

# ACT Policy Brief

## Topic Title: The Criminalization of HIV Non-Disclosure

Published: January 2023

Criminal law is an ineffective and inappropriate tool with which to address HIV exposure. HIV and AIDS are a health issue first and foremost and should be addressed as such. All legal and policy responses to HIV and AIDS should be based on the best available evidence, the objectives of HIV prevention, care, treatment and support, and respect for human rights.

There is little, if any, evidence to suggest that criminal prosecutions for non-disclosure of HIV-positive status will offer any significant benefits in terms of HIV prevention. On the other hand, there is strong reason to believe that these criminal prosecutions have negative effects, including hindering HIV testing and access to services, spreading misinformation about HIV, increasing stigma and discrimination associated with HIV, and invasions of privacy.

In 1998, the Supreme Court of Canada ruled that people living with HIV have a legal obligation to disclose their status to sexual partners before any activity that poses “a significant risk of serious bodily harm”.<sup>1</sup> It deemed that not disclosing one’s status constitutes fraud that reverses the legal validity of consent and considers this sexual assault. It ruled that in future cases, it would need to be established that the complainant would not have consented to sex had they known their partner’s HIV status.<sup>2</sup>

In 2012, the Court further defined “significant risk” by establishing that there must be a “realistic possibility of transmission” in such cases.<sup>3</sup> In *R v Mabior*, the Court ruled that there is no obligation to disclose when a condom is used and the HIV-positive partner has a viral load of fewer than 1500 copies/mL of blood for at least six months.

Since 1989, many people have been unjustly charged and convicted of HIV non-disclosure. While there is no specific offence in the *Criminal Code* criminalizing HIV transmission for non-disclosure, the courts have established an obligation to disclose in various circumstances. Many of these convictions occurred despite the fact that HIV was not transmitted, and the sexual activity posed no risk of any harm.<sup>4</sup> The charges have included aggravated assault, sexual assault, and criminal negligence causing bodily harm.

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<sup>1</sup> [R v Cuerrier, \[1998\] 2 SCR 371.](#)

<sup>2</sup> [Canadian HIV Legal Network \(2022\). Prosecuting HIV-related Criminal Cases in Canada – A Model Policy.](#)

<sup>3</sup> [R v Mabior, \[2012\] SCC 47.](#)

<sup>4</sup> [Canadian HIV Legal Network \(2019\) The Criminalization of HIV non-disclosure in Canada: Current Status and Need for Change.](#)

Scientific developments in the last ten years have demonstrated that a person living with HIV who is on antiretroviral treatment and has an undetectable viral load **cannot** transmit HIV. In 2016, the message of Undetectable = Untransmittable (U=U) became popularized. In December 2018, the Attorney General of Canada released new prosecutorial guidance stating that courts are not to prosecute when the person living with HIV (PHA) has maintained a suppressed viral load (under 200 copies/mL of blood) because there is no realistic possibility of transmission. The Attorney General further recommended that non-disclosure no longer be prosecuted as sexual assault.<sup>5</sup> To date, this directive has been limited to the three territories.

As of 2020, 90% of people living with HIV in Canada were diagnosed, 87% of those diagnosed had started treatment, and 95% of those on treatment had achieved viral suppression.<sup>6</sup> In July 2022, as part of Canada's 2SLGBTQI+ Action Plan, the government committed to a public consultation regarding the issue.

HIV and AIDS are a health and human rights issue. Criminal charges do little or nothing to stem the spread of HIV and divert resources and attention away from the policies and initiatives that make a real difference (e.g., education, testing, support services, access to safer sex and harm reduction materials, and programs to address stigma, discrimination, poverty, and violence).

It is everyone's responsibility, whether they know their HIV status or not, to ensure that HIV and other sexually transmitted infections are not transmitted. Criminalization disproportionately places the responsibility for preventing HIV transmission on PHAs. It must be acknowledged as well that factors such as knowledge about HIV, homophobia, sexism, transphobia, racism, HIV stigma and discrimination, employment in sex work, abusive relationships, and other social determinants of health all impact an individual's ability to disclose.

Criminal charges for non-disclosure of HIV-positive status increase stigmatizing attitudes in the public by portraying all PHAs as "potential criminals" and foster prejudice and discrimination against PHAs. The registry of people living with HIV as sex offenders also carries significant and wide-ranging social and psychological harm.<sup>7</sup> Canada is the only country that approaches the criminalization of HIV non-disclosure in such a way.

Using the criminal law to address issues of HIV exposure may have disproportionate impacts on specific groups, namely: Black, Indigenous, and people of colour, newcomers to Canada, people who are incarcerated, and sex

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<sup>5</sup> [Department of Justice Canada \(2018\). Attorney General of Canada to issue Directive Regarding Prosecutions of HIV Non-Disclosure Cases.](#)

<sup>6</sup> [Public Health Agency of Canada \(2022\). Canada's progress towards global HIV targets, 2020.](#)

<sup>7</sup> [Canadian HIV Legal Network \(2021\). Harms of Sex Offender Registries in Canada Among People Living with HIV.](#)

workers. Black and Indigenous individuals are charged, prosecuted, and convicted at a higher rate, and are more likely to be incarcerated than White people who face similar charges.<sup>8</sup> People from marginalized communities may be subject to selective or more arbitrary investigations. Newcomers may face threat of deportation if they are convicted under this law. Obligations to disclose HIV status could result in violence against PHAs, especially sex workers and women in abusive relationships.

Some PHAs may be unable to disclose their HIV-positive status for reasons of mental health, significant cognitive or psychological impairment, or a reasonable apprehension of harm. Criminal prosecutions do not respond to this reality nor prevent further exposures in these circumstances.

In alignment with the Canadian Coalition of HIV Criminalization Reform (CCHCR)'s Consensus Statement<sup>9</sup>, we call for the following actions to be taken:

1. Remove non-disclosure, exposure, or transmission of HIV or other sexually transmitted bloodborne infections (STBBIs) from the reach of sexual assault laws, including the current mandatory designation as a sex offender. Prohibit prosecutions for sexual assault where HIV non-disclosure takes place in the context of sex among otherwise consenting adults. Such misuse of sexual assault charges not only harms people living with HIV or other STBBIs, but also undermines the law of sexual assault as a means of addressing sexual violence, which is already a concern given that the criminal legal system is too often ineffective in addressing cases of forced or coercive sex.
2. Enact reforms to ensure that any other provisions in the Criminal Code are not used to further stigmatize and discriminate against people living with HIV and STBBIs. Prosecution under any offence in the Criminal Code should be limited to cases of actual, intentional transmission. More specifically, criminal charges should never be laid when:
  - The sexual activity in question posed no significant possibility of transmission (oral sex; anal, vaginal, or frontal sex with a condom; anal or vaginal sex without a condom while having a low or suppressed viral load; and spitting or biting);
  - The individual did not understand how the infection is transmitted;
  - The individual disclosed their status or honestly believed their partner was aware through some other means and voluntarily engaged in sex;
  - Took precaution to prevent transmission (e.g. condom use, treatment as prevention/low or suppressed viral load while on treatment);

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<sup>8</sup> [Canadian HIV Legal Network \(2022\). \*HIV Criminalization in Canada; Key Trends and Patterns.\*](#)

<sup>9</sup> [Canadian Coalition to Reform HIV Criminalization \(2022\). \*Change the Code: Reforming Canada's Criminal Code to Limit HIV Criminalization, A Community Consensus Statement.\*](#)

- Did not disclose their status, or did not take precautions, because they feared violence or other serious negative consequences would result in doing so;
- Was forced or coerced into sex; or
- Did not intend to transmit the infection.

3. End the deportation of non-citizens following conviction. This policy and practice is racist in its effect. A criminal conviction based on HIV or STBBI nondisclosure must not affect immigration status.

4. Review past convictions. The law should create an opportunity for past convictions to be reviewed and for a conviction to be expunged if it does not fit within the new limitations on the scope of criminalization.