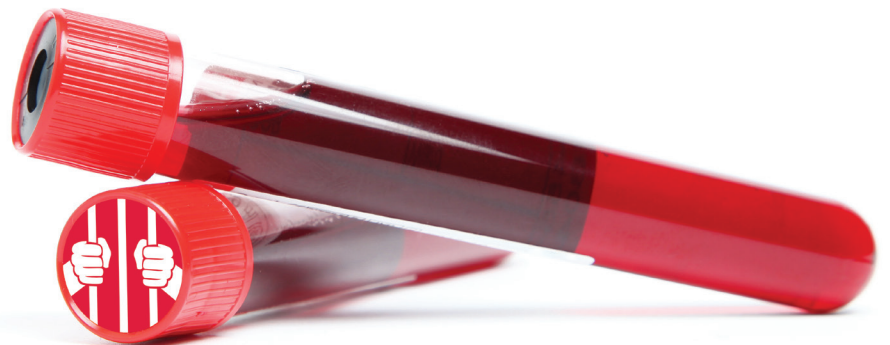


CANADIAN
COALITION
TO REFORM
HIV
CRIMINALIZATION
(CCRHC)

COMMUNITY CONSENSUS STATEMENT ON
**ENDING UNJUST
HIV CRIMINALIZATION**

FREQUENTLY ASKED QUESTIONS



» What is the Canadian Coalition to Reform HIV Criminalization?

The Canadian Coalition to Reform HIV Criminalization (CCRHC) is a national coalition of people living with HIV, community organizations, lawyers, researchers and others formed in October 2016 to progressively reform discriminatory and unjust criminal and public health laws and practices that criminalize and regulate people living with HIV in relation to HIV 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 includes a steering committee on which a majority of members are people living with HIV.

» What is the Community Consensus Statement?

The Community Consensus Statement outlines a shared critique of why Canada's approach to HIV criminalization is wrong and calls for some specific actions that federal, provincial and territorial governments should take to end unjust criminal prosecutions against people living with HIV. It was developed by the CCHRC to be a common set of demands by those organizations who sign on to it. The Coalition is looking for widespread endorsement of the Statement by HIV organizations and other organizations concerned about unjust HIV criminalization across Canada. The Statement reflects a consensus. The more endorsements the statement receives, the stronger our collective advocacy will be in getting governments to take the steps outlined in the Statement.

» How was the Community Consensus Statement developed?

The CCRHC prepared a draft of the Statement by drawing from a number of sources, including the international Oslo Declaration on HIV Criminalisation that was prepared and endorsed in 2012 by a number of civil society organizations (including some Canadian groups resisting unjust HIV criminalization). The Coalition also benefited from discussion with people with HIV, human rights advocates and legal experts during a one-day think tank (held in May 2017) that looked at various questions on the pros and cons of pursuing reforms to the *Criminal Code* as one strategy for limiting unjust prosecutions.

CCRHC then sought input on the draft Statement by consulting with people living with HIV, service providers, scientific experts, communities affected by HIV and by over-criminalization of various sorts, and others from across the country. It did so over a period of three months through a series of in-person consultations and a bilingual, anonymous online survey. (See more details on who participated in the consultations below.) The Coalition then revised and finalized the Statement with the benefit of input from all these sources.

» Why is the Canadian Coalition to Reform HIV Criminalization (CCRHC) concerned about the overly broad criminalization of HIV?

HIV criminalization infringes the human rights of people living with HIV, who are often also members of other marginalized, stigmatized or criminalized communities. Unjust criminalization results in

- 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;
- 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 and, in some instances, to loss of employment and housing, social ostracism, and in some cases deportation for migrants living with HIV (and hence, also, in some instances, 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.

HIV criminalization is at odds with scientific knowledge about HIV.

The science around HIV treatment has evolved dramatically and so must the law. HIV is difficult to transmit through sex, and an unbroken condom used correctly is 100% effective at preventing HIV transmission. People living with HIV who have a low viral load — often as a result of effective medication — pose a negligible risk of transmission.¹ Moreover, there is now global consensus that “Undetectable = Untransmittable,” meaning that the risk of transmission is effectively zero when a person living with HIV has an undetectable viral load.²

The scientific evidence about HIV risk, including the evidence of the effectiveness of HIV treatment, 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 be in a position to reach an undetectable status 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 where someone has a low viral load, we must also keep in mind that the use of the criminal law by the state should be a measure of last resort. As a general rule, criminal prosecutions and convictions should be reserved for cases where there has been actual harm or significant risk of harm, and the intent to do harm. Furthermore, any penalties should be closely related to injury actually caused.³

HIV criminalization does not advance sexual autonomy or protect women 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. On the contrary, 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, thus pushing women further away from autonomy, justice, dignity and safety. The criminal law, including laws against sexual assault, should protect against coercive sex — although in practice it too often doesn't. However, 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.

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

Rather than resort to criminal prosecutions, a better approach to HIV prevention is to create an environment that enables people to seek testing, support and timely treatment, and to safely disclose their HIV status.⁴ Rather than being threatened with criminal prosecution, people living with HIV should be supported from the moment of diagnosis,⁵ 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 race, gender, sexuality, experience 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. 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, 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 October 2017, according to data tracked by the Canadian HIV/AIDS Legal Network, Canada has the third-largest absolute number of recorded prosecutions for alleged HIV non-disclosure in the world (more than 200 separate documented prosecutions to date) and one of the highest rates of prosecution in the world.

Under the current interpretation and application of the criminal law in Canada, HIV is singled out from other communicable diseases for criminal prosecution. There have been a few prosecutions for non-disclosure of other conditions (e.g., herpes, hepatitis C) to a sexual partner, but almost all the prosecutions have been for non-disclosure of HIV.⁶

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

Since a key decision of the Supreme Court of Canada in 2012, people living with HIV could face 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 also has to prove that the HIV-positive person’s sexual partner would not have consented to sex had the partner 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 HIV-positive partner 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 courts assess the evidence in front of them on whether there is a “realistic possibility” of transmission in the circumstances.

- *Oral sex* does not pose a significant risk of transmitting HIV, but Canadian courts have not yet definitely decided whether there is a duty to disclose before oral sex.
- At the moment, using a *condom* may not be considered enough, and there might still be a risk of prosecution for not disclosing — even though correctly using an unbroken condom is 100% effective at blocking the virus.
- It’s also unclear if having an “undetectable” viral load is enough — even though science has established that there is effectively zero risk of transmission to a sexual partner in such a circumstance, even if no condom is used. There have been some lower court decisions acquitting a person living with HIV because their undetectable viral load meant there was no “realistic possibility” of transmission to their sexual partner, but the law is still evolving on this point.

Outside of the sexual context, people have also been charged with spitting and biting in some cases, even though there is effectively zero risk of transmission via saliva in such cases. This indicates how pervasive misinformation and stigma about HIV still is, including in the criminal justice system.

» 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. The Community Consensus Statement developed by the Coalition and endorsed by a wide range of organizations reflects the international consensus that in limited, and quite rare, circumstances there could be legitimate prosecutions. Specifically, the Coalition agrees that in cases of actual, intentional transmission of HIV, criminal charges may be warranted.

The Coalition also pragmatically recognizes that currently Canadian criminal law — and particularly the serious offence of 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, more appropriate set of circumstances. This likely will need to be achieved through various means, including more restrictive interpretations of the existing legal tests by courts (informed by scientific expertise), guidelines that mean police and prosecutors lay and pursue criminal charges in a narrower set of cases than is currently the case, and reforms to at least some parts of the *Criminal Code*.

For these reasons, the Community Consensus Statement has explicitly identified 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.

OUTSIDE OF THE SEXUAL CONTEXT, PEOPLE HAVE ALSO BEEN CHARGED WITH SPITTING AND BITING IN SOME CASES, EVEN THOUGH THERE IS EFFECTIVELY ZERO RISK OF TRANSMISSION VIA SALIVA IN SUCH CASES. THIS INDICATES HOW PERVERSIVE MISINFORMATION AND STIGMA ABOUT HIV STILL IS, INCLUDING IN THE CRIMINAL JUSTICE SYSTEM.

» Who participated in the consultation process to develop the Community Consensus Statement?

As noted above, the Coalition developed the Community Consensus Statement over the course of six months, including with input from a three-month consultation across the country. A total of 228 responses to the online questionnaire were received (193 in English, 35 in French). Approximately 160 individuals attended in-person consultations in Halifax (NS), Montreal (QC), Drummondville (QC), Sherbrooke (QC), Quebec City (QC), Toronto (ON), London (ON), Winnipeg (MB), Regina (SK) and Edmonton (AB).

Participants in the consultations (both in-person and online) 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:

- 61% identified as male, 29% identified as female, 3% identified as trans, and 7% indicated another gender identity;
- 15% are under 30 years of age, 24% are in their 30s, 23% are in their 40s, 22% are in their 50s, and 16% are over the age of 60;
- 39% identified as persons living with HIV, and of these, 3% indicated they had experienced criminal prosecution for allegedly not disclosing their HIV-positive status;
- 59% work or volunteer with an HIV organization or an organization that does a substantial amount of work in relation to HIV;
- 47% identified as gay, 27% identified as heterosexual, 9% identified as bisexual, 9% identified as queer, 1% identified as lesbian, 2% identified as two-spirited and 4% identified their sexuality using another term;
- 42% identified as white, 9% identified as Black, 4% identified as Indigenous, 3% identified as Latin American; and 3% identified as either South Asian, Southeast Asian, West Asian, Korean, Chinese or Japanese;
- 11% identified as having current or former experience in sex work;
- 26% identified as having current or former experience using illegal drugs;
- 4% identified as having current or former experience of being incarcerated; and
- 21% identified as having current or former experience with disability.

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

Organizations are encouraged to sign on to the CCRHC's Community Consensus Statement to help demonstrate widespread support for ending unjust HIV criminalization, including through the actions requested 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 unjust HIV criminalization. The Community Consensus Statement, this Frequently Asked Questions document and resources available online (see below) can be useful tools.

Both individuals and organizations can become a "Friend of the CCRHC" to receive periodic updates about our ongoing work, provide input to the Coalition and participate in advocacy initiatives. If you would like to get connected to our ongoing work to reform unjust HIV criminalization in Canada, contact us at ccrhc.info@gmail.com. (If you are interested in a deeper level of engagement, there are occasionally opportunities to join the Steering Committee of the Coalition. Contact us for more information if you're interested.)

» Where can I get more information about HIV criminalization?

See these useful sources online:

CANADIAN COALITION TO REFORM HIV CRIMINALIZATION
HIVcriminalization.ca

CANADIAN HIV/AIDS LEGAL NETWORK
aidslaw.ca/criminalization

ONTARIO WORKING GROUP ON CRIMINAL LAW AND HIV EXPOSURE
clhe.ca

HIV JUSTICE WORLDWIDE
hivjusticeworldwide.org



- ¹ M. Loutfy et al., “Canadian Consensus Statement on HIV and its transmission in the context of the criminal law,” *Canadian Journal of Infectious Diseases & Medical Microbiology* 25, 3 (2014): pp. 135–140; HALCO, “Canada’s HIV scientists express deep concern about overly broad criminalization,” April 7, 2017.
- ² *Undetectable = Untransmittable Consensus Statement: Risk of sexual transmission of HIV from a person living with HIV who has an undetectable viral load* (endorsements updated as of October 15, 2017).
- ³ *Consensus Statement on HIV “Treatment as Prevention” in Criminal Law Reform*, July 13, 2017.
- ⁴ UNAIDS/UNDP, *Policy Brief: Criminalization of HIV Transmission*, August 2008; Open Society Foundations, *Ten Reasons to Oppose the Criminalization of HIV Exposure or Transmission*, fact sheet, 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; UNAIDS, *Guidance Note: Ending overly broad criminalization of HIV non-disclosure, exposure and transmission: critical scientific, medical and legal considerations*, 2013.
- ⁵ UNAIDS and The Global Network of People Living with HIV, *Positive Health, Dignity and Prevention: A Policy Framework*, January 2011.
- ⁶ For a more detailed breakdown of cases of HIV criminalization between 1989 and December 2016, see: C. Hastings, C. Kazatchkine and E. Mikhailovskiy, *HIV Criminalization in Canada: Key Trends and Patterns*, Canadian HIV/AIDS Legal Network, 2017.