

STATEMENT ON HIV CRIMINALIZATION IN CANADA

HIV and the Criminal Law

HIV clinicians and scientists are deeply concerned about the ongoing, overly broad use of the criminal law in HIV non-disclosure cases.ⁱ Used correctly, an unbroken condom provides 100% protection against HIV transmission. In addition, recent scientific evidence indicates that the possibility of sexual transmission approaches zero when the HIV-positive partner is on antiretroviral therapy (ART) and has an undetectable viral load.ⁱⁱ This evidence should inform current consultations between federal, provincial and territorial governments on the application of the criminal law to HIV non-disclosure. We support the call for measures to limit the overly broad use of the criminal law, including prosecutorial guidance, that are based on current scientific evidence as well as human rights and public health principles.

HIV Criminalization in Canada

In Canada, individuals are being charged and prosecuted for not disclosing their HIV status, irrespective of the possibility of transmission or whether transmission occurs. The most common charge in such prosecutions is aggravated sexual assault, one of the most serious offences in Canada's *Criminal Code*, designed to respond to the most horrific of forced sex acts. It carries a maximum penalty of life imprisonment and mandatory designation as a sex offender. In 2012, the Supreme Court of Canada ruled that there is a legal duty to disclose one's HIV-positive status before having sex that poses a "realistic possibility" of HIV transmission.ⁱⁱⁱ However, since that ruling, people have been convicted of aggravated sexual assault, even in circumstances where (i) sexual behaviour is consensual; (ii) there is negligible to no risk of HIV transmission; (iii) there is no intention to transmit HIV; and (iv) transmission does not occur. This has led to fear and uncertainty in the HIV community regarding disclosure obligations. The overly broad use of the criminal law in cases of HIV non-disclosure also has a negative impact on the engagement of people living with HIV in the health care system and on public health initiatives.^{iv}

The Science of HIV Transmission

Recent clinical studies of both male same-sex and heterosexual sero-discordant couples found zero cases of HIV transmission despite tens of thousands of episodes of condomless sex, providing more evidence that the possibility of HIV transmission approaches zero when the HIV-positive partner is on effective ART.^v The studies were large, longitudinal, multi-site international cohorts, providing robust evidence from both developing and developed setting contexts of the efficacy of ART in reducing the risk of transmission. Clinicians have raised concerns for nearly a decade about the extent to which criminal prosecutions for HIV non-disclosure have too often ignored these important findings.^{vi}

It is imperative that current consultations between federal, provincial and territorial governments focus on measures to reduce the overly broad use of the criminal law in HIV non-disclosure cases, including the development of prosecutorial guidelines that are informed by human rights principles, the public health response to HIV and current scientific evidence regarding effective ART or condom use. Ignoring, misunderstanding or misinterpreting such evidence in HIV-related criminal prosecutions can lead to miscarriages of justice, heightens HIV stigma and damages HIV prevention efforts.

Dr. Mona Loutfy, Women's College Hospital, Toronto
Dr. Mark Tyndall, British Columbia Centre for Disease Control, Vancouver
Dr. Rupert Kaul, University of Toronto, Toronto
Dr. Jean-Guy Baril, Université de Montréal, Montréal
Dr. Catherine Hankins, McGill University, Montréal
Dr. Julio Montaner, BC Centre for Excellence in HIV/AIDS, Vancouver
Board of Directors of the Canadian Association for HIV Research (CAHR)

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ⁱ See M. Loutfy et al., “Canadian consensus statement on HIV and its transmission in the context of criminal law,” *Canadian Journal of Infectious Diseases and Medical Microbiology* 25,3 (May–June 2014): 135–140.

ⁱⁱ In Canada, laboratory tests can detect the amount of HIV in the blood when it is above 40 copies of virus per milliliter of blood, below which it is considered “undetectable.”

ⁱⁱⁱ *R. v. Mabior*, 2012 SCC 47; *R. v. D.C.*, 2012 SCC 48.

^{iv} S.E. Patterson et al., “The impact of criminalization of HIV non-disclosure on the healthcare engagement of women living with HIV in Canada: a comprehensive review of the evidence,” *Journal of the International AIDS Society* 18 (December 22, 2015): 201572; E. Mykhalovskiy, “The Public Health Implications of HIV Criminalization: Past, Current, and Future Research Directions,” *Critical Public Health* 25,4 (2015): 373–385.

^v M.S. Cohen et al., “Antiretroviral Therapy for the Prevention of HIV-1 Transmission,” *New England Journal of Medicine* 375 (September 2016): 830–839; S.H. Eshleman et al., “Treatment as Prevention: Characterization of Partner Infections in the HIV Prevention Trials Network 052 Trial,” *Journal of Acquired Immune Deficiency Syndromes* 74,1 (January 2017): 112–116; V. Supervie et al., “Heterosexual Risk of HIV Transmission per Sexual Act Under Combined Antiretroviral Therapy: Systematic Review and Bayesian Modeling,” *Clinical Infectious Diseases* 59,1 (July 2014): 115–122.

^{vi} P. Vernazza and E.J. Bernard, “HIV is not transmitted under fully suppressive therapy: The Swiss Statement – eight years later,” *Swiss Medical Weekly* 146 (January 2016): w14246.