



Criminal Code reform of HIV non-disclosure is urgently needed: Social science perspectives on the harms of HIV criminalization in Canada

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Abstract

The criminalization of HIV non-disclosure represents a significant issue of concern among people living with HIV, those working across the HIV sector, public health practitioners, and health and human rights advocates around the world. Recently, the government of Canada began a review of the criminal law regarding HIV non-disclosure and invited feedback from the public about potential reforms to the Criminal Code. In light of this public consultation, this commentary examines social science research from Canadian scholars that documents the intersecting damaging effects of HIV criminalization. Canadian social scientists and other researchers have shown that HIV criminalization is applied in uneven and discriminatory ways, impedes HIV prevention efforts, perpetuates HIV stigma, and has a damaging impact on the daily lives of people living with HIV. We argue that there is an urgent need for reforms that will significantly restrict how the criminal law is applied to HIV non-disclosure.

Résumé

La criminalisation de la non-divulgence du VIH est une question très préoccupante pour les personnes vivant avec le VIH, celles qui travaillent dans le secteur du VIH, les praticiens et praticiennes de la santé publique et les porte-parole de la santé et des droits de la personne du monde entier. Récemment, le gouvernement du Canada a amorcé un examen du droit criminel

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portant sur la non-divulgence du VIH et a invité le public à commenter d'éventuelles réformes du Code criminel. À la lumière de cette consultation publique, notre commentaire porte sur les études en sciences sociales menées au Canada qui font état des effets croisés préjudiciables de la criminalisation du VIH. Des spécialistes des sciences sociales et d'autres chercheuses et chercheurs canadiens ont montré que la criminalisation du VIH est appliquée de façon inégale et discriminatoire, qu'elle nuit aux efforts de prévention du VIH, qu'elle perpétue la stigmatisation liée au VIH et qu'elle a des effets dommageables sur la vie quotidienne des personnes vivant avec le VIH. Nous soutenons qu'il existe un besoin urgent de réformes pour restreindre de façon appréciable l'application du droit criminel à la non-divulgence du VIH.

Keywords HIV criminalization · Stigma · Law reform · Race and racism · HIV prevention

Mots-clés Criminalisation du VIH · stigmatisation · réforme du droit · race et racisme · prévention du VIH

HIV criminalization refers to “the unjust application of criminal law to people living with HIV for non-malicious HIV transmission, perceived or potential HIV exposure, or non-disclosure of known HIV-positive status” (Bernard et al., 2022, s395). In Canada, criminal laws have been applied to the non-disclosure of HIV-positive status since 1989. It is most common for HIV non-disclosure to be prosecuted in Canada under sexual assault laws. This is because of a landmark Supreme Court of Canada (SCC) decision in 1998 that established that non-disclosure may amount to fraud vitiating consent to sex in some circumstances. The decision also stated that people living with HIV have a legal obligation to disclose their HIV-positive status to sexual partners before sex that poses a “significant risk” of HIV transmission (*R. v. Cuerrier, 1998*). In 2012, the SCC modified the disclosure obligation such that people living with HIV are currently required to disclose their HIV status in circumstances that pose a “realistic possibility” of HIV transmission (*R. v. Mabior, 2012*). This ruling was intended to address, in part, the Cuerrier decision’s failure “to draw a clear line between criminal and non-criminal conduct (uncertainty)” (*R. v. Mabior, 2012, para. 13*). Unfortunately, the Mabior decision did little to diminish the criminal law’s uncertain (but certainly discriminatory) application to people living with HIV, and we have continued to see highly problematic criminal prosecutions since 2012. Overall as of 2022, there have been at least 224 prosecutions for alleged HIV non-disclosure in Canada since 1989 (Hastings et al., 2022).

HIV criminalization has been a major concern for and site of sustained advocacy by people living with HIV, HIV justice advocates, medical scientists (Barre-Sinoussi et al., 2018; Loutfy et al., 2014), and legal scholars. This widespread advocacy led the Federal Government of Canada to recognize and acknowledge HIV criminalization as a “problem of overcriminalization” (Standing Committee on Justice & Human Rights, 2019, p. 23). In 2019, the House of Commons Standing Committee on Justice and Human Rights released a report that included important recommendations from HIV advocates to further limit the broad, unscientific, and unjust use of the criminal law against people living with

HIV (HIV & AIDS Legal Clinic Ontario, 2019; Standing Committee on Justice & Human Rights, 2019). Most notably, the report recommended that “HIV must be treated as a public health issue” and recognized that “the use of sexual assault provisions to deal with consensual sexual activities is simply not appropriate” (Standing Committee on Justice & Human Rights, 2019, p. 23).

In 2022, the Federal Government committed to a public consultation to reform the Criminal Code as it relates to HIV non-disclosure (Government of Canada, 2022, 2023). This commentary reviews Canadian social science research¹ that documents the intersecting damaging effects of criminalization with a view to contributing to an evidence-based approach to reforming the Criminal Code (HIV Justice Network, 2023). The harms of criminalization that are evidenced by this research reinforce the urgent need for Criminal Code reform. Numerous studies of HIV criminalization show that the use of the criminal law has wide-ranging negative impacts. Research demonstrates that HIV criminalization hinders public health responses to HIV, intensifies HIV stigma, exacerbates anti-Black and anti-Indigenous racism in the criminal legal system and broader society, and increases forms of harm and surveillance already experienced by people living with HIV, especially people from communities of Black, Indigenous, and People of Colour (BIPOC) communities and people who came to Canada as immigrants or refugees.

Social science research on HIV criminalization in Canada

Canadian researchers from the fields of sociology, health studies, criminology, socio-legal studies, public health, political science, women and gender studies, Indigenous

¹ While this commentary is focused on Canadian social science research and addresses the context of HIV criminalization in Canada, HIV criminalization is a global phenomenon and social science research worldwide has highlighted its myriad harms (Bernard et al., 2022; Csete et al., 2023; Hoppe, 2018; Wait, 2011).

studies, critical race studies, and more have expressed serious concerns about HIV criminalization (see, for example, Hindmarch et al., 2018; McClelland, 2019a, 2019b; Mykhalovskiy & Namaste, 2019). This body of scholarship orients to HIV criminalization as a social process with wide-ranging effects on HIV prevention, people living with HIV, communities disproportionately affected by HIV, and, more generally, health care providers alongside medical care and public health systems. While multiple methods are used, qualitative approaches predominate. Many studies draw attention to how HIV criminalization intersects with or impacts public health approaches to HIV non-disclosure (French, 2015; French, 2023 - unpublished manuscript, available from author upon request; Mykhalovskiy, 2011, 2015, 2016; Sanders, 2014).

Social science scholarship on HIV criminalization in Canada may be organized into four broad categories: (i) research that examines the content of the criminal law and illustrates its discriminatory and uneven application; (ii) studies that show the negative impact of the criminal law on HIV prevention efforts; (iii) analyses of race and racialization in media representations of HIV criminalization; (iv) scholarship that illustrates the damaging impacts that HIV criminalization has on the everyday lives of people living with HIV (French, 2023 - unpublished manuscript, available from author upon request; Mykhalovskiy, 2015).

The discriminatory content and application of criminal law

Social scientists and legal scholars have conducted doctrinal research on Supreme Court of Canada decisions related to HIV non-disclosure. Studies argue that the Court has “over criminalized HIV non-disclosure” by applying the most serious form of sexual assault law to instances in which there is only a remote possibility of HIV transmission, or no possibility of HIV transmission at all (Grant, 2013, 2020). In fact, research shows that most prosecutions in Canada have been for cases that did not involve HIV transmission (Hastings et al., 2022).

In addition to concerns about the overcriminalization of people living with HIV, studies of Supreme Court decisions also point to the damaging effects that HIV criminalization has on notions of consent and legal thinking about risk (Dej & Kilty, 2012; Grant, 2013, 2020; Rawluk, 2013; Symington, 2009). Considering these concerns, Grant argues that legislatively removing HIV non-disclosure prosecutions from the scope of sexual assault law is the only way to remedy the harm done to people living with HIV (Grant, 2020).

Other researchers ground arguments for legal reform related to HIV non-disclosure in claims about how HIV criminalization operates as a manifestation of state-sponsored stigma and proxy for other forms of stigma and discrimination (Bernard et al., 2022, s396). Researchers have shown that the criminal law in Canada is applied in uneven

ways that reinforce systemic inequities based on race, gender, sexual orientation, and migration status (Bisaillon, 2022; Hastings et al., 2017, 2022; Mykhalovskiy & Beteridge, 2012; Patterson et al., 2016). For example, Hastings and colleagues’ review of the temporal and demographic patterns of HIV non-disclosure criminal cases in Canada between 1989 and 2020 showed that the criminal law is used disproportionately against people living with HIV from some racialized populations. Black and Indigenous people are convicted at a higher rate, are acquitted at a lower rate, and are more likely to face prison sentences compared to white people who face similar charges (Hastings et al., 2022). Scholars understand these disproportionate rates as an extension of how racism and colonialism underpin the criminal legal system in the Canadian settler state (Manning, 2019; Wilson, 2013).

Qualitative studies with women living with HIV show that the racialized character of HIV criminalization intersects with and reinforces forms of gender-based violence against women (Greene et al., 2019). For example, Indigenous women are overrepresented among people living with HIV in Canada and account for a significant proportion of women who have faced charges related to HIV non-disclosure (Hastings et al., 2022; Patterson et al., 2020). Both qualitative and quantitative findings indicate that HIV criminalization constitutes a form of structural violence that exacerbates risks for interpersonal violence among women living with HIV (Krusi et al., 2018; Patterson et al., 2022). Rather than protect the health or human rights of women, HIV criminalization, combined with a heightened perception of surveillance, has been shown to produce barriers for women living with HIV when disclosing their HIV-positive status to partners and linking with health care services and treatment (Greene et al., 2019; Krusi et al., 2018; Patterson et al., 2015, 2020; Timothy, 2013). Furthermore, quantitative work has revealed poor understanding of the legal obligation to disclose among women living with HIV, preventing informed decision-making to avoid criminal charges and realize sexual rights in the era of undetectable = untransmittable (Patterson et al., 2020).

The negative impact of the criminal law on HIV prevention efforts

Social scientists in Canada have situated HIV criminalization within a longstanding, ongoing, problematic trend of using the criminal law to address complex public health problems (Mykhalovskiy et al., 2014). Studies highlight the disjuncture between the complex practicalities of HIV disclosure in one’s everyday life, and what Adam and colleagues refer to as, “the somewhat abstracted vision of the rational actor envisioned in court decisions requiring near universal disclosure in sexual interactions” (Adam et al., 2015).

Scholars have also drawn on the concept of “the medico-legal borderland” to illustrate how criminal law and health care governance converge and overlap in the context of HIV criminalization in problematic ways (French, 2015; McClelland, 2013; Mykhalovskiy, 2011, 2015; Sanders, 2014). Studies raise concerns about the criminal law’s potential to heighten HIV stigma and discrimination, discourage HIV testing (Bulsara et al., 2018; Mykhalovskiy et al., 2014; Wainberg, 2009), disrupt access to HIV care, treatment, and support, and erode public health norms that promote shared responsibility for HIV prevention (Mykhalovskiy et al., 2014). Studies also show that the presence of the criminal law impacts the type of information people living with HIV would be willing to share with healthcare providers (Patterson et al., 2020). For example, studies with gay men and other men who have sex with men suggest they are less willing to seek assistance from, and speak candidly with, public health about their sexual practices, because of concerns that public health practitioners may share information with police and legal authorities (O’Byrne et al., 2013).

Evidence that HIV non-disclosure prosecutions can hinder health professionals’ ability to provide accurate, open, and supportive care for people living with HIV is corroborated in studies with public health workers. For example, Mykhalovskiy (2011) found that public health practitioners undertook HIV prevention counseling with “an eye to the law”, and O’Byrne and Gagnon (2012) reported that nurses noticed that non-disclosure prosecutions negatively affected their therapeutic relations with people living with HIV and undermined their abilities to provide appropriate and timely nursing care (O’Byrne et al., 2013, p. 10). As Sanders (2014) illustrates, issues related to HIV criminalization can influence public health nurses’ work in subtle but significant ways that jeopardize key public health practices, such as risk reduction counseling. His study views HIV criminalization as a “structural force that obscurely impacts important micro-level interaction between nurses and clients during HIV posttest counseling” (p. 259). Overall, there is no evidence that HIV non-disclosure prosecutions actually achieve public health outcomes of increasing willingness to test, increasing HIV disclosure practices, increasing condom use, promoting PrEP/PEP use, or decreasing HIV transmission (O’Byrne, 2011).

Media representations of HIV criminalization

A third category of social science research on HIV criminalization focuses on popular representations of criminal HIV non-disclosure cases. Social science scholarship has evidenced major longstanding activist concerns about how the press disproportionately covers HIV criminal non-disclosure cases that involve African, Caribbean, and Black people living with HIV and circulates highly stigmatizing,

racist, and anti-migrant discourses. For example, Mykhalovskiy and colleagues’ study of news reports of criminal HIV non-disclosure cases shows that, at a time when Black men accounted for just 21% of people who had faced HIV non-disclosure charges, they were the focus of 62% of newspaper articles about such cases. This pattern is amplified for Black men who came to Canada as immigrants and refugees. While these men accounted for only 15% of people who have faced charges, they were the focus of 61% of all newspaper articles (Mykhalovskiy et al., 2020). Such a pattern serves to reinforce structures of anti-Black racism in society and to situate Black people as risky subjects threatening the public health of Canadian society.

In addition to quantitative analyses of news media coverage of HIV criminal non-disclosure cases, studies have also attended to the discursive patterns within news stories and highlighted the troubling ways that mainstream media represent the issue. Studies have established that the press covers the issue in highly sensational, reductionist, racist, and stigmatizing ways, and reinforces conceptions of people living with HIV as “dangerous others.” This problematic trend is especially acute in news coverage of cases in which Black men who came to Canada as immigrants or refugees face charges related to alleged HIV non-disclosure (Hastings et al., 2020; Mykhalovskiy et al., 2020). It is common for people from African, Caribbean, and Black communities to be represented as risks to white Canadians and for press coverage to undergird support for the deportation of those who face charges (African & Caribbean Council on HIV/AIDS in Ontario, 2010; Hastings et al., 2020, 2022; Kilty & Bogosavljevic, 2019; Manning, 2019; Mykhalovskiy et al., 2020). Kilty and Bogosavljevic (2019) also show how race, gender, class, and sexuality are mobilized in the press to evoke negative moral emotions and shore up moralized discourses about race, sexuality, and HIV.

Impacts of HIV criminalization on people living with HIV

Finally, scholars have illustrated the myriad ways that HIV criminalization negatively shapes the everyday lives of people living with HIV (Knight et al., 2018). In Adam and colleagues’ research on the impacts of criminalization on the everyday lives of people living with HIV, respondents living with HIV report a heightened sense of uncertainty, fear, or vulnerability. The authors argue that this context “is having counter-productive or unanticipated consequences that can run contrary to the ostensible objective of discouraging behaviour likely to transmit HIV” (Adam et al., 2014, p. 39).

McClelland centers the lived experiences of people who have faced criminal non-disclosure charges to attend

to the legal and extra-legal material, violent impacts of HIV criminalization (McClelland, 2019a, 2019b). His research shows that criminal charges related to HIV non-disclosure render people living with HIV who have been charged and/or prosecuted vulnerable to harassment, discrimination, and physical and psychological violence. His research underlines the harms of the use of sexual assault law, and sex offender registry, which pose major obstacles when one is trying to meet fundamental needs, such as securing employment or housing (McClelland, 2019a). Research confirms that HIV criminalization results in a context of heightened surveillance, which has highly stigmatizing effects that reverberate into the daily lives of people living with HIV, impacting mental health, sexual health and rights, and physical and economic security, and limiting access to crucial social services and resources (Adam et al., 2008, 2016; Gagnon & Vezina, 2018; Kilty & Orsini, 2019; Ng et al., 2020), particularly for women living with HIV (Kaida et al., 2015; Patterson et al., 2022; Symington, 2009, 2013) and people from BIPOC communities living with HIV (African & Caribbean Council on HIV/AIDS in Ontario, 2010; Sanderson et al., 2021; Tatham, 2023; Wilson, 2013).

Conclusion

HIV criminalization has been shown to have wide-ranging overlapping harms. Social science research in Canada illustrates that the criminalization of HIV non-disclosure is applied in uneven and discriminatory ways, hinders public health HIV prevention efforts, and has damaging effects on the everyday well-being, safety, security, and rights of people living with HIV. Studies also show that the mainstream press reinforces damaging, racist, stigmatizing messages about HIV in its coverage of criminal non-disclosure cases. It is clear that Criminal Code reform of HIV non-disclosure is urgently needed. In 2022, the Canadian Coalition to Reform HIV Criminalization (CCRHC), a leading advocacy organization on this issue, published a consensus statement that called on the federal government to limit HIV criminalization by removing non-disclosure, exposure, or transmission of HIV and other STBBIs from sexual assault law; ending the deportation of non-citizens following convictions; and reviewing past convictions with a view to undoing the harms of being labeled as a criminal in relation to HIV non-disclosure charges (Canadian Coalition to Reform HIV Criminalization, 2022). Criminal Code reform in line with these calls from the CCRHC would be an important step to ending the harms of HIV criminalization.

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