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Misleading and Misguided: Mandatory Incarceration for Certain Drug Offences

Brief to the House of Commons Standing Committee on Justice and Human Rights regarding Bill C-9, *An Act to amend the Criminal Code (conditional sentence of imprisonment)*

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1. About the Canadian HIV/AIDS Legal Network

The Canadian HIV/AIDS Legal Network (www.aidslaw.ca) promotes the human rights of people living with and vulnerable to HIV/AIDS, in Canada and internationally, through research, legal and policy analysis, education, and community mobilization. The Legal Network is Canada's leading advocacy organization working on the legal and human rights issues raised by HIV/AIDS.

The Legal Network is a national non-governmental organization with over 200 members across Canada and around the world, the majority of which are community-based AIDS service organizations. The Legal Network has been involved in extensive government and community consultations regarding a wide range of HIV/AIDS-related legal and policy issues, and has developed particular expertise on drug law and policy as they relate to people who are at risk of HIV infection as a result of injection drug use.

A body of research and analysis by the Legal Network, including publications in peer-reviewed research journals, has addressed a number of issues that are relevant to the debate regarding Bill C-9, *An Act to amend the Criminal Code (conditional sentence of imprisonment)*, including:

- wide-ranging recommendations for better addressing the HIV epidemic among people who inject drugs, including legal reforms to support more effective health-protection and promotion services for this vulnerable population;¹
- extensive work on the need to address HIV in prisons as a matter of both sound public health practice and basic human rights, including addressing the risk of HIV transmission through use of contaminated drug injection equipment;²
- the first and most comprehensive international report on the successful experience of other countries in implementing sterile syringe programmes in prisons;³ and
- analyses of international drug control treaties and international human rights law as they relate to HIV prevention and other health services for people who use drugs.⁴

2. HIV/AIDS and drug policy in Canada

For many years, Canada's Drug Strategy has explicitly acknowledged that problematic substance use is primarily a health issue, rather than an issue for law enforcement.⁵ In 2001, following a detailed report by the Legal Network on the need for reforms to Canadian drug laws and policies to enable a more effective, evidence-based response to the HIV epidemic among people who use drugs,⁶ Health Canada issued an official response in which it confirmed that "injection drug use [IDU] is first and foremost a health issue", and that "fundamental changes are needed to existing legal and policy frameworks in order to effectively address IDU as a health issue".⁷ Since that time, an extensive, two-year national consultation — led by Health

Canada, its federal partners (e.g., Public Safety and Emergency Preparedness Canada, Justice Canada), and the Canadian Centre on Substance Abuse — has developed a new *National Framework for Action to Reduce the Harms Associated with Alcohol and Other Drugs and Substances in Canada*, released last year and already endorsed by many stakeholders, ranging from community-based organizations to law enforcement.⁸ That new national framework explicitly reaffirms, as its first principle, that problematic substance use is a health issue. It also affirms that efforts to reduce the harms associated with substance use should be based on knowledge and evidence of what works, as well as respect for human rights.

However, the rhetorical commitment to dealing with drug use as a health issue and to implementing policies and programmes based on evidence has never been reflected in practice in the federal government's response. In 2001, the Auditor General reported that at that time, although Canada's drug strategy called for a “balanced approach” — consisting of action in the four key areas of drug control and law enforcement, prevention of drug use, treatment and rehabilitation for harmful drug use, and harm reduction measures — 95 percent of the \$500 million spent annually by the federal government went toward enforcement, and the amount spent by other orders of government was unknown.⁹ Five years later, the bulk of federal funds for responding to drug use in Canada appears to remain overwhelmingly concentrated on law enforcement, even as evidence mounts that the so-called “war on drugs” has failed and this failure is increasingly recognized across the political spectrum.¹⁰

Regrettably, Bill C-9 would exacerbate the already damaging imbalance in Canada's response to drug use by further emphasizing, and spending additional resources on, enforcing criminal prohibitions through mandated sentences of incarceration for certain drug offences. As such, it represents a further distancing of government policy from the evidence of what works (and what is counter-productive) in responding to drug use and related harms as primarily health issues. It moves further away from sensible, pragmatic public policy in an effort to demonstrate that the government is “getting tough” on crime.

Before the introduction of Bill C-9, the Legal Network prepared a briefing paper entitled *Mandatory Minimum Sentences for Drug Offences: Why Everyone Loses*, explaining, in general terms, why the approach of imposing mandatory minimum sentences for drug offences is ill-advised. A copy of that paper is attached as part of this submission. Now that Bill C-9 has been introduced, this submission supplements that general analysis with some specific observations regarding the particular effects of the bill in relation to drug offences in Canada.

3. Application of Bill C-9 to drug offences

Currently, under *Criminal Code* s. 742.1, a court may impose a conditional sentence, to be served in the community rather than through incarceration in a correctional facility, in any case where

- a) the offence for which a person has been convicted does not carry a minimum term of imprisonment;
- b) the possible term of imprisonment for that offence is less than 2 years;
- c) the court is satisfied that a conditional sentence would not endanger community safety; and
- d) the court is satisfied that a conditional sentence would be consistent with the sentencing principles of the *Criminal Code*.

The primary objective of conditional sentencing is to provide courts with alternatives to incarceration. This is consistent with the basic principles of sentencing, as stated in the *Criminal Code* (s. 718.2), that an offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances, and that all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders.

However, Bill C-9 would preclude a conditional sentence, served in the community, in the event that a person is convicted of an offence prosecuted by way of indictment that carries a possible term of imprisonment of 10 years or more — that is, in such cases, it would require any sentence to be served through incarceration in a correctional facility.

What does this mean for drug offences? We do not present here an exhaustive analysis of Bill C-9's application to all offences currently set out in the *Controlled Drugs and Substances Act* (CDSA). However, we do wish to highlight two particular points of importance.

First, we note that the offence of simple *possession* of various controlled substances, contrary to CDSA s. 4, does not currently carry maximum penalties of 10 years or more of imprisonment. Fortunately, therefore, assuming there is no change to the existing penalties for CDSA offences, Bill C-9 would not remove the option of conditional sentencing in the event of a sentence of imprisonment for the offence of simple *possession* of a controlled substance. Indeed, such a draconian step of harshly penalizing people for simply using drugs, including those with addictions, would be intolerable as a matter of basic human rights. It would also be a direct repudiation of the long-standing recognition that problematic drug use should be seen primarily as a health issue, and would be ill-advised from a public health perspective.

However, upon closer examination, some of these same concerns must be raised with regard to a second dimension of Bill C-9 — namely, the consequences with respect to the offences *trafficking* and *possession for the purposes of trafficking* contrary to CDSA s. 5. Under Bill C-9, a conditional sentence would be precluded and incarceration to serve a sentence would be mandatory in the case of conviction for *trafficking* or *possession for the purposes of trafficking* (contrary to CDSA s. 5), of the following controlled substances:

- any quantity of any substance listed in CDSA Schedule I (e.g., heroin, cocaine, methadone);
- cannabis in excess of 3 kg resin or marijuana, pursuant to CDSA Schedules II and VII;
- any quantity of any substance listed in CDSA Schedule III (e.g., amphetamines, LSD, psilocybin), if the Crown elects to prosecute by way of indictment.

In other words, in the event that a court imposed a sentence of imprisonment upon conviction in one of the above circumstances, Bill C-9 would force the person to serve that sentence through incarceration.

For reasons that we outline further below, and in the attached material, such an outcome of Bill C-9 is of concern to the Legal Network as an organization concerned with human rights and with sound public health policy, particularly as they relate to the response to HIV/AIDS in Canada.

4. Mandatory incarceration for certain drug offences: bad public policy

Insofar as the proposed legislation mandates incarceration in the event of certain sentences for some drug offences — such as trafficking in even small quantities of drugs — it amounts to bad public policy as a matter of both public health and human rights. Furthermore, Bill C-9 is over-inclusive and its full scope and implications have not been presented adequately to Canadians or to members of Parliament. We draw the Committee’s attention to a number of considerations.

(a) Targeting “drug dealers”: What does this mean in practice?

As noted above, under Bill C-9, any sentence of imprisonment for *trafficking* (or *possession for the purpose of trafficking*) any quantity of certain drugs would have to be served through incarceration in a correctional facility. It might, therefore, be suggested that this legislation is targeting “drug dealers” and not people with addictions or others who use drugs, and is therefore consistent with treating drug use as primarily a health issue rather than an issue of criminal law enforcement. However, this is misleading. Careful scrutiny shows this distinction

cannot be drawn so simplistically, particularly when harsh penalties are mandated for dealing in *any* quantity of prohibited drugs.

The real profiteers, who traffic large quantities of illegal drugs, distance themselves from more visible drug-trafficking activities and are rarely captured by law enforcement efforts. Rather, it is those people who are addicted and involved in small-scale, street-level drug distribution to support their addictions who are much more easily targeted for law enforcement efforts and more commonly end up being charged with drug trafficking. As noted above, Bill C-9 would preclude conditional sentencing in the case of a conviction for trafficking even small quantities. In practice, precluding conditional sentences for dealing in any quantity of an illegal drug has the consequence of incarcerating some of the most marginalized people who use drugs, while doing little to penalize large-scale traffickers.¹¹

Instead of wasting considerable public funds on a “get tough” approach that would harshly penalize people with addictions, it would be more advisable to invest significantly in more cost-effective, proven addiction treatment services.¹² This would not only address the matter more appropriately as a health issue but would also have the benefit of reducing demand for illicit drugs, more effectively targeting those who profit from the drug trade.

(b) Greater incarceration of people who use drugs is bad public health policy

Greater incarceration of people who use drugs is ill-advised as a matter of both human rights and public health. Evidence indicates that incarceration of people who inject drugs contributes to Canada’s worsening HIV epidemic. The number of known HIV cases in Canada’s prisons has risen by 35 percent in the last five years.¹³

Incarceration has been shown to lead to injection drug use among some prisoners who did not previously use drugs or use by injection.¹⁴ Correctional Service Canada (CSC) acknowledges that drugs enter prisons despite efforts to prevent this. Over a decade ago, a CSC study found that almost 40 percent of inmates in federal prisons reported having used drugs since arriving at their institution, 11 percent of whom indicated drug use by injection.¹⁵ However, there is little access to sterile injection equipment in prisons. Correctional systems in Canada continue to refuse to implement needle exchange programs that have long been demonstrated to be an effective and crucial element of HIV prevention among people who inject drugs in Canada outside the prison setting; this ignores ample evidence of the success of such programmes from numerous other countries¹⁶ and endorsements from a wide range of experts.¹⁷ Not surprisingly, a recent Vancouver study revealed that incarceration more than doubled the risk of HIV infection of people who use illegal drugs, and suggested that 21 percent of all HIV infections among Vancouver injection drug users may have been acquired in prison.¹⁸

Sentencing people with addictions to conditions of imprisonment that prevent access to health-protection tools such as sterile injection equipment unjustifiably infringe their human rights, and violates prisoners' constitutional rights (e.g., to equality in access to health services, to security of the person, and to freedom from cruel and unusual punishment under ss. 7, 12 and 15 of the *Charter*) and the state's statutory obligation to take reasonable care to safeguard the health of prisoners (e.g., *Corrections and Conditional Release Act*, s. 4).

Furthermore, incarcerating people who use drugs, or may have a greater vulnerability to initiating drug use, in a setting where drugs are available but sterile injection equipment is not, is a recipe for a public health disaster. There is ample evidence from numerous countries of outbreaks of HIV infection related to drug injection using contaminated equipment shared by multiple prisoners.¹⁹ Most prisoners are eventually released back into their communities, so the protecting public health requires protecting prisoners' health, including taking proven, pragmatic measures to protect against the risks of infection with blood borne diseases such as HIV and hepatitis C from contaminated injection equipment.

(c) Mandatory minimum sentences for drug offences don't work

Mandatory minimum sentences for drug offences have been in place in the United States for some time, and there is no evidence to support the claim that this has helped curb drug-related crime or problematic drug use. Rather, the vast increase in incarceration of non-violent drug offenders in U.S. prisons has simply taken a terrible human toll and led to enormous financial expenditure, while the drug problem in the U.S. has worsened, despite such "get tough" approaches. After careful examination comparing mandatory minimum sentences for drug offences to similar policies for drunk driving and gun crimes, Justice Canada has concluded that such an approach is "least effective in relation to drug offences" and that "blunt instruments" such as mandatory minimum sentences "do not appear to influence drug consumption and drug-related crime in any measurable way."²⁰

(d) Bill C-9 goes beyond violent offences

We submit that Bill C-9 is considerably over-inclusive, and has been presented misleadingly to the public and to Parliament. When the legislation was introduced in the House of Commons, the Government declared that its primary concern was "serious and violent offences"²¹, and much of the discussion has revolved around "gun and gang crime". Yet, as currently drafted, Bill C-9 covers many offences that do not involve violence and, as noted above, it has the effect of precluding conditional sentencing even for non-violent offenders charged with, for example, an offence such as *trafficking*, or *possession for purposes of trafficking*, of even small quantities of some controlled substances. This

overreaches. In the event that violence is committed in connection with a drug offence, applicable charges under the *Criminal Code* (e.g., assault, firearms offences) may be laid. But in the case of non-violent offenders convicted of trafficking only small quantities, there is little justification for departing from the basic sentencing principle in criminal law that incarceration should be a punishment of last resort.

(e) Mandatory minimum sentences are at odds with fundamental sentencing principles and raise constitutional concerns

Bill C-9 imposes a certain variant of mandatory minimum sentencing — that is, it mandates incarceration as the *form* of a sentence of imprisonment for certain drug offences, as described above. Under the proposed legislation, in the event a court deemed it appropriate to impose a sentence of imprisonment for certain drug offences, it would be mandatory that the convicted person serve that sentence inside a correctional facility. Such an approach flies in the face of long-established sentencing principles aimed at avoiding overzealous use of incarceration.

The fundamental principle of sentencing is that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender (*Criminal Code*, s. 718.1). As such, mandatory minimum sentences are *prima facie* at odds with this principle, because they deny judicial discretion to tailor the penalty to the circumstances of the case. The Supreme Court of Canada has ruled that a mandatory minimum sentence constitutes cruel and unusual punishment, contrary to the *Canadian Charter of Rights and Freedoms* (s. 12), if it is possible for the sentence, in a specific matter or reasonable hypothetical case, to be “grossly disproportionate,” given the circumstances of that case. In fact, in *R. v. Smith*, the Court previously ruled that a mandatory minimum sentence of seven years for importing or exporting a narcotic constituted cruel and unusual punishment because it failed to take into account the nature and quantity of the substance, the reason for the offence, or the absence of any previous convictions; it therefore struck down the provision as unconstitutional.²²

As outlined above that, under Bill C-9, any time to which a person is sentenced for the offences of *trafficking* or *possession for the purposes of trafficking* would have to be served inside prison, regardless of the quantity of the drug in question or other circumstances of the individual case. In light of the decision in *Smith*, we question whether such an outcome of the law is constitutionally sound.

5. Conclusions and recommendation

As drafted, Bill C-9 adopts a mandatory minimum sentencing approach by imposing mandatory incarceration for a number of drug offences. But, as outlined above, such approaches are not likely to be effective responses to drug offences and raise

constitutional concerns, particularly given that incarceration would be mandated for non-violent drug offenders. Rather than penalizing those profiteers engaged in large-scale trafficking, it is likely to be primarily the most marginalized people with addictions, engaged in small-scale trafficking often related to their drug dependence, who will bear the brunt of such mandatory incarceration provisions. Mandating greater incarceration of people who use drugs and are convicted of such small-scale trafficking, without crimes of violence involved, is ill-advised from the perspective of protecting prisoners' and the public's health against the spread of blood borne pathogens such as HIV and hepatitis C.

Given the absence of any significant benefit from applying Bill C-9 to drug offences, and the very real adverse consequences of such a policy approach, **the Canadian HIV/AIDS Legal Network urges the government and the Standing Committee to amend Bill C-9 so as to exempt offences under the Controlled Drugs and Substances Act from its application.**

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¹ Canadian HIV/AIDS Legal Network. *Injection Drug Use and HIV/AIDS* (1999); Canadian HIV/AIDS Legal Network. *Establishing Safe Injection Facilities in Canada: Legal and Ethical Issues* (2001), both online: www.aidslaw.ca/drugpolicy; I Malkin, R Elliott & R Mcrae, Supervised Injection Facilities and International Law, *Journal of Drug Issues* 2003; 33(3): 539.

² Canadian HIV/AIDS Legal Network. *HIV/AIDS in Prisons: Final Report* (1996); *Action on HIV/AIDS in Prisons: Too Little, Too Late – A Report Card* (2002), both online: www.aidslaw.ca/prisons.

³ Canadian HIV/AIDS Legal Network. *Prison Needle Exchange: Lessons from a Comprehensive Review of International Evidence and Experience*, 2nd ed (2006), online: www.aidslaw.ca/prisons.

⁴ R Elliott, J Csete, E Wood and T Kerr. Harm Reduction, HIV/AIDS and the Human Rights Challenge to Global Drug Control Policy, *Health and Human Rights: An International Journal* 2005; 8(2): 104.

⁵ Health Canada. *Canada's Drug Strategy* (Ottawa, 1998).

⁶ Canadian HIV/AIDS Legal Network. *Injection Drug Use and HIV/AIDS* (1999), online: www.aidslaw.ca/drugpolicy.

⁷ Health Canada. *Injection Drug Use and HIV/AIDS: Health Canada's Response to the Report of the Canadian HIV/AIDS Legal Network* (Ottawa, 2001), online: www.aidslaw.ca/drugpolicy.

⁸ Government of Canada & Canadian Centre Substance Abuse. *National Framework for Action to Reduce the Harms Associated with Alcohol and Other Drugs and Substances in Canada* (Ottawa, 2005), online: www.nationalframework-cadrenational.ca.

⁹ Office of the Auditor General of Canada. *Report of the Auditor General of Canada -2001, Chapter 11— Illicit Drugs: The Federal Government's Role* (Ottawa, 2001), online: www.oag-bvg.gc.ca/domino/reports.nsf/html/0111ce.html.

¹⁰ T Kerr and E Wood. The public health and social impacts of drug market enforcement: A review of the evidence. *International Journal of Drug Policy* 2005; 16(4): 210-220; P. Basham, ed., *Sensible Solutions to the Urban Drug Problem*, ed. P Basham (Vancouver: Fraser Institute, 2001), online: http://oldfraser.lexi.net/publications/books/drug_papers/.

¹¹ Kerr & Wood, *supra* note 10.

¹² T Gabor and N Crutcher. *Mandatory Minimum Penalties: Their Effects on Crime, Sentencing Disparities, and Justice System Expenditures* (Ottawa: Justice Canada, 2002), pp. 17-18.

¹³ Correctional Service Canada. *Infectious Disease Prevention and Control in Canadian Federal Penitentiaries 2000-2001* (Cat. No. 0-662-33512-0), online: www.csc-scc.gc.ca/text/pblct/infectiousdiseases/index_e.html; Canadian HIV/AIDS Legal Network, *Action on HIV/AIDS in Prisons: Too Little, Too Late – A Report Card* (2002), online: www.aidslaw.ca/prisons.

¹⁴ E Wood et al. Initiation of opiate addiction in a Canadian prison: a case report, *Harm Reduction Journal* 2006.

¹⁵ Correctional Service Canada. *1995 National Inmate Survey: Final Report* (Ottawa: CSC, 1996).

¹⁶ *Prison Needle Exchange: Lessons from a Comprehensive Review of International Evidence and Experience*, *supra* note 3.

¹⁷ E.g., Ontario Medical Association. *Improving Our Health: Why is Canada Lagging Behind in Establishing Needle Exchange Programs?* (Toronto: OMA, 2004); World Health Organisation & UNAIDS. *HIV/AIDS Prevention, Care, Treatment and Support in Prison Settings: A Framework for an Effective National Response* (Geneva, 2006), online: http://data.unaids.org/pub/Report/2006/20060701_HIV-AIDS_prisons_en.pdf.

¹⁸ MW Tyndall et al. Intensive injection cocaine use as the primary risk factor in the Vancouver HIV-1 epidemic, *AIDS* 2003; 17(6): 887; H Hagan. The relevance of attributable risk measures to HIV prevention planning. *AIDS* 2003; 17(6): 911.

¹⁹ *Prison Needle Exchange: Lessons from a Comprehensive Review of International Evidence and Experience*, *supra* note 3.

²⁰ *Ibid.*

²¹ Justice Canada. News release: Minister of Justice moves to end house arrest for serious and violent offences, 4 May 2006.

²² *R. v. Smith*, [1987] 1 S.C.R. 1045.