



Positive Justice Project Proposed Resolution Submitted to President's Advisory Council on AIDS (PACHA) On Ending Federal and State HIV-Specific Criminal Laws, Prosecutions and Civil Commitments

The following text was introduced at the October 25, 2012 PACHA meeting for approval:

HIV disease, while still a serious health condition, is today a chronic and manageable disease for those with access to appropriate care and treatment. Those who discover their infection in a timely fashion and have access to quality health care can expect a near-normal life span. The relative risk of HIV transmission varies widely based on the type of sexual activity, the viral load of the person with HIV and whether or not the person at risk has other sexually transmitted infections (STIs); for instance, oral sex in general poses an extremely low to zero risk of transmission.

Despite the relatively low risk of transmission and significantly lowered level of harm, thirty-four U.S. states and territories have adopted criminal statutes based on perceived exposure to HIV. Most of these laws were adopted before the availability of effective antiretroviral treatment for HIV and at a time when data about the limited routes and risks of HIV transmission were not widely available. Additionally, many states were induced to adopt such laws because the federal government initially made emergency funding for treatment and care under the Ryan White CARE Act available only after states showed capability of prosecuting intentional transmission of HIV.

In reality, it is now clear that HIV-specific criminal laws, the use of felony laws such as attempted murder and aggravated assault, and the use of sentence enhancements to prosecute HIV positive individuals are based on outdated and erroneous beliefs about the routes, risks, and consequences of HIV transmission. Legal standards applied in HIV criminalization cases regarding intent, harm, and proportionality deviate from generally accepted criminal law principles and reflect stigma toward HIV and HIV-positive individuals. Prosecutions involving allegations of non-disclosure, exposure, or transmission of HIV conflict with public health priorities and violate basic principles of justice. Such prosecutions have occurred in at least thirty-nine (39) states under HIV-specific laws or under general criminal laws.

People living with HIV have been charged under aggravated assault, attempted murder and even bioterrorism statutes, and face more severe penalties because law enforcement, prosecutors, courts, and legislators continue to view and characterize people living with HIV and their bodily fluids as inherently dangerous, even as "deadly weapons". Punishments imposed for non-disclosure of HIV status, exposure, or HIV transmission are grossly out of proportion to the actual harm inflicted and reinforce the fear and stigma associated with HIV. Public health leaders and global policy makers agree that HIV criminalization is unjust, bad public health policy and is fueling the epidemic rather than reducing it. HIV is a treatable virus, not evidence of a crime.

Whereas the National HIV/AIDS Strategy (NHAS), released in 2010, includes a statement on the problem and public health consequences of HIV criminalization and notes that many state



HIV-specific criminal laws reflect long-outdated misperceptions of HIV's modes and relative risks of transmission;

Whereas the NHAS recommends that legislators reconsider whether these laws further the public interest and support public health approaches to preventing and treating HIV;

Whereas The President's Advisory Council on HIV/AIDS (PACHA) is tasked to develop recommendations for ways to improve the safety of voluntary HIV status disclosure by those who are HIV-positive;

Whereas PACHA is directed to "provide, on an ongoing basis, recommendations on how to effectively implement the National HIV/AIDS Strategy (NHAS), as well as monitor the Strategy's implementation";

Whereas criminalization harms women with HIV in many ways, because it

1. Creates a tool for control by abusers who threaten prosecution of women who want to leave abusive relationships; complicates custody disputes and pregnancies;
2. Imprisons women for non-disclosure without regard for the complex reasons, such as fear of violence, that disclosure may not be advisable; and
3. Over-targets sex workers, against whom condom possession may be used as evidence of intent to commit a crime);

Whereas criminalization harms young people, for whom negotiating sex and relationships while cultivating acceptance and community is additionally complex, particularly those perinatally infected who have never known a life without HIV;

Whereas sound criminal justice and public health policy towards people living with HIV would ensure an evidence-based approach to disease control, provide sound public education and ensure understanding of all public health threats, treat like risks alike, and take vigorous public stands against laws and policies that negatively target and stigmatize PLWHA;

Whereas research demonstrates that HIV-specific laws do not reduce transmission or increase disclosure, and a growing body of research shows that they fuel the epidemic because they increase stigma, may discourage testing and make it more difficult for people with HIV to disclose their HIV status;

Whereas punishments imposed for non-disclosure of HIV status, exposure, or HIV transmission are grossly out of proportion to the actual harm inflicted or intended, and reinforce the fear and stigma associated with HIV; and the use of sex offender registries and civil commitment to impose life-long restrictions on individuals for consensual sex after testing positive for HIV minimizes the seriousness of actual sexual assault and misdirects resources used for monitoring and surveillance away from actual sexual predators;

Whereas the criminal law has been unjustly used in the United States to target people with HIV, such that correct and consistent condom use and effective antiretroviral therapy that reduces the

risk of HIV transmission to near-zero are not considered evidence of a lack of intent to harm; and that spitting and biting charges have resulted in sentences as long as 35 years;

1. **Be it resolved**, that the President's Advisory Council on HIV/AIDS recommends that the DOJ and HHS/CDC immediately launch a review regarding opportunities for creation of specific guidance and incentives to state attorneys general and state departments of health for the elimination of HIV-specific criminal laws and to develop recommendations for treatment of HIV within the civil and criminal justice systems that parallels the treatment of similar health and safety risks.
2. **Be it further resolved**, that modernization of current criminal laws shall eliminate HIV-specific statutes and ensure that any prosecution on the basis of HIV or any other STIs requires:
 - a. Proof of an intent to harm;
 - b. Conduct that is likely to result in that harm;
 - c. Proof that the conduct of the accused in fact resulted in the alleged harm; and
 - d. Punishment that is proportionate to the actual harm caused by the defendant's conduct.
3. **Be it further resolved**, that Federal and state officials should review the HIV-specific convictions and related penalties, sentence enhancements and other restrictions imposed on people living with HIV, such as mandated sex-offender registration and civil commitment or quarantine orders, in their jurisdictions. In the event that such convictions or sentence enhancements fail to conform to the principles outlined above, federal and state officials should take appropriate measures (e.g., through executive clemency, pardon, sentence reconsideration, parole, probation, community work release, etc.) to mitigate the harm caused to individuals through inappropriate application of the criminal law and other civil restrictions to HIV-positive individuals.
4. **Be it further resolved**, all U.S. law should be consistent with current medical and scientific knowledge and accepted human rights-based approaches to disease control and prevention that respect the right to be free of discrimination and the imposition of unwarranted, punitive rules of conduct based on health and disability status.
 - a. Singling out HIV status or any other health condition or disability as an element of a crime or proof of an intent to harm is unjust and unwarranted from legal, ethical, and public health perspectives.
 - b. Incarceration or isolation under either the criminal or civil law should never be based on unsupported beliefs or assumptions about HIV or an individual's HIV or STI status, disability, guilt or dangerousness.
 - c. Cases in which people living with HIV engage in conduct with the specific intent and actual likelihood to inflict harm through transmission of HIV are exceedingly rare and, regardless, can be addressed through existing criminal assault statutes.
 - d. In cases of intended and actual transmission of a sexually transmitted infection, punishment must be proportionate to the nature of the harm and should include diversion program options and alternatives to incarceration, such as restorative justice

approaches, that constructively address the needs of the individual who has been harmed.

5. **Be it further resolved**, That HHS/HRSA should revisit inclusion of a provision requiring the removal of laws and policies that, by stigmatizing and punishing HIV status, serve as barriers to testing and care in any reauthorization of the Ryan White Care Act. An example of such language is: “Plans and reports required of the Secretary, planning councils, health authorities and applicants under this Act to increase numbers of people who know their HIV status and enter care, shall address one or more of the broad range of legal and other barriers to testing that perpetuate HIV stigma and disparate treatment of HIV and affected populations in medical, social service and criminal justice systems.”
6. **Be it further resolved**, that the Surgeon General should send a letter to all U.S. households, with current information about HIV and other STIs and the importance of frank discussions about maintaining sexual health and destigmatizing sexuality and HIV. A letter from the current Surgeon General will help correct many persistent misconceptions about HIV, its transmission, and the prognosis for those whose infection is detected reasonably early and who are provided with appropriate access to HIV-related healthcare.
7. **Be it further resolved**, That the Centers for Disease Control and Prevention (CDC) should issue a clear statement summarizing the problem of HIV criminalization and punishments that:
 - a. Reflect and reinforce stigma,
 - b. Treat HIV as more infectious and dangerous than it is,
 - c. Do nothing to positively influence behavior and may serve as a disincentive to get tested and into care,
 - d. Ignore the fact that effective treatment of HIV disease renders HIV even more difficult, and possibly impossible, to transmit,
 - e. Punish the decision to get tested, and
 - f. Violate essential public health principles by failing to treat like risks alike.