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Ministère de la Justice
Canada

HIV

non-disclosure
public consultation

What We Heard Report

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Introduction

The Government of Canada is reviewing the criminal law on HIV non-disclosure and sought feedback from the Canadian public through an online consultation. Participants were invited to share their views on possible criminal law reforms related to HIV non-disclosure. This consultation is one of the commitments made by the federal government in Canada's first Federal 2SLGBTQI+ Action Plan, launched in August 2022.

Background

"HIV non-disclosure" refers to criminal cases where a person living with HIV, who is aware of their status and knows they are infectious, does not disclose their HIV status before sexual activity that poses a realistic possibility of transmission.

Areas explored included:

- Whether sexual assault offences are appropriate in HIV non-disclosure cases;
- Whether the criminal law should apply only where the accused intended to transmit HIV or actually transmitted HIV;
- Whether the criminal law should apply in cases where an accused has taken precautions to protect their sexual partner(s) from transmission; and
- Whether a new HIV, STI or infectious disease-specific offence should be created to address HIV non-disclosure cases.

Currently, persons living with HIV who do not disclose their status prior to sexual activity that poses a risk of transmission can be charged with different offences, including aggravated sexual assault, which is the most serious sexual assault offence in the *Criminal Code*. This is because, in certain circumstances, the non-disclosure of one's HIV status can invalidate another person's consent to engage in sexual activity.

However, evidence suggests that criminalization can lead to the stigmatization of people living with HIV, which may discourage individuals from being tested or seeking treatment. There has also been considerable progress in terms of HIV treatment, as reflected in the scientific evidence on rates of transmissibility. Together, these points suggest that it is prudent to periodically review criminal laws related to non-disclosure. Holding a consultation and hearing from stakeholders and those with lived experience is key to creating a path forward that follows science, protects victims, and reduces the stigma of those living with HIV.

Methodology

On October 21, 2022 Justice Canada launched a [consultation website](#) to solicit input on possible criminal law reforms related to HIV non-disclosure. The website included a paper outlining the background and context of HIV non-disclosure, and visitors were invited to provide their input through a survey. The consultation was shared on Justice Canada's social media, as well as through a media release. An email invitation to participate was also shared with key stakeholders. The survey was open for 12 weeks, closing on January 13, 2023. Responses were accepted through an online platform and by email.

Results of each question are presented below, in the order they appeared in the survey. A thematic analysis was conducted on the qualitative responses to the survey questions and illustrative quotations are included throughout the report. The survey also included a question allowing respondents to share documents (research papers, reports, etc.). A bibliography of the reports and articles that were shared is included as Annex 1 to this report for information.

Results from the online consultation

There were 980 responses to the online consultation; 965 were submitted via the online survey tool and 15 were submitted via email.¹ The vast majority (907, or 93%) of submissions were from individuals and the rest (73, or 7%) were submitted on behalf of an organization. Of the responses from organizations, the most common were from the NGO (non-governmental organization) sector (59%), followed by the healthcare sector (29%). The remainder were from the legal, and academic sectors.² There was a range of professions represented among individual respondents. The highest percentage of respondents came from “other professionals” who were primarily employed in the arts/film, finance/retail/hospitality, and education sectors. Health/social services professionals (30%), advocates (17%), academics (17%), and lawyers (6%) made up the remaining categories.³

Respondents were asked if they had read the consultation paper, which provided background on the context and purpose of the consultation. About 9 in 10 respondents indicated they had read the paper. Chart 1 shows that survey respondents had a high level of familiarity with the topic of HIV non-disclosure with over two-thirds (67%) of respondents rating themselves as very (43%) or extremely (24%) familiar with the topic.

Chart 1 – Most respondents were familiar with the topic of HIV non-disclosure

Question 1: How would you rate your level of familiarity with the topic of HIV non-disclosure? n=969



¹ Email submissions that provided answers to the survey questions are included in the survey results.

² Percentages do not add to 100 because multiple responses were permitted.

³ Percentages do not add to 100 because multiple responses were permitted.

Use of sexual assault offences in HIV non-disclosure cases

Chart 2 indicates that more than 8 in 10 respondents (85%) agreed that the *Criminal Code* should be amended to ensure that sexual assault offences cannot be used where the only issue in the case is HIV non-disclosure. This largely reflects the views of individuals (83% agreed), while a higher percentage of organizations (92%) agreed with such an amendment.

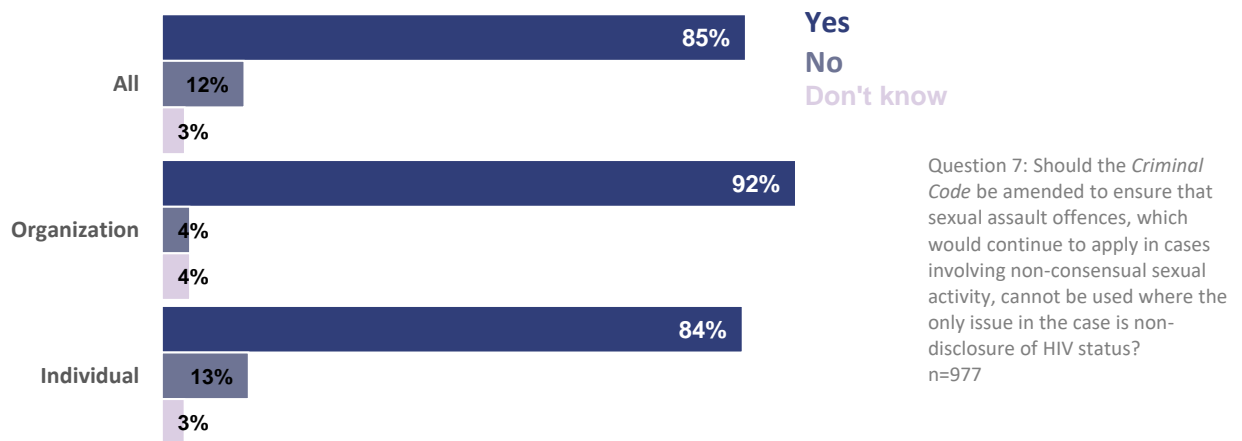
Comments from those who agreed that sexual assault offences should not be used centered on the appropriateness of sexual assault laws in this context, suggesting they discriminate against and cause harm to persons living with HIV through disproportionately harsh sentences, unjustified mandatory sex offender designations and deportations for non-citizens. Many also stressed that equating non-disclosure of HIV status with sexual assault serves to undermine the objectives of sexual assault laws in addressing sexual violence. For example:

“Prosecuting non-disclosure of HIV under sexual assault... imposes disproportionate and unduly harsh sanctions on people living with HIV and ignores alternative and less intrusive means to protect people from HIV infection. Lastly, prosecuting non-disclosure of HIV under sexual assault provisions risks undermining progress and gains in setting an affirmative standard for consent, and may reintroduce discriminatory concepts and considerations into determinations about the admissibility of sexual history evidence.”

In contrast, there were respondents who expressed the view that sexual assault provisions are appropriate in cases of HIV non-disclosure. As one comment outlines:

“The sexual assault offences are intended to safeguard and enhance sexual autonomy and agency. Consent to sexual activity must be freely given (R. v. Ewanchuk, 1999 CanLII 711 SCC) contemporaneous (R. v. J.A., 2011 SCC 28) informed (R. v. Mabior, 2012 SCC 47, R. v. N.G., 2020 ONCA 494) and meaningful (R. v. Kirkpatrick, 2022 SCC 33). Knowingly exposing a sexual partner to a realistic risk of transmission of HIV through sexual activity, without disclosing the risk so the partner can make an informed decision whether to assume the risk or participate in its mitigation, is a violation of the partner’s sexual autonomy and dignity which is properly characterized as sexual assault. This characterization safeguards and promotes Charter values.”

Chart 2 – More than 9 in 10 organizations and more than 8 in 10 individuals agreed that the *Criminal Code* should be amended so that sexual assault offences cannot be used where the only issue in the case is non-disclosure of HIV status.



Intention to transmit

Chart 3 shows whether respondents agreed or disagreed that the *Criminal Code* should be amended to limit application of the criminal law to HIV non-disclosure cases where the accused intended to transmit HIV. Half (50%) of all respondents agreed an accused should have intended to transmit HIV in order to be held criminally liable. The percentage of organizations that held this view (71%) was substantially higher than that observed among individuals (48%).

Comments from those who agreed that intention to transmit should be required generally indicated that the criminal law should only be used as a last resort in cases of “malicious” transmission. As one respondent described:

“Any use of the criminal law should only be as a last resort to deal with the rare case of intentional transmission, and where other interventions have proven insufficient to protect others from harm. Any prosecution should require proof that: the person acted for the purpose of transmitting the infection, the person engaged in activity likely to transmit the infection, and it was in fact transmitted. In the case of a conviction, any penalty should be proportionate to the actual harm caused.”

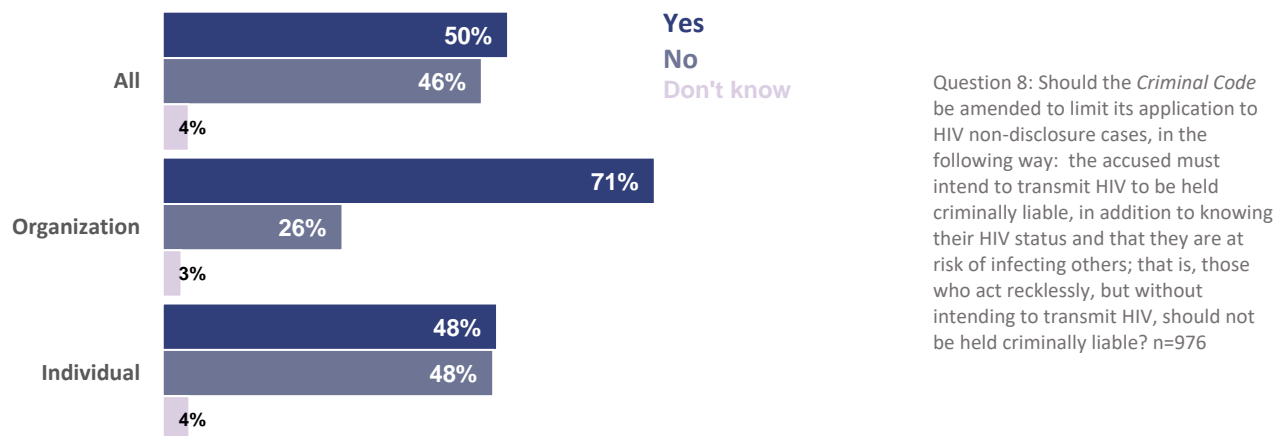
For the 46% of all respondents (48% of individuals and 26% of organizations) who indicated that the criminal law should not be amended to require intent to transmit, some were of the view that requiring intent to transmit would reduce the law’s ability to protect the public from high-risk behaviour. As described in one comment:

“Amending the law in this way would reduce the protection currently afforded to the public under existing law and create an unacceptable gap. The criminal law should continue to apply to

those individuals who knowingly place others at risk of infection with HIV, regardless of whether they do so with the specific intent to transmit HIV.”

In contrast, some who opposed a specific intent requirement expressed concern about the terminology “intent to transmit,” on the basis of their view that it is a myth that people with HIV would ever *intend* to transmit the virus. They view the terminology as rooted in transphobia and homophobia. Some respondents felt the continued use of the terminology leads to stigma and endangerment of equity-deserving people: “the intention to transmit, is a homophobic and transphobic myth. This [legislative change] would intensify stigma, and give judges way too broad of interpretation [sic]. It could also be exploited by police to target marginalized communities.”

Chart 3 – About half of *individuals* and just under three-quarters of *organizations* agreed that the *Criminal Code* should be amended to limit its application to cases where an accused intended to transmit HIV.



Actual transmission

Respondents were asked whether they agreed or disagreed that the *Criminal Code* should be amended to limit its application to those who actually transmit HIV. Chart 4 shows that overall, less than half (43%) of respondents expressed the view that the criminal law should be limited to cases involving actual transmission. A slightly lower proportion of individuals (41%) agreed with this statement, whereas organizations were more likely (66%) to agree that the criminal law should be limited in this way. A relatively high proportion of individuals (7%) responded don't know to this question.

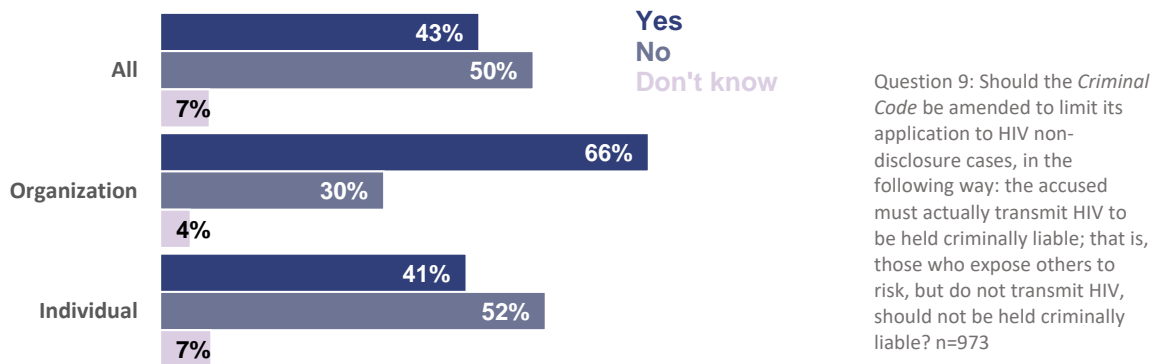
Comments from those who feel the criminal law should not be limited to actual transmission related to the uncertainty around the likelihood of transmission, which in their view makes the requirement of transmission for criminal liability problematic. As one comment highlighted:

“Criminalizing behaviour that puts members of the public at risk should not depend on the outcome when it is sheer chance. It would hinge criminality on something outside the control of

the accused after they voluntarily engaged in risky behaviour, and it would be impossible to predict whether liability would attach at the time of the offence. This model would create a legal landscape where two individuals could engage in identical conduct, and chance would determine whether either or both of them committed a criminal act. This approach would be antithetical to the fair operation of the criminal law under the Charter of Rights and Freedoms.”

Among the 43% of all respondents who agreed the *Criminal Code* should be amended so that only people who actually transmit HIV can be held criminally liable, most comments related to the harmful impact of HIV transmission. As one respondent noted “criminal liability should be tied to impact. A person experiencing the risk of HIV transmission is not comparable to the experience of acquiring HIV. These are not the same thing.” Others pointed to the element of transmission as being important because “there is no public interest served by prosecuting someone where there has been no transmission.”

Chart 4 – About 4 in 10 individuals and two-thirds of organizations agreed that the *Criminal Code* should be limited to persons who actually transmit HIV.



Application of the criminal law in cases where a person has taken precautions to protect their sexual partner(s) from transmission

Respondents were asked whether the *Criminal Code* should be amended so that it would not apply in cases where the accused took reasonable precautions to protect their sexual partners from transmission, such as anti-retroviral therapy (ART), condom use and/or limiting sexual activity to oral sex. Chart 5 shows there was strong support for such an amendment, with just under two-thirds of all respondents (61%) agreeing (60% of individuals and 78% of organizations). Those who agreed expressed the view that there is no significant possibility of transmission when reasonable precautions, such as ART, are taken. Many of the comments highlighted those activities:

“Criminal charges related to non-disclosure, exposure, or transmission of HIV or another STBBI [sexually transmitted blood borne infections] are not justified where someone engaged in activities that, according to the best available scientific evidence, posed no significant possibility

of transmission. These include: oral sex; anal or vaginal sex with a condom; anal or vaginal sex without a condom while having a low or suppressed viral load; and spitting and biting.”

Just over one-third (36%) of respondents (37% of individuals and 21% of organizations) disagreed with an amendment that would limit the application of criminal law for those who took reasonable precautions to prevent HIV transmission. Based on the comments, many disagreed on the basis that they do not believe the criminal law should be amended at all:

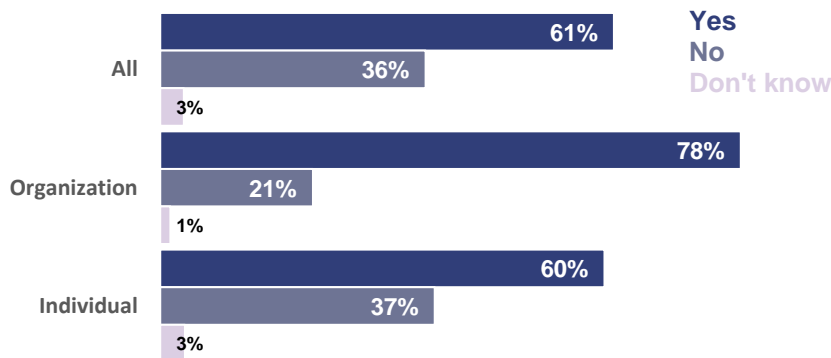
“[T]he *Criminal Code* does not need to be amended. The law is clear. If there is no realistic possibility of transmission (e.g., the person is on ART and has a suppressed viral load) there is no offence.”

Others disagreed with limiting the criminal law in this way because in their view a sexual partner cannot provide informed consent if HIV status is not disclosed, regardless of any preventative measures taken.

Some respondents felt that a provision that limits criminal liability when precautions are taken is discriminatory on the basis that some groups may unknowingly transmit because they are not able to take reasonable precautions. As one comment describes:

“Medication is not universally available. Migrants and economically disadvantaged people may not be able to afford them, even at the reduced cost of health care plans. Criminalizing poverty and other disadvantageous life circumstances multiplies the harm of these circumstances.”

Chart 5 – Just under two-thirds of *individuals* and more than three-quarters of *organizations* agreed that the *Criminal Code* should be amended so that it does not apply when an accused takes reasonable precautions to prevent HIV transmission.



Question 10: Should the *Criminal Code* be amended to limit its application to HIV non-disclosure cases, in the following way: the criminal law does not apply where the accused took reasonable precautions to protect their sexual partners from transmission, such as anti-retroviral therapy, condom use and/or limiting sexual activity to oral sex? n=975

Creation of a new HIV, STI or infectious disease-specific offence to address HIV non-disclosure cases

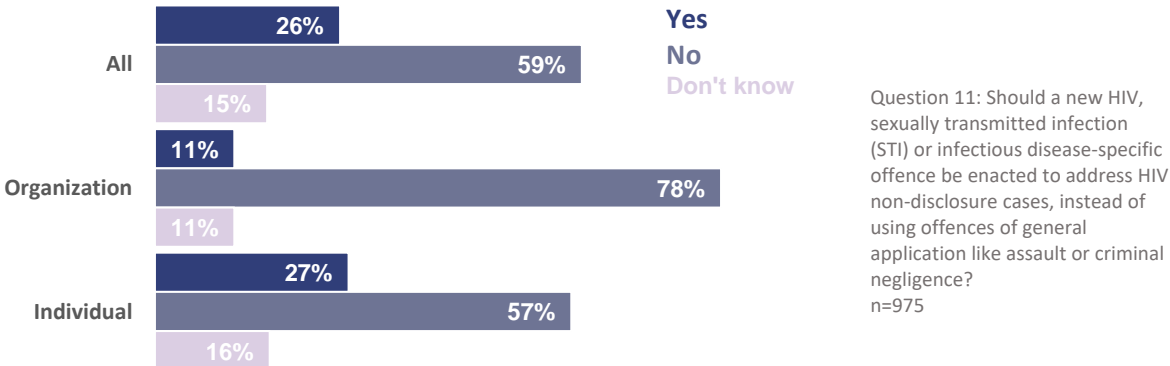
Survey results showed that a majority of respondents opposed the enactment of a new HIV, sexually transmitted infection, or infectious disease-specific offence. Chart 6 shows that 59% of all respondents disagreed with the creation of a new offence, while 57% of individuals and more than three-quarters (78%) of organizations disagreed. Many comments centered on the harm any new offence could cause, and the increased stigma that would result. Many also highlighted that HIV non-disclosure should be treated as a public health issue, not a criminal issue. As one person stated:

“This will exacerbate the known public health related harms which have stemmed directly from the use of criminal law to prosecute cases of HIV non-disclosure, and broaden these impacts. It will increase stigma, which will decrease uptake of testing and treatment, and produce conditions which further introduce barriers to disclosure with intimate / sexual partners.”

Just over one-quarter (26%) of all respondents, 27% of individuals and 11% of organizations, agreed that a new offence should be created. Those supportive of this proposal highlighted that a new offence could allow for the complexities of non-disclosure cases to be taken into account. As one respondent described, “often these cases are far more complex than someone willingly using their HIV status as a 'weapon' they [sic] are often more because of the complexities of peoples' lives and situations around disclosure before consent and should be treated as such.”

Many noted that existing criminal laws (e.g., sexual assault) are too blunt of an instrument, and may have unintended harms (e.g., mandatory *Sex Offender Information Registration Act* designation). Some also noted that any new offence “should not be overly punitive and not seen on the same level as assault or sexual assault. Rehabilitation should include education on HIV and access to anti-retroviral therapy so the offence does not occur again.”

Chart 6 – Almost 6 in 10 of individuals and 8 in 10 organizations did not support the creation of a new offence to address HIV non-disclosure cases.



Additional *Criminal Code* amendments

Lastly, respondents were asked if they felt there were other ways the *Criminal Code* should be amended to address HIV non-disclosure cases. Almost one-third (31%) of all respondents and 32% of individuals indicated don't know when answering this question, while only 14% of organizations did the same. Of the remainder, 50% of all respondents responded yes (47% of individuals; 77% of organizations), and 19% of all respondents responded no (20% of individuals; 5% of organizations) that they did not think there are other ways the *Criminal Code* should be amended to address HIV non-disclosure cases.

The comments from those who responded yes were mostly reiterating their view that HIV non-disclosure should be completely decriminalized. Others reiterated that the criminal law should be reserved for cases “where there is actual and intentional transmission, and where no other extenuating circumstances are present (e.g., fear of violence upon disclosure).” In a similar vein, some comments highlighted gender issues:

“The *Criminal Code* needs to consider gender differences in the application of the law. Women living with HIV continue to face stigma and discrimination, and laws criminalization [sic] HIV non-disclosure institutionalize this stigma. Extensive research now documents that the law is more of a threat to the lives of women living with HIV than HIV itself. The *Criminal Code* needs to be fully amended to end the over-criminalization of HIV. Rather, to address HIV prevention goals, we need to focus on supporting early and regular HIV testing and early linkage to HIV treatment and care for those who are diagnosed with HIV. Ending HIV will require ending HIV-related stigma.”

In addition, many respondents highlighted what they view as the discriminatory practice of deportation of non-citizens following conviction for HIV non-disclosure. Many argued that this practice should be ended because it disproportionately impacts racialized people living with HIV. The practice may also contribute to limiting or removing their access to HIV medication. Similarly, many respondents also called for a review of past HIV non-disclosure convictions.

Other findings

A keyword search of the data was conducted to assess the degree to which respondents directly expressed support for full decriminalization of HIV non-disclosure (the search used variations of the term “decriminalization” in English and French). Based on this search, just over one-quarter of respondents (27%) expressed support for decriminalization somewhere in their survey responses. Many of these respondents provided comments similar to this: “...I believe in the total decriminalization of HIV.”

The data were also reviewed to assess the degree to which respondents felt that the existing criminal law appropriately addresses the issue of HIV non-disclosure. A key word search was conducted, combined with filtering questions to those that responded no to any *Criminal Code* amendments. A small number of respondents (less than 1%), answered no to the questions and/or specified in their responses that they support using existing laws and jurisprudence in matters of HIV non-disclosure. For example, one respondent stated, “stop trying to legislate over what the Supreme Court has done in its

case law. Assault is assault and takes many forms. Judges and prosecutors can exercise their discretion appropriately with the law as it stands.”

Relevant research, reports, publications

The consultation survey also invited respondents to share relevant documents (research reports, policy papers, etc.). There were over 140 documents shared both via email and the online survey tool, with many papers (such as CCRHC’s Change the Code paper) shared multiple times. Annex 1 is a bibliography of all of the submissions received (with duplications excluded).

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