



Engagement on the Automatic Sequestering of Criminal Records June 2022

The HIV Legal Network (Legal Network) and the HIV & AIDS Legal Clinic Ontario (HALCO) make this submission to Public Safety Canada and Portfolio agencies to provide their perspective on an automatic sequestering of criminal records system (ASCR) as it relates to people living with HIV who are criminalized for HIV non-disclosure. The Legal Network and HALCO have an interest in and commitment to ensuring that the rights of people living with HIV are protected and that the law supports, rather than undermines, just outcomes for people living with HIV, including those criminalized for non-disclosure.

In Canada, a person living with HIV can be convicted of aggravated sexual assault for not disclosing their HIV status to their sexual partner in certain circumstances.¹ As recognized by the House of Commons Standing Committee on Justice and Human Rights, Canada’s approach to HIV criminalization is “overly broad and punitive”:² a person can be convicted of aggravated sexual assault for HIV non-disclosure even if they had no intent to cause harm, posed little to no risk of transmission, and did not actually transmit HIV. Those convicted face up to a lifetime in prison as well as mandatory registration on the sex offender registry, which is associated with significant and wide-ranging harms for people living with HIV convicted for non-disclosure.³

A categorical exclusion of those convicted of aggravated sexual assault from the ASCR would exacerbate the already disproportionate harms experienced by people living with HIV who are criminalized for non-disclosure, especially Black and Indigenous peoples and men who have sex with men.

Although the offence of aggravated sexual assault can capture very serious conduct, the underlying conduct captured in the context of HIV non-disclosure varies greatly and often falls at the lower end of the seriousness spectrum. To categorically exclude everyone convicted of aggravated sexual assault would contribute to the stigma and discrimination many accused of HIV non-disclosure face, even where the accused’s conduct was less morally blameworthy. This is particularly true for cases involving women and Indigenous people. As a Department of Justice

¹ *R v Mabior*, 2012 SCC 47. People living with HIV can be prosecuted for aggravated sexual assault for not disclosing their HIV status to their sexual partner prior to engaging in sexual activities that carry a “realistic possibility of HIV transmission.”

² House of Commons Standing Committee on Justice and Human Rights, *Criminalization of Non-Disclosure of HIV Status*, June 2019.

³ Liam Michaud et al, *Harms of Sex Offender Registries in Canada among people living with HIV*, HIV Legal Network, 2021.

Canada report concluded, “HIV non-disclosure cases reflecting factors that indicate lower levels of blameworthiness tend to involve Indigenous and female accused.”⁴

For instance, women and men living with HIV have been convicted of aggravated sexual assault for HIV non-disclosure for a single sex act, even when they have had undetectable viral loads⁵ or used condoms,⁶ meaning that the risk of transmission was negligible.⁷ Moreover, the circumstances that render some communities more vulnerable to HIV infection and to non-disclosure reflect the impacts of colonialism. For example, in *R. v. S.*, an Ojibway woman was convicted of aggravated sexual assault following three instances of condomless sex, which occurred after the accused and the complainant had been drinking.⁸ The accused had a difficult upbringing, being born after her mother was sexually assaulted,⁹ and suffered from depression from a young age, leading to several suicide attempts. By the time of the conduct leading to her conviction, she had a long history of drug and alcohol use and had been in several abusive relationships. In this instance, a categorical exclusion from the ASCR compound the already harmful impacts of HIV non-disclosure laws.

In addition, a categorical exclusion of aggravated sexual assault from the ASCR would contribute to disproportionate harms against Black and Indigenous people, who are among those disproportionately policed and overrepresented,¹⁰ and who are also disproportionately represented among prosecutions for HIV non-disclosure. Between 1989 to 2020, there were 224 known prosecutions for alleged HIV non-disclosure in Canada, with Black men and Indigenous women being disproportionately represented among those prosecuted.¹¹ Indigenous and Black people are also more likely to face prison sentences upon conviction for HIV non-disclosure, at 75% and 73% respectively, compared to white people (57%) who face similar charges.¹² A categorical exclusion from the ASCR would also disproportionately harm gay and bisexual men who have sex with men (GBMSM). GBMSM are the single largest population affected by HIV and would be disproportionately affected by the *prospect* of prosecution and exclusion from the ASCR.¹³

⁴ Department of Justice Canada, *Criminal Justice System’s Response to Non-Disclosure of HIV*, December 2017 at 16.

⁵ *R v Murphy*, [2013] OJ No 3903 (Ont SCJ).

⁶ *R v G*, 2017 ONSC 6739.

⁷ *Ibid* at paras 95-96. It should be noted that this trial predated the publication of newer studies confirming zero risk of sexual transmission by a person with a suppressed viral load: see *R v CB*, 2017 ONCJ 545 at paras 63-73; *R v G*, 2018 ONSC 4291.

⁸ *R v S*, 2016 MBQB 44 at paras 4–9, 14, affirmed 2017 MBCA 62, leave to appeal to SCC refused, 2017 CanLII 78703.

⁹ *Ibid* at paras 4–5.

¹⁰ Fresh Start Coalition, *Working to change the law so people can move beyond their old criminal records*, 2022.

¹¹ Colin Hastings et al, *HIV Criminalization in Canada: Key Trends and Patterns (1998 – 2020)*, HIV Legal Network, 2022.

¹² *Ibid*.

¹³ *Ibid*.

An exclusion of consideration for aggravated sexual assault offences would exacerbate the discrimination that Black and Indigenous people already face, particularly those seeking employment. A recent study in Toronto found that for identical job applications, a white applicant and a Black applicant without a criminal record had a call back rate of 33% and 10% respectively. When both applicants had a criminal record, the call back rate declined to 18% and 1%.¹⁴ Similarly, a recent federal government study showed harrowing findings on the economic status of individuals who have served time in federal corrections. The study found that 14 years following release from a federal institution, only half of individuals had employment and the median income was \$0.¹⁵ Of those that had an income, the average was \$15,000 for non-Indigenous earners, while Indigenous individuals earned an average of \$10,000.¹⁶

As a result, those who are disproportionately criminalized for HIV non-disclosure are also among those that face the most social exclusion resulting from having a criminal record. A categorical exclusion of aggravated sexual assault from the ASCR would exacerbate these challenges for people living with HIV accused of non-disclosure whose conduct is often far less morally blameworthy, despite being convicted of a “serious” offence. Canada should ensure that any implementation of an ASCR does not further contribute to the harms experienced by people living with HIV.

¹⁴ Ainslie Cruickshank, “Black job seekers have harder time finding retail and service work than their white counterparts,” *Toronto Star*, December 26, 2017, online: <https://www.thestar.com/news/gta/2017/12/26/black-job-seekers-have-harder-time-finding-retail-and-service-work-than-their-white-counterparts-study-suggests.html>.

¹⁵ Kelly M. Babchishin, Leslie-Anne Keown & Kimberly P. Mularczyk, *Economic Outcomes of Canadian Federal Offenders*, Public Safety Canada, 2021.

¹⁶ *Ibid.*