

HIV-Positive Individuals Who are Unwilling or Unable to Prevent the Spread of HIV in Alberta

A Report by Alberta's Chief Medical Officer of Health
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Message from the Chief Medical Officer of Health

The Chief Medical Officer of Health (CMOH) is appointed under the *Public Health Act* by the Minister of Health and has a number of legislated powers and responsibilities. The CMOH is responsible for making recommendations to the Minister on measures to protect and promote the health of the public and to prevent disease, and has the authority to give directions to Alberta Health Services, Medical Officers of Health (MOH) and Executive Officers in the exercise of their powers and the carrying out of their responsibilities under the Act. It is in this capacity that this report is published.

Given my duty to protect and promote the health of the public and to contain the spread of communicable diseases such as Human Immunodeficiency Virus (HIV), this report aims to continue the collaborative work that has been on-going in this province for a number of years. I hope that it will be a starting point for the next stage of work to be done to assist those living with this illness, as well as to prevent the unnecessary spread of this virus.

Individuals who are diagnosed as HIV-positive and who are unable or unwilling to take appropriate steps to prevent the potential transmission of HIV to others are referred to as Unwilling/Unable (U2) individuals. This report intends to facilitate and strengthen dialogue among all stakeholder organizations to collectively address the needs of U2 individuals, support the rights and dignity of all people, and protect the population from the spread of HIV. After providing a brief description of HIV and the related Acquired Immune Deficiency Syndrome (AIDS) and further details about U2 individuals, the report goes on to set out the key relevant stakeholders, and the existing areas of services and supports for these persons. It then sets out some of the legal tools that may be used when necessary under the Act to protect the health of others, and provides a brief summary of the criminal law and the way in which it can be used. Finally, the report ends with some recommendations for future action to better address the needs of U2 individuals while improving prevention strategies, strengthening coordination between stakeholders, and better coordinating the use of various measures including the appropriate use of legal tools when necessary.

It is only by acting together that we can fully promote and protect the health of Albertans.

Sincerely,

James Talbot, BSc, MD, PhD, FRCPC, CCM

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1. Introduction

People living with Human Immunodeficiency Virus (HIV) who fail to take steps to protect themselves and others while engaging in activities known to transmit the disease can pose a significant risk to others. This is particularly so when an HIV-positive individual also lives with other disabilities or life circumstances that make it difficult or impossible for him or her to act in ways to prevent the spread of this virus. Individuals who are diagnosed as HIV-positive and who are unable or unwilling to take appropriate steps to prevent the transmission of HIV to others are the focus of this report; and the report will refer to these persons as “U2 individuals”. Ideally, services and supports providing assistance to such individuals will not only serve to protect the health of these persons, but will also protect others by containing the spread of such disease. Given public health’s focus on prevention and protection of the health of populations, public health officials and health care professionals play a key role in addressing such issues. However, as this report will convey, the best response for all concerned will be a coordinated effort by a number of stakeholders, not only those working in public health. Organizations involved in other supportive services, law enforcement officials and the justice system may all play a significant role, depending upon the case in question.

In addition to evidence gathered that indicates a need to take further steps to address issues related to this particular population, media reports have signaled the importance of efforts focused on everything from better services for U2 individuals, greater education, the development of procedures for those working with such persons, and a review of current practices related to legal interventions. One disconcerting news story out of our province dealt with the disclosure of sensitive information about an adolescent living in extremely compromised circumstances who was allegedly HIV-positive and acting in ways that could have exposed others to the virus. Disclosure was made by a service provider to police rather than to public health officials. Law enforcement chose to publish details related to this case, including information that made this teenager identifiable. The story serves to illustrate the need for collaboration amongst all of us here and elsewhere who have roles related to the handling of such a case in a way that serves to protect society, but not at the expense of unnecessarily harming the U2 individuals involved. The aim of this report is not to criticize past actions but to work together with all relevant stakeholders to ensure an appropriate response from all involved when we deal with cases such as this.

The development of this report aims to facilitate dialogue amongst all stakeholder organizations to collectively address the needs of U2 individuals while protecting the population from the spread of HIV.

2. What is HIV/AIDS?

A diagnosis of HIV infection or the related Acquired Immune Deficiency Syndrome (AIDS) are chronic, lifelong yet completely preventable diseases. HIV is a virus that attacks the body’s immune system, and individuals can be infected with HIV for years yet not show any signs or symptoms. HIV causes AIDS; however, a person can live for many years without developing AIDS. This means that a person can look and feel well yet still infect others. Over time and without treatment, HIV weakens the body’s immune system so much that it has difficulty fighting off infections. AIDS is the final stage of the HIV infection and is

characterized by the presence of opportunistic infections and other life-threatening conditions. Due to advances in treatment and drug therapies, HIV can be managed; however, there is still no cure or vaccine. Preventing the transmission of HIV has been a significant public health priority as it is the only means to stop the spread of the disease.

For a person to become infected with HIV, the virus must enter the bloodstream via infected blood, or through other bodily fluids such as semen or vaginal fluids. The common modes of transmission of HIV are through unprotected sexual contact and sharing of HIV-contaminated needles, syringes and other equipment for injection drug use. Less common modes of transmission include the transfusion of blood or blood products through organ or tissue transplants, and mother-to-child transmission during birth.

3. Who are U2 Individuals?

Individuals who are diagnosed as HIV-positive and who are unable or unwilling to take appropriate steps to prevent the potential transmission of HIV to others are the focus of this report and will be referred to as “U2 individuals”. The terms “unable” and “unwilling” are well defined in the *Alberta Sexually Transmitted Infections and Blood Borne Pathogens Strategy and Action Plan, 2011-2016*. “Unable” is defined as an HIV-positive individual who does not have the capacity to prevent HIV transmission for physical, mental or environmental reasons such as: being in a coercive, subordinate or abusive relationship; homeless; or incarcerated. “Unwilling” is defined as an HIV-positive individual who intentionally engages in behaviours with known potential to transmit HIV yet possesses the capacity and opportunity to prevent HIV transmission. It is important to note this definition applies as long as the source understands and has been counseled on risk of transmission and the recipient or partner has not given or does not have the capacity to consent.

While a large part of the U2 population is unable to take appropriate steps, it is important to differentiate between those who are unable to manage their disease from those who are unwilling to do so. Those unable rarely intend to spread HIV. They may or may not have engaged in risk activities, and their actions may or may not engage legal interventions, whether under public health legislation or the criminal justice system. However, there is a small proportion of the U2 population who are unwilling to take the recommended steps to protect others from potential infection. Unwilling individuals with HIV possess the necessary information, mental capacity and ability to take steps to prevent transmission (such as, for example, disclosure of their HIV status to sexual partners and the use of condoms) but choose not to.

In order to discuss the issues raised in this report, it is important to carefully define the characteristics of individuals who make up the U2 population and those at risk of becoming so. Many U2 individuals have disabilities, other health conditions, or live in circumstances that create or contribute to an inability to act in ways to prevent or reduce the likelihood of transmission of the virus. In addition, a number of these persons have a broad and complex range of unmet needs that contribute in varying degrees to their inability. Contributing factors can include a lack of cognitive functioning, a lack of self-regulation or control, or the absence of insight or a grasp of reality due to a health condition, including a disability or mental illness. Despite comprising a very small proportion of people generally who are living with HIV, U2 individuals require a significant amount of resources since they can pose a

substantial risk to others and often have a host of health and social problems (e.g., homelessness, mental illness or substance abuse). They often have low self-esteem and are socially isolated; behaviours that can be unpredictable; and changing needs over time that require social supports and counseling to manage their condition. As each U2 individual has unique factors and needs, no one standard procedure can be created to support them or intervene to protect the health of others. The factors to take into consideration with respect to these individuals may well be different from those who lack the capacity to take certain steps (or avoid them). One of the difficulties in addressing an approach in individual cases is the lack of clarity in some instances between those who are unable as opposed to unwilling. To further complicate matters, sometimes individuals can move back and forth between these categories. Legal interventions may be appropriate with respect to certain individuals who are unable, as well as vis-à-vis those who are unwilling. However, arguably there should be a greater reluctance to use certain such interventions (i.e., the criminal law) when managing cases where individuals simply lack the capacity to follow instructions or take appropriate steps. A model or framework for managing U2 individuals must be adaptive enough to be able to identify the factors that contribute to an individual's U2 status, and the needs of, and appropriate responses to, the individual.

There is no current source that provides a complete and accurate number of U2 individuals in Alberta. Estimates indicate that less than 50 such individuals are being managed by public health. However, this estimate would not account for those known only to non-health organizations (such as police services) or those who have not yet been identified as being at risk of becoming U2. Engaging in a collaborative approach to address the issues related to U2 individuals will enhance the ability to better identify U2 individuals in the province and provide a more accurate estimate of the total number. This is important to plan for appropriate resources.

4. Stakeholders

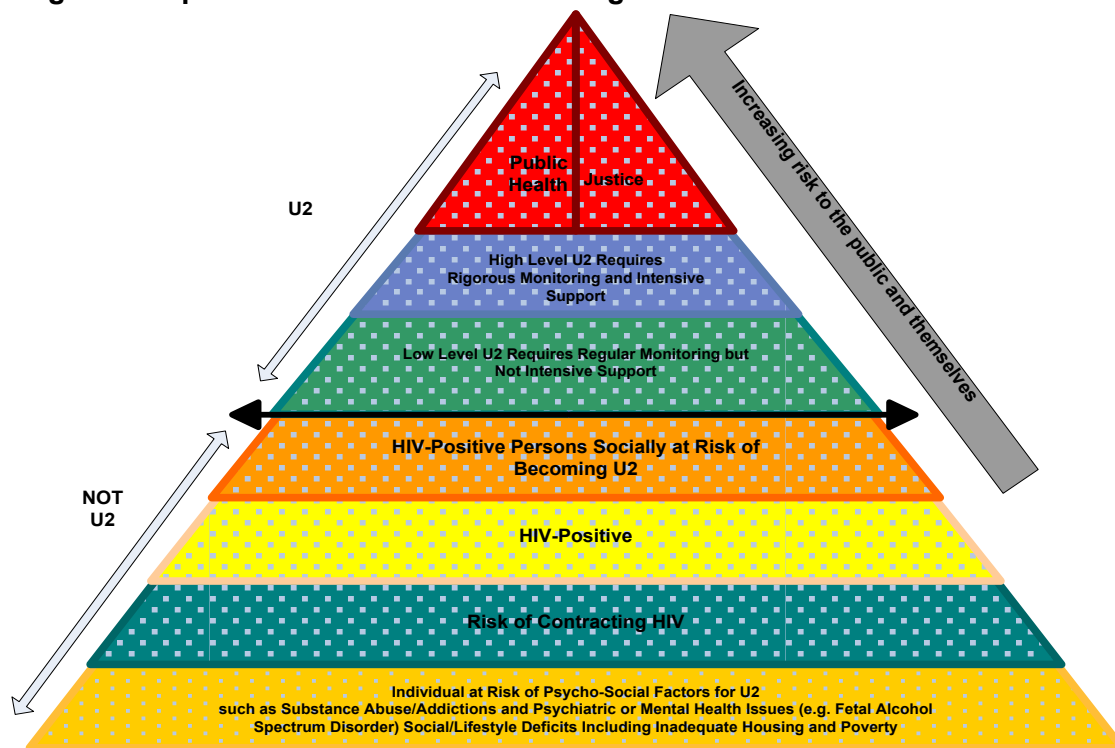
There are a number of organizations, agencies and individuals involved with and directly affected by the issues dealt with in this report. This section of the report briefly sets out each of the key groups of stakeholders. Such stakeholders include U2 individuals and potential U2 individuals, governments and governmental agencies, health and other service providers, public health officials and the criminal justice system. As U2 individuals have multifaceted needs that go beyond the parameters of public health or health services, it is important for all governments and community agencies involved to work together to provide a variety of support services, as well as a coordinated approach when legal interventions are necessary to protect the health of others.

4.1 U2 Individuals (and those at risk of becoming U2)

U2 individuals and their personal supports, such as family members or caregivers, are important stakeholders when considering a coordinated approach to addressing the needs or interventions with respect to this population. U2 individuals' circumstances and needs may change over time, as may the level of risk that they pose to themselves or the public.

Diagram 1, *Spectrum of U2 Individual Management*, illustrates that individuals can move up and down the risk spectrum as life circumstances, support networks or other factors change.

Diagram 1: Spectrum of U2 Individual Management



As there is no cure for HIV, providing supports to U2 individuals requires life-long resources and monitoring. Based on individual life circumstances or other factors that make addressing the needs of this population and protecting the health of others challenging, some U2 individuals will never move down the management spectrum and will require a significant investment of time and resources over their lifetime.

4.2 Government

All levels of government are important stakeholders. The federal government has a role given its jurisdiction over criminal law. Municipal governments often become involved depending on the type and level of services they provide to certain populations. Provincial governments are central to this discussion as a result of a number of factors, including

provincial jurisdiction over most health matters, their mandate to provide strategic direction and set policy related to health, and the role they play in funding, directly or indirectly, many of the services (health or otherwise) to U2 individuals.

Given the role of the Government of Alberta to establish legislation and policy that provides the framework that will guide how U2 individuals are managed, it is important to consult with the various departments that provide services to, or have interactions with, such individuals. This will include many ministries but some key examples in the Alberta context are the Ministries of Health, Human Services, Education, Justice and Solicitor General, Aboriginal Relations and Municipal Affairs.

Given the mandate of Alberta Health generally, and the role of the CMOH and the duties under the *Public Health Act* to protect the health of the population from the spread of communicable diseases including HIV/AIDS, this Ministry is a key stakeholder with respect to this issue. There has been significant work completed in the past with respect to the public health management of U2 individuals. For example, Alberta Health implemented the *Guidelines for the Management of Recalcitrant HIV Positive Individuals Unwilling and/or Unable to Prevent the Spread of HIV* (2009). These guidelines are consistent with related principles of the World Health Organization as well as other provinces regarding the public health management of U2 individuals.

Although past work by Alberta Health and others has been constructive, Alberta Health understands the importance of improving the management and supports for U2 individuals. The *Alberta Sexually Transmitted Infections and Blood Borne Pathogens Strategy and Action Plan, 2011-2016* provided recommendations under goal 3.2. Specifically, it recommended that part of the work to be done included efforts to reduce disease transmission by U2 individuals. The strategy recommended that Alberta Health develop, initiate and enhance the existing unwilling/unable management program and that a revised protocol for the management of U2 individuals be developed and implemented. This is one of the main impetuses behind this report and the collaboration we hope will continue.

4.3 Health Service Providers

Organizations that provide related health services, as well as health care providers, are key stakeholders that must be involved in this discussion. The aim of this report is not to list or describe all such providers and organizations. However, it will list a few examples here to illustrate the breadth of such providers.

Alberta Health Services (AHS) is a key provider of resources to U2 individuals. Although this is based on provincial management guidelines, the public health management of U2 individuals by AHS often varies across the province. This has led to a number of issues with respect to ongoing support and funding over the long term. As such, it is crucial to have AHS at the table.

First Nations and Inuit Health Branch, Alberta Region (FNIHB) provides HIV public health management and follow up for on-reserve First Nations in Alberta. FNIHB is an important partner in managing U2 individuals and must be included in further work to address the management of some U2 individuals.

Health care professionals who work in hospitals, public health clinics or the community are also key partners. As the persons who have direct one-on-one contact with U2 individuals, this is a necessary voice in these discussions.

Finally, a range of other health services is provided by programs or organizations that deal with health issues not directly related to HIV transmission or the management of that but are important to include given the work they do with U2 individuals. Given the contributing factors that increase the likelihood of HIV-positive individuals falling within the U2 population (such as addictions, mental health issues, health conditions such as brain injury or other disabilities), these service providers are necessary partners in this work.

4.4 Public Health Officials

The management of U2 individuals is a public health issue because a key aspect of this issue is protection of the public's health, including the responsibility to act when necessary to prevent the transmission of HIV. There are significant potential health consequences of not adhering to HIV treatment which in turn increase the likelihood of spread. By virtue of the duties and powers of MOHs under the *Public Health Act*, Alberta's public health officials play a significant role.

4.5 Other Service Providers and Community Groups

Although health service providers, and public health in particular, are central to the management of U2 individuals, other stakeholders are crucial if the aim is to support U2 individuals and prevent them from affecting the health of others. Stakeholders that provide non-health related community supports contribute valuable advice and resources. Given the social determinants of health, these may arguably be as or more important than health services in addressing these issues. As a result, stakeholders contributing to this work must include service providers that offer supports related to areas such as housing, financial services, non-health related disability supports, and abuse or exploitation prevention or treatment assistance, to name a few.

4.6 Law Enforcement and the Justice System

Finally, organizations involved with law enforcement (e.g., police services; the RCMP) and various aspects of the justice or correctional systems (e.g., Crown prosecutors; judges and the courts; probation officers; prisons) are important stakeholders with respect to this issue as they may interact with U2 individuals who may or may not have had contact with health or other services. Further, as the criminal law is a possible legal tool that may be utilized, it is key to have these perspectives brought to any over-arching approach.

5. Support Services

In Alberta, as the list of stakeholders makes clear, multiple organizations and individuals play roles in providing services that support U2 individuals. Due to their complex needs, supporting high-risk clients with HIV is an intricate matter that crosses many agencies and programs, including medical and other health services, as well as social services. The lack of

a singular body to oversee such supports creates a number of issues with respect to coordination and management of these individuals.

Not only are services aimed at U2 individuals required; it is essential to assist individuals at risk of becoming U2, as has been previously noted. Proactive programs should be implemented to reduce the number of newly infected people and to provide the necessary supports to ensure that individuals who do become HIV-positive do not become U2 individuals. This goes well beyond public health counseling aimed at preventing those with HIV from engaging in risk activities; there must be some focus on reducing the number of high-risk HIV individuals by providing the necessary social supports. Supporting ongoing HIV prevention campaigns and advocating for increased support to those most at risk of becoming a U2 individual are essential to a comprehensive U2 program. The *Alberta Sexually Transmitted Infections and Blood Borne Pathogens Strategy and Action Plan, 2011-2016* provides guidance for HIV reduction programs.

The aim of this report is not to list every service or support available in Alberta. However, ensuring we subsequently identify all of the options and programs available in the province is a key step to enable appropriate referrals and coordination, as well as to work towards filling any gaps that exist. Additionally, coordinating the roles and responsibilities of various service providers, and highlighting the need to include prevention in client management, are essential. The following is a brief description of some of the key essential services that must be considered in a coordinated approach. The continuing dialogue amongst stakeholders that will follow this report will serve, in part, to capture a more complete list.

5.1 Health Services

HIV infection is largely a health issue and management within the health system is important to ensure the risk that U2 individuals pose to themselves and others is mitigated. Within the health system there are a number of program areas that U2 individuals often engage with including primary care, public health, mental health and addictions.

For many U2 individuals, there are barriers to accessing health services, such as acquiring an Alberta personal health card or accessing a physician. Health professionals, regardless of the type of services they provide, are an important aspect of the management of U2 individuals as they can set the tone for future, as well as current, interactions with the health system. If people living with HIV have had negative experiences with health care professionals, they may be less likely to seek help or adhere to treatment protocols. Reducing any entrenched disempowering health care practices such as inadvertent blame or stigmatization when interacting with those living with HIV will increase the likelihood that individuals will follow treatment and other recommendations. Family physicians are often the ones who inform individuals that they are HIV-positive and they may be able to identify whether an individual is at risk for becoming a U2 individual. Physicians have an important role to play in terms of HIV prevention, screening, treatment, continuity of care and monitoring.

AHS provides U2 individuals and others with HIV with resources to manage their condition and decrease the risk to the health of the public. Public health programs, and those working in them, are correspondingly key to addressing the same issues as those working in primary care or other health care settings.

Whether delivered through a public health program or through a primary care physician or clinic, ongoing health counseling and education are integral aspects of providing supports to U2 individuals. They provide the opportunity to continually educate the individual about their condition, the modes of transmission, how to reduce the risk of transmission to others, and their public health, social and legal responsibilities to disclose their HIV-positive status to sexual or intravenous drug-use partners and take other recommended steps. Counseling also provides the opportunity to address other issues that increase risk factors and move a U2 individual upwards in the spectrum of management.

U2 individuals often have a diagnosed psychiatric illness or cognitive impairment related to a developmental disability or brain injury. Others may have external or environmental life circumstances that make managing their condition extremely challenging, including relationships of dependency, coercion or fear of other persons. This can lead them to continue to engage in high-risk behaviours. Individual factors that can affect behaviour, as identified by the Canadian Psychiatric Association, include “denial, ignorance, substance abuse, violence and threat, economic imperatives, disorganization, or an experienced inability to change”¹.

Studies have demonstrated a higher prevalence of HIV infection in people with serious chronic mental illness than in the population as a whole. Efforts should be made to ensure that those with mental health issues who are at risk of contracting HIV are identified and receive the appropriate supports. Mental health issues can severely affect a U2 individual’s ability to manage their condition or inform others. Acute or severe mental illness and trauma can increase behavioural risks such as drug use and unsafe sexual practices. Mental health disorders and trauma may also interfere with the ability to acquire and/or understand information about HIV which can increase the likelihood of situations in which risk behaviours occur. Mental health supports are an important consideration for the collaborative management of U2 individuals.

Cognitive impairments, neurological disorders and brain injury are also associated with barriers to managing this population. For example, HIV rates are higher in the Fetal Alcohol Spectrum Disorder (FASD) population than in the general population due to higher rates of mental health issues, substance abuse and unsafe sexual practices. Individuals with FASD are at a greater risk of becoming U2 individuals as they are less likely to seek medical help and are more likely to act impulsively. This makes them less likely to be able to manage a serious and complicated health issue such as HIV.

The link between HIV and drug and alcohol use has long been understood and recognized by health care professionals. Despite the knowledge that drug and alcohol abuse can lead to an increased risk of HIV infection, many people still engage in risk behaviours as a result of an addiction. It is challenging to support U2 individuals with addiction and substance abuse

¹ Canadian Psychiatric Association. HIV & Psychiatry A Training and Resource Manual: Legal and Ethical Issues in HIV Disease. [cited 2012 Nov 6] Available from <http://publications.cpa-apc.org/browse/documents/16>

issues as these problems can make it difficult to prevent transmission. Drug use (including alcohol abuse) can reduce inhibitions which can increase the number of sexual partners and a variety of other risk situations, including intravenous drug use (a common way of transmitting HIV). Alberta offers a variety of programs to assist individuals to stop substance abuse or minimize the related risks. Often U2 individuals require access to these programs to help manage their risk. Thus, supporting the prevention, harm reduction and management of addiction to drugs and alcohol is important.

5.2 Social Services

Social supports are necessary to meet the basic needs of many U2 individuals. Ensuring these needs are met will allow individuals to focus on managing their condition and consequently decrease the potential threat to public health. Many HIV-positive individuals who access social services are focused on immediate needs such as food and shelter rather than their health status.

Social supports encompass a wide range of activities and programs available to support U2 individuals. There are a number of services that are provided by the Government of Alberta and by non-governmental organizations. Coordination of service provision and public health interventions are improving; however, there is still a need to address the gaps that remain. Cultural and other barriers can have strong influences over a person's ability to access social supports and should be a consideration for managing U2 individuals.

Alberta Human Services, in partnership with AHS, is developing an integrated case management model for individuals with complex needs who are eligible for Persons with Developmental Disabilities (PDD) services. The *Adults with Complex Service Needs Cross-Ministry Policy Framework* (ASCS) addresses individuals with complex needs which has many similar characteristics to the supports needed for U2 individuals. It currently focuses only on the implementation for PDD; however, adopting the integrated case management model for U2 individuals in the future is a very promising collaborative approach and should be included in ongoing discussions. Progress made under the ASCS should be monitored.

The Government of Alberta's recognition of the importance of access to social supports was demonstrated through the implementation of the *Alberta Supports Initiative*. The initiative provides information and access to social-based assistance programs offered by the government. Individuals can access the appropriate type and level of service they require and receive help from case managers with transitioning between programs as their age and circumstances change. Streamlined access will assist case managers to provide necessary services to U2 individuals.

U2 individuals often face difficulties in finding appropriate housing. A stable residential placement is important for managing health and maintaining healthier behaviours. The Government of Alberta identified providing housing to those with complex needs as part of The Alberta Secretariat for Action on Homelessness' report: *A Plan For Alberta: Ending Homelessness In 10 Years*. The strategy includes initiatives aimed at providing integrated housing and social services to those with complex needs such as U2 individuals.

Although AHS provides referrals to community supports such as housing, access to secure housing for U2 individuals is often limited or difficult for AHS to obtain. Integration and coordination with other organizations and agencies is required. As a specific example, U2 individuals with addictions have been placed in the past with housing agencies that had vacancies rather than first considering the individual's needs and his or her stage in the recovery process. A continuum of housing/treatment (set out below) is available for U2 individuals who also have addiction or mental health issues and this is necessary to take into account with a placement.

- Outreach and Support
- Emergency Shelter and Respite Services
- Supported Living Programs
- Residential Treatment Program (with 24-hour supervision)
- Secure Treatment Programs

Finally, where possible, ensuring that U2 individuals are employed or have income support will allow them to increase their independence and place them in a better position to manage their health and interactions with others. These types of social supports should be considered in an overall management approach.

6. Legal Interventions

Supports and services are primarily focused on assisting the U2 individual. Legal interventions, however, whether they occur under public health legislation or the Criminal Code, are aimed at the needs of the community. Whenever consideration is being given to the use of a legal tool under the law, awareness of the necessary balancing between the rights of an individual and the need to protect the community is crucial. It is also key to consider the measures that have already been taken through non-legal tools. For example, as addressed in the previous section regarding supports and services, an important question to ask would be whether or not efforts had been made to provide counseling, education and assistance in accessing services. Where such services have been attempted and are insufficient to manage particular individuals, or where extreme circumstances exist, public health officials and others with a legal duty to protect the public may need to consider or utilize the legal authority they have.

If we consider interventions along a spectrum, it may be helpful to keep in mind the levels set out below. The progression of an individual through these levels is not necessarily linear and management can include multiple interventions at several levels simultaneously.

- Level 1: Counseling and education
- Level 2: Assistance in accessing and/or provision of services (health and other)
- Level 3: Medical Officer of Health certificate
- Level 3: Warrant for examination
- Level 4: Isolation order
- Level 5: Criminal prosecution

6.1 Public Health Act Interventions

Public health interventions follow an adaptive continuum from least restrictive to most restrictive in proportion to the risk posed by the U2 individual. Legal interventions under Alberta's *Public Health Act* include reporting of individuals to public health officials, disclosure of information to third parties in certain circumstances, powers to apprehend and detain individuals, powers to perform tests or conduct examinations, powers to prescribe treatment without the consent of individuals, and powers to prescribe any other conditions to mitigate the disease or limit its spread to others. The aim and scope of this report is to provide a brief, general description of some of the key powers available under this legislation. It is not an exhaustive list or description of measures that can be taken under the Act, nor does it provide legal advice as to when such powers may or should be exercised.

One of the key steps that the *Public Health Act* allows for is the issuance of a certificate by a MOH upon notification by a physician, community health nurse, midwife or nurse practitioner in circumstances where the notifying individual knows or has reason to believe that the individual is infected with a prescribed disease, and he or she refuses or neglects to:

- submit to a medical examination to ascertain whether they are infected,
- submit to medical, surgical or other remedial treatment prescribed by a physician that is necessary to render the person non-infectious, or
- comply with any other conditions that have been prescribed by a physician as being necessary to mitigate the disease or limit its spread to others.

If a certificate is issued, it is authority for:

- any peace officer to apprehend the person named in it and take the person to a facility specified by the MOH within seven days from the date of issue;
- for a physician to perform any test or physical examination required to determine if the person has a communicable disease and to detain them for the period required to obtain the results of the examination;
- for any physician to treat or prescribe treatment for that person to render them non-infectious (with or without the consent of the person) and to detain them for that purpose; and
- for a physician to prescribe any other conditions necessary to mitigate the disease or limit its spread to others.

The *Public Health Act* also includes provisions that require a person to comply with treatment or conditions prescribed by a physician after release; if they fail to do so, a MOH may issue an order to have that person apprehended and returned to the facility.

While an individual subject to a certificate must be released no later than seven days after they are admitted to a facility, the Act also allows for the issuance of isolation orders, which authorize a person to be held for a longer period of time. An isolation order must be issued by a physician, in accordance with the Act, where a person is infected and that person refuses or neglects to submit to medical, surgical or other remedial treatment, or other conditions as prescribed by a physician as being necessary to mitigate that disease or limit its spread to others. Persons held under isolation orders must be re-examined at least once every seven days to determine whether the order ought to be cancelled in accordance with

the Act. It is conceivable that individuals could be under such an order over the course of a lifetime if the conditions continue to be met.

The powers with respect to certificates or isolation orders are found in a section of the *Public Health Act* under the heading “recalcitrant patients”. This is a term sometimes used to describe individuals who are infected with a specified communicable disease, and who refuse or neglect to comply with treatment or conditions to limit the spread of the disease. This report uses the language of “unwilling or unable individual” or “U2 individual” as this has become more commonly utilized when referring to individuals who are non-compliant and HIV-positive.

6.2 Criminal Prosecutions

In 2011, Alberta experienced a high-profile incident widely reported in the media involving a female adolescent allegedly engaging in risk activities that could have led to the transmission of HIV. The youth was thought to be HIV-positive and putting people at risk by engaging in unprotected sex without informing partners of her HIV status. Sensitive, personal information, including the youth’s name, picture and unconfirmed health status, were released to the media by a police service under the disclosure in the public interest provisions of Alberta’s *Freedom of Information and Protection of Privacy Act*. Neither Alberta Health nor AHS were informed of or involved in the management of this situation until after the media release. Media reports stated that police had been alerted by a service provider who had been involved in providing particular supports to this individual. Collaboration between public health and police services during the management of this case may have reduced negative impacts for all involved, including the youth, while still effectively managing the risk to the public. This incident serves to emphasize the need to initiate a multi-stakeholder discussion on the issues regarding U2 individuals.

Media reports over the last several years have also included numerous referrals to the prosecution of HIV-positive individuals charged with a variety of criminal offences as a result of sexual activity with partners where the HIV-positive individual allegedly failed to disclose his/her infection to his/her partner or take precautionary measures to reduce the risk of transmission (e.g., condom use). There have been convictions for a wide range of criminal offences, including aggravated assault and even murder. Given the aims and scope of this report, neither a description of the current state of the criminal law, nor all of the key cases that have dealt with such criminal charges, will be set out here. For a good overview of related legal issues, see the chapter on HIV/AIDS and Public Health Law in the book *Public Health Law and Policy in Canada*.

However, it is worthwhile to briefly note that the Supreme Court of Canada (SCC) recently issued two decisions dealing with the legal duties of HIV-positive individuals. In *R. v. Mabior* and *R. v. D.C.* (2012), the SCC confirmed that non-disclosure of one’s HIV-positive status and/or failure to take other steps to reduce the likelihood of transmission may lead to convictions under the criminal law. They attempted to provide more specific guidance regarding the legal duties of individuals given the variety of interpretations by courts of earlier SCC decisions on point. They took into account new evidence regarding HIV infection and transmission, and factors such as viral load. While these cases aimed to provide some further clarification as to what is required under the law with respect to the disclosure

of an individual's HIV-positive status to sexual partners and the use of risk-reducing actions, it is important to note that there was critique of the decisions after they were released (regarding on-going confusion as to when and in what circumstances an individual would have to disclose his/her status). As a result, and given that the factual circumstances of each case will be unique, caution is required in this area. Stakeholders involved in counseling HIV-positive individuals regarding such legal duties should seek legal advice as to what and how to relay appropriate information to their patients and others. However, it is clear that the criminal law remains a legal tool that may be used in such cases.

Keeping in mind that these measures may be used, it becomes clear why law enforcement (e.g., police services; the RCMP) and various aspects of the justice or correctional systems (e.g., Crown prosecutors; judges and the courts; probation officers; prisons) are important stakeholders in this discussion. Canada has been criticized for utilizing criminal measures far too often. There is much literature focused on this perceived over-use, as well as a critique of the use of criminal law at all. Given the aims of public health and the criminal system, it is easy to suggest that the use of such measures should only be taken with respect to U2 individuals who fall into the unwilling, as opposed to the unable, category. This is particularly so given the lack of evidence that the threat of punishment itself will cause people to change complex behaviours. If supports and services fail to provide the means to protect the health of others, powers under public health legislation are almost always better suited to address such cases. Criminal measures continue to be an important component in dealing with the very few unwilling U2 individuals who intentionally or recklessly fail to follow public health advice. However, the 2011 incident in Alberta and the recent 2012 SCC judgments stress the need to gain a better understanding of the respective roles, responsibilities and authorities of the organizations involved with U2 individuals.

7. Moving Forward: Recommendations for Action

Despite the small proportion of HIV-positive individuals falling within the U2 group, such individuals pose a significant risk to the health of the public and may consume a large amount of resources ineffectively if not supported and managed appropriately. The Office of the Chief Medical Officer of Health proposes proactive and preventative recommendations to ensure that U2 individuals continue to be collectively managed and supported, and that steps are taken to do so more effectively. U2 individuals have complex needs that often require the support of both health and social services. The need for these services is growing as many service providers confront increasingly complex client needs. To assist current U2 individuals and to prevent or mitigate others from falling into this category, work needs to focus on the coordination of such supports, as well as appropriate public health management and criminal justice involvement. To provide the comprehensive and seamless services and legal interventions that may be required, it is necessary that all stakeholders, including government and community agencies, increase their levels of cooperation. This work will reduce the threat to the public health, protect U2 individuals' health and safety, and prevent persons from becoming U2 individuals.

In order to effectively support and manage U2 individuals in Alberta, the Office of the Chief Medical Officer of Health recommends that:

1. Alberta Health establish and coordinate a provincial cross-government initiative to develop, strengthen and standardize prevention measures and supports to U2 individuals, including the development of an integrated case management system for U2 individuals. This provincial cross-government initiative will link with other initiatives including, but not limited to: *Support for Adults with Complex Service Needs Cross-Ministry Policy Framework; Creating Connections: Alberta's Addiction and Mental Health Strategy; Alberta Safe Communities; Alberta Sexually Transmitted Infections and Blood Borne Pathogens Strategy and Action Plan, 2011-2016* and the *Alberta Social Policy Framework*.
2. Alberta Health work with partners to develop direction respecting disclosure of HIV-positive status to sexual and drug-injecting partners.

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