



Public Safety Division

Division de la sécurité publique

25 Grosvenor St.  
12<sup>th</sup> Floor  
Toronto ON M7A 2H3

25 rue Grosvenor  
12<sup>e</sup> étage  
Toronto ON M7A 2H3

Telephone: (416) 314-3377  
Facsimile: (416) 314-4037

Téléphone: (416) 314-3377  
Télécopieur: (416) 314-4037

**MEMORANDUM TO:** All Chiefs of Police and  
Commissioner J.V.N. (Vince) Hawkes  
Chairs, Police Services Boards

**FROM:** Stephen Beckett  
Assistant Deputy Minister  
Public Safety Division and Public Safety Training Division

**SUBJECT:** **Non-Disclosure of HIV Status**

<b>DATE OF ISSUE:</b>	<b>May 1, 2018</b>
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At the request of the Ministry of the Attorney General (MAG), I am sharing a communication regarding a new directive on the prosecution of individuals for non-disclosure of HIV status.

For further details, please review the attached memo from A/Assistant Deputy Attorney General Lowell Hunking and consult with your local Crown Attorney's office.

Sincerely,

A handwritten signature in black ink, appearing to read "S. Beckett".

Stephen Beckett  
Assistant Deputy Minister  
Public Safety Division and Public Safety Training Division

Attachments

**Ministry of the Attorney General**  
Assistant Deputy Attorney General  
Criminal Law Division

McMurtry-Scott Building  
6<sup>th</sup> Floor, 720 Bay Street  
Toronto ON M7A 2S9

Tel.: (416) 326-2615  
Fax: (416) 326-2063

**Ministère du Procureur général**  
sous-procureure générale adjointe  
de la Couronne – droit criminel

Édifce McMurtry-Scott  
6<sup>th</sup> étage, 720 rue Bay  
Toronto, ON M7A 2S9

Tél. : (416) 326-2615  
Télec. : (416) 326-2063



**MEMORANDUM TO:** Stephen Beckett  
Assistant Deputy Minister  
Public Safety Division and Public Safety Training Division  
Ministry of Community Safety and Correctional Services

**FROM:** Lowell Hunking  
A/Assistant Deputy Attorney General  
Criminal Law Division  
Ministry of the Attorney General

**DATE:** April 27, 2018

**SUBJECT:** **HIV Exposure Prosecutions**

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I am writing to bring to your attention a development in the medical science and a resulting change in prosecution practice for HIV exposure cases.

In *R. v. Mabior*, 2012 SCC 47, the Supreme Court held that in certain circumstances a failure to disclose one's HIV status can be a criminal offence. The Supreme Court of Canada has held that a person has an obligation to disclose their HIV status to a sexual partner where there is a realistic possibility of transmission. At the time of the *Mabior* decision, the Supreme Court found there was no realistic possibility of transmission where a person had a low viral load and used a condom and therefore had no obligation to disclose their HIV status. The Supreme Court also recognized that the scientific understanding of risk of transmission, as well as advances in medical treatment, may evolve over time, and allowed for the law to evolve accordingly.

On December 1, 2017, the federal government released a report on the Criminal Justice System's Response to Non-Disclosure of HIV, which includes a scientific analysis on the sexual risk of HIV transmission by the Public Health Agency of Canada's (PHAC). The scientific conclusions reflect the growing body of evidence that shows that there is no realistic possibility of transmission of HIV if a person is on antiretroviral therapy and has maintained a suppressed viral load for six months. Ontario endorses PHAC's scientific analysis included in the federal report.

On December 1, 2017, the Attorney General issued a written direction that we will not prosecute individuals for non-disclosure of their HIV status where they have maintained

a suppressed viral load for six months. Further, all Crowns with carriage of an HIV exposure case must seek the advice of our Sexually Transmitted Infections (STI) Advisory Group. This expert group maintains up-to-date knowledge of the scientific evidence.

This direction can be found in the Sexual Offences Against Adults Directive in the Crown Prosecution Manual. The Directive is attached and can be found online at: [www.Ontario.ca/crownmanual](http://www.Ontario.ca/crownmanual) (English) and [www.Ontario.ca/manueldelacouronne](http://www.Ontario.ca/manueldelacouronne) (French).

Prosecutions involving exposure to HIV are complex and engage a number of legal and scientific issues. We would ask you to advise Chiefs of Police and Detachment Commanders of this development, and to encourage their officers to reach out to their local Crown Attorneys to seek pre-charge advice on all HIV exposure cases.

Sincerely,

A handwritten signature in black ink, appearing to read 'L. Hunking', enclosed in a faint rectangular box.

Lowell Hunking  
A/Assistant Deputy Attorney General  
Criminal Law Division  
Ministry of the Attorney General

Attachment: Sexual Offences Against Adults Directive

## Sexual Offences against Adults

Sexual offences involve violations of sexual integrity, privacy and autonomy that can have enduring and substantial effects upon victims. These crimes pose a serious threat to individual and public safety and must be prosecuted vigorously.

Rape myths, misogyny and stereotypes about the nature of sexual offences and of victims of sexual offences must not influence any aspect of the criminal case. Prosecutors play an important role in preventing those distortions and harmful effects on victims and the integrity of the administration of justice. Each region has a designated “Sexual Violence Crown”, who is also a member of the Sexual Violence Advisory Group. The work of this group includes education, training, mentorship and enhanced community outreach.

The Prosecutor must ensure that efforts are made, at all stages of the criminal proceedings, to provide the victim with whatever information or assistance is required to ensure full and fair participation in the criminal justice system. This includes the availability of the following:

- specialized victim’s services facilitated by the Victim/Witness Assistance Program (V/WAP) or other similar victims’ support services
- interpreters to assist the victim in communicating
- testimonial aids to assist the victim in providing evidence
- appointment of counsel to cross-examine the victim where the accused is self-represented
- access to independent legal representation for victims or witnesses on applications to access their private records under the *Criminal Code*.

Reference should be made to the following directives [Victims](#), [Publication Bans and Sealing Orders](#), [DNA Data Bank Orders](#), [Weapons Prohibitions and Forfeiture](#), [High-Risk Offender National Flagging System](#), [Intimate Partner Violence](#), [Judicial Interim Release \(Bail\)](#), and [Testimonial Aids and Accessibility](#).

## **\*NEW\* Sexually Transmitted Infections and HIV Exposure Cases**

Cases dealing with sexually transmitted infections like HIV raise many complex and sensitive medical and legal issues. With diagnosis and treatment, HIV is a chronic, manageable condition.

Prosecutions for HIV exposure are guided by the law and the medical science. The Supreme Court of Canada has said that in certain circumstances a failure to disclose one's HIV status will be a criminal offence. The Supreme Court of Canada held that a person living with HIV has a legal obligation to disclose to their sexual partner their HIV status if there is a realistic possibility of transmission. Whether there is a realistic possibility of transmission will depend on the facts of the case. For example, there is no realistic possibility of transmission in cases where a condom is used and there is a low HIV viral load. In addition, according to a review by the Public Health Agency of Canada, if a person living with HIV is on antiretroviral therapy and has maintained a suppressed viral load for six months, there is also no realistic possibility of transmission. In these circumstances a failure to disclose does not result in criminal liability for exposure to HIV, and charges will not proceed.

The ministry has a group of experienced Prosecutors who are available to provide advice in this area. The STI Advisory Group is up-to-date on developments in the medical science and the risk of transmission. A Prosecutor assigned to a case involving HIV exposure must consult with the STI Advisory Group at the earliest stage possible.

### **Judicial interim release (bail)**

In sexual offences against adults, the Prosecutor must take a position on judicial interim release applying the general principles set out in the [Judicial Interim Release \(Bail\) Directive](#) including the requirement for ongoing assessment of the strength of the Crown's case. The Prosecutor must be conscious of the potential risk of harm in these cases and must seek a detention order where she considers it necessary for the safety and security of the victim or the public.

Where the accused is remanded in custody pending a bail hearing, detained or released on conditions, the Prosecutor should seek an order from the Court prohibiting the accused from having any contact with the victim, or where appropriate, any witnesses. The Prosecutor must ensure that any conditions she recommends on a bail release are

necessary and appropriate to the circumstances of the alleged offence and the accused.

At the bail stage, the Prosecutor must seek a publication ban directing that the identity of a victim or a witness and any information that could disclose the identity of the victim or witness not be published or transmitted in any way. If the victim wishes to have her identity known, the issue of lifting the publication ban can be revisited at any later stage in the proceedings. Reference should be made to the [Publication Bans and Sealing Orders Directive](#).

The Prosecutor must ensure that efforts are made to notify the victim of any release order, the conditions of release, including non-communication and any order detaining the accused. In all cases where there is reason to have concern for a victim's safety, the Prosecutor must ensure that bail notification occurs as soon as possible. On request, the victim must be provided with a copy of the court order.

## **Prosecution**

### *Charge screening*

The Prosecutor should determine whether the full gravity of the criminal act is reflected in the offence charged and recommend a more appropriate charge be laid if necessary.

The following factors should be considered when determining the offence charged is appropriate to the circumstances and whether to proceed summarily or by indictment:

- the circumstances of the offence e.g. protracted sexual abuse; significant physical, emotional or psychological harm to the victim
- whether the offence is alleged to have occurred within 6 months of reporting
- the circumstances of the offender e.g. history of similar offences, position of trust/authority in relation to victim
- the circumstances of the victim including the impact on the victim of testifying twice (at a preliminary inquiry and trial) and special vulnerabilities (disabilities, health, age of victim)
- the potential range of sentence.

The Prosecutor should consider whether the accused should be flagged as a High Risk Offender or the subject of a Long Term Offender or Dangerous Offender Application. In

those cases, the Prosecutor should consult with her Regional High-Risk Offender Crown.

Reference should be made to the [Charge Screening Directive](#), [Dangerous/Long-term Offender Directive](#) and [High-Risk Offender National Flagging System Directive](#)

## **Protecting privacy**

Prosecutors must be sensitive to the privacy interests of victims at every stage of the prosecution. Privacy of victims of sexual offences is protected by publication bans and laws restricting access to their private records and sexual history.

The Prosecutor should consider the directions set out in the [Disclosure Directive](#) concerning the disclosure of sensitive materials.

### *Publication bans*

The *Criminal Code* directs that the court shall prohibit the publication of any information that could identify the victim or witness, upon application. Reference should be made to the [Publication Bans and Sealing Orders Directive](#).

### *Production of private records (third party records)*

In order to gain access to a victim's private information, such as their medical, psychiatric or personal records, the *Criminal Code* provides that the accused must establish that the private records are likely relevant to an issue at trial or to the competence of a victim to testify. The Prosecutor should engage V/WAP to assist the victim in obtaining independent legal counsel to provide advice and represent their interests on the third party records application.

The Prosecutor must not disclose victim's records absent a court order unless the victim has expressly waived her right to privacy over those records. The victim is entitled to independent legal advice about their right to privacy. The validity of any waiver will depend on the circumstances.

If the victim chooses not to be represented by counsel, the Prosecutor should make the victim aware that the *Criminal Code* prohibits publication of information provided on the application.

### *Sexual history*

The *Criminal Code* provides that evidence that a victim has engaged in prior sexual activity with the accused or with any other person is not admissible. This evidence cannot support an inference that the victim consented to the sexual activity nor can it be used to assess the victim's credibility.

Should the accused bring an application to have evidence of the victim's sexual history admitted, the Prosecutor must advise the victim that they are not required to testify at the hearing to determine the admissibility of their sexual history. The Prosecutor must also advise the victim that the *Criminal Code* prohibits publication of information provided on the application.

### **Cross-examination by a self-represented accused**

In cases where an accused person is self-represented, the Prosecutor must seek an order appointing counsel to conduct the cross-examination of the victim.

### **Expert evidence**

Before engaging an expert witness, the Prosecutor must obtain the prior approval of the Crown Attorney. Reference should be made to the [Experts Evidence Directive](#).



## **Testimonial aids**

Prosecutors should consider whether a victim's ability to communicate their evidence would be facilitated by the use of testimonial aids or other means that enable the evidence to be better understood. Where appropriate, Prosecutors should apply for an order permitting the use of a testimonial aid. Reference should be made to the [Testimonial Aids and Accessibility Directive](#).

## **Resolution discussions and sentence**

The Prosecutor must ensure reasonable steps are taken to inform the victim of a proposed resolution (e.g. guilty plea or proposed sentence) or that the charges will be withdrawn.

The Prosecutor must not negotiate a guilty plea in exchange for agreeing to forego a dangerous or long-term offender application without first consulting with the Regional High-Risk Offender Crown and her Crown Attorney.

Except with the prior approval of the Crown Attorney or designate, the Prosecutor must not:

- withdraw or stay proceedings
- accept a plea to a lesser charge or non-sexual offence
- reduce or withdraw charge solely to avoid a mandatory minimum sentence or any ancillary orders.

### *Victim impact statement*

As soon as feasible after a finding of guilt, the Prosecutor must ensure reasonable steps are taken to provide the victim with the opportunity to prepare a Victim Impact Statement, and inform the victim of their right to present it to the court and their other options.

### *Restitution*

The *Criminal Code* directs the court to consider making a restitution order and to ask the Prosecutor if reasonable steps have been taken to provide the victim with an opportunity to indicate whether they are seeking restitution i.e. compensation for counselling. As soon as feasible after a finding of guilt, the Prosecutor must ensure

reasonable steps are taken to provide the victim with an opportunity to indicate whether the victim is seeking restitution for their losses and damages.

### **Ancillary orders**

The Prosecutor must seek the following orders if applicable and remind the court of all mandatory orders:

- DNA order
- *Sex Offender Information Registration Act* (SOIRA)
- Weapons Prohibition.

Reference should be made to the following directives [DNA Data Bank Orders](#) and [Weapons Prohibitions and Forfeiture](#).