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Mr. Bob Chiarelli, Mayor
City of Ottawa
110 Laurier Avenue West
Ottawa, ON
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Dear Mayor and Ottawa City Council:

Re: Safer crack use kits

The Canadian HIV/AIDS Legal Network wishes to register its support for the City of Ottawa's decision to expand the range of products included in the Site Program's harm reduction measures to include the provision of safer crack use equipment to those who smoke this illicit drug. Based on the available evidence, Ottawa's Medical Officer of Health has recommended this expansion of the program, and we have previously communicated our support to you (by way of letter dated November 2, 2004).

However, we understand that further objections have now been raised by the Chief of Police and that Council is reconsidering its approval of this initiative. The Canadian HIV/AIDS Legal Network is dedicated to promoting laws and policies that respect, protect and fulfil human rights of people living with HIV/AIDS and those vulnerable to the disease, thereby helping to prevent its spread and promoting access to HIV/AIDS care, treatment and support. As a national, not-for-profit organization focussing exclusively on the legal and policy dimensions of HIV/AIDS, we wish to address some of the legal aspects of the distribution of safer crack use equipment to people who use this illicit drug. In our view, this expansion of the Site Program's harm reduction efforts is permissible under Canadian law and is consistent with Canada's human rights obligations under international law.

Criminal Code

Over the years, concerns have been raised about the legality under the *Criminal Code* of needle exchange programs that provide access to material such as sterile needles and related items to people who inject illicit drugs. As we understand it, this concern is now also being raised in relation to the distribution of safer crack use kits to people who smoke this drug. The Canadian HIV/AIDS Legal Network has examined these questions in considerable detail in a number of reports analysing the application of Canadian laws on illicit drugs and their impact on harm reduction initiatives. We therefore take this opportunity to share our assessment with you.

The *Criminal Code* (s 462.2) states:

“Every one who knowingly imports ... promotes or sells instruments or literature for illicit drug use is guilty of an offence and is liable on summary conviction

- (a) for a first offence, to a fine not exceeding one hundred thousand dollars or to imprisonment for a term not exceeding six months or both; or
- (b) for a second or subsequent offence, to a fine not exceeding three hundred thousand dollars or to imprisonment for a term not exceeding one year or both.

Another section of the *Criminal Code* defines some of the terms relevant in understanding the scope of this prohibition. Section 461.1 states (with emphasis added):

“consume” includes inhale, inject into the human body, masticate and smoke;

“instrument for illicit drug use” means anything designed primarily or intended under the circumstances for consuming or to facilitate the consumption of an illicit drug, but does not include a “device” as that term is defined in section 2 of the *Food and Drugs Act*;

“sell” includes... distribute, whether or not the distribution is made for consideration.

A reasoned analysis of these provisions in the *Criminal Code* leads to the conclusion that, as with the distribution of sterile syringes through needle exchange programs, the distribution of safer crack kits should not be seen as contrary to Canadian law. We note the following:

- A “device”, as defined in the *Food and Drug Act* (s. 2), is expressly exempted from the definition of “instrument for illicit drug use”. The *Food and Drugs Act* defines “device” as: “any article, instrument, apparatus or contrivance, including any component, part or accessory thereof, manufactured, sold or represented for use in... the diagnosis, treatment, mitigation or prevention of a disease, disorder or abnormal physical state, or its symptoms, in human beings or animals.” Just as with the distribution of sterile needles to drug users, safer crack use equipment distributed as part of a “safer crack use kit” to prevent or reduce the spread of bloodborne pathogens such as HIV or hepatitis C fall within this definition of a device and are therefore excluded from the definition of “instrument for illicit drug use.” Needle exchange programs have been operating for almost two decades in Canada, with official government approval and financial support. Yet the distribution of sterile equipment aimed at reducing the harms associated with the unsafe injection of illicit drugs is not qualitatively different from the proposal to distribute sterile pipes aimed at reducing the harms associated with the unsafe smoking of illicit drugs. It would be illogical and to fund the former, as a sensible, pragmatic and cost-effective public health measure, yet declare the latter to be criminal.
- The legislative intent behind this provision should be considered. The legislation on drug paraphernalia and literature stemmed from Parliamentary concern about retail sales in “head shops”. As the authors of the leading legal text on Canada’s laws on illicit drugs have pointed out, this provision “is quite clearly aimed at those seeking to profit from the

huge illegal drug industry, as mere possession of drug paraphernalia or literature is not proscribed.”¹ Support for this conclusion is found in the 1987 report of the Standing Committee on National Health and Welfare, which expressed concern about commercial enterprises whose principal business was the sale of drug paraphernalia. The Standing Committee also expressly noted that: “in most cases, items of drug paraphernalia also have legitimate and non-drug applications. The intent of legislation should be to close “head shops” and not to attack the items themselves. The law must be carefully drafted to address those commercial enterprises which glamorize and facilitate drug use.”² Courts have noted this Parliamentary intent in striking down the prohibition on drug “literature” as an unconstitutional infringement of freedom of expression.³

Human rights obligations: protecting and promoting health

In our view, not only is there a good public health rationale for ensuring access to sterile injection equipment for people who inject drugs, and not only is it permissible under the *Criminal Code*, but doing so is also sound from the perspective of the government's human rights obligations and international guidance, and in keeping with Ontario's public health law.

Canada has ratified the *International Covenant on Economic, Social and Cultural Rights*. As such, a sub-national government, such as the City of Ottawa, is also obliged to take measures, in areas within its jurisdiction, to ensure Canada's compliance with this treaty. It is well established that sub-national governments in federal states are not excused from the country's obligations under international law.

Most importantly, Article 12 of the *Covenant* recognizes the human right “to the highest attainable standard of physical and mental health”, as follows:

1. The States Parties to the present Covenant recognize the right of everyone to the highest attainable standard of physical and mental health.
2. The steps to be taken by the Parties to the Present Covenant to achieve the full realization of this right shall include those necessary for: [...]
 - (c) the prevention, treatment and control of epidemic... and other diseases;...

It has long been recognized that needle exchange programmes, through providing access to sterile equipment to those who continue to use illicit drugs, are a critical and effective component of preventing HIV transmission among this population. As such, they reflect one measure taken in compliance with Canada's obligations under international human rights law to prevent and

¹ BA MacFarlane, RJ Frater, C Proulx. *Drug Offences in Canada*, 3rd ed. Aurora: Canada Law Book, 1998.

² Standing Committee on National Health and Welfare. *Booze, Pills and Dope: Reducing Substance Abuse in Canada*. House of Commons, Minutes of Proceedings, No. 28, 17 September 1987, at 35-36.

³ *Iorfida v. McIntyre* (1994), 93 CCC (3d) 395 (Ont. Ct. Gen. Div.), cited with approval on this point in *R v. Spindloe* [1998] SJ No 561 (Sask. Prov. Ct.) (QL).

control epidemic diseases. If such programmes are to have the greatest public health benefit, then it is important that they provide the full range of equipment that is used in the consumption of those substances; it is arbitrary to limit their health protection and promotion capacity by permitting only the provision of sterile needles when we know that drugs are consumed in a variety of ways that can result in harms such as the transmission of HIV.

The UN Committee on Economic, Social and Cultural Rights, which is tasked with monitoring States' compliance with their obligations under this treaty, has further clarified what the “right to health” obligation entails for States. In its ***General Comment*** on Article 12 of the Covenant, adopted in 2000, the Committee points out that, while this right is one that, obviously, can only be “progressively realized” over time, with due regard for the available resources of the state, there is a clear legal obligation on the part of governments “to move as expeditiously and effectively as possible towards the full realization of Article 12.” (para 31). This must include addressing the health of those who are often some of society’s most marginalized and vulnerable. The objective of protecting and promoting health applies regardless of the legal status of the substance and of the person using it; access to *all* the sterile equipment that is needed should be the norm across the board given the concern for health.

Furthermore, under the International Covenant, States have three types of obligations: the obligations to *respect*, *protect* and *fulfil* (para 33). The first and third of these obligations are the most important in this context. The obligation to *respect* requires that States refrain from interfering directly with the enjoyment of the right to health (paras 33-34). Limiting access to sterile equipment that is used to prevent or reduce the risk of a harm to health, such as HIV infection, would constitute such interference. The obligation to *fulfil* requires States to take positive measures “that enable and assist individuals and communities to enjoy the right to health”, including situations where “individuals or groups are unable, for reasons beyond their control, to realize that right themselves by the means at their disposal.” (para 37). For significant numbers of persons who use needle exchange programmes, the circumstances of addiction and poverty are such that, without access to sterile equipment (such as safer crack use equipment), unsafe and dangerous drug use practices are likely, thereby undermining the objective of achieving the highest attainable standard of health.

We also draw your attention to the ***International Guidelines on HIV/AIDS and Human Rights*** that have been promulgated by the Joint UN Programme on HIV/AIDS and the Office of the UN High Commissioner for Human Rights, in order to translate international human rights norms – such as those found in the *International Covenant on Economic, Social and Cultural Rights* – into practical observance in the context of HIV/AIDS. One way in which the Guidelines do this is by providing guidance to governments in the areas of law, administrative policy and practice that will protect human rights and achieve HIV-related public health goals. The International Guidelines stress, *inter alia* (with emphasis added):

Guideline 6 (revised 2002): Access to prevention, treatment, care and support

States should also take measures necessary to ensure for all persons, on a sustained and equal basis, the availability and accessibility of quality goods, services and information for HIV/AIDS prevention...

State should take such measures... with particular attention to vulnerable individuals and populations.

Guideline 8: Women, children and other vulnerable groups

States should support the implementation of specially designed and targeted HIV prevention and care programmes for those who have less access to mainstream programmes due to language, poverty, social or legal or physical marginalisation, e.g., [...] injecting drug users. (Guideline 8, para 38j)

In addition, in June 2001, all UN Member States adopted the *Declaration of Commitment on HIV/AIDS*, in which they recognized “that effective prevention... strategies will require... increased availability of and non-discriminatory access to, inter alia,...sterile injecting equipment” (para 23). They therefore committed, among other things, to ensuring by 2005 “expanded access to essential commodities, including ... sterile injecting equipment; harm reduction efforts related to drug use.” (para 52). The commitment is not limited to ensuring access to sterile needles; these are simply singled out for express reference because of their central importance in addressing the spread of HIV among people who inject drugs. Furthermore, it also refers to harm reduction efforts broadly (recognizing that it is not only drug injection that is of concern). It would run counter to this HIV prevention commitment to limit access to sterile equipment among those who continue to use illicit drugs.

Finally, we note that **Ontario's *Health Protection and Promotion Act***, R.S.O 1990, c. H.7, states that its purpose:

...is to provide for the organization and delivery of public health programs and services, the prevention of the spread of disease and the promotion and protection of the health of the people of Ontario.

The available evidence indicates that provision of a broader range of sterile equipment, beyond simply the needles themselves, is important to achieving the full health protection benefits of such programmes. It is but a half-measure to provide sterile needles/syringes if people who are consuming drugs are then using other equipment, in preparing and using those drugs, that is contaminated – whether with blood-borne pathogens such as HIV or HCV or with other substances that can cause other sorts of infection. Provision of the needed sterile equipment advances the purpose set out in Ontario's public health legislation and represents a responsible, health-protecting use of resources. Furthermore, the international norms reviewed above all favour ensuring that needle exchange programmes in Canada are properly equipped to deliver the goods and services that are needed to effectively achieve the objective of preventing or reducing such adverse outcomes as HIV infection among populations that include some of the most marginalized and most at risk for ill health. It would be advisable for Ontario's needle exchange programmes to be able to include more than just sterile needles in the equipment they provide.

We welcome the City of Ottawa's continued support for effective harm reduction programs and interventions to protect and promote the health of vulnerable people, including people who inject drugs. We welcome the leadership being shown by the city health department in responding to the identified needs of the communities whose health they are mandated to protect, and hope that the city's elected officials will show similar leadership. The Site Program is an important initiative, and we hope you will ensure that it is equipped to be most effective in achieving its health protection and promotion objectives.

Sincerely,

A handwritten signature in black ink, appearing to read 'Richard Elliott', with a long horizontal stroke extending to the right.

Richard Elliott
Director, Legal Research & Policy

cc: Dr. Robert Cushman, Medical Officer of Health
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