

October 29, 2018

**OPEN LETTER TO FEDERAL MINISTER OF JUSTICE
AND ATTORNEY GENERAL OF CANADA**

Via electronic mail (mcu@justice.gc.ca) and regular mail

The Hon. Jody Wilson-Raybould, P.C., Q.C., M.P.
Minister of Justice and Attorney General of Canada
284 Wellington Street
Ottawa, Ontario K1A 0H8



Dear Minister:

Re: Commitment to take action to end “overcriminalization of HIV” in Canada?

I write further to our letter of August 3rd and following recent discussions with representatives of your office and of your department regarding measures your government could take to follow through on your previously stated concern about the overly broad use of the criminal law against people living with HIV.

You will recall that nearly two years ago, on the occasion of World AIDS Day (December 1st) in 2016, you issued a [public statement](#) recognizing that Canada must address the “overcriminalization of HIV” because it contributes to HIV stigma and undermines public health by discouraging people from seeking testing and treatment. In that statement, you declared, quite rightly, that “the criminal justice system must adapt to better reflect the current scientific evidence on the realities of this disease.”¹ Finally, you committed as follows:

Over the coming months, I intend to work with my provincial and territorial counterparts, affected communities and medical professionals to examine the criminal justice system’s response to non-disclosure of HIV status. This could include a review of existing charging and prosecution practices, as well as the possible development of prosecutorial guidelines.

This was a historic moment, the first-ever such public recognition of the harms of HIV criminalization by the federal government and a commitment to take action. We publicly welcomed that commitment.

Following this declaration, your department prepared its report [Criminal Justice System’s Response to the Non-Disclosure of HIV](#), which you released a year later, on World AIDS Day (December 1, 2017). We were pleased to see that our many resources developed over the years documenting and analyzing the concerns with HIV criminalization were of obvious assistance in that task. Again, we publicly welcomed the report, which reached a number of important conclusions and recommendations about appropriately limiting HIV criminalization in Canada.

However, nearly a year later, there still has been no concrete progress in acting on the sound recommendations in your department’s report.

You will recall that, shortly before the release of Justice Canada's report, the Canadian Coalition to Reform HIV Criminalization (CCRHC), of which we are a founding member, released a national [Community Consensus Statement](#) on ending unjust HIV criminalization. (I shared a copy of that statement with you and your advisors at the time and subsequently.) Endorsed by more than 150 community organizations from the HIV sector and beyond, from across Canada, it represents a clear civil society consensus for specific steps that must be taken, by federal and provincial governments, to end the misuse of the criminal law. As you know, that community consensus includes:

- 1) a call for federal and provincial Attorneys General to develop **sound guidance to prosecutors** to preclude unjust HIV prosecutions; and
- 2) a call for **reforms to the Criminal Code** to limit the unjust use of the criminal law against people living with HIV, including removing HIV non-disclosure prosecutions from the reach of sexual assault laws (and hence the current mandatory designation as a sex offender if convicted).

Since last December, when both the *Community Consensus Statement* and the Justice Canada report were released, we have raised both of these items on numerous occasions with departmental officials at Justice Canada, with advisors in your office and with you (most recently in our correspondence of August 3rd).

Furthermore, we have kept them and you (again, via our most recent correspondence) informed of relevant international developments that can and should inform action on both these fronts. These include the release on July 25th at the International AIDS Conference of the groundbreaking [Expert consensus statement on the science of HIV in the context of the criminal law](#).² This statement, authored by 20 of the world's leading HIV scientists (including two Canadians), was further endorsed by 70 additional scientific experts from dozens of countries around the world, as well as the International AIDS Society, the International Association of Providers in AIDS Care and the Joint United Nations Programme on HIV/AIDS (UNAIDS) — the three leading global scientific organizations responding to the epidemic. It provides the most current, comprehensive consolidated assessment of the possibility of HIV transmission associated with various acts under various conditions. As you can read in the statement, it was developed out of concern that HIV criminalization is partly driven by a poor appreciation of the science related to HIV, and to assist actors in the criminal justice system to limit unjust prosecutions and convictions.

Indeed, in her [public remarks at the International AIDS Conference](#) the following day,³ your colleague the Minister of Health, the Hon. Ginette Petitpas Taylor, on behalf of the Government of Canada, explicitly welcomed the *Expert Consensus Statement*, decried HIV stigma and the role of HIV criminalization in perpetuating that stigma, and declared that you were working to address this. She advised the thousands of delegates and media attending AIDS 2018, as well as the Canadian HIV sector and broader public, that:

Finally, we have taken steps to prevent the criminalization of HIV non-disclosure.

We know that U=U. Undetectable = Untransmittable. This means that there is effectively no risk of sexual transmission of HIV when an individual is being treated and maintains a suppressed viral load.

Having considered the evidence, the Government of Canada has determined that the criminal law should not apply to individuals engaging in sexual activity without disclosing their HIV status, if

they maintain a suppressed viral load.

My colleague, the Minister of Justice, is working with her provincial counterparts towards addressing the criminalization of HIV.

Because we know that HIV criminalization is a manifestation, and driver, of stigma.

As such, the Government of Canada welcomes the work undertaken by experts to develop the Expert Consensus Statement on the Science of HIV in the Context of the Criminal Law which was released yesterday, and supports its conclusions that more caution be exercised when considering criminal prosecution.

The Health Minister's statement of concern and commitment regarding HIV criminalization was welcomed at AIDS 2018 in July, and was consistent with your own previous statements.

Since you released Justice Canada's report last December, ongoing discussions on several occasions with your office, over a period of at least eight months, led us to understand that there was a desire on your part, as Attorney General of Canada, to move forward with the development of a directive to federal prosecutors in keeping with the concern about limiting what you have already publicly recognized is the harmful "overcriminalization of HIV." (Your department's report, and subsequent discussions, also indicated expressly that possible *Criminal Code* reform was also still an option open for consideration but, not surprisingly, would, if pursued, take more time than the development of a directive to federal prosecutors.) Over and over, we have been given to understand that you wished to proceed in the short-term with developing a prosecutorial directive — and indeed, it is our understanding that some work had been initiated in the first months of 2018, although our requests, and those of the broader CCRHC, for further information and an opportunity to discuss the substance of any such directive have yet to be addressed.

Throughout all those interactions, in which we have engaged in good faith, we have consistently (1) urged that, at the bare minimum, any such prosecutorial directive should reflect the recommendations set out in your own department's report, and (2) emphasized the importance of your office's working with community representatives and organizations from the HIV sector, including people living with HIV, scientific experts, and legal experts, in the course of developing such a directive before it is finalized and adopted, in keeping with your express commitment to this effect on World AIDS Day 2016, nearly two years ago. We have consistently offered and requested to meet with you or your officials to advance both these initiatives.

I was, therefore, deeply concerned by recent telephone and email conversations with your office over the past two weeks, when I reached out yet again to seek a further meeting to discuss how best to move forward, ensuring the involvement of the HIV sector and experts, with these proposals — and in particular, the shorter-term project of a prosecutorial directive. My requests to your office for information and for some indication of when we can expect to see some action have ultimately resulted in simply being told the following: "Unfortunately, we do not have any additional updates at this time. Having said that, we will be sure to provide you with any new information we can share when it is made available."⁴

As you know, World AIDS Day 2018 is just over a month away. At that time, it will be two years since you stated your government's concern about the overcriminalization of HIV, and a year since your

department's well-researched report with several substantive recommendations for addressing that problem. It is also now less than a year before the end of your current mandate.

And yet we still have no concrete action to translate those recommendations into practice, or even a commitment to work with the HIV sector on some defined timeline to do so.

I look forward to hearing from you at your earliest convenience, and to working with your office and your department to move forward with the proposals to end the unjust use of the criminal law against people living with HIV that enjoy the support of the HIV sector across the country.

Sincerely yours,



Richard Elliott, Executive Director

cc: The Hon. Ginette Petitpas Taylor, P.C., M.P., Minister of Health
The Hon. Randy Boissonnault, M.P., Special Advisor to the Prime Minister on LGBTQ2 Issues

¹ Government of Canada, Statement: "Minister Wilson-Raybould Issues Statement on World AIDS Day," 1 December 2016, online: <https://www.canada.ca/en/department-justice/news/2016/12/minister-wilson-raybould-issues-statement-world-aids.html>.

² F. Barré-Sinoussi et al., "Expert consensus statement on the science of HIV in the context of criminal law," *Journal of the International AIDS Society* 2018; 21: e25161 (25 July 2018), online: <https://onlinelibrary.wiley.com/doi/full/10.1002/jia2.25161>.

³ Public Health Agency of Canada, "Remarks for Ginette Petitpas Taylor, Minister of Health - AIDS 2018 Conference Symposia "Anti-fragile: Strengthening the HIV Response through Addressing Stigma, Prejudice and Discrimination," Amsterdam, July 26, 2018, online: <https://www.canada.ca/en/public-health/news/2018/07/remarks-for-ginette-petitpas-taylor-minister-of-health---aids-2018-conference-symposiaanti-fragile-strengthening-the-hiv-response-through-addressin.html>.

⁴ Email communication received on October 23, 2018, on file.