



Canada's source for  
HIV and hepatitis C  
information

La source canadienne  
de renseignements sur  
le VIH et l'hépatite C

From *HIV in Canada: A primer for service providers*

## Criminalization of HIV non-disclosure

### Key Points

- Canadian legislation states that people living with HIV have a duty to disclose their HIV status before engaging in sexual behaviours that pose a “realistic possibility” of transmitting HIV to another person.
- At least 184 people who allegedly failed to disclose their HIV status have been charged with criminal offences in Canada. There is no evidence that criminalization of HIV non-disclosure acts as a deterrent against participation in behaviours that can transmit HIV.
- Criminalization of HIV non-disclosure may have many negative consequences.

According to the Supreme Court of Canada's 1998 decision in *R vs Cuerrier*, people living with HIV have a legal duty to disclose their HIV status before engaging in sexual relations that pose a “significant risk” of transmitting the virus. In 2012, this duty was made more precise in two decisions from the Supreme Court. Those rulings stated that there is duty to disclose before any sexual relations that pose a “realistic possibility” of transmission. In the decisions, the court ruled that individuals are not required to disclose their HIV status before having vaginal sex if a condom is used and the HIV-positive person has a “low” HIV viral load. In one of the decisions, the court considered an HIV viral load of 1,500 copies of the virus or fewer per millilitre of blood to be “low.” Whether 1,500 will become the standard for defining “low” is not clear. The court did not rule on disclosure before other types of sex, such as anal sex or oral sex.

Experts in HIV and criminal law have interpreted these decisions to mean that a person with HIV has a legal duty to disclose his or her HIV status before having:

- vaginal, frontal<sup>1</sup> or anal sex without a condom, regardless of viral load
- vaginal, frontal or anal sex when viral load is higher than “low,” even when a condom is used

The Supreme Court only ruled on specific instances of vaginal sex, so it is unclear whether a person with a “low” viral load has a legal duty to disclose his or her HIV status in the following circumstances:

- having **anal sex** or **frontal sex** with a condom
- engaging in sexual acts that have a lower risk of transmission, such as oral sex without a condom
- sharing equipment to inject drugs (because this does pose a high risk of transmission, the Canadian HIV/AIDS Legal Network states that it is safest to assume that HIV-positive drug users also have a legal duty to disclose)

Research now tells us that people living with HIV who are adherent and maintain an undetectable viral load when they are on treatment do not transmit HIV to their sexual partners. However, this information was not available to inform the 2012 Supreme Court rulings. As a result, criminal charges continue to be brought against people living with HIV who do not disclose their HIV status even though they are on treatment and maintain an undetectable viral load.

Criminal charges have been laid in Canada against people living with HIV because their behaviour posed a real or perceived risk for transmitting HIV, or the person's positive status was considered a factor aggravating the seriousness of other charges. By the end of 2016 at least 184 people who allegedly failed to disclose their HIV status had been charged with criminal offences in Canada. Some people with HIV have been convicted of serious criminal offences and sentenced to significant time in prison for failing to disclose their HIV status before engaging in risky behaviours. People have been charged and convicted of various crimes, including assault, common nuisance, criminal negligence causing bodily harm, murder and attempted murder, and uttering threats.

One of the main arguments for criminal prosecution is that it will act as a deterrent against behaviours that pose a risk for transmitting HIV to others. However, there is no good evidence to support this argument. The other main

argument for criminal prosecution is that it punishes the individual for the behaviour.

However, the criminalization of non-disclosure HIV may have negative consequences that should be considered. For example:

- Imprisoning people living with HIV may not prevent HIV transmission. In fact, prisons are environments in which high-risk behaviours are common and where HIV prevention measures are limited. This may lead to the transmission of HIV within prisons and then more broadly when people in prison return to their communities.
- Prevention interventions, such as education and risk-reduction counselling, may be better suited than criminalization for changing complex human behaviours related to sex and drug use.
- The fear of criminal prosecution may deter people from being tested. If someone doesn't test for HIV, then they won't know their HIV status and thus may believe that disclosure and/or onward transmission of HIV isn't an issue for them.
- Extensive use of criminal prosecution could lead to a misperception by the public about the risk of transmission. This is especially relevant in cases where stiff sentences are imposed for behaviours associated with a negligible risk of transmission.
- The public attention given to criminal prosecutions may create a false sense of security that the law will protect people from HIV infection.
- Criminal prosecution can add to the stigma and discrimination faced by people with HIV. It places the burden of preventing HIV transmission on those living with HIV and portrays those living with HIV as potential criminals.
- Confidentiality of records can be breached when evidence is being gathered for a prosecution and the identity of the person living with HIV is revealed. This can lead to stigma and discrimination. It can also undermine trust in the healthcare system.
- Gender and power inequity can make the situation more complex. For example, some HIV-positive women may not be able to insist on condom use or may fear violence if they reveal their HIV status.

Across the country, advocates are responding to the increasing use of criminal prosecution. The Canadian HIV/AIDS Legal Network has produced *HIV Disclosure and the Law: A Resource Kit for Service Providers* to help front line workers and their clients make informed and empowered choices in the face of criminalization.

In 2014, close to 80 Canadian experts endorsed a statement that the chance of transmitting HIV is low to zero for many types of sex and that a poor appreciation of this knowledge within the legal community has contributed to the overly broad use of criminal charges against people with HIV.

On World AIDS Day 2017, the federal government issued a report acknowledging that "HIV is first and foremost a medical and public health issue" [pg3] and that over-criminalization of HIV non-disclosure leads to some of the negative consequence listed above [pg32]. The Ontario and BC provincial governments have also issued updated guidance on prosecuting people with HIV who do not disclose to their sex partners.

## Resources

[HIV Criminalization](#) - Canadian HIV/AIDS Legal Network

[Criminal Justice System's Response to Non-Disclosure of HIV](#) (2017) - Department of Justice, Government of Canada

[Sexual Offences against Adults](#) (2017) - Ontario Crown Prosecution Manual

[Sexual Transmission, or Realistic Possibility of Transmission, of HIV](#) (2018) - British Columbia Prosecution Service Crown Counsel Policy Manual

## Sources

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6. Caivano N, Ka Hon Chu S. *U=U and the overly-broad criminalization of HIV nondisclosure* . Toronto: CATIE; 2017. Available from: <http://blog.catie.ca/2017/06/06/uu-and-the-overly-broad-criminalization-of-hiv-nondisclosure/>

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1. Frontal sex is what is commonly referred to as vaginal sex. This term is sometimes used by trans men or people on the trans masculine spectrum who feel more comfortable with this language.

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