



February 2, 2017

VIA EMAIL: ynaqvi.mpp@liberal.ola.org

Ministry of the Attorney General
McMurtry-Scott Building
720 Bay Street, 11th Floor
Toronto, ON M5G 2K1

Attn: Honourable Yasir Naqvi, Attorney General

Dear Minister Naqvi,

Re: Criminal Law and HIV

On behalf of the British Columbia Civil Liberties Association (the "BCCLA"), I am writing to you because we are deeply concerned about Ontario's approach to prosecuting allegations of HIV non-disclosure.¹ We request that you immediately undertake the following actions to put an end to unjust and harmful prosecutions of people living with HIV:

1. Impose an immediate moratorium on all HIV non-disclosure prosecutions, unless there is alleged intentional transmission of HIV, while law reform options are being explored and sound prosecutorial guidelines are being developed – in conjunction with the community – to limit the current misuse and overextension of the criminal law.
2. Publicly state that the Ministry of the Attorney General (MAG) is committed to ending the overly broad application of the criminal law in cases of alleged HIV non-disclosure and to reviewing Ontario's approach to these prosecutions.

3. Engage in meaningful dialogue with the Ontario Working Group on Criminal Law and HIV Exposure (CLHE) as well as people living with HIV and scientific experts when developing prosecutorial guidelines and other responses to this issue.

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.

In December 2010, then Attorney General Chris Bentley agreed to develop, with the input of CLHE, guidance for Crown prosecutors related to HIV non-disclosure, and to share a draft with CLHE. However, in June 2011, MAG refused to engage in a broad-based consultation proposed by CLHE, thereby prompting CLHE to provide MAG with a *Report and Recommendations*² based on community and expert consultations conducted by CLHE in Ontario 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, which details the science surrounding HIV transmission and raises serious concerns with the manner in which criminal prosecutions are taking place.³

In November 2016, the UN Committee on the Elimination of Discrimination against Women, following its review of Canada's compliance with the *Convention on the Elimination of All Forms of Discrimination against Women*,⁴ recommended that Canada limit the application of criminal law provisions to cases of intentional transmission of HIV, as recommended by international public health standards. The Committee noted the need for a review of the use of harsh criminal sanctions applied to women for not disclosing

their HIV status to sexual partners, even when the transmission was not intentional, there was no transmission or the risk of transmission was minimal.

In December 2016, the Honourable Jody Wilson-Raybould, Minister of Justice and Attorney General of Canada, explicitly acknowledged 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."⁵

But Ontario continues to remain a world leader in unjustly prosecuting people with HIV. The province is out of step with scientific evidence and human rights principles, and appropriate guidance has not been developed, while 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 offences in Canada's Criminal Code — even where there is no intent to cause harm, no transmission occurs and the risks of transmission are negligible if not zero.

Ontario's approach is also dramatic from a public health perspective. It hinders HIV prevention efforts and hampers care, treatment and support for those living with HIV by providing disincentives for HIV testing and deterring honest and open conversations with health care providers, including Public Health authorities, for legitimate fear that such conversations will be used in criminal cases.⁶

For many years, CLHE and others have highlighted the injustices taking place and conveyed the unacceptable reality that such prosecutions are having a disproportionate impact on the most marginalized and vulnerable of persons living with HIV, such as racialized newcomers and vulnerable women with HIV who are in abusive relationships or who cannot safely impose condom use or disclose their HIV status to sexual partners.

It is time for Ontario to finally show leadership by immediately imposing a moratorium, releasing a public statement and meaningfully engaging with community to bring the law in line with international recommendations, science and human rights. Unjust and harmful prosecutions must end now.

Thank you for your time, and we look forward to hearing from you soon.

Sincerely,



Micheal Vonn
Policy Director

cc Honourable Indira Naidoo-Harris, Minister of Women's Issues
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¹ A. Robinson, « Document on HIV non-disclosure prosecutions disclosed », *Legal Feeds: The Blog of Canadian Lawyer and Law Times*, 13 janvier 2017; J. Gallant, « Guide to prosecuting HIV cases 'undermining' public health, critics say », *Toronto Star*, 15 janvier 2017 at <https://www.thestar.com/news/gta/2017/01/15/guide-to-prosecuting-hiv-cases-undermining-public-health-critics-say.html>; J. Smith, « Criminalization of HIV non-disclosure a bigger burden on women, advocates say », *Toronto Star*, 15 janvier 2017 at <https://www.thestar.com/news/canada/2017/01/15/criminalization-of-hiv-non-disclosure-a-bigger-burden-on-women-advocates-say.html>

² <http://clhe.ca/wp-content/uploads/CHLE-guidelines-report.pdf>.

³ M. Loutfy et al., "Canadian consensus statement on HIV and its transmission in the context of criminal law," *Canadian Journal of Infectious Diseases and Medical Microbiology* 25,3 (2014 May–June): pp. 135–140, at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4173974/>.

⁴ 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.

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

⁶ K.A. Shea (Assistant Crown Attorney, Hamilton, Ontario), *HIV: The Medicine, the Science, and the Law: A Practical Guide for Crown Attorneys involved in the prosecution of HIV exposure and transmission cases* (October 2010): pp. 16–19.