



June 28, 2016

VIA ELECTRONIC MAIL

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

Dear Minister Naqvi,

Re: Criminal law and HIV

On behalf of the Ontario Working Group on Criminal Law and HIV Exposure (CLHE), we offer congratulations on your appointment as Attorney General of Ontario.

CLHE has been working for almost a decade to confront unjust and discriminatory criminal prosecutions of people living with HIV in Ontario. Since 2010, CLHE has been in discussions with the Ministry of the Attorney General (MAG) with the goal of ensuring that any prosecutions for HIV non-disclosure are informed by a complete and accurate understanding of current medical and scientific research about HIV, and are compatible with broader scientific, medical, public health, and community efforts to prevent the spread of HIV and to provide care, treatment and support to people living with HIV.¹ In particular, discussions have focused on the development of prosecutorial guidelines for Crown prosecutors handling alleged HIV non-disclosure matters.

We were initially encouraged when then Attorney General Chris Bentley agreed in December 2010 to develop guidelines with the input of CLHE. To this end, in mid-2011, CLHE provided MAG in good faith with a *Report and Recommendations*² based on comprehensive community consultations conducted around the province. Unfortunately, since that time, that good faith has not been reciprocated by MAG. After unnecessarily suspended consultations pending the decisions of the Supreme Court of Canada in two matters (*R. v. Mabior* and *R. v. D.C.*), released in October 2012, MAG responded to our request to meet with further delays.

In May 2014, nearly 80 leading scientific experts signed the *Canadian Consensus Statement on HIV and its Transmission in the Context of Criminal Law* (Consensus Statement), which details the science surrounding HIV transmission and raises serious

¹ Please see attached (and <http://clhe.ca/advocacy-timeline>) for the history of the written record of discussions.

² Please see <http://clhe.ca/wp-content/uploads/CHLE-guidelines-report.pdf>.

concerns with the manner in which criminal prosecutions are taking place.³ A copy of that statement is enclosed. In August 2014, Drs. Mona Loutfy and Mark Tyndall, co-chairs of the scientific expert team who developed the Consensus Statement, shared the document with MAG and offered to meet with Ministry staff to assist in the development of scientifically sound guidelines. (Nearly two years later, MAG has yet to respond to Drs. Loutfy and Tyndall.)

Eventually, in early November 2014, representatives of CLHE met with senior staff from MAG's Criminal Law Branch to discuss the draft guidance document prepared by MAG. While prosecutorial guidelines are needed in Ontario to curb the stigmatizing and discriminatory prosecution of people living with HIV, the draft guidelines did nothing to achieve this. Indeed, we strongly believe that the adoption of the draft guidance document that was reviewed at that time – or even its informal circulation within MAG and among Crown prosecutors, as we fear to be the current practice – risks promoting additional overly broad prosecutions and unjust convictions, further stigmatizing Ontarians living with HIV and further impeding effective public health and community responses to addressing the complex issues associated with HIV disclosure and HIV prevention. As a result, we had no option but to insist that, in the absence of substantial changes, the guidance be discarded. In December 2015, then Attorney General Madeleine Meilleur, who failed to meet with CLHE during her tenure despite our requests, confirmed to CLHE by way of letter that the draft policy that was shared with our representatives “will not be issued to all Crown counsel.” We note the rather limited wording of her commitment, particularly in light of our concern that the draft guidance is nonetheless likely to be circulating and circulated, even if informally, among Crown counsel handling such cases as they arise.

The absence of efforts to meaningfully engage with CLHE and others in the HIV community — and the apparent unwillingness to date of MAG to limit prosecutions in light of developments in applicable scientific knowledge, numerous public policy concerns about over-reach of the criminal law, and international recommendations calling for a more limited application of the law than is currently the case in Canada — is deeply problematic and stands in stark contrast to law reform efforts or the development of official guidance by prosecution services undertaken successfully elsewhere (e.g., England and Wales, Scotland, Switzerland, Colorado USA, Victoria Australia, Denmark). Law reform and prosecutorial guidance are supported by the recommendations from the Joint United Nations Programme on HIV/AIDS (UNAIDS), the UN Development Program (UNDP) and the Global Commission on HIV and the Law, which have called for limits on the use of the criminal law in circumstances of alleged HIV non-disclosure, exposure or transmission, for both human rights and public health reasons. UNAIDS and UNDP are clear that the criminal law should never be used against people living with HIV who engage in oral sex, use a condom, have a low viral load or are under effective

³ 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.hindawi.com/journals/cjidmm/2014/498459/abs/>.

HIV treatment because there is no significant risk of transmission.⁴ The Global Commission on HIV and the Law has recommended that “law enforcement authorities must not prosecute people in cases of HIV non-disclosure or exposure where no intentional or malicious transmission has been proven to take place,” and has further noted that countries “may legitimately prosecute HIV transmission that was both actual and intentional, using general criminal law, but such prosecutions should be pursued with care and a require a high standard of evidence and proof.”⁵ Furthermore, the UN Special Rapporteur on the right to health,⁶ respected jurists,⁷ and women’s rights advocates (including leading feminist legal academics),⁸ among others, have all expressed concerns about the over-use of the criminal law and urged governments to limit the use of the criminal law to cases of *intentional transmission* of HIV (i.e., where a person knows his or her HIV-positive status, acts with the intention to transmit HIV, and does in fact transmit it). In 2013, UNAIDS developed a guidance note providing critical scientific, medical and legal considerations in support of ending or mitigating the overly broad criminalization of HIV non-disclosure, exposure or transmission.⁹ This document contains explicit recommendations against prosecutions in cases where a condom was used consistently, where other forms of safer sex were practiced (including oral sex and non-penetrative sex), or where the person living with HIV was on effective HIV treatment or had a low viral load.

Ontario continues to be a global leader in prosecuting people living with HIV— relying on offences such as aggravated sexual assault, one of the most serious in the *Criminal Code* — even in circumstances where the risk of HIV transmission is extremely low if not non-existent and no transmission occurred.

CLHE is extremely concerned that prosecutions are having 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 Indigenous persons. Similarly, there is great concern that prosecutions have had a disproportionate impact on vulnerable women living with HIV who are in

⁴ UNAIDS/UNDP, [Policy brief: criminalization of HIV transmission](#), August 2008.

⁵ Global Commission on HIV and the Law, *HIV and the Law: Risks, Rights and Health* (July 2012), p. 25 (Recommendations 2.2 and 2.4), online: www.hivlawcommission.org

⁶ UN General Assembly, [Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover](#), Human Rights Council, Fourteenth session, Agenda item 3, A/HRC/14/20, April 27, 2010.

⁷ E. Cameron, “[Criminalization of HIV transmission: poor public health policy](#),” *HIV/AIDS Policy and Law Review* 14(2) (2009).

⁸ Athena Network, [Ten Reasons Why Criminalization of HIV Exposure or Transmission Harms Women](#), 2009; I. Grant, “[The Prosecution of Non-disclosure of HIV in Canada: Time to Rethink *Cuerrier*](#),” *McGill Journal of Law and Health* 5(1) (2011): 7–59; I. Grant, “The over-criminalization of persons with HIV,” *UT Law Journal* 63(3) (2013): 475-484; K.S. Buchanan, “When Is HIV a Crime? Sexuality, Gender and Consent,” [Minnesota Law Review](#) 99(4) (2014): , 2014: 1231-1342; and see the perspectives articulated in the documentary film *Consent: HIV non-disclosure and sexual assault law* (Goldelox Productions & Canadian HIV/AIDS Legal Network, 2015), online: <http://www.consentfilm.org/>.

⁹ UNAIDS, [Ending overly broad criminalisation of HIV non-disclosure, exposure and transmission: Critical scientific, medical and legal considerations](#), 2013.

abusive relationships or who cannot safely impose condom use or disclose their HIV status to sexual partners.

In addition to these questions of injustice, there is evidence that an overly broad use of the criminal law is bad public health policy, in that it 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 current use of the law 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 may be used as evidence against them in criminal proceedings. We also remain deeply concerned that an overly broad use of the criminal law creates a disincentive for individuals to seek HIV testing.

You demonstrated a clear understanding of the issues when you met with CLHE members on November 2, 2011. We respectfully request another meeting with CLHE members, as well as Dr. Loutfy, to discuss the impacts of prosecutions on public health and people living with HIV.

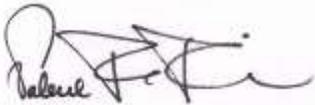
We very much look forward to hearing from you, and thank you for your attention to this matter.

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

Enclosures

- Advocacy Timeline (Ontario Working Group on Criminal Law and HIV Exposure)
- Canadian consensus statement on HIV and its transmission in the context of criminal law (M Loutfy, M Tyndall, J-G Baril, JSG Montaner, R Kaul, C Hankins)

cc

- Honourable Eric Hoskins, Minister of Health and Long-Term Care
- Dr. Mona Loutfy, Co-chair of Canadian Experts on HIV and Transmission Team
- Honourable Tracy MacCharles, Minister of Children and Youth Services & Minister Responsible for Women's Issues
- Honourable Glenn Murray, Minister of the Environment and Climate Change