

Briefing Note:

Criminalizing non-disclosure of HIV status

OVERVIEW: In Canada, an increasing number of charges (from aggravated assault to murder) are being laid by prosecutors against people living with HIV (PHAs) for not disclosing their HIV status to sexual partners. Given the significant media reporting on such cases, the Ontario Working Group on Criminal Law and HIV Exposure has developed this briefing note. We hope it will be helpful in the lead up to the cases to be heard before the Supreme Court of Canada on February 8, 2012.

BACKGROUND: THE LAW AND NON-DISCLOSURE OF HIV STATUS

- In 1998 the Supreme Court of Canada (SCC) ruled (in the case of *R. v. Cuerrier*) that a person must disclose his or her HIV-positive status before engaging in sexual activity that poses a 'significant risk of serious bodily harm' (i.e., a significant risk of HIV transmission) to their partner. The SCC did not define what would constitute 'significant risk' in its decision or provide criteria for assessing risk.
- There is considerable confusion about what the SCC decision means in the current legal and medical context, particularly with respect to which sexual activities constitute a legally 'significant risk' of HIV transmission.
- Lower court decisions have been inconsistent in how the "significant risk" threshold is applied; for example, some people charged for HIV non-disclosure have been acquitted because they used a condom while some others have been convicted.
- The inconsistent rulings and wide variances in which criminal charges are used have led to confusion regarding how to counsel people with HIV on the legal implications of various sexual behaviours.
- Of the more than 130 people with HIV who have faced non-disclosure of HIV status criminal charges,¹ more than 65 have been convicted; 55 were sentenced to prison terms.
- Since 2004, the number of charges laid each year against people with HIV for non-disclosure of HIV status has increased significantly.
- Courts have convicted people with HIV of some of the most severe offences in the *Criminal Code* even when no transmission occurs. People are often charged with aggravated sexual assault, which carries a maximum penalty of life imprisonment and registration as a sex offender.

¹ This number is based on tracking data from the Canadian HIV/AIDS Legal Network as of February 2011 and may underestimate the total number of criminal charges against PHAs for non-disclosure of HIV status.

- Prosecutorial guidelines should be developed so the application of the criminal law reflects current scientific evidence and medical advances in treating HIV disease. Criminal charges must only be applied as a last resort – fairly, consistently and only in very limited circumstances.

SCIENTIFIC EVIDENCE AND MEDICAL ADVANCES IN HIV TREATMENT

- Even activities considered ‘high-risk’ for HIV transmission (such as unprotected vaginal or anal intercourse) in most cases do not result in transmission. A 2009 study indicated the risk of female-to-male transmission was 0.04% per act and for male to female transmission was 0.08% per act (i.e., both were well below 1 in 1000); the risk of transmission for receptive anal intercourse was 1.7% per act (i.e., less than 2 in 100).² These figures must be interpreted with caution as transmission risk can increase or decrease depending on many factors, such as the specific activity in question, viral load in the body, the presence of other sexually transmitted infections, and the stage of disease. The risk also increases with the number of sexual acts.
- Recent scientific evidence indicates that the risk of HIV transmission from an HIV-positive to an HIV-negative person is dramatically reduced (by up to 96% in a recent clinical trial) if the HIV-positive person is on antiretroviral therapy.³
- When people have access to appropriate treatment, HIV becomes a chronic, manageable condition for most people, which can be very effectively controlled through antiretroviral therapy.

PROMOTING AN EVIDENCE-BASED APPROACH TO NON-DISCLOSURE OF HIV STATUS

- The World Health Organization, Joint United Nations Programme on HIV/AIDS (UNAIDS) and other public health and clinical experts agree that a public health approach, which includes counselling to reduce risk behaviours and other proven HIV prevention measures, has been proven effective at reducing the risks of transmission. UNAIDS recommends that the criminal law apply only to rare cases where there is evidence of malicious intent and HIV is actually transmitted.⁴ It also recommends establishing prosecutorial guidelines for police and prosecutors in exercising their discretion when deciding to lay or pursue criminal charges, so as to prevent the misuse and overuse of the criminal law.

² Boily MC, Baggaley RF, Wang L, Masse B, White RG, Hayes RJ, Alary M. Heterosexual risk of HIV-1 infection per sexual act: systematic review and meta-analysis of observational studies. *Lancet Infect Disease* 2009. (2):118-29

³ Anglemyer A, Rutherford GW, Baggaley RC, Egger M, Siegfried N. Antiretroviral therapy for prevention of HIV transmission in HIV-discordant couples (Review). *Cochrane Database Syst Rev*. 2011 Aug 10;(8):CD009153.

⁴ UNAIDS. Criminalization of HIV Transmission: Policy Brief. UNAIDS, Geneva, 2008.

- Sensationalist and sometimes misleading media reporting on criminal cases of non-disclosure of HIV status increases HIV-related stigma. It contributes to negative public perceptions of people with HIV as dangerous threats to public health and safety. This undermines the important public health message of mutual responsibility for sexual health.
- The Ontario Working Group on Criminal Law and HIV Exposure, together with community leaders, lawyers, public health professionals and clinical experts in Canada are urging Attorneys-General to establish evidence-informed prosecutorial guidelines. The guidelines should be informed by current scientific evidence and take into account the objectives of HIV prevention, treatment, care and support – and would ensure charges are only laid when warranted.

RESOURCES

Additional information on criminal law and non-disclosure of HIV status (including Questions & Answers on Criminal Law and HIV Non-Disclosure in Canada) is available on the Canadian HIV/AIDS Legal Network website at: <http://www.aidslaw.ca/stopcriminalization>.

Other resources include the following:

CLHE website: <http://ontarioaidsnetwork.on.ca/clhe/>

CLHE (2010). Questions & Answers About the Campaign for Ontario Guidelines for Criminal Prosecutions of HIV Non-disclosure: <http://ontarioaidsnetwork.on.ca/clhe/wp-content/uploads/2011/11/Guidelines-QA.pdf>

CLHE (2011). Consultation on Prosecutorial Guidelines for Ontario Cases Involving Non-disclosure of Sexually Transmitted Infections: Community Report and Recommendations to the Attorney General of Ontario: <http://ontarioaidsnetwork.on.ca/clhe/wp-content/uploads/2011/11/CHLE-guidelines-report.pdf>

Mykhalovskiy E, Betteridge G & McLay D (2010). *HIV non-disclosure and the criminal law: Establishing policy options for Ontario*. Toronto: A report funded by a grant from the Ontario HIV Treatment Network. <http://www.catie.ca/pdf/Brochures/HIV-non-disclosure-criminal-law.pdf>

CMAJ commentary: <http://www.cmaj.ca/content/early/2011/12/19/cmaj.111848.full.pdf+html>