



January 12, 2023

SUBMISSIONS FOR THE PUBLIC CONSULTATION ON REFORMING THE CRIMINAL LAW REGARDING HIV NON-DISCLOSURE IN CANADA

A. INTRODUCTION

The South Asian Legal Clinic of Ontario (“SALCO”) is a not-for-profit legal aid clinic funded by Legal Aid Ontario that serves low-income South Asians in Ontario. We provide legal services in many areas of law including immigration, income security, family, human rights, gender-based violence, and various areas of poverty law. We are involved in law reform initiatives on issues that impact low-income South Asian and other racialized communities throughout Canada. We believe that a broad response to the problems our clients face can have a greater impact in changing legislation, policy, and unfair practices. Over the years, we have done extensive law reform and advocacy work to improve access to justice and gender equality for low income South Asian women by appearing at the highest levels of court, and making submissions to all levels of the Canadian government, as well as on the international platform.

The Chinese and Southeast Asian Legal Clinic (“CSALC”) is a dynamic community legal clinic which serves low income members of Chinese, Vietnamese, Cambodian and Laotian communities in Ontario. Recognized for its advocacy work on behalf of disadvantaged communities, CSALC is a United Nations accredited NGO with ECOSOC consultative status.

The Black Legal Action Centre (BLAC) is an independent not-for-profit community legal clinic that combats individual and systemic anti-Black racism by conducting research, engaging in structural transformation, and providing legal services to members of Ontario’s low income Black communities. BLAC is funded by Legal Aid Ontario and governed by a volunteer Board of Directors.

The Queen’s Prison Law Clinic (“QPLC”) is a not-for-profit student-based specialty legal aid clinic funded by Legal Aid Ontario that serves federal prisoners located in Kingston, including Warkworth Institution. We assist with institutional court, Parole Board of Canada Hearings, written grievances against the Correctional Service, Human Rights Complaints and test-case litigation at all levels of court. We also provide some support and advice to prisoners on conditional release. We are particularly concerned with the

over-incarceration and systemic discrimination faced by Indigenous and visible minority prisoners and we work to address that concern both at the front line and systemically.

B. OUR POSITION

We recognize the Government of Canada's commitment to work collaboratively with the public in reforming the criminal legal system whereby all individuals especially those from marginalized communities are safer, victims are supported, and offenders are held accountable in accordance to the principles of fundamental justice. Our submissions are in response to the federal government's national public consultation that was launched on October 20, 2022 with regard to reforming Canada's criminal laws on HIV non-disclosure.

We support the Canadian Coalition to Reform HIV Criminalization's ("CCRHC") End Unjust HIV Criminalization Community Consensus Statement and their call to the Government of Canada to take the measures necessary to limit the unjust use of the criminal law against people living with HIV.

C. SUBMISSIONS

Canada's approach to criminalizing HIV non-disclosure has contributed to HIV stigma and the further marginalization of vulnerable people living with HIV. Current laws and policy have systematically perpetuated the undermining of public health efforts to stop the spread of HIV, while disproportionately impacting Black, Indigenous, and racialized communities who are already unjustly overrepresented within the criminal legal system through state-imposed sanctions that target individuals living with HIV specifically from Black, Indigenous, and racialized communities. Many of those who have faced charges or been found guilty experience barriers to housing and employment, social exclusion, poverty, risk of deportation, and increased instances of gender-based violence and abuse.¹ Furthermore, criminalization does not address the rampant gender inequalities and violence that continues to place Black, Indigenous, and racialized women, trans, and gender non-conforming people in a double bind; whereby Black, Indigenous, and Racialized women, trans, and gender non-conforming people are at a significantly increased risk of contracting HIV due to the heightened personal and structural threat of violence stemming from their social location; and whereby Black, Indigenous, and racialized women, trans, and gender non-conforming people who live with HIV face a heightened risk of personal and structural violence against them due to living with HIV.²

¹ Kronfli, N., Linthwaite, B., Sheehan, N. *et al.* Delayed linkage to HIV care among asylum seekers in Quebec, Canada. *BMC Public Health* **19**, 1683 (2019). <https://doi.org/10.1186/s12889-019-8052-y>.

² Patterson S, Nicholson V, Gormley R, Carter A, Logie CH, Closson K, Ding E, Trigg J, Li J, Hogg R, de Pokomandy A, Loutfy M, Kaida A. 2022. Impact of Canadian human immunodeficiency virus non-disclosure case law on experiences of violence from sexual partners among women living with human immunodeficiency virus in Canada: Implications for sexual rights. *Womens Health (Lond)*.

The perverse reality that has been created by criminal legislation in Canada includes the criminalization of these marginalized women who live with HIV and who themselves have been subjected to gender-based violence, in turn facing charges of aggravated sexual assault due to HIV non-disclosure even if disclosure would mean further violence would be inflicted upon them.³

Many people living with HIV perpetually fear the violence they may be subjected to by virtue of disclosing their HIV status to a sexual partner.⁴ There is also a live fear of abusive partners who may make threats to falsely report “non-disclosure” to get the person living with HIV criminally charged and/or deported if they fail to comply to their demands and/or remain silent about the abuse as a means of coercive control – with many women questioning the extent to which the law would protect them from sexual partners “who might dishonestly pursue charges in situations where disclosure actually took place.”⁵

This heightened vulnerability of experiencing violence, threats, and coercive control as a by-product of living with HIV is significantly increased for Black, Indigenous, and racialized women, trans, and gender non-conforming people who continue to be disproportionately impoverished and precariously housed within Canada.⁶ Many women living with HIV who are financially dependent on their abusive partners, particularly women from Black, Indigenous, and racialized communities in Canada whose lineages have historically focused on community and collective care, are forced to remain in these violent relations as a sardonic act of survival within a capitalist first-world country that continues to lack the societal infrastructure required to meet the basic needs of its residents.

D. OUR RECOMMENDATIONS

To this effect, we propose the following recommendations:

- i. Sexual assault charges should be **prohibited** from being used to prosecute allegations of non-disclosure, exposure, or transmission of HIV. Using the law of sexual assault to deal with non-disclosure in the context of consensual sex is harmful to people living with HIV, including the mandatory designation as a sex offender if convicted.
- ii. We propose that any changes to the law should be made to clearly indicate that people who engage in consensual sex who do not pose a significant risk of

³ HIV Legal Network. 2021. HIV criminalization, women and gender-diverse people: at the margins, <http://www.hivlegalnetwork.ca/site/hiv-criminalization-women-and-gender-diverse-people-at-the-margins/?lang=en>.

⁴ *R. v. D.C.*, 2012 SCC 48.

⁵ Greene S, Odhiambo A, Muchenje M, et al. How women living with HIV react and respond to learning about Canadian law that criminalises HIV non-disclosure: ‘how do you prove that you told?’ *Cult Health Sex* 2019; 21(10): 1087–1102.

⁶ Zhao, Y., Shannon, K., Buxton, J.A. *et al.* The prevalence and social-structural correlates of housing status among women living with HIV in Vancouver, Canada. *BMC Public Health* 22, 1804 (2022). <https://doi.org/10.1186/s12889-022-14113-9>.

transmission according to up-to-date scientific research should not be deemed as criminals.

- iii. We further propose that the criminal law should **not** be used in extenuating circumstances for HIV non-disclosure **even when there is transmission**, such as not disclosing due to a fear of violence or instances of non-consent.
- iv. Amendments to the Criminal Code should **not** include the creation of a new HIV-specific offence, which we strongly believe would further **stigmatize and discriminate** against people living with HIV, particularly people who are already vulnerable and marginalized. We instead propose that the Criminal Code should be amended so that the existing offences will be moot in prosecuting for non-disclosure where there is no actual and intentional transmission as well as for extenuating circumstances.
- v. **We strongly propose the end of deportation of non-citizens following conviction**. This policy is inherently racist and unjustly creates **double punishment** against non-citizens who are subjected to deportation, after already facing retribution from the criminal legal system in Canada pursuant to their conviction. **Criminal convictions, including a conviction based on HIV non-disclosure, must not violate the principles of fundamental justice by adversely affecting a person's immigration status.**
- vi. Past convictions should be **reviewed** in order for people living with HIV, who have been criminalized under the harmful and stigmatizing laws against them, will **no longer** be forced to live with the label of being a criminal – particularly for individuals who have been deemed as a 'sex offender' for HIV non-disclosure, such is the case of **most** convictions to date.
- vii. We propose the **allocation of funding** to public advocacy and health organizations to create more legal, medical, and social environments that empower and support **safer disclosure** that is sensitive to the diverse and intersecting identities of people living with HIV.



Submitted by:

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