

Questionnaire on human rights challenges and responses in the context of HIV and AIDS:

**Responses of the Canadian HIV/AIDS Legal Network (Legal Network), a
non-governmental organization in Special Consultative Status with the
Economic and Social Council of the United Nations**

1. General (Maximum 200 words). Are human rights, including but not limited to the rights to non-discrimination, privacy, health, education and information, explicitly incorporated in your existing national plan or national strategy on HIV and AIDS? Please cite the relevant text.

*Leading Together: An HIV/AIDS Action Plan for All Canada (2005-2010)*¹ is described as the “blueprint for Canada’s response to HIV/AIDS to 2010” (p. 2). Recognition, respect and promotion of the human rights of people living with or vulnerable to HIV/AIDS is explicitly stated as part of the vision, mission, values and goals of the document (p. 5).

Human rights specifically included in the body of the document include the right to a “healthy active sex life” (p. 8), the right to the highest attainable standard of health (p. 15), a discussion of HIV-related stigma leading to “unlawful discrimination in housing, employment and health and social services” (p. 11) and discussions of poverty, homelessness and other social determinants of health fuelling the epidemic (pp. 11, 15).

An entire section in the action plan is dedicated to addressing the “social factors/ inequities driving the epidemic”, and describes how in many communities, HIV is only one of a number of pressures that threaten individuals’ health — others being poverty, homelessness, stigma, addiction, violence, untreated mental health problems, lack of employment opportunities, powerlessness, lack of choice, lack of legal status (i.e., undocumented refugees) and lack of social support (p. 26). Accordingly, a number of proposed actions related to human rights are discussed.

2. Challenges: main human rights challenges in the realization of universal access to HIV prevention, treatment, care and support (Maximum 600 words)

2.1. Identify at least 3 key human rights challenges and the population groups particularly affected by these challenges.

2.2 For each of the three key challenges identified, describe: (i) the main causes of these challenges, (ii) the actors that have a role to play in addressing these challenges and, (iii) the factors that may prevent them from taking effective action (capacity and institutional gaps).

1. People who use drugs

Insite, Vancouver's supervised injection facility, has decreased rates of syringe-sharing and deaths from overdose, reduced the risk of HIV and hepatitis C (HCV) transmission and increased the chances of directing drug users to addiction treatment services.² While a trial court judgment protected Insite from closure in 2008³ — a decision affirmed by that province's appellate court in 2010⁴ — the federal Government has appealed further the decision that enables Insite to operate without fear of users or staff being criminally prosecuted, and maintains a moratorium on considering new applications to open any other such facilities.

In 2010, the federal government introduced Bill S-10 to the Senate for consideration. The bill would impose mandatory minimum sentences for certain drug offences, despite a Department of Justice review that concluded the imposition of mandatory minimum sentences for drug offences has little impact on crime and two decades of disastrous experience in the United States with mandatory minimum sentences for drug offences.⁵ Bill S-10 would mean putting more people in prison who are already vulnerable to HIV and HCV infection, where drug use will continue, but often with even higher risks for transmission of such blood-borne infections because prisoners lack access to sterile injecting equipment.

2. People in prison

In Canada, estimates of HIV and HCV prevalence in prisons are at least ten and twenty times, respectively, the reported prevalence in the population as a whole.⁶ The scarcity of sterile syringes leads people in prison to use non-sterile injecting equipment. A 2007 national survey revealed that 15 percent of people incarcerated in federal prisons reported having injected an illegal drug since arriving at their current institution and almost half of those injected with someone else's used needle.⁷

By 2001, Health Canada reported that there were over 200 needle and syringe programs operating in Canada, which have enjoyed both government support and funding.⁸ To date, prison-based needle and syringe programs (PNSPs) have been introduced in over 60 prisons in 11 countries,⁹ but in none of Canada's provincial, territorial or federal prisons. Evaluations of PNSPs have consistently demonstrated that they reduce the use of non-sterile injecting equipment and resulting blood-borne infections, do not lead to increased drug use or injecting, reduce drug overdoses, facilitate referral of users to drug treatment programmes and have not resulted in needles or syringes being used as weapons.¹⁰

Under international law, the rights to health and equality in the enjoyment of human rights (except insofar as necessarily limited by incarceration) are explicitly retained by persons in detention. In particular, prisoners have a right to preventative measures comparable to the treatment and services available in the community as a whole, including PNSPs.¹¹

3. Sex workers

While prostitution is legal in Canada, certain provisions of the *Criminal Code* make illegal virtually every activity related to prostitution and render sex workers vulnerable to violence and HIV. Sections 210 to 213 of the *Criminal Code* criminalize keeping or transporting a person to a “bawdy house”, encouraging or forcing a person to participate in prostitution or to live on money earned from prostitution by someone else, and communicating in public for the purposes of prostitution. Further undermining sex workers’ safety and health, the federal government introduced regulations in July 2010 targeting organized crime that designate keeping a common bawdy-house a “serious offence,” thus providing law enforcement with greater powers to investigate and charge sex workers with an additional criminal offence.¹²

The preponderance of credible evidence demonstrates that the *Criminal Code* provisions contribute to sex workers’ risk of experiencing violence and other threats to their health and safety,¹³ risks that are borne disproportionately by street-based sex workers, which means also the burden of such human rights abuses is born disproportionately by transgender persons, Aboriginal persons or people with drug dependence.¹⁴

3. Response (Maximum 600 words)

3.1. Please describe key legal, policy, programming, budgeting or other measures in place to address the challenges faced by those groups or populations more severely affected by HIV, as well as the measures being taken to overcome the capacity and institutional gaps described in question 2.

3.2 Please indicate whether affected persons participated in the design, implementation and evaluation of these policies, programmes or measures. If so, please describe the participation process.

Federal legislative, policy and budgeting measures are worsening, not remedying, the challenges faced by people who use drugs. In 2007, the federal government introduced its *National Anti-Drug Strategy*.¹⁵ In contrast with previous national strategies, the *National Anti-Drug Strategy* supports law enforcement, prevention and treatment programs — three of the four so-called “pillars” common in many drug strategies — and eliminated the fourth pillar, harm reduction, which includes needle and syringe programs, methadone clinics and supervised injection facilities, all demonstrated to help with HIV prevention and the health promotion of a population particularly affected HIV. Accordingly, the *National Anti-Drug Strategy* allocated \$64 million additional funding to combat the production and distribution of illegal drugs over the next two years, with $\frac{3}{4}$ of the funding directed towards law enforcement and no additional funding allocated for harm reduction programs.¹⁶

In line with this strategy, the federal government has taken steps that undermine the right of people who use drugs to health services, such as challenging the legality of supervised

injection facilities.¹⁷ The federal government has also taken steps that will exacerbate the HIV and HCV epidemic in Canada's prisons, such as introducing a mandatory minimum sentencing bill for drug offences, passing legislation that prolongs the duration of prisoners' incarceration, and refusing to allow community-based needle and syringe programs to operate in federal prisons. Needless to say, people who use drugs and harm reduction experts did not participate in the design, implementation and evaluation of the *National Anti-Drug Strategy*.

With respect to sex work, a House of Commons Subcommittee on Solicitation Laws released a report in December 2006, having been mandated to review *Criminal Code* provisions related to prostitution in order to improve sex workers' safety and recommend changes that would reduce exploitation of, and violence against, sex workers.¹⁸ One of the unanimous recommendations of the 2006 report was that the federal government "recognize that the status quo with respect to Canada's laws dealing with prostitution is unacceptable". A majority recommendation called for "concrete efforts to be made immediately to improve the safety of individuals selling sexual services and assist them in exiting prostitution if they are not there by choice."

Since the release of the report, the criminalization of sex workers has persisted and, further aggravating the potential for human rights abuses against sex workers, new regulations concerning "criminal organizations" designate the keeping of a common bawdy house a "serious offence", for which sex workers can be convicted of participating in a criminal organization.

While the Subcommittee on Solicitation Laws heard testimony from witnesses in public hearings across Canada, including over 100 current and former sex workers, academic and legal researchers, policy experts, social service and health workers, police officers and private citizens, it failed to respond meaningfully in its report to the pervasive harassment and violence that sex workers experience by calling for the repeal of the prostitution-related *Criminal Code* provisions. Moreover, the majority recommendation to "improve the safety" of sex workers has not been realized through any progressive policy or legal changes. With respect to the development of the regressive "criminal organization" regulations, such regulations were informed by discussions with the provinces and territories through meetings of the "Coordinating Committee of Senior Officials – Criminal Justice".¹⁹ Sex workers were not consulted in these discussions, and since the enactment of the regulations, many have spoken out against them, raising serious concerns about the ways in which the regulations ignore sex workers' experience and research that demonstrates how criminal laws contribute to unsafe working conditions for sex workers, thereby increasing their vulnerability to violence.²⁰

4. Achievements (Maximum 300 words)

What are your most significant human rights achievements in the national HIV response? Please describe briefly how these achievements came about and the lessons learnt from the experience.

In Canada, the Legal Network has created an extensive body of research, policy analysis and policy advocacy tools on legal and human rights aspects of HIV/AIDS, which is continually updated and available at www.aidslaw.ca.

One key issue on which we work is the criminalization of HIV non-disclosure, having intervened before the Supreme Court of Canada in the first case to reach the country's highest court on this issue. Without this intervention, the Court's judgment would likely not have contemplated the need to limit the scope of the criminal law in various ways. That judgment is now one basis for a number of *amicus curiae* interventions before provincial Courts of Appeal that aim to limit the scope of criminalization by firmly establishing the legal position that individual people living with HIV do not commit a criminal offence by not disclosing their HIV status in cases where there is no "significant risk" of transmission, including as a result of condom use or in other circumstances of comparable low (or lower) risk (e.g., undetectable viral load).

We are making such interventions in the face of a growing trend toward ever-more expansive use of the criminal law by prosecutors seeking convictions even where the available evidence does not support a finding of "significant risk" of transmission. We are contributing to a growing community movement to demand that Attorneys-General adopt guidelines that would limit prosecutors in their pursuit of such convictions.

¹ Canadian Public Health Association, *Leading Together: Canada Takes Action on HIV/AIDS*, (2005-2010), 2005.

² See for example *Vancouver's INSITE service and other Supervised Injection Sites: What has been learned from research?* Final Report of the Expert Advisory Committee, 31 March 2008 at <http://www.hc-sc.gc.ca/ahc-asc/pubs/sites-lieux/insite/index-eng.php> and T. Kerr *et al.*, "Impact of a Medically Supervised Safer Injection Facility On Community Drug Use Patterns: A Before and After Study," 332 *British Medical Journal* (2006a): pp. 220-222.

³ *PHS Community Services Society v. Attorney General of Canada*, 2008 BCSC 661 (B.C. Supreme Court).

⁴ *PHS Community Services Society v. Canada (Attorney General)*, 2010 BCCA 15 (B.C. Court of Appeal).

⁵ T. Gabor and N. Crutcher, *Mandatory Minimum Penalties: Their Effects on Crime, Sentencing Disparities, and Justice System Expenditures*, Department of Justice Research and Statistics Division, January 2002.

⁶ Canadian HIV/AIDS Legal Network, *HIV and hepatitis C in prisons: the facts*, 2008.

⁷ D. Zakaria *et al.*, *Summary of Emerging Findings from the 2007 National Inmate Infectious Diseases and Risk-Behaviours Survey*, March 2010.

⁸ A. Klein, *Sticking Points: Barriers to access to needle and syringe programs in Canada*, Canadian HIV/AIDS Legal Network.

⁹ R. Lines *et al.*, *Prison Needle Exchange: Lessons from a comprehensive review of international evidence and experience*, Canadian HIV/AIDS Legal Network, 2006 and R. Jürgens, *Interventions to Address*

HIV/AIDS in Prisons: Needle and Syringe Programmes and Decontamination Strategies, WHO, UNODC and UNAIDS, 2007.

¹⁰ *Prison Needle Exchange, Interventions to Address HIV/AIDS in Prisons*, H. Stöver and J. Nelles, “10 years of experience with needle and syringe exchange programmes in European prisons: A review of different evaluation studies,” *International Journal of Drug Policy* 14 (2003): pp. 437-444 and Public Health Agency of Canada, *Prison needle exchange: Review of the evidence*, April 2006.

¹¹ U.N. Committee on Economic, Social, and Cultural Rights, *General Comment 14: The right to the highest attainable standard of health*, 22nd Sess., (2000) UN Doc E/C.12/2000/4, *Basic Principles for the Treatment of Prisoners*, UNGAOR, 45th Sess., Supp. N 49A, UN Doc A/45/49 (1990), UNODC, WHO and UNAIDS, *HIV/AIDS Prevention, Care, Treatment and Support in Prison Settings: A Framework for an effective National Response*, 2006, UNAIDS, “Statement on HIV/AIDS in Prisons to the UN Commission on Human Rights at its Fifty-second session, April 1996,” in *Prison and AIDS: UNAIDS Point of View*, 1997 and OHCHR and UNAIDS, *International Guidelines on HIV/AIDS and Human Rights, Consolidated Version*, UN Doc. HR/PUB/06/9, 2006.

¹² Canada Gazette, *Regulations Prescribing Certain Offences to be Serious Offences*, 13 July 2010.

¹³ G. Betteridge, *Sex, work, rights: reforming Canadian criminal laws on prostitution*, Canadian HIV/AIDS Legal Network, July 2005 and Pivot Legal Society Sex Work Subcommittee, *Voices for dignity: a call to end the harms caused by Canada’s sex trade laws*, 2004.

¹⁴ *Sex, work, rights*.

¹⁵ Department of Justice Canada, *National Anti-Drug Strategy Backgrounder*, February 2008 at www.nationalantidrugstrategy.gc.ca/back-fich/doc2008_02_21_2.html.

¹⁶ *Ibid.*

¹⁷ *Sticking Points*.

¹⁸ *Sex, work, rights*.

¹⁹ Canada Gazette, *Regulations Prescribing Certain Offences to be Serious Offences: Regulatory Impact Analysis Statement*, 13 July 2010.

²⁰ See for example Maggie’s, *Press Release: The Toronto Sex Workers Action Project Objects to Recent Changes to Bawdy House Sentencing Regulations*, 12 August 2010.