

IS IT TIME TO DECRIMINALISE HIV NON-DISCLOSURE IN SINGAPORE?

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I. INTRODUCTION

Following the recent data leak of the HIV registry, founding President of Action for AIDS Singapore Professor Roy Chan called for Singapore to “adopt the internationally recognised guideline that criminalisation should be limited to cases where there is intentional and malicious transmission of the human immunodeficiency (“HIV”) virus.”¹

Currently, section 23 of the Infectious Diseases Act² [*IDA*] imposes a legal duty on persons living with HIV (“PLHIV”) to disclose their HIV-positive status to sexual partners. In 2008, the criminal penalties for a breach of this statutory duty was increased five-fold to a fine of up to \$50,000 or 10 years’ imprisonment.

That same year, the Joint United Nations Programme on HIV/AIDS (“UNAIDS”) and the United Nations Development Programme (“UNDP”) published the Policy Brief on Criminalisation of HIV transmission by UNAIDS, which urged governments to repeal HIV-specific criminal laws, including those that mandated the disclosure of HIV status.³ Subsequently, in 2012, the Global Commission on HIV and the Law published a report calling for the repeal of such laws on the basis that they are counterproductive to reducing the rate of HIV infection.⁴

In light of Professor Chan’s suggestion, this article presents the case for decriminalisation of HIV non-disclosure in Singapore. Firstly, the criminal law may be ineffective and

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¹ Roy Chan, “HIV Registry data leak: Time for change to reduce stigma”, *The Straits Times* (31 January 2019), online <<http://afa.org.sg/time-for-change-to-reduce-stigma/>>.

² Cap 137, 2003 Rev Ed Sing.

³ UNAIDS, “Criminalisation of HIV Transmission”, online: <http://www.unaids.org/sites/default/files/media_asset/jc1601_policy_brief_criminalization_long_en.pdf>.

⁴ Global Commission on HIV and the Law, “Risks, Rights & Health”, online: <<https://hivlawcommission.org/wp-content/uploads/2017/06/FinalReport-RisksRightsHealth-EN.pdf>>.

counterproductive in ending the HIV/AIDS epidemic. Secondly, such a law is unnecessary because there are existing criminal provisions under the Penal Code that can punish irresponsible PLHIV who irresponsibly transmit the virus to others or put others at risk of contracting HIV. Finally, even if Parliament decides against repealing s 23, it should be reformed to address the disproportionate burden that such a law imposes on one of the most vulnerable groups in society.

II. LEGISLATIVE OBJECTIVES OF THE CRIMINALISATION OF HIV NON-DISCLOSURE

Before proceeding, it is crucial to note that this paper does not contend the moral duty that PLHIV have to disclose their HIV-positive status to their sexual partners. What is in question is whether a breach of that moral duty should be codified into a criminal offence. To answer this, it is necessary to consider the legislative objectives behind s 23 of the IDA.

After the first case of HIV was reported in 1985, Part IIIA⁵ of the IDA was enacted a few years later in 1992 to address “irresponsible and dangerous behaviour” by PLHIV.⁶ This led to the introduction of the current s 23(1), which prohibits PLHIV from engaging in sexual activity unless he has informed his sexual partner of the risk of contracting HIV/AIDS from himself and that other person has voluntarily agreed to accept that risk. Subsequently, in 2008, s 23(2) was introduced to compel a person who has “reason to believe that he has” or “has been exposed to a significant risk” of contracting HIV/AIDS to disclose to their sexual partners the risk of contracting HIV/AIDS from him. The public health goal of s 23 generally therefore appears to be the prevention or reduction of HIV/AIDS infection as part of a larger strategy to end the HIV/AIDS epidemic. In addition, there is a normative element to the law where the non-disclosure of one’s HIV-positive status before engaging in sexual activity is regarded as “irresponsible” and morally reprehensible.⁷

The next section argues that the criminalisation of HIV non-disclosure may hinder, rather than help, efforts to end the HIV/AIDS epidemic. Section III suggests that existing provisions in the Penal Code are sufficient to prosecute irresponsible PLHIV.

III. CRIMINALISATION OF HIV NON-DISCLOSURE IS NOT EFFECTIVE

⁵ Now Part IV of the Act.

⁶ Parliamentary Debates Singapore: Official Report, vol 59, col 447 (27 February 1992) (Minister for Health (Mr Yeo Cheow Tong)).

⁷ *Ibid.*

There does not appear to have been any local study on the effectiveness of the criminalisation of HIV non-disclosure on reducing HIV infection rates. However, epidemiological research in other contexts have suggested that such laws may not only be ineffective but also be counterproductive in achieving the purported goal of ending the HIV/AIDS epidemic.

Firstly, the criminalisation of HIV non-disclosure may perpetuate social stigma towards PLHIV. This occurs in two ways. On one hand, such laws may reinforce prevailing social attitudes and the culture of blame that regard PLHIV as irresponsible individuals who engage in high-risk sexual activity.⁸ On the other hand, the use of the criminal law in managing a public health problem can shape perceptions towards PLHIV not so much as patients who deserve medical care and support but as potential criminals whose behaviour must be coercively constrained.⁹

That such laws may perpetuate stigma towards PLHIV is significant because epidemiological research has found that HIV/AIDS stigma can seriously undermine wider efforts to address the epidemic.¹⁰ Firstly, studies in China, South Africa and France have demonstrated an association between either perceived or actual experience of stigma and increased risk behaviour.¹¹ In addition, the reduction of stigma towards HIV/AIDS has been shown to have a significant impact on increasing HIV testing and treatment rates.¹² For instance, a recent study in New York found that higher anticipated HIV stigma was associated with a lower probability of having been tested for HIV in the previous six months.¹³ Similarly, a review of studies done in Sub-Saharan Africa found that the fear of stigma contributes significantly to low HIV testing rates due to concerns with being

⁸ Catherine Dodds & Peter Keogh, "Criminal Prosecutions for HIV Transmission: People Living with HIV Respond" (2006) 17 *International Journal of STD & AIDS* 315.

⁹ Trevor Hoppe, "From sickness to badness: The Criminalization of HIV in Michigan" (2014) 101 *Social Science & Medicine* 139.

¹⁰ Carol L Galletly & Steven D Pinkerton, "Toward rational criminal HIV exposure Laws" (2004) 32:2 *The Journal of Law, Medicine & Ethics* 327; Carol L Galletly & Steven D Pinkerton, "Conflicting Messages: How Criminal HIV Disclosure Laws Undermine Public Health Efforts to Control the Spread of HIV" (2006) 10:5 *AIDS and Behaviour* 451.

¹¹ Anish P Mahajan et al, "Stigma in the HIV/AIDS Epidemic: A Review of the Literature and Recommendations for the Way Forward" (2008) 22 *AIDS* S67.

¹² UNAIDS, "Confronting Discrimination: Overcoming HIV-related stigma and discrimination in health-care settings and beyond", online: <http://www.unaids.org/sites/default/files/media_asset/confronting-discrimination_en.pdf>.

¹³ Sarit A Golub & Kristi E Gamarel, "The Impact of Anticipated HIV Stigma on Delays in HIV Testing Behaviors: Findings from a Community-Based Sample of Men Who Have Sex with Men and Transgender Women in New York City" (2013) 27:11 *AIDS Patient Care and STDs* 621.

seen at a testing centre, which was associated with sexual promiscuity and assumed HIV-positive status.¹⁴

This is concerning because current statistics already suggest that there is significant stigma in getting tested. Only 24% of new cases of HIV infection in 2016 were detected via voluntary HIV screening.¹⁵ In 2015, it was even lower at 18%, which HIV/AIDS advocacy group Action for AIDS described as “extremely worrying”.¹⁶ Since early testing and detection have been recognised as being critically important to ending the HIV epidemic given that “late diagnosis is associated with poorer clinical outcomes and greater opportunities for HIV transmission”,¹⁷ the negative impact that the criminalisation of HIV non-disclosure may have on HIV testing rates seems to run contrary to the very purpose it was enacted for.

Secondly, research has also demonstrated that such laws are ineffective in influencing behaviour in the first place.¹⁸ Such laws do not affect HIV risk behaviours either through mechanisms of incapacitation, norm setting and deterrence. Firstly, since very few individuals are incarcerated across jurisdictions for violating HIV non-disclosure laws, the law is not effective in removing irresponsible PLHIV from society to protect the general public. Secondly, the existence of such laws have not been shown to affect or change social attitudes or perceptions on moral responsibility regarding HIV transmission.¹⁹ Finally, there is also insufficient evidence to suggest that such laws are effective in deterring HIV risk behaviour, with mixed findings across different communities.²⁰

Though these findings were based on research in other jurisdictions, they are at least indicative that such laws may not achieve the purpose of reducing HIV infection rates that Parliament had contemplated it would serve. Coupled with the negative impact that criminalisation has on stigma

¹⁴ Maurice Musheke et al, “A systematic review of qualitative findings on factors enabling and deterring uptake of HIV testing in Sub-Saharan Africa” (2013) 13:1 BMC Public Health.

¹⁵ Ministry of Health, “Update on the HIV/AIDS situation in Singapore 2017 (June 2018)”, online: <https://www.moh.gov.sg/content/moh_web/home/statistics/infectiousDiseasesStatistics/HIV_Stats/update-on-the-hiv-aids-situation-in-singapore-2017--june-2018-0.html>.

¹⁶ Channel NewsAsia, “Voluntary HIV screening rate in Singapore “extremely worrying”: Action for Aids”, online (9 June 2016): <<https://www.channelnewsasia.com/news/singapore/voluntary-hiv-screening-rate-in-singapore-quot-extremely-worryin-7986390>>.

¹⁷ *Ibid.*

¹⁸ Zita Lazzarini et al, “Criminalization of HIV Transmission and Exposure: Research and Policy Agenda” (2013) 103(8) American Journal of Public Health 1350.

¹⁹ Scott Burris et al, “Do Criminal Laws Influence HIV Risk Behavior? An Empirical Trial” (2007) 4 Ariz. St. L.J. 35.

²⁰ *Ibid.*; Carol Galletly et al, “A Quantitative Study of Michigan’s criminal HIV exposure law” (2012) 24(2) AIDS Care 174; Pamina Gorbach et al, “Don't ask, Don't tell: Patterns of HIV Disclosure among HIV Positive Men who have sex with Men with recent STI practising High Risk behaviour in Los Angeles and Seattle” (2004) 80(6) Sexually Transmitted Infections 512.

and HIV testing, such a law may not only be ineffective, but even counterproductive to achieving the intended goal of mitigating the HIV/AIDS epidemic in Singapore.

IV. CRIMINALISATION OF HIV NON-DISCLOSURE IS UNNECESSARY

Another reason behind the enactment of s 23 was to punish persons who irresponsibly transmit HIV/AIDS to others or put others at risk of contracting HIV/AIDS. However, considering the problems discussed in the previous section, it is suggested that existing criminal legislation can sufficiently address the risk of irresponsible transmission. Consequently, s 23 may be unnecessary to address such irresponsible sexual behaviour and its repeal should be seriously contemplated.

Firstly, s 326 of the Penal Code²¹ [PC] may be an appropriate legislation to criminalise the deliberate and malicious transmission of HIV. The provision makes it an offence for anyone to voluntarily cause grievous hurt by means of any substance which is “deleterious to the human body... to receive into the blood” and is punishable with an imprisonment term of up to 7 years. In conjunction with the repeal of s 23 of the IDA, Parliament may introduce the actual transmission of HIV/AIDS as a kind of grievous hurt under s 320 of the PC. Many other jurisdictions without HIV-specific laws, including the United Kingdom and Australia, have been able to address such reprehensible conduct in such a way.²²

Furthermore, in comparison, the criminal penalties under s 23 seem extremely disproportionate given that the mere failure to disclose one’s HIV status may attract more serious consequences, namely imprisonment up to 10 years and a fine of up to \$50,000, than the actual causing of hurt to another person. While this was allegedly justified on the basis of the “seriousness with which society views such offences”,²³ this may not be a sound reason particularly when it relates to a group that is already vulnerable. Indeed, it has been suggested that such social attitudes may be “polluted at its core by fear of HIV or disdain for those who are infected with it”.²⁴

Secondly, there are also other criminal provisions such as s 338 PC which relates to causing grievous hurt by doing a rash or negligent act. This may be used to prosecute an irresponsible

²¹ Cap 224, 2008 Rev Ed Sing.

²² UNAIDS, “Background Paper – Criminalisation of HIV Non-Disclosure, Exposure and Transmission: Background and Current Landscape”, online: <http://www.unaids.org/sites/default/files/media_asset/JC2322_BackgroundCurrentLandscapeCriminalisationHIV_en.pdf>.

²³ *Supra* note 25.

²⁴ Scott Burris & Matthew Weait, “Criminalisation and the moral responsibility for sexual transmission of HIV” (2011) Working paper prepared for the Third Meeting of the Technical Advisory Group of the Global Commission on HIV and the Law, online: <<http://bibliobase.sermais.pt:8008/BiblioNET/upload/PDF/0571.pdf>>.

PLHIV who does not take reasonable precautions in practicing safe sex. Alternatively, where there is no actual transmission of HIV, an irresponsible PLHIV may still be prosecuted under s 336 PC for an act that endangers the life or personal safety of other persons.

These laws therefore already sufficiently address situations where an irresponsible PLHIV either directly causes harm to others or puts others at risk of contracting HIV/AIDS. This may be preferable to s 23 IDA which compels all PLHIV to disclose their HIV-positive status. Given that there remains significant stigma against PLHIV in our society, s 23 IDA may impose a disproportionate and unfair burden on them. It is to this issue that we turn to in the next section.

V. CRIMINALISATION OF HIV NON-DISCLOSURE DISPROPORTIONATELY BURDENS PLHIV

Gostin proposed that public health law is a field that aims to “pursue the highest possible level of physical and mental health in the population, consistent with the values of social justice”.²⁵ In his view, the concept of social justice is founded upon two moral impulses that animate the field of public health: “to advance human well-being by improving health and to do so particularly by focusing on the *needs of the most disadvantaged*”.²⁶ The criminalisation of HIV non-disclosure may run contrary to the values of social justice because it unfairly burdens PLHIV as a group that is one of the most vulnerable in our society.

One dimension of justice is distributive justice or proportionality, which demands that benefits and burdens be distributed fairly.²⁷ In this regard, s 23(1) seems to impose an unfair burden of disclosure on those living with HIV. While it may be justified in relation to the specific situation contemplated by the then Minister of Health where wives of husbands who visit sex workers are especially vulnerable,²⁸ it is less clear in other scenarios outside of marriage where the other party agrees to engage in unsafe sexual practices with the PLHIV notwithstanding his HIV-positive status. Given that s 23 contemplates consensual sexual activity, it may be potentially unjust to impose such a weighty legal burden on PLHIV in two ways. This is especially in light of their already vulnerable status in a society that remains both ignorant and hostile towards PLHIV.

²⁵ Gostin, Lawrence O. “A Theory & Definition of Public Health Law” (2007) 10 *Journal of Healthcare Law & Policy* 1.

²⁶ *Ibid.*

²⁷ Nancy E Kass, “An Ethics Framework for Public Health” (2001) 91:11 *American Journal of Public Health* 1776, 1780 citing Beauchamp and Childress.

²⁸ Parliamentary Debates Singapore: Official Report, vol 84, col 2661 (22 April 2008) (The Minister for Health (Dr Khaw Boon Wan)).

Since practising safe sex can significantly reduce the risks of contracting HIV, mandating all PLHIV to disclose their HIV-positive status without affording them any other alternatives may be disproportionate and unjust. This is in light of the prevailing stigma against HIV in society: a PLHIV must either risk exposing himself to prejudice and discrimination if he discloses his HIV-positive status or potentially be prevented from experiencing sexual intimacy with another person at all. This is especially since there are no safeguards to prevent sexual partners from revealing this information to other persons.²⁹ After all, the then Minister of Health had himself acknowledged that “a promiscuous person who practises safer sex, by using condoms every time he engages in sexual activity, is not considered at high risk of contracting HIV/AIDS”.³⁰ This comment indicates the recognition that consistent condom use significantly reduces the risk of HIV transmission; there does not appear to be any reason why this same reasoning should not also be applied to avail PLHIV to the alternative of adopting responsible sexual practices over disclosing their HIV-positive status.

It may therefore be problematic that this duty is imposed on *all* PLHIV, including those with undetectable viral loads where the risk of transmitting HIV to others is negligible.³¹ Currently, about 77% of those diagnosed with HIV are on sustained treatment and about 82% of these individuals have undetectable viral loads.³² This means that about 63% of all PLHIV in Singapore are effectively non-infectious. It is not clear why these individuals should be imposed with the duty of disclosure when they are epidemiologically no different from a person with a HIV-negative status.³³ There have been significant medical advancements since s 23 IDA was enacted and the law should accordingly be amended to reflect these developments.

In sum, even if Parliament decides against the complete repeal of the law, it is suggested that s 23(1) should be amended to give PLHIV an alternative option to disclosing their HIV-positive status by taking reasonable precautions. This option is available under s 23(2) to persons who have reason to believe that he has HIV/AIDS or have been exposed to a significant risk of contracting

²⁹ Section 25 of the IDA which protects the identity of persons with AIDS, HIV or other sexually transmitted diseases applies only to persons who is aware or has reasonable to believe that a person has AIDS or HIV in the performance or exercise of his functions or duties under the IDA.

³⁰ *Supra* note 25.

³¹ Alison J Rodger et al, “Sexual Activity Without Condoms and Risk of HIV Transmission in Serodifferent Couples When the HIV-Positive Partner Is Using Suppressive Antiretroviral Therapy” (2016) 316:2 *Jama* 171.

³² Ministry of Health, “Speech by Dr Amy Khor at the 10th Singapore AIDS Conference, 3 Dec”, online: <https://www.moh.gov.sg/content/moh_web/home/pressRoom/speeches_d/2016/speech-by-dr-amy-khor-at-the-10th-singapore-aids-conference--3-d.html>.

³³ Myron S Cohen et al, “Prevention of HIV-1 Infection with Early Antiretroviral Therapy” (2011) 365:5 *The New England Journal of Medicine* 493.

HIV/AIDS. It should be extended to PLHIV as well for two reasons. Firstly, s 23 was intended to punish *irresponsible* PLHIV. However, it imposes on responsible PLHIV who are compelled to disclose their HIV-positive status even if they actively make responsible choices in their sexual relations. Secondly, HIV is no longer the “death sentence”³⁴ that people have once thought it to be and the law should be updated to reflect the medical developments in this respect.³⁵

VI. CONCLUSION

The use and effectiveness of criminal law in public health management has always been controversial and this paper has presented a case for repealing, or at least reforming, s 23 of the IDA. While criminalisation of such behaviour may be intuitively appealing on moral and emotional grounds, these cannot be sufficiently reasonable grounds on which our laws are made. This does not mean that PLHIV or those at high risk do not have a moral duty to disclose their risk status to their sexual partners; indeed, it is unlikely that this moral duty is controversial at all. Rather, this paper has demonstrated that it is not clear that imposing criminal liability for HIV non-disclosure is necessarily justified.

Ultimately, this paper does not purport to have provided a conclusive answer; instead, it is hoped that the foregoing discussion will engender greater reflection on the matter. At a minimum, the criminalisation of HIV non-disclosure may not be as straightforward as many might intuitively assume. A review of this area of the law requires the contribution of experts from different disciplines and it is hoped that there will be more written on this subject beyond this paper.

³⁴ Parliamentary Debates Singapore: Official Report, vol 70, col 31 (26 February 1999) (Mr Bernard Chen (West Coast)).

³⁵ TodayOnline, “Life is better now for HIV patients in S’pore”, online (25 November 2015): <<https://www.todayonline.com/daily-focus/health/life-better-now-hiv-patients-spore>>.