

# ONTARIO WORKING GROUP ON CRIMINAL LAW + HIV EXPOSURE



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Honourable Yasir Naqvi  
Attorney General of Ontario  
Ministry of the Attorney General  
720 Bay Street, 11th Floor  
Toronto, ON M5G 2K1

Honourable Eric Hoskins  
Minister of Health and Long-Term Care  
Ministry of Health and Long-Term Care  
10<sup>th</sup> Floor, Hepburn Block  
80 Grosvenor Street  
Toronto, ON M7A 2C4

Dear Attorney General Naqvi and Minister Hoskins:

**Re: Criminal Law and HIV**

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

CLHE commends and agrees with your position, as stated today in a joint statement, that you “believe strongly that HIV should be considered with a public health lens, rather than a criminal justice one, wherever possible,” and that work must continue “towards reducing the stigma and discrimination of people living with HIV/AIDS and their families.”

We further welcome the reiteration of your commitment to engage with people living with HIV and other stakeholders on HIV criminalization. While we join you in the hope that the federal government will take immediate action in relation to legislative reform, it is vital that both the Ministry of the Attorney General and the Ministry of Health and Long-Term Care also take immediate steps to bring the use of the criminal law in line with science and human rights in a manner that is supportive of HIV-related care, treatment and prevention.

To this end, the decision to cease prosecutions in situations where a person living with HIV is on antiretroviral therapy and has maintained a suppressed viral load for six months is a welcome, necessary first step. This is entirely consistent with the 2014

consensus statement<sup>1</sup> by Canadian scientists aimed at helping the criminal justice system appropriately limit the scope of the criminal law, and would reflect one of the minimum points called for by CLHE and others.

As indicated for many years, and as reflected in the recently released Community Consensus Statement<sup>2</sup> endorsed by more than 150 organizations across the country, criminal prosecutions should be removed from the reach of sexual assault laws and be limited to cases of actual, intentional transmission of HIV. In particular, HIV-related criminal charges are not appropriate where a person living with HIV engaged in activities that, according to the best available scientific evidence, posed no significant risk of transmission, which activities include:

- oral sex;
- anal or vaginal sex with a condom; and
- anal or vaginal sex without a condom while having a low viral load.

The federal government itself, in Justice Canada's *Criminal Justice System's Response to Non-Disclosure of HIV*<sup>3</sup> report, recognizes that HIV is first and foremost a public health matter, that use of the criminal law should be a matter of last resort, and that it is problematic in at least some circumstances to use the law of sexual assault to deal with allegations of HIV non-disclosure. In addition, the report includes the following recommendations:

*The criminal law should generally not apply to persons living with HIV who: are on treatment; are not on treatment but use condoms; or, engage only in oral sex (unless other risk factors are present and the person living with HIV is aware of those risks), because the realistic possibility of transmission test is likely not met in these circumstances.*<sup>4</sup>

While the decision by Ontario to cease prosecutions against those with a suppressed viral load is a welcome first step, we are deeply concerned that the province will continue its overzealous approach by continuing to prosecute those who do not have a suppressed viral load, even in circumstances relating to sex with a condom or oral sex.

Not only would this perpetuate stigma and discrimination against people living with HIV, it would continue unjust criminalization, continue to ignore scientific evidence, and would be bad public policy. Furthermore, those who would be most negatively affected are the most marginalized of people living with HIV, including Indigenous persons, low-

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<sup>1</sup> 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.aidslaw.ca/site/wp-content/uploads/2014/06/Canadian-statement1.pdf>.

<sup>2</sup> Canadian Coalition to Reform HIV Criminalization. End Unjust HIV Criminalization: Community Consensus Statement, 2017, at <http://www.hivcriminalization.ca/community-consensus-statement/>.

<sup>3</sup> Department of Justice, Canada. *Criminal Justice System's Response to Non-Disclosure of HIV*, 2017, at <http://www.justice.gc.ca/eng/rp-pr/other-autre/hivnd-vihnd/hivnd-vihnd.pdf>.

<sup>4</sup> *Ibid*, at 30.

income individuals, racialized individuals, women, those with precarious immigration status, and people with mental health conditions.

After many years of work on this issue, we are hopeful that, through meaningful engagement with the HIV community, Ontario will cease to be a world leader in prosecuting people with HIV. Instead it is our fervent hope that Ontario will lead the way to arrive at a place, as envisioned in the provincial HIV/AIDS strategy,<sup>5</sup> where new HIV infections are rare and people living with HIV will lead long, healthy lives, free from stigma and discrimination.

Thank you for your attention to this matter, and we very much look forward to working with you to end the unjust criminalization of people living with HIV.

Sincerely,



**Ryan Peck**

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



**Valérie Pierre-Pierre**

Director, African and Caribbean Council on HIV/AIDS in Ontario  
Co-Chair, Ontario Working Group on Criminal Law and HIV Exposure

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<sup>5</sup> Ontario Advisory Committee on HIV/AIDS. HIV/AIDS Strategy to 2016: Focusing our Efforts – Changing the Course of the HIV Prevention, Engagement and Care Cascade in Ontario, 2017, at [http://www.health.gov.on.ca/en/pro/programs/hiv aids/docs/oach\\_strategy\\_2026.pdf](http://www.health.gov.on.ca/en/pro/programs/hiv aids/docs/oach_strategy_2026.pdf).