HIV LEGAL NETWORK
RÉSEAU JURIDIQUE VIH

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Halt the Harm

Ending and Avoiding Criminalization of HIV, COVID-19, and Other Public Health Challenges in Canada

Key points

- There is ample evidence of the many harms done by turning to the criminal law and other punitive measures to deal with public health issues. Support, rather than punishment, makes for more effective public health policy.
- The legal response to COVID-19 by federal, provincial, and municipal governments has included unnecessarily punitive measures, raising some serious human rights concerns. Such an approach was mainly used to enforce broad public health measures. However, resorting to the *criminal* law to punish exposure or transmission of SARS-CoV-2 was largely avoided, showing that this tool is not needed as part of the response to the public health challenge of communicable diseases.
- Canadian law criminalizing HIV non-disclosure is unjustifiably broad, and the burden of HIV criminalization has fallen disproportionately on Black, Indigenous, and gay communities, while compounding gender inequality for women living with HIV. It is undermining public health and human rights. *Criminal Code* reforms are needed to end the harmful misuse of the criminal law in relation to HIV and other sexually transmitted infections.
- Parliament should end the use of sexual assault laws to deal with allegations of HIV non-disclosure. Other legislative reforms are also needed to limit any criminal prosecution to, at most, cases of actual, intentional transmission.
- In changing the law, Parliament should avoid creating a new offence. It should also avoid expanding the criminal law to encompass other communicable diseases. Such changes are not necessary to properly limit the criminalization of HIV or other sexually transmitted infections and would do harm.

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Introduction

Canada has long been among the global "hotspots" for prosecuting people accused of HIV non-disclosure, exposure, or transmission of HIV. As of the end of 2020, there have been at least 224 confirmed prosecutions. Most cases have not involved any allegation that HIV was transmitted or that the accused person had any intent to transmit it.[1] Bound up with judgments about "immoral" sexual behaviour, the criminalization of HIV non-disclosure is yet another example in Canada's long history of unhelpful and ineffective measures of punishment and enforcement in response to communicable diseases, targeting poor and racialized communities.[2] The broad use of the criminal law in relation to HIV has been repeatedly recognized as a concern for many reasons, not only by civil society organizations,[3] but also increasingly by policymakers in Canada. There is growing momentum for change, including through necessary reforms to the federal *Criminal Code*.

This brief was developed out of concern that, in the process of legislatively limiting HIV criminalization, lawmakers could end up expanding the criminal law to other communicable diseases. These discussions now take place against the backdrop of heightened concern about infectious diseases, in particular because of the ongoing COVID pandemic. This context could lead some policymakers to suggest expansion of the criminal law in some respects, albeit for a range of reasons. Such an approach would be ill-advised.

This briefing paper is intended to be use of to both lawmakers and advocates in ensuring careful, focused legislative reforms to address HIV criminalization. To that end, it:

- summarizes the current use of the criminal law in Canada in relation to HIV, the harms this causes to human rights and public health, and efforts to limit such criminalization, including through changes to the *Criminal Code*;
- discusses key punitive aspects of the legal responses to COVID and some concerns they raise, and draws some lessons from this recent experience; and
- outlines why and how legislators should act to legislatively limit the current unscientific and discriminatory criminalization of HIV (and certain other STIs) in Canada, without expanding the law to criminalize other infectious diseases.

HIV criminalization in Canada

The current legal framework

Tens of thousands of people living with HIV in Canada are affected by stigma, discrimination, and criminalization, as are their families and friends; they are active community members, advocates, and voters. More than 63,000 people in Canada are living with HIV.[4] Certain communities have been hardest hit by the HIV epidemic, in particular gay, bisexual, and other men who have sex with men; people who inject drugs; and Indigenous and Black communities.[5] Indigenous women, Black women and women who inject drugs have been disproportionately affected.[6]

There is no criminal statute in Canada that explicitly and specifically imposes an obligation to disclose HIV-positive status before sex. Instead, the obligation to disclose has been established by the courts' interpretation of existing offences of general application in the federal *Criminal Code*, particularly (but not exclusively) the provisions criminalizing sexual assault.

Nor is there a blanket obligation to disclose before any sexual activity. Rather, the Supreme Court of Canada has ruled that people living with HIV have an obligation to disclose their status to a sexual partner before sexual activity that poses a **"significant risk of serious bodily harm."**[7] In the Supreme Court's view, when the legal obligation to disclose arises based on this threshold, not disclosing may amount to "fraud" that, under current provisions in the *Criminal Code*, invalidates a partner's consent to sex. As a result, what is an otherwise consensual sexual encounter becomes a sexual assault under Canadian law, treated as legally equivalent to an instance of forced or coerced (i.e. clearly non-consensual) sex.[8]

This standard of a "significant risk of serious bodily harm" can also encompass at least certain other sexually transmitted infections, and there has been a small handful of prosecutions based on alleged non-disclosure of certain other infections that can be transmitted through sexual contact, such as herpes and hepatitis C. However, the overwhelming majority of prosecutions to date have been against people living with HIV.

The current law is at odds with international recommendations from UN agencies, including UNAIDS, and from various UN human rights experts and bodies, all of which have recommended that any use of the criminal law be limited to the exceptional case of actual, intentional transmission of HIV.[16]

In the specific case of HIV, the Court has further ruled "significant risk of serious bodily harm" means that there is a **"realistic possibility of transmission of HIV."**[9] Therefore, if a person living with HIV does not disclose their serostatus to a partner before engaging in a sexual activity that, *in the eyes of prosecutors and the courts,* carries a "realistic possibility of HIV transmission," they could be charged with and convicted of sexual assault. More specifically, the charge usually laid is that of *aggravated* sexual assault, the most serious sexual offence in the *Criminal Code*, because the courts have held that exposure to possible HIV infection "endangers life."[10]

However, the very broad interpretation by police, prosecutors, and courts of what amounts to a "realistic possibility" of HIV transmission has led to charges, prosecutions, and convictions for alleged HIV non-disclosure in cases where there was little or no risk of transmission, no intent to cause harm, and HIV (or another STI) was not transmitted. In fact, most prosecutions to date have not alleged actual transmission.[11] People living with HIV have been convicted even in cases where their conduct shows they sought to avoid transmission (e.g. using a condom, a highly effective and long recommended means of HIV prevention[12]).

The legal penalties are also particularly severe. A conviction for aggravated sexual assault carries a maximum penalty of life imprisonment, and any sexual assault conviction currently also results in mandatory designation as a sex offender.[13] Some of those incarcerated have been placed in "administrative segregation" — in other words, solitary confinement — and have encountered further violence and stigma at the hands of the criminal justice system.[14] A non-citizen, including a permanent resident, convicted of this offence also faces nearly certain deportation from (and future inadmissibility to) Canada.[15]

The scope of activities criminalized, and the unacceptably low threshold of mental culpability required for a conviction, results in the harsh, stigmatizing sanction of the criminal law in far too wide an array of circumstances. As it currently stands, Canada's law on HIV non-disclosure has been rightly criticized as ignoring sound science and sound public policy concerns about the adverse impact on both public health and on human rights (such as privacy, liberty, and freedom from discrimination). The current law is at odds with international recommendations from UN agencies, including UNAIDS, and from various UN human rights experts and bodies, all of which have recommended that any use of the criminal law be limited to the exceptional case of actual, intentional transmission of HIV.[16]

Harms of HIV criminalization

The experience with criminalizing communicable diseases has demonstrated the ample harms to public health and to human rights of misusing the criminal law. The example of ongoing HIV criminalization is particularly instructive.[17]

- **Criminalization undermines HIV prevention efforts through misinformation and fear.** It contributes to misinformation about HIV and its transmission — especially when criminal prosecutions, and accompanying media coverage that is inaccurate or sensational, target conduct that poses no substantial possibility of HIV transmission. This only reinforces inaccurate and stigmatizing perceptions of HIV and its transmission, which then, in a vicious cycle, feed further resort to criminal charges in cases where there is little or no possibility of transmission. As recognized by the Attorney General of Canada, "the over-criminalization of HIV non-disclosure discourages many individuals from being tested and seeking treatment, and further stigmatizes those living with HIV or AIDS."[18] If taking a test means risking arrest and prosecution, this is an additional disincentive to people getting diagnosed and getting diagnosed early, which is key for preventing onward transmission.[19]

- **Criminalization undermines the relationship between providers and recipients of health services.** It infringes the right to privacy, including in relation to confidential medical and other sensitive personal information that is used in a prosecution — a regular feature of such cases. Health care workers and other service providers may also be forced to testify against their patients/clients.[20]

- **Criminalization exacerbates racial and other injustice. HIV criminalization has been marked by discrimination in both prosecutions and in sentencing.** As with other uses of the criminal law, there is evidence of anti-Black racism in the criminalization of HIV, with Black men disproportionately represented among those prosecuted to date.[21] In addition, there is evidence of harsher sentencing of Black and Indigenous people in HIV criminalization cases.[22] Populations such as gay men and Indigenous women are disproportionately represented in the HIV epidemic in Canada, meaning they also disproportionately live under the threat of HIV criminalization. Justice Canada has previously recognized the burden of HIV criminalization falls disproportionately on Black, Indigenous, and gay communities.[23]

- **HIV criminalization compounds gender inequality.** Women living with HIV may face prosecution for alleged non-disclosure even though circumstances were such that neither disclosure nor taking other measures to reduce the risk of transmission were realistic options. Studies have also shown that HIV non-disclosure laws are a structural driver of increased violence against women living with HIV[24] and that many women with HIV choose abstinence as a means of resisting surveillance threats and disclosure expectations associated with sexual activity.[25] Meanwhile, criminalization offers little in the way of practical protection against HIV infection, including for women (and others) in vulnerable positions vis-à-vis their partners.[26] It also undermines their access to health care.[27] In Canada, "HIV non-disclosure prosecutions have led to an increase in women, particularly marginalized women, being convicted of aggravated sexual assault. Almost 80% of women living with HIV are Indigenous or racialized, and they already face serious over-criminalization."[28] There has been a growing body of criticism from women's rights advocates about the misuse of criminal law in relation to HIV, both because of the harms to women and because of the damage done to important principles in the law of sexual assault by misusing this legal tool for such prosecutions.[29]

- **Criminalization regularly results in unfair "trial by media."** The coverage, sometimes inaccurate and sensational, of allegations and court proceedings results in lasting, serious harm to those accused, including in the case where someone is acquitted, or charges are withdrawn or stayed. Analyses have demonstrated how media coverage of such cases has also sometimes drawn upon and reinforced racist stereotypes.[30]

- **Sentencing in HIV criminalization cases appears disproportionately harsh.** Analysis of prosecutions in Canada to date suggests sentences imposed in HIV non-disclosure cases (overwhelmingly prosecuted as sexual assault) are harsher than the sentences imposed for sexual assault convictions based on forced or coerced sex.[31]

- **Criminalization creates a context of fear and uncertainty for all people living with HIV.** And those prosecuted experience myriad additional harms, including violent and harsh punishment while incarcerated (e.g. "administrative segregation," meaning solitary confinement), and various forms of social shunning and discrimination affecting them economically (e.g. denial of jobs, housing, healthcare), physically (threats and physical violence), and mentally (ongoing surveillance as registered "sex offenders", threats and harassment by police and other community members, leading to long-lasting damage to mental health).[32]

Momentum for change

Considering such harms, people living with HIV and human rights advocates have for years spoken out against such HIV criminalization and have pursued multiple strategies to mobilize communities and to advocate for changes in law, policy, and practice. These have included support to accused people living with HIV and their defence lawyers, media advocacy, strategic interventions by community organizations in court cases, and pressing for changes in provincial and federal policies guiding prosecutors.

In 2017, the Canadian Coalition to Reform HIV Criminalization (CCRHC) identified *Criminal Code* reform as an important and necessary part of the solution to this problem, in its original *Community Consensus Statement*, endorsed by more than 170 HIV and other organizations across Canada. Scientific experts, in Canada and internationally, have also expressed their concerns about the failure of the criminal law to reflect the best available (and evolving) scientific evidence regarding HIV, including in relation to the possibility of transmission, or lack thereof, in various circumstances.[33]

In recent years, the federal Department of Justice has recognized the need to constrain prosecutions in a detailed departmental report in 2017 that recommended limits on the law.[34] So, too, have successive federal Ministers of Justice, in public statements recognizing the harms of the "overcriminalization of HIV"[35] and in a directive to the federal public prosecution service limiting prosecution in various circumstances.[36] Some provinces have also adopted new prosecutorial policy or guidance articulating some limits on prosecution, most clearly in cases where a person living with HIV has a suppressed viral load; this reflects the scientific consensus that "undetectable = untransmittable" (U=U).[37]

While important, these new policy developments fall significantly short of the limits on prosecution urged by civil society advocates, including those based on the available science.[38] It is indeed unscientific and unfair to criminalize HIV non-disclosure by a person with a suppressed viral load. But a range of inequities, including in access to HIV care, also means disparities along lines of race and class among other factors, in who can achieve and sustain a suppressed viral load.[39] As advocates have long urged, decriminalizing solely on this basis further exacerbates the disproportionate, discriminatory impact of HIV criminalization, which will continue to burden those facing such underlying inequities. Such a limited approach to law reform also fails to address other ways in which HIV criminalization is overly broad, such as allowing convictions even when then is no transmission, no substantial possibility of transmission, or any intent to transmit.[40]

Therefore, advocates have continued to press for *Criminal Code* reforms as necessary to narrow the overly broad scope of the law that has been established through prosecutorial practice and courts' interpretations of various offences in the *Code*, especially, but not only, the sexual assault provisions.

In July 2022, after extensive consultations and internal deliberations about possible approaches to *Criminal Code* reform, the CCRHC submitted detailed proposals for legislative amendments to the federal Minister of Justice, and issued *Change the Code*, a new Community Consensus Statement, endorsed by more than 100 organizations across the country.[41] This consensus statement outlines four key elements of needed legislative reforms:

Key elements of law reform to end HIV criminalization

- end the use of sexual assault laws to prosecute HIV/STI non-disclosure, exposure, or transmission;
- limit the use of any other provisions in the *Criminal Code* to cases of actual, intentional transmission;
- end the deportation of non-citizens following conviction; and
- create a mechanism for reviewing past convictions in line with the new limits on the scope of criminalization to be enacted.

In late July 2022, shortly before Canada hosted the 24th International AIDS Conference (AIDS 2022), the Justice Minister announced the federal government would begin consultations on potential *Criminal Code* reforms in October 2022.

Current context for legislative change to end HIV criminalization

The emergence of the COVID-19 pandemic has delayed both community and government deliberations about how best to reform the *Criminal Code* to limit HIV criminalization. In addition, the law reform exercise — which ultimately requires successfully passing legislation in Parliament — now proceeds in a context of potentially heightened concern about infectious diseases. More recently, the monkeypox virus (MPV) has emerged as another "public health emergency of international concern."[42] MPV is another infection transmitted primarily through close physical contact (and respiratory droplets and certain fomites in some circumstances). The science about whether MPV can spread or is spreading through semen or certain other bodily fluids is still evolving, but increasingly suggests this is likely. *De facto* it is a sexually transmitted infection spreading in Canada and other high-income countries overwhelmingly through sexual networks of gay, bisexual, and other men who have sex with men, and evoking some of the same stigma, homophobia, and racism that shaped public consciousness and public policy in previously responding to HIV.

In such a context, some lawmakers may be more resistant to proposals that would *limit* the scope of the law in relation to HIV or other STIs. In addition, some policymakers may perceive a greater need to *expand* on paper the scope of the law, which currently overwhelmingly singles out HIV in practice, to further criminalize conduct that transmits, or is perceived as posing a risk of transmitting, other infectious diseases. It is often easier to call for harsher sanctions for the "irresponsible" individual portrayed as a threat to public health than to address the greater threats — namely, inadequate investments in public goods, and policies that create discriminatory structural barriers that limit people's access to the information and tools they need to protect themselves, their families, and their communities against infection, serious disease and death. Not only does this risk infringing human rights, but defaulting to punishment instead of building supports makes for poor public health policy.

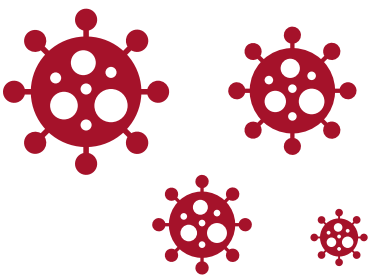
In the response to COVID, "we are all in this together" soon regressed to "everyone for themselves."

This context cannot be ignored in pursuing long-overdue legislative amendments to rectify the "overcriminalization of HIV." It makes it even more important that advocates and lawmakers think clearly and carefully about the various harms of misusing the criminal law to address what are primarily public health problems, rather than default to a simplistic — and often unscientific, discriminatory, and ineffective — resort to the blunt instrument of the criminal law. Criminalization rarely works as successful public health policy, and prioritizing punishment to the point of undermining effective, evidence-based public health interventions is ultimately not in the public interest either. This is a key lesson to be learned from the experience with HIV criminalization. Meanwhile, recent experience with COVID has illustrated again the concerns that arise from a turn to punitive legal responses — while, interestingly, largely avoiding the use of criminal sanctions *per se* that have been such a marked presence in the HIV response.

Punitive policies in the response to COVID: concerns and a key lesson

While COVID has not necessarily been marked by the same stigma that surrounds sexually transmitted infections, there has been a significant punitive strand in Canada's policy response to this new public health challenge that raises serious concerns. Our knowledge and options for behavioural, biomedical, and structural interventions to prevent SARS-CoV-2 transmission, and to treat and mitigate COVID, have evolved. So, too, have legal and policy responses to this new pandemic. During the first months of the pandemic, jurisdictions across the country rapidly adopted new legislation, regulations, and executive orders imposing various measures in the interests of public health — some more, and some less, justified by the available, and frequently changing, evidence. In many instances, police and by-law officers were authorized to enforce such measures through arrests and the imposition of fines.

Researchers and civil society organizations sought to monitor and analyze the use of such powers. The leading initiative was the "Policing the Pandemic Mapping Project" (www.policingthepandemic.ca), which was sustained for the first year of the pandemic. The initiative was rooted in concern that "ongoing racist and classist patterns of enforcement evidenced in other criminal justice contexts would only reproduce themselves in new ways in the COVID-19 context."[43] Certainly one ongoing lesson from the HIV pandemic has been that too often such coercive uses of the state's power "are not based in science, and have led to human rights abuses, racist targeting and harassment, and the reinforcement of ongoing marginalization of people living in poverty, those who are homeless, sex workers, people who use drugs, and Indigenous and racialized communities."[44] Such a concern was heightened by the reality, soon observed in the COVID-19 pandemic, that structural inequalities led to people of colour being disproportionately affected; a turn to policing and punitive responses would therefore also affect such communities disproportionately. Researchers have highlighted that the well-known racializing of policing that predated COVID provides ample reason for concern that the same patterns of anti-Black racism would manifest in the context of the "public health policing" that emerged in the early phases of the COVID response.[45]



Human rights advocates have cautioned that "using police and by-law officers, who are not trained to deal with health issues, to enforce public health measures over-associates police and public health functions and can instill mistrust of public health among marginalized people."[46] In some jurisdictions, there have been troubling suspensions of privacy rights, allowing police access to individuals' COVID data, with the risk that feeds into punitive responses, including potentially criminalization, further blurring the lines between a public health response and a policing response.[47]

As discussed further below, the available data suggest a disturbingly widespread use of punitive measures, especially in the early phases of the COVID pandemic, giving rise to serious human rights concerns in many instances. However, for purposes of the current discussions regarding *Criminal Code* reform to address the ongoing harms of HIV criminalization, what is also noteworthy is that there does not appear to have been a significant resort specifically to the criminal law to penalize (i) breaching public health rules or (ii) specific instances of alleged transmission of, or exposure to, the virus causing COVID.[48]

Sanctions for breaching public health rules

There appear to have been relatively few charges under the federal *Criminal Code* for breaching public health requirements enacted to prevent the spread of COVID (e.g. related to masking, physical distancing, gathering limits, or quarantining or isolating). For the most part, charges and penalties — particularly substantial fines — have been imposed for offences under provincial legislation or regulations,[49] or as "contraventions" of federal laws, rather than through the pursuit of criminal charges (whether under the *Criminal Code* or other federal statutes).[50]

Enforcement of federal quarantine measures

In the first year of the COVID pandemic, the RCMP recorded "proactive action" in relation to approximately 70,475 cases (excluding Ontario) of travellers entering Canada who were flagged for follow-up by the Public Health Agency of Canada. Of these cases, "the most common outcome was confirmed compliance" by travellers with requirements to quarantine or isolate; a total of 129 fines were issued under the federal *Quarantine Act*, and four individuals were charged with an offence under the Act for not complying with quarantine requirements.[51]

As of May 2021, the Public Health Agency of Canada (PHAC) reported that at least 1,098 tickets had been issued and 15 people had been criminally charged for violations of the *Quarantine Act* since March 2020.[52] Most recently, PHAC reported that between April 2020 and August 2022, a total of 17,246 fines were issued under the *Quarantine Act*. This figure includes charges for: refusal to quarantine or isolate in government-approved accommodations; arriving without a valid pre-entry test for SARS-CoV-2; refusing to test on arrival; breach of quarantine, and "other reasons."[53] If the enforcement approach during this entire period was similar to that during the first year, as just noted, then the vast majority of this enforcement of the *Quarantine Act* was via fines under the *Contraventions Act*, with a much smaller number of cases being dealt with as criminal charges, though this is difficult to ascertain, given how the figures are reported. In addition, in a related area of federal jurisdiction (transportation), reports suggest a few dozen cases in which charges have been laid and/or fines imposed for "contraventions" of Transport Canada rules by people refusing to wear a mask on board an airplane; this represents just a handful of the reported incidents of non-compliance.[54]

Enforcement of provincial measures

There have been reported cases of charges under provincial trespassing laws for attempting to enter a hospital in contravention of COVID-related restrictions, or for refusing to leave a store in compliance with rules limiting the number of occupants.[55] Some charges have been laid for operating non-essential businesses when these were to be closed under provincial emergency public health orders.[56] A charge was also laid under Alberta's provincial public health act for obstructing a public health inspector (who sought to confirm members of a church congregation were complying with the requirement to wear a mask indoors).[57]

However, as demonstrated by the data gathered by McClelland and colleagues, as well as by civil liberties organizations, by far the most significant manifestation of a punitive response to COVID was the use of monetary fines for breaching public health rules or orders related to physical distancing, limits on gatherings, and use of public spaces.[58] For example, during the first three months of the pandemic, and the first wave of fairly stringent emergency public health measures, more than 10,000 fines, totalling more than $13 million, were issued for breaches of such measures.[59] In some jurisdictions, addressing this public health crisis as a public security matter persisted well into the second year of the pandemic — for example, researchers and community organizations in Quebec documented more than 46,500 tickets issued by police for infractions of public health rules in the one-year period between late September 2020 and early October 2021.[60]

Researchers and advocates have rightly questioned whether monetary fines are ultimately ineffective as a COVID-19 prevention measure, often unwarranted, and do more harm than good (especially for marginalized populations).[61] Based on data gathered during the first months of the pandemic, the widespread use of fines for breaching provincial or municipal laws has drawn criticism for being unequal and discriminatory, with a particular impact on racialized people and those living in poverty, experiencing homelessness, or otherwise economically marginalized.[62] As noted by researchers: "Despite large data gaps, however, there are numerous indications that the arbitrary rules, increased enforcement powers, and significant fines are having a disproportionate impact on specific communities, including Black, Indigenous, and other racialized groups, those with precarious housing, recent immigrants, youth, members of the LGBTQ2S community, and certain religious minorities."[63] Furthermore, as researchers have noted, "in a context of rising unemployment and continued threats of eviction, the potential harms of a large fine are very real and should be examined seriously."[64]

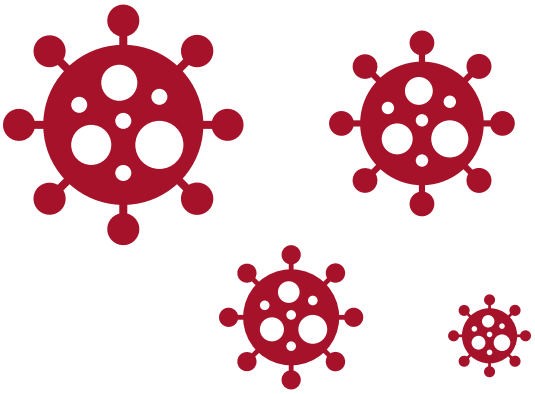
Sanctions under such public health measures, enforced by police, particularly when the targets of those sanctions are already members of marginalized populations subject to police profiling, could amount *de facto* to an experience of "criminalization" for those subjected to them.[65] Non-payment of fines can lead to imprisonment, meaning the enforcement of provincial offences can escalate into effectively criminal treatment. In any event, they are significant manifestations of coercion by the state and warrant scrutiny and, when they are arbitrary, overly broad, or grossly disproportionate, they raise constitutional concerns about unjustifiable infringements of human rights contrary to the *Canadian Charter of Rights and Freedoms*.

However, as noted, such sanctions (including fines), have been largely imposed under provincial law or municipal by-laws, depending on the jurisdiction and conduct in question; they have not generally been treated as *criminal* offences. This is not to dismiss very real concerns raised by the thousands of instances in which such fines have been imposed, including legitimate questions about potential misuse and overreach of such police powers, as well as the discriminatory application of such fines.[66] The point is simply that resort to the *criminal* law *per se* appears to be infrequent so far — which also suggests it has not been particularly necessary as an element of the policy response to COVID. This point should be remembered if proposals for extending the criminal law in this fashion arise in the context of pursuing *Criminal Code* amendments to limit HIV criminalization.

There appears to be only one reported case to date in which a person with COVID has been charged criminally for breaching provincial public health rules.[67] In July 2020, an international student from the Democratic Republic of Congo was charged in Prince Edward Island with two counts of *common nuisance* (under s. 180 of the *Criminal Code*) for not complying, on two separate occasions, with a self-isolation order issued by the province's medical officer of health after testing positive for COVID. While racist vitriol boiled up on social media, he was denied bail and spent more than seven weeks in custody before pleading guilty and being granted a conditional discharge by the court. His mental health challenges at the time of the two incidents played a key role in the court's decision on this approach to sentencing.[68]

Cases of perceived SARS-CoV-2 transmission or exposure: few criminal prosecutions

Overall, there has been relatively little use of criminal prosecutions *per se* in responding to conduct seen as directly posing a risk of transmitting SARS-CoV-2. Where there has been a turn to the criminal law is in the case of **physical assaults that carry a potential or perceived risk of transmitting the virus causing COVID**. Between April and December 2020, McClelland and Luscombe documented more than 60 people across Canada who faced criminal charges related to COVID-19 in some fashion.[69] Of these, roughly half involved assault charges in cases where it was alleged that the accused person deliberately spat or coughed on another person while claiming to have COVID; in some cases, charges for uttering threats have also been laid.[70] It is debatable whether such use of criminal charges, driven largely by the concern about a possible exposure to SARS-CoV-2, is warranted. But it is not controversial that at least spitting on someone constitutes an assault *per se* in Canadian law, regardless of the real or perceived risk of transmitting any infection — and at least one court has ruled that deliberately coughing on a person or near them, with the intent of exposing them to airborne droplets (capable of transmitting SARS-CoV-2), can constitute an assault under the *Criminal Code*.[71]



Most significantly, unlike what has been seen with HIV, there appears to have been no use to date of the criminal law in relation to alleged non-disclosure, exposure, or transmission of SARS-CoV-2 through otherwise **consensual close physical contact, including sex.** There have been the occasional calls to extend the legal framework that criminalizes non-disclosure of HIV to SARS-CoV-2.[72] These have prompted quick rebuttal, pointing out the recognized overbreadth of this body of law, and the various ways in which such a move would be misguided, given the harms already observed in the HIV criminalization context.[73] But amidst the flurry of legislative and regulatory responses to the pandemic, there has been no move in Parliament to introduce new laws to criminalize SARS-CoV-2 non-disclosure, exposure, or transmission. And amidst the wave of litigation before the courts grappling with the legal implications of COVID and governments' responses, based on searches of publicly available legal databases, there does not appear to have been any prosecution for alleged SARS-CoV-2 non-disclosure, exposure, or transmission in the context of *consensual* interpersonal interactions.

Overall, there has been a relatively limited turn to the *criminal* law *per se* as an ostensible form of COVID prevention policy. This has been the case even though SARS-CoV-2 is much more casually communicable (as an airborne respiratory virus) and in a wider variety of circumstances than HIV (which is relatively difficult to transmit and only through exposure in specific ways to a sufficient quantity of specific bodily fluids). More than two years into the COVID pandemic, there has not been any significant demand for use of the *Criminal Code*, nor has it proven necessary to resort to such a blunt instrument in dealing with this public health challenge. It is a recent example illustrating that, in enacting changes to the *Criminal Code* to limit HIV criminalization, there is no need to expand the criminal law to encompass other infectious diseases.[74]

Unlike what has been seen with HIV, there appears to have been no use to date of the criminal law in relation to alleged non-disclosure, exposure, or transmission of SARS-CoV-2 through otherwise consensual close physical contact, including sex. This recent example illustrates that, in enacting changes to the *Criminal Code* to limit HIV criminalization, there is no need to expand the criminal law to encompass other infectious diseases.

Ending HIV criminalization: considerations in amending the *Criminal Code*

As noted above, because there is no HIV-specific offence in the *Criminal Code* to repeal or amend, prosecutors and courts have interpreted and applied *Criminal Code* offences of general application — and most frequently (but not only) the offence of sexual assault, by characterizing non-disclosure of HIV or certain other STIs as fraud that vitiates consent.

In its 2019 report, the House of Commons Standing Committee on Justice and Human Rights recognized that the law is currently overbroad and recommended amendments to the *Criminal Code*. It also acknowledged the many concerns that have arisen with the use of existing general offences to prosecute alleged HIV non-disclosure — including charges of sexual assault. The Committee recommended "immediately prohibiting the use of sexual assault provisions" in the *Code*.[75]

> **"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.**
>
> **The Committee agrees with witnesses that the use of sexual assault provisions to deal with HIV non-disclosure is overly punitive, contributes to the stigmatisation and discrimination against people living with HIV, and acts as a significant impediment to the attainment of our public health objectives. The consequences of such a conviction are too harsh and the use of sexual assault provisions to deal with consensual sexual activities is simply not appropriate."**
>
> **— House of Commons Standing Committee on Justice and Human Rights, June 2019**

The Standing Committee also recommended enacting that the criminal law should only apply in cases of actual transmission, as community advocates have urged.[76] However, the Committee proposed that this be done through the creation of a new offence in the *Criminal Code*, with amendments that would also preclude the use of any other, existing offences. Furthermore, out of an understandable concern that the law as it has evolved has *de facto* singled out HIV and people living with HIV, and out of a desire to avoid such a stigmatizing, discriminatory approach in future, the Committee also recommended that its proposed new offence apply not only to HIV or other STIs but encompass the transmission of "infectious diseases" more generally.

It should be noted that the Standing Committee did not make any recommendation as to the appropriate degree of mental culpability that should be required as part of the offence, which the prosecution will have to prove; instead, it recommended this be the subject of further discussion with key stakeholders. HIV community advocates in Canada have urged that any use of the criminal law should be limited to cases where there is *intent* to transmit.[77] This is in keeping with a consensus internationally among advocates against HIV criminalization[78] and with repeated international recommendations, as noted above.

Expanding criminalization in the name of avoiding HIV stigma: not the right remedy

Advocates against HIV criminalization share the Standing Committee's concern about the stigma of singling out people living with HIV for criminal prosecution. Indeed, the imposition of criminal sanctions is inherently stigmatizing. The fact that it has been overwhelmingly people living with HIV who have been prosecuted under the law as it has evolved, and the current overbreadth of the law, only intensifies the stigmatizing effect.

However, the CCRHC does *not* support the introduction of a new, specific offence in the *Criminal Code* related to non-disclosure, exposure, or transmission of HIV or other communicable infections. It is precisely because of lessons learned from the harms of HIV criminalization that HIV advocates have objected to the suggestion to extend criminalization, through a new offence, to other infectious diseases[79] — and have subsequently also sounded early alarms over the potential use of the criminal law in relation to COVID.[80]

> **One hallmark of the rush to criminalize HIV has been the adoption of laws, or the overly broad interpretation or application of pre-existing laws, driven by misinformation, fear, and stigma rather than science. In the context of the current COVID-19 pandemic, the same concerns are glaringly obvious. In the churn of rapidly evolving science and pressure to "do something," it is easy to reach for familiar tools and repeat misguided patterns. But we already have evidence of the harms caused to individuals and public health, and to the law of sexual assault, by misusing the criminal law in the context of HIV non-disclosure. We should not replicate these harms by extending the law further.[81]**

Concerns with creating a new offence in the *Criminal Code* include the following:

- The very fact of adding a new offence will contribute significantly to further stigmatization, and all the social, economic, and physical harms that flow from it, particularly of people living with HIV (who will feature prominently in the legislative and media discussion surrounding the creation of any new offence).[82] This is the case even if the provision were worded more broadly than referring solely to HIV, and even if such a new offence were to explicitly and entirely preclude the use of any other, existing offences, which would be essential in order to avoid simply adding to the existing problem of the criminalization of HIV (and, to a much lesser extent, certain other STIs).

- Another concern, rooted in long historical experience, is that the creation of any new criminal offence — even a narrowly circumscribed one — also creates a new opportunity for the law to be applied in discriminatory ways against certain people and communities. As noted above, anti-Black racism is already evident in HIV criminalization in the disproportionate prosecution of Black men and harsher sentences for Black and Indigenous people. Meanwhile, gay men and Indigenous women are disproportionately represented in the HIV epidemic in Canada, and therefore also disproportionately live under the threat of HIV criminalization.[83] Justice Canada has previously recognized that the burden of HIV criminalization falls disproportionately on these populations.[84] This experience does not inspire confidence in the creation of a new offence in the *Criminal Code* that would expand the potential scope of criminalization to include other infectious diseases — even if it *may* also limit the circumstances in which prosecution and conviction occur (an outcome of the legislative process that is by no means guaranteed).

- Finally, the CCRHC does not believe that the remedy to ending the stigmatizing, discriminatory, and overly expansive use of the criminal law against people living with HIV is to extend such misuse to people living with other STIs or other infectious diseases. Such an approach may be well-intentioned, rooted in a very valid concern about not singling out HIV and people living with HIV — a concern shared by HIV advocates. But introducing a new offence into the *Criminal Code* that criminalizes "transmission of infectious disease" is to ignore the lessons learned from the experience with HIV criminalization. While it may seem rational in moments of crisis to appeal to the criminal law or other forms of punishment, experience indicates that such responses are ultimately unhelpful. There is little evidence that such responses are effective in protecting public health; as discussed above, there is evidence that they can and do cause harm in multiple ways.[85]

Limiting criminal offences of general application

Such an approach of legislating a new offence, including one that could potentially extend criminalization to other communicable diseases, is not necessary to remedy the troubling overuse of the criminal law in relation to HIV (and, occasionally, other STIs).

Rather, the CCRHC takes the position that, in the Canadian legal context, **the better approach to limiting the current broad criminalization of HIV and other STIs is to instead enact amendments to the federal *Criminal Code* that would completely preclude the use of sexual assault law to prosecute the non-disclosure of HIV or another STI, and would carefully limit the potential use of any other offence of general application to only cases where someone intentionally transmits HIV or another STI.**

Based on the best available scientific evidence about possibility of transmission, amendments to the *Code* would exclude certain conduct from the scope of the criminal law, such as oral sex, and anal or vaginal sex when a condom is used *or* when the partner living with HIV has a viral load that is low or suppressed *or* the HIV-negative partner is on pre-exposure prophylaxis (PrEP).[86] Furthermore, amendments to the *Code* would clearly establish in the law that there is the absence of intent to transmit in various circumstances, including, for example, in cases where a person took measures to prevent transmission (e.g. condom use, adhering to anti-retroviral treatment).

Under such an approach, someone who commits what is clearly a physical or sexual assault (i.e. forced or coerced physical or sexual contact) can still be prosecuted for this assaultive conduct, which constitutes an offence regardless of the accused person's HIV/STI status.[87] But the amendments would prevent the misuse of sexual assault or other charges that are driven heavily by stigma (especially in relation to HIV) and that currently capture conduct that is not so blameworthy as to warrant the harsh sanction of the criminal law.

Conclusion

The experience with criminalizing communicable diseases, including the ongoing criminalization of HIV, has demonstrated the ample harms of the attempt to use the criminal law as public health policy. Criminalization has been observed to undermine effective public health efforts and human rights. In short, criminalization is not an evidence-based response to a public health issue such as HIV. This has led to a growing recognition, including by lawmakers, of the need to significantly curtail HIV criminalization.

The experience with COVID also offers an insight. While there are many aspects of the punitive legal responses to COVID that are cause for concern, particularly those in the early phases of the epidemic, there has not been extensive use of the criminal law, including in relation to alleged non-disclosure, exposure, or transmission of SARS-CoV-2 through close physical (including sexual) contact. Even in the context of a much more widespread pandemic of a more casually communicable disease, criminalization of those diagnosed with COVID has not been seen as a necessary policy response to protect public health against an infectious disease — and rightly so. This no doubt arises in part because HIV is transmitted largely through sexual activity (and the sharing of drug injection equipment), activities that continue to provoke discomfort and moral judgments. Nonetheless, the limited use of the *Criminal Code* in relation to COVID highlights further the continued exceptional, stigmatizing treatment of HIV and people living with HIV in Canadian criminal law.

These two experiences reinforce the need to reform Canadian law to end the current overly broad criminalization of HIV, while also illustrating the importance and the possibility of doing so in a manner that avoids extending the harms of criminalization to other infectious diseases. They have also illustrated more generally the importance of avoiding punitive responses to public health challenges, and combatting stigma and discrimination instead, as urged by WHO and UNAIDS; empowering affected communities; and addressing social inequities that shape vulnerability to the virus and limit access to health services.[88]

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[7] *R. v. Cuerrier,* [1998] 2 SCR 371.

[8] *Criminal Code*, RSC 1985, c. C-46, ss. 265 and 273.

[9] *R. v. Mabior,* 2012 SCC 47.

[10] *Criminal Code*, s. 273.

[11] C. Hastings et al., *supra* note 1.

[12] For example, see the decision of the Ontario Court of Appeal *R v. NG*, 2020 ONCA 494 (upholding a conviction on three counts of sexual assault against a man who did not disclose his HIV-positive status but used a condom for his consensual sexual encounters, even though there was no allegation that he had transmitted HIV nor was there any evidence of improper use or failure of the condom). For a different outcome, see the earlier decision of a Nova Scotia trial court in *R v. Thompson*, 2016 NSSC 134 (acquitting the accused person charged for HIV non-disclosure on the basis that the evidence before it from scientific experts was that condom use precludes a realistic possibility of HIV transmission).

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[60] V. Fortain et al., *Une approche punitive alarmante face à la pandémie de COVID-19: analyse des données policières,* Observatoire des profilages, March 2022, available at www.observatoiredesprofilages.ca/wp-content/uploads/2022/03/Une-approche-punitive-alarmante-face-a-la-pandemie-de-COVID-19-analyse-des-donnees-policieres.pdf. It is worth noting that nearly half of these tickets were issued for violating the provincially ordered curfew, and not for any conduct specifically linked to any significant risk of SARS-CoV-2 transmission.

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[62] A. McClelland and A. Luscombe, "Policing the Pandemic: Counter-mapping Policing Responses to COVID-19 across Canada," *supra* note 43.

[63] A. Deshman et al., *supra* note 2, p. iv.

[64] A. McClelland and A. Luscombe, "Policing the Pandemic: Counter-mapping Policing Responses to COVID-19 across Canada," *supra* note 43, at 218.

[65] In one case, in August 2020, a New Brunswick physician, a Black man of Congolese origin, was accused of failing to self-isolate after returning from a brief trip across the border into Quebec and was charged under the provincial *Emergency Measures Act*, but that charge was withdrawn in June 2021 (see A. Cooke, "Doctor accused of spreading COVID-19 launches lawsuit against N.B., RCMP and Facebook," *Global News*, January 20, 2022, available at https://globalnews.ca/news/8523124/jean-robert-ngola-lawsuit-nb-rcmp-facebook/.) He was vilified in social media and in public commentary, including by the New Brunswick premier, to the point that he ultimately had to leave the province in the face of violent, racist threats. Such instances unfortunately underscore that the application of punitive legal responses is often informed by, and can contribute to, racism. Such harms cannot be ignored by lawmakers.

[66] A. McClelland et al., *supra* note 44.

[67] Searches in the publicly accessible legal databases maintained by the Canadian Legal Information Institute (CanLII) turned up no reported case in which a criminal charge appears to have been laid for breaching a provincial public health law with conduct seen as directly putting others at risk of infection with SARS-CoV-2.

[68] *R. v. N*, 2021 PESC 9.

[69] A. McClelland and A. Luscombe, "Policing the Pandemic: Counter-mapping Policing Responses to COVID-19 across Canada," *supra* note 43, p. 210.

[70] A. McClelland and A. Luscombe, "Policing the Pandemic: Tracking the Policing of COVID-19 Across Canada," dataset, *supra* note 53.

[71] *R v Pruden*, 2021 ABPC 266 (CanLII), https://canlii.ca/t/jk24h.

[72] E.g. L. David, "COVID-19 and consent to sexual activity," *The Lawyer's Daily*, April 21, 2020, available at www.thelawyersdaily.ca/articles/18720/covid-19-and-consent-to-sexual-activity-lawrence-david?category=opinion.

[73] R. Elliott et al., "Prosecuting COVID-19 non-disclosure misguided," *The Lawyer's Daily*, April 29, 2020, available at www.thelawyersdaily.ca/articles/18816; L. Seshagiri, "Criminalizing COVID-19 transmission via sexual assault law? No. And that means no," *The Lawyer's Daily*, April 28, 2020, available at www.thelawyersdaily.ca/articles/18817.

[74] In fact, not only should lawmakers avoid extending the law used to criminalize HIV non-disclosure to COVID, this new pandemic presents an opportunity to implement some lasting changes in the criminal legal system that concerns about preventing transmission of SARS-CoV-2 triggered, albeit to a modest degree, in the early phases of the pandemic (e.g. reducing pre-trial detention and the imposition of custodial sentences): e.g. T. Skolnik, "Criminal Law During (and After) COVID-19," 2020 43-4 *Manitoba Law Journal* 145, 2020 CanLIIDocs 2573, https://canlii.ca/t/sxmn.

[75] House of Commons Standing Committee on Justice, *supra* note 23.

[76] *Ibid*.

[77] Canadian Coalition to Reform HIV Criminalization, *supra* note 3.

[78] *Oslo Declaration on HIV Criminalisation*, Prepared by international civil society in Oslo, Norway on 13th February 2012, available at: www.hivjustice.net/oslo/.

[79] HIV Legal Network, *Statement: Response to Justice Committee's report on the criminalization of people living with HIV*, June 17, 2019, available at www.hivlegalnetwork.ca/site/statement-response-to-justice-committees-report-on-the-criminalization-of-people-living-with-hiv/?lang=en

[80] Canadian Coalition to Reform HIV Criminalization, *Statement on COVID-19 and Criminalization*, April 27, 2020, available at www.hivcriminalization.ca/statement-covid-19-criminalization/; HIV JUSTICE WORLDWIDE, *HIV JUSTICE WORLDWIDE Steering Committee Statement on COVID-19 Criminalisation*, 2020, available at www.hivjusticeworldwide.org/en/covid-19/.

[81] R. Elliott et al., "Prosecuting COVID-19 non-disclosure misguided," *supra* note 73.

[82] It has also been noted that if someone were convicted under a new offence of transmitting HIV or another STI, the person charged would inherently be outed as living with HIV or another STI. Aside from the public stigmatization, this could have implications for people who are incarcerated as well, particularly people living with HIV.

[83] C. Hastings et al., *supra* note 1.

[84] House of Commons Standing Committee on Justice, *supra* note 23.

[85] UNAIDS, *Rights in the time of COVID-19: Lessons from HIV for an effective, community-led response*, March 2020, available at www.unaids.org/sites/default/files/media_asset/human-rights-and-covid-19_en.pdf.

[86] F. Barré-Sinoussi et al., *supra* note 33.

[87] Furthermore, it can be assumed that if they transmitted an infection during this underlying assault, this would certainly be considered an aggravating factor upon sentencing if convicted of the assault; this is already settled law. However, to be scientifically sound and to address one manifestation of discriminatory HIV criminalization that we have also seen previously, amendments to the *Criminal Code* should also expressly state that the fact that someone who is convicted of an assault or sexual assault has been diagnosed with HIV or another STI before the offence is not relevant to sentencing unless their conduct either transmitted the infection or created a significant possibility of transmission (which is defined in the proposed amendments). Such a provision would be aimed at preventing HIV/STI-related stigma leading to discriminatory and disproportionate sentencing when an accused person's HIV/STI-positive status is irrelevant.

[88] UNAIDS, *supra* note 85; World Health Organization, *Addressing human rights as key to the COVID-19 response,* April 2020, available at www.who.int/publications/i/item/addressing-human-rights-as-key-to-the-covid-19-response; E. Mykhalovskiy et al., "Human rights, public health and COVID-19 in Canada," *Can J Public Health* 2020;111(6):975-979, https://doi.org/10.17269%2Fs41997-020-00408-0.

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