

Women & HIV

This is one in a series of four info sheets on the human rights of women living with or affected by HIV in Canada.

1. Women in Prison, HIV and Hepatitis C

2. Women and the Criminalization of HIV Non-Disclosure

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Women and the Criminalization of HIV Non-Disclosure

Canadian HIV/AIDS Legal Network | Réseau juridique canadien VIH/sida

Women, HIV and the criminal law

In Canada, people living with HIV have a legal duty, under the criminal law, to disclose their HIV status to sexual partners before having sex that poses a “realistic possibility of transmission,” as defined by the courts.¹ Regardless of whether HIV transmission occurs or not, people living with HIV can be charged with aggravated sexual assault, one of the most serious offenses in the *Criminal Code of Canada* even if they had no intent to cause any harm.

The legal obligation to disclose one’s HIV status was established by the Supreme Court of Canada (SCC) in *R. v. Cuerrier* in 1998.² In 2012, the law became harsher after the SCC released its decisions in *R. v. Mabior* and *R. v. D.C.*³ and established that people living with HIV were now at risk of prosecution *even if* they used condoms or had a low or undetectable viral load.

Criminalizing HIV non-disclosure has been widely criticized by the HIV community and women’s rights advocates, legal experts, clinicians and nurses as the wrong approach for addressing HIV exposure. HIV criminalization undermines public health efforts to combat HIV and contributes to HIV-related stigma and discrimination. The current use of the criminal law in Canada ignores the complexity of disclosure as well as tremendous advances in HIV treatment and prevention, and often results in great injustice for those being prosecuted.

Arguments for criminalizing HIV non-disclosure often position the law as a tool to protect women from HIV infection and enhance women’s dignity and autonomy with regard to sexual decision-making. In its 2012 decision, the SCC repeatedly asserted, without much explanation, that its approach was in line with the values of equality and sexual autonomy outlined in the *Canadian Charter of Rights and Freedoms*. This perception is reinforced by the fact that (a) most people charged to date are HIV-positive

men who had sex with women and (b) sexual assault law is applied in cases of alleged non-disclosure — a body of law traditionally meant to protect women from gender-based violence.

As of this writing, at least 18 women in Canada have been charged in relation to HIV non-disclosure, but the impact on women goes much further. A gendered analysis of the current use of the criminal law with respect to HIV non-disclosure reveals that criminalization is a blunt, punitive and inflexible approach to HIV prevention that does little to protect women from HIV infection, violence, coercion or sexual objectification. The current use of the criminal law has serious adverse impacts on women living with HIV, especially those who live in poverty, face stigma and discrimination, have insecure immigration status, or are in abusive or dependant relationships.⁴ Moreover, the use of sexual assault law in the context of HIV non-disclosure — where the sexual activity is consensual — is a poor fit and can ultimately have a detrimental impact on sexual assault law as a tool to advance gender equality and renounce gender-based violence.⁵

Facts and Figures

- People living with HIV can be prosecuted for not disclosing their HIV-positive status to a sexual partner before having sex that represents “**a realistic possibility of HIV transmission.**”
- **The courts decide what “realistic possibility of transmission” means.** In *R. v. Mabior*, the SCC stated that “as a general matter, a realistic possibility of transmission of HIV is negated if: (i) the accused’s viral load at the time of sexual relations was low and (ii) condom protection was used.” The Crown must also prove that the complainant would not have consented to sex if they had known about their partner’s HIV-positive status.

- Based on scientific evidence, the probability of HIV transmission during one act of penile-vaginal intercourse (without a condom or a low viral load) is about 0.08% or 8 in 10,000. Studies suggest that the **probability of HIV passing from a woman to a man** is about half that of it passing from a man to a woman (i.e. 0.04% or **4 in 10,000**).⁶
- Where a **condom** is used *or* where the HIV-positive individual is on **effective antiretroviral** therapy, vaginal or anal sex poses **negligible**⁷ to no possibility of transmitting HIV.
- In 2016, the PARTNER study found **zero HIV transmissions after HIV sero-discordant couples had condomless sex** over 58,000 individual times.⁸ The HIV-positive partner was on antiretroviral therapy and had a viral load below 200 copies/ml.
- When used correctly and no breakage occurs, **condoms are 100% effective** at stopping the transmission of HIV.⁹
- Oral sex performed by an HIV-positive individual on an HIV-negative individual poses no possibility of transmitting HIV. **Cunnilingus** performed on an HIV-positive woman has **never been definitely associated with transmission of HIV**.¹⁰
- **Being spat** on by an HIV-positive individual poses **no possibility** of transmitting HIV.¹¹
- **Being bitten** by an HIV-positive individual poses a **negligible possibility** of transmitting HIV when the biting breaks the other person's skin and the HIV-positive individual's saliva contains blood. Otherwise, being bitten by an HIV-positive individual poses no possibility of transmitting HIV.¹²
- **More than 180 people have been charged for HIV non-disclosure before sex in Canada (i.e., from 1989 to December 2016) including 18 women living with HIV, 6 of whom are Indigenous**.¹³ Indigenous women are over-represented among women charged for HIV non-disclosure.
- Women living with HIV have also been charged in relation to spitting and biting.
- With the exception of a handful of prosecutions related to other sexually transmitted infections (i.e., herpes, hepatitis B and hepatitis C), **prosecutions for non-disclosure have focused on HIV only**.

- Nearly all women charged for HIV non-disclosure in Canada have been charged with **aggravated sexual assault** which carries a **maximum penalty of life imprisonment and sexual offender registration**.
- Women living with HIV, including women who have been charged for non-disclosure, are at high risk of violence. In a recent study of women living with HIV in Canada, **80% of participants** reported having **experienced violence** in adulthood, **including 43%** who reported experiencing **sexual violence**.¹⁴

Protecting women?

Effective prevention requires full access to HIV testing, care, treatment and support. It involves encouraging testing and safer sex practices and making disclosure safe for people living with HIV. It includes empowering women to protect themselves and others by implementing programs that take into account the intersectionality of race, gender, experience of colonization, and other social determinants of health. It also requires addressing the pervasive violence against women that increases their risk to HIV and creates barriers to access to treatment, care and support and to HIV disclosure.

The criminalization of HIV non-disclosure does not respond to any of these objectives. While more research on the specific impact of the criminalization on women's access to care, treatment and support is needed, existing evidence suggests that the criminalization of HIV non-disclosure compromises access to HIV prevention and treatment by increasing HIV-related stigma, discouraging HIV testing for some individuals and spreading misinformation about HIV and its transmission. The current use of the criminal law also compromises engagement in care by reducing the willingness of people living with HIV to have open and candid discussions regarding HIV disclosure and their sexual lives due to a fear that discussions with clinical care providers, public health professionals or other support workers may be used as evidence against them in criminal proceedings.¹⁵

Moreover, the criminalization of HIV non-disclosure does nothing to advance sexual autonomy or protect women from gender-based violence. Many women are unable to make autonomous decisions about when to have sex, with whom, what type, and whether to use condoms. The reasons for this lack of autonomy are diverse and include being under the pressure of cultural norms, living in a situation of dependence or economic insecurity, lacking confidence and negotiation skills, as well as experiencing

violence and coercion. But the criminalization of HIV non-disclosure will not change any of these factors or make women any more autonomous. On the contrary, the threat of prosecution for alleged non-disclosure has been used as a tool of abuse by vindictive partners against women living with HIV. The threat of prosecution can also discourage some women living with HIV from leaving abusive relationships or reporting sexual assaults to the police for fear that their HIV status might be used against them,¹⁶ thus pushing women further away from autonomy, justice, dignity and safety.

Women living with HIV: from “victims” to “sexual offenders”

Because most of the prosecutions for HIV non-disclosure have been against men who had sex with women, women are usually seen as “victims” in HIV non-disclosure cases. But once infected with HIV, women become vulnerable to prosecution, being cast as “sexual offenders” if they do not disclose their status (or cannot prove they disclosed).

Most of the women convicted of HIV non-disclosure occupy marginalized positions that may have contributed to putting them at risk for HIV infection. Moreover, their social position in society may have made disclosure of their HIV status particularly challenging. Some are survivors of violence including sexual violence, some are living in socioeconomic insecurity, some were struggling with mental health issues, some have insecure immigration status or are members of racial or ethnic minority communities who continue to suffer from the effect of colonization, slavery and racism. Some have acquired HIV through forced or coerced sex. As a result of HIV criminalization, they have become the new faces of sexual offenders.¹⁷

The fact that the law has not caught up with the science also increases the risks of prosecutions for women who are marginalized. Some women may not be in a position to impose condom use on their male sexual partner.¹⁸ Others may not be able to achieve a low or undetectable viral load. Indeed, evidence suggests that women living with HIV in Canada experience specific barriers to treatment access and outcomes.¹⁹ By suggesting that the law requires both a condom and a low or undetectable viral load to preclude a legal duty to disclose under the criminal law, the decision of the Supreme Court of Canada in *R. v. Mabior* is not only at odds with medical evidence regarding the risk of HIV transmission, but also very problematic from a gender perspective.²⁰

A recent Canadian study conducted among sexually active men and women living with HIV who inject drugs confirmed these concerns. The study showed that nearly half (44%) of participants could face a legal obligation to disclose their HIV status because they either did not practice consistent condom use or did not have a low viral load. Notably, women were significantly more likely than men to face a legal duty to disclose based on a strict reading of the *R. v. Mabior* decision (55% of women v. 35% of men). However, and consistent with evidence showing a negligible risk of HIV transmission associated with condom use or a low viral load, if either of these HIV prevention strategies were considered sufficient to avoid criminal liability for non-disclosure, less than 2% of participants would face a legal obligation to disclose.²¹

HIV disclosure: a personal and complex undertaking

Disclosure of one’s HIV-positive status is generally an intensely personal and complex undertaking.²² Moreover, stigma and discrimination against people living with HIV remain very real in our society, making it difficult for people to reveal their status. Research on women and HIV highlights the difficulty that many women experience in disclosing to men, especially men on whom they are dependent.²³

Studies have suggested that the desire to be morally responsible towards their sexual partners and to protect their partners’ health often motivates women living with HIV to disclose their status. But fear that a partner may share the information with others and concerns around preserving the confidentiality of their HIV status prevent some women from disclosing.²⁴ These concerns around confidentiality are particularly real in tight-knit communities in which many immigrant women live in Canada and where the experience or fear of gossip is particularly prominent.²⁵ They are also particularly real for mothers who may be concerned about the repercussions of disclosure on their children. Mothers living with HIV already face increased surveillance by health and social service providers, friends, family and their community, which, in turn, may result in a need to isolate themselves to protect their privacy and reduce HIV-related stigma and discrimination.²⁶

HIV disclosure is not always a simple, one-step process; in fact, the decision to disclose and the timing for disclosure may differ depending on the context and the nature of the sexual relationship. Moreover many women in longer-term heterosexual relationships may face gender-specific

HIV Criminalization: Listening to women's stories

In 2005, D.C. was charged in Quebec for not disclosing her status to her ex-partner before the first time they had sex. The couple had a relationship for four years after she disclosed her status to him. The end of the relationship was marked by violence, and she turned to the police for protection. At this point, he complained to the police that she had not disclosed her HIV-positive status before their first sexual encounter.²⁷ He said that this first instance of sex had been unprotected, whereas she said they had used a condom. At trial, she was convicted of aggravated assault and sexual assault and sentenced to twelve months' house arrest. In contrast, for his assaults, her ex-partner received an absolute discharge. HIV was never transmitted. In 2010, D.C. was acquitted by the Court of Appeal on grounds that her viral load was undetectable at the time of the relevant sexual encounter. As a result, although the trial judge had found that no condom was used, sex did not represent a significant risk of HIV transmission triggering the duty to disclose. In 2012, the SCC upheld D.C.'s acquittal but solely on technical legal grounds regarding how the trial judge dealt with the evidence on condom use in the case. If it weren't for this technicality, she would have been convicted based on a strict application of the Mabior decision.²⁸

In 2009, a woman pleaded guilty to aggravated sexual assault after a single sexual encounter. She had asked for a condom to be used and then disclosed her HIV status when the condom broke. Despite the fact that she had practised safer sex, disclosed when the condom broke and that her partner was not infected with HIV, she was still sentenced to two years' house arrest, three years' probation and registered as a sex offender. She was described by the sentencing judge as "a lonely woman who feared rejection" because of her HIV status.²⁹ That may explain, at least in part, why she chose not to disclose her HIV-positive status. As a result of the prosecution, her picture and story were published in the media.

In 2011, a 17-year-old girl, living on the streets was charged for not disclosing her HIV status before having sex with two teenage boys. The community centre where she found shelter contacted the police.³⁰ Her name, picture and HIV-positive status were published and distributed by the media prior to a publication ban being issued.³¹

In 2013, a 50-year-old woman was sentenced to 10 months in jail for spitting on police officers. She had called police because a man who was drunk had refused to leave her apartment.³²

In 2013, a woman living with HIV was convicted to 39 months in jail in Ontario for not disclosing her status before one instance of casual sex without a condom.³³ Her viral load at the time was undetectable and the risk of transmission was therefore close to zero, if not zero. The woman was also charged for receiving oral sex while her viral load was undetectable. The Crown prosecutors refused to drop charges although their expert testified that "you have a better chance of having a piano fall on your head than you do contracting HIV through oral sex."³⁴ She was eventually acquitted on the oral sex charge.

In March 2016, a 29-year-old Indigenous woman was sentenced to two years in jail for the crime of aggravated sexual assault. More than four years ago, she had sex without a condom with a friend on three occasions. She did not disclose the fact that she was HIV positive. The woman, a survivor of sexual violence in both her family and her relationships with partners, is now registered as a sex offender.³⁵ At the time of this writing, she is appealing her conviction.

challenges related to HIV disclosure; e.g., a partner's expectations that safer sex practices will cease once a relationship becomes "serious," expectations related to childbearing, or assumptions about women's sexuality that may vary from one community to another.

Given the gendered power relations in many relationships, the prevalence of violence against women in our society, and ongoing HIV-related stigma, many women worry about the reaction of their partners if they reveal that they are living with HIV. Fear of violence, abandonment or rejection can lead some women to conceal their status or delay disclosure.³⁶ A study conducted among African and Caribbean communities in Toronto reported that some women living with HIV encounter problems with male partners after an HIV diagnosis: women "described verbal, psychological or physical abuse, which either followed or was aggravated by disclosure of their HIV status to their partners."³⁷ Recent evidence from British Columbia shows that women whose status has been disclosed without their consent are five times more likely to experience HIV-related violence.³⁸

By its nature, the criminal law is unable to respond to the challenges and complexities of HIV disclosure for women. Instead, it increases the vulnerability of women living with HIV to abuses by exposing them to the possibility of false allegations, investigations and even criminal trials. Service providers have reported that some HIV-positive clients in serodiscordant relationships (where one partner is HIV positive and the other is HIV negative) have been blackmailed and harassed by vindictive partners.³⁹ Studies also have reported high rates of sexual abstinence among women living with HIV, associated with HIV-related stigma.⁴⁰ Emerging evidence demonstrates that intentional sexual abstinence is partly driven by concerns about HIV criminalization and fear of HIV disclosure.⁴¹ By creating anxiety and fear and by reinforcing vulnerabilities, criminalization has an impact on women's well-being that goes far beyond actual prosecution.

The misuse of the law of sexual assault

The specific use of the law of aggravated sexual assault in cases of HIV non-disclosure is particularly problematic. The offence of aggravated sexual assault is usually reserved for the most violent rape that "wounds, maims, disfigures or endangers the life of the complainant,"⁴² but people living with HIV have been convicted of aggravated sexual assault even when transmission did not occur.⁴³ Most importantly, HIV non-disclosure cases are very different from sexual

assaults. In these cases, both partners consented to the sexual activity. (If they do not, then HIV non-disclosure is not the crux of the issue.)

Violence against women generally — and sexual assault in particular — remains a persistent and deplorable reality in Canada. Equating HIV non-disclosure with a violent crime like sexual assault trivializes the offence of sexual assault and diverts the law of sexual assault and associated resources from its original purposes. HIV non-disclosure may result from a lack of power as opposed to an exercise of power or objectification of the complainant, making the aggravated sexual assault charge and sexual offender label even more disproportionate and unjust. Equating HIV non-disclosure with assault also reinforces stigma associated with HIV and results in disproportionate penal consequences for HIV-positive women charged for HIV non-disclosure.

The way forward

Because of the numerous human rights and public health concerns associated with HIV-related prosecutions, the Joint United Nations Programme on HIV/ AIDS (UNAIDS) and the United Nations Development Programme (UNDP),⁴⁴ the UN Special Rapporteur on the right to health,⁴⁵ and the Global Commission on HIV and the Law,⁴⁶ among others, have **all urged governments to limit the use of the criminal law only to cases of intentional transmission of HIV** (i.e., the HIV-positive person knows their status, acts with the intention to transmit HIV, and does in fact transmit it). Moreover, UNAIDS recommends that no prosecutions should take place when people have used a condom or had a low viral load or practiced oral sex.⁴⁷

In November 2016, the UN Committee on the Elimination of Discrimination against Women denounced Canada's "concerning application of harsh criminal sanctions (aggravated sexual assault) to women for non-disclosing their HIV status to sexual partners, even when the transmission is not intentional, when there is no transmission or when the risk of transmission is minimal" and advised Canada to "limit the application of criminal law provisions to cases of intentional transmission of HIV/AIDS, as recommended by international public health standards."⁴⁸

In Canada, women's rights advocates and researchers also are increasingly expressing concerns about the current use of the criminal law against people living with HIV.⁴⁹ In spring 2014, the Canadian HIV/AIDS Legal Network convened leading feminist scholars, frontline workers, activists and legal experts for a ground-breaking dialogue on the (mis)use of sexual assault laws in cases of HIV non-disclosure. The conclusions of the dialogue demonstrated this approach both over-extends the criminal law against people living with HIV and threatens to damage hard-won legal definitions of consent aimed at protecting women's equality and sexual autonomy. Multiple research projects looking at the impact of HIV criminalization and increased surveillance of women living with HIV are also underway.⁵⁰

These efforts led to a historical recognition in December 2016 by the federal government of the problematic overly broad use of the criminal law against people living with HIV in Canada.⁵¹ Measures now need to be taken at both provincial and federal levels to put an end to unjust prosecutions.

Recommendations for policy and law reforms

The following recommendations are in line with best practice, and international, evidence-based recommendations:

- The use of the criminal law should be limited to extremely rare cases of **intentional transmission of HIV**.
- In **no circumstances** should the criminal law be used against people living with HIV who use a condom or have condomless sex with a low or undetectable viral load or who practice oral sex for not disclosing their status to sexual partner(s).
- The offence of **sexual assault should not apply** to HIV non-disclosure as it constitutes a stigmatizing misuse of this offence.

In consultation with the community, federal and provincial governments must take action to limit HIV criminalization and bring the law in line with international recommendations, science and human rights by

- exploring possible options for **legislative reform**
- developing sound **prosecutorial guidelines** at a provincial level

- exploring **alternatives** to criminal charges and prosecutions
- providing **support to potential complainants** in cases of HIV non-disclosure
- developing **training and resources** for police, Crown prosecutors and prison staff around HIV
- taking measures to combat **violence, harassment, stigma, discrimination and intimate partner violence** against women, including women living with HIV

For more information

Criminal Law and HIV Non-Disclosure in Canada, info sheets, Canadian HIV/AIDS Legal Network, 2011. Available at www.aidslaw.ca/site/criminal-law-and-hiv.

Indigenous Communities and HIV Disclosure to Sexual Partners: Questions and Answers, Canadian HIV/AIDS Legal Network, 2016. Available at www.aidslaw.ca/site/indigenous-communities-and-hiv-disclosure-to-sexual-partners-questions-and-answers.

HIV Disclosure to Sexual Partners: Questions and answers for newcomers, Canadian HIV/AIDS Legal Network, 2015. Available at www.aidslaw.ca/site/hiv-disclosure-to-sexual-partners-qa-for-newcomers.

Women living with HIV and intimate partner violence: Questions and Answers, Canadian HIV/AIDS Legal Network, 2016. Available at www.aidslaw.ca/site/women-living-with-hiv-and-intimate-partner-violence-questions-and-answers.

For more information on HIV non-disclosure and the law of sexual assault, see the resources and publications listed at www.consentfilm.org/resources-and-publications.

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- ⁹ M. Loutfy et al.
- ¹⁰ *Ibid.*
- ¹¹ *Ibid.*
- ¹² *Ibid.*
- ¹³ This number is based on tracking data from the Canadian HIV/AIDS Legal Network as of December 2016 and may underestimate the total number of criminal charges against people living with HIV for non-disclosure of HIV status.
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³⁵ C. Kazatchkine and L. Gervais, “Canada’s newest sex offenders.”

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³⁷ F. Gardezi et al.

³⁸ D. Barretto et al., “HIV Disclosure Without Consent Linked to Increased Risk of Violence Against Women Living with HIV in Metro Vancouver, British Columbia,” 7th International Workshop on HIV & Women, Seattle, February 11–12, 2017.

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⁴² Section 273 (1) of the *Criminal Code*.

⁴³ In *R. v. Mabior*, the SCC indicated that despite medical advances, HIV remains life endangering because it “remains an incurable chronic infection that, if untreated, can result in death.” See *R. v. Mabior*, 2012 SCC 47 at para. 92.

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⁴⁸ Committee on the Elimination of Discrimination against Women, *Concluding observations on the combined eighth and ninth periodic reports of Canada*, CEDAW/C/CAN/CO/8-9, November, 18, 2016.

⁴⁹ See, for example, Gender and Sexual Health Initiative, “Current Research, Gaps & Challenges” panel at the Women, HIV and the Law Research Roundtable, October 23, 2015, Vancouver, B.C. Panel presentations available for download at <http://gshi.cfenet.ubc.ca/women-hiv-and-law-project>.

⁵⁰ Canadian HIV/AIDS Legal Network, *What does consent really mean? Rethinking HIV non-disclosure and sexual assault law meeting report*, 2014.

⁵¹ Department of Justice Canada, “Minister Wilson-Raybould Issues Statement on World AIDS Day,” news release, Ottawa, December 1, 2016. Available at <http://news.gc.ca/web/article-en.do?nid=1163979>.

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