



Comments on Recommendations from Canada's Third Universal Periodic Review

Submission to the Government of Canada, Department of
Canadian Heritage

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Submitted by the
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INTRODUCTION

The Canadian HIV/AIDS Legal Network (“Legal Network”) welcomes this opportunity to provide comments on recommendations that Canada has received during its third Universal Periodic Review (UPR), which took place on May 11, 2018.

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.

In this brief, the Legal Network provides comments on priority recommendations that Canada should consider accepting of the 299 recommendations received during the UPR. As these recommendations suggest, the human rights of numerous marginalized communities continue to be routinely violated in Canada. The Legal Network focuses its submissions on those UPR recommendations with implications for four key areas requiring action from the government of Canada to address ongoing violations of its international human rights obligations. These areas are:

- the rights of Indigenous and Black people
 - i. who are disproportionately charged, prosecuted and incarcerated in Canada under laws that criminalize people who use drugs; and
 - ii. denied equivalent access to health services, including key harm reduction measures, in prison;
- violence and discrimination against women in sex work; and
- the criminalization of HIV non-disclosure, which disproportionately targets LGBTQ, Black and Indigenous people and women.

THE RIGHTS OF INDIGENOUS AND BLACK PEOPLE: DRUG POLICY REFORM AND HARM REDUCTION IN PRISONS

2. Follow-up to recommendations and implementation of international obligations

33. Take all necessary measures to ensure that the recommendations made by the United Nations Committee on the Elimination of Racial Discrimination are fully implemented (Azerbaijan)

3. Indigenous Peoples

41. Take further legal and administrative measures for the promotion and protection of human rights of aboriginals and to eliminate discrimination against minorities so that they enjoy life on equal basis throughout the country (Democratic People’s Republic of Korea)

46. Take additional measures to end discriminatory practices against Canada’s indigenous populations, especially indigenous women and children (Algeria)

74. Develop a comprehensive plan to counteract all forms of discrimination against indigenous peoples (Sweden)
76. Adopt and implement policy measures to protect the rights of the peoples of the First Nations and immigrants, especially women (Pakistan)
140. Ensure that Indigenous peoples have access to the same support, services and ability to exercise their human rights as other Canadian citizens (Sweden)
141. Enhance efforts to protect the rights of indigenous peoples, especially in the field of education and health services (Italy)
143. Address disparities in access to health, education and welfare services provided for indigenous people, in particular for children (Hungary)
233. Continue efforts to protect the rights of Indigenous peoples (Republic of Moldova)
234. Continue efforts to guarantee the rights of indigenous people (Gabon)
235. Continue strengthening policies, programmes and legislative reforms for recognition of the rights of indigenous peoples (Plurinational State of Bolivia)
236. Take effective legislative and administrative measures to concretely improve the living conditions of indigenous people and ensure all kinds of rights of them (China)
237. Promote and protect the human rights of its indigenous people, in particular economic, social and cultural rights (Sudan)
238. Take further steps to promote, protect and fulfil the rights of indigenous peoples, particularly regarding their economic, social and cultural rights, on an equal basis with non-indigenous populations (Brazil)
240. Ensure the full equality for indigenous peoples in the protection of their international human rights to health, education and welfare (Norway)
244. Implement effective measures to reduce the high levels of poverty, food insecurity of the indigenous peoples and to ensure better access for them to health care, education, adequate housing and other basic necessities (India)
248. Continue to revise and adapt legislation to improve the living conditions of the First Nations (Spain)
249. Continue the important work on reconciliation with Canada's indigenous peoples by fulfilling the Government's promise to implement all of the recommendations of the Truth and Reconciliation Commission in a timely manner (Sri Lanka)
250. Implement all of the "calls to action" from the Truth and Reconciliation Commission (Australia)
5. Equality and non-discrimination
- 5.6 Racism and non-discrimination
39. Further intensify their efforts for the elimination of structural inequality and intersectional discrimination faced by vulnerable groups (Cyprus)

229. Continue taking steps to address the gaps in the promotion and protection of the rights of minorities and indigenous peoples (Bhutan)

239. Enable vulnerable persons, including indigenous peoples, to enjoy their basic rights; access to water, health, education, and a fair justice system (France)

241. Make additional efforts to ensure equitable access to quality health, education and other social services for those belonging to indigenous communities and to those racialized individuals and groups (Qatar)

6. Public safety and law enforcement

43. Strengthen measures adopted by the Government to combat racism and discrimination against Canadians of African descent and indigenous peoples in the criminal justice system (Belarus)

108. Stop racial profiling and other discriminatory practices by the police and security agencies (India)

114. Tackle the root causes of the over-representation of African Canadians and indigenous peoples at all levels of the judicial system, from arrest to incarceration (Congo)

117. Adopt specific measures to address racial profiling in law enforcement to prevent arbitrary arrests, stops, searches and investigations and over-incarceration of African Canadians (Botswana)

Canada received a number of recommendations related to the rights of Indigenous and Black people. Notably, these recommendations echo the concerns raised by the UN Committee on the Elimination of Racial Discrimination in its Concluding Observations (“CERD Committee”), released in August 2017, which note the disproportionately high rate of incarceration of Indigenous and Black people for drug crimes in Canada — a violation of the government’s obligations under the *International Convention on the Elimination of All Forms of Racial Discrimination*.¹ The CERD Committee called on Canada to re-examine its drug policies, to provide evidence-based alternatives to incarceration for non-violent people who use drugs and to implement key health and harm reduction measures across all prisons. The Legal Network urges Canada to accept the CERD Committee’s recommendations and below, expands on how Canada can advance the rights of Indigenous and Black people in the areas of (a) drug policy and (b) harm reduction in prisons.

a. DRUG POLICY

In Canada, the human rights of people who use drugs, who are often among the most marginalized people in Canada, are consistently violated. Racialized communities, in particular, are disproportionately charged, prosecuted and incarcerated in Canada under laws that criminalize people who use drugs, depriving them of their rights to equal treatment in the justice system, to security of the person, and to health and social services.

Data from the Toronto police collected from 2003 to 2013 shows that Black people with no history of criminal convictions were three times more likely to be arrested for possession of small amounts of marijuana than White people with similar backgrounds.² In addition, according to one report, “persons described as black are most over-represented among prisoners charged with drug offences”³ with almost 20% of Black federal prisoners incarcerated for a drug-related

offence.⁴ In particular, Indigenous and Black women are more likely than White women to be in prison for that reason,⁵ 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.⁶

In 2012, the federal government intensified that discrimination with the passage of the *Safe Streets and Communities Act*, which introduced mandatory minimum sentencing for non-violent drug offences.⁷ Despite purporting to only target those who *traffic* in drugs, the burden of harsher enforcement still falls most heavily on those with drug dependence, particularly those who may engage in small-scale dealing to support their own drug use.⁸ Mandatory minimum sentences also deny Indigenous Peoples their right to more culturally appropriate and restorative alternatives to incarceration by effectively preventing judges from considering a person's Indigenous heritage or connection, as prescribed by the *Criminal Code*⁹ and the Supreme Court of Canada in *R. v. Gladue*.¹⁰ Eliminating mandatory minimum sentences would be in line with recommendations by the Truth and Reconciliation Commission of Canada to amend the *Criminal Code* to allow trial judges to depart from mandatory minimum sentences and restrictions on the use of conditional sentences¹¹ and consistent with Canada's acceptance of a recommendation at the previous UPR to address the "overincarceration of Aboriginals."¹² Notably, in 2016, the UN Committee on the Elimination of Discrimination against Women ("CEDAW Committee") also recommended that Canada "repeal mandatory minimum sentences for minor, non-violent drug-related offences."¹³

Moreover, an immense body of evidence demonstrates that the continued overwhelming emphasis on drug prohibition — from policing to prosecution to prisons — undermines efforts to address the health needs of people struggling with problematic drug use and results in costly damage to the public purse, public health and human rights.¹⁴ Continuing to criminalize people who use drugs, including through the use of mandatory minimum sentences, ignores Canada's previous commitments to combat racial discrimination, to address the over-incarceration of Indigenous Peoples, and to fulfill the right to health, including for people who may be dependent on drugs. As the UN Special Rapporteur on the right to health recommended in 2016, States should "seek alternatives to punitive or repressive drug control policies, including decriminalization and legal regulation and control."¹⁵

RECOMMENDED ACTIONS

The Legal Network recommends that Canada

- **Repeal all mandatory minimum prison sentences for non-violent offences;**
- **Expand evidence-based alternatives to incarceration for people who use drugs, taking into account the need for culturally appropriate care, including for women, Indigenous Peoples, racialized minorities and youth;**
- **Ensure access to appropriate health and social support services (including evidence-based harm reduction services), and scale up access to evidence-based drug dependence treatment (including culturally appropriate and gender-specific treatment), for people who use drugs in need of such supports; and**

- **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.**

b. HARM REDUCTION IN PRISONS

Canada's failure to provide prisoners, who are disproportionately Indigenous and Black,¹⁶ with equivalent access to health services, including key harm reduction measures, is a violation of their rights to health and social services, security of the person, equality and non-discrimination.

Significant numbers of prisoners use drugs. In a national survey conducted by Correctional Service Canada (CSC), 17% of men and 14% of women reported injecting drugs during the past six months in prison, many of whom shared their injection equipment.¹⁷ Other studies have also 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.¹⁸ Not surprisingly, research shows that the incarceration of people who inject drugs is a factor driving Canada's HIV and HCV epidemic.¹⁹ Already, rates of HIV and HCV in prison are considerably higher than they are in the community as a whole.²⁰ Indigenous prisoners, in particular, have much higher rates of HIV and HCV than non-Indigenous prisoners.²¹

Overwhelming evidence of the health benefits of prison-based needle and syringe programs and opioid agonist therapy (OAT) have led a number of UN agencies, including the UN Office on Drugs and Crime (UNODC), the Joint UN Programme on HIV/ AIDS (UNAIDS) and the World Health Organization (WHO) to recommend that prisoners have access to needle and syringe programs and drug-dependence treatment including OAT.²² Yet a number of provincial and territorial prisons do not offer OAT to prisoners,²³ and CSC's recent plan to permit the distribution of sterile injection equipment in two federal prisons, as part of a "phased approach" to implementation across all federal prisons in 2019, is riddled with operational flaws.

For example, sterile injection equipment will only be distributed to individual prisoners who satisfy a "threat/risk assessment" undertaken by CSC security staff, on a one-for-one exchange. This approach, which will inevitably operate as a very strong barrier to access given the requirement for a prisoner to expose their drug use to prison staff (with the attendant potential for institutional disciplinary and criminal repercussions), is contrary to clear recommendations from the UNODC, which emphasize the need for confidentiality and trust.²⁴ A threat/risk assessment based on security rather than clinical need will undoubtedly deny equipment to many prisoners who inject drugs. In particular, a restrictive approach to access will have a harmful impact on Indigenous prisoners, who are disproportionately incarcerated in Canada's prisons, more likely to acquire HIV and HCV via injection drug use, and as noted above, already have much higher rates of HIV and HCV than non-Indigenous prisoners.²⁵ Denying — or severely limiting — prisoners' access to sterile injection equipment and OAT is in clear contravention of the Truth and Reconciliation Commission of Canada's recommendation to Canada to close the gaps in health outcomes between Indigenous and non-Indigenous communities,²⁶ as well as Canada's own commitment to realizing the right to health, "with a special focus on the most disadvantaged groups."²⁷

The UN Standard Minimum Rules for the Treatment of Prisoners 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.²⁸ According to the Special Rapporteur on Torture, States should “ensure that all harm-reduction measures and drug-dependence treatment services, particularly opioid substitution therapy, are available to people who use drugs, in particular those among incarcerated populations.”²⁹ In 2016, the CEDAW Committee urged 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.”³⁰

RECOMMENDED ACTIONS

The Legal Network recommends that Canada

- **Implement key health and harm reduction measures in all prisons in Canada, including prison-based needle and syringe programs (PNSPs) and opioid agonist therapy (OAT), and ensure the models employed are based on the best evidence and public health expertise. At minimum, this requires that PNSPs be administered as a health service, with confidential access to sterile injection equipment via multiple access points, the supply of equipment determined by need (i.e., not limited to “one-to-one” exchange), and meaningful consultation with prisoners, prisoner groups and community health organizations to ensure operational success, taking into account the need for culturally appropriate and gender-specific programs.**

GENDER-BASED VIOLENCE: THE CRIMINALIZATION OF SEX WORK

5. Equality and non-discrimination

5.1 Women and girls

178. Continue adopting programs and measures that seek to address the inequalities that women and girls suffer in the country (Cuba)

5.2 Violence against women and children

75. Step up efforts to protect indigenous women and girls from all forms of discrimination, violence and abuse (Philippines)

179. Continue efforts to combat discrimination and violence against women (Morocco)

180. Continue to combat violence against women (France)

181. Continue efforts to curb violence against women (Nepal)

182. Further strengthen its efforts in addressing issues regarding gender-based violence against women

(Indonesia)

183. Strengthen measures taken to prevent and punish all forms of violence against women and girls (Mali)

190. Strengthen measures to protect victims of violence against women and girls, particularly among minority communities, including through ensuring access to quality multi-sectoral responses for survivors covering safety, shelter, health, justice and other essential services (Rwanda)

198. Take effective legal measures to combat violence against women, especially indigenous and ethnic minority women (China)

200. Continue all efforts to combat discrimination against women and to combat violence against women, particularly indigenous women and women of African descent (Tunisia)

202. Take immediate legal measures in order to stop the ongoing violence against indigenous and aboriginal peoples especially women (Islamic Republic of Iran)

203. Continue its efforts to prevent and punish all forms of violence against indigenous women and girls as well as to redress victims (Myanmar)

207. Continue working with partners at all levels to address the significant levels of violence against aboriginal women, and its root causes (United Kingdom of Great Britain and Northern Ireland)

5.5 Immigrants, refugees, asylum-seekers, and migrant workers

259. Consider taking further necessary measures to ensure adequate protection of the rights of migrants and refugees (Nigeria)

260. Take legislative and administrative actions to reform current policies to ensure protection of all migrants (Islamic Republic of Iran)

261. Improve the conditions of migrant workers (Iraq)

262. Continue to take steps to improve the conditions of migrant workers, including temporary and seasonal workers and their welfare (Sri Lanka)

5.6 Racism and non-discrimination

39. Further intensify their efforts for the elimination of structural inequality and intersectional discrimination faced by vulnerable groups (Cyprus)

50. Eliminate all forms of racial discrimination through legal, administrative and policy measures (Kenya)

Canada received a number of recommendations during the UPR on gender equality and women's rights. In this section, the Legal Network urges Canada to decriminalize all aspects of sex work. Given that the majority of sex workers are women and that many identify as migrant, racialized, Indigenous or LGBTQ, protecting the rights of sex workers is imperative to Canada's response to the UPR review and to advancing the human rights of marginalized groups.

Human rights violations against sex workers in Canada have escalated under the 2014 *Protection of Communities and Exploited Persons Act*, which criminalizes sex workers, who

continue to be arrested,³¹ as well those who purchase sex and third parties (such as managers, security, receptionists or drivers) involved in sex work.³² 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.³³

Numerous studies 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.³⁴ In Canada, research has demonstrated that police targeting 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, including HIV prevention measures.³⁵ By facilitating the removal of sex workers from public spaces, such tactics have merely perpetuated labour conditions that subject sex workers to greater risk of violence and poor health.³⁶

The criminalization of third parties who work with or for, or employ sex workers also 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*.³⁷ 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.³⁸ 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 or their employer may be charged with prostitution-related offences.³⁹ Migrant sex workers, in particular, are reluctant to seek help from police for fear of deportation.⁴⁰

At the same time, the conflation of sex work with trafficking in Canada's *National Action Plan to Combat Human Trafficking*, in which the federal government claims the "demand for sexual services can be a contributing cause of human trafficking,"⁴¹ the *Immigration and Refugee Protection Regulations* prohibiting all temporary workers from sex work-related employment,⁴² and the *Protection of Communities and Exploited Persons Act*, which contends in its preamble that exploitation "is inherent in prostitution"⁴³ has increased anxiety, moral panic and racism against racialized migrants and sex workers. To date, anti-trafficking practices have had extraordinarily harmful impacts on sex workers and impaired efforts to support actual victims of trafficking and exploitation.

In Canada, anti-trafficking enforcement efforts such as raids by the RCMP, Canada Border Services Agency (CBSA) and municipal police put women from the most marginalized groups, including Indigenous and migrant women, in danger. Law enforcement agencies across Canada have regularly participated in mass, indiscriminate efforts to identify trafficking victims in the sex industry such as Operation Northern Spotlight, during which police have detained and harassed numerous sex workers where there has been no evidence of coercion, exploitation or human trafficking. When police have raided indoor sex work establishments or posed as sex workers' clients in their efforts to "rescue" human trafficking victims, sex workers have repeatedly experienced this as a form of intimidation, harassment, surveillance and a gross violation of privacy that has further entrenched fear

and distrust of police services.⁴⁴ Rather than investing in peer-led programs that allow Indigenous people who sell or trade sex to exchange knowledge and support each other, undue focus on trafficking of Indigenous women and girls has led to law enforcement strategies that increase over-policing in Indigenous communities. Anti-trafficking initiatives and policies directed towards migrant sex workers lead sex workers to avoid law enforcement due to precarious immigration status in addition to conflict with numerous sex work-related criminal and municipal prohibitions. For Asian sex workers, who may not speak English and have no reason to trust police, anti-trafficking raids and often warrantless incursions into their homes and workplaces are especially frightening.⁴⁵

Decriminalizing sex work, which reduces the risk of violence against sex workers and promotes sex workers' right to health, is in line with Canada's acceptance of recommendations at its previous UPR to realize the right to health and address violence against women.⁴⁶ Decriminalizing sex work is also 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, explicitly calling for the decriminalization of sex work, and has spoken out against the conflation of sex work and human trafficking.⁴⁷ The UN 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."⁴⁸ Similarly, UN Women has expressed its support for decriminalizing sex work, acknowledging 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."⁴⁹

RECOMMENDED ACTIONS

The Legal Network recommends that Canada

- **Immediately repeal all sex work-specific criminal laws, which endanger sex workers' lives, health and safety;**
- **Stop raids, detentions and deportations of sex workers by using anti-trafficking, anti-sex work and immigration laws in the name of protection;**
- **Ensure CBSA is never involved in anti-trafficking investigations, because their involvement exacerbates migrant workers' fears of detention and deportation and inhibits reporting of violence if it occurs;**
- **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;**
- **Fund and support programs and services that are developed by people who have lived experience 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"; and**

- **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, including for youth, Indigenous Peoples and migrants.**

DISCRIMINATION AGAINST LGBTQ, BLACK AND INDIGENOUS PEOPLE AND WOMEN: THE CRIMINALIZATION OF HIV NON-DISCLOSURE

5. Equality and non-discrimination

5.1 Women and girls

178. Continue adopting programs and measures that seek to address the inequalities that women and girls suffer in the country (Cuba)

5.2 Violence against women and children

75. Step up efforts to protect indigenous women and girls from all forms of discrimination, violence and abuse (Philippines)

179. Continue efforts to combat discrimination and violence against women (Morocco)

180. Continue to combat violence against women (France)

181. Continue efforts to curb violence against women (Nepal)

182. Further strengthen its efforts in addressing issues regarding gender-based violence against women (Indonesia)

183. Strengthen measures taken to prevent and punish all forms of violence against women and girls (Mali)

190. Strengthen measures to protect victims of violence against women and girls, particularly among minority communities, including through ensuring access to quality multi-sectoral responses for survivors covering safety, shelter, health, justice and other essential services (Rwanda)

198. Take effective legal measures to combat violence against women, especially indigenous and ethnic minority women (China)

200. Continue all efforts to combat discrimination against women and to combat violence against women, particularly indigenous women and women of African descent (Tunisia)

202. Take immediate legal measures in order to stop the ongoing violence against indigenous and aboriginal peoples especially women (Islamic Republic of Iran)

203. Continue its efforts to prevent and punish all forms of violence against indigenous women and girls

as well as to redress victims (Myanmar)

207. Continue working with partners at all levels to address the significant levels of violence against aboriginal women, and its root causes (United Kingdom of Great Britain and Northern Ireland)

5.6 Racism and non-discrimination

39. Further intensify their efforts for the elimination of structural inequality and intersectional discrimination faced by vulnerable groups (Cyprus)

44. Strengthen legislation to combat discriminatory practices against indigenous peoples and people of African descent, and promote their inclusion in the area of human rights (Madagascar)

50. Eliminate all forms of racial discrimination through legal, administrative and policy measures (Kenya)

57. Strengthen measures to combat structural discrimination against Canadian Africans, indigenous peoples, LGTBIQ persons and religious minorities, in particular by establishing effective mechanisms of investigation and punishment of authors of acts of discrimination and violence against them (Argentina)

5.8 LGBTQ2

83. Continue strengthening efforts in promoting the rights of LGBTI persons (South Africa)

During the UPR, several states urged Canada to protect the rights of LGBTQ, Black and Indigenous people and numerous states urged Canada to address violence against women. In this section, the Legal Network discusses the ongoing criminalization of HIV non-disclosure. Given that gay men are the single largest group of people living with HIV in Canada, and that prosecutions for HIV non-disclosure have been shown to disproportionately affect LGBTQ, Indigenous and racialized communities and women, the Legal Network urges Canada to accept recommendations to address discrimination and racism against LGBTQ, Black and Indigenous people and violence against women and end the overly broad use of the criminal law in cases of HIV non-disclosure as part of its efforts to realize its international human rights obligations.

In Canada, a person living with HIV is at risk of prosecution for not disclosing their HIV-positive status before sex even if there was no HIV transmission, the person had no intention to harm their sexual partner, and the person used a condom or had an undetectable viral load, meaning there is effectively no risk of HIV transmission. 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 offence that carries a maximum penalty of life imprisonment and mandatory registration as sexual offender for a minimum of 20 years. Canada has the third-largest absolute number of recorded prosecutions for alleged HIV non-disclosure in the world, with more than 200 separate documented prosecutions so far, and one of the higher per capita rates of prosecution given the number of people living with HIV in the country.⁵⁰ Evidence also suggests that the criminalization of HIV non-disclosure is a barrier to health care for some people living with HIV, discouraging access to HIV testing and linkage to HIV treatment, care and support, which is important to promote both individual and population health.⁵¹

Broadly criminalizing people for not disclosing their HIV-positive status not only infringes on the right to health but numerous other human rights, including the rights to privacy, equality and non-discrimination, as the UN Special Rapporteur on the right to health has recognized.⁵² Such criminalization also disproportionately affects the human rights of groups protected under

Canada's international treaty obligations, including LGBTQ people, racialized communities and women.⁵³

The criminalization of HIV non-disclosure has a number of discriminatory dimensions. Prosecutions against gay men appear to be on the rise.⁵⁴ At the same time, available data indicates that among men who have been prosecuted, Black men are disproportionately represented.⁵⁵ Out of 184 cases prosecuted between 1989 and 2016, for example, 23% of those facing criminal charges were Black men, despite constituting only 1.25% of the Canadian population.⁵⁶ The criminalization of HIV non-disclosure can also have a particularly 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.⁵⁷ 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.⁵⁸ Indigenous women, in particular, are over-represented among women charged for HIV non-disclosure.⁵⁹ The persistent criminalization of people living with HIV thus undermines Canada's acceptance of previous UPR recommendations to combat racial discrimination, to fulfill the right to health, and to address violence against women.⁶⁰

In light of the numerous human rights and public health concerns associated with HIV-related prosecutions, UNAIDS, the UN Development Programme (UNDP),⁶¹ the UN Special Rapporteur on the right to health,⁶² the Global Commission on HIV and the Law,⁶³ and the CEDAW Committee,⁶⁴ among others, have urged governments to limit the use of the criminal law to cases of *intentional transmission* of HIV (i.e., where a person knows their 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.⁶⁵ Reflecting the urgency for reform, the Canadian Coalition to Reform HIV Criminalization released a Community Consensus Statement in 2017, endorsed by more than 150 organizations from across the country, denouncing the current overly broad use of the criminal law in Canada against people living with HIV and calling for urgent action from federal, provincial and territorial governments to limit the scope of the criminal law.⁶⁶

On World AIDS Day 2017, both the federal and Ontario governments recognized the need to limit the "overcriminalization of HIV" in Canada. Both took a first step forward by recognizing that criminal prosecution for alleged HIV non-disclosure is not warranted in the case where a person living with HIV had a "suppressed viral load." The federal Justice Minister released her department's report, *Criminal Justice System's Response to Non-Disclosure of HIV*.⁶⁷ The report contains a number of important conclusions warranting a more limited application of the criminal law. For example, the report makes clear that HIV is first and foremost a public health matter and the criminal law should not apply to persons living with HIV if they have maintained a suppressed viral load. The report further states that the criminal law should generally not apply to persons living with HIV who are not on treatment but use condoms or engage only in oral sex (unless other risk factors are present and the person living with HIV is aware of those risks).

In Ontario, the province that has accounted for more than half the prosecutions against people living with HIV to date, the Attorney General and the Minister of Health and Long-Term Care released a joint statement announcing that Crown prosecutors will no longer proceed with criminal prosecutions for alleged HIV non-disclosure in cases where a person with HIV had maintained a "suppressed viral load" for six months (defined as being under 200 copies/ml). The joint statement further indicates that "HIV should be considered with a public health lens, rather than a criminal justice one, wherever possible."⁶⁸

The federal report and the new Ontario directive to prosecutors are welcome first steps. But what is needed is deeper, broader reform. The over-reach of the criminal law in addressing cases of alleged HIV non-disclosure, both in its definitional scope and its interpretation and application by prosecutors and judges, must be restricted, in the interests of both human rights and public health.

RECOMMENDED ACTIONS

The Legal Network recommends that Canada

- **Limit the use of the criminal law to the intentional and actual 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; and**
- **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.**

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- ¹ UN Committee on the Elimination of Racial Discrimination, *Concluding observations on the combined twenty-first to twenty-third periodic reports of Canada*, CERD/C/CAN/CO/21-23, September 13, 2017.
- ² Toronto Star, “Toronto marijuana arrests reveal ‘startling’ racial divide” (6 July 2017). Available at <https://www.thestar.com/news/insight/2017/07/06/toronto-marijuana-arrests-reveal-startling-racial-divide.html>.
- ³ *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen’s Printer for Ontario, 1995): pp. 69–70.
- ⁴ Office of the Correctional Investigator, *A Case Study of Diversity in Corrections: The Black Inmate Experience in Federal Penitentiaries Final Report*, 2013. Available at www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20131126-eng.aspx.
- ⁵ The Correctional Investigator of Canada, *Annual Report 2014–2015 of the Office of the Correctional Investigator*, 2015.
- ⁶ The Correctional Investigator of Canada, *Annual Report 2012–2013 of the Office of the Correctional Investigator*, 2013.
- ⁷ *Safe Streets and Communities Act*, SC 2012, c 1.
- ⁸ Canadian HIV/AIDS Legal Network, *Mandatory Minimum Sentences for Drug Offences: Why Everyone Loses*, 2006; D. Bennett and S. Bernstein, *Throwing Away the Keys: The Human and Social Cost of Mandatory Minimum Sentences*, Pivot Legal Society, 2013.
- ⁹ *Criminal Code of Canada*, s. 718.2(e).
- ¹⁰ *R v. Gladue*, [1999] 1 SCR 688.
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