

Questions and Answers



about the Campaign for Ontario Guidelines for Criminal Prosecutions of HIV Non-disclosure

Why you should sign the call for guidelines

The Background

People living with HIV have a duty under Canadian criminal law to disclose their HIV status to sex partners before having sex that carries a significant risk of HIV transmission. People living with HIV have been charged, convicted and sent to prison when they have not disclosed—even when no one became infected with HIV.

The criminal law also applies to other sexually transmitted infections. But with the exception of three cases (involving herpes, Hepatitis B and Hepatitis C), only people living with HIV have been prosecuted.

HIV is not easy to transmit. And HIV medications reduce the risk of transmission and have transformed HIV for many people into a chronic manageable illness.

The Problems

Courts have not clearly defined in law what counts as a *significant risk* of HIV transmission. This has led to an expansive use of the criminal law.

HIV-positive people don't know what the criminal law expects of them. Some have been charged and convicted when they practiced safer sex or had only oral sex. Others have been found not guilty.

The criminal justice system, including courts, is ill-equipped to address complex social problems like HIV disclosure and HIV prevention. People living with HIV in Canada face stigma and discrimination. HIV disclosure can lead to a loss of privacy, employment, housing, friends and family, and can sometimes lead to violence. Paradoxically, over-reliance on the criminal law might make HIV disclosure more difficult and might hinder HIV prevention efforts.

The criminal law and high-profile criminal prosecutions are making it more difficult to support people living with and at risk of HIV infection, many of whom are already socially marginalized. In light of the systemic discrimination Black people of African and Caribbean descent have historically faced in Ontario society and in the criminal justice system, the significant number of prosecutions against Black men is of special concern and requires further examination.

The criminal law will not stop the HIV epidemic. No one wants to be infected with HIV. An HIV diagnosis can be devastating, especially for a person who feels he or she has been deceived. People may feel anger, betrayal, grief and a desire for retribution. But criminal charges, trials and convictions are not a “cure” for HIV.

Criminalization of HIV non-disclosure in Canada has gone forward without an informed public debate, without clear rules

This document will inform you about:

- 1 the criminal law regarding HIV disclosure and sex;
- 2 the number of people charged and the outcome of the cases;
- 3 public health authorities' role in preventing HIV transmission; and
- 4 why we are calling for prosecutorial guidelines, and how they can support a more rational, just and appropriate use of the criminal law in cases of HIV non-disclosure.

about when it is appropriate to use the criminal law, and without examining the effect of criminal law on HIV care and prevention. While some situations of HIV non-disclosure may warrant prosecution, we view the current expansive use of criminal law with concern.

The Solution

Prosecutorial guidelines are an important part of the solution. Guidelines can help police and Crown Prosecutors handle HIV-related criminal complaints in a fair and non-discriminatory manner. Guidelines can help ensure that cases are informed by current medical and scientific knowledge about HIV and the social contexts of living with HIV.

What is the guideline campaign and who is involved?

While criminal prosecutions may be warranted in some situations of HIV non-disclosure, we view the current expansive use of criminal law with concern. Criminalization of HIV non-disclosure in Canada has gone forward without an informed public debate, without clear rules about when it is appropriate to use the criminal law, and without examining the effect of criminal law on HIV care and prevention.

The Guideline Campaign is being organized by the Ontario Working Group on Criminal Law and HIV Exposure. The Working Group is made up of people living with HIV and representatives of over 20 community-based AIDS organizations from across Ontario. *We are calling on Ontario's Attorney General to immediately undertake a process to develop prosecutorial guidelines for cases involving allegations of HIV non-disclosure. We are asking fair-minded Ontarians, like you, to sign our Call for Ontario Guidelines for Criminal Prosecutions of HIV Non-disclosure.*

We believe it is vital to take practical, strategic, concrete steps right now to limit the expansive use of the criminal law.

Using the criminal law to try to prevent sexual transmission of HIV

When do people have a legal duty to disclose their HIV-positive status to sex partners?

Parliament did not change the Criminal Code to include an HIV/AIDS-specific crime. Canadian courts have created the law about HIV non-disclosure. The Supreme Court of Canada decided in the *Cuerrier* case that the criminal law has a role to play in HIV prevention. It ruled that people living with

HIV have a legal duty to disclose their HIV status to sex partners before engaging in sex that carries a *significant risk* of HIV transmission. So a person who does not disclose his or her HIV status can be convicted of the Criminal Code offence of *aggravated sexual assault* even when a sex partner does not become infected with HIV.

A person living with HIV can be convicted of a crime even when a sex partner does not become infected with HIV.

But the Supreme Court did not clearly define the most important part of the legal test: What counts legally as a *significant risk*? As a result, trial court decisions have been confusing and often contradictory.

- Some courts have ruled that sexual intercourse using a condom does not present a legally *significant risk* of HIV transmission. Others have said it can be. Yet another court has said that to avoid conviction an HIV-positive person must not only wear a condom but also have an undetectable amount of HIV in their blood (also known as undetectable HIV viral load).
- One court convicted a person living with HIV for having oral sex without a condom. Another court found a person not guilty.

Courts have not clearly set out when people living with HIV have a legal duty to disclose their HIV-positive status.

Recently, one person has been convicted of *murder*, and police have laid *attempted murder* charges.

HIV non-disclosure charges and convictions in Canada and Ontario

Canada:

- At least 97 people have been charged.
- Since 2003 there has been an average of 10 cases per year.
- At least 59 people have been convicted.
- In 24 cases a person was convicted even though there was no HIV transmission alleged to have taken place.
- Almost 90% of the people convicted have gone to jail.
- White people make up about 30% of people charged. Black people make up almost 25%. Aboriginal and other people make up about 6%. We don't know the race or ethnicity of the other people charged.

Ontario:

- Leads Canada with at least 47 cases and 31 convictions.
- About 40% of the people charged have been white, 30% have been black, 7% have been aboriginal or another race or ethnicity. We don't know the race or ethnicity of the other people charged. Since 2005, 40% of men charged have been black.

Mykhalovskiy, E., Betteridge, G. "The criminalization of HIV non-disclosure in Canada: A preliminary analysis of trends and patterns." Unpublished data. 31 December 2009.



Canadians' knowledge and attitudes about HIV/AIDS

32%

of people believe incorrectly that HIV can be transmitted through kissing

29%

believe incorrectly that HIV can be transmitted through a mosquito bite

26%

would feel uncomfortable working in an office where someone developed HIV/AIDS

49%

say that they would feel uncomfortable using a restaurant drinking glass once used by a person living with HIV/AIDS

20%

do not believe in supporting the rights of people living with HIV/AIDS

HIV/AIDS Attitudinal Tracking Survey 2006:
Final Report. EKOS Research Associates Inc.,
31 March 2006.

Is the criminal law being used against people with other infectious diseases, like other sexually transmitted infections, hepatitis, TB, SARS or H1N1?

There are many other infectious diseases that pose a significant risk of serious bodily harm. The Supreme Court decided that the criminal law could be used to address not only the risk of HIV infection but also of other sexually transmitted infections. However, with the exception of three cases (involving herpes, Hepatitis B and Hepatitis C), only people living with HIV have been prosecuted.

Why is the current criminal law a problem for people living with HIV?

Some people living with HIV have expressed serious concerns about using the criminal law against people who *allegedly* have not disclosed their HIV-positive status to a sex partner.

- People living with HIV in Canada face stigma and discrimination. HIV disclosure can lead to a loss of privacy, employment, housing, friends and family, and sometimes violence. The criminal law does not recognize this reality.
- Courts have not clearly set out the circumstances under which people living with HIV have a legal duty to disclose their HIV-positive status. The law has not defined with certainty what sex acts, under what circumstances, involve a legally *significant* risk of HIV transmission.
- Vindictive and abusive spouses, lovers and exs have used the criminal law as a way to control people living with HIV. Spouses, lovers and exs have threatened to falsely accuse their HIV-positive partners of not disclosing their HIV status.
- Many court cases involving alleged HIV non-disclosure have been decided based on credibility. Yet it is difficult if not impossible for people to prove that

they disclosed their HIV-positive status, or practiced safer sex.

- Black people of African and Caribbean descent have historically faced systemic discrimination in Ontario society and the criminal justice system. Given this context, and the number of Black men who have been prosecuted for alleged HIV non-disclosure, Black men may be significantly affected by these prosecutions.
- Even when a court finds a person not guilty, his or her life may have already been ruined. A photo and private medical information may have been reported in the media. Before a trial takes place he or she has been judged "guilty" in the court of public opinion. And he or she may have spent many months in jail awaiting trial.

What concerns do people working in the field have with using the criminal law to prevent HIV?

Public health staff, community health and social service workers, HIV outreach and prevention workers, mental health professionals and human rights and civil liberties advocates are troubled by the current expansive use of the criminal law. Many people living with or at risk of getting HIV are already socially marginalized. As front-line workers, including people living with HIV, we know that the criminal law is making it more difficult to support people living with HIV. It might also be making it more difficult to prevent new HIV infections.

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We are concerned that the current criminal law and media sensationalism may make people:

less likely

to talk openly and honestly about sex, HIV and other sexually transmitted infections

reluctant

to get health care for sexually transmitted infections, including HIV, which may result in poor health and a greater risk of HIV transmission during sex

feel stigmatized

because they have HIV (or people may think they have HIV), and more likely to face discrimination

avoid

HIV testing out of a fear that they may be criminally charged

fear

public health staff and mistakenly presume that public health staff and police are working together

think

that the criminal law will protect them from being exposed to HIV

Public health's role in preventing HIV infections

What role does public health play in preventing HIV?

The Ontario Health Protection and Promotion Act imposes on public health authorities a legal duty to control the spread of certain infectious diseases, including sexually transmitted infections like HIV. It also gives public health authorities the legal powers they need to protect the public's health.

Public health:

- Provides information, counselling, testing, surveillance and partner follow-up for HIV and other sexually transmitted infections.
- Can order a person living with HIV to take action so that he or she does not put another person's health at risk (known as a section 22 order).
- Can apply to a court to enforce the section 22 order where there is evidence that the person is not following the order.

Does it make sense to use public health powers, rather than the criminal law, to prevent the spread of HIV?

If preventing HIV is our ultimate goal, in the vast majority of cases it makes sense to use public health powers rather than the criminal law. If public health authorities are adequately funded and effectively exercise the full range of their legal powers, we believe that the vast majority of situations involving HIV non-disclosure can be addressed without recourse to the criminal law.

Does it ever make sense to use the criminal law against people living with HIV who fail to disclose their HIV status to sex partners?

Public health authorities in Ontario may require more resources to effectively address difficult situations where people engage in

Expert Public Health Advice

An expert panel organized by the Federal/Provincial/Territorial Advisory Committee on HIV/AIDS concluded that, "Unwarranted punitive measures taken against relatively few difficult cases could impair the effectiveness of voluntary programs for the many routine cases through increased stigmatization or fear of discrimination; this may lead to the increased spread of HIV."

Persons who fail to disclose their HIV/AIDS status: Conclusions reached by an expert working group." *Canada Communicable Disease Report* (2005) 31:5.

behaviours that pose a risk of HIV transmission to others. Even with adequate resources, there may be rare cases when public health powers may not be effective to prevent someone from knowingly putting a sex partner at risk of HIV infection. After extensive consultation and study, the Joint United Nations Programme on HIV/AIDS (UNAIDS) recognized a limited role for the criminal law, in cases of *intentional transmission*—where a person knows his or her HIV-positive status, acts with the intention to transmit HIV, and successfully transmits HIV. UNAIDS also takes the position that the criminal law should not be applied where an HIV-positive person took reasonable measures to reduce risk of transmission, such as practising safer sex through using a condom or other precautions to avoid higher risk acts.

How can we change the situation? The Guidelines Campaign.

How are criminal laws changed?

There are two ways to change the criminal law:

- Parliament can amend the Criminal Code by passing a new law. It can take years of advocacy to convince Members of Parliament that a new law is needed. And if an issue is politically contentious or unpopular, the law might never be changed, or a new law might be worse than the old one.
- Courts, through their decisions, can interpret or re-interpret existing Criminal Code offences. In concert with lawyers, we are working on this. But it can take many years to bring about change through the courts.

But there is a way to change not the law itself, but how Ontario police and Crown Counsel use the law. The Attorney General of Ontario can issue *prosecutorial guidelines*.

What are prosecutorial guidelines?

The Attorney General issues prosecutorial guidelines to assist Crown Counsel in making decisions and to promote high standards and consistency in how criminal cases are handled. Crown Counsel, sometimes called Crown Prosecutors, are lawyers responsible for the prosecution of criminal cases.

Prosecutorial guidelines are rarely absolute and do not take decision-making responsibility away from Crown Counsel. They provide the overall philosophy, direction and priorities

of the Attorney General and set out detailed practice guidance for Crown Counsel.

Examples of criminal offences covered by Ontario prosecutorial guidelines include:

- hate crimes and discrimination
- sexual offences
- spouse/partner offences

Ontario's Crown Policy Manual is available at: www.attorneygeneral.jus.gov.on.ca/english/crim/cpm.

Do prosecutorial guidelines apply to police and courts?

No. However, Crown Counsel play a pivotal role in the criminal justice system. Decisions by Crown Counsel under prosecutorial guidelines can influence the charges that police lay, whether a case goes to court, and how a case is presented in court.

Have other provinces in Canada developed guidelines for HIV-related criminal cases?

Yes. Since 2007 a brief and very limited *Sexually Transmitted Diseases* guideline has been in place in British Columbia.¹ It applies to HIV/AIDS and other sexually transmitted infections, but only provides guidance on:

- (1) communicable disease reporting by Crown Counsel to the public health authorities; and

- (2) the process for review and approval of Crown Counsel's decision to proceed with a charge.

What about other countries?

In 2008, the Crown Prosecution Service (CPS) of England and Wales published legal guidance entitled, *Intentional Or Reckless Sexual Transmission of Infection*.² That guidance recognizes that this area of criminal law is "exceptionally complex," and sets out how prosecutors should deal with cases where there is an allegation that the accused has passed on an infection during consensual sexual activity. The guidance covers issues such as:

- appropriate use of scientific, medical and factual evidence
- safer sex
- interests of complainants and witnesses

How might Ontario prosecutorial guidelines help people living with HIV?

Guidelines might:

- Clarify the circumstances under which prosecution is appropriate and help ensure that people living with HIV will not be prosecuted where there was no real risk of HIV transmission.
- Help ensure that criminal investigations and prosecutions are informed by a

¹ www.ag.gov.bc.ca/prosecution-service/policy-man

² For more information about the England and Wales CPS guidance: www.cps.gov.uk/legal/h_to_k/intentional_or_reckless_sexual_transmission_of_infection_guidance/ www.cps.gov.uk/Publications/research/sti_one_year_on.html www.aidslaw.ca/publications/publicationsdocEN.php?ref=866

guidelines campaign



complete and accurate understanding of current medical and scientific research about HIV and the risk of HIV transmission, and take into account the social contexts of living with HIV.

- Help ensure that police and Crown Counsel handle HIV-related criminal complaints in a fair and non-discriminatory manner.
- Make clear that the law applies to all sexually transmitted infections, so that HIV is not singled out and stigmatized.

By asking for guidelines aren't we giving up on the UNAIDS position that criminal law should only be used to punish intentional transmission of HIV?

No. But under existing Canadian law the UNAIDS position is a long-term goal. The Supreme Court, in the Cuerrier case, decided that the criminal law of aggravated sexual assault should include HIV non-disclosure cases where there is a *significant risk* of HIV transmission—not just intentional HIV transmission. We believe that it is vital to take practical, strategic, concrete steps right now to limit the expansive use of the criminal law. That is why we are asking fair-minded Ontarians, like you, to sign the *Call for Ontario Guidelines for Criminal Prosecutions of HIV Non-disclosure*.

**This document is
NOT LEGAL ADVICE.**

For more information and legal advice, contact the HIV & AIDS Legal Clinic (Ontario), a Legal Aid Ontario-funded clinic.

Tel 416-340-7790
Toll-free 1-888-705-8889
TTY 416-922-2352
TTY toll-free 1-866-513-9883
www.halco.org

Where can I get more information about criminal law and HIV in Ontario?

Contact the Co-Chairs of the Ontario Working Group on Criminal Law and HIV Exposure (CLHE):

- Ryan Peck
peckr@lao.on.ca
- Anne-Marie DiCenso
annemarie@pasan.org
- www.ontarioaidsnetwork.on.ca/clhe

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