

HARMS OF SEX OFFENDER REGISTRIES IN CANADA AMONG PEOPLE LIVING WITH HIV



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Introduction

This paper examines the harms of sex offender registries (SOR) in Canada as experienced by people living with HIV. These harms are significant and wide-ranging, and include social harms, psychological harms, and harms to liberty and human dignity. Specifically, this paper examines the experiences of people living with HIV convicted of aggravated sexual assault for not disclosing their HIV status to sexual partners, and who, as a result of their conviction, face compulsory registration with the National Sex Offender Registry (NSOR).

The number of prosecutions of people living with HIV in Canada for alleged HIV non-disclosure is among the highest in the world. There have been at least 200 people prosecuted for alleged HIV non-disclosure in Canada since 1989 (House of Commons Standing Committee on Justice and Human Rights, 2019, p. 15). There are no HIV-specific provisions within the *Criminal Code* that criminalize non-disclosure; rather, individuals accused of non-disclosure are most commonly charged with aggravated sexual assault (HLN, 2019, p. 3). In legal terms, non-disclosure of one's HIV status

amounts to fraud (*Criminal Code*, RSC 1985, c C-46, s. 265(3)(c)), which invalidates the other partner's consent to the sexual activity. As a result, otherwise consensual sexual activity becomes, as a matter of law, non-consensual sex. Charges are generally elevated to *aggravated* sexual assault (*Criminal Code*, s. 273) because the possibility of acquiring HIV has been considered by the courts as "endangering life" (HLN, 2019, p. 7). Both sexual assault and aggravated sexual assault are among the designated offences that result in compulsory registration in the NSOR (*Criminal Code*, ss. 490.011(1), 490.012(1)).

Canada is unique in applying sexual assault law to cases of alleged HIV non-disclosure, charges that carry heavy social and legal consequences, and significant stigma and related harms (House of Commons Standing Committee on Justice and Human Rights, 2019, p. 16). The harms associated with the use of sexual assault law in cases of HIV non-disclosure have been widely documented elsewhere (McClelland et al., 2017; Hastings et al., 2017). These harms have been acknowledged by the House of Commons Standing Committee on Justice and Human Rights in 2019 when they recommended prohibiting the use of sexual assault provisions in such cases (House of

Commons Standing Committee on Justice and Human Rights, 2019, p. 23), recognizing the use of sexual assault provisions to respond to consensual sexual activities as not appropriate (ibid, p. 23). The inappropriate fit of sexual assault law in these cases is underscored by the fact that women who are themselves survivors of coercion and sexual assault are disproportionately represented among prosecutions, deepening existing dynamics of criminalization of marginalized, racialized, and Indigenous women (LEAF, 2019, p. 8). The use of sexual assault law in cases of HIV non-disclosure has a negative impact on sexual assault law more generally by potentially eroding “the gains made in establishing an affirmative standard for consent” (LEAF, 2019, p. 9).

People living with HIV convicted of aggravated sexual assault for non-disclosure experience substantial social, psychological, and other harms to human dignity as a result of their engagement with the criminal legal system generally, and specifically as a result of their conviction under sexual assault laws. These harms stem from multiple sources, including:

- mandatory designation and registration with the NSOR under the federal *Sex Offender Information Registration Act*, SC 2004, c 10 (*SOIRA*) (and associated provisions in the *Criminal Code*);
- the circulation and dissemination of knowledge pertaining to their designation as a sex offender by media;
- the circulation and dissemination of knowledge pertaining to the charges for which they were convicted, also by media;
- HIV-related stigma; and
- extraordinary release conditions.

While the experience of these various sources of harm can be difficult to disentangle, this study demonstrates that sex offender designation and registration requirements under *SOIRA* play a defining and central role in the experience of harms within this group. As such, the automatic requirement to register with the NSOR if convicted of designated offences and the removal of Crown and judicial discretion significantly contributes to the harms of those living with HIV convicted of sexual assault or aggravated sexual assault.

Further, these harms exacerbate — and are reinforced by — pre-existing forms of systemic racism in the criminal legal system, particularly anti-Black and anti-Indigenous racism. Black and Indigenous people are disproportionately represented among prosecutions for HIV non-disclosure (Mykhalovskiy & Betteridge, 2012). Between 2012 and 2016, almost half of all people charged for whom race is known were Black men (HIV Legal Network, 2019, p. 9). The social, psychological, and other harms to liberty and human dignity resulting from sex offender registries and compulsory registration among people living with HIV convicted of aggravated sexual assault are disproportionately experienced by racialized individuals, particularly Black men and Indigenous women (McClelland, 2019, HIV Legal Network, 2019).

This paper draws on existing research on sex offender registries in Canada and draws extensively on a study conducted by one of the authors (McClelland, 2019) on the qualitative experiences of people living with HIV facing criminal convictions for alleged HIV non-disclosure to sexual partners.ⁱ

The first section of this paper provides an overview of the NSOR and the 2011

amendments to *SOIRA*, which imposed mandatory registration for individuals convicted of designated offences, including aggravated sexual assault. As a result of these amendments, all individuals living with HIV convicted of aggravated sexual assault for non-disclosure became subject to the mandatory sex offender registration. The second section contextualizes the harms of sex offender registries for people living with HIV, focusing on harms resulting from news media reporting on sex offender status and conviction and psychological harms from sex offender treatment stemming from correctional policy. The third section examines the harms arising from the NSOR itself, focusing on social harms, including family estrangement; psychological harms due to sex offender designation, including internalized stigma and negative impacts on re-entry and reintegration following release from custody; and psychological harms arising from onerous registration requirements and long-term or potential lifetime registration and surveillance.

1. Overview of Sex Offender Registries in Canada

The SOR regime in Canada is made up of an interplay of national and provincial registries. The experience of SORs among those subject to their requirements is also shaped by local police forces' *SOIRA* enforcement practices, correctional policy while incarcerated, which includes sex offender treatment and programming, as well as the broader media landscape. Although several provinces (e.g. Ontario and B.C.) have enacted their own sex offender registration laws, and several other provinces have enacted their own policies and practices regarding management of individuals convicted of sexual offences, this paper focuses primarily on the NSOR, a

federal registry which is governed by *SOIRA*.

1.1 National Sex Offender Registry

Enacted in 2004 with the passage of *SOIRA*, the NSOR contains three components, including the federal legislative framework, an electronic sex offender database managed by the RCMP, and administration and enforcement of the legislation by police agencies (Amyot, 2009). Once an individual is convicted for a “designated offence” (enumerated within the *Criminal Code*), the sentencing judge is required to order them to register with the NSOR. Sexual assault and aggravated sexual assault — the offences most often used to prosecute HIV non-disclosure — are among the designated offences for which registration is required upon conviction (*Criminal Code*, ss. 490.011(1), 490.012(1)).

Individuals mandated to register with the NSOR are required to provide extensive identifying information including the following:

- primary and secondary addresses;
- employment information including address, names of employers, and role;
- educational institutions in which they are enrolled;
- information regarding volunteer work and role;
- driver's license and passport information;
- vehicle information including model, license plate, and registration information; and
- height, weight, and any identifying marks (e.g. tattoos) (*SOIRA*, s. 5).

Changes in information (e.g. place of residence) must be reported within seven days of the change (s. 4.1(1)). Individuals on

the registry must provide notice if they depart from their place of residence for more than seven consecutive days. Registration is required annually (s. 4.1), and failure to comply can result in a fine of \$10,000 or up to two years' imprisonment (s. 17) (*SOIRA*, ss. 4, 5; *Criminal Code*, s. 490.031). Individuals can remain in an active status on the list for 10 years, 20 years, or for their lifetime (*Criminal Code*, s. 490.013(2)), though information is retained indefinitely by the RCMP unless an individual is acquitted or pardoned (*SOIRA*, ss. 15(1), (2) and (3)). *SOIRA* does not have specific provisions mandating the collection of DNA samples; however, DNA sample collection is mandated in cases where an individual is convicted of designated offences, including aggravated sexual assault (*Criminal Code*, s. 487.04).

The NSOR is generally only accessible to law enforcement (*SOIRA*, s. 16). Beyond accessing the NSOR for administrative functions, police services may generally only consult the information contained in the NSOR for the purposes of preventing or investigating a crime of a sexual nature (*SOIRA*, s. 16(2(a))). However, *SOIRA* provides several legal bases for the disclosure of information in certain instances to, among others, the Canada Border Services Agency, prosecutors, and courts (*SOIRA*, s.16(4)). While *SOIRA* does not have specific provisions allowing for community notification (in contrast to the United States, where community notification is a defining feature of sex offender registries (Petrunik et al., 2008; Petrunik, 2003), information regarding sex offender designation can become publicly available through news media reporting (elaborated further in section two below).

The stated purpose of *SOIRA* is to “help police services prevent and investigate

crimes of a sexual nature by requiring the registration of certain information relating to sex offenders” (s. 2(1)). However, there is insufficient evidence to demonstrate that the NSOR succeeds in meeting this stated purpose. A review of the available literature demonstrates that there is a stark lack of evidence that federal and provincial SORs meet their stated aims, including that SORs reduce recidivism (Lussier & Mathesius, 2018; Napier et al., 2018; Murphy et al., 2009), or that SORs reduce the prevalence of sexual crimes (Bouffard & Askew, 2017; Sandler et al., 2017).

In addition to issues regarding effectiveness, a range of problems have been widely cited as inherent to the Canadian NSOR regime, including the negative impacts of sex offender registration requirements on the rehabilitation and reintegration efforts of those convicted, and the collateral effects on community safety (e.g. the promotion of a false sense of protection) (Amyot, 2009, p. 200). These identified problems are in addition to widely cited problems with accuracy and reliability of information contained therein (Lussier & Mathesius, 2019, p. 109).

1.2 2011 Amendments to *SOIRA*

In 2011, *SOIRA* (and the corresponding provisions in the *Criminal Code*) were amended when Bill S2 came into force. The most significant among the amendments was the imposition of *mandatory* sex offender registration under the NSOR for designated offences, including for first-time offences (*Criminal Code*, s. 490.012(1)). The amended legislation also included provisions for lifetime registration for those convicted of more than one sexual offence (*Criminal Code*, s. 490.013 (2.1)).

Prior to the 2011 amendments, Crown prosecutors were entitled, but not required, to apply to the court for a *SOIRA* order for individuals convicted of designated offences. Following this, sentencing judges were not required to make a *SOIRA* order if the individual had established that the impact on their privacy or liberty interests would be “grossly disproportionate to the public interest in protecting society through the effective investigation of crimes of a sexual nature” (*Criminal Code*, RSC 1985, c C-46, s. 490.012(4) as it appeared on 14 April 2011). The 2011 amendments removed Crown and judicial discretion in *SOIRA* applications, preventing both the prosecutor and presiding judge from weighing the circumstances of the case, and to determine whether a registration order was appropriate. This is also irrespective of level of risk a person convicted of a designated offence is deemed to pose. The 2011 amendment effectively removed Crown and judicial discretion in *SOIRA* applications, ushering in an era where all individuals living with HIV convicted of sexual assault or aggravated sexual assault for non-disclosure were designated as sex offenders and subject to the NSOR requirements.

2. Contextualizing the harms of Sex Offender Registries for people living with HIV

This section provides context for how *SOIRA* operates in the daily lives of people living with HIV convicted of aggravated sexual assault for HIV non-disclosure. It points to harms stemming from news media reporting on sex offender designation and conviction, as well as psychological harms from sex offender treatment stemming from correctional policy. These contextual harms have significant implications with respect to

human dignity and represent clear violations of individuals’ rights to privacy and psychological integrity. The harms emerging directly from the NSOR and provisions under *SOIRA*, which are detailed below in section three, interplay significantly with and exacerbate the accompanying harms detailed here.

2.1 Harms stemming from news media reporting on sex offender status and conviction

Under *SOIRA*, access to the information contained within the NSOR is generally restricted to law enforcement (*SOIRA*, s. 16).ⁱⁱ However, despite these formal limitations on public accessibility of the NSOR and the privacy provisions within *SOIRA*, information regarding the sex offender designation of those interviewed in McClelland’s 2019 study was often made public through news media coverage of their case, in which charges, convictions, and often, sex offender designation is publicized. In some cases, this includes that an individual is registered — or will be required to register — with the NSOR. A review of news media coverage from 2013-2014 on such cases conducted for this paper included headlines such as “Sex offender set for deportation from Winnipeg” and statements including “[Defendant] will also be required to give a DNA sample and will be registered on the national sex offender registry for life” (CTV, 2013) and “[she] was required to register as a sex offender upon her release” (CBC, 2014).

Publication bans in cases of HIV non-disclosure generally protect publication of information pertaining to the complainant but not the accused (*Criminal Code*, s. 486.4). News media reports of cases of alleged HIV non-disclosure are often highly sensational and include significant

identifying and sensitive information pertaining to individuals' area of residence, health status, and personal relationships. The public dissemination and circulation of this information by news media exposes individuals not only to HIV-related discrimination, but to harassment and vigilante violence on the basis of their sex offender status (Spencer, 2009; Murphy et al., 2009), including harassment and threats of violence against the family of those designated as sex offenders (Amyot, 2009, p. 200).

The exceptional stigmatized status of sex offenders means that the public circulation and dissemination of sex offender designation exposes individuals to extreme levels of vitriol, contempt, prejudice, and exposure to vigilante violence (Spencer & Ricciardelli, 2020). The vigilante violence and routine discrimination to which sex offenders are exposed results from the abject and monstrous status of sex offenders (Spencer, 2009). The presumption in the public imagination that sex offender designation is reserved for violent and repeat sexual offenders — the “worst of the worst” — underscores this exceptionally stigmatized status (ibid). This understanding stands in stark contrast with the realities of those convicted of sexual offences for HIV non-disclosure (McClelland, 2019). Public knowledge and dissemination of sex offender designation and registration is particularly harmful in this context, both within the criminal legal system and in the community (Ricciardelli & Spencer, 2014).

Media reporting on sex offender designation in connection with an individual's HIV status is also a privacy concern. The protection of the privacy interest is particularly important for individuals living with HIV as HIV is a highly stigmatized medical condition, and people living with

HIV often go to great lengths to keep their HIV status private. Information about stigmatized medical conditions is recognized as a type of personal information deserving of special protection because it directly affects a person's dignity-related privacy interest (*Sherman Estate v. Donovan*, 2021 SCC 25 at para 77). Disclosure of a person's sex offender status and the nature of their offence not only discloses their HIV status but also perpetuates pernicious stereotypes of people living with HIV as dangerous. The following passage highlights the harms to privacy and personal dignity stemming from news media reports:

“I come from a small town, so everybody knows everything. The quiet girl is all of a sudden a big media star, everybody knows who I am ... my name in the news, my graduation picture was up in the media.” (Darlene,ⁱⁱⁱ Indigenous woman, late 20s).

The dissemination of sensitive information by media pertaining to convictions and sex offender designation resulted in substantial barriers to employment opportunities among those convicted of HIV non-disclosure (McClelland, 2019). Most of the individuals interviewed in McClelland's study were compelled to enroll in social assistance programs due to the employment barriers posed by the circulation and public availability of this information (2019, p. 283).

Substantial barriers to housing were also widely experienced by those who were part of the study, also stemming from media reporting on their conviction in combination with their sex offender designation. In some cases, individuals were evicted as result of the public availability of this information. One interviewee was told “we don't rent to

rapists,” underscoring how this group is exposed to increased risks of homelessness, precarious housing, and related effects on health because of discriminatory treatment on the basis of conviction and sex offender designation. This is consistent with the substantial and direct impacts on housing security generated by sex offender registration that is amply demonstrated in both Canadian (Amyot, 2009; Knack et al., 2021) and US research (Mercado et al., 2008; Levenson, 2008).

In the case of one individual, as result of the publication of her conviction in combination with her sex offender designation, her mother was socially ostracized, was refused service at local restaurants, and faced harassment at the grocery store. Another participant reported being excluded from volunteer opportunities at local HIV service organization because of his sex offender designation.

It should be noted that the harms to human dignity and privacy stemming from media reporting on conviction and sex offender designation interplay significantly with systemic racism in reporting on HIV non-disclosure cases more generally. This includes a disproportionate volume of media coverage of cases in which the accused is racialized relative to overall cases (Mykhalovskiy et al., 2020). In cases alleging HIV non-disclosure in which the individuals are charged with aggravated sexual assault, Black men are significantly over-represented in news media coverage, and are “represented as dangerous, hypersexual foreigners who pose a threat to the health and safety of individuals (White women)” (Mykhalovskiy et al., 2016, p. 9). Due to disproportionate media coverage of cases involving racialized defendants in general, and migrant Black men in particular (ibid.), the social and psychological harms

pertaining to the public circulation of sex offender designation — as well as other sensitive information, such as health status — are experienced disproportionately by racialized individuals.

While *SOIRA*’s limits on the use and disclosure of NSOR information aim to safeguard the privacy interests of those with a sex offender designation (*SOIRA*, s. 2(2)(c)(ii)), in practice, these protections are diminished through news media disclosure and reporting. The public dissemination and circulation of information pertaining to one’s registration as a sex offender under *SOIRA* may subsequently trigger a range of harms including housing and employment discrimination, and exposure to interpersonal stigma, harassment, and violence.

2.2 Psychological harms from sex offender treatment stemming from correctional policy

Another significant area that contextualizes the harms of sex offender registries among people living with HIV is the psychological harms resulting from sex offender treatment. *SOIRA* does not include provisions for treatment or compulsory programming among those registered as sex offenders with the NSOR; rather, sex offender treatment and related programming stem from correctional and institutional policy. The federal correctional service, for example, has a legal mandate to provide programs and services that address prisoners’ “criminal behaviour.” Participation in sex offender treatment and related programming is based on individual risk assessment (Correctional Service of Canada, 2018; 2019) — assessments that can be highly discretionary and vary widely in their application (Public Safety Canada, 2007; 2017).

Among those convicted for aggravated sexual assault for HIV non-disclosure, many in McClelland's study were required to participate in sex offender treatment or related programming. Participation in treatment and related programming for sex offenders is revealed to often be an inappropriate fit for the specific circumstances of particular sexual offences, particularly in the context of HIV non-disclosure, as in the case of Stephanie, described by McClelland (2019):

“Prior to her sentencing, the Crown Prosecutor in charge of her case had an expert sex offender psychologist interview Stephanie to evaluate her level of risk to the public. Stephanie told me it was the first time the psychologist had seen a case involving HIV non-disclosure. They had no official diagnostic tools to calculate her potential level of risk based on the circumstances of the case. She did not fit any of the official criteria of sex offenders that the psychologist used during the interview. Despite this, Stephanie was still designated a sex offender, deemed a risk to the public, and denied bail. Stephanie told me the psychologist said she was a unique threat and a “different kind of sex offender.” She is now registered as a sex offender for life, and was sentenced to multiple years under house arrest and, later, incarceration (p. 174)”.

These psychiatric evaluations and forensic assessment procedures are particularly psychologically harmful in instances where the circumstances of the crime do not correspond with treatment models, as is the case for those convicted of aggravated sexual assault for HIV non-disclosure:

“While incarcerated, Paul was mandated to participate in the Moderate Intensity National Sex Offender Program, and underwent regular psychiatric evaluation. Those evaluations included phallometric testing, a procedure to determine the sexual preferences of people with penises by measuring their erection responses to visual stimuli depicting various sexual behaviours. ‘They put an apparatus on your private parts and make you watch all sorts of rapes, child sex, torture, violence, and see if you are aroused. ‘Oh, when that girl was getting tortured, you got excited.’” Paul was angry that he had to undergo such testing. Watching and listening to the videos traumatized him. Paul found it increasingly challenging and traumatizing to participate in the program, and the facilitator, despite also agreeing that the program was not a proper fit for him, had to evaluate him using the same criteria applied to everyone else. ‘She [the parole officer manager] said they didn’t think I should be labelled as a sex offender, as I did not fit any of the criteria. But, since I was found guilty, they were institutionally mandated to put me through the program.’ (McClelland, 2019, p. 192-194).”

Psychological harms from sex offender treatment stemming from correctional policy represent a clear violation of the psychological integrity of people living with HIV who are convicted of non-disclosure. These harms, in combination with harms resulting from news media reporting on sex offender status and conviction, are both key contextual elements when understanding the

harms of sex offender designation and registration requirements and how this plays out in the daily lives of people convicted of offences related to HIV non-disclosure.

3. Impacts and harms of Sex Offender Registries in Canada

This section provides an inventory of social, psychological, and other harms to liberty and human dignity among individuals living with HIV who are on the NSOR due to their aggravated sexual assault conviction. These harms arise directly from provisions under *SOIRA*. As a result, they represent a partial picture of the overall harms arising from the use of aggravated sexual assault charges in cases of HIV non-disclosure. Some of the harms detailed here stem from sex offender designation under *SOIRA* and inclusion in the NSOR, whereas others come from specific registration requirements themselves.

Those harms that arise from sex offender designation include, most significantly, family estrangement and strains on interpersonal relationships, as well as psychological harms arising from the resulting social isolation and internalized stigma. Sex offender designation — as result of social stigmatization and resulting social isolation — also significantly impedes individuals' re-entry and reintegration efforts into the community following their release from custody. Those harms arising from registration requirements under *SOIRA* include the disproportionate nature of long-term and potential lifetime registration and related surveillance, as well as harms represented by the threat of reincarceration for breaching onerous and complex *SOIRA* requirements.

3.1 Family estrangement and internalized stigma

Sex offender designation places significant strains on relationships and undermines family reunification following release from custody. Those interviewed reported family members having serious reservations about maintaining relationships, and being regarded as “dirty” by family members due to their sex offender designation. These individuals attributed these ruptured family bonds to the weight and stigma attached to sex offender designation, and the experience of being on the NSOR, independent of their conviction for aggravated sexual assault:

“My mum she knows, but she makes like it’s a secret, like only family should know. It’s embarrassing for the family to have a daughter who’s a sex offender.” (Lenore, Indigenous woman, late 30s)

Those interviewed reported significant social isolation and feelings of loneliness because of family estrangement. They also reported psychological distress as result of internalizing the stigma attached to their sex offender designation, despite feeling that the use of aggravated sexual assault charges for HIV non-disclosure was inappropriate.

3.2 Negative impacts on re-entry and reintegration

In addition to the negative impacts of family estrangement and resulting social isolation arising from sex offender designation, individuals convicted in HIV non-disclosure cases also spoke of how their sex offender designation significantly undermined their ability to reintegrate into their community following release, including resuming previous engagements and pursuing personal goals:

“I’m on the registry that is for rapists and pedophiles, I really don’t feel like I belong there. I am on there because of HIV. I have to let people know when I am working or when I am volunteering. They need to keep tabs on me.” (Lenore, Indigenous woman, late 30s)

Importantly these experiences stand in stark contrast with *SOIRA*’s stated principle of public interest in the rehabilitation and reintegration of sex offenders (*SOIRA*, s.2(2)(c)). These difficulties are exacerbated by the harms to re-entry and reintegrative efforts described in the previous section due to media disclosure and resulting public knowledge of sex offender designation.

3.3 Undue burden and psychological harms arising from potential lifetime of surveillance and onerous registration requirements

The first section of this paper outlined the vast amounts of personal information that individuals must disclose under the registration requirements under *SOIRA*. The level of detail required — and significant legal consequences that can result from non-compliance — substantially contribute to the psychological burden experienced by those who are subject to registration requirements. Participants in McClelland’s study emphasized that while they eventually completed their sentence, the long-term and in some cases indefinite nature of the NSOR registration and associated requirements was a cause of significant psychological distress. Among the sources of this distress, individuals cited the legal liability resulting from a potential breach of conditions, as well as the absence of any mechanism through which they might appeal their sex offender designation (though *SOIRA* does

provide a mechanism for a termination order after a designated period of time [*Criminal Code*, s. 490.015]). These individuals attested to the fear and anxiety related to the threat of re-arrest in the event of an unintended breach of conditions, long after they had finished serving their sentence.

Several individuals interviewed were subject to random checks by local law enforcement to ensure compliance with *SOIRA* registration requirements.^{iv} Participants reported that registration requirements and interactions with law enforcement personnel at designated *SOIRA* registration centres brought up painful and traumatic memories of the harms they experienced while incarcerated, including HIV-related discrimination from correctional officers, and prison medical staff. Additionally, participants reported the extent to which annual registration brought up traumatic memories of sex offender treatment while incarcerated. Registration requirements compounded psychological distress associated with the contextual harms detailed in the previous section including widespread social stigma and ostracization due to news media disclosure of convictions and sex offender designation, and traumatic experiences with sex offender treatment while incarcerated.

The provisions within *SOIRA* for long-term, indefinite, or lifetime registration on the NSOR result in their own distinct harms (*SOIRA*, s. 15(1); *Criminal Code*, s. 490.013(2)). Many of those interviewed attested to the psychological distress resulting from the knowledge that requirements under the NSOR would continue beyond the end of their sentence, in many cases for their lifetime. Several people indicated that they would not have taken a plea bargain had they known the implications of registration within the

NSOR. Participants reported feeling like they could not move on with their lives and that they felt as though they were under constant and ongoing surveillance. The quasi-permanence or potential permanence of registration within the NSOR is another manifestation of harms to human dignity and an instance where the NSOR regime is especially at odds with rehabilitative principles (*SOIRA*, s. 2(2)(c)):

“To label someone a sex offender you know, that’s for life, the sentence is over, the three years, but this is until you die. I have to I have to carry this for the rest of my life. I think it’s really unfair you know, like it’s hard to travel... It’s really hard that someone has to carry for the rest of their life.” (Darlene, Indigenous woman, late 20s)

All respondents reported attempts to commit suicide or prolonged periods of suicidal ideation due to the psychological harms resulting from a combination of factors including ongoing registration requirements and sex offender designation — a label that followed them beyond the end of their sentence, affecting multiple spheres of their lives. These demonstrable harms indicate that long-term registration, and the potential for lifetime registration is vastly disproportionate to *SOIRA*’s purpose, particularly given that these requirements stand regardless of deemed risk to the public.

4. Conclusion

4.1 Summary of harms

The experiences by people living with HIV registered as sex offenders with the NSOR pursuant to *SOIRA* point to an array of mutually reinforcing harms. While some of

these harms arise from the use of aggravated sexual assault charges against people accused of HIV non-disclosure, the research conducted by McClelland clearly indicates that the most significant of these harms are directly attributable to provisions under *SOIRA*. These harms include:

- family estrangement and internalized stigma;
- negative impacts to re-entry and reintegration following release from custody; and
- psychological harms arising from onerous registration requirements and long-term or potential lifetime registration and surveillance.

The purpose and principles of *SOIRA* do not include the punishment of those on the NSOR. Yet, people living with HIV required to register as sex offenders clearly experience *SOIRA* registration as punitive. Available evidence does not reveal the NSOR to be effective in achieving its stated purpose of helping police services prevent and investigate crimes of a sexual nature, or its principles of societal protection, and public interest in the rehabilitation and reintegration of sex offenders. This is especially the case in the context of those living with HIV convicted of aggravated sexual assault. Instead, for these individuals, *SOIRA* provisions create additional barriers to the re-entry process, increasing economic and material precarity, and deepening emotional distress and social isolation.

As study participants underscored, the possibility of being subject to lifetime registration requirements (*Criminal Code*, s. 490.013(2)), the indefinite retention of information (*SOIRA*, s.15(1)), the frequency of reporting and the onerous level of information disclosure required, along with the risk of re-incarceration due to failure to

comply with *SOIRA*'s requirements, further compound and intensify the broader contextual harms faced by those convicted of HIV non-disclosure, including the public circulation of information pertaining to conviction and sex offender designation by news media, and the psychological harms from sex offender treatment stemming from correctional policy. This results in a range of cascading harms including housing and employment discrimination, and exposure to interpersonal harassment, stigma, and violence.

4.2 Knowledge gaps and future research

This paper points to several areas that would benefit from further research:

- (1) *Criteria used to determine who is subject to community notification measures by provinces and local law enforcement.* Determinations of “high-risk” offenders and “high-risk sexual” offenders are generally used by provincial governments and local law enforcement to decide who will be subject to community notification measures. Further research is required to assess the extent to which people living with HIV convicted of aggravated sexual assault for non-disclosure might be vulnerable to community notification practices.
- (2) *The intersections of systemic racism and sex offender designation.* The over-representation of racialized people — in particular Black men and Indigenous women — among those charged for HIV non-disclosure, as well as the disproportionate media representation of Black migrant men suggests that systemic racism is deeply implicated in sex offender designation under the existing *SOIRA* regime. Further research is needed to explore the relationship between systemic racism and sex offender designation within the NSOR.
- (3) *The potential role of publication bans in mitigating the harms arising from news media disclosure of conviction and sex offender designation among those living with HIV.* At present, publication bans are mandatory for complainants but rarely available for the accused in sexual assault cases. Given the substantial and cascading harms stemming from public disclosure of sex offender designation, further research is needed to explore what beneficial effect publication bans might have on those accused of HIV non-disclosure.

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ⁱ The study involved 28 in-depth qualitative interviews with 16 people from across five Canadian provinces from 2017 to 2018. Of the 16 people interviewed, three had been threatened with criminal charges by police, while thirteen had been formally criminally charged, all with aggravated sexual assault. Some faced multiple other charges, including attempted murder, all related to alleged HIV non-disclosure. In only one of the cases was HIV transmission alleged to have taken place. Eight of the people interviewed were consequently registered as sex offenders on the NSOR (three women/five men).

ⁱⁱ Information regarding an individual’s designation as a sex offender can in certain cases become publicly accessible. This is the case for people who are also subject to Dangerous Offender (DO) or Long-Term Offender (LTO) designation (*Criminal Code*, ss. 753, 753.1). DO and LTO designation can play a role in community notification practices as permitted by provincial Police Services Acts and policing policy, where local law enforcement publicly circulates information of individuals convicted. This information generally includes photo, area of residence, convictions, and in some cases, information pertaining to health status or communicable disease. Given that the majority of individuals with DO designation had a sex offence as their primary conviction (Petrunik et al., 2008, p. 116) researchers have characterized these as legislative “loopholes” with respect to the privacy provisions of sex offender registries (Amyot, 2009, p. 195).

ⁱⁱⁱ All names are pseudonyms.

^{iv} While there are no provisions for random checks within *SOIRA* itself, and practices such as these are instead reflective of police discretion or department practice, these random checks nonetheless reflect the arbitrary nature of registration-related enforcement in the daily experience of those individuals on the NSOR.