

ONTARIO WORKING GROUP ON CRIMINAL LAW + HIV EXPOSURE



January 17, 2017

VIA ELECTRONIC MAIL: inaidoo-harris.mpp.co@liberal.ola.org

Honourable Indira Naidoo-Harris
Minister of Women's Issues
10th Floor, Hepburn Block
80 Grosvenor Street
Toronto, Ontario M7A 1E9

Dear Minister Naidoo-Harris,

Re: Criminal Law and HIV

On behalf of the Ontario Working Group on Criminal Law and HIV Exposure (CLHE), we wish you the best as Minister of Women's Issues (MWI). We write in relation to the December 5, 2016 Ministerial Roundtable on HIV and Criminal Law convened by the Honourable Glenn Murray, Minister of the Environment and Climate Change.¹

We thank your predecessor, the Honourable Tracy MacCharles, for participating in the Roundtable. We welcome her openness to working with the federal government² and CLHE on this issue, and her assurance that the issue will be added to the agenda of the Premier's Roundtable on Violence Against Women. At the December 5 Roundtable, the Honourable Yasir Naqvi also made it clear that, as Attorney General of Ontario, he is looking forward to learning more about the federal government's efforts to address the issue of the overly-broad use of the criminal law in relation to HIV and is open to engaging in a meaningful dialogue with CLHE.

As background, it is important to note that CLHE has been working for many years to confront the growing crisis of criminal prosecutions of people living with HIV in Ontario.³ Since 2010, CLHE has been in discussions with the Ministry of the Attorney General (MAG) to ensure that the manner in which such 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.

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² See December 1, 2016 statement by Canadian Minister of Justice Jody Wilson-Raybould recognizing the ongoing problem of overly-broad, unjust criminalization of people living with HIV, at <http://news.gc.ca/web/article-en.do?nid=1163979>.

³ Please see <http://clhe.ca/advocacy-timeline> for the history of the written record of discussions.

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*⁴ 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.

In May 2014, over 75 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.⁵ The statement was sent to MAG by Drs. Mona Loutfy and Mark Tyndall, co-chairs of the scientific expert team who developed the Consensus Statement.

In December 2016, the Honourable Jody Wilson-Raybould, Minister of Justice and Attorney General of Canada, explicitly recognized the over-criminalization of people with HIV. The Minister declared, on World AIDS Day (December 1), her government's intention "to examine the criminal justice system's response to non-disclosure of HIV status," recognizing that "the over-criminalization of HIV non-disclosure discourages many individuals from being tested and seeking treatment, and further stigmatizes those living with HIV or AIDS." The Minister further stated that "the [Canadian] criminal justice system must adapt to better reflect the current scientific evidence on the realities of this disease."⁶

Notwithstanding above, appropriate guidance has not been developed and the scope of the problem continues to escalate. People living with HIV continue to be charged with *aggravated sexual assault* – one of the most serious offenses in our Criminal Code – even where there is no intent to cause harm, no transmission occurs and the risks of transmission are negligible if not zero.

Canadian women's rights advocates are also expressing concerns about the current use of the criminal law against people living with HIV.⁷ Criminalization is often described as a tool to protect women from HIV infection and enhance women's dignity and autonomy in sexual decision-making. This perception is reinforced by (i) the fact that the vast majority of people who have been charged to date are men who had sex with women and (ii) the application of sexual assault law in those cases. However, a gendered analysis of the

⁴ Please see <http://clhe.ca/wp-content/uploads/CHLE-guidelines-report.pdf>.

⁵ 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/>.

⁶ See <http://news.gc.ca/web/article-en.do?nid=1163979>.

⁷ See the perspectives articulated by women's rights advocates in the documentary film *Consent: HIV non-disclosure and sexual assault law* (Goldelox Productions & Canadian HIV/AIDS Legal Network, 2015). Available online at www.consentfilm.org.

current use of the criminal law with respect to HIV reveals that criminalization is a blunt, punitive and inflexible approach to HIV prevention that does little to protect women from HIV infection, violence, coercion or sexual objectification. Moreover, the use of sexual assault law in the HIV non-disclosure context — where the sexual activity is consensual — is a poor fit and can ultimately have a detrimental impact on sexual assault law as a tool to advance gender equality and renounce gender-based violence.⁸

Women living with HIV may not be in a position to disclose and/or impose the use of a condom, which could put them at high risk of being criminalized. In particular, the criminalization of HIV non-disclosure can have a serious, adverse impact on women living with HIV, especially if facing challenges due to their socioeconomic status, discrimination, insecure immigration status, or abusive or dependent relationships.⁹ An overly broad use of the criminal law puts women at increased risk of violence¹⁰ and prosecution by providing a tool of coercion or revenge for vindictive partners. As illustrated by the D.C. case in Quebec¹¹ (where the defendant turned to the police for protection from her violent partner prior to the allegation of HIV non-disclosure), the criminalization of HIV non-disclosure can affect women in abusive relationships or who occupy marginalized positions in society.

Some of the women prosecuted for HIV non-disclosure and/or other HIV-related criminal offenses in Canada, including in Ontario, are survivors of violence and/or sexual violence; some are living in socioeconomic insecurity; some have insecure immigration status or are members of Indigenous and racialized communities who continue to suffer from the effects of colonization, slavery and racism.¹² In 2016, at least one woman living with HIV has been charged in Ontario. Last October, an Aboriginal woman, who endured an extremely difficult childhood, received an 18-month suspended sentence for spitting at a man. The media headlines described her as an “HIV-infected spitter.” In 2013, a woman living with HIV in Ontario was convicted and sentenced to 36 months in prison for not disclosing her status before one instance of casual sex without a condom. Her viral load at the time was undetectable and the risk of transmission was therefore close to zero if not zero.

⁸ Canadian HIV/AIDS Legal Network, *What does consent really mean? Rethinking HIV non-disclosure and sexual assault law meeting report*, 2014. Available at <http://www.consentfilm.org/resources-and-%20publications/>.

⁹ P. Allard, C. Kazatchkine and A. Symington, “Criminal prosecutions for HIV non-disclosure: Protecting women from infection or threatening prevention efforts?” in J. Gahagan (ed.), *Women and HIV Prevention in Canada: Implications for Research, Policy, and Practice* (Toronto: Women’s Press, 2013): pp. 195–218.

¹⁰ Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, Report on the 14th session, UN General Assembly, agenda item 3, UN Doc. A/HRC/14/20, April 27, 2010. Available at www.aidslaw.ca/site/wp-content/uploads/2014/02/4_R.Special2010EN.pdf, at para. 71.

¹¹ *R. v. D.C.*, 2012 SCC 48; B. Myles, « De bourreau à victime; de victime à criminelle », *Le Devoir*, February 15, 2008.

¹² See, for instance, C. Kazatchkine and L. Gervais, “Canada’s newest sex offenders,” *Winnipeg Free Press*, March 8, 2016; Canadian HIV/AIDS Legal Network, “Women and the Criminalization of HIV Non-Disclosure,” info sheet, 2012.

Research on the impact of the criminalization of HIV non-disclosure on women living with HIV is currently ongoing in Canada. In particular, researchers are studying the impact of HIV criminalization on women's access to care, treatment and support, and women's decisions to engage in sexual relationships. Evidence already suggests that the criminalization of HIV non-disclosure may represent a structural barrier to health care engagement for some people living with HIV in Canada, discouraging access to HIV testing and linkage to HIV care services required to achieve viral suppression, which is important to promote both individual and community health.¹³ Studies have also reported high rates of sexual abstinence among women living with HIV associated with high HIV related-stigma.¹⁴

The criminalization of HIV non-disclosure undermines the rights of women living with HIV and public health as recognized by the UN Committee on the Elimination of Discrimination against Women in its concluding observations released on November 18, 2016 and following its review of Canada's compliance with the *Convention on the Elimination of All Forms of Discrimination against Women*.¹⁵ In particular, the Committee recommended that Canada limit the application of criminal law provisions to cases of intentional transmission of HIV, as recommended by international public health standards. It noted the need for a review of the concerning application of harsh criminal sanctions, such as aggravated sexual assault, to women for not disclosing their HIV status to sexual partners, even when the transmission is not intentional, when there is no transmission or when the risk of transmission is minimal.

In light of your predecessor's welcome assurances, and given the particular impact of HIV-related prosecutions on women living with HIV, we reiterate our request that MWI work with CLHE to:

- Call for a limiting use of the criminal law and the law of sexual assault in the context of HIV non-disclosure.
- Contribute to the development and delivery of evidence-based resources and trainings for Crown prosecutors, police forces and prison guards on HIV and on violence against women.

¹³ S.E. Patterson et al., "The impact of criminalization of HIV non-disclosure on the health care engagement of women living with HIV in Canada: a comprehensive review of the evidence," *Journal of the International AIDS Society* 18, 1 (2015): 20572. Available at <http://jiasociety.org/index.php/jias/article/view/20572>.

¹⁴ A. Kaida et al., "Sexual inactivity and sexual satisfaction among women living with HIV in Canada in the context of growing social, legal and public health surveillance," *Journal of the International AIDS Society* 18, Supplement 5 (2015): 20284. Available at <http://jiasociety.org/index.php/jias/article/view/20284>.

¹⁵ Committee on the Elimination of Discrimination against Women, Concluding observations on the combined eighth and ninth periodic reports of Canada, CEDAW/C/CAN/CO/8-9, November, 18, 2016.

- Contribute to the development and implementation of alternatives to criminal charges and prosecutions to limit the use of the criminal law against people living with HIV especially where there is no alleged transmission and/or malicious intent to transmit HIV.
- Help ensure potential complainants receive appropriate support and referrals in cases of HIV non-disclosure.
- Take measures to protect women living with HIV from violence, harassment and domestic abuse including through the threat of HIV non-disclosure charges.

We respectfully request a meeting with you to further discuss this vital issue.

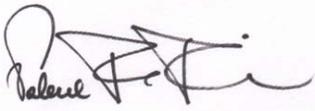
Thank you for your attention to this matter, and we look forward to hearing from you shortly.

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 Marie-France Lalonde, Minister of Community Safety and Correctional Services
- Honourable Eric Hoskins, Minister of Health and Long-Term Care
- Honourable Glen Murray, Minister of the Environment and Climate Change
- Honourable Yasir Naqvi, Attorney General

ONTARIO WORKING GROUP ON CRIMINAL LAW + HIV EXPOSURE



January 17, 2017

VIA ELECTRONIC MAIL: mflalonde.mpp.co@liberal.ola.org

Honourable Marie-France Lalonde
Ministry of Community Safety and Correctional Services
18th Floor, George Drew Building
25 Grosvenor Street
Toronto, ON M7A 1Y6

Dear Minister Lalonde,

Re: Criminal Law and HIV

On behalf of the Ontario Working Group on Criminal Law and HIV Exposure (CLHE), we wish you the best as Minister of Community Safety and Correctional Services. We write in relation to the December 5, 2016 Ministerial Roundtable on HIV and Criminal Law convened by the Honourable Glenn Murray, Minister of the Environment and Climate Change.¹

We are disappointed that your predecessor, the Honourable Minister Oraziotti, was not in attendance at the Roundtable, as we had understood he would be joining us for the discussion. At the Roundtable, the Honourable Yasir Naqvi made it clear that, as Attorney General of Ontario, he is looking forward to learning more about the federal government's efforts² to address the issue of the overly-broad use of the criminal law in relation to HIV and is open to engaging in a meaningful dialogue with CLHE. The Honourable Tracy MacCharles, the then Minister Responsible for Women's Issues, expressed her openness to working with the federal government and CLHE on this issue, and assured us that she will add the issue to the agenda of the Premier's Roundtable on Violence Against Women.

As background, it is important to note that CLHE has been working for many years to confront the growing crisis of criminal prosecutions of people living with HIV in Ontario.³ Since 2010, CLHE has been in discussions with the Ministry of the Attorney General (MAG) to ensure that the manner in which such prosecutions occur take into

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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.

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*⁴ 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.

In May 2014, over 75 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.⁵ The statement was sent to MAG by Drs. Mona Loutfy and Mark Tyndall, co-chairs of the scientific expert team who developed the Consensus Statement.

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justice system must adapt to better reflect the current scientific evidence on the realities of this disease.”⁷

Notwithstanding above, appropriate guidance has not been developed and the scope of the problem continues to escalate. People living with HIV continue to be charged with *aggravated sexual assault* – one of the most serious offenses in our Criminal Code – even where there is no intent to cause harm, no transmission occurs and the risks of transmission are negligible if not zero.

From the laying of charges and issuance of police press releases, to the treatment of people with HIV in correctional institutions, the Ministry of Community Safety and Correctional Services has a central role to ensure that the use of the criminal law is based on up-to-date science and human rights principles. To this end, in 2013, the Canadian HIV/AIDS Legal Network and the HIV & AIDS Legal Clinic Ontario provided submissions and recommendations to the Ontario Association of Chiefs of Police (OACP) Diversity Committee.⁸ An adapted version of the submission was included in the OACP’s *Best Practices in Policing and LGBTQ Communities in Ontario* (November 2013).⁹

On November 30, 2016, we wrote to Honourable Minister Oraziotti in preparation for the Roundtable. We would like to take this opportunity to reiterate our request that the Ministry of Community Safety and Correctional Services work with CLHE to:

- Develop resources and training for police forces on handling matters of alleged non-disclosure, including the issuance of police press releases, HIV non-disclosure prosecutions, HIV transmission, occupational exposure to HIV, post-exposure prophylaxis, HIV testing, and HIV medical care.
- Develop resources and training on the realities of living with HIV, as well as HIV and human rights, privacy and confidentiality.
- Develop resources and training for police to provide support to potential complainants in cases of HIV non-disclosure and appropriate referrals.
- Develop resources and training for police on sexual violence, abuse and harassment against people living with HIV, especially women.
- Develop resources and training for corrections staff on HIV transmission, occupational exposure to HIV, post-exposure prophylaxis, HIV testing, and HIV medical care.

⁷ Please see <http://news.gc.ca/web/article-en.do?nid=1163979>.

⁸ Please see <http://tinyurl.com/zf2dddt>.

⁹ Please see <http://tinyurl.com/kb273px>.

- Develop resources and training for corrections staff on the realities of living with HIV, as well as HIV and human rights, privacy and confidentiality.
- Take measures to prevent any interruption of treatment in detention and correctional facilities and guarantee access to care.
- Take measures to reduce the use of segregation against people living with HIV and protect prisoners against discrimination and violence.

We respectfully request a meeting as soon as possible to discuss these vital issues.

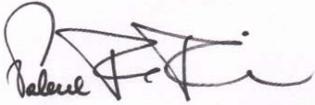
Thank you for your attention to this matter, and we look forward to hearing from you shortly.

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
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cc

- Honourable Eric Hoskins, Minister of Health and Long-Term Care
- Honourable Glen Murray, Minister of the Environment and Climate Change
- Honourable Indira Naidoo-Harris, Minister of Women's Issues
- Honourable Yasir Naqvi, Attorney General