

July 22, 2019

The Hon. David Lametti, Minister of Justice and Attorney General of
Canada
180 Wellington St.
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House of Commons
Ottawa, Ontario
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Dear Minister:

First of all, we would like to thank you once again for taking the time to speak at the Legal Network's 8th Symposium on HIV, Law and Human Rights on June 14th, 2019. The criminalization of HIV non-disclosure is a critical and urgent issue for people living with HIV in Canada and we welcome your government's commitment to end the "over-criminalization of HIV non-disclosure." We also welcome your commitment to continue working with your provincial counterparts to develop sound prosecutorial directives across the country.

Such commitments are in line with the Standing Committee on Justice and Human Rights' report on the [criminalization of HIV non-disclosure in Canada](#), which was released on June 17th. In its report, the Standing Committee notably recommends that your department:

"[...] immediately establish a federal-provincial working group to develop a common prosecutorial directive to be in effect across Canada

- *to end criminal prosecutions of HIV non-disclosure, except in cases where there is actual transmission of the virus;*
- *to ensure that the factors to be respected for criminal prosecutions of HIV non-disclosure reflect the most recent medical science regarding HIV and its modes of transmission and only applies when there is actual transmission having regard to the realistic possibility of transmission. At this point of time, HIV non-disclosure should never be prosecuted if (1) the infected individual has an undetectable viral load (less than 200 copies per millilitre of blood); (2) condoms are used; (3) the infected*

individual's partner is on PrEP or (4) the type of sexual act (such as oral sex) is one where there is a negligible risk of transmission.”¹

This recommendation is extremely important with regard to the current situation in Canada where federal prosecutorial directives on HIV non-disclosure only apply to the three territories. Of the provinces, only Ontario, British Columbia and Alberta have developed formal policies or sent instructions to prosecutors in relation to HIV non-disclosure. Both prosecutorial policies and instructions from Ontario and Alberta fail to preclude prosecutions against people who used a condom or engaged in oral sex only; in British Columbia, condom use is just a “factor” that “may weigh against prosecution.” These guidelines are not sufficient to prevent unjust prosecutions.²

Time is of essence with the federal elections coming up and we hope that your government will continue to show leadership by taking immediate action to implement the Standing Committee’s recommendations. At the very least, we expect your department to write to all provincial Attorneys General to reiterate your concerns around the overly broad use of the criminal law in cases of HIV non-disclosure in Canada and to inform them about the Standing Committee’s recommendation to immediately establish a working group to develop a common prosecutorial directive. That particular recommendation should be put on the agenda for federal/provincial/territorial discussions.

Recognizing that “to end the epidemic, [...] barriers undermining the public health objectives of HIV prevention, testing and treatment need to be removed,” the Standing Committee further affirmed in its report “that the use of criminal law to deal with HIV nondisclosure must be circumscribed immediately and that HIV must be treated as a public health issue,” through law reform.³ In particular, the Committee recommended:

“That the Government of Canada:

- *create a specific offence in the Criminal Code related to the nondisclosure of an infectious disease (including HIV) when there is actual transmission, and that prosecutions related to such transmission only be dealt under that offence;*
- *draft the contemplated legislation in consultation with all relevant stakeholders, including the HIV/AIDS community, to circumscribe the use of criminal law to deal with HIV non-disclosure and make sure HIV is treated as a public health issue like any*

¹ Standing Committee on Justice and Human Rights, *The criminalization of HIV non-disclosure in Canada*, Report, House of Commons Canada, June 2019, p. 25.

² See Canadian HIV/AIDS Legal Network, *The Criminalization of HIV Non-Disclosure in Canada: Current Status and the Need for Change*, June 2019. Available at www.aidslaw.ca/site/the-criminalization-of-hiv-non-disclosure-in-canada-report/?lang=en.

³ Standing Committee on Justice and Human Rights, *supra* note 1, p. 23

other infectious disease. This process should also determine the appropriate mental element (mens rea) for the new offence.”⁴

We do not agree with the Standing Committee’s recommendation to extend the criminal law to other infectious diseases; we will not solve the inappropriate use of the criminal law against people living with HIV by punishing more people and more health conditions. However, we applaud the recommendation to remove HIV non-disclosure from the law of sexual assault and to limit HIV criminalization to cases of *actual transmission* by amending the *Criminal Code*.

But we must go further. As you rightly said, we need to draft legislative provisions that set a right balance and limit the criminal law to cases involving “intent and not criminalize everything else.”⁵ As recommended by the UN’s expert health and human rights bodies, HIV criminalization should be restricted to cases of *intentional transmission* only (i.e. where there is intent to transmit the virus and the virus is transmitted).⁶ Criminal charges and punishments are the most serious of society’s tools; their use should be limited and a measure of last resort.

We understand that your government no longer has time to act legislatively before the election but we believe that you can take measures now to prepare for law reforms efforts post-election.

In particular, the Department of Justice should be instructed to research issues related to *Criminal Code* reform, and the government should re-affirm its commitment to consult with legal, medical and public health experts, people living with HIV and people who have been charged, prosecuted or convicted of HIV non-disclosure, in examining those options.

Again, such commitment is aligned with the Standing Committee’s recommendations to “draft the contemplated legislation in consultation with all relevant stakeholders, including the HIV/AIDS community, to circumscribe the use of criminal law to deal with HIV non-disclosure and make sure HIV is treated as a public health issue like any other infectious disease,” indicating that “process should also determine the appropriate mental element (*mens rea*) for the new offence.” We welcome this recommendation and indeed, we have been calling for such collaboration for a very long time.

⁴ *Ibid*, p. 24.

⁵ S. Jefford, “Liberals hope to deal with HIV nondisclosure issue if re-elected, says justice minister,” *The Toronto Star*, June 14, 2019.

⁶ See for example, Committee on the Elimination of Discrimination against Women, [Concluding observations on the combined eighth and ninth periodic reports of Canada, CEDAW/C/CAN/CO/8-9](#), November 18, 2016 and UNAIDS, [Ending overly broad criminalisation of HIV non-disclosure, exposure and transmission: Critical scientific, medical and legal considerations](#), 2013.

Finally, we note that the Standing Committee recommends that your department “establish a mechanism to review the cases of all individuals who have been convicted for not disclosing their HIV status and who would not have been prosecuted under the new standards set out in the recommendations of the Committee.”⁷ As you know, many people living with HIV in Canada have been prosecuted and/or convicted for non-disclosure even if they had no intent to transmit HIV, did not transmit HIV and in some cases, did not even pose a risk of transmission. Many of these people are now registered as sexual offenders for life. **We ask that your department publicly commit to establish such mechanism as recommended by the Standing Committee.**

Thank you again for your interest in this important human rights issue. We look forward to continuing working with you, the Department of Justice and the federal government to end unjust prosecutions of people living with HIV.

We remain available should you wish to meet and discuss the implementation of the Standing Committee’s recommendations.

Sincerely,

Richard Elliott
Executive Director, Canadian HIV/AIDS Legal Network

⁷ Standing Committee on Justice and Human Rights, supra note 1, p. 26.