

December 1, 2023

Deputy Attorney General David Corbett
Ministry of the Attorney General – Criminal Law Division
McMurtry-Scott Building 11th Floor
720 Bay St
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World AIDS Day – Ontario’s Prosecutorial Policy on HIV Non-Disclosure

Dear Deputy Attorney General David Corbett,

We write to you on this 35th annual commemoration of World AIDS Day, on behalf of both the HIV Legal Network and the HIV & AIDS Legal Clinic Ontario (HALCO). The HIV Legal Network promotes the human rights of people living with HIV or AIDS and other populations disproportionately affected by HIV, punitive laws and policies, and criminalization, in Canada and around the world. HALCO is the only community legal clinic in Canada that exclusively provides services for people living with HIV. As you may know, both the HIV Legal Network and HALCO have been involved as members of the Canadian Coalition to Reform HIV Criminalization (CCRHC or “the Coalition”) in efforts to limit the negative consequences of Canada’s overly broad criminalization of HIV non-disclosure, an issue that has long been flagged by lawmakers as requiring reform, most notably in [2019 by the House of Commons Standing Committee on Justice and Human Rights](#). In fact, the Government of Canada sought out our organizations’ opinions and expertise — as well as those of Coalition members — during [stakeholder consultations](#), as part of the prospective law reform process.

While it remains essential to modify the Canadian *Criminal Code* to address the harms of HIV criminalization at their source, and to bring the law in line with science and human rights principles, other steps should be taken to mitigate the harms of HIV criminalization until such law reform has taken place. Namely, prosecutorial offices have an important role to play in the administration of criminal justice and in upholding the public interest. Prosecutors across Canada can and should ensure that any prosecutions involving allegations of HIV non-disclosure are conducted in a fair and objective manner, in line with international human rights guidance and the best available scientific evidence.¹ Moreover, due to the standard imposed by the Supreme Court of Canada in [R. v. Mabior \[2012 SCC 47\]](#) and [R. v. D.C., \[2012 SCC 48\]](#), it is imperative that prosecutorial services across Canada remain abreast of the evolving medical and scientific realities related to HIV and its transmission since these rulings require that people living with

¹ Guidance for Prosecutors on HIV-related criminal cases, UNDP, June 2021: <https://www.undp.org/publications/undp-guidance-prosecutors-hiv-related-criminal-cases>.

HIV disclose their status before having sex that poses a “realistic possibility of HIV transmission.”

As founding members of the Ontario Working Group on Criminal Law and HIV Exposure, the HIV Legal Network and HALCO have actively engaged with decision-makers at the provincial level in pursuit of aligning prosecutorial policy with science and human rights. Accordingly, in December 2017 the Ministry of the Attorney General amended its policy on sexual offences in the *Crown Prosecution Manual*, in order to reflect the need for HIV to be “considered with a public health lens, rather than a criminal justice one, wherever possible.”² This policy instructed prosecutors not to prosecute individuals for HIV non-disclosure if there was no realistic possibility of transmission, as defined by the Public Health Agency of Canada, and further required that any prosecutor assigned to a case involving HIV exposure consult with the STI Advisory Group “at the earliest stage possible” in order to receive guidance regarding the up-to-date medical science.³ Importantly, the policy also states that there is no realistic possibility of HIV transmission where a person living with HIV is on antiretroviral therapy and has maintained a suppressed viral load for six months.⁴ At the time this policy was introduced, a suppressed viral load was understood to mean a viral load under 200 copies/mL of blood.

Latest Medical and Scientific Developments

On this note, we draw your attention to the most up-to-date, internationally recognized scientific evidence, which continues to demonstrate the transformative impacts of viral suppression in the lives of people living with HIV — and, importantly, on the possibility of transmission during sexual activities.

[New guidance](#) from the World Health Organization (WHO) was released at the [12th International AIDS Society \(IAS\) Conference on HIV Science](#) on July 23, 2023, along with the results of a [systematic review](#) published in *The Lancet* scientific journal. This new guidance reaffirms the scientific consensus that a consistently maintained **suppressed viral load under 200 copies/mL carries zero risk of sexual transmission**. Backed by the latest scientific research, the WHO’s guidance goes even further, establishing that a **suppressed viral load**

² Attorney General of Ontario and Minister of Health and Long-term Care, *World AIDS Day 2017 Statement*, December 1, 2017, <http://clhe.ca/wp-content/uploads/Ontario-AG-and-MOHLTC-WorldAIDSDay2017statement.pdf>.

³ Ontario Crown Prosecution Manual, D. 33 Sexual Offences against Adults, online: <https://www.ontario.ca/document/crown-prosecution-manual/d-33-sexual-offences-against-adults#section-0>.

⁴ The same recognition should be formalized for individuals known as “long-term non-progressors” or “elite controllers”, who are able to naturally maintain a suppressed viral load without anti-retroviral therapy and therefore pose no realistic possibility of HIV transmission, as the Ontario Court of Appeal concluded in *R v Rubara*, [2022 ONCA 694](#).

between 200-1000 copies/mL carries an “almost zero or negligible risk” of sexual transmission.

Aligning prosecutorial practices with current scientific realities is all the more important as we await crucial modifications to the *Criminal Code*, whose outdated treatment of HIV currently perpetuates the harms of criminalization, including by exacerbating the stigma and discrimination faced by Canadians living with HIV and discouraging people from being tested and seeking treatment. **We therefore urge you to promptly update your prosecutorial policies to reflect the scientific realities uncovered by these latest developments.** Doing so would further align with the commitments made by former Attorney General Caroline Mulroney – in her correspondence with the Ontario Working Group on Criminal Law and HIV Exposure – for the Ministry of the Attorney General to continue being “guided by developments in the science and the law in this area”.⁵ With potential charges of *aggravated sexual assault* hanging in the balance, following the most up-to-date expert guidance, as compiled in the WHO’s latest guidelines, is critical.

As the thousands of people living with HIV in Canada eagerly await the modification of the *Criminal Code* to bring the law in line with science and human rights, prosecutorial services across Canada have a duty to keep abreast of the latest scientific developments in order to mitigate the ongoing harms of Canada’s overbroad HIV criminalization.

We look forward to continued engagement with you on these vital issues and remain readily available to provide further information or to meet to discuss any questions you may have.

Sincerely,

André Capretti - Policy Analyst/Lawyer
HIV Legal Network

Ryan Peck – Executive Director/Lawyer
HIV & AIDS Legal Clinic Ontario



⁵ Letter from Caroline Mulroney, Attorney General of Ontario, to Ryan Peck, Executive Director (HALCO) & Fanta Ongoiba, Director (Africans in Partnership Against HIV/AIDS), M-2018-4260, February 20, 2019, <http://clhe.ca/owg-criminal-law-hiv-exposure/wp-content/uploads/2019/02/M-2018-4260.pdf>.