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Science-Based: Creating Legal Frameworks to Quash and Mitigate HIV Criminalisation

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Overview

- Definitions
- Global landscape
- Impact on public health and human rights
- Science-based: case studies
- Expert Consensus Statement on the science of HIV in the context of HIV criminalisation
- Five-year impact of Expert Consensus Statement
- Beware ‘function creep’: Molecular HIV surveillance / recency testing
- Conclusions



What is HIV criminalisation?

- HIV criminalisation is the unjust and inappropriate use of criminal and similar laws (e.g. public health law) and policies against people living with HIV based solely on their known or perceived HIV-positive status.
- HIV criminalisation is discredited as being a proportionate public health response.
- Most laws and prosecutions:
 - Are often an over-reaction to a zero or negligible risk of transmission.
 - Ignore up-to-date scientific knowledge and medical advances.
 - Are being used as a proxy for increased state control and attacks on marginalised populations.
 - Are driven by homophobia, gender inequalities, xenophobia and racism, and perpetuate HIV-related stigma.



HIV criminalisation's impacts (1)

- There is **no evidence** that HIV-specific criminal laws or criminal prosecutions under general laws help prevent new HIV infections.
- Rather, there is evidence that overly broad criminalisation of HIV non-disclosure, exposure or transmission **undermines public health** by:
 - contradicting public-health messages encouraging everyone to take **responsibility** for their own sexual health (i.e. criminalisation instead assigns responsibility for HIV prevention to people who know they are HIV-positive)
 - contributing to misconceptions about HIV and how it is transmitted, especially where low or negligible **risk** activities are being criminalised
 - creating a **false sense of security** in those who are HIV-negative or who do not know their HIV status by encouraging people to believe that the law can protect people from exposure to HIV
 - **undermining trust** between health professionals, service providers and their patients, and deterring people from talking openly about their sexual practices, seeking advice to minimise risk for fear that what they say could be used against them in a criminal investigation
 - **deterring access to HIV prevention, testing, treatment and care** for fear of legal ramifications
 - reinforcing **stigma and discrimination** against people living with HIV.



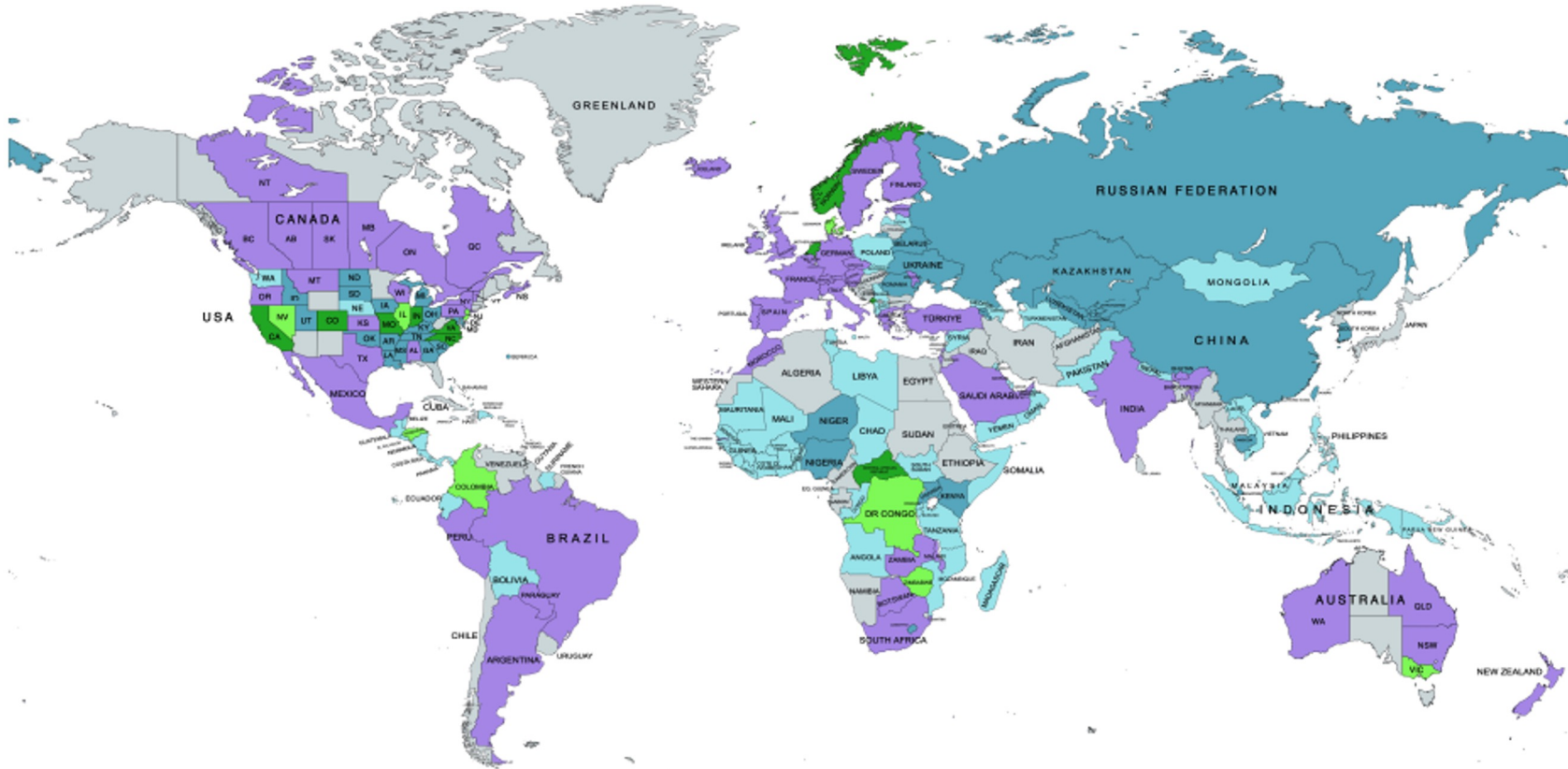
HIV criminalisation's impacts (2)

- HIV criminalisation undermines the **human rights** of people living with HIV, many of whom are also members of marginalised or additionally criminalised communities.
- Threatening to go to police with accusations of HIV non-disclosure has been used as a form of **abuse or retaliation** against current and former HIV-positive partners.
- HIV criminalisation places people living with HIV—particularly but not only women—at **heightened risk of violence and abuse** and ignores the reality that some may not be able to safely disclose their status or in a position to ask their partner to use a condom.
- **Stigmatising statements** from law enforcement or public health agencies, and media coverage, including full names and photographs—even of those merely subject to allegations—can result in public disclosure of a person's HIV status and accusations of serious criminal conduct, leading to loss of employment and housing, social ostracism or even physical violence.
- Investigations and prosecutions often have a **disproportionate impact** on racial and sexual minorities, migrants, and women.
- Poorly-resourced accused may be without **access to adequate legal representation**, resulting in unjust outcomes, including deportation for people without citizenship.



HIV CRIMINALISATION GLOBAL OVERVIEW - March 2023

CURRENT STATE OF HIV CRIMINALISATION

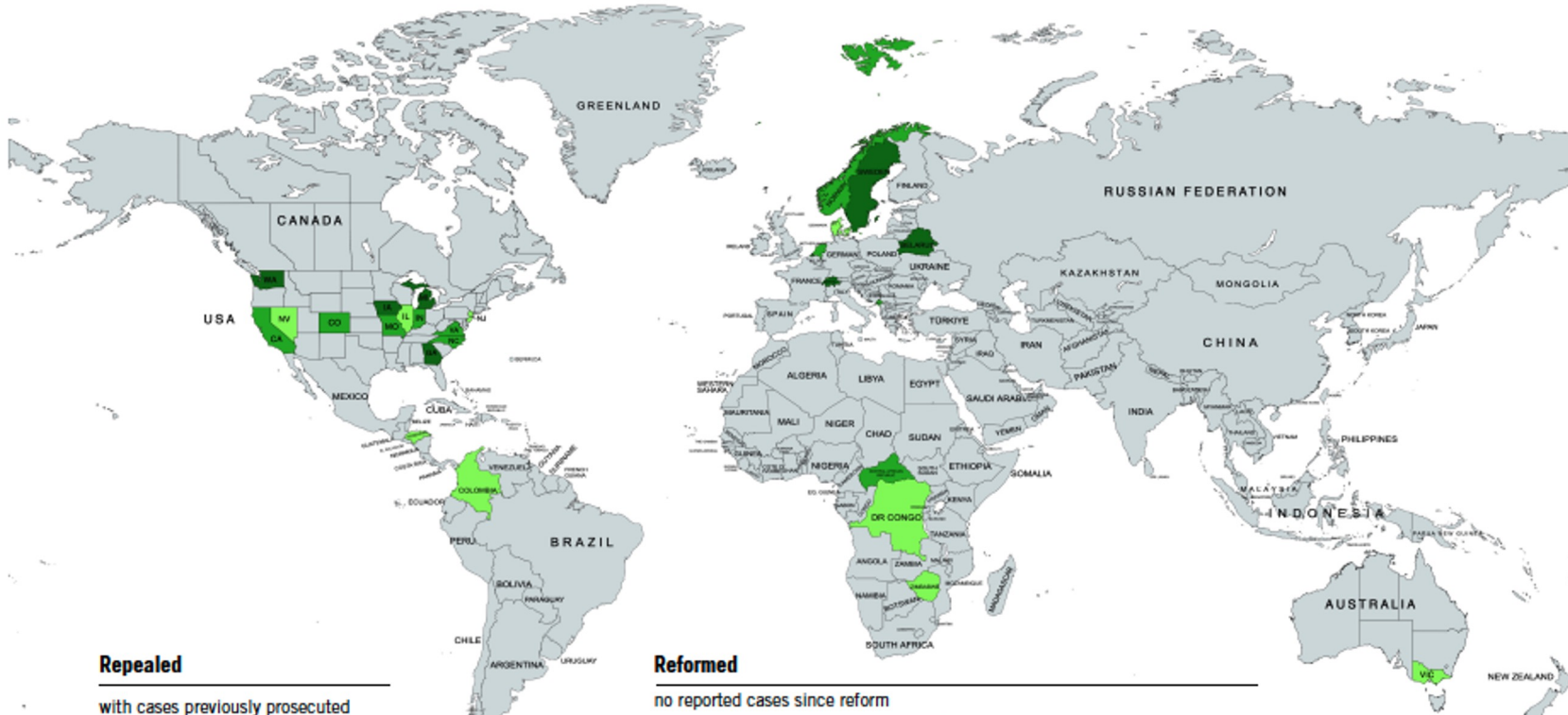


- Repealed**
with cases previously prosecuted under repealed law
- Reformed**
no reported cases since reform
- HIV-specific criminal laws**
WITH reported cases since 2013
- HIV-specific criminal laws**
with NO reported cases (since 2013)
- Non-HIV-specific criminal or similar laws**
WITH reported cases since 2013



HIV CRIMINALISATION GLOBAL OVERVIEW - March 2023

REPEALED OR REFORMED HIV CRIMINALISATION LAWS



Repealed

with cases previously prosecuted under repealed law

Colombia
Democratic Republic of Congo
Denmark
Honduras
Illinois (USA)
New Jersey (USA)
Nevada (USA)
Victoria (Australia)
Zimbabwe

Reformed

no reported cases since reform

California (USA)
Central African Republic
Colorado (USA)
Indiana (USA)
Missouri (USA)
Montenegro
Netherlands
North Carolina (USA)
Norway
Virginia (USA)

WITH cases still reported since reform (using this or another law)

Belarus
Georgia (USA)
Iowa (USA)
Michigan (USA)
Sweden
Switzerland
Washington (USA)



What are 'typical' HIV criminalisation cases?

Most cases involve an HIV-positive person having sex where it is alleged they did not disclose their HIV status. Others involve spitting, biting, breastfeeding or blood donation.

Many cases involve:

- Potential or perceived exposure only (no HIV transmission alleged)
- No or negligible risk, e.g. condom, low viral load, oral sex, and also *spitting, biting, scratching*.
- Faulty assumptions of guilt where transmission is alleged (e.g. first diagnosed in a couple is often considered first infected, phylogenetic analysis rarely used to exonerate accused, and where it is used results can be misinterpreted without additional evidence.)

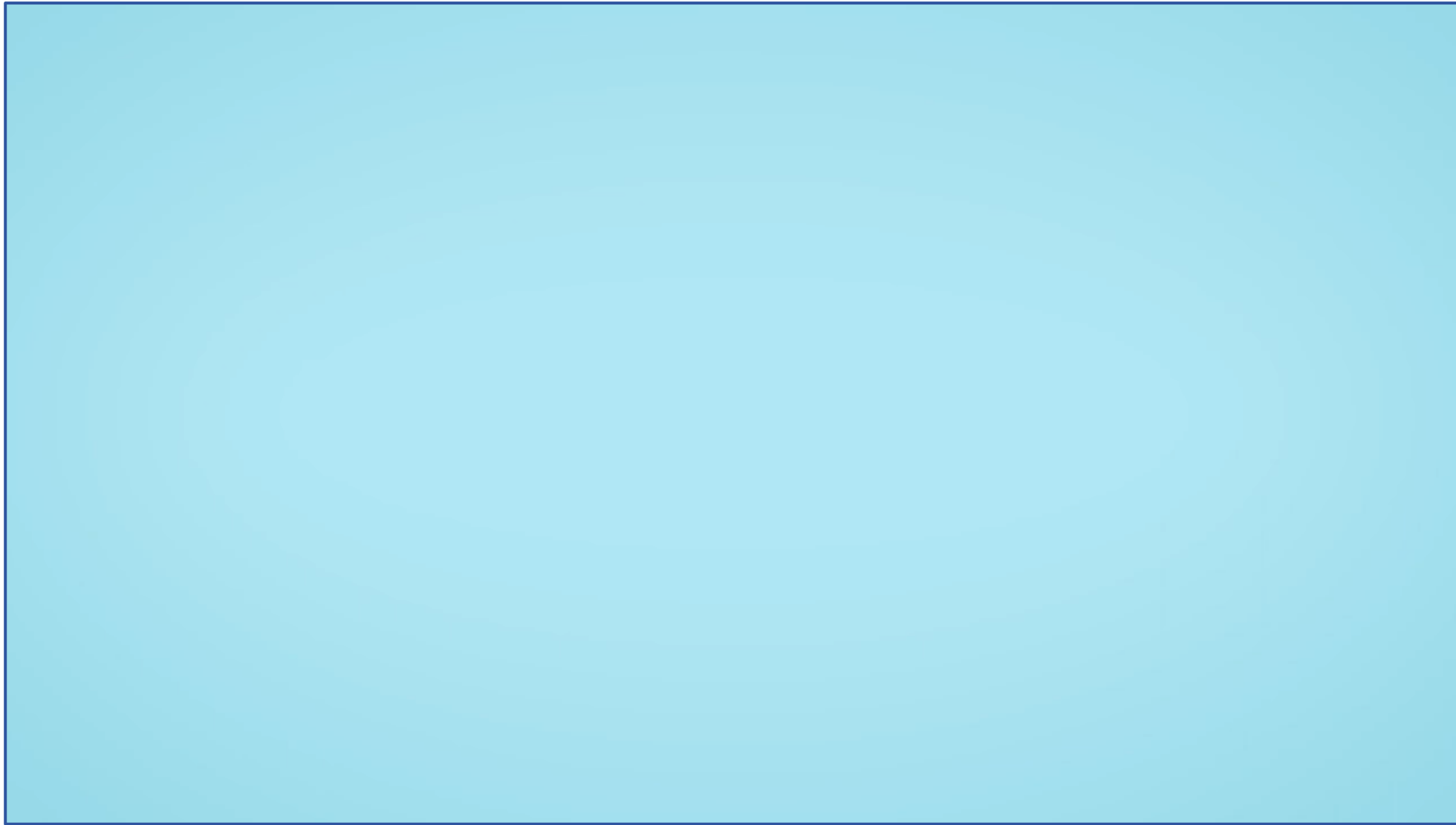
Among the thousands of known prosecutions, cases where it was *proven beyond reasonable doubt* that an individual wanted to infect another person with HIV – and actually did so – are unusual and extremely rare.



Science-based: case studies

- **Risk:** Netherlands Supreme Court limits application of general law based on understanding of HIV risk (2005) and Geneva Court of Justice quashes HIV exposure conviction recognising “hypothetical” HIV risk on ARVs (2009)
- **Harm:** Denmark court acquits accused on the basis of reduced HIV harm: HIV is no longer life-threatening, law suspended. (2011)
- **Proof:** Limitations of phylogenetics for proof of timing/direction of transmission incorporated into prosecutorial guidance for England & Wales in 2008.





Five-year impact of Expert Consensus Statement

- **Supported defence arguments** in many cases, and in constitutional challenges. Pivotal in acquitting people living with HIV and/or constitutionally challenging HIV-related laws in Taiwan, Canada, Colombia, Lesotho, Kenya and Uganda.
- **Supported advocacy campaigns**, providing accessible and authoritative information about HIV to counteracts widespread stigma, discrimination and misinformation. Significant to law reform efforts in Canada, Morocco, Czechia, Belarus, Zimbabwe, and Burkina Faso.
- **Supported education and awareness-raising**: Often cited as an authoritative source on HIV transmission risk in academic papers and research reports, it is distributed in training sessions and courses, and used to inform discussions with policymakers, public health authorities and media.





Beware of 'function creep': Molecular HIV Surveillance and recency tests in the context of HIV criminalisation

- Molecular HIV surveillance (MHS) is an umbrella term that describes a wide range of practices focused on the monitoring of HIV variants using phylogenetic analysis to compare the differences and similarities between them for scientific research, public health surveillance, and intervention.
- To conduct MHS, scientists rely on the results of HIV genetic sequencing tests taken from people living with HIV – these tests are often done as part of resistance testing. Interest in, and use of, MHS for reasons other than tailoring treatment regimens is increasing globally, however. Of particular concern, in some regions, MHS is being conducted and HIV data is being shared in ways that put the rights and safety of people living with HIV in jeopardy.
- Individuals who receive recency test results suggesting they *may* have been recently infected might believe that they are confident they know who was responsible for infecting them. However, because of the considerable uncertainty around such tests on an individual level, this test alone is not an adequate basis for such assumptions.
- In addition to the serious limitations of recency tests in establishing that an infection is recent, there is evidence that an individual's assumption as to the person most likely to be the source of their infection - often their most recent sexual partner - may be inaccurate.
- MHS and recency test results should be interpreted with great caution on an individual level and should never be the starting or central point of a criminal investigation.
- As public health tools that are unreliable on an individual level there is a strong possibility of misuse and abuse especially for already marginalised individuals from criminalised communities, and for women and girls.



Conclusions

- Ending HIV criminalisation cannot rely on science alone.
- But science can help limit unjust prosecutions while we work to end the HIV-related stigma, discrimination and structural inequalities that drive criminalisation.
- Beware ‘function creep’ of public health tools that are unreliable on an individual level such as phylogenetic analysis for HIV surveillance purposes and recency testing.
- Community leadership (not just engagement) imperative to inform use of HIV science in laws and policies that impact us.



Recommendations

Cities can play a critical role in ending HIV criminalisation by taking the following steps:

- Advocate with national or state government to repeal HIV-specific criminal laws – use science argument to show laws are out-of-date, ineffective and counterproductive.
- Adopt non-discrimination ordinances protect people living with HIV from discrimination in housing, employment, and other areas.
- Provide education and training about up-to-date risks and realities of HIV to criminal legal system actors, including police, prosecutors and judges.
- Ensuring access to justice for people living with HIV, by training and funding public defence lawyers and community paralegals; and
- Listening to, working with – and funding – civil society who are the experts on the impact of punitive laws on their communities.





www.hivjustice.net

www.hivjusticeworldwide.org

