

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



30 September 2015

The Honourable Madeleine Meilleur
Attorney General
Ministry of the Attorney General
720 Bay Street, 11th Floor
Toronto, ON M5G 2K1

Dear Minister Meilleur:

Re: HIV and the criminal law

On behalf of the Ontario Working Group on Criminal Law and HIV Exposure (CLHE), I write to follow up on a series of discussions members of CLHE have had with representatives of the Ministry of the Attorney General (MAG), including from the Criminal Law Policy Branch, over an extended period of time, regarding proposals for prosecutorial guidelines addressing the overly-broad use of the criminal law in Ontario against people living with HIV — an ongoing problem that undermines both human rights and public health efforts.

Specifically, I write to seek confirmation, as previously discussed with MAG representatives, that given their serious deficiency, the draft guidelines previously shared with some CLHE representatives under the terms of a confidentiality agreement, will

- a) not be adopted as MAG policy; and
- b) will not be used by prosecutors as guidance in exercising their discretion about pursuing and conducting prosecutions in individual cases.

As you know, for more than five years, CLHE has been discussing with MAG our proposal that guidelines be developed for prosecutors so as to avoid unjust prosecutions and convictions. This is an initiative that has been undertaken successfully elsewhere (e.g., in the United Kingdom). Those processes have involved meaningful engagement of community organizations working in the HIV sector, health professionals and scientific experts, and have generated official guidance adopted by the relevant prosecution service that has identified appropriate and effective limits on when charges should be laid and pursued, and when they should not. They have also been consistent with recommendations from such bodies as the Joint United Nations Programme on HIV/AIDS (UNAIDS) and the Global Commission on HIV and the Law to carefully limit the scope of the criminal law as used in relation to alleged HIV non-disclosure, exposure or transmission, for both human rights and public health reasons.

We were encouraged, therefore, 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* 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 late 2012, we then encountered further extensive delays in even agreeing to meet with community representatives or to share a draft of the guidelines for input, despite the previous commitment to do so.

Eventually, in early November 2014, representatives of CLHE met with senior staff from MAG's Criminal Law Branch to discuss the draft guidance document that had been prepared. In that discussion, with great regret, we stated directly and unambiguously that the draft shared with us was profoundly deficient in multiple ways, and that in the absence of substantial changes it should be discarded rather than adopted. The response we received in that discussion indicated this was certainly a possibility. We subsequently communicated this view again, a few weeks later, at a meeting with senior advisors in both MAG and the office of the Premier, along with our profound disappointment in the bad faith of MAG with respect to both the process as well as the substance of the draft guidelines. We also communicated this request to the Premier in correspondence in early December 2014.

Prosecutorial guidelines remain urgently required in Ontario. The province accounts for roughly half of prosecutions to date in Canada of people living with HIV. We have also seen inconsistent and unfair application of the law across the province, and aggressive laying and pursuit of charges even in circumstances where the risk of HIV transmission is infinitesimal or non-existent. We have drawn examples of such cases to the attention of MAG, including those within the Criminal Law Branch, repeatedly – including in the discussion of the draft guidelines that were shared with us and that are so profoundly troubling.

As you also know well, dozens of leading HIV physicians and scientists from across the country have reviewed the scientific evidence about HIV transmission risks and have articulated the ways in which current application of the criminal law in Canada – driven disproportionately by prosecutions in Ontario – is at odds with that science. They released a consensus statement last year outlining the science and these concerns. They have shared it directly with MAG officials and have offered repeatedly to meet with MAG staff to assist in the development of scientifically sound guidelines. Those offers have simply gone unaddressed.

Sadly, while prosecutorial guidelines are needed in Ontario to curb the stigmatizing and discriminatory misuse of prosecutions against people living with HIV, the draft guidelines do nothing to achieve this. Indeed, adopting (or even informally circulating them) as they stand risks perpetuating the practice of overly broad prosecutions that we have seen to date, resulting in more unjust convictions, further stigmatizing Ontarians living with HIV, and further impeding effective public health responses.

It is for this reason that CLHE has reiterated its request that the draft guidance be discarded. (Should the Ministry be willing to consider substantial revisions to the draft shared with CLHE representatives, we would be pleased to pursue further discussions about securing useful and fair guidance for prosecutors.) Most recently, when members of CLHE met in early March of this year with senior representatives of MAG and the Premier's office, we were advised that clarification would be forthcoming that the guidelines as drafted would not be adopted or used. However, we have not received any such clarification to date.

Therefore, as noted at the outset, we write to request formally this clarification from the Ministry.

Sincerely,



Ryan Peck

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

c.c.:

The Hon. Kathleen Wynne, Premier of Ontario
Patrick Monahan, Deputy Minister, Ministry of the Attorney General
Howard Leibovich, Director, Crown Law Office – Criminal, Ministry of the Attorney General