



Submission to the International Commission of Jurists’ consultation: “Developing principles to address the detrimental impact on health, equality and human rights of criminalization with a focus on select conduct in the areas of sexuality, reproduction, drug use and HIV”

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Canadian HIV/AIDS Legal Network

1240 Bay Street, Suite 600

Toronto, Ontario Canada M5R 2A7

Telephone: +1 416 595-1666

www.aidslaw.ca

INTRODUCTION

The Canadian HIV/AIDS Legal Network (“Legal Network”) welcomes this opportunity to make a submission to the International Commission of Jurists’ consultation on “Developing principles to address the detrimental impact on health, equality and human rights of criminalization with a focus on select conduct in the areas of sexuality, reproduction, drug use and HIV.” In this submission, the Legal Network focuses on four key areas of our work:

- Criminalization of sex work;
- HIV criminalization;
- Criminalization of drug possession for personal use; and
- Criminalization of same-sex intimacy.

CORE QUESTIONS

What is the interest of your organization in this work? What specific issues do you work on in relation to the proposed topics covered?

For over 25 years, the Legal Network has promoted 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. Our work is rooted in a number of guiding values, including the centrality of human rights in the response to HIV and AIDS and a focus on the rights of marginalized populations. To that end, the Legal Network has always worked closely with people living with HIV and communities at greater risk of HIV — in part because of the oppressive reach of the criminal law — including LGBTQ communities, people who use drugs and sex workers, to defend and uphold their human rights.



In your view, what concepts (human rights, moral/ethical, legal, good governance, harm) are helpful in understanding whether the use of criminal law is justified in the context of the select areas? Are there some areas or conduct that should never be criminalized? On what basis?

Human rights should underpin all considerations in determining whether the use of criminal law is justified. Criminal law is a blunt and often ineffective tool to regulate human behaviour and should be a measure of last resort. Given the significant infringements on human rights of those convicted of criminal offences (including but not limited to the profound loss of liberty), criminal laws must always be based on the best available evidence. In many cases, criminalizing certain conduct (under the guise of protecting or promoting specific moral values or protecting seemingly vulnerable persons) is not rationally connected to a legislative objective, yet states continue to deploy such laws contrary to ample evidence demonstrating their perverse outcomes. Even in cases where criminalizing certain conduct does satisfy a legislative objective (e.g. by denouncing perceived immoral or harmful conduct), the impact of such criminalization on human rights should *always* be measured against the benefits of the legislative outcome. We support the application of the principles of necessity, proportionality, reasonableness and non-discrimination to this analysis, as outlined in the ICJ's "Report on the May 2018 Expert Meeting of Jurists."¹ If a desired legislative objective comes at the expense of human rights, criminal laws should be reconsidered and repealed.

What would your topline recommendations be to States on the use of criminal law in the areas you work in?

i. SEX WORK

States should repeal all sex work–specific criminal laws, including those that criminalize sex workers, clients and third parties (such as managers, security, receptionists or drivers) involved in sex work.

Among other things, criminalizing sex work exacerbates sex workers' experiences of marginalization, stigmatization and discrimination; hinders sex workers' capacity to set the terms and conditions of their services and interferes with the safety mechanisms that sex workers use to stay safe on the job; reinforces hostile treatment from and diminishes trust in the police and criminal legal system; isolates sex workers; and reduces their access to health, social and other services. Criminalizing sex work thus leads to numerous violations of sex workers' human rights, including their rights to work; privacy; equality and non-discrimination; life, liberty and security of the person; health; working conditions that are just, favourable, safe and healthy; freedom of expression; freedom of association; freedom from unreasonable search and seizure; freedom from arbitrary detention and imprisonment; and freedom from torture and cruel, inhumane and degrading treatment or punishment.

In many jurisdictions, sex work–specific criminal laws are intended to address public nuisance (e.g. those that prohibit public solicitation or communication); a growing number of jurisdictions, including Canada, have also passed laws that criminalize clients and third parties involved in sex work under the guise of "preventing the exploitation of women" and "ending the demand for prostitution."² As the Supreme Court of Canada has held in *Canada (Attorney General) v. Bedford* 2013 SCC 72, "Parliament has the power to regulate against nuisances, but not at the cost of the health, safety and lives of prostitutes." In particular, criminalizing public solicitation or communication has a disproportionate impact on sex workers who work on the street, many of whom are poor, racialized, including Indigenous, and LGBTQ.

Moreover, the notion that sex work is *inherently* harmful is not borne out by the evidence in Canada.³ Rather, numerous studies have concluded that "end demand" laws that attempt to abolish sex work by 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.⁴ Research has also 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,⁵ but has facilitated sex workers' removal from public spaces and perpetuated labour conditions that subject them to greater risk of violence and poor health.⁶

The criminalization of third parties who work with, work for or employ sex workers also forces sex workers to work in isolation, away from social support networks and without proven safety mechanisms. Evidence has demonstrated the role of safer work environments and supportive housing through supportive managerial and venue-based practices in reducing violence and HIV risks among sex workers.⁷ A legal framework that subjects all third parties to criminal sanctions 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 accessing the criminal legal system when they experience violence, because they may fear that they, their colleagues or their employer may be charged with prostitution-related offences.⁸ The conflation of sex work and human trafficking also has particularly disproportionate impacts on migrant and Indigenous sex workers who face aggressive surveillance from law enforcement officers who have racially and socially profiled them as human trafficking victims, thus exposing their co-workers, employers or employees — many of whom may also be sex workers — not only to criminal charges as third parties, but as traffickers.⁹

ii. HIV CRIMINALIZATION

In relation to **HIV non-disclosure, exposure or transmission before consensual sex, States must limit the use of the criminal law to cases involving the *intentional and actual transmission of HIV***, in which intent must be proven to the applicable criminal law standard (i.e. intent to transmit cannot be presumed solely from the knowledge of one's HIV status or from the fact of non-disclosure by an accused person). Criminal charges should never be used in where a person living with HIV did not understand how the virus is transmitted, disclosed their status to their sexual partner or reasonably believed their sexual partner was aware of their status through some other means, did not disclose their status because they feared violence or other serious negative consequences would result from such disclosure, or was forced or coerced into sex. Given the over-reach of the criminal law in addressing cases of alleged HIV non-disclosure, exposure or transmission, criminal law in this area should be informed by the best available scientific evidence. Under no circumstances should the criminal law be used against people living with HIV for not disclosing their status to sexual partners when they have used a condom, practiced oral sex or had sex without a condom while their viral load was low or undetectable.¹⁰ Pursuing cases in these circumstances is discriminatory and also interferes with the exercise by individuals of their rights to health, privacy, life, liberty and security of the person.

While HIV criminalization is often described as a tool to protect women from HIV and enhance their dignity and autonomy in sexual decision-making, it is a blunt, punitive and inflexible approach to HIV prevention that does little to protect women from HIV infection, violence, coercion or sexual objectification. HIV criminalization can have a serious, adverse impact on women living with HIV, especially those facing challenges due to their socioeconomic status, discrimination, insecure immigration status, or abusive or dependent relationships.¹¹ As illustrated by the Canadian case *R. v. D.C.* 2012 SCC 48 (where the defendant turned to the police for protection from her violent partner prior to the allegation of HIV non-disclosure),¹² HIV criminalization can put women at increased risk of violence and prosecution by providing a tool of coercion or revenge for vindictive partners.¹³ Studies have also reported high rates of sexual abstinence among women living with HIV,¹⁴ which are driven

partly by concerns about HIV criminalization and fear of HIV disclosure.¹⁵ In Canada, other concerning trends in prosecutions have been observed with an increase in cases against gay men¹⁶ and data that indicates that Black men have been disproportionately represented among men who have been prosecuted.¹⁷ Sensationalizing media reports have also focused on accused persons who are Black or migrant.¹⁸

More broadly, research in Canada suggests that HIV criminalization likely damages HIV prevention efforts by increasing HIV-related stigma and fear,¹⁹ hindering access to and eroding trust in voluntary approaches to HIV prevention including counselling and testing,²⁰ and spreading misinformation about the nature of HIV and its transmission.²¹ Evidence also suggests that the criminalization of HIV non-disclosure may represent a structural barrier to health care engagement for some people living with HIV in Canada, by preventing them from talking openly with health care providers out of fear that their HIV and other test results and discussions with medical professionals may be used as evidence against them in criminal proceedings.²²

iii. DRUG POSSESSION

States should repeal all criminal laws that prohibit drug possession 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. The criminalization of drug possession has led to numerous health and social harms resulting in grave violations of the human rights of people who use drugs, including their rights to health; equality and non-discrimination; life, liberty and security of the person; freedom from arbitrary detention and imprisonment; freedom from unreasonable search and seizure; and freedom from torture and cruel, inhumane and degrading treatment or punishment.

Criminalizing drug possession is often justified as a way to reduce problematic drug use. However, an over-emphasis on trying to reduce or prevent the use of drugs — much of which is not necessarily harmful or problematic — tends to blame and stigmatize people who use drugs, often ignoring the structural and other determinants of (problematic) use. While denunciation has been effective in creating strong negative perceptions about drugs and people who use drugs, criminal prohibitions are *ineffective* in deterring actual drug use. As noted in the 2018 UNODC *World Drug Report*, there has been no significant progress in the past decade either on reducing demand for substances or on reducing drug-related health and social risks. Globally, the number of people aged 15-64 who used drugs at least once in 2016 is estimated to be 275 million — an increase of 31% from 2009.²³

The health and social harms of repressive drug policy are significant. As the UN Special Rapporteur on the right to the highest attainable standard of health has concluded, “[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.”²⁴ While global rates of HIV and hepatitis C infection among people who inject drugs remain stable, they nonetheless also remain high at 11% and 51%, respectively.²⁵ In Canada, Indigenous populations are acquiring HIV at a disproportionately higher and faster rate than the general Canadian population: almost 60% of HIV infections among Indigenous people between 1998 and 2005 were attributable to injection drug use.²⁶ Since 2000, there has also been a 60% surge of drug-related deaths, globally.²⁷ Moreover, the UN Commission on Crime Prevention and Criminal Justice has previously estimated in 2014 that one in five prisoners worldwide was incarcerated for a drug offence, and that the overwhelming majority of those were accused of drug use or drug possession for personal use, while the rest were mostly accused of low-level dealing — with only a small percentage imprisoned for violent drug offences or large-scale

trafficking.²⁸ In some regions, women are disproportionately affected by punitive drug laws, with an even higher proportion of women in prison being incarcerated for drug offences.²⁹ Racial disparities in incarceration rates are also of concern, including in Canada, with Indigenous and Black people disproportionately represented.³⁰

There is now copious evidence of the harms of criminalizing simple drug possession, which contributes to stigma, discrimination and abuse against people who use drugs, leads to mass incarceration, prevents people from seeking vital health and social services, and undermines the development of health services because resources are diverted to the criminal legal system (including correctional facilities) and because people with problematic drug use, when regarded as criminals, are not seen as deserving of services. This does little to protect and promote the health of people who use drugs and of communities, but produces or compounds harms associated with problematic drug use.

IV. SAME-SEX RELATIONS

States must fully repeal criminal laws that prohibit same-sex intimacy and gender non-conformity, which are utterly inconsistent with human rights principles including the rights to equality and non-discrimination; privacy; health; freedom of expression; and freedom from torture and cruel, inhumane and degrading treatment.

The criminalization of same-sex conduct is often justified as a way to denunciate perceived “immoral” conduct and to protect the religious and moral integrity of a community, which comes at the expense of human rights violations against LGBTQ communities. In jurisdictions where same-sex conduct and/or gender non-conformity are criminalized, such laws condone stigma, discrimination and violence against LGBTQ persons.³¹ As the Inter-American Commission on Human Rights has concluded, these laws “reinforce existing societal prejudices and increase the negative effects of such prejudices on the lives of LGBT persons, particularly in contexts where the violence based on prejudice against LGBT persons is pervasive. These laws provide a social sanction for abuse, breed intolerance, and have been used to justify arbitrary detention, police abuse, and extortion and torture.”³²

The stigma and fear engendered by such criminalization also have serious impacts on health, creating a hostile climate fraught with the risk of discrimination (or worse) for LGBTQ members who seek health services, particularly sexual health services, including HIV testing, prevention, treatment, care and support.³³ There is overwhelming evidence establishing that laws criminalizing same-sex sexual conduct exacerbate the public health challenge of HIV, alienating gay men and other men who have sex with men from health services.³⁴ As the Joint UN Programme on HIV/AIDS has noted: “Legislation that bans sexual intercourse between consenting adults of the same sex can derail efforts to provide HIV and health services to gay men and other men who have sex with men.”³⁵

How do you think a set of principles will help support the work you do? How will you use them?

Authoritative principles in the areas of criminal law discussed above, developed by the ICJ and grounded in human rights, will help advance the work of human rights advocates as we strive to convince policy-makers and courts of the need to consider human rights in weighing the constitutionality or necessity of certain criminal laws. This is especially critical on issues such as sex work, HIV criminalization, drug policy and same-sex relations, in which debates are often driven by ideology rather than evidence, specific moral values prevail over the human rights of marginalized communities, and criminal laws are consequently misused.

¹ ICJ, *Report on the May 2018 Expert Meeting of Jurists: “Developing principles to address the detrimental impact on health, equality and human rights of criminalization with a focus on select conduct in the areas of sexuality, reproduction, drug use and HIV,”* 2018.

² See, for example, the preamble to Canada’s *Protection of Communities and Exploited Persons Act* (S.C. 2014, c. 25).

³ See, for example, C. Benoit and L. Shumka, *Sex Work in Canada*, May 7, 2015, online at www.understandingsexwork.com; C. Atchison, D. Vulmirovich and P. Burnett, *Executive Summary of the Preliminary Findings for Team Grant Project 4 – Sex, Safety and Security: A Study of the Experiences of People who Pay for Sex in Canada*, Canadian Institutes of Health Research, June 2015.

⁴ See, for example, L. Platt et al., “Associations between sex work laws and sex workers’ health: A systematic review and meta-analysis of quantitative and qualitative studies,” *PLoS Med* 15(12): e1002680; J. Levy and P. Jakobsson, “Sweden’s abolitionist discourse and law: Effects on the dynamics of Swedish sex work and on the lives of Sweden’s sex workers,” *Criminology & Criminal Justice* 1–15 (March 31, 2014); P. Östergren and S. Dodillet, “The Swedish Sex Purchase Act: Claimed success and documented effects,” paper presented at the International Workshop: Decriminalizing Prostitution and Beyond: Practical Experiences and Challenges, The Hague, Netherlands, March 3–4, 2011; and U. Bjørndah, *Dangerous Liaisons: A report on the violence women in prostitution in Oslo are exposed to*, Municipality of Oslo, 2012.

⁵ A. Krüsi et al., “Criminalisation of clients: reproducing vulnerabilities for violence and poor health among street-based sex workers in Canada—a qualitative study,” *BMJ Open* 4 (2014): e005191; Sex Workers United Against Violence, Pivot Legal Society and Gender and Sexual Health Initiative, *My Work Should Not Cost Me My Life: The Case Against Criminalizing the Purchase of Sexual Services in Canada*, 2014.

⁶ A. Krüsi et al., “‘They Won’t Change It Back In Their Heads That We’re Trash’: The Intersection of Sex Work Related Stigma and Evolving Policing Strategies,” *Sociology of Health & Illness* (April 26, 2016).

⁷ K. Shannon et al., “Global epidemiology of HIV among female sex workers: Influence of structural determinants,” *Lancet* 385:9962 (2015): pp. 55–71.

⁸ Canadian Alliance for Sex Work Law Reform, *Pimps, Managers and Other Third Parties: Making Distinctions Between Third Parties and Exploitation*, 2014.

⁹ C. McIntyre, “Migrant sex workers caught up in Ottawa sting facing deportation, further exploitation: activists,” *National Post*, May 13, 2015, online at: <http://news.nationalpost.com/news/canada/migrant-sex-workers-caught-up-in-ottawa-sting-facing-deportation-further-exploitation-activists>.

¹⁰ See, for example, findings of F. Barrée-Sinoussi et al., [Expert consensus statement on the science of HIV in the context of criminal law](#), July 2018.

¹¹ 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): pp. 195–218.

¹² B. Myles, “De bourreau à victime; de victime à criminelle,” *Le Devoir*, February 15, 2008

¹³ See, for example, C. Kazatchkine and L. 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.

¹⁴ A. Kaida et al., “Sexual inactivity and sexual satisfaction among women living with HIV in Canada in the context of growing social, legal and public health surveillance,” *Journal of the International AIDS Society* 18, Supplement 5 (2015): 20284. Available at <http://jiasociety.org/index.php/jias/article/view/20284>.

¹⁵ According to preliminary results of the Canadian HIV Women’s Sexual & Reproductive Health Cohort Study (CHIWOS), 240 (41%) participants personally reported recent intentional sexual abstinence. Fifty-four (23%) reported that abstinence was driven by concerns about HIV criminalization and 84 (35%) reported that abstinence was driven by fear of HIV disclosure. These preliminary results were presented by Valerie Nicholson, one of the peer associate researchers involved in CHIWOS, at a workshop being held at the “HIV Is Not a Crime” training academy, in Huntsville, Alabama, in May 2016.

¹⁶ C. Hastings, C. Kazatchkine and E. Mykhalovskiy, *HIV Criminalization in Canada: Key Trends and Patterns*, Canadian HIV/AIDS Legal Network, March 2017, online at: www.aidslaw.ca/site/hiv-criminalization-in-canada-key-trends-and-patterns.

¹⁷ *Ibid.*

¹⁸ E. Mykhalovskiy, C. Hastings, C. Sanders, M. Hyman and L. Bisaillon, “‘Callous, Cold and Deliberately Duplicitous’: Racialization, Immigration and the Representation of HIV Criminalization in Canadian Mainstream Newspapers,” a report funded by a grant from the Canadian Institutes of Health Research Centre for Social Research in HIV Prevention, 2016, online at: <https://ssrn.com/abstract=2874409>.

¹⁹ B. Adam et al., “Impacts of Criminalization on the Everyday Lives of People Living with HIV in Canada,” *Sex Res Soc Policy* (2014) 11:39–49, DOI 10.1007/s13178-013-0131-8.

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