

ONTARIO WORKING GROUP ON CRIMINAL LAW + HIV EXPOSURE



April 4, 2017

VIA ELECTRONIC MAIL: ydaqvi.mpp@liberal.ola.org

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

Dear Minister Naqvi:

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 in receipt of your letter of March 3, 2017. First, thank you for your kind words regarding the Sidney B. Linden Award, and please accept our apologies for the inadvertent misquotation in relation to the Canadian Lawyer and Law Times' blog about the 2010 document produced by Crown attorney Karen Shea.

With respect to the guide produced by Ms. Shea, we appreciate that it was not a policy or guideline issued by the Ministry of the Attorney General (MAG). However, it is clear to us that the zealous approach put forward in the document is reflective of the overall prosecutorial approach in Ontario. This is evidenced by the fact that there have been at least 10 cases subsequent to the Supreme Court of Canada decision in *R v. Mabior* involving an accused person with a low or undetectable viral load —nine of which were pursued in Ontario.¹ The intolerable fact remains that Ontario continues to be a world leader in unjustly prosecuting people with HIV.

This reality is unfortunately not reflective of your indication that you applaud the federal Justice Minister's statement on World AIDS Day 2016, in which she recognized that: "[T]he over-criminalization of HIV non-disclosure discourages many individuals from being tested and seeking treatment, and further stigmatizes those living with HIV or AIDS. Just as treatment has progressed, the criminal justice system must adapt to better reflect the current scientific evidence on the realities of this disease."²

¹ Colin Hastings, Cécile Kazatchkine and Eric Mykhalovskiy, *HIV Criminalization in Canada: Key Trends and Patterns*, Canadian HIV/AIDS Legal Network, March 2017, online: www.aidslaw.ca/site/hiv-criminalization-in-canada-key-trends-and-patterns.

² Government of Canada, "Minister Wilson-Raybould Issues Statement on World AIDS Day," 2016. Available at <http://news.gc.ca/web/article-en.do?nid=1163979>.

We note in your letter (of March 3, 2017) the statement that “in cases of HIV exposure, prosecutors in Ontario follow the Supreme Court of Canada direction from *R. v. Mabior*, 2012 SCC 47 and *R. v. D.C.*, 2012 SCC 48.” This position has been articulated by representatives of MAG before, and what appears to be meant by such a statement, either explicitly or implicitly (as is the case here), is that Ontario prosecutors are simply applying the direction of the Supreme Court in those cases. The statement suggests an absence of responsibility on the part of Ontario prosecutors. With respect, we reject any such suggestion as both ethically and legally untenable.

Provincial governments are constitutionally responsible for the administration of the (federal) criminal law. Provincial Attorneys General have the power and responsibility to ensure that administration is sound, and as a matter of law, provincial Crown prosecutors acting on behalf of your Ministry have and must exercise discretion to ensure that any prosecution is “in the public interest.” The pattern of zealous, overly broad prosecution of people living with HIV in Ontario is the result of deliberate choices, both by individual prosecutors and MAG. This includes decisions in particular cases to seek an even wider ambit of criminalization, both in proposed argument before the Supreme Court and in advancing before Ontario courts the widest possible interpretation of the Supreme Court’s 2012 rulings. Indeed, Ontario prosecutors have even sought convictions in additional circumstances beyond those rulings (e.g., for oral sex). The over-criminalization of people living with HIV also results from a deliberate decision to date by MAG to refuse to develop sound guidelines that limit the scope of prosecutions—or indeed to take *any* steps (to our knowledge) to prevent misuse of the criminal law against people living with HIV. Instead, MAG appears content to leave circulating among its prosecutors an (ostensibly) unofficial guide by Crown prosecutor that was written for the purpose of aggressively prosecuting allegations of HIV non-disclosure.

You, your Ministry and your prosecutors do indeed have discretion in how the criminal law is applied in Ontario. With that authority also comes the responsibility to ensure the law is not applied unjustly. The 2012 rulings of the Supreme Court of Canada do not in any way mandate the overly-broad, zealous pursuit of criminal convictions in HIV non-disclosure cases that has been documented in Ontario, and they do not preclude you and your Ministry from taking steps to appropriately limit the scope of criminalization. We reject any assertion or implicit suggestion that in broadly criminalizing people with HIV in Ontario MAG is simply following the Supreme Court’s direction and has no ability to act otherwise. We trust the Ministry will not continue to suggest that it has no responsibility or discretion in this area.

Similarly, while we appreciate your commitment to work with the federal government and CLHE, we cannot accept the claim that it would be premature for MAG to take any action on this issue prior to the completion of the work being done in conjunction with the federal government, provinces and territories (as indicated in your letter of March 3, 2017). It is unacceptable that unjust prosecutions continue and lives are ruined. And it is unacceptable that Ontario continues to be out of step with current science, human rights principles, and the public health response to HIV care, treatment, support and prevention.

A review and inter-jurisdictional discussions, while welcome and long overdue, are not an excuse for inaction in the interim.

People with HIV can wait no longer, and as a result, we, along with the over 800 people who have contacted you in recent weeks, reiterate our call that you immediately take the following actions:

1. Impose an immediate moratorium on all HIV non-disclosure prosecutions, unless there is alleged intentional transmission of HIV, while law reform options are being explored and sound prosecutorial guidelines are being developed – in conjunction with the community – to limit the current misuse and overextension of the criminal law.
2. Publicly state that the Ontario Ministry of the Attorney General is committed to ending the overly broad application of the criminal law in cases of alleged HIV non-disclosure and to reviewing Ontario's approach to these prosecutions.
3. Engage in meaningful dialogue with CLHE as well as people living with HIV and scientific experts when developing prosecutorial guidelines and other responses to this issue.

Now is time for your Ministry to take action on this issue.

We request a meeting as soon as possible to discuss this vital issue with you.

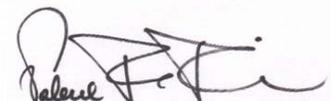
We look forward to hearing from you shortly.

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

cc

- Honourable Indira Naidoo-Harris, Minister for the Status of Women (inaidoo-harris.mpp.co@liberal.ola.org)
- Honourable Eric Hoskins, Minister of Health and Long-Term Care (ehoskins.mpp@liberal.ola.org)
- Honourable Marie-France Lalonde, Minister of Community Safety and Correctional Services (mflalonde.mpp.co@liberal.ola.org)
- Honourable Glen Murray, Minister of the Environment and Climate Change (gmurray.mpp@liberal.ola.org)
- Honourable Jody Wilson-Raybould, Minister of Justice and Attorney General (mcu@justice.gc.ca)
- The Honourable Kathleen Wynne, Premier of Ontario (kwynne.mpp.co@liberal.ola.org)