

**HIV CRIMINALIZATION,
WOMEN, AND GENDER-DIVERSE PEOPLE:**

**AT THE
MARGINS**



© March 2021

Production of this brief has been made possible through a financial contribution from the Public Health Agency of Canada and benefited from a consultation convened by the HIV Legal Network with financial support from Women and Gender Equality (WAGE). The views expressed herein do not necessarily represent the views of the Public Health Agency of Canada or WAGE.

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HIV criminalization in Canada

In Canada, people can be criminally charged, prosecuted, and convicted if they do not disclose their HIV-positive status to a sexual partner before engaging in sexual activity in some circumstances. Different offences have been used over the years, but the charge most commonly laid is *aggravated sexual assault*. According to decisions by the Supreme Court of Canada, if the sexual activity in question poses a “realistic possibility” of transmitting HIV, a duty to disclose (known) HIV-positive status arises, and not disclosing in such circumstances may amount to “fraud” that makes a sexual partner’s consent to sex legally invalid.¹

It is only if there is a “realistic possibility” of transmission that the legal duty to disclose arises. The Supreme Court of Canada has ruled that, in the case of vaginal or anal sex, there is no realistic possibility if a condom is used and the partner living with HIV has a low viral load (defined as less than 1500 copies per ml of blood); this means there is no legal duty to disclose in such circumstances.²

Since those Supreme Court decisions, other, lower courts have accepted the scientific evidence and established that, even in the absence of a condom, a person who has a suppressed viral load cannot transmit HIV sexually (i.e. “undetectable = untransmittable” or “U=U”), and this is now also reflected explicitly in the policy of prosecution services in some jurisdictions in Canada. In other situations (e.g. just using a condom), someone living with HIV may be vulnerable to criminal prosecution — despite condoms having been proven to be 100% effective at stopping HIV transmission when used correctly and the possibility of HIV transmission through sex with a condom ranging from negligible to none.³ Courts in different provinces have reached different conclusions on whether condom use alone is enough to prevent someone from being prosecuted for HIV non-disclosure.

Canada is among the worst countries in the world for prosecuting people living with HIV; by the end of 2020, there were at least 224 known prosecutions for alleged non-disclosure in this country.⁴ The majority of these cases involve men who had sex with women, but **a large proportion of the cases where a woman was charged involve Indigenous women and women who had long histories of sexual abuse by men.** In a few cases, women have faced charges of HIV non-disclosure in the context of themselves being sexually assaulted. As a result of being criminalized, women living with HIV have suffered severe mental health outcomes.⁵

Thankfully, over time the science regarding the transmission of HIV has evolved. But the law itself has not kept pace.

In 2018, Canada’s Attorney General instructed federal Crown attorneys, who handle prosecutions in the three territories, to stop prosecuting people with a suppressed viral load, and “generally” not prosecute someone who has *not* maintained a suppressed viral load but who used a condom, took HIV treatment, or just had oral sex,⁶ because the requirement of a “realistic possibility” of HIV transmission is “likely” not met in these circumstances. This directive applies to the three territories only; each province has their own provincial Attorney General and Crown attorneys who are responsible for prosecuting *Criminal Code* offences. Some other provinces have adopted policies that do not limit HIV criminalization as much.

Ending prosecution for HIV non-disclosure in cases where someone has a suppressed viral load is based on good science, and is proper and just public policy. However, a 2018 study of cis and trans women living with HIV highlights that even with such a limit on prosecutions, 48% of women living with HIV would continue to be at risk for criminal prosecution. Those at highest risk are the most marginalized women living with HIV, including women who are unstably housed, sex workers, and women who have been recently incarcerated.⁷ As the House of Commons Standing Committee on Justice and Human Rights recognized in its 2019 study of HIV criminalization, the current law on HIV non-disclosure “fails to address how both cis and trans women may not be able to safely negotiate condom use with their sexual partners” and can also “make women more vulnerable to intimate partner violence.” Among the Committee’s recommendations was urgent *Criminal Code* reform, including ending the use of sexual assault charges as the tool for prosecuting alleged HIV non-disclosure.⁸

Suppressed viral load means that a person living with HIV has fewer than 200 copies of the virus per ml of blood. When viral load is suppressed, HIV cannot be transmitted.

Criminalization: Impacts for women living with HIV

Women, ART, and the Criminalization of HIV (WATCH HIV)⁹

The WATCH study is a three-year community-based arts study — a collaboration of cis and trans women living with HIV, academic researchers, and members of community health and social service organizations — to examine how the criminalization of HIV non-disclosure is experienced by women living with HIV across Canada, and how criminalization affects women's social and sexual relationships, and their interactions with legal, health, and social service providers.

Among the WATCH study's findings are how HIV criminalization is experienced by women living with HIV a form of “judicial violence.” As one WATCH participant noted, “When you include the Indigenous community and the numbers and statistics there, like we're already like 10 times the rate of being gone missing, murdered and, you know, facing violence every day. So, when you throw in...you know, HIV, you know, like it just becomes sometimes not even safe. A lot of people stay in very vulnerable situations because of this law.” Another participant shared “It feels like this law, unless you have a fairy tale relationship, sets you up for rejection and/or violence...It makes you very vulnerable.” This in turn reproduces the conditions through which gender-based violence occurs.

While we have seen cases decline in Canada over the past number of years, in part because of greater acceptance of the science regarding HIV treatment successfully reducing possibility of transmission and in part because of advocacy by communities, people are still being threatened and charged with alleged HIV non-disclosure. **The threat of being criminalized is menacing for women**, many of whom may also face the additional threat of numerous other criminal laws. For example, in a study of women living with HIV, 76% of participants had been in jail or prison at some point in their lives, and 17% had been in jail or prison within the past six months.¹⁰ HIV criminalization has also had particularly pronounced impacts on the most marginalized women living with HIV. In a study of Indigenous women living with HIV, participants highlighted how the criminalization of HIV non-disclosure formed an additional layer of trauma and fear, exacerbating existing traumas that a high proportion of Indigenous women have experienced as the legacies of colonialism.¹¹

Despite what may be intended, the current legal approach to criminalizing HIV non-disclosure — that is, under the law of sexual assault — has not promoted sexual autonomy. While criminalizing HIV non-disclosure is sometimes presented as a tool to protect women from HIV infection and enhance women's dignity and autonomy with regard to sexual decision-making, research has shown how this approach has pushed women living with HIV to stay in abusive relationships and deterred them from reporting violence for fear of themselves being charged.¹² At the same time, women living with HIV may have difficulty negotiating condom use by their male partners. This puts a disproportionate legal burden on women living with HIV to disclose their HIV status. **When a male partner refuses to use a condom, women living with HIV either risk violence and rejection if they disclose, or they break the law and risk criminal prosecution.**¹³

Women living with HIV often experience significant isolation, marginalization and stigma, enabling scenarios wherein gender-based violence can persist. They may have disproportionately little power in their intimate relationships, and disclosure can be extremely difficult in myriad ways. Some women living with HIV avoid intimate relationships altogether so they need not disclose their HIV status to a new partner.¹⁴

Why Disclosure is Difficult

In intimate relationships, sexual consent is critical. But what does this mean when one partner is living with HIV and the other isn't?

In relationships with a power imbalance, this disclosure can be extremely difficult. A person can be charged for not disclosing their HIV-positive status even if they have reason to fear for their safety if they disclose. This can apply in abusive relationships, in relationships where one partner is financially dependent on the other, or in relationships where there may be something else at stake (e.g. children in the home, immigration status, possible loss of confidentiality in the community). For these and many other reasons, the partner living with HIV may feel they have no option but to keep their condition private. **In serodiscordant couples — i.e. where only one partner is living with HIV — the risk of the person living with HIV being charged with *aggravated sexual assault* if they don't disclose is very real.**

In order to avoid any chance of being charged, a person living with HIV must disclose their status before any sexual activity that police, prosecutors, or a court might consider poses a “realistic possibility” of HIV transmission. But HIV disclosure can also shift the power dynamics in a relationship by aggravating partner abuse and manipulation. **Even after disclosing, many women fear legal consequences because their partners may threaten or actually press charges for HIV non-disclosure as a form of control and intimidation — in other words, they “weaponize” the law against their partner.**¹⁵

Criminalization and Access to Services

One important way HIV criminalization intersects with gender-based violence is when women or gender-diverse people experience violence and need access to services.

Because HIV non-disclosure is prosecuted under the law of sexual assault, any person who is convicted automatically receives a mandatory lifelong designation as a sex offender. This, in turn, impedes their ability to access services: women convicted of HIV non-disclosure and designated as sex offenders have reported this label was intimidating and threatening to people in their local HIV organizations,¹⁶ and shelters providing services to women experiencing violence have been reported to deny services to women with this designation.

Sometimes service providers responding to violence against women (VAW) do not reflect the communities that they support, which can pose additional barriers for racialized, Indigenous, and gender-diverse people living with HIV who experience violence. **HIV stigma is extremely powerful and acts as a barrier to services. This can be compounded if there is a lack of culturally competent care and services**, if people fear or experience misunderstanding, stigma, or even outright discrimination from a system that is not staffed by people who share their lived experiences and may not be adequately set up to help them. Many VAW shelters continue to require that their residents abstain from drug use, which means that women living with HIV who also use drugs have fewer options for safe shelter.¹⁷ As a result, women and gender-diverse people living with HIV who have experienced gender-based and other violence are all too often unable to get the support they need and are more likely to stay in violent or otherwise dangerous intimate relationships.

CASE STUDY: D.C. and the Weaponization of HIV Criminalization¹⁸

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 relationship became physically abusive, and the end of the relationship was marked by violence against D.C. and her young son. She turned to the police for protection, and her ex-partner was prosecuted for the physical assault — after which he complained to police that she had not disclosed her HIV-positive status before their very first sexual encounter. He said it had been “unprotected” (meaning without a condom); she said they had used a condom. Her viral load was undetectable at the time, so there was no possibility of transmission. The trial judge explicitly noted that the accusation by D.C.’s ex-partner was motivated by his desire for revenge. HIV criminalization allowed him to weaponize the law of sexual assault against the woman he himself was convicted of assaulting. At trial, D.C. was convicted of aggravated assault and sexual assault and sentenced to 12 months’ house arrest and designated for life as a sex offender. She was ultimately acquitted in 2012 by the Supreme Court of Canada, but solely on a technicality;¹⁹ had it not been for the trial judge’s error in his handling of the evidence, D.C. would have been convicted and designated a sex offender for life.

HIV Criminalization: Recommended Legal and Policy Changes²⁰

The current legal and policy context of HIV criminalization has not promoted women’s dignity or sexual autonomy, nor does it align with public health objectives, as it can drive people away from HIV testing, treatment, and support. Policy and lawmakers must be alive to how social and structural vulnerabilities and criminalization are closely linked, and take steps to stop the overcriminalization of women and gender-diverse people living with HIV:

- **The federal government must reform the *Criminal Code* to limit the use of the criminal law against people living with HIV. At a minimum, HIV non-disclosure should not be prosecuted as sexual assault, and there should be no prosecutions except in cases of actual, intentional transmission.** Law reform should be done in collaboration with women living with HIV and legal experts who can apply an intersectional, gendered lens to discussions.

- **Prosecutorial guidelines that are adopted must be in step with current science** and clearly communicated to prosecutors, police, and the public to avoid any unnecessary charges and resulting trauma.
- **Investment must be made in supports that reduce the vulnerability of women and gender-diverse people living with HIV to gender-based violence**, including universal access to basic income, housing in a multitude of supportive options, VAW shelters, paid sick leave, childcare, legal services, harm reduction services, and support services that are culturally safe for Indigenous, Black, and other racialized women.

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