Community Consultation: Reforming the Criminal Code to limit HIV criminalization

What is this document and who is it for?

The Canadian Coalition to Reform HIV Criminalization (CCRHC) has previously called for changes to the federal *Criminal Code* that would limit HIV criminalization. This call was in the Coalition's *Community Consensus Statement* released in 2017. Since then, Coalition members have continued to press the federal government for action and have been developing some options for amendments to the *Criminal Code*.

To inform the next phase of our advocacy, the Coalition has launched a cross-Canada consultation about those options with people living with HIV, people working in the HIV response, legal and human rights experts, and activists. *The Coalition wants your input. This document provides background about the issue of HIV criminalization in Canada and information about how to share your views.*

We want to ensure that our community has the tools to understand the implications of various proposals for law reform. We want to be prepared to address complex and sensitive issues and technicalities that will arise during the process of drafting proposed changes to the *Criminal Code* and then campaigning for them. We want to be prepared for difficult conversations and decisions in negotiations with lawmakers, if and when we can get a bill introduced in Parliament. Outcomes of the consultation will help ground our efforts in the expertise, needs, and input of the HIV community and our allies as we work to limit criminal prosecutions against people living with HIV.

Out of this consultation we will develop a document that outlines our path forward and recommendations for changes in the *Criminal Code*. It will also help mobilize the HIV community and our allies in the major advocacy effort that will be needed to see the law changed for the better.

How do I participate in this consultation?

This consultation will take place between August 23 – October 22, 2021 via an online survey. To take the survey, use this link: https://www.surveymonkey.com/r/P9FWMLQ .

In addition, there will also be a number of consultations led by community-based organizations. We expect that these will mostly happen online. As they are organized, we'll circulate information about consultation sessions through Coalition members' networks and will post information on the Coalition's website at www.HIVcriminalization.ca. If you would like to organize a consultation in or with your community, contact us here: ccrhc.ccrcv@gmail.com.

HIV criminalization in Canada: what is the issue?

Canada is known around the world as a global hotspot for criminalizing people living with HIV who have allegedly not told sexual partners about their HIV-positive status. Since 1989, more than 220 people have been criminally prosecuted for alleged HIV non-disclosure, transmission, or exposure in Canada. People have been charged, and are still being charged, even when there is little to no risk of transmission, they had no intent to transmit the virus, and HIV was not transmitted.

It is widely recognized that HIV criminalization undermines the rights of people living with HIV as well as public health objectives, and is often at odds with scientific knowledge about HIV, including the possibility of transmission in various circumstances.

Want to know more before taking the survey or joining a consultation?

- Watch this **short two-minute video** that outlines the basics of this issue in Canada
- Read this more detailed **brief by the HIV Legal Network** that describes the current state of HIV criminalization in Canada and some of the advocacy to change it
- See additional resources on the **Coalition's website**

What have we already agreed as a community?

In 2017, the Coalition undertook a national consultation that led to the release of its original *Community Consensus Statement*. Through the consultation process, we gathered perspectives and expertise from the HIV community, including people living with HIV, experts, service providers, and allies.

This allowed us to develop a common position on HIV criminalization and several calls for action. The consensus statement has been endorsed by more than 170 HIV and other organizations across the country and has been an important tool in our ongoing engagement with government.

As we go through the difficult and complex exercise of determining what *Criminal Code* amendments to advocate for, it is important that we remember what has already been widely endorsed. In the Community Consensus Statement, we agreed that:

- Canada's current approach to HIV criminalization is unscientific, unjust, and undermines public health.
- The criminal law must be used only as a measure of last resort and must be limited in its scope and application.

- The federal government should change the *Criminal Code* to limit the unjust use of the criminal law against people living with HIV, including putting an end to the use of sexual assault laws (including the current mandatory designation as a sex offender if convicted).
- Reforms must also ensure that other provisions in the *Criminal Code* are not used to further stigmatize people living with HIV and are appropriately limited.
- A criminal conviction based on HIV non-disclosure must not affect immigration status.

In the consensus statement, we collectively called for changes to bring Canadian law into line with international guidance and the basic principles of criminal law, such that **criminal prosecutions should be limited to cases of actual, intentional transmission of HIV.**

This means that criminal charges should **only be used** when there is:

- proof that the person intended to transmit HIV;
- proof that the person engaged in sexual activity that was likely to transmit the virus;
- proof that HIV was actually transmitted; and
- in the case of a conviction, a penalty that is proportionate to the actual harm caused.

We also agreed that criminal charges should **never be used** when:

- someone did not understand how the virus is transmitted;
- someone disclosed their status to their sexual partner or reasonably believed their sexual partner was aware of their status through some other means;
- someone did not disclose their status because they feared violence or other serious negative consequences would result from such disclosure;
- someone was forced or coerced into sex; or
- someone engaged in activities that, according to the best available scientific evidence, posed no significant risk of transmission, which include: oral sex; anal or vaginal sex with a condom; anal or vaginal sex without a condom while having a low viral load; and spitting and biting.

The Community Consensus Statement was developed based on feedback gathered from across the country through in-person meetings, and an online questionnaire, involving people living with HIV, service providers, scientific experts, communities affected by HIV and over-criminalization, and others. In-person consultations took place in 9 cities and were attended by more than 80 individuals. We also received 193 English and 35 French responses to our online survey. To date, the Consensus Statement has been endorsed by more than 170 organizations across Canada.

Read more about the 2017 consultation and the Community Consensus Statement at http://www.hivcriminalization.ca/community-consensus-statement/.

Opportunity for change: Where are we now?

After years of dedicated advocacy, activism, and expert engagement, the current legal situation related to HIV in Canada may be open to change.

- In 2016, the Attorney General of Canada and Minister of Justice announced on World AIDS Day the need to address Canada's "overcriminalization of HIV." This announcement led Justice Canada to release its report *Criminal Justice System's Response to Non-*

Disclosure of HIV, which contains some important conclusions useful in our efforts to limit HIV criminalization in Canada.

- In 2018, the federal government issued a directive to federal prosecutors to limit prosecutions against people living with HIV (although technically only applicable to the three territories). Prosecutorial guidelines have been issued in British Columbia and in Ontario and instructions to prosecutors have been released in Quebec and Alberta. Unfortunately, guidelines from provincial authorities do not provide sufficient protection against unfair prosecutions.

- In 2019, the House of Commons Standing Committee on Justice and Human Rights (Justice Committee) conducted a study on HIV criminalization in Canada and released a groundbreaking report calling for changes in the *Criminal Code*. Some of its recommendations align with those of the Coalition.

- In June 2019, at the HIV Legal Network's symposium, the federal Minister of Justice restated the government's commitment to eliminating the over-criminalization of non-disclosure of HIV, recognizing that it is primarily a matter of public health and not criminal law. Read more here.

These are important developments in the ongoing effort to secure long-term changes in Canada. But reforms to the *Criminal Code* will not happen without ongoing input and momentum from the HIV community.

What is the current state of the law?

Currently in Canada, according to key Supreme Court of Canada decisions (most recently in 2012), a person living with HIV must disclose their status to a sexual partner before engaging in any sexual activity that carries what the courts consider a **"realistic possibility of transmission of HIV."** In that circumstance, the court considers that not disclosing is a "fraud" that makes a partner's consent to sex invalid. Therefore, given the current wording and interpretation of the relevant parts of the *Criminal Code* that deal with sexual assault, what is otherwise a consensual sexual encounter becomes, as a matter of law, an *aggravated sexual assault*, the same as coercive, non-consensual sex.

Aggravated sexual assault is one of the most serious offences in Canada's *Criminal Code*. The maximum sentence for this offence is life in prison. The law currently says that a person convicted of aggravated sexual assault must also be registered as a sex offender. (This mandatory designation is being challenged in the courts, and HIV advocates are intervening to support this challenge, given the implications for people living with HIV who are being unjustly prosecuted using sexual assault charges.) Because a sexual assault is a serious offence, if the person is not a citizen (e.g. is a permanent resident), they are also likely to be deported if convicted.

Part of the problem has been how the test of a "realistic possibility of HIV transmission" has been applied. It has frequently been interpreted to mean that a person living with HIV must disclose their status before having vaginal or anal sex unless they have a low viral load (defined as less than 1500 copies/ml) and a condom is used. (It is unclear whether there is a legal duty to disclose before engaging in oral sex.)

In recent years, there have been **important court decisions** in which judges have concluded, based on the scientific evidence before them, that if a person living with HIV has a suppressed or undetectable viral load, there is no realistic possibility of sexually transmitting HIV. In this case, therefore, there is no legal duty to disclose, and thus non-disclosure is not considered to be sexual assault in these circumstances. In other words, there is increasing recognition in the law that "undetectable = untransmittable" (U=U). This is an important and welcome development.

However, there are conflicting court decisions about whether just using a condom is enough to prevent a "realistic possibility of transmission." Prosecutions and convictions for HIV non-disclosure are still sometimes happening against people who use condoms. Nova Scotia courts have accepted in two different cases that a person should not be convicted for HIV non-disclosure if they used a condom (regardless of their viral load). But last year, Ontario's Court of Appeal came to the opposite conclusion: it upheld the conviction of a man living with HIV who had used condoms (even though he was not accused of using them incorrectly or of transmitting HIV).

In the three territories and in some provinces, the prosecution of HIV non-disclosure has also been limited, to varying degrees, by **prosecutorial directives, guidelines, or instructions**. These do not change the law itself, but they can restrict prosecutors' ability to prosecute cases of HIV non-disclosure — or at least influence whether and when they choose to prosecute. Stated prosecutorial policy varies across the country:

- In Ontario: A person living with HIV who is on antiretroviral therapy and maintains a viral load of under 200 copies/ml for at least six months should not be prosecuted for HIV non-disclosure. This is the case regardless of the type of sex they had (anal, vaginal, or oral) or whether a condom was used.

- In Quebec, Alberta, and British Columbia: A person living with HIV who is on antiretroviral therapy and maintains a viral load of under 200 copies/ml for at least four to six months should not be prosecuted for HIV non-disclosure. This is the case regardless of the type of sex they had (anal, vaginal, or oral) and whether a condom was used.

- In the Northwest Territories, Yukon, and Nunavut: A 2018 directive to federal prosecutors from the Attorney General of Canada states that a person living with HIV:

    - will not be prosecuted if they maintained a viral load of under 200 copies/ml; and
    - should "generally" not be prosecuted if they were taking treatment as prescribed, or a condom was used, or they and their partners only had oral sex.

- No specific directives, guidelines, or instructions are in effect in Newfoundland and Labrador, Nova Scotia, Prince Edward Island, New Brunswick, Manitoba, or Saskatchewan.

Lastly, it cannot be forgotten that, in addition to sexual assault charges, other offences in the *Criminal Code* can and have been used to prosecute HIV non-disclosure, exposure or transmission in Canada. These offences include:

- Criminal negligence causing bodily harm;
- Common nuisance;
- Administering a noxious thing;
- Assault (non-sexual); and

- Murder and attempted murder.

What are some options for *Criminal Code* reform?

As reflected in its original Community Consensus Statement, the Coalition takes the position that HIV non-disclosure must be completely removed from the reach of sexual assault laws. Therefore, the Coalition will be advocating for changes to the law that take HIV non-disclosure completely out of the definition of "fraud" in the *Criminal Code* sections on sexual assault.

In addition, as noted above, other offences in the *Criminal Code*, other than the sexual assault laws, could still be used to unjustly prosecute people. Therefore, the Coalition is also considering two main options for *Criminal Code* reform to further limit the currently overbroad use of the law. The Coalition has also included a third option, which would be to accept the current state of the law and not advocate for any changes to the *Criminal Code*. These options are summarized below.

Option 1: Change the interpretation and application of existing laws

One option would be to add some wording to the *Criminal Code* that would restrict the interpretation and application of <u>any and all existing offences</u>, ideally limiting their use to only the case where there is actual, intentional transmission of HIV.

In summary, such an amendment to the *Criminal Code* would do this by stating that:

- there is no crime, under any offence in the *Criminal Code*, unless the prosecution establishes the person acted with *intent* to transmit HIV; and

- as a matter of law, there is no intent in various circumstances, including where a person takes, or offers to take, practical steps to prevent a significant possibility of transmission (e.g. using a condom, being on treatment).

The pros and cons of this option include the following:

Pros:

- This option avoids the creation of an HIV-specific offence and the associated stigma that such an offence would perpetuate.

- This option could carry less risk of the law being extended to criminalize the non-disclosure, exposure, or transmission of other sexually transmitted infections (STIs) or infectious diseases.

Cons:

- This option provides less certainty as to the way in which people may be prosecuted for HIV non-disclosure, exposure, or transmission. Even if they are limited, there are still various offences under which someone could be charged, and people may be charged with different offences that each carry a different sentence.

- Under this option, person living with HIV could still be prosecuted for exposing someone to a "significant possibility" of HIV transmission (although ideally the amendments would

very clearly exclude specific situations as not posing such a risk, including oral sex, sex using a condom, or having a low or suppressed viral load).

Option 2: Create a new HIV-specific offence that is very limited and also prevents the use of other, existing offences

A second option would be to create a new HIV-specific offence in the *Criminal Code* that both prevents the use of any other sections in the *Criminal Code* and is suitably narrow in its scope. Ideally, any such new offence would limit prosecutions to cases of actual and intentional transmission of HIV. (It should also ensure that in such very limited cases where a conviction could be obtained, the sentence attached to this new offence is proportionate.)

Under this option, it would no longer be possible to charge someone with any other offences. For someone to be found guilty of the new HIV-specific offence, the prosecutor would have to prove **two things**: a) the person intended to transmit HIV **and** b) HIV was in fact transmitted as a result of the person's actions.

The pros and cons of this option include the following:

Pros:

- This option provides certainty as to the one and only way in which people may be prosecuted for HIV non-disclosure, exposure, or transmission. Not only would it no longer be possible to charge someone with sexual assault, but prosecutions would also be prevented for offences such as criminal negligence causing bodily harm, common nuisance, administering a noxious thing, assault, murder, or attempted murder.

Cons:

- This option perpetuates (and perhaps exacerbates) the stigma associated with HIV by explicitly introducing reference to HIV into the *Criminal Code*. (However, it should also be remembered that under the current state of the law, it is already the case that it is almost exclusively people accused of not disclosing HIV that have been, and are being, prosecuted — in practice, Canada already has singled out HIV, and people living with HIV, for specific criminalization, even in the absence of an HIV-specific offence in the *Criminal Code*.)

- Given that this would be an exercise in introducing a new offence into the Code (even as it removes the use of other, existing offences), there *might* be a greater risk that it is extended to include not just HIV but also other STIs or possibly even other "infectious diseases."

Option 3: Accept the state of the law and do not advocate for any changes to the *Criminal Code*

Recognizing the risks associated with initiating reforms and that the number of HIV-related prosecutions seems to have decreased in recent years, the third option would be to accept the law as it currently stands and to not advocate for any changes to the *Criminal Code*.

Over the last few years, the number of prosecutions for alleged HIV non-disclosure have decreased, at least in cases where people are on antiretroviral therapy and have achieved an undetectable or suppressed viral load. However, people living with HIV still remain at risk of criminal prosecutions, including for aggravated sexual assault, in other circumstances. There is

also the possibility of people being prosecuted (for aggravated sexual assault or other charges) for non-disclosure of other STIs, though this has been seen in much smaller numbers than HIV non-disclosure to date. In addition, although prosecutions are generally decreasing, the mere threat of criminalization negatively affects people living with HIV. For example, criminalization may be weaponized against a person living with HIV by an abusive partner or may discourage a person living with HIV from speaking openly to healthcare professionals.

On the other hand, the process of advocating for *Criminal Code* reform carries its own risks (discussed in greater detail in the section below). Even if we are successful in removing HIV non-disclosure from the scope of sexual assault, there is a risk that the final *Criminal Code* amendments may more clearly embed the prospect of non-sexual assault prosecutions against people living with HIV.

What would such legal changes mean in practical terms?

The Coalition is advocating, at a bare minimum, for an end to prosecutions for sexual assault in cases where someone is accused of not disclosing their HIV+ status.

In addition, if these other reforms to the *Criminal Code* being sought by the Coalition were made, a criminal conviction could only be obtained in a case where a person acted with the *intent* to transmit HIV and actually did so. This is in keeping with international guidance (e.g. from UNAIDS, the Global Commission on HIV and the Law and UN Committee on the Elimination of Discrimination Against Women).

This would mean that someone could not be convicted just for being what a court might consider *negligent*, which is all the prosecution needs to prove to get a conviction for an offence such as *criminal negligence causing bodily harm* or the offence of *common nuisance*. Negligence is a much lower degree of mental fault than *intention*; proving intent is a higher bar for the prosecution to clear. (Please see the **Key concepts** section below for a more detailed explanation of the different degrees of mental fault recognized in Canadian law.)

Requiring the prosecution to prove intent to transmit would be an important limitation on HIV criminalization, as would requiring proof of actual transmission of HIV. Such would be the case with either of the two options for reform described above, because in either approach, the Coalition would be proposing amendments that limit any use of an offence — whether it's an existing offence or a new, HIV-specific offence — by requiring the prosecution to prove actual, intentional transmission.

This would be the case if the reforms were passed as proposed by the Coalition. It is important to remember that we cannot predict what the final wording of any changes to the Code might be at the end of the legislative process in Parliament. There are many opportunities for MPs or Senators to propose amendments to a bill after it is introduced. It is almost certain that some amendments would be proposed; it is not possible to predict at this time exactly what those might be and which ones, if any, would succeed. If a bill were finally to get passed into law, it might not limit HIV criminalization as much as the Community Consensus Statement calls for and as the Coalition is advocating. This is always a risk with any process of legislative reform, which is why it's important that the Coalition and community have these discussions about these important details to inform our advocacy.

Key concepts

To convict someone of a crime, the prosecution must prove two things in court beyond a reasonable doubt. First, they must prove the *material* elements of the crime — i.e. that the accused person did a certain act or failed to do some act they had a legal duty to do. Second, the prosecution must prove the *mental* element — i.e. the accused person's state of mind at the time the crime was committed. Both of these elements are defined in law for each given crime.

There are three degrees of mental fault recognized in Canadian law:

- *intention*;
- *recklessness*; and
- *negligence*.

As mentioned above and as further detailed below, the Coalition is advocating for HIV criminalization to be limited to cases where there was an **intention** to transmit HIV. But some lawmakers may want to make prosecutions easier by requiring a lower degree of mental fault, such as recklessness or negligence. It is therefore important that we, as a community, share a common understanding of these legal standards of *intention*, *recklessness*, and *negligence*. Having our own clear understandings and rigorous definitions of these concepts, and how they relate to our proposals for change, will be vital as we move forward to engage with policymakers on *Criminal Code* reform.

Intention	
What is **intention**?	A person **intends** to commit a crime when they act <u>either</u> with the purpose of causing the thing the law prohibits <u>or</u> they know with reasonable certainty their actions will cause it. Intention is a subjective standard as it focuses on the subjective mental state of the specific person at the time they did the acts in question.
Why is **intention** relevant to HIV criminalization reform?	We are advocating for criminalization to be limited to cases where there was an **intention** to transmit HIV. In other words, if a person does some act for the <u>purpose</u> of transmitting HIV to another person, or does that act knowing with reasonable certainty that their act will transmit HIV, and then HIV is actually transmitted, they can be said to have intentionally transmitted HIV. However, "intention" can be a tricky concept. The Coalition is proposing amendments that would make clear that, as a matter of law, there is no intent to transmit in certain kinds of situations (e.g. believing that a sexual partner was aware of the risk of HIV and was prepared to run that risk, or not disclosing because of fear of violence) or in the case where there is certain kinds of conduct (e.g. using or offering to use a condom, being on effective HIV treatment). Obviously, we do not know at this point how any final amendments passed by Parliament might define "intent" in the context of HIV criminalization.

Recklessness	
What is **recklessness**?	A person acts **recklessly** when they are aware of a risk that their actions might result in the thing that the law prohibits but go ahead with their actions anyway. The higher the risk associated with their actions, the greater the likelihood a court would find someone was reckless. Recklessness is a subjective standard in that it focuses on the actual mental state of the specific person at the time they did the acts in question.
Why is **recklessness** relevant to HIV criminalization reform?	In the context of non-disclosure of a communicable disease, a court *could* decide that, if a person was aware that an act *could* transmit HIV but did not take what the court considers to be reasonable precautions to prevent this, they were reckless. Recklessness is an even fuzzier concept than intention, and how it might be defined in relation to HIV criminalization remains to be seen. Based on the experience of the Coalition we know that, <u>at the very least</u>, we would not want someone to be considered "reckless" in not disclosing their HIV status if a condom was used (or if they offered or proposed the use of a condom), or if they reasonably feared that disclosing (or insisting on a precaution like condom use) could result in violence or other serious harm. How might the idea of recklessness affect women or others who may be in relationships that don't allow negotiation of condom use? Not everyone can safely negotiate the use of a condom with their partner. If a woman living with HIV had sex with a man but was not able to use a condom, could that be considered reckless? This is why it is important to consider clarifying in the law that certain situations or conduct are not treated as "reckless," so that the law is not overly broad. There is also a concern that the criminalization of behaviour defined as reckless may have a disproportionate impact on already over-criminalized and marginalized communities, including people who sell sex or people who use drugs. What might seem reckless to some observers (e.g. a judge or jury), might in real-life situations seem necessary to protect oneself from violence or even necessary for survival. It is not yet clear if adopting the standard of recklessness would have any impact on people without access to effective HIV treatment, and who are therefore, in most cases, not likely to achieve a suppressed viral load. This could leave criminalization disproportionately affecting those who are already marginalized in other ways and is one reason we

	should reserve the criminal law for cases of actual intention to transmit.

Negligence	
What is **negligence**?	Unlike the person who acts intentionally or recklessly, a person who acts **negligently** may not think about, or be fully aware of, a risk of harm. Nonetheless, a person can be found to have acted negligently if they failed to behave in a way that a "reasonable person" would behave in the same circumstances. It is the court that decides what constitutes reasonable behaviour based on the circumstances. Unlike *intention* and *recklessness*, *negligence* is an objective standard — i.e. it's not about the specific mental state of the accused person at the time of the alleged offence, it's about whether their behaviour deviated in a sufficiently significant way from what an objectively "reasonable person" would have done (or not done) in their circumstances that they should be found to be at fault and held criminally responsible.
Why is **negligence** relevant to HIV criminalization reform?	If the legal standard that the prosecution has to meet is *negligence*, then prosecution merely has to show that the accused person's conduct was significantly different from the conduct that can be expected of a reasonable person in those same circumstances. An example of this would be the offence of *criminal negligence causing bodily harm* (or the offence of *common nuisance*). There have been cases of prosecutions and convictions against people living with HIV who did not disclose their status using these offences, where this much lower standard of mental fault is enough to convict. Many of the concerns related to allowing prosecutions for *recklessness* apply as much, or even more, if the even lower standard of negligence is deemed enough for a conviction.

Both options for *Criminal Code* reform presented above would raise the bar to require that any prosecution for HIV non-disclosure, exposure, or transmission has to establish intent to transmit — in other words, showing either negligence or even recklessness would not be enough to convict someone. But, of course, lawmakers might not set the bar that high in making changes to the law.

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. For more info about the Coalition, including its Community Consensus Statement, see www.HIVcriminalization.ca.