

# ONTARIO WORKING GROUP ON CRIMINAL LAW + HIV EXPOSURE



27 June 2013

Kirsten Mercer  
Senior Policy Advisor, Justice Policy  
Office of the Premier  
Whitney Block, Suite 6340  
99 Wellesley Street West  
Toronto, ON M7A 1A1

Dear Ms. Mercer:

**Re: HIV and the criminal law**

On behalf of the Ontario Working Group on Criminal Law and HIV Exposure (CLHE), I thank you for taking the time to talk with me at the Law Society of Upper Canada event on June 25, 2013.

CLHE has been working for the last six years to confront the growing crisis of criminal prosecutions of people living with HIV in Ontario. In December 2010, then Attorney General Chris Bentley agreed to develop a Practice Memorandum in relation to HIV non-disclosure with the input of CLHE, and to share a draft with CLHE (see attached letter of December 16, 2010). Although CLHE proposed a formal consultation process including itself and various stakeholders, the Ministry of the Attorney General (MAG) declined to implement such a process. MAG, however, did agree to meet with CLHE and accept written submissions on the issue. To this end, in summer 2011, CLHE provided MAG with a *Report and Recommendations* (see attached) based on comprehensive community and expert consultations conducted by CLHE around the province with people living with HIV, communities affected by HIV, legal, public health, criminal justice and scientific experts, health care providers, and advocates for women's rights in the context of sexual violence and the criminal justice system. Unfortunately, the development of guidance was subsequently suspended by MAG pending the release of Supreme Court of Canada (SCC) decisions in two HIV non-disclosure cases (*R. v. Mabior* and *R. v. D.C.*).

In October 2012, the SCC released its decisions, proclaiming a new test that requires disclosure of HIV status before sexual activity that poses a "realistic possibility of HIV transmission." Prosecutorial guidelines, however, remain urgently required in Ontario. Because the SCC decisions concerned only vaginal sex, a number of uncertainties remain regarding the new "realistic possibility" test. It is unclear, for example, how the law will be applied by Crown prosecutors in relation to other sexual activities such as oral sex.

.../3

Such uncertainties have already resulted in inconsistencies in the application of the law across Ontario - for example, while some prosecutions are proceeding in relation to non-disclosure involving oral sex, including a woman in Barrie who is facing aggravated sexual assault charges in relation to giving and receiving oral sex, others are being withdrawn because of the low risks of transmission associated with such activity.

The spectre of unjust and unfair prosecutions, including those in relation to oral sex, continues to be of great concern in Ontario, and judging from the constant stream of questions and concerns CLHE and our member organizations continue to receive, it remains one of the top preoccupations for people living with HIV and those working in HIV prevention and care – particularly in the wake of the SCC rulings.

We are very concerned that the “realistic possibility” test, if not applied with great caution and restraint, will result in an overly broad use of the criminal law in relation to HIV non-disclosure. We have known for a number of years that condom use is a highly effective tool for HIV prevention. When used properly and consistently, condoms are essentially 100% effective in preventing HIV. We also know that anti-retroviral treatment reduces viral loads (the amount of HIV virus in blood) to levels where the risk of transmission is negligible. Prosecuting people who use precautions to protect their partners, or people who have a low viral load, is not only unfair, but also counterproductive in terms of HIV prevention.

There is serious concern that prosecutions against individuals who take precautions will have a disproportionate impact on the most marginalized and vulnerable of persons living with HIV, including those who may not have access to medications or sustained health care, such as racialized newcomers and First Nations persons. Similarly, there is great concern that prosecutions will have a disproportionate impact on vulnerable women living with HIV who are in abusive relationships or who cannot safely impose condom use or disclose their HIV status to sexual partners.

Further, there is great concern that overbroad prosecutions will take place in relation to anal sex, which will have a disproportionate negative impact on gay men in Ontario, a community currently subject to significant HIV stigma and one that has historically borne the brunt of the HIV epidemic in Ontario.

In terms of public health, there is an increasing body of evidence that an overly broad use of the criminal law undermines HIV prevention efforts, and compromises the ability of people living with HIV to access the care, treatment and support they need to stay healthy. The overly broad use of the criminal law is creating a disincentive to individuals to seek HIV testing. It also prevents people living with HIV from talking openly with health care providers due to the fear that their HIV and other test results and discussions with medical professionals will be used as evidence against them in a criminal proceeding.

CLHE has raised these concerns with MAG on numerous occasions since 2010. Most recently, in January 2013, CLHE met with Mary Nethery, Director, Criminal Law Policy Branch. At that time Ms Nethery informed CLHE that MAG was not in a position to provide a timeline for the development of prosecutorial guidance.

By way of letter dated 30 April 2013 (see attached), we were very happy to receive a commitment from MAG that guidance would be developed by fall 2013. However, the letter made clear that MAG was not willing to meet with CLHE to further discuss this issue. The letter, from James L. Cornish, Assistant Deputy Attorney General, Criminal Law Division, indicates that the “Ministry has engaged in extensive consultation with the Ontario Working Group on Criminal Law and HIV Exposure (CLHE).” It further states that guidance should be finalized by fall 2013 but that MAG “do[es] not anticipate conducting any further external consultations,” but would consider additional information in writing from CLHE.

MAG’s unwillingness to meet with CLHE was reiterated by way of letter dated 17 May 2013 (see attached). A similar letter was sent to various other individuals and organizations.

CLHE is extremely dismayed by MAG’s refusal to meaningfully consult on the development of prosecutorial guidance. While we have met with MAG representatives on several occasions, the meetings have focussed on the urgent need for guidance. There has been little substantive discussion, before or after the recent Supreme Court of Canada rulings, regarding the content of prosecutorial guidance. It is also unclear whether a draft of the guidance will be shared with CLHE for review, as promised by former Attorney General Bentley. It is vital that a draft be shared for review and that meaningful discussion take place with CLHE surrounding the substance of the guidance as soon as possible, given MAG’s stated fall 2013 deadline for completing such guidance.

We sincerely appreciate the Premier’s support for the HIV community in Ontario, and for her commitment to just and evidence-based policy. We request that the Premier arrange a meeting between the Attorney General and CLHE in order to facilitate meaningful and transparent consultation on this urgent issue.

We thank you very much for your attention to this matter, and look forward to hearing from you.

Sincerely,



**Ryan Peck**

Barrister & Solicitor, Executive Director, HIV & AIDS Legal Clinic Ontario  
Co-chair, Ontario Working Group on Criminal Law and HIV Exposure

Enclosures