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Global Commission on HIV and the Law - Secretariat,
United Nations Development Programme, BDP, HIV/AIDS Practice,
304 East 45th Street – FF1180, New York NY 10017, USA.

Dear Commissioners:

Since its founding in 1870, the Association of the Bar of the City of New York has grown to over 23,000 members who work to promote the public good by advocating for legal reform. The membership of the Association's Special Committee on AIDS includes lawyers with comprehensive knowledge of HIV-related law and policy issues. The Global Commission on HIV and the Law has asked for submissions from organizations working on issues relevant to its work, addressing how the law can facilitate or substantially change the trajectory of the HIV epidemic. The Commission's focus is on how laws and law enforcement can support effective HIV responses. Although the Committee has addressed many legal questions about HIV since the 1980's, for this report we have chosen to address two pervasive issues for which we have come to a longstanding and unanimous consensus: (1) needle exchange and needle access are crucial components in the fight against HIV transmission, and (2) laws criminalizing HIV transmission are unnecessary, abusive and counterproductive.

The Importance of Sterile Needles

The availability of sterile needles to intravenous drug users is essential to the prevention of new HIV infections.[1] It is well established that such programs correlate with significant declines in HIV transmission among intravenous drug users, while not increasing drug use.[2] In New York State, nearly 40% of all cumulative AIDS cases report use of, or contact with, injection drugs.[3]

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[1] *See Access to Sterile Syringes Fact Sheet*, U.S. Centers for Disease Control and Prevention (December 2005) (indicating that if intravenous drug users "use a new sterile syringe for every drug injection, it can substantially reduce their risks of acquiring and transmitted blood-borne viral infections" and describing the availability of sterile needles as "necessary" to the prevention of HIV infections) *available at* http://www.cdc.gov/idu/facts/aed_idu_acc.htm.

[2] *See generally* National Institute on Drug Abuse, *Principles of HIV Prevention In Drug-Using Populations* (2002), *available at* http://www.nida.nih.gov/pohp/faq_1.html; *see also* Don C. Des Jarlais et al., *HIV Incidence Among Injection Drug Users in New York City, 1990 To 2002: Use of Serologic Test Algorithm to Assess Expansion of HIV Prevention Services*, 95 Am. J. Pub. Health 1439-1444 (2005) (finding correlation between expansion of syringe exchange programs in NYC and significant decline in reported HIV infections among intravenous drug users).

[3] *See New York State HIV/AIDS Surveillance Annual Report For Cases Diagnosed Through December 2008* (June 2010), *available at* http://www.nyhealth.gov/diseases/aids/statistics/annual/2008/2008-12_annual_surveillance_report.pdf.

Accordingly, as an obvious exposure category, the Committee has strongly supported changes in the law which facilitate easy access to clean syringes.

Given the demonstrated value of needle exchanges, and the negative impact of criminal drug and paraphernalia possession laws on syringe access, the New York City Bar Association's Special Committee on AIDS has long advocated for legal reform in this area. Effective legal reform, though, must include not only the implementation of a needle access program, but also the removal of those laws that dilute the effectiveness of such a program.

Prior to 2001, syringes could only be purchased legally in New York with a medical prescription. Unlawful possession of syringes was illegal, as was possession of syringes with drug residue. Such restrictions increased infection rates and were a public health disaster. In 2001, New York State changed its Public Health Law to authorize a demonstration program to expand access to sterile hypodermic needles and syringes. This program, known as ESAP (Expanded Syringe Access Demonstration Program), allowed for the purchase of syringes without a medical prescription. It also provided for the inclusion of a safety insert with the purchase of syringes to demonstrate their proper use and to explain the risk of blood borne disease.

In 2009, ESAP was made a permanent program, and syringe access is now the law in New York. The change in law was a vital component of the fight against new infections in New York. Because of the success of the syringe access program, the state has taken further steps to ensure ready access to clean needles. Most importantly, New York State Penal Law was amended so that possession of a residual amount of a controlled substance in or on a syringe obtained pursuant to the syringe access program is no longer considered criminal conduct in New York. In addition to these changes, governments should place no restrictions on (1) the age a person must be to access clean needles, (2) the number of syringes allowed to be sold at one time, or (3) advertising for the sale of syringes.

Criminalizing the use of sterile needles or of residue discovered in needles severely undermines the public health by discouraging the participation in syringe exchange programs.[4] Even though syringe programs like those in New York have been scientifically proven to help fight HIV transmission, movements to restrict or undermine access to sterile needles remain pervasive. The UN and its member countries should continue to advocate for such programs, and to dispel any misinformation associated with their effectiveness.

The Detrimental Effects of Criminalizing HIV Transmission

Fortunately, the transmission of HIV is not a crime in New York. However, concerns about the persistent spread of HIV have inspired the adoption of laws that criminalize HIV transmission or exposure across the globe. In the US, 34 states have enacted such statutes. Criminalization statutes aim to punish malicious transmission, to prevent transmission by discouraging risk behaviors, and to protect vulnerable populations, such as women who are infected by partners that fail to disclose their status. Though these goals are important, in practice, criminalization laws do not prevent transmission and in fact work against preventative efforts by officially promoting fear, ignorance and prejudices.

Very few individuals maliciously expose others to HIV, and those who do should be prosecuted under existing penal laws. Not only are existing laws sufficient for that purpose, the basic

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[4] *See Committee on AIDS, Report on Legislation by the AIDS Committee and the Drugs and the Law Committee* (2010), *available at* http://www2.nycbar.org/Publications/reports/reportsbycom.php?com=86.

realities of transmission make laws that specifically criminalize HIV exposure unjust. Misunderstandings regarding the science of transmission, fear, and the complicated nature of the virus mean that many laws punish behavior that poses no risk of transmission or is otherwise not morally blameworthy. In the US, for example, many statutes broadly criminalize exposing others to "bodily fluids," and numerous prosecutions have been brought against an HIV-positive individual alleged to have bitten someone, despite the fact that transmission does not occur via saliva. Criminalizing actions that do not pose a risk of transmitting the virus promotes dangerous misinformation about HIV transmission.

Moreover, criminalization statutes assume a level of moral blameworthiness that make it virtually impossible for an individual living with HIV to remain "innocent". The laws do not account for the ethical gradations represented by a person, for example, who took steps to prevent transmission, who believed his or her HIV status was known, who had an undetectable viral load, who believed that his or her behavior did not pose a risk of transmission, or who had agreed to mutually acceptable risks with a partner. Because these statutes do not require an intent to expose another to the virus, the subjective spectrum of risk and moral blameworthiness posed by these common scenarios leads to selective prosecution and misapplication of law.

In exposure or transmission cases, the difficulty of proving key facts, including date of infection, pre-exposure disclosure of status, or attempts at risk mediation efforts such as condom use makes convictions based on incomplete information inevitable. Because of the window period after infection in which HIV test results are inaccurate, and because individuals are unlikely to be tested with great frequency, it is often difficult to pinpoint the exact time of transmission. Disclosure is often the only affirmative defense to prosecution,[5] yet proving that a status disclosure occurred can be particularly problematic as most cases arise between former sex partners, creating an emotional "he said she said" dispute.[6] In an illustrative example, one woman in the state of Georgia received a sentence of eight years despite the testimony of two witnesses who maintained that her sexual partner was aware of her HIV status and the fact that her status had been reported on the front page of her local newspaper.[7]

Furthermore, criminalization statutes often provide for grossly severe punishments relative to any intended or actual harm. A man in Iowa was sentenced to 25 years in jail for one sexual encounter even though he had an undetectable viral load, used a condom, and did not actually transmit HIV.[8] His case was not atypical. In many jurisdictions, even when HIV is not transmitted and a condom is used, having consensual sex while HIV-positive results in a longer jail term than vehicular manslaughter.[9] Upon release, individuals convicted of exposure or transmission are often forced to register as sex offenders and to suffer the social, economic, and personal burdens that accompany that label.

By treating HIV-positive individuals as dangerous and potentially criminal vectors of disease, statutes that criminalize exposure or transmission officially support and encourage HIV stigma. In fact, HIV counselors are often obliged to warn that agreeing to a routine screening could result

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[5] *Positive Justice Project: HIV Criminalization Fact Sheet*, The Center for HIV Law & Policy (December 2010), *available at* http://www.hivlawandpolicy.org/resources/view/560.

[6] *What HIV Criminalization Means to Women in the U.S.,* The Center for HIV Law & Policy (2011), *available at* http://www.hivlawandpolicy.org/resources/view/584.

[7] *National HIV/AIDS Strategy Imperative: Fighting Stigma and Discrimination by Repealing HIV-Specific Criminal Statutes*, NASTAD, (February 2011), *available at* http://www.nastad.org/Docs/highlight/2011311_NASTAD%20Statement%20on%20Criminalization%20-%20Final.pdf.

[8] *Id.*

[9] *What HIV Criminalization Means to Women in the U.S.,* The Center for HIV Law & Policy (2011), *available at* http://www.heart-intl.net/HEART/040111/WhatHIVCriminalization.pdf.

in criminal liability.[10] Unsurprisingly, HIV-positive individuals report experiencing increased stigma as a result of criminalization and media attention surrounding trials for exposure.[11] Fear of facing ostracism at the hands of friends and family, stigmatized reactions to HIV in the workplace, or rejection by the community at large are some of the main reasons people forgo testing, fail to maintain treatment regimens, and/or avoid disclosing their status.

Laws that criminalize HIV are sometimes promoted as a means to protect vulnerable populations, most often women who contract the virus from a male partner who fails to disclose his status, is unfaithful, or forces her to engage in unprotected sex.[12] Here too, applying criminal law to HIV exposure actually exacerbates existing problems. Because women engage more frequently with the health care system, they are likely to discover their status before their partner does.[13] To avoid criminal liability, immediately upon discovering her status, a woman must inform her partner or, potentially, refuse intercourse. For many women, however, either of these options would lead to disastrous results – including abuse, ostracism, blame for introducing HIV into the household, loss of children, or eviction.

The spread of HIV is not powered by criminals, but by ordinary people acting in ordinary ways. Most transmission occurs during a consensual sexual act between individuals who are unaware of their status.[14] Twenty-five years of experience has shown that the existence of criminalization statutes do not deter HIV-positive individuals from engaging in risk behaviors.[15] Rather than propagating legislation demonizing HIV-positive individuals, lawmakers should turn their attention to the obstacles that keep people from protecting their health and their partners. Eradicating stigma, combating misinformation, ensuring access to confidential testing and treatment, and providing social services all encourage and allow HIV positive individuals to discover their status and prevent transmission. By promulgating fear, discrimination, and ignorance, HIV-specific criminal statutes do just the opposite.

Yours Respectfully,

Lynn Neugebaur

Lynn Neugebaur, Esq.
Committee Chair

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[10] Ralf Jürgens et. al., *Ten Reasons to Oppose the Criminalization of HIV Exposure or Transmission*, 17 Reproductive Health Matters 163 (2009).
[11] Scott Burris & Edwin Cameron, *The Case Against Criminalization of HIV Transmission*, 300 JAMA 578 (2008).
[12] Ralf Jürgens et. al., *Ten Reasons to Oppose the Criminalization of HIV Exposure or Transmission*, 17 Reproductive Health Matters 163 (2009).
[13] *Id.*
[14] Scott Burris & Edwin Cameron, *The Case Against Criminalization of HIV Transmission*, 300 JAMA 578 (2008).
[15] *Id.*