

**Submission to the Government of Canada Consultation on  
Reforming the Criminal Law regarding HIV Non-Disclosure**  
HIV Legal Network and HIV & AIDS Legal Clinic Ontario  
January 10<sup>th</sup>, 2023

**Experience of HIV Legal Network and HIV & AIDS Legal Clinic Ontario addressing HIV criminalization**

The HIV Legal Network is a non-governmental organization founded in 1992 (as the Canadian HIV/AIDS Legal Network). The Legal Network is the only national organization in Canada that works exclusively on legal and policy issues related to HIV and is one of the world's leading expert organizations in this field.

The HIV & AIDS Legal Clinic Ontario (HALCO), founded in 1995, is the only legal clinic in Canada devoted to the HIV community. HALCO staff provide legal advice and representation and engage in public legal education, community development, and law reform activities.

Over the course of the epidemic, there has been a growing body of evidence and concern about the considerable harms, and few benefits, arising from HIV criminalization.<sup>1</sup> Over the past 30 years, Canada has earned the unfortunate distinction of being a world leader in prosecuting people living with HIV: as of 2022, there have been at least 224 prosecutions for alleged HIV non-disclosure in Canada.<sup>2</sup> The Legal Network and HALCO have long expressed concern about the criminalization of HIV non-disclosure in Canada, tracked its evolution, and called for change.<sup>3</sup> Both organizations have extensive experience making submissions, often jointly, on this matter before courts across Canada (including, between us, intervening in appellate courts in five provinces and at the Supreme Court of Canada), as well as before federal and provincial legislative committees and UN treaty bodies.

The Legal Network and HALCO are founding members of the [Ontario Working Group on Criminal Law and HIV Exposure](#) (CLHE), which has engaged with decision-makers at the provincial level in pursuit of prosecutorial policy limiting HIV-related prosecutions. Both also worked closely with key HIV organizations in British Columbia to engage the former Attorney General and the BC Prosecution Service in updating their policy regarding HIV non-disclosure prosecutions. The Legal Network and HALCO are also founding members of the [Canadian Coalition to Reform HIV Criminalization](#) (CCHRC), a national coalition of people living with HIV, community organizations, lawyers, researchers and others, and guided by a steering committee on which a majority of members are people living with HIV. This national coalition was formed in October 2016 and supports people living with HIV, including people with lived

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<sup>1</sup> For a recent review, see: J. Csete et al., "So many harms, so little benefit: a global review of the history and harms of HIV criminalization," *Lancet HIV* 2023; 10(1): e52-61, [https://www.thelancet.com/journals/lanhiv/article/PIIS2352-3018\(22\)00248-X/fulltext](https://www.thelancet.com/journals/lanhiv/article/PIIS2352-3018(22)00248-X/fulltext).

<sup>2</sup> C. Hastings et al., *HIV Criminalization in Canada: Key Trends and Patterns (1989-2020)*, HIV Legal Network, March 8, 2022.

<sup>3</sup> Canadian HIV/AIDS Legal Network, *The Criminalization of HIV Non-Disclosure in Canada: Current Status and the Need for Change*, June 2019.

experience of HIV criminalization, to respond to prosecutions and engage in law reform advocacy, including at the federal level.

Since 2016, both organizations, independently and as members of the CCHRC, have also engaged in numerous discussions with the office of the federal Minister of Justice and Attorney General and the federal Minister of Health on the issue of HIV non-disclosure. This ultimately led, in December 2018, to the then-Minister, in her capacity as Attorney General of Canada, issuing a directive to the Director of the Public Prosecution Service of Canada (PPSC) under the *Director of Public Prosecutions Act*.<sup>4</sup> That directive was to not prosecute HIV non-disclosure cases in specific scenarios because there is no realistic possibility of transmission, and to “generally” avoid prosecutions in a number of other instances because there is “likely” no realistic possibility of transmission. This directive reflected a significant limitation on the prosecution of such cases and was welcome insofar as it went.

### **Federal law reform is necessary to properly limit HIV criminalization**

However, it has become increasingly clear that, while sound guidance for prosecutors can sometimes be helpful in avoiding prosecutions that are unsound and not in the public interest,<sup>5</sup> relying solely on prosecutorial policies and discretion is insufficient to address the ongoing harms of HIV criminalization.

We have observed over the past 30 years that prosecutors and provincial Attorneys General in some provinces have been more aggressive in pursuing prosecutions and repeatedly arguing in court proceedings for judicial interpretations that would expand HIV criminalization even further beyond the already disturbingly wide scope of the law. Furthermore, not every jurisdiction has a clear policy. There is also significant variation between those existing policies. All of this means that certain conduct by a person living with HIV accused of HIV non-disclosure attracts a greater risk of prosecution in some jurisdictions than others, raising concerns about fairness in the application of the substantive federal law across the country. The House of Commons Standing Committee on Justice and Human Rights recognized this in its 2019 report: “[e]xisting prosecutorial directives creating different standards for prosecution of HIV non-disclosure in the provinces results in inconsistent applications of the law in Canada. The Committee believes that this situation urgently needs to be rectified to ensure that all people who have committed similar acts in Canada are treated in the same manner.”<sup>6</sup>

The Legal Network and HALCO also submit that none of the current prosecutorial policies that have been officially adopted — in Ontario and British Columbia, and by the federal Public Prosecution Service of Canada (PPSC) applicable to prosecutions in the three territories — adequately limit HIV criminalization. We reiterate our long-standing position that federal and

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<sup>4</sup> Office of the Director of Public Prosecutions, Director of Public Prosecutions Act, Directive, Ottawa, November 30, 2018, *Canada Gazette, Part I*, Volume 152, Number 49: Government notices, December 8, 2018, online: <http://gazette.gc.ca/rp-pr/p1/2018/2018-12-08/html/notice-avis-eng.html>.

<sup>5</sup> E.g. see the UN Development Programme’s *Guidance for Prosecutors on HIV-related Criminal Cases* (2021).

<sup>6</sup> House of Commons Standing Committee on Justice and Human Rights, *Criminalization of Non-Disclosure of HIV Status* (June 2019), at p. 24.

provincial prosecutorial policies should go further in restraining prosecutions, based on both scientific and public policy grounds, including the protection of human rights and the promotion of public health.

Finally, even if this were done, such prosecutorial policies to guide the exercise of discretion by individual prosecutors can only go so far. They are important measures that *can* reduce instances of misuse of the criminal law in relation to HIV non-disclosure, but they cannot ultimately change the substantive law, which has evolved to date through judicial interpretation (at the instigation of prosecutors seeking convictions) of various provisions of general application of the *Criminal Code*. Ultimately, necessary changes — such as eliminating the use of sexual assault charges as a vehicle for HIV criminalization — will require legislative reforms. The CCRHC has mobilized civil society support across Canada for action by governments to address the harms of HIV criminalization, including through its original [Community Consensus Statement](#) in 2017, which first included a call in general terms for amendments to the *Criminal Code*, widely endorsed by most HIV-related organizations in the country as well as by other organizations. That original call to action is now complemented by second community consensus statement, released in July 2022. [Change the Code: Reforming Canada's Criminal Code to Limit HIV Criminalization](#) delineates key elements of the necessary reforms. As previously discussed with Justice Canada and the office of the Minister of Justice, with whom this new consensus statement has been shared, the statement was informed by a months-long community consultation by the CCRHC.<sup>7</sup> The results of the consultation confirmed very strong support among the HIV sector and related organizations for amending the *Criminal Code* to limit the scope of HIV criminalization. The widespread endorsement of the CCRHC consensus statement that followed also shows strong support for the substance of the key elements of law reform set out in *Change the Code*.

As members of the CCRHC and endorsers of both its consensus statements, the Legal Network and HALCO urge the Government of Canada to implement the legislative reforms called for by the HIV sector and allies in those statements. We take this opportunity to address specific questions posed by the Government of Canada in its current consultation regarding potential legislative reforms, and to highlight other significant points that should be reflected in such reforms.

***Question 7: Should the Criminal Code be amended to ensure that sexual assault offences, which would continue to apply in cases involving non-consensual sexual activity, cannot be used where the only issue in the case is non-disclosure of HIV status?***

**Yes. Sexual assault charges should never be used to prosecute allegations of non-disclosure, exposure, or transmission of HIV (or other sexually transmitted infections [STIs]) in the context of a consensual sexual encounter.**

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<sup>7</sup> For more background, see the [Frequently Asked Questions](#) document that accompanies the 2022 community consensus statement, on the CCRHC website.

The HIV Legal Network and HALCO echo broader community concerns about the harmful effects of using sexual assault laws as the primary vehicle to charge people for HIV non-disclosure. Such misuse of sexual assault charges harms people living with HIV in multiple ways, including through disproportionately harsh sentences, designation as sex offenders, and deportation for non-citizens. Research has shown that people living with HIV who are required to register as sex offenders after being convicted for non-disclosure experience significant and wide-ranging social and psychological harms, including barriers to housing and employment.<sup>8</sup>

Women living with HIV face an increased risk of violence compared to women generally, and HIV criminalization can further increase this risk.<sup>9</sup> According to a recent study, 86% of women living with HIV in Canada surveyed reported a history of physical, verbal, or sexual violence from partners.<sup>10</sup> In the context of intimate partner violence and social and economic inequality, the current legal framework creates an impossible choice for many women living with HIV: if she *does* disclose her HIV-positive status to her intimate partner, she may be at risk of increased violence and manipulation by her partner; however, if she *does not* disclose, she faces the risk of aggravated sexual assault charges and all its attendant consequences. Women have also faced charges of HIV non-disclosure in the context of themselves being assaulted, physically and/or sexually.<sup>11</sup> Moreover, some women living with HIV are deeply hesitant about reporting experiences of sexual violence because of the fear that they themselves will be charged with aggravated sexual assault if the accused learns that they are living with HIV.<sup>12</sup>

The use of sexual assault law in HIV non-disclosure cases also undermines the law of sexual assault as a means of addressing sexual violence.<sup>13</sup> This is especially a concern given that the criminal legal system is too often ineffective in addressing cases of forced or coercive sex. Conflating HIV non-disclosure in a consensual sexual encounter with coerced sex, through the

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<sup>8</sup> L. Michaud et al., “[Harms of Sex Offender Registries in Canada among people living with HIV](#)” (HIV Legal Network, November 2021).

<sup>9</sup> S. Patterson et al., “Impact of Canadian human immunodeficiency virus non-disclosure case law on experiences of violence from sexual partners among women living with human immunodeficiency virus in Canada: Implications for sexual rights,” *HIV and Women’s Health* 18 (2022): pp. 1–14; S. Greene et al., “How women living with HIV react and respond to learning about Canadian law that criminalises HIV non-disclosure: ‘How do you prove that you told?’” *Culture, Health & Sexuality* 21(1) (2019): pp. 1087–1102; C. H. Logie et al., “A longitudinal study of associations between HIV-related stigma, recent violence and depression among women living with HIV in a Canadian cohort study,” *Journal of the International AIDS Society* 22, 7 (2019); HIV Legal Network, [HIV Criminalization, Women, and Gender-Diverse People: At the Margins](#), May 2021.

<sup>10</sup> S. Patterson et al., “Impact of Canadian human immunodeficiency virus non-disclosure case law on experiences of violence from sexual partners among women living with human immunodeficiency virus in Canada: Implications for sexual rights,” *HIV and Women’s Health* 18 (2022): pp. 1–14.

<sup>11</sup> For one example, see *R v DC*, 2012 SCC 48 at paras 6–7. See also DC’s account (as “Diane”) in the documentary *Positive Women: Exposing Injustice* (2012), online at <https://www.positivewomenthemovie.org/>. The Legal Network is also aware, from confidential discussions with the accused and her defence lawyer, of another case in Quebec (not publicized, so as not to jeopardize plea discussions with the Crown), in which a sex worker, who was physically and sexually assaulted by a client, with a knife, was then herself charged with sexual assault based on his allegation that she did not disclose her HIV status.

<sup>12</sup> M. Schwartztruber et al., [Special Considerations for Advising Sexual Assault Complainants Living with HIV](#) (HALCO & Legal Network, December 2022).

<sup>13</sup> Women’s Legal Education and Action Fund, [A Feminist Approach to Law Reform on HIV Non-Disclosure](#), January 2019.

use of sexual assault charges, both devalues the seriousness of sexual violence and exacerbates the stigma that people living with HIV face.

It also runs contrary to the notion of a shared responsibility for HIV/STI prevention in a consensual sexual encounter. It invokes the weight of some of the harshest criminal sanctions in Canadian law to place all legal responsibility for HIV prevention on the person living with HIV, while absolving the complainant of any responsibility for practising safer sex. The law thereby also indulges the fiction that, unless a participant in a consensual sexual encounter is advised of a partner's HIV/STI-positive status (which may or may not be based on accurate information), that participant lacks all agency and autonomous decision-making when engaging in sexual activity, which inherently carries risks. The criminal law — and particularly the use of sexual assault charges — is a poor fit for addressing the complexity of disclosure and decision-making in a consensual sexual encounter, where assumptions and reasonable expectations about degrees of disclosure can and do vary widely among participants. And the more widely the criminal law casts the net, attaching criminal liability, including for sexual assault, based on exaggerated assessments of the per-act risk of transmission, the more it produces unjust results and shows itself unfit for this purpose.

***Question 8: Should the Criminal Code be amended to limit its application to HIV non-disclosure cases, in the following way:***

- ***the accused must intend to transmit HIV to be held criminally liable, in addition to knowing their HIV status and that they are at risk of infecting others; that is, those who act recklessly, but without intending to transmit HIV, should not be held criminally liable?***

**Yes, amendments should limit criminal liability in this fashion.**

As a result of the Supreme Court of Canada's decision in *R. v. Mabior*, 2012 SCC 47, convictions for HIV non-disclosure can and do occur even where a person had no intent to transmit HIV, posed little to no scientific risk of transmission, and did not actually transmit the virus. Canada's HIV non-disclosure laws have been recognized as overly broad and punitive by a wide range of stakeholders including the former federal Attorney General and Justice Canada, the House of Commons Standing Committee on Justice and Human Rights, international health agencies and human rights bodies, Canada's HIV and scientific communities, and women's rights advocates.<sup>14</sup>

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<sup>14</sup> E.g. Government of Canada, "Minister Wilson-Raybould Issues Statement on World AIDS Day," December 1, 2016; Department of Justice Canada, [Criminal Justice System's Response to Non-Disclosure of HIV](#) (2017); House of Commons Standing Committee on Justice and Human Rights, [Criminalization of Non-Disclosure of HIV Status](#) (June 2019); UN Committee on the Elimination of Discrimination against Women, *Concluding observations on the combined eighth and ninth periodic reports of Canada*, UN Doc. CEDAW/C/CAN/CO/8-9, November 18, 2016; M. Loutfy, M. Tyndall et al., "[Canadian Consensus Statement on HIV and its transmission in the context of the criminal law](#)," *Canadian Journal of Infectious Diseases & Medical Microbiology* 2014; 25(3): 135-140; Canadian Coalition to Reform HIV Criminalization, [Ending unjust HIV criminalization: Community consensus statement](#), November 2017 (updated March 2019); Women's Legal Education and Action Fund, [A Feminist Approach to Law Reform on](#)

As well, Canada’s approach to HIV non-disclosure overlooks the numerous structural factors that underpin experiences of non-disclosure — particularly as they apply to women and gender-diverse people — including gendered power dynamics (including gender-based violence), colonialism, racism, stigma and discrimination.<sup>15</sup> Available data indicates that Black men are overrepresented among those prosecuted, Indigenous women represent a significant proportion (33%) of women prosecuted, and Black and Indigenous people receive harsher sentencing following conviction for HIV non-disclosure.<sup>16</sup>

More generally, as has been recognized by Justice Canada, HIV criminalization disproportionately affects people from Black, Indigenous, and gay communities.<sup>17</sup> Since these groups face increased vulnerability to HIV, they are disproportionately represented among the population of those persons living with HIV in Canada. This means they also disproportionately live under the shadow of possible prosecution for alleged HIV non-disclosure — and in a criminal legal system that has a long history of biased treatment of these communities and that is not immune to the persistence of stigma and discrimination related to race, Indigeneity, or sexual orientation, as well as HIV stigma.

These considerations cannot be overlooked in considering the appropriate limits on criminalizing HIV, including when it comes to the question of the appropriate standard of mental culpability (*mens rea*) that should be required to trigger criminal liability. **If the criminal law is ever used, it should only be as a last resort to deal with the rare case of intentional and actual transmission, and where other interventions have proven insufficient to protect others from harm.** This is consistent with international guidance.<sup>18</sup> As the CCRHC has proposed in its earlier technical memorandum to the Minister and Department of Justice, shared in July 2022, any prosecution should require proof that: the person acted with the intent — and more specifically, the motive or desire — to transmit the infection, the person engaged in activity likely to transmit it, and it was in fact transmitted. (And in the case of a conviction, any penalty should be proportionate to the actual harm caused.)

Intent to transmit HIV cannot be presumed or established simply because a person did not disclose their HIV/STI-positive status or they engaged in certain activity (e.g. sex without a condom). There are various reasons a person might misrepresent or not disclose their status or might not be in a position to use precautions to prevent HIV. It does not mean they intended to cause harm to their partners or disregarded their partner’s health. The context and circumstances

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[HIV Non-Disclosure](#), January 2019; Canadian Coalition to Reform HIV Criminalization, [Change the code: Reforming Canada’s Criminal Code to limit HIV criminalization](#), July 2022.

<sup>15</sup> S. Patterson et al., “Impact of Canadian human immunodeficiency virus non-disclosure case law on experiences of violence from sexual partners among women living with human immunodeficiency virus in Canada: Implications for sexual rights,” *HIV and Women’s Health* 18 (2022): pp. 1–14, at 3.

<sup>16</sup> C. Hastings et al., [HIV Criminalization in Canada: Key Trends and Patterns \(1989-2020\)](#), HIV Legal Network, March 8, 2022.

<sup>17</sup> Department of Justice Canada, [Criminal Justice System’s Response to Non-Disclosure of HIV](#) (2017).

<sup>18</sup> UNAIDS, [Ending overly broad criminalisation of HIV non-disclosure, exposure and transmission: Critical scientific, medical and legal considerations](#) (2013); Global Commission on HIV and the Law, *HIV and the Law: Risks, Rights and Health* (2012) and *Supplement* (2018), online via [www.hivlawcommission.org](http://www.hivlawcommission.org); UNAIDS & UNDP, [Policy Brief: Criminalisation of HIV Transmission](#) (2008); [UNDP, Guidance for Prosecutors on HIV-related Criminal Cases](#) (2021).

in which the alleged misrepresentation or non-disclosure occurred — including the mental state of the person living with HIV and the reasons for the alleged behaviour — should be taken into consideration.

**Specifically, the stigma and harsh sanction of a criminal prosecution and conviction is not justified for non-disclosure of HIV (or other STI) in cases where someone:**

- did not understand how the virus is transmitted;
- honestly believed that the activity in question did not pose any significant possibility of transmission;
- disclosed their status to their sexual partner, or honestly believed their sexual partner was aware of their status through some other means, and voluntarily engaged in sex;
- took precautions to prevent a significant possibility of transmission, or proposed or attempted the use of such precautions but the complainant, under no duress, rejected that proposal or attempt;
- did not disclose their status, or did not take or insist on precautions, because they feared violence or other serious negative consequences would result from doing so;
- honestly believed that, although they did not disclose their status, the complainant was willingly proceeding with the activity in question because the circumstances of the encounter (e.g. a setting in which there is commonly no discussion, or expectation of disclosure, of sexually transmitted infections); or
- was forced or coerced into sex.

The current law on non-disclosure increases the potential for coercion and violence within intimate partner relationships, especially for women living with HIV. Coercive partners may weaponize non-disclosure laws by holding the threat of criminalization over a woman's head if they threaten to leave or report their partner's abuse.<sup>19</sup> A recent study revealed that 75% of women living with HIV in Canada fear disclosing their HIV status, and 18% percent reported that they experienced violence from a sexual partner upon disclosure.<sup>20</sup> As the House of Commons Standing Committee on Justice and Human Rights recognized in its 2019 report, the current law on HIV non-disclosure, including the requirement to use a condom (in addition to maintaining a low viral load), “fails to address how both cis and trans women may not be able to safely negotiate condom use with their sexual partners.”<sup>21</sup>

The factors listed above, including taking precautions to prevent or reduce the possibility of transmission of HIV, should also be factors negating any intent to cause harm and could, depending on the circumstances, also negate any recklessness or criminal negligence. So, too, could be an honest belief that a partner was taking effective precautions to prevent HIV transmission (e.g. using a condom, taking pre-exposure prophylaxis). Legislative amendments should reflect this.

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<sup>19</sup> HIV Legal Network, *HIV Criminalization, Women, and Gender-Diverse People: At the Margins*, May 2021.

<sup>20</sup> S. Patterson et al., “Impact of Canadian human immunodeficiency virus non-disclosure case law on experiences of violence from sexual partners among women living with human immunodeficiency virus in Canada: Implications for sexual rights,” *HIV and Women's Health* 18 (2022): pp. 1–14, at 3.

<sup>21</sup> House of Commons Standing Committee on Justice and Human Rights, *Criminalization of Non-Disclosure of HIV Status*, June 2019, <https://www.ourcommons.ca/DocumentViewer/en/42-1/JUST/report-28/>.

In the vast majority of cases, other interventions, including under existing public health law, may offer a better alternative, meaning there is no need to resort to the criminal law. Unlike criminal charges, these other interventions can and should be tailored to individual circumstances, should involve community organizations with expertise in HIV issues, and should be supportive rather than punitive. To be consistent with human rights, at a minimum, any such intervention must ensure due process safeguards, including access to legal support for those subject to them, and must also be based on the best available evidence, be proportionate to an objectively reasonable assessment of the possibility of transmission, and be no more intrusive or restrictive than necessary.

***Question 9: Should the Criminal Code be amended to limit its application to HIV non-disclosure cases, in the following way:***

- ***the accused must actually transmit HIV to be held criminally liable; that is, those who expose others to risk, but do not transmit HIV, should not be held criminally liable?***

**Yes. International guidance from UN bodies is that, if the criminal law is ever used, prosecutions and convictions should be reserved for cases where there has been actual transmission (with intent).<sup>22</sup>**

Under the current legal framework in Canada, prosecutions can and do occur in the absence of HIV transmission. In fact, they represent a majority of prosecutions: between 1989 to 2020, of prosecutions in which the HIV status of the complainant was known, 64% did not involve HIV transmission.<sup>23</sup> Limiting the law to apply only in cases of actual transmission would greatly mitigate the harms related to HIV criminalization. The harsh sanction and stigma of a criminal conviction should be limited to cases where there has been the actual infliction of serious harm. In its 2019 report, the House of Commons Standing Committee on Justice and Human Rights recommended enacting such a limit on the scope of the criminal law.<sup>24</sup>

***Question 10: Should the Criminal Code be amended to limit its application to HIV non-disclosure cases, in the following way:***

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<sup>22</sup> UNAIDS, [Ending overly broad criminalisation of HIV non-disclosure, exposure and transmission: Critical scientific, medical and legal considerations](#) (2013); UNAIDS & UNDP, [Policy Brief: Criminalisation of HIV Transmission](#) (2008); UNDP, [Guidance for Prosecutors on HIV-related Criminal Cases](#) (2021).

<sup>23</sup> C. Hastings et al., [HIV Criminalization in Canada: Key Trends and Patterns \(1989-2020\)](#), HIV Legal Network, March 8, 2022, at p. 11.

<sup>24</sup> House of Commons Standing Committee on Justice and Human Rights, [Criminalization of Non-Disclosure of HIV Status](#) (June 2019), Recommendation 1.

- *the criminal law does not apply where the accused took reasonable precautions to protect their sexual partners from transmission, such as anti-retroviral therapy, condom use and/or limiting sexual activity to oral sex?*

**Yes. Criminal charges related to non-disclosure, exposure, or transmission of HIV or another STI are never justified where someone engaged in activities that, according to the best available scientific evidence, posed no significant possibility of transmission.** According to the *Canadian Consensus Statement on HIV and its Transmission in the Context of Criminal Law* (2014) and the international *Expert Consensus Statement on the Science of HIV in the Context of Criminal Law* (2018),<sup>25</sup> the following activities pose negligible to no risk of HIV transmission:

- oral sex;
- anal or vaginal sex with a condom;
- anal or vaginal sex without a condom while having a low or suppressed viral load; and
- spitting and biting.

Reforms to the *Criminal Code* should explicitly preclude prosecutions in these circumstances. It is critical that the law reflect the best available scientific evidence on the transmission of HIV, to avoid unscientific, discriminatory, and unjust convictions, and to prevent exacerbating misinformation and stigma about HIV.

Some have interpreted the Supreme Court of Canada’s 2012 *Mabior* ruling as always requiring both condom use and a low viral load to negate the existence of a “realistic possibility of HIV transmission” in the case of vaginal or anal sex — and therefore preclude criminal conviction for not disclosing HIV-positive status before engaging in such acts.<sup>26</sup> However, this interpretation has been and is contested, including by other courts, and is no longer tenable given the expert scientific consensus to the contrary and subsequent developments in the law. Some courts have expressly considered and rejected this interpretation as too narrow; they note that *Mabior* cannot be understood correctly as requiring the courts to ignore the scientific evidence before them in each case, especially regarding factors such as an accused’s viral load and condom use.<sup>27</sup> The Supreme Court itself has not yet revisited the matter — but Parliament should act to properly limit the scope of the law as recommended above, rather than leave this matter to be clarified through further

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<sup>25</sup> M. Loutfy et al., Canadian consensus statement on HIV and its transmission in the context of criminal law. *Can J Infect Dis Med Microbiol* 2014 May;25(3):135-40. doi: 10.1155/2014/498459; F. Barré-Sinoussi et al., Expert consensus statement on the science of HIV in the context of criminal law. *J Int AIDS Soc* 2018 Jul;21(7):e25161. doi: 10.1002/jia2.25161. PMID: 30044059.

<sup>26</sup> There are few instances in which courts have considered criminal liability for oral sex without HIV disclosure, but two known cases have confirmed that, regardless of condom use or viral load, the risk of transmission is not significant enough to warrant prosecution or conviction: *R v Edwards*, 2001 NSSC 80; *R v Murphy*, 2013 CanLII 54139 (ON SC). This is consistent with the scientific consensus that the possibility of transmission through oral sex ranges from negligible (in very unusual and extreme circumstances) to none: Barré-Sinoussi et al., *supra*; Loutfy et al., *supra* note 25. It is also consistent with the statements in both the federal Attorney General’s directive to the PPSC and the BCPS policy in British Columbia suggesting that oral sex is unlikely to warrant prosecution.

<sup>27</sup> *R. v. Thompson*, 2018 NSCA 13; *R. v. J.T.C.*, 2013 NSPC 105.

expensive, protracted litigation in one or more individual cases, all at the expense of individual accused persons living with HIV.

Furthermore, as previously noted, the federal government and some provincial governments have developed prosecutorial policy on HIV-related cases, which move, albeit very modestly, beyond this narrower interpretation and application of *Mabior*, with respect to each of the factors of viral load and condom use. But as the Standing Committee on Justice and Human Rights recognized, the approach in prosecutorial policies to this question varies across the jurisdictions; this underscores the importance of action by Parliament.

**Prosecutions and convictions imposing criminal liability for HIV non-disclosure even in the presence of little or no risk of transmission has been observed in multiple cases, despite the Supreme Court’s ostensible articulation of a “significant risk” or “realistic possibility” standard. This ignores science, is contrary to international recommendations, and amounts to de facto and discriminatory criminalization of a person based on their HIV-positive status.**

**Furthermore, extending the criminal law in this fashion is bad for public health in various ways.** HIV criminalization contributes to misinformation about HIV and its transmission, thereby further stigmatizing people living with HIV and fostering social ostracism, discrimination, and violence.<sup>28</sup> Fear of criminal prosecution for alleged non-disclosure, exposure or transmission creates an additional disincentive to seeking HIV testing for fear of prosecution.<sup>29</sup> Criminalization undermines the relationship between providers and recipients of health services, including by compelling disclosure of confidential medical and other sensitive personal information for use in a prosecution.<sup>30</sup> Restricting potential criminal liability to cases where there is truly a significant risk of transmission is one important aspect of limiting prosecutions and the harms to people living with HIV and to public health. Unfortunately, despite professing such a restrained approach, numerous courts to date have interpreted and applied such a standard far too liberally,

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<sup>28</sup> D. Adam et al., Impacts of Criminalization on the Everyday Lives of People Living with HIV in Canada. *Sex Res Soc Policy* 2014; 11: 39–49; A. McClelland, *The Criminalization HIV in Canada: Experiences of People Living with HIV* (November 2019), [www.alexandermcClelland.ca/blog-1/2019/11/21/the-criminalization-of-hiv-in-canada-experiences-of-people-living-with-hiv](http://www.alexandermcClelland.ca/blog-1/2019/11/21/the-criminalization-of-hiv-in-canada-experiences-of-people-living-with-hiv).

<sup>29</sup> E.g. M. A. Kesler et al., Prosecution of non-disclosure of HIV status: Potential impact on HIV testing and transmission among HIV-negative men who have sex with men, *PLOS ONE* 2018; 13(2): e0193269; P. O’Byrne et al. Nondisclosure prosecutions and HIV prevention: results from an Ottawa-based gay men’s sex survey. *JANAC* 2013; 24(1): 81–7. P. O’Byrne et al., Nondisclosure prosecutions and population health outcomes: examining HIV testing, HIV diagnoses, and the attitudes of men who have sex with men following nondisclosure prosecution media releases in Ottawa, Canada. *BMC Public Health* 2013; 13: 94; P. Sah et al., HIV criminalisation exacerbates subpar diagnosis and treatment across the United States: response to the 'Association of HIV diagnosis rates and laws criminalizing HIV exposure in the United States'. *AIDS* 2017; 31(17): 2437-9; K. E. Dibble et al., Associations between HIV testing and multilevel stigmas among gay men and other men who have sex with men in nine urban centers across the United States. *BMC Health Services Research* 2022; 22(1): 1-10.

<sup>30</sup> S. Savage et al., “How could I tell them that it’s going to be okay?” The impact of HIV nondisclosure criminalisation on service provision to people living with HIV. *Journal of HIV/AIDS & Social Services* 2016; 16(3): 287-300; E. Mykhalovskiy, The problem of ‘significant risk’: Exploring the public health impact of criminalizing HIV nondisclosure. *Social Science & Medicine* 2011; 73: 668-675; C. Dodds et al., Keeping confidence: HIV and the criminal law from HIV service providers’ perspectives. *Critical Public Health* 2015; 25: 410–26; S. E. Patterson et al., The impact of criminalization of HIV non-disclosure on the healthcare engagement of women living with HIV in Canada: a comprehensive review of the evidence. *J Int AIDS Soc* 2015; 18: 20572.

criminalizing conduct in circumstances that have led repeatedly to expressions of concern by scientific experts (and others). Even when charges are ultimately not pursued or there are acquittals, police often issue press releases containing all manner of identifying information about accused persons, including photographs and health information. Such disclosures have drastic consequences, ranging from loss of family, friends, employment, and housing to violence. It falls to Parliament to correct this failing and to properly rein in the current wide scope of Canada's criminal law and the harms it is causing.

***Question 11: Should a new HIV, sexually transmitted infection (STI) or infectious disease-specific offence be enacted to address HIV non-disclosure cases, instead of using offences of general application like assault or criminal negligence?***

**No. The HIV Legal Network and HALCO do not support the introduction of a new, specific offence in the *Criminal Code* related to non-disclosure, exposure, or transmission of HIV or other communicable infections.**

One major concern is that adding a new offence will contribute significantly to further stigmatization, particularly of people living with HIV, even if the provision were worded more broadly than referring solely to HIV. Given a long and continuing history of racism in the criminal legal system, including in the context of application of the current law regarding HIV non-disclosure (noted above),<sup>31</sup> there is also good reason for concern that creating a new HIV- or STI-specific offence would also likely have a disproportionate impact on Indigenous and Black communities. Finally, the solution to the current stigmatizing, discriminatory treatment of people living with HIV in Canadian criminal law is not to expand criminalization further to people with other STIs. Rather than exacerbate the harms already seen with overly broad criminalization of HIV, the solution is to properly limit the scope of the criminal law.

***Question 12: Are there other ways that you think the Criminal Code should be amended to address HIV non-disclosure cases?***

**Yes. The *Criminal Code* should be amended so that any offence of general application can only be used to prosecute non-disclosure, exposure, or transmission where there is actual, purposeful transmission, and where no other extenuating circumstances are present (e.g. fear of violence upon disclosure).**

Furthermore, **amendments should be made — to either the *Criminal Code* or the *Immigration and Refugee Protection Act* or both — to end the discriminatory deportation of non-citizens**, who are currently treated more harshly for the same conduct. This policy and this

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<sup>31</sup> C. Hastings et al., [HIV Criminalization in Canada: Key Trends and Patterns \(1989-2020\)](#), HIV Legal Network, March 8, 2022, at p. 11.

practice are racist in their effect. A criminal conviction based on HIV/STI non-disclosure must not affect immigration status.

**There must also be an accessible way to review past convictions** under overly broad laws, so that people living with HIV previously criminalized under these harmful and stigmatizing laws no longer must live with the label of being a criminal (and a sex offender in the case of most convictions to date). The law should create an opportunity for a conviction to be expunged if it does not fit within the new limitations on the scope of criminalization. In its 2019 report on HIV criminalization, the Standing Committee on Justice and Human Rights likewise recommended the creation of “a mechanism to review the cases of all individuals who have been convicted for not disclosing their HIV status,” and who would not have been prosecuted under the new legislated limits of the law. The Committee recommended that this mechanism also apply to people who have been prosecuted but not convicted.<sup>32</sup>

In 2022, the Ontario Court of Appeal overturned aggravated assault convictions in two separate cases, *R v. JM* and *R. v. ER*.<sup>33</sup> In both cases, the person living with HIV had been convicted for not disclosing their HIV status while having an undetectable viral load. Relying on updated scientific evidence, the Court overturned the convictions on the basis that there had been no realistic possibility of transmission at the time of the non-disclosure. However, these decisions came nine years after JM’s conviction and six years after ER’s. While these decisions are an important step in righting the harms of Canada’s non-disclosure laws, it is imperative that the Government introduce an accessible and efficient way to review past convictions.

The Government of Canada has a unique opportunity to rectify the overly broad and harmful use of the criminal law against people living with HIV in Canada. **We call on the Government of Canada to take urgent action to limit HIV criminalization to ensure that the law is aligned with science and human rights principles in a manner that is supportive of HIV prevention, care, treatment, and support.**

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<sup>32</sup> House of Commons Standing Committee on Justice and Human Rights, [Criminalization of Non-Disclosure of HIV Status](#) (June 2019), at p. 26.

<sup>33</sup> *R. v. JM*, 2022 ONCA 615; *R. v. ER*, 2022 ONCA 694.