

# ONTARIO WORKING GROUP ON CRIMINAL LAW + HIV EXPOSURE



December 19, 2016

VIA ELECTRONIC MAIL: [mcu@justice.gc.ca](mailto:mcu@justice.gc.ca)

The Honourable Jody Wilson-Raybould  
Minister of Justice and Attorney General of Canada  
284 Wellington Street  
Ottawa, Ontario K1A 0H8

Dear Minister Wilson-Raybould,

**Re: Criminal Law and HIV**

Please accept this letter on behalf of the Ontario Working Group on Criminal Law and HIV Exposure (CLHE). We write to commend your recent World AIDS Day statement<sup>1</sup> and to request a meeting to discuss correcting the current misuse of the criminal law in relation to HIV non-disclosure.

CLHE, founded in 2007 to oppose the expansive use of the criminal law to address HIV non-disclosure, is comprised of people living with HIV, representatives from many community-based AIDS organizations from across Ontario, lawyers, academics and activists. Since 2010, CLHE has been in discussions with the Ontario Ministry of the Attorney General (MAG) to ensure that the manner in which HIV-related prosecutions occur take into account a complete and accurate understanding of current medical and scientific research about HIV, and are compatible 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.<sup>2</sup>

In December 2010, CLHE was very pleased that then Attorney General Chris Bentley agreed to develop, with the input of CLHE, guidance for Crown prosecutors in relation to HIV non-disclosure, and to share a draft with CLHE. In summer 2011, CLHE provided MAG with a *Report and Recommendations*<sup>3</sup> based on community and expert consultations conducted by CLHE 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.

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<sup>1</sup> Please see <http://news.gc.ca/web/article-en.do?nid=1163979>.

<sup>2</sup> Please see <http://clhe.ca/advocacy-timeline> for the history of the written record of discussions.

<sup>3</sup> Please see <http://clhe.ca/wp-content/uploads/CHLE-guidelines-report.pdf>.

In May 2014, nearly 80 leading scientific experts signed the Canadian Consensus Statement on HIV and its Transmission in the Context of Criminal Law (Consensus Statement), which details the science surrounding HIV transmission and raises serious concerns with the manner in which criminal prosecutions are taking place.<sup>4</sup> The Consensus Statement was shared with MAG by the co-chairs of the Consensus Statement scientific expert team.

Although discussions have been taking place since 2010, appropriate guidance has not been developed and the scope of the problem continues to escalate. Ontario continues to lead the way in terms of HIV prosecutions and people living with HIV continue to be charged with *aggravated sexual assault* – one of the most serious offenses in our Criminal Code – even where the sexual activity in question is consensual, there is no intent to cause harm, the risks of transmission are negligible if not zero, and no transmission occurs.

CLHE is extremely concerned that prosecutions are having 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 Indigenous persons. Similarly, there is great concern that prosecutions are having a disproportionate impact on vulnerable women living with HIV who are in abusive relationships or who cannot safely impose condom use or disclose their HIV status to sexual partners.

In addition to these questions of injustice, there is evidence that an overly broad use of the criminal law is bad public health policy, in that it undermines HIV prevention efforts and compromises the ability of people living with HIV to access the care, treatment and support they need to stay healthy. The current use of the law prevents people living with HIV from talking openly with health care providers due to the fear that their HIV and other test results and discussions with medical professionals may be used as evidence against them in criminal proceedings. We also remain deeply concerned that an overly broad use of the criminal law creates a disincentive for individuals to seek HIV testing.

We commend and welcome your statement of December 1, 2016 that recognizes the over-criminalization of people with HIV and notes your intention to work with your provincial and territorial counterparts, affected communities and medical professionals to examine the criminal justice system's response to non-disclosure of HIV status.

At a recent provincial Ministerial Roundtable on Criminal Law and HIV in Toronto on December 5, 2016,<sup>5</sup> the Honourable Yasir Naqvi, Ontario's Attorney General, informed CLHE that he is looking forward to learning more about the federal government's efforts

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<sup>4</sup> 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, at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4173974/>

<sup>5</sup> The CLHE briefing paper for the Roundtable is at [http://clhe.ca/wp-content/uploads/CLHE\\_Ministers-Roundtable-brief\\_5Dec16.pdf](http://clhe.ca/wp-content/uploads/CLHE_Ministers-Roundtable-brief_5Dec16.pdf).

to address the overly broad use of the criminal law in relation to HIV and to meaningful engagement with CLHE on the issue. At the same Roundtable, the Honourable Tracy MacCharles, Ontario's Minister Responsible for Women's Issues, expressed her willingness to working with the federal government and CLHE, and assured us that the issue will be added to the agenda of the Ontario Premier's Roundtable on Violence Against Women.

The criminalization of HIV non-disclosure is a most pressing legal issue facing the HIV community. We believe it requires measures to be taken at both the federal and provincial levels. CLHE has been working on this issue for many years and we respectfully request a meeting, as soon possible, to discuss how together we can best, in a timely manner, ensure that the criminal law is reflective of current science and human rights principles.

Thank you very much for your attention to this matter, and we look forward to hearing from you shortly.

Sincerely,



**Ryan Peck**

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



**Valérie Pierre-Pierre**, Director, African and Caribbean Council on HIV/AIDS in Ontario

Co-Chair, Ontario Working Group on Criminal Law and HIV Exposure

cc

- Honourable Dr. Jane Philpott, Minister of Health (Canada)
- Honourable Tracy MacCharles, Minister Responsible for Women's Issues (Ontario)
- Honourable Yasir Naqvi, Attorney General (Ontario)