



CAYR
COMMUNITY CONNECTIONS
People Supporting People



Harm
Reduction



HIV/
AIDS



Rainbow
Space



Learn



Grow



Partner

CRIMINALIZATION OF HIV NON-DISCLOSURE: POSITION STATEMENT

Approved: February 25, 2016

I. Statement of Commitment

CAYR COMMUNITY CONNECTIONS (CAYR) believes that criminal law is not an effective way to prevent HIV as it fuels misinformation, contributes to stigma and negative perceptions of people living with HIV/AIDS and discourages open conversations about sexual health and safer drug sharing practices. CAYR is committed to working with people living with HIV/AIDS to understand legal issues they may face based on HIV non-disclosure, and to provide them with ongoing support with challenges they may face directly or indirectly because of the criminalization of HIV non-disclosure.

The legal duty placed on people living with HIV/AIDS to disclose their HIV status to sexual and drug sharing partners does not accurately reflect scientific evidence on the effectiveness of HIV prevention strategies, including the low risk of transmission for people with an undetectable viral load, nor has it been shown to be an effective deterrent to HIV transmission. We support the application of evidence-informed practice when it comes to the criminalization of HIV non-disclosure.

II. Context/Background

1. In 1998, the Supreme Court of Canada (SCC) ruled in the case of *R. v. Cuerrier* that a person must disclose their HIV-positive status before engaging in sexual activity that poses a “significant risk of serious bodily harm” to their partner. Further rulings from the SCC in 2012 modified this requirement, deeming disclosure mandatory when there was a “realistic possibility” of HIV transmission. The court found people living with HIV/AIDS were not required to disclose their HIV status if they were both a) using a condom and b) had a “low viral load”, which the courts defined as 1,500 copies of the virus or fewer per millilitre of blood.¹
2. Criminalization of HIV non-disclosure operates on an assumption that fear of criminal prosecution will increase disclosure and therefore promote public health. However, no evidence has been shown that criminalization of HIV non-disclosure supports broader disclosure of HIV status. To the contrary, it is believed that fear of criminal prosecution may negatively impact public health by creating an additional burden for those who are diagnosed with HIV. Undiagnosed HIV infections are a serious concern for agencies working to reduce the HIV epidemic, as people who are undiagnosed may not access treatment or care that can dramatically extend their lives and reduce the possibility of transmission of HIV to serodiscordant partners.

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3. Legal requirements placed on people living with HIV/AIDS to disclose their status do not accurately reflect the complexity of decisions facing people living with HIV/AIDS in disclosing their status to sexual and drug sharing partners. In Canada, decisions about HIV disclosure are affected by the

variable prevalence rates in different communities, by pervasive stigma based on HIV status, race, sex, gender and sexual orientation, as well as by the common discomfort that many experience in discussing disease, mortality and discrimination.

4. Placing legal responsibility on people living with HIV/AIDS to disclose their status also assumes that people living with HIV/AIDS are solely responsible for HIV prevention. This is counter to evidence based and best practices promoted by AIDS Service Organizations (ASOs) and others in the sexual health and harm reduction field.
5. The Supreme Court rulings are also based solely on cases of penile-vaginal sex. As the HIV & AIDS Legal Clinic of Ontario (HALCO) and other have pointed out, these rulings can be assumed to apply to activities with higher likelihood of HIV transmission, such as anal sex and sharing of injection drug use equipment. There remains a lack of clarity about how the criminalization of HIV non-disclosure applies in other sexual and drug sharing contexts where HIV transmission is possible but less likely. These decisions are likely to be determined in the courts, leaving people living with HIV without concrete guidelines for when they have a legal duty to disclose their status.ⁱⁱ
6. HIV is difficult to transmit, particularly when HIV prevention methods are used. In 2014, the *“Canadian consensus statement on HIV and its transmission in the context of criminal law”* was published in *The Canadian Journal of Infectious Diseases and Medical Microbiology* by a collection of leading HIV physicians. The authors provided a comprehensive review of per-act possibility of HIV transmission, citing a “poor appreciation of the scientific understanding of HIV and its transmission” in Canadian criminal law that “may lead to miscarriages of justice”. The authors highlight the low to negligible per-act possibility of HIV transmission, including activities most commonly associated with HIV transmission, and the efficacy of undetectable viral loads to prevent HIV transmission.ⁱⁱⁱ
7. Experts working in HIV prevention have provided alternative options to Canada’s existing legal framework around HIV non-disclosure. The Ontario Working Group on Criminal Law and HIV Exposure (CLHE) is a group of agencies serving people living with HIV and prominent figures in the HIV sector, who have been working together since 2010 to advocate for “[Ontario’s] Attorney General to create prosecutorial guidelines to stop unjust prosecutions for HIV non-disclosure in Ontario”. CLHE has consistently asked that “guidelines should be developed in consultation with people living with HIV, service providers working in the field and other experts and should be informed by current medical and scientific knowledge about HIV and the social context of living with HIV.” Despite their ongoing efforts, including a 2013 meeting with Premier Kathleen Wynne, the Attorney General has not implemented revised prosecutorial guidelines.^{iv}

III. Principles

CAYR upholds the following core principles as they apply to working with people living with HIV/AIDS and the law:

- Our role is to **raise awareness about HIV/AIDS and provide support and access to dignified care for people living with and affected by HIV/AIDS;**
- Current laws criminalizing HIV non-disclosure **contribute significantly to HIV stigma and adversely impact our efforts to reduce HIV transmission;**
- As such, we **support evidence-based modifications** to existing laws;
- The **majority of people living with HIV/AIDS are taking treatment that reduces the risk of HIV transmission** to their sexual and drug sharing partners and **actively use other methods to prevent HIV transmission;**
- We **encourage all people, regardless of HIV status, to take an active role in engaging sexual and drug sharing partners in discussion about HIV prevention** and creating agreements with partners about what HIV prevention methods to use;
- We **encourage all people to use HIV prevention methods** that are scientifically proven to reduce HIV transmission and to regularly get tested for HIV;
- We **will provide up-to-date programming for our clients** related to HIV non-disclosure and the law;
- Where clients require legal advice, we will make **referrals to and strengthen partnerships with the HIV & AIDS Legal Clinic Ontario (HALCO)** to support clients in accessing legal advice;
- We will continue to **provide non-judgmental services to clients living with HIV/AIDS**, including those facing legal issues related to HIV non-disclosure;
- We will actively **work to create an environment that upholds the right of people living with HIV/AIDS to self-determined HIV disclosure** without fear of violence, stigma, abandonment or violation of confidentiality;
- We **will reflect Greater/Meaningful Involvement of People Living with HIV/AIDS (GIPA/MIPA)** in our responses to the criminalization of HIV non-disclosure in policies, practices and programming;
- We **will employ ethical decision-making standards and tools** in HIV non-disclosure situations where the rights and interests of two or more people are in conflict, or where an HIV disclosure situation presents two or more competing values or principles – and where operational policy is incapable of providing sufficient guidance.

ⁱ AIDS Committee of Toronto. (2012, May). Criminal Law and HIV Non-Disclosure. Retrieved February 19, 2016, from <http://www.actoronto.org/home.nsf/pages/act.docs.2158>

ⁱⁱ HIV & AIDS Legal Clinic Ontario, & CATIE. (2013). HIV disclosure: A legal guide for gay men in Canada [Pamphlet]. Toronto, ON: CATIE.

ⁱⁱⁱ Loutfy, M., Tyndall, M., Baril, J., Kaul, R., & Hankins, C. (2014). Canadian consensus statement on HIV and its transmission in the context of criminal law. *Canadian Journal of Infectious Diseases and Medical Microbiology*, 25(3), 135-140.

^{iv} Ontario Working Group on Criminal Law and HIV Exposure. (2014, February 11). Latest News. Retrieved February 19, 2016, from <http://clhe.ca/>