



HIV Criminalization

“The Committee strongly believes that the use of criminal law to deal with HIV non-disclosure must be circumscribed immediately and that HIV must be treated as a public health issue.” – HOUSE OF COMMONS STANDING COMMITTEE ON JUSTICE AND HUMAN RIGHTS, 2019

There is no HIV-specific criminal legislation in Canada. In 1998, the Supreme Court of Canada established a criminal law duty to disclose known HIV-positive status before sex in certain circumstances. It has subsequently ruled that someone living with HIV can be criminally charged for not disclosing before sex that poses a “realistic possibility of HIV transmission.” Courts decide what “a realistic possibility of HIV transmission” means — and many have interpreted this very broadly.

The law in Canada is severe. People accused of non-disclosure are usually charged with aggravated sexual assault (which carries a maximum penalty of life imprisonment and mandatory registration as sexual offender). People can be charged even if they had no intent to harm their partner and did not transmit HIV. People have been charged and imprisoned for sex that posed zero to negligible risk of transmission, including sex with an undetectable (or “suppressed”) viral load, oral sex, or sex with a condom.

As a result of tenacious efforts from community advocates including people living with HIV, scientists, lawyers, and academics, things are finally changing. In December 2018, Canada’s Attorney General instructed federal lawyers to stop prosecuting people who have a suppressed viral load (i.e. under 200 copies/ml). The directive also instructs that they should “generally” not prosecute someone who used a condom, who took HIV treatment as prescribed, or who just had oral sex, because “there is likely no realistic possibility of transmission.” But the directive only applies to the three territories and provincial Attorneys General are lagging behind.

In addition to sound prosecutorial policies, *Criminal Code* reforms are needed to end HIV criminalization, as the House of Commons Standing Committee on Justice and Human Rights noted in its June 2019 report. Ending stigma and discrimination against people living with HIV in Canada must include ending the injustice of criminalizing people on the basis of their status.

PRIORITIES FOR ACTION

To uphold the health and human rights of people living with HIV, we must:

- **Amend the *Criminal Code* to end the use of sexual assault laws and limit prosecutions to cases of actual, intentional transmission of HIV.** Draft amending legislation in consultation with the HIV and AIDS community.
- **Develop sound, Canada-wide prosecutorial policies** based on scientific evidence to preclude unjust HIV prosecutions and review previous unjust convictions, as recommended by the House of Commons Standing Committee (2019).
- **Provide judges, police, Crown prosecutors, and prison staff nationwide with resources and training** to address misinformation, fear, and stigma related to HIV. Also support efforts to engage media and challenge stigmatizing reporting.
- **Explore human rights–based alternatives to prosecutions.** Public health measures in particular should reflect the principle of the least intrusive, most effective response that complies with human rights standards.
- **Make anonymous testing for HIV and other sexually transmitted infections (STIs) easily accessible** and enhance access to different forms of testing, including self-testing, across the country.
- **Pass legislation that prohibits the use of information gathered for public health purposes from being used to criminally prosecute someone.**

FACTS AND FIGURES

- As described in the 2018 *Expert Consensus Statement on the Science of HIV in the Context of Criminal Law*, HIV cannot be transmitted through sex when a condom is used correctly. Similarly, there is no possibility of HIV transmission when a person has a suppressed viral load.
- Canada has one of the highest numbers of reported cases of HIV criminalization in the world. More than 200 people have been charged for alleged HIV non-disclosure since 1989.
- HIV criminalization disproportionately affects marginalized communities. Between 2012 and 2016, almost half of all people charged for whom race is known were Black men. Indigenous women in Canada account for a large proportion of women charged.
- The criminalization of HIV is at odds with public health objectives and has resulted in serious invasions of privacy (e.g. people's HIV status made public in the media). Fear of criminal accusation or prosecution can deter people from getting tested and knowing their status. Criminalization has meant that doctors, nurses, and other health professionals can be made to testify against their patients.
- The Attorney General of Canada recognized the “problem of overcriminalization of HIV” in 2016 and issued a directive to federal prosecutors in 2018 to limit prosecutions, but it only applies to the territories. Of the provinces, as of September 2020, only Ontario and British Columbia have published formal prosecutorial policies, which don't go far enough in limiting unwarranted prosecutions.

CASE STUDY

A movement to end HIV criminalization in Canada

The HIV Legal Network has long played a key role in advocacy efforts to end unjust HIV criminalization in Canada. Our strategy is multi-faceted. We provide support to defence lawyers and intervene in strategic cases before the courts, including the Supreme Court of Canada. We track and monitor legal developments and prosecutions in Canada. We mobilize community partners and allies including scientists and women's rights advocates. In particular, and with the support of HIV JUSTICE WORLDWIDE (a global movement against HIV criminalization we helped found), the HIV Legal Network has facilitated the creation of the first national coalition of people living with HIV, community organizations, lawyers, researchers, and others against criminalization.

The Canadian Coalition to Reform HIV Criminalization (CCRHC) was formed in 2016 and has become a major voice in Canada and a key stakeholder for both policy makers and the media.

In 2017, the coalition, with the support of the HIV Legal Network, released an unprecedented Community Consensus Statement calling for sound prosecutorial guidelines and federal *Criminal Code* reforms, which has been endorsed by more than 170 community organizations across the country. The 2018 federal directive and the 2019 recommendations from the House of Commons Justice Committee have been significantly influenced by our years of collective, strategic, and persistent advocacy.

KEY RESOURCES

Attorney General of Canada, “Directive to Director of the Public Prosecution Service,” *Canada Gazette*, Part I, Vol. 152, December 8, 2018. Available at <http://gazette.gc.ca/rp-pr/p1/2018/2018-12-08/html/notice-avis-eng.html#n14>.

F. Barré-Sinoussi et al., “Expert consensus statement on the science of HIV in the context of criminal law,” *Journal of the International AIDS Society*, 2018, 21:e25161, July 2018.

Canadian Coalition to Reform HIV Criminalization, *End Unjust HIV criminalization: Community Consensus Statement*, November 2017 (updated in March 2019).

Canadian HIV/AIDS Legal Network, *The Criminalization of HIV Non-Disclosure in Canada: Current Status and the Need for Change*, June 2019.

C. Hastings, C. Kazatchkine, and E. Mykhalovskiy, *HIV criminalization in Canada: key trends and patterns*, March 2017.

House of Commons, *The criminalization of HIV non-disclosure in Canada*, Report of the Standing Committee on Justice and Human Rights, June 2019.

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