

Position Statement – HIV Non-Disclosure

HIV stigma is deeply ingrained and is exacerbated by the threat of criminalization for not disclosing one's positive status to sexual partners. Casey House believes that the criminal law should not be used to undermine public health or further stigmatize and discriminate against people living with HIV. We believe that any legal response to HIV non-disclosure must be informed by the best available scientific evidence and promote an effective public health response to HIV.

“...the over-criminalization of HIV non-disclosure discourages many individuals from being tested and seeking treatment, and further stigmatizes those living with HIV or AIDS. Just as treatment has progressed, the criminal justice system must adapt to better reflect the current scientific evidence on the realities of this disease.”ⁱ

– Statement from The Honourable Jody Wilson-Raybould, then Minister of Justice and Attorney General of Canada on World AIDS Day (December 1, 2016)

While there is no criminal law provision in Canada that explicitly criminalizes HIV, those living with HIV have been prosecuted under a variety of criminal provisions since the 1980s. The most common charge under which people are prosecuted is aggravated sexual assault, one of the most serious offences in Canada's *Criminal Code*. A person may be convicted of aggravated sexual assault if they fail to disclose their HIV-positive status prior to sexual intercourse and there is a realistic possibility of transmission.ⁱⁱ A conviction of aggravated sexual assault can entail up to life imprisonment and involves presumptive lifetime registration on the National Sex Offender Registry. Canada's approach to the criminalization of HIV non-disclosure is one of the most aggressive in the world: people living with HIV can be criminalized *even when* no harm was intended, no transmission occurred, and the risk of transmission was negligible. The use of sexual assault law to deal with HIV non-disclosure is overly punitive and the threat of criminalization is a barrier to health care that undermines relationships between those living with and at risk of HIV and their health care providers.

Several important developments have effectively narrowed the scope of this criminalization, including prosecutorial directives and trends in case law. However, the criminalization of HIV non-disclosure continues to have significant, detrimental impacts on those living with and at risk of HIV. These effects are disproportionately felt by Black, Indigenous, and LGBTQ2S+ communities. Women are also uniquely and negatively impacted, such as when there is a power imbalance with a sexual partner that affects their ability to safely negotiate condom use.

Building on its 2016 commitment, the federal government is currently reviewing the criminal law's treatment of HIV non-disclosure, to create “a path forward that follows science, protects victims, and reduces the stigma of those living with HIV”ⁱⁱⁱ.

Calls to action

Limiting HIV criminalization

1. We call on the federal government to **limit the criminalization of HIV non-disclosure**, as outlined in the *2022 Community Consensus Statement*^{iv} (developed by the Canadian Coalition to Reform HIV Criminalization and endorsed by 174 organizations), by:
 - Removing non-disclosure, exposure, or transmission of HIV or other STBBIs from the reach of sexual assault laws, where HIV non-disclosure takes place in the context of sex among otherwise consenting adults
 - Enacting reforms to ensure that any other provisions in the *Criminal Code* are not used to further stigmatize and discriminate against people living with HIV and STBBIs and that prosecutions are limited to cases of actual, intentional transmission
 - Ending the deportation of non-citizens following conviction – non-disclosure should not affect immigration status
 - Reviewing past convictions to enable expungements if the conviction does not fit within the new limitations on the scope of criminalization

For more information about Casey House's public policy and advocacy work, and a glossary of key terms, visit caseyhouse.ca/our-insights/advocacy.

Contact

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ⁱ Department of Justice Canada. (2017). *Criminal Justice System's Response to Non-Disclosure of HIV*. Retrieved from: <https://www.justice.gc.ca/eng/rp-pr/other-autre/hivnd-vihnd/p10.html>

ⁱⁱ R v Mabior, 2012 SCC 47 at para 104 [Mabior]

ⁱⁱⁱ Department of Justice Canada. (2023). *Reforming the criminal law regarding HIV non-disclosure – Online Public Consultation*. Retrieved from: <https://www.justice.gc.ca/eng/cons/hiv-vih/index.html>

^{iv} Canadian Coalition to Reform HIV Criminalization (CCRHC) – 2022 Consensus Statement: <http://www.hivcriminalization.ca/2022-consensus-statement/>