



Brief to the Standing Senate Committee regarding Bill C-66, An Act to establish a procedure for expunging certain historically unjust convictions and to make related amendments to other Acts

April 2018

1. OVERVIEW

The Canadian HIV/AIDS Legal Network (the “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. It is the only national organization working exclusively on HIV-related legal issues in Canada, and one of the world’s leading organizations in the field, with an extensive body of human rights-based research and analysis on a range of legal and policy issues related to HIV, including the impact of criminal laws on LGBTQ2S+ communities.

The HIV & AIDS Legal Clinic (Ontario) (“HALCO”) is the only community-based legal clinic in Canada serving low-income people living with HIV. HALCO staff practice a broad range of law, including privacy, immigration, health, human rights, tenancy and income maintenance, and engage in public legal education, law reform, and community development initiatives. Since its inception, HALCO has represented many members of LGBTQ2S+ communities who have been and continue to be affected by criminal laws.

While Bill C-66, *An Act to establish a procedure for expunging certain historically unjust convictions and to make related amendments to other Acts* (“Bill C-66”), was described by Member of Parliament Randy Boissonnault as a law intended to address criminal offences that were used “to victimize LGBTQ2S+ people systematically,” the Legal Network and HALCO are concerned that the bill does not address the full range of laws that unjustly and disproportionately affected and continue to affect LGBTQ2S+ people and inhibit their access to HIV prevention, care, treatment and support. As a group of historians who have researched the impact of criminal laws on LGBTQ2S+ communities has identified:

This restrictive approach ignores the various offenses historically used to criminalize the consensual sexual activities of LGBTQ2S+ communities. This includes the bawdy house law, used against gay bathhouses, but also used against sex workers, who successfully challenged the law at the Supreme Court. Other offenses, including indecent act, obscenity and vagrancy are likewise missing.¹

The Legal Network and HALCO fully endorse the findings of this group of historians, including their recommendations (i) for an amendment to Bill C-66 to establish a clear definition of “historically unjust conviction” that is broad enough to include offences that have been used to criminalize consensual LGBTQ2S+ sexual and gender activities; (ii) to expand the list of offences covered in Bill C-66; (iii) to include criminal prohibitions on bawdy house, indecent act, obscenity and vagrancy; and (iv) for a full repeal of the anal intercourse and the bawdy-house laws from the *Criminal Code*.² In addition, the Legal Network and HALCO will make holistic recommendations on two areas of law that have been excluded from Bill C-66 but which unjustly impact LGBTQ2S+ communities, undermine their access to HIV and other health care interventions and frustrate the national HIV response, and recommend that they be included in the remit of Bill C-66: criminalization of sex work and criminalization of HIV non-disclosure. In

¹ P. Gentile, T. Hooper, G. Kinsman and S. Maynard, *Fix Bill C-66: Gay and Lesbian Historians Speak Out*, February 2018. Available at https://sencanada.ca/content/sen/committee/421/RIDR/Briefs/2018-02-05_BILLC-66_Historians_e.pdf.

² Ibid.

order to meaningfully address historic harms against LGBTQ2S+ communities, Bill C-66 should not only permit applications to expunge criminal charges for gross indecency, buggery and anal intercourse, but should also repeal other laws that have had (and continue to have) serious impacts on the dignity, health and security of LGBTQ2S+ people who sell or trade sex or are living with HIV.

2. CRIMINALIZATION OF SEX WORK

There is substantial overlap between LGBTQ2S+ and sex worker communities. Many sex workers are members of LGBTQ2S+ communities, and the venues and spaces of these two communities have often also been shared. There is also a long, shared history of both communities facing criminalization for consensual sex motivated by similar moral judgments and prejudice, and being targeted by indecency and prostitution-related laws. For example, solicitation and common bawdy-house laws were historically used against gay communities. Indeed, before the Supreme Court of Canada's landmark 2013 ruling in *Canada (Attorney General) v. Bedford*, the definition of "common bawdy-house" included places "kept or resorted to" for "prostitution" or "acts of indecency." In finding the common bawdy-house prohibition unconstitutional, the Supreme Court removed the reference to prostitution in the definition (*Criminal Code*, s. 197).

In *Bedford*, the Supreme Court unanimously declared that the *Criminal Code* prohibitions on keeping or being in a "common bawdy-house" (s. 210), "living on the avails" of prostitution (s. 212(1)(j)) and communicating in a public place for the purposes of prostitution (s. 213(1)(c)) were unconstitutional because they unjustifiably violate the rights of sex workers under section 7 of the *Canadian Charter of Rights and Freedoms* ("Charter") by undermining their health and safety.³ The Supreme Court suspended its declaration of invalidity for one year, until December 2014. In response, in November 2014, the federal government enacted Bill C-36, the so-called *Protection of Communities and Exploited Persons Act* ("PCEPA"), which created a new legal framework that criminalizes many aspects of sex work, including the purchase of sexual services, the advertisement of sexual services, and communication for the purpose of prostitution (including by sex workers).⁴ As a result, a web of criminal offences surround sex work, making it difficult for a sex worker to work without running afoul of the law, and clients and third parties are now criminalized across the board.

For example, the *PCEPA* introduced a new absolute prohibition on purchasing sexual services and re-introduced a prohibition on communication for the purpose of obtaining sexual services by clients *anywhere*, and by sex workers in a public place that is "next to" a school ground, playground or day care centre. These laws, which make sex workers' clients guilty of a crime for any communication to obtain their services, have the same effect as the previous laws, and are particularly harmful for street-based sex workers, who are among the most marginalized people in the industry and were among those overwhelmingly targeted for prosecution under the former "communicating" provision that was struck down in *Bedford*.

The available evidence demonstrates that prohibiting communicating contributes to the following adverse effects:

³ *Canada (Attorney General) v. Bedford*, 2013 S.C.C. 72 (Supreme Court of Canada).

⁴ *Protection of Communities and Exploited Persons Act*, S.C. 2014, c. 25.

- Sex workers who work on the street experience greater displacement, isolation and continued fear of, and antagonism from and towards, police;
- All sex workers experience reduced ability to negotiate clear terms of services with clients. Pressure from clients concerned about arrest to proceed as quickly as possible means less opportunity for sex workers to screen or negotiate with their clients;
- Sex workers' legal right to give full consent is undermined, by not allowing clear and direct communication about services with clients;
- All sex workers face barriers to accessing police protection because of fear of being criminalized or subject to surveillance; and
- Clients and sex workers are less willing to contact police about harmful working conditions, exploitation or trafficking.

The law also prohibits the advertising of sexual services. While an individual sex worker does not face prosecution for advertising their own services, the provision can be interpreted as prohibiting any other party (e.g., a newspaper, website, etc.) from publishing any prostitution-related advertising due to the laws restricting receipt of material benefit. The prohibition on advertising includes the following negative impacts:

- Prohibiting advertising creates significant barriers to working indoors, which research demonstrates is safer than working on the street. The impact of the prohibition is especially pronounced for migrant sex workers, who rely on third parties to advertise because of language barriers and lack of papers;
- Third parties who run newspapers or websites have placed restrictions on the ways that sex workers advertised, with a return to “code language,” which reduces the capacity for sex workers to clearly communicate which services they offer and which they do not. This can increase misunderstandings and frustrations with clients;
- Forum boards where sex workers advertise are also targeted by this law. These forums are vital to sharing information with other workers that could improve security; and
- Framing all third parties as exploitative reduces the opportunities for actual cases of abuse to be identified as the industry moves underground.

PCEPA also created a new offence of “receiving a material benefit,” which criminalizes all third parties⁵ who receive a financial or other material benefit from someone else’s sex work. This provision is excessively vague and complicated, making it difficult to determine who is at risk of prosecution. However, it is clear that the provision will prevent sex workers from creating professional relationships that provide ongoing, secure working conditions. In this regard, the provision creates the same harms as its predecessor, the “living on the avails of prostitution” law.

⁵ The Global Network of Sex Work Projects (NSWP) has outlined why the decriminalization of third parties is important for sex workers’ health and human rights, and has specified that: “The term ‘third parties’ includes managers, brothel keepers, receptionists, maids, drivers, landlords, hotels who rent rooms to sex workers and anyone else who is seen as facilitating sex work”: NSWP, *Criminalisation of Third Parties and its Impact on Sex Workers’ Human Rights*, May 2016. Available at www.nswp.org/resource/criminalisation-third-parties-and-its-impact-sex-workers-human-rights.

The same reasons give rise to concerns about the enforcement of the procuring provisions, which undermine sex workers' ability to legally establish non-exploitive safety-enhancing relationships. The provisions of *PCEPA* targeting "material benefit" contribute to the following harms:

- Sex workers have decreased ability to access the services of third parties that could increase their safety and security;
- Sex workers' personal and professional relationships are criminalized if they cannot be proved to be "legitimate living arrangements";
- Sex workers are unable to benefit from health and safety regulations, labour laws and human rights protection;
- Sex workers experience increased social and professional isolation;
- Sex workers' options regarding where and how they engage in sex work are restricted even though research has established that working indoors is safer than working on the street; and
- Migrant sex workers rely on third parties, and they often get caught up in detention and deportation sweeps when there are anti-trafficking raids—a huge incentive not to report exploitative working conditions.

In addition, the material benefit and procuring provisions are unnecessary, because other provisions of the *Criminal Code* already capture the forms of exploitation and abuse that they seek to prevent.⁶

A wide range of civil society organizations, domestically and internationally, have called for the decriminalization of sex work—meaning removing all laws and policies that make it a criminal offence to sell, solicit, purchase or facilitate sex work or to live off the proceeds of sex work. Most significantly, a large number of sex worker organizations and networks, including the Canadian Alliance for Sex Work Law Reform and the Global Network of Sex Work Projects, support the decriminalization of sex work as a means to realize sex workers' human rights.⁷ Calls for decriminalization have also come from, among others, UNAIDS,⁸ the Global Commission on

⁶ The range of criminal laws that protect sex workers from abuse by third parties and others are set out clearly in House of Commons, Report of the Standing Committee on Justice and Human Rights, *The Challenge of Change: A Study of Canada's Criminal Prostitution Laws*, 2006, Appendix D. Available via www.parl.gc.ca/HousePublications/Publication.aspx?Language=e&Mode=1&Parl=39&Ses=1&DocId=2599932.

⁷ See, for example, Canadian Alliance for Sex Work Law Reform, *Safety, Dignity, Equality: Recommendations for Sex Work Law Reform in Canada*, March 2017, available at <http://sexworklawreform.com/wp-content/uploads/2017/05/CASWLR-Final-Report-1.6MB.pdf>; Canadian Alliance for Sex Work law Reform, *After Bedford: Developing a health and safety framework for sex workers and Canadian Communities*, 2014, available at http://maggiestoronto.ca/uploads/File/after_bedford_140316.pdf; and Global Network of Sex Work Projects, *Consensus Statement on Sex Work, Human Rights, and the Law: A Summary*, 2013, which is guided by "opposition to all forms of criminalisation and all other legal oppression of sex work (including sex workers, clients, third parties, families, partners and friends)," and is available at www.nswp.org/sites/nswp.org/files/ConStat%20PDF%20EngSum.pdf.

⁸ UNAIDS, *Guidance Note on HIV and Sex Work*, 2012. Available at www.unaids.org/sites/default/files/en/media/unaids/contentassets/documents/unaidspublication/2009/JC2306_UNAIDS-guidance-note-HIV-sex-work_en.pdf.

HIV and the Law,⁹ Open Society Foundations,¹⁰ the Global Alliance Against the Traffic in Women (GAATW),¹¹ the UN Special Rapporteur on the right to health,¹² Human Rights Watch¹³ and Amnesty International.¹⁴

Recommendations

Sex workers continue to experience profound human rights violations. While Bill C-66 acknowledges the injustice of criminalizing consensual same-sex sexual activities, Canada continues to police and criminalize consensual sexual activity by criminalizing sex work. This must end. The federal government has an opportunity to create a legal framework that ensures safe working conditions for sex workers (many from LGBTQ2S+ communities) and respects the rights of all people in Canada by taking the following steps:

- Repeal all sex work-specific laws introduced through *PCEPA*;
- Include the expungement of criminal convictions for sex workers and clients in Bill C-66;
- Create new legislative frameworks for sex work that provide meaningful protections against violence and exploitative working conditions and ensure safe working conditions for sex workers, in consultation and collaboration with sex workers and provincial and territorial governments. Consultation should include mechanisms—both financial and social to allow for anonymity—for sex workers living and working in more marginalized contexts to participate;
- Prioritize policies that are founded in sex workers’ well-being rather than criminal intervention;¹⁵ and
- Invest in social programs that prioritize youth and adults in poverty, access to education, homelessness and economic empowerment.

⁹ Global Commission on HIV and the Law, *HIV and the Law: Risks, Rights and Health*, July 2012. Available at <https://hivlawcommission.org/report/>.

¹⁰ Open Society Foundations, *Ten reasons to decriminalize sex work*, 2012. Available at www.opensocietyfoundations.org/publications/ten-reasons-decriminalize-sex-work.

¹¹ Global Alliance Against the Traffic of Women (GAATW), *Statement to the Human Rights Council*, 2012. Available at www.gaatw.org/statements/GAATWStatement_05.2013.pdf.

¹² 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, UN Doc. A/HRC/14/20 2010. Available at www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.20.pdf.

¹³ Human Rights Watch, “Canada’s prostitution bill a step in the wrong direction,” news release, Ottawa, June 18, 2014. Available at www.hrw.org/news/2014/06/18/canadas-prostitution-bill-step-wrong-direction.

¹⁴ Amnesty International policy on state obligations to respect, protect and fulfil the human rights of sex workers, 2016, AI Index POL 30/4062/2016. Available at www.amnesty.org/en/documents/pol30/4062/2016/en/.

¹⁵ For further discussion, see: Canadian Alliance for Sex Work Law Reform, *Safety, Dignity, Equality: Recommendations for Sex Work Law Reform in Canada*, March 2017, available at <http://sexworklawreform.com/wp-content/uploads/2017/05/CASWLR-Final-Report-1.6MB.pdf>; Canadian Alliance for Sex Work Law Reform, *After Bedford: Developing a health and safety framework for sex workers and Canadian Communities*, 2014, available at http://maggiestoronto.ca/uploads/File/after_bedford_140316.pdf; Pivot Legal Society, *Beyond Decriminalization: Sex Work, Human Rights and a New Framework for Law Reform*, 2006, available at www.pivotlegal.org/beyond_decriminalization.

3. CRIMINALIZATION OF HIV NON-DISCLOSURE

Homophobia marked the response to HIV from the outset when the first cases reported in 1981 were labelled “gay-related immune deficiency” (“GRID”). The LGBTQ2S+ community played, and continues to play, a key role in mobilizing the social and political response to what remains one of the world’s greatest public health challenges. This includes resistance to stigmatizing, discriminatory and harmful laws that impede access to care, treatment and support and undermine HIV prevention efforts and access to testing. In addition, gay men (and other men who have sex with men) remain the single largest “key population” represented among those living with HIV in Canada and among new HIV infections each year, according to the Public Health Agency of Canada.¹⁶ The overly broad criminalization of HIV non-disclosure is one of the most pressing issues for people living with HIV in Canada and therefore a pressing issue for the LGBTQ2S+ community. While most of the people who have been charged for non-disclosure in Canada are men who have sex with women, an increasing number of cases are against gay men or other men who have sex with men. Since 2012, when the Supreme Court of Canada last dealt with this issue, 42% of prosecutions have been against men who have sex with men, as opposed to 27% prior.¹⁷

As of today, there have been more than 215 prosecutions in relation to alleged non-disclosure of HIV positive status to sexual partners. This makes Canada a world leader in prosecuting people with HIV, third only to the United States and Russia.¹⁸ People are most often charged with the offence of “aggravated sexual assault,” even in cases where no transmission occurs or the risks of transmission are zero or close to zero. Aggravated sexual assault is one of the most serious criminal offences in the *Criminal Code*. It is a charge traditionally used for violent rape, carrying a maximum penalty of life imprisonment and a registration as sexual offender (presumptively for a lifetime, but for a minimum of 20 years before an application can be made to void the designation).

All legal and policy responses to HIV should be based on the best available evidence, rooted in human rights principles and law, and supportive of HIV-related care, treatment and prevention. Not only is there is no evidence that criminalizing HIV non-disclosure has prevention benefits, the overly broad use of the criminal law is (i) causing considerable harm by increasing stigma and discrimination against people living with HIV; (ii) spreading misinformation about HIV and undermining public health messaging about prevention; (iii) affecting the trust between HIV patients and their physicians and counsellors; and (iv) resulting in injustices and human rights violations. As a result, numerous HIV organizations across Canada and internationally oppose criminal charges for non-disclosure in cases of otherwise consensual sex, except in limited circumstances (such as when people are aware of their status and maliciously infect others).

¹⁶ Public Health Agency of Canada, *Population-Specific HIV/AIDS Status Report: Gay, Bisexual, Two-Spirit and Other Men Who Have Sex With Men*, 2013. Available at www.catie.ca/sites/default/files/SR-Gay-Bisexual-Two-Spirit-and-other-Men-Who-Have-Sex-With-Men.pdf

¹⁷ C. Hastings et al, *HIV Criminalization in Canada: Key Trends and Patterns*, Canadian HIV/AIDS Legal Network, 2017, p. 5. Available at www.aidslaw.ca/site/hiv-criminalization-in-canada-key-trends-and-patterns/?lang=en.

¹⁸ E. Bernard and S. Cameron, *Advancing HIV Justice 2: Building momentum in global advocacy against HIV criminalisation*. HIV Justice Network and GNP+, 2016. Available at www.hivjustice.net/wp-content/uploads/2016/05/AHJ2_final2_10May2016.pdf.

The numerous human rights and public health concerns associated with the criminalization of HIV non-disclosure, exposure or transmission have led not only HIV organizations, but many others, including numerous UN bodies, respected jurists and women's rights advocates (including leading feminist legal academics) 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).¹⁹ In 2013, UNAIDS developed a guidance note providing critical scientific, medical and legal considerations in support of ending or mitigating the overly broad criminalization of HIV non-disclosure, exposure or transmission.²⁰ This document contains explicit recommendations against prosecutions in cases where a condom was used consistently, where other forms of safer sex were practiced (including oral sex and non-penetrative sex), or where the person living with HIV was on effective HIV treatment or had a low viral load.

However, based on the 2012 Supreme Court of Canada decisions in *R. v. Mabior*, 2012 SCC 47 and *R. v. D.C.*, 2012 SCC 48, a person living with HIV in Canada is at risk of prosecution for non-disclosure 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. The use of the criminal law in this manner runs contrary to recommendations by UNAIDS and the other international bodies noted above. It has moved nearly 80 of the country's leading HIV clinicians and scientific experts to issue a consensus statement in 2014 that clarifies the risks of HIV transmission associated with various acts, and in doing so, to state their concern about the way in which the criminal justice system has lost its way in its understanding of the scientific evidence available.²¹ It has also led the Canadian Coalition to Reform HIV Criminalization to release a joint Community Consensus Statement in 2017, endorsed by more than 150 organizations from across the country, denouncing the current overly broad use of the criminal law in Canada against people living with HIV and calling for urgent action from federal, provincial and territorial governments to limit the scope of the criminal law.²²

On World AIDS Day 2017, both the federal and Ontario governments recognized the need to limit the "overcriminalization of HIV" in Canada. Both took a first step forward by recognizing that criminal prosecution for alleged HIV non-disclosure is not warranted in the case where a person living with HIV had a "suppressed viral load." The federal Justice Minister released her

¹⁹ See, for example, UNAIDS/UNDP, *Policy brief: criminalization of HIV transmission*, August 2008, available at www.aidslaw.ca/site/wp-content/uploads/2014/02/1.UNAIDSUNDPposition.pdf; 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, UN Doc. A/HRC/14/20 2010, available at www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.20.pdf; and Global Commission on HIV and the Law, *HIV and the Law: Risks, Rights and Health*, July 2012, available at <https://hivlawcommission.org/report/>; and the perspectives articulated in the documentary film *Consent: HIV non-disclosure and sexual assault law* (Goldelox Productions and Canadian HIV/AIDS Legal Network, 2015), available at www.consentfilm.org/.

²⁰ Joint United Nations Programme on HIV/AIDS (UNAIDS), *Ending overly broad criminalization of HIV non-disclosure, exposure and transmission: Critical scientific, medical and legal considerations*, 2013. Available at: www.unaids.org/sites/default/files/media_asset/20130530_Guidance_Ending_Criminalisation_0.pdf

²¹ M. Loutfy, M. Tyndall, J.-G. Baril, J. Montaner, R. Kaul and C. Hankins, "Canadian consensus statement on HIV and its transmission in the context of criminal law," *Can J Infect Dis Med Microbiol* Vol 25 No 3 May/June 2014.

²² Canadian Coalition to Reform HIV Criminalization, *Community Consensus Statement*, 2017. Available at www.hivcriminalization.ca/community-consensus-statement/.

department's report, *Criminal Justice System's Response to Non-Disclosure of HIV*.²³ The report contains a number of important conclusions warranting a more limited application of the criminal law. For example, the report makes clear that HIV is first and foremost a public health matter and the criminal law should not apply to persons living with HIV if they have maintained a suppressed viral load. The report further states that the criminal law should generally not apply to persons living with HIV who are not on treatment but use condoms or engage only in oral sex (unless other risk factors are present and the person living with HIV is aware of those risks).

In Ontario, the province that has accounted for more than half the prosecutions against people living with HIV to date, the Attorney General and the Minister of Health and Long-Term Care released a joint statement announcing that Crown prosecutors will no longer proceed with criminal prosecutions for alleged HIV non-disclosure in cases where a person with HIV had maintained a "suppressed viral load" for six months (defined as being under 200 copies/ml). The joint statement further indicates that "HIV should be considered with a public health lens, rather than a criminal justice one, wherever possible."²⁴

The federal report and the new Ontario directive to prosecutors are welcome first steps. But what is needed is deeper, broader reform. The over-reach of the criminal law in addressing cases of alleged HIV non-disclosure, both in its definitional scope and its interpretation and application by prosecutors and judges, must be restricted, in the interests of both human rights and public health.

Recommendations

We call on the federal government to limit the scope and application of the criminal law, in keeping with best practices and international, evidence-based recommendations, as follows:

- Limit the use of the criminal law to intentional and actual transmission of HIV;
- At a minimum, in no circumstances should the criminal law be used against people living with HIV who use a condom, practice oral sex, or have condomless sex with a low or undetectable viral load; and
- Ensure that the offence of sexual assault is not applied to HIV non-disclosure.

²³ Government of Canada, Department of Justice, *Criminal Justice System's Response to Non-Disclosure of HIV*, 2017. Available at www.justice.gc.ca/eng/rp-pr/other-autre/hivnd-vihnd/hivnd-vihnd.pdf.

²⁴ Y. Naqvi and E. Hoskins, *Statement in response to the release of the Federal report on Criminal Justice System's Response to Non-Disclosure of HIV*, 2017. Available at <http://clhe.ca/wp-content/uploads/Ontario-AG-and-MOHLTC-WorldAIDSDay2017statement.pdf>.