

Gendered Impact of Criminalization of HIV Non-Disclosure: Implications for Criminal Code Reform

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The Research:

The **Sexual Health and HIV/AIDS Women's Longitudinal Needs Assessment (SHAWNA)** is a 5 year longitudinal community-based research project focused on the social, policy, legal, gender and geographic gaps in cis and trans women's sexual health and HIV care across Metro Vancouver. The project was launched by the Centre for Gender and Sexual Health Equity and the University of British Columbia in 2015 and follows over 330 women living with HIV in Metro Vancouver. The project includes semi-annual questionnaires, HIV disease monitoring, and qualitative/arts-based methods. SHAWNA is built on partnerships with Oak Tree Clinic/BC Women's Hospital, Canadian Aboriginal AIDS Network, YouthCO AIDS Society, Afro-Canadian Positive Network of BC, BC Centre for Excellence in HIV/AIDS and Canadian HIV/AIDS Legal Network. The Centre for Gender and Sexual Health Equity (CGSHE) has a strategic mandate to advance gender & sexual health equity among marginalized populations in BC, Canada, and globally through three pillars: research, policy and practice. These pillars incorporate community-based, clinical and population health research, policy evaluation, implementation science and education.

Recent Science & Policy Developments:

Despite the well-established science that antiretroviral therapy dramatically reduces HIV transmission risk (Barré-Sinoussi et al. 2018; Loutfy et al., 2014) and a growing body of evidence pointing to the shortcomings of the criminal law in governing HIV transmission (O'Byrne et al., 2013; Patterson et al., 2015), Canada stands out globally in its assertive and overly-broad approach to criminalizing HIV non-disclosure. In a positive development, in December 2018 Canada's Attorney General issued a directive to limit HIV non-disclosure prosecutions, but this only applies in the territories. Unfortunately, to date no provinces have moved to implement the federal directive and further action is required.

The Evidence on women and criminalization of HIV Non-Disclosure:

Our team's research adds to the growing body of evidence that highlights how the current approach to criminalizing HIV non-disclosure in Canada is gender-blind to the *power dynamics of negotiating male condom use* (a necessary pre-condition of the 2012 Supreme Court of Canada decision) and the *impact of HIV disclosure on women's experiences of violence and access to HIV care*.

- **Violence & gendered power dynamics.** Many women living with HIV fear violence, rejection, loss of financial support, negative consequences for their children, and involuntary outing of their HIV+ status if they disclose. Women who had their HIV+ status disclosed without consent were 5 times more likely to experience HIV-related violence (Baretto et al., 2017). HIV disclosure can shift relationship power dynamics by aggravating partner abuse and manipulation. Even after disclosure, many women fear legal consequences because their partners may threaten to file a non-disclosure report with police as a form of intimidation. Likewise, women who experience rape or sexual assault may not report to police for fear of non-disclosure charges (Krüsi et al., 2017 & 2018).
- **Condom negotiation & gendered power dynamics.** Gendered power imbalance in negotiating male condom use in heterosexual relationships can make it difficult for women living with HIV to negotiate condom use - as beyond verbal requests and physically providing a condom, women have limited power over whether a condom is used. This puts a disproportionate legal burden to disclose their HIV status on women living with HIV. When a male partner refuses to use a condom, women living with HIV either risk violence and rejection if they disclose, or they break the law and make themselves vulnerable to prosecution (Krüsi et al., 2018).

“You can't get into a relationship without fear of going to jail.”

“Women live in fear. You stay in that relationship because you are afraid that the person will report you.”

“I've been raped recently. I didn't report it. I couldn't. Halfway through he just asked, 'Are you positive?' How do I answer that?”

– Women living with HIV

“I try [to insist on condom use], but for most men it ends up in an argument “So you don't trust me? Are you saying I have something else?” So you just end up going, “Okay”. Even though you know it's not but I tried. So when this backfires, just don't come back and bite me.”

– Woman living with HIV

- **Viral suppression & prosecution.** A recent study based on virologic data from 277 women living with HIV collected over a seven-year period in Vancouver, BC, highlights that approaches exempting criminal liability for HIV non-disclosure conditional on maintaining an ‘undetectable’ (< 50 copies/ml) or ‘suppressed’ (< 200 copies/ml) viral load would continue to put 61% and 48% of women living with HIV at risk for criminal prosecution, respectively. Those at highest risk of prosecution are the most marginalized women living with HIV, including women who are unstably housed, sex workers and women who have been recently incarcerated (Krüsi et al., 2018).

61 % of women living with HIV continue to be at risk of prosecution if prosecution for HIV non-disclosure was conditional on maintaining an undetectable HIV viral load.

Policy Implications:

Despite being frequently positioned as serving to protect women, our findings indicate that the current assertive and overly broad approach to the criminalization of HIV non-disclosure creates a climate of fear, fuels stigma and constitutes a form of gendered structural violence that exacerbates risk for interpersonal violence among women living with HIV. In line with the recommendations by international policy bodies such as WHO, UNAIDS, and the Global Commission on HIV and the Law, these findings demonstrate the negative impacts of regulating HIV prevention through the overly broad use of the criminal law among women living with HIV. Thus, our findings emphasize the urgent need to implement evidence-based Criminal Code reforms that limit the application of the criminal law to HIV non-disclosure cases and take into consideration the gendered power imbalances in negotiating condom use as well as the limitations of approaches solely focused on viral suppression.

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