

ONTARIO WORKING GROUP ON
**CRIMINAL LAW +
HIV EXPOSURE**



December 17, 2018

VIA ELECTRONIC MAIL: caroline.mulroneypc@pc.ola.org, christine.elliottpc@pc.ola.org

The Honourable Caroline Mulroneyp
Attorney General of Ontario
Ministry of the Attorney General
720 Bay Street, 11th Floor
Toronto, ON M7A 2S9

The Honourable Christine Elliott
Minister of Health and Long-Term Care
Ministry of Health and Long-Term Care
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Toronto, ON M7A 1E9

Dear Ministers:

Re: Criminal Law and HIV

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

First, we congratulate you both on your recent appointments and wish you a happy and healthy holiday and New Year. To start the year, we urge that the Ministry of the Attorney General and Ministry of Health and Long-Term Care continue to engage with the HIV community to ensure, as noted by the federal government and your predecessors, that HIV is considered with a public health lens rather than a criminal justice one. In short, further steps must be taken in Ontario to prevent the misuse of the criminal law against people living with HIV.

Background

The overly-broad use of the criminal law in cases of alleged HIV non-disclosure, including serious charges such as aggravated sexual assault, leads to unjust prosecutions, further stigmatizes people living with HIV, and creates additional barriers to people seeking testing and treatment.

For many years the HIV community has been urging Ontario to cease contributing to this overcriminalization, and to bring the use of the law in line with science and human rights in a manner that is supportive of HIV-related care, treatment and prevention.¹

We were encouraged to hear the federal Attorney General recognize this problem of overcriminalization on World AIDS Day 2016 (December 1), when she declared, among other things, that “the criminal justice system must adapt to better reflect the current scientific evidence on the realities of this disease.”²

We were also encouraged by the work undertaken by Justice Canada that resulted in the report released on World AIDS Day 2017, entitled Criminal Justice System’s Response to the Non-Disclosure of HIV.³ We welcomed that report and its recommendations, which in our view provide a very solid basis for further measures, by both federal and provincial governments, aimed at limiting the misapplication of the criminal law in Canada against people living with HIV. We have also been clear, as have others, that both federal and provincial governments have roles to play in ensuring more evidence-based, just approaches to the criminal law in this area—including, in the case of provincial Attorneys General, adopting sound guidance governing the conduct of provincial prosecutors, who handle the large majority of prosecutions across the country.

Last year, also on World AIDS Day, Ontario finally moved in the proper direction by ceasing prosecutions against people living with HIV who have a suppressed viral load.⁴ While we very much welcome this decision, it reflects but one of the minimum points called for by CLHE and others to end unjust prosecutions.

As indicated for many years, and as reflected in a statement endorsed by more than 160 organizations⁵ 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 include:

¹ Please see <http://clhe.ca/advocacy-timeline> for the history of correspondence.

² Government of Canada, Department of Justice. Statement: “Minister Wilson-Raybould Issues Statement on World AIDS Day,” December 1, 2016. Available at <https://www.canada.ca/en/departement-justice/news/2016/12/minister-wilson-raybould-issues-statement-world-aids.html>.

³ Government of Canada, Department of Justice. Criminal Justice System’s Response to Non-Disclosure of HIV, December 1, 2017. Available at <http://www.justice.gc.ca/eng/rp-pr/other-autre/hivnd-vihnd/index.html>.

⁴ Government of Ontario, Ministry of the Attorney General. Crown Prosecution Manual – D. 33: Sexual Offences against Adults, updated December 1, 2017. Available at <https://www.ontario.ca/document/crown-prosecution-manual/d-33-sexual-offences-against-adults#section-0>.

⁵ Canadian Coalition to Reform HIV Criminalization. End Unjust HIV Criminalization: Community Consensus Statement, 2018. Available at <http://www.hivcriminalization.ca/community-consensus-statement/>, along with a Frequently Asked Questions document. We also encourage you to listen to the video hosted on the site that shares four first-hand stories of what HIV criminalization means to the lives of those targeted, which is available at <http://www.hivcriminalization.ca/testimonials/>.

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

In addition to concerns raised by the HIV community, the current use of the criminal law in Canada has been largely criticized for being unfair and at odds with the science, including by the UN Committee on the Elimination of Discrimination against Women (CEDAW). In its latest review of Canada's compliance with its human rights treaty obligations, CEDAW expressed its concern regarding the application of harsh criminal sanctions (aggravated sexual assault) to women for non-disclosure of their HIV status to sexual partners, even when the transmission is not intentional, when there is no transmission or when the risk of transmission is minimal. CEDAW recommended that Canada limit the application of criminal law provisions to cases of intentional transmission of HIV, as recommended by international public health standards.⁶

In 2014, about 80 HIV experts in Canada released a consensus statement out of concern that the criminal law is being used in an overly broad fashion against people living with HIV in Canada because of, in part, a poor appreciation of the scientific understanding of HIV and its transmission.⁷

In July 2018, at the International AIDS Conference, 20 of the world's leading HIV scientists (including two Canadians and Nobel Prize laureate Prof. Barré-Sinoussi) joined by 70 additional scientific experts from dozens of countries around the world, the International AIDS Society, the International Association of Providers in AIDS Care and the Joint United Nations Programme on HIV/AIDS (UNAIDS), released a groundbreaking expert consensus statement to address use of HIV science within the criminal justice system.⁸

Recent developments

On December 8, 2018, the federal government listened to above-noted concerns and operationalized the important conclusions from its 2017 report by issuing a directive to Crown attorneys. Importantly, the announcement made in relation to the issuance of the directive recognizes that "HIV is first and foremost a public health matter" and that "the over-criminalization of HIV non-disclosure discourages many individuals from being tested and seeking treatment, and further stigmatizes those living with HIV or AIDS."⁹

⁶ Committee on the Elimination of Discrimination against Women. Concluding observations on the combined eighth and ninth period reports of Canada, November 18, 2016. UNC Doc. CEDAW/C/Can/CO/8-9, paras. 42-43. Available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/402/03/PDF/N1640203.pdf?OpenElement>.

⁷ 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. Available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4173974/>.

⁸ F. Barré-Sinoussi et al. Expert consensus statement on the science of HIV in the context of criminal law. *Journal of the International AIDS Society* 2018; 21: e25161. Available at <https://onlinelibrary.wiley.com/doi/full/10.1002/jia2.25161>.

⁹ Government of Canada, Department of Justice. Statement: "Attorney General of Canada to issue Directive Regarding Prosecutions of HIV Non-Disclosure Cases," December 3, 2018. Available at <https://www.newswire.ca/news-releases/attorney-general-of-canada-to-issue-directive-regarding-prosecutions-of-hiv-non-disclosure-cases-701701791.html>.

Importantly, the directive recognizes that “it is not in the public interest to pursue HIV non-disclosure prosecutions for conduct that medical science shows does not pose a risk of serious harm to others” and that “the most recent medical science shows that the risk of HIV transmission through sexual activity is significantly reduced where: the person living with HIV is on treatment; condoms are used; only oral sex is engaged in; the sexual activity is limited to an isolated act; or, the person exposed to HIV, for example as a result of a broken condom, receives post-exposure prophylaxis.”¹⁰

In addition, the directive makes clear that laws that apply to HIV non-disclosure are likely to disproportionately impact “persons from marginalized backgrounds such as, for example, Indigenous, Black and gay persons.”¹¹

We are pleased to see that the Attorney General of Canada listened to our collective voices and took concrete measures to address the ongoing over-criminalization of HIV non-disclosure. However, the directive only governs federal prosecutors, who handle such criminal prosecutions in the three territories in Canada.

Next Steps in Ontario

It is essential that Ontario follow the federal government’s lead and issue updated directives or people living with HIV will remain at risk of unjust prosecutions. Directives should be developed in consultation with community organizations based on the federal government directive and CLHE recommendations¹².

In particular, we urge directives ceasing prosecutions where, based on medical and scientific evidence, there is no to negligible possibility of HIV transmission, including in cases of:

- oral sex
- anal or vaginal sex with a condom
- anal or vaginal sex without a condom while having a low viral load or while on treatment
- spitting and biting

In addition, we urge directives clarifying that prosecutions should not take place when the person living with HIV:

- did not understand how the virus is transmitted
- disclosed their status to their sexual partner or reasonably believed their sexual partner was aware of their status through some other means
- did not disclose their status because they feared violence or other serious negative consequences would result from such disclosure
- was forced or coerced into sex

¹⁰ Government of Canada, Office of the Director of Public Prosecutions. HIV Non-Disclosure Directive, December 8, 2018. Director of Public Prosecutions Act, Canada Gazette, Part I, Volume 152, Number 49: GOVERNMENT NOTICES. Available at <http://gazette.gc.ca/rp-pr/p1/2018/2018-12-08/html/notice-avis-eng.html>.

¹¹ Ibid.

¹² Ontario Working Group on Criminal Law and HIV Exposure. Ending Overcriminalization of People Living with HIV in Ontario, April 12, 2018. Available at http://clhe.ca/owg-criminal-law-hiv-exposure/wp-content/uploads/2018/05/Brief_Ministerial-Meeting_FINAL.pdf.

Moreover, and as recognized by the Attorney General of Canada, directives should also limit the use of the law of sexual assault in cases of HIV non-disclosure.

As acknowledged by the federal government, provincial directives should also recognize that HIV transmission is primarily a public health issue and must be treated as such. Directives must also take into account persisting inequities in access to health services and treatment that continue to affect most marginalized communities of people living with HIV, as well as gender dynamics that may prevent some women living with HIV to disclose their status or use condoms. Directives should also include, as does the federal directive, explicit recognition of the particular and disproportionate impacts of the law on Indigenous, Black and gay persons.

While we continue to advocate for legislative reform by the federal government, it is essential that Ontario immediately update its prosecutorial policy. Further to above, additional recommendations, including a review of historic convictions, can be found in the CLHE brief produced in relation to the Ontario Ministerial Roundtable held in April 2018.¹³

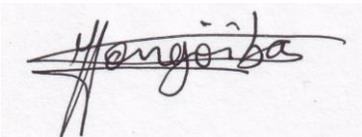
We urge you to act in concert with the overwhelming evidence, and to respect the human rights of people living with HIV, by taking firm, proactive measures to prevent further unjust prosecutions in Ontario. We look forward to hearing from you at your earliest convenience to arrange a meeting with your office and members of CLHE and the scientific community.

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



Fanta Ongoiba
Director, Africans in Partnership Against HIV/AIDS
Co-Chair, Ontario Working Group on Criminal Law and HIV Exposure

¹³ Ibid.