

## Sexual exposure/transmission defence

**Defence Toolkit For:** Lawyers, paralegals & advocates

**The Allegation:** HIV non-disclosure, exposure or transmission in relation to sex

**Take action! Provide a vigorous defence. Oppose mandatory HIV testing. Inform. Educate. Protect.**

People living with HIV may face criminal prosecution if accused of not advising a sexual partner of their HIV-positive status prior to engaging in sex, for participating in sexual activities with a perceived or potential risk of HIV transmission, or for allegedly transmitting HIV to a sexual partner. Unless transmission with intent can be proven, such criminal prosecutions are unjust and detrimental to the HIV response.

### Inexperienced with respect to HIV? Start here:

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[HIV and AIDS - Basic facts \(UNAIDS\)](#)

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[Stigma and HIV \(AVERT\)](#)

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[HIV disclosure \(NAM\)](#)

### Fact:

A person living with HIV who has an undetectable viral load cannot transmit the virus to another person through sex.

### Find relevant laws (by jurisdiction)

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[Global HIV Criminalisation Database](#)

## What is the criminalised act (actus reus)?

**Non-disclosure:** not revealing one's HIV-positive status to sexual partner prior to sex.

- Where non-disclosure is criminalised, it may be a strict liability offence or it may be tied to a specified level of HIV transmission risk (e.g. "realistic possibility of transmission" in Canada).

**Potential or Perceived Exposure:** engaging in a sexual act that potentially exposes (or is perceived to expose) another person to HIV, and therefore could potentially have resulted in HIV transmission.

- Where semen, vaginal or anal secretions, or blood are transferred from a person living with HIV into another person, that person may be exposed to HIV. In alleged exposure cases, the complainant is HIV-negative.

**Transmission:** engaging in a sexual act that is believed to have resulted in HIV transmission.

- Vaginal or anal sex with fluid exchange can result in HIV transmission. In alleged transmission cases, the complainant is HIV-positive.
- Phylogenetic analysis can be used to exclude the possibility of transmission between two or more people, but it *cannot* definitively prove the source or timing of an infection.

**Note:** Some laws state that the criminalised act is *transmission*, but people have been prosecuted in relation to *exposure* or *perceived exposure*.

### CHECKLIST

## Factors of potential relevance to the defendant's intent (mens rea):

- ☐ Was the defendant diagnosed HIV-positive before the incident?
  - If not, it is unlikely that they were acting with relevant intent.
- ☐ Did the defendant understand how HIV is transmitted?
  - A lack of understanding may undermine allegations that the defendant had relevant intent.
  - If yes, and they engaged only in sexual activities with no or negligible risk of transmission, this could be evidence of a lack of intent.
  - If the defendant knew that an undetectable viral load makes sexual transmission impossible, this knowledge could also undermine allegations of intent.
- ☐ Were protective barriers used (i.e., condoms)?
  - Taking active steps to prevent transmission stands in opposition to an intent to expose/transmit.
- ☐ Was the defendant on treatment? Did they have an undetectable viral load?
  - If on treatment, they may (rightly) have assumed they could not transmit the virus which undermines allegations of intent. Even if they did not know their viral load at the time of the incident(s) in question, being on treatment reduces the possibility of transmission (having an undetectable viral load reduces that possibility to zero).
  - Having a high viral load when tested in prison does not mean that the defendant had a high viral load at the time of the alleged incident.
- ☐ Is there independent evidence of (lack of) intent or prior disclosure?
  - Messages, information provided on a dating profile, conversations, and other statements may provide helpful evidence.
- ☐ Was there violence, coercion or control?
  - A person experiencing violence, coercion or control may not be in a position to disclose their HIV-status or negotiate safer sex.
  - An abuser may make false allegations of HIV non-disclosure, exposure or transmission.
- ☐ Did the complainant consent to the risk of HIV exposure/transmission?
  - If yes, there is little justification for a prosecution.

### Note:

Note: Depending on the criminal offence and the jurisdiction, the standard required for conviction could vary (e.g. purpose, knowledge, recklessness, or negligence) and relate to non-disclosure (intent to deceive sexual partner

or conceal HIV status), exposure or transmission.

Intention cannot be assumed from the mere fact of engaging in sex that may risk exposure or transmission. International guidelines recommend intent to transmit as a requirement for prosecution, but prosecutions proceed with lower standards of intent in many jurisdictions.

## Fact:

For HIV transmission to occur, certain basic conditions must exist:

- There must be a sufficient amount of the virus in particular bodily fluids (i.e. blood, semen, pre-seminal fluid, rectal fluids, vaginal fluids, or breast milk).
- A sufficient quantity of at least one of those bodily fluids must come into direct contact with sites in the body of an HIV-negative person where infection can be initiated. These are usually mucous membranes, damaged tissue or inflamed ulcers, but not intact skin.
- The virus must overcome the person's innate immune defences so that infection can be established and propagated.

Source: [Expert consensus statement on the science of HIV in the context of criminal law](#) (JIAS, 2018)

## ACTION

### Action: Learn more about HIV criminalisation

The criminal law is often applied to people living with HIV in a manner that is inconsistent with up-to-date scientific evidence, including overstating the risks of HIV transmission, and overstating the harm to a person's health and well-being from being exposed to HIV.

In addition, the criminal system often conflates the intention to have sex that may risk HIV transmission with intent to do harm, and it tends not to appreciate how unreliable scientific tests are for determining whether the defendant was the source of the complainant's infection.

To learn more, register for the HIV Justice Academy's course on HIV criminalisation [here](#).

## ACTION

### Action: Challenge assumptions regarding HIV transmission

The fact that a defendant tests HIV-positive at the time of arrest does not mean they were aware of their HIV status at the time of the alleged incident.

The fact that the complainant was unaware of their HIV-positive status at the time of the alleged incident does not necessarily mean the accused is the source of their infection.

Be aware of the limitations of phylogenetic analysis. It can not definitely prove the source of an HIV infection.

## The essential documents

[Ending overly broad criminalization of HIV non-disclosure, exposure and transmission: Critical scientific, medical and legal considerations \(UNAIDS Guidance Note, 2013\)](#)

This Guidance Note was prepared following a two-year project involving research, policy dialogue, and consensus-building on criminalisation of HIV non-disclosure, exposure and transmission aimed at ensuring that any application of criminal law in the context of HIV achieves justice and does not jeopardise public health objectives. It provides a comprehensive overview of the critical policy dimensions of the issue.

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#### **Expert consensus statement on the science of HIV in the context of criminal law (JIAS, 2018)**

Twenty scientists from around the world developed this Expert Consensus Statement to address the use of HIV science by the criminal legal system. It provides a detailed analysis of the best available scientific and medical research on HIV transmission, treatment effectiveness and forensic phylogenetic evidence so it may be better understood in criminal law contexts.

HJN recommends defence advocates reference this statement (as opposed to independently researching HIV-related science) because it includes the most relevant data explained in terminology relevant to legal cases.

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## **Other helpful resources**

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**Practical guide for paralegals: Supporting people living with HIV affected by HIV criminalization in the EECA region (SOS Project Consortium, 2022)**

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**Guidance for prosecutors (UNDP, 2021)**

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**Responding to the criminalization of HIV transmission or exposure: Resources for lawyers and advocates (Canada, online resource collection, HIV Legal Network)**

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**The use of phylogenetic analysis as evidence in criminal investigation of HIV transmission (NAM, 2007)**

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## **Relevant case Law**

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**Pre-2018: HIV criminalisation defence case compendium (South African Litigation Centre, 2018)**

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**Post-2018: DECISION C-248 /2019 of the Constitutional Court of Colombia**

The court found the section of the criminal code that criminalised HIV and Hepatitis B transmission in violation of the principles of equality and the free development of the personality, enshrined in Articles 13 and 16 of the Constitution.

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**Appeal No. 18-82.704 of the Court of Cassation - Criminal Division, France**

The court found that having an undetectable viral load rules out conviction for HIV exposure.

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**R2012/1093, Taltio 2133, Supreme Court of Finland**

The court dismissed the charge due to the low viral load of the accused, which made the risk of transmission so unlikely that it did not meet the requirement of the Criminal Code regarding the danger of a crime being committed.

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**Sentencia 690/2019 de 11 Mar. 2020, Rec. 1807/2018, Supreme Court of Spain**

The court upheld the acquittal because the complaint had reason to know that the accused was living with HIV, even if he had not explicitly disclosed.

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[Spain: Supreme Court upholds acquittal of man accused of HIV transmission as evidence points to complainant being aware of his status](#)

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[May 2020, High Court of Taiwan](#)

The court referred to recent scientific evidence and ruled that the alleged sexual activities did not risk transmitting HIV, therefore the accused was acquitted.



## **Action: Challenge the criminalisation of HIV non-disclosure, exposure and transmission**

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[HIV is a virus, not a crime: ten reasons against criminal statutes and criminal prosecutions \(JIAS, 2008\)](#)

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[Global Commission on HIV and the Law, HIV and the Law: Risks, rights and health \(UNDP, 2012\)](#)

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[Supplement \(2018\)](#)

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[Body politics: A primer on criminalization of sexuality and reproduction, \(Amnesty International, 2018\)](#)

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[Limit Cases: How and why we can and should decriminalise HIV transmission, exposure and non-disclosure \(Medical Law Review, 2019\)](#)

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## **HIV criminalization – Human rights fact sheet series (UNAIDS, 2021)**

Have a look at these fact sheets and other resources from UNAIDS to familiarise yourself with some of the communities that are impacted by HIV criminalisation.

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[HIV and gay men and who have sex with other men](#)

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[HIV and sex work](#)

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[HIV and transgender and other gender-diverse people](#)

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[HIV and people in prisons and other closed settings](#)

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[HIV and people who use drugs](#)

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[Other UNAIDS Resources: Migrants and HIV](#)

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[Other UNAIDS Resources: Women and HIV](#)

**ACTION****Action: Advocate for uninterrupted access to HIV treatment**

Antiretroviral treatment must be taken consistently in order to be effective. If your client is in prison or another closed setting, advocate for their uninterrupted access to HIV treatment from arrest to release, and for other medical needs such as nutritional supplements, tuberculosis testing and treatment, prevention and treatment of sexually transmitted infections, and opioid substitution therapy.

HIV-related medical needs are another reason to avoid pre-trial detention and custodial sentences, whenever possible.

**ACTION****Action: Protect your client's privacy**

Information contained in your client's medical records can be used against them in a prosecution. Proceed with caution when police or prosecutors request medical records or HIV test results.

Public disclosure that your client is living with HIV could have negative effects on their life. Where available, *in camera* proceedings, publication bans, and other privacy protections may provide some protection.

**ACTION****Feedback**

*We'd appreciate your feedback on this Action Toolkit! Please take a moment to complete this [short survey](#).*