

Criminal law and HIV non-disclosure



HIV-positive youth and the criminal law

The youth criminal justice system is complex. The information in this section is intended to provide an **overview of how the criminal law on HIV non-disclosure may impact youth.**

If you have specific questions about youth, the *Youth Criminal Justice Act* and the criminal law, consult a lawyer with expertise representing youth in the criminal justice system.

Information can also be found on the website of **Justice For Children and Youth** (JFCY) at www.jfcy.org. JFCY is a legal clinic which gives legal advice, information and assistance to young people, parents (in education matters), professionals and community groups across Ontario.

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How does the criminal law apply to HIV-positive youth?

The criminal law regarding HIV non-disclosure applies to HIV-positive youth in Canada. This is why HIV-positive youth and the people who counsel them need to know what duties the criminal law places on youth in the disclosure of their HIV status. They also need to know how the criminal law may treat youth if they are charged with an offence for not disclosing their status.

The minimum age of criminal liability in Canada is **12 years old**. Over 12 years of age, youth can be charged with offences under the *Criminal Code*, including (aggravated) (sexual) assault — an offence commonly used in cases of HIV non-disclosure. However, a special system of dealing with criminal charges applies to youth.

In the case of any young person under the age of 18 charged with a criminal offence, the handling of the prosecution and the possible sentencing outcomes are generally governed by the *Youth Criminal Justice Act* (YCJA). The YCJA applies to young people aged 12 through 17.

Young people under 18 years of age are tried in **youth court**, in most provinces the provincial court. They are sentenced with special consideration of their reduced level of maturity, and with greater focus on rehabilitation. However, in some cases, **adult sentences** can be imposed on young offenders.

Youth and consent to sexual activity (aside from the issue of HIV disclosure or non-disclosure)

- A person must be 18 years old to give legally valid consent to sexual activity with someone in a position of trust and authority (babysitter, teacher, coach, community centre staff, etc.).
- At age 16, a person can give legally valid consent to sexual activity to anyone who is not in a position of trust or authority.
- If a person is 14 or 15 years old, he or she can only give legally valid consent to sexual activity to someone who is less than 5 years older (e.g., if a person is 14, the older person can be no more than 19; if 15, the older person can be no more than 20), and, of course, not with anyone in a position of trust or authority.
- If a person is 12 or 13 years old, he or she can only give legally valid consent to sexual activity with someone who is less than 2 years older; and, again, the older person cannot be in a position of trust or authority.
- If a person is under 12 years old, he or she cannot give legally valid consent to sexual activity.

The Youth Criminal Justice Act

The YCJA is different in many ways from the criminal justice system for adults under the *Criminal Code*. The YCJA establishes:

- enhanced protections throughout the process to ensure that the youth's rights are safeguarded;
- alternatives to prosecution for criminal charges, including cautions, warnings and penalties agreed to by the youth;
- as a general principle, a ban on the publication of any information that would identify a young person dealt with under the Act;
- a maximum youth sentence of imprisonment of three years; and
- the disposal or destruction of youth court records after the passage of a specified period of time.

However, in 2012, the *Safe Streets and Communities Act* amended several provisions of the YCJA, and may result in a greater possibility of custody for young offenders and undermine the protection of young offenders' privacy and identity. At the time of this writing, the *Safe Streets and Communities Act* has received Royal Assent and the provisions related to young offenders are to enter into force on October 23, 2012.

Youth and pre-trial detention

With the introduction of the *Safe Streets and Communities Act*, young offenders charged with a serious offence (defined as an offence for which the maximum punishment for an adult is imprisonment for five years or more) could face pre-trial detention.¹

This is likely to be the case for HIV-positive youth who are prosecuted for not disclosing their HIV status as they are likely to be charged with a serious offence.

Youth sentence and custody

Under the YCJA, the general rule is that young persons cannot be sentenced to custody unless certain conditions are met.²

For example, custody is a possible sentencing option if a young person has committed an indictable offence for which an adult would be liable to imprisonment for a term of more than two years, *and* has a history that indicates a pattern of either extrajudicial sanctions or of findings of guilt, or of both.³

Custody is also a possible sentencing option if the young person has committed a **violent offence**, defined by the Supreme Court of Canada as an offence in which the young person causes, attempts to cause, or threatens to cause bodily harm.⁴ But the *Safe Streets and Communities Act* has expanded that definition to now include offences in which the young person **endangers the life or safety of others by creating a substantial likelihood of causing bodily harm.**

This new definition may apply to convictions for HIV non-disclosure, which, at the time of this writing, do not require actual transmission of the virus but only a significant risk of serious bodily harm (i.e., HIV transmission). HIV-positive young offenders might therefore face a sentence of custody for not disclosing their HIV-positive status, even if they receive a youth sentence and don't have any previous history with the criminal justice system.

N.B.: To learn about the current state of the criminal law as it relates to HIV non-disclosure, see "HIV non-disclosure: what's the law in Canada?" also in this section of this resource kit.

¹ *Youth Criminal Justice Act* (YCJA), amended section 29(2), entering into force October 23, 2012.

² *Ibid.*, section 39 (1).

³ *Ibid.*, amended section 39(1) (c), entering into force October 23, 2012.

⁴ Department of Justice Canada, "Backgrounder: *Safe Streets & Communities Act*: Protecting Society from Violent and Repeat Young Offenders." Available at http://canada.justice.gc.ca/eng/news-nouv/nr-cp/2011/doc_32633.html.

Adult sentences

Under the YCJA, a young person cannot be transferred to an adult court. However, in certain circumstances, and only after a finding of guilt, a young offender may receive an adult sentence. An **adult sentence** means any sentence that could be imposed on an adult who has been convicted of the same offence.

The minimum age for adult sentences is 14 years. However, each province and territory can increase the minimum age to 15 or 16 years of age.

While application for adult sentence used to be at the discretion of the Crown, with the introduction of the *Safe Streets and Communities Act*, the legislation will now **require the Crown to consider seeking adult sentences** for youth convicted of the most serious violent crimes such as murder, attempted murder, manslaughter, and **aggravated sexual assault** — a charge commonly used in cases of HIV non-disclosure. If the Crown decides not to apply for an adult sentence, they must inform the court that they are not doing so.⁵

The Crown *may* also consider applying for an adult sentence, if a young person is guilty of an offence for which an adult is liable to imprisonment **for a term of more than two years and if the offence was committed after he was 14 years old**. This would be the case, for example, if a young offender were charged with sexual assault — a charge also commonly used in cases of HIV non-disclosure.⁶

An adult sentence will only be ordered if the youth court is satisfied that the presumption of diminished moral blameworthiness or culpability of the young person is rebutted, and a youth sentence will not be of sufficient length to hold the young person accountable for his or her offending behaviour.⁷

No young person under 18 is to serve any portion of imprisonment in a provincial correctional facility for adults or a penitentiary, regardless of whether they were given an adult or youth sentence.

Disclosure of personal information related to a young person

Young persons who are HIV-positive face the possible disclosure of their HIV status and identity under the YCJA, even when they do not give their consent. There are different ways the YCJA may lead to the disclosure of a young person's HIV-status without his or her consent:

- The **parents** (or a relative or another adult) **must be informed** of measures or proceedings involving their children. The police have a duty to inform parents when a young person is arrested and to inform them of the reason for the arrest,

⁵ YCJA, amended section 64, entering into force October 23, 2012.

⁶ Ibid., amended section 64, entering into force October 23, 2012.

⁷ Ibid., amended section 72 (1), entering into force October 23, 2012.

including the charge.⁸ If the court orders a medical or psychiatric report, a copy of the report must be given to the young person's parents.⁹ Some youth may not tell their parents that they are HIV-positive, for any number of reasons. Where a young person is charged with a criminal offence related to non-disclosure of HIV status, his or her HIV status will probably be disclosed to parents, either directly or indirectly.

- Although, as a general principle, a young person's identifying information is to be protected, a youth justice court can nevertheless make a **temporary order** permitting any person (including the police via media alert) to publish information that identifies a young person as having committed or allegedly committed an indictable offence if the judge is satisfied that:
 - there is reason to believe that the young person is a danger to others; and
 - the publication of information is necessary to assist in apprehending the young person.¹⁰
- **Publication bans** do not apply to a young person who has received an adult sentence.¹¹
- Moreover, with the introduction of the *Safe Streets and Communities Act*, the court will now have to consider lifting the publication ban — even if a young person has received a youth sentence — as soon as the young person has been convicted for a *violent offence* (now including an offence in which a young person endangers the life or safety of another person by creating a substantial likelihood of causing bodily harm).¹²
- A youth worker, the Attorney General, a peace officer, or any other person engaged in the provision of services to young persons may disclose a youth's HIV status, as part of information in his or her record, to any **professional or other person engaged in the supervision or care of a young person**, including a representative of any school board or school, if it is necessary to:
 - ensure compliance with the terms of an authorization granting leave from custody;
 - ensure the safety of staff, students or other persons; or
 - facilitate the rehabilitation of the young person.¹³

⁸ Ibid., section 26.

⁹ Ibid., section 34 (7).

¹⁰ Ibid., section 110 (4). Such an order ceases to have effect five days after it is made (section 110 (5)).

¹¹ Ibid., section 110 (2) (a).

¹² Ibid., amended sections 75 (1) and section 100 (2) (b), entering into force October 23, 2012.

¹³ Ibid., section 125 (6).

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