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May 1, 2019

Via email: HESA@parl.gc.ca

The Honourable Bill Casey, M.P.
Chair, Standing Committee on Health
Sixth Floor, 131 Queen Street
House of Commons
Ottawa, ON K1A 0A6

Dear Mr. Casey,

Re: LGBTQI2S Health in Canada

We are writing on behalf of the CBA's Sexual Orientation and Gender Identity Community Section (SOGIC) and Health Law Section (CBA Sections) to provide input to the Standing Committee on Health's study of LGBTQI2S health in Canada.

The CBA is a national association of 36,000 members, including lawyers, notaries, academics and students across Canada, with a mandate to seek improvements in the law and the administration of justice. SOGIC represents LGBTQI2S members in the CBA and provides a forum for the exchange of information, ideas and action on legal issues relating to sexual orientation and gender identity. The Health Law Section deals with all aspects of the law relating to health care, institutions and professions.

We wish to highlight the following issues.

Conversion therapy

We commend the federal government's recent position that "conversion therapies are immoral, painful, and do not reflect the values of our government or those of Canadians".[1] However, we do not agree that combatting conversion therapy is largely a provincial and territorial issue or that existing *Criminal Code* offences are sufficient to prevent its practice in Canada.

[1] Government response to petition for a federal ban on conversion therapy tabled by NDP MP Sheri Benson. See Perlita Stroh, "Ottawa rejects plea for nationwide conversion therapy ban", CBC News, March 23, 2019, online.

Several Canadian jurisdictions have taken steps to ban conversion therapy.[2] Provincial and territorial governments can prohibit public expenditure on conversion therapy and prohibit regulated professionals from engaging in it.

This approach creates a patchwork of legislative responses with no guarantee of equal protection across the country. We also question if existing bans on conversion therapy are sufficient (e.g. current provincial bans apply only to minors) and suggest that bans should extend to incapacitated or otherwise vulnerable adults. Several U.S. bans include protections for incapacitated adults and Vancouver's ban applies to businesses that provide conversion therapy to people of all ages.[3]

Given the risk that minors and incapacitated or otherwise vulnerable adults could be taken to foreign jurisdictions to undergo conversion therapies, a specific ban addressing this is also required. Only the federal government has the power to impose this ban.

The existing *Criminal Code* offences of kidnapping, forcible confinement and assault are insufficient to address conversion therapy, especially on vulnerable individuals because pressuring a teenager or vulnerable adult to participate in a conversion therapy would not be covered by existing criminal offences. A criminal sanction targeted directly at conversion therapy is necessary to convey a clear denunciation, appropriately attribute moral blameworthiness and act as a strong deterrence.

The federal government should determine whether the criminal power under section 91(27) of the *Constitution Act, 1867* could be used to ban conversion therapy comprehensively and ban the removal of vulnerable individuals from Canada for the purpose of undergoing conversion therapy.

We also recommend that the federal government use its taxation power under section 91(3) of the *Constitution Act, 1867* to ensure that tax benefits are not available to organizations engaging in conversion therapy in Canada and abroad. Denying tax benefits will further restrict these organizations' ability to conduct conversion therapies.

Access to pre-exposure prophylaxis (PrEP) treatments

Access to pre-exposure prophylaxis (PrEP) treatments as part of an HIV prevention strategy has increased steadily in Canada since the initial approval of tenofovir/emtricitabine for use as a PrEP by Health Canada in February 2016. This is demonstrated by the increased coverage of the costs of PrEP treatments by provincial health insurance plans for members of identified high risk groups, including men who have sex with men, transgender women, people who inject drugs and persons in serodiscordant relationships.

However, PrEP remains an expensive medication out of reach for many Canadians. It is also inconsistently covered by provincial health insurance plans across Canada, with no public coverage currently available in Manitoba and the Yukon.

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2 Manitoba, Ontario, Nova Scotia and Vancouver. Currently 15 U.S. jurisdictions ban conversion therapy with two more jurisdictions legislating bans imminently. See Curtis M. Wong, "Puerto Rico Bans Conversion Therapy For LGBTQ Youth", Huffington Post US, March 28, 2019, online, and Trudy Ring, "Colorado Lawmakers Approve Ban on Conversion Therapy", Advocate, March 25, 2019, online.

3 Liam Bretten,"Vancouver to ban businesses offering conversion therapy", CBC News, June 6, 2018, online. The U.S. bans with protections for incapacitated adults are in New York City and Washington, D.C. See Lou Chibbaro Jr., "Bowser signs conversion therapy ban for adults with disabilities", Washington Blade, January 24, 2019, online.

In June 2018, the federal government created the Advisory Council on the Implementation of National Pharmacare to give independent advice on implementing a national pharmacare program. Too many Canadians cannot afford their prescription drugs and that access to prescription drug coverage is inconsistent across jurisdictions.

In March 2019, the Council released three "foundational elements" to national pharmacare, including development of a comprehensive evidence-based list of prescribed drugs (national formulary). The national formulary would be developed and maintained by a newly established national drug agency.

We recommend that the federal government ensure that coverage for PrEP is studied by the national drug agency for inclusion in the national formulary. Epidemiological studies show a link between an increase in PrEP use and a decline in new HIV infections. Given its high cost and inconsistent coverage, PrEP is a type of medication that falls squarely in the Council's objectives and should be included in the national drug agency's study.

Intersex surgery on infants and children

A growing number of health professionals, medical associations and countries are taking the position that medically unnecessary genital *normalizing* surgeries on intersex infants and children should be prohibited until the child is able to participate in the decision. Canada should be a leader and protect the rights of intersex children by amending section 268 of the *Criminal Code* to prohibit these surgeries until the child is able to meaningfully participate in the decision.

As many as 1.7 percent of the population is born with intersex variations or Differences of Sex Development (DSD).[4] There is a wide range of intersex variations. While some are life threatening and require immediate surgical intervention at birth, the majority pose no immediate health risks and treatment is optional and can be safely delayed until the child can participate in the decision.

Yet *normalizing* surgery to make children born with ambiguous genitalia look more *typically* male or female has been standard practice for decades. The aim has been to spare children from teasing, rejection and stigmatization and to reduce parental concern of social rejection. However well-intentioned, it is increasingly clear that these surgeries may be more harmful than beneficial.

There are significant risks of physical harm as early genital *normalizing* surgeries can interfere with nerves, reduce genital sensation and sexual function, leave scar tissue and create other lifelong health issues.

There are also risks of severe psychological suffering. The surgical assignment of gender often involves multiple surgical interventions continuing into puberty. Constant medical examination of the intersex child's genitals and pathologizing of their different appearance can create feelings of shame and humiliation. In addition, there can be uncertainty in the gender assignment decision, particularly at a very young age. Early and irreversible surgeries can lead to damaging consequences when the child ultimately does not identify with the gender assigned through surgery.

In 1997, the federal government used the criminal law to protect girls from female genital mutilation (FGM) by amending section 268 of the *Criminal Code* to define FGM as aggravated assault. However, the exemption in section 268(3) allows surgeries for the purpose of a person

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4 "I want to Be Like Nature Made Me: Unnecessary Surgeries on Intersex Children in the U.S.", Human Rights Watch, July 25, 2017, online.

having a "normal sexual appearance". With growing evidence of the mutilating and traumatizing effects of genital *normalizing* surgeries on many intersex children, it is time to revisit this exemption and protect the rights of intersex children – in the face of potentially strong social pressures to make the genitalia of intersex children conform with a *typical* male or female.

We are not suggesting a complete ban on surgical procedures. We recommend amending the *Criminal Code* to postpone genital *normalizing* surgeries on children until the child can meaningfully participate in the decision – except where there is immediate risk to the child's health and medical treatment cannot be delayed.

Part of the difficulty is the limited data on intersex surgeries of children and the wellbeing of intersex children who undergo surgeries and those that do not. There is an opportunity for the federal government to work with provinces, territories and medical associations to start tracking this information and develop national guidelines.

Eligibility to donate blood

Currently, men who have sex with men (MSM) are restricted from donating blood for one year after their last sexual contact. In 2018, Canadian Blood Services recommended that this restriction be reduced to three months. We support the immediate implementation of this recommendation. A restriction of longer than three months is not supported by the medical evidence and unreasonably discriminates against MSM.

We support the continued evolution of blood donor eligibility criteria based on new research (including Canada Blood Service's MSM Research Grant Program) and resulting recommendations for new blood eligibility criteria that lessen, or even eliminate, any distinction between MSM and other individuals.

Trans health

Health care is a basic right for all Canadians. Sadly, transgender individuals report significant difficulties with accessing trans-competent health care providers[5], discrimination, long waitlists for gender confirming surgeries (GCS) and a lack of surgeons trained in gender reassignment surgery. Physicians also face barriers to providing trans-competent health care. They report a lack of information and training in trans issues to provide health care competently to the trans population.[6]

Trans individuals are at higher risk for stress, depression, suicidality and infections due to HIV and other sexually transmitted diseases.[7] Those who require medical intervention such as hormone treatment or surgery are required to interact with the health care system regularly.[8]

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5 G. Benaway, "When it comes to health care, transphobia persists," Globe and Mail, July 20, 2018, online; R. Giblon, G.R. Bauer, "Health care availability, quality, and unmet need: a comparison of transgender and cisgender residents of Ontario, Canada," BMC Health Services Research, April 18, 2017, online.

6 JW Snelgrove *et al*., "Completely out-at-sea" with "two-gender medicine": A qualitative analysis of physician-side barriers to providing healthcare for transgender patients," BMC Health Services Research, May 4, 2012, online.

7 G.R. Bauer *et al*., "Factors Impacting Transgender Patients' Discomfort with Their Family Physicians: A Respondent-Driven Sampling Survey," December 17, 2015, online.

8 *Ibid*.

Over half of trans individuals report negative experiences in hospital emergency departments and over one-third report a negative interaction with their family physician.[9] Half of trans individuals report discomfort discussing trans-related issues with their family physician. So pervasive is this discrimination, that over 20% of trans individuals report avoiding emergency departments fearing a negative interaction.[10]

Waitlists, due largely to a lack of GCS-trained specialists, are also problematic. Vaginoplasty and phalloplasty are currently available only at the GRS Clinic in Montreal or the Women's College Hospital in Toronto (they will be offered in British Columbia in 2019).[11] Trans persons must travel significant distances to undergo surgery, far from their home and support network.

We recommend that the federal government (in partnership with provinces and territories) increase sensitivity and competency training in trans health care issues for providers and fund training for GCS surgeries.

In conclusion, we acknowledge the importance of the Health Committee undertaking this important study, and offer any further assistance in pursuing the issues we raise.

Yours truly,

(original letter signed by Marc-Andre O'Rourke for Salimah Walji-Shivji and Dorianne Mullin)

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9 G.R. Bauer, et al. "Reported Emergency Department Avoidance, Use, and Experiences of Transgender Persons in Ontario, Canada: Results From a Respondent-Driven Sampling Survey," Ann. Emerg. Med. Vol 63, June 2014, online.

10 *Ibid.*

11 "B.C. brings gender-affirming surgery for trans people closer to home", B.C. Government News, November 16, 2018, online.