The criminalization of HIV non-disclosure: Recommendations for police

Submissions to the Ontario Association of Chiefs of Police Diversity Committee by the Canadian HIV/AIDS Legal Network and the HIV & AIDS Legal Clinic Ontario, February 2013

Preliminary remarks

The following submissions are informed by the Canadian HIV/AIDS Legal Network's (the Legal Network) and the HIV & AIDS Legal Clinic Ontario's (HALCO) extensive experience in working on the issue of the criminalization of HIV non-disclosure in Canada. We have undertaken research and analysis, and developed numerous resources on the issue of criminalization. We provide legal information and legal advice to people living with HIV and service providers, as well as support to defence lawyers. We intervened, jointly with other AIDS organizations, in several cases of HIV non-disclosure, including in the recent matters of *R. v. Mabior* and *R. v. D.C.* before the Supreme Court of Canada. Finally, we are active members of the Ontario Working Group on Criminal Law and HIV Exposure (CLHE), a group calling for the development of prosecutorial guidelines for Ontario Crown prosecutors handling matters of alleged HIV (and other sexually transmitted infection) non-disclosure (see below for additional information about CLHE).

While these submissions are informed by our experience with the issue of HIV non-disclosure, including our participation in community consultations and discussions with the Ministry of the Attorney General (MAG) in relation to the development of prosecutorial guidelines, these submissions have not been informed by a consultative process focussed on police practices or by engagement with police representatives in Ontario. We hope that these submissions will be a first meaningful step in our engagement with police on this issue. While we include concrete recommendations for police that could be addressed in a general Best Practice Manual, we recommend the development of specific guidelines in relation to HIV (and possibly other sexually transmitted infection) non-disclosure, in consultation with people living with HIV and CLHE, as well as other relevant stakeholders.

An overview of the issue

Canada has the dubious distinction of being one of the world leaders in prosecuting people living with HIV for non-disclosure of their HIV-positive status to a sexual partner.[1] As of mid-February 2013, more than 145 people have been prosecuted.[2] Ontario leads Canada, with at least 59 HIV non-disclosure prosecutions, resulting in at least 34 convictions, from 1989 to the end of February 2011.[3] Ontario prosecutions represent nearly 50 percent of the 129 prosecutions in Canada during said time period.[4] Ontario is also home to the only murder and attempted murder convictions in Canada related to HIV non-disclosure.[5] While the vast majority of non-disclosure cases are related to HIV, there have been approximately five prosecutions for non-disclosure of other sexually transmitted infections.[6]

Since the Supreme Court of Canada's *Cuerrier*[7] decision in 1998, the vast majority of prosecutions for HIV non-disclosure have been brought under assault-based offences of the *Criminal Code* (sections 265 to 268, 271, 273). The criminal offence charged in the overwhelming majority of cases has been aggravated sexual assault (section 273), one of the most serious offences in the *Criminal Code* — one which carries a maximum penalty of life imprisonment[8] and mandatory registration as a sexual offender (presumptively for life and for a minimum of 20 years).[9]

The vast majority of people who have been charged for not disclosing their status, both in Canada and in Ontario, are men. And most of them are men who had sex with women. By the end of 2010, heterosexual men accounted for 65% (74/114) of all accused in Canada and 60% (33/55) of all accused in Ontario.[10] However, in recent years, there have been an increasing number of prosecutions against gay men. For instance, in Ontario, by the end of 2010, 13 of 48 men charged allegedly did not disclose their HIV-positive status before engaging in sexual relations with men. Of these 13 men, 12 were charged within the last 5 years for which data is

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[1] UNAIDS, *Criminalisation of HIV Non-Disclosure, Exposure and Transmission: Background and Current Landscape* (2011). Prepared as background for the Expert Meeting on the Science and Law of Criminalisation of HIV Non-Disclosure, Exposure and Transmission in Geneva, Switzerland, 31 August – 2 September 2011, p. 7-8.
[2] This information is based on the tracking of cases conducted by the Canadian HIV/AIDS Legal Network.
[3] 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), p. 3.
[4] Ibid.
[5] Ibid. See also "HIV-positive Ottawa man guilty of attempted murder", CBC news, November 1st, 2012 at http://www.cbc.ca/news/canada/ottawa/story/2012/11/01/ottawa-steven-boone-guilty-verdict.html.
[6] At least three people have been charged for not disclosing herpes in Ontario (*R. v. Sherman*, 2010 ONCA 462; *R. v. J.H.* 2012 ONCJ 753; see M. Gillis., "Soldier pleads guilty to spreading herpes", *Ottawa sun*, January 11, 2013, at http://www.ottawasun.com/2013/01/11/soldier-pleads-guilty-to-spreading-herpes). One person was charged and pled guilty, in Prince Edwards Island, for not disclosing he had hepatitis B. Another person was charged, in New Brunswick, for not disclosing he had hepatitis C. He was acquitted at trial; *R. v. Jones*, [2002] N.B.J. 375 (QL).
[7] *R. v. Cuerrier*, [1998] 2 SCR 371.
[8] *Criminal Code*, RSC 1985, c. C-46, s. 273.
[9] *Criminal Code*, RSC 1985, c. C-46, ss. 490.012, 490.013 and 490.015.
[10] E. Mykhalovskiy and G. Betteridge, "Who? What? Where? When? And with What Consequences? An Analysis of Criminal Cases of HIV Non-disclosure in Canada," *Canadian Journal of Law and Society*, 27(1) (2012): 31–53, p. 40.

available, representing 42% (12/28) of men charged in Ontario from 2006 through 2010.[11] Given the high HIV prevalence among gay men in Ontario,[12] the increasing number of prosecutions is of concern.

HIV non-disclosure cases often attract sensational and intensive media coverage, and cases involving gay men are no exception, as recently illustrated by the case of a young gay man in Ottawa. People living with HIV have serious concerns regarding media coverage of HIV-related prosecutions. Many of those who have been charged have seen their picture and HIV-positive status released by the police and circulated in the media. This is terrifying for people who continue to experience pervasive stigma and discriminations based on their HIV-positive status.[13]

The law

In 1998, the Supreme Court of Canada, in *R. v. Cuerrier*, decided that people living with HIV have a legal duty to disclose their HIV-positive status to sexual partners before having sex that represents a "significant risk" of HIV transmission. The Court found that non-disclosure before sexual activity that poses a "significant risk of serious bodily harm" (i.e., significant risk of HIV transmission) constitutes "fraud" that vitiates consent, thereby transforming otherwise consensual sex into an assault, even in the absence of actual transmission. It is important to note that the Supreme Court of Canada did not impose a blanket duty to disclose — it is only where there is a "significant risk" that the legal duty to disclose would engage. The Court further suggested that if a condom was used the risk may be so reduced that it might no longer be "significant," and therefore no corresponding duty to disclose would arise. The Court did not definitively pronounce on the condom issue because the facts in *Cuerrier* related to unprotected sex. The question of a "condom defence" was left to be resolved in other cases by other courts.

The "significant risk" test adopted in *Cuerrier* by the Supreme Court of Canada resulted in a great deal of uncertainty and unfairness for people living with HIV — people were charged and convicted in some circumstances where others were acquitted.[14] In several instances, people

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[11] Ibid, p. 41.

[12] As of 2008, gay and bisexual men accounted for 57% of HIV-infected people in Ontario, see *Ontario HIV/AIDS Infection Rates*, at http://www.health.gov.on.ca/en/public/programs/hivaids/charact_epidemic.aspx.

[13] For example, 18% of Canadians would be somewhat or very uncomfortable working in an office with someone living with HIV, 23% expressed discomfort shopping at a small neighborhood grocery store owned by someone living with the illness, and 35% would be somewhat or very uncomfortable if their child was attending a school where one of the students was known to be living with HIV. *HIV and AIDS in Canada: A National Survey, Summary Report* (2012), CIHR Social Research Center in HIV Prevention at the University of Toronto and the Canadian Foundation for AIDS Research; C. Kazatchkine, "Surveys in Quebec reveal workplace discrimination against people living with HIV/AIDS," *HIV/AIDS Policy & Law Review*, 2010 14(3): 21-22.

[14] The report by E. Mykhalovskiy, G. Betteridge and D. McLay, HIV *non-disclosure and the criminal law: establishing policy options for Ontario* (2010), funded by the Ontario HIV Treatment Network, illustrates the inconsistencies in the interpretation and application of the "significant risk" test in Canada. The report is available at http://www.catie.ca/pdf/Brochures/HIV-non-disclosure-criminal-law.pdf. See also, Canadian HIV/AIDS Legal Network, *HIV non-disclosure and Canadian criminal law: antiretroviral treatment and viral load*, Briefing paper (2011), at http://www.aidslaw.ca/publications/publicationsdocEN.php?ref=1247 and Canadian HIV/AIDS Legal Network, *HIV non-disclosure and Canadian criminal law: condom use*, Briefing paper (2011), at http://www.aidslaw.ca/publications/interfaces/downloadFile.php?ref=1947.

were charged for engaging in sexual activity that posed no significant risk of HIV transmission based on scientific and medical evidence, including where a condom was used. In some cases, people were charged even where there was no risk of transmission. For example, in 2009, a gay man was charged in Ontario for performing oral sex on another man.[15] The individual had to wait for over one year until the Crown finally decided to stay the charges of aggravated sexual assault. Another gay man was charged for not disclosing his HIV-positive status before engaging in mutual masturbation with another man, although such sexual contact cannot transmit HIV.[16]

The science related to HIV is complex and evolving but there is significant scientific consensus on certain key issues: HIV is not easy to transmit during sex. A number of factors affect the risk of HIV transmission during sex. Condoms substantially reduce the risk of HIV transmission during sex. Having a low or an undetectable viral load (i.e., level of HIV, usually measured through blood testing) — usually as the result of effective treatment with antiretroviral drugs (ARVs) — dramatically reduces the risks of HIV transmission through sex to a point where the risk of transmission is negligible.[17] It is now well established that effective antiretroviral treatment has a significant preventive effect on HIV transmission. It is also well established that while there is no cure for HIV, it is certainly no longer the "death sentence" it once was. For over a decade, HIV has been medically understood as a chronic, manageable infection.[18] A person infected with HIV today who has access to appropriate medical care can expect to live a normal life, both in terms of longevity and quality of life. Unfortunately, actors in the criminal justice system have not always demonstrated an up-to-date understanding of current scientific and medical facts about HIV. This is true beyond the issue of HIV exposure in the sexual context. Some individuals have been charged in relation to biting, scratching and spitting, despite the extremely low — and in some cases, non-existent — risk of transmission.[19]

On October 5, 2012, the Supreme Court of Canada released its decisions in the two landmark cases of *R. v. Mabior* and *R. v. D.C.*, which declared the legal framework established in *Cuerrier* valid (i.e., non-disclosure would only amount to fraud vitiating consent to sex where there is a "significant risk of serious bodily harm"). However, it decided that in cases of HIV non-disclosure, the "significant risk" test established in 1998 is to be interpreted to mean a "realistic possibility of transmitting HIV." As a result, the Supreme Court found that people living with HIV have a legal duty to disclose their HIV-positive status to sexual partners before having sex

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[15] Canadian HIV/AIDS Legal Network, "AIDS organization welcomes crown decision to stay criminal charges in Hamilton HIV case. But guidelines needed to avoid unsound, unjust prosecutions," news release, Toronto, April 22 2010.

[16] *R. v. Boone*, (13 July 2011) Ottawa, Ontario (OCJ) (Preliminary hearing) unpublished.

[17] See D. McLay et al., "Scientific research on the risk of the sexual transmission of HIV infection and on HIV as a chronic manageable infection" (updated December 2011), available at http://www.aidslaw.ca/EN/lawyers-kit/documents/2a.McLay2010_s.3update-Dec2011.pdf. Originally published in E. Mykhalovskiy, G. Betteridge, and D. McLay, *HIV Non-Disclosure and the Criminal Law: Establishing Policy Options for Ontario*, *supra.*

[18] Ibid.

[19] Canadian HIV/AIDS Legal Network, *Criminal law and HIV*, Info sheet (2011). See also for instance, *R. v. Bear*, 2011 MBQB 191. In Quebec, a woman was sentenced to 10 months imprisonment, for spitting on police officers although HIV is not transmitted from saliva, see L. D. Ebacher, "Dix mois de prison pour avoir craché sur des policiers", *La presse*, February 6, 2013, at http://www.lapresse.ca/le-droit/actualites/justice-et-faits-divers/201302/06/01-4618915-dix-mois-de-prison-pour-avoir-crache-sur-des-policiers.php).

that represents a "realistic possibility" of HIV transmission. Based on this "realistic possibility" test, HIV non-disclosure can amount to aggravated sexual assault even when a condom is used or when the person living with HIV has a low or undetectable viral load. The only sex that the Supreme Court has clearly indicated does not pose a "realistic possibility" of HIV transmission, for criminal law purposes, is vaginal sex that takes place when a condom is used and when the person living with HIV has a viral load that is undetectable or low (including, at least, any viral low below 1500 copies/ml).[20]

The Supreme Court's decisions run directly counter to recommendations by UNAIDS,[21] the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health,[22] and the Global Commission on HIV and the Law,[23] all of which urge governments to limit the use of the criminal law to cases of *intentional transmission* of HIV (i.e., where there is intent to transmit as well as actual transmission). The Supreme Court judgments further fail to adequately consider the current, best available medical and scientific evidence relating to HIV and risks of transmission of HIV. As mentioned above, it is well established that condoms are effective tools to prevent HIV. It is now equally well established that having a low or undetectable viral load dramatically reduces the risks of HIV transmission. UNAIDS has urged that the criminal law should not be applied where there is no "significant risk of HIV transmission."[24] This should include circumstances where there is consistent use of condoms or where the person or has a low or undetectable viral load.[25]

Unfortunately, the Supreme Court's decision also fails to provide certainty in the law, thereby risking injustices in the application of the law. This includes the question of whether oral sex (male or female, giving or receiving) will be considered a "realistic possibility" of HIV transmission, thus exposing people who did not disclose (or cannot prove that they disclosed) their status before engaging in oral sex to imprisonment and mandatory registration as sex offenders. Prosecutions for oral sex are already underway in Ontario[26] although a man was recently acquitted by a jury in Ottawa in relation to charges for oral sex,[27] and charges were withdrawn in another case in Kitchener.[28]

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[20] *R. v. D.C.*, 2012 SCC 48; *R. v. Mabior*, 2012 SCC 47. For more information on these two cases, see Canadian HIV/AIDS Legal Network, *HIV non-disclosure and the criminal law: An analysis of two recent decisions of the Supreme Court of Canada* (2012), at http://www.aidslaw.ca/publications/interfaces/downloadFile.php?ref=2083.
[21] UNAIDS, *Policy brief: criminalization of HIV transmission*, August 2008.
[22] UN, General Assembly, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, Human Rights Council, Fourteenth session, Agenda item 3, A/HRC/14/20, April 27, 2010.
[23] Global Commission of HIV and the Law, *HIV and the Law: Risks, Rights and Health*, UNDP HIV/AIDS Group, July 2012.
[24] UNAIDS, *Policy brief: criminalization of HIV transmission*, August 2008.
[25] Ibid. See also, UNAIDS, *Expert Meeting on the Scientific, Medical, Legal and Human Rights Aspects of Criminalization of HIV Non-Disclosure, Exposure and Transmission*, meeting report, Geneva, 31 August – 2 September 2011, para. 28. Note that para. 28 also indicates that "risk of transmission should not be considered "significant", "substantial", "unjustifiable", "serious" or "likely" by the law when there is (...), no vaginal or anal penetrative sex (...)."
[26] Information provided by defence counsel.
[27] In the case of Steven Boone, see note 5.
[28] Information provided by defence counsel.

There is also serious concern that prosecutions against individuals who take precautions will have a disproportionate impact on the most marginalized and vulnerable of persons living with HIV, including those who may not have access to medications or sustained healthcare, such as racialized newcomers and First Nations persons. Similarly, there is great concern that an application of the "realistic possibility" test without great caution and restraint will have a disproportionate impact on vulnerable women living with HIV who are in abusive relationships and/or cannot safely impose condom use nor disclose their HIV status to sexual partners.

The public health impact of an overly broad use of the criminal law

While there is little evidence that criminalization helps prevent new infections, there is a substantial body of research demonstrating the beneficial impact of HIV testing and other public health initiatives in modifying behaviour that risks transmitting HIV. Promoting regular HIV testing, and hence earlier detection of infection and interventions to modify risk behaviour is particularly important, given that it is in the early weeks following initial HIV infection that a person's viral load tends to be highest and hence s/he is most infectious.[29] An estimated one-quarter of HIV-positive Canadians are unaware of their infection,[30] and a considerable proportion of HIV transmission occurs through unprotected penetrative sex when both partners are unaware that one of them has HIV.[31] Furthermore, since antiretroviral treatment dramatically reduces the risks of HIV transmission, encouraging people to be tested and seek treatment is crucial to reducing the spread of the virus — and is increasingly an area of focus in domestic and global HIV prevention efforts.[32] However, because diagnosis exposes a person to greater risk of prosecution for non-disclosure, and because over-criminalization reinforces stigma surrounding HIV, emerging data suggests that prosecutions may operate as an additional disincentive to HIV testing, especially for marginalized communities and/or communities most at risk of HIV.[33]

Moreover, criminalization undermines access to HIV testing and HIV prevention efforts by contradicting well established public health messages of shared responsibility. Rather than encouraging people to seek testing and protect their own sexual health by using condoms, the overbroad use of the criminal law reinforces and legitimizes perceptions that people living with HIV are solely responsible for HIV prevention and that unless a partner discloses his or her HIV-

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[29] E.g., P. Vernazza, et al., « Les personnes séropositives ne souffrant d'aucune autre MST et suivant un traitement antirétroviral efficace ne transmettent pas le VIH par voie sexuelle » *Bulletin des médecins suisses* 2008, 89(5): 165–169, available in English at http://www.aidslaw.ca/EN/lawyers-kit/documents/8.Vernazza2008.pdf.

[30] At the end of 2008, approximately 26% of people living with HIV in Canada were not aware of their infection: Public Health Agency of Canada, *HIV/AIDS Epi Updates*, July 2010.

[31] B. G. Brenner et al., "High rates of forward transmission events after acute/early HIV-1 infection," *Journal of Infectious Disease* 2007 195: 951–959.

[32] M-J Milloy et al., "Ending Canada's HIV trials," *CMAJ*, Feb.7, 2012 184:264; published ahead of print December 19, 2011, doi:10.1503/cmaj.111848.

[33] P. O'Byrne, "The Potential Public Health Effects of a Police Announcement About HIV Nondisclosure: A Case Scenario Analysis," *Policy, Politics & Nursing Practice* 2011; 12(1): 55-63; P. O'Byrne, A. Bryan and C. Woodyatt, "Nondisclosure Prosecutions and HIV Prevention: Results from an Ottawa-Based Gay Men's Sex Survey" *Journal of the Association of Nurses in AIDS Care*, 2013 24(1): 81-87; P. O'Byrne, "Criminal Law and Public Health Practice: Are the Canadian HIV Disclosure Laws an Effective HIV Prevention Strategy?" *Sexuality Research and Social Policy* 2012 9(1): 70-79; P. O'Byrne and M. Gagnon, "HIV Criminalization and nursing practice," *Aporia* 2012 4(2): 1-34; Canadian Association of Nurses in AIDS Care (CANAC), *Position on criminalization (*2011).

positive status, there is no need to take precaution.[34] Encouraging this false sense of security is of particular concern given the high percentage of Canadians with HIV who are unaware of their status. Prosecuting those who act responsibly by getting tested and using condoms is at odds with the public health objective of encouraging testing and condom use.

The overbroad use of the criminal law in cases of HIV non-disclosure also create barriers to access to services — and may in fact result in less disclosure, rather than more — by threatening the therapeutic relationship between patient/client and his or her physician or other health and social service provider.[35] Some may not agree to, or cooperate with, partner notification procedures initiated by public health authorities if they worry that a partner might in turn have them charged for non-disclosure, and some may avoid HIV testing, counselling, education or support services for fear of prosecution should their HIV-positive status become known. In short, an overly broad use of the criminal law undermines the public health response to HIV by creating disincentives for individuals to seek HIV testing and to talk openly with health care providers, due to the fear that, one day, their test results and/or discussions with medical professionals will end up as evidence against them in a criminal court.

Disclosure: a difficult undertaking

Most people living with HIV believe they have an ethical duty to disclose and to protect their partners from HIV,[36] but disclosure is an intensely personal and difficult undertaking. Several complex factors influence a person's ability to disclose, and the timing of disclosure. Studies have suggested that fear of violence and/or rejection affects the decision to disclose.[37] 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."[38] In Manitoba, a gay man was recently beaten to death after disclosing his HIV status to his partner.[39]

People also fear that their status may be further disclosed to others without their consent.[40] Concerns regarding confidentiality are heightened in tight-knit communities, in which many immigrants living with HIV[41] — as well as First Nations persons living with HIV — reside.

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[34] C. Dodds, "Homosexually active men's views on criminal prosecutions for HIV transmission are related to HIV prevention need," *AIDS Care* 2008 20(5): 509-514.
[35] 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; P. O'Byrne and M. Gagnon, "HIV Criminalization and nursing practice," *supra*; P. O'Byrne, A. Bryan and C. Woodyatt, *supra*.
[36] C.L. Galletly & J.B. Dickson-Gomez, "HIV seropositive status disclosure to prospective sex partners and the criminal laws that require it: Perspectives of persons living with HIV," *International Journal of STD & AIDS* 2009; 20(9): 613-618; K. Siegel et al., "Serostatus disclosure to sexual partners by HIV-infected women before and after the advent of HAART," *Women and Health* 2005; 41(4): 63-85.
[37] B. Adam, "Effects of the criminalization of HIV transmission in Cuerrier on men reporting unprotected sex with men," *Cdn. J. L. & Soc'y* 2008 23: 143-159; A.C. Gielen et al, "Women's lives after an HIV-positive diagnosis: disclosure and violence," *Maternal and Child Health Journal* 2000 4: 111-120; Galletly & Dickson-Gomez, *supra;* Siegel et al., *supra*.
[38] J. Gahagan & C. Ricci, *HIV/AIDS Prevention for Women in Canada: A Meta-Ethnographic Synthesis* (2011).
[39] D. Pritchard, "Seven years for beating of HIV-positive gay lover," *Winnipeg Sun*, September 5, 2012, at http://www.winnipegsun.com/2012/09/05/seven-years-for-beating-of-hiv-positive-gay-lover.
[40] Galletly and Dickson-Gomez, *supra*.
[41] Canadian HIV/AIDS Legal Network, *Women and the Criminalization of HIV Non-Disclosure* (2012).

Social exclusion and isolation, and the acceptance or denial of HIV-positive diagnosis, also influence a person's ability to disclose. Moreover, stigma and discrimination against people living with HIV remain pervasive, making it difficult for people to reveal their status.[42]

An overbroad use of the criminal law in cases of HIV non-disclosure makes disclosure to sexual partners even more challenging for people who may fear being subjected to false accusations of non-disclosure and/or unprotected sex if they tell their partners they have HIV.[43] This is of particular concern upon relationship breakdown and for people in abusive relationships,[44] as illustrated in the recent *D.C.* case before the Supreme Court of Canada.[45] In that case, a woman living with HIV complained to the police about domestic violence, but was then accused by her abusive ex-partner of not disclosing her status the first time they had sex. The couple had a relationship for four years after she disclosed her status and he was never infected with HIV. Her viral load at the time of their first sexual encounter was undetectable (and her evidence was that she used a condom). Although the Supreme Court of Canada ultimately acquitted the woman, she was initially found guilty of aggravated assault and sexual assault, while her abusive ex-partner was granted an absolute discharge upon conviction.

Recommendations

The Ontario Association of Chiefs of Police should engage in a dialogue with representatives of the community, including the Ontario Working Group on Criminal Law and HIV Exposure (CLHE) in order to develop:

- training for police about HIV transmission and the realities of living with HIV today; and
- guidelines for police handling matters of alleged HIV (and possibly other sexually transmitted infection) non-disclosure.

CLHE was founded in 2007 to respond to the expansive use of the criminal law as applied to HIV non-disclosure. CLHE is comprised of people living with HIV, representatives from community-based AIDS organizations from across Ontario, lawyers, and academics. Both HALCO and the Legal Network are active members of CHLE, which advocates for sound policy responses to HIV prevention and transmission — based on the best available evidence, grounded in proven HIV prevention, care, treatment and support programs, and respectful of the human rights of people living with and vulnerable to HIV.

Over the past three years, CHLE has focused its work on the development of prosecutorial guidelines for Ontario Crown prosecutors handling allegations of HIV non-disclosure. In December 2010, then Attorney General Chris Bentley agreed to develop guidelines with the

[42] *HIV and AIDS in Canada: A National Survey, Summary Report* (2012), CIHR Social Research Center in HIV Prevention at the University of Toronto and the Canadian Foundation for AIDS Research; C. Kazatchkine, "Surveys in Quebec reveal workplace discrimination against people living with HIV/AIDS," *HIV/AIDS Pol'y & L. Rev* 2010 14(3): 21-22.
[43] Galletly and Dickson-Gomez, *supra*; C. Dodds et al., "Responses to criminal prosecutions for HIV transmission among gay men with HIV in England and Wales," *Reproductive Health Matters* 2009 17: 135–145.
[44] Canadian HIV/AIDS Legal Network, *Women and the Criminalization of HIV Non-Disclosure* (2012).
[45] *R. v. D.C.*, 2012 SCC 48.

input of CLHE. In spring 2011, CLHE conducted comprehensive community consultations across the province, and in summer 2011, CLHE provided MAG with a report and recommendations based on the consultations (*Report and Recommendations*). The development of guidelines was subsequently suspended by MAG pending the release of the Supreme Court of Canada decisions in two landmark cases relating to HIV non-disclosure (*R. v. Mabior* and *R. v. D.C.*). Discussions between MAG and CLHE have resumed since the release of the Supreme Court decisions.

The development of prosecutorial and police guidelines are not unprecedented. For example**,** prosecutorial guidelines have been developed in England and Wales, and in Scotland.

England and Wales

See the Crown Prosecution Service for England and Wales (CPS), *Intentional or Reckless Transmission of Sexual Infection* and *Policy for prosecuting cases involving the intentional or reckless sexual transmission of infection* (Originally published 2008; updated 15 July 2011) at http://www.cps.gov.uk/legal/h_to_k/intentional_or_reckless_sexual_transmissionof_infection_guidance/ and http://www.cps.gov.uk/publications/prosecution/sti.html.

Scotland

See the Crown Office and Procurator Fiscal Service of Scotland, *Guidance on intentional or reckless sexual transmission, or exposure to, infection*, May 2012, at http://www.crownoffice.gov.uk/sites/default/files/Final%20Policy%201%20May%202012.pdf.

While the law in Scotland differs from England and Wales (the latter focussing on actual transmission rather than exposure and transmission), the Scotland guidance notes the following: "While recognising that culpable and reckless conduct to the danger of others is potentially criminal, in cases involving exposure to sexually transmitted infections, ***where there has been no resultant transmission of the infection, prosecution for the crime of culpable and reckless conduct would only be contemplated in exceptional circumstances***." "In cases of exposure alone, and in view of the negligible risk of transmission, there is a very strong presumption against prosecution" when "the person infected is receiving treatment and been given medical advice that there is a low risk of transmission or that there was only a negligible risk of transmission in some situations or for certain sexual acts," or "the person infected took appropriate precautions such as using a condom or other safeguards throughout the sexual activity." (See, pp. 5 & 6.)

For more information about CLHE, and to consult its *Report and Recommendations* on prosecutorial guidelines, please visit http://ontarioaidsnetwork.on.ca/clhe/.

1) Training

Training for police would assist in ensuring that police forces have a full understanding of the science related to HIV, the social context of living with HIV, specific challenges encountered by women and particular communities vulnerable to HIV, as well as the impact of HIV non-

disclosure prosecutions on public health initiatives. Training for police would also help officers identify useful referrals (e.g. HALCO, the Legal Network, AIDS service organizations, public health agencies) for both complainants and accused.

Such training should take place in collaboration with AIDS organizations, people living with HIV and relevant experts, including medical experts.

2) **Guidelines for police**

Cases of HIV non-disclosure are extremely complex and sensitive. Guidelines can help ensure that:

- complaints are handled in a fair, non-discriminatory and consistent manner across the province;
- criminal investigations are informed by current medical and scientific knowledge about HIV and the social contexts of living with HIV;
- criminal investigations do not reinforce societal prejudices, preconceptions, and irrational fears regarding HIV, or undermine public health efforts to prevent the spread of HIV;
- unnecessary investigations are not pursued; and
- the rights of people living with HIV and complainants are fully respected and preserved.

Again, guidelines for police forces are not unprecedented. An *Investigation Guidance relating to Criminal Transmission of HIV* was developed for police forces in England, Wales and Northern Ireland, and approved by the Association of Chief Police Officers (ACPO). ACPO worked with the community, including the National Aids Trust, to produce the guidance materials. For more information, see http://www.nat.org.uk/Our-thinking/Law-stigma-and-discrimination/Police-investigations.aspx. Note that in England and Wales, unlike in Canada, the law is applied to HIV transmission rather than exposure.

The development of guidance materials for police forces handling cases of HIV non-disclosure is also recommended by UNAIDS.[46]

Particular points that should be addressed and included in the guidance[47]

N.B.: This list is not exhaustive. Other issues may be identified through a process of engagement between representatives of police and relevant stakeholders including people living with HIV and CLHE. Moreover, this list focuses on HIV but some of these recommendations can also apply to cases of other sexually transmitted infection non-disclosure.

- Prosecutions relating to HIV non-disclosure to sexual partners are highly sensitive and very complex. Prosecutions should be conducted with restraint and caution. (See, *Report*

[46] UNAIDS, *Policy brief: criminalization of HIV transmission*, August 2008.
[47] These particular recommendations are notably informed by the recommendations for prosecutorial guidelines in Ontario and the guidance for police forces developed in the England, Wales and Northern Ireland.

and Recommendations pp. 6, 9–12 and 19.)

- Criminal investigations and prosecutions must be informed by complete, accurate and comprehensive understanding of the science surrounding HIV, risks of HIV transmission, and the reality of living with HIV. (See, *Report and Recommendations* pp. 4; 6–8; 16.)

- Our understanding of HIV infection and the risks of transmission during sex have evolved considerably over the last 30 years. The evolving nature of science and scientific understanding requires the criminal justice system to proceed very cautiously in such circumstances. While there is no cure for HIV, it is certainly no longer a "death sentence." For over a decade, HIV has been medically understood as a chronic, manageable infection. A person living with HIV today who has access to appropriate medical care can expect to live a normal life, both in terms of longevity and quality of life. (See, *Report and Recommendations* pp. 6–7.)

- The science related to HIV is complex and evolving, but there is significant scientific consensus on certain key issues: HIV is not easy to transmit during sex. A number of factors affect the risk of HIV transmission during sex. Condoms substantially reduce the risk of HIV transmission during sex. Having a low or an undetectable viral load — usually as the result of effective treatment with antiretroviral drugs (ARVs) — dramatically reduces the risks of HIV transmission through sex to a point where the risks of transmission are negligible. Effective antiretroviral treatment has a significant preventive impact on HIV risks of transmission. (See, *Report and Recommendations* p. 7.)

- Complainants should be advised, when warranted, of Post-Exposure Prophylaxis (PEP) treatment in cases of exposure to HIV (PEP should be taken within 72 hours of exposure). Complainants should be provided with adequate referrals for PEP treatment, HIV testing, support, counseling and information about HIV, victim support, and legal advice. (See, *Police Investigation Flowchart* guidance and *HIV Key Facts* developed in England.)

- Complainants should be informed, in a highly sensitive manner, about the consequences of making a complaint in relation to HIV non-disclosure, including privacy concerns. Police should ensure complainants have received the necessary information and support to make an informed decision.

- Police officers should be encouraged to consult with the Crown Attorney or Deputy Crown Attorney before laying charges relating to HIV non-disclosure. (See, *Report and Recommendations* pp. 7; 17; 20; 22.)

- Police should consult, at an early stage in the investigation, with an HIV expert. (See, *Report and Recommendations* pp. 7; 12; 15–18.)

- Charges for alleged HIV non-disclosure should never be laid in the absence of a "realistic possibility of HIV transmission," including in cases of hand holding, kissing, mutual

masturbation, or when a condom was used and the person living with HIV had a low or undetectable viral load as decided in *R. v. Mabior*.[48]

- Great caution and restraint should be exercised before deciding to lay charges in cases of alleged HIV non-disclosure where a condom was used *or* the person living with HIV had a low or undetectable viral load *or* is under effective antiretroviral treatment *or* in cases involving oral sex. We have known for many years that when used properly and consistently, condoms are essentially 100% effective in preventing HIV, and that oral sex is very low risk activity. We also know that having a low or undetectable viral load dramatically reduces the risks of transmission and that effective antiretroviral treatment has a significant preventive effect on HIV transmission. A recent Canadian systematic review found that the rate of HIV transmission was zero where individuals were engaged in antiretroviral therapy and had an undetectable viral load.[49] Prosecuting people who engage in oral sex or use precautions to protect their partners, or people who have a low viral load, is unfair and counterproductive in terms of HIV prevention. There is also serious concern that such prosecutions may disproportionately impact the most marginalized and vulnerable of persons living with HIV, including those who may not have access to medications or sustained health care, such as racialized newcomers and First Nations persons, or those who are in abusive relationships and/or cannot safely impose condom use nor disclose their HIV status to sexual partners.[50] (See, *Report and Recommendations* pp. 18–19.)

- When deciding to lay charges in case of alleged HIV non-disclosure, police should consider public interest factors that are specific to cases of alleged HIV non-disclosure, as described at pp. 19–20 of the *Report and Recommendations*. In particular:

    - Police should be mindful of the possible power imbalance in intimate relationships where the accused is in a subordinate position. Many people living with HIV are living in fear of false accusation by vindictive partners. Because it is very hard for a person living with HIV to prove that they did in fact disclose their HIV-positive status to their sexual partner, the criminalization of HIV non-disclosure can easily be used to blackmail those in abusive relationships; and
    - HIV/STI prevention is preeminently a public health issue. The availability and efficacy of interventions by public health should be considered as an alternative to prosecutions especially where the accused was not previously subject to public health case management.

- HIV non-disclosure prosecutions are distinct from other sexual assault prosecutions involving coercion, force and violence because the sexual activity involved is consensual but for the alleged non-disclosure. When lack of consent results from non-disclosure,

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

[49] Loutfy M. R. et al, "Systematic review of HIV transmission between heterosexual serodiscordant couples where the HIV-positive partner is fully suppressed on antiretroviral therapy", 2013, PLoS ONE 8(2): e55747. doi:10.1371/journal.pone.0055747, at http://www.plosone.org/article/info:doi/10.1371/journal.pone.0055747.

[50] See Canadian HIV/AIDS Legal Network, *HIV non-disclosure and the criminal law: An analysis of two recent decisions of the Supreme Court of Canada*, *supra.*

police should consider laying a charge that does not include a sexual element. This will permit greater flexibility — including a wider range of resolution and sentencing options - to best ensure protection of the public and fairness to the accused and complainant. (See, *Report and Recommendations* pp. 7; 12–14; 20.)

- Because of the negligible — if not inexistent — risk of transmission, HIV should not be a relevant element in cases involving spitting, scratching and biting. In particular, police should not lay charges of "aggravated" assault against people living with HIV in any cases involving spitting, biting or scratching because there is no possibility of endangerment of life.
    - Spitting: Contact with saliva alone has never been shown to result in transmission of HIV, and there is no documented case of transmission that resulted from a person living with HIV spitting on another person.
    - Scratching: There is no risk of transmission from scratching because there is no transfer of body fluids between individuals.
    - Biting: HIV transmission through biting is extremely rare. Documented cases where transmission did occur included severe trauma with extensive tissue damage and the presence of blood.[51]

- Police should consider the negative impacts of publicly disclosing a person's HIV-positive status given the high level of stigma experienced by people living with HIV. Police must ensure that the privacy of HIV status and other medical information is respected to the greatest extent possible (applies to accused and complainants). Media releases including the name, picture and/or health information of an accused are extremely prejudicial for people living with HIV and should only be published in exceptional circumstances and under strict conditions. Police should be mindful that even where HIV is not specified on a police and/or media release, members of the general public and/or people associated with the accused may easily understand that the accused is HIV-positive because of general awareness of HIV non-disclosure prosecutions in Canada. Detailed guidance should be developed to assist police in making decisions to publish a police and/or a media release, and to assist police with the content of such releases. Guidance should be developed to assist police in communicating to the media and the public about cases involving HIV non-disclosure. (See, *Report and Recommendations*, p. 7 and, as an example, the *Communication Strategy* guidance developed in England.)

- Particular care should be taken with any investigation involving young offenders, including maintaining confidentiality of HIV-positive status. (See, for instance, *Accused under 18?*, guidance developed in England.)

- Police should ensure that people living with HIV have full access to treatment and care, without interruption, while in detention. (See, *Report and Recommendations*, pp. 14–15.)

- Given the constitutional presumption in favour of bail, and the disproportionate health

[51] See the Centers for Disease Control and Prevention, *Questions and Answers - HIV risks of transmission*, at http://www.cdc.gov/hiv/resources/qa/transmission.htm.

consequences for persons in custody who are living with HIV, police should strongly consider supporting the release of persons charged with offences involving HIV non-disclosure. It should only be in rare cases that bail should be opposed. Detention can result in interruptions of HIV anti-retroviral medication, which can have serious long-term negative impacts on the health of a person living with HIV. Detention can also result in a lack of access to other facets of appropriate medical care. Finally, detention can also result in serious personal safety concerns for people living with HIV. HIV and sexual crimes are heavily stigmatized within the incarcerated population at detention centres, which may result in threats, intimidation or violence directed at an HIV-positive accused. (See, *Report and Recommendations*, pp. 14–15.)

- Guidelines should include a "HIV 101" info sheet for police. (See, *HIV Key facts* guidance developed in England, which includes key biological and clinical facts, information on PEP, HIV testing, antiretroviral medication, and discrimination issues.)

- Measures should be taken to ensure that police forces have access to properly qualified experts, receive training to support the implementation of police guidelines, and that the guidelines are regularly reviewed. (See, *Report and Recommendations*, pp. 25–26.)

Suggestions for reading

GUIDELINES

Ontario

- Mykhalovskiy E. et al., *HIV Non-Disclosure and the Criminal Law: Establishing Policy Options for Ontario* (August 2010), at http://www.catie.ca/pdf/Brochures/HIV-non-disclosure-criminal-law.pdf.

- 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), at http://ontarioaidsnetwork.on.ca/clhe/wp-content/uploads/2011/11/CHLE-guidelines-report.pdf.

United Kingdom

Guidance for Police:

- Association of Chief Police Officers, *Investigation Guidance relating to Criminal Transmission of HIV* (2010). Key guidance documents (including those cited in the submissions) and additional information, at http://www.nat.org.uk/Our-thinking/Law-stigma-and-discrimination/Police-investigations.aspx.

Guidelines for Crown Prosecutors

- Crown Prosecution Service for England and Wales (CPS), *Intentional or Reckless Transmission of Sexual Infection* (Originally published 2008; updated 15 July 2011), at http://www.cps.gov.uk/legal/h_to_k/intentional_or_reckless_sexual_transmission_of_infection_guidance/.

- Crown Prosecution Service for England and Wales (CPS), *Policy for prosecuting cases involving the intentional or reckless sexual transmission of infection* (Originally published 2008; updated 15 July 2011), at http://www.cps.gov.uk/publications/prosecution/sti.html.

- Crown Office and Procurator Fiscal Service of Scotland, *Guidance on intentional or reckless sexual transmission, or exposure to, infection*, May 2012, at http://www.crownoffice.gov.uk/sites/default/files/Final%20Policy%201%20May%202012.pdf.

SCIENCE RELATED TO HIV

- McLay D. et al., "Scientific research on the risk of the sexual transmission of HIV infection and on HIV as a chronic manageable infection," (updated December 2011) at 15-16, originally published in E. Mykhalovskiy et al., *HIV Non-Disclosure and the Criminal Law: Establishing Policy Options for Ontario* (August 2010), at http://www.aidslaw.ca/EN/lawyers-kit/documents/2a.McLay2010_s.3update-Dec2011.pdf.

- Cohen M.H. et al., "Prevention of HIV-1 Infection with Early Antiretroviral Therapy," *NEJM* 2001; 365: 493–505, at http://www.aidslaw.ca/EN/lawyers-kit/documents/1.Cohenetal2011.pdf.

- Loutfy M. R. et al, "Systematic review of HIV transmission between heterosexual serodiscordant couples where the HIV-positive partner is fully suppressed on antiretroviral therapy," 2013, PLoS ONE 8(2): e55747. doi:10.1371/journal.pone.0055747, at http://www.plosone.org/article/info:doi/10.1371/journal.pone.0055747.

HIV NON-DISCLOSURE AND THE LAW

Canada

- Canadian HIV/AIDS Legal Network, *HIV non-disclosure and the criminal law: An analysis of two recent decisions of the Supreme Court of Canada* (2012), at

http://www.aidslaw.ca/publications/publicationsdocEN.php?ref=1326.

- Canadian HIV/AIDS Legal Network, *Women and HIV — "Women and the Criminalization of HIV Non-Disclosure"* (2012), at http://www.aidslaw.ca/publications/publicationsdocEN.php?ref=1282.

International: UNAIDS

- UNAIDS, *Policy brief: criminalization of HIV transmission*, August 2008, at http://www.aidslaw.ca/EN/lawyers-kit/documents/1.UNAIDSUNDPposition.pdf. As mentioned during our meeting, UNAIDS will soon publish (spring 2013) additional guidance on this issue.

- UNAIDS, *Expert Meeting on the Scientific, Medical, Legal and Human Rights Aspects of Criminalization of HIV Non-Disclosure, Exposure and Transmission*, meeting report, Geneva, 31 August – 2 September 2011, at http://www.aidslaw.ca/EN/lawyers-kit/documents/5.UNAIDS-ExprtMtgRpt2011.pdf. This meeting is informing the development of the upcoming UNAIDS guidance. The paragraphs of particular interest with regard to the development of guidelines in Ontario are: 24, 26, 28 43(h), 48, 80(b)(c).