

ICWNA



INTERNATIONAL COMMUNITY OF
WOMEN LIVING WITH HIV
NORTH AMERICA

WOMEN AND HIV CRIMINALIZATION

The International Community of Women Living with HIV North America (ICW-NA)

ICW-NA Call to Action

ICW-NA supports all efforts in Canada, the United States and globally to repeal laws that criminalize HIV exposure, non-disclosure, and unintentional transmission.



ICW-NA advocates for improved education to women living with HIV about the risks of criminal prosecution.

ICW-NA is a regional network of ICW Global that is accountable to its membership of women living with HIV in Canada and the United States. ICW-NA shares the global vision of a world where all women living with HIV live free of gender oppression, realizing and claiming our full rights inclusive of sexual, reproductive, legal, social, economic and health right. ICW-NA exists to lead efforts to secure and improve the quality of life for women living with HIV in North America. We do this by mobilizing, organizing, advocating, mentoring, and raising consciousness on the issues and policies that directly affect our lives.¹

This policy brief represents our view, as women living with HIV, of the current state of criminalization of HIV among women in Canada and the United States after reviewing academic and grey literature, statutes and policies and an unpublished survey of our membership. Although there is limited research and data on this subject that is specific to women, it appears that many issues facing

women living with HIV in Canada and the United States are similar. Demographics, cultures, structures, and policies differ between the two countries suggesting a need for varied approaches. Our membership survey, conducted in November 2015, confirmed that ICW-NA members consider the criminalization of HIV as a critical issue for women living with HIV in both the United States and Canada. Specifically, ICW-NA members highlighted their concern about stigma and discrimination in the justice system related to HIV non-disclosure and the lack of information available to them to determine their risks of being charged.

“ICWNA members highlighted their concern about stigma and discrimination in the justice system related to HIV non-disclosure.”

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ICW-NA advocates for improved education to service providers about the impacts of criminal prosecution and the challenges to disclose HIV status for women living with HIV.



ICW-NA urges state, provincial, and federal justice systems in Canada and the United States to develop and adopt prosecutorial guidelines that consider scientific evidence and intent to harm as a basis for prosecution, not stigma and misinformation.

Women living with HIV in the United States and Canada

Women living with HIV in the United States and Canada are ethnically and socio economically diverse and include women of all ages and lived experiences who are heterosexual, lesbian, bisexual and transgender.

According to the Centers for Disease Control in the United States, approximately one in four of about 1.2 million people living with HIV are women. Heterosexual contact accounts for 84% of all new transmissions among women. An estimated 88% of all women living with HIV in the United States are diagnosed, leaving 22% who are unaware of their status. Black/African American and Latina women continue to be disproportionately affected by HIV, compared with women of other races/ethnicities. Despite living in a resource rich country, only 45% of women living with HIV are engaged in care with 32% having achieved the gold standard of HIV viral suppression.

The Public Health Agency of Canada (2014) reports an estimated 16,880 women living with HIV, accounting for about 22.4% of Canada's total. About 21% of all people living with HIV do not know their status. However, this data is not disaggregated by sex. Women in Canada account for about 23.2% of all new diagnosis including 79.2% reported through heterosexual contact, and 20.8% attributed to injection drug use. Among new transmissions in Canada, women who identify as black (36%) and those who are First Nations, Inuit, and Metis (31%), are disproportionately affected by the epidemic than other races. More women (8%), than men (5%) in prison are living with HIV. More women living with HIV in Canada report that they are in care than women in the United States. Additionally, 56% of women say they are currently taking prescribed HIV drugs compared to 75% of males in Canada.

Women, HIV, and Criminalization

HIV is a health condition; it is not a crime. As such, it is a public health issue, and should not be treated as a criminal issue. In North America, people living with HIV are subject

to prosecution under criminal law for not disclosing their HIV status to sexual partners, drug-using partners, and even for biting, and spitting. ⁱⁱ For women, there are even further

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ICW-NA advocates for more research to understand the impacts of HIV criminalization on women and increase collection of data regarding criminalization that is disaggregated by gender and ethnicity.

risks of criminal prosecution. A woman living with HIV who risks transmitting HIV to a child during delivery and after the birth could face criminal charges and intervention from child protection authorities.ⁱⁱⁱ According to our membership survey, women also fear and face discrimination in custody hearings because of their HIV status. North American Justice Systems are not evidenced based and unfairly brand women living with HIV as criminals instead of people with a health condition.^{iv}

Prosecution, conviction, and the legal processes can potentially negatively affect the lives of women living with HIV. Studies in both countries have shown that treating HIV as a criminal issue undermines public health prevention and care efforts^v “This uninformed, discriminatory approach to a public health problem

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increases stigma and discrimination; increases women’s risk for intimate partner violence; discourages disclosure of HIV status and affects negatively on wellbeing.^{vii viiiix x xi} In

every case, even those that result in acquittal or do not go to trial, the lives of women living with HIV and their families are disrupted and often destroyed. Women can lose their children, jobs, school, benefits, and housing. Socioeconomic status, immigration status, or intimate partner violence compound the impact of prosecution.^{xii} The Sero Project reports that more than 40% of women living with HIV in the US are unclear what behaviours might put them at risk for arrest. Bourne et al supports these finding in the general population of people living with HIV, suggesting a need for further outreach and education to women and beyond.^{xiii xiv}

Criminalization of HIV does not protect women from HIV or violence. Women are often the first person diagnosed in a relationship due to increased interaction with the health care system including prenatal testing for HIV. Women are often blamed for bringing HIV into the family and disclosure can create a power imbalance in relationships leading to a “who transmitted HIV to who” situation. In the case of a relationship break up a “he said she said scenario can develop when it comes to HIV disclosure placing women at risk of prosecution and violence.^{xv} The Sero Project Criminalization survey showed that more than 20% of women surveyed feared that they would be falsely accused of HIV non-disclosure.^{xvi}

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ICW-NA endorses and encourages efforts to reach out to women living with HIV and creating a network of women who have experienced or are in danger of experiencing criminalization.

Funding opportunities must be available for women to develop community capacity to address criminalization among women.

Criminalization of HIV nondisclosure is undermining public health efforts to ensure that women are linked to care.^{xvii} Women living with HIV, fearing disclosure of their health information to the judicial system and immigration systems may be reluctant to seek care or discuss sexual health issues with their care providers. Criminalization also undermines prevention efforts leading women to avoid testing for fear of having to disclose to partners... This is particularly true for women who identify as transgender and women involved in sex work who are often portrayed inaccurately

as vectors of HIV transmission and are especially vulnerable to accusations of HIV non-disclosure and violence.^{xviii} For women seeking to relocate to North America, refugees in particular, may be afraid to disclose their HIV status for fear of deportation or, in some cases, for fear that family members back in their home countries would be in danger if their status were known.^{xix} For people living with HIV, criminalization creates an atmosphere of fear in the public and undermines efforts to reduce stigma against them.^{xx xxi xxii}

Stigma and Discrimination In The Justice System

The judicial systems in Canada and the United States often do not consider scientific evidence about HIV transmission risk, even when the risk is negligible or zero.^{xxiii xxiv xxv} Instead, most HIV related prosecutions and convictions are fear and stigma based. Prosecutions for exposure and negligible or zero risk activities such as spitting and biting, along with sensationalized media coverage only serve to perpetuate myths about HIV transmission and increase stigma for people living with HIV.^{xxvi} In 2013, The Global Network of People Living with HIV (GNP+) reported that at least 600 individuals living with HIV in 24 countries have

been convicted under HIV-specific or general criminal laws.^{xxvii} HIV specific laws focus only on people living with HIV. HIV-specific criminal laws criminalize and impose additional penalties for behaviors, such as sexual activity or needle sharing without disclosure of positive status; prostitution and solicitation; donation of blood/tissue/fluids (including breastmilk and semen); biting, spitting and throwing of body fluids; and sex offenses.^{xxviii} The most reported cases are occurring in North America and appear to be on the increase in Canada, the United States and other high-income countries.^{xxix}

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ICW-NA supports the efforts of its sister community-based organizations in Canada and the United States to improve the sexual and reproductive health of women living with HIV and to regain our right to healthy, satisfying sex lives.

Canada

Although Canada does not have any HIV-specific laws, it does have the dubious reputation of having the most prosecutions for HIV non-disclosure per capita in the world. The most common criminal law used is aggravated sexual assault. At least 17 women have been charged related to non-disclosure to a sexual partner^{xxx}. All people living with HIV in Canada who know their status, have a duty to disclose their HIV status if they engage in activities that pose a reasonable risk of transmission. However current scientific evidence is not always used to define, “reasonable risk”.^{xxxi} ^{xxxii}Charges and convictions ranging from aggravated sexual assault to murder have been imposed within provincial and federal jurisdictions. Many of the laws, such as sexual

assault, were initially designed to protect women, but are now used to villainize them. In both Canada and the United States, stiff penalties are imposed ranging from probation to life in prison. Most people who are convicted are branded sex offenders for life. Prosecution of mother-to-child transmission is rare in Canada however, in 2006 the Globe and Mail reported, “an Ontario mother living with HIV was found guilty of failing to provide the necessities of life to her second child, who acquired HIV after the mother elected not to disclose her HIV status to the medical staff providing her care during childbirth, meaning post-partum antiretrovirals could not be administered to her baby immediately after delivery.”^{xxxiii}

The United States

In the United States criminalization of HIV is an issue that is dealt with state by state. While some states in the USA have specific HIV legislation on the books, other states, as in Canada, rely on existing laws, such as aggravated sexual assault, in their respective criminal codes. Approximately 541 people including

115 women have been convicted related to HIV exposure. Ninety-eight percent of these convictions were related to sexual exposure although data is difficult to obtain.^{xxxiv} In the early years of the epidemic, in order to receive funding under the Ryan White Act, ^{xxxv} states were required to prove that they had

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ICW-NA encourages the use of “people first” language and use of less stigmatizing language when discussing HIV and AIDS issues.

sufficient laws on the books to ensure that anyone who intentionally transmitted HIV would be duly prosecuted. Unfortunately, many of these laws were based on fear and although this funding requirement was repealed in 2000, many laws are still in effect and have not been revised to include advances in research in the area of HIV transmission.^{xxxvi}

Lambda Legal reports that more than thirty states have HIV-specific laws that can be used to prosecute people living with HIV. Some of these laws have little or no basis in a science. For example, in Georgia and Louisiana, spitting HIV-positive

saliva or throwing feces or urine at an officer of the law, is considered a criminal offense.^{xxxvii xxxviii} In 2009, a Michigan exotic dancer was convicted of nondisclosure after a lap dance client rubbed her vagina with his nose—a form of contact which cannot transmit HIV.^{xxxix} Another example of stigma and fear fueled laws is in Alaska where it is not only a criminal offense to expose someone to a real risk but also exposure to a “fear that the offense could result in the transmission of HIV”. Such laws only serve to fuel the lingering stigma and discrimination faced by people living with HIV^{xl}

Current Response

People living with HIV and community members have the support of most HIV specialists and some elected officials. In Canada, leading health care providers developed a consensus statement in 2013 condemning the criminalization of HIV non-disclosure in sexual exposure cases. The statement was released during the Canadian Association of HIV Researchers Conference held in St. John’s Newfoundland and published in several national newspapers. To highlight the statement, Canadian scientists and advocates have published journal articles express-

ing their concern over the broad use of criminalization.^{xli xlii} The Canadian HIV/AIDS Legal Network is a national and global leader in the fight to end criminalization.^{xlii} This non-governmental organization produces policy briefs, issue updates, films and forums that provoke lively, evidence-based discussion of the Criminalization issue in Canada including issues specific to women. Their film, *Exposing Injustice*, highlights the issues faced by women living with HIV in the context of criminalization. In Ontario, the province most affected by criminalization of HIV, an active working group of

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ICW-NA seeks to ensure the meaningful involvement of women living with HIV in the development of policies and programs designed to serve them.

concerned advocates is lobbying the judicial system and law enforcement to adopt evidence based, prosecutorial guidelines for HIV

In the United States, The National HIV/AIDS Strategy provides some guidance regarding the issue of criminalization and notes that some existing HIV exposure laws may need to be re-examined. Additionally, Rep. Barbara Lee (D-CA) introduced H.R. 3053, The Repeal Existing Policies that Encourage and Allow Legal HIV Discrimination Act or the REPEAL HIV Discrimination Act. The REPEAL HIV Discrimination Act calls for review of all federal and state laws, policies, and regulations regarding the criminal prosecution of individuals for HIV-related offenses.

This bill was introduced on May 7, 2013, in a previous session of Congress, but was not enacted.^{xliv} In March 2011, the National Alliance of State and Territorial AIDS issued a statement calling for the repeal of HIV criminalisation statutes in the United States. The HIV Medicine Association of the Infectious Diseases Society of America has issued a similar statement.^{xlv} As in Canada, several community based organizations and projects in USA are taking the lead on collecting data, advocating and creating information resources regarding HIV criminalization including the PWN USA, The Well Project, Sero Project, HIV Justice Network and Positive Justice Project (HIV Law & Policy).^{xlvi}

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