



Brief to the Standing Committee on Justice and Human Rights

Study on the criminalization of non-disclosure of HIV Status

April 29, 2019

Background

WATCH — the Women, ART and Criminalization of HIV Study — is a Canadian Institute of Health Research- (CIHR) funded community-based research study examining how the criminalization of HIV non-disclosure is understood and experienced by women living with HIV across Canada.¹ The study results reveal how the criminalization of HIV non-disclosure negatively impacts women's social and sexual relationships, and their interactions with legal, health and social service providers. The 48 women who participated in the study engaged in profound reflection on the criminalization of HIV non-disclosure using arts-based methods and facilitated conversation during four-day retreats.² We analyzed the research data through a participatory visual and narrative analysis process.³

We undertook this study because in our collective lived and professional experience, we have come to understand that the criminalization of HIV non-disclosure can be employed as a form of gender-based violence, exacerbating the already dangerous and disempowering circumstances in which so many women and girls continue to live. We have seen how the criminalization of HIV non-disclosure is fueled by HIV-related stigma, discrimination, misinformation and revenge. It undermines women's sexual, reproductive and family rights, and has particularly negative consequences for immigrant, racialized and Indigenous women. We therefore designed the WATCH study in order to explore and document these realities — with the ultimate objective of supporting progressive change and rights-based reforms.

The study results firmly support the view that the criminalization of HIV non-disclosure using the *Criminal Code* provisions on aggravated sexual assault and sexual fraud is unjust and ill-informed. Moreover, the study results confirm that the criminalization of HIV non-disclosure is particularly harmful for women living with HIV.

We therefore welcome the Federal Attorney-General's directive on limiting HIV non-disclosure prosecutions but note that the directive is *insufficient* to address the multiple harms revealed by the WATCH Study. Nothing short of law reform that ends the use of sexual assault law as the means of

¹ See watchHIV.ca.

² See Appendix 1 for a breakdown of the sociodemographic characteristics of the study participants.

³ The WATCH Study research team members are listed in Appendix 2.

addressing HIV non-disclosure and limits the use of criminal law to cases of intentional, actual HIV transmission will be sufficient.

The impact of HIV criminalization on women living with HIV

According to the Public Health Agency of Canada, 14,520 women in Canada are living with HIV — that is 23% of all people living with HIV. 2017 national surveillance data indicates that 46% of newly diagnosed women were identified as Black, 31% as Aboriginal, and 14% as Caucasian. New infections in women are mainly attributable to heterosexual sex (78%) and injection drug use (22%).⁴ According to the case tracking conducted by the Canadian HIV/AIDS Legal Network, 19 women have been charged for not disclosing their HIV-positive status to a sexual partner.⁵

Some early proponents of HIV criminalization suggested that criminal charges against those who had exposed a sexual partner to the possibility of HIV infection would contribute to HIV prevention efforts, and in particular that it would offer protection to women. There were likely assumptions that women who had unknowingly contracted the virus from a sexual partner would feel that criminal charges against that partner were appropriate. The WATCH Study makes clear, however, that women living with HIV today do not experience the criminalization of HIV non-disclosure as protective, just or appropriate — in fact, quite the opposite.

The WATCH Study found that women living with HIV experience the criminalization of HIV non-disclosure as:

- exacerbating their fear of HIV disclosure;
- encroaching on their sexual relationships; and
- intensifying violence against them.

Given high levels of HIV-related stigma and misinformation, disclosing one's HIV status is a daunting task for many people living with HIV. Women in particular are rightfully fearful that disclosure could lead to physical, psychological or verbal abuse or violence, loss of financial support or a place to live, rejection, threats of being separated from their children, and deportation (where a woman has no independent legal status to stay in Canada). They also worry that if they disclose and later the relationship breaks down, they could be accused of not disclosing their status — even when they had.⁶

The women who participated in our study expressed that the criminal obligation to disclose increased their fears with respect to disclosure and the fears they felt in accessing care and support. They expressed how fear creates an unhealthy environment for them. Fear of the law and having to disclose

⁴ CATIE, Fact Sheet, *The epidemiology of HIV in females*. Available on-line at <https://www.catie.ca/en/fact-sheets/epidemiology/epidemiology-hiv-women>. Most of the data in this fact sheet come from a population-specific surveillance system (I-Track), and the 2016 HIV estimates published by the Public Health Agency of Canada (PHAC).

⁵ Personal Communication with Cécile Kazachkine, Senior Policy Analyst, The Canadian HIV/AIDS Legal Network, April 2019.

⁶ See also W. Tharao, M. Muchenje & M. Mehes, "An evidence-based intervention to support African, Caribbean, and Black women in Canada to disclose their HIV-positive status," in J. Gahagan, ed., *Women and HIV Prevention in Canada: Implications for Research, Policy, and Practice* (Toronto: Women's Press, 2013), 105-133 (at 114-6).

crept into their relationships and exacerbated their anxiety regarding possible negative consequences of disclosure.

Our research also confirmed that many women living with HIV cease having sexual relationships, and even romantic relationships, because of HIV criminalization. Some women said that they felt empowered by that decision while others felt they are being forced into celibacy, fearful of criminalization or interpersonal violence. Women experienced this as inequitable. The law places an unfair burden of responsibility on them, even when sex occurs between two consenting, informed adults.⁷

International and Canadian human rights law, as well as social science and medical research, confirms that sexuality and sexual expression are fundamental aspects of human rights and healthy lives. When women choose not to engage in sexual relationships at all, because of the criminalization of HIV non-disclosure, they are denied the full enjoyment of their sexual and reproductive rights and their roles as life-givers and mothers.⁸

Finally, our research confirms that the possibility of criminal charges in relation to HIV-positive status (whether disclosure actually took place and/or the risk of transmission was sufficiently low to remove the legal disclosure obligation) can and has been used as a form of gender-based violence. This includes women's concern and anxiety about having their HIV-positive status used against them by sexual partners, particularly in situations where they experience economic inequality, isolation from their cultural community, and fears related to precarious immigration status and/or child protection.⁹ Abusive partners can manipulate and harm women by threatening to reveal their HIV-positive status, by threatening to report them for non-disclosure, or by shaming and ridiculing them. In this way, the legal requirement to disclose can be leveraged — effectively weaponized — by those who are seeking to assert or regain power and control over women. The high level of violence against women living with HIV was a common thread throughout the narratives of the women who participated in our research.

One of the effects of aggressively criminalizing HIV non-disclosure in Canada (and the sensational media coverage that accompanies prosecutions) is an exacerbation of negative assumptions about people living with HIV and on-going surveillance and judgement — by service providers, health practitioners, family, neighbours, and others. Ironically, at the same time that HIV medicine and science is making impressive gains to improve the health and life expectancy of people living with HIV, celebrating the

⁷ Greene, S., Symington, A., Muchenje, M., Cotnam, J., Dunn, K., Frank, P., Glum, S., Gormley, R., Ion, A., Nicholson, V., Nyman, S., Odhiambo, A.J., Shore, K., Vaccaro, M., Kaida, A. (2019). Scales of (In)Justice: Visual representations of women's experiences in light of the aggressive criminalization of HIV non-disclosure in Canada [oral presentation]. 28th Annual Canadian Conference on HIV/AIDS Research (CAHR). May 9-12, 2019. Saskatoon, SK. Kaida A, et al. Also The influence of the criminalization of HIV non-disclosure on intentional sexual inactivity among women living with HIV in Canada. [oral presentation]. 26th Annual Canadian Conference on HIV/AIDS Research (CAHR). April 6-9th, 2017. (<http://www.chiwo.ca/wp-content/uploads/2017/10/The-influence-of-the-criminalization-of-HIV-non-disclosure-on-intentional-sexual-inactivity-among-women-living-with-HIV-in-Canada.pdf>)

⁸ Greene, S., Ion, A., Elston, D., Kwaramba, G., Smith, S., Loutfy, M. (2015). (M)othering with HIV: Resisting and Reconstructing Experiences of Health and Social Surveillance. In B. Hogeveen & J. Minaker (Eds), Criminalized Mothers, Criminalizing Motherhood (pp.231-263). Toronto, ON: Demeter Press.

⁹ Greene, S., Ion, A., Kwaramba, G., Smith, S., Loutfy, M.R. (2016). "Why are you pregnant? What were you thinking?": How women navigate experiences of HIV-related stigma in medical settings during pregnancy and birth. Social Work in Health Care, 55(2), 161-179.

discovery that “undetectable equals untransmittable” (U=U), the Canadian criminal justice system continues to work in contradiction to the empowerment of people living with HIV. Women living with HIV experience surveillance, judgement and condemnation for no legitimate reason. The women we work with are diverse – marginalized, yet also strong, resilient, wise, interesting, creative and responsible. The criminal law as it stands impedes, rather than promotes, these positive attributes.

Resilience and resistance to legal injustice

The WATCH Study demonstrates that Canada’s aggressive approach to criminalizing HIV non-disclosure has multiple harmful impacts on women living with HIV, including exacerbating their fear of HIV disclosure, encroaching on their sexual relationships, and intensifying violence against them. The study also reinforces earlier findings regarding the interconnectedness of stigma, racism, poverty and criminalization.

In addition to these important findings, WATCH also documented incredible resilience and resistance on the part of women living with HIV. Women are far from passive receivers of services. Every woman who participated in the WATCH study shared how they enacted resilience in their daily lives. Women demonstrate resilience through providing care to others, upholding the strength in their families, kinship, advocacy, self-care, and self-acceptance.

As one participant said, “I found out I was HIV-positive, but that has not stopped my life. I’m still up, I’m still fighting, I’m still a survivor. And right now I’m in the best place. I have love.” And another said, “I really want to keep on advocating. I want to have a voice. I want to make a difference. I want to stand up for what’s right.”

These acts of resistance strengthen individual and collective resilience. Women resist the current reproachful climate and the many oppressions they face by envisioning, and pursuing, a more just future.

Conclusion

We honour the women who participated in the WATCH Study and generously contributed to our understanding of HIV criminalization in Canada. The WATCH team is writing papers for publication and sharing our research findings in various community and academic venues.

As you conduct your study on the criminalization of HIV non-disclosure in Canada, we submit three recommendations:

- HIV exposure should be addressed primarily as a public health and individual health issue, not a criminal justice issue. Support, empowerment and rights-protection should be the primary response to HIV infection, not punishment or retribution. Any use of criminal law should be restricted to cases of actual HIV transmission where the accused knowingly and maliciously put the other person at risk of HIV infection.

- The sexual assault provisions of the criminal code should not be used to prosecute cases of HIV non-disclosure. Sexual assault and HIV non-disclosure and/or exposure must be separate in law.
- Any guidelines or law reform you propose should be based on the best available evidence — including not only scientific evidence on HIV prevention and treatment, but also evidence regarding sexual violence, gender inequality and HIV-related stigma.

We believe that a change in the law is urgently needed. The criminalization of HIV non-disclosure is experienced as another layer of HIV-related stigma and violence against women. We trust that these submissions will help inform your important study.

Appendix 1

WATCH Study Participants

| Total n=48 women | Frequency n (%) |
|-----------------------------------|-----------------|
| Age (median [range]) | 47 [30 – 59] |
| Ethnicity | |
| Indigenous | 29 (60%) |
| African/Caribbean/ Black | 7 (15%) |
| Caucasian | 4 (8%) |
| Latina | 2 (4%) |
| Other (other or mixed race, PNTA) | 6 (13%) |
| Gender Identity | |
| Cisgender | 46 (96%) |
| Transgender | 2 (4%) |
| Relationship Status | |
| Single | 16 (34%) |
| Common-law relationship | 14 (29%) |
| Married | 7 (15%) |
| Relationship, not living together | 5 (10%) |
| Separated / Divorced | 2 (4%) |
| Prefer not to answer | 4 (8%) |

Appendix 2

WATCH Research Team

Lead Investigators:

Dr. Saara Greene, Associate Professor, McMaster University School of Social Work

Dr. Angela Kaida, Associate Professor, Faculty of Health Sciences, Simon Fraser University

Marvelous Muchenje, [title] Women's Health in Women's Hands Community Health Centre

Alison Symington, Independent Legal Expert

Shelly Glum, Supervisor, Positive Living Program, Saskatoon Health Region

Research Personnel:

Allyson Ion

Rebecca Gormley

Jasmine Cotnam

Peggy Frank

Valerie Nicholson

Judith Odhiambo

Kristin Dunn

Krista Shore

Note: Biographies available at <https://watchhiv.ca/people>.

Appendix 3

Suggested Resources

Allard, P., C. Kazatchkine, & A. Symington, "Criminal Prosecutions for HIV Non-Disclosure: Protecting Women from Infection or Threatening Prevention Efforts?" in ed. J. Gahagan, *Women and HIV Prevention in Canada: Implications for Research, Policy, and Practice*, (Women's Press, 2013).

Canadian Coalition to Reform HIV Criminalization, *End Unjust HIV Criminalization: Community Consensus Statement* (November 2017). Available on-line at <http://www.hivcriminalization.ca/community-consensus-statement/>.

Criminals and Victims? The Impact of the Criminalization of HIV Non-Disclosure on African, Caribbean and Black Communities in Ontario (The African and Caribbean Council on HIV/AIDS in Ontario, 2010). Available on-line at http://www.accho.ca/Portals/3/documents/resources/ACCHO_Criminals_and_Victims_Nov2010_LoRes.pdf.

Consent: HIV Non-Disclosure and Sexual Assault Law. (Canadian HIV/AIDS Legal Network & Goldelox Productions, 2015). [Film] Available on-line at <http://www.consentfilm.org/>.

Grant, I., M. Shaffer & A. Symington, "R v Mabior and R v DC: Sex, HIV, and Non-Disclosure, Take Two," 63:3 *University of Toronto Law Journal* (2013), 462-495. Available on-line at <http://www.consentfilm.org/consent-film/wp-content/uploads/2015/09/Focus-R-v-Mabior-and-R-v-DC-Sex-HIV-and-Non-Disclosure-Take-Two.pdf>.

Greene, S., et al., "How women living with HIV react and respond to learning about Canadian law that criminalises HIV non-disclosure: 'How do you prove that you told?'". *Culture, Health & Sexuality* (2019), 1-16. Available on-line at <https://www.tandfonline.com/eprint/jqXEScKghxnivGhauW9Q/full>.

Patterson, S., et al. "Awareness and Understanding of HIV Non-disclosure Case Law and the Role of Healthcare Providers in Discussions About the Criminalization of HIV Non-disclosure Among Women Living with HIV in Canada, *AIDS and Behavior*, <https://doi.org/10.1007/s10461-019-02463-2> (Published online 2 March 2019).

What does consent really mean? Rethinking HIV non-disclosure and sexual assault. Meeting Report, April 24 – 26, 2014, Toronto. (Canadian HIV/AIDS Legal Network). Available on-line at http://www.consentfilm.org/consent-film/wp-content/uploads/2016/03/consent_workshop_EN_feb25.pdf.

Appendix 4

Images from the WATCH Study

This PowerPoint presentation was on display in the Canada Pavilion during the 22nd International AIDS Conference in Amsterdam, 23-27 July 2018.

The presentation contains information on the Body Mapping process, photos of the images produced by the participants in the WATCH Study, and quotes from the participants themselves.

We encourage you to view this presentation to hear directly from women living with HIV in Canada about their experiences and perspectives on the criminalization of HIV non-disclosure.

Please paste the following link into your browser:

https://www.dropbox.com/s/u61a99q064z1nhr/WATCH%20Powerpoint%20Loop_2018-07-11%20AI%20edits_PF.pptx?dl=0

How women living with HIV react and respond to learning about Canadian law that criminalizes HIV non-disclosure: ‘how do you prove that you told?’

Women, ART, and the Criminalization of HIV Publication Factsheet

In 2012, the Supreme Court of Canada held in *R. v. Mabior* and *R. v. D.C.* that people living with HIV are required by law to disclose their HIV-positive status to sexual partners before engaging in sexual activities that pose a ‘realistic possibility of transmission,’ or they may face charges of aggravated sexual assault. Hence, people living with HIV must disclose their status unless they have a low viral load (plasma viral load < 1500 copies per ml) AND a condom was used at the time sexual activities took place. This ruling is not based in current science, which shows that when a person has an undetectable viral load, there is effectively no risk of sexual HIV transmission. It has also fuelled HIV-stigma and discrimination, magnified by various forms of social and structural marginalization, especially among women living with HIV (WLWH).

Methods

Women, ART and the Criminalization of HIV (WATCH) is a community and arts-based study that uses Body Mapping to explore the far-reaching impacts of criminalization of HIV nondisclosure on the lives of WLWH (cis and trans-inclusive). Seven Body Mapping retreat-style workshops were held across Canada (2-British Columbia, 2-Saskatchewan, 3-Ontario), facilitated by WLWH, and supported by an Indigenous Elder. We used data from seven in-depth group discussions following an HIV non-disclosure education session that occurred during each workshop, and documented women’s responses to developing their knowledge of the law that criminalizes HIV non-disclosure in Canada and the ways the law reproduces and reinforces HIV stigma, sexism, racism, and violence against WLWH. The same women who facilitated the workshops were also involved in the analysis of the transcripts.



Results

After undergoing feminist participatory thematic analysis from the transcripts of the discussion, three main themes emerged:

(1) Social and legal injustices

“How do we know what the judge is thinking? What is his viewpoint on HIV, what is his viewpoint even maybe on women? Like we don’t know. They’re supposed to be impartial. But everybody has morals and values. And we don’t know ... or what their education level even is on medical terms.” (Adele, British Columbia)

The criminalization of HIV non-disclosure reproduces—and reinforces—social and legal injustices: public and institutional stigma, lack of access to care, education/literacy, and other factors that already disadvantage WLWH and puts them at higher risk of being criminalized.

(2) Gendered experiences of intimate injustice

So, it's supposed to be he has to know before he has sex with me ... I have not committed a crime ... because everybody knows I am. So, if they say, 'Oh, she give it to me because I have sex. She don't tell me anything'. And I say, 'Excuse me, I already told you'. So that means for me will be no criminal charges? (Lana, Ontario)

All women discussed the sexual surveillance, and intimate injustices that the law perpetrates, and the difficulty in developing strategies to maintain their innocence, such as having witnessed and signed forms proving their disclosure and/or condom use.

(3) Disclosure and violence

I was raped by three [people] in [Canadian city]. They broke into my home and they held me prisoner for 24 hours and beat me and raped me. And if I had told him I was HIV positive, I would have been dead. I know it. So where does that fit in the picture? (Julie, British Columbia)

Requiring HIV disclosure does not take into account the social realities of many women's lives, but instead may increase experiences of stigma, rejection, and interpersonal violence - especially in oppressive conditions and power balances in sexual or romantic relationships where condom negotiation and disclosure may not be safe.

Implications

These discussions show that women's HIV status, compounded with their experiences of sexism, racism, colonization and violence, influence their interpretations and experiences of the criminalization of HIV non-disclosure. Immediate support is needed to improve women's understanding and knowledge of the law, while advocating for larger legal reform.

Citation: Saara Greene, Apondi J. Odhiambo, Marvelous Muchenje, Alison Symington, Jasmine Cotnam, Kristin Dunn, Peggy Frank, Shelly Glum, Rebecca Gormley, Allyson Ion, Valerie Nicholson, Krista Shore & Angela Kaida (2019) How women living with HIV react and respond to learning about Canadian law that criminalises HIV non-disclosure: 'how do you prove that you told?', Culture, Health & Sexuality, DOI: 10.1080/13691058.2018.1538489



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