



Public Consultation Paper: HIV Non-Disclosure

On July 27, 2022, the Government committed to consult Canadians on the criminal justice response to HIV non-disclosure, an issue that was identified as a priority issue by stakeholders during consultations undertaken with 2SLGBTQI+ communities in 2020-2021. These consultations¹ were led by the 2SLGBTQI+ Secretariat of the Department of Women and Gender Equality to inform the development of the 2SLGBTQI+ Action Plan, launched on August 28, 2022. For more information on the Action Plan, please see: [2SLGBTQI+ Action Plan](#).

This consultation seeks views on how the criminal law addresses situations where a person living with HIV fails to disclose their HIV status to someone prior to engaging in sexual activity with that person. The Supreme Court of Canada held in *R v Mabior*² that disclosure of HIV status prior to sexual activity was required where there is a realistic possibility of transmission. If there is no realistic possibility of transmission, failure to disclose will not constitute a crime. The Court also noted that a realistic possibility of transmission is negated if (a) viral load is low at the time of sexual relations; and (b) a condom was used. Despite this guidance, as discussed below, the application of the law in this area has been inconsistent. Moreover, there have also been calls to limit the criminal law's application in this area. The views you share will inform the development of possible criminal law reform in this area.

Current Approach to HIV Non-Disclosure Prosecutions

On December 1 (World AIDS Day), 2016, the then Minister of Justice expressed concern about the over-criminalization of persons living with HIV and announced that she would work with the provinces and territories, affected communities, and medical professionals to examine the criminal justice system's response to non-disclosure of HIV status, which imposes a duty to disclose HIV positive status prior to sexual activity that poses a realistic possibility of transmission. Further to this commitment, the Department of Justice Canada released a report on December 1, 2017, entitled [The Criminal Justice System's Response to Non-Disclosure of HIV](#). The Department's report provides an overview of important considerations, including that:

- Sexual activity with an HIV positive person poses a **negligible risk** of transmission where that person has maintained a suppressed viral load (i.e., a viral load of under 200 copies per ml of blood) as a result of anti-retroviral therapy. This is the case regardless of whether a condom was used. This finding is based on the Public Health Agency of Canada's systematic review of the scientific evidence of the sexual transmission of HIV, summarized in Part B of Justice Canada's 2017 report and published on the [CMAJ website](#);
- Certain types of sexual activity with a person living with HIV pose a **low risk** of transmission:
 - Sexual intercourse without a condom with a person who is on anti-retroviral therapy, but has not maintained a suppressed viral load;

¹ [2SLGBTQI+ Action Plan Survey findings - Women and Gender Equality Canada](#)

² *R v Mabior*, [2012] 2 SCR 584



- Sexual intercourse with a condom with a person who is not on treatment;
- Oral sex without a condom with a person who is on anti-retroviral therapy, but has not maintained a suppressed viral load; and,
- Oral sex without a condom with a person who is not on treatment;
- The majority of persons estimated to be living with HIV in Canada know their HIV status and receive appropriate treatment, such that a person living with HIV in Canada cannot be assumed to be at risk of transmitting it;³ and,
- Gay and bisexual men who have sex with men, Indigenous and Black persons, are disproportionately represented among those living with HIV in Canada, such that criminal laws that apply to HIV non-disclosure are likely to disproportionately impact these groups.

These considerations informed the development of a federal prosecutorial directive, issued by the Attorney General of Canada, to limit prosecutions of HIV non-disclosure cases, which came into force on December 8, 2018, and applies to cases prosecuted by the Public Prosecution Service of Canada (PPSC).⁴ While the PPSC is responsible for prosecuting *Criminal Code* offences in the territories, provinces are responsible for the administration of justice in their respective jurisdictions, which includes prosecuting *Criminal Code* offences. Some provincial prosecutorial authorities have implemented similar limitations on HIV non-disclosure prosecutions.⁵ It is open to provinces to develop guidelines, in the form they deem appropriate, to guide the enforcement of the *Criminal Code* within their respective jurisdictions, given their responsibility for the administration of justice.

In 2019, the House of Commons Standing Committee on Justice and Human Rights released its report entitled, *Criminalization of HIV Non-Disclosure in Canada*.⁶ Witnesses who appeared before the Committee identified several issues with respect to Canada's criminal law approach to HIV non-disclosure cases, including that:

- The current law criminalizes people living with HIV when no harm was intended, when there was no HIV transmission, and for sexual behaviours that posed zero to negligible risk of transmission;
- Using sexual assault law to deal with HIV non-disclosure increases the stigmatization of people living with HIV and is overly punitive;

³ It is estimated that about 63,000 people were living with HIV in Canada at the end of 2020. Canada achieved both the 1st and 3rd 90-90-90 targets expected for 2020:

- Among those living with HIV, an estimated 90% were diagnosed;
- Of those diagnosed, 87% were estimated to be on treatment; and,
- An estimated 95% of persons on treatment had a suppressed viral load.

Source: <https://www.canada.ca/en/public-health/services/publications/diseases-conditions/estimates-hiv-incidence-prevalence-canada-meeting-90-90-90-targets-2020.html>; <https://www.canada.ca/en/public-health/services/publications/diseases-conditions/hiv-canada-people-living-with-hiv-new-infections-2020.html>; <https://www.canada.ca/en/public-health/services/publications/diseases-conditions/canada-progress-towards-global-hiv-targets-90-90-90-2020.html>

⁴ Available at: <https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p5/ch12.html>.

⁵ See: [Crown Prosecution Manual: D. 33: Sexual Offences against Adults | Ontario.ca](#); [Sexual Transmission, or Realistic Possibility of Transmission, of HIV \(SEX 2\) \(gov.bc.ca\)](#); [Poursuites criminelles en matière d'exposition au VIH et de non-divulgateion de la séropositivité \(Québec\)](#) (in French only).

⁶ <https://www.ourcommons.ca/Content/Committee/421/JUST/Reports/RP10568820/justrp28/justrp28-e.pdf>



- Studies indicate that certain groups are more impacted by the criminalization of HIV non-disclosure in Canada, notably: Black people, Indigenous women, and gay and bisexual men who have sex with men;
- Some women, particularly those in vulnerable relationships, face added challenges when insisting on condom use by their partners. In particular, they may fear that disclosure of HIV status could trigger loss of relationships, which could have emotional, financial and immigration consequences. Women may also fear abuse and physical violence, as well as the use of the criminal law as a weapon, especially in situations where relationships break down.

A majority of the Committee made a number of recommendations and observations, including that:

- A specific *Criminal Code* offence related to the non-disclosure of an infectious disease (including HIV) when there is actual transmission should be created, and prosecutions related to such transmission should only be dealt under that offence;
- The use of sexual assault provisions to deal with HIV non-disclosure is overly punitive, contributes to the stigmatization of, and discrimination against, people living with HIV, and acts as a significant impediment to attaining Canada’s public health objectives; and
- The current approach to HIV non-disclosure is overly broad, but in some cases prosecutions under the criminal law would be appropriate.

Stakeholders have expressed concern about the stigma associated with HIV or sexually transmitted infections (STI)-specific offences and have recommended law reform to address over-criminalization concerns.⁷

Applicable Criminal Law

In HIV non-disclosure cases, the criminal law applies where a person who knows they are HIV positive and infectious, transmits HIV to others or exposes others to a “realistic possibility of HIV transmission” without affording their sexual partner the opportunity to choose whether to assume that risk. Specifically, courts have found that a complainant’s consent to sexual activity may be vitiated, or not obtained in law, if the accused misrepresented or failed to disclose their HIV status prior to that activity. In such circumstances, the assault (sections 266 to 268) or sexual assault (sections 271 to 273) offences have been applied. Most HIV non-disclosure cases have involved aggravated assault or aggravated sexual assault charges, because contracting HIV has been considered to endanger the life of that person.⁸ Criminal negligence causing bodily harm (section 221), and common nuisance (section 180)

⁷ Department of Justice, *Criminal Justice System’s Response to HIV Non-Disclosure* (2017), Part D. See also: [2022 Consensus Statement – Canadian Coalition to Reform HIV Criminalization \(CCRHC\)](#).

⁸ In its 2012 *Mabior* decision, the Supreme Court of Canada held:

HIV is indisputably serious and life-endangering. Although it can be controlled by medication, HIV remains an incurable chronic infection that, if untreated, can result in death. As such, the failure to advise a sexual partner of one’s HIV status may lead to a conviction for aggravated sexual assault under [s. 273\(1\)](#) of the *Criminal Code*. (This said, it may be that with further medical advances, the death rate may decline to the point where the risk of death is virtually eliminated, reducing the offence to sexual assault *simpliciter* under [s. 271\(1\)](#) of the *Criminal Code*. Similarly, the day may come when researchers will find a cure for HIV, with the possible effect that HIV will... no longer fall under the category of fraud vitiating consent for the purposes of sexual assault.)



have also been applied in HIV non-disclosure cases. The *Criminal Code* contains no HIV or other infection-specific offences. A “venereal disease”-specific *Criminal Code* offence was repealed in 1985.

In its 1998 *Cuerrier* and 2012 *Mabior* decisions, the Supreme Court of Canada established that consent to sexual activity will be vitiated by fraud under paragraph 265(3)(c) of the *Criminal Code* for the purposes of the assault and sexual assault offences where:

- the accused does not disclose, or misrepresents, their HIV status;
- the accused knows that they are HIV positive and that they are at risk of transmitting HIV to others;
- the sexual activity in question causes, or poses a significant risk of, serious bodily harm; **and**,
- the complainant would not have consented to the sexual activity had they known of the accused’s HIV positive status.

A significant risk of serious bodily harm is established by a “realistic possibility of transmission”⁹ of HIV. A realistic possibility of HIV transmission is established with reference to medical evidence, and advances in HIV treatment should be taken into account when applying this test.¹⁰ However, courts have come to different conclusions on when the realistic possibility of transmission test is met, resulting in inconsistent application of the law across Canada. In some cases, persons living with HIV have been convicted of a criminal offence, despite the fact that they had a suppressed viral load at the time of the sexual activity in question or took other appropriate precautions, such as condom use. In the majority of cases, aggravated sexual assault is the offence charged. A conviction for a sexual offence, including aggravated sexual assault, results in registration in Canada’s Sex Offender Registry.

Reported HIV non-disclosure cases decided since the Supreme Court of Canada’s 1998 *Cuerrier* decision indicate that HIV non-disclosure cases involve a broad range of conduct. Generally, cases involving high levels of blameworthiness tend to involve a pattern of conduct that routinely places numerous, and often vulnerable, complainants at a high level of risk, which indicates intention to transmit HIV. Such cases often involve conduct that shows a disregard for public health interventions and the well-being of others. These cases may involve transmission of HIV to some, but not all, of the complainants or, in some cases, no transmission, despite the high-risk behaviour of the accused. HIV non-disclosure cases reflecting factors that indicate higher levels of blameworthiness tend to involve male accused and female complainants.

Cases involving lower levels of blameworthiness generally involve spontaneous or isolated sexual acts where the accused has not turned their mind to the risk posed, sometimes as a result of life circumstances that make it difficult to consider such risks. Case law refers to such conduct as reckless, as

⁹ See the Supreme Court of Canada’s 2012 *Mabior* decision, paragraphs 87 to 95.

¹⁰ See the Supreme Court of Canada’s 2012 *Mabior* decision, paragraph 95.



opposed to intentional.¹¹ HIV non-disclosure cases reflecting factors that indicate lower levels of blameworthiness tend to involve Indigenous and female accused.¹²

Approaches in Other Countries

In 2020, 92 countries reported to the Joint United Nations Programme on HIV/AIDS (UNAIDS) that they criminalized HIV non-disclosure, exposure and transmission through either HIV, STI or infectious disease-specific offences or offences of general application. Justice Canada's 2017 report provided general observations concerning the approaches of several like-minded jurisdictions, including that:

1. Most apply non-sexual offences of general application to HIV non-disclosure cases (such as assault);
2. All criminalize intentional HIV transmission and most criminalize reckless transmission,¹³ whether through offences of general application or HIV/STI/infectious disease-specific offences;
3. Most criminalize HIV exposure, but some more narrowly than others; for example, England and Wales and New South Wales only criminalize HIV exposure where intent to transmit HIV can be established; and,
4. All apply more serious offences that carry higher maximum penalties to cases involving intentional HIV transmission and less serious offences that carry lower maximum penalties to cases involving reckless transmission or exposure.¹⁴

Examples of approaches that use infectious disease-specific offences and offences of general application include the following:¹⁵

- In California, an offence prohibiting intentional transmission of an infectious or communicable disease applies where the accused knows that they have such a disease, specifically intends to transmit that disease, engages in conduct that poses a substantial risk of transmission and transmits the disease.¹⁶

¹¹ In common law jurisdictions, *intention* generally refers to an accused's mental attitude toward a particular goal, purpose or outcome, such as intending to transmit an infection. *Recklessness* is generally understood to refer to the subjective awareness of the accused that a prohibited consequence is likely to occur or that a prohibited circumstance likely exists, combined with the decision to act in spite of that risk, such as knowing that one has a communicable infection and that engaging in certain acts risks transmitting it, and engaging in that act anyway. See: *Sansregret v. The Queen*, [1985] 1 SCR 570.

¹² See discussion of the relevant reported jurisprudence in Department of Justice, *Criminal Justice System's Response to HIV Non-Disclosure* (2017), Part C, as well as reported jurisprudence post-dating that report: *R. v. Thompson*, 2018 NSCA 13; *R. v. Goodchild*, 2018 ONSC 6654, appeal: *R. v. N.G.*, 2020 ONCA 494; *R. v. Boone*, 2019 ONCA 652; *R. v. Gracie*, 2019 ONCA 658; *R. v. Bowser*, 2020 NSSC 337; *R. v. Gauthier*, 2021 BCSC 1295; *R. v. Al Safi*, 2021 ONCJ 135.

¹³ In common law jurisdictions, *intention* generally refers to an accused's mental attitude toward a particular goal, purpose or outcome, such as intending to transmit an infection. *Recklessness* is generally understood to refer to the subjective awareness of the accused that a prohibited consequence is likely to occur or that a prohibited circumstance likely exists, combined with the decision to act in spite of that risk, such as knowing that one has a communicable infection and that engaging in certain acts risks transmitting it, and engaging in that act anyway. See: *Sansregret v. The Queen*, [1985] 1 SCR 570.

¹⁴ Department of Justice, *Criminal Justice System's Response to HIV Non-Disclosure* (2017), Part E.

¹⁵ https://www.unaids.org/sites/default/files/media_asset/01-hiv-human-rights-factsheet-criminalization_en.pdf

¹⁶ https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB239



- In the UK, intentional or reckless sexual transmission of an infection is criminalized by offences of general application that prohibit causing grievous bodily harm or inflicting bodily injury.¹⁷
- In Scotland, intentional transmission of STIs is criminalized by the offence of assault, and reckless¹⁸ transmission or exposure to STIs is captured by the offence that prohibits culpable and reckless conduct.¹⁹

¹⁷ <https://www.cps.gov.uk/legal-guidance/intentional-or-reckless-sexual-transmission-infection>

¹⁸ Defined as “gross or wicked, or criminal negligence, something amounting, or at any rate analogous, to a criminal indifference to consequences”. Source: <https://www.copfs.gov.uk/for-professionals/prosecution-guidance/prosecution-policy-on-the-sexual-transmission-of-infection/html/>

¹⁹ <https://www.copfs.gov.uk/for-professionals/prosecution-guidance/prosecution-policy-on-the-sexual-transmission-of-infection/html/>



Public Consultation Survey: HIV Non-Disclosure

The Department of Justice Canada is seeking input from stakeholders and the public on the criminal law's treatment of HIV non-disclosure. Before completing the survey, we ask that you please review the consultation paper, which outlines the background and context for this work.

The Department of Justice is subject to the [Privacy Act](#) and is committed to ensuring your privacy and the protection of your personal information. Although participation in this survey is voluntary, your participation is encouraged. Please be aware that your individual responses, or responses provided on behalf of an organization are being collected as part of a public consultation and are not confidential. Note that organizations that voluntarily provide their organization's name could be identified. That said, any personal information you provide in your survey responses will be protected and managed in accordance with the *Privacy Act*. The information you choose to provide will be managed in accordance with the *Personal Information Banks – Outreach Activities PSU 938*. The *Privacy Act* gives you the right of access to your personal information, if you choose to do so, please contact the Department's ATIP office at ATIP-AIP@justice.gc.ca.

Your participation in this survey will help inform the Government's approach to modernizing the criminal justice system's response to HIV non-disclosure. Respondents can request a pdf copy of the survey for accessibility purposes by contacting us at: rsd.drs@justice.gc.ca.

Thank you for your participation.



Consultation Questions:

1. **Have you read the Department of Justice’s consultation paper on HIV non-disclosure** *Select one response only.*
 - Yes
 - No

2. **How would you rate your level of familiarity with the topic of HIV non-disclosure?** *Select one response only.*
 - 1 - Not at all familiar
 - 2- Slightly familiar
 - 3- Somewhat familiar
 - 4- Very familiar
 - 5- Extremely familiar

3. **Are you responding to this survey as an individual or on behalf of an organization?** *Select one response only.*
 - Individual (if checked go to q. 6)
 - Organization (if checked go to q.4, q.5)

4. **What sector is your organization in?** *Select all that apply.*
 - Healthcare
 - Law
 - Academia
 - Non-governmental organization
 - Other, please specify _____

5. **If you wish to provide the name of the organization, please do so here:** _____

6. **What is your profession?** *Select all that apply*
 - Academic
 - Lawyer
 - Health professional
 - Advocate
 - Other professional working in the area (Please specify: _____)
 - Other, please specify:

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 one response only.*
 - Yes, please explain:
 - No, please explain:
 - Don’t know



8. Should the *Criminal Code* be amended to limit its application to HIV non-disclosure cases, in the following way:
the accused must intend²⁰ 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,²¹ but without intending to transmit HIV, should not be held criminally liable? *Select one response only.*
- Yes, please explain:
 - No, please explain:
 - Don't know
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 one response only.*
- Yes, please explain:
 - No, please explain:
 - Don't know
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 one response only.*
- Yes, please explain:
 - No, please explain:
 - Don't know
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 one response only.*
- Yes, please explain:
 - No, please explain:
 - Don't know

²⁰ *Intention* generally refers to an accused's mental attitude toward a particular goal, purpose or outcome, such as intending to transmit an infection.

²¹ *Recklessness* is generally understood to refer to the subjective awareness of the accused that a prohibited consequence is likely to occur or that a prohibited circumstance likely exists, combined with the decision to act in spite of that risk, such as knowing that one has a communicable infection and that engaging in certain acts risks transmitting it, and engaging in that act anyway. See: *Sansregret v. The Queen*, [1985] 1 SCR 570.



- 12. Are there other ways that you think the *Criminal Code* should be amended to address HIV non-disclosure cases?**
- Yes, please explain:
 - No
 - Don't know
- 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 using the link on the consultation webpage.**