Briefing to the High-level Working Group on Health and Human Rights of Women, Children and Adolescents

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The Canadian HIV/AIDS Legal Network promotes the human rights of people living with and vulnerable to HIV/AIDS, in Canada and internationally, through research and analysis, advocacy and litigation, public education and community mobilization.

Le Réseau juridique canadien VIH/sida fait valoir les droits humains des personnes vivant avec le VIH/sida et vulnérables à l'épidémie, au Canada et dans le monde, à l'aide de recherches et d'analyses, de plaidoyer, d'actions en contentieux, d'éducation du public et de mobilisation communautaire.

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INTRODUCTION

The Canadian HIV/AIDS Legal Network ("Legal Network") promotes the human rights of people living with and vulnerable to HIV and AIDS, in Canada and internationally, through research and analysis, advocacy and litigation, public education, and community mobilization. We envision a world in which the human rights and dignity of people living with HIV and those affected by the disease are fully realized and in which laws and policies facilitate HIV prevention, care, treatment and support.

The Legal Network submits this briefing to the High-Level Working Group on Health and Human Rights of Women, Children and Adolescents of the World Health Organization and the Office of the United Nations High Commissioner for Human Rights in order to provide inputs on the following areas of concern: (i) the rights of women living with HIV; (ii) the rights of women, children and adolescents who use drugs; (iii) the rights of women in sex work; and (iv) the rights of incarcerated women.

THE RIGHTS OF WOMEN LIVING WITH HIV

The ongoing, overly-broad criminalization of HIV non-disclosure in many states is undermining both the rights of women living with HIV and public health. Criminalization is often described as a tool to protect women from HIV infection and enhance women's dignity and autonomy in relation to 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.[1]

Numerous human rights and public health concerns associated with the criminalization of HIV non-disclosure, exposure or transmission have led UNAIDS and UNDP,[2] the UN Special Rapporteur on the right to health,[3] the Global Commission on HIV and the Law,[4] and leading women's rights advocates,[5] among others, to urge governments to limit the use of the criminal law to cases of *intentional transmission* of HIV (i.e., where a person knows his or her HIV-positive status, acts with the intention to transmit HIV, and does in fact transmit it). The Special Rapporteur on the right to health has noted that criminalizing HIV transmission not only infringes on the right to health but also on other rights, including the rights to privacy, equality and non-discrimination.[6] More recently, the CESCR Committee, in its General Comment No. 22 on the right to sexual and reproductive health, called on states "to reform laws that impede the exercise of the right to sexual and reproductive health. Examples include laws criminalizing abortion, *HIV non-disclosure, exposure and transmission*, consensual sexual activities between adults or transgender identity or expression" [emphasis added].[7]

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 socio-economic status, discrimination, insecure immigration status or abusive or dependent relationships.[8] An overly-broad use of the criminal law puts women at increased risk of violence and prosecution by providing a tool of coercion or revenge for vindictive partners.[9] The criminalization of HIV non-disclosure can affect women in abusive relationships or who occupy marginalized positions in society. Some of the women convicted of HIV non-disclosure in Canada, where the Legal

Network focuses much of its research, have been survivors of violence and sexual violence; some were living in socioeconomic insecurity; some had insecure immigration status or were members of Indigenous and racialized communities who continue to suffer from the effects of colonization, slavery and racism.[10]

The Legal Network recommends that states limit the scope and application of the criminal law in cases of HIV non-disclosure in keeping with best practice and international, evidence-based recommendations. States should limit the use of the criminal law to the intentional transmission of HIV. At a minimum, they should ensure that the criminal law is under no circumstances used against people living with HIV for not disclosing their status to sexual partners where they use a condom, practice oral sex or have condomless sex with a low or undetectable viral load.

THE RIGHTS OF WOMEN, CHILDREN AND ADOLESCENTS WHO USE DRUGS

When poorly developed and implemented, drug policies can lead to serious human rights violations, including police harassment and violence, arbitrary detention, disproportionate sentencing and incarceration, torture and ill-treatment, discrimination and violations of the right to health. Ill-advised drug policy can not only exacerbate the harms sometimes associated with the use of controlled substances, but contribute to the risk of other preventable harms, including HIV and hepatitis C (HCV) and overdoses. Under international law, states have a binding legal obligation to realize the right to health, including steps "necessary for… prevention, treatment and control of epidemic, endemic… and other diseases" and "the creation of conditions which would assure to all medical services and medical attention in the event of sickness."[11]

In almost every nation, punitive drug policies have a disproportionate impact on women, particularly those who are coping with poverty, histories of physical and sexual violence, untreated mental health concerns, inadequate support systems, and marginalization due to race or ethnicity.[12] Women who are heavy substance users rarely use a single substance, exacerbating their risk of overdose and death.[13] Women are also more likely than men to engage in the use of a range of drugs, including the non-medical use of opioids and tranquilizers.[14] UNODC has stated that women affected by drug dependence and HIV are more vulnerable and more stigmatized than men, as well as more likely to suffer from co-occurring mental health disorders.[15] Women face significant barriers to accessing appropriate drug treatment, including lack of childcare, lack of trauma-informed care and threats of arrest if they reveal that they are pregnant.[16] Without proper access to healthcare, including drug treatment, a woman's chance of acquiring HIV or HCV, experiencing homelessness, drug overdose and significant family rupture all increase.[17] Women are more vulnerable to violence and have fewer options for challenging that violence when drug control policy focuses on punishment, hindering the achievement of the Sustainable Development Goals target of eliminating violence against all women and girls.[18] Women are also often subject to trafficking and sexual assault by those involved in the drug trade and by those charged with enforcing drug laws.[19]

The continued criminalization of people who use drugs in many states undermines efforts to address the health needs of people struggling with problematic drug use, and thereby undermines public health more broadly. According to the Special Rapporteur on torture, states

should "[e]nsure that all harm-reduction measures and drug-dependence treatment services, particularly opioid substitution therapy, are available to people who use drugs."[20] The Special Rapporteur on the right to the health has stated, "[a]t the root of many health-related problems faced by people who use drugs is criminalization itself, which only drives issues and people underground and contributes to negative public and individual health outcomes."[21] The *Vienna Declaration*, the central policy position articulated at the XVIII International AIDS Conference in 2010, also articulates that "there is no evidence that increasing the ferocity of law enforcement meaningfully reduces the prevalence of drug use."[22] The Special Rapporteur on violence against women has highlighted the vulnerability of women who use drugs to discrimination in the criminal justice system.[23] In addition, the CEDAW Committee recently noted the susceptibility of women who use drugs to discrimination in access to health care, including reproductive health services.[24]

Many strategies to counter the "world drug problem" have also had documented negative effects on the health and human rights of children and adolescents. In most countries, children and adolescents are criminalized for drug use.[25] If they are caught using drugs, they may be sent to mandatory treatment or rehabilitation facilities, or to youth detention centers or jails.[26] In lieu of incarceration, young people are often kicked out of schools and educational institutions. In most states, there is a severe lack of lack of youth-specific harm reduction, HIV and drug policies and programs.[27] This includes a lack of honest drug education, lack of services and interventions for those already using drugs, and lack of needle exchanges and substitution therapy.[28] Even where harm reduction services do exist, most children and adolescents under 18 are either excluded due to their age, or cannot access those services without parental consent.[29] The CRC Committee has commented on the need for appropriate harm reduction services for children and adolescents who may need them, and included this recommendation in its 2014 General Comment on the child's right to health.[30]

The Legal Network recommends that states reduce the gaps in health service delivery related to drug use, including for people living with HIV or HCV, by scaling-up and ensuring access to comprehensive, culturally-appropriate harm reduction services, including needle and syringe distribution programs, supervised consumption services, opioid substitution therapy and naloxone, drug dependence treatment and support services, including in remote and rural communities and in prisons. Given the multiple harms caused, including to women, children and adolescents by punitive drug laws, states should also repeal mandatory minimum sentences for minor, non-violent drug crimes, and, learning from the experience of countries that have already done so, should decriminalize the possession for personal use of all currently illegal substances.

THE RIGHTS OF WOMEN IN SEX WORK

Ensuring that sex workers are treated with dignity and enjoy the human rights guaranteed to all people, including their right to self-determination, affirms the principles of universality, human rights and "leaving nobody behind." Accordingly, states' policies on sex work should uphold sex workers' human rights, including their rights to work, life, liberty and security of the person, privacy, freedom of expression, movement and assembly, health, equality before the law and equal protection of the law, and protection against all forms of discrimination, including gender-based violence.

Criminal laws and other forms of repressive legislation governing sex work (e.g. anti-trafficking laws and immigration laws that lead to raids, detentions and deportations of sex workers in the name of protection; administrative offences penalizing sex work; vagrancy or loitering laws that target sex workers and/or their clients) prevent sex workers from working safely and free from state, police and other violence, as well as hinder their access to health and social supports and police protection. Criminalizing or otherwise penalizing sex work is thus a violation of sex workers' rights to employment, health, life, security of the person, freedom from torture and cruel, inhumane and degrading treatment, work, privacy, equality and non-discrimination.[31] In particular, criminalizing sex work disproportionately affects those most marginalized by society, i.e. sex workers who are most likely to be "left behind."[32]

Decriminalizing sex work is in line with recommendations made by UN Special Procedures and other UN agencies which have considered the human rights implications of criminalizing sex work. The Special Rapporteur on the right to health has described the negative ramifications of criminalizing third parties such as brothel owners and explicitly called for the decriminalization of sex work as well as spoken out against the conflation of sex work and human trafficking.[33] The Special Rapporteur on violence against women has noted the need to ensure that "measures to address trafficking in persons do not overshadow the need for effective measures to protect the human rights of sex workers."[34] Similarly, UN Women has expressed its support for the decriminalization of sex work, acknowledged that sex work, sex trafficking and sexual exploitation are distinct, and that their conflation leads to "inappropriate responses that fail to assist sex workers and victims of trafficking in realizing their rights."[35] The Global Commission on HIV and the Law, as well as international human rights organizations including Amnesty International[36] and Human Rights Watch,[37] have also recommended the decriminalization of sex work (including clients and third parties) and called for laws and policies to ensure safe working conditions for sex workers.[38]

The Legal Network recommends that states repeal any and all sex work-specific criminal laws, which endanger sex workers' lives, health and safety. States should put in place legislative measures to ensure that sex workers' rights, safety and dignity are respected, protected and fulfilled. States should fund and support programs and services that are developed by people who have lived experience trading or selling sexual services, including sex worker–led outreach. States should support concrete measures to improve the safety of individuals selling sexual services and to assist those who wish to transition out of the sex industry, including by providing significant resources for income support, poverty alleviation, housing, childcare, education and training, and treatment and support for substance use.

THE RIGHTS OF INCARCERATED WOMEN

Incarcerated individuals are entitled to the same standard of health care found on the outside, without discrimination, including with regard to prevention, harm reduction and antiretroviral therapy. As OHCHR has acknowledged, drug use, including by injection, has been consistently documented to occur in prisons throughout the world. High rates of sharing injecting equipment leads to an elevated risk of transmitting HIV in prisons.[39] The Special Rapporteur on the right to health has stated that if harm reduction programs and evidence-based treatments are made available to the general public, but not to persons in detention, this contravenes the right to

health. In 2014, however, while opioid substitution therapy was available in 80 countries, only 43 countries provided such therapy.[40]

In Canada, for example, a heavy emphasis on drug prohibition rather than treatment and support for people who use drugs has led to a significant increase in the country's prison population. Women are now the fastest-growing prison population in the country, with the number of women being sentenced to federal prisons increasing by 66 percent over the last decade.[41] Moreover, an estimated 80 percent of federally incarcerated women in Canada are reported to have a history of substance use,[42] and approximately one-third of all federally incarcerated women are serving sentences for drug-related offences.[43] Behind bars, a lack of harm reduction and other health measures has led to significantly higher rates of HIV and HCV in prison compared to the community as a whole — a harm that has been disproportionately borne by the rapidly-growing population of women in prison.[44] Access to HCV treatment, however, remains inadequate, and only a small proportion of prisoners who are eligible for treatment are able to access it.[45]

A principal driver of high rates of HIV and HCV in prison is injection drug use among prisoners and the sharing of used needles to inject drugs. In a study of people incarcerated in federal institutions in Canada, 14 percent of women admitting to injecting drugs while in prison, many of whom shared their injection equipment.[46] Yet no Canadian prison currently permits the distribution of sterile injection equipment to prisoners and a number of provincial and territorial prisons do not offer opiate substitution therapy to prisoners.[47] Correspondingly, in a study of federally incarcerated women, 1 in 4 women were reported to have engaged in tattooing and 1 in 4 had unprotected sex while in prison.[48] However, safer tattooing programs do not exist in any prison in Canada, and a number of provincial and territorial prisons still do not make condoms and other safer sex supplies available to prisoners.[49]

The UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), as well as the UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders with their Commentary (the Bangkok Rules) recommend that prisoners enjoy the same standard of health care that is available in the community.[50] A number of UN agencies, including the UNODC, UNAIDS and WHO, have also recommended that prisoners should have access to interventions including needle and syringe programs, condoms, drug dependence treatment including opioid substitution therapy, programs to address tattooing, piercing and other forms of skin penetration, and HIV treatment, care and support.[51] The failure to provide prisoners with equivalent access to health services, including key harm reduction measures, is a violation of their rights to life, health, equality and non-discrimination.

The Legal Network recommends that states minimize custodial sentences for women who commit non-violent offences and develop appropriate health and social support, including gender-appropriate treatment of drug dependence, for those who need it. States should expand evidence-based alternatives to incarceration for people who use drugs. States should implement key health and harm reduction measures in all prisons, in consultation with prisoner groups and community health organizations to ensure operational success, taking into account the need for culturally appropriate and gender-specific programs. States should expand care, treatment and support services for women living with and vulnerable to HIV and HCV, and ensure such support is developed and implemented to meet the specific needs of women in each institution and made consistently accessible to all.

[1] Canadian HIV/AIDS Legal Network, *What does consent really mean? Rethinking HIV non-disclosure and sexual assault law meeting report*, 2014.

[2] UNAIDS/UNDP, *Policy brief: criminalization of HIV transmission*, August 2008.

[3] UN General Assembly, *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*, Human Rights Council, Fourteenth session, Agenda item 3, A/HRC/14/20, April 27, 2010.

[4] Global Commission on HIV and the Law (UNDP HIV/AIDS Group), *HIV and the Law: Risks, Rights and Health* (July 2012), 24. Available at www.hivlawcommission.org.

[5] See the perspectives articulated in the documentary film, Consent: HIV non-disclosure and sexual assault law (Goldelox Productions & Canadian HIV/AIDS Legal Network, 2015). Available at http://www.consentfilm.org/.

[6] A/HRC/14/20, paras. 2, 51.

[7] UN Committee on Economic, Social and Cultural Rights, *General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights,* E/C.12/GC/22, May 2016, para. 40.

[8] 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): 195–218.

[9] UN General Assembly, *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*, at para. 71.

[10] See for instance, Cécile Kazatchkine and Laverne 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.

[11] *International Covenant on Economic, Social and Cultural Rights*, Article 12(2).

[12] UN General Assembly Special Session (UNGASS) on the World Drug Problem, *UNGASS 2016 Women's Declaration*, April 2016.

[13] N. Poole and C.A. Dell, Girls, Women and Substance Use (2005) at 1. Available at http://www.ccsa.ca/Resource%20Library/ccsa-011142-2005.pdf.

[14] United Nations, "Record 29 million people drug-dependent worldwide; heroin use up sharply – UN report" (23 June 2016). Available at http://www.un.org/apps/news/story.asp?NewsID=54302.

[15] United Nations, "Record 29 million people drug-dependent worldwide; heroin use up sharply – UN report" (23 June 2016). Available at http://www.un.org/apps/news/story.asp?NewsID=54302.

[16] UN General Assembly Special Session (UNGASS) on the World Drug Problem, *UNGASS 2016 Women's Declaration*, April 2016.

[17] Ibid.

[18] Ibid.

[19] Ibid.

[20] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez. A/HRC/22/53. 1 February 2013. Online: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf

[21] D. Puras, UN Special Rapporteur on the right of everyone to the highest attainable standard of mental and physical health. Open letter to UNODC Executive Director Yury Fedetov, in the context of the preparations for the UN General Assembly Special Session on the Drug Problem (UNGASS), dated December 7, 2015.

[22] Vienna Declaration. Online: http://www.viennadeclaration.com/the-declaration.

[23] Report to the UN General Assembly by Special Rapporteur on violence against women, its causes and consequences, *Pathways to, conditions and consequences of incarceration for women*, A/68/340, 21 August 2013, p. 9-10.

[24] Concluding observations of CEDAW on the combined fourth and fifth periodic reports of Georgia, CEDAW/C/GEO/CO/4-5, July 2014, para. 30.

[25] Harm Reduction International, *Drugs, Harm Reduction and the UN Convention on the Rights of the Child: Common themes and universal rights*, 2009.

[26] Ibid.

[27] Ibid.

[28] Ibid.

[29] Ibid.

[30] Concluding Observations Ukraine, CRC/C/UKR/CO/4, para 59, 60; Austria, CRC/C/AUT/CO/3-4, para 51; Albania, CRC/C/ALB/CO/2-4, para 63(b); Guinea, CRC/C/GIN/ CO/2, para 68; Guyana, CRC/C/GUY/CO/2-4, para 50(d); General Comment No. 3: HIV/AIDS and the Rights of the Child, UN doc. no. CRC/GC/2003/3, para 39; General Comment No15: The Right of the Child to the Highest Attainable Standard of Health, UN doc. no. CRC/C/GC/ 15, para 66.

[31] M. Decker et al., "Human rights violations against sex workers: burden and effect on HIV," *Lancet* 385, 9963 (2015): pp. 186–199.

[32] Amnesty International, *Explanatory Note on Amnesty International's Policy on State Obligations to Respect, Protect and Fulfil the Human Rights of Sex Workers*, May 26, 2016, p. 9.

[33] Human Rights Council, *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*, UN Doc. A/HRC/14/20, 2010; Human Rights Council, *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*, UN Doc. A/HRC/23/41.

[34] Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo*, UN Doc. A/HRC/26/38/Add.1, 2014.

[35] UN Women, *Note on Sex Work,* Sexual Exploitation and Trafficking, October 9, 2013.

[36] Amnesty International, *Explanatory Note on Amnesty International's Policy on State Obligations to Respect, Protect and Fulfil the Human Rights of Sex Workers*, May 26, 2016, p. 42.

[37] Joseph Amon, "Canada's prostitution bill a step in the wrong direction" (18 June 2014) Human Rights Watch. Available at https://www.hrw.org/news/2014/06/18/canadas-prostitution-bill-step-wrong-direction.

[38] Global Commission on HIV and the Law, *Risks, Rights & Health*, 2012, p. 43

[39] OHCHR, Annual report of the United Nations High Commissioner for Human Rights, Study on the impact of the world drug problem on the enjoyment of human rights (4 September 2015), A/HRC/30/65.

[40] A/65/255.

[41] Correctional Investigator of Canada, *Annual report 2013-2014 of the Office of the Correctional Investigator,* Office of the Correctional Investigator, 2014.

[42] Correctional Investigator of Canada, *Annual report 2013-2014 of the Office of the Correctional Investigator,* Office of the Correctional Investigator, 2014.

[43] K. DeBeck et al., "Incarceration and drug use patterns among a cohort of injection drug users," *Addiction* 104:1 (2009): 69-76.

[44] Correctional Investigator of Canada, *Annual report 2013-2014 of the Office of the Correctional Investigator,* Office of the Correctional Investigator, 2014.

[45] P. Webster, "Prisons face hep C-treatment funding crisis," *Canadian Medical Association Journal*, January 8, 2016.

[46] D. Zakaria et al., *Summary of emerging findings from the 2007 National Inmate Infectious Diseases and Risk-Behaviours Survey Research Report R-211*, Correctional Service of Canada, 2010.

[47] G. Dias and G. Betteridge, *Hard Time: HIV and Hepatitis C Prevention Programming for Prisoners in Canada*, Canadian HIV/AIDS Legal Network and PASAN, 2007.

[48] A. DiCenso et al., *Unlocking our Futures: A National Study on Women, Prisons, HIV, and Hepatitis C*, PASAN, 2003.

[49] G. Dias and G. Betteridge, *Hard Time: HIV and Hepatitis C Prevention Programming for Prisoners in Canada*, Canadian HIV/AIDS Legal Network and PASAN, 2007.

[50] Rule 24 of the *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, December 17, 2015, UN Doc. A/RES/70/175; Rule 10 of the *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders with their Commentary, (the Bankok Rules)*, 21 December 2010, UN Doc. A/RES/65/229.

[51] UNODC, ILO, UNDP, WHO and UNAIDS, *Policy brief: HIV prevention, treatment and care in prisons and other closed settings: a comprehensive package of interventions*, 2013.