Survey Assessment as part of this release.

Survey Methods

NASTAD surveyed administrators of state-level HIV/AIDS and viral hepatitis health department programs in fifty-nine (59) U.S. states and territories, including the District of Columbia, Puerto Rico, U.S. Virgin Islands, and U.S. Pacific Islands. This 34-item survey was developed in partnership with the CDC, with input from an ad hoc advisory committee comprised of HIV and adult viral hepatitis prevention staff and other subject matter experts. Survey questions consisted of multiple choice and open-ended questions. The survey was administered electronically via Survey Monkey, which 38 state health departments (64.4 percent) completed and these data were analyzed by NASTAD.

The HIV criminalization portion of the survey asked respondents to answer questions about existing state laws or criminal prosecutions related to intentional HIV exposure and inquired about existing policies or procedures related to this intentional exposure and the release of medical information. The questions were chosen for two primary reasons. The two questions regarding existing laws and criminal prosecutions were asked to compare responses regarding laws and prosecutions with the research findings published in the PJP's November 2010 Ending and Defending Against HIV Criminalization: State and Federal Laws and Prosecutions (the PJP Report) in an effort to ascertain whether state health department programs were aware of HIV criminalization laws that might exist in their state. The remaining questions – all of which related to existing policies and procedures – were asked to ascertain how health departments were responding to the existing laws.

Findings

More than half of the respondents (55.3 percent (n=21)) indicated that their state has law(s) that criminalize intentional exposure and/or failure to disclose status to a sex partner. The PJP Report detailed that two-thirds of all states (34 states and two territories) have HIV-specific criminalization laws, NASTAD'S survey results indicate either 1) that the states with HIV criminalization laws were dispro-

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portionally among those that did not respond to the survey or 2) that there are some respondents who either inadvertently identified that their state did not have HIV criminalization laws or were unaware of whether those laws were in existence. Similarly, 55.3 percent (n=21) of survey respondents reported that there have been cases in their states where someone was prosecuted or sentenced for intentional exposure, or failure to disclose status. In one state, a “reckless endangerment” statute has been applied in such cases even though the state has no

specific laws regarding HIV criminalization. Again, the PJP Report detailed that two-thirds of all states (36 states) reported proceedings in which HIV-positive people have been arrested and/or prosecuted for consensual sex, biting, and spitting, so the results of the NASTAD survey indicate underreporting or an unknown or inadvertent mischaracterization of whether state prosecutions had occurred. The full set of responses to the survey’s HIV criminalization questions are set out in Table 1 below.

Table 1

HIV criminalization laws, prosecutions, practices and procedures.	Percent (%) Responding “Yes”	Actual Number of Responses n=38
State has laws that criminalize intentional exposure of a sexual partner to HIV or failure to disclose HIV positive status	55.3	21
State has had cases or incidences in which someone was prosecuted or sentenced for intentional exposure of a sexual partner to HIV or failure to disclose HIV positive status	55.3	21
State has institutional policies or regulations that require persons who are HIV positive (or who have been incarcerated) to sign forms or document their acknowledgment of criminal liability if they engage in otherwise legal conduct, e.g., sexual intercourse or donating blood	15.8	6
State has institutional policies that may discourage individuals from seeking HIV testing, counseling or treatment services for concern of criminal liability for engaging in non-criminal conduct, e.g., counseling and testing consent forms which require agreement not to intentionally transmit	2.6	1
State health department has policies or procedures around the release of medical records to law enforcement in incidences involving alleged HIV exposure	65.8	25
State health department has materials and forms, e.g., testing, in-take, etc., that reflect current knowledge and understanding of HIV transmission risk	71.1	27

With respect to criminalization policies and procedures, most health departments reported not having (55.2 percent (n=21)), or not being aware of (28.9 percent (n=11)), policies and procedures that require HIV positive persons to acknowledge potential criminal liability for engaging in sexual intercourse without prior disclosure of their HIV positive status or giving blood. Seven of those health departments having acknowledgement policies (18.4 percent) provided a narrative description of those policies. The policies identified in these descriptions included the following:

- One health department noted that health department specialists “will explain the individual’s criminal liability when giving positive HIV results;”
- Two health departments reported that their states have policies in place which require HIV positive individuals to sign written documents that outline the individual’s duty to disclose their status to potential partners;
- One health department also indicated that the written documents include an individual acknowledgment that they “are aware of the code that states that any person who exposes another in any manner with the intent to infect, knowing that he or she has AIDS or HIV is guilty of a felony;” and
- Another health department reported that it had “step wise interventions with the final step being a cease and desist order” from the state health commissioner.

Only one health department (2.6 percent) reported having policies or procedures which may discourage individuals from seeking HIV counseling, testing or treatment. That state reported that individuals in their state might be being deterred from learning about their status due to that state’s law which “requires that someone with HIV or an STD must disclose their status to sexual partners.” It is unclear from any of these responses whether these assessments applied solely to state-wide policies and procedures, or whether there might be further variation among local policies and procedures within each state.

The majority of health departments (65.8 percent (n=25)) responding to the survey indicated that their

state health department has policies and practices that allow for the release of medical records to law enforcement and courts in incidences involving alleged intentional HIV exposure. It is unclear from the survey whether these policies encourage adherence to the requirements of the Health Insurance Portability and Accountability Act or other medical record privacy laws or if these policies may be inconsistent with these privacy laws.

Summary and Next Steps

According to the PJP Report, most of the prosecutions under HIV-specific criminalization laws involve low- or no-risk conduct such as spitting and biting. The survey data underscore that some of the policies and procedures that derive from these laws may be similarly out of touch with sound public health policy. Given the immeasurable harm to HIV positive individuals that these practices may bring and the broad threat upon civil liberties, such statutes, policies and procedures, and their related enforcement measures, must be strongly opposed. Given this, the PJP is working to repeal and remove HIV criminalization laws and to prevent criminal prosecutions, and NASTAD has developed the *Guidelines to End HIV Criminalization In Public Health Practice* and *Sample HIV Criminalization Survey Assessment* so that health departments can develop sound and effective public health policies and practices.

In accordance with steps identified in the NHAS Federal Implementation Plan, NASTAD supports the promotion of public health approaches to HIV prevention and care based on current understanding of HIV transmission risks and strengthening practices that reduce stigma. In light of this, NASTAD recommends the careful examination of HIV-specific sentencing laws and their implications for persons living with HIV/AIDS. As HIV criminalization undercuts our most basic HIV prevention and sexual health messages, and breeds ignorance, fear and discrimination against people living with HIV, NASTAD reiterates the commitment outlined in the Strategic Imperative and encourages health departments to:

- Support the maintenance of confidentiality of HIV test results and medical records in order to encourage and support individuals to be tested, learn their status and enter services if positive;

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- Maintain a clear separation between public health activities/patient services and criminal law enforcement;
- Identify and share best practices related to successes in repeal of policies and/or laws and statutes in states that are not grounded in public health science;
- Promote public education and understanding of the stigmatizing impact and negative public health consequences of criminalization statutes and prosecutions; and,
- Provide unequivocal public health leadership on the relative risks of transmission and the dangers of a punitive response to HIV exposure on the epidemic.

To further these goals, NASTAD has developed the *Guidelines to End HIV Criminalization In Public Health Practice*, which set out a preliminary set of steps that each health department can take to review and, as needed, modify policies and procedures which needlessly impact HIV positive individuals and undercut fundamental public health prevention messages, and the attached *Sample HIV Criminalization Survey Assessment*, which may be used in its entirety (or in selected portions) or used merely as guidance to evaluate local health department policies and procedures. Together, these materials offer a preliminary toolkit for state public health officials

to use in guiding and refining HIV public health policies. NASTAD will conduct a series of webinars to discuss the *Guidelines to End HIV Criminalization In Public Health Practice* and *Sample HIV Criminalization Survey Assessment*, and the importance of this policy review, in more detail. As health departments undertake their evaluation and review of these policies and procedures, NASTAD will provide technical assistance. Health departments desiring any technical assistance should contact Terrance Moore at NASTAD for further information.

NASTAD will continue to advocate at the national level and will work with the PJP to continue to raise awareness of this urgent issue. NASTAD will further work with health departments to ensure that policies and procedures regarding HIV transmission are based on well-founded public health principals rather than fear and conjecture, and serve to protect civil and human rights of people living with HIV rather than stigmatizing HIV positive individuals.

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