

# **CRIMINALS AND VICTIMS?**

**The Impact of the Criminalization of HIV  
Non-Disclosure on African, Caribbean and  
Black Communities in Ontario**

**CACVO**  
Conseil des Africains  
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in Ontario

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### **African and Caribbean Council on HIV/AIDS in Ontario (ACCHO)**

The African and Caribbean Council on HIV/AIDS in Ontario (ACCHO) provides leadership in the response to HIV and AIDS in African, Caribbean and Black communities in Ontario. It is an Ontario-based coalition of organizations and individuals committed to HIV prevention, education, advocacy, research, treatment, care and support for African, Caribbean and Black communities. ACCHO and its members strive to reduce the incidence of HIV among African, Caribbean and Black people in Ontario, and to improve the quality of life for those infected and affected by HIV/AIDS through the coordination, and monitoring and evaluation of the implementation of the *Strategy to Address Issues Related to HIV Faced by People in Ontario from Countries Where HIV Is Endemic*, research and advocacy, and through the promotion of the greater and meaningful involvement of people living with HIV/AIDS from African, Caribbean and Black communities.

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# CRIMINALS AND VICTIMS?

## The Impact of the Criminalization of HIV Non-Disclosure on African, Caribbean and Black Communities in Ontario



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## INTRODUCTION

Under Canadian law, a person living with HIV may be guilty of a crime for not disclosing his or her HIV-positive status before engaging in behaviours that pose a “significant risk” of serious bodily harm, namely sexual activities where HIV transmission is possible.<sup>1</sup> In Ontario alone, since 1989 more than 50 individuals have been criminally charged for HIV non-disclosure. There has been an increase over time in the average number of cases each year, with a sharp increase beginning in 2004. Paralleling this increase in the number of charges laid, there has been an escalation in the severity of those charges, the media coverage surrounding the cases, and the anxiety and debate within the HIV community about this use of the criminal law with respect to HIV. This discussion paper explores both the expanding and expansive use of the criminal law to punish behaviours that risk transmitting HIV, and the impacts of criminalization of HIV non-disclosure, as they relate to African, Caribbean and Black (ACB) communities in Ontario.

While there have been various initiatives to examine the implications of criminalization of HIV non-disclosure in Ontario and to challenge this use of the criminal law, to date little attention has been paid to its impacts on members of ACB communities. This paper acknowledges that racism is one of the most pervasive forms of systemic oppression shaping social relations in Ontario, and presents an original analysis of the race-related dimensions of the criminalization of HIV non-disclosure. It highlights how people living with HIV (PHAs) within ACB communities experience multiple forms of oppression, and explores how the criminalization of HIV non-disclosure intersects with this oppression. It is the first analysis, albeit preliminary, of criminalization of HIV non-disclosure as experienced by ACB communities and suggests possible future initiatives that respond to these priorities.

This paper begins with a discussion of ACB communities in Ontario, vulnerability to HIV among members of these communities, and the personal and community dynamics associated with HIV disclosure. It then examines the criminalization of HIV non-disclosure in Ontario, situating the

discussion within the context of race and the criminal justice system in Canada. Next, it explores how the criminalization of HIV non-disclosure affects PHAs within ACB communities and ACB communities more broadly. It then critically examines media coverage of HIV non-disclosure cases and the constructions of ACB people produced through that reporting. Finally, the paper recommends a number of specific actions geared to a variety of stakeholders (including but not limited to AIDS services organizations, ethno-specific organizations, policymakers, media, individuals and community groups) to address the racialization of the criminalization of HIV non-disclosure in Ontario, and with the hope of improving the overall health and quality of life of ACB communities in Ontario.

The content of this report reflects the opinions and experiences of ACB people living with or affected by HIV in Ontario. The priority issues and the analysis are informed by conversations with a diverse set of Ontario-based ACB people, backed up by the literature (see methodology below). The quotes included are the voices of community members who participated in the research for this report (through interviews, focus groups and other discussion sessions, see below). They remain unattributed in order to respect privacy and the opinions expressed do not necessarily represent those of the authors of this report, of ACCHO, nor of the working committee members. In discussing specific criminal cases, the names of those accused are omitted wherever possible, as they are not necessary to the analysis and their inclusion could contribute to further stigma.

This report is the first to focus on the intersections of race, HIV and law in Ontario. To be clear, this report focuses on HIV non-disclosure in otherwise consensual sex. Rape and other forms of sexual violence and coercion are not addressed in this paper. Moreover, it is beyond the scope of this paper to explore the impact of the criminalization of HIV non-disclosure on specific vulnerable populations, such as sex workers, people who are imprisoned, gay, bisexual and other men who have sex with men (MSM), and people who use drugs.

## ➔ Methodology of this project

Following a call for proposals process, ACCHO contracted Akim Adé Larcher (of The Larcher Group) and Alison Symington to develop this discussion paper on the racialization of the criminalization of HIV non-disclosure. ACCHO also established an expert working committee comprised of representatives of AIDS service organizations (ASOs), lawyers, community representatives, academics, a journalist, at least one person living with HIV, and researchers. They acted in an advisory capacity and provided strategic guidance and feedback on the issues to be addressed, recruitment of participants, development of topic guides, and drafts of the discussion paper.

In order to engage the community in a critical examination of the racialization of HIV non-disclosure and to identify and analyze issues of importance to ACB communities, interviews and focus groups were conducted. Recruitment of participants for these discussions was based on their knowledge of the criminalization of HIV non-disclosure and their first-hand experience in providing programs and services to ACB people infected with or affected by HIV. Participants were recruited through a number of strategies, including word-of-mouth referrals, peer networks, and through the client networks of the expert working committee.

Seventeen confidential face-to-face and telephone interviews were conducted in August and September 2010 with key informants, including the directors of several nongovernment organizations NGOs or ASOs, support workers, an academic, several journalists, a lawyer and a researcher. The key informants included ten women and seven men, and two participants openly self-identified as living with HIV. The interviews lasted between 40 and 70 minutes. The interview topic guide included questions about their understanding of the law in Canada, ways in which ACB communities are affected by criminalization, media representations of ACB communities, and community responses to criminalization. Finally, participants were asked about their recommendations for future initiatives to address racialization and the criminalization of HIV non-disclosure in Ontario.

In addition, two focus groups were held in September 2010, each approximately 90 minutes in length. One focus group was for frontline workers from ethno-specific ASOs, as well

as those providing programs and services specifically to ACB communities. The second was for ACB community leaders and community members who were already informed about or engaged with this issue. Eight people participated in the first focus group, including six women and two men, and several participants openly self-identified as living with HIV. The second focus group included five women and one man, including one participant who openly self-identified as living with HIV. The interview topic guides were developed in consultation with the expert working committee, and included questions and probes exploring the experiences of PHAs in accessing services; the role of the media in racializing HIV non-disclosure in Ontario; ways in which stigma, discrimination, racism, immigration status and other factors impact on HIV disclosure; and recommendations for future initiatives to address racialization and criminalization.

In both the structured interviews and the focus groups, researchers used questions and probes to explore factors such as racism, homophobia, sexism, power imbalances and social determinants of health in relation to race, HIV and the law in Ontario.

Two further discussion sessions were held to gather community input into the project. On September 17, 2010, the project was presented to the participants of ACCHO's Strategy Workers' Symposium, which included ACCHO staff; the ACCHO Executive Committee; people from agencies across the province of Ontario working on the implementation of the *Strategy to Address Issues Related to HIV Faced by People in Ontario from Countries where HIV Is Endemic* ("Strategy Workers") and their executive directors or managers; and representatives of the AIDS Bureau, Ontario Ministry of Health and Long-Term Care. On October 5, 2010, the project was presented to the ACCHO Council. At each discussion session, the framework and emerging themes from the literature review, key informant interviews and focus group discussions were presented, and participants were given the opportunity to provide input into the research and analysis.

An extensive literature review was conducted, including both academic and grey literature on race, the criminalization of HIV non-disclosure and media representations.

## ➔ Acknowledgements

ACCHO would like to acknowledge the many individuals who contributed their time, expertise and experience to the development of this discussion paper. Special thanks to Akim Adé Larcher (of The Larcher Group) and Alison Symington for researching and writing this report; to Jonathan Glenn Betteridge, Shannon Thomas Ryan and Patricia Allard for their assistance in developing the project; to the ACCHO staff and ACCHO Council for their insightful contributions at various stages of the report; to the working committee members for their valuable guidance throughout the project; to all of those who participated in the interviews, focus groups and discussions informing this report; and to our other colleagues and supporters who provided input and insights throughout the process. Finally, thank you to Vajdon Sohaili for copyediting the report, and to Nicole Roswell (of Phoenixx Creative) for its artistic direction and layout.

All errors and omissions remain the responsibility of ACCHO.

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<sup>1</sup> While HIV can also be transmitted non-sexually (e.g., vertical transmission, sharing injection drug-use equipment), the application of assault charges for HIV exposure without disclosure in Canada has focused on sexual transmission and this paper will do so as well.

## SECTION 1

### The Context: African, Caribbean and Black Communities in Ontario



African, Caribbean and Black (ACB) people and communities in Ontario are diverse, vibrant and dynamic. Some have been in Ontario for generations while others are new arrivals. Many have family and friends “back home” in addition to a community here in Canada. ACB people are overrepresented among HIV infections in Canada, meaning that proportional to their percentage of the population, more ACB people are HIV-positive than would be expected. Most countries in the Caribbean and sub-Saharan Africa have been classified as HIV-endemic,<sup>2</sup> and people from countries where HIV is endemic account for almost one quarter of all new HIV cases in Ontario.<sup>3</sup> ACB people and their communities in Ontario have also suffered a legacy of discrimination, dating back to their first arrival in Canada in the early 1600s and 1700s, and continuing in various forms today. All these factors (among others) provide the context for current racialization with respect to the criminalization of HIV non-disclosure.<sup>4</sup>

HIV vulnerability among ACB people and communities can be understood in terms of the social determinants of health, that is, the social and economic conditions that shape the health

of individuals, communities and jurisdictions as a whole. Limited access to safe, affordable housing; unemployment and underemployment; gendered norms that prescribe male domination over women; a reluctance to talk about sex, sexuality and health; pervasive homophobia; and barriers to accessing HIV supports and services, other social services and educational opportunities — all contour the experiences of those living with or affected by HIV. The intersectionality of gender, race, poverty, stigma, denial, fear and discrimination contours the exclusion and marginalization that, unfortunately, is experienced by so many ACB people within Ontario, as elsewhere.

Particularly relevant in this regard are the findings of *HIV/AIDS Stigma, Denial, Fear and Discrimination: Experiences and Responses of People from African and Caribbean Communities in Toronto* (the Stigma Study).<sup>8</sup> This study found that

[t]here are a range of cultural and structural issues that may increase the risk for infection, create obstacles to testing and treatment, and lead to isolation and stigma

#### Racialization:

The process through which groups become designated as different, and on that basis are treated as outside the norm and receive unequal treatment. Racialized people are non-white. They include non-white people who might experience differential treatment on the basis of race, ethnicity, language, religion or culture.

According to the 2006 Census, there were 783 795 Black people in Canada, which represents 2.5% of the country’s population. The majority lives in urban areas of Ontario and Quebec.<sup>5</sup>

HIV/AIDS-related stigma can be described as a ‘process of devaluation’ of people either living with or associated with HIV/AIDS. ... Discrimination follows stigma and is unfair and unjust treatment of an individual based on his or her real or perceived HIV status. Stigma and discrimination breach fundamental human rights and can occur at a number of levels including: political, economic, social, psychological and institutional.

— UNAIDS Fact Sheet: “Stigma and Discrimination”

experienced by HIV positive people. Participants discussed religious beliefs and norms, homophobia or the denial of homosexuality within communities, and silence about health and sexuality as issues affecting responses to HIV within African and Caribbean communities. Gossip and fear within communities leads to isolation of HIV positive people and discourages many from seeking testing, treatment or support services. The racialization of HIV as a Black or African disease by mainstream cultural media and institutions has a detrimental impact on willingness to approach health or support services and on HIV knowledge and awareness. Participants spoke about how HIV stigma intersects with other forms of stigma and discrimination, and suggest that its impact is especially heavy on gay men, women, and poor people.<sup>9</sup>

For ACB women, certain religious and cultural norms, values and practices may increase their risk of HIV infection. For example, the patriarchal nature of many African and Caribbean cultures may result in some African and Caribbean women deferring to male authority and privilege, even at the risk of their own health.<sup>10</sup> Similarly, condom use with long-term partners (i.e., husbands and boyfriends) is reportedly less common within African and Caribbean communities, thereby depriving many women within these communities of one effective means of HIV prevention.<sup>11</sup> As with all ethno-racial communities, gender relations within African and Caribbean communities are diverse and complex, therefore different women may be differently empowered or vulnerable. Within the communities, some women are constructed as innocent victims and expected to behave subserviently. Age and sexuality are intersecting factors with manifestations particular to Black communities. They also play a role in HIV risk for some people within these communities.

### ➔ HIV Disclosure by ACB PHAs

In all of the discussions that have taken place as part of this project, participants emphasized three factors especially relevant to HIV disclosure in ACB communities. First, disclosure for many within ACB communities is not an individualized action. PHAs are not only considering the personal ramifications of disclosure, but also the possible impacts on their immediate families, their communities, and their extended families “back home”. News is seen to travel quickly within ACB communities and it is expected that if one discloses one’s HIV-positive status, that news will very quickly be spread through an individual’s entire network, including immediate family, local community, extended family and also to friends and family overseas.

Second, our respondents told us that many ACB PHAs are living in fear that their HIV-positive status will become known. Many avoid intimate relationships altogether to avoid having to disclose their status. Others avoid ethno-racial ASOs and community health centres because they are afraid of being seen by members of their community. Many are plagued with fear that if they disclose they will lose their partners and also be alienated by their families and their communities. Given the deep-seated stigma associated with HIV — including assumptions that it is a “gay disease”; that it is associated with promiscuity, extra-marital sex and sex

## BY THE NUMBERS

In Canada, there are an estimated 58 000 people living with HIV, with 7 500 (12%) of cases reported among people from countries where HIV is endemic. The rate of HIV infection is estimated to be 12.6 times higher among people from HIV-endemic countries than other Canadians. The majority of these infections are transmitted through heterosexual sexual contact and women are overrepresented.<sup>6</sup>

As of December 2008, an estimated 26 627 persons in Ontario were infected with HIV. The most affected groups by exposure category were: men who have sex with men (MSM) (approximately 57%); persons from HIV-endemic regions (approximately 18%); and others infected by heterosexual transmission (approximately 15%).

It is estimated that 67% of the HIV-infected persons in Ontario know they are infected. However, only 55% of persons infected by heterosexual transmission and 56% of those from HIV-endemic countries are thought to have been diagnosed.

The proportion of HIV diagnoses in Ontario attributed to persons from HIV-endemic countries has increased steadily over time, from less than 5% of those diagnosed from 1985–1990 to 24% of those diagnosed since 2001. From January 2009 to September 2010, 23% of those newly diagnosed with HIV were African, Caribbean or Black, and 31% of HIV-positive tests among men with known race/ethnicity who did not identify as MSM were African, Caribbean or Black.<sup>7</sup>

*“Each way you turn with this issue there is stigma, and it’s the multiplicity I think of all those stigmas working together that really create huge burdens.”*

*“There is some uniqueness to the fears of confidentiality, disclosure, gender-power imbalances, and cultural nuances that exist within ACB communities.”*

*“It’s not just a personal ramification, but about how your immediate family is treated later, your extended family here, your extended family back home and your entire community. ... The ripple effect actually goes far beyond the individual, and that’s what people think of. This doesn’t only impact me, it impacts my whole family.”*

*“The reasons why people do not disclose in specific ethnic minorities permeates so deep into something so different, like into culture, up-bringing. Stigmas associated with this issue, and it is socialized into people from a family, community and societal level.*

work; that it comes from “outsiders”; and that it only happens to those who transgress their culture or religion<sup>12</sup> — it is understandable that some ACB PHAs choose to deny or conceal their status.

Third, our discussions demonstrated that there is a significant amount of confusion regarding when a person should or must disclose to sexual partners that he/she is HIV-positive. In terms of the criminal law, PHAs are uncertain whether they are required to disclose when condoms are used, if they have a low or undetectable viral load, and if the relationship is short-term.<sup>13</sup> Beyond the mandates of the criminal law, ACB PHAs struggle with whether to disclose to their children, families, employers, colleagues and health-care providers, among others.

Denial of one’s HIV-positive status is also an important factor with respect to HIV (non-)disclosure. As discussed in the Stigma Study, following diagnosis some PHAs are in denial, and it is suggested that there is a tendency among heterosexual men in particular to deny that they are HIV-positive.<sup>14</sup> Denial may be related to assumptions that HIV is not real; that HIV is a gay disease and there is no homosexuality within the community; that the person simply cannot deal with something “so immense”; or that HIV is something that happens to “others”.<sup>15</sup>

<sup>2</sup> “HIV-endemic” refers to specific countries meeting the following two criteria: high HIV prevalence (more than 1% in the general population) and predominantly (more than 50%) heterosexual mode of transmission among HIV-infected persons. The vast majority of HIV-infected persons from HIV-endemic countries are Black. Personal communication with Dr. Robert Remis, Epidemiology Professor, Dalla Lana School of Public Health, University of Toronto, November 11, 2010.

<sup>3</sup> Ontario Ministry of Health and Long-Term Care and the Public Health Agency of Canada, Ontario and Nunavut Regional Office March, Ontario Community HIV/AIDS Reporting Tool (OCHART), *The View from the Frontlines: Fourth Annual Summary and Analysis of Data Provided by Community-based HIV/AIDS Services in Ontario — To the End of Fiscal Year 2008-09* (March 2010): p. 4.

<sup>4</sup> See section 2, below, for an explanation of the criminal law in Canada with respect to HIV exposure without disclosure.

<sup>5</sup> 2006 Census Release Topics: Ethnic origin and visible minorities. Online at <http://www12.statcan.ca/census-recensement/2006/rt-td/eth-eng.cfm>.

<sup>6</sup> See generally, Public Health Agency of Canada, *Population-Specific HIV/AIDS Status Report, People from Countries where HIV is Endemic — Black people of African and Caribbean descent living in Canada* (2009). Note that some people are infected in their country of origin before immigrating to Canada, while others are infected in Canada.

<sup>7</sup> R. Remis, C. Swantee, and J. Liu, “Executive Summary,” in *Report on HIV/AIDS in Ontario 2008* (April 2010), and personal communication with Dr. Robert Remis, November 2, 2010.

<sup>8</sup> E. Lawson et al., *HIV/AIDS Stigma, Denial, Fear and Discrimination: Experiences and Responses of People from African and Caribbean Communities in Toronto* (Stigma Study) (Toronto: The African and Caribbean Council on HIV/AIDS in Ontario (ACCHO) and the HIV Social, Behavioural and Epidemiological Studies Unit, University of Toronto, 2006).

<sup>9</sup> *Ibid.*, p. 1.

<sup>10</sup> E. Tharao, N. Massaquoi, and S. Teclom, *Silent Voices of the HIV/AIDS Epidemic: African and Caribbean Women in Toronto 2002–2004* (Toronto: Women’s Health in Women’s Hands Community Health Centre, April 2006): p. 11.

<sup>11</sup> *Silent Voices*, p. 12; Stigma Study, pp. 38–39.

<sup>12</sup> Stigma Study, pp. 22–26. Note that HIV-related stigma is an issue for all PHAs, but it manifests differently in different communities.

<sup>13</sup> See also E. Mykhalovskiy, G. Betteridge, and D. McLay, *HIV Non-disclosure and the criminal law: Establishing policy options for Ontario*, report funded by a grant from the Ontario HIV Treatment Network (August 2010): pp. 49–58.

<sup>14</sup> Stigma Study, p. 26.

<sup>15</sup> Stigma Study, pp. 26–28.

## SECTION 2

# Criminal Law, HIV Non-Disclosure and Race in Ontario

### ➔ Racism and the criminal justice system

In order to understand how the criminalization of HIV non-disclosure is a racialized issue, and to develop appropriate interventions and responses, we must recognize the historic legacy of racism and injustice within which the contemporary criminalization of HIV exposure sits. Deep-seated racism has long been a feature of Black peoples' interactions with police, courts and prisons.<sup>16</sup> Dating back to the slavery era, racist beliefs and practices have permeated criminal justice institutions.

Today, the relationship between police and racialized people is troubling, especially in urban areas.<sup>17</sup> Racialized communities often complain of over-policing and also of slower response times to complaints. Moreover, the practice of racial profiling is now well documented.<sup>18</sup> Racialized people tend to be underrepresented among lawyers, judges and juries, leading many accused to feel justice will not be done because the system does not understand or represent them.<sup>19</sup> Lawyers and judges are also criticized for relying on stereotypical attitudes and views of racial minorities, and for failing to recognize (or being unprepared to deal with) issues of race and racism.<sup>20</sup>

As a result, although the Canadian justice system strives to provide an impartial adjudicative process that dispenses “justice” regardless of race, it does not deliver on its promise of equality and at times contributes to the marginalization of people of colour within Canada. Moreover, the law has a difficult time taking into consideration the obstacles and limitations that racialized persons face within our society. The criminal process is an adversarial one. Complex events subject to multiple interpretations are reduced to simple statements of fact. There is a perpetrator and a victim(s), one person who is responsible and another claiming redress. Fitting a nuanced and contextualized understanding of HIV disclosure, sex, and intimate interpersonal encounters that are mediated by gender roles (and sometimes violence, alcohol or drugs) into this legal tradition is very difficult.

### ➔ Race and sexual assault

In terms of sexual assault, the racism of the criminal justice system has taken a specific form. The myth of “the Black rapist” refers to a prevalent assumption that Black men rape white women. The corollary of this is the myth of “the bad Black woman”, implying that Black women are sexually available, immoral, and of a lower status than white men and women.

### CRIMINALIZATION OF HIV EXPOSURE: CURRENT CANADIAN LAW

Under Canadian law, a PHA may be guilty of a crime for not disclosing his or her HIV-positive status before engaging in behaviours that pose a “significant risk” of serious bodily harm — namely, sexual activities where HIV transmission is possible. This includes anal or vaginal sex without a condom. What else it includes remains unclear within Canadian law.<sup>23</sup> A person can be convicted of a crime for not disclosing his or her HIV-positive status before having sex that poses a significant risk of transmission even if the other person does not actually become infected. The crime is exposure without disclosure.<sup>24</sup>

In addition to a number of cases in lower courts, there have been two Supreme Court of Canada decisions on this issue.<sup>25</sup> The Supreme Court, however, did not establish clear parameters for assessing the level of risk in a given sexual encounter. The science regarding the risk of transmission is complex and has not been applied consistently by Ontario courts. Moreover, the body of scientific evidence regarding transmission has grown considerably since the Supreme Court decided the *Cuerrier* case in 1998 (which established the legal disclosure requirement), and we are now aware of various factors that decrease transmission risk. Lower courts have not clarified the legal test and have issued conflicting decisions. Apparent inconsistencies in police charging practices and Crown counsel charge-screening likely contribute to the climate of uncertainty.<sup>26</sup>

*“In reaching this conclusion, I should not be taken to condone the behaviour of the accused. He had a moral obligation to disclose his HIV-positive status to his partner and to give the complainant the opportunity to assume or reject the risk involved in sexual activity with the accused, no matter how small. But not every immoral or reprehensible act engages the heavy hand of the criminal law.”<sup>28</sup>*

— Madam Justice Fenlon, Supreme Court of British Columbia

These ideas date back to the period of slavery where racist ideologies flourished and sexual coercion was an essential element of the relationship between slave owners and slaves.<sup>22</sup> While there is no evidence that Black men commit more sexual assaults than white men or that Black rapists commit their assaults against white women, nor that Black women are any less victimized by sexual coercion and rape, these myths continue to exist in the public imagination and they may colour our understanding of, and response to, crimes of sexual violence.

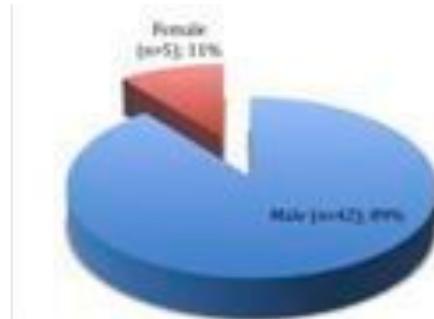
### ➔ The “facts” about criminal law and ACB communities in Ontario

In 1998, the Supreme Court of Canada ruled that a PHA could be found guilty of aggravated assault if he or she did not disclose his or her HIV-positive status and exposed another person to a “significant risk” of HIV transmission.<sup>27</sup> At the time of the ruling, various organizations and individuals raised questions about the implications of imposing full legal responsibility for HIV prevention on PHAs (as between individuals; Public Health retains responsibilities with respect to protecting “the public”). Some of those questions remain unanswered, while a host of new concerns — including racialization — have been added to the debate as the criminal law has increasingly been used in response to HIV exposure cases throughout Canada. And while many HIV advocates, in Ontario and beyond, recognize that HIV infection remains a serious medical condition and criminal charges for HIV non-disclosure may be warranted in certain egregious cases (such as where there is a malicious intent to infect), those cases will be rare. Charges are currently being applied to a much broader set of circumstances, which warrants interrogation.

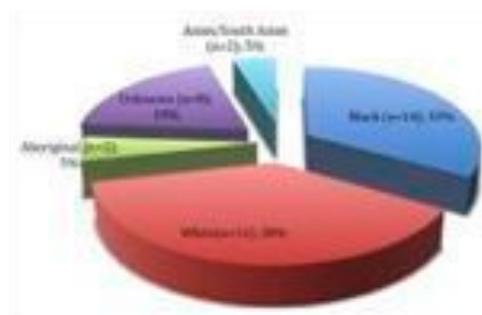
Policy discussions on HIV non-disclosure and the criminal law have thus far been hampered by a lack of aggregate empirical data on the nature of the phenomenon. In August 2010, Eric Mykhalovskiy, Glenn Betteridge and David McLay released an important report that aims to address this obstacle by amalgamating what is known about the criminal cases in Ontario through analysis and a discussion of policy options for responding to the issue.<sup>29</sup> According to Mykhalovskiy et al., at least 98 individuals were criminally charged for HIV non-disclosure in Canada between 1989 and 2009. Of these, 47 were in Ontario.<sup>30</sup> They further report an increase over time in the number of cases each year, with a sharp increase in 2004, which was sustained through 2009.<sup>31</sup> Eighty-four percent of the Ontario cases have taken place since 2004.<sup>32</sup>

Of those charged in Ontario, 89% were men, and of those, 71.4% were charged in relation to heterosexual encounters.<sup>33</sup> Heterosexual men therefore represent the single largest category of people charged. However, it is worth noting that charges against MSM are increasing. Ten MSM have been charged in Ontario, nine of those since 2006.<sup>34</sup>

The Mykhalovskiy et al. report does not provide complete data with respect to the race of the accused as that information is not available. However, the authors were able to gather a substantial amount of information about the cases from various sources (including media reports, court documents, and personal communications with both ASOs and lawyers representing some of the accused), and thereby determine



*HIV non-disclosure cases, gender of person charged, Ontario, 1998-2009 (n=47)*



*HIV non-disclosure, race/ethnicity of men charged, Ontario, 1989-2009 (n=42)*

that of the 5 women charged in Ontario, 2 are white, 1 is Thai and the race of the other 2 is unknown. Of the men charged in Ontario, 16 were white, 14 Black, 2 Aboriginal, 2 Asian/South Asian and 8 of unknown race.<sup>35</sup> Notably, of those charged since 2004, Black men account for a higher proportion than white men.<sup>36</sup> They note that

[t]he large number of recent cases of HIV non-disclosure involving Black male defendants is a particular concern given research evidence documenting discrimination against Blacks that operates at all levels of Ontario's criminal justice system including prison admissions, imprisonment before trial, charge management, within court proceedings, imprisonment after conviction and community policing. Whether Black men are over-represented in these cases relative to their proportion of all HIV-positive heterosexual men is difficult to determine given differences in available data. [references omitted]<sup>37</sup>

Since Mykhalovskiy et al. compiled their data, charges have not abated. It would seem that at least six more men in Ontario have been charged in relation to HIV non-disclosure in 2010, at least one of whom is Black. In addition, at least one Black woman (an immigrant from Africa) has also been charged thus far in 2010.<sup>38</sup>

While some data are available on the race/ethnicity of those charged in Ontario, no similar information is available about the complainants in the cases. These statistics are not kept in Ontario, and the information cannot generally be garnered from other sources (such as media reports) because the identities of the complainants in sexual assault cases are usually protected. Similarly, data are not available on investigations that do not proceed or on charges that are dropped.

### ➔ The potential overrepresentation of Black men amongst those charged

Many of those we consulted in the course of this project expressed the belief that Black men are overrepresented amongst those charged for non-disclosure in Ontario. Based on the data available, it is difficult to empirically confirm or deny this perception. The percentage of those charged who are known to be Black men (approximately 41% in the period 1998–2009, or 50% if one looks only at heterosexual men charged in the period 2004–2009)<sup>39</sup> is close to the estimated percentage of HIV-positive heterosexual men in Ontario who

are Black (approximately 46% of heterosexual HIV-positive men).<sup>40</sup> Therefore, as a rough conclusion, there would seem to be a small overrepresentation in recent years. The number of charges we are dealing with, however, is relatively small (as compared, for example, to the number of people in prisons, where we know there is an overrepresentation of Black and Aboriginal persons) and, as discussed above, the data on race are incomplete.

Whether there is a numerical overrepresentation, however, is not the most important issue for ACB communities. More revealing is an examination of why the perception exists that Black men are overrepresented among those charged. Moreover, what are the impacts of this perceived overrepresentation? And how can ACB communities intervene most effectively in this issue, which is obviously of critical importance within our communities?

.....

*“The overrepresentation of Black men is a natural progress of what has historically been an overrepresentation of Blacks in the criminal justice system, period.”*

.....

*“When the media starts to create images of what that looks like, ... put[s] a face to criminalization and non-disclosure and that paints this image of you know, of Black men infecting women who have died, having sex loosey-goosey, not having any form of protection, no taking or sense of responsibility, using their sexuality as a weapon, et cetera. I think this seems very familiar to us from the Black communities because this is the kind of stereotyping and profiling that we see come up in other areas for many years.”*

.....

*“When you are looking at Black men, you are looking at issues around race, gender, sexual orientation and how we view HIV. And you are also looking at that intersection with HIV. I think we need to have a framework that recognizes that people are actually navigating these intersections in very unique ways.”*

## ➤ Racialization of the criminalization of HIV non-disclosure

Racialization is a process by which non-white groups are designated as different and singled out for unequal treatment on the basis of their race, ethnicity, language, religion or culture. Both the literature review and the discussions we conducted for this project suggest that the criminalization of HIV non-disclosure has become racialized in Ontario. While our conversations were diverse and many different facets of this issue were addressed, the overwhelming perception was that the racialization of this issue is a pressing concern to ACB communities. What follows below is a synopsis of some of the themes that emerged in our research as specifically relevant to understanding the impacts of the criminalization of HIV non-disclosure on ACB PHAs and on ACB communities, and more generally as relevant to understanding racialization.

### a) The definition of the crime

Why does HIV *non-disclosure* attract criminal charges? And why is non-disclosure characterized as invalidating consent, transforming otherwise consensual sex into a sexual assault? The law is a powerful tool for defining what will be considered legitimate and acceptable behaviour within a society and, likewise, what will fall outside of that sphere. How crime is conceptualized and defined therefore has serious implications for how we understand deviance, alternative lifestyles and diverse communities, as well as for delineating gender, race and class divisions.<sup>41</sup>

Through our discussions and further reflections, it became clear, first, that defining the crime as non-disclosure of HIV status has somewhat of a convoluted effect on the agency of the so-called “victim”, as well as that of the so-called “perpetrator”. The complainant’s agency to ascertain information, accept risk and participate fully and actively in the sexual encounter is therefore discounted. Similarly, the accused’s efforts to reduce the risk of HIV transmission through other means (e.g., engaging in lower risk sexual activities only, consistently using condoms, diligently complying with treatment regimens) may also be underappreciated. Individuals find themselves in different social positions — mediated by their sex, age, education, language, immigration status, economic security and sexuality, among other factors — which impact on their ability and willingness to seek and reveal personal information and/or reduce risk. Defining the crime in this way allows little room for appreciating the many different approaches to HIV prevention and to sexual intimacy

that characterize “real-life” sexual encounters. Similarly, it does not allow for recognition of the differing social contexts that empower or disempower individuals in their sexual interactions. Nor does it allow for differentiation between cases where there is a malicious deception and those where the PHAs attempted to act, or believed that they acted, responsibly and in line with HIV prevention.

Second, our research led us to question what types of sexual activities and relationships are being defined as legitimate (and illegitimate) by this body of criminal law. In reality, there is great diversity in sexual relationships, including the number of partners, types of sexual activities, venue, degree of intimacy, and the personal information that is shared. Did the Supreme Court justices have a certain model of relationship in mind when they crafted the disclosure requirement — perhaps monogamous, heterosexual, longer-term, trusting relationships, assuming a certain commitment that would include mutual sharing of all aspects of each other’s lives and also, probably, unprotected sex? Because disclosure is a process and involves a considerable amount of intimacy and trust, it may be less common in certain types of relationships, including, for example, non-monogamous relationships, short-term relationships or one-time encounters, commercial transactions, and abusive relationships. As the law is constructed, these types of relationships may be more likely to attract scrutiny and criminal charges.

Finally, we were reminded that the ASO community in general does not promote disclosure as a primary means of HIV prevention. Therefore, as one of our informants pointed out, the law is increasingly out of step with the latest developments in HIV prevention and treatment. Furthermore, the number of charges cannot be interpreted as a proxy for how much disclosure is actually taking place. Using the criminal justice system is only one of many responses to instances of HIV exposure, and the lens of the law is very limiting. We must be careful to resist putting too much emphasis on the criminal cases when trying to understand and respond to HIV in our communities.

.....  
*“Most infections take place when people don’t know their status. The reality is that PHAs have been incredibly vigilant, have been incredibly cautious and fearful of transmitting or passing the virus. The public perception doesn’t reflect this reality.”*

Arguably then, this definition of the crime may tend towards criminalizing alternative sexualities and sexual activities that realistically are very common, including unprotected heterosexual intercourse with some assumption of unspoken risk (i.e., knowledge that pregnancy and/or sexually transmitted infections are a possible outcome) when they occur in certain types of relationship (i.e., abusive, shorter term, non-monogamous).<sup>42</sup> Further research and analysis are required to determine how this may be contributing to the racialization of the criminalization of HIV non-disclosure. However, if the definition of the crime is contributing to more charges against ACB people and to constructions of racially specific HIV “criminals” and “victims” in the public imagination, then the definition of the crime most certainly is a factor contributing to the racialization of the criminalization of HIV non-disclosure in Ontario.

### b) Who is reporting HIV non-disclosure to the police?

As this is a complaint-driven process, in the normal course of events someone goes to the police and makes a complaint before an investigation begins. A question raised in several of our discussions was “who are the complainants?” Many of our informants stated that the complainants were mostly heterosexual white women, a conclusion that we cannot empirically confirm. While media reports and court transcripts of the cases seldom contain information about the complainants’ race or ethnicity, it is likely that some of our informants may have known the identities of some of the complainants through their community networks. Undoubtedly, assumptions are also made based on knowledge of racism within the justice system and also based on how the media reports on the cases.

Even if one assumes that most complainants are white women, there is no reason to assume that more white women are unwittingly exposed to HIV. As noted above, Black people in Canada have been subjected to over-policing, racial profiling and a failure of the police to protect adequately in response to requests for assistance.<sup>43</sup> This has led to mistrust, suspicion, hostility and fear towards the police.<sup>44</sup> This influences who reports to police, making it less likely that members of ACB communities — especially ACB women — will go to the police to seek protection and assistance.

With respect to HIV exposure, Black women may pursue other forms of redress and assistance. Many Black women also believe they are unlikely to achieve justice by going to the police.<sup>45</sup> Similarly, we note that few gay men seem to be reporting HIV non-disclosure to the police, relative to the number of MSM who are HIV-infected. For women who are in situations of dependence — emotional, social, economic, immigration sponsorship — reporting a sexual partner to the police may threaten their safety and stability (and in some instances, that of their families), further deterring them from making a police report. Whether anyone chooses to report a

“We expect people to just go and disclose, without really helping them understand what the process of disclosure looks like. If you hear Public Health calls you, to say you just tested HIV positive, and a couple weeks later they are following you. Have you told your sexual partners, can we contact and follow-up, and stuff like that. Not recognizing that disclosure is a process, it’s a process that works well when people have dealt with the losses that surround an HIV diagnosis. When they have come to accept that they are HIV positive and willing to actually move forward. And this is a state that can take years.”

“Black women are unwilling to come forward, yet there are all of those stories in the papers. There should be more cases of white gay men in the media but they are relatively few. I’m not sure what’s the reason for that. But what I do know however is, among Black men, those who are given the most prominence are cases involving white women. Sometimes I think there is an important sub-text there which in fact has always been there. In terms of relationships between Black men and white women, and how they are interpreted by white society, and how Black men are interpreted by white society when they transgress that racial boundary.”

“... [P]erhaps poor white women without agency. How they access and use the justice system as a tool for redemption is worth exploration.”

“I think part of why, why also perhaps more Black people haven’t brought it forward is history ... is history and experience of racism with the criminal justice system. And also there is a cost to take legal action. The criminal justice system hasn’t served us well, ... . We have a history of that. I don’t think Black people are going to be quick to want to lay charges against someone else. And of course there are all sort of gender dynamics in that as well, based on the nature of relationships.”

*“Criminalization creates a fertile environment for HIV to continue spreading.”*

perceived criminal activity to the police depends in many ways on their community's relationship to the police, as well as their age, social position, previous experience with the police, and other factors. Therefore, based both on the literature review and our interviews and focus groups, we can conclude that some of the racial distinctions (in terms of who is charged with HIV non-disclosure and how the cases are portrayed) result from the dynamics of who reports to the police, in which race may be an important dimension.

Another factor raised in one of the focus group discussions is the fact that a PHA who is supported and well informed is better able to deal with the shock, anger or other emotions they feel about their HIV-positive diagnosis, and therefore less likely to go to the police than someone who is unsupported and panicking. This suggests that those who are not connected with ASOs or other support networks, including those who avoid community organizations and those who are marginalized in society for any number of reasons, may be prominent amongst complainants. Further research is required to understand the full array of dynamics at play, including racial elements.

### c) Why do some PHAs not disclose their HIV-positive status?

As discussed above, HIV disclosure is not a simple, straightforward or "normal" act. As one focus group participant explained, disclosure is a process that takes time and support. It should not be expected that PHAs can just go out and automatically disclose. We should also appreciate the very real impediments to disclosure that are particular challenges for ACB people, as discussed above.

It is also important to note that just because allegations have been made does not necessarily mean that the PHA did not disclose. In fact, disclosure will not necessarily protect a PHA from allegations, threats, police investigations or criminal charges. The threat of making a complaint to police is a powerful weapon in the hands of a disgruntled ex-lover or abusive partner. Even if a case does not proceed, the threat and/or investigation can be extremely damaging.

In terms of the racialization of HIV non-disclosure, an important question for further interrogation is with respect to HIV disclosure and sexual cultures amongst diverse ACB people. Are there cultural, religious or social assumptions, practices or beliefs that encourage or discourage disclosure? The Stigma Study, discussed above, certainly suggests some factors, but the analysis would have to be taken one step further in order to see how it is playing out in the face of criminal prosecutions.

### d) The immigration factor

An added dimension to this issue is that of immigration. Immigration status is one of the characteristics that can be used to justify treating certain groups differently, and thereby racializing them. As pointed out by many of our informants, many members of ACB communities are newcomers to Canada and various aspects of this issue have particular significance for newcomers. For example, understanding one's legal responsibilities may be particularly difficult for a newcomer, given language and

"As long as we are not tackling stigma, I'm not sure we will be able to deal with issues of disclosure. It is one of those factors that is very heavily interlinked with what people do, what they think they can do, and how they choose to respond."

"Clients have a fear of being outed to their communities and to their family back home and have been very hesitant to [connect] with Black ASOs."

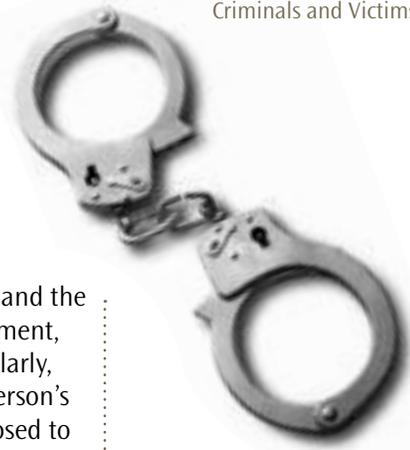
"From a trauma perspective, when individuals are coming from significant trauma from various countries, the first thing that happens with severe trauma is people do disassociate. And when you disassociate, disclosing HIV is not something, the first thing to be thinking about. So a number of individuals who is in that place of multiple trauma, they don't disclose. And some of them also, they don't know they are HIV positive."

"What criminalization does is that it makes that disclosure [in personal relationships] even harder ... . It doesn't make it easier."

"One of the things that happens is not that they just lose, they just serve their sentence, but on top of their sentence they get deported. And it doesn't matter how much they have given to Canadian society."

"A lot of newcomers fear this issue messing with their whole immigration process, so they isolate themselves, so they are lonely and that causes depression."

"Knowledge of your own rights and how the legal system works as a newcomer is very low. Other things take more of a priority, like learning how to take the TTC, navigate the city, so issues like this goes on the back burner."



cultural barriers, the abundant misinformation circulating in the community, and the prioritizing of more immediate concerns such as finding housing and employment, learning the transit system, and assisting children adapt to a new school. Similarly, anxiety regarding one's immigration status within Canada may impact on a person's ability to disclose their HIV-positive status or to seek support or redress if exposed to HIV in Canada.

Furthermore, as much of the literature on race and crime highlights, there has been a tendency within Canada to associate crime with those deemed as "outsiders", particularly Black men.<sup>46</sup> HIV has also been characterized as an African disease, a scourge brought into Canada by foreigners. When these two assumptions come together, a racialized criminalization of HIV non-disclosure becomes a foreseeable outcome. Further analysis is required to fully understand the various ways in which the immigration factor may be intersecting with the criminalization of HIV non-disclosure, but it is patently clear from our research that it is a critical element in the larger picture of how this issue is playing out in Ontario.

#### e) Impact of criminalization of HIV non-disclosure on ASOs and other agencies

HIV among ACB people in Ontario is a large and complex issue and the organizations working to serve these populations' needs in terms of HIV prevention, care, treatment and support are understandably stretched. Adding a complex legal issue such as the criminalization of HIV non-disclosure to the plethora of issues they are already dealing with cannot but cause anxiety, confusion, resource depletion, and programmatic challenges in terms of how to effectively service all clients. Through our conversations, we heard of organizations struggling with dwindling public support for their work as a result of ongoing HIV non-disclosure cases in their area; we heard also of agencies challenged to serve both individuals charged in relation to HIV non-disclosure and complainants in these cases. The possibility that agency records could be subpoenaed if a client is charged creates further dilemmas for agencies (as well as a possible disincentive for PHAs to be forthcoming about their

*"I have had experience with Black women who will plead guilty before they go to court, just because it's easier, you know, you won't have your story plastered all over the place. The other part is, one woman, I know before they picked her up, she chose to go back home. You know she left, she chose to go back. She had come here as a refugee, but she chose to go back, and face what she was fleeing. That seemed to be a better option for her than to actually go to jail or end up in jail."*

*"I think for Black men, there is more scrutiny, more judgement perhaps. Part of that is, for so long, in terms of sexual socialization, it was perhaps perceived that maybe some men are not really capable of using good judgement."*

**"Agencies who have had to deal with this on a more local level have seen public participation and support in their agency decline as a result of being in the media. At the dollar level, the agency feels it. Hate mail. The media is steering this towards a criminal/police/Crown attorney system, when this is largely a public health issue."**

**"We are a relatively young sector and a sector that is not media savvy, when we should be. We are not and part of that is that we have our heads in the sands, we are trying to do this work, as organizations we are trying to stay afloat, and in a challenging economic environment we are trying to keep our heads above water."**

**"For our agency, really, we encourage the staff to unfortunately, but realistically, really not delve into this conversation."**

**"For those partnerships to work, it means that those agencies, like the one I work for, and most of those in Ontario, will have to have a certain degree of understanding about issues to do with race and sex and oppression and power in order to really make those things happen well."**

risk behaviours and seek services and support). Moreover, we learned of the difficulties some agencies were experiencing in terms of educating their own staff and volunteers about this issue, developing their own internal policies and procedures, and building their own understanding of the dynamics of the criminal justice system in relation to race, culture and sexuality.

Supporting and building capacity among these important agencies is obviously an essential focus for future actions, as is developing avenues for appropriate referrals to more legally focused organizations. Recognizing the additional burdens this issue is placing on agencies, how different agencies may be differently affected depending on the race and social status of their clients, and how the focus of services may be shifting in response to the escalation of criminal charges for HIV non-disclosure in Ontario will help to guide strategic interventions.

### ➔ Fuelling the fires of stigma and discrimination

At the core of this issue is the interaction between stigma, discrimination and the criminalization of HIV non-disclosure. On the one hand, there is the stigma associated with race. It is based in histories of slavery, prejudice, colonialism, exclusion and poverty, and casts people as “racial others,” positioning them in unequal power relations and exposing them to racial discrimination. On the other hand, there is the deep-rooted stigma associated with HIV, which further compounds the

challenges surrounding disclosure. At the intersection of these stigmas, Black people face a criminal justice system that associates certain deviant behaviours with certain racial contexts.

Stigma and discrimination are among the impetuses behind the criminalization of HIV non-disclosure. Criminalization of HIV non-disclosure also fans the fires of stigma and discrimination.<sup>47</sup> This dynamic is apparent from both the literature on HIV, race, and the criminal law, as well as from our discussions conducted throughout this project.

*“The images that we often see, the ways that Black sexuality has always been depicted as uncontrollable, you know the notions of wild and savage, we can’t control our libidos, and from the start of HIV we were considered vectors of the disease. So that way of thinking and talking about Black people continues.”*

*“To us this issue is about the pathologizing of Black men, the criminalizing of Black men, the profiling of Black men as dangerous sexual predators and criminalizing of their condition, and this was systemic in nature.”*

*“The general assumption is that anything I do as an HIV-positive person is probably going to be open to scrutiny and like trouble.”*

*“Society has given itself permission to discriminate in certain areas and this is one of them.”*

“... [C]riminalisation increases stigma. From the first diagnosis of AIDS 27 years ago, HIV has carried a mountainous burden of stigma. This has been for one over-riding reason: the fact that it is sexually transmitted. No other infectious disease is viewed with as much fear and repugnance as HIV. Because of this, stigma lies at the heart of the experience of every person living with HIV.

It is stigma that makes those at risk of HIV reluctant to be tested; it is stigma that makes it difficult — and often impossible — for them to speak about their infection; and it is stigma that continues to hinder access to the life-saving antiretroviral therapies that are now increasingly available across Africa.

Legislators, bewildered, baffled, or at a loss as to how to respond effectively to the epidemic, may be seduced into taking recourse to criminalisation, because it seems attractive, effective and media-friendly. But it is not prevention- or treatment-friendly. It is hostile to both.

This is because, tragically, it is stigma that lies primarily behind the drive to criminalization. It is stigma, rooted in the moralism that arises from the sexual transmission of HIV, which too often provides the main impulse behind the enactment of these laws.

Even more tragically, such laws and prosecutions in turn only add fuel to the fires of stigma. Prosecutions of HIV transmission and exposure, and the chilling content of the enactments themselves, reinforce the idea of HIV as a shameful, disgraceful, unworthy condition, requiring isolation and ostracism.

But HIV is a virus, not a crime. That fact is elementary, and all-important. Law-makers and prosecutors overlook it. We must fight this new burden of moralising stigma and persuade them of how wrong their approach is.”<sup>48</sup>

— Edwin Cameron, Scott Buris and Micheala Clayton, “HIV is a virus, not a crime: ten reasons against criminal statutes and criminal prosecutions”

- <sup>16</sup> See, for example, C. J. Mosher, *Discrimination and Denial: Systemic Racism in Ontario's Legal and Criminal Justice Systems, 1892–1961* (Toronto: University of Toronto Press, 1998); *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen's Printer for Ontario, 1995); W. Chan and K. Mirchandani, *Crimes of Colour: Racialization and the Criminal Justice System in Canada* (Peterborough: Broadview Press Ltd., 2002); and F. Henry and C. Tator, *The Colour of Democracy: Racism in Canadian Society*, 3rd Ed. (Toronto: Thomson Nelson, 2006).
- <sup>17</sup> Henry and Tator, *The Colour of Democracy*, p. 133.
- <sup>18</sup> See, for example, S. Wortley and J. Tanner, "Racial Profiling in Canada: Survey Evidence from Toronto," *The Canadian Review of Policing Research* 1 (2004): pp. 24–36; S. Wortley and J. Tanner, "Discrimination or Good Policing? The Racial Profiling Debate in Canada," *Our Divers Cities* 1 (2004): pp. 197–201; F. Henry and C. Tator, *Racial Profiling in Toronto: Discourses of Domination, Mediation, and Opposition* (Toronto: Canadian Race Relations Foundation, 2005); C. Tator and F. Henry, *Racial Profiling in Canada: Challenging the Myth of 'A Few Bad Apples'* (Toronto: University of Toronto Press, 2006); and D. Tanovich, *The Colour of Justice: Policing Race in Canada* (Toronto: Irwin Law Inc., 2006).
- <sup>19</sup> Henry and Tator, *The Colour of Democracy*, p. 133.
- <sup>20</sup> *Ibid.*, p. 134.
- <sup>21</sup> *Ibid.*, p. 127.
- <sup>22</sup> A.Y. Davis, *Women, Race & Class* (New York: Vintage Books, 1983), pp. 172–201.
- <sup>23</sup> Canadian HIV/AIDS Legal Network, "Criminalization of HIV exposure: current Canadian Law — Info Sheet 1," *Criminal Law and HIV* (Info Sheets) (2008). Available via: [www.aidslaw.ca/criminallaw](http://www.aidslaw.ca/criminallaw). Note that a recent decision of the Manitoba Court of Appeal decided that intercourse without a condom may not require disclosure if the PHA's viral load is sufficiently low that there is no longer a "significant risk" of HIV transmission, or if condoms are used carefully and consistently. See *R. v. Mabior*, 2010 MBCA 93, para. 78–97, 127–37. Similarly, a trial court in British Columbia recently acquitted a man of aggravated sexual assault charges for HIV non-disclosure in relation to intercourse as the judge found the medical evidence did not establish a "significant risk" of HIV transmission for the specific sex activities in question. See *R. v. J.A.T.*, 2010 BCSC 766. In each of these cases, the judges considered scientific evidence about the risk of HIV transmission in the specific circumstances of the case, and were careful to note that a determination will have to be made based on the evidence presented in each case. It remains to be seen if these decisions will be upheld on appeal and whether other courts will follow the same approach. Given these developments, however, it can no longer be said without qualification that anal or vaginal intercourse without a condom always poses a legally "significant risk" of HIV transmission and hence requires HIV disclosure in order to avoid criminal prosecution.
- <sup>24</sup> *Ibid.*, Info Sheet 1.
- <sup>25</sup> *Ibid.*, Info Sheet 1.
- <sup>26</sup> Mykhalovskiy et al., p. 17.
- <sup>27</sup> *R. v. Cuerrier*, [1998] 2 S.C.R. 371.
- <sup>28</sup> *R. v. J.A.T.*, 2010 BCSC 766, at para. 89.
- <sup>29</sup> Mykhalovskiy et al.
- <sup>30</sup> *Ibid.*, p. 8–9.
- <sup>31</sup> *Ibid.*, p. 8.
- <sup>32</sup> *Ibid.*, p. 9.
- <sup>33</sup> *Ibid.*, p. 10.
- <sup>34</sup> *Ibid.*, p. 11.
- <sup>35</sup> *Ibid.*, p. 11.
- <sup>36</sup> *Ibid.*, p. 12.
- <sup>37</sup> *Ibid.*, p. 13.
- <sup>38</sup> Canadian HIV/AIDS Legal Network tracking of criminal prosecutions for HIV non-disclosure.
- <sup>39</sup> Mykhalovskiy et al., p. 12.
- <sup>40</sup> Personal communication with Dr. Robert Remis, November 11, 2010.
- <sup>41</sup> K. Mirchandani and W. Chan, "From Race and Crime to Racialization and Criminalization," in Chan and Mirchandani, *Crimes of Colour*, p. 14.
- <sup>42</sup> This point is made in A. Persson and C. Newman, "Making monsters: heterosexuality, crime and race in recent Western media coverage of HIV," *Sociology of Health & Illness*, 30 (2008): pp. 632–646.
- <sup>43</sup> Henry and Tator, *The Colour of Democracy*, pp. 162–165.
- <sup>44</sup> *Ibid.*, p. 163.
- <sup>45</sup> "In assisting the women who were processed through the different legal and social institutions, it was apparent to anti-rape workers that women are not all treated in the same way by those institutions. The likelihood of a woman's case making it through to a trial depends not only on her age, marital status, and whether or not she knew the rapist, it also has a great deal to do with whether or not she is white, and whether she is employed or is on welfare. . . . Because the police have the power to decide if a case is 'founded' or 'unfounded' (the distinction is supposed to be based purely on whether there is enough evidence to get the case into court, although decisions often have a strong basis in the police's judgements of the woman reporting the rape), they have a direct influence on which women's cases end up in court. And, because the police's judgements reflect the biases of controlling institutions, the women who are most likely to be believed are white, middle-class, married (though being a youthful virgin is almost as good), and professionals or homemakers. The fewer categories that a woman fits, the less are her chances of being believed." Toronto Rape Crisis Centre, "Rape: Toronto Rape Crisis Centre," online at <http://www.trccmwar.ca/articles/rape.html>.
- <sup>46</sup> Henry and Tator, *The Colour of Democracy*, p. 165; and Henry and Tator, *Racial Profiling in Toronto*, p. 36.
- <sup>47</sup> C. Dodds and P. Keogh, "Criminal prosecutions for HIV transmission: people living with HIV respond," *International Journal of STD & AIDS* 17 (2006): pp. 315–18; *10 Reasons to Oppose the Criminalization of HIV Transmission* (New York: Open Society Institute, 2008), pp. 10–11.
- <sup>48</sup> E. Cameron, S. Burris and M. Clayton, "HIV is a virus, not a crime: ten reasons against criminal statutes and criminal prosecutions," *Journal of the International AIDS Society* 11 (2008). Open Access version available online at <http://www.jiasociety.org/content/11/1/7/abstract>.

## SECTION 3

### The Role of the Media

*“Predators.” “Not Canadian.” “Foreigners.” “Promiscuous.” “Wanton disregard for human life.” “Using sexuality as a weapon.” “Irresponsibility.” “Dangerous.”*

These are the piercing words used by community members to describe the image of ACB PHAs being painted by the media through its reporting on criminal cases related to HIV non-disclosure. These images are seen as inaccurate, harmful, stigmatizing and all too prevalent by many members of the community. Furthermore, recent research revealed that more than half of PHAs who know that the law requires them to tell their sexual partners of their HIV status learned this from the media.<sup>49</sup> As a result, the role of the media with respect to the racialization of the criminalization of HIV non-disclosure is a key concern, requiring both analysis and intervention.

#### ➤ Race, the media and crime reporting

Studies have demonstrated that the Canadian media generally portrays a negative image of people of colour.<sup>50</sup> The stories told about people of colour, including the photographs, are often not those that ACB communities would choose themselves. A consistent theme seen in Canadian reporting is the portrayal of people of colour as “outsiders within”.<sup>51</sup> Moreover, it has been noted that members of minority groups are often extremely sensitive to negative images of their community in the media as these portrayals are linked to their feelings of marginalization, exclusion and “otherness” vis-à-vis mainstream society.<sup>52</sup> Negative representations of ACB community members can quickly take on symbolic meaning.

Crime reporting in particular has been a site of racialization within Canadian media. Racist ideology permeates crime reporting, evidenced by the over-reporting of crimes allegedly committed by people of colour and the emphasis on the race, ethnicity and/or immigration status of the accused in many crime stories. Through crime reporting then, racism in Canadian society is reproduced, normalized and preserved. According to academics Carol Tator and Frances Henry, media portrayal of Black people may lead some to think that Black people are criminally disposed. These persistent representations of Black men as criminals may generate fear of and hostility towards Black men in particular.<sup>53</sup> As violence and crime are continually coded as a Black problem, it becomes difficult for the public to distinguish fact from fiction when it comes to the links between race and crime.<sup>54</sup>

The public’s understanding of crime generally reflects what the media reports. Most people do not have first-hand experience

or knowledge of crime: the world of criminal activity is revealed to them by the media.<sup>55</sup> Moreover, many white people acquire most of their information about minorities and issues of concern to minority communities from the media.<sup>56</sup> For this reason, the media’s influence in this regard is extensive. In addition, the media raises public anxiety about crime, which in turn influences social and political agendas.

#### ➤ HIV Non-disclosure in the news

It is against this backdrop of racialized crime reporting that we must consider the impacts of the extensive coverage of many of the criminal cases against PHAs accused of not disclosing their HIV-positive status to their sexual partners. As non-disclosure charges have proliferated in recent years, reports about the charges, trials and verdicts have been featured in local and national newspapers, on talk radio and standard radio programs, on TV newscasts and various TV programs, as well as in online and alternative media sources. Moreover, cases in which the accused is Black have received particularly extensive media coverage.<sup>57</sup> All this coverage has sounded alarms among members of ACB communities.

It is beyond the scope of this paper to do a comprehensive survey or scan of the content of media reporting on HIV non-disclosure cases. The focus here is on community perceptions of this coverage and the potential impacts of the reporting, both on community members and on HIV prevention efforts within ACB communities. To that end, we reviewed stories about ongoing HIV non-disclosure investigations and trials appearing in Canadian newspapers during July, August and September 2010,<sup>58</sup> as well as a sampling of stories relating to the cases against:

- a Black Toronto man charged in 2009 with several criminal offences related to alleged HIV non-disclosure and sexual assault;
- a Black man in Southern Ontario charged with multiple counts of aggravated sexual assault for alleged HIV non-disclosure in 2006; and
- a Black British Columbia man charged with four counts of aggravated sexual assault for alleged HIV non-disclosure in 2007.

In addition, the perspectives of community members were gathered through the focus groups, interviews and discussions that were part of this project.

## The tone of Canadian coverage changes: HIV transmission as murder

In 2005, Aziga, a Black Southern Ontario man, was charged with multiple counts of aggravated sexual assault and first-degree murder for allegedly not disclosing his HIV-positive status to his female sexual partners. Two of the complainants had died of allegedly AIDS-related causes, resulting in what is believed to be the first murder charges for HIV non-disclosure anywhere in the world. This case received extensive coverage through to his ultimate conviction for these offences in 2009. No discussion of race, media and HIV non-disclosure prosecutions in Canada would be complete without reference to this sensational case.

Aziga was a Ugandan-born Canadian citizen who had been diagnosed HIV-positive in 1996. A newspaper article on the testimony of a forensic psychiatrist who examined Aziga recounted that he had a traumatic childhood, witnessing extensive violence and suffering the loss of several siblings, amid civil unrest in Uganda. He fled to a Kenyan refugee camp in 1982 where he witnessed further violence and human rights abuses.<sup>59</sup> Other articles recounted that he entered Canada as a refugee in 1984, after which he studied at the University of Guelph and found employment with the Ontario government. He was married in Canada and had three children.<sup>60</sup> In October 2002, he was served with a Sec. 22 order under the Health Protection and Promotion Act. In August

2003, the Medical Officer of Health sought a stricter court order against Aziga, in light of his reckless behaviour.<sup>61</sup>

Arguably, given the extensive coverage surrounding this case and its extraordinary circumstances, it is foremost in the minds of the general public (and journalists) when they think of criminal prosecutions for alleged HIV non-disclosure. The distinct circumstances of other, less sensational cases may well be lost in discussions of future cases.

In addition, the Aziga case prompted the most extensive reporting on the policy debate around criminal prosecutions for HIV non-disclosure in the media in recent years.<sup>62</sup> Unfortunately, the positions of some advocates and organizations were misrepresented in some of the reporting and the subtleties of the policy arguments were lost in the sensational reporting on the historic guilty verdict. Moreover, anti-immigration sentiment was overt in some of the articles, hammering home the link between HIV/AIDS and immigrants from Africa that is so central to the racialization of this issue in the media. Below are three examples, extracted from articles appearing in Canadian newspapers in the days following the verdict.

### “He killed with hatred and HIV”

*“When he wasn’t busy fornicating them to death, Johnson Aziga must have hated women.*

*Alternatively, the former Ontario civil servant was entirely indifferent to females, without feeling or conscience as he introduced a silent killer – cloaked in lust – into their lives.*

*Dishonest and duplicitous, thinking only of his immediate sexual gratification, the 52-year-old knowingly and intentionally exposed his unsuspecting lovers to the HIV virus right up until the morning of his arrest on Aug. 30, 2003.*

*He cut a wide swath with his penis. ...*

*He liked his women white, plain, even homely and probably lonely. They were co-workers, single-mom neighbours and ladies picked up in bars.*

*Of course, to make love is not necessarily to like and clearly not to give a damn.”*

— **Rosie DiManno, Toronto Star,**  
April 6, 2009

### “Murder, not policy,”

*“... The AIDS advocates misunderstand the role of the state. The state can never overlook rape or murder on policy grounds. To argue that a generalized stigma is a bigger concern than an actual victim of rape or murder (or in Mr. Aziga’s crimes, both) is nonsensical. For a society to give up, in light of policy considerations, the protection it extends to each and every individual would require a debate the likes of which this society has never had. But to equate Mr. Aziga’s wilful spreading of HIV with murder is simply to apply the law’s protection to all, within Canadian norms.*

*When Pierre Trudeau said the state should keep out of the bedroom (he was advocating the decriminalization of homosexuality), he explained that “What’s done in private between two consenting adults doesn’t concern the Criminal Code.” The key is consent. Sexual intercourse without consent is rape. And if the rape victim dies in the course of a violent assault, it is murder. Elsewhere [Senior Policy Analyst with the Canadian HIV/AIDS Legal Network, Alison] Symington says that human rights, and in particular women’s rights, should be at the core of the response to the HIV/AIDS pandemic. It is a strange view of women’s rights in which the criminal law offers women no protection from rape in certain cases. ...”*

— **Editorial, Globe and Mail, April 7, 2009**

### “Opening doors to disease,”

*“Johnson Aziga is an immigrant from Uganda to Canada. ...*

*... Aziga’s case is unique in that it marks the first time in this country, perhaps in the world, that someone has been accused and convicted of first-degree murder for such a crime. It is a verdict that finally recognizes the careless or wilful transmission of HIV as the act of deliberate violence that it is. All sexually active Canadians should feel a little more comfortable because of that.*

*No Canadian, however, should feel very comfortable about this country’s immigration regulations as demonstrated in the Aziga case and other cases as well.*

*Although Johnson Aziga came to Canada from a continent, Africa, where AIDS is endemic, and from a country that has had one of the highest rates of HIV infection on that continent, he was not tested for the disease before he was accepted as an immigrant. ...”*

— **Editorial, Winnipeg Free Press,**  
April 7, 2009

The choice of what to report on, as well as the headlines, quotations and details to include are powerful decisions that help define what is normal and natural in our societies. Moreover, how the stories are told shapes the public's understanding of the issues, communities and events described. A number of trends were evident in the sample of newspaper stories we reviewed, as discussed below. Together, these journalistic techniques and the frequent reporting on the cases contribute to the sense of unease, even anger, expressed by community members about the media coverage of cases of HIV non-disclosure.<sup>63</sup>

### a) Explicit and hyperbolic language

Sex, disease, deception ... stories of criminal charges for HIV non-disclosure provide ample fodder for reporters to use a range of journalistic strategies to tell an enticing story. In many of the reports reviewed, we see exaggeration, evocative language and sexual imagery. See for example the following two quotes and a headline:

“He’s possibly waking up somewhere in Calgary this morning, another notch on his bedpost and another devastating HIV-positive blood test to follow. That’s how two Winnipeg women learned they had the potentially lethal virus.”<sup>64</sup>

“Handcuffs offer protection even more effective than a condom – and hopefully it isn’t too late.”<sup>65</sup>

“Assault with HIV; Cops seek warrant after 2 women infected”<sup>66</sup>

### b) A sense of panic and danger

Creating tension and urgency in the stories is accomplished, at least in part, by building a sense of panic and danger. We found that many of the stories reviewed allude to an exaggerated risk of HIV transmission, notions of HIV/AIDS as fatal, and the possibility that either there are numerous other potential “victims” who remain unaware that they have been exposed to HIV, or that the accused will continue exposing unsuspecting partners until the police are able to stop him. This technique also leads readers to feel that “something has to be done,” that criminal charges for HIV non-disclosure are warranted, and that PHAs are putting the public at terrible risk and must be stopped. The following three quotes are examples of this:

“You can draw all kinds of analogies — you’re walking around with a loaded gun,” Mr. Wamback [co-founder and Chair of the Canadian Crime Victim Foundation] said in an interview.”<sup>67</sup>

“Cops know of at least one person who had sexual contact with him without knowing his status. But they say [name of accused] was known to hang around in Toronto’s gay and straight communities, and they’re worried he may have had similar relationships with people who may not be aware of his past.”<sup>68</sup>

“It’s believed the alleged HIV-carrier has been living in Calgary for months, potentially infecting women across the city with the virus. His name and photograph are now public and it’s probable there are Calgary women who are in for a nasty shock. If allegations of [name of accused] spreading the HIV virus prove accurate, his local sexual partners face a frightening blood test and then a terrifying wait for results that may change their lives.”<sup>69</sup>

### c) References to prior cases

Many of the newspaper articles reviewed conclude with references to other criminal cases related to HIV non-disclosure. By reminding the reader of earlier cases, reporters are emphasizing that this is not an isolated event, and may be inviting readers to apply a ready-made set of stereotypes, judgements and interpretations. Each new case can be understood as a further example of the original story.<sup>70</sup> The diverse circumstances of each case are played down and a common narrative template is created. The following two quotations are examples of this technique:

“There have been two other local arrests this year involving charges related to the possible spread of HIV infection. [Name of accused], 40, was arrested in June and faces one charge of aggravated sexual assault. [Name of accused] was arrested following a police complaint by another man. His preliminary hearing is set for Dec. 21.

[Name of accused], 30, was arrested in May and charged with aggravated sexual assault. An 18-year old woman complained she had sex with a man who did not disclose he had HIV.”<sup>71</sup>

“This isn’t the first time police in Canada have issued a warrant over HIV and allegations of knowingly spreading the virus. Another Winnipeg man from [African country], [name of accused], is seeking to overturn a 14-year prison sentence, after being convicted of not disclosing his HIV infection to his partners. It’s expected he will be deported once released from jail. And in 2009, a Hamilton jury found [name of accused] guilty, making him the first HIV-positive man in Canada to be convicted as a killer for recklessly spreading the AIDS-causing virus.”<sup>72</sup>

#### d) A focus on immigration status

When the accused in a criminal case of HIV non-disclosure was an immigrant, this fact was repeatedly mentioned in the news reports reviewed. Some of our informants also highlighted this feature as particularly prominent and problematic, stating that it reinforced the belief that HIV is a problem of foreigners, of “outsiders”, imported from the Caribbean and Africa by people wanting to take advantage of the Canadian system. Some also remarked that it could reinforce anti-immigrant sentiment. We noted that other information — irrelevant to the legal issues in the case, but possibly serving to paint a picture of the accused as deceptive and transgressing societal values — is also often included in the stories, such as marital status or a history of sex work or drug use. See the following examples:

“Born in [African country], [name of accused] came to Toronto in 2001 as a political refugee with his wife. After having difficulty starting a family, [name of accused] took his spouse to a Toronto hospital where they discovered she was HIV positive. ...

Over the next two years, [name of accused] had a series of overlapping relationships in which he had unprotected, consensual sex with seven women in London. To this day, [name of accused] remains married to his wife.”<sup>73</sup>

“The women said the man is from [African country], moved to Canada from Africa about 10 years ago, and has split his time between Winnipeg and Calgary.”<sup>74</sup>

“Court heard the woman was one of two who both believed they were in monogamous relationships with the now 34-year-old [African] immigrant.”<sup>75</sup>

#### e) Portrayal of the accused

In the stories reviewed, seldom is any sympathetic reporting spared for the accused. Information regarding his life and reasons he may not have disclosed are not included; instead the image of the accused suggests sexual predation, and a tendency to hunt innocent women. There is an emphasis on deception, hypersexuality and resistance to condom use. The media coverage of the cases involving Black men seems to tap into their mythical hypersexuality, portraying what has been referred to as a “monstrous masculinity”,<sup>76</sup> alien to proper Canadian heterosexuality. See the following two examples:

“That same year, [name of accused] met another woman at a wedding and pursued her for several months before she relented.”<sup>77</sup>

Three journalists were interviewed as key informants for this project. The points below are some highlights of the interviews, providing insight into how and why criminal cases are reported in particular ways, and possible avenues of intervention by the community.

- Reporting on crime is “cheap and dirty”: it is resource-friendly for a news outlet. Articles that “skim the surface” of the cases have a large audience. Rarely do reporters sit through an entire trial process, so a lot of details get lost in the coverage. If the charges are dropped, that is likely not reported to the public.
- Reporters follow the template of the media release from the police: a statement of what happened, who the victims are, the charges and the reason for the charges, and that the investigation is ongoing.
- Women who are the alleged victims are portrayed as “duped”, taken in and charmed by a “smooth talker”, and generally taken advantage of. The reporting tends to highlight the names, images, and immigration statuses of the Black men charged, portraying them as “not Canadian”.
- There has not been a clear message from ASOs that the media can hook on to.
- To be proactive with the media on this issue, one might target journalists who know HIV issues and develop relationships with them; meet with editorial boards and present concerns from a community point of view; send information packages to assignment editors containing basic facts, such as who to contact on specific issues, etc.; and develop FAQs or one-page backgrounders that are quick and factual.
- Specific work might be done with the Black media — print, radio, TV, and social media networks — to spread messages.
- An effort could be made to groom lead spokespeople on whom journalists can rely for an objective and nuanced side of the story from the perspective of an ASO, the community, and a client.
- When charges have been dropped or allegations proven untrue, complaints could be made with the Ombudsman or community relations departments of various media outlets about the impact of having one’s name and image in the media.

“This man is a danger to the public, and to women. He deserves condemnation from this court,’ Crown attorney Melinda Murray said. ‘There’s no remorse here. He doesn’t care that these women may have contracted HIV. He preyed on these women because they loved him and he took advantage of it. It’s unspeakable betrayal to these women.”<sup>78</sup>

#### f) Complainants as innocent victims

Our review of articles revealed that the female complainants are commonly portrayed as innocent, if naïve, victims.<sup>79</sup> They are reported to have been exposed to HIV by deceitful male partners whom they trusted. Often reference is made to the anger they feel at having been exposed to HIV, their ongoing fears about HIV infection, how their lives have been changed forever, and to their health situations. Unlike the treatment

given to the accused, their stories are conveyed with empathy and often their own voices are included. Several examples are featured below to illustrate this point:

“Four women, whose names are protected by a court order and are identified here by an initial, testified in court that they trusted him and had unprotected sex.”<sup>80</sup>

“Two women fought back tears and bared their souls Wednesday, saying they’ll never understand how their former boyfriend put them at risk by failing to disclose he was infected with HIV before engaging in unprotected sex. ‘I believe I literally slept with the devil,’ one of the victims told court during an emotional sentencing hearing. ‘I’ve become numb to the fact that such great evil and I could become so intimate. To use sex as a weapon of choice to try and kill people is so inhumane, so out of this world. There is no punishment fit for his crimes.’”<sup>81</sup>

“I realize this is not my fault. I’ve done nothing wrong other than love and trust this man,” she said.”<sup>82</sup>

“They were together for five years. He was the only father her son knew. They talked about having children of their own. ‘I loved him, I never loved anybody how I loved him,’ she said, tears streaming down her face.”<sup>83</sup>

### ➤ Community perceptions of the impact of this media coverage

The news reporting described above, marked by dichotomies of “innocent victims” and “guilty AIDS carriers”, is remarkably similar to that described by Asha Persson and Christy Newman in their account of newspaper coverage of criminal prosecutions in Australia,<sup>84</sup> and also that described in James Miller’s study of the case of a London (Ontario) man who was one of the first people in Canada criminally charged in relation to HIV exposure.<sup>85</sup> While perhaps not new, many of the participants in the development of this paper felt that this reporting was decidedly harmful to both PHAs and ACB communities more broadly.

First, there was a strong feeling that the style of coverage was contributing significantly to the stigma and discrimination against PHAs and racialized communities. Moreover, there was a perception that the media coverage itself, not just the possibility of false allegations or charges, was causing significant fear and anxiety among PHAs, especially women. PHAs were specifically fearful of having their name and photo circulate through the media and the ramifications this would have in their lives. They were specifically anxious about the stigma they would endure as a result of sensational reporting on PHAs who had been charged.

“AIDS stories are not that easy to sell, except when they end up in the criminal system.”

“... We have a media that loves this issue and loves to portray Black men as predators, without even realizing that they are doing it. We have a PHA community that is really divided on this issue. I think we as the Black community are also divided on this issue, because there is so much stigma there. There are a lot of contradictory factors at play that make it hard and difficult to find a solution.”

“... [B]ut if you do something wrong, immediately the media is there. There is still this belief that Black is bad.”

“White men are also charged, but rarely ever depicted in the media.”

“People are being tried and convicted in the media.”

“The cultural dynamics at play between men and women in some of these communities are different than what people from North American or Caucasian backgrounds would be familiar with. There is a sense that people may feel a need to not push back because they may not know whether it is racialization that is playing out here. Or is it the gender power imbalances, biases around sex and silence to not talk about sex that are playing a part there. So for someone who is less informed about the nuances at play, it is more difficult to push back against what they see in the media.”

“I mean the media is just so horribly negative ... The PHA is always portrayed as being intentional, I mean really deplorable, I mean the words that come out of some of the articles ...”

Second, we heard a condemnation of the media from some community members. Some informants felt that the media were being irresponsible by extensively reporting on allegations before anything had been proven in court. The absence of spokespeople and experts from ACB communities commenting on the issue may go hand-in-hand with the one-sidedness perceived in much of the media coverage of these cases.

Finally, in terms of the racialization of the issue, it is interesting to note the community perceptions regarding the race of the perpetrators (presumed mostly Black) and victims (presumed mostly white), as well as the perception expressed by some of our informants that the cases involving Black accused received more media coverage. Research currently underway by Mykhalovskiy and Sanders may well ultimately provide empirical confirmation of this perception,<sup>86</sup> but in the meantime it is worth observing that these perceptions reflect longstanding concerns about race and crime reporting in general.

- <sup>49</sup> B. Adam, "Drawing the line: Views of HIV-positive people on the criminalization of HIV transmission in Canada," presentation at the 2<sup>nd</sup> Annual Symposium on HIV, Law and Human Rights, hosted by the Canadian HIV/AIDS Legal Network, June 11–12, 2010. The findings are based in survey questions to over 900 PHAs in Ontario and 122 interviews conducted in Toronto and Ottawa. Of the respondents, 96% reported that they had heard that Canadian law requires them to tell their sexual partners that they are HIV-positive, at least in some circumstances. Of those, 56% had heard this from the media, 54% from an ASO, 31% from another PHA, and 21% from an HIV clinic. (Results for other categories were less than 20%). While we are unaware of any similar research demonstrating how non-PHAs learn about the criminalization of HIV exposure, it is reasonable to assume that the media will play an even larger role, since most non-PHAs would not have contact with the other identified sources of the information (e.g., ASOs, HIV clinics, etc.) and, as the literature on race and the media (discussed below) emphasizes, much of the general public learns about crime and race issues primarily from the media.
- <sup>50</sup> Henry and Tator, *The Colour of Democracy*, p. 255.
- <sup>51</sup> *Ibid.*, p. 256.
- <sup>52</sup> Henry and Tator, *Discourses of Domination*, pp. 27–28.
- <sup>53</sup> Tator and Henry, *Racial Profiling in Canada*, p. 53.
- <sup>54</sup> *Ibid.*
- <sup>55</sup> Henry and Tator, *Discourses of Domination*, p. 163.
- <sup>56</sup> Henry and Tator, *The Colour of Democracy*, p. 254.
- <sup>57</sup> The preliminary results of a study of the representation of HIV non-disclosure cases in Canadian print media reveal that the four cases receiving the highest number of articles in the Toronto Star between January 1989 and October 2010 involved Black defendants. E. Mykhalovskiy and C. Sanders, *Racialization, HIV and Crime: An Analysis of the Representation of HIV Non-Disclosure Criminal Cases in Canadian Print Media*. (Work in progress manuscript, 2010)
- <sup>58</sup> "Legal Network Daily Media Clippings," in-house news clippings service of the Canadian HIV/AIDS Legal Network, compiling stories from subscription-based clippings service FPIInfomart, and a variety of national and international online sources.
- <sup>59</sup> B. Brown, "Aziga's past comes to light," *Hamilton Spectator*, February 26, 2009, p. A5.
- <sup>60</sup> B. Brown, "Life terms for Aziga; Murder verdicts in HIV transmission case make history," *Hamilton Spectator*, April 6, 2009, p. A1.
- <sup>61</sup> B. Brown, "Life terms for Aziga; Murder verdicts in HIV transmission case make history," *Hamilton Spectator*, April 6, 2009, p. A1.
- <sup>62</sup> See, for example, W. Hemsworth, "Should we keep AIDS out of courts?; A legal expert says it's imperative society has 'the hammer' of law to deter reckless spread of HIV. But others say it may stigmatize sufferers," *Hamilton Spectator*, April 6, 2009, p. A3; J. Huber and T. Crawford, "Murder verdict in Canada sets off alarm; First in Canada," *National Post*, April 6, 2009, p. A1; J. Huber and T. Crawford, "More debate urged after historic murder verdict," *Canwest News Service*, April 5, 2009; L. Prokaska, "Aziga verdict serves justice," *Opinion, Hamilton Spectator*, April 7 2009, p. A12.
- <sup>63</sup> Also see Henry and Tator, *Discourses of Domination*, pp. 74–77, on the structure of newsmaking and argumentative strategies.
- <sup>64</sup> M. Platt, "Sex romp turns into HIV nightmare," *Edmonton Sun*, August 20, 2010, p. 35.
- <sup>65</sup> M. Platt, "HIV assault suspect surrenders to police," *Calgary Sun*, August 27, 2010, p. 2.
- <sup>66</sup> M. Platt, "Assault with HIV; Cops seek warrant after 2 women infected," *Winnipeg Sun*, August 23, 2010, p. 4.
- <sup>67</sup> A. McDowell, "HIV case tests limits of privacy, public safety; Ottawa police release photo of 'sexual predator'," *National Post*, July 28, 2010, p. A1.
- <sup>68</sup> "Cops Issue Warning about HIV positive man after he's charged with attempted murder," *CityNews.ca*, June 8, 2009.
- <sup>69</sup> M. Platt, "HIV assault suspect surrenders to police," *Calgary Sun*, August 27, 2010, p. 2.
- <sup>70</sup> Clive Seale discusses the idea of "media templates" (referencing Kitzinger 2000) in relation to health reporting. "Health and media: an overview," *Sociology of Health & Illness* 25 (2003): pp. 513–531 at 519–20.
- <sup>71</sup> P. Maloney and J. Sims, "Three charges added in HIV case; [name of accused] faces seven counts of aggravated sex assault," *London Free Press*, Nov 2, 2006, p. C4.
- <sup>72</sup> M. Platt, "HIV assault suspect surrenders to police," *Calgary Sun*, August 27, 2010, p. 2.
- <sup>73</sup> K. Seggewiss, "Man sentenced to seven years; COURT: [name of accused], 34, didn't reveal to his eight sexual partners that he was HIV positive," *London Free Press*, August 1, 2008, p. A3.
- <sup>74</sup> C. Kitching, "Cops call HIV man; Victim told of contact, complains arrest warrant not Canada-wide," *Winnipeg Sun*, August 25, 2010, p. 4.
- <sup>75</sup> P. Turenne, "'Sleeping with the devil'," *Winnipeg Sun*, August 14, 2008, p. 16.
- <sup>76</sup> Persson and Newman, "Making monsters," for an analysis of Australian media coverage of HIV non-disclosure cases, noting that African men had been singled out for particularly hostile stories. "In these stories, the figure of the African heterosexual man spreading HIV to (white) women through deception comes to stand for a monstrous masculinity that is other to an imagined Australian heterosexuality, rendered both vulnerable to and safe from HIV by its presence" (at p. 638).
- <sup>77</sup> T. Zytaruk, "'Outrageous' HIV sex crimes deserve 19 years, Crown says," *Surrey Now*, September 14, 2010.
- <sup>78</sup> M. McIntyre, "'Devil' with HIV gets 8 years for unprotected sex," *Winnipeg Free Press*, August 23, 2008, p. B5.
- <sup>79</sup> This observation was also made by Mykhalovskiy and Sanders in "A critical analysis of media representation of the criminalization of HIV non-disclosure in Canada," presented at the November 2008 Ontario HIV Treatment Network Annual Conference, Toronto, Ontario: "There is no excuse for this wanton, reckless, self-indulgent behaviour."
- <sup>80</sup> L. Dickson, "Mzite's path from Africa to jail," *Times Colonist* (Victoria), March 3, 2009, p. A3.
- <sup>81</sup> M. McIntyre, "HIV positive man to be deported," *Leader-Post* (Regina), August 14, 2008, p. B4.
- <sup>82</sup> P. Turenne, "'Sleeping with the devil,'" *Winnipeg Sun*, August 14, 2008, p. 16.
- <sup>83</sup> N. O'Reilly, "Woman hurt that 'lover' won't face charges," *Hamilton Spectator*, September 25, 2010.
- <sup>84</sup> Persson and Newman, "Making Monsters."
- <sup>85</sup> J. Miller, "African Immigrant Damnation Syndrome: The Case of Charles Ssenyonga," *Sexuality Research & Social Policy* 2 (June 2005): pp. 31–50.
- <sup>86</sup> Mykhalovskiy and Sanders, *Racialization, HIV and Crime*.

## SECTION 4

# Responses to the Criminalization of HIV Non-Disclosure

Canada is not alone in criminalizing HIV non-disclosure. Many countries throughout the Americas, Europe and increasingly Africa are prosecuting people living with HIV in relation to HIV exposure and/or transmission. Recognizing the many potential harms that could result from this phenomenon, diverse organizations throughout Canada and around the world have taken on research, education and advocacy activities on the issue. While far from comprehensive, the following list provides a snapshot of some of the key activities and resources.

The **Ontario Working Group on Criminal Law and HIV Exposure** came together in 2007 to oppose the expansive use of the criminal law to address HIV non-disclosure. It supports a comprehensive evaluation of how Canada's criminal law is being applied in Ontario and advocates for sound policy responses to HIV prevention and transmission — based on the best available evidence, grounded in proven HIV prevention, care, treatment and support programs, and respectful of the human rights of people living with and vulnerable to HIV.

The Working Group is calling on Ontario's Attorney General to immediately undertake a process to develop prosecutorial guidelines for cases involving allegations of HIV non-disclosure. Guidelines can help police and Crown prosecutors handle HIV-related criminal complaints in a fair and non-discriminatory manner. Guidelines can also help ensure that cases are informed by current medical and scientific knowledge about HIV and the social context of living with HIV.

See: [www.ontarioaidsnetwork.on.ca/clhe](http://www.ontarioaidsnetwork.on.ca/clhe)

The **Canadian HIV/AIDS Legal Network** is a Toronto-based organization that promotes the human rights of people living with and vulnerable to HIV/AIDS,

in Canada and internationally, through research, legal and policy analysis, education, and community mobilization. The Legal Network's work on the issue of criminalization of HIV non-disclosure is conducted in partnership with various organizations across the country and includes tracking and analyzing the Canadian cases, intervening before appeal level courts in key cases with the potential to clarify and narrow the law, and producing various publications and training workshops. The Legal Network (together with AIDES, Groupe sida Genève, and the Global Network of People Living with HIV) has recently produced "Responding to the Criminalization of HIV Transmission or Exposure: Resources for lawyers and advocates" ([www.aidslaw.ca/lawyers-kit](http://www.aidslaw.ca/lawyers-kit)), a kit that provides both informative documentation to support lawyers in the preparation of their cases and selected publications that can ultimately be presented in court.

See: [www.aidslaw.ca](http://www.aidslaw.ca)

**COCQ-SIDA (Coalition des organismes communautaires quebécois de lutte contre le sida)** is a coalition of AIDS service organizations in Quebec that works to build and sustain joint action against AIDS in Quebec. COCQ-SIDA's work on the issues of criminalization of

HIV non-disclosure includes intervening before the appeal level court in key cases with the potential to clarify and narrow the law; providing legal information and assistance to the lawyers of PHAs in Quebec who are being prosecuted for HIV non-disclosure; and advocating for the creation of prosecutorial guidelines in the province of Québec, together with the Institut national de santé publique du Québec.

See: [www.cocqsida.com](http://www.cocqsida.com)

The **Global Network of People Living with HIV (GNP+)** is the global network for and by people living with HIV. As a network of networks, GNP+ advocates to improve the quality of life of people living with HIV. GNP+ produced the "2010 Global Criminalisation Scan Report", which gives a global overview of the extent to which criminal and other laws have been used to prosecute people living with HIV for HIV transmission and exposure. The report gives examples of instances where people living with HIV have expressed concerns about negative consequences that come from the overly broad use of laws in cases of transmission and exposure to HIV. It highlights the urgent need for government reform and calls for the guided application of expert evidence



and legal opinion to stem the swell of prosecutions and to counter the false premise of the perceived benefit of HIV-specific criminal laws.

See: [www.gnpplus.net](http://www.gnpplus.net)

The **Joint United Nations Programme on HIV/AIDS (UNAIDS)** is the United Nations body working towards universal access to HIV prevention, treatment, care and support. In 2008, UNAIDS released a policy brief entitled “Criminalization of HIV Transmission”. This policy, developed by UNAIDS in collaboration with the United Nations Development Programme (UNDP), provides guidance for governments, civil society and other partners on the current broad application of criminal law to those who transmit or expose others to HIV infection, emphasizing that the such approaches risk undermining both public health and human rights.

See: [www.unaids.org](http://www.unaids.org)

The **Positive Justice Project** is a recent initiative in the United States that aims to achieve the repeal of “HIV criminalization” statutes — laws that create HIV-specific crimes or which enhance penalties for persons who are HIV-positive and convicted of criminal

offences — and the end of arrests and prosecutions based on the fact of a positive HIV test.

See: [www.hivlawandpolicy.org/public/initiatives/positivejusticeproject](http://www.hivlawandpolicy.org/public/initiatives/positivejusticeproject)

In the United Kingdom, the **Terrence Higgins Trust** (the largest HIV and sexual health charity in the U.K.) and the **National AIDS Trust** (the U.K.’s leading charity dedicated to transforming society’s response to HIV) are working with people living with HIV, HIV organizations and others to address prosecutions for the reckless transmission of HIV in England, Scotland and Wales. Their activities have included advocacy and consultations towards the Crown Prosecution Services’ “Policy Statement” and “Guidance for Prosecutors” on cases involving the intentional or reckless sexual transmission of infection. This is a generic policy covering all sexually transmitted infections.

See: [www.tht.org.uk](http://www.tht.org.uk) and [www.nat.org.uk](http://www.nat.org.uk)

The **Global Commission on HIV and the Law** was initiated by UNDP, with the support of the UNAIDS Secretariat, in the summer of 2010. The Commission’s aim is to increase understanding of the impact of the legal environment

on national HIV responses, by focusing on how laws and law enforcement can support, rather than block, effective HIV responses.

See: [www.hivlawcommission.org](http://www.hivlawcommission.org)

#### ➤ KEY RESOURCES

Mykhalovskiy, E., Betteridge, G. and McLay, D.(2010) *HIV non-disclosure and the criminal law: Establishing policy options for Ontario*. Toronto. A report funded by a grant from the Ontario HIV Treatment Network.

Available on-line via:

**AIDSLEX (the AIDS and Law Exchange), Criminalization of HIV Transmission page**

<http://aidslex.org/english/Topics/Topic-Details/?rid=9>

**Edwin Bernard**, a freelance writer and consultant, maintains a blog that focuses on prosecutions for exposure to, or transmission of, HIV around the world.

See: <http://criminalhivtransmission.blogspot.com/>

## SECTION 5

# Opportunities for a Strategic Response to the Racialization of the Criminalization of HIV Non-Disclosure in Ontario

A strategic, targeted and multi-sectoral response to the racialization of the criminalization of HIV non-disclosure is urgently needed. As the issue has unfolded, the negative impacts on ACB communities have been widely felt, and efforts to prevent HIV transmission and provide care, treatment and support to ACB persons living with HIV have been undermined. ACCHO therefore calls on its partners and stakeholders to pursue the following avenues in response to the racialization of the criminalization of HIV non-disclosure in Ontario.

ACCHO is uniquely positioned to act as a convenor and educator on this issue, providing leadership and collaborating with the community. Where possible, ACCHO will lead, collaborate on or support some of these initiatives.

### 1. Alliance-building and agenda-setting to oppose the racialization of the criminalization of HIV non-disclosure

- a) Engage a full range of stakeholders in order to build broad-based support and capacity to respond, including among ASOs, settlement organizations, sexual assault crisis centres, the leadership of churches and mosques, legal clinics, ethno-specific community organizations, and professional associations of businesspeople, lawyers, police officers, journalists, medical professionals and educators.
- b) Bring stakeholders together in a multi-sectoral dialogue to discuss racialization in relation to the criminalization of HIV non-disclosure with a focus on identifying priority issues and strategizing around how to deal most effectively with these priority issues.

### 2. Research to deepen the understanding of racialization with respect to criminalization of HIV and to inform initiatives aimed at lessening the negative impacts on ACB communities

- a) Conduct further research on sexualities, sexual cultures, gender relations, and power and interpersonal relationships within ACB communities in Ontario and their relationship to HIV (non-)disclosure.
- b) Conduct further research on how to create an environment among ASOs and other service providers where legal responsibilities are satisfied and people living with or affected by HIV are still comfortable engaging with them and fully accessing their services.
- c) Conduct interviews with police officers, public health officials and nurses, Crown prosecutors, PHAs who have been investigated, and support workers who have worked with accused individuals through the court process.
- d) File Access to Information Requests to determine how many PHAs are investigated in relation to non-disclosure allegations (including charges that are deemed unfounded), as well as the gender and race of complainants and those accused.
- e) Conduct research with some of the complainants in HIV non-disclosure cases. Who are they? What factors lead them to report to the police? What was the outcome for them?

### 3. Development of prosecutorial guidelines

- a) Support and participate in the campaign for prosecutorial guidelines on HIV non-disclosure prosecutions in Ontario.
- b) Ensure that ACB community members are active participants in any consultation process to develop guidelines in order that those guidelines are informed by an understanding of the history of racialization within the criminal justice system.

### 4. Tools for education and action

- a) Produce and widely disseminate tools and resources on disclosure, confidentiality, stigma, and criminalization of HIV non-disclosure. These tools and resources should be practical, user-friendly and innovative, including frameworks and checklists, short videos, and referral cards.
- b) Develop advocacy campaigns that address issues of privacy, stigma, sexual health and diverse sexualities.
- c) Explore and develop appropriate educational programs and interventions specifically addressing the needs of ACB heterosexual men.

## 5. Engaging with and responding to the media coverage of charges of HIV non-disclosure against ACB persons

- a) Write letters to the editor and call media comment lines in response to problematic stories about HIV non-disclosure cases.
- b) Provide media training and support to ACB community representatives to enable them to respond to media requests with racialization analyses, as needed.
- c) Pursue meetings with the editorial boards of various media outlets, as well as key reporters who understand health and HIV-related issues, to present the issues of the criminalization of HIV non-disclosure and raise concerns from communities' perspectives. Emphasis should be placed on the importance of ensuring balanced and accurate reporting about the prosecutions and also that the language used is appropriate, non-discriminatory and non-stigmatizing with respect to HIV and PHAs. Reference should be made to the "Statement of principles and ethical guidelines" of the Canadian Association of Journalists.<sup>87</sup>
- d) Develop information packages on the criminalization of HIV non-disclosure for reporters and assignment editors, including one-pagers of factual information about HIV transmission, available data on criminal prosecutions, racial analysis and community concerns, and contact information for spokespeople.
- e) Inform affected community members of the possibility of lodging a complaint with a media outlet about the impact of having their names, photographs and health and immigration statuses publically disclosed when charges are ultimately dropped or the accused is acquitted. Prepare to assist community members to make such complaints in the future as appropriate.
- f) Engage media aimed at ACB populations to encourage them to provide balanced reporting when covering stories about HIV in general and criminal cases in particular. The Black media should also be encouraged to report on topics related to sexual health, sexuality, safer sex, and stigma and discrimination against people living with HIV, in order to get this information into the community, beyond those who are already connected with service organizations and educational programs.

## 6. Increased funding to support HIV disclosure and responding to the criminalization of HIV non-disclosure

- a) Encourage public and private funders to provide increased funding to ASOs and diverse community agencies for support work related to HIV disclosure. These funds should be in addition to, not diverted from, existing funding provided to these organizations for other work.

- b) Encourage public and private funders to provide increased funding to diverse stakeholders in order to respond to the criminalization of HIV non-disclosure and its impacts on individuals and communities, including all of the activities recommended here.

## 7. Development of new protocols

- a) Develop a new public health protocol on disclosure and contact-tracing that recognizes the very real challenges and impediments to disclosure faced by PHAs, including those related to stigma, sexuality, gender, ethnicity, language, immigration status and socioeconomic dependence.
- b) Develop a new protocol for physicians with respect to newly diagnosed PHAs. This protocol should prioritize referring patients to appropriate agencies that can assist in establishing appropriate support networks for PHAs and assist in the process of disclosure to family, friends, employers, sexual partners and others.
- c) Develop a new protocol for police officers investigating complaints of HIV non-disclosure. This protocol should include a straightforward guide to the Canadian law related to HIV non-disclosure, as well as accurate, up-to-date information regarding HIV and sexually transmitted infections, including the actual risks of transmission associated with different types of exposure and the implications of a positive diagnosis for someone's future health. The guide should also include a list of expert external agencies from which officers could seek guidance about specific issues and circumstances.

**In addition to the above activities, which can be undertaken by various stakeholders and in partnership with ACCHO and its members, ACCHO will continue to take a leadership role in responding to racialization and the criminalization of HIV non-disclosure, and will support its membership in responding appropriately, effectively and jointly. In particular — in consultation with its membership, the Ontario Working Group on the Criminal Law and HIV Exposure (CLHE) and legal experts — ACCHO will develop a position statement on racialization and the criminalization of HIV non-disclosure, to be submitted for adoption and endorsement by ACCHO member organizations and other organizations working for/in African, Caribbean and Black communities. This position statement will inform all research, advocacy and community mobilization and education efforts.**

<sup>87</sup> Available online at <http://www.caj.ca/?p=20>.

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