

Submission of Questionnaire on Racism and the Right to Health

The [HIV Legal Network](#) is grateful for the opportunity to complete this questionnaire and inform the Special Rapporteur on the highest attainable standard of physical and mental health's forthcoming report to the General Assembly on the theme of racism and the right to health.

Contact Details

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| Can we attribute responses to this questionnaire to your Institution publicly*? *On OHCHR website, under the section of SR health | <u>Yes</u> No Comments (if any): N/A |

Key Questions

- 1. What are the main ongoing manifestations of racism, and related forms of discrimination enabled by racism that may be prevalent in your country in the area of the right to health broadly including in underlying determinants of health, health outcomes and access to health care?*

The criminalization of HIV non-disclosure and related forms of discrimination are ongoing manifestations of racism in Canada in relation to the right to health, particularly against Black and Indigenous communities. People living with HIV in Canada can be criminalized for not disclosing their HIV-positive status to their sexual partners in certain circumstances.ⁱ As recognized by the House of Commons Standing Committee on Justice and Human Rights in its 2019 study of HIV criminalization, the law in Canada is “overly broad and punitive”:ⁱⁱ a person can be convicted of aggravated sexual assault for HIV non-disclosure even if they had no intent to cause harm, posed little to no risk of transmission, and did not actually transmit HIV. Those convicted face up to a lifetime in prison and mandatory registration on the sex offender registry.ⁱⁱⁱ The UN Special Rapporteur on the right to health has previously described HIV criminalization as an infringement on the rights to health, privacy, equality, and non-discrimination.^{iv}

Racialized populations in Canada are disproportionately impacted by the criminalization of HIV non-disclosure, both because they are disproportionately affected by HIV and because certain racialized populations are disproportionately prosecuted for HIV non-disclosure. According to a recent analysis, there were 224 HIV non-disclosure-related prosecutions in Canada between 1989 to 2020.^v Black men and Indigenous women (compared to other women charged) are disproportionately represented among those prosecuted.^{vi} In addition, Black and Indigenous people in these cases face harsher punishment at each stage of the criminal legal system compared to white people, as further explained in the section below.

Research on Canada's HIV non-disclosure laws has shown that African, Caribbean, and Black communities experience the criminal law as another form of racial oppression.^{vii} Likewise, Indigenous women living with HIV have described how the criminalization of HIV non-disclosure constitutes an additional layer of colonial violence and control over their bodies, minds, and spirits.^{viii} In one study, Indigenous respondents raised concerns about the inaccessibility of understanding the HIV criminalization framework because Indigenous communities, who are at a heightened risk for HIV, often face lower literacy rates as a result of the legacy of colonialism.^{ix}

Additionally, the harmful effects of the law are compounded by the ensuing media coverage in HIV-related criminal prosecutions. Media coverage of these cases tends to focus disproportionately on Black and migrant defendants. While Black immigrant men represented 15% of defendants charged with aggravated sexual assault for HIV non-disclosure between 1989 and 2015, they accounted for 61% of news coverage.^x This coverage contributes to troubling racist stereotypes,^{xi} by representing men living with HIV as “dangerous, hypersexual, foreigners who pose a threat to the health and safety of individuals (white women) and, more broadly, the imagined Canadian nation.”^{xii}

For Indigenous and Black women, HIV criminalization presents additional, intersecting harms, beyond the risk of prosecution. Women living with HIV are disproportionately impacted by gender-based violence, and HIV criminalization can further increase this risk of violence.^{xiii} A large proportion of the HIV criminalization cases where a woman was charged involved Indigenous women and women who have long histories of sexual abuse by men.^{xiv} As the Standing Committee on Justice and Human Rights recognized, the current laws on HIV non-disclosure “fails to address how both cis and trans women may not be able to safely negotiate condom use with their sexual partners” and can also “make women more vulnerable to intimate partner violence.”^{xv} Research has shown how Canada's HIV non-disclosure laws have pushed women living with HIV to stay in abusive relationships, and deterred them from reporting violence for fear of themselves being charged for non-disclosure.^{xvi} Indeed, in some cases, women have faced charges for HIV non-disclosure in the context of themselves being sexually assaulted.^{xvii}

Overall, HIV criminalization negatively impacts the right to health of *all* people living with HIV, but especially for people living with HIV who are racialized. It does so by harming HIV prevention efforts by increasing HIV-related stigma and fear,^{xviii} hindering access to and eroding trust in voluntary approaches to HIV prevention,^{xix} care, and testing,^{xx} and spreading misinformation about the nature of HIV and its transmission.^{xxi} Some individuals may choose to delay testing and treatment out of fear of being prosecuted.^{xxii} Concerningly, criminalization both obscures and reinforces the determinants that increase vulnerability to HIV, such as socioeconomic status, immigration status, education levels, gender-based violence, and access to healthcare.

2. ***Who are the most affected people and why? Please describe existing disparities in the provision of and access to health services that affect people of different racial and ethnic origin, descent as well as other groups, such as migrants. The lack of data, analysis or health indicators in this regard may also be reflected.***

Black and Indigenous people are disproportionately impacted by HIV and by HIV criminalization.

HIV among Black and Indigenous communities

Data on the racial demographics of Canada's HIV epidemic is partial and inadequate, leading to a reliance on ongoing epidemiological surveillance data of new HIV infections instead. In 2019, where race was known, Indigenous people and Black people accounted for 24.7% and 25.5% of new HIV infections in Canada,^{xxiii} while only accounting for 3.5% and 4.9% of Canada's total population, respectively.^{xxiv} Among women, Indigenous women and Black women accounted for 40% and 42.1% of new HIV infections, respectively.^{xxv} Furthermore, Indigenous peoples across Canada have a 2.7 times higher incidence rate for HIV infection compared to non-Indigenous peoples.^{xxvi}

Systemic racism creates barriers to accessing quality healthcare which increases HIV vulnerability among racialized populations in Canada. Both African, Caribbean, and Black communities and Indigenous communities are more likely to receive lower quality health care from practitioners, who are predominantly white, and may hold racist views.^{xxvii} African, Caribbean, and Black women are also increasingly susceptible to HIV due to factors such as inadequate information or misinformation; sexual violence within and outside of marriage; and gender inequality, which may result in dependency on male partners and the inability to negotiate safe sex.^{xxviii} The stigma and discrimination perpetuated by HIV criminalization and structural violence also create distrust by racialized populations of healthcare institutions. Accordingly, this deters Black and Indigenous people from accessing services, treatment, supports, and information, which all help to mitigate the health impacts of HIV.^{xxix}

HIV related prosecutions among Black and Indigenous communities

Even considering the disproportionate prevalence of HIV in these communities, a recent study analyzing prosecutions for HIV non-disclosure between 1989 to 2020 showed that Black men are also disproportionately represented among those prosecuted for alleged HIV non-disclosure.^{xxx} As well, Black and Indigenous people are convicted at a higher rate, acquitted at a lower rate, and are more likely to face prison sentences compared to white people who face similar charges.^{xxxi}

In particular:^{xxxii}

- Of those charged in HIV non-disclosure-related cases, at least 22% of accused are Black people and 7% are Indigenous people.
- Among men prosecuted for whom race is known, 35% have been Black.
- Among women prosecuted for whom race is known, 33% are Indigenous. In comparison, Indigenous women only make up 4% of the total female population in Canada, according to the 2016 census.^{xxxiii}
- 7% of Black defendants and 12.5% of Indigenous defendants are acquitted, compared to 15% of white defendants.
- Only 7% of Black defendants and 6.25% of Indigenous defendants had their charges dismissed, stayed, or withdrawn, compared to 12% of white defendants.

- Black and Indigenous defendants face higher conviction rates (86% and 81.25%) compared to white defendants (73%).
- Black and Indigenous defendants are more likely to face prison time for a non-disclosure-related conviction (73% and 75%) compared to white defendants (57%).

These statistics align with broader trends, which highlight that systemic racism within policing, prosecutions, and the criminal legal system generally, results in the overincarceration of Black and Indigenous people in Canada. While accounting for only [3.5% of Canada's total population](#),^{xxxiv} Black people in 2018-2019 represented [8% of the federal prison population](#).^{xxxv} In Ontario in 2010, Black men were five times more likely to be incarcerated than white men, and Black women were three times more likely to be incarcerated than white women.^{xxxvi} Similarly, in 2021, Indigenous people represented [32% of individuals incarcerated in federal corrections](#),^{xxxvii} despite only comprising approximately 5% of the total population in Canada.^{xxxviii} Overrepresentation is even worse for Indigenous women — on [December 17, 2021](#), Canada's correctional ombudsperson cautioned that Indigenous women are nearing 50% of the proportion of women incarcerated in federal prisons.^{xxxix}

In some jurisdictions in Canada, prosecutorial policies on HIV non-disclosure exempt from criminal liability those who maintain suppressed viral loads for 4 to 6 months.^{xi} Although this represents a positive development in limiting HIV-related prosecutions, these policies increase the disproportionate impacts of HIV criminalization on racialized communities. As a result of various barriers to accessing healthcare, many Indigenous and Black people living with HIV do not have consistent access to anti-retroviral medications and are thus less likely to achieve suppressed viral loads for the requisite time period. This means that these communities are at higher risk of prosecution in relation to HIV non-disclosure in these jurisdictions,^{xii} further exacerbating the disproportionate harms to racialized communities living with HIV.

ⁱ *R v Mabior*, 2012 SCC 47.

ⁱⁱ House of Commons Standing Committee on Justice and Human Rights, *Criminalization of Non-Disclosure of HIV Status*, June 2019, <https://www.ourcommons.ca/DocumentViewer/en/42-1/JUST/report-28/>.

ⁱⁱⁱ *Criminal Code*, RSC 1985 c C-46, s 273.

^{iv} UN Human Rights Council, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, Report on the 14th session, UN General Assembly, agenda item 3, UN Doc. A/HRC/14/20, April 27, 2010.

^v C. Hastings et al., *HIV Criminalization in Canada: Key Trends and Patterns, 1989-2020* (Toronto: HIV Legal Network, 2022).

^{vi} *Ibid* at p. 8.

^{vii} S. Greene et al., "How women living with HIV react and respond to learning about Canadian law that criminalises HIV non-disclosure: 'How do you prove that you told?'" *Culture, Health & Sexuality* 21(1) (2019): pp. 1087–1102.

^{viii} A. Sanderson et al., "Indigenous Women Voicing Experiences of HIV Stigma and Criminalization Through Art," *International Journal of Indigenous Health* 16:2 (2021): pp. 267–290.

^{ix} Greene et al., *supra* note vii.

^x E. Mykhalovskiy et al., "Explicitly racialised and extraordinarily over-represented: Black immigrant men in 25 years of news reports on HIV non-disclosure criminal cases in Canada," *Culture, Health & Sexuality* 23(6) (2020): pp. 788–803.

^{xi} *Ibid*.

^{xii} E. Mykhalovskiy et al., *Callous, Cold and Deliberately Duplicious' Racialization, Immigration and the Representation of HIV Criminalization in Canadian Mainstream Newspapers*, November 22, 2016, p. 32.

^{xiii} HIV Legal Network, *HIV Criminalization, Women, and Gender-Diverse People: At the Margins*, May 2021, <https://www.hivlegalnetwork.ca/site/hiv-criminalization-women-and-gender-diverse-people-at-the-margins/?lang=en>.

^{xiv} *Ibid.*

^{xv} House of Commons Standing Committee on Justice and Human Rights, *supra* note ii.

^{xvi} A. Krüsi et al., “Positive sexuality: HIV disclosure, gender, violence and the law—A qualitative study,” *PloS one* 13(8) (2018): pp. 1–16.

^{xvii} HIV Legal Network, *supra* note xiv.

^{xviii} B. Adam et al., “Impacts of Criminalization on the Everyday Lives of People Living with HIV in Canada,” *Sexuality Research & Social Policy* 11 (2014): pp. 39–49.

^{xix} P. O’Byrne et al., “Nondisclosure Prosecutions and HIV Prevention: Results From an Ottawa-Based Gay Men’s Sex Survey,” *Journal of the Association of Nurses in AIDS Care* 24(1) (2013): pp. 81–87; P. O’Byrne et al., “Sexual practices and STI/HIV testing among gay, bisexual, and men who have sex with men in Ottawa, Canada: examining nondisclosure prosecutions and HIV prevention,” *Critical Public Health* 23:2 (2013): pp. 225–236; M.A. Kesler et al., “Prosecution of non-disclosure of HIV status: Potential impact on HIV testing and transmission among HIV-negative men who have sex with men,” *PLoS ONE* 13(20) (2018): 1–17.

^{xx} S.E. Patterson et al., “The impact of criminalization of HIV non-disclosure on the health care engagement of women living with HIV in Canada: a comprehensive review of the evidence,” *Journal of the International AIDS Society* 18(1) (2015): pp. 1–14; P. O’Byrne, “Criminal Law and Public Health Practice: Are the Canadian HIV Disclosure Laws an Effective HIV Prevention Strategy?,” *Sexuality Research & Social Policy* 9 (2012): pp. 70–79; C. Sanders, “Discussing the Limits of Confidentiality: The Impact of Criminalizing HIV Nondisclosure on Public Health Nurses’ Counseling Practices,” *Public Health Ethics* 7(3) (2014): pp. 253–260.

^{xxi} E. Mykhalovskiy, “The public health implications of HIV criminalization: past, current, and future research directions,” *Critical Public Health* 25(4) (2015): pp. 373–385; C.L. Galletly & S.D. Pinkerton, “Conflicting Messages: How Criminal HIV Disclosure Laws Undermine Public Health Efforts to Control the Spread of HIV,” *AIDS Behaviour* 10 (2016): pp. 451–46.

^{xxii} P O’Byrne et al. & M.A. Kesler et al., *supra* note xx.

^{xxiii} N. Haddad et al., *HIV in Canada – surveillance report, 2019*, Public Health Agency of Canada, January 2021.

^{xxiv} Statistics Canada, *Census Profile, 2016*.

^{xxv} N. Haddad et al., *supra* note xxiv.

^{xxvi} Greene, *supra* note vii.

^{xxvii} CL Wilson, “The Impact of the Criminalization of HIV Non-Disclosure on the Health and Human Rights of ‘Black’ Communities” *Health Tomorrow: Interdisciplinary and Internationality* 1(1) (2013): pp. 109–43.

^{xxviii} *Ibid.*

^{xxix} *Ibid.*

^{xxx} C. Hastings et al., *HIV Criminalization in Canada: Key Trends and Patterns (1989-2020)*, HIV Legal Network, 2022.

^{xxxi} *Ibid*, p. 10.

^{xxxii} *Ibid.*

^{xxxiii} Statistics Canada, *Census Profile, 2016*.

^{xxxiv} Statistics Canada, *Diversity of the Black population in Canada: An overview*, February 27, 2019.

^{xxxv} Office of the Correctional Investigator, *Annual Report of the Office of the Correctional Investigator 2018-2019*, June 25, 2019.

^{xxxvi} A. Owusu-Bempah, et al, “Race and Incarceration: The Representation and Characteristics of Black People in Provincial Correctional Facilities in Ontario, Canada,” *Race and Justice* (2021): 1–13.

^{xxxvii} Office of the Correctional Investigator, “Proportion of Indigenous Women in Federal Custody Nears 50%: Correctional Investigator Issues Statement,” 17 December 2021.

^{xxxviii} Statistics Canada, *Aboriginal Peoples in Canada: Key results from the 2016 Census*, 25 October 2017.

^{xxxix} *Supra* note xxxix.

^{xl} See e.g. Ministry of the Attorney General, Crown Prosecution Manual – D. 33: Sexual Offences against Adults, December 1, 2017, www.ontario.ca/document/crown-prosecution-manual/d-33-sexual-offences-against-adults; BC Prosecution Service, Sexual Transmission, or Realistic Possibility of Transmission, of HIV, Policy Code SEX-2, April 16, 2019, <https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy/manual/sex-2.pdf>.

^{xli} See for e.g. A. Krüsi, et al., “Marginalized women living with HIV at increased risk of viral load suppression failure: Implications for prosecutorial guidelines regarding criminalization of HIV non-disclosure in Canada and globally,” paper presented at the 22nd International AIDS Conference, 2018, Amsterdam, Netherlands, <http://programme.aids2018.org/Abstract/Abstract/11316>.