

ONTARIO WORKING GROUP ON CRIMINAL LAW + HIV EXPOSURE



23 April 2013

Honourable Kathleen Wynne
Premier of Ontario
Legislative Building
Queens Park
Toronto, ON M7A 1A1

Dear Premier Wynne:

Re: Criminalization of HIV non-disclosure

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

As you know, CLHE has been working for the last six years to confront the growing crisis of criminal prosecutions of people with HIV in Ontario. In December 2010, then Attorney General Chris Bentley agreed to develop a Practice Memorandum, in relation to HIV non-disclosure, with the input of CLHE, and share a draft with CLHE. To this end, in summer 2011, CLHE provided the Ministry of the Attorney General (MAG) with a *Report and Recommendations* based on comprehensive community and expert consultations conducted around the province with people living with HIV, 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. Unfortunately, the development of guidance was subsequently suspended by MAG pending the release of Supreme Court of Canada (SCC) decisions in two landmark cases relating to HIV non-disclosure (*R. v. Mabior* and *R. v. D.C.*).

In October 2012, the SCC released its decisions, proclaiming a new test that requires disclosure of HIV status before sexual activity that poses a "realistic possibility of HIV transmission." However, we still do not have a commitment from MAG as to a timeline and process for the development of guidance materials that will bring fairness to the application of the criminal law in relation to HIV non-disclosure.

Prosecutorial guidelines remain urgently required in Ontario. Because the SCC decisions concerned only vaginal sex, a number of uncertainties remain regarding the new "realistic possibility" test. It is unclear, for example, how the law will be applied by Crown prosecutors in relation to other sexual activities such as oral sex. Such uncertainties have already resulted in inconsistencies in the application of the law across Ontario - for example, while some prosecutions are proceeding in relation to non-disclosure involving oral sex, including a woman in Barrie who is facing aggravated sexual assault charges in relation to giving and receiving oral sex, others are being withdrawn because of the low risks of transmission associated with such activity.

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The spectre of unjust and unfair prosecutions, including those in relation to oral sex, continues to be of great concern in Ontario, and judging from the constant stream of questions and concerns we continue to receive, it remains one of the top preoccupations for people living with HIV and those working in HIV prevention and care – particularly in the wake of the SCC rulings.

We are very concerned that the “realistic possibility” test, if not applied with great caution and restraint, will result in an overly broad use of the criminal law in relation to HIV non-disclosure. We have known for a number of years that condom use is a highly effective tool for HIV prevention. When used properly and consistently, condoms are essentially 100% effective in preventing HIV. We also know that anti-retroviral treatment reduces viral loads (the amount of HIV virus in blood) to levels where the risk of transmission is negligible. Prosecuting people who use precautions to protect their partners, or people who have a low viral load, is not only unfair, but also counterproductive in terms of HIV prevention.

There is serious concern that prosecutions against individuals who take precautions will have 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 First Nations persons. Similarly, there is great concern that an application of the “realistic possibility” test without great caution and restraint will have a disproportionate impact on vulnerable women living with HIV who are in abusive relationships and/or cannot safely impose condom use nor disclose their HIV status to sexual partners.

Further, there is great concern that over broad prosecutions will take place in relation to anal sex, which will have a disproportionate negative impact on gay men in Ontario, a community currently subject to significant HIV stigma and that has historically borne the brunt of the HIV epidemic in Ontario.

More generally, there is increasing evidence that an overly broad use of the criminal law undermines the public health response to HIV by preventing individuals from talking openly with health care providers due to the fear that, one day, their test results and/or discussions with medical professionals will end up as evidence against them in a criminal proceeding. There is also the serious concern that an overly broad use of the criminal law is creating a disincentive for individuals to seek HIV testing.

When CLHE met with Ms. Mary Nethery, Director, Criminal Law Policy Branch, in January 2013, we were hopeful that the government was finally taking seriously its promise to develop guidance. However, when we requested a timeline and process for the development of guidance, we were informed that MAG was not in a position to provide such information.

The crisis surrounding the current approach to prosecuting HIV non-disclosure allegations is steadily growing. As MAG has failed to fulfill its promise, and is unwilling to provide CLHE with a timeline and process for doing so, we have no choice but to raise this issue in the public sphere. To this end, we will shortly be sharing an open letter with community, including media, about your government’s failure to fulfill its promise to develop guidance in this area.

We sincerely appreciate your support for the HIV community in Ontario, and it is with regret that we feel we have no choice but to proceed with an open letter. We are of course willing to discuss this matter with you before issuing the letter. If you would like to do so, please contact the undersigned by April 30, 2013.

Thank you very much for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Ryan Peck', written in a cursive style.

Ryan Peck

Barrister & Solicitor, Executive Director, HIV & AIDS Legal Clinic Ontario
Co-chair, Ontario Working Group on Criminal Law and HIV Exposure

Enclosures

c.c. The Honourable John Gerretsen, Attorney General
The Honourable Deborah Matthews, Minister of Health and Long-Term Care
The Honourable Glen Murray, Minister of Infrastructure/Transportation