



Submission to the Independent Civilian Review into Missing Person Investigations October 2020

Thank you for this opportunity to provide this submission to this independent review into the conduct of missing person investigations by the Toronto Police Service.

The HIV Legal Network (formerly known as the Canadian HIV/AIDS Legal Network) is a non-profit, charitable organization based in Toronto. The HIV 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 addition to defending and advancing the rights of people living with HIV, our work also includes particular attention to the rights of LGBTQ2S people, people who use drugs, sex workers and prisoners. Given the epidemiology of the HIV pandemic and the reality of racism, including systemic racism, in Canada, this also means much of our work to address structural determinants of health in these areas is also of considerable relevance to the health and rights of Indigenous communities and racialized people, including Black people.

This written submission complements comments made previously during our participation in two community consultation sessions.¹ In it, we wish to expand upon our overarching submission that **the unjustified criminalization of specific populations, and the role of police in enforcing such criminalization, have understandably impeded, and will continue to impede, relationships of trust and cooperation between those communities and police.** Unsurprisingly, among other adverse effects, this can undermine the prospect of effective investigations in cases where members of those communities have gone missing involuntarily. More generally, such criminalization contributes to hostile social environments, in which deep-rooted stigmas and prejudices regarding matters of sex, sexuality and drugs mean that, even if people may overcome concerns about possible prosecution or investigation by police, they may still be unable or unwilling to share information with police that may be highly relevant to a particular missing person investigation.

To remedy this systemic, structural factor, it is essential to abolish such criminalization and the role of police in enforcing it. People cannot trust those with the power to prosecute and punish them, something that is only confirmed every time communities experience unjust and abusive treatment at the hands of such authorities.

People cannot trust those with the power to prosecute and punish them.

In light of the events giving rise to this Independent Civilian Review, we assume that your recommendations will be rooted in an analysis of the historic and continued criminalization, *de jure* or *de facto* (e.g., through discriminatory policing), of LGBTQ2S communities, as well as the historic and ongoing reality of systemic racism in policing — and we wholeheartedly encourage you to formulate recommendations aimed at remedying these.

In this submission, we focus specifically on three other communities vulnerable, in their interactions with police, as a result of punitive criminal laws in Canada and their enforcement:

- **sex workers;**
- **people who use drugs;** and
- **people living with HIV.**

We discuss each of these in turn below, and offer a number of recommendations that we would urge you to include in your final report.

1. PUNITIVE SEX WORK LAWS AND THEIR ENFORCEMENT

The current law

In Canada, sex workers have been advocating for their human rights for decades. Part of this effort has included calls to repeal sex work–specific criminal laws as a first step to address the state repression that increases sex workers’ vulnerability to violence. In 2013, in *Canada (Attorney General) v. Bedford*, the Supreme Court of Canada held that the criminal prohibitions on *communicating in public for the purpose of prostitution*, *keeping a common bawdy-house* and *living on the avails of prostitution* violate sex workers’ constitutional right to security of the person.²

In response, the Harper government enacted the so-called *Protection of Communities and Exploited Persons Act* (PCEPA) in 2014,³ reintroducing in many respects the substance of the provisions previously struck down by the Court.⁴ Not only did the PCEPA maintain criminal prohibitions on sex work but also extended the scope of the criminal law under the guise of protecting sex workers from exploitation. As a result, demands from sex workers to remove police from their lives are often overshadowed by the myth that sex workers are no longer criminalized under the PCEPA and are, rather, protected by police and other law enforcement agencies. However, the reality experienced by sex workers is much different. Sex workers continue to be charged under the PCEPA and the harms of criminalization extend beyond the arrest, prosecution and conviction for sex work–related criminal charges.

The harms of the current law

Criminal law has perpetually trapped sex workers within dualities of criminality and victimization. Whereas the previous criminal offences framed sex workers in terms of nuisance and criminality, the PCEPA legally enshrined sex workers as victims, invalidating the labour of sex work and the agency and consent of people who sell or trade sexual services. The preamble of the law itself describes sex work as inherently exploitative and claims to protect the “human dignity and the equality of all Canadians by discouraging prostitution.” At the same time, the new law purports to “encourage those who engage in prostitution to report incidents of violence and to leave prostitution.” However, this ideological and legal framework for sex work ensures that when sex workers do not identify as victims of sex work, law enforcement pose a threat and potential danger to sex workers and they also fall outside the law’s

protection; as a result, **sex workers' experiences of actual violence go unaddressed.**

In 2016, the UN Committee on the Elimination of Discrimination Against Women (CEDAW Committee) expressed concern about the “potentially increased risk to the security and health of women in prostitution, particularly Indigenous women, brought about by the criminalization of prostitution under certain circumstances as provided for in the new legislation” and recommended that Canada “[f]ully decriminalize women engaged in prostitution and assess the impacts of the *Protection of Communities and Exploited Persons* [PCEPA], notably on the health and security of women in prostitution.”⁵ Nearly six years since the passage of the PCEPA in 2014, sex workers in Canada continue to be arrested,⁶ as do those who purchase sex and third parties involved in sex work.⁷ Sex workers have been prosecuted under the offences related to third-party benefits and trafficking when they work with, gain material benefits from, or assist other sex workers to enter or work in Canada.⁸ In particular, Indigenous women and youth, as well as migrant, racialized and trans women, face targeted violence, stigmatization, hyper-surveillance and over-policing under the PCEPA.⁹

These findings are not surprising. 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. In practice, the law continues to criminalize sex workers, who continue to be arrested, in addition to criminalizing those who purchase services from sex workers and third parties involved in sex work. 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.¹⁰ Predators are aware that in a criminalized regime, sex workers actively avoid police for fear of detection, apprehension and, in the case of migrant women, deportation. 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.¹¹ In a study involving 299 sex workers from Vancouver, B.C., more than 26% of respondents reported negative changes after the passage of the PCEPA, including a reduced ability to screen clients and reduced access to workspaces and clients.¹² 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.¹³

At the same time, research in Canada has shown that criminalizing third parties (e.g. drivers, security, bookers, webmasters, business owners, receptionists) who work with or for sex workers, or who employ sex workers, forces sex workers to work in isolation, away from support networks and without proven safety mechanisms.¹⁴ 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 health risks among sex workers.¹⁵ 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.¹⁶ A legal framework that subjects all third parties to criminal sanctions without evidence of abuse or exploitation drives the sex industry

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underground where labour exploitation can flourish, and deters sex workers from seeking protection from legal authorities when they experience violence, because they fear that they and/or their employer may be charged with prostitution-related offences.¹⁷

Moreover, since the passage of the PCEPA, criminalizing sex work has been deemed to be a central strategy to protect women from human trafficking and has resulted in the conflation of sex work with human trafficking.¹⁸ This strategy has enabled law enforcement to intensify police surveillance and other law enforcement initiatives against sex workers.¹⁹ Greater surveillance of migrant and Indigenous women who leave their communities has undermined their relationships with family members or others who may offer them safety or support, including in circumstances where they may be selling sex. Migrant sex workers, who are legally prohibited from working in the sex industry, are under constant threat of detention and deportation, thus hindering their access to health and support services and the police for fear of being labeled victims of trafficking.²⁰ Immigration restrictions prohibiting women from working in legal establishments offering sensual services, such as strip clubs, massage parlours and escort services, further serve to infantilize migrant women and treat them as incapable of making their own life decisions. Such policing initiatives have not resulted in more protection or safety for trafficked persons.²¹ An effective anti-trafficking strategy should prioritize support to people who wish to seek help, rather than employing law enforcement measures as a method of protection.

In such an environment of criminalization, and of police surveillance, harassment and abuse – ironically sometimes ‘justified’ in the name of ‘protection’ – it is little surprise that **sex workers, and their families, friends, loved ones and associates, are unlikely to see the police as indeed a source of protection or to volunteer information that could disclose involvement in sex work or related activities**, even though in some cases, such information could be relevant to a missing person investigation.

A (partial) remedy: decriminalization

The Canadian Alliance for Sex Work Law Reform (CASWLR), a coalition of groups across Canada – almost all of them led by and for sex workers, with some allied groups – issued a comprehensive report in 2017 with more than 60 recommendations aimed at better protecting the lives, health and safety of sex workers.²² The first, and foundational, recommendation is the **complete decriminalization of sex work** as a first step to protecting and respecting the human rights of all sex workers — this begins with the removal of criminal and immigration laws that criminalize sex work, which recommendation has been endorsed by more than 150 civil society organizations across Canada.²³

Decriminalizing sex work is in line with recommendations made by numerous UN entities, including UNAIDS,²⁴ UNDP²⁵ and the Global Commission on HIV and the Law.²⁶ The UN Special Rapporteur on the right to health has described the negative ramifications of criminalizing third parties such as brothel

“Sex workers’ fear of detection and arrest or harassment from police is one of the main factors contributing to violence against sex workers and unhealthy working conditions. Certain communities of sex workers are profiled and over-surveilled by police — particularly Indigenous women who sell and trade sex, racialized sex workers and people who work on the street.”

-- *Canadian Association of Sex Work Law Reform (2017)*

owners, called for the decriminalization of sex work, and denounced the conflation of sex work and human trafficking.²⁷ 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.”²⁸ Similarly, UN Women has expressed its support for the decriminalization of sex work, acknowledged 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.”²⁹ Human rights organizations such as Amnesty International,³⁰ Human Rights Watch,³¹ the Global Alliance Against Traffic in Women³² and the Center for Health and Gender Equity³³ have also studied the human rights implications of criminalizing sex work and have recommended the repeal of sex work–specific criminal laws, including those that criminalize clients and third parties.

Case study:

Brandy, an Indigenous sex worker, has faced unrelenting police surveillance, racial profiling, harassment and interrogation when she works, including encounters with police posing as clients. In 2016, police officers arbitrarily stopped Brandy on the street while she was on her way to meet a client and demanded to know where she was going. When Brandy tried to leave, the officers restrained her, tackled her to the ground, hit her with a baton, tased her and punched her, fracturing one of her ribs. Brandy was arrested and detained overnight. For Brandy and other sex workers, this was not an isolated incident, but reflects a systematic pattern of harassment and abuse that law enforcement officers — empowered by sex work–specific criminal and other laws — have perpetuated against sex workers since the passage of the PCEPA.³⁴

Recommendations

In light of the above considerations, we urge this Independent Civilian Review to put forward recommendations including the following:

- The federal government should **repeal all sex work–specific criminal laws**, and work with sex workers to develop a legislative framework that respects, protects and fulfills their human rights.
- The federal government should **repeal all immigration regulations that prohibit migrant people from working in the sex industry** and have led to the detention and deportation of migrant sex workers.
- Federal, provincial/territorial and municipal governments should **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.”
- Federal, provincial/territorial and municipal governments should **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 those seeking to reduce or end substance use they find problematic.

Furthermore, we urge you to consider a number of additional recommendations specific to policing by sex worker organizations (e.g., Canadian Association for Sex Work Law Reform, Butterfly: Asian and Migrant Sex Workers Network):

- Police forces and their governing bodies must **end the racial profiling of migrant sex workers**.
- Federal, provincial and municipal governments should, within their jurisdictions, **stop law enforcement activities** including raids, detentions and deportations of sex workers that are justified through anti-trafficking and anti–sex work laws and policies.
- In cases of anti-trafficking investigations, police should **never refer cases to the Canada Border Services Agency (CBSA)**.
- Sex worker-designed **training for police** should be mandatory as part of diversity training. **Municipal bylaw officers should be trained** on the realities of sex work and **bylaw enforcement** that engages police should proceed with respect for sex workers’ rights to privacy and well-being.
- Police should not be permitted to engage in initiatives (including the application of laws unrelated to sex work) to **unjustifiably remove and displace sex workers from public spaces**.
- Provinces and territories should ensure that their cities, local police and community services adopt **“Access (to services) Without Fear” policies** throughout Canada, so that people can access services without fear of prosecution, detention or deportation.

2. PUNITIVE DRUG LAWS AND THEIR ENFORCEMENT

During a previous in-person consultation, we raised the issue of the ongoing harms of the current legal regime of drug prohibition, including that it undermines the ability of people who use drugs to interact with police without fear of criminal prosecution or other negative repercussions. We take this opportunity to set out below in some detail the multi-faceted case for ending such criminal prohibitions, because it strengthens our case for the recommendations we propose. The many reasons for decriminalization are already compelling, but given the focus of this Independent Civilian Review, there is yet another: the ongoing criminalization of drug possession (even for personal use) and trafficking (even the sharing or selling of small quantities with other people using prohibited substances) creates an obvious barrier to people sharing information about such activities with police, even where this may be relevant to a missing person investigation. Policing practices related to the enforcement of Canada's prohibitionist drug laws have a similar effect. We elaborate on this point in this written submission and set out below a number of recommendations aimed at remedying these systemic structural barriers.

The current law

In Canada, the unauthorized *possession* of various drugs ("controlled substances") for personal use ("simple drug possession") is a crime under section 4(1) of the *Controlled Drugs and Substances Act* (CDSA). This includes substances such as cocaine, heroin and various opioids, amphetamines, psychedelics and various other synthetic drugs. *Trafficking* of these substances (and various precursors used in their production) is also a crime under section 5 of the CDSA, as is *possession for the purpose of trafficking*. "Trafficking" is defined to include unauthorized selling, administering, giving, transferring, transporting, sending, or delivering a controlled substance — or offering to do any of these things. Meanwhile, the *Cannabis Act*, in force as of October 2018, has legalized the possession and the sale (i.e., trafficking) of cannabis within certain parameters, but any activities outside these parameters remain illegal and carry harsh penalties. The maximum penalties for offences under the CDSA and the *Cannabis Act* amount to years in prison or possibly, in the case of trafficking, up to life imprisonment.

The futility, costs and harms of the law

As noted above, aside from the potential impact on missing person investigations, a growing body of evidence indicates that criminalizing drug possession is ineffective, a waste of public funds, and taking a terrible human toll on people who use drugs and their loved ones.

For decades, the majority of drug arrests in Canada have been for simple drug possession.³⁵ More recently, from 2014 to 2018, police in Canada made more than 470,000 arrests for drug offences; 72% of those were for simple drug possession.³⁶

Yet more than a century of drug prohibition in Canada and globally has not had an impact on levels of drug consumption or drug



dependence.³⁷ As the Global Commission on Drug Policy noted in 2016, drug prohibition “has had little or no impact on rates of drug use, with the number of consumers increasing by almost 20 percent between 2006 and 2013.”³⁸ A 2014 study which analyzed the drug policies of 11 countries — a mixture of those with a predominantly prohibitionist approach and those that had adopted decriminalization — “did not observe any obvious relationship between the toughness of a country’s enforcement against drug possession and levels of drug use.”³⁹ In 2017, 15% of people in Canada aged 15 years and older reported using illegal drugs during the previous year, an increase from 13% in 2015,⁴⁰ and from 11% in 2013.⁴¹ **Criminalizing drugs does not prevent their use.**

However, **criminalizing drug possession does put people who use drugs at increased risk of harm**, including by impeding their access to much needed services and emergency care in the case of overdose, as well as contributing to new HIV and hepatitis C infections. In Canada, drug prohibition has hampered efforts to scale-up critical “safe supply” programs and has contributed to a drug poisoning crisis that has resulted in more than 16,300 opioid overdose deaths between January 2016 and March 2020.⁴² Since the onset of the COVID-19 pandemic, which has led to closed or reduced harm reduction services and disrupted drug markets, record numbers of overdose deaths have been reported in multiple cities and provinces,⁴³ including Toronto, where emergency medical services (EMS) responded to 132 suspected opioid-related overdose deaths between April 1 and September 30, 2020, an increase from 59 in the previous year.⁴⁴

Drug prohibition also disproportionately affects Black, Indigenous, and poor communities, who are profiled and disproportionately arrested, charged and incarcerated for drug offences. Research shows that, while Black and Indigenous people are not more likely to commit drug offences, they are more likely to be policed, arrested and incarcerated for drug offences, given the legacy of racist law enforcement and criminal law practices. For example, data collected from 2003 to 2013 by the Toronto Police Service (TPS) indicate Black people with no history of criminal convictions were three times more likely to be arrested for possession of small amounts of cannabis than white people with similar backgrounds.⁴⁵ A 2019 study of cases between 2007 and 2013 found that Black youth accused of cannabis possession in Ontario were more likely to be charged and less likely to be cautioned than white youth and youth from other racial backgrounds.⁴⁶ Both a 2018 report⁴⁷ and a 2020 study⁴⁸ found that Black and Indigenous men and women were overrepresented in cannabis possession arrests across Canada. The impact of policing practices on Black and Indigenous communities has recently received long overdue global attention, and various governments and police departments throughout Canada have publicly committed to re-evaluating and addressing bias in policing. As the offence of simple drug possession is disproportionately enforced against poor and racialized communities (in turn causing serious health and safety harms to those same communities), decriminalizing simple drug possession is one way to minimize discriminatory police interactions and the corresponding harms experienced by Black and Indigenous communities, and to reduce the damage done to police relations with these communities.

Beyond its racist enforcement, the **criminalization of drug possession perpetuates stigma, discrimination and the over-incarceration of people who use drugs** (and this incarceration again has disproportionate, discriminatory impact on Black and Indigenous people⁴⁹). Furthermore, the harms of criminalization follow people for the rest of their lives, with criminal records limiting liveable employment opportunities, restricting travel and sometimes housing. Once branded a person who uses drugs or who engages in a criminalized drug-related activity (either as the result of a criminal record or by association), a person faces discrimination and exclusion.

A (partial) remedy: decriminalization

At a time when movements to “defund police” and challenge abusive and racist police practices are also gaining momentum, steps to decriminalize drug possession, scale back the ‘war on drugs’ and re-invest resources in community-based health and social supports are long overdue. The understandable mistrust of police on the part of people who use drugs, and of communities subjected to abusive police enforcement of archaic and harmful drug laws, ought to be of concern to this Review: it is a structural factor that impedes effective missing person investigations when the investigation concerns a missing person who used or uses drugs, or whose drug use may be relevant to the circumstances of their disappearance but is never brought to the attention of police, or when police seek information about the missing person from friends, family or acquaintances who are aware of the person’s drug use or who may themselves use or have used drugs. **Part of the remedy is to remove the threat of criminal prosecution for possession or small-scale trafficking entirely.**

Decriminalizing possession *de jure* or *de facto* is already the case in a significant number of countries. In a scan of more than 25 jurisdictions around the world that have decriminalized drug possession, some of whom also reoriented efforts and resources into dealing with drugs as a public health challenge, a number of positive health outcomes were identified, including reduced rates of HIV transmission and fewer drug-related deaths; improved education, housing, and employment opportunities for people who use drugs; and significant savings of public monies — and meanwhile, there has been a negligible effect on levels of drug use.⁵⁰ While decriminalizing simple drug possession is not a “silver bullet”, an environment where drug possession is no longer criminalized will reduce stigma and the fear of criminal prosecution. Correspondingly, this reduces significant barriers to health and support services, including “safer supply” initiatives and other vital harm reduction services – and would also go some way toward reducing understandable reticence of people who use drugs to interact with, or volunteer information to, police.

In Canada, important precedents have already been set, in the courts and through changes to legislation and regulations, that exceptions to the criminal prohibition on possession must be made in order to protect health, from the decriminalization of cannabis for medical use to exemptions for health services such as supervised consumption and overdose prevention sites. More recently, Canada has decriminalized, within certain parameters, not only the possession of cannabis but even its (highly-regulated) sale for non-medical use.

Case study: lessening the risk of drug possession charges when calling first responders

One particularly relevant and recent illustration of the acknowledged relationship between drug criminalization and fear of interaction with police is the adoption by Parliament in 2017 of the *Good Samaritan Drug Overdose Act*.

Research has shown that police attendance and the corresponding threat of criminal charges are major deterrents to people seeking emergency medical assistance in the event of an overdose. The *Good Samaritan Drug Overdose Act* provides some important, but limited, protection against charges for simple drug possession for those who are present on the scene of an overdose when first responders (including police) arrive. The legal “safe zone” that the legislation creates is important, but it is limited, because people remain exposed to the risk of various other drug-related charges, meaning its provisions carving out protection from

criminalization require further strengthening – or, better yet, removing the underlying criminalization that is the source of the problem.

Even within the zone of protection ostensibly afforded by the current law, the reality on the ground underscores that, in addition to the criminalized legal environment, police practices have a major impact on people’s ability or willingness to seek police assistance. Recent research conducted by the HIV Legal Network and a Ryerson University criminologist, including focus groups and surveys with 109 people who use drugs across Ontario, found that many remain hesitant to call 911 for assistance because police continue to be routinely dispatched to the overdose site. We also found that the vast majority of participants had negative interactions with police in such instances, such as being questioned aggressively about the presence of other drugs, the identity of the dealer(s) who provided the drugs, etc. Such experiences understandably discourage people from seeking medical assistance at future overdose incidents. Almost all participants questioned the necessity of dispatching law enforcement to a health emergency that requires medical intervention.⁵¹

We have therefore recommended ending routine police attendance at drug overdose calls. This would be one concrete measure that the TPS and police forces across the country could take to not only facilitate greater access to emergency assistance in the context of the ongoing overdose crisis, but also reduce instances of negative police interaction with people who use drugs, thereby further undermining trust in police.

We offer this case study because of its relevance to the issues before this Review: if people are reluctant to call for emergency assistance in the event of a potentially fatal overdose because of police attendance and behaviour, and the attendant underlying risk of criminal charges for a drug offence, then it should be easy to understand that, in the context of a missing person investigation, people who use drugs are unlikely to want to interact with police or volunteer information that could result in drug charges. In both cases, the lives and safety of vulnerable people may be jeopardized by the hostile legal environment of drug prohibition and police practices in its enforcement.

These established exceptions to criminalization of drug possession are important, and a recognition that criminalization must give way, at least in some instances and settings, to concern for health. **But a more fundamental change is required, one that removes entirely the criminalization of people for possessing a substance for their own personal consumption or for selling or sharing in limited quantities** (including to support one’s own drug use or subsistence, or to provide a safe supply).

We note that **there is strong support for the decriminalization of drug possession for personal use, domestically and internationally.** This support comes from organizations of people who use drugs — whose health and welfare has been most directly and negatively harmed — and more than 170 community organizations across Canada, including leading harm reduction and human rights organizations, who have recently called on the federal Health Minister to effect decriminalize of simple possession immediately through the issuing of a class exemption to all persons in Canada from the prohibition in s. 4 of the CDSA, pursuant to her power under s. 56 of the Act.⁵²

Support for decriminalization also comes from a growing number of public health associations and authorities, including the following:

- Canadian Public Health Association;⁵³
- Canadian Mental Health Association;⁵⁴
- Canadian Nurses Association;⁵⁵
- Chief Public Health Officer of Canada;⁵⁶
- Toronto Board of Health;⁵⁷
- Toronto’s Medical Officer of Health;⁵⁸
- Montreal Public Health;⁵⁹
- Quebec’s Director of Public Health;⁶⁰
- Winnipeg Regional Health Authority;⁶¹
- Yukon’s Chief Medical Officer;⁶²
- Vancouver’s Chief Medical Health Officer;⁶³ and
- Provincial Health Officer of British Columbia.⁶⁴

A growing number of elected municipal and provincial officials and bodies have also supported the call to decriminalize simple drug possession, including the Mayor of Vancouver⁶⁵ and Vancouver City Council,⁶⁶ the Premier of British Columbia,⁶⁷ and St. Catherine’s City Council.⁶⁸ Federally, the Liberal Party of Canada adopted a policy resolution at its national convention in April 2018 calling on the Government of Canada to address problematic drug use as a health (and not criminal justice) issue by expanding harm reduction and treatment services and removing the criminal sanction for low-level drug possession.⁶⁹ Other federal parties, including the New Democratic Party of Canada and the Green Party of Canada, have also indicated their support for decriminalizing simple drug possession.⁷⁰

In July 2020, the Canadian Association of Chiefs of Police (CACP) released a report in which police chiefs across the country “agree the evidence suggests, and numerous Canadian health leaders support, decriminalization for simple possession as an effective way to reduce the public health and public safety harms associated with substance use.”⁷¹ In addition, in August 2020, the Director of the Public Prosecution Service of Canada (PPSC) issued a guideline that directs prosecutors to “focus upon the most serious cases raising public safety concerns for prosecution and to otherwise pursue suitable alternative measures and diversion from the criminal justice system for simple possession cases,” acknowledging that “criminal sanctions, as a primary response, have a limited effectiveness as (i) specific or general deterrents and (ii) as a means of addressing the public safety concerns when considering the harmful effects of criminal records and short periods of incarceration.”⁷²

Globally, decriminalizing simple drug possession has been recommended by numerous health and human rights bodies as a measure that both protects health and upholds human rights, including the World Health Organization (WHO), the Joint United Nations Programme on HIV/AIDS (UNAIDS), the UN Development Program, multiple UN Special Rapporteurs on the right to health,⁷³ and the UN Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment.⁷⁴ The *International Guidelines on Human Rights and Drug Policy*, co-published by the International Centre on Human Rights and Drug Policy, UNDP, UNAIDS and WHO, also recommend States “decriminalise the possession, purchase, or cultivation of controlled substances for personal consumption.”⁷⁵ And the Global Commission on Drug Policy, comprising former heads of state or government and other eminent political, economic, and cultural leaders, has highlighted the tremendous damage caused by the criminalization of people who use drugs and called for the removal of all punitive responses to drug possession and use.⁷⁶ In fact, all agencies of the UN system (including the UN Office on Drugs on Crime,

the lead technical agency on drug policy issues) have adopted, in late 2018, a common position recommending to all governments that they decriminalize simple drug possession.⁷⁷

Decriminalizing simple possession of drugs for personal consumption is necessary to respect personal privacy and autonomy, and in the interests of individual and public health, given the ample evidence of the harms from criminalizing and enforcing the prohibition on simple possession, as described above. But decriminalizing the selling or sharing of limited quantities of a controlled substance is also in line with a human rights-based approach to drug policy; it is not uncommon that people may engage in selling of limited quantities to others in their network as a means of livelihood, potentially to support their own dependent use, or to provide a safe supply. It is also a poor use of public resources to criminalize selling or sharing of limited quantities. Decriminalization on this front could be achieved by setting **threshold amounts**, such that the selling or sharing of limited quantities of a substance in quantities below the threshold are excluded from the definition of ‘trafficking’ in the CDSA.⁷⁸

Redistribution of resources

According to the Canadian Institute for Substance Use Research (CISUR) and the CCSA, more than \$6.4 billion of policing, courts and correctional costs in 2017 could be attributed to the use of criminalized substances, including costs associated with the enforcement of drug laws (i.e. the drug-related offences in the *Controlled Drugs and Substances Act*) as well as “the impact of violent and non-violent crimes that would not have occurred without some substance use.”⁷⁹ While this research does not single out the specific costs of enforcing the criminal prohibition on simple drug possession, it does provide a snapshot of the colossal financial burden of drug offences on the criminal legal system. Indeed, there is significant evidence from various jurisdictions outside of Canada that removing criminal sanctions for simple drug possession can result in direct savings⁸⁰ — which funds can be redirected toward more effective, evidence-based services and interventions that can promote healthier communities.

Funds saved from decriminalizing drug possession must be adequately redistributed to the communities most affected by decades of police violence, racism and injustice. These resources must be reinvested into community-based organizations that support people who use drugs, including by providing health services to prevent and treat overdose, HIV, HCV and other infections; mental health services; and harm reduction services such as opioid agonist therapy (OAT) (including injectable forms), safe supply programs to provide quality-controlled alternatives to toxic drugs from the illegal market, and other forms of medication and treatment to manage substance use. Resources should also be reinvested into social services such as affordable housing programs, food security projects, and employment opportunities, including in a drug-related industry. Not only do people who use drugs need drug decriminalization and a safe supply of drugs, they need meaningful opportunities to engage in their communities and be compensated for their knowledge and expertise.

Recommendations

In light of the above considerations, we urge this Independent Civilian Review to put forward recommendations including the following:

- The federal government should **decriminalize all drug possession for personal use and the selling or sharing of limited quantities**. It should do so through amendments to the *Controlled Drugs and Substance Act*, including the full repeal of s. 4 and amendments to s. 5 of the Act.

- In the interim, the federal government should effect this change immediately by **exempting all persons in Canada from the relevant provisions of the CDSA**, via an exemption issued by the federal Minister of Health under section 56 of the Act and/or a regulation adopted by the federal Cabinet under section 55 of the Act. Provincial and municipal governments, or even provincial or local public health authorities, should request such exemptions, for those within their jurisdictions, from the federal government.
- Federal, provincial and municipal governments should take legislative, regulatory or other measures, within their respective jurisdictions, to **change police practices** to ensure the following (some of which are contingent upon decriminalization, but others of which are not):
 - Police should not routinely attend the scene of an overdose in response to a call for emergency assistance, but instead only attend if the caller specifically asks for police to attend.
 - Police (and all first responders) must be trained properly on the provisions of the *Good Samaritan Drug Overdose Act* and, should police be in attendance at an overdose scene, they should not question those present about their possession, purchase or transfer of drugs, as doing so undermines the purpose of the Act.
 - There must be clear rules and strict limitations for when police can stop, search and investigate a person for drug possession.
 - Police must not be permitted to confiscate drugs or drug use equipment from people absent an arrest and charges.
 - Police metrics should be changed such that laying charges for simple possession, or for trafficking of small quantities or possession of small quantities for the purpose of trafficking, is deprioritized in police departments.
 - Following decriminalization, there must be mandatory training for police on the new system and the quantities of substances that a person is legally allowed to possess or share/sell, and a police decision to proceed with a criminal charge in relation to drugs should be assessed by a party outside the criminal justice system (e.g. social worker, health authority, or administrative agent).
 - People who use drugs have access to legal advice and representation to help them know and defend their rights.
 - Effective civilian police complaint and oversight mechanisms must be accessible to people who use drugs and ensure accountability for police officers.
 - With a view to reducing racial and other disparities, people of different backgrounds must be included in the entire reform process, and governments should fund external, independent research to collect (non-identifying) data related to age, gender, race, disability, sexual orientation, gender identity and expression, income, and substance found during police stops, and to track the impact of reforms to law and policy.
- Within their respective areas of responsibility, federal, provincial and municipal governments should **redistribute resources** from law enforcement of the prohibitions on simple possession and small-scale selling or sharing to policies, programs and services that protect and promote people's health and human rights, including health and social services that support people who use drugs.

3. HIV STIGMA AND CRIMINALIZATION

Direct experiences and publicly reported instances of discriminatory, stigmatizing and abusive behaviour by police toward people who are, or are perceived to be, HIV-positive can naturally be expected to create a barrier to people trusting police. Such stigma is only encouraged by the continued criminalization of people living with HIV and police practices in investigating and enforcing such criminalization – e.g., police forces issuing ‘wanted’ press releases with names and photos of people living with HIV based on allegations of non-disclosure. The unjustifiable use of criminal charges for alleged HIV non-disclosure, exposure or transmission means people living with HIV have good reason to avoid any interaction with police (or public health authorities) that could result in the revelation of information about their sexual (or drug-sharing) relationships with partners. When offering such details could result in you “incriminating” yourself in a legal system that continues to engage in unjust prosecutions, silence is the safer course. It is not hard to see how, in at least some missing person investigations, this could mean important information and leads are never identified.

The current law

In Canada, more than 200 people have been charged to date for not disclosing their HIV-positive status to their sexual partners.⁸¹ The law in Canada is known internationally for its severity.⁸² People living with HIV are usually charged with aggravated sexual assault — an offence that carries a maximum penalty of life imprisonment and mandatory registration as a sexual offender for a minimum of 20 years, as well as likely deportation for any person who is not a citizen — for not disclosing their status. Based on a pair of decisions of the Supreme Court of Canada in 2012, 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.⁸³ This is contrary to international recommendations and human rights standards on HIV criminalization, as well as the medical evidence on HIV and public health considerations.⁸⁴

Harms of the current law

As noted, people living with HIV have been, and are being, charged and prosecuted for not disclosing their status before sex that poses minimal or no risk of transmission. No other medical condition has been criminalized to that extent; the law profoundly **stigmatizes people living with HIV**. In particular, the misuse of the law of sexual assault to deal with HIV non-disclosure has severe implications for people living with HIV. The criminalization of HIV non-disclosure disproportionately affects marginalized people living with HIV including racialized people (particularly Black and Indigenous people), migrants and women (including Indigenous women and women experiencing intimate partner violence). Gay men represent the largest proportion of people living with HIV in Canada, and the number of cases against gay men has also increased since the Supreme Court’s 2012 decision in *Mabior*.

The criminalization of HIV is **at odds with public health objectives**. Fear of prosecution can deter people, especially those from communities particularly affected by HIV, from getting tested and knowing their status. HIV criminalization can also deter access to HIV care and treatment by undermining counselling and the relationship between people living with HIV and health-care professionals and other service providers, because their records can be used as evidence in court and professionals can be compelled to testify against their patients or others to whom they provide support services.⁸⁵

The criminalization of HIV non-disclosure has resulted in **serious invasions of privacy** (e.g., use of medical records in criminal proceedings, people's HIV status made public in the media including through police press releases) and bodily integrity (e.g., forced HIV treatment upon pain of prosecution).

The numerous human rights and public health concerns associated with the criminalization of HIV non-disclosure, exposure or transmission have led the Joint UN Programme on HIV/ AIDS (UNAIDS) and the UN Development Programme (UNDP),⁸⁶ and the Global Commission on HIV and the Law⁸⁷ to urge 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). The UN Special Rapporteur on the right to health has pointed out that criminalizing HIV transmission infringes on not only the right to health, but also the rights to privacy, equality and non-discrimination.⁸⁸ Meanwhile, the UN Committee on Economic, Social and Cultural Rights has called on States "to reform laws that impede the exercise of the right to sexual and reproductive health" including laws criminalizing "HIV non-disclosure, exposure and transmission"⁸⁹ and the UN Committee on the Rights of the Child has noted the need to review legislation "that criminalizes the unintentional transmission of HIV and the non-disclosure of one's HIV status."⁹⁰ Women's rights advocates have also called for an end to the overly broad use of the criminal law (including the misuse of sexual assault law),⁹¹ and in 2016, in its review of Canada, the UN Committee on the Elimination of Discrimination Against Women (CEDAW) stated its concern about "the application of harsh criminal sanctions (aggravated sexual assault) to women for non-disclosing their HIV status to sexual partners, even when the transmission is not intentional, when there is no transmission or when the risk of transmission is minimal," and it recommended that Canada "limit the application of criminal law provisions to cases of intentional transmission of HIV/AIDS, as recommended by international public health standards."⁹²

The need for prosecutorial and police guidelines and policies

In recent years, there have been positive – but insufficient – developments in Canada to limit HIV criminalization. In December 2018, the federal Attorney General instructed federal lawyers to stop prosecuting people who have a suppressed viral load (i.e., under 200 copies/ml).⁹³ The directive also, *inter alia*, instructs federal lawyers to "generally" not prosecute someone who used a condom, took HIV treatment as prescribed, or just had oral sex, because "there is likely no realistic possibility of transmission" in these circumstances. But the directive only applies to Canada's three territories. Most people live in the provinces, and provincial Attorneys General are lagging behind in adopting a similar approach.⁹⁴

To the best of our knowledge, there are no requirements for training regarding HIV and related stigma for the Toronto Police Service (or any police force in Canada). Similarly, we are not aware of any police force in Canada having guidelines or policies in place for how police should handle cases of alleged HIV non-disclosure, transmission or exposure (including ensuring access to accurate science about HIV and avoiding stigmatizing conduct during the course of investigations),⁹⁵ or more generally how to ensure community members living with HIV, or perceived to be living with HIV, receive non-stigmatizing, non-discriminatory treatment in their interactions with police. We do not assert that training and guidelines are a panacea, but they can and should be *part of* the solution, and the likelihood of their having an impact is greater if they receive the clear, ongoing endorsement of police leadership. Such training and guidelines *could* help ensure that:

- complaints are handled in a fair, non-discriminatory and consistent manner;

- criminal investigations are informed by current medical and scientific knowledge about HIV and the social contexts of living with HIV;
- criminal investigations do not reinforce societal prejudices, preconceptions, and irrational fears regarding HIV, or undermine public health efforts to prevent the spread of HIV;
- unnecessary investigations are not pursued; and
- the rights of people living with HIV and complainants are fully respected and preserved.

The need for federal law reform

In addition to sound policies governing prosecutors and police, more fundamental change is needed – specifically, reforms to the federal *Criminal Code* are necessary to end unjust HIV criminalization, as recognized by the House of Commons Standing Committee on Justice and Human Rights in a June 2019 report.⁹⁶ In particular, the Standing Committee recommended removing HIV non-disclosure from the reach of sexual assault law and limiting any HIV criminalization to cases of actual transmission of the virus. As long as police (and prosecutors) have in hand a tool for the unwarranted and unjust pursuit of criminal charges, that tool will continue to be used – and the prospect of its use will continue to hang over the interaction of people living with HIV with police.

Case study: Unjust criminalization after seeking police protection against abuse

In 2005, D.C. was charged in Quebec for not disclosing her status to her ex-partner before the first time they had sex. The couple had a relationship for four years after she disclosed her status to him. The relationship became physically abusive, and the end of the relationship in particular was marked by violence against D.C. and her son. She turned to the police for protection — after which her ex-partner complained to police that she had not disclosed her HIV-positive status before their first sexual encounter. He said that this first instance of sex had been unprotected, whereas she said they had used a condom. Her viral load was undetectable at the time of the encounter, which science has subsequently confirmed meant there was no risk of transmission. Indeed, HIV was not transmitted. The trial judge explicitly noted that the accusation by D.C.’s ex-partner was motivated by a desire for revenge. HIV criminalization allowed him to weaponize the law of sexual assault against the woman he was convicted of assaulting. At trial, D.C. was convicted of aggravated assault and sexual assault and sentenced to 12 months’ house arrest. D.C. was ultimately acquitted in 2012 by the Supreme Court of Canada, but solely on technical grounds regarding mishandling of the evidence by the trial judge in his reasons for judgment; absent this technicality, she would have remained convicted of one of the most serious offences in the *Criminal Code* and still be designated for life as a sex offender, as is currently mandatory under (arguably unconstitutional) provisions in the *Code*.⁹⁷

Recommendations

In light of the above considerations, we encourage you to include in your report the following recommendations:

- The federal government should, through **Criminal Code amendments** developed in consultation with the HIV community and legal and scientific experts, limit the use of the criminal law against people living with HIV to cases of actual and intentional HIV transmission, in keeping with international guidance.

- The federal government should establish a federal-provincial working group to develop, in consultation with the HIV community and legal and scientific experts, a **common prosecutorial directive** to apply across Canada that limits the prosecution of people living with HIV to cases of actual and intentional HIV transmission and otherwise reflects key principles in international guidance for prosecutors on handling HIV-related criminal prosecutions.
- The TPS and other police forces should engage in a dialogue with representatives of the HIV community in order to develop: (i) **training for police** about HIV transmission and the realities of living with HIV today; and (ii) **guidelines for police** handling matters of alleged HIV non-disclosure.

CONCLUSION

From discussions to date, it appears that recommendations from this Independent Civilian Review may include initiatives to train police officers better, to improve transparency and to make better use of technology. These are welcome initiatives, and our recommendations above do include some related to improving the knowledge and understanding of police officers regarding communities that historically have experienced poor policing practices and hence have good reason to avoid interacting and sharing information with police, which in some instances can hinder the effectiveness of missing person investigations.

However, training, transparency and technology must be complemented by more fundamental changes. As was noted in one of the background research papers commissioned by the Review: “In short, for many LGBTQ2S+ communities (especially Black and Indigenous people of colour, sex workers, trans people, people living with HIV, those who are homeless, and/or those who are undocumented), another way to improve relations with police is to become less reliant on the criminal legal system altogether.” **A common theme running through our submissions above is the urgent need for legal reforms that remove or substantially reduce the risk of legal (and physical) jeopardy currently inherent in interaction with the police for people who are living with HIV, who use drugs or who sell sex.** Under the current state of the law in Canada, the spectre of criminalization hangs over all these individuals and communities; it is police who are the frontline of enforcing such punitive policy and we have seen, time and again, that enforcement has been arbitrary, discriminatory or abusive. The result is that such communities often end up not only over-policed but also under-protected, including in the tragic circumstance where someone may go missing involuntarily and police are called upon to investigate their disappearance.

¹ This submission also incorporates, with edits, text and recommendations from a number of previous publications by the HIV Legal Network.

² *Canada (Attorney General) v. Bedford*, 2013 SCC 72.

³ S.C. 2014, c. 25.

⁴ S. Chu et al., *Reckless Endangerment: Q&A on Bill C-36: Protection of Communities and Exploited Persons Act*, Canadian HIV/AIDS Legal Network, June 2014.

⁵ UN Committee on the Elimination of Discrimination Against Women, *Concluding Observations: Canada*, UN Doc. CEDAW/C/CAN/CO-/8-9, November 2016.

⁶ See, for example: Canadian HIV/AIDS Legal Network, *The Perils of "Protection": Sex Workers' Experiences of Law Enforcement in Ontario*, 2019; B. Sawchuk, "Undercover cops take aim at sex trade," *St. Catharines Standard*, July 20, 2016.

⁷ See, for example: Hamilton Police Service, "Project Orchid Takes Aim at Illegal Massage Parlours," June 3, 2019 and K. Nielson, "Waterloo police arrest man as part of province-wide 'Operation Northern Spotlight'," *Global News*, October 24, 2018.

⁸ See, for example: E. Lam, *Behind the rescue: How anti-trafficking investigations and polices harm migrant sex workers*, Butterfly (Asian and Migrant Sex Workers Support Network), 2018; Canadian HIV/AIDS Legal Network, *The Perils of "Protection": Sex Workers' Experiences of Law Enforcement in Ontario*, 2019.

⁹ E. Lam, *Survey on Toronto Holistic practitioners with bylaw enforcement and police*, Butterfly (Asian and Migrant Sex Workers Support Network), 2018; E. Lam, *Behind the rescue: How anti-trafficking investigations and polices harm migrant sex workers*, Butterfly (Asian and Migrant Sex Workers Support Network), 2018 and Canadian HIV/AIDS Legal Network, *The Perils of "Protection": Sex Workers' Experiences of Law Enforcement in Ontario*, 2019.

¹⁰ E.g., see: 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, March 3-4, 2011, The Hague, Netherlands; and U. Bjørndah, *Dangerous Liaisons: A report on the violence women in prostitution in Oslo are exposed to*, Municipality of Oslo, 2012.

¹¹ 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); 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.

¹² S. Machat et al., "Sex workers' experiences and occupational conditions post-implementation of end-demand criminalization in Metro Vancouver, Canada," *Canadian Journal of Public Health*, June 10 2019.

¹³ 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).

¹⁴ B. McBride et al., "Third Parties (Venue Owners, Managers, Security, etc.) and Access to Occupational Health and Safety Among Sex Workers in a Canadian Setting: 2010-2016," *American Journal of Public Health* 109, 5 (May 2019): pp.792-798.

¹⁵ K. Shannon et al., "Global epidemiology of HIV among female sex workers: influence of structural determinants," *Lancet* 385, 9962 (January 3, 2015): pp. 55–71.

¹⁶ See B. McBride et al., "Third Parties (Venue Owners, Managers, Security, etc.) and Access to Occupational Health and Safety Among Sex Workers in a Canadian Setting: 2010-2016," *American Journal of Public Health* 109, 5 (May 2019): pp.792-798, E. Lam, *Stop the harm from anti-trafficking policies & campaigns: support sex workers' rights, justice and dignity*, Butterfly (Asian and Migrant Sex Workers Support Network), 2016 and E. Lam, *Behind the rescue: How anti-trafficking investigations and polices harm migrant sex workers*, Butterfly (Asian and Migrant Sex Workers Support Network), 2018.

-
- ¹⁷ Canadian HIV/AIDS Legal Network, *The Perils of “Protection”: Sex Workers’ Experiences of Law Enforcement in Ontario*, 2019 and Canadian Alliance for Sex Work Law Reform, *Pimps, Managers and Other Third Parties: Making Distinctions Between Third Parties and Exploitation*, 2014.
- ¹⁸ Indeed, the *National Action Plan to Combat Human Trafficking* makes the unsubstantiated claim that the sexual exploitation of women and girls is the most common manifestation of trafficking in Canada. See Public Safety Canada, *National Action Plan to Combat Human Trafficking*, 2012.
- ¹⁹ A. Rose, “Punished for Strength: Sex Worker Activism and the Anti-Trafficking Movement,” *Atlantis* 37, 2 (2015): pp. 57-64; POWER (Prostitutes of Ottawa/Gatineau Work, Educate, and Resist), *Ottawa Area Sex Workers Targets of Intrusive Police Visits*, 2014; Canadian HIV/AIDS Legal Network, *The Perils of “Protection”: Sex Workers’ Experiences of Law Enforcement in Ontario*, 2019.
- ²⁰ E. Lam, *Behind the rescue: How anti-trafficking investigations and polices harm migrant sex workers*, Butterfly (Asian and Migrant Sex Workers Support Network), 2018.
- ²¹ Amnesty International, *Explanatory Note on Amnesty International’s Policy on State Obligations to Respect, Protect and Fulfil the Human Rights of Sex Workers*, May 26, 2016, p. 42.
- ²² Canadian Association for Sex Work Law Reform, *Safety, Dignity, Equality: Recommendations for Sex Work Law Reform in Canada* (2017, online: <http://sexworklawreform.com/recommendations/>).
- ²³ *Solidarity Statement for Sex Workers’ Rights* (September 2019), online: <https://secure.actioncanadashr.org/en/solidarity-sex-workers-rights>.
- ²⁴ UNAIDS, *UNAIDS Guidance Note on HIV and Sex Work*, 2012.
- ²⁵ J. Godwin, *Sex Work and the Law in Asia and the Pacific: Laws, HIV and human rights in the context of sex work*, UNDP, 2012.
- ²⁶ Global Commission on HIV and the Law (UNDP HIV/AIDS Group), *HIV and the Law: Risks, Rights & Health*, July 2012.
- ²⁷ UN Human Rights Council, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover*.
- ²⁸ UN Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo*, Report on the 26th Session, UN General Assembly, agenda item 3, UN Doc. A/HRC/26/38/Add.1, 2014.
- ²⁹ UN Women, *Note on Sex Work, Sexual Exploitation and Trafficking*, October 9, 2013.
- ³⁰ Amnesty International, *Amnesty International Policy on state obligations to respect, protect and fulfill the human rights of sex workers*, May 2016.
- ³¹ J. Amon, “Canada's prostitution bill a step in the wrong direction,” *Ottawa Citizen*, June 18, 2014, online: <http://ottawacitizen.com/news/politics/joseph-amon-canadas-prostitution-bill-a-step-in-the-wrong-direction>.
- ³² Global Alliance Against Traffic in Women, *Response to UN Women’s consultation on sex work*, 2016.
- ³³ B. Roose-Snyder, P. Mitchum and D. Shea, *Between Her and Her Rights: Criminalization of Sex Work is the Barrier*, December 16, 2016.
- ³⁴ Canadian HIV/AIDS Legal Network, *The Perils of “Protection”: Sex Workers’ Experiences of Law Enforcement in Ontario*, 2019.
- ³⁵ Research and Statistics Division Department of Justice Canada, *Profile and Projection of Drug Offences*, February 2000. Online: https://www.justice.gc.ca/eng/rp-pr/csj-sjc/crime/rr00_30/rr00_30.pdf.

-
- ³⁶ Statistics Canada, *Police-reported crime statistics in Canada, 2015*, July 20, 2016; Statistics Canada, *Police-reported crime statistics, 2016*, July 24, 2017; Statistics Canada, *Unfounded criminal incidents in Canada, 2017*, July 23, 2018; and Statistics Canada, *Police-reported crime statistics, 2018*, July 22, 2019.
- ³⁷ See, for example, S. Boyd, *Drug use, arrests, policing, and imprisonment in Canada and BC, 2015–2016*, March 9, 2018 and S. Boyd, *Addendum: Drug Arrests in Canada, 2017*, September 15, 2018.
- ³⁸ Global Commission on Drug Policy, *Advancing Drug Policy Reform: A New Approach to Decriminalization*, 2016. Online: <https://www.globalcommissionondrugs.org/wp-content/uploads/2016/11/GCDP-Report-2016-ENGLISH.pdf>.
- ³⁹ UK Home Office, *Drugs: International Comparators*, 2014. Online: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/368489/DrugsInternationalComparators.pdf.
- ⁴⁰ Statistics Canada, Canadian Tobacco, Alcohol and Drugs Survey (CTADS): summary of results for 2017, 2018.
- ⁴¹ Statistics Canada, *Canadian Tobacco, Alcohol and Drugs Survey (CTADS): summary of results for 2015*, 2016.
- ⁴² Government of Canada, Opioid-related harms in Canada, September 2020, Available at <https://health-infobase.canada.ca/substance-related-harms/opioids/>.
- ⁴³ See, for example, C. Bains, “B.C. overdose crisis: New public health order issued after record number of monthly deaths,” *The Canadian Press*, September 16, 2020, online: <https://bc.ctvnews.ca/b-c-overdose-crisis-new-public-health-order-issued-after-record-number-of-monthly-deaths-1.5107303>; M. Draaisma, “Toronto had record 27 suspected overdose-related deaths in July,” *CBC News*, August 10, 2020, online: <https://www.cbc.ca/news/canada/toronto/toronto-27-suspected-overdose-related-deaths-july-1.56814591>; A. Bridges, “Drug users, advocates weigh in on why Sask. overdose deaths are at record high,” *CBC News*, September 14, 2020. Online: <https://www.cbc.ca/news/canada/saskatoon/overdose-deaths-record-interviews-addicts-saskatchewan-1.5723019>.
- ⁴⁴ J. Lavoie, Opioid-related overdose deaths in Toronto double year over year, 2020, online: <https://www.toronto.com/news-story/10225307-opioid-related-overdose-deaths-in-toronto-double-year-over-year/>.
- ⁴⁵ J. Rankin & S. Contenta, “Toronto marijuana arrests reveal ‘startling’ racial divide,” *Toronto Star*, July 6, 2017.
- ⁴⁶ K. Samuels-Wortley, “Youthful Discretion: Police Selection Bias in Access to Pre-Charge Diversion Programs in Canada,” *Race and Justice* 1-24, 2019.
- ⁴⁷ R. Browne, “Black and Indigenous people are overrepresented in Canada’s weed arrests,” *Vice News*, April 18, 2018.
- ⁴⁸ A. Owusu-Bempah & A. Luscombe, “Race, cannabis and the Canadian war on drugs: An examination of cannabis arrest data by race in five cities,” *International Journal of Drug Policy*, 1 October 2020, 102937.
- ⁴⁹ See: Office of the Correctional Investigator, *A Case Study of Diversity in Corrections: The Black Inmate Experience in Federal Penitentiaries – Final Report*, 2013; Office of the Correctional Investigator of Canada, *Annual Report 2014–2015 of the Office of the Correctional Investigator*, 2015; Office of the Correctional Investigator of Canada, *Annual report of the Office of the Correctional Investigator 2016-2017*, 2017; Office of the Correctional Investigator of Canada, *Annual report of the Office of the Correctional Investigator, 2012-2013*, 2013.
- ⁵⁰ Release, *A Quiet Revolution: Drug Decriminalisation Across the Globe* (2nd ed), March 2016. See also Global Commission on Drug Policy, *Advancing Drug Policy Reform: A New Approach to Decriminalization*, 2016.
- ⁵¹ E. van der Meulen, S.K.H. Chu & J. Butler-McPhee. “‘That’s why people don’t call 911’: Ending Routine Police Attendance at Drug Overdoses,” *International Journal of Drug Policy* 2020 (forthcoming, on file); J. Butler-McPhee, S.K.H. Chu & E. van der Meulen, *The Good Samaritan Drug Overdose Act: The Good, the Bad and the Ineffective*

(HIV Legal Network, 2020), online: <http://www.hivlegalnetwork.ca/site/the-good-samaritan-drug-overdose-act-the-good-the-bad-and-the-ineffective/?lang=en>.

⁵² Canadian HIV/AIDS Legal Network et al., *Open letter to the Hon. Patty Hajdu, Minister of Health et al.*, May 13, 2020 (updated September 21, 2020), endorsed by more than 170 civil society organizations across Canada, online: <http://www.hivlegalnetwork.ca/site/letter-to-canadian-government-decriminalize-simple-drug-possession-immediately/?lang=en>.

⁵³ Canadian Public Health Association, Decriminalization of personal use of psychoactive substances, position statement, October 2017. Online: www.cpha.ca/sites/default/files/uploads/policy/positionstatements/decriminalization-positionstatement-e.pdf

⁵⁴ Canadian Mental Health Association, *Care not Corrections: Relieving the Opioid Crisis in Canada*, April 2018. Online: https://cmha.ca/wp-content/uploads/2018/04/CMHA-Opioid-Policy-Full-Report_Final_EN.pdf

⁵⁵ Canadian HIV/AIDS Legal Network, “Canada must adopt a human-rights based approach to drug policy,” November 22, 2018. Online: www.aidslaw.ca/site/statement-canada-must-adopt-a-human-rights-based-approach-to-drug-policy/?lang=en.

⁵⁶ T. Wright, “Talks needed on decriminalizing hard drugs to address opioid crisis, Tam says,” *The Canadian Press*, August 22, 2020. Online: <https://www.thestar.com/news/canada/2020/08/22/talks-needed-on-decriminalizing-hard-drugs-to-address-opioid-crisis-tam-says.html>.

⁵⁷ Toronto Board of Health, Item HL28.2: A Public Health Approach to Drug Policy, July 16, 2018 and Toronto Board of Health, Item HL17.2: Toronto Overdose Action Plan: Status Report 2020, June 8, 2020.

⁵⁸ E. Mathieu, “Chief medical officer calls for decriminalization of all drugs for personal use,” *The Toronto Star*, July 9, 2018.

⁵⁹ Santé Montréal, “La directrice régionale de santé publique de Montréal salue les recommandations de Toronto” news release, July 27, 2018. Online: <https://santemontreal.qc.ca/population/actualites/nouvelle/decriminalisation-des-drogues-pour-usage-personnel/>.

⁶⁰ J. Ling, “Seven Chief Public Health Officers Call for Drug Decriminalization, But Justin Trudeau Isn’t Budging,” *Vice News*, September 2, 2020. Online: https://www.vice.com/en_ca/article/935j58/seven-chief-public-health-officers-call-for-drug-decriminalization-but-justin-trudeau-isnt-budging.

⁶¹ Winnipeg Regional Health Authority, Position statement on harm reduction, December 2016. Online: <https://serc.mb.ca/wp-content/uploads/2018/06/HarmReduction-wrha.pdf>

⁶² J. Ling, “Seven Chief Public Health Officers Call for Drug Decriminalization, But Justin Trudeau Isn’t Budging,” *Vice News*, September 2, 2020. Online: https://www.vice.com/en_ca/article/935j58/seven-chief-public-health-officers-call-for-drug-decriminalization-but-justin-trudeau-isnt-budging

⁶³ C. Bains, “B.C. doctor calls for illicit drug regulation to save lives,” *The Canadian Press*, July 26, 2019. Online: <https://www.theglobeandmail.com/canada/article-bc-doctor-calling-for-legalizing-drugs-to-save-lives/>.

⁶⁴ British Columbia Office of the Provincial Health Officer, *Stopping the Harm: Decriminalization of People who use Drugs in BC*, April 2019. Online: www2.gov.bc.ca/assets/gov/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/reports-publications/special-reports/stopping-the-harm-report.pdf.

⁶⁵ A. Woo, “Vancouver mayor calls for drug decriminalization after record year for opioid overdoses,” *Globe and Mail*, March 28, 2018. Online: <https://www.theglobeandmail.com/canada/british-columbia/article-vancouver-mayor-calls-for-drug-decriminalization-after-record-year-for/>;

⁶⁶ “City of Vancouver calls for decriminalization of drug possession,” *CBC News*, March 9, 2018. Online: <https://www.cbc.ca/news/canada/british-columbia/city-of-vancouver-drug-possession-1.4570720>.

⁶⁷ R. Shaw, “B.C. asks Ottawa for drug decriminalization, but hasn't made provincial reforms,” Vancouver Sun, July 22, 2020, online: <https://vancouversun.com/news/politics/b-c-asks-ottawa-for-drug-decriminalization-but-hasnt-made-provincial-reforms>.

⁶⁸ K. Vallier, “St. Catharines Council Endorses Decriminalization of Illicit Drugs,” The Niagara Independent, August 4, 2020, online: <https://niagaraindependent.ca/st-catharines-council-endorses-decriminalization-of-illicit-drugs/>.

⁶⁹ T. Lupick, “Liberal party members overwhelmingly vote for decriminalizing drugs while Trudeau repeats opposition,” Georgia Straight, April 23, 2018.

⁷⁰ See, for example, NDP Convention 2018, Resolution on “Decriminalization of Drug Possession,” 2018; “Green Party would decriminalize all drug possession if elected,” CBC News, September 21, 2019; and individual federal parties’ responses to Canadian HIV/AIDS Legal Network, Federal Election 2019 Questionnaire, September 2019, online: <http://www.aidslaw.ca/site/federal-election-2019/?lang=en>.

⁷¹ Canadian Association of Chiefs of Police, *Decriminalization for Simple Possession of Illicit Drugs: Exploring Impacts on Public Safety and Policing*, 2020, online: http://www.cacp.ca/index.html?asst_id=2189.

⁷² Guideline of the Director Issued under Section 3(3)(c) of the Director of Public Prosecutions Act: “5.13 Prosecution of Possession of Controlled Substances Contrary to s. 4(1) of the Controlled Drugs and Substances Act,” *Public Prosecution Service of Canada Deskbook*, August 17, 2020, online: <https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p5/ch13.html>.

⁷³ See, for example, Anand Grover, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, UN General Assembly, 65th Session, UN Doc A/65/255, August 6, 2010; Anand Grover, *Submission to the Committee against Torture regarding drug control laws*, October 19, 2012; Anand Grover, *Open letter by the Special Rapporteur on the right of everyone to the highest attainable standard of mental and physical health, Dainius Pūras, in the context of the preparations for the UN General Assembly Special Session on the Drug Problem (UNGASS)*, to UNODC Executive Director Yury Fedotov, December 7, 2015.

⁷⁴ Juan E. Méndez, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN General Assembly, 22nd Session, UN Doc A/HRC/22/53, February 1, 2013.

⁷⁵ International Centre on Human Rights and Drug Policy, UNAIDS, UNDP, WHO, *International Guidelines on Human Rights and Drug Policy*, March 2019. Online: <https://www.humanrights-drugpolicy.org/>.

⁷⁶ Global Commission on Drug Policy, *Advancing Drug Policy Reform: A New Approach to Decriminalization*, November 2016.

⁷⁷ United Nations Chief Executives Board, Summary of Deliberations: Segment 2: common United Nations system position on drug policy, UN System, 2nd regular session of 2018, UN Doc CEB/2018/2, January 18, 2019; United Nations Chief Executives Board, *United Nations system common position supporting the implementation of the international drug control policy through effective inter-agency collaboration*, UNCEB, 2nd Session, Annex 1, UN Doc. CEB/2018/2, January 18, 2019.

⁷⁸ If such an approach is taken, then any threshold quantities should:

- be set high to reflect actual use or quantities people are likely to possess for personal consumption and/or small-scale sharing or selling (e.g., including for subsistence), that is determined by a special commission that includes people who use drugs, and periodically reviewed and updated to reflect developments in real-world patterns of use, sharing or selling;
- be clearly understandable and communicated to consumers, law enforcement and the public; and
- serve as floor, not a ceiling — i.e. possession or transfer of a quantity *below* the set threshold is *never* a crime. In the case of possession or transfer of a quantity *above* the threshold, the burden of proof remains on the prosecution to prove intent to sell in order to secure a conviction, be it for possession for the purpose of trafficking or actual trafficking, and a court can still decide, based on the evidence before it

in a given case, that the possession was for personal use and not for the purpose of trafficking, or that the transfer of the substance did not amount to trafficking.

⁷⁹ This calculation excludes costs associated with the use of alcohol and tobacco, and includes cannabis and other criminalized substances, as the survey preceded the legalization of non-medical cannabis. The inclusion of “violent and non-violent crimes that would not have occurred without some substance use” was based on a “comprehensive survey administered to offenders when they are admitted to federal penitentiaries that specifically asks about the role psychoactive substances played in their crimes.” See: Canadian Substance Use Costs and Harms Scientific Working Group, *Canadian substance use costs and harms 2015–2017*, Canadian Institute for Substance Use Research and the Canadian Centre on Substance Use and Addiction, 2020.

⁸⁰ See, for example, Global Commission on Drug Policy, *Advancing Drug Policy Reform: A New Approach To Decriminalization*, 2016 and R. Gonçalves, A. Lourenço & S. Nogueira da Silva, “A social cost perspective in the wake of the Portuguese strategy for the fight against drugs,” *International Journal of Drug Policy* 26:2, February 2015, pp. 199-209.

⁸¹ C. Hastings, C. Kazatchkine and E. Mykhalovskiy, *HIV criminalization in Canada: key trends and patterns*, March 2017; and ongoing tracking of cases by the HIV Legal Network (material on file).

⁸² E. J. Bernard and S. Cameron, *Advancing HIV Justice 2: Building momentum in global advocacy against HIV criminalisation*, HIV Justice Network and Global Network of People Living with HIV (GNP+), April 2016.

⁸³ *R. v. Mabior*, 2012 SCC 47 and *R. v. D.C.*, 2012 SCC 48.

⁸⁴ For example, when used correctly and no breakage occurs, condoms are 100% effective at preventing the transmission of HIV, and condomless sex with a person living with HIV under effective antiretroviral therapy poses no risk of transmission: M. Loutfy, M. Tyndall et al., “Canadian consensus statement on HIV and its transmission in the context of the criminal law,” *Canadian Journal of Infectious Diseases & Medical Microbiology* 25, 3 (2014): pp. 135–140; 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, July 2018.

⁸⁵ S. E. Patterson et al., “The impact of criminalization of HIV non-disclosure on the health care engagement of women living with HIV in Canada: a comprehensive review of the evidence,” *Journal of the International AIDS Society* 18, 1 (2015): 20572; E. Mykhalovskiy, “The public health implications of HIV criminalization: past, current, and future research directions,” *Critical Public Health* 25, 4 (2015): pp. 373–385.

⁸⁶ UNAIDS/UNDP, *Policy Brief: Criminalization of HIV Transmission*, August 2008.

⁸⁷ Global Commission on HIV and the Law (UNDP HIV/AIDS Group), *HIV and the Law: Risks, Rights & Health*, July 2012.

⁸⁸ UN Human Rights Council, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover*, Report on the 14th session, UN General Assembly, agenda item 3, UN Doc. A/HRC/14/20, April 27, 2010.

⁸⁹ UN Committee on Economic, Social and Cultural Rights, *General comment No. 22 (2016) on the right to sexual and reproductive health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc. E/C.12/GC/22, May 2016, para. 40.

⁹⁰ UN Committee on the Rights of the Child, *General Comment No. 20*, 2016.

⁹¹ See the perspectives articulated in the documentary film, *Consent: HIV non-disclosure and sexual assault law*, Goldelox Productions & Canadian HIV/AIDS Legal Network, 2015.

⁹² UN Committee on the Elimination of Discrimination Against Women, *Concluding Observations: Canada*, UN Doc. CEDAW/C/CAN/CO/8-9, November 2016, at paras 42 and 43.

⁹³ Attorney General of Canada, “Directive to Director of the Public Prosecution Service,” *Canada Gazette*, Part I, Vol. 152, December 8, 2018.

⁹⁴ Canadian HIV/AIDS Legal Network, [The Criminalization of HIV Non-Disclosure in Canada: Current Status and the Need for Change](#), June 2019.

⁹⁵ Note that some such guidance has been developed elsewhere: e.g., [Investigation Guidance relating to Criminal Transmission of HIV](#) was developed for police forces in England, Wales and Northern Ireland, and approved by the Association of Chief Police Officers (ACPO). ACPO worked with the community, including the National Aids Trust, to produce the guidance materials.. The development of such guidelines in Canada has previously been recommended by community advocates: e.g., [The criminalization of HIV non-disclosure: recommendations for police: Submissions to the Ontario Association of Chiefs of Police Diversity Committee by the Canadian HIV/AIDS Legal Network and the HIV & AIDS Legal Clinic Ontario](#), February 2013.

⁹⁶ House of Commons, *The criminalization of HIV non-disclosure in Canada*, Report of the Standing Committee on Justice and Human Rights, 42nd Parliament, 1st session, June 2019.

⁹⁷ B. Myles, « De bourreau à victime; de victime à criminelle », *Le Devoir*, February 15, 2008. See D.C.’s story in the documentary [Positive Women: Exposing Injustice](#), Goldelox Productions & Canadian HIV/AIDS Legal Network, 2012.