

ONTARIO WORKING GROUP ON CRIMINAL LAW + HIV EXPOSURE



May 1, 2017

VIA ELECTRONIC MAIL: susan.kyle@ontario.ca

Susan Kyle
Assistant Deputy Attorney General, Criminal Law Division
Ministry of the Attorney General
720 Bay Street, 11th Floor
Toronto, ON M7A 2S9

Dear Ms. Kyle:

Re: An opportunity for renewed and strengthened leadership in Ontario on the rights of persons living with HIV

On behalf of the Ontario Working Group on Criminal Law and HIV Exposure (CLHE), we write to congratulate you on your recent appointment as Assistant Deputy Attorney General, Criminal Law Division, at the Ontario Ministry of the Attorney General (MAG).

CLHE has been working for many years to confront the growing crisis of criminal prosecutions of people living with HIV in Ontario.¹ Since 2010, CLHE has been in discussions with 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.

Canada has the dubious distinction of being a world “leader” in prosecuting people living with HIV for alleged non-disclosure of their status—and Ontario accounts for roughly half of prosecutions in the country. We enclose a copy of a recently published analysis of all known cases until the end of 2016.² Amongst other deeply troubling realities noted in the document, including the growing trend of prosecuting African/Caribbean/Black men in Ontario, is the fact that there have been at least 10 cases subsequent to the Supreme Court of Canada decision in *R v. Mabior*³ involving an accused person with a low or undetectable viral load—nine of which were pursued in Ontario. It is now incontrovertible that the possibility of sexual transmission approaches zero when a

¹ Please see <http://clhe.ca/advocacy-timeline> for the history of the written record of discussions.

² C. Hasting, C. Kazatchkine & E. Mykhalovskiy. *HIV Criminalization: Key Trends and Patterns* (Canadian HIV/AIDS Legal Network, 2017), online: <http://www.aidslaw.ca/site/hiv-criminalization-in-canada-key-trends-and-patterns/?lang=en>.

³ *R. v. Mabior* 2012 SCC 47

person living with HIV has a suppressed viral load.⁴ Prosecutions involving behaviour that constitutes negligible to no risk of HIV transmission seem to criminalize HIV itself.

In the past few months, the unjust criminalization of people living with HIV has risen to the fore as a critical issue being considered by both the Governments of Ontario and Canada. 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 criminal justice system must adapt to better reflect the current scientific evidence on the realities of this disease." She noted in particular "a review of existing charging and prosecution practices, as well as the possible development of prosecutorial guidelines."⁵

A few days later, CLHE held a roundtable with several Ontario government ministers, including the Attorney General, the Honourable Yassir Naqvi, to discuss this ongoing human rights concern. At the roundtable, and subsequently, Mr. Naqvi made it clear that Ontario will engage actively in discussions with the federal government to address the issue of the overly-broad use of the criminal law in relation to HIV, as well as engage meaningfully with CLHE.

Yet, despite concerns raised by the scientific community, international bodies, Canada's own federal government, people with HIV and others, as well as recommendations developed and presented by CLHE several years ago,⁶ MAG still lacks appropriate guidance and the scope of over-criminalization of HIV continues to escalate. People living with HIV continue to be charged with aggravated sexual assault — one of the most serious offences 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.

⁴ Cohen MS, Chen YQ, McCauley M, et al, Antiretroviral Therapy for the Prevention of HIV-1 Transmission, *N Engl J Med*, Sept 2016; 375:830-839; Eshleman SH, Hudeelson, SE, Red AD, et al, Treatment as Prevention: Characterization of Partner Infections in the HIV Prevention Trials Network 052 Trial, *J Acquir Immune Defic Syndr*, Jan 2017; 74(1): 112-116; [Supervie V](#), [Viard JP](#), [Costagliola D](#), [Brebant R](#), Heterosexual risk of HIV transmission per sexual act under combined antiretroviral therapy: systematic review and bayesian modeling, *Clin Infect Dis*, Jul 2014;59(1):115-22.

⁵ 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, online: <http://news.gc.ca/web/article-en.do?nid=1163979>.

⁶ CLHE, *Consultation on Prosecutorial Guidelines for Ontario Cases Involving Non-disclosure of Sexually Transmitted Infections: Community Report and Recommendations to the Attorney General of Ontario*, June 2011, online: <http://clhe.ca/wp-content/uploads/CHLE-guidelines-report.pdf>; Canadian HIV/AIDS Legal Network and HIV & AIDS Legal Clinic Ontario, *Exploring Avenues to Address Problematic Prosecutions Against People Living with HIV in Canada*, March 2017 (updated recommendations, post-Mabior, are included in the appendix), online: <http://www.halco.org/wp-content/uploads/2017/03/HIV-Criminalization-ProblematicProsecutions-Brief-HALCOLegalNetwork-2017Mar.pdf>.

It is notable that Canadian women’s rights advocates have expressed concern 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. However, a gendered analysis of the 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

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 following its review of Canada’s compliance with the *Convention on the Elimination of All Forms of Discrimination against Women*.⁹ 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 expert bodies, including UNAIDS and the Global Commission on HIV and the Law. The Committee noted its concern about, and called for a review of, the application in Canada 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.

The overly broad use of the criminal law in relation to HIV not only raises a range of human rights and public health concerns, but is also increasingly recognized as at odds with a commitment to evidence-based policy. The scientific evidence has failed to demonstrate that HIV criminalization has any significant HIV prevention benefit. HIV criminalization, in fact, damages HIV prevention efforts by increasing HIV-related stigma, discouraging HIV testing for some individuals, hindering access to and eroding trust in voluntary approaches to HIV prevention, including HIV counselling, and spreading misinformation about the nature of HIV and its transmission. The current use of the criminal law also compromises the ability of people living with HIV to engage in the care they need to stay healthy, by preventing them 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.¹⁰

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), online: www.consentfilm.org.

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

⁹ UN 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 (paras. 42-43).

¹⁰ 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*

The recently released HIV/AIDS strategy, produced by the Ontario Advisory Committee on HIV/AIDS and supported by the Ontario Ministry of Health and Long-Term Care, further recognizes negative impacts of the current use of the criminal law and calls for engagement with community stakeholders and others on reform.¹¹

Due to above concerns, scientific experts internationally and in Canada are increasingly expressing concern about the overly broad use of the criminal law in relation to HIV. This includes the peer-reviewed, scientific consensus statement issued by nearly 80 of Canada's leading HIV researchers and clinicians in 2014 – and the renewed declaration of concern issued by the lead authors of that statement, and the Canadian Association for HIV Research (CAHR), earlier this month at the annual Canadian Conference on HIV/AIDS Research.¹² In Ontario in particular, with its recent history of unjust convictions based on unsound science (such as those that gave rise to the Goudge Inquiry), we would hope that MAG would be interested in avoiding the damaging over-reach of the criminal law, contrary to science.

We provide this information to make clear the urgency of addressing the numerous human rights and public health concerns associated with unjust HIV-related prosecutions, and the important role of your Ministry in supporting efforts to end the overly broad application of the criminal law to cases of HIV non-disclosure.

Thank you for your attention to this matter. We welcome the opportunity to discuss these concerns with you.

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

International AIDS Society 2015; 18(1): 20572; E. Mykhalovskiy, "The public health implications of HIV criminalization: past, current, and future research directions," *Critical Public Health* 2015; 25(4): 373–385.

¹¹ Ontario Advisory Committee on HIV/AIDS, *HIV/AIDS Strategy to 2026: Focusing Our Efforts – Changing the Course of the Prevention, Engagement and Care Cascade in Ontario*, December 2016, online: http://www.health.gov.on.ca/en/pro/programs/hiv/aids/oach_strategy.aspx.

¹² M. Loutfy et al., "Canadian consensus statement on HIV and its transmission in the context of criminal law," *Can J Infect Dis Med Microbiol* 2014 May-Jun; 25(3): 135–140, online: <http://www.aidslaw.ca/site/wp-content/uploads/2014/06/Canadian-statement.pdf>; "Canadian Association for HIV Research (CAHR) endorses Canadian consensus statement on HIV and its transmission in the context of criminal law," PositiveLite.com, 11 April 2017, online: <http://www.positivelite.com/component/zoo/item/canadian-association-for-hiv-research-cahr-endorses-canadian-consensus-statement-on-hiv-and-its-transmission-in-the-context-of-criminal-law>.