

**Consultation on Prosecutorial Guidelines for Ontario Cases Involving
Non-disclosure of Sexually Transmitted Infections: Community
Report and Recommendations to the Attorney General of Ontario**

Submitted by the Ontario Working Group on Criminal Law & HIV Exposure

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Contact

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Introduction

Our report and recommendations aim to contribute to the process underway within the Ontario Ministry of the Attorney General (MAG) that will result in guidance to assist Crown counsel to make fair and timely decisions in cases based on allegations of non-disclosure of human immunodeficiency virus (HIV) or another sexually transmitted infection (STI) to a sexual partner.

Ontario leads all Canadian provinces in HIV non-disclosure prosecutions. From 1989 to the end of February 2011, at least 59 HIV non-disclosure prosecutions had been initiated in Ontario, resulting in 34 convictions. Ontario prosecutions represent nearly 50 percent of the 129 prosecutions in Canada during that time period. Ontario is also home to the only murder convictions in Canada related to HIV non-disclosure. While the vast majority of non-disclosure cases are related to HIV, there have been approximately five prosecutions for non-disclosure of another STI, based on the Supreme Court of Canada's decision in *Cuerrier*.¹

Prior to the Supreme Court's decision in *Cuerrier*, people accused of HIV non-disclosure to a sexual partner were prosecuted under a range of existing *Criminal Code* offences. Since *Cuerrier*, the vast majority of prosecutions for HIV non-disclosure has been brought under assault-based offences of the *Criminal Code* (sections 265 to 268, 271, 273). The criminal offence charged in most of the HIV non-disclosure cases has been aggravated sexual assault (section 273), one of the most serious charges in the *Criminal Code*, which carries a maximum life imprisonment without eligibility for parole for 25 years. The legal test to determine if consent to sex was vitiated by HIV/STI non-disclosure—thus rendering otherwise consensual sex an assault—is based on the risk of HIV/STI transmission during sex: According to the test established in *Cuerrier*, consent is vitiated where non-disclosure results in a *significant risk* of HIV transmission. Thus, the science of HIV and of the risks of HIV transmission plays a critical element in prosecutions for HIV non-disclosure.

The criminal law related to HIV non-disclosure is uncertain. Within the criminal justice system there appears to be a poor appreciation of scientific and medical knowledge (i.e., evidence) related to HIV infection and the risk of HIV transmission during sex, and an inconsistent application and interpretation of the legal test set out in *Cuerrier*. This uncertainty has fueled an over-broad use of the Canadian criminal law to address what is preeminently a public health issue, namely, preventing the sexual transmission of HIV.

Since 2007, the Ontario Working Group on Criminal Law and HIV Exposure (the Working Group) has undertaken research, community organizing, education, and advocacy. The Working Group is made up of people living with HIV/AIDS, representatives of over 20 community-based AIDS organizations from across Ontario, members of the criminal defence bar, and academics and researchers from a number of disciplines. While criminal prosecutions may be warranted in some situations of HIV non-disclosure, we are gravely concerned about the current expansive use of criminal law against people living with HIV/AIDS. In the fall of 2010 we publicly launched the

¹ *R v Cuerrier*, [1998] 2 SCR 371.

*Campaign for Ontario Guidelines for Criminal Prosecutions of HIV Non-disclosure.*² We called on Ontario's Attorney General to immediately undertake a process to develop guidelines for Crown counsel in cases involving allegations of non-disclosure of HIV status. We believe that guidelines are needed to ensure that HIV-related criminal complaints are handled in a fair and consistent manner. Guidelines are also needed to ensure that decisions to investigate and prosecute such cases are informed by a complete and accurate understanding of current scientific and medical research about HIV and take into account the social contexts of living with HIV. To date, about 1000 Ontarians have signed on to the Campaign, including many leading figures in law, science, medicine, public health, the university sector, the arts, and the community-based HIV/AIDS sector.

In a letter dated 16 December 2010, MAG advised the Working Group that it was engaged in a process to develop a Practice Memorandum for Crown prosecutors in the area of HIV prosecutions. While MAG did not commit to holding consultations, the Ministry "welcome[s] the opportunity to receive the reports and recommendations generated by your own consultation process," and assured the community that "MAG will make every effort to consider all relevant perspectives and concerns, including those presented by your working group." In addition, MAG expressed a willingness to continue to meet with the Working Group and share with the Working Group a draft of the Practice Memorandum prior to its issuance. In a letter dated 11 February 2011, MAG clarified that the purpose of the Practice Memorandum on cases involving exposure to HIV/AIDS is to "provide specific policy direction and detailed legal and practice guidance to Crown counsel in exercise of their discretion." MAG recognized the "need for consultation in developing well thought out and considered policy."

The Working Group received funding from the MAC AIDS Fund (www.macaidsfund.org) to undertake the "Criminalization of HIV Non-Disclosure: Community Consultation and Response Project." During March and April 2011 we consulted with a range of Ontario stakeholders. We invited people living with HIV/AIDS, communities affected by HIV, legal, public health, criminal justice and scientific experts, health care providers, and advocates for women's rights in the context of sexual violence and the criminal justice system to in-person consultations. We held eight consultations across Ontario, with a total of 65 people. Each community consultation lasted a full-day, and each expert consultation lasted a half-day. To reach more people, including especially those beyond metropolitan areas, we posted an on-line consultation survey for 13 days during May. We publicized the on-line consultation survey via email sent to people invited to the in-person consultations, and more broadly among existing networks and communications channels in the HIV/AIDS and public health communities in Ontario. One hundred and forty-nine people participated in the on-line consultation. The consultations were informed by HIV non-disclosure case law, MAG *Crown Policy Manual*, existing Working Group documents, and policy reports including *HIV Non-disclosure and the criminal law: Establishing policy options for Ontario*.³ See Appendix A for a list of stakeholder groups

² For more information about the Campaign, including *Questions and Answers about the Campaign for Ontario Guidelines for Criminal Prosecutions of HIV Non-disclosure*, please go to: www.ontarioaidsnetwork.on.ca/clhe/.

³ Mykhalovskiy, E., Betteridge, G. and McLay, D. (2010) *HIV Non-disclosure and the criminal law: Establishing policy options for Ontario*, available at www.aidslex.org/site_documents/CR-0137E.pdf.

and consultation locations. See Appendix B for a list of documents used during the in-person consultations. See Appendix C for the on-line consultation survey.

The consultation project was a partnership between the Working Group, the HIV & AIDS Legal Clinic (Ontario) and the Canadian HIV/AIDS Legal Network. Jonathan Glenn Betteridge Legal & Policy Consulting was retained to develop the consultation format and materials, facilitate the consultations, and prepare a draft report and recommendations.

Our report reflects discussions, feedback and recommendations from the in-person and on-line consultations, and discussion and analysis of the Working Group. It is organized into three sections. Sections 1 and 2 are intended to, borrowing the words of MAG's February letter, "provide specific policy direction and detailed legal and practice guidance to Crown counsel in exercise of their discretion." Section 1 sets out the policy statement we recommend to MAG, supported by a rationale. Section 2 sets out detailed recommendations on legal and practice guidance on: general principles, bail, scientific/medical evidence and experts, charge screening, resolution discussions, sentencing, and complainant considerations. Each recommendation in section 2 is supported by a rationale. Section 3 sets out additional recommendations related to the administration of justice that require action on the part of MAG. The rationales supporting our recommendations in Sections 1 to 3 are grounded in the views of consultation participants, case law, MAG *Crown Policy Manual*, existing Working Group documents, policy reports, and published and grey literature.

The Working Group's Prosecutorial Guidelines Sub-committee ⁴ and members of the Legal Strategy committee ⁵ reviewed and provided feedback on a draft of this document.

⁴ Cécile Kazatchkine, Policy Analyst, Canadian HIV/AIDS Legal Network, Eric Mykhalovskiy, Ph.D., Associate Professor, Department of Sociology, York University, Ryan Peck, Barrister & Solicitor, Executive Director, HIV & AIDS Legal Clinic (Ontario).

⁵ Corie Langdon, Associate, Cooper & Sandler LLP and Jonathan Shime, Partner, Cooper & Sandler LLP.

Section 1: Policy Direction

Recommended Text

The Working Group recommends that MAG adopt the following policy statement:

Non-disclosure of HIV and other Sexually Transmitted Infections

Cases involving an allegation of non-disclosure of human immunodeficiency virus (HIV) infection or another sexually transmitted infection (STI) to a sexual partner are very complex and prosecutions should be conducted with restraint and caution. Not every ethical obligation engages the criminal law. Equating non-disclosure of HIV, or another STI, with lack of consent would ignore the test established by the Supreme Court of Canada in the Cuerrier case,⁶ and would fail to take into account the complex scientific and medical factors that must be assessed in determining whether non-disclosure has put a sexual partner at a significant risk of serious bodily harm.

HIV/STI prevention is preeminently a public health issue. Under the Ontario Health Protection and Promotion Act,⁷ public health authorities in Ontario have the duty to reduce or eliminate risks to public health, and are given the powers required to do so. Throughout Ontario, public health units undertake HIV and other STI testing and counseling, follow up with partners of people who have tested HIV positive for HIV or other STI, and can issue public health orders against infected people who put other people's health at risk. Criminal prosecution of non-disclosure of HIV and other STIs should be reserved for the clearest of cases where public health powers have proven ineffective. Crown counsel must take care not to prosecute cases in a manner that would undermine public health efforts to prevent the spread of HIV and other STIs, or reinforce societal prejudices, preconceptions, and irrational fears regarding HIV. In Ontario, the HIV epidemic has disproportionately affected people who are socially and economically marginalized. Once infected, people face significant and ongoing stigma, and often discrimination, related to their HIV status. The vast majority of people who have been diagnosed with HIV infection, when empowered to do so, take steps to prevent the onward transmission of HIV to their sexual partner(s). The criminal law should be reserved for the most blameworthy behavior.

HIV is more scientifically and medically complex than other STIs. Our understanding of HIV infection and the risk of transmission during sex have evolved considerably over the last 30 years. The evolving nature of science and scientific understanding requires the criminal justice system to proceed very cautiously in such circumstances. While there is no cure for HIV, it is certainly no longer the "death sentence" it was at the time the Supreme Court decided Cuerrier in 1998. For over a decade HIV has been medically understood as a chronic, manageable infection. A person infected with HIV today who has access to

⁶ *R v Cuerrier*, [1998] 2 SCR 371.

⁷ RSO 1990, c. H.7.

appropriate medical care can expect to live a normal life, both in terms of longevity and quality of life. Scientific knowledge of the sexual transmission of HIV is complex and evolving. However, there is significant scientific consensus on certain key issues: HIV is not easy to transmit during sex. A number of factors affect the risk of HIV transmission during sex. Condoms substantially reduce the risk of HIV transmission during sex. Effective treatment with HIV anti-retroviral medications can render a person living with HIV non-infectious to a sexual partner, and can have a greater protective effect than the use of condoms.

When prosecuting cases involving non-disclosure of HIV or other STIs, Crown counsel should be mindful of the recommendations from the Inquiry into Pediatric Forensic Pathology in Ontario (commonly referred to as the Goudge Inquiry). Prosecutions must be informed by a complete, accurate and comprehensible account of current scientific and medical research. Crown counsel have an obligation to seek out, at the earliest possible occasion, an expert scientific/medical opinion from a properly qualified expert based on the best available evidence. This will facilitate a narrowing of issues and the wise use of scarce resources, and ultimately avoid the prosecution of cases where there was no significant risk of serious bodily harm.

Care must also be taken not to equate sexual offences involving coercion, force and violence with cases based on allegations of HIV/STI non-disclosure by applying the same prosecutorial approach. HIV/STI non-disclosure prosecutions are distinct from other sexual assault prosecutions because the sexual activity involved is consensual but for the alleged non-disclosure. When lack of consent results only from non-disclosure, Crown counsel should consider proceeding with a Criminal Code offence that does not include a sexual element. This will permit Crown counsel greater flexibility—including a wider range of resolution and sentencing options—to best ensure protection of the public and fairness to the accused and complainant.

The use of the criminal law in the most intimate of physical exchanges, especially in cases involving an allegation of HIV exposure or transmission, is likely to attract significant publicity and will invite strongly held and differing views. Crown counsel should ensure that the interests of complainants, including their privacy interests and harm suffered by them, are considered at every stage of the prosecution. The Crown should keep in mind the negative impacts of publicly disclosing a person's HIV-positive status given the high levels of stigma experienced by people living with HIV/AIDS, and should ensure that the privacy of the accused's and complainant's HIV status is respected to the greatest extent possible. Crown counsel should take care to relate to the media and the public in a measured and dispassionate manner.

Due to the complex nature of cases involving non-disclosure of HIV and other STIs, after screening the charge(s), Crown counsel should seek approval of the Crown Attorney or Deputy Crown Attorney to proceed with a prosecution. The Crown Attorney or Deputy in each jurisdiction should record such approvals and report on an annual basis to the Regional Director of Crown Prosecutions.

Rationale

Consultation participants overwhelmingly saw prosecutorial guidance as a significant opportunity for the community to raise awareness about HIV/AIDS among all of the participants in the criminal justice system. When presented with statistical information about HIV non-disclosure prosecutions and the reasons for decisions in cases, participants were struck by the criminal justice system's ill-informed understanding of current scientific and medical facts about HIV/AIDS and its failure to appreciate the complexity of the lives of people living with HIV/AIDS. Participants from the in-person consultations provided much of the wording included in the recommended text of the Policy Direction, above. They drew this wording from their own knowledge and experience and from the documents they reviewed during the consultations. Participants believed that it is impossible to conduct prosecutions in the public interest and in a just and fair manner without an informed understanding of: the science and medicine of HIV/AIDS; the social context of the HIV epidemic; and the experience of people and communities living with HIV/AIDS.

We recommend that the policy and practice memo include both HIV and other STIs, for three reasons. First, according to the Supreme Court of Canada's decision in *Cuerrier*, the law of assault as it applies in the context of HIV non-disclosure applies to other STIs (per Cory J. at para. 136; McLachlin J. at para. 75). Second, limiting the guidance to HIV would potentially have the unintended effect of further stigmatizing HIV/AIDS and people living with HIV/AIDS, and reinforcing the association of HIV/AIDS with criminality. Third, cases involving HIV and cases involving other STIs both require a solid understanding of the complex science.

Nonetheless, our recommendations focus attention on prosecutions involving HIV, for a number of reasons. First, the vast majority of non-disclosure prosecutions have been brought against people living with HIV/AIDS; it is our understanding that only approximately five prosecutions in Ontario have involved other STIs. Second, the law and its uncertainty have been developed in relation to HIV non-disclosure prosecutions. Third, HIV/AIDS is poorly understood by the population at large, and within the criminal justice system. Many of the decided HIV non-disclosure cases characterize HIV/AIDS using outdated and inaccurate terminology and rhetoric from the 1980s (e.g., HIV is a death sentence; HIV is easily transmitted during sex). Therefore, guidance is needed so that criminal justice proceedings are informed by up-to-date information about HIV/AIDS—as opposed to HIV/AIDS as it was understood in the 1980s or even the 1990s—which will promote fair and consistent decision-making and just outcomes. Fourth, the science of HIV/AIDS, and in particular the sexual transmission of HIV, is complex and evolving rapidly, more so than the science of other STIs. Guidance that squarely focuses on HIV/AIDS is needed in order to ensure that Crown counsel meet their burden of proof and to ensure that HIV non-disclosure cases are informed by a complete and accurate understanding of the current scientific and medical research about HIV/AIDS.

Given the complexity of the science and the complexity of human sexual relations, we are calling for restraint in HIV non-disclosure prosecutions. We believe that our position is supported by the Supreme Court's *Cuerrier* decision, in which six of seven justices cautioned against too easily finding that consent to sexual relations is vitiated based on non-disclosure:

- Per Cory J at para 139: “The phrase ‘significant risk of serious harm’ must be applied to the facts of each case in order to determine if the consent given in the particular circumstances was vitiated. Obviously consent can and should, in appropriate circumstances, be vitiated. Yet this should not be too readily undertaken. The phrase should be interpreted in light of the gravity of the consequences of a conviction for sexual assault and with the aim of avoiding the trivialization of the offence. It is difficult to draw clear bright lines in defining human relations particularly those of a consenting sexual nature. There must be some flexibility in the application of a test to determine if the consent to sexual acts should be vitiated. The proposed test may be helpful to courts in achieving a proper balance when considering whether on the facts presented, the consent given to the sexual act should be vitiated.”
- Per McLachlin J at para 49: “Another cause for concern is that the extension of the criminal law of assault proposed by Cory J. represents a curtailment of individual liberty sufficient to require endorsement by Parliament. The equation of non-disclosure with lack of consent oversimplifies the complex and diverse nature of consent. People can and do cast caution to the winds in sexual situations. Where the consenting partner accepts the risk, non-disclosure cannot logically vitiate consent. Non-disclosure can vitiate consent only where there is an assumption that disclosure will be made, and that if HIV infection were disclosed, consent would be refused. Where a person consents to take a risk from the outset, non-disclosure is irrelevant to consent. Yet the proposed test would criminalize non-disclosure nonetheless. This effectively writes out consent as a defence to sexual assault in such cases. The offence of sexual assault is replaced by a new offence -- the offence of failure to disclose a serious risk.”

In addition to *Cuerrier*, numerous other sources support restraint and caution in HIV/STI non-disclosure prosecutions:

- In terms of precedent for prosecutorial guidance, policy and legal guidance developed in England and Wales suggests that Crown prosecutors follow a measured approach.⁸ That guidance emphasizes the exceptional legal complexity of this area of the criminal law and the sensitive nature of the cases.
- The *Report of the Inquiry into Pediatric Forensic Pathology in Ontario* (the *Goudge Inquiry*) sets out specific and detailed recommendations to guide the criminal justice system in its interactions with scientific/medical evidence and the scientific community in the context of pediatric forensic pathology. Numerous recommendations, in particular those that focus on the need for caution in the use of expert scientific opinion as evidence in criminal proceedings, are highly relevant to HIV/STI non-disclosure prosecutions because, like pediatric forensic pathology, the science of HIV/STIs is complex and rapidly evolving. Moreover, cases

⁸ Crown Prosecution Service for England and Wales (CPS), *Intentional Or Reckless Transmission of Sexual Infection* (Originally published 2008; updated 21 June 2010.) and *Policy on prosecuting cases involving the Intentional or Reckless Sexual Transmission of Infection* (Published 2008), available at www.cps.gov.uk.

involving the death of children and cases involving the non-disclosure of HIV/STIs are legally complex, highly emotive, and invite publicity and strongly held opinions.

- *HIV Non-disclosure and the criminal law: Establishing policy options for Ontario* documents the uncertainty in the law as a result of the failure of the “significant risk of serious bodily harm test” to provide sufficient guidance to trial courts and Crown counsel. It also provides qualitative evidence of the detrimental effects on communities and people living with HIV/AIDS and service providers of the expansive use of the uncertain criminal law in cases of HIV non-disclosure.
- The African and Caribbean Council on HIV/AIDS in Ontario, in a recent report, raises significant concerns about the racialization of the criminalization of HIV non-disclosure, and the potential disproportionate impact of the law on African, Caribbean and Black communities in Ontario.⁹ The report situates the interpretation and application of the criminal law related to HIV non-disclosure in the context of the systemic racism documented within Ontario’s criminal justice system, and the pervasive societal prejudice against African, Caribbean and Black people when issues of race, crime, sex and immigration are publicly broached.
- As documented by EKOS Research Associates, ignorance and fear continue to characterize the Canadian public’s response to HIV/AIDS and people living with HIV/AIDS.¹⁰ Thirty-two percent of survey respondents believed incorrectly that HIV can be transmitted through kissing, while 49% said that they would feel uncomfortable using a restaurant drinking glass once used by a person living with HIV/AIDS. In such a climate, where people living with HIV/AIDS face stigma and discrimination, Crown prosecutors must take care not to exacerbate existing social exclusion and marginalization, and ensure that they conduct prosecutions in a manner that is fair to the public, the complainant and the accused.
- The Ontario Legislative Assembly passed the *Health Protection and Promotion Act* and in doing so assigned duties and granted powers to protect public health in relation to communicable diseases. The Cabinet used its regulation-making authority to empower public health officials to undertake HIV/AIDS case management under the *Act*. The *Act* provides public health authorities a flexible progression of interventions to address complex behaviours that pose a risk for public health. In the vast majority of cases, public health case management under the *Act* offers a better option than the criminal law for addressing behaviours that risk transmitting HIV/STIs and promoting public health.

Finally, there was a high level of agreement among people living with HIV/AIDS and the range of other people we consulted that cases of HIV/STI non-disclosure should not be prosecuted according to the same policy and practice memo that applies to sexual

⁹ Larcher, A.A. and Symington, A. (2010) *Criminals and Victims: The Impact of the Criminalization of HIV Non-Disclosure on African, Caribbean and Black Communities in Ontario*. ACCHO, available at www.accho.ca/pdf/ACCHO_Criminals_and_Victims_Nov2010.pdf.

¹⁰ *HIV/AIDS Attitudinal Survey 2006: Final Report*, EKOS Research Associates Inc., 31 March 2006, available at www.phac-aspc.gc.ca/aids-sida/publication/por/2006/pdf/por06_e.pdf.

offences and assaults. We expand upon the rationale for this recommendation in section 2.1 (General Principles), below.

Section 2: Detailed Legal and Practice Guidance

We recommend that the following topics be included in the Practice Memorandum:

- general principles;
- bail;
- scientific/medical evidence and experts;
- charge screening;
- resolution discussions;
- sentencing;
- complainant considerations.

2.1 General Principles

Recommended Text

This practice memorandum applies to prosecutions based on allegations of non-disclosure of human immunodeficiency virus (HIV) infection or another sexually transmitted infection (STI) prior to sex.

Sections 2.2 (Bail), 2.3 (Scientific/Medical Evidence and Experts) and 2.4 (Charge Screening) of this practice memorandum are also relevant to prosecutions against a person living with HIV or another STI based on exposure in a non-sexual context.

Prosecutions involving an allegation of non-disclosure of HIV infection or another STI to a sexual partner should be conducted with restraint and caution. Prosecution of cases of non-disclosure of HIV and other STIs prior to sex are complex and involve special considerations. In non-disclosure prosecutions, Crown counsel must establish, inter alia, that the non-disclosure resulted in a significant risk of serious bodily harm. This involves a medically and scientifically complex assessment, especially given that scientific and medical knowledge of the sexual transmission of HIV is complex and evolving. Therefore, Crown counsel have an obligation to seek out, at the earliest possible occasion, a complete, accurate and comprehensible expert scientific/medical opinion from a properly qualified expert. Where the expert opinion does not support a significant risk of serious bodily harm, the charge should be withdrawn.

Care must be taken not to equate sexual offences involving coercion, force and violence with cases based on allegations of HIV/STI non-disclosure. HIV/STI non-disclosure prosecutions are distinct from other sexual assault prosecutions because the sexual activity involved is consensual but for the alleged non-disclosure. Thus, when lack of consent results only from non-disclosure, Crown counsel should not rely upon CPM Policy "Sexual Offences" (March 21, 2005) and PM 2006 No. 9 "Sexual Assault and other Sexual Offences". Crown counsel should also consider proceeding with a Criminal Code offence that does not include a sexual element.

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 STIs.

Crown counsel should ensure that the interests of complainants, including their privacy interests and the harm suffered by them, are considered at every stage of the prosecution.

Rationale

There was a high level of agreement among consultation participants, including women's criminal justice and sexual assault service providers and researchers that HIV/STI non-disclosure prosecutions are fundamentally different from sexual assaults involving force, coercion or violence because the sexual activity involved was consensual but for the non-disclosure. Therefore, cases of HIV/STI non-disclosure should not be prosecuted according to the same policy and practice memo that applies to serious sexual offences and assaults.

More specifically, participants viewed as inappropriate the application of MAG policy on sexual offences to cases of HIV/STI non-disclosure. They pointed to a number of distinguishing features of HIV non-disclosure cases: the complexity of the science of HIV/AIDS; the pervasive climate of ignorance and fear that surrounds HIV/AIDS; the fact that the vast majority of people living with HIV/AIDS take measures to protect their sexual partners; the fact that HIV is not easily transmitted through sex; and the otherwise consensual nature of the sex involved. These features underpinned their strong view that HIV non-disclosure was not, in the words of MAG policy on sexual offences, "an ongoing serious threat to public and individual safety" that requires "the sanctions of the criminal justice system to be fully utilized through the vigorous prosecution of provable offences." Consultation participants believed HIV non-disclosure prosecutions have been, in the words of MAG policy on sexual offences, "permeated by long-entrenched myths and stereotypes"—but not in relation to the dynamics of sexual offences, rather in relation to HIV/AIDS and people living with HIV/AIDS.

Finally, consultation participants expressed forcefully the view that prosecuting HIV non-disclosure and sexual assaults involving force, coercion or violence using the same *Criminal Code* offences trivializes the experiences of survivors of sexual violence, and diverts the law of sexual assault from its original purpose. Consultation participants also believed that the consequences of conviction of (aggravated) sexual assault for HIV non-disclosure, especially when no transmission occurred, are disproportionate to the nature of the crime. Statutory maximum penalties for sexual assault and aggravated sexual assault as well as the mandatory registration as a sexual offender were believed to be exceedingly harsh and unfair. Many participants commented that the sentences handed down in HIV non-disclosure cases appeared to be far more severe than sentences handed down for sexual assaults involving force, coercion and violence. Participants also noted with concern the reality that people accused or convicted of sexual offences and people living with HIV often face threats, intimidation and violence while incarcerated.

Participants pointed favorably to the cautionary tone sounded by the Supreme Court in *Cuerrier* (discussed under section 1, above) and the bright line between non-disclosure and forced sex drawn in the legal guidance developed in England and Wales. The latter states that non-disclosure is not rape under the law of England and Wales (section 50), and that in cases of rape or sexual assault a convicted person's sexual infection is a matter for sentencing (section 51).

Consultation participants, the vast majority of whom are living with HIV/AIDS or provide services to people living with HIV/AIDS, emphasized that the law must be guided by scientific and medical knowledge of HIV/AIDS. Moreover, the report *HIV non-disclosure and the criminal law: Establishing policy options for Ontario* has documented the need for prosecutorial guidance to ensure that prosecutions are informed by a complete and accurate understanding of medical and scientific research about HIV/AIDS. This rationale is expanded upon in section 2.3 (Scientific/Medical Experts and Evidence) and 2.4 (Charge Screening), below.

2.2 Bail

Recommended Text

This section addresses bail issues specific to prosecutions involving non-disclosure of HIV or another STI, and should be read in conjunction with PM [2002] No. 4 "Bail (Comprehensive Practice and Legal Memorandum)". [NOTE: PM [2002] No. 4 should be amended to include the HIV/STI PM at pages 13 to 15 where specific types offences are addressed.]

Given the constitutional presumption in favour of bail, and the disproportionate health consequences for persons in custody who are living with HIV/AIDS, the Crown should strongly consider consenting to the release of persons charged with offences involving HIV non-disclosure. It should only be in rare cases that the Crown would oppose bail. Detention can result in interruptions of HIV anti-retroviral medication, which can have serious long-term negative impacts on the health of a person living with HIV. Detention can also result in a lack of access to other facets of appropriate medical care. Finally, detention can also result in serious personal safety concerns for people living with HIV/AIDS. HIV/AIDS and sexual crimes are heavily stigmatized within the incarcerated population at detention centres, which may result in threats, intimidation or violence directed at an HIV-positive accused.

Rationale

Our recommendations about bail arise out of the negative consequences that pre-trial detention present for many people living with HIV/AIDS. Numerous consultation participants have provided services to people living with HIV/AIDS who were incarcerated in remand centres and other provincial correctional facilities. These participants expressed serious concern about the negative health consequences that arrest and pre-trial detention can have for people living with HIV/AIDS. While HIV

infection can be effectively managed with HIV anti-retroviral medications, the effectiveness of the medications depends upon taking the medications as prescribed by a physician and without an interruption in dosing. A high level of adherence (in the 95% range) is required, failing which the person's medications can become ineffective at controlling HIV, which might lead to illness and would force the person to switch to other medications. These participants also noted that the health care received by people living with HIV/AIDS in pre-trial detention centres is often not up to community standards. Finally, numerous participants relayed stories of discrimination, violence and sexual violence suffered by people living with HIV/AIDS in pre-trial detention centres.

For these reasons, we believe that, absent serious public safety concerns that cannot be addressed otherwise, it is essential that Crown counsel take seriously the constitutional presumption in favour of judicial interim release.

2.3 Scientific/Medical Evidence and Experts

Recommended Text

This section addresses the use of scientific and medical evidence in prosecutions involving non-disclosure of HIV or another STI, and should be read in conjunction with PM [2006] No. 7 "Physical Scientific Evidence".

Goudge Inquiry: When prosecuting cases involving non-disclosure of HIV or other STIs, Crown counsel should be mindful of the recommendations of the Report of the Inquiry into Pediatric Forensic Pathology in Ontario (the Goudge Inquiry). While the Inquiry was specifically tasked with restoring confidence in pediatric forensic pathology in Ontario, Justice Goudge set out recommendations to guide the criminal justice system in its interactions with scientific/medical evidence and the scientific community. There are important parallels between pediatric forensic pathology (e.g., shaken baby syndrome) and scientific/medical knowledge of HIV/AIDS (i.e., the risk of sexual transmission of HIV). Both are complex and evolving areas of scientific inquiry, which require interpretation to properly apply existing knowledge to the facts of a particular case.

Scientific/Medical Evidence: Scientific/medical evidence plays a central role in the criminal law related to non-disclosure of HIV or another STI. Crown counsel must prove that the non-disclosure resulted in a significant risk of serious bodily harm. Prosecutions involving non-disclosure and the resulting risk of harm are scientifically and medically complex, based on rapidly evolving scientific/medical evidence. Therefore, Crown counsel must obtain an expert medical report as part of properly screening the charge in such cases.

In the exercise of their discretion at all stages of the prosecution, Crown counsel have a threefold obligation in relation to scientific/medical evidence: (i) To ensure that prosecutions are informed by a complete, accurate and comprehensible account of current scientific and medical research; (ii) To ensure that scientific/medical evidence is presented with no more and no less than its legitimate force and effect; and (iii) To ensure that scientific/medical evidence is

provided by properly qualified experts who understand their role within the criminal justice system. The particular scientific and medical evidence needed to determine whether the non-disclosure resulted in a significant risk of serious bodily harm will depend on the STI concerned.

In order to facilitate early resolution of cases, Crown counsel should disclose the expert scientific/medical report (or summary opinion and grounds for such opinion) as soon as possible.

Scientific/Medical Experts: *Crown counsel should select scientific/medical experts from a list of experts approved by the Ministry of the Attorney General to provide opinions in HIV/STI non-disclosure prosecutions. In order to avoid delays and to narrow outstanding issues for trial, Crown counsel should discuss and, wherever possible, come to an agreement with defence counsel on the selection of the expert(s).*

Rationale

Our recommendations are aimed at promoting consistency by providing guidance for Crown counsel regarding the need for accurate and comprehensible science/medical evidence and properly qualified expert witnesses in HIV/STI non-disclosure prosecutions. Our recommendations are grounded in the “significant risk of serious bodily harm” test established by the Supreme Court in *Cuerrier*, the Crown’s burden of proof, and the need for greater certainty in the law related to non-disclosure of HIV/STIs. *HIV non-disclosure and the criminal law: Establishing policy options for Ontario* provides evidence of the uncertainty arising out of the inconsistent interpretation and application of the law related to HIV non-disclosure. The report found that the inconsistency in the interpretation and application of the “significant risk of serious bodily harm” test is partly attributable to the complex and rapidly evolving nature of the scientific/medical research on HIV/AIDS. Inconsistency in the law has led to situations where people in like circumstances have not been treated alike—some people have been criminally charged based on oral sex alone, or where condoms were used, while other have not. Moreover, the criminal justice system has often been misinformed about current scientific and medical facts about HIV/AIDS. One of the consequences of this misinformation has been the over-estimation of the actual risk of sexual transmission of HIV.

The decision to proceed with a prosecution should be based, to a significant extent, on an expert opinion of the risk of HIV/STI transmission arising out of the sexual act in the circumstances of the case. However, numerous cases in Ontario have proceeded to trial with no scientific/medical evidence of HIV transmission risk, or without proper consideration of such evidence. We recommend expeditious disclosure of expert reports (or summary of opinions) in order to promote identification of the contentious issues at the earliest possible stage, and promote resolution of cases prior to trial.

Our recommendations are also grounded in the lessons learned and recommendations from the *Goudge Inquiry*. The *Goudge Inquiry* recommendations regarding effective communication by experts and expert opinions within the criminal justice system are highly relevant to HIV/STI non-disclosure prosecutions. (See *Goudge Inquiry* recommendations 84, 87, 88, 91, 92, 95, 96, and 100.)

2.4 Charge Screening

Recommended Text

Introduction: This section provides specific, detailed guidance to Crown counsel for screening charges based on non-disclosure of HIV or another STI.

When screening charges in non-disclosure cases, Crown counsel have an obligation to seek out, at the earliest possible occasion, an expert scientific/medical opinion from a properly qualified expert based on the best available evidence. Crown counsel are required to bring forth scientific/medical evidence to establish that the sexual act resulted in: (i) a significant risk of serious bodily harm; and, (ii) if transmission is alleged, actual transmission.

Scientific/medical evidence will only ever form part of the case against an accused. Crown counsel must build a strong factual case around the scientific/medical evidence in order to meet the burden of proving all essential elements of an offence beyond a reasonable doubt.

These cases are highly sensitive and complex. Approval of the Crown Attorney or Deputy Crown Attorney is required before proceeding with an HIV non-disclosure prosecution.

This section should be read in conjunction with PM [2002] No. 5 “Charge Screening”.

Reasonable Prospect of Conviction: In applying the test for reasonable prospect of conviction Crown counsel should take into account the following factors and circumstances:

a) The accused’s knowledge of infection and knowledge of transmission risk: Crown counsel should establish that the accused knew of his or her infection with HIV or another STI. This knowledge will almost always come from a positive test result for the infection, communicated to the accused by a medical professional. Crown counsel should bring forward evidence capable of establishing that the accused understood the significant risk of sexual transmission of the infection associated with the sexual act(s) alleged.

b) Evidence of non-disclosure and sexual acts: There will rarely be independent confirmation of the communication, and the details of sexual relations, between the accused and complainant. Crown counsel should look to objective factors that may affect assessment of the credibility of the accused’s and complainant’s accounts of the sexual encounter(s) and whether the accused disclosed his or her infection. In some cases, independent evidence may corroborate that disclosure took place or that the complainant otherwise knew of the accused’s infection (e.g., medical or counseling records; knowledge of friends, family, acquaintances, or professionals). Special attention should be paid to the

dynamics of spousal/partner relationships for evidence that the decision of one spouse/partner to charge the other was motivated by an attempt to control the spouse/partner, or is part of a pattern of threats, intimidation, actual violence, or revenge. (See PM [2002] No. 10 “Risk Indicators Checklist in Domestic Violence Cases”.)

c) *Scientific/medical evidence of risk and harm: Crown counsel have an obligation to seek out, at the earliest possible occasion, an expert scientific/medical opinion from a properly qualified expert based on a detailed factual foundation. Where the expert opinion does not establish a significant risk of serious bodily harm, the charge should be withdrawn.*

Crown counsel should seek the expert’s opinion on:

- (i) *the risk of transmission of HIV, or another STI, associated with the sexual act(s) alleged in each charge;*
- (ii) *the bodily harm associated with infection, based on the morbidity and mortality associated with infection; and*
- (iii) *proof of actual transmission, if transmission is alleged*

Crown counsel should be prepared to provide the expert with the factual foundation required to formulate an expert opinion on each charge, including where available the following information for each charge:

- (i) *gender of sexual partners;*
- (ii) *for each sexual act, a description of the sexual act, the sexual role of the partners, and whether the sexual act involved ejaculation;*
- (iii) *whether a condom was used;*
- (iv) *whether the male(s) are circumcised;*
- (v) *STI test results;*
- (vi) *treatment/medication history of the infected person;*
- (vii) *in the case of a person infected with HIV, results of HIV viral load testing.*

d) *Use of condoms in HIV non-disclosure cases: In general, the use of a condom for anal or vaginal intercourse reduces the risk of HIV transmission to the point where it is not significant. Therefore, in the absence of clear expert opinion to the contrary, where there is reasonable basis to find that a condom was used during sexual intercourse, the charge should be withdrawn.*

e) *Broken condoms in HIV non-disclosure cases: Where a condom breaks during sexual intercourse, in the absence of clear expert opinion to the contrary, the charge should be withdrawn where the person has an undetectable viral load. Even if the accused did not have an undetectable viral load, the charge should be withdrawn where the accused disclosed his or her HIV status upon discovering the broken condom, since this disclosure allows his or her sexual partner to seek emergency medical advice and, where medically indicated, start on anti-HIV medications that can prevent infection (i.e., HIV post-exposure prophylaxis).*

f) *Oral sex in HIV non-disclosure cases: In general, oral sex—whether the HIV-infected partner is performing or receiving oral sex—does not carry a significant risk of HIV transmission. Therefore, in the absence of clear expert opinion to the contrary, a charge based on oral sex alone should be withdrawn.*

g) *Undetectable viral load in HIV non-disclosure cases: As part of routine medical care, people infected with HIV usually undergo periodic HIV viral load testing. An HIV viral load test measures the amount of HIV genetic material in the blood plasma. Effective anti-HIV medication can reduce a person’s viral load to the point where it is “undetectable” by current testing methods. Effective anti-HIV medication resulting in an undetectable viral load reduces the risk of sexual transmission of HIV to the point where it is not significant. Therefore, in the absence of clear expert opinion to the contrary, the charge should be withdrawn where the accused person has an undetectable HIV viral load.*

h) *Charges requiring proof of transmission: Phylogenetic analysis is a complex scientific process undertaken by virologists that compares viral genes from two or more people to determine the degree or relatedness of the viral genes. Phylogenetic analysis can definitively establish that one person did not infect another person. However, phylogenetic analysis cannot per se definitively establish that one person infected another person. Therefore, in cases where proof of transmission of HIV or another viral STI is an element of the offence Crown counsel will need to bring forward additional evidence to establish transmission of HIV or another viral STI. This should include evidence of past sexual contacts of the complainant to determine whether another person may be the source of the complainant’s infection.*

Public Interest Factors: *The "Report of the Attorney General’s Advisory Committee on Charge Screening Disclosure and Resolution Discussions (the Martin Committee Report)" as quoted in PM [2002] No.5 “Charge Screening” states that “the contemporary view favours restraint generally in the exercise of the criminal law power.” Crown counsel should consider the following public interest factors that work in favour of discontinuing an HIV/STI non-disclosure prosecution:*

- a) *the complainant was not infected with HIV or another STI;*
- b) *non-disclosure was an isolated incident and there is no evidence of a history of non-disclosure placing sexual partners at a significant risk of serious bodily harm;*
- c) *compromised physical and mental health of an accused, especially an accused living with HIV/AIDS;*
- d) *the availability and efficacy of interventions by public health authorities under the Health Protection and Promotion Act, RSO 1990 c.H.7, as an alternative to criminal prosecution, especially where the accused was not previously subject to public health case management;*
- e) *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/AIDS;*

- f) *the possible power imbalance in intimate relationships, where the accused in a subordinate position; and*
- g) *the staleness of the alleged offence in situations where historical sexual partners come forward alleging non-disclosure.*

Downgrading Aggravated Sexual Assault Charges: *In situations where HIV/STI transmission is not alleged and when lack of consent results only from non-disclosure, Crown counsel should consider, at the charge screening stage, proceeding with simple assault or a Criminal Code offence not based on assault. This will permit Crown counsel greater flexibility—including a wider range of resolution and sentencing options—to best ensure protection of the public and fairness to the accused and complainant.*

Approval of Crown Attorney or Deputy Crown Attorney: *HIV/STI non-disclosure cases are highly sensitive and complex. Crown counsel must have the approval of the Crown Attorney or Deputy Crown Attorney before proceeding with an HIV/STI non-disclosure prosecution. The Crown Attorney or Deputy in each jurisdiction should record such approvals and report on an annual basis to the Regional Director of Crown Prosecutions.*

Rationale

Our recommendations are intended to promote certainty and consistency in the exercise of Crown counsels' discretion and, by extension, the law, in HIV/STI non-disclosure cases. Scientific/medical evidence is essential when assessing whether there is a "reasonable prospect of conviction." Therefore, many of our recommendations are based on ensuring that Crown counsel bring forward scientific/medical evidence and expert opinion required to prove some of the essential elements of the offence. For assault-based offences, Crown counsel must lead evidence to prove that the sexual activity created a significant risk of serious bodily harm. Where HIV/STI transmission is alleged, Crown counsel must lead scientific/medical evidence capable of establishing transmission.

We make specific recommendations regarding the factual information Crown counsel should provide to experts in order to secure a properly informed expert opinion. The scientific/medical experts we consulted enumerated the seven crucial factual elements that allow an expert to offer as fully informed an opinion as possible regarding the risk of HIV transmission. See paragraph c) *Scientific/medical evidence of risk and harm*, above.

Based on feedback provided by the scientific/medical experts we consulted, we recommend a principled, "bright line" approach for incorporating the scientific/medical evidence into the threshold test of charge screening in HIV non-disclosure cases: Crown counsel should be guided by an expert scientific/medical opinion. Prosecutions should not go forward in circumstances where, in the absence of case-specific expert scientific/medical opinion to the contrary, there is scientific/medical consensus that there is not a significant risk of HIV transmission. Charges should not be prosecuted where:

- only oral sex took place, regardless of whether the HIV-positive person was giving or receiving oral sex;
- a condom was used for sexual intercourse (anal or vaginal);
- the HIV-positive person had an undetectable HIV viral load at the time of the alleged offence;
- a condom breaks during sexual intercourse and the HIV-positive person had an undetectable viral load; or
- a condom breaks and the HIV-positive person discloses his or her HIV-positive status upon discovering the broken condom.

Regarding the final bullet, maintaining the threat of criminal prosecution upon disclosure at that point would be a disincentive to disclosure. When a person does disclose in such circumstances, his or her sexual partner can seek medical advice and prophylactic medications that, if administered within 72 hours of exposure to HIV, are believed to be very effective at preventing HIV infection (aka HIV post-exposure prophylaxis).¹¹

Many of our recommendations for charge screening are informed by the experiences of the people living with HIV/AIDS and service providers who participated in our consultations. These participants questioned the presumption that someone who had received a positive HIV test result understood the implications of being HIV-positive, including the risk of sexual transmission of HIV. In Ontario, post-test HIV counseling is not standardized. The information people receive when they get an HIV-positive test result varies according to who is providing the counseling. Health care providers in private practice or clinics counsel some people, while public health nurses from local public health units provide counseling to others. People tested in other countries, for example as part of an immigration medical exam, may not have received any pre- or post-test counseling. Mental health issues, addictions, and a lack of English language skills may also affect people's knowledge and understanding of HIV/AIDS. Many consultation participants also pointed out that when a person receives an HIV-positive diagnosis they often go into a state of "shock," which makes it difficult to understand or retain any other information provided at the time of diagnosis.

People living with HIV/AIDS spoke about their fear of being criminally charged based on false accusations. Some people pointed to the fact that many of the cases that have proceeded to trial have involved conflicting testimony regarding whether disclosure took place, when it took place, what sexual acts were engaged in, and whether a condom was used. Women living with HIV/AIDS felt especially vulnerable to charges based on false complaints from abusive spouses and ex-spouses—many told of partners who attempted to control them with the threat of laying criminal charges. They urged us to

¹¹ See, for example, the discussion of broken condoms, post-exposure prophylaxis and the duty to disclose in *R v Mabior*, 2010 MBCA 93, at para 97: "I acknowledge that even with the most responsible and careful precautions taken, a condom may break. However, in such circumstances, surely the person with HIV must then disclose his HIV status to enable his non-HIV partner to take prophylactic measures. As noted in *R. v. J.A.T.*, at para. 25, a non-HIV partner can successfully be treated with drugs for one month so long as treatment starts within 72 hours. Obviously then, when a condom breaks, immediately disclosing one's HIV status to a non-HIV partner could reduce the risk of harm. Not disclosing would mean that the risk of harm is equal to that of unprotected sex."

recommend that Crown counsel examine the motivation behind, and credibility of, the criminal complaint.

We recommend a formal consultation, approval and reporting process involving the Crown Attorney (or Deputy Crown Attorney) as part of charge screening in HIV/STI non-disclosure prosecutions. We understand that this is exceptional in Ontario but believe that it is necessary, at least in the short-term, to promote transparency and consistent application of the policy and practice memo. Our recommendation is not without precedent: The legal guidance of the Crown Prosecution Service for England and Wales includes “internal procedures” to ensure consistency of approach in these highly sensitive STI transmission cases.¹²

2.5 Resolution Discussions

Recommended Text

This section should be read in conjunction with PM [2005] No. 16 “Resolution Discussions”.

Disclosure of Expert Medical Report: Crown counsel should obtain an expert medical report as part of charge screening (as per sections 2.3 and 2.4) and disclose it to defence counsel prior to entering into resolution discussions.

Unrepresented Accused: Given the central role played by complex scientific/medical evidence in the criminal law related to non-disclosure of HIV or another STI, and the seriousness of the consequences of a conviction, Crown counsel should only enter into negotiations with an unrepresented accused in strict adherence to the guidelines in relation to unrepresented accused set out in PM [2005] No. 16 “Resolution Discussions”. Where relevant, particular attention should be paid to ensuring that an accused understands the implications of sex offender registration under the national sex offender registry (SOIRA) and Ontario’s sex offender registry (Christopher’s Law).

Rationale

Our recommendations attempt to respond to concerns voiced by consultation participants. Participants expressed concern at the significant proportion of HIV non-disclosure prosecutions that have resulted in guilty pleas.¹³ Some speculated that

¹² Crown Prosecution Service for England and Wales (CPS), *Intentional Or Reckless Transmission of Sexual Infection*, sections 63 to 65.

¹³ According to unpublished data compiled by Jonathan Glenn Betteridge Legal & Policy Consulting, presented at the consultations, 34 of 59 prosecutions in Ontario HIV non-disclosure cases (1989 to the 28 February 2011) have resulted in a conviction. Of the 34 convictions, 20 have been entered as a result of a guilty plea.

people living with HIV/AIDS might have felt tremendous pressure to plead guilty to put an end to the media and public attention surrounding the case, which often resulted in public disclosure of a person's HIV-positive status. Some worried that people had pled guilty in circumstances where there may not have been evidence of a "significant risk of HIV transmission." This may have been as a result of poor legal representation, because the person was self-represented, or because Crown counsel did not obtain an expert opinion regarding the risk of transmission associated with the sexual act(s) in question. Finally, consultation participants worried that people who pled guilty did not fully appreciate that, as a result of pleading guilty to sexual assault or aggravated sexual assault, they would be required to register as a sex offender.

2.6 Sentencing

Recommended Text

No Transmission: Where there is no evidence of transmission of HIV or another STI, and no evidence of other exceptional circumstances, Crown counsel should consider starting at the low end of the range of sentences for the offence.

Health and Safety: Where the offender is a person living with HIV, Crown counsel should consider the person's health at the time of sentencing, and potential negative health and safety consequences of incarceration. Detention can result in interruptions of HIV anti-retroviral medication, which can negatively impact the health of a person living with HIV. Detention can also result in a lack of access to other aspects of appropriate medical care. Detention may also pose serious personal safety concerns for people living with HIV/AIDS. HIV/AIDS and sexual crimes are heavily stigmatized within the incarcerated population, which may result in threats, intimidation or violence directed at an accused.

Rationale

Our recommendation regarding the absence of transmission as an important factor is based on the fact that proportionality is the guiding principle in sentencing (*Criminal Code* section 718.1). It stands to reason that a conviction for an offence based on a potential harm (i.e., significant risk) should attract a lesser sentence than one where actual harm (i.e., transmission) has been proven.

Our recommendation regarding health and safety as an important factor in sentencing is supported by the rationale set out under section 2.2 (Bail), above.

2.7 Complainant Considerations

Recommended Text

Crown counsel should treat cases involving non-disclosure of HIV or other STIs as sensitive cases, and refer to PM [2005] No. 11 “Victims of Crime: Access to Information and Services / Communications and Assignment of Sensitive Cases”.

Complainant’s Privacy Interests: By their very nature, HIV/STI non-disclosure prosecutions involve intimate details about the sexual lives of the complainants. In prosecutions where there is an allegation of infection, a complainant’s sexual and medical history may form part of the evidence relied upon by Crown counsel or defence counsel. Therefore, Crown counsel should pay particular attention to the privacy interests of complainants. Crown counsel should refer to PM [2005] No. 12, “Victims of Crime: Privacy, Publication Bans and Exclusion of the Public from the Courtroom”.

Rationale

Consultation participants understood the important role played by complainants in the criminal justice system. The majority of our consultation participants were people living with HIV/AIDS or people who provide services to people living with HIV/AIDS. They appreciated first-hand the profound impact of being exposed to or infected with HIV, including the need for protection of personal privacy. Most participants had first-hand knowledge of the potentially devastating consequences that follow when a person is publicly identified as someone infected with HIV, given the pervasive social climate of HIV-related stigma and discrimination.

Section 3: Additional Recommendations for the Administration of Justice

3.1 Roster of Scientific Experts

We recommend that MAG establish a roster of properly qualified and trained scientific/medical experts. MAG should seek experts based on academic and clinical training, and clinical experience. The roster should include people who have expertise in the following fields:

- epidemiology of HIV including transmission;
- epidemiology of other STIs including transmission;
- diagnosis and treatment of HIV;
- diagnosis and treatment of other STIs;
- virology and phylogenetic analysis of HIV; and
- virology and phylogenetic analysis of other viral STIs.

In terms of clinical expertise in the diagnosis and treatment of HIV/AIDS, MAG should consider including both specialist infectious disease physicians and family physicians. There are numerous family physicians in Ontario who have treated for many years a significant caseload of people living with HIV. In recognition of this expertise in the treatment and care of people living with HIV, the Ontario Health Insurance Plan has created a special physician compensation program, the HIV Alternate Funding Program Group (HIV AFP). To be eligible for compensation under the HIV AFP, physicians must meet criteria established by OHIP. Physicians compensated under the HIV AFP should be considered experts in the diagnosis and treatment of HIV/AIDS.

MAG should ensure that roster experts are trained to properly fulfill their role, in keeping with recommendations arising out of the *Goudge Inquiry*. See, in particular, recommendations in relation to effective communication by experts and expert opinions within the criminal justice system (recommendations 84, 87, 88, 91, 92, 95, 96, 100).

3.2 Training for Crown Counsel

We recommend that MAG provide Crown counsel with training to support the implementation of the policy and practice memorandum on *Non-disclosure of HIV and other Sexually Transmitted Infections*. Crown counsel play a critical role in ensuring that prosecutions are conducted in a fair and just manner. Yet it is difficult for Crown counsel to fulfill this role in the case of HIV/STI non-disclosure prosecutions in the absence of training. Training about the complex science of HIV/AIDS and its transmission is especially needed, given the misinformation and resulting social stigma associated with HIV/AIDS and the potential for preconceptions and prejudice about HIV and people living with HIV to undermine fairness in criminal proceedings.

3.3 Collection of Case Information & Practice Implementation Review

We recommend that MAG systematically collect information about prosecutions involving the non-disclosure of HIV and other STIs, and review the implementation of the practice memorandum 12 months after it is published. Non-disclosure prosecutions are relatively new, involve complex and rapidly evolving science, and until now have been marked by inconsistency. Therefore, it is important for MAG to monitor and periodically review the implementation of the practice memorandum on *Non-disclosure of HIV and other Sexually Transmitted Infections*, and revise the policy and practice memorandum where necessary, to ensure a fair and consistent approach by Crown counsel.¹⁴

¹⁴ The Crown Prosecution Service for England and Wales (CPS) conducted a review of the policy and legal guidance to prosecutors on the sexual transmission of infection 12 months after the publication of the policy and guidance. See, *A Review of the CPS Policy and Guidance to Prosecutors on the Sexual Transmission of Infection - One Year On*, July 2009, available at www.cps.gov.uk.

Appendix A: In-person Consultations—Locations, Dates & Stakeholders

A total of 65 people participated in eight in-person consultations. We held full-day community consultations for people living with HIV/AIDS, service providers and advocates. We held half-day consultations with subject-matter and professional experts.

- Toronto, 28 March 2011, community consultation
- Toronto, 30 March 2011, public health
- Toronto, 31 March 2011, community consultation
- London, 4 April 2011, community consultation
- Ottawa, 7 April 2011, community consultation (also included were academics from public health and nursing)
- Toronto, 18 April 2011, criminal defence bar and criminologists
- Toronto, 20 April 2011, medical professionals and researchers
- Toronto, 21 April 2011, women's criminal justice and sexual assault service providers and researchers

Appendix B: List of In-Person Consultation Documents and Materials

Criminalization of HIV Non-Disclosure: Ontario Community Consultation and Response

CONSULTATION BOOK

- 📖 CLHE (2010) *Call for Prosecutorial Guidelines* [complete]
- 📖 CLHE (2010) *Questions & Answers about the Campaign for Ontario Guidelines for Criminal Prosecution of HIV Non-disclosure* [complete]
- 📖 Mykhalovskiy et al (2010) *HIV Non-Disclosure and the Criminal Law: Establishing Policy Options for Ontario* [excerpt]
- 📖 ACCHO (2010) *Criminals and Victims: The Impact of the Criminalization of HIV Non-Disclosure on African, Caribbean and Black Communities in Ontario* [excerpt]
- 📖 Canadian HIV/AIDS Legal Network, *AIDS Organization Welcomes Crown Decision to Stay Criminal Charges in Hamilton HIV Case*, 22 April 2010 [complete]

- 📖 *Aziga*, [2006] OJ No. 5232 [excerpt]
- 📖 *Cuerrier*, [1998] 2 SCR 371 [excerpt]
- 📖 *JAT*, 2010 BCSC 766 [complete]
- 📖 *Mabior*, 2010 MBCA 93 [excerpt]
- 📖 *Mekonnen*, 2009 ONCJ 643 [complete]

- 📖 British Columbia *Crown Policy Manual*, “Sexually Transmitted Diseases” (ARCS/ORCS file number 57140-01; effective 16 May 2007) [complete]
- 📖 England & Wales Crown Prosecution Services, *Intentional or Reckless Transmission of Infection*, 12 March 2008 [excerpt]
- 📖 Ontario *Crown Policy Manual*
 - *Policy - Preamble: Role of the Crown Attorney*
 - *Charge Screening* [complete]
 - Policy
 - PM [2002] No. 5
 - *Hate Crimes & Discrimination* [complete]
 - Policy
 - PM [2005] No. 18
 - *Various Section of the Crown Policy Manual relevant to Issues to be Considered* [excerpts]

Appendix C

On-line Consultation Survey

CLHE Survey - Guidelines to Restrict Criminalization of HIV Non-disclosure

What is this Survey About?

People living with HIV/AIDS have a criminal law duty to disclose their HIV status to sex partners before they have sex where the sex would lead to a significant risk of HIV transmission. A person with HIV/AIDS who does not disclose can be charged with and convicted of a crime—even if there is no HIV transmission. This is the law in Canada. Over 120 people have been charged. Close to 70 people have been convicted.

The Ontario Working Group on Criminal Law and HIV Exposure (CLHE) is very concerned about the current over-use of the criminal law in cases involving allegations of HIV non-disclosure. We are holding consultations across Ontario asking people about prosecutorial guidelines to restrict the use of criminal law.

We want your valuable input into recommendations we will be making to the Ontario Attorney General, who is responsible for making prosecutorial guidelines.

Survey Background

This survey will take about 20 minutes. You can skip any question you do not want to answer. There are three parts to this survey: (1) background information; (2) survey questions; and (3) information about you, if you choose to provide it.

Criminalization of HIV non-disclosure is an emotionally charged, legally complex, and technical subject. This survey presumes that you have some basic knowledge about HIV and the criminal law, and that you have thought about some of the issues involved in the criminalization of HIV non-disclosure. If you want background information about criminalization of HIV non-disclosure in Ontario, please go to www.ontarioaidsnetwork.on.ca/clhe.

Your Confidentiality

We want to know what you think. We don't need to know who you are. We will not collect your name or any other personal information. We will not track or save your computer's Internet address (often called an "IP address").

Question #1 - The Big Picture

The Attorney General begins each prosecutorial guideline with a Policy Statement. The Policy Statement deals with the "big picture". The Policy Statement includes guiding principles for Crown prosecutors. It explains why it is important to prosecute the crime. And it tells Crown prosecutors what to keep in mind when prosecuting the crime.

Please provide your opinion on the following "big picture" policy statements:

In Canada, the non-disclosure of HIV to sexual partners is a big social problem that causes significant harm to society.

Strongly Disagree Disagree Neutral Agree Strongly Agree

I chose this answer because:

CLHE Survey - Guidelines to Restrict Criminalization of HIV Non-disclosure

It is unfair and unjust to criminally prosecute a person living with HIV who did not disclose and put one person at a significant risk of HIV infection.

- Strongly Disagree Disagree Neutral Agree Strongly Agree

I chose this answer because:

It is unfair and unjust to criminally prosecute a person living with HIV who did not disclose over and over and put ten people at a significant risk of HIV infection.

- Strongly Disagree Disagree Neutral Agree Strongly Agree

I chose this answer because:

It is unfair and unjust to criminally prosecute a person living with HIV who did not disclose, had unprotected sex and the other person became infected with HIV as a result.

- Strongly Disagree
 Disagree
 Neutral
 Agree
 Strongly Agree

I chose this answer because:

CLHE Survey - Guidelines to Restrict Criminalization of HIV Non-disclosure

Making HIV non-disclosure a crime has encouraged people to disclose their HIV status to sexual partners.

- Strongly Disagree Disagree Neutral Agree Strongly Agree

I chose this answer because (optional):

The criminal law has prevented some new HIV infections by placing a legal duty on people living with HIV/AIDS to disclose their status where there is a significant risk of HIV transmission during sex.

- Strongly Disagree Disagree Neutral Agree Strongly Agree

I chose this answer because:

The best way to prevent the sexual transmission of HIV in Canada is for public health staff, police and Crown prosecutors to work together in every case where a person living with HIV is having unprotected sexual intercourse without disclosing his or her HIV status.

- Strongly Disagree Disagree Neutral Agree Strongly Agree

I chose this answer because:

A Crown prosecutor should use restraint and caution when prosecuting a person who allegedly did not disclose his or her HIV status to a sexual partner.

- Strongly Disagree Disagree Neutral Agree Strongly Agree

I chose this answer because:

CLHE Survey - Guidelines to Restrict Criminalization of HIV Non-disclosure

Scientific and medical evidence about HIV transmission risk is the most important thing that a Crown prosecutor should look at when deciding whether to drop, or to go ahead and prosecute, an HIV non-disclosure case.

- Strongly Disagree Disagree Neutral Agree Strongly Agree

I chose this answer because:

It is very important for Crown prosecutors and Courts to know that people infected with HIV today can expect to live in good health for many, many years -- thanks to advances in HIV treatments.

- Strongly Disagree Disagree Neutral Agree Strongly Agree

I chose this answer because:

Question #2 - Should prosecutorial guidelines be about HIV or all Sexually ...

CLHE Survey - Guidelines to Restrict Criminalization of HIV Non-disclosure

HIV is different from other sexually transmitted infections in many ways. The medical, social, legal and economic consequences of living with HIV are more serious and long lasting.

The criminal law about HIV non-disclosure can also be used against people who do not disclose other sexually transmitted infections, like herpes and hepatitis. However, only a handful cases have been brought against people with herpes, hepatitis C and hepatitis B. The overwhelming majority of criminal prosecutions (and media attention) has been against people living with HIV/AIDS.

Should we recommend prosecutorial guidelines:

- Only deal with HIV cases
- Focus on HIV cases, but also cover cases involving other sexually transmitted infections
- Focus on cases involving sexually transmitted infections, and cover HIV cases
- I don't know

Please let us know why you chose that answer.

Question #3 - Taking Into Account the Science of HIV/AIDS

CLHE Survey - Guidelines to Restrict Criminalization of HIV Non-disclosure

In Canada, it is criminal to expose someone to a SIGNIFICANT RISK of HIV transmission during sex. But many HIV non-disclosure cases have been decided without looking at the risk, let alone determining if the RISK of HIV transmission was SIGNIFICANT.

What information (in other words evidence) should Crown prosecutors and Courts be required to look at when deciding if there was a SIGNIFICANT RISK of HIV transmission during sex?

Question #4 - Taking into Account the Social Context of Living with HIV

In each case it is up to a Crown prosecutor to decide whether to drop the charges or go ahead and prosecute the case. For example, a Crown prosecutor can decide to drop a charge against person living with HIV because the victim can't remember whether a condom was used during sex.

Please complete the following sentence (feel free to give us more than one answer):

"Crown prosecutors should seriously consider dropping the charges against a person living with HIV where ... "

Question #5 - Should HIV Non-Disclosure Be treated as A Sexual Crime?

CLHE Survey - Guidelines to Restrict Criminalization of HIV Non-disclosure

The Canadian criminal law treats HIV non-disclosure in the same way as it treats forced sex.

People who force other people to have sex—for example, people who use threats or violence to get sex—can be charged with sexual assault, because there was no consent to sex.

Police, Crown prosecutors and Courts also treat HIV non-disclosure as a sexual assault. They take the view that there is no consent to sex when a person does not disclose his HIV status to his sex partner and there is a significant risk of HIV transmission, even where there are no threats or violence.

Does it make sense to charge people living with HIV/AIDS who do not disclose with a sexual assault?

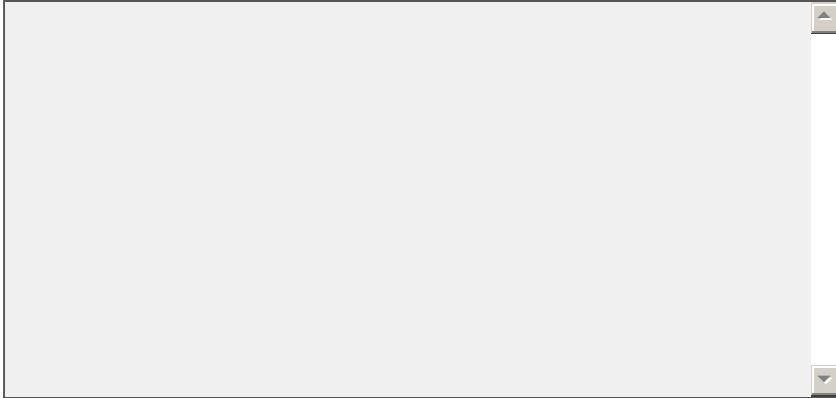
- Yes
- No
- Don't Know

Please let us know why you chose that answer.

Other Issues You Think Should be Included

CLHE Survey - Guidelines to Restrict Criminalization of HIV Non-disclosure

Are there other recommendations about prosecutorial guidelines that you want us to make to the Attorney General?



Information About You (OPTIONAL)

You do not have to fill out this section. We are asking for this information so that we have a general idea who participated in this on-line consultation—we do not need to know your identity. Any answers you provide are anonymous.

I am (please check all the boxes that apply):

- A man
- A woman
- Transgendered
- Lesbian, gay, bi-sexual or two-Spirited
- A person living with HIV/AIDS
- A person of colour
- An Aboriginal / First Nations person

CLHE Survey - Guidelines to Restrict Criminalization of HIV Non-disclosure

I work or volunteer in (please check all the boxes that apply):

- An AIDS service organization
- A community service agency (other than an AIDS service organization)
- A medical office or health clinic
- Public health unit or public health administration
- Another type of organization or agency (please provide details)