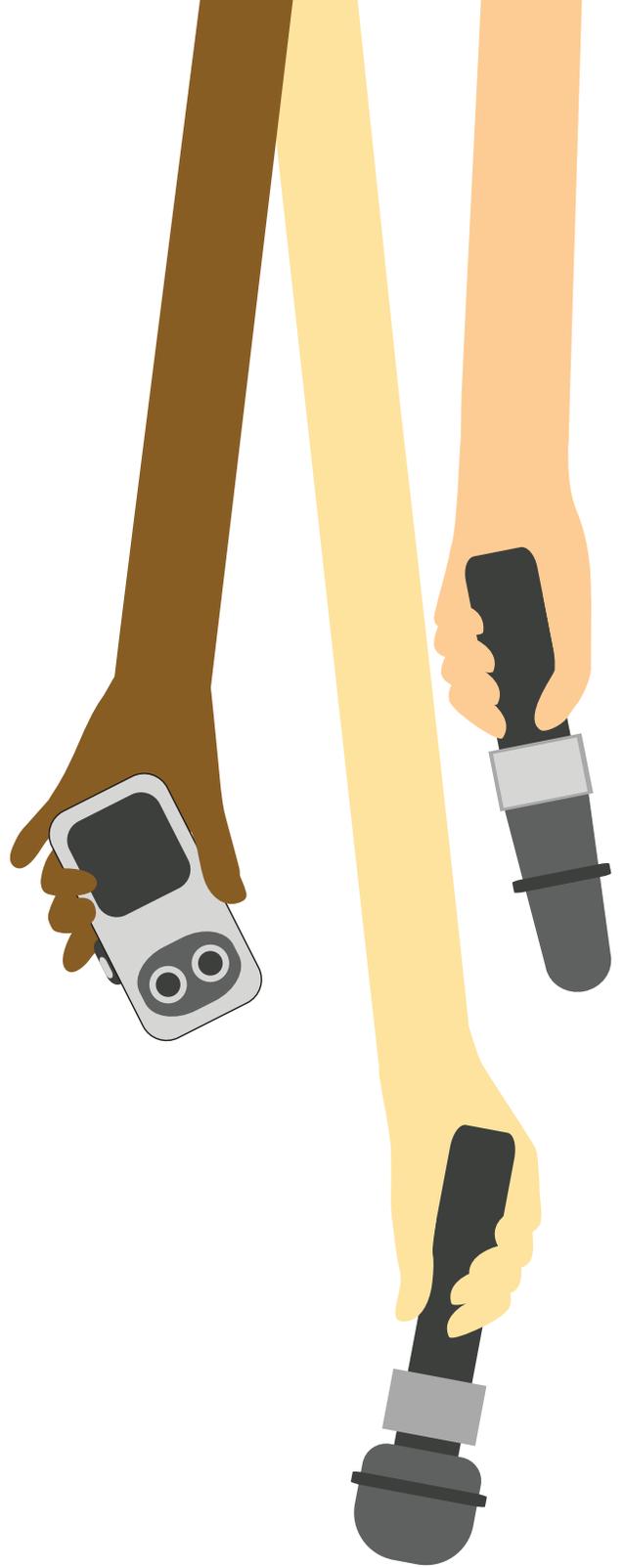


MEDIA REPORTING: HIV AND THE CRIMINAL LAW



HIV
LEGAL
NETWORK



RÉSEAU
JURIDIQUE
VIH

CANADIAN
COALITION
TO REFORM
HIV
CRIMINALIZATION
(CCRHC)

"I come from a small town, so everybody knows everything. The quiet girl is all of a sudden a big media star, everybody knows who I am ... my name in the news, my grad[uation] picture was up in the media. I felt very violated, I was told by my doctors and by the police that I'm innocent until proven guilty. It's my right to disclose; those rights were taken away."

- Lenore, Indigenous woman, late twenties

Excerpted from McClelland, A. (2019). *The Criminalization of HIV Non-Disclosure in Canada: Experiences of People Living with HIV.



INTRO

This guide is an evidence-based resource to assist journalists in Canada in reporting responsibly and accurately about alleged HIV non-disclosure and resulting criminal cases.

People living with HIV in Canada can be prosecuted for “aggravated sexual assault” (one of the most serious charges in the *Criminal Code*) if they don’t tell their sexual partners, in advance of intimate contact, that they have HIV. The criminalization of “HIV non-disclosure” is severe and rooted in stigma: people face charges even in cases where there is little or no risk of transmitting HIV. The maximum penalty is life imprisonment, and a conviction carries with it a mandatory designation as a sex offender. This approach has been criticized, both domestically and internationally, as being contrary to human rights and principles of public health, including by United Nations experts. Instead of reducing HIV transmission, HIV criminalization is now recognized by many experts as a driver of the epidemic.

There have been dramatic advances in treating and preventing HIV, which have resulted in a gradual change in public discourse and understanding. But there’s still a lot of misinformation. **Media can play a vital role by modernizing the discussions we’re having about HIV and by reporting about HIV non-disclosure in an evidence-based and responsible way that doesn’t perpetuate stigma.**



People living with HIV can live long and healthy lives; a person diagnosed today can expect to live a normal lifespan. With effective treatment, HIV is no longer sexually transmittable. Once a person’s viral load (meaning the amount of the virus that can be detected in their blood) is less than 200 copies/mL, it is deemed “suppressed.” Yet people living with HIV still face discrimination in many aspects of daily life due to misinformation and stigma. This includes their medical condition being criminalized, unlike other serious or chronic medical conditions.

THE CURRENT STATE OF THE LAW

- People living with HIV in Canada can face criminal prosecution for *aggravated sexual assault* if they don’t disclose their HIV-positive status before a sexual activity that the courts believe poses a “realistic possibility” of transmitting the virus, a vague characterization subject to discriminatory or stigmatizing interpretation.
- In 2012, the Supreme Court of Canada ruled that there is no “realistic possibility” of HIV transmission — and therefore no legal duty to disclose — when a condom is used and the HIV-positive partner has a low viral load.
- Science shows that someone with a “suppressed viral load” cannot transmit HIV sexually. However, there have still been some cases in which people with a suppressed viral load have been charged and convicted for non-disclosure. Fortunately, this has been changing recently, as courts and prosecutors learn more about the issue and recognize current scientific understanding of HIV transmission.
- Science has also established that a correctly used condom is 100% effective at blocking HIV. Despite this, some people have been criminally charged and convicted even if they used a condom. Courts have been conflicted about whether condom use alone is enough to remove the duty to disclose.
- People living with HIV can be criminally charged and imprisoned even if they had no intent to harm their partner and HIV was not transmitted. An act of consensual sexual intercourse where the only issue is HIV non-disclosure could see a person treated as legally equivalent to a violent rapist and designated as a sex offender for life.

AN IMPORTANT RECENT DEVELOPMENT

In 2018, the then Attorney General of Canada recognized the ongoing problem of the unjust criminalization of people living with HIV and officially directed federal lawyers to stop prosecuting people whose HIV is suppressed (i.e. they have a “suppressed viral load”). She also directed these lawyers to “generally” not prosecute people who used a condom, who took HIV treatment as prescribed, or who just had oral sex, because she concluded that “there is likely no realistic possibility of transmission” in those circumstances.

But the issue of HIV criminalization remains. This directive only applies to federal prosecutors who handle criminal cases in the three territories. And, contrary to international recommendations to limit HIV criminalization to cases of *intentional transmission*, people across the country living with HIV continue to face the threat of unjust prosecution, even in cases where there was no intent to transmit or proved transmission, and in some cases, even where there was little to no risk of transmission.

PARLIAMENTARY COMMITTEE STUDY

In June 2019, the House of Commons Standing Committee on Justice and Human Rights released a report called *The Criminalization of HIV Non-Disclosure in Canada*. It contains several important recommendations to limit the broad, unscientific, and unjust use of the criminal law against people living with HIV. One standout recommendation is to remove HIV non-disclosure from the reach of sexual assault law. Another is to limit criminal prosecutions to cases where *actual* transmission is alleged. This report is an important recognition that criminal law is currently too broad. HIV advocates have called on the government to act on these recommendations, including consulting HIV legal and community experts on changes to the *Criminal Code* that would limit prosecutions to cases of *intentional* transmission only.



People have been charged with aggravated assault for spitting and biting, even though there is effectively zero risk of transmission in such cases. This indicates how pervasive misinformation and stigma about HIV remains.



Canada ranks 5th

in the world for number of HIV non-disclosure prosecutions.

Approximately **200** people

have been prosecuted for alleged HIV non-disclosure in Canada.

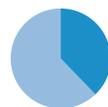


Recognition of scientific advances and strong advocacy efforts have both contributed to

a reduction of charges in recent years.

From 2004 to 2014, there were roughly 10-15 cases per year. There were at least 6-11 cases each year between 2015 and 2017, and at least 6 cases in 2018.

Qualitative and quantitative studies of Canadian news reports about HIV criminal non-disclosure cases since 1989 confirm that **news coverage disproportionately reports on cases involving racialized people** who face charges, and represents racialized people in ways that reinforce problematic connections between HIV, criminality, race, and foreignness. (See Resource #8.)



Indigenous women living with HIV in Canada,

who may be in vulnerable situations where it is not safe for them to disclose their status, **account for a large proportion of women charged (38%).**

Excerpted from McClelland, A. (2019). *The Criminalization of HIV Non-Disclosure in Canada: Experiences of People Living with HIV.*

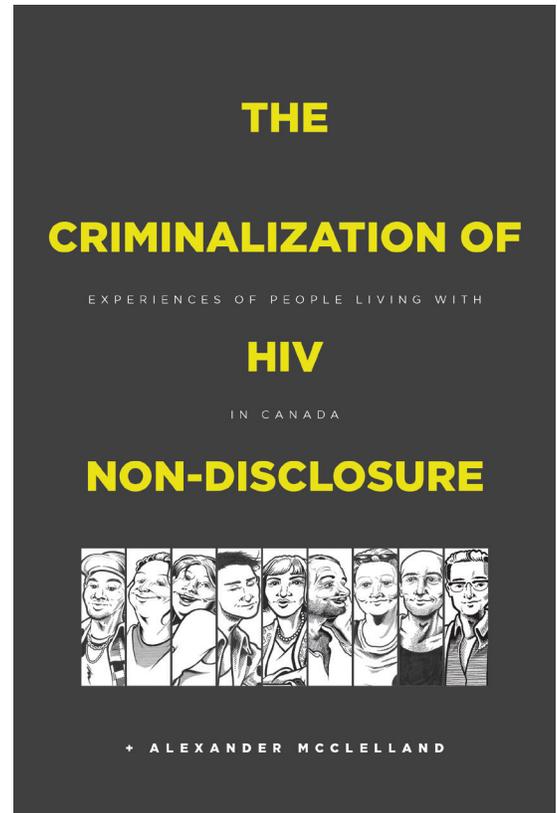
One Black man, Shaun, in his late twenties, whose charges were no longer being pursued by the Crown prosecutor, told me that while hearing in court his charges were being withdrawn and he was finally going to be free:

“I was, like, trying to hold back tears. There was, like, fucking journalists behind me and shit. But you know what’s fucking funny? I wasn’t even in the newspaper for being let off. They were there to see if I was going to be convicted. That’s why they were there. This attitude, I wasn’t in the newspaper for being acquitted. But, I guarantee if I was convicted, I would have been in the newspaper. So that’s messed up.”

Despite his charges being withdrawn, past negative media coverage continued to haunt him and meant he faced physical violence in his community.

“Some guys knew my status and they ganged up and robbed me. They were like we read about you... you’re spreading HIV that’s what the media said. I’m like, man [...] I’m undetectable, I am no risk, my case was [overturned], and they are like it doesn’t matter...”

Experiences of violence left him feeling constantly surveilled and unable to protect himself in his own community.



CONSIDERATIONS & TIPS FOR REPORTING

This issue of HIV criminalization has important nuances and consequences that can be difficult to understand if one is not part of the community of people living with or affected by HIV, or unfamiliar with the science about HIV and the evidence about the impact of criminalization. Here are some important things journalists can do when reporting on HIV non-disclosure:

- 1. Reach out to people living with HIV, including those who have been prosecuted, and/or HIV legal experts** (including at the HIV Legal Network) and HIV service organizations who can provide accurate, current information. HIV non-disclosure reporting has too often been categorized as “crime reporting,” dominated by information from police news releases and other documents, prosecutors, and judges. But HIV is — and should be treated as — a public health issue. These stories need to be informed not just by the perspectives of police and prosecutors, but also by people living with HIV, community-based HIV groups, other legal experts, and reputable scientific sources.
- 2. Refrain from reporting personal information** from a police press release, such as the accused’s name and photograph. Reporting such information is rarely necessary, and it irreversibly “outs” the person both as living with HIV and as accused of one of the most serious criminal offences. Charges are often based only on one person’s word about disclosure, and are too often brought in cases where the science shows no significant risk of transmission. The damage from such “outing” can never be undone. This can include harmful consequences for personal safety, relationships, child custody, employment, and housing prospects, given the pervasive stigma related to HIV as well as the seriousness of sexual assault charges. (Recall that these charges relate to cases of otherwise consensual sex.)
- 3. Always consider the context**, as HIV non-disclosure is a complex issue. It is often wrongly assumed that someone charged with HIV non-disclosure has done something to put their partner at risk of infection. For example, people may be charged even in cases where they used condoms (posing zero or negligible risk of transmission) or have a suppressed viral load (which means they cannot transmit HIV sexually). It’s often assumed that HIV is easy to transmit but in fact the transmission rate is statistically very, very small, even when condoms are not used or the virus is not fully suppressed. In 2018, 20 leading scientific experts from around the world published a groundbreaking statement laying out how unlikely HIV transmission is on a per-act basis, including during intercourse. (This international consensus statement followed a similar and equally trailblazing 2014 statement from nearly 80 Canadian scientific experts on HIV. Both statements were made to assist courts in interpreting the science in the context of criminal law and to help prevent further miscarriages of justice.) There are also numerous reasons someone may not be able to disclose their status, which are often not recognized. Someone who is in an abusive or otherwise imbalanced relationship may not have the power to disclose without fearing consequences. In such cases, it’s often safer for them to remain silent or to try to give indirect hints to a partner about practicing safer sex. When media don’t report crucial evidence, stigmatizing narratives often fill the gaps.
- 4. Be mindful of the language used** when reporting on HIV non-disclosure. Inaccurate or outdated terms can reinforce or perpetuate stigma and misinformation about HIV and its transmission. (See more in the “Language Considerations for Media Reporting” section below.)



LANGUAGE CONSIDERATIONS IN MEDIA REPORTING

Inflammatory language and harmful rhetoric around HIV is still common and have been shown to have long-lasting harmful effects on people living with HIV. Here are some words to avoid when reporting on HIV, particularly criminal cases involving allegations of HIV non-disclosure.

“Death sentence”

Reporting HIV as “a death sentence” is inaccurate. HIV treatment is highly effective. With proper access to treatment, people living with HIV can live long and healthy lives. A person newly diagnosed today has a lifespan essentially the same as someone without HIV.

“Deliberate” or “reckless” transmission

Media reports and headlines sometimes describe someone as being prosecuted for “deliberately spreading HIV” or for “recklessly” transmitting someone to HIV. “Deliberate” and “reckless” are legal standards and it’s the courts’ job to decide, based on the evidence, whether there was intent and whether specific behaviour was reckless. When reporting on a criminal case, it is best to avoid such terminology, unless in the context of legal arguments presented in court. Aside from this specific consideration, it has been assumed in some cases — even without evidence — that having a sexual encounter without disclosing HIV-positive status equates to “intent to infect” or is at least “reckless.” Our advice is to question such assumptions; they are often rooted in unexamined prejudice about HIV and are rarely warranted. There are many reasons a person may not have disclosed their status before an encounter, or may not have used condoms. These do not necessarily mean that they have disregarded their partner’s health or had any intention to harm them. Remember that disclosing is difficult, and that HIV is actually very difficult to transmit. In a criminal case where a complainant is HIV-positive, it’s also inadvisable to assume that the accused person is the source of the complainant’s infection simply because they had sex — or that if transmission did occur, it was done intentionally or the result of reckless behaviour. Cases of intentional transmission — meaning the person actually intended to transmit the virus — are extremely rare and it is harmful to view all cases through this lens.

“Exposure to HIV”

Having sex with a person living with HIV doesn’t automatically mean that there has been exposure to HIV. For example, if the person has a low or undetectable viral load, there is no possibility of transmission and therefore no exposure. Using a condom correctly also means no exposure. Sex can also mean a range of activities, some of which don’t involve exposure. Assuming that exposure is automatic perpetuates the mistaken belief that HIV is easy to transmit.

“Sexual predator”

This reinforces the image of people living with HIV as criminals and as threats, or as intentionally transmitting the virus. Even using the term “sex offender” can be problematic as it reinforces the same notion.

“Transmit/contract/catch AIDS” (or the “AIDS virus”)

AIDS is a medical syndrome, diagnosed by certain clinical signs and symptoms. It is not a transmittable disease. Human immunodeficiency virus (HIV) can progress to causing AIDS by harming a person’s immune system. HIV is what can be transmitted or acquired, and only in certain specific ways. Current treatment is also highly effective in preventing transmission, suppressing HIV, and preventing the progression to AIDS, making accurate reporting on this doubly important. Most people who have HIV or acquire it today in Canada will now never progress to an AIDS diagnosis.

“HIV-infected/HIV carrier”

This is outdated and stigmatizing terminology. Avoid using the term “infected” when referring to a person. Instead use phrases such as “diagnosed with HIV,” “HIV-positive,” or, much preferred, “person or people living with HIV.” Using person-first language recognizes someone’s personhood first, rather than defining them by their health condition.

We recognize that publications have their own style guides that regulate language used in their articles, but these should be considered carefully if they mandate inaccurate, outdated, or stigmatizing language. If you have any questions about how your news organization’s style guide represents issues related to HIV, please contact the HIV Legal Network. Our team would be happy to discuss how to report on HIV-related cases without contributing to HIV stigma.

FREQUENTLY ASKED QUESTIONS

Why is it bad to broadly criminalize HIV non-disclosure?

- 1. It does not prevent HIV transmission.** There is no evidence, in Canada or internationally, that HIV criminalization helps prevent new infections. Laying charges — especially for acts that do not pose a significant risk of transmitting HIV — does nothing to help HIV-related public health objectives. In fact, criminal prosecutions that ignore the science about transmission, and media reporting that publicizes these prosecutions, work against accurate HIV education. Together, they continue to exaggerate the likelihood of transmission and the notion that HIV is still a “death sentence.” (See above.) There is also evidence that fear of prosecution deters some people from getting tested, because the law only applies to those who are aware of their HIV-positive status. Finally, criminalization also undermines access to HIV care and treatment: medical records, and any information a person provides to a health care provider or social worker, can be used as evidence against them in court.
- 2. The law is unjust.** In Canada, we currently use sexual assault law to deal with cases of HIV non-disclosure before (otherwise) consensual sex. People are convicted of “aggravated sexual assault” even when there has been no transmission of HIV and no intent to harm. This is vastly disproportionate and means that people who engaged in consensual sex are treated in law like violent rapists. To make matters worse, the law is so broad that it is open to interpretation and is applied differently by prosecutors and courts across Canada. This leads to confusion and fear regarding the obligations of people living with HIV under the law.

- 3. It infringes on the human rights of people living with HIV,** who are often also members of other marginalized, stigmatized, or criminalized communities. Prosecutions and convictions are based on outdated and misunderstood science, exaggerated fears, and prejudice. Using the criminal law to deal with a health condition is ineffective and harmful. In fact, no other medical condition is criminalized in this way in Canada.

Are there any cases of HIV non-disclosure where the criminal law should be used?

This is a complex issue, but the current law treats a wide range of situations the same way. The HIV Legal Network, the Canadian Coalition to Reform HIV Criminalization (CCRHC), and more than 170 organizations across the country (see Resource #3 below) support long-standing international recommendations that criminal charges be brought only in the (extremely rare) cases of actual and intentional transmission of HIV.



RESOURCES & KEY CONTACTS

1. **HIV Legal Network** — A leading organization in the movement against HIV criminalization, in Canada and internationally, through research and analysis, litigation and other advocacy, public education, and community mobilization. Formerly known as the Canadian HIV/AIDS Legal Network. We offer an extensive online resource designed to answer questions about HIV criminalization, which is available at www.hivlegalnetwork.com/lawyers-kit.

info@aidslaw.ca • +1 416 595 1666
www.hivlegalnetwork.com
2. **Canadian Coalition to Reform HIV Criminalization (CCRHC)** — A national coalition of people living with HIV, community organizations, lawyers, researchers, and others, formed to reform discriminatory and unjust criminal and public health laws and practices that criminalize people living with HIV.

www.hivcriminalization.ca
3. **Community Consensus Statement** — A shared critique of why Canada’s approach to HIV criminalization is wrong, this statement was developed by the CCRHC and calls for specific actions that federal, provincial, and territorial governments should take to end unjust criminal prosecutions against people living with HIV. It was endorsed by more than 170 organizations from across the country.

www.hivcriminalization.ca/community-consensus-statement/
4. **Attorney General of Canada’s Directive** — “Directive to Director of the Public Prosecution Service” in December 2018 to limit HIV criminalization.

<http://gazette.gc.ca/rp-pr/p1/2018/2018-12-08/html/notice-avis-eng.html#nl4>
5. **Expert consensus statement on the science of HIV in the context of criminal law** — A peer-reviewed, detailed analysis of the best available scientific and medical research data on HIV transmission, treatment effectiveness, and forensic phylogenetic evidence, describing the possibility of HIV transmission associated with acts most often at issue in criminal cases. Authored by 20 of the world’s leading HIV scientists, endorsed by dozens more and by the three leading international HIV science organizations (including the International AIDS Society and UNAIDS). Published in July 2018 in the *Journal of the International AIDS Society*.

<https://onlinelibrary.wiley.com/doi/full/10.1002/jia2.25161>
6. **The Criminalization of HIV Non-Disclosure: Experiences of People Living with HIV in Canada** — Doctoral dissertation by Dr. Alexander McClelland examining the lives of people living with HIV who were criminally charged and prosecuted for not disclosing their HIV-positive status.

www.alexandermcclelland.ca/thesis
7. **HIV JUSTICE WORLDWIDE** — A global coalition that campaigns to abolish criminal and similar laws, policies, and practices that regulate, control, and punish people living with HIV based on their HIV-positive status. The coalition has developed a toolkit that aims to support advocates to oppose HIV criminalization at all levels — from educating communities and lawmakers to defending individual cases.

<http://toolkit.hivjusticeworldwide.org/>
8. **Important resources on HIV criminalization and the media** — Some selected academic resources on the research that has been done on this important topic.
 - African and Caribbean Council on HIV/AIDS in Ontario. 2010. *Criminals and Victims? The Impact of the Criminalization of HIV Non-Disclosure on African, Caribbean, and Black Communities in Ontario*. Toronto. www.hivlawandpolicy.org/resources/criminals-and-victims-impact-criminalization-hiv-non-disclosure-african-caribbean-and
 - African and Caribbean Council on HIV/AIDS in Ontario. 2013. *Our Voices: HIV, Race, and the Criminal Law*. Toronto.
 - E. Mykhalovskiy, C. Sanders, C. Hastings, and L. Bisailon. n.d. *“Explicitly Racialized and Extraordinarily Over-Represented: Black Immigrant Men in 25 Years of News Reports on HIV Non-Disclosure Criminal Cases in Canada.”* *Culture, Health, & Sexuality*. [Under review]
 - E. Mykhalovskiy, C. Hastings, C. Sanders, M. Hayman, and L. Bisailon. 2016. *“Callous, Cold and Deliberately Duplicious”: Racialization, Immigration and the Representation of HIV Criminalization in Canadian Mainstream Newspapers*. Toronto. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2874409
 - C. Hastings. (2020). Dissertation: *Writing for Digital News: The Social Organization of News Stories about HIV Criminalization in an Age of Convergence Journalism*. Doctor of Philosophy. York University. Toronto, Ontario. Canada.

Thank you for being invested in responsible reporting.

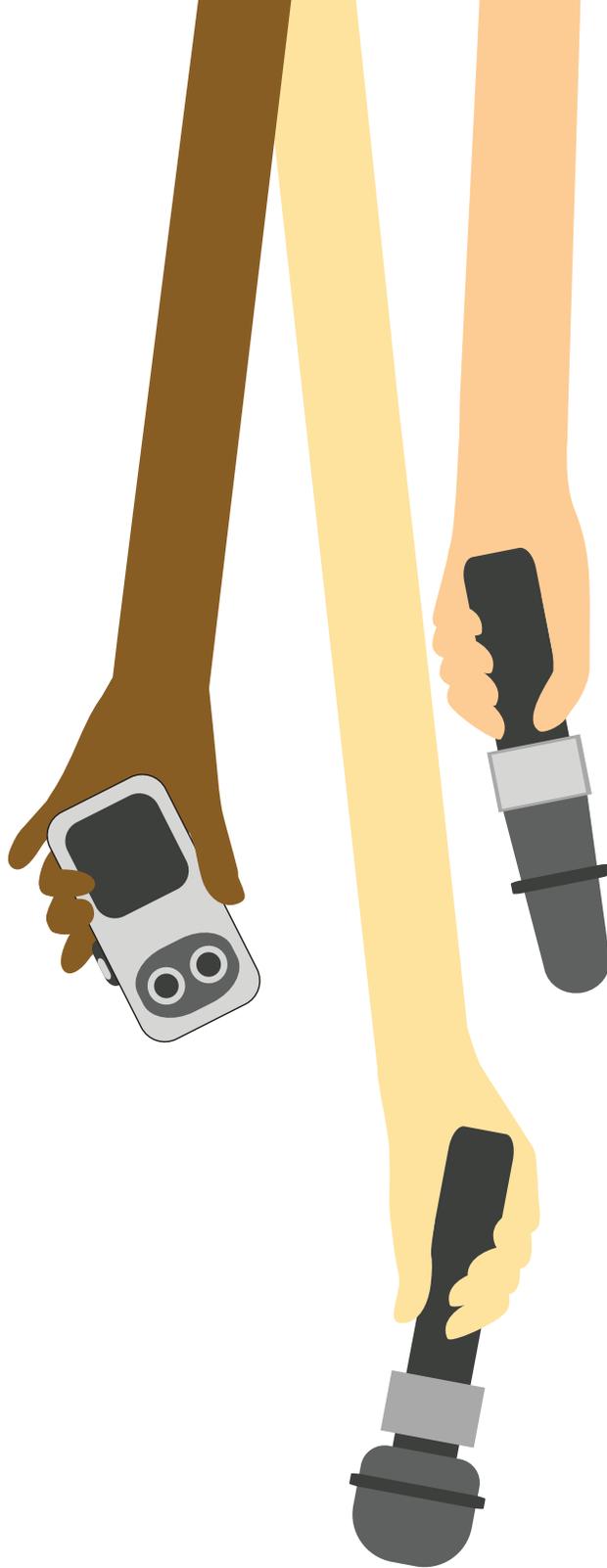
Your words make a big difference in the lives of people living with HIV.

This guide has been produced by the HIV Legal Network, in collaboration with the other members of the CCRHC, with funding from the Elton John AIDS Foundation. © 2020. We encourage the dissemination of the information contained in this guide and will grant permission to reproduce excerpts of the text for non-commercial purposes, provided that proper credit is given. We kindly request a copy of any publication in which material from this guide is used.

The Legal Network acknowledges that the land we on which we live and work is traditionally known as Turtle Island and home to the the Haudenosaunee, the Wendat, and the Anishinaabe, including the Mississaugas of the Credit First Nation. We are all Treaty People. As settlers and as human rights advocates working for health and justice, we are called to honour the Calls to Action of the Truth and Reconciliation Commission in our work. We must do our part to address the ongoing injustices and resulting health inequities faced by Indigenous Peoples, which contribute to the disproportionate impact of the HIV epidemic on Indigenous communities. We are actively committed to this effort, working in collaboration with our Indigenous colleagues and others.



For more information:
hivlegalnetwork.ca



**HIV
LEGAL
NETWORK**  **RÉSEAU
JURIDIQUE
VIH**

**CANADIAN
COALITION
TO REFORM
HIV
CRIMINALIZATION
(CCRHC)**