

A central white circle is held by ten diverse hands of various skin tones and wearing different watches and bracelets. The hands are arranged in a circle around the white circle, which contains the title text. The background is a light pink color with a darker pink curved band at the bottom.

A gender-centred dialogue on

Alternative Justice Responses

to HIV non-disclosure criminalization

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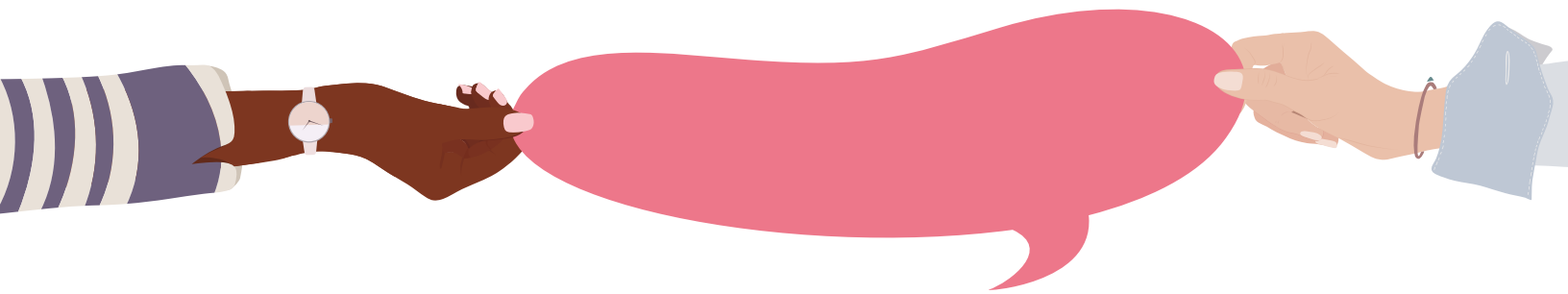
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About the HIV Legal Network

The HIV Legal Network promotes the human rights of people living with HIV or AIDS and other populations disproportionately affected by HIV, punitive laws and policies, and criminalization, in Canada and internationally. We do this through research and analysis, litigation and other advocacy, public education, and community mobilization.

The HIV Legal Network acknowledges that the land on which we live and work is traditionally known as Turtle Island and home to the Haudenosaunee, the Wendat, and the Anishinaabe, including the Mississaugas of the Credit First Nation.



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Introduction


On June 20th, 2022, the HIV Legal Network, in collaboration with Communities, Alliances & Networks and the Women & HIV/AIDS Initiative, hosted a roundtable about alternative justice responses to the criminalization of HIV non-disclosure in Canada. The objective of the roundtable was to gather cross-sector perspectives about whether such an alternative approach is warranted or appropriate in situations of non-disclosure. Given the interaction between HIV criminalization, disclosure, and gender, including the risks of gender-based violence and gendered power dynamics on both sides of the equation, gender-centred considerations grounded our discussion. We also specifically chose to focus on *community-based* justice alternatives and how we can foster collaboration between the HIV sector, the sexual assault and gender-based violence sector, and alternative justice organizations in this area of work.

The roundtable brought together people living with HIV, AIDS Service Organizations (ASOs), Indigenous-led organizations, organizations working in gender-based violence, women's rights organizations, restorative and transformative justice experts, and members of the Canadian Coalition to Reform HIV Criminalization (CCRHC).

The idea for this roundtable was born out of community consultations as part of the CCRHC's ongoing law reform advocacy to limit HIV criminalization to cases of actual and intentional transmission. After many years of advocacy from the CCRHC and the broader community, the federal government has demonstrated a willingness to engage on this issue, with the possibility of law reforms now on the horizon.¹ At the same time, there have been ongoing community discussions about implementing alternative justice responses to either complement law reform efforts or to mitigate the harms of the current legal approach until such reforms are implemented. It became clear through community dialogue that, while law reform in Canada may greatly reduce harms against people living with HIV, it will not transform the conditions that lead people who have experienced non-disclosure to seek a traditional criminal justice response.

Since most alternative justice responses focus on repairing the *harm* caused by an individual and include *holding people accountable* for their actions, our discussion necessarily raised questions around applying the notions of “harms” or “wrongdoing” to HIV non-disclosure: is HIV non-disclosure a harm in and of itself? Or does it depend on the circumstances and characteristics of the involved parties? Similarly, can we really assert that non-disclosure is wrong in and of itself? Is there still a role for community-based interventions to support people living with HIV and/or their partners around non-disclosure and if so, what forms would such interventions take? The roundtable was designed to bring together diverse perspectives to grapple with these many complex issues and to foster collaboration in this area of work. It was *not* intended to provide a clear path forward on implementing and designing alternative justice responses.

This report represents a synthesis of discussions during the roundtable, as well as findings from the research and previous community engagement.



The roundtable began with a land acknowledgement and opening from Elder Albert McCleod. It was followed by background presentations on HIV criminalization by the HIV Legal Network, and restorative and transformative justice approaches by Rittenhouse. Participants were then split into breakout groups to envision and discuss potential alternative justice responses based on specific non-disclosure case studies (see Appendix 1). Marvelous Muchenje opened the afternoon with a recognition of the impact of HIV criminalization on African, Caribbean, and Black communities. The afternoon session was dedicated to a circle exercise, involving an item of their choosing that participants were asked to bring, facilitated by Molly Bannerman of WHAI, in which three questions were asked: (1) how does your item symbolize your hope for a just society? (2) what values do we need to keep in mind in moving forward with this work? and (3) how can you personally or professionally contribute to this work? The day was closed by Elder Albert.

Current state of HIV non-disclosure law and its impacts

With at least 224 prosecutions for non-disclosure since 1989, Canada has earned the unfortunate distinction of being a world leader in prosecuting people living with HIV. Under the existing legal framework articulated by the Supreme Court of Canada in 2012, people living with HIV can be charged and convicted if they do not disclose their HIV status to their sexual partner when there is a “realistic possibility” of HIV transmission.² However, because of the Court’s overly broad and unscientific interpretation of the meaning of “realistic possibility,” convictions can and do occur even where the sexual encounter posed little to no scientific risk of transmission. Moreover, a person living with HIV can be charged and sent to jail even if they had no intent to harm their partner and did not actually transmit the virus. People are usually charged with aggravated sexual assault — one of the most serious offences in the *Criminal Code*.³

HIV disclosure and the right to privacy

HIV disclosure refers to telling someone you are living with HIV. HIV status is intensely personal information. Disclosure is a highly complex and difficult personal process, which is influenced by HIV stigma, discrimination, race, gender, relationship dynamics, violence, economic and housing situations, and other factors.

People living with HIV have the right to privacy when it comes to their HIV status. While disclosure in a positive and supportive environment can have important beneficial effects, disclosure may also lead to negative consequences in other contexts. People living with HIV should be provided with all the necessary support and information to decide if, when, and how they will tell other people about their HIV status.

The criminal law in Canada requires people living with HIV to disclose their HIV positive status to sexual partners in certain situations or they can be prosecuted and imprisoned. Efforts are underway to reform the current criminal law on disclosure.

Impacts of HIV non-disclosure laws on women and gender-diverse people: Research summary and roundtable contributions

Both research and roundtable participants' experience show how HIV criminalization adds to and compounds the intersecting harms experienced by women and gender-diverse people living with HIV, including HIV stigma and discrimination, surveillance, social isolation, barriers to healthcare, racism, colonialism, poverty, and gender-based and sexualized violence.⁴

Disproportionate effects on Indigenous, Black, and 2SLGBTQ+ communities

HIV criminalization disproportionately affects people from Indigenous, Black, and 2SLGBTQ+ communities, since these groups face higher HIV incidence and thus are at increased risk of prosecution.⁵ Indigenous and Black people made up only 4.9% and 3.5% of Canada's population according to the 2016 census.⁶ Yet Indigenous women and Black women accounted for 40% and 42.1% of new HIV diagnoses among women in Canada, respectively.⁷ And while the majority of prosecutions for alleged non-disclosure involve men who had sex with women (with Black men being disproportionately represented among these numbers), a large proportion of prosecutions against women involve Indigenous women and women who had long histories of sexual abuse by men.⁸ Research has also shown that Indigenous and Black people are convicted at a higher rate, acquitted at a lower rate, and more likely to face prison sentences than white people.⁹

Additionally, roundtable participants highlighted that sex workers, transgender women, and women who have migrated to Canada are also at greater risk of systemic violence and of being charged for HIV non-disclosure and other forms of criminalization.

Research on Canada's HIV non-disclosure laws has shown that women from African, Caribbean, Black, and newcomer communities experience the application of the criminal law as another form of racial oppression and sexism.¹⁰ Likewise, research has shown that Indigenous women living with HIV experience the criminalization of HIV non-disclosure as an additional layer of colonial violence and control over their bodies, minds, and spirits.¹¹

HIV criminalization and gender-based violence

DC's story

In 2012, the Supreme Court released its decision in a HIV non-disclosure case involving a woman living with HIV, anonymized as "DC." DC and her partner were in a four-year relationship after she disclosed her HIV status to him. The relationship became physically abusive and when DC ended the relationship, he violently assaulted DC and her son. Her ex-partner was subsequently charged with and convicted of assault. To retaliate, he pursued charges of HIV non-disclosure, on the grounds that when he and DC first had sex, she had not disclosed her HIV status. He alleged they had also not used a condom — an allegation that DC disputed. DC had an undetectable viral load at the time. DC was subsequently charged with aggravated sexual assault and convicted at trial. In the end, DC was acquitted by the Supreme Court — but only on technical grounds.¹² DC's case shows how HIV non-disclosure laws can, and are, used by abusive partners to exert control over women.

Women living with HIV face an increased risk of violence compared to women generally, and HIV criminalization can further increase this risk.¹³ According to a recent study, 86% of women living with HIV in Canada surveyed reported a history of physical, verbal, or sexual violence from partners.¹⁴ Many women living with HIV are structurally vulnerable to intimate partner violence: 63% of women living with HIV had an income below the poverty guidelines, over a third had a history of incarceration, around half had used drugs, and over a quarter reported a history of sex work.¹⁵ In the context of intimate partner violence and social and economic inequality, women often do not have the power to navigate when and how sex happens.

In addition to these structural risks, non-disclosure laws increase the potential for coercion and violence within intimate partner relationships. Coercive partners may weaponize non-disclosure laws by holding the threat of criminalization over a woman's head if they threaten to leave or report their partner's abuse.¹⁶ One-fifth of the women living with HIV surveyed in one study — particularly Indigenous and Black women, members of the 2SLGBTQ+ community, women experiencing unstable housing, and women who reported experiences of violence as an adult — perceived that HIV non-disclosure laws had increased their experience of violence from sexual partners.¹⁷ This study revealed that 75% of women living with HIV in Canada fear disclosing their HIV status, and 18% percent reported that they experienced violence from a sexual partner upon disclosure.¹⁸ Because of this risk, 20% of participants in the study reported disclosing their HIV status to a new partner in front of a witness,¹⁹ while other women may remain in abusive relationships due to the fear of stigma, social isolation, and retaliation.²⁰

As the House of Commons Standing Committee on Justice and Human Rights recognized, the current law on HIV non-disclosure, including the requirement to use a condom (in addition to a maintaining a low viral load), “fails to address how both cis and trans women may not be able to safely negotiate condom use with their sexual partners.”²¹ Even where women are able to access treatment and use condoms, the current law places the burden on people living with HIV to prove that they did, in fact, disclose their HIV status.

These research findings were corroborated by the roundtable participants' experience. Roundtable participants that work in the HIV sector summarized the reasons women might not disclose to a partner, including fear of violence within the relationship upon disclosure; lack of control over the dynamics around sex; fear of criminalization and their HIV status being potentially weaponized against them if they *do* disclose; fear of the complexities of the criminal law and of “child welfare” or family policing laws; and/or difficulty processing their diagnosis. These reasons illustrate that the decision about whether to disclose is one that is framed by situational nuances and gendered dynamics that the criminal law is unable to address in responding to non-disclosure allegations.

One roundtable participant who studied the experiences of women living with HIV outlined that the current legal framework creates an impossible choice: if a woman *does* disclose her HIV positive status to her intimate partner, she faces a risk of increased violence and manipulation by her partner; however, if a woman *does not* disclose, she faces the risk of criminalization and all its attendant consequences. Women have also faced charges of HIV non-disclosure in the context of being sexually assaulted themselves.²²

Experiences of incarceration of a woman convicted for non-disclosure

One woman who was incarcerated for HIV non-disclosure shared her experience at the roundtable. She highlighted that it was already hard enough to deal with the diagnosis of a “life-changing virus,” without the added weight, fear, and stigma of incarceration. She articulated how a charge of aggravated sexual assault and automatic registration as a sex offender creates stigma and adds to the shame she feels for living with HIV. In her case, this stigma manifested in verbal abuse and discrimination from correctional officers and other prisoners. Rather than policing HIV non-disclosure through surveillance and the threat of criminal prosecution, she believed she could have navigated her diagnosis differently if there had been a greater openness about HIV and a normalization of practicing safe sex.

HIV treatment, prevention, and care

Research has shown that HIV criminalization undermines public health objectives by harming HIV prevention efforts through increasing HIV-related stigma and fear,²³ hindering access to and eroding trust in voluntary approaches to HIV prevention,²⁴ testing,²⁵ and care, and spreading misinformation about the nature of HIV and its transmission.²⁶ Related stigma and discrimination can also prevent people from accessing HIV testing and treatment. Some individuals may choose to delay testing and treatment out of fear of being prosecuted.²⁷

Women living in poverty and experiencing racism already face increased barriers to accessing HIV treatment. One roundtable participant explained that African and Caribbean women who have migrated to Canada face distinct barriers in accessing HIV services because of a lack of awareness and language barriers. A participant working with Indigenous communities outlined that access barriers to HIV prevention and treatment also stem from a severe distrust of institutions. They elaborated that Indigenous people and immigrants often witness the state causing harm to family, friends, and members of their community, and thus will not turn to state resources when they need help. Research affirms this experience: in a 2018 study of Indigenous peoples' experience of the healthcare system in Prince George, BC, participants reported racism and discrimination as among the top barriers to accessing healthcare.²⁸

Barriers to Achieving Suppressed Viral Loads Increase Disproportionate Impact of the Law

Since the Supreme Court's decision in *Mabior* in 2012, some progress has been made to bring the law in line with the science, after years of community advocacy. In some jurisdictions in Canada, prosecutorial policies on HIV non-disclosure prevent prosecutions against people who maintain a suppressed viral load (less than 200 copies/mL) for four to six months.²⁹ In other words, the law has evolved to recognize "U=U" ("Undetectable = Untransmittable").

Although this represents a positive step in limiting prosecutions, these policies increase the disproportionate impacts of HIV criminalization on communities that face barriers to accessing HIV treatment, including racialized communities and those living in rural and remote areas. One study of women living with HIV in Metro Vancouver found that 61% of those surveyed — in particular, women who were younger, unstably housed, who did sex work, and who had been recently incarcerated — would not have benefitted from the protection of the prosecutorial policy because they could not sustain a suppressed viral load for six months.³⁰ As a result, these women remain at risk of criminal prosecution.

HIV criminalization and effects on the sexuality of women living with HIV

The use of the criminal law to punish people living with HIV for non-disclosure has been described by some as a tool to protect women who are at risk of acquiring HIV, and to uphold women's sexual integrity and autonomy. In reality, roundtable participants shared that HIV criminalization constrains the sexual autonomy and pleasure of women living with HIV, sentiments that are echoed in the research.³¹ Roundtable participants working in the HIV sector shared that many women living with HIV choose not to enter romantic or sexual relationships due to fear of discrimination, rejection, violence, and criminalization. Indeed, a recent study revealed that 37% of women living with HIV surveyed chose not to have sex with a new partner due to concerns about non-disclosure laws; this was especially the case among women who had experienced an increased risk of violence because of HIV non-disclosure laws.³²

Some roundtable participants who work with people living with HIV outlined that, upon diagnosis, public health professionals often use the law as a tool to compel people into disclosing their status to sexual partners, without providing adequate emotional support to process their diagnosis and their new risk of criminalization. This can be traumatizing and frightening for those that have received a new diagnosis. For women who cannot access treatment due to structural barriers and cannot disclose safely, they must choose between risking criminalization and isolation and the loss of physical intimacy. This is an area in which roundtable participants identified a strong need for support for women.

Use of aggravated sexual assault to prosecute cases of HIV non-disclosure

Participants of the roundtable echoed broader community concerns about the harmful impacts of using sexual assault laws as the primary vehicle to charge people for HIV non-disclosure. While some participants acknowledged that HIV non-disclosure may result in feelings of betrayal or distrust, many were firm that HIV non-disclosure is *not* an act of sexual assault. Conflating the two fails to take survivors' experiences of sexual violence seriously and exacerbates the stigma that people living with HIV face. Women's rights experts have also noted how the law of HIV non-disclosure has warped the law of sexual assault generally, as courts have tried to grapple with evolving notions of both.³³

Impacts on those who experience non-disclosure

Some women who face non-disclosure by a sexual partner may experience harm or negative consequences. Roundtable participants working in the HIV and other STBBIs sector, and the gender-based violence sector discussed some examples of negative experiences that may result from non-disclosure: not using precautions to reduce HIV transmission; acquiring HIV as a result of engaging in unprotected sex; a feeling of destroyed trust in relationships; and anxiety and fear about possibly contracting HIV. Fear and anxiety are intensified by stigma and misconceptions around HIV and its transmission while accessible and adequate sexual health education increases sexual autonomy and the use of precautions to reduce HIV and other risks associated with sex.

In the absence of tailored support for people who experience HIV non-disclosure, reporting to police is often one of the only avenues of redress (or “perceived support”) available. Some of the roundtable participants from the HIV sector shared that some women who are newly diagnosed with HIV actively seek to press non-disclosure charges against their former partners as a way to protect other women from a similar experience.

In addition, one participant shared that women who experience non-disclosure might also experience intimate partner or sexualized violence generally, but their experiences are only taken seriously by the criminal legal system following an allegation or accusation of HIV non-disclosure to them. This reflects the research in this area, which points to a broader problem of the justice system failing survivors, contributing to misogynistic stereotypes and harmful rape myths, and failing to take the accounts of survivors of sexual violence seriously or finding them “unfounded.”³⁴ Therefore, while allegations of HIV non-disclosure might facilitate entry into the criminal legal system for a person who has felt wronged, the law does not alter how the system continues to treat survivors of gender-based violence more broadly.

More generally, advocates from the gender-based violence sector participating to the roundtable highlighted that, in their experience, the expectations of survivors (of non-HIV-related sexual violence) relating to accountability and justice diverge from what the criminal legal system can provide. For many survivors of (non-HIV-related) sexual violence, accountability and justice involve the prevention of future potential harm and a recognition from the person who has caused harm of the impacts of their behaviour, which the criminal legal system cannot always provide.



Alternative responses to HIV non-disclosure

Given its harmful impacts, there was a consensus among participants that the criminal law is not the appropriate instrument to respond to non-disclosure. To respond to the needs of people who experience non-disclosure and account for the realities of women and gender-diverse people including those living with HIV, roundtable participants discussed potential alternative responses, including restorative and transformative justice models.

Alternative Models of Justice: Restorative vs. Transformative Justice

Both restorative and transformative justice recognize that people cause harm, but that the root causes of violence stem from oppressive structures, violence, and trauma. However, these approaches diverge in their origins and breadth of impact.³⁵

Restorative Justice (“RJ”) refers to a relationship-based process for resolving crime and conflicts. It focuses on repairing harm to those who experienced harm, holding people accountable for their actions, and where appropriate, re-establishing the relationship of the person who caused harm in the community.³⁶ RJ acknowledges that crime is a type of interpersonal conflict and opens the door for forgiveness.³⁷ RJ prioritizes dialogue and direct involvement of all that have a role to play in supporting the victim and the person who harmed them, including the community. RJ processes attempt to facilitate their personal growth and recovery and, where warranted, to transform their relationship and restore some basis of understanding and common purpose. RJ principles emphasize respectful and inclusive processes.³⁸

Restorative justice processes stem from Indigenous processes and teachings, communities’ teachings, prison abolition advocacy, and alternative dispute resolution work. While RJ practices often borrow heavily from Indigenous knowledge, it is important to note that this occurs often without recognition or respect for relevant cultural practices,³⁹ and that there are important features that distinguish Indigenous legal traditions from restorative justice processes. For instance, Indigenous legal traditions prioritize tackling the root causes of harm, use preventative strategies through kinship networks, place a high importance on spirituality, and sometimes engage the use of punitive/retributive justice strategies.⁴⁰

At its core, restorative justice prioritizes healing and dialogue between communities. One participant described how in many Indigenous traditions, justice is preventative and involves maintaining balance within the

community to prevent harm and the conditions of harm from happening — and that restorative justice is one way to achieve this.

Transformative Justice (“TJ”) is a political framework and approach to responding to violence, harm, and abuse. TJ is derived from practices cultivated by Indigenous, Black, and racialized people, people living with disabilities, and 2SLGBTQ+ communities to respond to and prevent harm within their own communities, as an alternative “to state responses that are rooted in colonialism and white supremacy.”⁴¹ As such, TJ is fundamentally an abolitionist framework that understands systems such as prisons, police, and immigration enforcement as “sites where enormous amounts of violence take place and as systems that were created to be inherently violent to maintain social control.”⁴² TJ recognizes that we must transform the conditions that help create acts of violence or make them possible. Often this includes transforming harmful oppressive dynamics, our relationships with each other, and our communities at large.⁴³

Transformative justice responses and interventions: (1) do not rely on the state, including state-funded services; (2) do not reinforce or perpetuate violence such as oppressive norms or vigilantism; and most importantly, (3) actively cultivate the things we know prevent violence such as healing, accountability, resilience, and safety for all involved.⁴⁴ Strategies are wide ranging. At their most effective, they involve support teams for both the person who experienced harm and the person who caused harm, that seek to enhance healing, accountability, and address root causes among all involved, including community members.

Implementing transformative justice processes in HIV non-disclosure contexts

Roundtable participants were asked to think about the following questions, reflecting on specific case scenarios (see Appendix 1).

How do you envision an alternative community-based response to HIV non-disclosure?

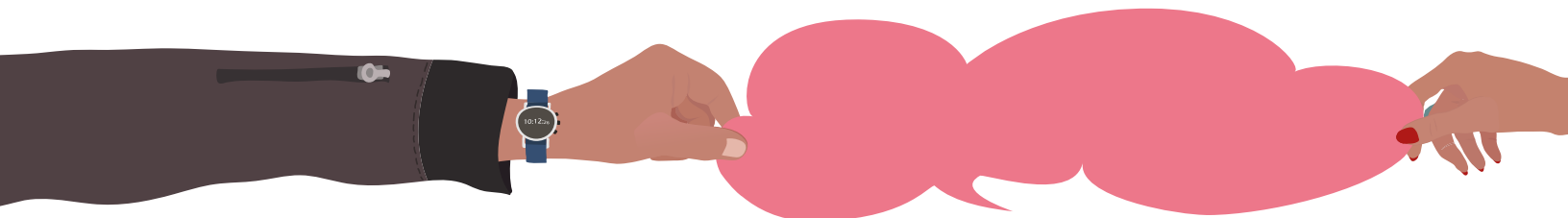
- What purpose would it serve?
- What harm or potential harms would it try to address?
- Whom would it serve?
- In what situations?
- What form would it take?
- Who would administer it?

Many roundtable participants felt that HIV non-disclosure cannot be reduced to a conflict between two individuals and that any approach to situations involving HIV non-disclosure must consider the multiple realities affecting disclosure and sexual relationships, including racism, colonialism, stigma, discrimination, and gendered forms of oppression.

While there is an increasing uptake of RJ in Canada, some participants criticized how RJ has been co-opted by what they described as a “white settler state” and has been used to uphold the carceral system through the use of formalized RJ diversion programs in court proceedings. Some participants therefore felt transformative justice was a more appropriate framework from which to work. Others shared the belief that restorative and transformative justice do not need to be mutually exclusive processes. Instead, restorative justice can be seen as a process to heal within relationships and community, while transformative justice can be used as a broader blueprint for social action to change systems that contribute to the criminalization of HIV and other forms stigma and discrimination.

However, there are several challenges and considerations in applying these alternative justice models to HIV non-disclosure. First, both restorative and transformative justice assume the occurrence of a harm. While the act of non-disclosure may result in negative consequences to the other person, this is not necessarily always the case. Moreover, experiences of non-disclosure may not rise to the level of harm that necessitates an alternative justice response. The level of harm will vary greatly depending on both the subjective experience of the person who has not been disclosed to, as well as the scientific risks of transmission in the circumstances. For example, a person who contracts HIV following non-disclosure will experience a different degree of harm than someone who experiences feelings of betrayal (in the absence of seroconversion). As a result, there will be situations of non-disclosure where an alternative justice response is not warranted although some form of support may still be helpful, including to alleviate feeling of fear, anxiety, or other forms of mental distress.

Additionally, since many alternative justice responses focus on holding people *accountable* for the harms they have caused, this raises the question of whether an alternative justice response would fit in this context because non-disclosure cannot necessarily be considered a “wrongdoing,” which necessitates accountability measures. Disclosure is an intensely personal undertaking and a person may choose not to disclose for many reasons. Moreover, disclosure is not an absolute objective in and of itself. While disclosure can be beneficial for the parties involved, it is not required to prevent HIV transmission. Alternative responses should focus on creating a supportive environment so people can safely disclose their status and protect themselves from any infection. It should not be about blaming people for not disclosing their HIV-positive status.



Lastly, given the structural risks that underpin the experiences of being a person living with HIV (particularly, a woman living with HIV), the “perpetrator” and “victim” narrative central to some alternative models often do not fit non-disclosure contexts. For example, women living with HIV have themselves been charged for non-disclosure following a sexual assault. In such a case, the woman would be considered the “perpetrator” and her assaulter the “victim.” As well, the power dynamics between a woman and her partner — that may have contributed to her not disclosing in the first place — may make an alternative response unsafe or inappropriate. These considerations set non-disclosure contexts apart from alternative justice models used for other offences, including sexual offences, where the harms and the perpetrator/victim narrative may be more easily ascribed.

Though the roundtable participants began to grapple with these issues, further discussion is required on these points.

Nonetheless, while the experience of sexual violence survivors and of people who have experienced non-disclosure is distinct, learning from the sexual violence sector and its response to harm caused to women is helpful given the sector’s long experience with the legal system and advanced thinking around possible community-based alternatives.

Themes to guide cross-sector collaboration

Three main themes on alternative community-based interventions emerged from the roundtable. These themes are designed to guide further cross-sector collaboration on this issue between the HIV sector, the sexual assault and gender-based violence sector, and alternative justice organizations. First, participants described how effective alternative justice interventions should focus on creating enabling environments for positive and healthy sexuality and sexual relationships. Second, responses to situations of non-disclosure should be tailored to the needs of the parties involved, including being mindful of the power dynamics between the person living with HIV and the person who experienced non-disclosure. Lastly, an alternative justice approach must be grounded in an anti-colonial and anti-racist framework, recognizing the disparate impact of colonial laws, systemic and structural oppression, and white supremacy on Indigenous, African, Caribbean, and Black, and other racialized people. These themes are meant to guide alternative responses in situations where non-disclosure has led to a harm warranting a response — which, as detailed above, will not be all situations where there has been a non-disclosure.

Theme 1: Creating enabling environments for positive and healthy sexuality and sexual relationships

Participants agreed that a transformative response to non-disclosure must be one that creates an enabling environment for healthy sexuality and sexual relationships. This includes addressing the underlying structural and social factors that lead someone to not disclose their HIV status in a situation that causes harm to another. At the same time, it is important to recognize that people living with HIV have a right to privacy and should not be expected to disclose their status in all circumstances, even if it might be safe to do so. As discussed in the section above, these factors include HIV stigma, lack of HIV education, gender-based violence, socioeconomic precarity, racism, systemic and structural oppression, colonialism, and barriers to accessing healthcare and socioeconomic supports. In this way, “justice” is envisioned as a longer-term, community-led outcome, achieved through prevention, education, and health and social supports.



Participants living with HIV recognized that dismantling the stigma and harm associated with HIV non-disclosure must involve discussions about sex, pleasure, and justice, and must treat HIV like a health issue. To do so, participants agreed that investments in education and programming related to sexual health education, healthy relationships, misogyny and misogynoir, safer sex, power imbalances, consent, pleasure, 2SLGBTQ+ sexuality, and gender norms are critical.

Participants agreed on the need for expanded HIV and health-related programs, and ensuring these programs are accessible to communities. In particular, participants identified a need for tailored and expanded HIV services specific to Indigenous and immigrant communities. This would require public health services to engage in improved counselling upon HIV diagnosis, including using accessible language, particularly for those whose first language is neither English nor French. For instance, one Indigenous participant described how Indigenous clients have sometimes misinterpreted the term “undetectable viral load” as meaning that the virus has been eliminated since it cannot be detected in testing. As a result, they may suspend their treatment and engage in sexual behaviours that put them at increased risk of criminalization. For African, Caribbean, Black, and other racialized women, HIV services that address cultural nuances are critical. For example, the experiences of Caribbean women living with HIV will differ from those of African women living with HIV (and the experience among African women is not homogenous as well). Therefore, HIV services for African, Caribbean, Black, and other racialized women cannot be subsumed under one banner of “Blackness.” In addition, for queer African, Caribbean, Black, and racialized women living with HIV, intersecting oppressions around their sexuality fuel additional discriminations and challenges accessing HIV services given the stigma and discrimination regarding queerness and gender diversity in many African, Caribbean, and Black communities.

Participants recommended increasing the number of frontline services providers with lived experience to ensure that these services are culturally safe and accessible. Another participant outlined that there is a community need for developing guidelines on how to disclose safely within intimate relationships.

Several participants outlined that community accountability in the context of HIV might involve widespread recognition of shared responsibility for public health, rather than placing all responsibility and risk on those living with HIV. Several participants noted that alternative responses should focus on public health supports and education rather than on the legal system, recognizing that “justice” responses are not appropriate for every interpersonal conflict, including HIV non-disclosure. Concrete strategies would involve a greater shared responsibility to share information about safer sex, healthy relationships, and resources, including condoms and dental dams. However, participants also shared several examples where public health responses can be extremely punitive and exacerbate the harms faced by people living with HIV.

Participants discussed the importance of structural responses to heal communities and repair the social conditions that allow gender-based and other forms of violence to exist. This would involve interventions to reduce the structural risks that increase experiences of violence against women, including ensuring access to healthcare, social supports, affordable housing, food security, and stable employment. For instance, in one study, women who were unstably housed were significantly more likely to report increased experiences of violence from sexual partners, as a result of HIV non-disclosure laws. These women experienced more HIV-related stigma and were often unable to leave abusive relationships.⁴⁵ Participants also emphasized a need for supports for people living with HIV who have been incarcerated to reintegrate into the community. For example, a participant who works with Indigenous people who have been criminalized for HIV non-disclosure highlighted the fact that once people are released, they often face difficulties securing employment and housing, especially those registered as sex offenders.

Participants raised the importance of ensuring people living with HIV can access safe community networks and spaces to gain support and foster dialogue on disclosure, and other issues, like gender-based violence, and violence within communities.

Theme 2: Dynamic responses to situations of non-disclosure depending on the needs of the parties and communities involved

Every situation of non-disclosure is different, involving many complex intersecting factors and varying levels or forms of harm (if any) to the parties. As such, alternative justice responses to situations of non-disclosure must be dynamic and respond to the realities and needs of those involved, including whether it is safe for both parties to engage. In other words, there is no one-size-fits all approach to address a situation involving non-disclosure.

Traditional alternative justice responses promote a feeling of accountability among the parties to the conflict, and the community members at large. Primary research reported by participants in the gender-based violence sector outlined that the criminal legal system was not able to meet the justice and accountability expectations of people that reported gender-based violence. Instead, for survivors, accountability looked like forward-looking prevention efforts such as counselling that would support the person that caused harm not to continue to harm others and recognizes the impacts of their actions.

In cases of HIV non-disclosure where it is appropriate, interventions could take the form of healing circles or mediation between all parties to the conflict, facilitated by, for example, counsellors, community Elders, social workers, and mediation experts. A participant who presented on restorative justice models highlighted how forms of Indigenous justice could be useful to promote healing. They described how the Medicine Wheel used by some First Nations and Métis communities can serve as a useful framework that allows community members to address healing at all points of conflict. Often, Indigenous justice programs involve healing circles, diversion programs, community arbitration, and community involvement focused on healing to repair and restore relationships following conflict and avoid dependence on the criminal legal system. For African, Caribbean, Black, and other racialized women, there may be other culturally relevant justice alternatives and interventions that can be used, including kinship-based support groups. Further discussion is required to unpack how these responses would be resourced, implemented, and accessed.

However, this framework of accountability may not be appropriate or safe in all cases, particularly in a situation where a woman did not disclose to a partner because she feared violence. In this type of situation, education can be a response for those that have experienced non-disclosure. Given that many of these harms associated with HIV non-disclosure are founded in and intensified by HIV stigma and misconceptions, efforts to address harm must include HIV awareness and education for the person who experiences non-disclosure.

Those working in the gender-based violence sector also raised that sometimes those who have *caused* harm by not disclosing their status may not want to engage in alternative justice processes, so supports and resources, like counselling, must be available for those who have experienced harm to begin healing on their own terms.



How can you even entertain putting yourself in a space for accountability if you're grounding in shame? Are you going to want to be in that space to recognize a space where shame exists?"

Participants also stressed that alternative justice responses **must not involve shame**. Some alternative justice mechanisms involve accountability strategies that use shame to encourage participation and to hold people accountable for wrongdoing. While some participants from the gender-based violence sector acknowledged that some individuals who have experienced harm might want to engage in public shaming, they stressed the need to unpack where this impulse comes from, recognizing that it does not align with transformative justice principles and can make alternative responses less effective. One participant raised, "how can you even entertain putting yourself in a space for accountability if you're grounding in shame? Are you going to want to be in that space to recognize a space where shame exists?" Especially in the context of HIV non-disclosure, using shame in this way ought to be avoided. HIV is already extremely stigmatized; reliance on shaming could have severely negative impacts for public health prevention and treatment strategies. Public outing and shaming could also create increased risks of violence and barriers to employment and housing for women and other marginalized people.

Theme 3: Responses must be grounded in an anti-racist and anti-colonial approach

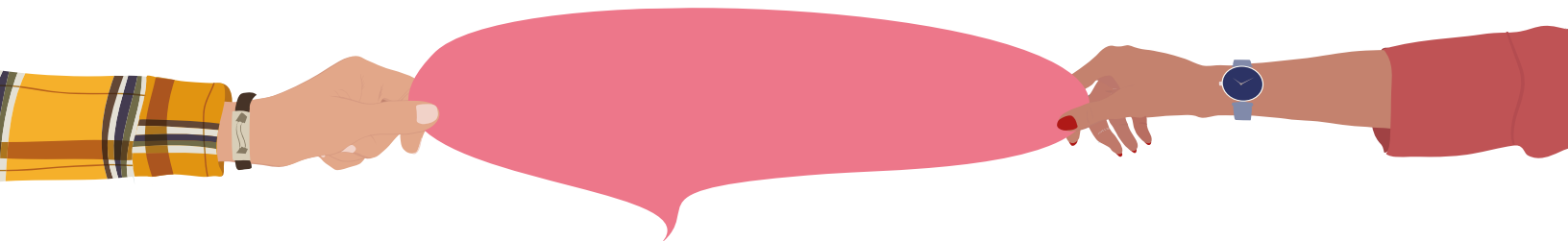
Participants overwhelmingly agreed that responses should be rooted in grassroots activism, community, and abolitionist frameworks that centre anti-colonial and anti-racist approaches. Indigenous, African, Caribbean, Black, and other racialized women living with HIV face an additional layer of racism, poverty, and stigma, which shape their interactions with the colonial legal system.⁴⁶ **An alternative justice approach to HIV non-disclosure must be one that transforms the conditions that lead to increased HIV vulnerability and experiences of violence and criminalization.**

To accomplish this, participants raised the importance of centring those with lived experience of HIV criminalization, and HIV generally. Participants emphasized the importance of prison abolition, recognizing the over-representation of Indigenous and Black people in the carceral system in Canada. Indigenous participants raised a need for approaches that centre Indigenous self-determination and teachings, and that engage the broader conversation surrounding decolonization. African, Caribbean, and Black participants raised the need for approaches that take into account the systemic and structural oppression of anti-Blackness and misogyny.

Participants also highlighted that the public health sector must be accountable to the diverse population it serves by addressing the discrimination and racism that Indigenous and Black people, migrants, and other racialized people face in the healthcare system. Though there was overwhelming agreement that there is a need for increased HIV services, participants also recognized that implementing these services requires resources and that there are significant disparities in resources across communities in Canada, particularly in (remote and isolated) Indigenous and African, Caribbean, and Black communities.

Participants also outlined that services must involve community, allies, and collectives, and not only formal state programming. In reference to the experiences of Indigenous people and immigrants accessing non-profit and state services, one participant exclaimed “How can you trust someone that says you can go ‘here’? When all they’ve seen are institutions that are chewing apart their families and friends?” Accordingly, participants emphasized the importance of building robust community networks to support people living with HIV. At the same time, participants in the human rights sector also raised that alternatives to current approaches must recognize that discrimination also happens within communities and create frameworks to ensure the human rights of all are protected throughout the development of new responses.

Participants also outlined that educational approaches must acknowledge the different ways that gender norms and stigma can play out especially in Indigenous, African, Caribbean, Black, and immigrant communities, due to the harmful impacts of colonialism. Education would also involve an emphasis on a community-based approach to safer sex and personal responsibility for sexual health, rather than an approach that places all risks and responsibilities onto a person living with HIV.



Looking forward

What values should guide our collective work in this area going forward?

As part of a circle exercise, each participant of the roundtable was asked to share a guiding value that they would like to see upheld in our collective work in this space. Here are their responses:

- Shared responsibility
- Humility
- Learning
- Listening
- Reciprocity
- Love
- Accountability to one another
- Diversity
- Lightness
- Resilience
- Art
- Beauty
- Authenticity
- Family
- Creativity
- Boldness
- Courage
- Interconnectedness
- Pragmatism
- Respect
- Tolerance
- Humour
- Sharing
- Compassion



Our collective commitments and offerings in this work:

- Being open to evolving our approach as an organization
- Contributing to further transformative justice principles
- Bringing together Indigenous community members
- Moving our organization towards non-carceral responses on the issues we work
- Holding space for people with lived experience
- Examining and confronting white privilege and social class privilege to question oppressive structures
- Staying open to learning
- Bringing people together to listen and facilitate community engagement
- Be the voice for others who cannot speak
- Deeply listening
- To amplify, without leading
- Accepting complexity
- Continuing to think about gender equality and equity beyond mainstream white feminism
- Demanding space to be heard

Recommendations

The current state of HIV criminalization is untenable and fails to promote “justice” for anyone involved — instead, the law exacerbates harms faced by women and gender-diverse people. As such, urgent action is needed to prevent these harms. The following recommendations were born from the HIV Legal Network’s synthesis of the roundtable discussions. They did not necessarily emerge directly from the dialogue or the participants.

Recommendations for the federal government

- Reform the criminal law to limit its use as a measure of last resort in HIV-related cases. At a minimum, the law should be tightly prescribed and only used in cases of actual and intentional transmission, where no other extenuating circumstances are present.
- Remove HIV non-disclosure from the scope of sexual assault laws.
- Provide funding and support for communities to explore appropriate alternative justice models for HIV non-disclosure, centring the lived experience of women and gender-diverse people, particularly those from Indigenous, African, Caribbean, Black, and 2SLGBTQ+ communities.
- Increase funding and support to AIDS Service Organizations (ASOs), gender-based violence organizations, and alternative justice organizations to support the development of services and resources for people living with HIV.

Recommendations for public health

- In collaboration with communities, develop culturally appropriate and relevant resources and services to support people living with HIV that recognize the many risks associated with disclosure, particularly for women from Indigenous and racialized communities, and gender-diverse people.
- Develop and promote culturally appropriate and relevant HIV education and awareness campaigns, including about safer sex practices, HIV transmission and U=U, prevention, and treatment, and HIV de-stigmatization.
- Develop trauma-informed healthcare policies and practices that are relational to Indigenous and racialized communities. This includes curating culturally appropriate resources and training for healthcare providers that considers the social histories of colonialism, anti-Blackness, and discrimination towards immigrants and migrants.

Recommendations for communities

- Support and facilitate cross-sector collaboration on issues related to HIV criminalization, including through the creation of awareness campaigns, community forums, advocacy, and knowledge translation and exchange.
- Create sustainable peer-led support services for Indigenous and racialized communities.
- Recognize the importance of community-led healing practices, as well as the reality that some individuals may not access community-led resources, but instead opt for more interpersonal individual counselling support.



Participant list

At the roundtable, representatives were present from the following organizations and institutions:

- Canadian Coalition to Reform HIV Criminalization (CCRHC)
- Centre for Gender & Sexual Health Equity, University of British Columbia
- Centre for Indigegogy, Wilfrid Laurier University
- Coalition des organismes communautaires québécois de lutte contre le sida (COCQ-SIDA)
- Communities, Alliances & Networks (CAAN)
- Department of Sociology, Toronto Metropolitan University
- Factor-Inwentash Faculty of Social Work, the University of Toronto
- HIV Justice Network
- HIV Legal Network
- HIV & AIDS Legal Clinic Ontario (HALCO)
- Native Women's Association of Canada
- PASAN
- Rittenhouse
- School of Social Work, McMaster University
- Toronto Rape Crisis Centre / Multicultural Women Against Rape (TRCC/MWAR)
- WomenatthecentrE
- Women's Legal Education & Action Fund (LEAF)
- Women & HIV/AIDS Initiative (WHA!)

Roundtable Elder: Albert McLeod, 2Spirit Consultants of Manitoba.

The views expressed in this document do not necessarily represent the views of all participants.



Appendix 1: Case studies used in breakout group discussions

Case Study A: Judy is a woman in her 50s. She has been in a relationship for four years with the same man, Andrew. He knows she is living with HIV. She disclosed her status to him a few months after they met. Their relationship is now degrading. Andrew is jealous and keeps harassing Judy. She is worried he may become violent. She wants to leave him to protect herself and her son, but he starts threatening her. If she leaves, he says he will tell the police that she did not disclose her status when they met. At the time they met, Judy was not on treatment, but they always used condoms. She fears she may be charged if she leaves him.

Case Study B: Rob is a 20-year-old gay man recently diagnosed with HIV. For a few weeks after his diagnosis, Rob struggled with denial. He went to the local bathhouse a week after he was diagnosed and engaged in condomless sex with two strangers without disclosing his HIV-positive status. One of these men later discovered Rob's status and went to the police to report him. The police released his picture to the public, and the second man came forward. Neither of his partners contracted HIV. Rob is charged with aggravated sexual assault.

Case Study C: Layla, a woman in her 30s, begins a romantic relationship with her coworker, Harry. Their relationship progresses quickly and intensely. Within weeks of dating, Layla and Harry discuss marriage and having children. Several months later, their relationship ends abruptly when Layla learns that Harry has been seeing many other people. Layla later learns from another coworker that Harry is living with HIV. She immediately seeks testing and learns she is also positive for HIV. Layla's coworker encourages her to report Harry to the police for non-disclosure, which she then does. Layla is unaware of how HIV non-disclosure laws work, but she is concerned Harry may not be disclosing to other women and may be putting them at risk of HIV transmission. She feels deeply betrayed by him. She believes the only way to stop Harry is to report his behaviour to the police.

Case Study D: Thom met Georgia at a party. They had sex on the first night. They used condoms but she did not disclose her status. Thom insists on seeing her again. Georgia is excited but she hesitates. It has been a long time since she met someone she is actually interested in, but she fears he might reject her if she discloses her status. She has already experienced rejection once before after disclosing. Also, Georgia has also heard that people living with HIV can be charged if they do not disclose their status. She is worried that if she tells him, he may report her to the police for not disclosing the first time they had sex.

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