

# 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

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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 (25%) or consensual adult sex (50%). 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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# Guidelines to end HIV Criminalization In Public Health Practice

## Overview

In connection with the release of *Understanding HIV Criminalization Policy: a Summary of Survey Findings (Part II) and Strategic Guidance Towards Ending Criminalization-Related Stigma and Discrimination* (the Criminalization Summary), the National Alliance of State and Territorial AIDS Directors (NASTAD) has developed the following *Guidelines to End HIV Criminalization in Public Health Practice* (the Guidelines) for health departments to examine existing public health policies related to HIV criminalization that have the potential to exacerbate stigma and discrimination and lessen the likelihood that individuals will learn their HIV status. These Guidelines serve as a preliminary resource that can be used in the review and, if needed, modification of state or territorial policies. As noted in the Criminalization Summary, NASTAD is committed to providing technical assistance to those state health departments that need support in this review and modification.

Below are five guidelines for the review and modification of policies and procedures relating to HIV criminalization. Most of the guidelines contain additional points of clarification and many have links to external material that may be useful in the evaluation of these policies and procedures. The first guideline looks to identify those policies or practices that may add to the stigma and discrimination faced by people with HIV. The next two guidelines provide a framework in which to evaluate policies and practices. The final two guidelines establish a framework for remedial measures and follow-up monitoring.

## Guidelines

**Survey statewide, county and local programs/providers to ensure that current policies and practices (1) protect the privacy of medical information to the maximum extent allowed, and (2) promote prevention and link individuals to appropriate medical treatment. This survey will provide a baseline of information and may assist in the identification of specific policies or practices which need to be modified.**

Attached is a copy of a *Sample HIV Criminalization Survey Assessment* (the Sample Criminalization Assessment), which may be used as the basis for a survey of county and local programs/providers.

- Health departments may use the entire Sample Criminalization Assessment, or any portion of it that they see fit, in the survey of programs and providers within their jurisdiction.
- As an alternative, Health departments may use the Sample Criminalization Assessment merely as guidance in creating their own survey instrument.

Regardless of what instrument is used, the survey must request that programs and providers supply copies of counseling protocols and any paperwork given to patients regarding their duty or obligation to disclose their HIV status.

This paperwork takes on many forms and might require:

- Acknowledgement by HIV-positive individuals of potential criminal liability for creating a risk of infecting another person, regardless of whether condoms are used ([click here for a summary of an example of this type of form and a link to a downloadable version](#)); or
- Acknowledgement by HIV-positive individuals of the necessity of informing future sexual partners of their HIV status before sex, even if condoms are used ([click here for an example and a link to a downloadable version](#)).

**Provide an overview of privacy laws, such as the Health Insurance Portability and Accountability Act (HIPAA), that apply to individual medical records AND remind programs/providers that medical information, including an individual's HIV status, is protected by these privacy laws.**

Health departments should check with legal counsel to see if their jurisdiction has additional state or territorial laws which protect the privacy of medical records.

**If there are specific state medical record privacy laws in the jurisdiction, programs and providers will need to follow the enhanced requirements of those laws.**

- As an example, in 2009 California enacted new medical record privacy rules which cover more providers than HIPAA and provide for broader legal causes of action if medical records are released without consent. An overview of California's enhanced medical record privacy rules [can be found here](#).
- An overview of state and territorial health policy, provided by the Center for Medical Record Rights and Privacy of Georgetown University's Health Policy Institute, [can be found by here](#).

**If there is no special medical record privacy law in the jurisdiction, programs and providers will need to adhere to the baseline HIPAA privacy rule.**

In connection with a criminal prosecution, HIPAA's privacy rule allows for release of confidential medical records only pursuant to a court order.

- A complete summary of the requirements of HIPAA's privacy rule [can be found on the U.S. Department of Health and Human Services' \(DHHS\) website here](#) (and then clicking on the link marked "Administrative Requirements"). In general, HIPAA's privacy rule mandates:
  - (1) designation of a person as a "privacy official" responsible for developing and implementing privacy policies and procedures;
  - (2) training of all workforce members on privacy policies and procedures;
  - (3) mitigation of any harmful effect caused by use or disclosure of protected health information;
  - (4) establishment of data safeguards; and
  - (5) creation of procedures for individuals to complain about its compliance with its privacy policies.

- Absent a court order, programs and providers have the right to refuse to disclose any medical information to third parties, even police or prosecutors. Revealing an individual's HIV status to a third party during the course of a conversation could constitute disclosure of medical information, so HIPAA's privacy rule applies broadly.
- A subpoena is not a court order, and programs and providers should never disclose any medical information prior to review of the request by legal counsel.
- Best practice requires notification to the individual whose medical information is being requested by law enforcement, and an opportunity for that individual to secure legal assistance before the information is released.
- A more a complete overview of HIPAA's privacy rule put out by DHHS [can be found here](#).

**Regardless of whether there are state medical record privacy laws, there may be relevant common law (i.e., court-made) that governs how and when personal medical information can be released.** Each health department's legal counsel/ attorney general should provide guidance on this source of law.

**Ensure that policies and practices that assist with an individual's understanding of the importance of disclosure of their HIV status (and any potential liability for failure to disclose) are free of inaccurate, misleading or deceptive information. These types of inaccuracies lead to the very stigmatization, discrimination and deterrence that NASTAD and the health departments have committed to minimize.**

Verify the health department's understanding of any HIV criminalization laws and advise programs and providers about the extent of such laws.

- Policies and procedures regarding HIV criminalization laws must neither contribute to the stigmatization of HIV nor act as a deterrent to getting individuals tested for HIV (or in obtaining treatment).

While programs and providers sometimes play a role in informing clients or patients about the criminal laws related to HIV status, this is not the advisable method of conveying this information. It is very important that programs and providers do not engage in activity that could compromise the integrity of the patient-provider relationship, or that potentially create actual or perceived conflicting obligations that might lead to a violation of patient confidentiality.

- If providers or programs engage in counseling on legal issues, this could unintentionally result in an appearance of support for (or involvement with) the criminal prosecution of their patients living with HIV and lead to a potential violation of patient confidentiality.

NASTAD will make technical assistance available to members as they review policies and practices for inaccurate, misleading or deceptive information.

**If problems are identified as a result of the survey of programs and providers, the State AIDS director should work with those programs and providers to make needed changes as quickly as possible. These efforts can include:**

Consulting with NASTAD on the scope of the problem and receiving technical assistance from NASTAD on recommended modifications to policies and procedures used by programs and providers;

Issuing a formal directive to programs and providers regarding required revisions or modifications. For an example of what this type of letter might look like, [click here](#);

Releasing further summaries on HIPAA (or enhanced state) medical record privacy laws or the scope and limit of any HIV criminalization statutes;

Offering formal training sessions related to the policies and procedures in need of modification; or,

Conducting an extensive review (whether independently or in connection with NASTAD) of problem policies or procedures and making specific policy and procure recommendations.

**Conduct ongoing monitoring of HIV-related policies and procedures. This ongoing effort can take a variety of approaches, but all should involve ongoing review of policies and procedures at the state, county and local levels.**

Ongoing efforts at the state health department level should provide the unequivocal public health leadership envisioned in NASTAD's *National HIV/AIDS Strategy Imperative: Fighting Stigma and Discrimination by Repealing HIV-specific Criminal Statutes*. This monitoring could include any of the following:

- Collaborating with other jurisdictions to identify and share best practices regarding HIV-related policies and procedures;
- Designating an individual/agency as a "watchdog" to oversee HIV-related policies and procedures; or
- Providing periodic bulletins or statements which outline both best practices nationally, as well as best practices within the state.

Encourage county and local programs and providers to periodically review their policies and practices with counsel and to submit copies of all revisions to written information that is provided to newly-diagnosed HIV-positive patients.

- NASTAD can make technical assistance available to health departments for further review of the revisions to these policies and procedures.

# Sample HIV Criminalization Survey Assessment

Below are a series of sample questions which may be used by AIDS directors in assessing HIV-related policies and procedures at the state, county or local level. The National Alliance of State & Territorial AIDS Directors (NASTAD) has developed these sample questions in connection with the release of *Understanding HIV Criminalization Policy: a Summary of Survey Findings (Part II) and Strategic Guidance Towards Ending Criminalization-Related Stigma and Discrimination*. NASTAD encourages health departments to use all or any portion of these sample guidelines as may be appropriate. Whatever survey instrument is used, that survey must adhere to the principals set out in NASTAD's *Guidelines to End HIV Criminalization in Public Health Practice*.

<b>1</b>	Does your practice have any institutional policies that require persons who are HIV positive to sign forms or document and acknowledge possible criminal liability if they engage in otherwise legal conduct (such as sexual intercourse) without prior disclosure of their HIV status?	yes	no	uncertain
<b>2</b>	If you answered 'yes' to question 1, when were these institutional policies last reviewed?	within the last 12 months	1 year or more ago	uncertain
<b>3</b>	If you answered 'yes' to question 1, were these institutional policies reviewed to ensure they are consistent with local law?	yes	no	uncertain
<b>4</b>	If you answered 'yes' to question 1, were these institutional policies reviewed to ensure they are consistent with established public health approaches to disease prevention and health promotion?	yes	no	uncertain
<b>5</b>	If you answered 'yes' to question 1, do you have periodic training for members of your staff regarding these policies?	yes	no	uncertain
<b>6</b>	Regardless of your answer to question 1, please attach a copy of any form or document that requires an individual to acknowledge possible criminal liability if they engage in otherwise legal conduct (such as sexual intercourse) without prior disclosure of their HIV status or any written policy regarding these forms or documents.			
<b>7</b>	Does your practice have any 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 (such as counseling and testing consent forms which require agreement not to intentionally transmit)?	yes	no	uncertain

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<b>8</b>	If you answered 'yes' to question 7, when were these institutional policies last reviewed?	within the last 12 months	1 year or more ago	uncertain
<b>9</b>	If you answered 'yes' to question 7, were these institutional policies reviewed to ensure they are consistent with local law?	yes	no	uncertain
<b>10</b>	If you answered 'yes' to question 7, were these institutional policies reviewed to ensure they are consistent with established public health approaches to disease prevention and health promotion?	yes	no	uncertain
<b>11</b>	If you answered 'yes' to question 7, do you have periodic training for members of your staff regarding these policies?	yes	no	uncertain
<b>12</b>	Regardless of your answer to question 7, please attach a copy of any counseling and testing consent form and any written policy regarding these consent forms.			
<b>13</b>	Does your practice have any policies or procedures around the release of medical records to law enforcement in incidences involving alleged HIV exposure?	yes	no	uncertain
<b>14</b>	If you answered 'yes' to question 13, when were these institutional policies last reviewed?	within the last 12 months	1 year or more ago	uncertain
<b>15</b>	If you answered 'yes' to question 13, were these institutional policies reviewed to ensure they are consistent with applicable law (such as HIPAA)?	yes	no	uncertain
<b>16</b>	If you answered 'yes' to question 13, do you have periodic training for members of your staff regarding the policies and procedures?	yes	no	uncertain
<b>17</b>	If you answered 'yes' to question 13, do you have a person on staff who has responsibility for maintaining your medical records privacy policies?	yes (please provide the title of the person holding this position _____)	no	uncertain
<b>18</b>	Regardless of your answer to question 13, please attach a written copy of the written policies and procedures regarding medical records privacy.			