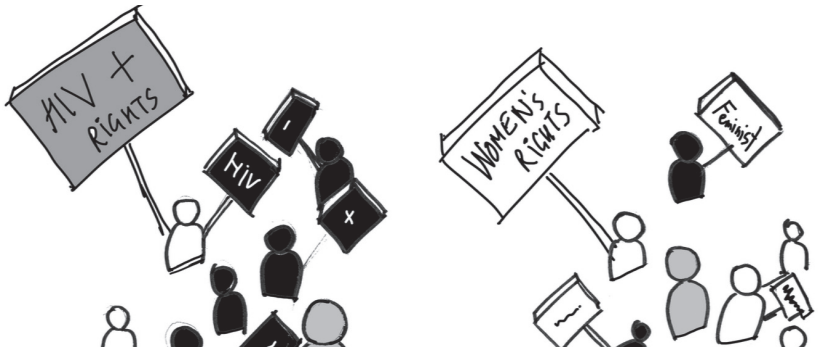
RETHINKING HIV NON-DISCLOSURE AND SEXUAL ASSAULT LAW

MEETING REPORT

April 24 – 26, 2014
Toronto, Ontario



Sexual violence, and in particular

sexual violence against women, has long been a feature of the Canadian social and legal landscape. Legal responses have been inadequate in reducing sexual violence; nevertheless, for better or for worse, the criminal justice system remains a central element in official efforts to deter sexual assaults, punish perpetrators and provide some redress to survivors.

There have been numerous notable milestones in the development of this area of law over the years; for example, the *Criminal Code* revisions of the 1980s and 1990s,[1] and the landmark Supreme Court decision in the *Ewanchuck* case in 1999.[2] Through these developments, many of the rape myths and gender stereotypes that had characterized the criminal justice response to sexual violence were removed from the law — at least, from the law as it appears on the books.

The importance of the 1998 *Cuerrier* case to the law of sexual assault was perhaps not so obvious until it was reaffirmed by the Supreme Court of Canada in the 2012 decisions in *R. v. Mabior* and *R. v. D.C.*[3] *Cuerrier*, *Mabior* and *D.C.* were not cases of rape or sexual assault as it is more traditionally understood. Cuerrier,

Consent, the film

To share the analysis from the Feminist Dialogue and to spur further discussion, the Legal Network, together with Goldelox Productions, produced the short film, *Consent: HIV non-disclosure and sexual assault law* (2015). Through powerful and incisive commentaries, eight leading experts in HIV, sexual assault and law highlight the problematic intersection of sexual assault law and the criminalization of HIV non-disclosure. The film interrogates whether criminalizing HIV non-disclosure in fact protects sexual autonomy and dignity, as posited by the Supreme Court, or instead does injustice both to individuals charged and to our criminal justice system's approach to sexual violence. Watch *Consent* at www.consentfilm.org.

[1] See the descriptions of the presentations by Professors Alana Klein and Isabel Grant, below, for more details on these reforms.

[2] *R. v. Ewanchuk*, [1999] 1 SCR 330. The case involved a 17-year old woman who went for a job interview in a trailer at a city mall. She was subjected to unwanted sexual touching by her prospective employer. She had said "no" to his sexual advances three times. At the trial, the judge concluded that the young woman had not clearly stated her unwillingness to the man's sexual touching. The judge believed that the young woman had "implied consent" because she did not resist her assailant strongly enough. The Supreme Court's decision clearly established that absence of consent is purely subjective and determined by reference to the complainant's subjective internal state of mind toward the touching, at the time it occurred.

[3] *R. v. Cuerrier*, [1998] 2 SCR 371; *R. v. Mabior*, [2012] 2 SCR 584; *R. v. D.C.*, [2012] 2 SCR 626.

Mabior and D.C. were all convicted for not revealing their HIV-positive status to sexual partners in circumstances that would be considered consensual if not for the non-disclosure of this potentially important piece of information. Under Canadian criminal law, courts have interpreted non-disclosure of HIV-positive status to a sexual partner before having sex that might expose the partner to HIV as a type of fraud that can legally invalidate a person's consent to sex.[4] Sex without consent is sexual assault — and in cases of HIV non-disclosure, aggravated sexual assault.

Criticism of the aggressive use of criminal law with respect to HIV non-disclosure in Canada has pointed to the injustice of the harsh punishment in comparison to the harm; the detrimental impact of overly broad criminalization on public health prevention, testing and treatment interventions; the uneven enforcement of the law; and the exacerbation of HIV-related stigma. To date, however, little attention has focused on the impacts and implications of using the law of sexual assault, in particular, to prosecute these alleged crimes.

For this reason, in April 2014, the Canadian HIV/AIDS Legal Network hosted a ground-breaking workshop, *Rethinking HIV Non-Disclosure and Sexual Assault: A Feminist Dialogue*. Approximately 30 socio-legal scholars, criminologists, lawyers, anti-violence advocates, researchers, graduate students, people living with HIV, and other members of the feminist and HIV communities participated in a series of panels and roundtables. This report presents highlights and key messages from that workshop.

A note on this publication:
This workshop took place over the course of one evening and the following two days. Formal presentations were followed by lively discussions in Q&A sessions, breakout groups and over meals. While this report aims to provide brief descriptions of each formal presentation, we wanted to ensure that some of the rich auxiliary discussion was also captured. Therefore, the reader will find, alongside the presentation summaries, a series of sidebars labeled "Discussion." These sidebars highlight some of the key questions, insights and themes that emerged throughout the event.

The conundrum: Is HIV non-disclosure a sexual assault?

Advocacy against the overly broad criminalization of HIV non-disclosure in Canada has primarily sought to reduce the scope of criminalization by introducing accurate scientific understandings of the risk of HIV transmission in particular sexual encounters, as well as establishing that criminalizing HIV non-disclosure is not helpful in terms of HIV prevention. These were reasonable and necessary approaches in light of the *Cuerrier* decision, which established a legal test that required disclosure of HIV-positive status only when the risk of HIV transmission was thought to reach a certain level, defined as "a significant risk of serious bodily harm."[5] As the science around HIV advanced and effective HIV treatment became available, the logical defence to criminal charges was to prove that the accused in fact had no legal obligation to disclose because the risk of transmission did not

[4] Ibid.

[5] *R. v. Cuerrier*, [1998] 2 SCR 371.

Format of the Feminist Dialogue

The Feminist Dialogue opened with a well-attended public event featuring three speakers, each sharing unique insights from their distinct work. The reception facilitated cross-sectoral networking and relationship-building.

The two-day workshop that followed was an invitation-only event, convening approximately 30 people living with HIV, academics, service providers, researchers, lawyers and activists. Each participant brought important experience and expertise to the discussion, and each made a personal contribution by presenting, facilitating or performing rapporteur duties.

Over the course of the event, participants interacted through a series of panels, discussions and strategic working groups. On the final afternoon, four thematic rapporteurs shared their reflections and the group collectively brainstormed next steps for research and advocacy. A full agenda and participant list is included at the end of this report.

reach this "significant" level.[6] Moreover, as it became increasingly clear that criminalizing non-disclosure was not an effective way to prevent infections, challenging the prevention justification for criminalization was an important strategy.

However, in recent years, prosecutors and commentators alike have increasingly put forth new justifications for maintaining and even extending the legal obligation to disclose, justifications not as embedded in risk of transmission and HIV prevention. The basic idea behind these justifications is that every individual should be able to give, withhold or withdraw consent to sex for whatever reasons they want. Voluntary consent is an essential component of our understanding of sexual autonomy. Thus, some prosecutors, academics, community members and complainants have argued that it doesn't matter how slight the statistical risk of transmission might be in a given sexual encounter; if the complainant says that he or she would not have consented to sex with the HIV-positive individual, then it is a clear sexual assault if there was no disclosure of HIV status. If we are to end the overly broad criminalization of HIV non-disclosure, then new legal, ethical and popular arguments are needed to counter these positions.

At the crux of the issue lies the question: "Does failing to reveal one's HIV-positive status before sex constitute sexual assault?" Our law currently responds in the affirmative — where the possibility of transmission is perceived as "realistic." The specific use of sexual assault law to prosecute HIV non-disclosure cases (as opposed to using the law of negligence or a specific offence regarding reckless transmission of an illness, for example) is a defining element in the Canadian experience of criminalizing HIV. And in the same way that sexual assault is a gendered crime, HIV non-disclosure carries gendered implications. Its prosecution has particular consequences for women living with HIV in Canada.

[6] Even if this would only ever be a partial solution and dependent on the specifics of each case.

Workshop Presentations

a) The impacts of criminalizing HIV non-disclosure on women living with HIV and the community

"I'm never going to have sex again." This is what mothers living with HIV told social worker and researcher **Saara Greene**. They told her they were worried about being charged with non-disclosure, even though they had disclosed to their partners. They told her that they felt criminalized from pregnancy through motherhood, even though they were doing nothing wrong. For HIV-positive mothers, HIV-related stigma and criminalization result in continual surveillance and interrogation on everything from sexual activities to medication adherence and parenting techniques.

Beri Hull, Global Advocacy Officer of the International Community of Women Living with HIV (ICW), reinforced this perception. As she described it, women avoid intimacy in order not to have to disclose their status. Women living with HIV around the world have different opinions on the appropriate role of the criminal law when it comes to HIV exposure or transmission, but Beri questioned whether women who support the expansive use of the criminal law had really thought about how the law could be turned on them since, in her view, a courtroom is not the place to deal with a partner's non-disclosure.

Simone Shindler, Program Manager at The Teresa Group, explored criminalization of HIV non-disclosure from the perspective of children and families, noting that the consequences of a criminal prosecution reach well beyond the person charged. Simone highlighted the detrimental impact on children when a parent is incarcerated, when a parole officer is involved in their family life, when they witness violence against their mother, and when they are taken into care because there is nowhere else for them to go. Children in families affected by HIV live with many secrets; criminalizing non-disclosure adds yet another layer of stigma and secrecy.

Fear is a key word when talking about the criminalization of HIV non-disclosure. **Anne Marie DiCenso**, Executive Director of the Prisoners with HIV/AIDS Support Action Network (PASAN), invited participants to think about how fear manifests for people accused of HIV non-disclosure. Many individuals charged with HIV non-disclosure have had no previous interaction with the criminal justice system. Police may show up at a woman's home without warning to arrest her, resulting in her HIV status becoming known to anyone present. Her health status, photo and personal details will become public. She may suffer stress and trauma from the disconnection from her family, loss of confidentiality, inadequate health care and the experience of being a prisoner, all of which compound over time as the court process drags on. Anne Marie also drew attention to the challenges women face after serving a prison sentence, and the importance of post-release services and support.

Marvelous Muchenje, Community Health Coordinator at Women's Health in Women's Hands

DISCUSSION

In *R. v. Mabior* and *R. v. D.C.* (2012), the Supreme Court indicated that a person living with HIV has a legal obligation to disclose their HIV-positive status to a sexual partner before engaging in a sexual act that poses a "realistic possibility of HIV transmission." If they do not disclose, they can be convicted of aggravated sexual assault — a rarely used but extremely serious criminal offence.

All legal issues have a human face and impact real people.

There is no single feminist perspective.

Community Health Centre, discussed the practical and personal challenges women may face with HIV disclosure. She highlighted in particular the experience of newcomer women, many of whom discover their status through the immigration process, resulting in complex and intense fears around disclosure. Many women wish to disclose but do not know how, nor fully understand the legal requirements. A holistic approach to addressing the lives of women living with HIV is critical, including support to think through the possible consequences of disclosure and the process of how to disclose safely.

DISCUSSION

We have to consider a range of experience: from women in long-term relationships who are betrayed by their partners and end up infected with HIV, to women in abusive relationships whose only protection or redress for the violence is to have their partner prosecuted for HIV non-disclosure.

The broadest possible definition of consent doesn't necessarily protect women.

Using a condom is not always a simple decision. There are often significant power issues at play.

b) Why is HIV non-disclosure prosecuted as sexual assault?

Professor **Isabel Grant**, University of British Columbia law faculty, reviewed the legal history of how aggravated sexual assault became the offence employed in Canada to prosecute alleged cases of HIV non-disclosure. Aggravated assault was not the obvious choice when prosecutors first began trying to find an offence that would fit with this new "wrongful behaviour." (Aggravated sexual assault usually involves extreme violence, brutality and grievous injury.) As Isabel recounted, from the first cases onwards, every decision was answered in a way that broadened the net of prosecutions. Sexual assault is easier to establish than criminal negligence when it comes to HIV.[7]

As a result, Canada is in the exceptional situation of treating HIV non-disclosure as a crime of risk of bodily harm (as opposed to requiring actual harm) and also as a sexual offence. She noted that in 1985, a provision criminalizing venereal disease transmission (and carrying a 6-month penalty) was repealed from the *Criminal Code*. However, the stigma attached to HIV resulted in aggravated sexual assault prosecutions. Isabel concluded that by equating HIV non-disclosure and aggravated sexual assault, Canadian law is doing damage to both people living with HIV and survivors of sexual violence.

Professor **Martha Shaffer,** University of Toronto law faculty, demystified the legal framework for prosecuting HIV non-disclosure by explaining the relevant *Criminal Code* provisions. In Canadian law, any touching that is not consented to can constitute assault. When the touching is of a sexual nature, it is a sexual assault; the absence of consent is what characterizes assault. There are four reasons in our law that consent will be considered legally invalid ("vitiated") — (1) the application of force, (2) threats or fear of force, (3) fraud and (4) the exercise of authority. If any of these four factors are present, then there is no true consent to the touching. For fraud to vitiate consent, it must be demonstrated that the person would not have consented if they had known about the deception. Any kind of deception could potentially amount to a fraud invalidating consent, but the courts have traditionally only

[7] As explained by Professor Grant, this is because of the *mens rea* and *actus reus* requirements of the offences, as well as the evidence needed to meet the burden of proof. For example, direct causation is difficult to establish with respect to HIV exposure.

accepted two types: fraud as to the identity of the person or to the type of activity (e.g., is it a medical procedure or a sexual activity?). With the *Cuerrier* case, the Supreme Court expanded the idea of sexual fraud to include non-disclosure of sexually transmitted infections. Fraud is distinct from the others in the list because, with force or fear the complainant *knows* at the time that they are not consenting; with fraud, at the time you *think* you are consenting but the law would disagree.

Professor **Elaine Craig,** Dalhousie University law faculty, reflected on the shortcomings of the *Mabior* decision. The Supreme Court's ruling has resulted in over-criminalization: the offence is too serious and too many people are caught. The test is not properly calibrated — "we essentially have a no-risk test." Moreover, placing the burden on defendants to provide evidence of their viral load is contrary to basic principles of criminal law. Instead of rectifying the uncertainty that remained following the *Cuerrier* decision, *Mabior* created new uncertainty, especially with respect to viral load. Finally, Elaine suggested that these cases are rooted in homophobic, racist and sexist attitudes; disproportionately affect

newcomers to Canada; and are informed by a perverse anxiety regarding the sexual behaviours of men who have sex with men (MSM). Given these many shortcomings in the Court's reasoning, we cannot put our faith in the justice system to resolve this.

Placing these jurisprudential developments in a feminist historical context, Professor **Alana Klein,** McGill University law faculty, explained that prior to the reforms that took place from 1983 through the mid-1990s, the criminal justice approach to sexual violence against women was highly flawed and very restricted. Rape could not be committed within a marriage, only forced penetrative sex was considered rape, women were considered likely to lie and needed corroborating evidence, and women who had sex frequently were thought to be more likely to consent to rapists. Feminists lobbied long and hard for the reform of rape laws; reforms were designed to challenge the mistrust of women and the extreme sexism embedded in the law. By contrast, HIV non-disclosure jurisprudence is not about removing sexist stereotypes from the law. It is therefore inevitable that feminists are concerned that these normative victories could be eroded when we start putting limits around a complainant's ability to define their own consent subjectively, including what sorts of fraud/deceptions will vitiate their consent.

DISCUSSION

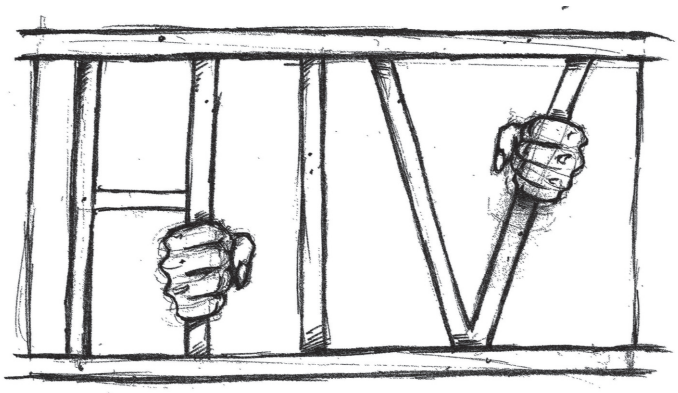
How can we better define consent, while avoiding the overly broad criminalization of HIV non-disclosure?

The issue has proven challenging for feminist legal scholars because sexual assault law is such a battleground. Protecting sexual autonomy is critically important for women.

A key question is "What constitutes exploitation?" The Supreme Court assumed that non-disclosure constitutes exploitation, but do we have the right to assume that everyone we have sex with is HIV-negative *unless* they say otherwise?

c) Sexual assault and consent in Canadian criminal law

Lenore Lukasik-Foss, Executive Director of Sexual Assault Centre (Hamilton and Area) (SACHA), discussed the gendered nature of sexual assault — survivors are predominantly women and the vast majority of perpetrators are men. She reminded participants that sexual assault is about power, control and dominance, not sex. With respect to criminal justice, Lenore discussed how survivors want a system that works but currently, they do not see it as working. Therefore, a very small numbers of survivors (approx. 8%) actually report assaults to the police. Survivors do not come forward because they doubt they will be believed, feel like they are under constant scrutiny, and do not feel protected. Using sexual assault law for HIV non-disclosure cases is not an issue on which sexual assault and rape crisis centres hold a common position, but it certainly raises questions and challenges when distinguishing between offender and victim.



Professor **Debra Parkes,** University of Manitoba law faculty, focused on sentencing, punishment and imprisonment — the endgame of the criminal justice system. The prison system does not and cannot meet society's expectations, yet society is becoming more and more reliant on imprisonment to address complex social questions. Prisons are fundamentally violent places, resistant to the rule of law, inconsistent with human rights, and infused with violent notions of masculinity and entrenched rape culture. We ignore state violence at our own peril. Because survivors are generally disappointed with the criminal justice system, where should we direct our efforts? What alternatives are there to using the criminal justice system as recourse for sexual assault? How else can we collectively denounce sexual assault and promote the changes we want to see?

Professor **Lise Gotell,** University of Alberta department of women's and gender studies, situated her analysis of the criminalization of vulnerable women for alleged HIV non-disclosure in an understanding of neoliberalism, noting the language of risk and responsibility that permeates discussions about HIV non-disclosure. Neoliberalism represents a shift away from welfare-state responses; it instead prioritizes individualization and criminalization, a proliferation of law and order aspects of the state. The *Mabior* decision fits within the neoliberal framework, individualizing responsibility and positing consent as the action of a rational, autonomous, self-actualizing subject. Disempowerment is re-conceptualized as risk-taking (e.g., missing Indigenous women are blamed for living "high-risk" lifestyles). In the sexual violence area, there have long been those considered "worthy victims" and "good complainants." This categorization used to be based on chasteness; now it is about responsibility and sexual safety. Lise explained that the *Mabior* approach risks eroding an understanding of sexual assault as a violation of sexual integrity because of the focus on risk as opposed to the developing understanding of consent as active, contemporaneous and voluntary. The *Hutchison* decision, which adopted a *Mabior*-based fraud reasoning, exemplifies this danger by taking a very narrow view of "the sexual act in question," which is biologically essentialist and contradicts the *Ewanchuk* understanding that consent implicates who touches your body and *how*.[8] The devel-

[8] *R. v. Hutchinson*, [2014] 1 SCR 346. This case involved a man poking holes in condoms, resulting in his girlfriend becoming pregnant against her wishes. He was ultimately found guilty of sexual assault by reason of fraud vitiating consent.

opment of the idea of the voluntariness of consent seems cut-off by *Hutchison* which focuses on fraud and harm, as opposed to sexual autonomy.

Professor **Viviane Namaste,** Concordia University, shared the strategy of the Simone de Beauvoir Institute with respect to sex work law reform, with a view to inspiring possible advocacy strategies. First, the Institute openly acknowledged that there is not a single feminist perspective on sex work. Feminists can agree to take different positions, and academics can strategically position themselves to open dialogue where things are being done supposedly to "protect" women. She also encouraged an examination of ideas of risk and of harm in the law. What is the relationship between these concepts? Cases that define harm and community standards may provide helpful direction.

DISCUSSION

The core wrong of sexual assault is disrespect for autonomy. We must maintain our focus on whether or not consent was truly voluntary. That is the key question.

How do we protect the rights of people living with HIV without diluting the legal concept of consent?

A person does not lose their sexual autonomy just because they do not have certain information.

d) Legal strategy in HIV non-disclosure cases

Megan Longley, defence lawyer, shared her experience of defending a young man charged with HIV non-disclosure. She took the approach that *Mabior* does not say that a condom plus low viral load is the only way to get an acquittal; Megan found other evidence to establish that there was no realistic possibility of transmission. She noted the aggressive approach of the Crown prosecutors, but ultimately won an acquittal for her client by using scientific evidence on low risk.

Cynthia Fromstein, defence lawyer, discussed possible strategies for challenging a complainant's assertion that they would not have had sex with the accused had they known the person was HIV-positive. She recounted a case where the accusers testified that they would not have consented, but their behaviour suggested otherwise. Cynthia emphasized that in order to defend her clients, she must be able to look at behaviour and beyond bald assertions made on the stand. As a result, applications to permit questioning related to sexual risk-taking are necessary in some cases.[9]

Jonathan Shime, defence lawyer, described his experience in the courtroom with respect to HIV non-disclosure cases. While he noted that most judges are doing their best to understand the issues and make sound decisions, he often needs to be an educator in the courtroom to help judges understand the most recent science and to counter irrational fears about HIV. He noted the zeal for HIV non-disclosure prosecutions cases among Ontario officials, and that the solution will not be found in the courtroom.

Joanna Birenbaum, human rights lawyer, also spoke about the use of sexual history evidence in HIV-related prosecutions — either to establish causation if transmission is alleged or to challenge the credibility of the complainant. She explained that protections are in place to limit the use of sexual history evidence in

[9] In order to prevent myths about women's sexuality from skewing sexual assault proceedings, provisions exist that prohibit the introduction of evidence about the complainant's sexual history (often called "rape shield laws"). Section 276 of the *Criminal Code* allows an application to be made by the defendant to introduce evidence that otherwise would be excluded under these provisions.

sexual assault cases because of the so-called "twin myths" which once permeated sexual assault prosecutions — that is, that a woman is less credible as a witness and she is more likely to have consented to the alleged assault if she has had multiple sexual partners. These protections are important to protect sexual assault complainants, and Joanna expressed concern that allowing questioning related to sexual history in HIV non-disclosure cases will undermine the protections. On the other hand, bias about HIV infects judicial procedures in HIV-related cases, and there are few other avenues to mount a defence. It may be a situation of "damned if you do, damned if you don't."

DISCUSSION

There are differences in how cases involving opposite-sex partners and same-sex partners are treated — in terms of the language invoked, narratives told, underlying assumptions, and whether statements are accepted at face value.

One possible avenue of reform: Perhaps *Criminal Code* section 276 could apply differently between sexual assault cases and HIV cases.

Consent is not a hypothetical. It is about what the person actually believes is happening at the time.

If there is no medical risk of transmission, then a prosecution for non-disclosure is discrimination.

e) Building blocks for a principled response to the prosecution of HIV non-disclosure as sexual assault

Alison Symington, Co-director of Research & Advocacy at the Canadian HIV/AIDS Legal Network, described the Legal Network's work on this issue over the last 20-plus years. For example, alongside a range of partners, the Legal Network has developed resources for different audiences (e.g., people living with HIV, defence lawyers, service providers), intervened in the media, worked with defence lawyers and medical experts to ensure accused people living with HIV get the best possible defence, produced a documentary film on women and HIV criminalization, intervened in key cases, and advocated for prosecutorial guidelines. The present meeting will help inform the Legal Network's research, advocacy and public education going forward.

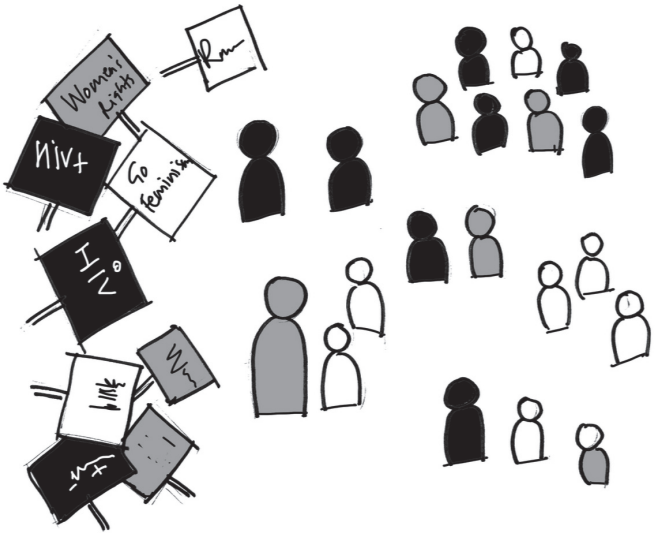
Erin Seatter, Resource Coordinator at Positive Women's Network (PWN), discussed the divergent perspectives of women living with HIV on the criminalization of HIV non-disclosure. As service providers, PWN faces the challenge of both supporting women who want to pursue criminal charges for HIV non-disclosure while also supporting women living with HIV who see criminalization as another layer of stigma and discrimination. She noted that some women living with HIV are sought out by police and Crowns to testify, a situation she has not seen for other sexual assault cases. She also noted how traumatic it can be for a woman to testify in a non-disclosure prosecution — a process that does not bring relief, satisfaction or a sense of justice to the women.

Jessica Whitbread, then Interim Global Director of the International Community of Women Living with HIV (ICW), discussed how her own perspective on HIV criminalization shifted over time as she became attuned to the social complexities and socio-historical contexts within which criminal prosecutions play out.

Under current Canadian law, the bodies of people living with HIV are governed by the legal system. Jessica encouraged participants to pay attention to root causes of criminalization — patriarchy, HIV-phobia, homophobia, etc. — and to create alternatives to the criminal law for women seeking redress.

Professor **Annette Houlihan,** St. Thomas University, described the Australian experience with criminalizing HIV exposure, where the laws differ throughout the country and cases can be prosecuted under HIV-specific statutes. She traced the origins of the criminal provisions to fear of "AIDS-needle bandits." Australian courts have recently struggled with the issue of informed consent in the context of whether a person can consent to the risk of HIV transmission.

Professor **Kim Buchanan,** University of Southern California law faculty, presented an analysis of the gender dimensions of the criminalization of HIV non-disclosure, noting the disproportionate emphasis on white women as victims and Black men as perpetrators. In her view, courts believe that criminalizing HIV non-disclosure respects or protects sexual autonomy, and that it is a good feminist response. But she identified numerous racial, sexual and gendered elements that contribute to the characterization of HIV non-disclosure as a fraud to be criminalized, pointing out that other frauds do not share these elements. This inherent discrimination should be reason enough to decriminalize.



DISCUSSION

How are feminist discourses being appropriated, and what are we doing to resist?

Before the law-and-order approach took hold, people used to talk to one another, live in the community, find resolutions. How can we return to a time before state agents encouraged people to present themselves as complainants in the criminal justice system?

If the law were to protect the vulnerable party, it would protect the HIV-positive person in a serodiscordant relationship.

We must consider what is — and isn't — possible through law.

As HIV advocates, we ignore well-founded fears about the rollback of consent at our peril. Similarly, those who want to preserve gains in the area of sexual assault law cannot afford to think of HIV prosecutions as collateral damage in the quest for coherent jurisprudence in this area of law.

We must take time to consider the long-term outcomes of our proposed strategies towards social change. We need a range of strategies — both short-term reformist and also long-term aspirational.

Conclusion

After two days of rich knowledge exchange, discussion and strategizing, it was clear that the group shared a collective discomfort with the prosecutions of alleged HIV non-disclosure as aggravated assault, as we are currently seeing in Canada. While acknowledging that there is no single feminist perspective, the consensus is that we need to interrogate the elements of risk, harm, choice and consent as feminists, informed by a holistic understanding of the diverse injustices HIV non-disclosure prosecutions are producing.

At a conceptual level, we are committed to interrogating several key questions: What is the place of power in our understanding of consent? How should we understand power and consensual sexual relationships? How should the fraud provision in sexual assault law be understood and delineated?

We agreed that the answer to these quandaries will not be found in the courtroom, at least not immediately. At a practical level, we are therefore committed to conducting strategic research to inform our theorizing and advocacy, developing alternatives to the criminal justice system for redress and support, recognizing the link between gender-based violence and HIV-related criminalization, and working to end the root causes: HIV-related stigma, socioeconomic inequality and gender-based violence.

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About the Canadian HIV/AIDS Legal Network
The Canadian HIV/AIDS Legal Network (www.aidslaw.ca) promotes the human rights of people living with and vulnerable to HIV/AIDS, in Canada and internationally, through research and analysis, advocacy and litigation, public education and community mobilization. The Legal Network is Canada's leading advocacy organization working on the legal and human rights issues raised by HIV/AIDS.

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Consent: HIV non-disclosure and sexual assault law
www.consentfilm.org

Appendix I

Rethinking HIV Non-disclosure and Sexual Assault: A Feminist Dialogue

April 24 – 26, 2014

AGENDA

Thursday, April 24, 2014
6:30 – 9:00 p.m.

HIV Non-Disclosure and Sexual Assault: What Does "Consent" Really Mean?

** Note: This event is open to workshop participants and the broader community*

6:30 **Welcome/Introduction**
Alison Symington

6:50 **Presentations**
Saara Greene
Joanna Birenbaum
Beri Hull

7:35 **Q&A and Discussion**
Eric Mykhalovskiy

8:00 **Close program and move to reception**
Richard Elliott

Friday, April 25, 2014
8:30 a.m. – 5:00 p.m.

Rethinking HIV Non-Disclosure and Sexual Assault: A Feminist Dialogue (Day 1)

8:30 **Coffee and registration**

9:00 **Opening Remarks: Welcome, Logistics, Introductions, Format & Expectations**
Alison Symington & Eric Mykhalovskiy

9:35 **Overview of HIV non-disclosure prosecutions in Canada**
Cécile Kazatchkine

9:45 **Impacts of criminalization on women living with HIV & community**
Moderator: *Maria Nengeh Mensah*
Presenters: *Simone Shindler*
Anne Marie DiCenso
Marvelous Muchenje
Kerrigan Beaver
Q & A and discussion

11:15 **Break**

11:30 **Why is HIV non-disclosure prosecuted as sexual assault?**
Moderator: *Mariana Valverde*
Presenters: *Isabel Grant* (by videoconferencing)
Martha Shaffer
Elaine Craig
Alana Klein
Q & A and discussion

1:00 **Lunch**

2:00 **Concurrent small group discussions following from morning sessions**
Facilitators: Group A — *Richard Elliott & Erin Seatter*
Group B — *Cécile Kazatchkine & Jessica Whitbread*
Group C — *Alison Symington & Beri Hull*

3:15 **Break**

3:30 **Sexual assault and consent in Canadian criminal law**
Moderator: *Kim Buchanan*
Presenters: *Lenore Lukasik Foss*
Lise Gotell
Vivianne Namaste
Debra Parkes (by videoconferencing)
Q & A and discussion

4:45 **Wrap up for the day**
Alison Symington & Eric Mykhalovskiy

Saturday, April 26, 2014
8:30 a.m. – 4:30 p.m.

Rethinking HIV Non-Disclosure and Sexual Assault: A Feminist Dialogue (Day 2)

8:30 **Coffee**

9:15 **Legal strategy roundtable**
Chair: *Kim Stanton*
Lawyers: *Jonathan Shime*
Megan Longley
Cynthia Fromstein
Joanna Birenbaum
Q & A and discussion

10:45 **Break**

11:00 **Ongoing work: Building blocks for a principled response to the prosecution of HIV non-disclosure as sexual assault**
Moderator: *Eric Mykhalovskiy*
Presenters: *Alison Symington*
Kim Buchanan
Jessica Whitbread
Erin Seatter
Annette Houlihan
Q & A and discussion

12:00 **Lunch**

1:00 **Concurrent working groups**

1. Developing messaging and responses to criminalization of HIV non-disclosure that are empowering to women and acknowledge gender inequality.
2. Advancing collaboration between the sexual assault community and academics, and the HIV community and academics.
3. Constructing legal arguments that are empowering to women and acknowledge gendered power relations for HIV non-disclosure cases.

2:15 **Break**

2:30 **Moving ahead strategically**
Facilitators: *Alison Symington & Eric Mykhalovskiy*
a) Rapporteur Reports
Marcus McCann
Alex McClelland
Rosemary Cairns-Way
Laura Bisaillon
b) Planning discussion

4:00 **Wrap-up and acknowledgements**
Alison Symington & Eric Mykhalovskiy

Appendix 2

PARTICIPANT LIST

N.B.: Affiliations are current as of April 2014.

Joanna Birenbaum, Ursel Phillips Fellows Hopkinson LLP, Toronto

Laura Bisaillon, University of Toronto Scarborough, Toronto

Kim Buchanan, University of Southern California Law, Los Angeles

Rosemary Cairns Way, Faculty of Law, University of Ottawa, Ottawa

Elaine Craig, Schulich School of Law, Halifax

Anne Marie DiCenso, Prisoners with HIV/AIDS Action and Support Network (PASAN), Toronto

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Isabel Grant, University of British Columbia Faculty of Law, Vancouver

Lise Gotell, Department of Women's and Gender Studies, University of Alberta, Edmonton

Saara Greene, McMaster University, School of Social Work, Hamilton

Annette Houlihan, St. Thomas University, Fredericton

Beri Hull, International Community of Women Living with HIV (ICW), Washington, D.C.

Cécile Kazatchkine, Canadian HIV/AIDS Legal Network, Toronto

Alana Klein, McGill University Faculty of Law, Montréal

Andrea Krüsi, Gender and Sexual Health Initiative, BC Centre for Excellence in HIV/AIDS, Vancouver

Liz Lacharpagne, COCQ-SIDA, Montréal

Megan Longley, Nova Scotia Legal Aid – Youth Justice Office, Halifax

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