

ONTARIO WORKING GROUP ON CRIMINAL LAW + HIV EXPOSURE



December 2, 2014

VIA ELECTRONIC & LETTERMAIL

Honourable Kathleen Wynne
Premier of Ontario
Legislative Building
Queens Park
Toronto, ON M7A 1A1

Dear Premier:

Re: Criminal law and HIV

Please accept this letter on behalf of the Ontario Working Group on Criminal Law and HIV Exposure (CLHE).

We are writing once again to express our deep frustration with the process surrounding the urgent need to mitigate the unjust, overly-broad use of the criminal law to prosecute people for allegedly not disclosing their HIV-positive status to sexual partners.

As you know, almost five years ago CLHE began discussions with the Ministry of the Attorney General (MAG) in relation to the development of prosecutorial guidelines for Crown prosecutors handling allegations of HIV non-disclosure. We refer you to the attached letter of June 27, 2013, which outlines the process to that date. Unfortunately, despite all efforts, the process has remained woefully flawed since then, notwithstanding the meeting you had in October 2013 with a representative of CLHE and Stephen Lewis, former Commission of the Global Commission on HIV and the Law, at which meeting the discussion canvassed the multiple ways in which unjust criminalization of people living with HIV undermines public health, human rights and other concerns, and therefore the need for appropriate guidance to prosecutors to mitigate the misuse of the law.

For example, although in 2010 former Attorney General Chris Bentley agreed to share draft guideline material with CLHE, MAG, when finally sharing the draft in November 2014, was only willing to provide the material to three lawyers¹ affiliated with CLHE under the condition that they undertake to not discuss the content with any other parties without MAG's consent. After deliberations with others within CLHE, they agreed to this restriction in order to be able to make an informed assessment of MAG's draft, but formally noted their objections to such a non-transparent and non-inclusive process for addressing a key public policy issue of concern to many people living with HIV and those

¹ Richard Elliott, Executive Director, Canadian HIV/AIDS Legal Network; Ryan Peck, Executive Director, HIV & AIDS Legal Clinic Ontario; Jonathan Shime, Partner, Cooper, Sandler, Shime & Bergman LLP.

working in the field of HIV. In addition, despite the fact that the question of risk of transmission is a central element of HIV non-disclosure prosecutions, MAG has ignored a request for a meeting from leading scientific experts who were involved in the creation of the *Canadian Consensus Statement on HIV and its Transmission in the Context of Criminal Law*, a document signed by more than 75 scientific experts across Canada, many from Ontario.² CLHE remains extremely dismayed that MAG has been unwilling to meaningfully engage with CLHE and other experts in a transparent manner.

We respectfully remind you that there is increasing evidence that the overly broad use of the criminal law undermines the public health response to HIV by preventing individuals from talking openly with health care providers because of the fear that, one day, their test results and/or discussions with medical professionals might end up as evidence against them in a criminal proceeding. We also remain deeply concerned that an overly broad use of the criminal law creates a disincentive for individuals to seek HIV testing.

We further respectfully remind you of the injustice that results from an inappropriate use of the criminal law against individuals who pose no real risk of HIV transmission. We know that people living with HIV in Ontario continue to be charged and prosecuted for having sex with an undetectable viral load despite medical evidence that the risk of transmission in such circumstances is close to zero. Similarly, people living with HIV continue to be prosecuted for having sex even with an unbroken condom, in which case the risk of transmission is indeed zero. We had also informed you in our letter dated January 7, 2014 about a charge for *assault causing bodily harm* that was laid against a person living with HIV in Toronto for spitting at a paramedic. Again, HIV cannot be transmitted through saliva. Yet this is not the only case of its kind, as police and prosecutors continue to ignore more than 30 years of scientific knowledge about HIV and its transmission.

Our efforts to deal in good faith with MAG have not been reciprocated. On November 4, 2014, the three lawyers noted above met with MAG to review and discuss the draft guidance document prepared by MAG. At that time, the lawyers communicated that MAG should not proceed with the guidelines as drafted, given their unacceptable content. That recommendation has been endorsed by CLHE.

In a recent meeting with the Honourable Glen Murray, it was suggested that we gather and clarify government support for a variety of options to resolve the impasse we find ourselves in once again. We would greatly appreciate the opportunity to meet with you to discuss how to stop unjust prosecutions of people living with HIV in Ontario.

² M Loutfy, M Tyndall, J-G Baril, JSG Montaner, R Kaul, C Hankins. Canadian consensus statement on HIV and its transmission in the context of criminal law. *Can J Infect Dis Med Microbiol* 2014;25(3):135-140, at [http://www.pulsus.com/journals/pdf_frameset.jsp?jnlKy=3&atlKy=12838&isArt=t&jnlAdvert=Infdis&adv erifHCTp=&sTitle=Canadian%20consensus%20statement%20on%20HIV%20and%20its%20transmission%20in%20the%20context%20of%20criminal%20law%2C%20Pulsus%20Group%20Inc&VisitorType=.](http://www.pulsus.com/journals/pdf_frameset.jsp?jnlKy=3&atlKy=12838&isArt=t&jnlAdvert=Infdis&adv erifHCTp=&sTitle=Canadian%20consensus%20statement%20on%20HIV%20and%20its%20transmission%20in%20the%20context%20of%20criminal%20law%2C%20Pulsus%20Group%20Inc&VisitorType=)

Given the apparent bad faith and unwillingness of MAG to curtail unwarranted, unscientific and unjust prosecutions against Ontarians living with HIV, we have no choice but to raise with our communities of interest our serious concern with the manner in which an overly broad and inappropriate use of the criminal law is being used to respond to a public health issue in Ontario.

Many in our community are supportive of your government as they consider you to be an ally on many fronts. Sadly, the area of criminalization of HIV non-disclosure remains a notable and problematic exception.

We are at your disposal to discuss this pressing matter for Ontario's HIV community.

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

Sincerely,

A handwritten signature in black ink, appearing to read 'Ryan Peck', written in a cursive style.

Ryan Peck

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

Enclosure

cc Honourable Eric Hoskins, Minister of Health and Long-Term Care
Honourable Madeleine Meilleur, Attorney General
Honourable Glen Murray, Minister of the Environment and Climate Change