

**Questionnaire Submission:**

***Freedom of religion or belief and freedom from violence and discrimination based on sexual orientation and gender identity***

The [HIV Legal Network](https://www.hivlegalnetwork.ca/site/?lang=en) welcomes the opportunity to contribute to the work of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (SOGI), specifically the Independent Expert’s upcoming report to the United Nations Human Rights Council on the relationship between freedom of religion or belief (FoRB) and freedom from violence and discrimination based on SOGI.

The HIV Legal Network promotes the human rights of people living with HIV and other populations disproportionately affected by HIV, punitive laws and policies, and criminalization, in Canada and internationally through research and analysis, litigation and other advocacy, public education, and community mobilization.

In our submission, we wish to highlight two examples of our work dealing with the interplay between FoRB and the rights of LGBTQ+ individuals to be free from violence and discrimination touching on (a) “good practices” and (b) conscientious objection.

**Good Practices:**

11a. Provide any examples of good practice — at the international, national or local level — where State and non-State actors (including faith leaders, groups and organisations, international organisations, civil society organisations, and the UN human rights system) have taken effective measures to protect and promote freedom of religion or belief of LGBT+ and gender-diverse persons, and made efforts to prevent, mitigate and respond to any violence and/or discrimination justified in the name of religion.

In 2017 and 2020, the HIV Legal Network hosted two conferences ([*Intimate Conviction*](https://www.hivlegalnetwork.ca/site/intimate-conviction-volume/?lang=en) and [*Intimate Conviction 2: Continuing the Decriminalization Dialogue*](https://www.hivlegalnetwork.ca/site/intimate-conviction-2-continuing-the-decriminalization-dialogue-volume/?lang=en), respectively), examining the role (past, present, and future) of the Church in decriminalizing same-sex intimacy across the Commonwealth, with a particular focus on states in the Caribbean. These conferences brought together activists, church officials, and politicians from around the world, and led to the compilation of two volumes documenting remarks from the various participants.

The *Intimate Conviction* conferences and their accompanying volumes brought much-needed nuance to the oft-reductive debates around religion and LGBTQ+ rights. Conference participants unpacked the history of religious-based opposition to same-sex intimacy, and provided theological counterpoints to demonstrate how acceptance of homosexuality is consistent with Christian teachings and Biblical interpretation.[[1]](#footnote-1) In doing so, the religious experts and members of the Church who participated in the conference contextualized some of the “traditional” readings of the Bible that have been used to justify violence and discrimination based on SOGI in the name of FoRB.[[2]](#footnote-2) Through these close readings of foundational religious texts, conference participants challenged the very existence of a conflict between FoRB and freedom from violence and discrimination based on SOGI. **For instance, participants disputed the invocation of the Bible or Christian teachings as providing unequivocal support for retaining anti-sodomy laws, arguing that in their proper context these religious texts provided no such support.**[[3]](#footnote-3) Ultimately, many of the conference participants emphasized the need for dialogue among stakeholders in order to promote greater understanding amongst different communities and to address misconceptions about both FoRB and freedom from violence and discrimination based on SOGI.[[4]](#footnote-4)

Participants addressed the importance of adopting a conception of the rule of law founded in respect for human rights and fundamental freedoms, including the rights of minorities, and how religious-based laws that criminalized sodomy ran counter to such a conception.[[5]](#footnote-5) Drawing from examples of case law in Northern Ireland, South Africa, and Belize, conference participants emphasized the need for protection of private, consensual sexual conduct, as well as a separation and a “mutually respectful co-existence between the secular and the sacred,” requiring recognition that religious doctrine is not a proper source for interpreting constitutions, and that the law can “legitimately acknowledge a diversity of strongly held opinions on matters of great public controversy,” as long as “there is no prejudice to the fundamental rights of any person or group.”[[6]](#footnote-6)

One guest described the *Intimate Conviction* conference as an initiative to be welcomed on a spiritual, political, and healthcare level: spiritually, as a discussion necessary to reflect the love and mutual respect at the heart of Christianity; politically, to challenge the overreach of colonial laws which are not reflective of the proper function of criminal laws in modern-day society; and in the context of health, as a means of addressing how criminalization of same-sex intimacy impedes both HIV prevention and treatment.[[7]](#footnote-7)

The first *Intimate Conviction* volume (attached) expanded on these themes in three sections, titled “The Anglican Church and Decriminalization,” “Other Churches and Decriminalization,” and “Gender, HIV, and the Church.” Contributions include those of Reverend Winnie Varghese, from the Episcopal Church, who described her Church’s journey dating back to their first resolutions in 1976 recognizing that all homosexual persons are entitled to an equal claim to love, acceptance, and pastoral care of the Church, and to the equal protection of the laws with other citizens.[[8]](#footnote-8) Likewise, another volume entry spoke to the quiet role played by the Anglican Church in supporting the decriminalization of same-sex relations in Canada in the 1960s,[[9]](#footnote-9) while another examined the meaning of FoRB in Canadian law, highlighting a line of judicial reasoning that concludes that “the state should not impose narrow religious interpretations of morality on the lives and loves of consenting adults.”[[10]](#footnote-10) Many more participants acknowledged the work being done by the Church in various countries to initiate dialogues of understanding around different forms of human sexuality.[[11]](#footnote-11) Furthermore, representatives from the Roman Catholic Church and the United Church of Canada spoke out about the potential for partnership between faith groups and the LGBTQ+ community, and the possibility of reconciling doctrinal teachings with inclusive views on homosexuality.[[12]](#footnote-12) In analyzing approaches to decriminalization taken in Scotland, England, and Wales, one participant noted the important role played by churches and other religious organizations in decriminalization debates and “the positive role that churches can play in taking moral understanding forward.”[[13]](#footnote-13) Likewise, another attendee highlighted how the National Council of Churches in India has been intimately involved in organizing around the issue of decriminalization, taking a faith-based stance that rejects prejudice and discrimination against sexual minorities.[[14]](#footnote-14)

The second *Intimate Conviction* conference built on the work of the first, bringing together over 30 expert speakers virtually to discuss the role of the Church in maintaining homophobic laws, and how the Church can help dismantle them. The conference strived to illustrate that the religious justifications used as the basis for homophobic laws were built on faulty foundations, with no true basis in theology and religion.[[15]](#footnote-15) Many themes similar to those from the first conference were raised, with activists and religious leaders from around the world sharing their knowledge and experience and providing context on how their institutions have responded to calls for decriminalization and LGBTQ+ rights movements in their respective countries.[[16]](#footnote-16) Moreover, a significant takeaway from the conference was that faith leaders, including within the same churches, are far from being homogeneous — many different actors and branches from within the same religious institution can hold disparate positions on issues relating to human sexuality and the rights of SOGI minorities.[[17]](#footnote-17) Again, those religious leaders who affirm the rights of SOGI minorities — and who do so through appeal to religious scriptures and teachings — help demonstrate that FoRB does not have to be at odds with LGBTQ+ rights. The concluding remarks from the second *Intimate Conviction* volume were particularly poignant in this regard:

The religious beliefs of some — which are even themselves contested within a given faith tradition — must never dictate the law of the land and thereby deny the human rights of others. But more than this, in the case of those inclined to invoke religious injunctions to “justify” infringing others’ freedom, it is important and necessary to explore other reasonable interpretations of their own tradition’s texts, interpretations in keeping with own tradition’s teachings emphasizing the values of love, respect, charity and dignity for all. In this way, there is some hope to appeal to the better angels of their nature, and to add to the growing numbers of people, of many faiths, who support an end to the criminalization and persecution of people based on their sexual orientation or gender identity.[[18]](#footnote-18)

The *Intimate Conviction* volumes illustrate through many examples from around the world, that religious beliefs, religious leaders, and Church institutions themselves, can be a positive force in advocating for decriminalization of same-sex relations, and in the fight for freedom from violence and discrimination based on SOGI. The testimonies from these conferences demonstrate — contrary to reductive narratives about FoRB and LGBTQ+ rights — that it is entirely possible to reconcile FoRB with acceptance of LGBTQ+ rights and of freedom from violence and discrimination based on SOGI.

**Conscientious objection**

8. What role (if any) has the concept of conscientious objection played in limiting the full enjoyment of the right to freedom from violence and discrimination on the basis of sexual orientation and gender identity?

The HIV Legal Network wishes to draw to the Independent Expert’s attention an example of a [case in Canada from 2019](https://www.hivlegalnetwork.ca/site/statement-religious-beliefs-must-not-interfere-with-patients-rights-to-accessible-health-care/?lang=en) where the Court of Appeal for Ontario (the province’s highest court) was called to balance the personal religious beliefs and rights to conscientious objection of physicians with the rights of patients to receive accessible health care. In essence, a number of doctors argued that their rights under Canada’s constitution, the *Canadian Charter of Rights and Freedoms*,allowed them to refuse to provide patients with meaningful access to lawful and often medically necessary health services on the basis that providing these services did not align with their personal religious beliefs. The doctors submitted that if they objected to providing a certain medical service (e.g. medical assistance in dying) because of their religious beliefs, they should also be exempted from providing patients with an “effective referral” to another medical practitioner who was willing to provide that service.

The HIV Legal Network intervened in this case (legal submissions attached), alongside the Canadian Professional Association for Transgender Health and the HIV & AIDS Legal Clinic Ontario (“the intervenors”), to argue that allowing physicians to put their religious beliefs ahead of providing or ensuring non-discriminatory and dignified access to health care for their patients disregarded the fundamental principle of patient autonomy. Crucially, the intervenors highlighted that recognizing such a right would entail granting doctors a legal licence to discriminate, jeopardizing access to care for populations that already encounter stigma and discrimination in the health care setting, including LGBTQ+ people (particularly transgender and gender-diverse people) and people living with HIV. The scope of the physicians’ rights to freedom of conscience and religion had to be considered in light of the fact that allowing them to deny patients an effective referral creates a real risk of injury and harm to the physical and mental integrity of already marginalized patients.

Furthermore, the intervenors called on the court to consider the additional existing barriers, stigma, and discrimination, faced by trans people and people living with HIV, when it comes to accessing culturally appropriate and competent medical care. Allowing doctors in their professional capacity to act on their personal religious beliefs as the basis for refusing to provide healthcare to trans persons or people living with HIV would lead to delays when accessing healthcare and potentially the outright discriminatory denial of health services altogether. The potential for harm was particularly acute for trans people and people living with HIV, given that these populations rely on medical care on an ongoing basis. The intervenors submitted that the fundamental rights of the doctors was limited by their professional obligations and the public interest, both of which require members of the medical profession to deliver health services to the public in an equitable, non-discriminatory manner, respecting the dignity, autonomy, and basic humanity of the diverse populations that they serve.

**In a context where two opposing fundamental rights needed to be balanced, the intervenors advanced that the obligation to provide an “effective referral” was the solution that impaired the doctors’ rights most minimally**. On the other hand, requiring anything less than an effective referral would have resulted in a complete denial of the patients’ rights to make informed decisions about their own medical care — a negative consequence that would far outweigh any alleged positive benefit for the doctors.

Ultimately, the [Court of Appeal of Ontario agreed with the intervenors](https://www.ontariocourts.ca/decisions/2019/2019ONCA0393.pdf),[[19]](#footnote-19) unanimously concluding that physicians who invoke the right to conscientiously object in order not to participate in medical services that violate their religious beliefs must provide patients seeking such a service with an effective referral. **The Court found that the interference with the doctors’ right to freedom of conscience and religion was reasonably justified in light of the competing interest to provide patients with equitable access to medical care and the compelling evidence that patients, particularly vulnerable groups, would suffer harm in the absence of an effective referral. Crucially, the Court of Appeal determined that it was appropriate to conclude that patients should not bear the burden of managing the consequences of physicians’ religious objections**. In addition, the Court found it relevant to highlight the fiduciary nature of the physician-patient relationship, which requires doctors to act at all times in their patients’ best interests, and to avoid conflicts between their own interests and those of their patients. Consequently, **the effective referral solution represented a reasonable compromise, preserving a proportionate balance between the doctors’ rights of conscientious objection and the patients’ rights of timely access to appropriate health services**.

In conclusion, the HIV Legal Network hopes that these examples help demonstrate how the interplay between FoRB and freedom from violence and discrimination based on SOGI can be reconciled, how traditional narratives can be challenged, and how tensions that arise between seemingly divergent positions can be resolved in a rights-based approach centered on universality, indivisibility, and interdependence.

1. Most Rev. Dr. John Holder, Bishop of Barbados, Archbishop of the West Indies, “Keynote Address: Examining the Church and Anti-Sodomy Laws across the Commonwealth,” in *Intimate Conviction (Volume 1)*,(Toronto: Canadian HIV/AIDS Legal Network, 2019), pp. 15-25. [↑](#footnote-ref-1)
2. *Ibid*, pp. 21-25. [↑](#footnote-ref-2)
3. *Ibid*, p. 25. [↑](#footnote-ref-3)
4. See for instance Justin Petit (Commonwealth Secretariat), “Special Address,” in *ibid*, p. 29. [↑](#footnote-ref-4)
5. Lord Anthony Gifford, Q.C., “Address,” in *ibid,* pp. 31-34. [↑](#footnote-ref-5)
6. *Ibid*, p.33. [↑](#footnote-ref-6)
7. The Hon. Michael Kirby AC CMG, “Foreword,” in *ibid*, pp. 35-36. [↑](#footnote-ref-7)
8. Rev. Winnie Varghese, “Decriminalization in the United States of America and LGBTQI equality in The Episcopal Church,” in *ibid*, pp. 39-43. [↑](#footnote-ref-8)
9. Bishop Terry M. Brown “Mixed Forces for the 1969 Canadian Decriminalization of Homosexuality,” in *ibid*, pp. 44-48. [↑](#footnote-ref-9)
10. Rev. Tom Decker, “Military Chaplaincy in the Canadian Armed Forces,” in *ibid*, p. 59. [↑](#footnote-ref-10)
11. Rt. Rev. Dr. Alan Wilson, “A Church of England Take on Buggery Law,” in *ibid*, pp. 66-70; The Very Reverend Michael Weeder, “Awakening to Freedom: A Global South Perspective,” in *ibid,* pp. 72-74; Rev. Colin Coward, “Building an Ecumenical Dialogue for Decriminalization,” in *ibid,* pp. 75-77. [↑](#footnote-ref-11)
12. Francis DeBernardo, “Building Bridges: The Roman Catholic Church and the LGBT Community,” in *ibid*, pp. 85-87; Rev. Dr. Cheri DiNovo, “Where Politics and Religion Intersect” in *ibid*, pp. 89-92. [↑](#footnote-ref-12)
13. Dr. Matthew Waites, “Approaches to Decriminalization in Scotland, England, and Wales,” in *ibid*, p. 103. [↑](#footnote-ref-13)
14. Rev. Dr. George Zachariah, “Ecumenical and Interfaith Engagement with Sodomy Laws in India,” in *ibid*, pp. 111-115; See also: R. Christopher Rajkumar, “Radical Inclusion: Dare to Dream,” in *Intimate Conviction: Continuing the Decriminalization Dialogue* (Toronto: HIV Legal Network, 2021), pp. 89-99. [↑](#footnote-ref-14)
15. Maurice Tomlinson, “Introduction,” in *Intimate Conviction: Continuing the Decriminalization Dialogue*, (Toronto: HIV Legal Network, 2021), p. 8. [↑](#footnote-ref-15)
16. Bishop Francis Alleyne, “Keynote Address : How the Roman Catholic Church in Guyana and/or the Caribbean Views the Anti-Sodomy Law,” in *ibid*, pp. 11-15; Allan Aubrey Boesak, “Churches and LGBTQI Humanity: Learning Lessons from the Struggle,” in *ibid*, pp. 24-30; Fr Clifford Hall, “Making Good Trouble,” in *ibid*, pp. 33-39; Alexa D. V. Hoffmann, “The Church’s Role in LGBTI Decriminalization and De-stigmatization: The Perspective of a Barbadian LGBTI Advocate,” in *ibid,* pp. 52-59; Carlos Navarro Fernandez, “The Long Road from Decriminalization to Equal Marriage: Civil and Religious Activism for LGBTI+ Rights in Mexico,” in *ibid*, pp. 64-72; Ngozi Nwosu-Juba, “Left Behind by Laws, Policies and Practices: Lived Realities of Sexual Minorities in West Africa,” in *ibid,* pp. 81-87; Rev. Michael Blair, “Intimate Convictions: Journey to the Future – 1998 to 2020,” in *ibid,* pp. 109-111. [↑](#footnote-ref-16)
17. Dr. Edward Greene, “Global Solidarity and Reducing the Vicious Cycle of Inequality for the LGBTQ Community,” in *ibid*, pp. 16- 22. [↑](#footnote-ref-17)
18. Richard Elliott, “Afterword,” in *ibid,* p. 116. [↑](#footnote-ref-18)
19. *Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario*, 2019 ONCA 393. [↑](#footnote-ref-19)