



HOUSE OF COMMONS  
CHAMBRE DES COMMUNES  
CANADA

# **THE CRIMINALIZATION OF HIV NON-DISCLOSURE IN CANADA**

**Report of the Standing Committee on Justice and  
Human Rights**

**Anthony Housefather, Chair**

**JUNE 2019  
42<sup>nd</sup> PARLIAMENT, 1<sup>st</sup> SESSION**

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## **NOTICE TO READER**

### **Reports from committee presented to the House of Commons**

Presenting a report to the House is the way a committee makes public its findings and recommendations on a particular topic. Substantive reports on a subject-matter study usually contain a synopsis of the testimony heard, the recommendations made by the committee, as well as the reasons for those recommendations.

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# **THE STANDING COMMITTEE ON JUSTICE AND HUMAN RIGHTS**

has the honour to present its

## **TWENTY-EIGHTH REPORT**

Pursuant to its mandate under Standing Order 108(2), the Committee has studied the criminalization of non-disclosure of HIV status and has agreed to report the following:





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# LIST OF RECOMMENDATIONS

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*As a result of their deliberations committees may make recommendations which they include in their reports for the consideration of the House of Commons or the Government. Recommendations related to this study are listed below.*

## **Recommendation 1**

**That the Government of Canada:**

- **create a specific offence in the *Criminal Code* related to the non-disclosure of an infectious disease (including HIV) when there is actual transmission, and that prosecutions related to such transmission only be dealt under that offence;**
- **draft the contemplated legislation in consultation with all relevant stakeholders, including the HIV/AIDS community, to circumscribe the use of criminal law to deal with HIV non-disclosure and make sure HIV is treated as a public health issue like any other infectious disease. This process should also determine the appropriate mental element (*mens rea*) for the new offence..... 24**

## **Recommendation 2**

**That the Minister of Justice and Attorney General of Canada immediately establish a federal-provincial working group to develop a common prosecutorial directive to be in effect across Canada**

- **to end criminal prosecutions of HIV non-disclosure, except in cases where there is actual transmission of the virus;**

- to ensure that the factors to be respected for criminal prosecutions of HIV non-disclosure reflect the most recent medical science regarding HIV and its modes of transmission and only applies when there is actual transmission having regard to the realistic possibility of transmission. At this point of time, HIV non-disclosure should never be prosecuted if (1) the infected individual has an undetectable viral load (less than 200 copies per millilitre of blood); (2) condoms are used; (3) the infected individual's partner is on PrEP or (4) the type of sexual act (such as oral sex) is one where there is a negligible risk of transmission..... 25

**Recommendation 3**

That the Minister of Justice and Attorney General of Canada immediately establish 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 standards set out in the recommendations of the Committee. The review mechanism should also encompass the cases of individuals who have been prosecuted, but not convicted. .... 26

**Recommendation 4**

To achieve our public health objectives regarding HIV, that the Government of Canada, in partnership with the provinces and territories, work to make anonymous testing easily accessible and enhance access to different forms of testing, such as self-testing and on-the-spot testing, across the country..... 27



# THE CRIMINALIZATION OF HIV NON-DISCLOSURE IN CANADA

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## CHAPTER 1—CONTEXT OF THE STUDY

Following the former Minister of Justice’s commitment, in December 2016, to examine the criminal justice system’s response to human immunodeficiency virus (HIV) non-disclosure with provincial and territorial counterparts, affected communities and medical professionals, members of the House of Commons Standing Committee on Justice and Human Rights (the Committee) unanimously agreed in 2017 to “conduct a study, at the earliest opportunity, into the criminalization of non-disclosure of HIV status” and to “report [the Committee’s] findings to the House [of Commons].”<sup>1</sup>

In April and May 2019, the Committee held four meetings and heard evidence from a vast array of witnesses, which included scientists, researchers, legal and public health experts as well as people living with HIV.<sup>2</sup>

The witnesses who appeared as part of our study were in complete agreement: the application of criminal law in Canada to deal with HIV non-disclosure is overly broad and punitive. They also agreed that the criminalization of people living with HIV in Canada undermines the public health objectives of encouraging all those at risk to be tested for HIV and then to receive treatment. Both of those objectives are important to reach the goal of ending the HIV epidemic.<sup>3</sup> This report summarizes the main statements made during the study and presents the Committee’s proposals and recommendations for reform.

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- 1 House of Commons, Standing Committee on Justice and Human Rights (JUST), *Minutes*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 8 June 2017.
  - 2 A list of witnesses who appeared before the Committee is set out in Appendix A and a list of briefs submitted to the Committee, in Appendix B of this report.
  - 3 See, for example, JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 April 2019 (Martin Bilodeau, National Coordinator, Positive Leadership Development Institute Program, Ontario AIDS Network; William Flanagan, Dean, Faculty of Law, Queen’s University, As an Individual); JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 7 May 2019 (Robin Montgomery, Executive Director, Interagency Coalition on AIDS and Development); JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 14 May 2019 (Duane Morrisseau-Beck, President and Chair, Ontario Aboriginal HIV/AIDS Strategy).



## CHAPTER 2—THE LEGAL FRAMEWORK

The *Criminal Code* of Canada does not contain a specific offence making it illegal not to disclose one's HIV-positive status prior to engaging in sexual activity. However, the Supreme Court of Canada has established that people living with HIV have the legal duty to disclose their status before engaging in a sexual activity that poses a “realistic possibility of transmission.”<sup>4</sup> The rationale being that a sexual partner must be given the opportunity to choose whether or not to assume the risk. This legal standard is to be met based on the most recent medical science on HIV transmission.<sup>5</sup>

Intent to harm a sexual partner is not required for a conviction under the *Criminal Code*, nor is actual transmission of the virus. Indeed, in few documented cases in Canada, did HIV transmission actually occur.<sup>6</sup> Also, as noted by several witnesses, intentional HIV transmission is very rare and there have been very few cases in Canada and abroad.<sup>7</sup> As explained by Richard Elliott from the Canadian HIV/AIDS Legal Network,

this notion of a person living with HIV intentionally trying to infect other people is actually something of an urban myth. There may be the occasional isolated case where such a thing happens, but it is not by any means the predominant set of circumstances captured by the broad scope of the criminal law as it currently stands.<sup>8</sup>

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4 As defined by the Supreme Court of Canada in *R. v. Mabior* [2012] 2 SCR 584 and *R. v. D.C.* [2012] 2 SCR 626, the legal obligation to disclose is triggered by any sexual activity that poses “a realistic possibility of HIV transmission”. This decision was meant to clarify the 1998 decision of the Supreme Court in *R. v. Currier* [1998] 2 SCR 371, which established a duty to disclose prior to engaging in a sexual activity that poses a “significant risk of serious bodily harm”. In *Mabior* the Supreme Court of Canada concluded that such a risk exists when there is a “realistic possibility of transmission.”

5 As explained in the summary of the *Mabior* decision: “The evidence adduced in this case leads to the conclusion that, as a general matter, a realistic possibility of transmission of HIV is negated if: (i) the accused’s viral load at the time of sexual relations was low and (ii) condom protection was used. This general proposition does not preclude the common law from adapting to future advances in treatment and to circumstances where risk factors other than those considered in this case are at play.” *R. v. Mabior* [2012] 2 SCR 584.

6 JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 April 2019 (Richard Elliott, Executive Director, Canadian HIV/AIDS Legal Network); JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 30 April 2019 (Maureen Gans, Senior Director, Client Services, Parkdale Queen West Community Health Centre).

7 For example, Shannon Ryan of the Black Coalition for AIDS Prevention noted the following: “I also want to say that intentional transmission is incredibly rare, in my experience. It's not something we see much of, at all. Only in the rarest of cases do I believe this happens.” JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 April 2019 (Richard Elliott, Executive Director, Canadian HIV/AIDS Legal Network). JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 14 May 2019 (Shannon Ryan, Executive Director, Black Coalition for AIDS Prevention; Haran Vijayanathan, Executive Director, Alliance for South Asian AIDS Prevention).

8 JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 April 2019 (Richard Elliott, Executive Director, Canadian HIV/AIDS Legal Network).

Under the current legal framework, people who fail to disclose their HIV status to their sexual partner prior to engaging in a sexual activity that poses a “realistic possibility of transmission” can be charged and prosecuted under several *Criminal Code* provisions of general application. As explained by Professor Kyle Kirkup from the Faculty of Law at the University of Ottawa, since the 1980s people have been prosecuted under criminal provisions “varying from common nuisance to administering a noxious substance to criminal negligence causing bodily harm to aggravated assault to aggravated sexual assault and even, in extreme cases, to murder.”<sup>9</sup> Nevertheless, in light of the evidence collected during the study, the most common charge used in Canada to deal with such cases has been aggravated sexual assault.<sup>10</sup>

A person living with HIV convicted of aggravated sexual assault for not disclosing his or her status can therefore receive up to a life sentence of imprisonment and be required to register as a sex offender in the *National Sex Offender Registry*.<sup>11</sup>

## 2.1 The Application of Criminal Law to HIV Non-disclosure

### 2.1.1 Understanding the Risk of HIV Transmission

As established by the Supreme Court of Canada in 2012, the legal obligation to disclose one’s HIV positive status is triggered by engaging in a sexual activity that poses “a realistic possibility of HIV transmission”. This is a concept that is not easy to apply in the criminal justice context:

Risk of HIV transmission is a notoriously difficult concept to apply, engaging questions about which sexual activities were performed, whether a condom was used, whether

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9 JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 April 2019 (Kyle Kirkup, Assistant Professor, Faculty of Law, University of Ottawa, As an Individual).

10 *Criminal Code*, s. 273. JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 April 2019 (Richard Elliott, Executive Director, Canadian HIV/AIDS Legal Network); JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 30 April 2019 (Ryan Peck, Executive Director and Lawyer, HIV & AIDS Legal Clinic Ontario). See also Department of Justice Canada, *Criminal Justice System’s Response to Non-Disclosure of HIV*, 1 December 2017.

11 Convicted offenders in Ontario must also register in the Ontario registry. For more information about sex offender registries in the context of the criminal law and HIV non-disclosure, see Canadian HIV/AIDS Legal Network, *Sex Offender Registries: Fact Sheet*, April 2017, document provided to the Committee. In fact, as noted by Richard Elliott, you could be designated as a sex offender for life for not disclosing your HIV status before engaging in consensual sex in Canada, with no possibility to apply for a removal before at least 20 years. JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 April 2019 (Richard Elliott, Executive Director, Canadian HIV/AIDS Legal Network).



the person living with HIV had a low viral load, whether either partner had any other sexually transmitted infections, and a constellation of other factors.<sup>12</sup>

The Committee was told that, in practice, the actual risk of HIV transmission is often misunderstood by the various actors in the justice system. As explained by Richard Elliott from the Canadian HIV/AIDS Legal Network, “[t]he criminal justice system often misappreciates or misunderstands the science that we have about HIV and the risks associated with various sexual activity under various sexual acts.”<sup>13</sup>

Repeatedly, witnesses reminded the Committee that the current legislative framework does not align with scientific evidence regarding HIV transmission. For example, in its brief, the Canadian HIV/AIDS Legal Network, noted that the 2012 Supreme Court of Canada decision in *R. v. Mabior*

appeared to leave people open to prosecutions in a range of circumstances, including when a condom was used, or their viral load was low or undetectable. As such, the decision was widely criticized for being unfair and at odds with scientific evidence about the risks of HIV transmission; it also prompted leading Canadian scientists to speak out against the over-reach of the criminal law.<sup>14</sup>

Since the Supreme Court’s 2012 decisions in *R. v. Mabior* and *R. v. D.C.*, people living with HIV have been charged and prosecuted for not disclosing their status prior to engaging in sexual activities when “there was effectively no risk of transmission.”<sup>15</sup> The evidence submitted to the Committee indicates that at least 10 of the 35 HIV non-disclosure cases identified since the 2012 Supreme Court decisions involved the prosecution of a person living with HIV with a low or undetectable viral load.<sup>16</sup>

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12 JUST, [Evidence](#), 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 April 2019 (Kyle Kirkup, Assistant Professor, Faculty of Law, University of Ottawa, As an Individual).

13 JUST, [Evidence](#), 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 April 2019 (Richard Elliott, Executive Director, Canadian HIV/AIDS Legal Network).

14 JUST, Brief submitted by the Canadian Coalition to Reform HIV Criminalization, [Ending HIV criminalization in Canada](#), 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 30 April 2019, p. 2.

15 See, for example, JUST, [Evidence](#), 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 April 2019 (Richard Elliott, Executive Director, Canadian HIV/AIDS Legal Network).

16 HIV-AIDS Legal Aid Network, [HIV Criminalization in Canada: Key Trends and Patterns](#), 17 March 2017. See also the testimony of Professor Eric Mykhalovskiy and Ryan Peck. JUST, [Evidence](#), 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 14 May 2019 (Eric Mykhalovskiy, Professor, York University, As an Individual); JUST, [Evidence](#), 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 30 April 2019 (Ryan Peck, Executive Director and Lawyer, HIV & AIDS Legal Clinic Ontario).



### 2.1.2 Prosecutorial Directives

In December 2018, the former Attorney General of Canada issued a federal directive on HIV non-disclosure to guide federal prosecutors dealing with these cases.<sup>17</sup> Overall, the release of the federal directive was perceived as a good step forward by the witnesses appearing before the Committee.<sup>18</sup> However, several witnesses recognized its limitations, particularly since it applies only to prosecutions in Nunavut, the Northwest Territories and the Yukon, as they fall under federal jurisdiction.<sup>19</sup> This is an important limitation considering that most HIV-related prosecutions occur in the provinces, therefore falling under provincial jurisdiction.<sup>20</sup> At present, “only two provinces, Ontario and British Columbia, have a formal policy that limits prosecuting alleged HIV non-disclosure.”<sup>21</sup> In both cases, the provincial directives are different than the federal one. This situation contributes to the inconsistencies in the application of the law in Canada, an issue that was raised by several witnesses throughout the study. Therefore, people who have committed similar acts in different parts of the country may be treated differently, as illustrated, for example, by Léa Pelletier-Marcotte from the Coalition des organismes communautaires Québécois de lutte contre le sida:

In the current context, a person could wind up in prison for engaging in sex without using a condom in Longueuil but be shielded from criminal charges had they done the same in Whitehorse.<sup>22</sup>

In its brief, the Canadian HIV/AIDS Legal Network provides other examples of inconsistencies in the application of the law to HIV non-disclosure cases:

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- 17 The federal directive regarding prosecutions of HIV non-disclosure is reproduced in Appendix C.
- 18 See, for example, JUST, [Evidence](#), 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 April 2019 (Martin Bilodeau, National Coordinator, Positive Leadership Development Institute Program, Ontario AIDS Network; Kyle Kirkup, Assistant Professor, Faculty of Law, University of Ottawa, As an Individual; William Flanagan, Dean, Faculty of Law, Queen’s University, As an Individual); JUST, [Evidence](#), 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 7 May 2019 (Andrew Brett, Director, Communications, CATIE); JUST, [Evidence](#), 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 14 May 2019 (Jennifer Klinck, Chair, Legal Issues Committee, Egale Human Rights Canada); JUST, Brief submitted by the Women’s Legal Education and Action Fund, [A Feminist Approach to Law Reform on Non-disclosure of HIV Status](#), 4 May 2019.
- 19 Ibid.
- 20 JUST, [Evidence](#), 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 7 May 2019 (Khaled Salam, Executive Director, AIDS Committee of Ottawa).
- 21 JUST, Brief submitted by the HIV/AIDS Legal Network, [Ending HIV Criminalization in Canada](#), 30 April 2019.
- 22 JUST, [Evidence](#), 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 April 2019 (Léa Pelletier-Marcotte, Lawyer and Coordinator, Programme Droits de la personne et VIH/sida, Coalition des organismes communautaires québécois de lutte contre le sida).



There are conflicting court decisions on this issue. In Nova Scotia, courts found that, regardless of the HIV-positive partner’s viral load, sex with a condom does not pose a “realistic possibility of HIV transmission.” But in Ontario, a young man (who did not have a low viral load) was convicted for not disclosing his HIV-positive status before sex despite having used a condom.<sup>23</sup>

Based on the evidence collected throughout the study, there is no doubt that the application of the federal directive in all provinces could help to prevent unjust prosecutions, since its content is more consistent with current scientific evidence about HIV transmission.

However, the vast majority of witnesses thought that the federal directive does not go far enough. Jennifer Klinck from Egale Canada Human Rights Trust specified that “in terms of its content, the federal directive does not fully reflect the principles in the Community Consensus Statement [on Ending Unjust HIV Criminalization].”<sup>24</sup> According to that statement, “which has been endorsed by over 170 Canadian civil society organizations,”<sup>25</sup> prosecutions should be limited to intentional and actual HIV transmission. Also, as explained by Martin Bilodeau from the Ontario Aids Network, the federal directive does not completely rule out the possibility of prosecution when the sexual partner was receiving pre-exposure prophylaxis [PrEP], or when a condom was used.<sup>26</sup>

Overall, most witnesses held that “[e]ven if every province were to adopt a directive on how to interpret the realistic possibility of transmission of HIV [such as the federal directive], only legislative reforms would ensure that the criminal law applied only to cases of intentional HIV transmission.”<sup>27</sup>

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23 JUST, Brief submitted by the HIV/AIDS Legal Network, [Ending HIV Criminalization in Canada](#), 30 April 2019.

24 JUST, [Evidence](#), 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 14 May 2019 (Jennifer Klinck, Chair, Legal Issues Committee, Egale Canada Human Rights Trust). Canadian Coalition to Reform HIV Criminalization, [The Community Consensus Statement on Ending Unjust HIV Criminalization](#), November 2017.

25 JUST, [Evidence](#), 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 7 May 2019 (Kristopher Wells, Associate Professor, MacEwan University, As an Individual).

26 JUST, [Evidence](#), 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 April 2019 (Martin Bilodeau, National Coordinator, Positive Leadership Development Institute Program, Ontario AIDS Network).

27 JUST, [Evidence](#), 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 April 2019 (Léa Pelletier-Marcotte, Lawyer and Coordinator, Programme Droits de la personne et VIH/sida, Coalition des organismes communautaires québécois de lutte contre le sida). Similar comments were made by several witnesses during the study, including JUST, [Evidence](#), 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 April 2019 (Martin Bilodeau, National Coordinator, Positive Leadership Development Institute Program, Ontario AIDS Network).

### 2.1.3 Uncertainty Regarding the Legal Obligation to Disclose HIV Status

The inconsistent applications of the criminal law across the country and the absence of clear guidelines for prosecuting these cases surely contribute to a general sense of confusion regarding the duty to disclose, particularly for those living with HIV. People do not know exactly when they are legally required to disclose their HIV status or “what kind of behaviours are going to land them in jail.”<sup>28</sup>

In light of the grave consequences arising from the application of the law to HIV non-disclosure cases, people living with HIV “should be able to have some reasonable expectation of outcome, to know the law as it applies to them and to have some certainty as to how the law will be applied.”<sup>29</sup>

Alexander McClelland, who has conducted many interviews with people who have been accused or convicted of not disclosing their HIV status to their sexual partners for his doctoral thesis, confirmed that most of the people he interviewed were uncertain of their legal obligations.<sup>30</sup>

One young man I spoke with, after recently testing HIV-positive and going on HIV medications, was criminally charged within six months of finding out his HIV status. He was rendered virally undetectable and understood that, if he took his medications, he wouldn't transmit. He thought he was acting in a reasonable manner and that he wouldn't be criminally charged. His doctor told him he was uninfected, that he could have sex without condoms, and that he was not able to transmit the virus.<sup>31</sup>

### 2.1.4 Peculiar and Discriminatory Treatment

Another significant issue related to the current criminalization of HIV non-disclosure is the peculiar and discriminatory treatment reserved to people with HIV by the criminal

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28 JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 30 April 2019 (Ryan Peck, Executive Director and Lawyer, HIV & AIDS Legal Clinic Ontario). See also, JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 April 2019 (Kyle Kirkup, Assistant Professor, Faculty of Law, University of Ottawa, As an Individual; Léa Pelletier-Marcotte, Lawyer and Coordinator, Programme Droits de la personne et VIH/sida, Coalition des organismes communautaires québécois de lutte contre le sida; Valerie Nicholson, Member, Canadian Coalition to Reform HIV Criminalization).

29 JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 April 2019 (Léa Pelletier-Marcotte, Lawyer and Coordinator, Programme Droits de la personne et VIH/sida, Coalition des organismes communautaires québécois de lutte contre le sida).

30 JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 April 2019 (Alexander McClelland, Concordia University, As an Individual).

31 Ibid.



justice system, compared to the treatment reserved to people living with any other transmissible diseases.<sup>32</sup> As explained in the 2017 report of the Department of Justice:

HIV is treated in an exceptional way by the criminal justice system compared to other transmissible diseases (e.g., hepatitis B, C and human papillomavirus). Prosecutions for non-disclosure of HIV appear disproportionately and discriminatory given their relatively high number in comparison to prosecutions for non-disclosure of other transmissible diseases.<sup>33</sup>

The current application of the law is also problematic and perverse when victims of sexual assaults are criminalized for not disclosing their status, and, as a result, are treated as sex offenders:

All of the women I interviewed indicated having long histories of sexual abuse by men and discussed a context where disclosure was highly complex due to their lack of power in the relationships. A woman I spoke with was charged with aggravated sexual assault because she had been gang-raped and did not disclose to her rapists. Another woman who was threatened with criminal charges was raped at knifepoint, yet she was the one threatened with charges of aggravated sexual assault. Both had histories of sex work and authorities did not treat their accounts of their sexual assaults seriously. One of these women told me that if she's guilty of anything, she's guilty of being raped.<sup>34</sup>

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- 32 JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 14 May 2019 (Jennifer Klinck, Chair, Legal Issues Committee, Egale Canada Human Rights Trust); JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 30 April 2019 (Isaac Bogoch, Physician and Scientist, Toronto General Hospital and University of Toronto, As an Individual).
- 33 Department of Justice Canada, *Criminal Justice System's Response to Non-Disclosure of HIV*, 1 December 2017, p. 17.
- 34 JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 April 2019 (Alexander McClelland, Concordia University, As an Individual).

## CHAPTER 3—WHAT SCIENCE REVEALS ABOUT HIV

Witnesses all agreed that “HIV should be addressed from a scientific and evidence-based lens—particularly when it comes to risk factors and methods of transmission—and not from a place of prejudice, judgment and HIV phobia.”<sup>35</sup> In its brief, HIV Justice Worldwide, a global coalition campaign to abolish criminal laws, policies and practices that regulate, control and punish people living with HIV based on their HIV status, noted that:

In principle, criminal law should take into account the actual or possible harms caused by an act, but in practice HIV is over-criminalized as the result of persistent misconceptions exaggerating both the risks and the harms of HIV.<sup>36</sup>

Unfortunately, the evidence collected during the study demonstrated that our response to HIV non-disclosure continues to reflect myths and misconceptions about HIV and how the virus is transmitted. The scientific conclusions that were widely accepted by the witnesses, and which were mainly drawn from the Community Consensus Statement on Ending Unjust HIV Criminalization, are as follows:

- **HIV is no longer a fatal disease, but rather a “chronic but manageable disease.”**<sup>37</sup> Indeed, as noted by Dr. Isaac Bogoch, a physician at the Toronto General Hospital and University of Toronto, “people can live a long, healthy, happy, normal life with HIV.”<sup>38</sup> With treatment, they have “a near normal life expectancy.”<sup>39</sup>
- **“In Canada, the vast majority of new HIV diagnoses can be attributed to those who do not know their HIV-positive status, not to those who know that they are carrying HIV, are living with HIV, and do not take the**

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35 JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 7 May 2019 (Khaled Salam, Executive Director, AIDS Committee of Ottawa).

36 JUST, Brief submitted by HIV Justice Worldwide, *Study on the Criminalization of HIV Non-disclosure*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 30 April 2019.

37 JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 April 2019 (Kerry Porth, Sex Work Policy Researcher, Pivot Legal Society). See also, JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 7 May 2019 (Andrew Brett, Director, Communications, CATIE; Mark Tyndall, Lead of Research and Evaluation, BC Centre for Disease Control).

38 JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 30 April 2019 (Isaac Bogoch, Physician and Scientist, Toronto General Hospital and University of Toronto, As an Individual).

39 JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 7 May 2019 (Andrew Brett, Director, Communications, CATIE).



**precautions necessary to avoid transmission.”<sup>40</sup>** In other words, “HIV epidemics are driven by undiagnosed HIV infections, not by people who know their HIV positive status.”<sup>41</sup> Given that the criminal law only punishes those individuals who knew their HIV status was positive, a number of witnesses confirmed that this leads to individuals deciding to not get tested out of fear that knowledge of a positive test might lead to criminal charges being laid in the event of non-disclosure. Other witnesses stated that medical professionals being asked to testify against their patients also yielded patients being unwilling or worried about disclosing important information that could impact medical treatment. Both of these factors undermine the goal of making sure that all those at risk are tested and that those who test positive are treated.<sup>42</sup>

- **The antiretroviral medications are not only efficient to control the infection, but can also “mitigate and essentially eliminate the risk of HIV transmission.”<sup>43</sup>** As noted by Dr. Isaac Bogoch, “if an individual is HIV-positive, taking antiretroviral medications and has an undetectable virus for about four to six months [less than 200 copies per millilitre of blood], then that individual ... cannot transmit the virus to others.”<sup>44</sup> In other words, there is no possibility of HIV transmission through condomless sex

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40 JUST, [Evidence](#), 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 30 April 2019 (Sarah-Amélie Mercure, Member, Montréal sans sida).

41 JUST, [Evidence](#), 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 7 May 2019 (Robin Montgomery, Executive Director, Interagency Coalition on AIDS and Development). See also, JUST, [Evidence](#), 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 7 May 2019 (Andrew Brett, Director, Communications, CATIE).

42 See, for example, JUST, [Evidence](#), 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 April 2019 (Richard Elliott, Executive Director, Canadian HIV/AIDS Legal Network). Richard Elliott stated the following: “It also undermines the therapeutic relationship between service providers and people looking for health services, because anything you say to a health care worker, a social worker or other support worker can be used against you as evidence in a criminal proceeding, and in fact it has been and is regularly used in these criminal proceedings. In doing so, we conscript the health system and social services into the service of prosecuting people who are looking for support, including support, in some cases, around disclosure to partners and also practising safer sex and taking other measures to prevent transmission.” See also JUST, [Evidence](#), 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 30 April 2019 (Sarah-Amélie Mercure, Member, Montréal sans sida).

43 JUST, [Evidence](#), 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 30 April 2019 (Isaac Bogoch, Physician and Scientist, Toronto General Hospital and University of Toronto, As an Individual). Professor Flanagan, among others, spoke about the effectiveness of antiretroviral drugs in controlling the infection and transmission of HIV. See, for example, JUST, [Evidence](#), 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 April 2019 (William Flanagan, Dean, Faculty of Law, Queen’s University, As an individual; JUST, [Evidence](#), 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 30 April 2019 (Isaac Bogoch, Physician and Scientist, Toronto General Hospital and University of Toronto, As an Individual).

44 JUST, [Evidence](#), 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 30 April 2019 (Isaac Bogoch, Physician and Scientist, Toronto General Hospital and University of Toronto, As an Individual).

from a HIV-positive person with an undetectable (also referred too as suppressed<sup>45</sup>) viral load. “That is, “U equals U”: undetectable equals untransmittable.”<sup>46</sup>

- **This scientific evidence of U equals U has been endorsed “by major global public health bodies**, such as the joint United Nations program on HIV and AIDS—UNAIDS, the World Health Organization, [and] the United States Centres for Disease Control and Prevention.”<sup>47</sup> This evidence was also endorsed by the Canadian Minister of Health and Canada’s Chief Public Health Officer.<sup>48</sup>
- **When a person has a low viral load (between 200 and 1500 copies per millilitre of blood) at the time they have sex, the risk of transmission though condomless sex ranges from negligible to none.**<sup>49</sup>
- **Overall, it is much harder to transmit HIV than what was generally presumed.** In fact, “HIV is a very difficult virus to transmit compared to other viruses.”<sup>50</sup>

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45 Sean Hosein from CATIE noted more precisely: “Between 2011 and 2018 four large clinical trials have now confirmed that a person living with HIV who has a suppressed viral load does not transmit the virus to their partners.” JUST, [Evidence](#), 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 7 May 2019 (Sean Hosein, Science and Medicine Editor, CATIE).

46 JUST, [Evidence](#), 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 April 2019 (William Flanagan, Dean, Faculty of Law, Queen’s University, As an individual). See also, JUST, [Evidence](#), 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 7 May 2019 (Sean Hosein, Science and Medicine Editor, CATIE).

47 JUST, [Evidence](#), 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 30 April 2019 (Isaac Bogoch, Physician and Scientist, Toronto General Hospital and University of Toronto, As an Individual).

48 Ibid.

49 See, for example, JUST, Brief submitted by the Canadian HIV/AIDS Legal Network, [Ending HIV criminalization in Canada](#), 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 30 April 2019.

50 Video submitted to the Committee by Richard Elliott from the Canadian HIV/AIDS Legal Network entitled [Positive Women Exposing Injustice](#) (35:14).



- **Condoms are highly effective at preventing transmission.**<sup>51</sup> Indeed, the risk of transmission is zero if a condom is used properly and remains intact.<sup>52</sup>
- **“There is no possibility of an HIV-negative person contracting HIV when receiving oral sex from an HIV-positive person with or without a viral suppression.** There is a theoretical possibility of HIV transmission from performing oral sex on an HIV-positive man when ejaculate is present, although there is limited evidence to confirm this. If such transmission were possible it would be a negligible risk at most.”<sup>53</sup>
- **People who are HIV negative on HIV pre-exposure prophylaxis (or PrEP)**<sup>54</sup> **“can almost completely reduce their probability of acquiring the infection.”**<sup>55</sup>

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51 See, for example, JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 7 May 2019 (Sean Hosein, Science and Medicine Editor, CATIE). Sean Hosein indicated the following: “When a condom is used consistently and correctly, HIV transmission is not possible with or without viral suppression. Laboratory tests have confirmed that condoms are impermeable to HIV including condoms made of latex, polyurethane, nitrile or polyisoprene.”

52 See, for example, JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 30 April 2019 (Ryan Peck, Executive Director and Lawyer, HIV & AIDS Legal Clinic Ontario).

53 JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 7 May 2019 (Sean Hosein, Science and Medicine Editor, CATIE). See also, JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 14 May 2019 (Jennifer Klinck, Chair, Legal Issues Committee, Egale Canada Human Rights Trust).

54 PrEP is used when people are at very high risk of contracting HIV to prevent the acquisition of the virus. Research demonstrates that it is highly effective for prevention HIV if taken daily as prescribed.

55 JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 30 April 2019 (Isaac Bogoch, Physician and Scientist, Toronto General Hospital and University of Toronto, As an Individual).



## CHAPTER 4—CONSEQUENCES OF CRIMINALIZING HIV NON-DISCLOSURE

### 4.1 Consensus on the Overly Broad and Punitive Approach in Canada

There was consensus among the witnesses who appeared before the Committee that the “breadth and harshness of the law in Canada is particularly severe.”<sup>56</sup> Several witnesses pointed out that “Canada has the unfortunate distinction of being one of the most aggressive countries in the world in terms of the criminalization of HIV non-disclosure.”<sup>57</sup> The number of prosecutions for HIV non-disclosure in Canada is high. Since 1989, at least 200 individuals have been prosecuted for non-disclosure of their status. Throughout the study, witnesses identified several problems with respect to the Canadian approach to HIV non-disclosure:

- **The current law criminalizes people living with HIV when no harm was intended, when there was no HIV transmission, and for sexual behaviours that posed zero to negligible risk of transmission.** As explained for example by Ryan Peck from the HIV & AIDS Legal Clinic Ontario “people are prosecuted not only when there is no allegation of transmission or no intention to transmit, but in circumstances where the sexual activity in question poses negligible to zero risk of transmission.”<sup>58</sup>
- **Using sexual assault law to deal with HIV non-disclosure increases the stigmatization of people living with HIV and is overly punitive.** As noted earlier, a conviction under sexual assault law can lead to very harsh punishments, including being required to register in the *National Sex Offender Registry* for 10 years, 20 years or life, depending on the

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56 JUST, Brief submitted by the Canadian HIV/AIDS Legal Network, [Ending HIV criminalization in Canada](#), 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 30 April 2019, p. 1.

57 JUST, [Evidence](#), 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 April 2019 (Kyle Kirkup, Assistant Professor, Faculty of Law, University of Ottawa, As an Individual). Similar comments were made by other witnesses, including Professor Flanagan, Kerry Porth, Ryan Peck, Chad Clarke and Robin Montgomery. See JUST, [Evidence](#), 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 April 2019 (William Flanagan, Dean, Faculty of Law, Queen’s University, As an individual; Kerry Porth, Sex Work Policy Researcher, Pivot Legal Society); JUST, [Evidence](#), 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 30 April 2019 (Ryan Peck, Executive Director and Lawyer, HIV & AIDS Legal Clinic Ontario; Chad Clarke, Member, Canadian Coalition to Reform HIV Criminalization); JUST, [Evidence](#), 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 7 May 2019 (Robin Montgomery, Executive Director, Interagency Coalition on AIDS and Development).

58 JUST, [Evidence](#), 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 30 April 2019 (Ryan Peck, Executive Director and Lawyer, HIV & AIDS Legal Clinic Ontario).



offences. A person who is not a Canadian citizen may also face deportation.<sup>59</sup> Using sexual assault law “causes greater harm, often exacerbating situations that are already marked by stigma, trauma, shame and discrimination.”<sup>60</sup> Moreover, it has consequences on the employment and housing opportunities of the people convicted.<sup>61</sup> As explained by Ryan Peck from the HIV & AIDS Legal Clinic Ontario, in the case of HIV non-disclosure,

[t]he charge is almost always aggravated sexual assault; one of the most serious offences in the *Criminal Code*, one designed to respond to the most sickening and horrific of forced sex acts. Canada is the only known country to take such an approach. The consequences related to a conviction are wildly serious. For example, a conviction attracts a maximum life sentence and leads to a presumptive lifetime inclusion on sex offender registries, which brings with it enormous stigma and long-term life-changing consequences, not to mention severely diminished employment opportunities. For those who are not citizens, a conviction more or less leads to deportation.<sup>62</sup>

- **Criminalization of non-disclosure disproportionately impacts those who are vulnerable.** As stated by Brook Biggin from the Community-Based Research Centre,

HIV and the criminalization of non-disclosure do disproportionately impact those who are vulnerable, and it is our duty to ensure they are protected and can lead lives free of stigma and discrimination.<sup>63</sup>

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- 59 See, for example, JUST, [Evidence](#), 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 April 2019 (Richard Elliott, Executive Director, Canadian HIV/AIDS Legal Network).
- 60 See, for example, JUST, [Evidence](#), 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 April 2019 (Alexander McClelland, Doctoral Student, Centre for Interdisciplinary Studies in Society and Culture, Concordia University, As an Individual); JUST, [Evidence](#), 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 7 May 2019 (Mark Tyndall, Lead of Research and Evaluation, BC Centre for Disease Control). See also JUST, [Evidence](#), 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 30 April 2019 (Jonathan Shime, Lawyer, As an Individual); JUST, Brief submitted by the Women’s Legal Education and Action Fund, [A Feminist Approach to Law Reform on Non-disclosure of HIV Status](#), 4 May 2019.
- 61 Based on his doctoral research, Alexander McClelland noted more specifically that: “Given the charge of aggravated sexual assault, and the result of being registered as a sex offender, people were not able to get past employment they had expertise in doing and were denied jobs when applying. Many were on social assistance even though they wanted to work.” JUST, [Evidence](#), 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 April 2019 (Alexander McClelland, Concordia University, As an Individual).
- 62 JUST, [Evidence](#), 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 30 April 2019 (Ryan Peck, Executive Director and Lawyer, HIV & AIDS Legal Clinic Ontario).
- 63 JUST, [Evidence](#), 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 30 April 2019 (Brook Biggin, Director, Program Development, Scale-Up, and Implementation, Community-Based Research Centre).

- **“Risk factors for HIV are often interrelated circumstances of marginalization.”**<sup>64</sup> As explained by Jennifer Klinck from Egale Canada Human Rights Trust:

For example, members of the LGBTQ2SI community include injection drug users and sex workers. Criminalization of these already marginalized communities only adds to their social exclusion, fuelling stigma and frustrating public health initiatives.<sup>65</sup>

- **In particular, studies indicate that certain groups are more impacted by the criminalization of HIV non-disclosure in Canada, notably: black people, Indigenous women, and the LGBTQ2 community.**<sup>66</sup> It was suggested that black people are often the focus of media stories. As illustrated below by Shannon Ryan of the Black Coalition for AIDS Prevention and Maureen Gans from the Parkdale Queen West Community Health Centre:

African, Caribbean and black men living with HIV are highly represented among racialized defendants, and while black men account for about 20% of people who have faced criminal charges related to HIV non-disclosure in Canada, they're the focus of about 62% of newspaper articles dealing with such cases. The report also indicates that there are more than 2.5 times the number of newspaper articles featuring black than white defendants.<sup>67</sup>—*Black Coalition for AIDS Prevention*

Cases involving criminal charges against persons living with HIV garner considerable media attention. The profiled face of many media stories has been the face of black men. While black men may not have been charged in greater numbers than white men, studies reveal that public perception exists that black heterosexual men are the

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64 JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 14 May 2019 (Jennifer Klinck, Chair, Legal Issues Committee, Egale Canada Human Rights Trust).

65 Ibid. See also, JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 14 May 2019 (Haran Vijayanathan, Executive Director, Alliance for South Asian AIDS Prevention). Haran Vijayanathan specified that South Asians and Middle Eastern LGBTQ2 are disproportionately impacted.

66 See, for example, JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 April 2019 (Richard Elliott, Executive Director, Canadian HIV/AIDS Legal Network; Kyle Kirkup, Assistant Professor, Faculty of Law, University of Ottawa, As an Individual). For statistics on the overrepresentation of racialized communities, see HIV/AIDS Legal Aid Network, *HIV Criminalization in Canada: Key Trends and Patterns*, 17 March 2017. See also, JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 14 May 2019 (Fanta Ongoiba, Executive Director, Africans in Partnership Against AIDS; Shannon Ryan, Executive Director, Black Coalition for AIDS Prevention); JUST, Brief submitted by the Women's Legal Education and Action Fund, *A Feminist Approach to Law Reform on Non-disclosure of HIV Status*, 4 May 2019.

67 JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 14 May 2019 (Shannon Ryan, Executive Director, Black Coalition for AIDS Prevention).



perpetrators and are overrepresented among those charged.<sup>68</sup>—*Parkdale Queen West Community Health Centre*

- **Media attention given to HIV non-disclose cases contributes to the stigmatization of HIV.** People charged with HIV non-disclosure often suffer the consequences of the media attention given to their case, even when charges are dropped, or the person is acquitted.

People were regularly denied housing. One person was told we don't rent to rapists. The person had their charges dropped by the Crown, but information about their case was widely available online.<sup>69</sup>—*Alexander McClelland*

HIV non-disclosure prosecutions fuel stigmatizing messages about people living with HIV. For example, in many instances, HIV non-disclosure prosecutions are subjected to intense media coverage. In 2010, for example, the Ottawa Police Service issued a press release for a man they already had in custody, publishing his name, photo and details of his sexual orientation and his medical condition. Issuing this press release led to a series of sensationalist stories in newspapers such as the Ottawa Sun that continued throughout the trial process. These stigmatizing stories are yet another collateral consequence of the misguided approach to HIV non-disclosure in Canada.<sup>70</sup>—*Professor Kirkup*

- **The current law on HIV non-disclosure impacts women in particular ways.** The current law fails to address how both cis and trans women, may not be able to safely negotiate condom use with their sexual partners.<sup>71</sup> Prosecutions can also “make women more vulnerable to intimate partner violence.”<sup>72</sup> As explained by Maureen Gans from the Parkdale Queen West Community Health Centre:

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68 JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 30 April 2019 (Maureen Gans, Senior Director, Client Services, Parkdale Queen West Community Health Centre).

69 JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 April 2019 (Alexander McClelland, Concordia University, As an Individual).

70 JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 April 2019 (Kyle Kirkup, Assistant Professor, Faculty of Law, University of Ottawa, As an Individual).

71 JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 14 May 2019 (Kate Salters, Research Scientist, British Columbia Centre for Excellence in HIV/AIDS). See also JUST, Brief submitted by the Women's Legal Education and Action Fund, *A Feminist Approach to Law Reform on Non-disclosure of HIV Status*, 4 May 2019.

72 JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 7 May 2019 (Karen Segal, Staff Counsel, Women's Legal Education and Action Fund). See also JUST, Brief submitted by the Women's Legal Education and Action Fund (LEAF), *A Feminist Approach to Law Reform on Non-disclosure of HIV Status*, 4 May 2019, p. 9-10. As noted by LEAF in its brief: “In the case of R. v. D.C., the accused was a woman and a survivor of domestic violence at the hands her accuser. He only reported his allegation of HIV non-disclosure after D.C. brought a complaint of domestic violence against him.”

There are the added challenges that some women, particularly those in vulnerable relationships, may face when insisting on condom use by their partners, meaning that they then must either disclose or face the possibility of criminal liability. There are the fears that disclosure could trigger the loss of relationships, not only emotional but also financial consequences, or consequences for immigration status if the woman is being sponsored by her husband. There are the fears of abuse and physical violence, as well as the use of criminal law as a weapon, especially in situations where relationships break down and the woman may be subjected to unfounded accusations or threats of criminal charges as a means of seeking revenge or exerting control.

It is important to note that for any individual with HIV, but particularly those already marginalized and overrepresented in the criminal justice system, disclosure will not necessarily protect from allegations, threats, police investigations or criminal charges. The threat of making a complaint to police is a powerful weapon in the hands of a disgruntled ex-lover or abusive partner. Even if a case does not proceed, the threat or investigation can be extremely damaging.<sup>73</sup>

## 4.2 Criminalization as a Barrier to Achieving Public Health Objectives

The criminalization of HIV non-disclosure does not only have devastating consequences on those accused and convicted, “it also has highly detrimental effect on broader HIV prevention and care initiatives.”<sup>74</sup> Indeed, several witnesses stated that “[c]riminalization of HIV non-disclosure has stood as an impediment to public health and HIV/AIDS education and prevention.”<sup>75</sup> The Committee was also told that criminalization contributes to the stigmatization of people living with HIV and the fear and misinformation surrounding HIV.<sup>76</sup>

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73 JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 30 April 2019 (Maureen Gans, Senior Director, Client Services, Parkdale Queen West Community Health Centre).

74 JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 April 2019 (William Flanagan, Dean, Faculty of Law, Queen’s University, As an individual).

75 JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 7 May 2019 (Khaled Salam, Executive Director, AIDS Committee of Ottawa).

76 JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 April 2019 (Kyle Kirkup, Assistant Professor, Faculty of Law, University of Ottawa, As an Individual). Similarly, Martin Bilodeau noted that “[c]riminalization is an integral part of the stigma we continue to face.” JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 April 2019 (Martin Bilodeau, National Coordinator, Positive Leadership Development Institute Program, Ontario AIDS Network). See also, JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 7 May 2019 (Khaled Salam, Executive Director, AIDS Committee of Ottawa).



#### 4.2.1 Criminalization of HIV Non-disclosure as a Disincentive to HIV Prevention, Testing and Treatment

A number of studies indicate that the criminalization of HIV non-disclosure is acting as a disincentive for being tested. Research indicates that “it actually discourages people from disclosing their HIV status for fear of legal reprisals.”<sup>77</sup> As explained by Richard Elliott from the Canadian HIV/AIDS Legal Network:

When it becomes the case that finding out your HIV status means that you risk prosecution and potentially being convicted and designated as a sex offender for life for having consensual sex with a partner, even under the broad state of the law as it stands now, for circumstances in which there was no risk of transmission, or at most, a negligible risk of transmission, that is a real disincentive to getting testing, and there is some evidence to support this concern. It also undermines the therapeutic relationship between service providers and people looking for health services, because anything you say to a health care worker, a social worker, other support worker, can be used against you as evidence in a criminal proceeding, and in fact has been and is regularly used in these criminal proceedings. In doing so we conscript the health system and social services into the service of prosecuting people who are looking for support, including support, in some cases, around disclosure to partners and also practising safer sex and taking other measures to prevent transmission.<sup>78</sup>

During his testimony, Professor Flanagan, Dean of the Faculty of Law at Queen’s University, presented the results of a study showing that criminalization of non-disclosure increases the risk of HIV transmission.

The study interviewed 150 HIV-negative [men who have sex with men] and found that 7% were less or much less likely to be tested for HIV due to concerns over potential prosecution. The authors estimated that this 7% reduction in testing would cause an 18.5% increase in community HIV transmission, largely as a result of the failure of HIV-positive but undiagnosed MSM to access care and reduce HIV transmission by the use of effective antiretroviral treatment.<sup>79</sup>

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77 JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 7 May 2019 (Andrew Brett, Director, Communications, CATIE). He also noted that “[t]here is a very well-founded concern among people living with HIV that they could face a very serious criminal charge at the prospect of people who misuse sexual assault law, and as a result they conceal their HIV status to protect themselves, so if our goal here is to encourage people to disclose their HIV status to their sexual partners, using sexual assault law could actual be counterproductive.”

78 JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 April 2019 (Richard Elliott, Executive Director, Canadian HIV/AIDS Legal Network).

79 JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 April 2019 (William Flanagan, Dean, Faculty of Law, Queen’s University, As an individual).

## 4.2.2 Other Forms of Criminalization Undermining Public Health Objectives

During the study, the Committee also heard that other forms of criminalization, such as the criminalization of sex work, drug use and drug possession, were undermining public health efforts related to the prevention of HIV transmission, testing and access to treatment.<sup>80</sup> These forms of criminalization are acting as impediments to the eradication of HIV in Canada and the achievement of the 90-90-90 UNAIDS objectives. According to Dr. Isaac Bogoch “the criminalization of these acts, and of HIV, forms greater barriers to getting people diagnosed, on appropriate treatment and in appropriate care. It also prevents preventative measures.”<sup>81</sup> Similarly, Dr. Sarah-Amélie Mercure indicated that the community reported to Montréal sans sida

that everything to do with the criminalization of sex work, drug use and drug possession is a factor that leads to the increased stigmatization of communities at risk of contracting HIV and that distances them from HIV prevention services. In public health terms, that really distances us from our objectives of eliminating local transmission of HIV.<sup>82</sup>

With regards to sex work, Kerry Porth from Pivot Legal Society pointed out that the criminalization “exposes workers to higher risks of HIV transmission,” “makes workers vulnerable to exploitative and risky behaviour” and “prevents access to health care.”<sup>83</sup>

Research has consistently shown that criminalization of sex work and police enforcement reduce sex workers' ability to properly screen their clients, negotiate condom use and access health services without stigma, including HIV care.<sup>84</sup>

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80 For example, see, JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 30 April 2019 (Sarah-Amélie Mercure, Member, Montréal sans sida; Isaac Bogoch, Physician and Scientist, Toronto General Hospital and University of Toronto, As an Individual; Ryan Peck, Executive Director and Lawyer, HIV & AIDS Legal Clinic Ontario; Merv Thomas, Chief Operating Officer, Canadian Aboriginal AIDS Network); JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 7 May 2019 (Khaled Salam, Executive Director, AIDS Committee of Ottawa; Karen Segal, Staff Counsel, Women's Legal Education and Action Fund; Andrew Brett, Director, Communications, CATIE); JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 14 May 2019 (Haran Vijayanathan, Executive Director, Alliance for South Asian AIDS Prevention).

81 JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 30 April 2019 (Isaac Bogoch, Physician and Scientist, Toronto General Hospital and University of Toronto, As an Individual).

82 JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 30 April 2019 (Sarah-Amélie Mercure, Member, Montréal sans sida).

83 JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 April 2019 (Kerry Porth, Sex Work Policy Researcher, Pivot Legal Society).

84 Ibid.



## CHAPTER 5—THE COMMITTEE’S PROPOSALS FOR REFORM

Having carefully considered the evidence, the Committee concludes that the current Canadian approach to HIV non-disclosure is overly broad and punitive, particularly since it does not reflect the latest science on HIV transmission. The Committee’s study clearly demonstrates the need to limit the use of criminal law to respond to HIV non-disclosure. The areas of reform identified by the Committee and its recommendations to address them are presented in the following sections.

The Committee agrees with witnesses that a legislative reform to HIV non-disclosure should be informed by way of consultation with a wide range of stakeholders, including legal, medical and public health experts, people living with HIV and people who have been charged, prosecuted or convicted of HIV non-disclosure. In addition, the Committee concludes that the current reliance on prosecutorial directives is insufficient to resolve over-criminalization and creates inconsistent applications across the country.

### 5.1 The Need to Limit the Use of Criminal Law to Deal with HIV Non-disclosure

Despite the progress of science and our knowledge of actual risk of HIV transmission, stigma and discrimination against people living with HIV remain. There is no doubt based on the evidence collected during the study that, on the one hand, stigma drives criminalization and that, on the other end, criminalization fuels stigma. This is an important issue to address since stigma is acting as a significant barrier to achieving our goal to end the HIV epidemic. As noted by Brook Biggin from the Community-Based Research Centre, the current application of the criminal law “is so disproportionate and extreme that you are adding HIV stigma at a faster rate than you can remove it.”<sup>85</sup>

As demonstrated in the previous sections of this report, criminalization of HIV non-disclosure has grave consequences on the lives of the people affected by it and clearly acts as an impediment to achieving our public health objectives.<sup>86</sup> As presented by several witnesses, the current law is counterproductive to the objectives set out in the UNAIDS 90-90-90 strategy regarding treatment and testing, which was endorsed by

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85 JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 30 April 2019 (Brook Biggin, Director, Program Development, Scale-Up, and Implementation, Community-Based Research Centre).

86 JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 30 April 2019 (Ryan Peck, Executive Director and Lawyer, HIV & AIDS Legal Clinic Ontario).



Canada. The following excerpt from the testimony clearly summarizes what we learned regarding the impact of the overly broad criminalization:

Overcriminalization is also dramatic from a public health perspective. It hinders HIV prevention efforts and hampers care, treatment and support for those living with HIV by providing disincentives for testing, as we've heard, and deterring honest and open conversations with healthcare and other providers, including public health authorities, for legitimate fears that such conversations will be used in courts.<sup>87</sup>

To end the epidemic, the Committee is of the view that barriers undermining the public health objectives of HIV prevention, testing and treatment need to be removed.<sup>88</sup>

The Committee strongly believes that the use of criminal law to deal with HIV non-disclosure must be circumscribed immediately and that HIV must be treated as a public health issue.

### 5.1.1 Immediately Prohibiting the Use of Sexual Assault Provisions

The Committee agrees with witnesses that the use of sexual assault provisions to deal with HIV non-disclosure is overly punitive, contributes to the stigmatisation and discrimination against people living with HIV, and acts as a significant impediment to the attainment of our public health objectives. The consequences of such a conviction are too harsh and the use of sexual assault provisions to deal with consensual sexual activities is simply not appropriate.

### 5.1.2 Limiting Criminalization to the Most Blameworthy Circumstances

The Committee believes that a new offence should be created in the *Criminal Code* to cover HIV non-disclosure cases in specific circumstances. The new offence should not be limited to HIV but cover the non-disclosure of infectious diseases in general. The Committee is of the view that people living with HIV should not be treated differently than people living with any other infectious disease.

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87 Ibid.

88 JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 April 2019 (Martin Bilodeau, National Coordinator, Positive Leadership Development Institute Program, Ontario AIDS Network); JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 30 April 2019, (Chad Clarke, Member, Canadian Coalition to Reform HIV Criminalization; Brook Biggin, Director, Program Development, Scale-Up, and Implementation, Community-Based Research Centre); JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 7 May 2019 (Robin Montgomery, Executive Director, Interagency Coalition on AIDS and Development); JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 14 May 2019 (Fanta Ongoiba, Executive Director, Africans in Partnership Against AIDS; Shannon Ryan, Executive Director, Black Coalition for AIDS Prevention; Haran Vijayanathan, Executive Director, Alliance for South Asian AIDS Prevention; Duane Morrisseau-Beck, President and Chair, Ontario Aboriginal HIV/AIDS Strategy).



The Committee also agrees with the witnesses that “the criminal law is a blunt instrument that must be used sparingly in order to ensure that only those who are deserving of its sanction are prosecuted.”<sup>89</sup> The current approach to HIV non-disclosure is clearly overly broad, but the Committee believes that in some cases prosecutions under the criminal law would be appropriate.

The Canadian response to HIV non-disclosure must be based on scientific evidence and sound public health policy. Science is constantly evolving and, as illustrated by the evidence collected during the study, the current legal framework regarding HIV non-disclosure has not changed in accordance with the advancements of science.

After careful consideration of the evidence, the Committee recommends:

#### **Recommendation 1**

##### **That the Government of Canada:**

- **create a specific offence in the *Criminal Code* related to the non-disclosure of an infectious disease (including HIV) when there is actual transmission, and that prosecutions related to such transmission only be dealt under that offence;**
- **draft the contemplated legislation in consultation with all relevant stakeholders, including the HIV/AIDS community, to circumscribe the use of criminal law to deal with HIV non-disclosure and make sure HIV is treated as a public health issue like any other infectious disease. This process should also determine the appropriate mental element (*mens rea*) for the new offence.**

The Committee recognizes the limitation of a federal directive on HIV non-disclosure as it applies only to prosecutions in the three territories. The Committee agrees with witnesses that 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.

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89 JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 30 April 2019 (Jonathan Shime, Lawyer, As an Individual).

Given that the revisions to the *Criminal Code* that are needed to deal more appropriately with HIV non-disclosure will take some time and that the appropriate mental element for the new offence must be determined, the Committee recommends, in the interim:

## **Recommendation 2**

**That the Minister of Justice and Attorney General of Canada immediately establish a federal-provincial working group to develop a common prosecutorial directive to be in effect across Canada**

- **to end criminal prosecutions of HIV non-disclosure, except in cases where there is actual transmission of the virus;**
- **to ensure that the factors to be respected for criminal prosecutions of HIV non-disclosure reflect the most recent medical science regarding HIV and its modes of transmission and only applies when there is actual transmission having regard to the realistic possibility of transmission. At this point of time, HIV non-disclosure should never be prosecuted if (1) the infected individual has an undetectable viral load (less than 200 copies per millilitre of blood); (2) condoms are used; (3) the infected individual's partner is on PrEP or (4) the type of sexual act (such as oral sex) is one where there is a negligible risk of transmission.**

### **5.1.3 Applying the New Standards to Previous Convictions of HIV Non-disclosure**

The Committee acknowledges that because of the current approach, some individuals who have been convicted of HIV non-disclosure in Canada still suffer unjust consequences of this conviction, for example, as a result of the publicity related to their case, their criminal record or the fact of being registered in the *National Sex Offender Registry*. The Committee agrees with the witnesses who called for a mechanism to review previous convictions of HIV non-disclosure.<sup>90</sup>

Because the application of the law regarding HIV non-disclosure has not always evolved in accordance with the medical science regarding HIV transmission, the Committee

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90 JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 30 April 2019 (Jonathan Shime, Lawyer, As an Individual).



observes that “people who were no risk to others have been unfairly charged, convicted, sent to jail and stigmatized as sex offenders.”<sup>91</sup>

The Committee concludes that the Minister of Justice should create a review mechanism for past convictions, such as the one suggested by Jonathan Shime:

One could certainly enact an ad hoc review committee that would be open to hearing from individuals who have been jailed, and/or community groups, where there are concerns about individual cases and whether those convictions were justified or were miscarriages of justice, based not only on the science we may have understood at the time, which to be fair has on occasion been misinterpreted by...whether it be juries or even judges, but based on our current understanding of the science.<sup>92</sup>

Consequently, the Committee recommends:

### **Recommendation 3**

**That the Minister of Justice and Attorney General of Canada immediately establish 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 standards set out in the recommendations of the Committee. The review mechanism should also encompass the cases of individuals who have been prosecuted, but not convicted.**

## **5.2 The Need for collaboration between the Different Levels of Government to Increase Access to Testing**

HIV Testing is a central component to the eradication of HIV. Unfortunately, as illustrated by witnesses throughout the study, stigma associated with the diagnosis of HIV remains around the world and is acting as a significant barrier to achieving the UNAIDS 90-90-90 objectives.

The Committee concurs with the witnesses that an important part of the solution to eradicate HIV is to offer different forms of HIV testing, such as self-testing, anonymous testing and on-the-spot or rapid testing. We must also make those testing options readily available to everyone, notably the people at greater risk of contracting or

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91      Ibid.

92      Ibid.

transmitting HIV.<sup>93</sup> Self-testing is currently available in other countries, such as in the United States and some countries in Europe, but not yet in Canada.<sup>94</sup> Offering more HIV testing options can dramatically increase rates of HIV testing and treatment. Since people on effective antiretroviral treatment cannot transmit HIV, increasing options in that regard is key to eradicating HIV. Also, as suggested by the evidence collected during the study, the capacity of anonymous testing to reach out to marginalized communities makes it an important tool to end the epidemic.

The advantage of anonymous testing within a harm reduction agency, especially testing delivered by community testers and not health care professionals, is that we see a significant number of individuals from marginalized communities who will not necessarily go elsewhere for testing: newcomers, including a significant number of racialized individuals; men having sex with men who also use drugs; uninsured individuals; sex workers and folks identifying as trans or non-binary.<sup>95</sup>

Consequently, the Committee recommends:

#### **Recommendation 4**

**To achieve our public health objectives regarding HIV, that the Government of Canada, in partnership with the provinces and territories, work to make anonymous testing easily accessible and enhance access to different forms of testing, such as self-testing and on-the-spot testing, across the country.**

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93 See, for example, JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 April 2019 (Richard Elliott, Executive Director, Canadian HIV/AIDS Legal Network; William Flanagan, Dean, Faculty of Law, Queen's University, As an individual); JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 30 April 2019 (Maureen Gans, Senior Director, Client Services, Parkdale Queen West Community Health Centre); JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 7 May 2019 (Kristopher Wells (Associate Professor, MacEwan University, As an Individual); Shelley Williams, Executive Director, HIV Edmonton).

94 On this point, Professor Flanagan noted the following: "Point-of-care testing is dramatically underutilized in Canada, and self-testing options available in pharmacies much like a pregnancy test, now commonly available in most countries around the world, remain unavailable in Canada. All of this needs to change...Canada has been very slow to implement this. It would require regulatory approval by the federal agency, which is under way right now. Certainly, this is a part of our report, and we've been actively advocating for it. We're working with a number of companies that are prepared to provide self-testing kits in Canada, and we're seeking regulatory approval. We're hoping to expedite that as soon as possible.

Of course, it will be important to roll out these self-testing kits throughout Canada and to make sure that anyone who purchases a self-testing kit will be immediately and easily linked to care in the event that they are found to be HIV-positive." JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 April 2019 (William Flanagan, Dean, Faculty of Law, Queen's University, As an individual) See also, JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 7 May 2019 (Kristopher Wells (Associate Professor, MacEwan University)).

95 JUST, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 30 April 2019 (Maureen Gans, Senior Director, Client Services, Parkdale Queen West Community Health Centre).



## APPENDIX A LIST OF WITNESSES

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The following table lists the witnesses who appeared before the Committee at its meetings related to this report. Transcripts of all public meetings related to this report are available on the Committee’s [webpage for this study](#).

Organizations and Individuals	Date	Meeting
<p><b>As Individuals</b></p> <p>William F. Flanagan, Dean Faculty of Law, Queen’s University</p> <p>Kyle Kirkup, Assistant Professor Faculty of Law, University of Ottawa</p> <p>Alexander McClelland Concordia University</p>	2019/04/09	142
<p><b>Canadian HIV/AIDS Legal Network</b></p> <p>Richard Elliott, Executive Director</p>	2019/04/09	142
<p><b>Coalition des organismes communautaires québécois de lutte contre le sida</b></p> <p>Léa Pelletier-Marcotte, Lawyer and Coordinator Programme Droits de la personne et VIH/sida</p>	2019/04/09	142
<p><b>Ontario AIDS Network</b></p> <p>Martin Bilodeau, National Coordinator Positive Leadership Development Institute Program</p>	2019/04/09	142
<p><b>Pivot Legal Society</b></p> <p>Kerry Porth, Sex Work Policy Researcher</p>	2019/04/09	142
<p><b>As Individuals</b></p> <p>Isaac I. Bogoch, Physician and Scientist Toronto General Hospital and University of Toronto</p> <p>Jonathan A. Shime, Lawyer</p>	2019/04/30	145
<p><b>Canadian Aboriginal AIDS Network</b></p> <p>Merv Thomas, Chief Operating Officer</p>	2019/04/30	145

<b>Organizations and Individuals</b>	<b>Date</b>	<b>Meeting</b>
<b>Canadian Coalition to Reform HIV Criminalization</b> Chad Clarke, Member Valerie Nicholson, Member	2019/04/30	145
<b>Community-Based Research Centre</b> Brook Biggin, Director Program Development, Scale-Up, and Implementation	2019/04/30	145
<b>HIV &amp; AIDS Legal Clinic Ontario</b> Ryan Peck, Executive Director and Lawyer	2019/04/30	145
<b>Montréal sans sida</b> Sarah-Amélie Mercure, Member	2019/04/30	145
<b>Parkdale Queen West Community Health Centre</b> Maureen Gans, Senior Director Client Services	2019/04/30	145
<b>As an Individual</b> Kristopher Wells, Associate Professor MacEwan University	2019/05/07	147
<b>AIDS Committee of Ottawa</b> Khaled Salam, Executive Director	2019/05/07	147
<b>BC Centre for Disease Control</b> Mark Tyndall, Lead of Research and Evaluation	2019/05/07	147
<b>CATIE</b> Andrew Brett, Director Communications Sean Hosein, Science and Medicine Editor	2019/05/07	147
<b>HIV Edmonton</b> Shelley Williams, Executive Director	2019/05/07	147
<b>Interagency Coalition on AIDS and Development</b> Robin Montgomery, Executive Director	2019/05/07	147
<b>Women's Legal Education and Action Fund</b> Karen Segal, Staff Counsel	2019/05/07	147
<b>As an Individual</b> Eric Mykhalovskiy, Professor York University	2019/05/14	149



<b>Organizations and Individuals</b>	<b>Date</b>	<b>Meeting</b>
<b>Africans in Partnership Against AIDS</b> Fanta Ongoiba, Executive Director	2019/05/14	149
<b>Alliance for South Asian AIDS Prevention</b> Haran Vijayanathan, Executive Director	2019/05/14	149
<b>Black Coalition for AIDS Prevention</b> Shannon Ryan, Executive Director	2019/05/14	149
<b>British Columbia Centre for Excellence in HIV/AIDS</b> Kate Salters, Research Scientist	2019/05/14	149
<b>Egale Canada Human Rights Trust</b> Jennifer Klinck, Chair Legal Issues Committee	2019/05/14	149
<b>Ontario Aboriginal HIV/AIDS Strategy</b> Duane Morrissette-Beck, President and Chair	2019/05/14	149



## APPENDIX B LIST OF BRIEFS

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The following is an alphabetical list of organizations and individuals who submitted briefs to the Committee related to this report. For more information, please consult the Committee's [webpage for this study](#).

**Canadian HIV/AIDS Legal Network**

**HIV Justice Worldwide**

**Joint United Nations Programme on HIV/AIDS**

**Pivot Legal Society**

**Women, ART and the Criminalization of HIV**

**Women's Legal Education and Action Fund**



# APPENDIX C

## FEDERAL DIRECTIVE REGARDING NON-DISCLOSURE OF HIV STATUS

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### **Directive of the Attorney General Issued under section 10(2) of the *Director of Public Prosecutions Act***

December 8, 2018

#### **Directive**

Whereas HIV is first and foremost a public health issue, and public health authorities' efforts to detect and treat HIV have resulted in significantly improved health outcomes for those living with HIV in Canada, as well as prevention of its onward transmission;

Whereas the Supreme Court of Canada has stated that the criminal law has a role to play in cases involving sexual activity and non-disclosure of HIV where public health interventions have failed and the sexual activity at issue poses a risk of serious harm;

Whereas persons from marginalized backgrounds such as, for example, Indigenous, gay and Black persons, are more likely than others to be living with HIV in Canada such that criminal laws that apply to HIV non-disclosure are likely to disproportionately impact these groups;

Whereas the criminal law applies to persons living with HIV if they are aware of their HIV positive status and that they are infectious, and they fail to disclose, or misrepresent, their HIV status prior to sexual activity that poses a realistic possibility of transmission of HIV;

Whereas the Supreme Court of Canada has clarified that the issue of whether sexual activity poses a realistic possibility of transmission is to be determined on the basis of the most recent medical science on HIV transmission;

Whereas the most recent medical science shows that the risk of HIV transmission through sexual activity is significantly reduced where: the person living with HIV is on treatment; condoms are used; only oral sex is engaged in; the sexual activity is limited to an isolated act; or, the person exposed to HIV, for example as a result of a broken condom, receives post-exposure prophylaxis;

Whereas it is not in the public interest to pursue HIV non-disclosure prosecutions for conduct that medical science shows does not pose a risk of serious harm to others;

Whereas the research, medical science and analysis presented in Justice Canada's 2017 Report on the Criminal Justice System's Response to HIV Non-Disclosure, as well as any future developments in the relevant medical science, should be considered before pursuing a criminal prosecution in HIV non-disclosure cases;

Whereas I have consulted with the Director of Public Prosecutions under subsection 10(2) of the *Director of Public Prosecutions Act*;

1. I direct the Director of Public Prosecutions as follows:
2. The Director shall not prosecute HIV non-disclosure cases where the person living with HIV has maintained a suppressed viral load, i.e., under 200 copies per ml of blood, because there is no realistic possibility of transmission.
3. The Director shall generally not prosecute HIV non-disclosure cases where the person has not maintained a suppressed viral load but used condoms or engaged only in oral sex or was taking treatment as prescribed, unless other risk factors are present, because there is likely no realistic possibility of transmission.
4. The Director shall prosecute HIV non-disclosure cases using non-sexual offences, instead of sexual offences, where non-sexual offences more appropriately reflect the wrongdoing committed, such as cases involving lower levels of blameworthiness.
5. The Director shall consider whether public health authorities have provided services to a person living with HIV who has not disclosed their HIV status prior to sexual activity when determining whether it is in the public interest to pursue a prosecution against that person.

The Honourable Jody Wilson-Raybould  
Attorney General of Canada

## REQUEST FOR GOVERNMENT RESPONSE

Pursuant to Standing Order 109, the Committee requests the Government to table a comprehensive response to the Report; however, notwithstanding the deadline of 120 days stipulated in Standing Order 109, the Committee requests that the comprehensive response to this Report be tabled within 60 days of the presentation of the Report to the House.

A copy of the relevant *Minutes of Proceedings* ([Meetings Nos. 142, 145, 147, 149, 154, 156 and 157](#)) is tabled.

Respectfully submitted,

Anthony Housefather  
Chair





## Conservative Party of Canada – Dissenting Report

Conservatives have concerns surrounding the proposed repeal of legislation that provides a serious punishment for the non-disclosure of HIV status. We believe that the Directive issued by the former Minister of Justice and Attorney General regarding this matter is enough to ensure that prosecutions do not proceed when they are not in the interest of public safety. We would encourage provinces to adopt a similar directive.

While we accept witness testimony that deliberately attempting to infect one's partner is infrequent, it still occurs. Victims must have recourse, and law enforcement must have tools for these situations. Repealing criminal consequences for the deliberate, negligent or reckless attempts to spread HIV is not something that Conservatives can support.

We therefore recommend that:

1. HIV non-disclosure should be prosecuted under the *Criminal Code* where: (1) there is either a falsehood or failure to disclose HIV; and (2) there is a realistic possibility of transmission<sup>1</sup>; or (3) where actual transmission occurs.
2. HIV non-disclosure should not be prosecuted where: (1) the person was taking HIV treatment as prescribed and has maintained a suppressed viral load of less than 200 copies per ml, because there is no realistic possibility of transmission.<sup>2</sup> HIV non-disclosure should generally not be prosecuted where: (1) the person was taking HIV treatment but has not achieved a suppressed viral load; (2) used a condom; (3) engaged only in oral sex; or (4) was taking treatment as prescribed, because there is likely no realistic possibility of transmission.<sup>3</sup> The foregoing is consistent with the November 30, 2018 Directive of the Attorney General of Canada.
3. Factors respecting when HIV non-disclosure should be prosecuted should be modified as advances are made in science and medical treatment having regard for the standard of a realistic possibility of transmission.
4. The Attorney General of Canada should work with provincial Attorneys' General to develop a common prosecutorial directive for HIV non-disclosure consistent with the November 30, 2018 Directive.

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<sup>1</sup> *R. v. Mabior*, 2012 SCC 47, para. 12; *ibid.*, para. 84

<sup>2</sup> Criminal Justice System's Response to Non-Disclosure of HIV, Department of Justice Canada, December 1, 2017, p.9

<sup>3</sup> *ibid.*, p.9



## New Democratic Party Dissenting Report on the Justice Committee Report on the Decriminalization of HIV Non-Disclosure in Canada

The NDP dissents from Justice Committee Report on the Decriminalization of HIV Non-Disclosure in Canada despite the fact that this is overall a good report that we would like to have been able to support without reservation. We would like to thank the many witnesses whose stories and insightful analysis laid out both the injustice resulting from the criminalization of HIV non-disclosure and the perverse public health outcomes resulting from this criminalization. The overwhelming consensus among witnesses as outlined in the majority report was that our current policies are both a source of great injustice to individuals and, at the same time, actually make the fight to end the HIV/AIDS epidemic more difficult by discouraging people from getting tested.

The NDP voted against this report for two reasons. First, the majority of the committee has recommended a new criminal offence on transmission of communicable diseases presumably in the effort to avoid creating an HIV specific offence in the Criminal Code. In doing so the majority has opened the door to criminal sanctions for those with other diseases such as TB and Hepatitis C, rather than recognising that all communicable diseases including HIV are better dealt through existing public health measures.

Second, the NDP voted against the report because it departs from the consensus position endorsed by more than 170 community organizations that prosecutions for HIV non-disclosure should only take place when the behaviour in question was intentional and resulted in actual transmission of the virus. These are the only grounds for sanctions supported by medical science. The majority on the committee failed to recommend that criminal sanctions be limited to intentional and actual transfer of the virus. Instead they have chosen vague language that would leave the door open to adding recklessness or negligence as other types of behaviour that might be subject to criminal sanction.

The report evades the question of what exactly would constitute reckless or negligent behaviour in terms of HIV non-disclosure. However, criminalization of things like reckless or negligent behaviour would add an element of moral opprobrium to the question of non-disclosure which is sure to have a disproportionate impact on marginalized people. What might seem reckless or negligent behaviour in some contexts, might in real life situations seem behaviour necessary to protect oneself from violence or even necessary for survival. This undoubtedly would often be the case for those in violent interpersonal relationships, those engaged in sex work, those from the intravenous drug using community and others with limited resources for self-protection

Despite our dissent, the NDP is pleased to see that the majority report has included recommendation dealing two important pillars for eradicating HIV/AIDS, for which we have been advocates:

1) making the eradication of HIV the primary public policy goal of making amendments to remove HIV non-disclosure from the Criminal Code, though the majority report recommends removing HIV non-disclosure only from the sexual assault provisions of the Code; and

2) calling for interim action to reduce the harm resulting from criminalization of HIV non-disclosure while waiting for longer process of criminal law reform to take place. The report calls on the federal government to immediately convene a federal provincial working group with the goal of arriving at common prosecutorial directives for all provinces and territories that would limit prosecutions for HIV non-disclosure while awaiting reform of the Criminal Code. The NDPCP would go farther in specifying that in the interim prosecutions should be limited only to cases of intentional behaviour resulting in actual transmission of the virus.

The NDP is disappointed that the majority did not recommend calling for an examination of other sections of Criminal Code which inhibit public health efforts to eradicate HIV, including criminalization of sex work and possession of small amounts of scheduled drugs for personal use. New Democrats do however support the principle contained in Recommendation 4, that a mechanism should be established to review unjust convictions and criminal prosecutions which have taken place under the current provisions regarding non-disclosure of HIV.

New Democrats would also like to have seen a clearer recommendation in the majority report that the next government set up a working group to consult closely with the HIV/ AIDS community including its most marginalised members, on two possible questions. First, should HIV non-disclosure come under the purview of the Criminal Code at all or would the fight better be left to public health measures. If HIV non-disclosure is to be removed from the reach of the Criminal Code then how best can legislative changes be drafted to achieve this goal. Second, if instead HIV non-disclosure is to remain within the purview of the Criminal Code, where should it be placed to make sure that the extreme penalties now incurred under sexual assault provisions are to be avoided and how should a new offence of HIV non-disclosure be drafted so that it is clearly limited to cases of intentional and actual transmission of the virus?

Science tells us that if we can achieve the UNAIDS goal of 90/90/90 (90% of Canadians knowing their HIV status, 90% in treatment, and 90% with a suppressed viral load) then we can beat HIV/AIDS. New Democrats believe action to decriminalize HIV non-disclosure is an essential first step in this fight to eradicate HIV/AIDS and that we have no time to lose in making sure we take all necessary measures to win that fight.