

Standing Committee on Criminalization of Non-Disclosure of HIV Status Doing Critical Work (A Law Student's Perspective)

In April of this year, the House of Commons Standing Committee on Justice and Human Rights began its study on the criminalization of the non-disclosure of HIV. The aim of the committee's work is to look at a number of issues including the federal government's directive providing prosecutorial guidance on cases of HIV non-disclosure, the best practices to address HIV non-disclosure, how to improve co-operation between the criminal justice and public health systems, and the role that the federal government plays in provincial prosecution directives for non-disclosure cases.¹ The committee has already met once and received incredibly valuable information from various stakeholders, and will meet again at the end of April.

The various stakeholders who have presented at the committee included professors and academics, the Canadian HIV/AIDS Network, the Ontario AIDS Network, and Pivot Legal Society. The committee's Chair, Anthony Housefather, opened the first committee meeting with several remarks that outlined the background and purpose of the committee's study. He noted that "HIV is the only sexually transmitted disease where failure to disclose your status could lead to criminal charges".² He noted that there is interest in ensuring that individuals get tested for HIV and evaluating the current state of the law on HIV non-disclosure.³ The committee is particularly interested in hearing about the prosecution directives for HIV non-disclosure that have been established by the federal government as well as in Ontario and British Columbia.⁴

The first speaker at the committee was a representative from the Ontario AIDS Network ("OAN"), Mr. Martin Bilodeau, who spoke about the need to "stop penalizing people living with HIV, many of whom are already marginalized" and stated that "existing law on the non-disclosure of HIV status is... unfair and counterproductive to the objectives of increasing testing and ending the epidemic...."⁵ He also mentioned that if all of Canada has prosecution directives that mirrored the federal government's directive on HIV non-disclosure prosecutions, that the *Criminal Code* would have to be amended to reflect scientific evidence and changes and also reduce the siting associated with HIV/AIDS.⁶ The OAN's position is that prosecution directives should exist in all Canadian jurisdictions so as to ensure consistency regardless of geography. Concern was expressed about the reality that an individual who is HIV-positive and uses a condom during sexual intercourse with a partner and is receiving treatment or medication can be prosecuted based on their HIV status. This does not necessarily focus on limiting non-disclosure prosecutions to cases where HIV transmission actually happened and/or was intentional. The OAN advocates for a culture that promotes HIV disclosure without stigmatization and for actors within the justice system to receive training on the topic of HIV.⁷

The second speaker was Kyle Kirkup, a criminal law professor of Law at the University of Ottawa. The main point that was emphasized in his presentation was that Canada has the highest rates of criminalization of people for HIV non-disclosure in the world and the current legal approach to non-

¹ <https://www.ourcommons.ca/DocumentViewer/en/42-1/JUST/news-release/10411525>

² <https://www.ourcommons.ca/DocumentViewer/en/42-1/JUST/meeting-142/evidence#Int-10561534>

³ *Ibid.*

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*

disclosure is confusing and legally unclear.⁸ This leads to the marginalization of communities and undermines public health.⁹ He supports the removal of HIV non-disclosure from the *Criminal Code* except in clear cases of intentional and actual HIV transmission.¹⁰ The current state of the law harms HIV-positive Canadians in 4 main ways: they remain confused about when they are required to disclose their HIV-positive status, certain communities are disproportionately criminalized, non-disclosure prosecutions stigmatize people with HIV, and the criminalization of HIV non-disclosure can possibly undermine public health.¹¹

The third speaker was Alexander McClelland, a doctoral student for Interdisciplinary Studies at Concordia University who studies the experiences of people with HIV who have been charged and prosecuted in ways related to their HIV status. His research focuses on the understanding that the courts and media have of people living with HIV. He spoke about how the charge of aggravated sexual assault can be laid in cases where there has been consensual intercourse and how the label of the charge implies that other, more serious, harm and wrongdoing has taken place.¹² He also discussed the general lack of knowledge about HIV by actors within the justice system, meaning that the criminalization of many people with HIV comes from a place of ignorance about the virus and the law surrounding it. Mr. McClelland concluded by stating that charging HIV-positive with sexual assault-related laws causes greater harm and can exacerbate situations of people who have already faced “stigma, trauma, shame, and discrimination”.¹³

The next speaker was Richard Elliott, the Executive Director of the Canadian HIV/AIDS Legal Network. He discussed how criminal law is overly broad and very damaging towards people living with HIV based on the perceived risk of harm.¹⁴ He mentioned that although the science related to HIV continues to evolve, individuals continue to be unfairly charged and criminalized for HIV non-disclosure in situations where there is sufficient scientific evidence. Given that many people are charged with aggravated sexual assault for HIV non-disclosure, they are often placed on sex offender registries for a minimum of 20 years, which comes with various forms of harm to the HIV-positive individual that are disproportionate to their conduct.¹⁵ This potential reality for individuals with HIV is a factor that discourages testing and reaching out to health care providers. He suggested that the scope of criminalization of HIV non-disclosure should be more limited and advocated for sexual assault law to not be applied to non-disclosure cases and to limit criminal charges to cases of “actual and intentional transmission”.¹⁶

Following a round of questions and exchanges between the committee members and presenters, a second round of presenters spoke. Professor William Flanagan, the Dean of the Faculty of Law at Queen’s University spoke about the federal government’s prosecution directive and how it is limited due to the lack of prosecution directives in individual provinces. His presentation focused on the public health implications of the criminalization of people with HIV. He spoke about the rates of individuals who have been diagnosed and not diagnosed with HIV and how enhanced testing options and seeking

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

effective antiretroviral treatment are critical.¹⁷ Mr. Flanagan estimated that new cases of HIV can be dramatically reduced within the next five years by increasing testing and access to health care.¹⁸ The criminalization of individuals with HIV deters testing and “broader HIV prevention and care initiatives”. He advocated for the reduction of stigma and misinformation towards people with HIV.¹⁹

The next speaker was Kerry Porth, a researcher at Pivot Legal Society in Downtown Eastside Vancouver. Her presentation focused on sex work and her organization’s support for the federal prosecution guidelines for HIV non-disclosure cases. She spoke about the need for the directive to go farther because it can still unfairly criminalize sex workers and that sex work should be decriminalized.²⁰ HIV criminalization exposes sex workers to a high risk of HIV transmission, and the criminalization of sex work makes it difficult for sex workers to screen their clients and negotiate terms such as condom use.²¹ The criminalization of sex work prevents people from accessing health care because of the fear of being at a greater risk of prosecution.²² Ms. Porth advocated for the federal prosecution directive to be adopted in each province and for HIV cases to only be prosecuted in cases of deliberate transmission.²³

The last presenter was Mrs. Lea Pelletier-Marcotte from the Coalition des organismes communautaires québécois de lutte contre le sida (COCQ-SIDA). She spoke about her organization’s objection to the use of criminal charges to deal with the HIV/AIDS epidemic “for both public health and human rights reasons”.²⁴ She spoke about how Quebec does not seem to be in favour of developing its own prosecutorial guidelines, but how her organization is in support of Canada-wide prosecutorial guidelines on HIV non-disclosure that should be based on current scientific knowledge to prevent the unjust criminalization of people living with HIV.²⁵ There have been local efforts in Quebec to decrease HIV criminalization, including having a stakeholder working group and limiting the appointment of designated prosecutors to work on HIV-related cases.²⁶ A clear prosecution directive can ensure that prosecutors handle non-disclosure cases in the same way and based on the same legal and evidentiary standards.²⁷ Overall, her view was that the federal prosecution directive is a good start to much more work that will be needed to ensure that criminal law is only applied to cases of intentional transmission of HIV.

There were several main underlying messages from all of the presenters at the committee. The general consensus was that the federal government’s prosecution directive is a useful tool that should be adopted in all Canadian provinces and territories to ensure consistent application of the law and scientific evidence. There were common concerns about the ways in which *Criminal Code* provisions are applied to HIV cases. There were additional concerns about how the law is applied to criminalize individuals for HIV non-disclosure where there has not been transmission and individuals have had a low viral load that makes transmission impossible. These concerns led to the shared suggestion that the *Criminal Code* provisions regarding HIV non-disclosure should be changed and only applied in serious cases of HIV

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Ibid.*

transmission with intent. All of the presenters touched on the topic of public health and how the stigmatization surrounding having HIV and the concern about being prosecuted for non-disclosure contributes to the lack of desire to get tested for HIV and receive health care treatment. While there was much more content discussed at the committee stage during the question and answer periods, it was interesting to note that the presenters shared many of the same views despite coming from a wide variety of backgrounds. While the committee has much work left to do on the topic of HIV criminalization, the information presented thus far has laid the ground work for potential changes to be made by governments and decision makers to reduce the unjust harm, criminalization, and prosecution of Canadians living with HIV.