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Chair

Mr. Anthony Housefather

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• (0845)

[English]

The Chair (Mr. Anthony Housefather (Mount Royal, Lib.)): Good morning, everyone. Welcome to the Standing Committee on Justice and Human Rights, as we begin our study, pursuant to Standing Order 108(2), on the criminalization of non-disclosure of HIV status.

This is a long-awaited study for many of us. HIV is the only sexually transmitted disease where failure to disclose your status could lead to criminal charges. This committee wants to study whether or not the prosecutorial directives that have been put in place by the federal government, Ontario and B.C. are sufficient; whether there should be changes; or whether it should be removed from the Criminal Code, etc.

We are going to be joined for the next several meetings by a list of really distinguished witnesses. They will help us gain more insight into both what the law should be and also on best practices, in terms of making sure that we're up to date on the latest medical status and on what we might want to do to make sure that people get tested, and whether or not the current law is precluding or deterring people from getting tested.

[Translation]

Joining us today by video conference from Paris is Martin Bilodeau, of the Ontario AIDS Network. He is the national coordinator of the positive leadership development institute program.

Can you hear me, Mr. Bilodeau?

Mr. Martin Bilodeau (National Coordinator, Positive Leadership Development Institute Program, Ontario AIDS Network): Yes, I can hear you loud and clear. Thank you.

The Chair: Great. Since you are joining us by video conference and we have a good connection right now, you'll be going first, once I've introduced the other witnesses.

[English]

We're also joined by Mr. Kyle Kirkup, who is an assistant professor in the Faculty of Law at the University of Ottawa. We have Mr. Alexander McClelland from Concordia University. We have Mr. Richard Elliot, who is representing the HIV/AIDS Legal Network as the executive director.

Welcome.

Mr. Martin Bilodeau: I would first like to thank you for this opportunity to speak to the committee on such an important issue today. I'm perfectly bilingual, so if there are any questions, they can also be in English, though I'll do my speech in French.

[Translation]

Members of the committee, I appear before you today on behalf of my employer, the Ontario AIDS Network, or OAN for short, as a person living with HIV. I am the national coordinator of the positive leadership development institute program, known as PLDI, a leadership program for HIV-positive people with a focus on empowerment. The program is currently available in three provinces.

Since the beginning of the HIV/AIDS epidemic, people living with HIV have been on the front lines, battling against the epidemic. Consider, for instance, the Denver principles and the greater involvement of people living with HIV/AIDS, known as the GIPA principle.

The time has come for those in power to stop isolating and penalizing people living with HIV, many of whom are already marginalized. I am not a lawyer or an expert on the differences in federal and provincial jurisdiction, but I can safely say one thing. Existing law on the non-disclosure of HIV status is, as you probably know, unfair and counterproductive to the objectives of increasing testing and ending the epidemic, as set out in the UNAIDS 90-90-90 target, not to mention the objectives beyond that time frame.

I will now address the usefulness of the federal directive.

While the OAN and I recognize that the Attorney General's 2018 directive for federal prosecutors and 2017 report are steps in the right direction—for which we are grateful—the directive has yet to be fully implemented and is merely a first step.

Even if every province were to adopt a directive identical to the federal government's 2018 directive, it is our view that the Criminal Code would still need to be amended, as Ontario's then Attorney General Yasir Naqvi and then Minister of Health and Long-Term Care Eric Hoskins called for in December 2017, in a joint statement:

It is our hope that with this new report, Minister Wilson-Raybould [now the Honourable David Lametti, Minister of Justice and Attorney General] will take immediate action and consider reforms to the Criminal Code to align with new scientific evidence and reduce the stigma of HIV/AIDS in Canada.

We join the Canadian Coalition to Reform HIV Criminalization in calling on the federal government to consider reforms to the law. Given that criminal law is a federal domain, the OAN maintains that the federal government has a duty, as well as the necessary latitude, to do more than simply propose a directive that applies in just the three territories.

Yes? Is there a problem?

• (0850)

The Chair: Everything is fine. You may continue.

Mr. Martin Bilodeau: In the current landscape, Ontario is, to my knowledge, the only province that has adopted part of the federal directive addressing the U = U Consensus Statement. That is far from optimal. Clearly, the OAN's position is consistent with that of many stakeholders, who maintain that individuals travelling to different parts of the country would be subject to different directives.

If I understand correctly, under the current circumstances, someone living with HIV who uses a condom with a partner receiving preventive treatment, or pre-exposure prophylaxis, would be at risk of prosecution because of the inconsistencies in the various directives. The same is true of the federal directive, which lacks clarity and does not totally rule out the possibility of prosecution in a similar scenario.

In 1967, while justice minister, Pierre Elliott Trudeau proclaimed that there was no place for the state in the bedrooms of the nation, and that statement still holds true as regards our discussion today. Any involvement of the criminal justice system should be limited to cases involving intentional or actual transmission of HIV. The justice system should not penalize an individual for failing to disclose their HIV status under the pretext that they are committing fraud.

In terms of the best way to address non-disclosure of HIV status, I would point to the fact that all UN member states pledged to promote a social and legal environment supportive of and safe for voluntary disclosure of HIV status, further to the 2006 Political Declaration on HIV/AIDS. Canada has yet to follow through on that pledge. The current context of criminalization does not encourage HIV-positive people to come forward publicly and thus become role models. Nor does it protect individuals when disclosing privately. Under the current circumstances, people may enter into a loving relationship from a place of mistrust, which is absurd.

With the tremendous strides made on the treatment front, stigmatization and criminalization are now the biggest issues of concern, according to any group of people living with HIV—or PLWHAs—in any context. Criminalization is an integral part of the stigma we continue to face. The OAN maintains that the best way to address the issue of non-disclosure of HIV status is through education, reduced stigmatization and, of course, access to treatment. Through its positive leadership development institute program and special workshops, the OAN addresses not only the issue of disclosure by people living with HIV, but also leadership building to inspire role models for the community.

The OAN stands with the endorsers of the Community Consensus Statement in calling on all three levels of government to support the development of resources and training to address misinformation, fear and stigma related to HIV. Training should be conducted by

experts in HIV and be extended to judges, police, Crown prosecutors and prison staff nationwide. Better co-operation with the criminal justice system and public health authorities hinges on education and stigma reduction.

The federal government should ensure greater alignment between its directive and provincial directives on criminal prosecution, but that is only part of the solution. The OAN recognizes that aligning provincial directives with the federal directive poses a challenge and therefore echoes the Canadian Coalition to Reform HIV Criminalization in calling for Criminal Code reforms along with sound prosecutorial guidelines, including for provincial Crown attorneys. The two are not mutually exclusive, and both are, in fact, necessary.

Ending the over-criminalization of HIV requires legislative reforms to remove the non-disclosure of HIV from sexual assault provisions and ensure it applies only in cases of actual and intentional transmission.

Although PLWHAs like myself are grateful for the progress that's finally been made on an issue that is so vital to us, our peers and our communities, we urge elected officials to go one step further and amend the Criminal Code, in keeping with expert recommendations such as those of the Canadian Coalition to Reform HIV Criminalization.

• (0855)

Together, let's put a stop to this. Let's make sure that the unfair and ineffective discrimination against marginalized populations comes to an end. Let us work together effectively to put an end to this epidemic.

Thank you for listening.

The Chair: Thank you very much, Mr. Bilodeau.

[English]

We will go to Mr. Kirkup.

Professor Kyle Kirkup (Assistant Professor, Faculty of Law, University of Ottawa, As an Individual): Thank you, Mr. Chair.

Good morning. My name is Kyle Kirkup. I am an assistant professor at the University of Ottawa Faculty of Law.

Over the past decade I have published a series of peer-reviewed articles about the criminal law's regulation of gender and sexuality in Canada, including the criminalization of HIV non-disclosure. I have also written expert reports on LGBTQ human rights issues for the Office of the Correctional Investigator, the Ontario Human Rights Commission and the Ontario Association of Chiefs of Police.

My main point this morning is this. Canada targets people living with HIV for non-disclosure at one of the highest rates in the world. Our current approach leaves people living with HIV with considerable confusion about when they are legally required to disclose their status. It targets marginalized communities, including women. It fuels stigmatizing messages about people living with HIV. As well, it ultimately undermines public health.

To be sure, the federal prosecutorial directive issued in late 2018 was a step in the right direction in order to limit unjust prosecutions.

Now the federal government should take the next logical step, one recommended by a coalition of civil society organizations across Canada. HIV non-disclosure should be removed from the reach of the Criminal Code in all but the clearest of cases where there is the intentional and actual transmission of HIV.

I want to start by just briefly laying out the history of HIV non-disclosure in Canada. In the aftermath of the HIV/AIDS epidemic, it would have been open to Parliament to enact new Criminal Code offences to target HIV non-disclosure or transmission. It chose not to do so. Therefore, beginning in the 1980s, we saw judges graft instances of HIV non-disclosure onto existing Criminal Code offences, varying from common nuisance to administering a noxious substance to criminal negligence causing bodily harm to aggravated assault to aggravated sexual assault and even, in extreme cases, to murder.

This ill-defined, ad hoc approach left people living with HIV with considerable confusion about the precise circumstances under which they were legally required to disclose their status.

After over a decade of legal confusion, the Supreme Court issued its decision in *Cuerrier* in 1998. Here, the court held that people living with HIV had a legal duty to disclose their status whenever there was a so-called “significant risk of serious bodily harm”. Failure to do so constituted fraud within the meaning of paragraph 265(3)(c) of the code, which would transform what would otherwise be consensual sex into aggravated sexual assault. We know that aggravated sexual assault is one of the most serious offences in the Criminal Code. It carries with it the maximum punishment of life imprisonment as well as a mandatory designation as a sex offender.

Following the decision, the confusion did not end, however. Risk of HIV transmission is a notoriously difficult concept to apply, engaging questions about which sexual activities were performed, whether a condom was used, whether the person living with HIV had a low viral load, whether either partner had any other sexually transmitted infections, and a constellation of other factors.

Therefore, again, in 2012 the Supreme Court tried to clarify this legal standard in a case called *Mabior*, this time explaining that people living with HIV had a legal duty to disclose their status whenever there was “a realistic possibility of transmission”. The court went on to explain that, at least in the context of penile-vaginal sex, if the accused person had a low viral count and a condom was present, there was no legal duty to disclose their status.

In the face of this legal regime, and after years of advocacy done by people living with HIV, we started to see the emergence of long overdue prosecutorial guidelines, because this legal standard continued to be very difficult to apply in practice. In 2016, former

minister of justice and attorney general Jody Wilson-Raybould stated publicly that the criminalization of HIV non-disclosure “further stigmatizes those living with HIV”.

Then, two years later, she issued the directive to the Director of Public Prosecutions, which sets out four guiding principles designed to govern prosecutorial decision-making: first, not to prosecute people with suppressed viral loads; second, not to prosecute people where condoms were used or where only oral sex was performed, unless there were other risk factors present; third, to use non-sexual offences with lower levels of blameworthiness in appropriate circumstances; and fourth, to determine if public health authorities had provided services to a person accused of not disclosing their status when determining whether a prosecution would be in the public interest.

While this directive is a step in the right direction, and one that promises to help guide similar kinds of directives being constructed by provincial attorneys general across the country, it is important to underscore the limited jurisdiction of this directive. It only applies to prosecutions done in Yukon, the Northwest Territories and Nunavut.

● (0900)

Despite efforts to clarify the law and issue prosecutorial directives, people living with HIV continue to experience profound harms as a direct consequence of HIV non-disclosure. While the harms are expansive, I want to emphasize at least four. These harms lead me to conclude that statutory amendments are needed.

First, confusion remains about when people living with HIV are legally required to disclose their status. Indeed, the current state of HIV non-disclosure is antithetical to a fundamental precept of criminal law, one that I teach my students in my first-year class. Individuals ought to be able to clearly know what steps they ought to take to avoid contravening the Criminal Code.

Second, there is strong empirical evidence to suggest that the burden of criminalization is not distributed evenly across our communities. In particular, black and indigenous people are disproportionately targeted by criminal prosecutions. On this point, I would direct the committee to review the Canadian HIV/AIDS Legal Network’s 2017 report entitled “HIV Criminalization in Canada: Key Trends and Patterns” that tracks every known prosecution for HIV non-disclosure beginning in the late 1980s and finishing in 2016.

Third, HIV non-disclosure prosecutions fuel stigmatizing messages about people living with HIV. For example, in many instances, HIV non-disclosure prosecutions are subjected to intense media coverage. In 2010, for example, the Ottawa Police Service issued a press release for a man they already had in custody, publishing his name, photo and details of his sexual orientation and his medical condition. Issuing this press release led to a series of sensationalist stories in newspapers such as the Ottawa Sun that continued throughout the trial process. These stigmatizing stories are yet another collateral consequence of the misguided approach to HIV non-disclosure in Canada.

Lastly, the criminalization of HIV non-disclosure runs the risk of undermining public health. By way of a concrete example, health care providers may be placed in the unenviable position of having to provide legal information to people living with HIV about how to avoid coming into conflict with the criminal law. This is simply not the role they ought play.

Ultimately, Canada has the unfortunate distinction of prosecuting people living with HIV for non-disclosure at one of the highest rates in the world. The approach causes very real harms. To be sure, the federal prosecutorial directive issued in late 2018 was a step in the right direction, but the directive is not enough.

The federal government should now begin the process of removing HIV non-disclosure from the reach of the Criminal Code in all but the clearest of cases where there is intentional and actual transmission of HIV. If Parliament undertakes the project of legislative reform, it will be critical to ensure that experts, especially those who have been targeted by unjust prosecutions, are meaningfully consulted. Once and for all, it is time to move away from the misguided approach of criminalizing HIV non-disclosure in Canada.

Thank you.

• (0905)

The Chair: Thank you very much. It's much appreciated.

Mr. McClelland, the floor is yours.

Mr. Alexander McClelland (Doctoral Student, Centre for Interdisciplinary Studies in Society and Culture, Concordia University, As an Individual): Thank you to the Chair and the members of the justice committee.

I'm currently a doctoral student at Concordia University. Later this year, I'll begin a Social Science and Humanities Research Council Banting postdoctoral fellowship in the department of criminology at the University of Ottawa. I'm also a member of the Canadian Coalition to Reform HIV Criminalization.

For my doctoral research, I was funded by the Canadian Institutes of Health Research and Concordia University to examine the experiences of people living with HIV across Canada who have been charged, prosecuted or threatened criminally in relation to alleged HIV non-disclosure. To my knowledge, this is the first qualitative research study, globally, that is focused specifically on HIV criminalization from the perspectives of the people who have lived it.

Today I'll share findings from that study. I've also provided to the committee clerk statements about the experiences of the harms of criminalization from the people who are currently incarcerated.

In speaking directly with people who have been criminally charged, my research calls into question dominant understandings of the courts and media that people living with HIV are violent perpetrators who are actively trying to transmit to others. Rather, what comes to be institutionally understood as wrongdoing is much less obviously so. Because of criminalization, complex and nuanced situations—including people's silence, fear, actual disclosure or in some cases their inability to address their own HIV status—is forced by the criminal justice system into a dichotomous narrative of victim and perpetrator.

I conducted 28 interviews with 16 people from five different provinces. I spoke with five women and 11 men. One of the women identified as a transwoman. This was a diverse group of people who comprise a wide range of experiences across the spectrum of people who are facing criminal charges in relation to HIV non-disclosure. Many of them are socially marginalized, including black and indigenous people, gay men, people who live in poverty and women with histories of street-based sex work. The youngest person I interviewed was in their mid-teens at the time of charges and the oldest was in their mid-fifties.

The interviews consisted of detailed questions about people's experiences from the time they found out they were criminally charged, to, if relevant, their arrest, court proceedings, sentencing, incarceration, release and their lives outside after their sentence. Three of these people had been threatened with criminal charges by police, while 13 had been formally criminally charged—all with aggravated sexual assault. HIV transmission was alleged to have taken place in only one of these cases.

All of the women I interviewed indicated having long histories of sexual abuse by men and discussed a context where disclosure was highly complex due to their lack of power in the relationships. A woman I spoke with was charged with aggravated sexual assault because she had been gang-raped and did not disclose to her rapists. Another woman who was threatened with criminal charges was raped at knifepoint, yet she was the one threatened with charges of aggravated sexual assault. Both had histories of sex work and authorities did not treat their accounts of their sexual assaults seriously. One of these women told me that if she's guilty of anything, she's guilty of being raped.

The charge of aggravated sexual assault was extremely confusing for people because they understood that the sex they had was consensual—outside of those two instances. A majority of the people in the study were concerned about transmitting HIV to someone else. They understood that they acted in a manner so as to protect their partners from potential transmission, such as noting that they took their medications regularly, rendering them uninfected, or that they used condoms, or both. One woman I spoke with handed her partner a condom prior to sex, which he did not use. She is now a registered sex offender. In some cases, people had disclosed to their partners who later went to police and lied about the disclosure having taken place.

Due to being charged with a criminal sanction usually reserved for the most violent, non-consensual, actual sexual assaults, combined with being HIV-positive, the people I spoke with were confronted with intensified forms of punishment, violence and discrimination. This included denial of bail and ultimately incarceration for long periods of time on remand prior to trial or before charges were dropped or stayed, extraordinary release conditions as part of bail, or conditional release that included being mandated to present oneself to police 24 hours in advance of proposed sex with their sexual partner and having the partner consent to sex in front of police. The people I interviewed who had these conditions imposed had undetectable viral loads.

Additionally, people I spoke with told me that there was a widespread lack of knowledge of the current science of HIV by police, lawyers and courts. This put people who were criminally charged in the position of having to educate those tasked with criminalizing them about viral load and transmission. People felt that the police's stigma and ignorance was enabled by the legal context of criminalization.

● (0910)

All but two of the 14 people charged indicated that this was their first-ever criminal charge. Despite this, all but one of them were denied bail due to the perceived severity of the case, and were either held in remand or under house arrest for long periods.

Seven people I spoke with were prosecuted, with five of the seven pleading guilty. The reasons they indicated for taking a plea were the following: having been coerced by their lawyer into pleading despite having undetectable viral loads or having used condoms; being fearful of missing their families; or being ashamed of the charge and of having their HIV status exposed to the public. The longest sentence served was close to 15 years. The shortest sentence served was approximately two and a half years.

From the point of arrest through trial, incarceration and release, people I spoke with described a series of events that were marked by HIV-related stigma, panic, discrimination and fear. People described a range of forms of violence at the hands of government employees, namely police officers and prison staff. These included denial of health care and medication access from corrections employees. One person I spoke with almost died because guards would continually rip up his urgent requests to see a doctor in his face.

Other forms of violence included long periods of incarceration and administrative segregation as well as breaches of privacy wherein corrections officers would disclose their HIV status and

charges in front of others, knowing that physical violence would or could result.

Additionally, there were assaults by police officers and corrections officers accompanied by stigmatizing comments and discriminatory behaviour. One man told me:

I was getting beaten by all the inmates because their corrections officers had disclosed my charge to people on the range. I was on an isolated range for violent murderers and would still get harassed. You know this rape charge and HIV was worse than being a murderer in their eyes. One officer pushed me to the ground naked holding me with a boot to my chest saying he would never touch a man with AIDS.

Another indigenous woman told me, “They treated me like dirt. They only touched me with gloves and would use really heavy alcohol rub afterwards. They talked down to me like I was a non-person, an AIDS person.”

Given the charge of aggravated sexual assault and the resulting registration as a sex offender, people were not able to get employment in areas where they had past experience and expertise. They were denied jobs when applying. Many were on social assistance, even though they wanted to work.

People were regularly denied housing. One person was told, “We don't rent to rapists.” The person had had their charges dropped by the crown but information about their case was widely available online.

All of the participants noted that they failed or did not meet the criteria of the various psychological tests to determine what kind of sex offender they were. A few noted that the tests themselves had caused ongoing psychological trauma. This was due to being forced to watch videos of child pornography and violent sexual assaults, as well as being coerced into defining their normal adult sexual desires as deviant or wrong, just because they had HIV.

The past charge continued to extend into their daily lives by threatening their economic security. One indigenous woman told me, “I'm not allowed to work in the school I used to. I love working with kids, but now the school won't allow me to.” One man told me “To label someone as a sex offender, that's for life. I have to carry this for the rest of my life. I think that's unfair.”

All of the people I spoke with had a very hard time psychologically coping with being understood as a violent rapist. As a result of their experiences of criminalization, all had either tried to commit suicide or had long periods of suicidal ideation. Today, a majority of the people I spoke with live with post-traumatic stress disorder, which has a wide range of impacts on their daily lives.

Through speaking with criminalized people directly, it becomes apparent that applying the criminal law, specifically the laws of sexual assault, causes greater harm, often exacerbating situations that are already marked by stigma, trauma, shame and discrimination.

Thank you.

● (0915)

The Chair: Thank you very much.

Now, last but not least, Mr. Elliott.

Mr. Richard Elliott (Executive Director, Canadian HIV/AIDS Legal Network): Thank you to the members of the committee.

I want to take a moment to thank Alex for sharing those stories of people living with HIV, and what is some really incredible and groundbreaking research, and really important in underscoring to the members of the committee why this is an issue of such concern to people living with HIV and those of us involved in the HIV response in Canada.

The harm that follows from using the criminal law in the overly broad way that is currently being seen in Canada is real; it is deep; it damages people's lives in ways that are vastly disproportionate to whatever the perceived risks of harm may be in a variety of circumstances that are currently caught up in the scope of the criminal law.

I work for an organization called the Canadian HIV/AIDS Legal Network. I'm a lawyer, I've been with this organization for more than 25 years now, and have been co-counsel for us and other organizations as intervenors in a number of the cases that have been mentioned before the Supreme Court and a number of appellate courts across the country.

I have distributed a number of documents to you today, some of which have already been mentioned, that I would like to draw your attention to as I go through my remarks.

The first is a document that was already mentioned by Professor Kirkup, and that is this document that outlines for you the key trends and patterns in HIV criminalization from the late 1980s until the end of 2016. It analyzes all the known prosecutions, and represents the best, most comprehensive analysis of HIV criminalization cases to date in Canada.

Obviously, since it only goes until the end of 2016, it is now slightly dated. I just want to let you know that based on the tracking of cases since then, we can say that approximately 200 people have been prosecuted to date in more than 200 separate instances. Yet despite the advances in science and our understanding of HIV transmission, we continue to see prosecutions being brought in cases where there is simply no scientific basis for doing so.

As has already been mentioned, there is also a disproportionate impact of HIV criminalization on a number of different populations. Among men who have been charged, black men are disproportionately represented. Among women who have been charged, indigenous women are disproportionately represented. In the years since the Mabor decision of the Supreme Court of Canada in 2012, there has been a significant increase in the number of gay men being charged. I think it's also worth noting that of the cases we have

documented, the majority do not involve alleged transmission of HIV.

We have a problem; the data shows it. The harms you've heard about as well, of this broad and consistent use of the criminal law, you've heard in the remarks that have come from Martin and from Kyle and from Alex.

I want to take a moment to draw your attention to an additional document that I've shared with you, which is a summary of the law regarding sex offender registries, because given that the charge most often used now to prosecute allegations of HIV non-disclosure is aggravated sexual assault, if a guilty plea or a conviction follows a trial, it is currently mandatory under the law that this person be designated as a sex offender, and this is presumptively for life, given the charge. There's a minimum of 20 years before you can even apply for the possibility of being removed from the sex offender registry, and you've heard from some of the other witnesses the harms that follow from being designated a sex offender.

Let's keep in mind that we're talking here about circumstances in which the sexual assault described by law is not what we normally think of as a sexual assault. These are not instances of forced or coerced sex; these are instances of consensual sexual encounters where it is alleged after the fact that the non-disclosure of certain information turns that into an offence under the law that should be treated in the law the same as a violent rape. There is a mismatch here between the reality of people's lives and how we negotiate consensual sexual relationships and how the criminal law is being deployed. The consequences are severe.

You've also heard reference—and I'll think you'll hear reference from other witnesses—to the harms that happen not just to individuals, and those have been laid out very eloquently, but the broader public harms to the public interest, including public health.

When it becomes the case that finding out your HIV status means that you risk prosecution and potentially being convicted and designated as a sex offender for life for having consensual sex with a partner, even under the broad state of the law as it stands now, for circumstances in which there was no risk of transmission, or at most, a negligible risk of transmission, that is a real disincentive to getting testing, and there is some evidence to support this concern.

● (0920)

It also undermines the therapeutic relationship between service providers and people looking for health services, because anything you say to a health care worker, a social worker or other support worker can be used against you as evidence in a criminal proceeding, and in fact it has been and is regularly used in these criminal proceedings. In doing so, we conscript the health system and social services into the service of prosecuting people who are looking for support, including support, in some cases, around disclosure to partners and also practising safer sex and taking other measures to prevent transmission.

This is not good public policy. At the end of the day, I would suggest, the harms of HIV criminalization, particularly the broad scope of HIV criminalization that currently is characteristic of Canadian law, significantly outweigh any purported benefits of doing so. In fact, there is an emerging consensus, which has been forged over the years in response to the broad application of the criminal law, that there is indeed a problem and there is indeed a need for change.

We were encouraged to see the former federal attorney general recognize, a couple of years ago, the problem of the over-criminalization of HIV and recognize that steps needed to be taken to address it, to limit the scope of criminalization. The Department of Justice then conducted a year-long study—which, of course, you will have seen—that reached a number of fairly sound conclusions that also reflect the need to limit HIV criminalization, because Canadian law, in the way it has evolved, is too broad and too harsh.

There's particular concern expressed in the Justice Canada report about the use of sexual assault law as a vehicle for dealing with cases of alleged HIV non-disclosure. In fact, that concern is widely shared.

I would draw to your attention a third document, a community consensus statement that has already been referred to by a couple of the witnesses. It was developed by the Canadian Coalition to Reform HIV Criminalization. You'll see on the back page of that consensus statement that 174 organizations across the country, both within the HIV sector and also, notably, beyond it have supported the calls to action that are in this community consensus statement. You'll note the variety of organizations that have supported the calls to action, in terms of both the geographic spread across the country and the number of different sectors that are represented, the number of different constituencies, that are represented here, from local HIV service organizations to legal clinics to the Native Women's Association of Canada to LGBT organizations to women's organizations and beyond. You also have a companion document that addresses some of the detail about how this community consensus statement was developed through a broad national consultation across the country.

It's not just HIV organizations and other community groups that have articulated concerns about the broad scope of the criminal law; it's also scientists. I want to draw to your attention a fourth document that I've shared with you. Published in *The Journal of the International AIDS Society* last year during the international AIDS conference, it is an expert consensus statement on the science of HIV in the context of the criminal law. It reviews in detail the best available science about the risks of transmission under various circumstances. You'll see on the front page the executive summary of the conclusions from those scientists. These are 20 eminent scientists from around the world. The lead author is actually the co-discoverer of the human immunodeficiency virus. It's been endorsed by another 70 leading scientists around the world as well as by the International AIDS Society, the International Association of Providers of AIDS Care and UNAIDS—so the three leading HIV scientific organizations in the world.

You'll see that a key message they articulate is that the criminal justice system often misappreciates or misunderstands the science that we have about HIV and the risks associated with various sexual activity under various sexual acts. That risk of transmission per act is

actually much, much smaller than most people believe. I underscore that point because we have to remember that the criminal law, as it is being deployed in Canada, is operating on the basis that a single act that may pose a statistically negligible risk of transmission can have you treated in law as being equivalent to a violent rapist and designated a sex offender for life, with all of the harms that follow and that you've already heard about.

Scientists themselves have begun to speak out and to say, “We are concerned about the overreach of the criminal law.” This situation exists not just in Canada but elsewhere. I urge you to have regard for what the scientists are saying about the scope of the criminal law.

• (0925)

It's also women's organizations that have spoken out and that share the concern about the misuse of sexual assault law, for a variety of reasons. I believe, as a committee, you have also received a position paper from LEAF, Women's Legal Education and Action Fund, which articulates a number of the concerns about why using sexual assault law is problematic.

I would note that the UN Committee on the Elimination of Discrimination against Women has also specifically recommended to Canada that it limit the scope of criminal law to those cases of actual, intentional transmission of HIV, which, I should note, is consistent with the recommendations from UNAIDS and from the Global Commission on HIV and the Law.

Let me close by noting that we were grateful to see the directive from the former federal attorney general of Canada in December. As others have pointed out, that directive does indeed go some way toward limiting, at least in those jurisdictions where it's applicable, the scope of the criminal law. That is an important step forward.

However, as has also been underscored and is reflected in the community consensus statement that I've shared with you, it's not sufficient. We still need to see reforms to the Criminal Code that would oust the application of sexual assault law—because it's the wrong tool for the job—and that would limit any potential application of any criminal charge to those cases of actual and intentional transmission.

I'll stop there and would be happy to take any questions.

Thank you.

The Chair: Thank you very much.

We will now go to our question period. We will start with Mr. Cooper.

Mr. Michael Cooper (St. Albert—Edmonton, CPC): Thank you to the witnesses.

Mr. Elliott, I'll begin with you.

You provided this report, and you noted that since 1989, there have been some 200 cases, involving you said 200 individuals—

Mr. Richard Elliott: Approximately.

Mr. Michael Cooper: Approximately. I just wanted to clarify.

You further note that the vast majority of those cases—82%, or 163 out of 200—have occurred since January 2004. I'm trying to square those statistics with the statistics that were provided in the December 2017 Department of Justice report, which cited 59 cases between 1998 and April of 2017 involving HIV non-disclosure.

Mr. Richard Elliott: I can't tell you exactly how Department of Justice Canada came up with those numbers. I can tell you that we track every charge or investigation that we're aware of across the country, either by talking to people who are themselves the subject of the prosecution or their defence counsel, or drawing on legal databases where a case has progressed to the point that there is a reported decision of some sort.

That's where the figure that I've given you comes from. It may be, although you'd have to check with Justice, that the figure they're referring to, which was just since...when did you say?

Mr. Michael Cooper: Between 1998 and April 2017.

Mr. Richard Elliott: Yes. Those would be post-Cuerrier decisions, so cases that are post the Cuerrier decision from the Supreme Court of Canada, and it may be that Justice was only referring to reported cases where there's a reported decision in the database.

Mr. Michael Cooper: Right.

Mr. Richard Elliott: But not every case will necessarily get reported in the database.

Mr. Michael Cooper: Okay, thanks for the clarification.

Mr. Elliott, you stated that the vast majority of cases do not involve actual transmission of HIV—fair enough—but at least looking at the reported cases cited by the Department of Justice, the 59 non-disclosure cases that were reported involve other blameworthy conduct, including the deliberate non-use of antiretroviral medication, active misrepresentation of HIV-positive status, absence of remorse, cases involving vulnerable complainants.

Could you speak to that?

Mr. Richard Elliott: Yes.

I'm not sure that the Justice Canada report says that the majority of those cases involved those kinds of factors. Certainly, that would not be the case based on the data we have in our database. I would also underscore that this is why it's really important that our application of the criminal law be informed by the science.

As a general principle, we ought not to be using the criminal law except as a measure of last resort and except in those cases where there is serious harm or serious risk of harm to people. Keep in mind that criminalization has been deployed in many of those cases where there has been one single act or a statistically insignificant likelihood of HIV transmission. This is why I urge you to have a look at the expert consensus statement about the possibility of HIV transmission in various circumstances.

It's also important, I think, for us to draw a distinction between conduct that we may, in some circumstances, consider to be ethically objectionable and what we should be using the criminal law to deal with, especially when we're using one of the harshest tools in the criminal law with some of the most serious consequences. We ought not to be cracking a nut with a sledgehammer; and in some cases

that's what we're doing in a good number of cases where there has been no harm, no intent to harm and no statistically significant risk of harm. In those circumstances, I suggest, going to the law of sexual assault is not a particularly helpful or warranted response.

I think it's also important to underscore that advocates who have been working on this issue have not said there should never be any application of the criminal law. I think you've heard consistently from everyone so far today, and it's the consistent recommendation of UN agencies and others that in those circumstances where there is actual, intentional transmission of HIV, then there is potentially a role for the criminal law to play. In Canada, at the moment, the scope of the law is much vaster than that narrower circumstance.

• (0930)

Mr. Michael Cooper: What about in the context of reckless behaviour or something that rises to a level of negligence? In most upper jurisdictions there are statutes that pertain to that, although sometimes penalties are less than intentional transmission.

Mr. Richard Elliott: Yes. I think it's a good question.

Let me draw your attention to the guidance that UNAIDS, the joint UN program on HIV/AIDS, put out in 2013 that went through, in fairly exhaustive detail, the ethical, medical and legal considerations about the use of the criminal law. I think it is helpful to look at that when we start talking about concepts of negligence or recklessness because those are very fuzzy concepts. Within negligence and recklessness there is a broad interpretation of what rises to that level of moral or mental culpability, and there is a narrower interpretation. Perhaps you want to say, well, what about reckless conduct? Then we have to get into a discussion about when conduct is reckless and when it is reckless enough that it should arguably attract criminal liability.

You will see, for example, if you look at some of the guidance to prosecutors in other jurisdictions, like in the U.K., that it actually gets into detail, some of which is starting to be reflected in prosecutorial directives here. In some circumstances, for example, we should not consider conduct to be reckless. For example, if someone has not disclosed that he or she has HIV to a sexual partner but has used a condom, is that reckless behaviour? I would submit not, particularly given, as the scientists have pointed out, an intact condom correctly used is 100% effective at blocking the spread of HIV. In such a circumstance to treat such a person equivalent in law to a violent rapist seems to me a vast overreach in the criminal law.

I think there is a grey area and we need to get into specifics about what behaviour specifically.... As you've heard from some of the witnesses, people living with HIV still live with this fear and this uncertainty about when the disclosure is actually required. When the risks are so great of falling on the wrong side of that line, i.e., you become a sex offender for life with all that follows, then I think we owe people some clarity in the law. It is a very basic principle in the criminal law, as Professor Kirkup has articulated.

The Chair: Thank you very much.

Mr. Boissonnault.

Mr. Randy Boissonnault (Edmonton Centre, Lib.): Thank you to the panellists.

[*Translation*]

Thank you, Mr. Bilodeau, for joining us from Paris today. That's very nice of you.

[*English*]

This is exactly why we wanted to have the study. We think we are doing a good thing with the prosecutorial directive and we worked hard to see that take place. We wanted to know what we've missed.

As you may know, there is a concurrent study going on at the Senate committee on health that's looking into the health indicators of the LGBTQ2 community. We saw this as members of the justice committee when we did the human trafficking report. There's a difference in the data that the government is able to collect and what people who are working on the ground are able to collect. We also learned some things we didn't expect so, quite frankly, hearing today that people who have been raped are the ones being charged in having to live their lives with this sexual offender label is something I didn't know. It's important for us to know and it's important for us to get this right.

• (0935)

[*Translation*]

Mr. Bilodeau, in a minute or a minute and a half, could you talk about some of the discriminatory situations people living with HIV face on a weekly, if not daily, basis?

Mr. Martin Bilodeau: First is relationship discrimination, which is what we're talking about today.

Second is job discrimination. The fear of HIV and AIDS can run so deep that a doctor or nurse who poses no scientific risk of transmission can still be prevented from practising their profession, even if they are fully qualified.

Third is insurance discrimination. Right now, for instance, I can't get house insurance so that I can purchase a home, a common event in most people's lives. I can't get life insurance either.

Structurally speaking, those are the main types of discrimination I would point to, aside from the fear conjured up by the AIDS hysteria of the 1980s, of course. The public was shown images of people who were dying and who had no prognosis to live, and the stigma from that is still prevalent in society.

Mr. Randy Boissonnault: Thank you. It was nice of you to accept our invitation.

[*English*]

When we have witnesses who come forward and understand the rates of HIV—that knowledge—how many people in Canada living with HIV know their status? We know that the numbers are in the 70% to 80% range. In Europe, it's much higher. Do you see any link between the low stigma rates in Canada and the criminalization regime that is in place right now, Mr. Elliott?

Mr. Richard Elliott: Do you mean the low levels of knowledge?

Mr. Randy Boissonnault: Yes, the low levels of knowledge here in Canada.

Mr. Richard Elliott: Yes. As I think I noted, becoming exposed to the risk of prosecution, even for engaging in things that pose no or a negligible risk of transmission to a sexual partner, is a disincentive to finding out your HIV status. Frankly, when I speak to people, I tell them to seek anonymous testing, if possible, because there are real legal repercussions that arise instantly—

Mr. Randy Boissonnault: To knowing your status.

Mr. Richard Elliott:—some of which are unfair, and to divulge as little information as possible to the testing provider, which is not really good from a public health perspective if you're shutting down conversation—

Mr. Randy Boissonnault: We have a perversion of the health system due to the justice system.

Mr. Richard Elliott: Our public health objectives are running into conflict with the overly broad use of criminal law and, frankly, I think the public health objective is the thing that ought to take precedence here. When the criminal law does more harm than good, let's go with the things that we know actually work, which are public health interventions.

Mr. Randy Boissonnault: I'm going to go for a minute to Professor Kirkup and then back to you.

What changes should we see in the law, from a statutory perspective, that would do what you're asking us to do?

Prof. Kyle Kirkup: That's a good question. I was grappling with this question. I think we need to go to paragraph 265(3)(c), which is the fraud provision of the Criminal Code. What you could think about doing is defining fraud to exclude HIV non-disclosure of status. Keep the fraud provision potentially on the books, but carefully circumscribe the definition of fraud such that it would not apply to HIV non-disclosure of status, so—

Mr. Randy Boissonnault: Intentional transmission of the virus would still, then, satisfy the condition of fraud vitiating consent?

Prof. Kyle Kirkup: You could do it that way, or you could say that the other Criminal Code offences that exist on the books—perhaps criminal negligence causing bodily harm—outside of the scope of sexual assault would apply in that circumstance.

Mr. Randy Boissonnault: You're prepared to help us get it right?

Prof. Kyle Kirkup: I think what's really important is that you have the right actors around the table when you do that, because at the moment it's still early days, but one thing I would want to do is make sure that, for example, you had folks from the Women's Legal Education and Action Fund at the table. They've come out with a position statement, which is generally supportive of what you've heard today, but I think we're at the point where that's where the conversation needs to go.

Mr. Randy Boissonnault: I'll pause you there.

Mr. Elliott.

Mr. Richard Elliott: I would just like to note that the Canadian Coalition to Reform HIV Criminalization has actually convened an initial think tank to look at different options for Criminal Code reform. We've made a request to the justice department to meet with them to look at different options and at the pros and cons of different amendments that might be brought forward to the Criminal Code to achieve what we're proposing.

There is some thinking that has been done here, but I think it would be really important for Justice to actually sit down with scientific experts, legal experts, people living with HIV and others to actually work through this, because this is not a simple question.

• (0940)

Mr. Randy Boissonnault: Of course.

Mr. Richard Elliott: There are pros and cons to different approaches, so we should look at that carefully.

Mr. Randy Boissonnault: Putting on my other hat for five seconds, if we can connect you with the LGBTQ2 Secretariat as well, that will be an important piece for that discussion.

The Chair: Thank you very much.

Mr. Garrison.

Mr. Randall Garrison (Esquimalt—Saanich—Sooke, NDP): Thank you very much, Mr. Chair, and thank you to the witnesses for being here today. Also, thank you for your moderation.

I have to start by saying that, 30 years after Canada lost a generation of the talents of gay men and the families lost their love, we're still dealing with the stigmatization. We're still having to organize as a community and come to Parliament to demand action from a government that is so slow to act.

I want to thank Mr. McClelland for bringing the testimony of those who are actually being impacted.

I'm glad we're here, I'm glad we have the directive and I'm glad we're doing the hearings, but I'm sad that it occurs at this point in a Parliament. We haven't even begun the process of figuring out how to reform the criminal law, so this will not happen until after the next election.

I hope one of the outcomes of these hearings is that members of Parliament are committed to this being an early piece of the agenda of the next Parliament.

I was recently in Whitehorse, meeting with Blood Ties, an organization that's a front-line service delivery group for those living with HIV. Their big concern was that, even though the prosecutorial directive is in place, there's been no education around that in the

north. Therefore, the people most likely to be affected have no knowledge of the change in attitude of prosecutors.

I want to ask Mr. McClelland about that, in terms of those most likely to be affected.

Do they have knowledge that we're even moving in this direction, or is it still the stigmatization and the threat of prosecution that rules in their minds?

Mr. Alexander McClelland: A majority of all the people I spoke with were uncertain of their legal obligations. One young man I spoke with, after recently testing HIV-positive and going on HIV medications, was criminally charged within six months of finding out his HIV status. He was rendered virally undetectable and understood that, if he took his medications, he wouldn't transmit. He thought he was acting in a reasonable manner and that he wouldn't be criminally charged. His doctor told him he was uninfected, that he could have sex without condoms, and that he was not able to transmit the virus. He understood he was acting in a responsible, reasonable manner, and he was still criminally charged.

There is a lot of confusion out there. There is a context of fear, where people are uncertain of their legal obligations.

Also, no, there is no legal education. I think all the people I spoke with, after being incarcerated and serving their time, still said they had been provided with no education or support about how to disclose and felt more confused about disclosure and more trauma and stigma about disclosure than ever before. Therefore, even for the people who were sentenced, they still were uncertain.

Mr. Randall Garrison: One of the other things that came up in our conversations in the north was the status of the prosecutorial directive. The question was whether we should go and do a bunch of education.

What status does this have in law? Is this likely to change? Could another Attorney General or another government revoke this directive?

I'm not sure who's the expert here. Mr. Kirkup, perhaps you are. What's the legal status of this directive? How firm is the prosecutorial directive?

Prof. Kyle Kirkup: I don't think it's very firm at all, because if another government comes to power, the prosecutorial directive could be changed fairly easily. In the way that it was created, it could be taken away without any kind of a formal process.

Mr. Randall Garrison: A third thing we talked about, then, was capacity building in rural, remote and indigenous communities, both in dealing with HIV and generally in the LGBTQ community, and the fact that—as has historically been true—upper-middle-class gay white men dominate the organizations and the flow of funds to actually deal with these kinds of questions to rural and remote communities is quite limited.

One of the things that was suggested was that, in the new fund Mr. Boissonnault's secretariat has, there be some kind of earmarking of funds for rural, remote and indigenous LGBTQ and HIV organizations to build their capacity.

My question is to Mr. Bilodeau in terms of the Ontario AIDS Network.

How do you see the flow of resources in capacity building in these areas?

Mr. Martin Bilodeau: Through leadership programs and workshops, we're trying to give opportunities to each different priority populations to express and develop their tools so that they can become leaders in their own community and move forward that agenda. Another situation is in regard to B.C. and to more remote populations, where the PLDI program has really had an impact on people who started their own agencies and their communities and such. I think that's what I can say for now.

● (0945)

Mr. Randall Garrison: Mr. Elliott, in terms of access to anonymous testing, I've had people say to me that everyone has access to testing. What would your response be to that?

Mr. Richard Elliott: I don't think that's true. I think it depends on where you are, to go back to your point about rural and remote communities. The reality is that even if you do have access to anonymous testing, if you test positive, once you want to get connected to treatment, your anonymity will be gone. There will be a record in the health system that you have HIV. There will be records of your viral load over time, assuming that you have access to viral load monitoring. That material will be and has been subpoenaed for use in criminal prosecutions, so it doesn't get us out of the bite.

Mr. Randall Garrison: Thank you.

The Chair: Mr. Fraser.

Mr. Colin Fraser (West Nova, Lib.): Thanks very much, everybody, for coming here today and helping us understand this better.

I'd like to start with you, Mr. Kirkup. You suggested that the modifications or reforms to the Criminal Code should ensure that the only cases criminalized are those where there is actual and intentional transmission, and then you referred to section 265(3)(c), dealing with fraud. Is that the only thing you think would need to be changed in the code in order for what you'd like to see, the actual intentional transmission, to be fulfilled?

Prof. Kyle Kirkup: That's an interesting question. I think we still, in terms of procedure, have to have the right actors around the table before we make that decision, because this is a complex issue. However, if you were to ask me if I could connect the dots to the harms of the use of aggravated sexual assault as the operative offence, the bull's eye on this would seem to be section 265(3)(c). That's the provision that the Supreme Court interpreted to include HIV non-disclosure of status, which would vitiate consent, turning what would otherwise be consensual sex into aggravated sexual assault.

If I were thinking about where we ought to go, the interpretation of the fraud provision seems to be the clearest path, but I would want the right experts around the room. I'd want people living with HIV.

I'd want women's rights organizations, HIV-sector organizations, other criminal law experts, to think more about that, but that would be my initial impression for this committee.

Mr. Colin Fraser: I take it from what you're saying that anything below that standard should not be criminalized at all. Mr. Cooper referenced negligence or recklessness or other standards of mental elements in a criminal matter. You would think anything below actual knowledge would be insufficient to be part of the criminal law?

Prof. Kyle Kirkup: Yes, that's my position, and it goes back to the point I made. I teach first-year criminal law at the University of Ottawa, and one of the basic precepts of criminal law is that you're supposed to be able to pick up the code, go to the relevant offence, and make a decision about whether or not to commit the act. You can't go to the code at the moment and figure out when you're legally required to disclose your status, because this amorphous leaning on aggravated sexual assault and a realistic possibility of transmission is not generally understood. People living with HIV don't know what that means. Police officers don't know what that means. Courts don't know what that means.

If we're committed to clear, consistent guidelines set out in the Criminal Code, that's the direction I think we need to go in.

Mr. Colin Fraser: Okay, thank you.

Mr. Elliott.

Mr. Richard Elliott: If you want to oust the use of sexual assault provisions, then addressing how fraud has been interpreted in the assault provision in section 265 is a way to do that, as Professor Kirkup has mentioned. That's an important objective. However, think about, as has also been mentioned, limiting the scope of criminal law generally, whether it's under sexual assault law or other offences, to only those cases of intentional actual transmission is another important objective.

We can do part of the job by dealing with the sexual assault law as it has been interpreted through the courts, but that's only part of the job. We need to think about how we can make sure that other provisions in the criminal law are not used in an equally broad fashion, albeit without some of the equally harsh consequences like sexual-offender designation. There will still be problematic, overly broad use of the criminal law unless we limit it through other potential amendments to intentional and actual transmission.

● (0950)

Mr. Colin Fraser: Do you know how many cases there have been in Canada that would meet that high standard of actual intentional transmission?

Mr. Richard Elliott: There have been very few, and I'd say there are very few in the world. That's because, to go back to what Alex said, this notion of a person living with HIV intentionally trying to infect other people is actually something of an urban myth. There may be the occasional isolated case where such a thing happens, but it is not by any means the predominant set of circumstances captured by the broad scope of the criminal law as it currently stands.

Mr. Colin Fraser: Mr. Elliott, I'll stick with you.

Mabior in 2012, as I understand it, was meant to clarify the Cuerrier decision in 1998. I don't know how successful it was in assisting people in understanding what the threshold is.

But since 2012, my understanding is that there's been a decline in the number of non-disclosure of HIV cases.

Is that connected to the Mabior decision or are other reasons at hand?

Mr. Richard Elliott: I think that's a really great question. Probably multiple factors are at play that explain what you have observed.

The first thing that I would note, if you look at the trends and patterns document that I shared with you, in the immediate aftermath of the Mabior decision, because of a problematic and very wonky interpretation of the Mabior decision, there were at least 10 cases in which people were charged even though they had an undetectable viral load, meaning there was effectively no risk of transmission. Nine of those were in Ontario.

In the years following that, we have seen a reduction in the number of prosecutions coming forward. I think that is in part because of the advocacy work that has been done by organizations supporting defence lawyers and equipping them with the latest available science. That science has increasingly become clear and communicated to decision-makers like prosecutors in some jurisdictions. It has been possible to convince them that okay, maybe charges shouldn't be going forward in cases where someone has an undetectable viral load because there is no risk of transmission in such a circumstance.

There's been a lag for the criminal justice system to catch up with where science has evolved. But in too many cases we're still seeing that the science is accepted on some fronts like the viral load issue. But the equally strong science about the effectiveness of condoms is still not being accepted by prosecutors in many jurisdictions. People who are using condoms are still being prosecuted, even though this has been the HIV prevention measure recommended over and over again, from the beginning of the epidemic. People are acting responsibly by using condoms yet are still being criminalized as if they're violent rapists. That to me seems a real mismatch.

Mr. Colin Fraser: I have one other quick question for everyone, if you could chime in.

Is there a model jurisdiction in the world where this is dealt with?

You talked about the United Kingdom. We know there are different directives across Canada.

Mr. Richard Elliott: We couldn't point to one model jurisdiction. I think there are a few where there are good features we could learn from and adapt to the Canadian context.

The U.K., specifically England and Wales, is the first jurisdiction to have adopted a guidance for its prosecutors. It has been helpful. It has not been a full solution to the problem, which is a lesson we should learn from Canada, if we needed more evidence from beyond our own borders about how directives are insufficient in themselves, important though they may be.

We can also look to jurisdictions like California, for example, that has a fairly narrowly crafted offence in its law about when criminal charges may apply. I don't suggest every feature of the California legislation should necessarily be replicated here. I think there's room for improvement. It is an example of a jurisdiction where they have taken a much narrower approach to when the criminal law might be applied. We could look to a few of them in coming up with something that fits in our legal context here.

Mr. Colin Fraser: Thanks.

That's my time, I'm sure.

The Chair: Yes.

Thank you very much. Everybody on this panel was incredibly helpful. You gave excellent testimony. We really appreciate it. I think it will help the committee very much in our deliberations.

I will ask members of the next panel to come forward. We will briefly recess for a second while we change the panels.

● (0950)

(Pause)

● (0955)

The Chair: We will resume.

It is a pleasure to be joined by our second panel of the day.

[Translation]

We have with us Léa Pelletier-Marcotte, a Lawyer and Coordinator for the Human Rights and HIV/AIDS Program at the Coalition des organismes communautaires québécois de lutte contre le sida.

Welcome, Mrs. Pelletier-Marcotte.

Mrs. Léa Pelletier-Marcotte (Lawyer and Coordinator, Programme Droits de la personne et VIH/sida, Coalition des organismes communautaires québécois de lutte contre le sida): Thank you.

[English]

The Chair: By video conference, we have Prof. William Flanagan, who is the dean of the Faculty of Law at Queen's University.

Welcome, Dean Flanagan.

Professor William Flanagan (Dean, Faculty of Law, Queen's University, As an Individual): Thank you.

The Chair: From Pivot Legal Society, we have Ms. Kerry Porth, who is a sex work policy researcher, who is also joining us by video conference.

Welcome, Ms. Porth.

Ms. Kerry Porth (Sex Work Policy Researcher, Pivot Legal Society): Thank you.

The Chair: Perfect.

In order to make sure we don't lose the video conference folks, we'll start with Dean Flanagan, for about eight minutes, and then go to the others, after which we'll do questions.

Dean Flanagan, the floor is yours.

Prof. William Flanagan: Okay. Thank you very much.

Members of the committee, thank you for the opportunity to appear before you today. The issue of criminalization of non-disclosure of HIV is a serious one, and I'm pleased that the Standing Committee on Justice and Human Rights is studying the matter.

As you know, Canada has the unfortunate distinction of being one of the most aggressive countries in the world in terms of the criminalization of HIV non-disclosure. This has resulted in the prosecution of a wide number of cases that, in my view, did not warrant prosecution and the application of criminal law.

It's important to note that it is now well established that the possibility of HIV transmission from an HIV-positive person with an undetectable viral load as the result of effective treatment is, according to the U.S. Centres for Disease Control, effectively no risk. That is, "U equals U": undetectable equals untransmittable.

For that reason, it is important that the December 2018 federal directive providing prosecutorial guidance on HIV non-disclosure states that prosecution shall not proceed in cases of HIV non-disclosure "where the person living with HIV has maintained a suppressed viral load...because there is no realistic possibility of transmission".

As you know, however, the directive only applies to federal Crown attorneys and is limited to prosecutions in the territories. There are still many regions of Canada where prosecutions may proceed, notwithstanding this federal directive.

There are also other limits to the directive. Prosecutions can still proceed even in the absence of any transmission of HIV and may proceed even under the most serious charge of aggravated sexual assault, which carries a maximum sentence of life imprisonment and mandatory designation as a sex offender.

I know many of those appearing before you today will outline in greater detail the remaining problems associated with the criminalization of HIV non-disclosure in Canada, notwithstanding the federal directive. However, today I will focus on the public health impact of the overuse of criminal law in this context.

I had the privilege of serving as the chair of a recent national working group, convened by CANFAR, the Canadian Foundation for AIDS Research. I believe each of you has been given a copy of our report, "Ending the HIV Epidemic in Five Years", released in August of last year. The report was authored by a diverse group, including medical doctors and scientists, leaders from prominent HIV organizations and public health organizations, and people with lived experience from across Canada. The report also has the great virtue of being only eight pages long, so I would encourage you to read it.

In the report, we note that there are about 63,000 people in Canada living with HIV, but only 86% of them are diagnosed, which means there are about 9,000 individuals in Canada with undiagnosed HIV infection. For those diagnosed with HIV, only 81% are on antiretroviral treatment. This means another 10,000 individuals in Canada are diagnosed with HIV but not on treatment.

As noted in the report, we know that enhanced testing options, including point-of-care testing and self-testing, can dramatically increase rates of HIV testing. We also know that those on effective antiretroviral treatment cannot sexually transmit HIV.

If we can dramatically scale up testing options and access to care and support for treatment, we can get to the point where new infections will become rare and we can effectively end the HIV epidemic in Canada within the next five years.

That is the call to action in our report, but our report notes the many barriers that continue to exist. Point-of-care testing is dramatically underutilized in Canada, and self-testing options available in pharmacies much like a pregnancy test, now commonly available in most countries around the world, remain unavailable in Canada. All of this needs to change.

We also note that the stigma associated with HIV affects people's willingness to be tested and seek and engage in care. It affects their sense of self, community and belonging, their access to services and their ability to seek social support. The unwarranted criminalization of HIV non-disclosure greatly contributes to the ongoing stigma associated with HIV. Criminalization, often accompanied by sensationalized media reports that disproportionately focus on racialized people, damages HIV prevention efforts by discouraging HIV testing for fears that it may lead to criminal prosecution.

● (1000)

Criminalization erodes trust in voluntary approaches to HIV prevention and testing. It helps spread misinformation about the nature of HIV and its transmission. The overuse of criminal law compromises the ability of people living with HIV to engage in the care they need due to the fear that their HIV status and discussions with medical professionals may be used against them in criminal prosecutions.

Unwarranted criminalization has a devastating effect not only on those accused and convicted, as you have heard today; it also has a highly detrimental effect on broader HIV prevention and care initiatives. This detrimental effect was recently demonstrated in a Canadian study published in 2018 that explored the prosecution of non-disclosure of HIV status and its impact on HIV testing and transmission among HIV-negative men who have sex with men, MSM. The study interviewed 150 HIV-negative MSM and found that 7% were less or much less likely to be tested for HIV due to concerns over potential prosecution. The authors estimated that this 7% reduction in testing would cause an 18.5% increase in community HIV transmission, largely as a result of the failure of HIV-positive but undiagnosed MSM to access care and reduce HIV transmission by the use of effective antiretroviral treatment. In other words, the study demonstrated that concerns over potential prosecution reduced the number of HIV-positive people who were willing to be tested and access the care they needed to eliminate the possibility of transmission to another person. Concerns over potential prosecution deterred people from seeking testing and treatment. This was demonstrated to increase the risk of transmission to others.

In short, ending the HIV epidemic in Canada in the next five years will not happen if we continue to add to the stigma and misinformation associated with HIV by the ongoing and unwarranted overuse of criminal law measures. It will not happen if the over-criminalization of HIV non-disclosure continues to deter testing and treatment. We need to get this balance right, not only for those individuals inappropriately and unfairly caught up under Canada's current criminal law but also to advance our larger objective to end the HIV epidemic in Canada.

• (1005)

The Chair: Thank you very much.

We will now go to the Pivot Legal Society.

Ms. Porth.

Ms. Kerry Porth: Good morning. Thank you for inviting me to speak to the committee today.

My name is Kerry Porth and I am the sex work policy researcher at Pivot Legal Society. Pivot is an organization located in the Downtown Eastside of Vancouver that works with communities affected by poverty and social exclusion to develop solutions to complex human rights issues.

Our work is focused in several areas, but I will limit my remarks today to my own area of expertise, which is sex work and the law. I am here to offer Pivot's qualified support for the Attorney General's new guidelines on prosecution for the non-disclosure of HIV status.

I will remind this committee that Canada has the third-largest number of recorded prosecutions for alleged HIV non-disclosure in the world. 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 lower the number of prosecutions and to allow more consideration of individual circumstances. That being said, the directive does not go

far enough. In our opinion, the decriminalization of sex work is the only way to fully respect sex workers' rights and to 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, one, exposes workers to higher risks of HIV transmission. Two, it makes workers vulnerable to exploitative and risky behaviour. Three, it prevents access to health care.

On the first point, that 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. 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 sex workers who are living with HIV contracted the disease through injection drug use or, more often, through non-commercial sex with an intimate partner.

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 roles.

Research has consistently shown that criminalization of sex work and police enforcement reduce sex workers' ability to properly screen their clients, negotiate condom use and access health services without stigma, including HIV care.

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 streets, are limited in their ability to keep themselves safe under the new laws in much the same way 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. Such 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 the rates of violence against sex workers or increased their control over their sexual health, including HIV prevention.

On the second point, criminalization makes workers vulnerable to exploitative and risky behaviour. The directive still criminalizes sexual activity if a condom is not used. This requirement differentially impacts marginalized sex workers who are vulnerable to exploitative practices, such as clients who refuse to use condoms.

•(1010)

In Canada, most sex workers practice safer sex at much higher rates than the general public, and this should not need to be stated, as their work requires that they have a healthy body. However, sex workers living with HIV, who are living and working in challenging circumstances, might not be aware of their current viral load but still use condoms, which are proven to be 100% effective at stopping the transmission of HIV.

There are cases, however, where clients have pressured marginalized workers, often with a significant financial incentive, to not use a condom, or have removed it during the course of a transaction, or have sexually assaulted a sex worker and did not wear a condom.

The direct criminalization of third parties, such as drivers, managers and 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. Evidence demonstrates that safer work environments and supportive housing, which allow sex workers to work together, promote access to health services and reduce HIV risks among sex workers.

Those options are now less available, as anyone who even appears to be guilty of 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 that, creates an environment where violence and exploitation are more likely to occur.

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

On the third point, 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, it is easy to foresee circumstances where sex workers are unaware of their current viral load, and so we have

concerns about how “less blameworthy” conduct will be assessed under the new 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—

•(1015)

The Chair: Ms. Porth, I just wanted to let you know that you're at eight and a half minutes. I ask you to take one minute to wrap up, please.

Ms. Kerry Porth: No problem.

The Chair: Thank you.

Ms. Kerry Porth: I'll note that the Attorney General's directives will only apply to the three territories, so they are of limited effect. I trust that you are working with your provincial counterparts to ensure these changes are adopted in each province.

Our recommendations are as follows. Do not prosecute the transmission of HIV unless it is in one of the rare cases in which HIV transmission was deliberate and malicious, in which case use laws that have general application. 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.

The Chair: Thank you very much.

[*Translation*]

It is now Mrs. Pelletier-Marcotte's turn.

Mrs. Léa Pelletier-Marcotte: I'd like to begin by thanking the chair, the clerk and all the committee members for inviting the Coalition des organismes communautaires québécois de lutte contre le sida, or COCQ-SIDA, to share its views on the criminalization of HIV non-disclosure, specifically in relation to the recent directive issued by the former Attorney General of Canada.

Since being tasked with responding to the criminalization of HIV exposure, the COCQ-SIDA has publicly and consistently objected to the use of criminal charges as a way to deal with the HIV and AIDS epidemic, for both public health and human rights reasons.

As a member of the Canadian Coalition to Reform HIV Criminalization, the COCQ-SIDA fully endorses the Community Consensus Statement published in November 2017 and signed by more than 170 organizations to date.

In the statement, the coalition called on the Attorney General of Canada and provincial attorneys general to develop prosecutorial guidelines based on current scientific knowledge in order to end the unjust use of the criminal law against people living with HIV.

The COCQ-SIDA therefore welcomed the federal directive providing prosecutorial guidance issued by the former Attorney General of Canada in December of last year. The directive essentially builds upon the findings of Justice Canada's December 2017 report, "Criminal Justice System's Response to Non-Disclosure of HIV".

According to the report, the criminal law should apply neither to persons living with HIV who have maintained a suppressed viral load—in other words, under 200 copies per millilitre of blood—nor to persons living with HIV who are on treatment, use condoms or engage only in oral sex unless other risk factors are present. In both cases, there is no realistic possibility of transmission.

The federal directive goes further in limiting the use of the criminal law against people living with HIV than does the measure adopted in Ontario, which established a moratorium on prosecuting individuals for HIV non-disclosure in cases where the individual has maintained a suppressed viral load for six months, regardless of what the sexual activity was, whether a condom was used or whether the person was receiving treatment.

Now I'd like to talk a bit about the situation in Quebec. Even though the COCQ-SIDA has been calling for a directive limiting the use of the criminal law in cases of HIV non-disclosure for nearly a decade, no formal measures have been adopted or issued.

That doesn't mean, however, that nothing has been done. Efforts have been made over the years to limit prosecution in HIV-related cases. A stakeholder working group was set up to bring together representatives across sectors—government, justice, health, public safety and community. The objective was to take account of recent criminalization developments, the negative impact of criminal prosecution on public health and current scientific knowledge on HIV.

Quebec's justice ministry and Office of the Director of Criminal and Penal Prosecutions cited other reasons for not adopting a specific directive, primarily an insufficient number of reported cases. By our count, however, approximately 13 cases of HIV non-disclosure have been prosecuted since the 2012 Mabior and D.C. decisions. That said, Quebec has nevertheless made efforts to limit the use of the criminal law, including the appointment of designated prosecutors for HIV-related cases.

Despite our repeated demands, however, Quebec appears to have no plans for a clear prosecutorial directive as of now.

In the absence of a clear public directive, a person cannot know for sure whether their behaviour could lead to criminal charges. The lack of a clear directive can give rise to ill-advised situations within the provincial justice system, situations that illustrate genuine confusion or cast doubt on the appropriateness of existing guidelines. I'll give you an example.

● (1020)

In recent months, we've seen prosecutions being dropped after the attending physician of the accused confirmed the individual's viral

load and the absence of any transmission risk. Had there been a clear directive in place, these prosecutions would have been avoided altogether, not to mention all the trouble caused to the accused. Of course, we were still glad that the prosecutions were eventually dropped.

In a mid-March decision, the Court of Appeal of Quebec held the following:

As argued by the respondent, evidence of the appellant's viral load has no bearing on the charge of aggravated sexual assault taking into account the facts of the case. Since a condom was not used during the sexual activity, the fact that the appellant's viral load was low or undetectable at the time of the events in question is not sufficient to rule out the realistic possibility of HIV transmission.

It is therefore hard to believe that, without a clear directive, the designation of prosecutors to handle HIV-related cases will ensure the consistent application of provincial law if, on one hand, viral load is considered a sufficient reason to drop a prosecution, but, on the other hand, judges on Quebec's highest court are told that viral load is not relevant in assessing whether a realistic possibility of HIV transmission exists and they maintain that idea in their decisions.

Right now, there is no way for a person living with HIV in Quebec to know whether their viral load shields them from prosecution in the event that they do not disclose their status to a sexual partner.

These issues arise because, in Canada today, the potential for government intrusion in the bedrooms of people living with HIV and their sexual practices varies significantly depending on where in the country they happen to be.

In the current context, a person could wind up in prison for engaging in sex without using a condom in Longueuil, but be shielded from criminal charges had they done the same in Whitehorse.

At the risk of overusing a concept of administrative law that lends itself well to parallels, it seems to me that people living with HIV should be able to have some reasonable expectation of outcome, to know the law as it applies to them and to have some certainty as to how the law will be applied.

It should therefore come as no surprise that the inconsistent interpretation countrywide of the realistic possibility of transmission test, established by the Supreme Court, gives rise to confusion within the community. Keep in mind the burden of that confusion falls on the shoulders of people who, very often, are already marginalized.

What comes next? Given the troubling inconsistency that prevails across the country, the federal government's work is not done. It can and must do something. The government must undertake legislative reforms to limit the unjust use of the criminal law against people living with HIV, as per the second measure called for by the Canadian Coalition to Reform HIV Criminalization in its Community Consensus Statement.

The decision to call for Criminal Code reforms was carefully considered, because we recognize the challenges involved, but a strong and, especially, lasting response is necessary.

What exactly those reforms should look like has yet to be determined, but certain elements are clear, as highlighted by other witnesses. The reforms must ensure, on one hand, that sexual assault provisions do not apply to HIV non-disclosure and, on the other hand, that the criminal law apply only in very rare cases of intentional transmission and in no other circumstances.

In conclusion, committee members, the federal directive is merely the first step in a much more extensive process of legislative reform. Although the directive announced by the federal government certainly goes further than some of the measures taken by the provinces, it remains a harm reduction measure. Even if every province were to adopt a directive on how to interpret the realistic possibility of transmission of HIV, only legislative reforms would ensure that the criminal law applied only to cases of intentional HIV transmission.

We look forward to continuing to work with you and our partners on this issue.

Thank you.

• (1025)

The Chair: Many thanks to the witnesses.

We will now move into questions.

[English]

We are going to go to Mr. Cooper.

Mr. Michael Cooper: Thank you, Mr. Chair.

I'll begin with Ms. Pelletier-Marcotte.

In the last part of your presentation, you touched on some of the legislative measures you would like to see the federal government undertake. You spoke about amending paragraph 265(3)(c). Would that also encompass situations in which there was intentional transmission? What do you propose in that regard? I know you were cut off, so maybe just elaborate.

Mrs. Léa Pelletier-Marcotte: Yes. I skipped a little bit on that.

The proposal of the reform would be twofold. First would be to amend the relevant sections and the currently applied sections of the Criminal Code to make sure they do not apply in cases of HIV non-disclosure.

The second aspect would be to maybe create another HIV-specific measure to make sure that it would remain in cases where the transmission is real and intentional.

It would be twofold. First, amend those sections to make sure that they do not apply to cases of HIV non-disclosure. Second, create maybe a new clause that would make sure that one would be applied in cases of intentional HIV transmission.

Mr. Michael Cooper: Just to be clear in terms of my understanding, you're suggesting, in terms of this issue of non-disclosure where it is intentional, where it is deliberate, creating a specific offence, and that way other sections of the Criminal Code

would not be applied, such as the one on aggravated sexual assault and other provisions in the Criminal Code.

Mrs. Léa Pelletier-Marcotte: Yes. As I mentioned, creating something on specific, intentional HIV transmission would be one of the things we would recommend, but also making sure that rather than applying every actual occurrence regarding sex acts, sexual transmission or sexual assault in cases of HIV non-disclosure, it would be specifically intentional transmission.

Mr. Michael Cooper: I understand. Thank you for that clarification.

You spoke of the federal directive issued by the former attorney general. After referring to it, you cited the Ontario directive. You talked about a suppressed viral load for six months, but I didn't catch exactly what you were talking about there, so could you perhaps elaborate on that just so I can understand?

Mrs. Léa Pelletier-Marcotte: Right after Justice Canada published the report in 2017, the Ontario government adopted a moratorium on prosecutions for people who had demonstrated that they had maintained a suppressed viral load for the past six months prior to the infection. It's based specifically and only on the viral load of the accused with no regard to the use of a condom or to the type of sexual activity that was involved, contrary to the federal directive.

Mr. Michael Cooper: Thank you.

That's my time.

• (1030)

The Chair: We're going to go to Mr. McKinnon.

Mr. Ron McKinnon (Coquitlam—Port Coquitlam, Lib.): Thank you, Chair.

I would like to talk a little bit more about the explicit provision in the Criminal Code for an HIV offence.

Absent somewhat perverse outcomes whereby victims of rape themselves are charged with aggravated assault, if we had a specific provision in the Criminal Code for this, would it preclude charges under provisions for attempted murder, for administering a noxious substance, and so forth?

[Translation]

Mrs. Léa Pelletier-Marcotte: A new offence specific to intentional HIV transmission would also need to stipulate that other Criminal Code provisions that had been used in HIV non-disclosure cases in the past could not apply. It should only be possible to prosecute the intentional transmission of HIV under that specific criminal charge. Then, we are talking about an actual sexual assault or what have you. That could be determined. However, only a new Criminal Code provision should address the notion of HIV transmission.

[English]

I don't know if I answered your question.

Mr. Ron McKinnon: One of these documents we got from the previous panel suggests that provisions such as this should require proof that the person intended to transmit HIV, proof that the person engaged in sexual activity that was likely to transmit the virus, and proof that HIV was actually transmitted, and, in the case of a conviction, a penalty that is proportionate to the actual harm and cause.

Would you agree with those provisions?

[Translation]

Mrs. Léa Pelletier-Marcotte: Yes. I didn't have time to cover it, and I'm sorry for the inconvenience I just caused, but any new Criminal Code provision or amendment should make clear both *actus reus* and *mens rea* related to the offence, that is, the actual and intentional transmission of HIV. I therefore agree with everything in the report.

[English]

Mr. Ron McKinnon: Thank you.

Dean Flanagan, would you like to comment on this as well, regarding the provision of an explicit offence in the Criminal Code and what it should look like?

Prof. William Flanagan: My own sense is that an explicit provision in the Criminal Code does raise some concerns in that having an HIV-specific offence might also enhance the stigma around HIV, which is my major concern. At the same time, it's important that the current Criminal Code be applied in a way that does not lead to unwarranted prosecution and conviction. My sense is that in the absence of some change in the jurisprudence—for example, in Canada the Supreme Court can still prosecute cases of non-disclosure where there was no actual transmission of HIV—clarifying all of this would require a specific amendment to the Criminal Code. For this reason, I would support the comments made earlier by Léa on this point.

Mr. Ron McKinnon: First of all, I'd like to compliment you on your document, “Ending the HIV Epidemic in Canada in Five Years”. I think it's a laudable goal.

You indicated that one of the problems was the lack of self-testing in Canada. You seemed to indicate that this was available elsewhere in the world, and I was wondering why it is not available in Canada.

Prof. William Flanagan: That's a great question. It's widely available in the United States, in Europe and in many developing countries in the world.

Canada has been very slow to implement this. It would require regulatory approval by the federal agency, which is under way right now. Certainly, this is a part of our report, and we've been actively advocating for it. We're working with a number of companies that are prepared to provide self-testing kits in Canada, and we're seeking regulatory approval. We're hoping to expedite that as soon as possible.

Of course, it will be important to roll out these self-testing kits throughout Canada and to make sure that anyone who purchases a self-testing kit will be immediately and easily linked to care in the event that they are found to be HIV-positive.

This is a major objective of our report. For a whole variety of reasons, Canada has been slow to adopt self-testing as a strategy in HIV prevention and treatment, and we hope to change that.

• (1035)

Mr. Ron McKinnon: Are these tests considered reliable?

Prof. William Flanagan: Yes, the tests are highly accurate and easily applied. They can be done by either a blood prick or a saliva test. They're very accessible, low cost and demonstrated to be highly effective around the world.

Mr. Ron McKinnon: Thank you, those were my questions.

The Chair: Mr. Garrison.

Mr. Randall Garrison: I want to start by thanking Kerry Porth for getting the issue of decriminalization of sex work back before the justice committee, it's something that I have been committed to as an MP.

I want to ask maybe you to state the obvious. When we look at those who've been prosecuted for non-disclosure of HIV, how are sex workers represented in that group?

Ms. Kerry Porth: I honestly don't know what the numbers are on that. I would say, however, that because so many of the prosecutions are directed at highly marginalized people, it's possible that sex workers were some of those people, but it hasn't been explicitly stated. There is a fear among sex workers that if they're known to be HIV-positive they could be criminalized and surveilled by public health. So it creates a fear around criminalization. The nature of their work and the fear of HIV non-disclosure creates a perverse disincentive to testing.

When we're talking about the numbers of people who are likely living with HIV without knowing it, I would count a number of marginalized sex workers in that group. If we can remove from their work at least one layer of stigma and one sort of fear of being criminalized, I think more would be tested, and more could start receiving care, including critical preventative care.

Mr. Randall Garrison: That's great, thank you.

Dean Flanagan, I want to thank you for giving me an update on self-testing. I asked the Prime Minister in the House in December about self-testing, and he said he would be willing to work with me on this. I didn't hear from him. I wrote to the Minister of Health the next day and asked what was happening with self-testing. You've given me more information than I've gotten from the government on this.

When you say we're trying to expedite the regulatory approvals, what kind of time frame are we looking at here? Self-testing to me is a critical gap in the provision of HIV services in this country.

Prof. William Flanagan: I'm very pleased to hear that you're interested in the matter. The national working group would be delighted to work with you in any capacity to enhance the access to self-testing in Canada.

As I mentioned, we're working with a number of providers. In fact, one of the leading self-testing kits is produced by a Canadian company that curiously cannot be sold in Canada, because we do not yet have regulatory approval to do so.

One of my colleagues has received a number of major grants and has been undertaking research to demonstrate the effectiveness and accuracy of these tests. We're hoping that within the next six to 12 months we will obtain regulatory approval, and then we're going to be working very vigorously to make sure that self-testing kits are made widely available across Canada.

Mr. Randall Garrison: One of the things I've run across with the federal government when we talk about testing is there is a tendency to say this is the responsibility of the provinces. Once we get beyond the regulatory aspects of self-testing, can you see a role for the federal government in running pilot projects or promoting the use of self-testing?

Prof. William Flanagan: Yes. As you point out the regulatory matter is federal, so that's squarely within federal jurisdiction. We're actively working with the federal regulatory authorities to expedite this process.

I think there's also a federal role in the broader policy around ending the HIV epidemic within the next five years. Of course, much of this will fall within provincial jurisdictions such as provision of care, which is a very important part of provincial jurisdiction.

I think, however, that federal leadership in highlighting the possibility that we can truly end this epidemic within five years...if the federal government takes a lead in conjunction with its provincial partners to enhance access to testing and care. Likewise, I think a very important role for the federal government is to restrict the unwarranted prosecution of non-disclosure, as I mentioned in my earlier remarks.

•(1040)

Mr. Randall Garrison: As a gay man of a certain age, the eradication of HIV within five years is a phrase I never thought I'd hear. I do want to thank you.

Prof. William Flanagan: It is definitely possible. We have all the knowledge and the means to make it happen.

Mr. Randall Garrison: Thank you very much.

Ms. Pelletier-Marcotte, you talked about a separate HIV transmission or non-disclosure offence. I have a great deal of concern about that.

Aren't there already existing provisions of the Criminal Code that would take care of those very limited number of cases of deliberate harm and intention to harm by non-disclosure or deliberate attempts to transmit HIV?

[Translation]

Mrs. Léa Pelletier-Marcotte: Without a doubt, it's something that will have to be considered. The legislative reforms and what they will look like were the subject of discussion. Indeed,

[English]

the jury's still out about what they should look like.

[Translation]

In connection with the think tanks mentioned by the witness in the previous panel, two options were proposed. The first is to amend the existing provisions, specifically those related to sexual assault, so that they do not apply in the case of HIV non-disclosure. The second is to make sure that only cases involving an intent to transmit HIV or actual and intentional transmission are covered by the Criminal Code. That means making sure the criminal law applies only to those cases.

What will that look like? Will it take the form of an existing provision but one that is less stigmatizing than those covering sexual assault? Perhaps. Will a specific offence dealing with the intentional transmission of HIV be necessary? Perhaps. I'm just trying to show the importance of taking a two-phased approach. The first phase seeks to make sure the sexual assault offences do not apply to HIV non-disclosure, thus removing the stigma that goes along with that, and the second phase seeks to make sure only the intent to transmit HIV is subject to criminal charges.

Basically, that could mean adopting a specific provision or using an existing one. It would have to be determined.

[English]

Mr. Randall Garrison: Thank you.

I also want to thank you for—

The Chair: Mr. Garrison, you're over your time now, so I have to go to the next questioner.

Mr. Randall Garrison: Thanks for raising the issue of inconsistency in the Criminal Code across the country.

The Chair: Ms. Khalid.

Ms. Iqra Khalid (Mississauga—Erin Mills, Lib.): Thank you to the witnesses for your testimony today.

I'll start with Ms. Pelletier-Marcotte.

You spoke in your testimony about the discrepancy between provincial prosecutorial directives and federal.

Can you talk a little about the impact that discrepancy has and what we can do to have a complementary kind of guidance for the prosecution?

[Translation]

Mrs. Léa Pelletier-Marcotte: As you know, the federal government is responsible for developing the criminal law and determining what constitutes criminal conduct, but it is the provinces that apply the law.

Our focus is the non-disclosure of HIV status. The only guidance came in the form of Supreme Court decisions on what constituted a realistic possibility of transmission further to the charge of aggravated sexual assault, in cases involving the disclosure of HIV status. There may have been some consistency in application, but determining how to apply the instruction set out by the Supreme Court was still up to judges. Even then, clear differences emerged in how provinces were treating the Supreme Court's rulings.

Given the federal government's involvement and the fact that very few provinces adopt directives or guidelines on how to interpret the Supreme Court decisions, what constitutes a realistic possibility of transmission varies tremendously across the country, from B.C. to Nunavut. How the proverbial guillotine of the criminal law falls on people living with HIV differs drastically, depending on whether they are in Hull or Ottawa, for instance.

It can be likened to schizophrenia, in that people living with HIV don't really know how the state or the judicial system will interfere in their lifestyle, sex life and ability to thrive. If they can be deemed sex offenders, depending on where they travel to, how are they supposed to apply the U = U principle and lead a full and fulfilling life?

• (1045)

[*English*]

Ms. Iqra Khalid: Thank you kindly.

Ms. Porth, if I can turn to you now, there is a lot of data out there that shows the intersectionality of these prosecutions. We see that there's an overrepresentation of black men who are prosecuted under these provisions.

Can you talk a bit about how we as a federal government can approach a fairer system of developing these laws, taking into account race and the overrepresentation of certain races?

Ms. Kerry Porth: The recommendation is that you don't create new laws, that you would only prosecute very malicious and intentional HIV transmission and that you would use laws of general application.

The law doesn't appear to be colour-blind, right? It tends to fall more heavily on certain populations, and there certainly seems to be a trend of a lot of prosecutions against black men, due to really racist assumptions.

I think you need to address this through public education as well. I noticed in one of the articles I read about the new directive—and the comment stream underneath, which is always very enlightening—that the Canadian public is still woefully ignorant about HIV/AIDS.

I haven't seen any real public education in a long time. I was in first-year university when the crisis hit, and I watched friends I was going to university with start dying. People remember that; they don't remember that it's a chronic but manageable disease now, that people aren't running around deliberately infecting people.

Some leadership by the government in terms of public education, I think would be important as well.

Ms. Iqra Khalid: Thank you.

I think that's all the time I have.

The Chair: I want to thank all of our witnesses again.

[*Translation*]

We are grateful for your participation. Your input will certainly help our study.

[*English*]

Also, for those who joined us by video conference, thank you so much for giving us your time.

I'm going to suspend the meeting so that we can move to an in camera session on witnesses for a different study we're going to be doing.

Thank you again so much.

[*Proceedings continue in camera*]

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