



Ontario AIDS Network

## **ILLEGAL SEX? HIV NON-DISCLOSURE DEBATE – COMMUNITY ENGAGEMENT (TOOL KIT)**

### **Overview of a Debate**

#### **1. POSSIBLE TOPICAL RESOURCES AND SELECTED SUMMARIES – DISTINGUISHING BETWEEN RESEARCH (EVIDENCE-INFORMED) & EDITORIAL (OPINION-BASED) MATERIALS:**

NO (LITTLE) SUPPORT FOR APPLICATION OF CRIMINAL LAW: see resource list and selected summaries.

LIMITED (QUALIFIED) SUPPORT FOR APPLICATION OF CRIMINAL LAW: see resource list and selected summaries.

FULL (GREATER) SUPPORT FOR APPLICATION OF CRIMINAL LAW: see resource list and selected summaries.

GENERAL RESOURCES – LEGAL AND NON-LEGAL: crucial (central) court decisions and case law, relevant legal statutes (*assault, aggravated assault, aggravated sexual assault, consent*), criminal charges (convictions) to date, characteristics (demographics) of those charged (as well as complaints), etc. For general information and details on demographics, legal statutes, and court decisions -- Cuerrier (1998), Williams (2003), Mabior (2008), Aziga (2008), etc. – see: Glenn Betteridge, *HIV (Non) Disclosure & the Criminal Law in Canada*, CATIE Annual General Meeting & Educational Conference, 6 October 2008.

#### **2. DEBATE RESOLUTION AND FORMAT SUGGESTIONS – FRAMING AND REFRAMING THE CENTRAL ISSUE(S):**

HOW TO FRAME A RESOLUTION – SELECTION CRITERIA: the definition of a *resolution*, debate resolutions and strategic word choice, debate resolutions in the affirmative v. the negative, etc.

In a debate (and particularly a policy debate) a *resolution* or *topic* is a normative statement which the affirmative team affirms and the negative team negates. Resolutions may be selected by some organizational body or the debaters themselves. It is helpful to think of the debate resolution much like a *paper topic* and thus see the debate as a discussion of the *pros* and *cons* of that topic. As outlined in the OAN-Hart House debate, the debate resolution was: *Having Sex Without Disclosing Your HIV Positive Status Should Not Be A Crime*. As such, the resolution was framed in the *affirmative*; however, it could have also been framed in the *negative* as: *Having Sex Without Disclosing Your HIV Positive Status Should Be A Crime*.

It is important to point out that the resolution set in the OAN-Hart House debate was framed as it was for particular reasons. More specifically, it was framed in the *negative* to reiterate the reality of current law to both debaters and other debate participants (including the audience). In other words, the resolution was meant primarily to clarify the fact that HIV non-disclosure (most precisely in the case of *significant risk*) is indeed currently subject to criminal prosecution rather than the opposite. The logic is that had the resolution been framed in the *affirmative*, that some might have understood the debate as a suggestion that non-disclosure of positive HIV status *ought* to be subject to criminal prosecution.

THE DEBATE FORMAT – MODIFICATIONS AND PRACTICAL SUGGESTIONS:

Debate (or debating) is generally understood to be a formal method of interactive and representational argument – broader than simply a logical argument – in which one side often prevails over the other by presenting superior “context” or framing of the issue -- which is more subtle and strategic. In a formal debate contest, there are rules enabling people to discuss and decide on differences, within some framework defining how they will interact. Informal debates are common, but the quality and depth of a debate improves with the knowledge and skill of the participants. As such, a rule-based debate format is perhaps most effective. However, many different styles of debate occur under a broad variety of organizations and rules.

Each side is either in favor (*for, affirmative*) or opposed to (*against, negative*) some statement, proposition or resolution (see video) which, if adopted, could change something – in this case, current criminal justice statutes governing the non-disclosure of positive HIV status. The major goal of the debate style (as a method or art) is to develop one’s ability to play from either position with equal ease; therefore, it is not necessary that participants be *experts* on either side. The key to effective debating is strong preparation on some key aspects of a particular issue, as well as a sound understanding of those aspects likely to be addressed by the opposition – so that participants have reasonably anticipated their opponents’ counterarguments. One large misconception about debate is that it is all about argument; it is not. Importantly, it is also often about understanding the scope of the issue(s) being debated, and thus being prepared for the arguments of your opponents as well.

### **Recipe for a debate**

Some possible variations (suggestions) on the debate format – note that all of the following may be further modified to fit a particular context or issue.

(Canadian) Parliamentary debate format: this is the format used in the OAN-Hart House debate on the criminalization of HIV non-disclosure and is the most traditional form of debate. More specifically, it features the competition of individuals in a multi-person setting – and in many forms of the activity, rhetoric and style, as well as the more traditional knowledge and research, play a significant role in determining the victor with weight shared equally between matter and manner.

#### *Key ingredients:*

- ✓ Pre-set your topic
- ✓ Pre-determine a resolution
- ✓ Convene two opposing teams
- ✓ Team 1 supports the resolution
- ✓ Team 2 opposes the resolution
- ✓ Opening speech/remarks from both sides
- ✓ Cross-Examination
- ✓ Closing Remarks

It is important to note that *points of information* (POIs) are generally permitted and expected in the standard Canadian Parliamentary style. With POIs, debaters may rise and attempt to ask a question of an opposing debater, who can choose whether to accept or refuse the question. It is generally considered good form to accept at least a few questions during a speech (see video). The speaking times for this format are usually as follows (although these too may be modified):

Opening arguments: 7 minutes

Opposing arguments: 7 minutes

Cross-examination: 7 minutes

Opposition cross-examination (extended): 10 minutes

Closing arguments (rebuttal -- extended): 6 minutes

Closing arguments (rebuttal): 4 minutes

Public debate format: although evidence is used, the central focus here is to promote a debate format that emphasizes public speaking and *real-world* persuasion skills over the predominant use of evidence and speed (restricted or limited timing).

#### *Key ingredients:*

- ✓ Select judges who are well-versed (not necessarily experts) on subject matter. Debaters must persuade judges who will in turn determine victor.
- ✓ Circulate a list of topics to debaters 30 minutes prior to debate.
- ✓ 1 team affirms resolution, 1 negates resolution
- ✓ Opening remarks
- ✓ Cross-examination
- ✓ Closing remarks

\*(speaking times are pre-set by judge, yet often follow parliamentary format)

Policy debate format:, the policy debate format relies far more on researched evidence and tends to have a much broader sphere of what would be considered *legitimate* argument which includes: critical theory, counter plans (or policies), as well as the theoretical standards of such an activity itself.

*Key ingredients*:

- ✓ Current policy research on subject matter that informs debate arguments.
- ✓ Well-versed speakers who can argue points and counter points in a timely fashion.

Extemporaneous debate format: this debate style also involves two teams with a first and second speaker but essentially no planning in advance.

*Key ingredients*:

- ✓ Only one or two articles or forms of research are provided to debaters prior to debate.
- ✓ Affirmative and Negative speech from both speakers. (Six minutes in length)
- ✓ Two minutes of cross-examination.
- ✓ Affirmative and Negative rebuttals for each speaker. (Four minutes in length)

Most often, this style of debate is structured around three main contentions, although teams may occasionally use two or four. In order for the affirmative side to win, it must defeat all of the negative contentions, and all of the affirmative contentions must remain standing. As such, most of the information presented in the debate must be somehow tied to one of these contentions. It is worth noting that the extemporaneous debate is very similar to the policy debate format; however, the extemporaneous debate focuses far less on the actual implementation of the debate resolution.

Impromptu debate format: this is perhaps the most informal style of debate, and is far less structured than most other forms.

*Key ingredients*:

- ✓ Debate topic is circulated to participants 15 to 20 minutes prior to debate.
- ✓ Each team member must speak for roughly five minutes, alternating arguments.
- ✓ Allow for a ten-minute discussion period.

- ✓ Break for five minutes.
- ✓ Each team is given four minutes for a rebuttal.
- ✓ Victor is informally chosen with either an audience or judge.

### 3. KEY DEBATE POINTS – USING THE (OAN) VIDEO – SUCCESSES, CHALLENGES, AND LESSONS LEARNED:

TERMS OF REFERENCE – A GLOSSARY: *asymmetry of information (knowledge), bigotry, burden of proof (onus), civil v. criminal action, cognizance, credence, criminal prohibition, culpability, culture of disclosure, empirical evidence, exposure (v. transmission), homophobia, inebriation, informed consent, malice (malicious), monogamy, non-disclosure, panacea, public health (officer), rational calculation, retribution, safe(r) sex, serious bodily harm, sex worker, significant risk, status quo, stigma, state of mind, vitiated (consent).*

OVERVIEW OF THE DEBATE: what key issues were covered?

(DEBATER) **IAN FREEMAN**: *Having Sex Without Disclosing Your HIV Positive Status Should Not Be A Crime*

a) **The burden of proof – the elements of a crime**: outlines the legal *requirements* for the definition of (and conviction of) a *crime – dishonesty (fraud), significant risk, and a link between dishonesty and consent* – and suggests that current laws criminalizing HIV non-disclosure (as well as their application) are *unjust* and do not (in most cases) *unambiguously* reflect these three elements. Further, notes that current laws criminalizing HIV non-disclosure are *judicial* rather than *legislative* in nature – and thus suggests another inherent limitation as such.

b) **Sex, consent, and shared responsibility**: argues that all sexual activity carries with it some degree of *risk* – and that current laws fail to realize that the majority of sexual acts are consensual in nature, and that consent to sexual activity also carries with it the concomitant consent to all possible *risks*. As such, claims that all parties play a role in protection against STIs (including HIV) and in requesting that appropriate precautions are taken. Current laws (and their application) fail to reflect the centrality of *shared responsibility* with respect to sexual activity – despite any apparent *asymmetry of knowledge* about potential *risks*.

c) **The case for public health v. criminal law**: argues that the government has failed to support claims (and has made no effort to convince the population) that current laws further public health initiatives directed towards reducing the transmission of HIV – and that the onus remains with the federal government to prove the effectiveness of current law rather than relying on intuition alone – especially before *stripping* individuals of their rights. In fact, by contrast, argues that current laws may indeed be counter-productive in that they may

discourage HIV testing (see notes on fact-checking) and foster a *culture of disclosure* that encourages a misguided faith in disclosure as well as *safer sex practices* in general. Extending the argument, claims that government efforts to educate about HIV have also failed (e.g. beliefs among students about the existence of a *cure* for AIDS), and that the state must focus on more effective HIV education rather than relying on criminal laws to reduce HIV transmission.

d) **The reality and relevance of stigma:** establishes the claim that the *battle* against HIV is also a battle against *stigma*, and that current laws aggravate existing violent prejudices against those living with HIV. Further, argues that current laws are also (routinely) disproportionately applied – for example, those charged are more often men of color while *victims* are more likely to be women (who can more easily present themselves as *victims*). Additional claim that charges that intravenous drug users are victims are far more difficult given societal prejudices against such individuals (see notes on fact-checking).

e) **The individual right to sexual expression – taking a sex-positive approach:** in closing, makes an appeal for understanding the importance of the individual's *right* to sexual expression and a sexual life – and asks specifically for individuals to reflect on the centrality and importance of sexual activity in their lives in general – both of which are essentially under attack by current legislation criminalizing the non-disclosure of HIV status. As such, there is no place for the state in the *bedrooms of the nation* as it relates to HIV and HIV transmission.

(DEBATER) **MICHAEL KOTRLY:** *Having Sex Without Disclosing Your HIV Positive Status Should be a Crime*

a) **Sexuality and the role of the state:** counters the argument that the state has no place in the *bedrooms of the nation*, indicating that the state has long regulated sexual activity (and considers consent as vitiated) in a number of situations for good reason – and that this involvement in the sexual lives of Canadian is based (primarily) upon the state's role in protecting the dignity of its citizens – and that dignity is integral in the right to (informed) consent to any and all sexual activity.

b) **Consent and the vitiation of consent:** elaborates the legal approach to (and understanding of) consent to mean more than simple verbal agreement to something in the abstract. Extends the argument to note that the state's involvement in the sexual activity of Canadians is well-illustrated by the fact that it considers consent to be vitiated in a number of situations – particularly in those situations where consent is vitiated based on either age (in the case of minors) or *state of mind* (in the case of inebriation or intoxication) – as well as in those cases in which submission to sexual activity is forced upon an individual by someone in authority. Thus claims that consent is also (necessarily) vitiated in those situations where an individual is unknowingly exposed to the risk of *serious bodily harm*.

c) **The role of criminal law and the *right to sexual expression***: makes the qualified argument that state intervention into sexual activity (the *bedrooms of the nation*) is not simply about the regulation of sexual activity in Canada. More specifically, claims that state intervention occurs only in those situations in which an HIV positive individual either fails to disclose or misrepresents his status. As such, the intervention of the state is more accurately about the act of *fraud or misrepresentation* than it is about the sexual act itself. In an extension of the argument, reiterates his argument for the very existence of criminal law – to address those behaviors considered sufficiently harmful to others (and the state) – claiming that exposure to HIV meets these criteria because of its (potentially) profound effects on an individual (e.g. the absence of a cure, the long-term health effects, etc.). Further, the culpability of the HIV positive individual is greater given the fact that the exposed party would not have consented to the sexual act had he been cognizant of the potential risk.

d) **The effectiveness of criminal law and the onus of the state**: challenges earlier observations about the responsibility (or onus) of the state to prove the effectiveness of existing criminal law to reduce the transmission of HIV – and thus to serve a prevention role similar to that of public health. By contrast, suggests that there is no basis for such a claim – that the law *ought* to work – and argues that (in more general terms) the law is not meant to be a *panacea* to replace public health. As such, prevention is not the issue – rather it is intervention where there is harmful behavior that is the primary justification for the involvement of criminal law. The focus of the law then is the *promotion* of the unique obligation of the HIV positive individual to disclose – rather than taking a more general public health role in HIV prevention.

e) **Rethinking the relevance of stigma – balancing stigma and personal responsibility**: acknowledges the *existence* of stigma (albeit much less pronounced in Canada as opposed to other nations), however minimizes its more general relevance – particularly in relation to the application of criminal law. Also challenge assumptions about the counter-productivity of criminal law in discouraging HIV testing, claiming that there is no such evidence (see notes on fact-checking). In fact, by contrast, makes the claims that the incentives for testing are so great that to assume the law discourages testing is (arguably) illogical – basing this on the assumption that testing carries with it great benefits, not the least of which is treatment for those who do test positive. As such, the criminal law may indeed provide benefits beyond punishment of those who fail to disclose. In closing, makes the argument that the repeated emphasis upon *shared responsibility* by opponents of the law could actually perpetuate another form of stigma – namely that which stigmatizes those who are exposed to the risk of HIV transmission and infection – by *blaming* these victims for their failure to avoid potential dangers. As such, makes a final argument in favor of the benefits of promoting a *culture of disclosure* such that it encourages both disclosure and discussion about HIV status.

(DEBATER) **ERIN FITZGERALD**: *Having Sex Without Disclosing Your HIV Positive Status Should Not Be A Crime*

a) **HIV disclosure, transmission, and power relations – rethinking malice and intent:** opens with the argument that the law must be cautious (and indeed sensitive) to the complexities of (sexual) relationships and assumptions about malicious or intentional non-disclosure of HIV status. More specifically, focused upon those relationships more clearly defined by power relationships in which an HIV positive individual actually *fears* disclosure and its potential consequences (e.g. retaliation, violence, abandonment). As such, makes the claim that assumptions about malice are often misguided – and thus the involvement of the criminal law is entirely inappropriate (see notes on fact-checking). Draws more general attention to the possible obstacles to disclosure that one finds in much of the qualitative research itself.

b) **Shared responsibility and the apportioning of guilt – civil v. criminal actions:** reiterates earlier claims about the centrality of *shared responsibility* in most (if not all) sexual relationships and extends the argument in order to draw a key distinction between civil and criminal actions in Canadian courts. More specifically here, points out that in civil actions *blame* or *responsibility* is apportioned among parties while, in criminal actions, the sole objective is to assign *guilt*. In doing so, argues for the greater appropriateness of civil actions in addressing HIV non-disclosure such that civil actions implicitly acknowledge the involvement and culpability of all parties. Reliance upon criminal law in such cases serves to send the *wrong message* that sexual health is necessarily the responsibility of only one individual – in this case, that of the HIV positive individual in particular – and thus civil courts are the more appropriate venue for such matters and that this is more consistent with the principles of the criminal justice system.

c) **The counter-productivity of criminal law – reiterating the reality and relevance of stigma:** countering earlier arguments about the productiveness of criminal law in promoting both discussion and disclosure, makes the opposite argument that the (potential) effects of both *stigma* and *rejection* are great and may in fact create a real public health risk. More specifically, by labeling non-disclosure (in most cases) a criminal act, the disincentives to testing remain – primarily because not knowing one’s status is (arguably) the *best defense* (see notes on fact-checking). As such, claims that the law may actually encourage misbehavior (or risky behavior) – and should defer to public health and its promotion of *safer sex* practices. Further, it is both inappropriate and callous to dismiss the emotional consequences of both stigma and rejection upon those who are HIV positive – and indeed to promote both through the application of the criminal law in such situations.

(DEBATER) **ANDI WILSON:** *Having Sex Without Disclosing Your HIV Positive Status Should Be a Crime*

a) **Rethinking malice and intent – a limited view of the role of criminal law:** addresses claims that the intervention of the criminal law necessarily means that non-disclosure is viewed as either malicious (or intentional). Claims that while non-disclosure may not necessarily be malicious, the fact remains that the HIV positive individual necessarily has a greater burden in any and all sexual relationships. And this greater burden is simply because of that individual’s

possession of information that could vitiate consent to sexual activity. The claim is not that the exposed party bears *no* responsibility, but that the HIV positive individual always bears greater responsibility regardless of the circumstances.

b) **Rethinking consent and mutual responsibility:** challenges claims about the mutual or *shared responsibility* within sexual relationships arguing, once again, that the individual in possession of greater information – particularly that which potentially endangers the other through the risk of HIV transmission – necessarily bears greater responsibility. Without the benefit of that information, and especially in those cases where the exposed party is misled, it is essentially impossible to act responsibly – in other words, to make an informed decision and to fully consent to any sexual activity.

c) **Revisiting the relevance of stigma – rejection v. personal choice:** essentially challenges the very definition and identification of *stigma* by arguing that the refusal to engage in sexual activity based on information about the potential partner’s positive HIV status is not a matter of stigma but rather is a matter of exercising personal choice. As such, refusal to participate in sexual activity is less a matter of discrimination against another and more an issue of self-protection and self-preservation. Further, it is the place of the criminal law to protect the individual’s rights to self-protection and self-preservation.

(DEBATER) **MICHAEL KOTRLY:** *Recap and Closing Comments*

a) **In defense of the role of criminal law:** reiterates the claim that criminal law *ought* to be involved in the sexual realm based on the protection of the individual’s dignity and right to genuinely *informed* consent. This consent is paramount, once again, because of the fact that the individual would not have consented to sexual activity had he or she known of the other’s HIV positive status. Argues further that claims in favor of the criminalization of HIV non-disclosure is buttressed by the fact that few would disagree with the seriousness of the potential consequences of exposure to HIV – and that this seriousness clearly outweighs even those situations in which power dynamics might be an obstacle to disclosure. .

b) **Balancing rejection and responsibility:** a similar claim is made in relation to both HIV *stigma* and *rejection* such that, while stigma and rejection do exist to a lesser degree in Canadian rather than other societies, neither can be outweighed by the possible harms that accompany exposure to HIV. Further, claims that the law does not, in fact, increase or encourage either *stigma* or *rejection* – or discourage testing for HIV – and thus claims to the contrary lack any substantive evidence.

(DEBATER) **IAN FREEMAN:** *Recap and Closing Comments*

a) **State of mind v. knowledge and rational calculation – a key distinction:** in closing, challenges the argument that the vitiation of consent based on either age or inebriation (intoxication) is comparable to the vitiation of consent based on the non-disclosure of a positive HIV status. Argues, by contrast, that both such examples (as *states of mind*) vitiate consent primarily because in either case, the parties could never consent to sexual relations – and that non-disclosure of HIV is different such that consent is possible. Therefore, claims that the opposition has put forth a false analogy.

b) **Stigma and criminal law – the perpetuation of homophobia and bigotry:** closes debate with the claim that the very existence of laws criminalizing the non-disclosure of positive HIV status are, in and of themselves, part of the problem. More specifically, notes that such laws serve only to further stigma against those living with HIV, and that they embody both homophobia and bigotry – both of which should not (and cannot) be tolerated in Canadian society.

CENTRAL CHALLENGES FROM THE OAN EXPERIENCE -- lessons learned – fact-checking, and suggestions for future debates:

**Exposure v. transmission – clarifying the law:** the debate (and debaters) must be consistent in their discussion of the law that states that exposure to (and not necessarily transmission of) the virus that causes HIV has taken place. Debaters in the OAN debate were not always consistent on this point and often spoke only to transmission of HIV while omitting exposure.

**Actual knowledge v. awareness of HIV positive status – legal precedents:** debaters must be aware of the fact that lack of awareness of HIV status is not necessarily a defense in criminal prosecution. As noted in the OAN debate, claims about the counter-productivity of criminal law in terms of discouraging testing (for reasons of a potential defense to prosecution) need to take into account that actual knowledge of status may not be seen as entirely distinct from possible awareness of status – at least by some courts (see Betteridge on Williams, 2003).

**HIV status of other parties and *re-infection* – legal precedents:** it is important to note that the application of criminal law to HIV non-disclosure is not necessarily limited to those situations in which one party is HIV negative and the other party is HIV positive (see Betteridge).

**Evidentiary Vacuum – quantitative v. qualitative research:** claims about the complete absence of evidence about either the productiveness or counter-productiveness of the criminal law must be approached carefully. While there may not be quantitative evidence in favor of either position, there is emergent qualitative evidence that does suggest that criminal law has distinct effects upon the decision-making of individuals – both HIV positive and HIV negative – in relation to their sexual behaviors as well as their likelihood of disclosure. Although such evidence is not necessarily definitive, it does suggest that claims about *impact* may need to be reconsidered in the face of emerging evidence (see resource list).

**Malicious/Intentional Exposure to HIV – the problem of *mens rea*:** debaters must be cautious about taking a simplistic approach to either exposure or transmission (and the application of criminal law) purely in terms of what are defined as either intentional or malicious efforts by those who are HIV positive with partners who are HIV negative (see Betteridge).

**The disproportionate application of criminal law – the case of intravenous drug users:** debaters must be cautious about claims regarding the application of criminal law and case law to date – more specifically in relation to criminal law and intravenous drug use (see Betteridge).

**Vitiated consent – state of mind v. asymmetry of knowledge (information):** state of mind may be a relevant variable in court decisions (see Betteridge).

**Asymmetry of power (in relationships) and obstacles to disclosure (Cuerrier, 1998):** see the details of Cuerrier (1998) such that the importance of an asymmetry of power and its relevance for disclosure (as well as for future court decisions) was not dismissed entirely – and may indeed be relevant depending on specific circumstances.