Protecting the Human Rights of People Living with or at Risk of HIV in the Criminal Law

Submission to the Department of Justice: Consultations on Transforming the Criminal Justice System

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The Canadian HIV/AIDS Legal Network promotes the human rights of people living with, at risk of or affected by HIV or AIDS, in Canada and internationally, through research and analysis, litigation and other advocacy, public education and community mobilization.

Le Réseau juridique canadien VIH/sida fait valoir les droits humains des personnes vivant avec le VIH ou le sida et de celles qui sont à risque ou affectées autrement, au Canada et dans le monde, à l'aide de recherches et d'analyses, d'actions en contentieux et d'autres formes de plaidoyer, d'éducation du public et de mobilisation communautaire.

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INTRODUCTION

The Canadian HIV/AIDS Legal Network ("Legal Network") welcomes this opportunity to provide submissions to the Department of Justice on how the Canadian criminal law should be transformed.

The Legal Network promotes the human rights of people living with, at risk of or affected by HIV or AIDS, in Canada and internationally, through research and analysis, litigation and other advocacy, 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.

In this submission, the Legal Network sets out its concerns about Canada's criminal justice system, focusing on (i) the overly broad criminalization of HIV non-disclosure; (ii) the criminalization of people who use drugs and implications for prison health; and (iii) the criminalization of sex work.

THE OVERLY BROAD CRIMINALIZATION OF HIV NON-DISCLOSURE

Canada has the third-largest absolute number of recorded prosecutions for alleged HIV non-disclosure in the world, with more than 200 separate prosecutions documented so far, and one of the higher per capita rates of prosecution given the number of people living with HIV in Canada.[1] The current state of the law allows for an overly broad use of the criminal law against people living with HIV, who are usually charged with aggravated sexual assault — an offense that carries a maximum penalty of life imprisonment and mandatory registration as sexual offender for a minimum of 20 years.

Based on the paired 2012 Supreme Court of Canada decisions in *R. v. Mabior*, 2012 SCC 47 and *R. v D.C.,* 2012 SCC 48, a person living with HIV in Canada is at risk of prosecution for non-disclosure of their HIV-positive status even if there was no transmission, the person had no intention to harm their sexual partner, and the person used a condom or had an undetectable viral load. The decision was widely criticized for being at odds with international recommendations and human rights standards as well as medical evidence on HIV. Indeed, when used correctly and no breakage occurs, condoms are 100% effective at preventing the transmission of HIV.[2] There is now also an emerging global consensus that condomless sex with a person living with HIV under effective antiretroviral therapy poses effectively zero risk of transmission.[3] The ground-breaking *Opposites Attract Study*, for example, established that antiretroviral therapy which reduces the HIV virus to an undetectable level prevents transmission between HIV-positive gay men and their HIV-negative partners.[4] The PARTNER study provided further evidence that when a person living with HIV on treatment maintains an

undetectable viral load for at least six months, the risk of transmitting the virus through sex is effectively non-existent.[5]

In practice, the use of non-HIV-specific criminal laws discriminates against, and profoundly stigmatizes, people living with HIV. The criminalization of HIV non-disclosure has other discriminatory dimensions as well. Available data indicates that among men who have been prosecuted, Black men are disproportionately represented,[6] and sensationalizing media coverage of prosecutions has disproportionately focused on racialized people, particularly accused persons who are Black and/or migrants.[7] Among women, marginalized women — including Indigenous women and women who have experienced intimate partner violence — appear to be over-represented among those prosecuted.[8] Gay men are the single largest group of people living with HIV in Canada, meaning they live with the threat of criminal prosecution for alleged non-disclosure, and a growing number of prosecutions have been against gay men or other men with male sexual partners.[9]

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.[10] 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.[11] As illustrated by the *D.C.* case, where the defendant turned to the police for protection from her violent partner prior to the allegation of HIV non-disclosure,[12] 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 were 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.[13]

As the UN Special Rapporteur on the right to health has noted, the criminalization of HIV non-disclosure not only infringes the right to health but also on a number of other human rights, including the rights to privacy, equality and non-discrimination.[14] In light of the numerous human rights and public health concerns associated with HIV-related prosecutions, the Joint United Nations Programme on HIV/AIDS (UNAIDS), United Nations Development Programme,[15] UN Special Rapporteur on the right to health,[16] Global Commission on HIV and the Law,[17] and UN Committee on the Elimination of Discrimination against Women (CEDAW Committee),[18] among others, have all urged 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). Moreover, it is recommended that no prosecutions should take place when people used a condom, had a low viral load or practiced oral sex.[19]

RECOMMENDED ACTIONS

The Legal Network recommends that the Department of Justice, in keeping with best practice and international, evidence-based recommendations, and in consultation with provincial and territorial governments:

- **Limit the use of the criminal law to the intentional transmission of HIV.**
- **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.**
- **Mandate that the offence of sexual assault not be applied to HIV non-disclosure as it constitutes a stigmatizing and harmful misuse of this offence.**

THE CRIMINALIZATION OF PEOPLE WHO USE DRUGS

In recent years, Canada has witnessed a massive spike in reports of rising opioid fatalities and injuries[20] — an epidemic that has been called "the worst drug safety crisis in Canadian history."[21] A growing body of evidence has linked the criminalization of people who use drugs to this crisis, making the need to reform Canada's drug laws particularly acute.[22] Yet Canada's record on drug policy has been exemplified by a focus on prohibition and punishment.

In 2012, the federal government passed the *Safe Streets and Communities Act*, which introduced for the first time mandatory minimum sentences for the offences of trafficking; possession for the purpose of trafficking, importing and exporting; and production of substances set out in Schedules 1 and 2 of the *Controlled Drugs and Substances Act*.[23] Despite purporting to only target those who traffic in drugs while offering alternatives to incarceration for those struggling with drug dependency, this law exacerbated the already damaging imbalance in Canada's response to drug use — heavily oriented to law enforcement initiatives — by removing judicial discretion regarding sentencing and requiring minimum prison terms for a range of non-violent drug offences.[24]

There is no evidence, however, that mandatory prison time for people convicted of drug offences reduces the problems associated with drug use, or drug use itself. Justice Canada's own review of the evidence in 2002 concluded that mandatory minimum sentences are "least effective in relation to drug offences" and that "drug consumption and drug-related crime seem to be unaffected, in any measurable way, by severe

mandatory minimum sentences."[25] Studies have shown that of the most vulnerable, street-involved people who use drugs, many are involved in low-level tasks such as carrying drugs and steering buyers towards dealers.[26] Those serving jail time for drug offences are more frequently individuals working as "mules" and street dealers, since the real profiteers in the drug market distance themselves from visible drug-trafficking activities and are rarely captured by law enforcement efforts. In the U.S., where mandatory minimum sentences for drug offences have a substantial history, only 11% of federal drug defendants are high-level drug dealers.[27] A 2013 study of people who use drugs in Vancouver also found that for people with drug dependence, criminal activity was related to survival, and that their involvement in criminal activity would trigger mandatory minimum sentences under the *Safe Streets and Communities Act*.[28] As the Supreme Court of Canada acknowledged most recently in *R. v. Lloyd*, the imposition of a minimum penalty of one year in prison for anybody who has, within the 10 preceding years, been convicted of a "designated substance offence"[29] has the potential to capture drug-dependent people involved in small-scale, street-level drug distribution to support their drug use.[30]

Mandatory minimum sentences thus open the door to widespread discrimination against already marginalized groups, particularly drug-dependent people, people living in poverty, Indigenous people and other people of colour, and women.[31] By effectively preventing judges from considering the individual circumstances of a case when imposing a sentence (including a person's Indigenous heritage or connection, as prescribed by the *Criminal Code*[32] and the Supreme Court of Canada in *R. v. Gladue*[33]), mandatory minimum sentences hurt the most vulnerable members of our communities, who are more likely to be caught in the vast net of these sentences.[34] In particular, denying Indigenous people their right to more culturally appropriate and restorative alternatives to incarceration is a decidedly troubling development when federally incarcerated Indigenous people are more likely to present a history of substance use and dependence, as well as mental health concerns.[35] In 2015, the Truth and Reconciliation Commission of Canada issued calls to action which included recommendations to federal, provincial and territorial governments to commit to eliminating the overrepresentation of Indigenous people in custody, amend the *Criminal Code* to allow trial judges to depart from mandatory minimum sentences, and establish measurable goals to identify and close the gaps in health outcomes between Indigenous and non-Indigenous communities.[36] Eliminating mandatory minimum sentences for drug offences is a necessary element of acting on these recommendations.

More broadly, criminalizing the possession of drugs for personal use undermines efforts to address the health needs of people struggling with problematic drug use. An immense body of evidence demonstrates that the continued, overwhelming emphasis on drug prohibition — from policing to prosecution to prisons — is not only failing to achieve both the stated public health and public safety goals of prohibition, but also resulting in costly damage to the public purse, to public health and to human rights, in Canada[37] and globally.[38] The UN Special Rapporteur on the right to the highest attainable standard of health has stated that "[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."[39] Most recently, the UN and the World Health Organization (WHO) called for the "reviewing and repealing [of] punitive laws that have been proven to have negative health outcomes" including laws that criminalize "drug use or possession of drugs for personal use."[40]

Punitive drug policy has a particularly negative impact on racialized communities, who are disproportionately charged, prosecuted and incarcerated in Canada for drug-related offences. As the *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* found, "persons described as black are most over-represented among prisoners charged with drug offences"[41] with almost 20% of Black federal prisoners incarcerated for a drug-related offence.[42] Notably, Indigenous and Black women are more likely than White women to be in prison for that reason,[43] and a staggering 53% of Black women in federal prisons are serving sentences for a drug-related offence, many of whom were carrying drugs across borders as a way to alleviate their situations of poverty.[44]

Significant numbers of prisoners also use drugs. According to the Correctional Investigator of Canada, 80% of federal prisoners experience problematic substance use.[45] A 2007 national study conducted by Correctional Service Canada revealed that almost 60% of men and women used drugs in the months immediately preceding their incarceration, while 34% of men and 25% of women reported using drugs during the past six months in prison.[46] Other studies have revealed high rates of syringe-sharing among people who use drugs in Canada's prisons, due to the lack of sterile injection equipment behind bars.[47] Not surprisingly, research shows that the incarceration of people who inject drugs is a factor driving Canada's HIV and HCV epidemic.[48] Already, rates of HIV and HCV in prison are considerably higher than they are in the community as a whole. A 2016 study indicated that about 30% of people in federal facilities, and 15% of men and 30% of women in provincial facilities are living with HCV, and 1–2% of men and 1–9% of women are living with HIV.[49] Indigenous prisoners, in particular, have much higher rates of HIV and HCV than non-Indigenous prisoners.[50]

Yet in spite of the overwhelming evidence of the health benefits of prison-based needle and syringe programs (PNSPs), no Canadian prison currently permits the distribution of sterile injection equipment to prisoners, violating a number of human rights, including rights to security of the person and to equality and non-discrimination.[51] The UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules) recommend that prisoners enjoy the same standards of health care that are available in the community; these standards necessarily apply to persons with drug dependence.[52] A number of UN Special Rapporteurs and UN agencies, including the UN Office on Drugs and Crime, UNAIDS, the WHO and the Office of the UN High Commissioner on Human Rights, have recommended that prisoners have access to needle and syringe programs.[53] In 2016, the CEDAW Committee asked Canada to "expand care, treatment and support services to women in detention living with or vulnerable to HIV/AIDS, including by implementing prison-based needle and syringe programmes, opioid

substitution therapy, condoms and other safer sex supplies."[54] These recommendations are in line with a key call to action of the Truth and Reconciliation Commission of Canada, which urged the federal government to establish measurable goals to identify and close the gaps in health outcomes between Indigenous and non-Indigenous communities.[55]

RECOMMENDED ACTIONS

The Legal Network recommends that the Department of Justice, in consultation with other relevant federal, provincial and territorial authorities:

- **Minimize custodial sentences for people who commit non-violent offences, including repealing all mandatory minimum prison sentences in the *Controlled Drugs and Substances Act*.**
- **Expand evidence-based alternatives to incarceration for people who use drugs, taking into account the need for culturally appropriate care, including for women, Indigenous people, racialized minorities and youth.**
- **Decriminalize the possession of all drugs for personal use and commit to examining appropriate models for the legalization and regulation of other currently illegal substances as part of an evidence-based, public-health approach to drug policy.**
- **Work with prison authorities, prisoner groups and community health organizations to implement key health and harm reduction measures in all prisons in Canada, including prison-based needle and syringe programs, opioid substitution therapy, condoms and other safer sex supplies, and safer tattooing programs, taking into account the need for culturally appropriate and gender-specific programs.**

THE CRIMINALIZATION OF SEX WORK

The *Protection of Communities and Exploited Persons Act* (PCEPA) reflects the so-called 'Nordic approach' to prostitution (in which the purchase of sex is prohibited, while the sale of sex is technically not), which continues to criminalize sex workers, who continue to be arrested,[56] as well those who purchase sex and third parties involved in sex work.[57] Numerous studies of the Nordic approach have concluded that banning the purchase of sexual services has contributed to violence against sex workers, who are forced to work in isolation and in clandestine locations, as well as to rush negotiations with potential clients for fear of police detection.[58] In Canada, research has demonstrated that police targeting of clients (and third parties) rather than sex workers

has not affected rates of violence against sex workers or enhanced sex workers' control over their sexual health and HIV prevention.[59] By facilitating the removal of sex workers from public spaces, such tactics have merely perpetuated labour conditions that render sex workers at increased risk for violence and poor health.[60]

At the same time, criminalizing third parties (such as managers, security, receptionists, drivers) who work with, for, or employ sex workers forces sex workers to work in isolation, away from social support networks and without proven safety mechanisms, a finding confirmed by the Supreme Court of Canada in *Canada (Attorney General) v. Bedford*.[61] Evidence has demonstrated the role of safer work environments and supportive housing through supportive managerial and venue-based practices, which allow sex workers to work together and promote access to health and support services, in reducing violence and HIV risks among sex workers.[62] Third parties — who in some cases are sex workers themselves — can be helpful resources for other sex workers, especially migrant sex workers who may have limited resources and face language barriers.[63] Nevertheless, third parties are routinely described as exploitative 'pimps' or 'traffickers'. A legal framework that subjects all third parties to criminal sanction without evidence of abuse or exploitation does not promote sex workers' health and safety. Instead, it drives the sex industry underground where labour exploitation can flourish, and deters sex workers from the criminal justice system when they experience violence, because they may fear that they and/or their employer may be charged with prostitution-related offences.[64] Migrant sex workers, in particular, are reluctant to seek help from police for fear of deportation.[65]

Moreover, since the passage of the PCEPA in 2014, criminalizing sex work has been deemed to be a central strategy to protect women from human trafficking and resulted in the inaccurate equation of all selling of sexual services with human trafficking.[66] This has enabled law enforcement to intensify police surveillance and other policing initiatives against sex workers.[67] Greater surveillance of migrant and Indigenous women who leave their communities has undermined their relationships with family members or others who may offer safety or support to them, including in circumstances where they may be selling sex. Migrant sex workers are under constant threat of detention and deportation, thus deterring them from critical health and support services as well as police for fear of being labeled a trafficking victim.[68] This has not resulted in more protection or safety for trafficked persons. As Amnesty International has noted, "coercive or overreaching interventions, such as raids or 'rescues' solely on the basis that commercial sex is conducted, have resulted in sex workers being driven away from established sex work collectives or forced to move from one place to another. This undermines the connections and social fabric that can help keep them safe" and "can impede trafficked persons from reaching out for legal protection and support."[69]

Criminalizing sex work is a profound violation of sex workers' right to health, as well as their rights to life, security of the person, freedom from torture and cruel, inhumane and degrading treatment, work, privacy, equality and non-discrimination.[70] 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 UN 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.[71] The UN Special Rapporteur on violence against women has noted the need for measures to address trafficking not to "overshadow the need for effective measures to protect the human rights of sex workers."[72] The Global Commission on HIV and the Law, as well as international human rights organizations including Amnesty International[73] and Human Rights Watch,[74] 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.[75]

RECOMMENDED ACTIONS

The Legal Network recommends that the Department of Justice, in consultation with other relevant federal, provincial and territorial authorities:

- **Repeal all sex work-specific criminal laws, which endanger sex workers' lives, health and safety.**
- **Put in place legislative measures to ensure that sex workers' rights, safety and dignity are respected, protected and fulfilled, ensuring that sex workers and their allies are consulted in doing so.**
- **Stop raids, detentions and deportations of sex workers by using anti-trafficking, anti-sex work and immigration laws in the name of protection.**
- **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, ensuring that such measures are made available to everyone — not only to people who identify as "trafficked.**

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