

## **Brief to the Standing Committee on Justice and Human Rights**

### **Re: *Criminalization of HIV Non-Disclosure***

April 8, 2019

Pivot is pleased to offer qualified support for the Attorney General's new guidelines on prosecution for non-disclosure of HIV status. We remind this committee that Canada has the third-largest number of recorded prosecutions for alleged HIV non-disclosure in the world.<sup>1</sup> These prosecutions are disproportionately of individuals who are marginalized by poverty, race, gender expression, and sexual orientation – people like our sex working clients who continue to labour in a criminalized environment.

We are pleased to see the Attorney General taking steps to lessen the number of prosecutions and allow more consideration of individual circumstances. That being said, the Directive does not go far enough. In our opinion, decriminalization of sex work is the only way to fully respect sex workers' rights and protect their health and safety. We are concerned that even with the new Directive, sex workers may be unfairly criminalized for HIV-related offences that are in actuality related to the stigma and criminalization of sex work.

We know that the criminalization of sex work (1) exposes workers to higher risks of HIV transmission, (2) makes workers vulnerable to exploitative and risky behaviour and (3) prevents access to health care.

#### *1. Criminalization exposes workers to higher risks of HIV transmission*

In Canada, the HIV burden among sex workers is highest among those who are selling or trading sex on the street and this is due to issues such as criminalization, violence, stigma, and poor working conditions that limit their ability to engage in HIV prevention including the correct use of condoms. Most HIV+ sex workers contracted the disease through injection drug use or, more often, through non-commercial sex with a partner.<sup>2</sup>

In 2015, a comprehensive review of all HIV and sex work research over the previous six years demonstrated that biomedical and behavioural prevention efforts alone have had only a modest impact in reducing HIV infections of sex workers. Instead, the review found that structural factors played the largest role. Research has consistently shown that criminalization of sex work as well as police enforcement reduces sex workers' ability to properly screen their clients and negotiate condom use, and to access health services without stigma including HIV care.<sup>3</sup>

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<sup>1</sup> E. J Bernard and S. Cameron, *Advancing HIV Justice 2: Building momentum in global advocacy against HIV criminalisation* (Brighton/Amsterdam: HIV Justice Network and Global Network of People Living with HIV (GNP+), April 2016).

<sup>2</sup> K. Shannon, "HIV prevention, criminalization and sex work: Where are we at?" CATIE Fall 2016

<sup>3</sup> Lazarus L, Deering KN, Nabess R, et al. Occupational stigma as a primary barrier to health care for street-based sex workers in Canada. *Culture Health & Sexuality*. 2012;14(2):139–150.

Any suggestion that sex workers were decriminalized under the *Protection of Communities and Exploited Persons Act* introduced in December 2014 is wholly inaccurate. People selling or trading sex in challenging circumstances such as those working on the street are limited in their ability to keep themselves safe in much the same ways under these new laws as they were under the old. For example, the prohibition on client communication means that sex workers have very little time to assess the safety of a potential client on the street because the client fears detection by law enforcement. Sex workers in these circumstances have much less time to negotiate the terms of the transaction, including the use of condoms which can leave them vulnerable to HIV. In Canada, research has demonstrated that laws that target clients and third parties (such as managers, security and receptionists) have not reduced rates of violence against sex workers or increased their control over their sexual health including HIV prevention.<sup>4</sup>

## 2. Criminalization makes workers vulnerable to exploitative and risky behaviour

The directives still criminalize sexual activity if a condom is not used. This requirement differentially impacts marginalized sex workers. Marginalized sex workers are vulnerable to exploitative practices such as a client refusing to use a condom.

In Canada, most sex workers practice safer sex at much higher rates than the general public. This should not need to be stated as their work requires that their bodies be healthy. However, HIV + sex workers who are living and working in challenging circumstances, might not be aware of their current viral load but still use condoms which have been proven to be 100% effective at stopping the transmission of HIV. There are cases, however, where clients have pressured marginalized sex workers, often with a significant financial incentive, to not use a condom, or has removed it during the course of a sex transaction, or has committed a sexual assault against a sex worker and did not wear a condom.<sup>5</sup>

The direct criminalization of third parties (such as drivers, managers, security) is having an adverse effect on the health and safety of sex workers. It is well established in the literature and confirmed by the Supreme Court of Canada that sex workers enjoy greater safety and better health outcomes when they are able to work together in a fixed, indoor location.<sup>6</sup> Evidence demonstrates that safer work environments and supportive housing which allow sex workers to work together promotes access to health services and reduces HIV risks among sex workers.<sup>7</sup> Those options are now less available as anyone who even appears to be receiving a material benefit in the context of sex work is presumed to be guilty. This has reduced the pool of trusted third parties. Instead, people who are less averse to breaking the law and more likely to engage in exploitative practices with sex workers have stepped in to fill the void. In other words, a legal framework that casts all third parties and clients as exploitative and potentially violent with no evidence to support it creates an environment where violence and exploitation is *more* likely to happen.

Exploitative practices can include demands that sex workers take clients who don't want to use a condom. Migrant sex workers, in particular, lack connections and language skills and are at constant risk of

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<sup>4</sup> K. Shannon et al., "Global epidemiology of HIV among female sex workers: Influence of structural determinants," *Lancet* 385:9962 (2015): 55–71.

<sup>5</sup>Argento, Elena, Putu Duff, Brittany Bingham, Jules Chapman, Paul Nguyen, Steffanie A. Strathdee, and Kate Shannon. "Social cohesion among sex workers and client condom refusal in a Canadian setting: implications for structural and community-led interventions." *AIDS and Behavior* 20, no. 6 (2016): 1275-1283.

<sup>6</sup> 2013 SCC 72.

<sup>7</sup> K. Shannon et al., "Global epidemiology of HIV among female sex workers: Influence of structural determinants," *Lancet* 385:9962 (2015): 55–71.

deportation due to immigration regulations that prohibit them from working in the sex industry. As a result, they are unable to reach out to police and afraid of accessing health care.<sup>8</sup>

### *3. Sex work criminalization prevents access to health care*

The directive says that people will not be prosecuted if they have a suppressed viral load, but sex workers are deterred from accessing health care and are therefore exposed to a greater risk of prosecution than other communities.

Given the structural barriers to comprehensive HIV care for marginalized sex workers<sup>9</sup>, it is easy to foresee circumstances where a sex worker is unaware of their current viral load and so we have concerns about how “less blameworthy” conduct will be assessed under the directives. The stigma regarding sex workers is profound and their conception as vectors of disease by public health bodies traces its roots in modern times to the *Contagious Diseases Act* of 1860 in England.

Sex workers are also confused about the criminalization of HIV transmission with many believing that, were they to test positive for HIV, they would be subjected to surveillance, forced medical intervention and potential criminal sanction *because* they do sex work. These fears can amount to a perverse disincentive to be regularly tested for sexually transmitted infections, including HIV, in the belief that they could not be charged if they didn’t know they had HIV. Rather than “getting to zero” by focusing on groups who might engage in risky behaviours, we are pushing sex workers away from sexual health services that are critical to their health.

### *Conclusion*

Sex workers have demanded for more than 40 years that their work be decriminalized and that laws of general application, such as those prohibiting extortion, forcible confinement, assault, sexual assault, and murder for example, be used to address the harms that can happen to them. We recommend the same with HIV transmission. In other words, exceptional cases of intentional and malicious transmission could be addressed through laws that address homicide or assault. When a specific population is targeted for criminalization such as sex workers or people living with HIV, it increases the stigma against them and can infringe on their human rights to privacy, and to be free from discrimination which, in turn, inhibits their access to health care.

Finally, we note that the Attorney General’s directives will only apply to the 3 territories so they are of limited effect. We trust that you are working with your provincial counterparts to ensure that these changes are adopted in each province.

Our recommendations are as follows:

1. Do not prosecute the transmission of HIV unless it is one of the rare cases in which HIV transmission was deliberate and malicious, in which case use laws intended to address assault or homicide.
2. Decriminalize sex work which is consistent with recommendations by the World Health Organization, the Global Commission on HIV and the Law, the Canadian Public Health Association, the Canadian HIV/AIDS Legal Network, UNAIDS, and Amnesty International, among others.

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<sup>8</sup> SWAN Vancouver Society. “Im/Migrant Sex Workers, Myths and Misconceptions: Realities of the Anti-Trafficked”. (2015)

<sup>9</sup> K. Shannon et al., “Global epidemiology of HIV among female sex workers: Influence of structural determinants,” *Lancet* 385:9962 (2015): 55–71.