

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

DIRECTOR OF PUBLIC PROSECUTIONS ACT

Directive

Whereas HIV is first and foremost a public health issue, and public health authorities' efforts to detect and treat HIV have resulted in significantly improved health outcomes for those living with HIV in Canada, as well as prevention of its onward transmission;

Whereas the Supreme Court of Canada has stated that the criminal law has a role to play in cases involving sexual activity and non-disclosure of HIV where public health interventions have failed and the sexual activity at issue poses a risk of serious harm;

Whereas persons from marginalized backgrounds such as, for example, Indigenous, gay and Black persons, are more likely than others to be living with HIV in Canada such that criminal laws that apply to HIV non-disclosure are likely to disproportionately impact these groups;

Whereas the criminal law applies to persons living with HIV if they are aware of their HIV positive status and that they are infectious, and they fail to disclose, or misrepresent, their HIV status prior to sexual activity that poses a realistic possibility of transmission of HIV;

Whereas the Supreme Court of Canada has clarified that the issue of whether sexual activity poses a realistic possibility of transmission is to be determined on the basis of the most recent medical science on HIV transmission;

Whereas the most recent medical science shows that the risk of HIV transmission through sexual activity is significantly reduced where: the person living with HIV is on treatment; condoms are used; only oral sex is engaged in; the sexual activity is limited to an isolated act; or, the person exposed to HIV, for example as a result of a broken condom, receives post-exposure prophylaxis;

Whereas it is not in the public interest to pursue HIV non-disclosure prosecutions for conduct that medical science shows does not pose a risk of serious harm to others;

Whereas the research, medical science and analysis presented in Justice Canada's 2017 Report on the Criminal Justice System's Response to HIV Non-Disclosure, as well as any future developments in the relevant medical science, should be considered before pursuing a criminal prosecution in HIV non-disclosure cases;

Whereas I have consulted with the Director of Public Prosecutions under subsection 10(2) of the *Director of Public Prosecutions Act*;

1. I direct the Director of Public Prosecutions as follows:
 - (a) The Director shall not prosecute HIV non-disclosure cases where the person living with HIV has maintained a suppressed viral load, i.e., under 200 copies per ml of blood, because there is no realistic possibility of transmission.

- (b) The Director shall generally not prosecute HIV non-disclosure cases where the person has not maintained a suppressed viral load but used condoms or engaged only in oral sex or was taking treatment as prescribed, unless other risk factors are present, because there is likely no realistic possibility of transmission.
- (c) The Director shall prosecute HIV non-disclosure cases using non-sexual offences, instead of sexual offences, where non-sexual offences more appropriately reflect the wrongdoing committed, such as cases involving lower levels of blameworthiness.
- (d) The Director shall consider whether public health authorities have provided services to a person living with HIV who has not disclosed their HIV status prior to sexual activity when determining whether it is in the public interest to pursue a prosecution against that person.

Ottawa, November 30, 2018

The Honourable Jody Wilson-Raybould
Attorney General of Canada