

COMMUNITY CONSENSUS STATEMENT ON

REFORMING CANADA'S *CRIMINAL CODE* TO LIMIT HIV CRIMINALIZATION



FREQUENTLY ASKED QUESTIONS

What is the Canadian Coalition to Reform HIV Criminalization?

The Canadian Coalition to Reform HIV Criminalization (CCRHC or “the Coalition”) is a national coalition of people living with HIV, community organizations, lawyers, researchers, and others formed in October 2016 to progressively reform, repeal, limit the scope and harms of, and/or abolish discriminatory criminal and public health laws and practices that punitively regulate HIV-related exposure, transmission, and non-disclosure in Canada. The Coalition includes individuals with lived experience of HIV criminalization, advocates, and organizations from across the country. It is directed by a steering committee of which a majority of members are people living with HIV. You can learn more about the Coalition at www.HIVcriminalization.ca.

What is the Community Consensus Statement on Criminal Code Reform?

The CCRHC has developed a ***Community Consensus Statement on Reforming Canada’s Criminal Code to Limit HIV Criminalization***. The statement outlines key concerns with Canada’s approach to HIV criminalization and calls on the federal government and Parliament to pass legislation — particularly changes to the *Criminal Code* — to end unwarranted criminal prosecutions against people living with HIV and associated harms.

This new statement is in keeping with, and builds on, the Coalition’s [original consensus statement released in 2017](#), which included a general call for changes to the *Criminal Code*, along with other steps to limit HIV criminalization. That original consensus statement was widely endorsed by HIV-specific and other organizations across the country and has been an important tool in our ongoing engagement with Government of Canada. Since then, the federal Minister of Justice, the Department of Justice, and a Parliamentary committee studying HIV criminalization have all recognized that the current state of the law in Canada is overbroad and change is needed, including at the legislative level.

This new Community Consensus Statement was developed by the CCRHC to be a common set of demands for law reform by those organizations who sign on to it. **The Coalition is looking for widespread endorsement of its new consensus statement by HIV organizations and other civil society organizations concerned about HIV criminalization across Canada.** The more endorsements this statement receives, the stronger our collective advocacy will be in getting the federal government to pass amendments to the *Criminal Code* limiting HIV criminalization.

To endorse the CCRHC’s Community Consensus Statement on Reforming Canada’s *Criminal Code* to Limit HIV Criminalization, please visit [this SurveyMonkey website](#). Note: Only organizations, and not individuals, are being asked to endorse the Statement.

How was this Community Consensus Statement developed?

This Statement draws upon various sources, including the international 2012 [Oslo Declaration on HIV Criminalisation](#) by a number of civil society organizations and guidance from international expert bodies such as the Global Commission on HIV and the Law, UN agencies such as UNAIDS and the UN Development Program (UNDP), and international human rights bodies (e.g. the UN Committee on the Elimination of Discrimination Against Women, which has specifically recommended Canada act to limit HIV criminalization). The Coalition’s calls for limiting HIV criminalization through *Criminal Code* amendments are also informed by a peer-reviewed [international expert consensus statement by leading HIV scientists](#), endorsed by the leading international scientific organization such as the International AIDS Society and UNAIDS.¹

In developing its call for *Criminal Code* reforms, the Coalition benefited from discussions with people living with HIV, human rights advocates, and legal experts, including during a one-day think tank convened by the HIV Legal Network. The Coalition also reached out to advocates from other jurisdictions to learn from their experience with law reform in relation to HIV criminalization. Finally, the Coalition organized a broad national consultation to seek specific input on options for *Criminal Code* reforms. (See more details below.)

Based on all these inputs, the Coalition drafted proposed amendments to the law. The ***Community Consensus Statement on Reforming Canada’s Criminal Code to Limit HIV Criminalization*** reflects, in non-technical language, the legislative changes for which the Coalition is advocating.



FEAR OF PROSECUTION DETERS PEOPLE, ESPECIALLY THOSE FROM COMMUNITIES HIGHLY VULNERABLE TO ACQUIRING HIV, FROM GETTING TESTED AND KNOWING THEIR STATUS, BECAUSE MANY LAWS ONLY APPLY TO THOSE WHO ARE AWARE OF THEIR POSITIVE HIV STATUS.

Why are the Coalition and others concerned about HIV criminalization?

HIV criminalization infringes the human rights of people living with HIV, who are often also members of other marginalized, stigmatized, or criminalized communities. In Canada, we have seen:

- arrest, prosecution, and conviction in circumstances where there has been little to no risk of HIV transmission;
- selective or arbitrary investigations and prosecutions that have a disproportionate impact on racial and sexual minorities, and on women;
- confusion and fear regarding obligations under the law;
- the use of threats of allegations triggering prosecution as a means of abuse or retaliation against a current or former partner living with HIV;
- women living with HIV reporting a fear of being accused of non-disclosure if they report a sexual assault;
- stigmatizing media reporting, including names, addresses, and photographs of people with HIV, including those not yet found guilty of any crime but subject to allegations;
- improper and insensitive police investigations that can result in inappropriate disclosure, leading to high levels of distress, loss of employment and housing, as well as social ostracism, and in some cases deportation for migrants living with HIV (which can also mean loss of access to adequate medical care);
- limited access to justice, including as a result of inadequately informed legal counsel; and
- sentencing and penalties that are often vastly disproportionate to any potential or realized harm, including lengthy terms of imprisonment, and mandatory designation as a sex offender, presumptively for a person's lifetime.

HIV criminalization is at odds with public health objectives.

Fear of prosecution deters people, especially those from communities highly vulnerable to acquiring HIV, from getting tested and knowing their status, because many laws only apply to those who are aware of their positive HIV status. HIV criminalization can also deter access to HIV care and treatment, undermining counselling and the relationship between people living with HIV and health-care professionals because medical records can be used as evidence in court.

Current Canadian law is at odds with scientific knowledge about HIV and the principle of limiting criminal prosecutions.

The science regarding HIV treatment has evolved dramatically and so must the law. HIV is difficult to transmit through a single act of sex, and yet this is sufficient for criminal prosecution and conviction. People living with HIV who have a sufficiently low viral load — often as a result of effective medication — pose a negligible possibility of transmission. Moreover, there is now global consensus that “Undetectable = Untransmittable” (“U=U”), meaning that the risk of transmission is effectively zero when a person living with HIV has an “undetectable” (or “suppressed”) viral load. Meanwhile, the scientific consensus is that the possibility of HIV transmission during sex with a condom varies from none to negligible, depending on the context; an unbroken condom used correctly is 100% effective at preventing HIV transmission.² Yet the law has not kept up with evolving scientific understanding.

The scientific evidence about HIV risk, including the evidence of the effectiveness of HIV treatment and of long-recommended measures such as condom use, is one compelling reason to limit the scope of the criminal law. But it is not the only reason. Some people living with HIV may not be able to insist on the use of condoms by their partners, or may not be in a position to reach viral suppression because of factors limiting treatment access (e.g. inadequate health systems, poverty, racism, denial, stigma, discrimination — and criminalization of various kinds that keeps people from safely connecting to health services).

Beyond the scientific reasons for limiting HIV criminalization when someone has a low viral load or takes precautions such as using a condom, we must also keep in mind the established principle that the use of the criminal law by the state should be a measure of last resort. International guidance in relation to HIV is that criminal prosecutions and convictions should be reserved for cases where there has been actual harm and the intent to do harm. Furthermore, in the case of a conviction, any penalties should be closely related to injury caused.³ Currently, Canadian law is overly broad and harsh, at odds with these principles.

HIV criminalization does not advance sexual autonomy or protect women (and others) from gender-based violence.

Too often, women lack full autonomy in terms of when to have sex, with whom, what type, and whether protective measures such as condoms are used. The reasons for this lack of autonomy are diverse and include experiencing the pressure of cultural norms, living in a situation of dependence or economic insecurity, lacking confidence and negotiation skills, and experiencing violence and coercion.

But the criminalization of HIV non-disclosure will not change any of these factors or make women any more autonomous. In fact, the threat of prosecution for alleged non-disclosure has been used on some occasions as a tool of abuse by vindictive partners against women living with HIV. The threat of prosecution can also discourage some women living with HIV from leaving abusive relationships or reporting sexual assaults to the police for fear that their HIV status might be used against them — which we have seen in Canada. This pushes women further away from autonomy, justice, dignity, and safety and has been found to contribute to violence against women and undermine their access to health care.⁴ The criminal law, including laws against sexual assault, should protect against coercive sex — although in practice it too often doesn't. But applying sexual assault or other laws overly broadly to criminalize HIV non-disclosure in otherwise consensual sexual encounters is a misuse of the law that harms people living with HIV (including women) and undermines the integrity of sexual assault law. There is consensus among HIV advocates and women's rights advocates that using sexual assault laws to prosecute allegations of non-disclosure of HIV (or another sexually transmitted infection) is misguided and should end.

If criminalization isn't the answer, what should be done instead to prevent transmission of HIV?

Rather than resort to criminal prosecutions, a better approach to the prevention of HIV and other sexually transmitted or bloodborne infections (STBBIs) is to create an environment that enables people to seek testing, support, and timely treatment, and to safely disclose their status.⁵ Rather than being threatened with criminal prosecution, people living with HIV or other STBBIs should be supported from the moment of diagnosis,⁶ and everyone should be empowered to look after their own sexual health.

Effective HIV prevention requires addressing multiple and complex factors that increase vulnerability to HIV, including pervasive gender-based violence. It requires access to prevention and treatment programs that take into account the intersections of Indigeneity, race, gender, sexuality, experiences of colonization, and other social determinants of health. It also requires ending HIV-related stigma, which is one of the greatest barriers to testing, treatment uptake, and disclosure. However, the overly broad use of the criminal law for HIV non-disclosure reinforces and contributes to HIV-related stigma in multiple ways.

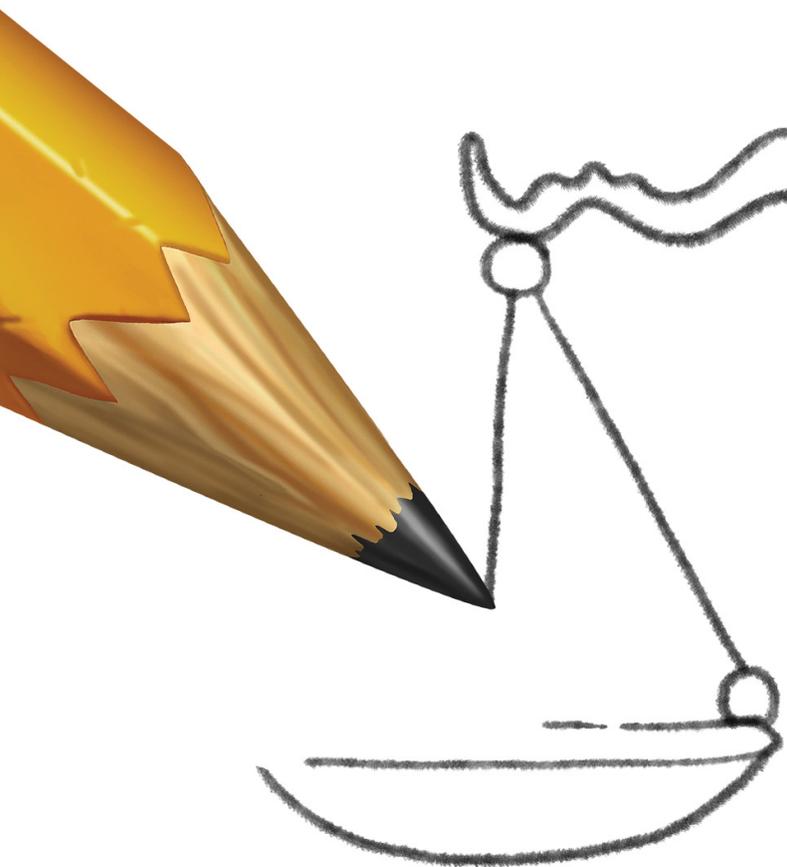
The criminal law should only be used as last resort to deal with the very rare case of intentional transmission, and where other interventions, including under public health laws (with appropriate safeguards for privacy and other rights), have proven insufficient to protect others from harm.

How often are criminal charges being used in Canada?

As of December 2021, according to [data tracked by the HIV Legal Network and other researchers](#), Canada had seen at least 224 separate documented prosecutions.

Under the current interpretation and application of the criminal law in Canada, HIV is overwhelmingly singled out from other communicable diseases for criminal prosecution. There have been a few prosecutions for non-disclosure of other medical conditions (e.g. herpes, hepatitis C) to a sexual partner, but almost all the prosecutions have been for non-disclosure of HIV.⁷

The solution to this stigmatizing, discriminatory treatment of people living with HIV is not to expand criminalization further to people with other sexually transmitted or bloodborne infections. Rather than exacerbate the harms already seen with overly broad criminalization of HIV, the solution is to properly limit the scope of the criminal law. This is reflected in the legislative reforms the Coalition is advocating to limit the criminalization of HIV and other STBBIs.



FOR MANY YEARS, PEOPLE LIVING WITH HIV HAVE FACED POSSIBLE CRIMINAL PROSECUTION FOR THE CRIME OF AGGRAVATED SEXUAL ASSAULT FOR NOT DISCLOSING THEIR HIV-POSITIVE STATUS BEFORE SEX THAT POSES WHAT THE COURTS CONSIDER TO BE A “REALISTIC POSSIBILITY OF HIV TRANSMISSION.”

What is the current state of the law in Canada? When is disclosure required?

For many years, people living with HIV have faced possible criminal prosecution for the crime of *aggravated sexual assault* for not disclosing their HIV-positive status before sex that poses what the courts consider to be a “realistic possibility of HIV transmission.” (The prosecution must also prove that the person living with HIV’s sexual partner would not have consented to sex had they known of the accused person’s HIV status.)

As the law currently stands, it is clear that there is no obligation to disclose HIV-positive status when having vaginal or anal sex if a condom is used and the partner living with HIV has a “low” viral load (less than 1500 copies/ml).

Whether there is an obligation to disclose in other circumstances is less clear. Much will depend on how prosecutors and courts assess the evidence in front of them on whether there is a “realistic possibility” of transmission in the circumstances.

- In the last few years, it has been accepted by several courts that someone with an “undetectable” or “suppressed” viral load does not pose a “realistic possibility” of transmission to their sexual partner, and therefore do not have a legal obligation to disclose their status (even if no condom is used). This is in keeping with the scientific consensus that “undetectable = untransmittable” (“U=U”). It has also been explicitly added to prosecutorial policy in a few jurisdictions in Canada (Ontario, British Columbia, and federal prosecutorial policy that applies in the three territories). Prosecution authorities in Alberta and Quebec have stated that this is their position as well, but there appears to be no clear, published guidance for prosecutors. There is no official policy to this effect in most jurisdictions and it is not fully settled law across the country.
- *Oral sex* does not pose a significant risk of transmitting HIV. A couple of court decisions suggest that prosecutions for just oral sex without disclosure (of HIV) are unlikely. But it is not yet definitely decided across the country whether there is a legal duty to disclose before oral sex, so the risk of prosecution remains.

- At the moment, people who do not have a low or suppressed viral load are still being convicted even if a *condom* was used — despite the scientific consensus that correctly using an unbroken condom is 100% effective at blocking the virus. There are a few conflicting court decisions on this point. Most recently, an Ontario appellate court upheld a conviction (and 3½-year prison sentence) of someone for not disclosing their HIV-positive status to partners, even though he used a condom on every occasion and was not accused of transmitting HIV.

For a more detailed summary of the law and prosecutorial policy, see a [briefing paper by the HIV Legal Network](#).⁸

Given all the harms of HIV criminalization, why does the Coalition not categorically oppose the use of the criminal law to deal with HIV non-disclosure?

This is a complex issue about which there is a range of opinions among people living with HIV and organizations responding to HIV. As with its original, widely endorsed Community Consensus Statement in 2017, the CCRHC’s new *Community Consensus Statement on Reforming Canada’s Criminal Code to Limit HIV Criminalization* reflects a common ground widely endorsed among the HIV community and allies in limiting HIV criminalization to exceptional cases of intentional and actual transmission. This position aligns with international recommendations.

The Coalition also pragmatically recognizes that current Canadian criminal law — and particularly the serious offence of (aggravated) sexual assault — has been interpreted and applied by prosecutors and courts very widely. The Coalition’s goal is to limit HIV criminalization to a much narrower set of circumstances, thereby significantly reducing the harms to people living with HIV and the HIV response. *Criminal Code* reforms are an essential part of the solution to limit HIV criminalization.

For these reasons, the Coalition has explicitly identified — including in its *Community Consensus Statement on Criminal Code* reform — situations that should not be criminalized and has outlined fundamental principles that should be applied in limiting the scope of the criminal law to very narrow circumstances.

THE MAJORITY OF RESPONDENTS (NEARLY 9 IN 10) EITHER AGREED OR STRONGLY AGREED THAT THE CCRHC SHOULD ADVOCATE FOR CHANGES TO THE *CRIMINAL CODE*, WITH THE POTENTIAL RISKS AND BENEFITS THIS INVOLVES. A MAJORITY PREFERRED THE APPROACH ULTIMATELY ADOPTED BY THE COALITION.

What was the consultation process to develop the Coalition's position on *Criminal Code* reforms?

As noted above, the Coalition developed its proposed reforms to the *Criminal Code* over years of deliberation, and most recently, through a process of consultation across the country and with communities particularly concerned about HIV criminalization. To inform the CCRHC's advocacy efforts, we consulted on three potential reform options with people living with HIV, people working in the HIV response, lawyers, researchers, and activists across the country. The consultation was conducted primarily through a bilingual online survey, as well as several live sessions. CCRHC members disseminated information about the consultation and survey to their networks via email and social media. The survey was also made available through the CCRHC's website. Respondents were provided with a background document that outlined each option in greater detail, including a discussion of the pros and cons of each option.

In addition, we asked respondents whether they thought the criminal law was ever warranted in a series of specific situations and/or whether they felt there should be no prosecutions *at all* in relation to HIV non-disclosure. Respondents were also provided with an opportunity to share any other comments or feedback on the reform advocacy. Further, during the live sessions, participants had the opportunity to ask questions, offer feedback, and raise concerns beyond the confines of the survey confines. The majority of respondents (nearly 9 in 10) either agreed or strongly agreed that the CCRHC should advocate for changes to the *Criminal Code*, with the potential risks and benefits this involves. A majority preferred the approach ultimately adopted by the Coalition, which is to limit the scope of existing *Criminal Code* offences without introducing a new, HIV/STBBI-specific offence.

In total, there were 211 responses to the online survey (153 English responses, 58 French responses). Participants in the online consultation were asked to voluntarily provide demographic information; most provided at least some of this information. The demographics of those participants who provided them are as follows:

- 52% identified as cisgender male, 37% identified as cisgender female, 10% identified as trans and/or non-binary, and 1% identified as Two-Spirit;
- 15% were in their 20s, 18% were in their 30s, 20% were in their 40s, 25% were in their 50s, and 18% were over the age of 60;

- a majority (54%) identified as people living with HIV, and of these, 3% indicated they had experienced criminal prosecution for allegedly not disclosing their HIV-positive status;
- 61% work or volunteer with an HIV organization or an organization that does a substantial amount of work in relation to HIV;
- in terms of representation of "key populations" affected by HIV, 34% identified as a gay, bisexual, or other man who has sex with men (GBMSM); 16% identified as a person who uses (or used) drugs; 7% identified as a person doing sex work; 3% identified as someone with a history of incarceration; and 3% identified as someone from a country with a high prevalence of HIV;
- 63% identified as white, 13% identified as Indigenous; 8% identified as Black, 3% identified as Latino or Latina, and 5% identified as South or East Asian;
- 45% were in Ontario, 36% were in British Columbia and 11% were in Quebec, while the remainder were from five other provinces.

In addition, more than 100 people participated across seven live (mostly online) consultation sessions in October 2021, which included open workshops in English and French, as well as live consultation sessions organized by and for Indigenous people, for African, Caribbean, and Black communities, cisgender and trans women, and gay men. Each session consisted of a presentation on the current state of the law, policy developments related to HIV criminalization, the current political landscape, and proposed legislative reforms, followed by a moderated discussion, in which participants were able to ask questions and share feedback.

How do I support the work of the CCRHC or get involved?

Organizations are encouraged to sign on to the *Coalition's Community Consensus Statement on Reforming Canada's Criminal Code to Limit HIV Criminalization* to help demonstrate widespread support for limiting HIV criminalization, including through the actions requested of the federal government in the Statement. (Only organizations, and not individuals, are being asked to endorse the Statement.)

We also encourage you and your organization to be a vocal advocate, including locally, in challenging HIV criminalization. The *Community Consensus Statement* on reforms to the *Criminal Code*, this *Frequently Asked Questions* document, and resources available online (see websites listed below) can be useful tools.

Where can I get more information about HIV criminalization?

See useful sources online at the following sites:

Canadian Coalition to Reform HIV Criminalization
www.HIVcriminalization.ca

HIV Legal Network
www.hivlegalnetwork.ca/criminalization

HIV Justice Worldwide
www.hivjusticeworldwide.org (and see the HIV Justice Toolkit at <https://toolkit.hivjusticeworldwide.org/>)



- ¹ Barré-Sinoussi F et al., [Expert consensus statement on the science of HIV in the context of criminal law](#), *Journal of the International AIDS Society*, 2018, 21: e25161.
- ² For a detailed discussion of the possibility of HIV transmission in various circumstances, see the global scientific consensus statement published in 2018: Barré-Sinoussi F et al., [Expert consensus statement on the science of HIV in the context of criminal law](#), *Journal of the International AIDS Society*, 2018, 21:e25161.
- ³ [Consensus Statement on HIV "Treatment as Prevention" in Criminal Law Reform](#), July 13, 2017.
- ⁴ E.g. see these Canadian studies: Patterson S et al., The impact of criminalization of HIV non-disclosure on the healthcare engagement of women living with HIV in Canada: a comprehensive review of the evidence. *Journal of the International AIDS Society* 2015; 18: 20572; Patterson S et al., Impact of Canadian human immunodeficiency virus non-disclosure case law on experiences of violence from sexual partners among women living with human immunodeficiency virus in Canada: Implications for sexual rights. *Women's Health* 2022; <https://doi:10.1177/17455065221075914>.
- ⁵ UNAIDS/UNDP, [Policy Brief: Criminalization of HIV Transmission](#), August 2008; Open Society Foundations, [Ten Reasons to Oppose the Criminalization of HIV Exposure or Transmission](#), December 1, 2008; IPPF, GNP+ and ICW, [HIV: Verdict on a Virus](#), 2008. See also IPPF, [HIV: Verdict on a Virus](#) (documentary film), 2011; Global Commission on HIV and the Law, [Risks, Rights & Health](#) (2012) and [Supplement](#) (2018); UNAIDS, [Guidance Note: Ending overly broad criminalization of HIV non-disclosure, exposure and transmission: critical scientific, medical and legal considerations](#), 2013; UNDP, [Guidance for Prosecutors on HIV-related Legal Cases](#) (2021).
- ⁶ UNAIDS and The Global Network of People Living with HIV, [Positive Health, Dignity and Prevention: A Policy Framework](#), January 2011.
- ⁷ For a more detailed breakdown of cases of HIV criminalization between 1989 and December 2020, see: Hastings C et al. [HIV Criminalization in Canada: Key Trends and Patterns \(1989-2020\)](#), HIV Legal Network, 2022.
- ⁸ [The Criminalization of HIV Non-Disclosure in Canada: Current Status and the Need for Change](#), HIV Legal Network, 2019.

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