



Government of Canada Consultation on HIV Criminalization: Backgrounder & Key Messages

Canada has been a global hotspot for HIV criminalization, which causes multiple harms to people living with HIV and undermines an effective public health response. Advocates have long called for legal changes. On October 20, 2022, the federal government launched a national public consultation on reforming Canada's criminal laws on HIV non-disclosure. The Canadian Coalition to Reform HIV Criminalization (CCRHC) has prepared this document to support individuals and organizations participating in the consultation.

What is the Coalition/CCRHC? The [CCRHC](#) 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. It is directed by a steering committee, a majority of whom are people living with HIV.

About the Government of Canada consultation

Why should I participate in the consultation? The CCRHC has been advocating for law reform and has previously undertaken its own community consultations in coming up with its [recommended changes to the law](#), which enjoy wide support from organizations across the country. The federal government has now launched its consultation to inform legislation that it may introduce in Parliament. It is important that the voices of people living with HIV and organizations working in the HIV response be heard by the government in this process.

How do I participate in the consultation? The consultation will take place as an online survey, based on a government background paper. You can access the background paper and answer the questions online [here](#). The survey consists of 13 questions and is available in both English and French. See below for some key messages and suggested answers to the consultation questions, prepared by the CCRHC for those who might find them helpful.

How long will the consultation run? The online consultation will run from October 20, 2022, to January 13, 2023.

Who can participate? Anyone! According to the federal government's website, they are seeking input from "stakeholders and the public." You can choose to respond to the survey as an individual or as an organization.

Can I participate anonymously? Yes. Respondents are not required to indicate their name to participate in the survey. However, the government's website indicates that the responses themselves are not confidential, so if you would like to remain anonymous, please ensure that you do not include any identifying information in your response (e.g. you may choose not to answer the optional question about your profession). Note that organizations that voluntarily provide their organization's name could be identified, according to the government's website.

If I have further questions about participating, who can I ask? The CCRHC will be hosting at least two virtual, 90-minute information sessions (one in English, one in French) for organizations and individuals interested in responding to in the government consultation. At these information sessions, you will have an opportunity to ask questions about the current law and the need for reform, the CCHRC's recommended changes to the law, and how best to contribute to the consultation. The final 30 minutes of each session will be reserved for people living with HIV to ask questions about how to share their own experiences with the law for the purposes of this consultation.

English info session: **Tuesday, November 8 from 1:00 to 2:30 pm ET. Register at this [link](#).**

French info session: **Tuesday, November 15 from 10:30am to 12:00pm ET. Register at this [link](#).**

HIV criminalization and the law in Canada

What's the issue with the current law? In Canada, people living with HIV can be criminalized if they do not disclose their HIV status to their sexual partner in *certain* circumstances. This is frequently referred to as the law of "HIV non-disclosure." The legal obligation to disclose is not set out in the *Criminal Code*, but rather comes from key Supreme Court decisions (*R v Cuerrier*, 1998 and *R v Mabior/R v DC*, 2012). Canada's non-disclosure laws have been criticized for being unscientific, overly broad, extremely punitive, and discriminatory by people living with HIV, community organizations, human rights advocates, scientists, UN bodies, and international organizations.

When is HIV disclosure legally required? HIV disclosure is not required in every sexual encounter. According to the Supreme Court of Canada, disclosure is required before having sex where there is a "realistic possibility" of HIV transmission. If a person does not disclose in these circumstances, they can be sent to prison. But prosecutors and courts have interpreted "realistic possibility" very broadly in a way that is not consistent with scientific evidence on HIV and its transmission. In Canada, people can be charged and convicted for non-disclosure even if they had no intent to transmit HIV, posed little to no risk of transmission, and did not actually transmit the virus.

What does a "realistic possibility" of transmission mean? Ten years ago, the Supreme Court in *Mabior* said that there is no "realistic possibility" of HIV transmission where a person has a low viral load (less than 1500 copies of the virus/mL of blood) *and* uses a condom. If both conditions are met, a person is not legally required to disclose. It's less clear whether there is an obligation to disclose in other circumstances. Since 2012, there has been growing recognition, in some court rulings and in prosecutorial policy in some jurisdictions, that a person with a suppressed viral load (under 200 copies of the virus/ml blood) does not pose a realistic possibility of transmitting HIV, even if they do not use a condom, meaning they do not need to disclose their status to their sexual partner.

This has been explicitly added to policy for prosecutors in Ontario, British Columbia, and to federal prosecutorial policies that apply to Yellowknife, Nunavut, and the Northwest Territories. It has also been unofficially adopted by prosecutors in Quebec and Alberta. This is an important development limiting unfair prosecutions. But it does not go far enough, and not all provinces have adopted even this basic limit on prosecutions. The law continues to be overly broad. For example, a person living with HIV was convicted in Ontario for having sex with a condom despite well-established evidence that condoms are highly effective at preventing transmission.

What are people charged with? People accused of HIV non-disclosure are most commonly charged with *aggravated sexual assault*, the same offence used to prosecute violent forced sex acts. Aggravated sexual assault can bring up to a lifetime in prison, and almost certain deportation for non-citizens. In addition, the law also currently mandates sex offender registration in the case of a sexual

assault conviction, leading to multiple, ongoing social and psychological harms for people convicted of HIV non-disclosure.

How many people have been charged? Since 1989, there have been more than 220 documented prosecutions for HIV non-disclosure in Canada. Notably, Black men are disproportionately represented among those prosecuted. In 2016, the Government of Canada publicly recognized the “over-criminalization” of HIV non-disclosure.

What has the community response been? The HIV community and its allies have been advocating against HIV criminalization for more than 25 years. Our advocacy has taken many different forms, including working with accused persons and their lawyers, public education and advocacy, intervening in court cases, and community mobilization, including the creation of the CCRHC.

Today, an advocacy priority is reforming the *Criminal Code* because it is essential to put an end to harmful HIV criminalization in Canada. After several months of Canada-wide consultations with the HIV community, including people living with HIV, experts, service providers, and allies, the CCRHC recently published its second [Community Consensus Statement](#). This follows the release of the Coalition’s [first Community Consensus Statement](#) in 2017, endorsed by more than 170 organizations across the country.

Building on the 2017 Statement, the newest Community Consensus Statement makes specific recommendations to the government on *Criminal Code* reform and other steps to stop the harm caused by HIV criminalization.

The CCHRC recognizes that HIV non-disclosure is a complex issue and that there is a range of opinions among people living with HIV and organizations about how to respond. The widely endorsed conclusions drawn from the community consultations, highlighted in both the first and second Community Consensus Statements, emphasize the need to strictly limit the use of the criminal law in the context of HIV. You can read more about the Community Consensus Statement and how it was developed in this [Frequently Asked Questions document](#).

Key messages to share with the federal government during the consultation:

Informed by years of community advocacy and extensive community consultations, the CCRHC recommends that organizations and individuals emphasize several key points when responding to the government's consultation:

- 1. Canada's approach to criminalizing HIV non-disclosure is unscientific; contributes to HIV stigma; undermines public health efforts to stop the spread of HIV; disproportionately affects Black, Indigenous, and gay communities; and imposes significant harms on people living with HIV.** Many of those who have faced charges or been found guilty experience barriers to housing and employment, social exclusion, and increased risks of violence and abuse. HIV criminalization does not address the gender inequalities and violence that can put women at risk of HIV, but has been used to threaten or victimize women living with HIV.
- 2. Sexual assault charges should never be used to prosecute allegations of non-disclosure, exposure, or transmission of HIV (or other sexually transmitted or bloodborne infections).** Using the law of sexual assault to deal with non-disclosure in the context of consensual sex is harmful to people living with HIV (including the many harms that flow from mandatory designation as a sex offender). Trying to adapt the law of sexual assault to such situations also raises concerns about damaging important principles in the law of sexual assault more generally.
- 3. If the criminal law is used, it should only be used as a measure of last resort, in rare cases where there was actual and intentional transmission of HIV.** Changes to the law should clearly state that people are not criminals for engaging in activities that, according to the best scientific evidence, do not pose a significant risk of transmission (e.g. sex with a condom, sex with a low or suppressed viral load, oral sex), or when extenuating circumstances were present (e.g. a person did not disclose because they feared violence). The law should be clear that any conviction requires proof that a person purposely and actually transmitted HIV.
- 4. As with HIV, the criminal law should be strictly limited with respect to other sexually transmitted and bloodborne infections (STBBIs) and never apply in absence of actual and intentional transmission.** While HIV has been singled out for prosecution, current criminal law applies to some other sexually transmitted infections as well. The solution to the stigmatizing, discriminatory treatment of people living with HIV in Canada is not to expand criminalization further to people with other STBBIs. 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.
- 5. Avoid the creation of a new HIV- or STBBI-specific offence.** Instead, amend the *Criminal Code* so that existing offences cannot be used to prosecute non-disclosure, exposure or transmission in absence of actual and intentional transmission. An HIV- or STBBI-specific offence would further stigmatize and discriminate against people living with HIV and STBBIs.
- 6. End the deportation of non-citizens following conviction.** This policy and this practice are racist in their effect. A criminal conviction based on HIV/STBBI non-disclosure must not affect immigration status.
- 7. Review past convictions** so that people living with HIV previously criminalized under these harmful and stigmatizing laws no longer must live with the label of being a criminal (and a sex offender in the case of most convictions to date).

Suggested responses to the federal government's Public Consultation Survey on the criminalization of HIV non-disclosure

The following section outlines suggested responses to questions 7–13 of [the federal government's public consultation survey on HIV non-disclosure](#). (Questions 1–6 are general and demographic questions.) We encourage you to use this as a starting place for your own responses, informed by the perspectives of your organization and your experience(s). Note, however, that answer must be brief: the online survey form allows respondents up to 500 characters of text (including spaces) to explain their answer. *If you prefer, you can also provide your written comments on the Government of Canada's discussion paper directly by emailing them at rsd.drs@justice.gc.ca.*

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

[Select "Yes"].

Cases related to the non-disclosure, exposure, or transmission of HIV or other STBBIs should be removed from the scope of sexual assault laws. Such misuse of sexual assault charges harms people living with HIV in multiple ways, including through disproportionately harsh sentences, unjustified mandatory designation as sex offenders, and deportation for non-citizens. It also undermines the law of sexual assault as a means of addressing sexual violence. [454 characters]

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

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

[Select "Yes"]

If the criminal law is ever used, it should only be as a last resort to deal with the rare case of intentional transmission, and where other interventions have proven insufficient to protect others from harm. Any prosecution should require proof that: the person acted with the motive or desire to transmit the infection, the person engaged in activity likely to transmit it, and it was in fact transmitted. In the case of a conviction, any penalty should be proportionate to the actual harm caused. [499 characters]

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

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

[Select "Yes"]

International guidance from UN bodies is that criminal prosecutions and convictions should be reserved for cases where there has been actual, intentional transmission. If the criminal law is ever used, it should only be used as a last resort to deal with the very rare case of actual (and

purposeful) transmission. The harsh sanction and stigma of a criminal conviction should be limited to cases where there has been the actual infliction of serious harm. [456 characters]

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

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

[Select “Yes”]

Criminal charges related to non-disclosure, exposure, or transmission of HIV or another STBBI are not justified where someone engaged in activities that, according to the best available scientific evidence, posed no significant possibility of transmission. These include: oral sex; anal or vaginal sex with a condom; anal or vaginal sex without a condom while having a low or suppressed viral load; and spitting and biting. [423 characters]

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

[Select “No”]

The creation of a new HIV- or STBBI-specific offence should be avoided. An HIV- or STBBI-specific offence would further stigmatize and discriminate against people living with HIV and STBBIs, and likely have a disproportionate impact on Indigenous and Black communities. The solution to the current stigmatizing, discriminatory treatment of people living with HIV in Canadian criminal law is not to expand criminalization further to people with other STBBIs. [457 characters].

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

[Select “Yes” and a text box will appear.]

The *Criminal Code* should be amended so that existing offences can only be used to prosecute non-disclosure, exposure or transmission where there is actual and intentional transmission, and where no other extenuating circumstances are present (e.g. fear of violence upon disclosure). Furthermore, end the discriminatory deportation of non-citizens, who are currently treated more harshly for the same conduct. There must also be an accessible way to review past convictions under overly broad laws. [497 characters]

Question 13: If you have any documents (e.g. policy papers, research reports) you would like to provide as part of your response to the public consultation, please upload them here:

Here are some suggested documents of relevance that may be of use in preparing your responses to the government’s consultation. You may also consider uploading them as part of your submission to the online survey.

[CCRHC’s 2017 Community Consensus Statement](#)

[CCRHC's 2022 Community Consensus Statement](#)

[THE CRIMINALIZATION OF HIV IN CANADA: EXPERIENCES OF PEOPLE LIVING WITH HIV](#) (key research study by A. McClelland)

[HALT THE HARM: ENDING AND AVOIDING CRIMINALIZATION OF HIV, COVID-19, AND OTHER PUBLIC HEALTH CHALLENGES IN CANADA](#) (HIV Legal Network, R. Elliott et al.)

[HIV CRIMINALIZATION IN CANADA: KEY TRENDS AND PATTERNS \(1989-2020\)](#) (HIV Legal Network, C. Hastings et al.)

[HARMS OF SEX OFFENDER REGISTRIES IN CANADA AMONG PEOPLE LIVING WITH HIV](#) (Carleton University, HALCO, HIV Legal Network - L. Michaud et al.)

[COVERING RISK: HIV CRIMINALIZATION AND CONDOMS](#) (HIV Legal Network)

For more information about HIV criminalization and community advocacy in Canada, see:

Canadian Coalition to Reform HIV Criminalization (CCRHC): www.HIVcriminalization.ca
HIV Legal Network: www.hivlegalnetwork.ca/criminalization