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HIV & AIDS Legal Clinic Ontario

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October 28, 2011

Honourable John Gerretson
Attorney General
Ministry of the Attorney General
McMurtry-Scott Building
720 Bay Street, 11th Floor
Toronto, ON M7A 2S9

Dear Minister Gerretson:

Re: Meeting request - criminalization of HIV non-disclosure

On behalf of the Ontario Working Group on Criminal Law and HIV Exposure (CLHE), we welcome you to your new post as Attorney General, and we respectfully request a meeting to discuss the criminalization of HIV non-disclosure.

The use of the criminal law to respond to HIV non-disclosure continues to be an extremely pressing legal issue facing people living with HIV in Canada. Ontario is home to the majority of HIV-related prosecutions in Canada, and is also one of the leading jurisdictions in the world when it comes to such prosecutions. CLHE, comprised of people living with HIV, lawyers, activists, academics, and AIDS service organization staff, came together in 2007 to oppose the current use of the criminal in relation to HIV non-disclosure, and to attempt to bring fairness and consistency to the law.

As you may know, in *R. v. Cuerrier*, [1998] 2 S.C.R. 371, the Supreme Court of Canada clarified that, for the purposes of the aggravated (sexual) assault provisions of the *Criminal Code*, there must be a "significant risk of serious bodily harm" before a duty to disclose something such as HIV-positive status arises. In the years since *Cuerrier*, treatment options for those living with HIV have developed significantly, such that HIV is now considered a chronic manageable illness. In addition, HIV prevention strategies, as well as the science surrounding transmission risks, have developed considerably. For example, it is clear that protected sex, sex with a low/undetectable viral load (amount of HIV in one's blood) and oral sex do not constitute a significant risk of HIV transmission. Unfortunately, in many instances the law surrounding HIV non-disclosure has not kept pace with the science.

As you know, the issue of the consistent and up-to-date use and interpretation of scientific and medical evidence is of central importance to the proper functioning of the justice system. CLHE has grave concerns about individual cases of injustice, in addition to concerns about the impacts

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on broader efforts at protecting public health through proven, effective programs and measures to prevent the spread of HIV and ensure care, treatment and support for those living with HIV. In 2010, CLHE brought this matter to the attention of Minister Chris Bentley, the then Attorney General, and urged Minister Bentley to develop prosecutorial guidelines for Crown prosecutors handling allegations of HIV non-disclosure. In July 2010, CLHE began meeting with Ministry of Attorney General (MAG) staff to discuss the development of guidance materials for Crown prosecutors, and in a letter dated December 16, 2010, attached, it was confirmed that MAG “is engaged in a process to develop a Practice Memorandum for Crown prosecutors in the area of HIV prosecutions.” The letter further states that the consultation process undertaken by CLHE “will inform the process MAG will be engaged in regarding the development of Ministry guidelines,” and that MAG will share a draft of the Practice Memorandum prior to its issuance.

To inform the development of guidelines, CLHE conducted a robust consultation with people living with HIV/AIDS, communities affected by HIV, legal, public health, criminal justice and scientific experts, health care providers, and advocates for women’s rights in the context of sexual violence and the criminal justice system. Flowing from the consultation, in June 2011, CLHE provided MAG with the attached *Consultation on Prosecutorial Guidelines for Ontario Cases Involving Non-disclosure of Sexually Transmitted Infections: Community Report and Recommendations to the Attorney General of Ontario*.

In July and August 2011, representatives from CLHE met with MAG staff to again discuss the *Report and Recommendations*. To date, MAG has not responded to the Report, and has not informed CLHE when it will be honouring its commitment to develop prosecutorial guidelines.

Moreover, in September, CLHE learned, with great dismay, of the position being taken by MAG in its recently-filed request for intervener status before the Supreme Court of Canada in the matter of *R. v. Mabior*, which is scheduled to be heard in early 2012. According to that application, the Attorney General of Ontario plans to call upon the Supreme Court to rule that people living with HIV must disclose their HIV status before any sexual activity whatsoever, even in the case where there is a negligible, effectively zero, risk of HIV transmission – and that not disclosing should be prosecuted as an aggravated sexual assault, one of the most serious offences in the *Criminal Code*. This position fails to take into account a complete and accurate understanding of current medical and scientific research about HIV, and is incompatible 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. To completely disregard the question of the risk of transmission is tantamount to declaring people criminal because they have HIV, not because their conduct poses any significant risk of serious bodily harm, which, as noted above, is the current standard articulated by the Supreme Court. As such, Ontario’s proposed position is a radical expansion that would depart from the basic role of the criminal law.

It is particularly troubling that the Ministry filed such materials at the same time as engaging in ongoing discussions with CLHE regarding the development of prosecutorial guidelines. Yet the position contained in the materials flies in the face of the notion of prosecutorial guidelines that could set out appropriate parameters for a fair, evidence-based application of the law.

On October 24, 2011, Minister Bentley met with Mr. Brian Lester, Executive Director, Regional HIV/AIDS Connection (London, Ontario based AIDS service organization). During this meeting, Minister Bentley made it clear that although the intervention materials advocate for the elimination of the current significant risk test and that there be a duty to disclose regardless of the risk of HIV transmission, that the Attorney General of Ontario has no intention of taking such a position at the Supreme Court of Canada. Minister Bentley further made clear that the Attorney General is seeking the maintenance of the significant risk test, and requesting that the Supreme Court provide clarification as to the interpretation of the test.

We are confident that you, as Attorney General, are devoted to evidence-based and just policies. CLHE requests a meeting, as soon as possible, to discuss these issues with you.

We look forward to hearing from you shortly.

Sincerely,
HIV & AIDS Legal Clinic (Ontario)

per;



Ryan Peck

Barrister & Solicitor
Executive Director

Enclosures

cc: The Honourable Glen Murray, Minister of Research and Innovation