

## Women & HIV

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

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# Women and the Criminalization of HIV Non-Disclosure

*“A man will say, ‘Oh, you’re leaving me? Well, I’m actually going to have you charged with non-disclosure.’ And that’s a really difficult thing to prove — that you disclosed your HIV status — so that’s quite terrifying for women. It’s actually keeping them in relationships and keeping them sometimes in situations of violence for fear that they’re going to end up getting prosecuted.”*

— Anne-Marie DiCenso, Prisoners’ HIV/AIDS Support Action Network

*“The more and more I start seeing this criminalization issue happening, the more I realize how far gone the criminal system is, because this isn’t a criminal issue. This is a societal issue.”*

— Woman living with HIV in Toronto, Ontario

### Women, HIV and the criminal law

Since the Supreme Court of Canada’s 1998 decision in *R. v. Cuerrier*,<sup>1</sup> people living with HIV can be prosecuted for not disclosing their HIV-positive status to a sexual partner before having sex that represents a “significant risk” of HIV transmission. Whether the partner becomes infected with HIV or not is irrelevant: exposure (to a significant risk of HIV transmission) without disclosure is sufficient to convict someone of aggravated sexual assault — one of the most serious offences in the Canadian *Criminal Code*.

Criminalizing HIV non-disclosure has been criticized as the wrong approach for addressing HIV exposure because it does not contribute to HIV prevention and in fact may undermine some public health initiatives. It exacerbates HIV-related stigma and discrimination, and it can result in great injustice for those being prosecuted, often in circumstances that pose little risk of HIV transmission and demonstrate no intention to harm the partner in any way. As of this writing, at least 14 women in Canada have been charged in relation to HIV non-disclosure, but the impact on

women goes much further.

Criminalization is often described and perceived as a tool to protect heterosexual women from HIV infection and enhance women’s dignity and autonomy in relation to sexual decision-making. This perception is reinforced by the fact that the vast majority of people who have been charged to date are men who had sex with women. Moreover, it is the law of sexual assault that is used in cases of alleged non-disclosure, a body of law traditionally used to protect women from gender-based violence.

A gendered analysis of the current use of the criminal law with respect to HIV reveals that criminalization is a blunt, punitive and inflexible approach to HIV prevention that does little to protect women from HIV infection, violence, coercion or sexual objectification. Moreover, it can also have serious adverse impacts on women living with HIV, especially if facing challenges due to their socio-economic situation, discrimination, insecure immigration status, or abusive or dependant relationships.<sup>2</sup>

Different factors influence the current extensive use of the criminal law in cases of HIV non-disclosure including:

- the false perception that criminalizing HIV non-disclosure may protect women;
- poor knowledge and understanding of the science related to HIV among the general population and the judiciary;
- an exaggerated sense of the risks of transmission;
- fear and prejudice around HIV and against people living with HIV;
- the sensitive and emotional nature of the issue involving intimate sexual relationships; and
- ignorance and misunderstandings of the social context of living with HIV, including the complexity and challenges associated with disclosure.

## Facts and figures

- Since 1998, people living with HIV can be prosecuted for not disclosing their HIV-positive status to a sexual partner before having **sex that represents a “significant risk” of HIV transmission**.
- **The notion of “significant risk” has been inconsistently interpreted across the country** and some people have been charged and convicted in circumstances where, based on medical and scientific evidence, the sexual activity they engaged in, did not pose a significant risk of transmission.
- The estimated per-act risk of transmission **from an HIV-positive women to a male sexual partner** through vaginal sex is **1 transmission in every 2500 sexual encounters**.<sup>3</sup>
- When an HIV-positive women’s **viral load** (i.e., the level of the virus in the body) is **low**, the risk of HIV transmission to her male sexual partners drops to **1.3 expected transmissions in 10 000** sexual encounters.<sup>4</sup>
- When a condom is used, the per-act risk of transmission from an HIV-positive women to a male sexual partner through vaginal sex is at most **1 in 12 500** sexual encounters.<sup>5</sup>
- **More than 130 people have been charged for HIV non-disclosure in Canada (i.e., 1989 until March 2012) including 14 women living with HIV**.<sup>6</sup> At least four of these women were Aboriginal and at least two were immigrants (from Asia and Sub-Saharan Africa).
- With the exception of a handful of prosecutions related to other sexually transmitted infections (i.e., herpes, hepatitis B and hepatitis C), **prosecutions for non-disclosure have focused on HIV only**.

- 10 of the 14 women charged for HIV non-disclosure in Canada have been charged with **aggravated sexual assault** which carries a **maximum penalty of life imprisonment and sexual offender registration**.

## Protecting women?

Fourteen years after the Supreme Court decision in *Cuerrier*, there has been no evidence that the criminalization of HIV non-disclosure has any benefit in terms of HIV prevention by deterring behaviours that risk transmitting HIV. In fact, the limited data that exists on the impact of criminalization on HIV prevention, together with abundant anecdotal evidence, suggests that criminalization is not only an *ineffective* prevention tool, but that it is also *counterproductive* as it undermines prevention measures, including those targeting women.<sup>7</sup>

Effective prevention requires **full access to HIV testing, care, treatment and support**. It involves **encouraging testing and safer sex practices and making disclosure safe** for people living with HIV. It includes **empowering women to protect themselves** and others by implementing programs that take into account the **intersectionality of race, gender and other issues that make some women more at risk** for HIV. Finally, effective HIV prevention requires implementing programs that **respond to women’s specific needs and constraints**.

The criminalization of HIV non-disclosure does not respond to any of these objectives. On the contrary:

- The use of private medical and counselling records as evidence in prosecutions may hinder open discussion between patients and their health care providers or

counsellors about sexual and disclosure practices, health concerns, pregnancy-planning or sexual assault. This may prevent counsellors from providing their patients, including both HIV-positive men and women, with the support they need to change their sexual behaviours and overcome disclosure barriers.<sup>8</sup> It may also discourage people from seeking testing for sexually transmitted infections or accessing a range of services, especially for members of marginalized communities.

**“Effective HIV prevention requires implementing programs that respond to women’s specific needs and constraints.”**

- Criminalization of HIV non-disclosure may make it more difficult for people to be open about their HIV-positive status because they may fear that their HIV-positive status might be used against them, as a tool of manipulation or abuse, and possibly lead to prosecution.<sup>9</sup> They may also fear how their children, family or others close to them may be treated as a result.
- The legal regime may be seen to set up a standard which encourages people to rely on their partner’s disclosure of HIV-positive status — in other words, criminalization creates a false sense of security that safer sex is not necessary unless so notified. This message is at odds with the fact that one-quarter of HIV-positive Canadians are unaware of their infection, and a considerable proportion of HIV transmission occurs during unprotected penetrative sex between partners unaware that one of them has HIV.<sup>10</sup>
- Many women in our society are unable to make autonomous decisions about when to have sex, with whom, what type, and whether to use condoms. The reasons for this are diverse, and include a lack of sexual health information, the pressure of cultural norms, living in a situation of dependence, lack of confidence and negotiation skills, as well as violence and coercion. But the criminalization of HIV non-

disclosure will not change any of these factors or make women any more autonomous. The threat of prosecution for alleged non-disclosure may in fact be used as a tool of abuse against vulnerable women living with HIV, pushing them further away from autonomy, justice, dignity and safety

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

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

Most of the women convicted of HIV non-disclosure occupied marginalized positions which may have both made them vulnerable to HIV infection and made disclosure of their status particularly challenging. Some were survivors of violence; some were living in socio-economic insecurity; some had insecure immigration status or were members of racial or ethnic minority populations who continue to suffer from the effect of colonization, slavery and racism. For instance, one of the women who have faced prosecution in Canada was a 17 year-old girl, living on the streets, who was charged for not disclosing her HIV status before having sex with two teenage boys. It was the community centre where she had found shelter that contacted the police.<sup>11</sup> Her name, picture and HIV-positive status were published and distributed in the media prior to a publication ban being issued.<sup>12</sup>

Disclosure of one’s HIV-positive status is generally an intensely personal and complex undertaking. Moreover, stigma and discrimination against people living with HIV remain very real in our society, making it difficult for people to reveal their status. Research on women and HIV highlights the difficulty that many women experience in disclosing to men, especially men on whom they are dependent.<sup>13</sup>

Studies have suggested that the desire to be morally responsible towards their sexual partners and to protect their partners’ health often motivates HIV-positive women to disclose their status. But fear that a partner may share the information with others and concerns

## The D.C. case<sup>i</sup>

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. The end of the relationship was marked by domestic violence and she turned to the police for protection. At this point, her ex-partner complained to the police with respect to her non-disclosure prior to their first sexual encounter. He said that this first instance of sex had been unprotected while she said they had used a condom. At trial, she was convicted of aggravated assault and sexual assault and sentenced to twelve months' house arrest. In contrast, for his assaults her ex-partner received an absolute discharge.<sup>ii</sup> He was never infected with HIV.

In 2010, D.C. was acquitted by the Court of Appeal on grounds that her viral load was undetectable at the time of the relevant sexual encounter. As a result, although the trial judge had found that sex was unprotected, it did not represent a significant risk of HIV transmission triggering the duty to disclose. At this writing, an appeal is pending before the Supreme Court of Canada. Crown Prosecutors argued before the Supreme Court that people living with HIV should have a legal duty to disclose their status *regardless of the level of risk of HIV transmission* in order, notably, to fully protect a sexual partner's right to sexual autonomy. If these arguments are accepted by the Supreme Court, it would be a radical further expansion of the criminal law. This would not only contradict recent advances in the treatment of HIV and our understanding of the risks of HIV transmission, but also trivialize the law of sexual assault and undermine public health and human rights.

<sup>i</sup> *R. c. D.C.*, [2008] J.Q. 994 (QL); *R. v. D.C.*, 2010 QCCA 2289.

<sup>ii</sup> B. Myles, « De bourreau à victime; de victime à criminelle », *Le Devoir*, February 15, 2008; L. Leduc, « Condamnée pour avoir cachée sa séropositivité à son partenaire », *La Presse*, February 15, 2008.

around preserving the confidentiality of their HIV status prevent some women from disclosing.<sup>14</sup> These concerns around confidentiality are particularly real in tight-knit communities in which many immigrant women live in Canada,<sup>15</sup> as well as for women with children.

Given the gendered power dynamics in many relationships, the prevalence of violence against women in our society, and ongoing HIV-related stigma, many women worry about the reaction of their partners if they reveal that they are living with HIV. Fear of violence, abandonment or rejection can lead some women to conceal their status or delay disclosure.<sup>16</sup> A recent Canadian study reports that some HIV-positive women encounter problems with male partners after an HIV diagnosis; women “described verbal, psychological or physical abuse, which either followed or was aggravated by disclosure of their HIV status to their partners.”<sup>17</sup>

The criminalization of HIV non-disclosure increases the vulnerability of women living with HIV to abuses by exposing them to the possibility of false allegations,

investigations and even criminal trials. AIDS service organizations have reported that some clients in serodiscordant couples (that is, having one HIV-positive partner and one HIV-negative partner) have been blackmailed by vindictive partners.<sup>18</sup> By creating anxiety and fear and by reinforcing vulnerabilities, criminalization has an impact on women's well-being that goes far beyond actual prosecutions.

By its nature, the criminal law is unable to respond to the challenges and complexities of HIV disclosure for women. HIV disclosure is not always a simple, one-step process; in fact, the decision to disclose and the timing for disclosure may differ depending on the context and the nature of the sexual relationship. Moreover many women in longer-term heterosexual relationships may face gender-specific challenges related to HIV disclosure — e.g., a partner's expectations that safer sex practices will cease once a relationship becomes “serious,” expectations related to childbearing, or assumptions about women's sexuality that may vary from one community to another.

Prosecutions against women have proved emblematic of the incapacity of the criminal law to deal with such complexity and with the realities of sexuality. This has resulted in disproportionate sanctions against some women who have been charged for HIV non-disclosure. For example, in 2009, a woman pleaded guilty to aggravated sexual assault after a single sexual encounter. She had asked for a condom to be used and then disclosed her status when the condom broke. Despite the fact that she had practised safer sex, disclosed when the condom broke and that her partner was not infected with HIV, she was still sentenced to two years' house arrest, three years' probation and registered as a sex offender. She was described by the sentencing judge as "a lonely woman who feared rejection" because of her HIV status.<sup>19</sup> As a result of the prosecution, her picture and story were published in the media.

The specific use of the law of sexual assault in cases of HIV exposure is also particularly problematic. HIV non-disclosure is very different from sexual assault. In HIV non-disclosure cases, both partners have consented to the sexual activity. (If they have not, then HIV non-disclosure is not the crux of the issue.) Violence against women generally — and sexual assault in particular — remains a persistent and deplorable reality in Canada. Equating HIV non-disclosure with sexual assault trivializes the offence of sexual assault and diverts the law of sexual assault and associated resources from their original purposes. To legally invalidate consent freely given is a significant move and, in order to protect sexual autonomy, vitiating consent on the basis of non-disclosure should only be done where the risk of harm is real. HIV non-disclosure may result from a lack of power as opposed to an exercise of power or objectification of the complainant, making the aggravated sexual assault charge and sexual offender label even more disproportionate and unjust. Equating HIV non-disclosure with assault also reinforces stigma associated with HIV and results in disproportionate penal consequences for HIV-positive women charged for HIV non-disclosure.

Finally, women living with HIV continue to face significant stigma because of their status. Women are more likely than men to face judgmental attitudes or implicit accusations of promiscuity or other negatively perceived behaviour.<sup>20</sup> Prosecutions of HIV non-disclosure are often subjected to intense and sensationalist media coverage. Cases concerning women

living with HIV are no exception and can sometimes perpetuate misogynous stereotypes or prejudice against women, especially the most marginalized. For example, in 2005, a woman charged for HIV non-disclosure in Ontario was described in the media as a sexual maniac. The press described her as "a partier with a pink thong,"<sup>21</sup> or "the red-headed bomb."<sup>22</sup> Similarly, when an Aboriginal woman who used to be a sex worker was released from prison following a conviction for non-disclosure, the media provided a full description of her and the places she used to work, perpetuating the idea that women, and especially sex workers, are vectors of HIV.<sup>23</sup>

*By creating anxiety and fear and by reinforcing vulnerabilities, criminalization has an impact on women's well-being that goes far beyond actual prosecutions.*

### Recommendations for policy and law reforms

- **Limit the use of the criminal law to only the most egregious cases — e.g., intentional transmission of HIV.** In addition, resort to the criminal law only where other less-intrusive approaches (e.g., public health interventions) have been exhausted. While the criminal law may be warranted in some very limited circumstances, the prevention of HIV remains primarily a public health issue.
- **Ensure the criminal law is never used in the absence of a "significant risk" of HIV transmission.** The notion of a "significant risk" of transmission must be interpreted and applied consistently alongside the science related to HIV and policy considerations. That means people living with HIV who use a condom, practise oral sex, or have unprotected sex only when their viral load is low or undetectable should not be prosecuted nor convicted for not disclosing their status to sexual partner(s).

- **Ensure that the offence of *sexual* assault is not applied to HIV non-disclosure** as it constitutes a stigmatizing miscategorization of the offence.
- **Train judges, lawyers, prosecutors and police across Canada, in collaboration with organizations representing people living with HIV and relevant experts, about HIV transmission and the realities of living with HIV today.** This training would help to ensure that the different actors within the criminal justice system have a fuller understanding of the science related to HIV, the social context of living with HIV, specific challenges encountered by women and key groups vulnerable to HIV, and the impact of prosecutions on public health initiatives.
- **Develop prosecutorial guidelines for Crown prosecutors in every Canadian province and territory for cases of alleged non-disclosure of HIV and other sexually transmitted infections.** This will ensure that decisions to investigate and prosecute such cases are informed by a complete and accurate understanding of current medical and scientific research about HIV and take into account the social contexts of living with HIV, including gender-dynamics in intimate relationships, as well as disclosure and safe-sex practices. Prosecutorial guidelines would also help guarantee that HIV-related criminal complaints are handled in a fair and non-discriminatory manner.
- **Focus energy and resources on creating an environment where people living with HIV can disclose their HIV status without fear of rejection, violence or discrimination.**

### For more information

**On the criminal law:** Canadian HIV/AIDS Legal Network, *Criminal law and HIV*, info sheets (2011), at [www.aidslaw.ca/criminallaw](http://www.aidslaw.ca/criminallaw).

**On prosecutorial guidelines** in cases of alleged non-disclosure of HIV or another sexually transmitted infection: Ontario Working Group on Criminal Law & HIV Exposure, *Consultation on Prosecutorial Guidelines for Ontario in Cases Involving Non-Disclosure of Sexually Transmitted Infections: Community Report and Recommendations to the Attorney General of Ontario* (June 2011), available at <http://ontarioaidsnetwork.on.ca/clhe/>.

### References

- <sup>1</sup> *R. v. Cuerrier*, [1998] 2 S.C.R. 371.
- <sup>2</sup> P. Allard et al., “Criminal Prosecutions for HIV Non-Disclosure: Protecting Women from Infection or Threatening Prevention Efforts?” *Women and HIV Prevention in Canada: The Past, The Present and the Future — Implications for Research, Policy and Practice* (Canadian Scholars’ Press, forthcoming 2012); Athena Network, *10 Reasons Why Criminalization of HIV Exposure or Transmission Harms Women*, 2009.
- <sup>3</sup> M. C. Boily et al., “Heterosexual risk of HIV-1 infection per sexual act: systematic review and metaanalysis of observational studies,” *The Lancet Infectious Diseases* 9, 2 (2009): pp. 118–129.
- <sup>4</sup> S. Attia et al., “Sexual transmission of HIV according to viral load and antiretroviral therapy: systematic review and meta-analysis,” *AIDS* 23 (2009): pp. 1397–1404.
- <sup>5</sup> S. C. Weller and K. Davis-Beaty, “Condom effectiveness in reducing heterosexual HIV transmission (Review),” *Cochrane Database of Systematic Reviews* 1 (2002) No. CD003255, doi:10.1002/14651858.CD003255
- <sup>6</sup> This number is based on tracking data from the Canadian HIV/AIDS Legal Network as of March 2012 and may underestimate the total number of criminal charges against people living with HIV for non-disclosure of HIV status.
- <sup>7</sup> S. Burris et al., “Do criminal laws influence HIV risk behaviour? An empirical trial,” *Ariz. State Law Journal*, 2007; 39:467–520; K. J. Horvath et al., “Should it be illegal for HIV-positive persons to have unprotected sex without disclosure? An examination of attitudes among US men who have sex with men and the impact of state law,” *AIDS Care* 2010; 22: 1221–1228; P. O’Byrne, “Criminal Law and Public Health Practice: Are the Canadian HIV Disclosure Laws an Effective HIV Prevention Strategy?” *Sex Res & Soc Policy* 2011, DOI 10.1007/s13178-011-0053-2; C. Galletly & S.D. Pinkerton, “Conflicting Messages: How Criminal HIV Disclosure Laws Undermine Public Health Efforts to Control the Spread of HIV,” *AIDS Behav* 2006; 10: 451–461.
- <sup>8</sup> P. O’Byrne et al., “Nondisclosure and HIV Prevention: Results From an Ottawa-Based Gay Men’s Sex Survey,” *Journal of the Association of Nurses in AIDS Care* (in press); P. O’Byrne, “Criminal Law

and Public Health Practice: Are the Canadian HIV Disclosure Laws an Effective HIV Prevention Strategy?" *supra*; M. Chesney & A. Smith, "Critical Delays in HIV Testing and Care: The Potential Role of Stigma," *Am Behav Sci* 1999; 42(7): 1162–1174; E. Mykhalovskiy, "The problem of 'significant risk': Exploring the public health impact of criminalizing HIV non-disclosure," *Soc Sci & Med* 2011; 73(5): 668–675.

<sup>9</sup> E. Mykhalovskiy et al., *HIV Non-Disclosure and the Criminal Law: Establishing Policy Options for Ontario* (August 2010), section 4.

<sup>10</sup> At the end of 2008, approximately 26 percent of people living with HIV in Canada were not aware of their infection: Public Health Agency of Canada, *HIV/AIDS Epi Updates*, July 2010. According to a U.S. study, up to 70 percent of new infections are acquired from people who are undiagnosed: G. Marks et al., "Estimating sexual transmission of HIV from persons aware and unaware that they are infected with the virus in the USA," *AIDS* 2006, 20: 1447–1450. See also, H. I. Hall et al., "HIV transmissions from persons with HIV who are aware and unaware of their infection, United States," *AIDS* 26, on-line edition. DOI:10.1097/QAD013e328351f73f, 2012.

<sup>11</sup> R. Elliott, "Teen's trust was broken", *Edmonton Journal*, Opinion, August 15, 2011.

<sup>12</sup> P. Simons, "Was HIV-infected girl harmed or helped by the state?" *Calgary Herald*, February 25, 2012.

<sup>13</sup> B. Adam, "Effects of the criminalization of HIV transmission in *Cuerrier* on men reporting unprotected sex with men," *Canadian Journal of Law and Society* 2008, Volume 23, nos. 1–2, p. 149; K. Siegel et al., "Serostatus disclosure to sexual partners by HIV-infected women before and after the advent of HAART," *Women and Health*, Vol. 41(4) 2005, pp. 63–85.

<sup>14</sup> K. Siegel et al., "Serostatus disclosure to sexual partners by HIV-infected women before and after the advent of HAART," *ibid.*

<sup>15</sup> E. Tharao, N. Massaquoi and S. Telcom, *Silent voices of the HIV/AIDS epidemic: African and Caribbean Women in Toronto 2002–2004*, Women's Health in Women's Hands Community Health Centre, 2005, p. 27.

<sup>16</sup> K. Siegel et al., "Serostatus disclosure to sexual partners by HIV-infected women before and after the advent of HAART," *supra*.

<sup>17</sup> J. Gahagan and C. Ricci, *HIV/AIDS Prevention for Women in Canada: A Meta-Ethnographic Synthesis*, 2011, p. 34.

<sup>18</sup> E. Mykhalovskiy et al., *HIV Non-Disclosure and the Criminal Law: Establishing Policy Options for Ontario* (August 2010), section 4.

<sup>19</sup> *R. v. R. L. St. C.* (20 November 2009), Metro North, Ontario (OCJ), p. 23.

<sup>20</sup> J. Csete, *Vectors, Vessels and Victims. HIV/AIDS and Women's rights in Canada*, Canadian HIV/AIDS Legal Network, 2005, p. 21.

<sup>21</sup> R. Avery, "House arrest for HIV-sex with soldier; had sex with a soldier at Borden. Known as partier with a pink thong," *The Toronto Star*, December 10, 2005.

<sup>22</sup> T. McLaughlin, "No jail for HIV assault against soldiers," *The Toronto Sun*, December 10, 2005.

<sup>23</sup> S. Cooper, "HIV-positive prostitute to be freed; Vancouver police don't know yet whether they will be issuing a public warning," *The Province*, August 12, 2009.

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