

Received via email July 13, 2018

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Ms. Jennifer Evin Jones, Executive Director

Ms. Katrina Jensen, Co-Chair

Pacific AIDS Network

Email: [evin@pacificaidnetwork.org](mailto:evin@pacificaidnetwork.org)

Dear Ms. Jones and Ms. Jensen:

I am responding to your email of June 25, 2018, in which you share your concerns about the BC Prosecution Service's (BCPS) revised policy: Sexual Transmission, or Realistic Possibility of Transmission, of HIV ([SEX 2](#)).

I would like to take this opportunity to clarify that it is not my role to become involved in the day-to-day operations of the BCPS. The BCPS manages the prosecution function on behalf of the Attorney General.

As you may know, British Columbia is very different from most other jurisdictions in Canada. In British Columbia it is Crown Counsel, not the police, who decide whether criminal charges should be approved. When the police in British Columbia recommend charges, Crown Counsel within the BCPS employ a two-part [charge assessment standard](#): whether there is a substantial likelihood of conviction (the evidentiary test), and whether a prosecution is required in the public interest. The public interest part of the test is only applied *if* the evidentiary test is met first.

In conducting charge assessment, Crown Counsel fully appreciate that invoking the sanctions of the criminal law inevitably has serious implications for all concerned. In cases involving non-disclosure of HIV status, prosecutors recognize both the serious implications for accused persons charged with an offence, and that complainants are often vulnerable persons who can run the risk of suffering serious or life-altering consequences.

In regard to the concerns you have expressed, the revised BCPS policy SEX 2 specifically provides that:

- in assessing whether there is a realistic possibility of transmission of HIV, Crown Counsel should consider the available medical information specific to the accused and the facts of the case;
- where there was no actual transmission, and where the risk of transmission does not meet the test in *v. Mabior* (realistic possibility), there is no fraud and no offence;
- if the evidence shows the risk was merely speculative, the infected person will not be criminally liable for failing to advise his or her sexual partner of their HIV infection;
- in completing a charge assessment, Crown Counsel should consider any medical information that the accused may provide in regard to their viral load at the time of the alleged offence; and
- subject to specific limitations (such as the actual transmission of HIV) where the evidentiary test is met, Crown Counsel should consider whether the public interest requires a prosecution or whether the risk to the public can be, or is being effectively addressed by the accused by taking proactive measures under medical supervision.

The BCPS also has a designated lawyer with particular expertise in both the law relating to non-disclosure of HIV status and the current medical science. This Crown Counsel acts as a resource for other lawyers, helping to ensure that only appropriate charges that meet the current legal, evidentiary, and public interest tests for charge approval proceed.

The Assistant Deputy Attorney General in charge of the BCPS and the BCPS Director of Policy and Justice Issues met earlier this year with representatives of BC organizations concerned with the issue of criminalization of non-disclosure of HIV status. The Prosecution Service readily acknowledges the understandable concerns expressed about stigmatization associated with an HIV-specific offence.

BCPS policies are reviewed on a regular and ongoing basis to ensure they accurately reflect developments in Canadian criminal law, respond appropriately to emerging trends or community

needs—including scientific developments—and reasonably balance individual rights with societal interests. This regular and ongoing review necessarily includes the SEX 2 policy and any relevant developments in the law or medical science relating to HIV, including developments stemming from the Federal Department of Justice [publication](#): Criminal Justice System’s Response to Non-Disclosure of HIV.

In carrying out its mandate, the BCPS is constitutionally required to remain independent of the political process and outside political influence. The BCPS must interpret and apply the criminal law, as codified by the federal government and interpreted by the Supreme Court of Canada. Given the governing provisions of the *Criminal Code* and the Supreme Court of Canada’s decision in *R. v. Mabior*, the BCPS policy provides principled guidance to prosecutors for addressing the evolving medical scientific evidence, applying the law in a fair and consistent manner, and working within the current established legal framework.

I understand and appreciate that this is an important issue that requires input and discussion at various levels. I hope that the above assists in your understanding of the approach taken by the BC Prosecution Service in this matter.

Thank you for taking the time to share your concerns with me.

Yours truly,

David Eby, QC

Attorney General