

Ending Overcriminalization of People Living with HIV in Ontario

ONTARIO WORKING GROUP ON
**CRIMINAL LAW +
HIV EXPOSURE**



Ministerial Roundtable

April 12, 2018 (1:00-3:00 p.m. EDT)

LIST OF ATTENDEES

Ministers

- **Hon. Dr. Helena Jaczek**, Minister of Health and Long-Term Care (represented by Ministry staff)
- **Hon. Marie-France Lalonde**, Minister of Community Safety and Correctional Services (represented by Ministry staff)
- **Hon. Harinder Malhi**, Minister for the Status for Women
- **Hon. Yasir Naqvi**, Attorney General

Public service

- Michael Laviolette, Inspector, Ottawa Police Service
- Howard Leibovich, Director, Crown Law Office – Criminal, Ministry of the Attorney General
- Dr. David Williams, Chief Medical Officer of Health of Ontario

Civil society

- Murray Jose-Boerbridge, Executive Director, Toronto People with AIDS Foundation
- Ruth Cameron, Executive Director, AIDS Committee Cambridge, Kitchener, Waterloo and Area
- Nicholas Caivano, Policy Analyst, Canadian HIV/AIDS Legal Network
- Chad Clarke, Community Activist
- Richard Elliott, Executive Director, Canadian HIV/AIDS Legal Network
- Abigail Kroch, Director of Data and Applied Science, Ontario HIV Treatment Network
- Mona Loutfy, MD, FRCPC, MPH, Infectious Diseases Specialist and Clinical Researcher; Scientist, Women's College Research Institute; Staff Physician, Women's College Hospital; Professor, Department of Medicine, University of Toronto; Research Director, Maple Leaf Research
- Lenore Lukasik-Foss, Director, Sexual Assault Centre of Hamilton and Area
- Shazia Islam, People Living with HIV Support Coordinator, Alliance for South Asian AIDS Prevention
- Rupert Kaul, MD, PhD, FRCPC, Director, Division of Infectious Diseases University Health Network; Professor, University of Toronto
- Lindsay (Swooping Hawk) Kretschmer, Executive Director, Ontario Aboriginal HIV/AIDS Strategy
- Notisha Massaquoi, Executive Director, Women's Health in Women's Hands
- Tim McCaskell, AIDS ACTION NOW
- Alex McClelland, PhD candidate, Concordia University
- Eric Mykhalovskiy, Professor, Department of Sociology, York University
- Judith Odhiambo, PhD candidate, University of Toronto
- Maureen Owino, Director, Committee for Accessible AIDS Treatment
- Ryan Peck, Barrister & Solicitor, Executive Director, HIV & AIDS Legal Clinic Ontario; Co-chair, Ontario Working Group on Criminal Law and HIV Exposure
- Jonathan Shime, Defence Counsel, Cooper, Sandler, Shime & Bergman LLP
- Trevor Stratton, Coordinator, International Indigenous Working Group on HIV & AIDS; Canadian Aboriginal AIDS Network; President, 2-Spirited People of the 1st Nations

THE LAW

Canada has the dubious distinction of being a “world leader,” after the United States and Russia, in prosecuting people living with HIV.

In 1998, the Supreme Court of Canada (SCC), in *R. v. Cuerrier*, decided that people living with HIV have a legal duty to disclose their HIV-positive status to sexual partners before having sex that poses a “significant risk” of HIV transmission, which the Crown must prove.¹ (The Crown also must prove that a complainant would not have consented to the sexual activity in question had they known about their partner’s HIV-positive status.)

In 2012, in *R. v. Mabior*, the SCC ruled that this means that people living with HIV have a legal duty to disclose before having sex that poses a “realistic possibility of HIV transmission.”² Commenting specifically in the context of a case involving penile-vaginal sex, the Court stated that “as a general matter, a realistic possibility of transmission of HIV is negated if: (i) the accused’s viral load at the time of sexual relations was low [which the Court defined as below 1500 copies/ml] and (ii) condom protection was used.” The Court did not rule that this was the only circumstance in which there is no realistic possibility of transmission. However, this evolving test in Canadian law has been applied in a wide array of circumstances, intensifying concern about the overbreadth of the criminal law.

The severity of the criminal law applied is also cause for concern. In Canada, people who face criminal charges related to HIV non-disclosure are typically charged with aggravated sexual assault, on the theory that the absence of disclosure, when legally required, vitiates a partner’s consent to sex (and that HIV infection “endangers the life” of the complainant). Aggravated sexual assault is one of the most serious offences in the Criminal Code: it carries a maximum penalty of life imprisonment and registration as a sexual offender for a minimum of 20 years.

Despite the ostensible requirement of a “realistic possibility” of transmission, such serious charges are being brought even when people living with HIV have no intent to transmit HIV, engage in behaviours that, based on medical evidence, effectively pose negligible to no risk of transmission, and do not transmit HIV to their sexual partners. In Canada, people have also been charged and prosecuted in relation to spitting or biting, even though there is effectively zero risk of transmission via such means.

HIV AND ITS TRANSMISSION

The treatment and transmission of HIV have changed dramatically since the SCC’s first decision in 1998, but the law has yet to catch up with the science. The following is now clearly established:

- HIV is a manageable chronic illness.
- Treatment not only allows people to live long and healthy lives, but also prevents HIV transmission to sexual partners.
- Vaginal or anal sex without a condom poses negligible to no possibility of transmission when the HIV-positive partner is under effective antiretroviral therapy.³
- An unbroken condom is 100% effective at stopping the transmission of HIV when used correctly.
- Oral sex poses no to negligible possibility of HIV transmission.
- Being spat on by an HIV-positive individual poses no possibility of transmitting HIV.
- Being bitten by an HIV-positive individual poses at most a negligible possibility of transmitting HIV when the biting breaks the other person’s skin and the HIV-positive individual’s saliva contains blood. Otherwise, being bitten by an HIV-positive individual poses no possibility of transmitting HIV.

In 2014, eminent Canadian scientific experts on HIV developed the “*Canadian consensus statement on HIV and its transmission in the context of the criminal law*,” out of a concern that the criminal law was being used in an overly broad fashion against people living with HIV because of, in part, a poor appreciation of the scientific understanding of HIV and its transmission. The peer-reviewed statement was published in the *Canadian Journal of Infectious Diseases and Medical Microbiology* and endorsed by nearly 80 scientific experts from across the country, as well as the Association of Medical Microbiology and Infectious Disease Canada.⁴

WHY IS HIV CRIMINALIZATION HARMFUL?

- People living with HIV continue to be criminally charged, prosecuted and imprisoned when there is minimal to no risk of HIV transmission. The smaller the risk of transmission, the greater the discrimination based on HIV status in prosecuting someone. In the case of no risk of transmission, criminal prosecution is simply unadulterated discrimination against people for being HIV-positive.
- HIV is singled out from other communicable diseases for criminal prosecution. In practice, the use of non-HIV-specific criminal laws discriminates against, and profoundly stigmatizes, people living with HIV.
- The criminalization of HIV non-disclosure has other discriminatory dimensions as well. Sensationalizing media coverage of prosecutions has disproportionately focused on racialized people, particularly accused persons who are Black or migrants.⁵ Among women, marginalized women — including Indigenous women and women experiencing intimate partner violence — appear to be over-represented. Gay men are the single largest group of people living with HIV in Canada, meaning they live with the threat of criminal prosecution for alleged non-disclosure.
- The scientific evidence has failed to demonstrate that HIV criminalization has any significant HIV prevention benefit. At the same time, this research shows that HIV criminalization damages HIV prevention efforts by increasing HIV-related stigma, discouraging HIV testing for some individuals, hindering access to and eroding trust in voluntary approaches to HIV prevention, including HIV counselling, and spreading misinformation about the nature of HIV and its transmission. The current use of the criminal law also compromises the ability of people living with HIV to engage in the care they need to stay healthy, by preventing them from talking openly with health care providers due to the fear that their HIV and other test results and discussions with medical professionals may be used as evidence against them in criminal proceedings.⁶
- The criminalization of HIV non-disclosure has resulted in serious invasions of privacy (e.g., use of medical records in criminal proceedings; people’s HIV status being made public in the media including through police press releases) and of bodily integrity (e.g., forced treatment as a bail condition).
- While conviction rates for sexual assault in cases of non-consensual, coercive sex are very low, convictions rates are much higher in cases of sexual assault prosecutions based on HIV non-disclosure in the case of otherwise consensual sexual encounters — suggesting HIV stigma and discrimination are at work.
- The law of sexual assault is also a poor fit to address HIV non-disclosure. The law is extremely stigmatizing, with severe implications for people living with HIV. Furthermore, while the law of sexual assault is an important tool to advance gender equality and address gender-based violence, its misuse and overuse is also undermining the integrity of the law, prompting a growing number of feminist legal academics and service providers to voice concerns and support calls for restraint.⁷

Canadian judges and policy-makers have expressed concerns about the unjust use of the criminal law. For example, some trial judges have expressed reservations about the SCC's 2012 decision in *R v. Mabior* and have interpreted it narrowly based on scientific evidence before them. In December 2016, the federal Justice Minister and Attorney General issued a World AIDS Day statement declaring her concern about the “overcriminalization of HIV,” which contributes to HIV stigma and undermines public health.⁸

Canadian public health authorities have begun to express concerns about the impact of HIV criminalization on public health. For example, in December 2016, the Winnipeg Regional Health Authority acknowledged the detrimental public health impact of HIV criminalization and called for “using public health law rather than criminal law in non-malicious or non-intentional situations of non-disclosure and transmission,” among other measures.⁹

The Ontario Advisory Committee on HIV/AIDS (OACHA), which advises the provincial Health Minister, identifies the criminalization of HIV non-disclosure as a “structural policy factor” and part of the “legal environment” that contributes to HIV stigma.¹⁰ Ontario's current HIV strategy, produced by OACHA and endorsed by the Ministry of Health and Long-Term Care, further recognizes that HIV criminalization has been particularly damaging to gay men and African, Caribbean and Black communities, and that HIV criminalization interferes with HIV prevention counselling. It endorses the use of prosecutorial guidelines that reflect current scientific knowledge and the principle of the least intrusive, most effective response, and recommends the establishment of public health HIV case management models that help people living with HIV avoid criminal charges. The strategy further endorses cross-sectoral collaboration in the HIV response, calling for collaboration between the criminal justice system, public health and community organizations to develop an approach to HIV non-disclosure that is evidence based, consistent and free of stigma.

INTERNATIONAL GUIDANCE

In light of the numerous human rights and public health concerns associated with HIV-related prosecutions, the Joint United Nations Programme on HIV/AIDS (UNAIDS), United Nations Development Programme (UNDP)¹¹, UN Special Rapporteur on the right to health¹², Global Commission on HIV and the Law¹³, and UN Committee on the Elimination of Discrimination Against Women (CEDAW Committee)¹⁴, among others, have all urged governments to limit the use of the criminal law to cases of intentional transmission of HIV (i.e., where a person knows his or her HIV-positive status, acts with the intention to transmit HIV, and does in fact transmit it). Moreover, it is recommended that no prosecutions should take place when people used a condom or had a low viral load, or simply on the basis of oral sex.¹⁵

In its November 2016 *Concluding Observations* on Canada's periodic report of its compliance with the UN *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW), the CEDAW Committee — a body of independent human rights experts appointed by UN member countries — stated that it

welcomes that [Canada] intends to review the use and application of criminal norms to certain HIV/AIDS issues. This review will include the concerning application of harsh criminal sanctions (aggravated sexual assault) to women for non-disclosing their HIV status to sexual partners, even when the transmission is not intentional, when there is no transmission or when the risk of transmission is minimal. The Committee recommends that [Canada] limit the application of criminal law provisions to cases of intentional transmission of HIV/AIDS, as recommended by international public health standards.¹⁶

HIV PROSECUTIONS IN CANADA

- As of 2018, more than 210 prosecutions have taken place across the country, approximately half of them in Ontario.¹⁷
 - The impact of prosecutions on African, Caribbean and/or Black communities is of particular concern.¹⁸ Out of at least 35 men charged to the end of 2016 in Canada who are Black and/or of African or Caribbean descent, 23 were charged in Ontario (66%).¹⁹
 - While most of the cases are against men who have sex with women, cases against gay men are increasing — as of the end of December 2016, one-quarter (25%) of all the men charged have been charged in relation to a sexual encounter with a male partner.²⁰
 - In 2015 and 2016, at least 12 individuals were charged in Canada (including eight in Ontario); five were Black men and five were gay men.²¹
 - At least 18 women have been charged to date with HIV non-disclosure, six of whom are Indigenous (33%).²²
 - The criminalization of HIV non-disclosure is of particular concern to Indigenous and African, Caribbean and/or Black communities, which are facing alarming rates of HIV and continue to experience systemic discrimination, as well as disproportionate rates of incarceration in Canada.²³
- People continue to be charged for oral sex. In 2013, for example, Crown prosecutors in Ontario refused to drop charges against a woman living with HIV. J.M. was notably charged for receiving oral sex while her viral load was undetectable. The Crown's expert testified that "you have a better chance of having a piano fall on your head than you do contracting HIV through oral sex."²⁴ Despite public protests, and following a consultation with senior personnel within the Ministry of the Attorney General, the prosecutor was instructed to pursue a conviction on this count. J.M. was eventually acquitted on the oral sex charge but was convicted of aggravated sexual assault in relation to vaginal sex although she had an undetectable viral load at the time.
 - People living with HIV continue to be charged with aggravated assault for spitting and biting despite the effectively zero risk of transmission — or at most, a negligible risk in the most extreme and unusual of circumstances.
 - Some people have been placed under extremely strict bail conditions, including mandatory HIV treatment or an obligation to inform authorities about potential new sexual partners.

EXAMPLES OF PROBLEMATIC PROSECUTIONS AND PRACTICES

- Since the SCC released its decision in *Mabior* in 2012, there have been at least 33 prosecutions in Ontario alone, 11 of which involved a low or undetectable viral load. (As noted below, more recently, we have seen some important developments in Ontario courts and in guidance to prosecutors on this question.)

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DEVELOPMENTS AT THE FEDERAL LEVEL

As noted above, on December 1, 2016, federal Minister of Justice and Attorney General Jody Wilson-Raybould issued a World AIDS Day statement recognizing the ongoing problem of overly broad, unjust criminalization of people living with HIV, and signaled the federal government's intent to address this critical issue in consultation with provincial and territorial counterparts, affected communities and medical professionals.²⁵ Federal Minister of Health Dr. Jane Philpott had previously met with civil society organizations to discuss this issue, and had noted that HIV criminalization in Canada is both a problem and a priority for the government to address.²⁶

In November 2017, after a day-long think tank and several months of cross-country consultation, the Canadian Coalition to Reform HIV Criminalization (CCRHC) released a joint *Community Consensus Statement* endorsed by more than 150 organizations across the country, from the HIV sector and beyond.²⁷ The statement demonstrates a clear consensus opposing the current overly broad use of the criminal law in Canada against people living with HIV and urges immediate action from federal, provincial and territorial governments.

People living with HIV continue to be criminally charged, prosecuted and imprisoned when there is minimal to no risk of HIV transmission.

The *Community Consensus Statement* declares that, in accordance with international guidance, current science and human rights principles, criminal prosecutions should be limited to cases of actual, intentional transmission of HIV. It also specifically identifies circumstances in which criminal prosecution for alleged HIV non-disclosure is clearly inappropriate. In particular, the *Community Consensus Statement* declares that HIV-related criminal charges are not appropriate where a person living with HIV engaged in activities that, according to the best available scientific evidence, posed no significant risk of transmission, which include:

- oral sex;
- anal or vaginal sex with a condom; and
- anal or vaginal sex without a condom while having a low viral load.

On World AIDS Day 2017, the federal Justice Minister and Attorney General released Justice Canada's report entitled *Criminal Justice System's Response to Non-Disclosure of HIV*, which contains a number of important conclusions warranting a more limited application of the criminal law than is currently the case.²⁸ In particular, the report explicitly recognizes that (i) HIV is first and foremost a public health matter; (ii) the use of the blunt instrument of the criminal law should be a matter of last resort; and (iii) the application of the criminal law to HIV non-disclosure is likely to disproportionately affect people Indigenous, gay and Black people. The report also recognizes that it is problematic, in at least some circumstances, to use the law of sexual assault to deal with allegations of HIV non-disclosure.

Justice Canada's report recommends, *inter alia*, that the criminal law should not apply to people who have a suppressed viral load. Furthermore, Justice Canada recommends that:

“The criminal law should generally not apply to persons living with HIV who: are on treatment; are not on treatment but use condoms; or, engage only in oral sex (unless other risk factors are present and the person living with HIV is aware of those risks), because the realistic possibility of transmission test is likely not met in these circumstances.”²⁹

The CCRHC, in which CLHE members are active, continues to engage with the federal government to put an end to overly broad HIV criminalization. This engagement includes the demand for legislative reform that ensures that HIV non-disclosure is removed from sexual assault law and applied only to actual and intentional transmission.

It is essential to emphasize that the demand for *Criminal Code* reform is made together with calls for sound prosecutorial guidance, including from provincial Attorneys General. These are **not** mutually exclusive steps; in fact, both are necessary to put an end to overly broad HIV criminalization. In addition, neither step is contingent upon the other. Provincial Attorneys General need not, and must not, wait for federal legislative reforms to move forward with developing sound guidance for provincial prosecutors, as discussed further below.

ENGAGEMENT WITH THE GOVERNMENT OF ONTARIO

In Canada’s constitutional federation, the *Criminal Code* is federal (enacted by the Parliament of Canada) and is uniformly applicable throughout the country, but provincial governments are responsible for its administration and enforcement. (In the three territories, the federal Attorney General has this responsibility.) As a result, since 2010, CLHE has been in discussions with the Ontario Ministry of the Attorney General (MAG) with the goal of ensuring that prosecutions for HIV non-disclosure are (i) informed by a complete and accurate understanding of current medical and scientific research about HIV; (ii) compliant with human rights laws and principles;

and (iii) supportive of HIV care, treatment and support, and prevention. In particular, discussions have focused on the development of prosecutorial guidelines for Crown prosecutors handling alleged HIV non-disclosure matters in Ontario.

In December 2010, then Attorney General Chris Bentley agreed to develop guidelines with the input of CLHE.³⁰ To this end, and because MAG refused to engage in a meaningful consultation with the HIV community and other stakeholders proposed by CLHE, in mid-2011, CLHE in good faith provided MAG with its *Report and Recommendations* based on comprehensive community consultations it conducted around the province.³¹

In April 2013, MAG informed CLHE that it was in the process of developing guidelines but would not engage in further consultations or meetings. In response to community objections, in December 2013, MAG offered to share draft guidelines with three lawyers involved in CLHE, but only if they agreed to a confidentiality clause precluding them from disclosing the contents of the draft guidelines. Ultimately, the three lawyers and CLHE had to request that the guidelines not be adopted, given their unacceptable content. It was evident to them that the guidelines not only did not provide guidance aimed at limiting HIV criminalization, but in fact continued to encourage an overly broad application of the criminal law. In December 2015, MAG confirmed that the draft guidelines would not be issued.

“I am on the registered sex offender list for the rest of my life- is this because I will have HIV for the rest of my life? Due to my presence on the sex offender registry, I am now prohibited from seeing my nieces and nephews and it has led to the fracturing of my family, which is detrimental to my rehabilitation and reintegration.”

On December 1, 2017, the same day that Justice Canada released its report (noted above), in Ontario, MAG finally took an initial step to bring the use of the criminal law in line with science and human rights in a manner that is supportive of HIV-related care, treatment and prevention. In a joint statement, the Attorney General and Minister of Health and Long-Term Care stated that they “believe strongly that HIV should be considered with a public health lens, rather than a criminal justice one, wherever possible.”³² In the statement, the two Ministries also joined CCRHC in their request for legislative reform from the federal government. (CLHE emphasizes the point above that the development and adoption of prosecutorial guidance by a provincial Attorney General is not contingent on federal legislative reforms to the *Criminal Code*.) **Encouragingly, the statement further made it clear that “where an individual has a suppressed viral load for six months, Ontario’s Crown Prosecutors will no longer be proceeding with criminal prosecutions.” This has also been reflected in a directive (as of December 1, 2017) in the updated Crown Prosecution Manual.**³³

FURTHER MEASURES TO BE TAKEN IN ONTARIO

The decision to cease prosecutions in situations where a person living with HIV has a suppressed viral load (for six months) is a welcome, necessary first step. This approach is entirely consistent with the 2014 consensus statement by Canadian scientists aimed at helping the criminal justice system appropriately limit the scope of the criminal law, as well as the more recent “Undetectable = Untransmittable” consensus statement³⁴ that has been widely endorsed, and the November 2017 statement by the Council of Chief Medical Officers of Health.³⁵ It reflects one of the minimum steps called for by CLHE and others.³⁶ It is also consistent with the recommendations in the recent Justice Canada report.

However, we are deeply concerned that Ontario will maintain its overzealous approach by continuing to prosecute those who do not have a suppressed viral load, even, for example, in circumstances relating to sex with a condom or oral sex.

Not only does this approach run counter to the federal recommendations and standards that have been recommended repeatedly, it would also (i) perpetuate stigma and discrimination against people living with HIV; (ii) ignore scientific evidence; (iii) continue unjust criminalization; and (iv) be bad public policy. Furthermore, those who would be most negatively affected by continued criminalization that only recognizes viral suppression as a “defence” against HIV criminalization would be the most marginalized of people living with HIV, including Indigenous persons, racialized individuals, gay men, women and those with precarious immigration status.

CLHE therefore puts forward, at this juncture, the following 12 recommendations as the minimum steps that should be taken to end and rectify unjust HIV criminalization and its harmful consequences in Ontario:

Recommendation #1

- Prosecutions should immediately cease in relation to oral sex.

Recommendation #2

- Prosecutions should immediately cease in relation to sex with a condom.

Recommendation #3

- Prosecutors should immediately cease using HIV-positive status against accused persons, including by elevating charges, in prosecutions related to spitting or biting.

Recommendation #4

- In order to accomplish the above and achieve other necessary reforms, the Attorney General of Ontario should create specific prosecutorial directives for HIV-related prosecutions to limit the use of the criminal law in cases of HIV non-disclosure and safeguard the rights of people living with HIV at all stages of criminal proceedings, including at bail and sentencing. (Attached as an Appendix are updated recommendations for such guidance, drawing in part on the previous CLHE recommendations from its province-wide consultation.)

Recommendation #5

- The Attorney General of Ontario, working with community organizations, should explore and implement alternatives to criminal charges and prosecutions as part of measures to limit the use of the criminal law against people living with HIV.

Recommendation #6

- The Ministry of the Attorney General should work with other ministries and with community organizations to ensure that potential complainants receive appropriate support and referrals in cases of HIV non-disclosure, including access to accurate information about HIV and its transmission and treatment.

Recommendation #7

- The Ministry of the Attorney General, working with other ministries and with community organizations, should take measures to protect women living with HIV from violence, harassment and domestic abuse, including through the threat of HIV non-disclosure charges.

Recommendation #8

- The Ministry of the Attorney General should systematically collect information about prosecutions involving perceived potential exposure to HIV (and other STIs) and ensure that such information is tracked in a transparent manner (while not further publicly identifying accused persons). This information should be used to review the implementation of new directives to prosecutors within 12 months and periodically after that, to ensure a fair and consistent approach by Crown counsel.

Recommendation #9

- The Ministry of the Attorney General should, in collaboration with community organizations and relevant counsel, review historic convictions in light of the federal report and Ontario's World AIDS Day announcement restricting prosecutions.

Recommendation #10

- The Ministry of the Attorney General, working with other relevant ministries, community organizations, relevant counsel and scientific experts, should develop HIV-related evidence-based resources and trainings and deliver these to Crown prosecutors, police forces and prison guards.

Recommendation #11

- The Ministry of Community Safety and Correctional Services, working with other relevant ministries, community organizations, and medical experts and health care providers, should ensure that measures are taken to ensure continuity of HIV treatment (and other medical care) in detention and correctional facilities and guarantee access to care.

Recommendation #12

- The Ministry of Community Safety and Correctional Services should immediately take measures to end the use of segregation against people living with HIV and to protect prisoners living with HIV against discrimination and violence.

After many years of work on this issue, we are hopeful that, through meaningful engagement with the HIV community, Ontario will cease to be one of the world's worst offenders in unjustly prosecuting people with HIV. Instead, it is our fervent hope that Ontario will lead the way in arriving at a place, as envisioned in the provincial HIV/AIDS strategy, where new HIV infections are rare and people living with HIV will lead long, healthy lives, free from stigma and discrimination.

APPENDIX

UPDATED RECOMMENDATIONS FOR PROSECUTORIAL GUIDELINES

Guidelines should:

- Ensure HIV-related prosecutions are conducted with restraint and caution.
 - Ensure HIV-related prosecutions are informed by complete, accurate and comprehensive understanding of the science surrounding HIV, risks of HIV transmission and the reality of living with HIV.
 - Exclude the use of the criminal law against people living with HIV who used a condom OR engaged in condomless sex with a low or undetectable viral load, OR performed or received oral sex.
 - Limit the use of the criminal law in cases of HIV non-disclosure that do not include malicious intent to transmit HIV and actual transmission.
 - Prevent an accused's HIV-positive status being taken into account in prosecutions related to spitting or biting.
 - Limit the use of the law of sexual assault in cases of HIV non-disclosure.
 - Provide potential complainants with the support they need (both in terms of counselling and medical care).
 - Protect the rights of people living with HIV to be free from discrimination. Their rights to privacy, to liberty and security of the person, to sexual and reproductive health and physical integrity must also be protected.
 - Protect people living with HIV, particularly women living with HIV, against violence, harassment and domestic abuse.
- To that effect, guidelines should be informed by the following considerations:**
- General considerations*
- The criminal law is a blunt instrument to deal with HIV non-disclosure, exposure or transmission and should only be used as a last resort.
 - Prosecutions relating to HIV non-disclosure to sexual partners are highly sensitive and complex. Prosecutions should be conducted with restraint and caution. In particular, there should be strong presumption against prosecutions in the absence of alleged intentional transmission. Prosecutions for alleged HIV non-disclosure are not warranted when:
 - ◆ there is no evidence of a realistic possibility of transmission;
 - ◆ the person did not know they were HIV-positive;
 - ◆ the person did not understand how HIV is transmitted;
 - ◆ the person did not disclose their HIV-positive status because of fear of violence or other serious negative consequences;
 - ◆ the person took reasonable measures to reduce the risk of HIV transmission, such as practicing safer sex through using a condom or engaging in oral sex or other non-penetrative sexual activity, or had a low or undetectable viral load; or
 - ◆ the person knew they could not transmit HIV given effective treatment or low viral load.
 - Crown prosecutors should consider the availability and efficacy of interventions by public health authorities under public health statutes, as an alternative to criminal prosecution, especially where the accused was not previously subject to public health case management.
 - Crown prosecutors should prioritize access to support both in terms of counselling and medical care for complainants over prosecutions.

- Crown counsel must take care not to prosecute cases in a manner that would reinforce societal prejudices, preconceptions and irrational fears regarding HIV, or undermine public health efforts to prevent the spread of HIV and other sexually transmitted infections (STIs).
- Crown counsel must take care not to prosecute cases in a manner that would place people living with HIV, especially women, at increased risk of violence, harassment and domestic abuse.
- Scientific knowledge of the sexual transmission of HIV is complex and evolving. However, there is significant scientific consensus on certain key issues:
 - ◆ HIV is a manageable chronic illness.
 - ◆ Treatment not only allows people to live long and healthy lives, but also prevents HIV transmission.
 - ◆ Vaginal or anal sex without a condom poses negligible to no possibility of transmission when the HIV-positive partner is under effective antiretroviral therapy.
 - ◆ An unbroken condom is 100% effective at stopping the transmission of HIV when used correctly.
 - ◆ Oral sex poses no to negligible possibility of HIV transmission.
 - ◆ Being spat on by an HIV-positive individual poses no possibility of transmitting HIV.
 - ◆ Being bitten by an HIV-positive individual poses at most a negligible possibility of transmitting HIV when the biting breaks the other person's skin and the HIV-positive individual's saliva contains blood. Otherwise, being bitten by an HIV-positive individual poses no possibility of transmitting HIV.

Science and HIV

- Prosecutions must be informed by complete, accurate and comprehensive understanding of the science surrounding HIV, risks of HIV transmission, and the reality of living with HIV.
- In any cases of alleged HIV non-disclosure, the Crown must, at the very least, establish a “realistic possibility of HIV transmission.”
- When transmission is alleged, Crown counsel must bring forth scientific or medical evidence and additional evidence, including evidence of past sexual contacts of the complainant, in order to establish actual transmission.
- Crown counsel must have an obligation to seek out, at the earliest possible occasion, an expert scientific opinion on the risks of transmission from a properly qualified expert based on the best available evidence.
- When prosecuting cases involving non-disclosure of HIV or other STIs, Crown counsel should be mindful of the recommendations of inquiries into the importance of ensuring accurate scientific evidence underpinning prosecutions (e.g., the Report of the Inquiry into Pediatric Forensic Pathology in Ontario, also known as the Goudge Inquiry).
- Prosecutions are not warranted against people living with HIV who used a condom OR practiced oral sex OR engaged in condomless sex with a low or undetectable viral load. Based on current scientific evidence, someone with an undetectable viral load is effectively non-infectious, and there is therefore no realistic possibility of transmission.
- An accused's HIV-positive status should not be taken into account in prosecutions related to spitting or biting.

Intent to transmit

- Cases of intentional transmission are extremely rare.
- Intent to transmit HIV cannot be presumed or solely derived from knowledge of positive HIV status or non-disclosure of that status.
- Intent to transmit HIV cannot be presumed or solely derived from engaging in sex that poses a realistic possibility of transmission.
- Proof of intent to transmit HIV should at least involve (i) knowledge of positive HIV status, (ii) deliberate action that poses a significant risk of transmission (e.g., repeated exposure to a significant risk of HIV transmission) and (iii) proof that the action is done for the purpose of infecting someone else.
- Intent to transmit cannot be presumed from active deception. The context and circumstances in which the alleged deception occurred — including the mental state of the person living with HIV and the reasons for the alleged deception — should be taken into consideration.

Sexual assault

- HIV and other STI non-disclosure prosecutions are distinct from other sexual assault prosecutions involving coercion, force and violence because the sexual activity involved was consensual if not for the alleged non-disclosure. When lack of consent results from non-disclosure, Crown counsel should strongly consider proceeding with a Criminal Code offence that does not include a sexual element.

Public interest factors

- Crown counsel should consider public interest factors that are specific to cases of alleged non-disclosure of HIV and other STIs, including:
 - ◆ The absence of transmission of HIV (or other STI) to the complainant, which has been the case in the majority of prosecutions to date.
 - ◆ A limited number of encounters posing a realistic possibility of transmission.
 - ◆ Non-disclosure was an isolated incident and there was no evidence of a history of non-disclosure placing sexual partners at a significant risk of serious bodily harm.
 - ◆ Compromised physical and mental health of the accused, especially an accused living with HIV.
 - ◆ The availability and efficacy of interventions by public health authorities under public health statutes as an alternative to criminal prosecution, especially where the accused was not previously subject to public health case management.
 - ◆ The potentially unduly harsh or oppressive consequences of prosecutions and a conviction for the accused; in particular, the health and safety risks that incarceration poses for people living with HIV and the impact of a criminal conviction on someone's immigration status.
 - ◆ The possible power imbalance in intimate relationships, where the accused was in a position of lower power.
 - ◆ The potentially unduly harsh consequences of prosecutions for alleged non-disclosure for women living with HIV at increased risk of violence, harassment or domestic abuse. HIV criminalization can be used as a coercive tool by vindictive partners. It can also discourage women living with HIV to report sexual assault.
 - ◆ The staleness of the alleged offence in situations where past sexual partners come forward alleging non-disclosure.

- Prosecutions in cases where a condom was used, the viral load of the HIV-positive person was low or undetectable, or oral sex was practiced are unlikely to meet the public interest requirement. Prosecution in these circumstances is not warranted.

Privacy

- Crown counsel should keep in mind the negative impacts of publicly disclosing a person's HIV-positive status given the high level of stigma experienced by people living with HIV. Crown counsel should ensure that the privacy of both the accused and the complainant, including with regard to their HIV status, is respected to the greatest extent possible.

Bail and sentencing

- Given the constitutional presumption in favour of bail (“judicial interim release”) and the disproportionate health consequences for people in custody who are living with HIV, the Crown should strongly consider consenting to the release of people charged with offences involving HIV non-disclosure. Only in rare cases should the Crown oppose bail. Crown counsel should ask for bail conditions that are proportionate and rationally linked to the alleged offence. Bail conditions should not disproportionately violate an accused's right to privacy, and sexual and physical integrity.
- Criminal prosecutions can have a severe impact on the accused's health, including depression or interruption of HIV treatment. Crown counsel should consider the offender's health at the time of bail and sentencing, and potential negative health and safety consequences of incarceration.

Other considerations

- Measures should be taken to ensure that Crown counsel has access to properly qualified experts and receives training to support the implementation of prosecutorial guidelines, and that the guidelines are regularly reviewed.

“I became involved in a non-disclosure case involving two women where a condom was used and my viral load was undetectable.

After four and a half years awaiting trial, the stigma around my case and its coverage in the media had caused me to be entirely isolated from my community.”

ENDNOTES

¹ *R. v. Cuerrier*, [1998] 2 S.C.R. 371.

² *R. v. Mabior*, 2012 SCC 47 and see also the companion case *R. v. D.C.*, 2012 SCC 48.

³ For the most recent data on treatment and HIV risks of transmission, see A.J. Rodger et al., “Sexual activity without condoms and risk of HIV transmission in serodifferent couples when the HIV-positive partner is using suppressive antiretroviral therapy,” *Journal of the American Medical Association* 316,2 (2016): pp. 171–181 (the PARTNER study). The study found zero transmissions from over 58,000 individual times that people had sex without condoms.

⁴ M. Loutfy, M. Tyndall et al., “Canadian consensus statement on HIV and its transmission in the context of the criminal law,” *Canadian Journal of Infectious Diseases and Medical Microbiology* 25,3 (2014): pp. 135–140. Available at www.aidslaw.ca/site/wp-content/uploads/2014/06/Canadian-statement.pdf.

⁵ E. Mykhalovskiy, C. Hastings, C. Sanders, M. Hyman and L. Bisailon, “‘Callous, Cold and Deliberately Duplicious’: Racialization, Immigration and the Representation of HIV Criminalization in Canadian Mainstream Newspapers.” A report funded by a grant from the Canadian Institutes of Health Research Centre for Social Research in HIV Prevention, 2016. Available at SSRN: <https://ssrn.com/abstract=2874409>.

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¹³ Global Commission on HIV and the Law (UNDP HIV/AIDS Group), *HIV and the Law: Risks, Rights & Health*, July 2012. Available at www.hivlawcommission.org/index.php/report.

¹⁴ UN Committee on the Elimination of Discrimination Against Women, *Concluding observations on the combined eighth and ninth periodic reports of Canada*, CEDAW/C/CAN/CO/8-9, November, 18, 2016, para. 43.

¹⁵ UNAIDS, *Ending overly broad criminalisation of HIV non-disclosure, exposure and transmission: Critical scientific, medical and legal considerations*, 2013. Available at www.unaids.org/sites/default/files/media_asset/20130530_Guidance_Ending_Criminalisation_0.pdf.

¹⁶ UN Committee on the Elimination of Discrimination Against Women, *Concluding observations on the combined eighth and ninth periodic reports of Canada*, CEDAW/C/CAN/CO/8-9, November 18, 2016, para. 43.

¹⁷ C. Hastings, C. Kazatchkine and E. Mykhalovskiy, *HIV Criminalization in Canada: Key Trends and Patterns*, Canadian HIV/AIDS Legal Network, 2017. Available at www.aidslaw.ca/site/hiv-criminalization-in-canada-key-trends-and-patterns.

¹⁸ The impact of HIV-related prosecutions on ACB communities is reinforced by the media coverage of cases involving Black men. A pioneering study of Canadian media, focusing on the newspaper coverage of HIV non-disclosure and transmission cases, has identified a clear pattern of racism towards Black men in Canadian mainstream newspaper articles from 1989 through 2015: E. Mykhalovskiy et al., “Callous, Cold and Deliberately Duplicious.”

¹⁹ *Supra* Note 17.

²⁰ *Ibid.*

²¹ *Ibid.*

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ENDNOTES (CONTINUED)

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²⁴ T. McLaughlin, “Extremely low’ chance of getting HIV through oral sex: Expert,” *Toronto Sun*, July 10, 2013. Available at www.torontosun.com/2013/07/10/extremely-low-chance-of-getting-hiv-through-oral-sex-expert.

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³⁶ Supra Note 4.

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c/o 1400-55 University Avenue
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The Ontario Working Group on Criminal Law and HIV Exposure (CLHE) was formed in 2007 to oppose the expansive use of the criminal law to address HIV non-disclosure. CLHE is comprised of people living with HIV, representatives from many community-based AIDS organizations, as well as lawyers, academics and activists from across Ontario. CLHE supports a comprehensive evaluation of how criminal law is being applied in Ontario. In addition, CLHE advocates for sound HIV-related policy responses based on best available evidence and up-to-date science, grounded in proven HIV prevention, care, treatment and support programs, and respectful of the human rights of people living with and affected by HIV.

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