

Briefing Paper | November 2006

Update on Bill C-9, *An Act to amend the Criminal Code (conditional sentence of imprisonment)*

The Canadian HIV/AIDS Legal Network is pleased to report that Bill C-9, the Government's legislation aimed at eliminating conditional sentencing for certain criminal offences, was amended before passing third reading in the House of Commons so that it no longer applies to drug offences. Without the amendments, made by the House of Commons Standing Committee on Justice and Human Rights ("the Justice Committee"), this legislation would have further entrenched law enforcement (rather than public health) as the primary approach to addressing drug addiction and illegal drug use. The bill is now before the Senate.

Since 1996, Canada's criminal law has provided for the option of conditional sentencing for certain crimes. Conditional sentencing allows sentences of imprisonment to be served outside of correctional facilities. House arrest with electronic monitoring is one example of a conditional sentence. Numerous restrictions on the offender make conditional sentences a midpoint between incarceration and penalties such as fines or probation. When they were introduced, conditional sentences were generally seen as an appropriate way to divert minor offenders away from the prison system, avoiding both the overuse of incarceration and the overcrowding of correctional facilities. In some cases, however, the use of conditional sentences for major offences has provoked criticism.

In May 2006, the Government introduced Bill C-9 in the House of Commons. As originally drafted, the bill would have amended the *Criminal Code* (s. 742.1) to remove

conditional sentencing as an option for anyone convicted of an indictable offence that carries a possible penalty of imprisonment for 10 years or more. In other words, anyone convicted and sentenced for an offence of this sort would have to serve the sentence — whatever its length — in prison. This mandatory incarceration is a form of mandatory minimum sentencing.

As originally drafted by the Government, the bill was very broad and would have required mandatory incarceration for some of the drug offences in the *Controlled Drugs and Substances Act* (CDSA), including "trafficking" or "[possessing] for the purposes of trafficking" any quantity of certain substances, such as heroin, cocaine or methadone. The Legal Network was concerned about how this bill would affect people who use drugs and would undermine efforts to reduce the harms associated with drug use, including HIV transmission. The bill would have favoured law enforcement over public health, thereby aggravating the damaging imbalance in Canada's response to drug use. In our view, proposing mandatory incarceration to appear "tough on crime" may have served the Government's political interests, but it did so at the expense of the public interest by ignoring or dismissing both human rights and ignoring the evidence that should inform policy-making.

On 26 September 2006, the Legal Network appeared before the Justice Committee and raised several concerns with Bill C-9 as drafted:

- The legislation was presented as targeting drug dealers; but in practice, the burden of mandatory imprisonment would not have fallen on the drug trade's real profiteers — large-scale dealers who traffic large quantities and consistently manage to escape prosecution. Instead, the burden would have been borne by people involved in small-scale, street-level drug distribution and consumption to support their addictions — and who, not coincidentally, are much more easily targeted by law enforcement officers.
- It would be bad public health policy to increase the incarceration rate of people who use drugs, especially since Canadian prisons fail to provide access to sterile syringes (despite unequivocal evidence from other countries that such a step is both feasible and effective in preventing the spread of infectious diseases). As it stands, people in Canadian prisons are denied their human rights to equality (because they are not provided with health services equivalent to those available outside of prisons), to the highest attainable standard of health (because they are not given the necessary tools to stop the spread of preventable infectious diseases), and to freedom from cruel, inhuman or degrading punishment (prisoners are sentenced to serve time, not to an avoidable higher risk of acquiring preventable diseases).
- As Justice Canada has previously concluded, evidence from the U.S. indicates that mandatory minimum sentences for drug offences don't work. Instead, they simply exacerbate the human and financial toll of the

"war on drugs" by incarcerating large numbers of non-violent drug offenders while doing nothing to curb drug-related crime or problematic drug use.

- Bill C-9, as introduced at first reading, would have included non-violent offences such as drug possession or trafficking. Mandating incarceration in such cases would have been contrary to the fundamental sentencing principles of Canadian law. Furthermore, by denying judges' discretion to make sentences proportionate to each conviction, it would have infringed human rights.

On 26 September 2006, the Legal Network therefore urged the Government and the Justice Committee to amend Bill C-9 so that it would not apply to drug offences under the *Controlled Drugs and Substances Act*. For the full text of the Legal Network's brief, *Misleading and Misguided: Mandatory Incarceration for Certain Drug Offences*, see www.aidslaw.ca/drugpolicy > Publications.

On 24 October 2006, the Justice Committee sent an amended bill back to the House of Commons for further debate and a final vote. As a result of the amendments introduced by the Committee, the legislation is much narrower — it precludes the option of conditional sentencing only in cases of certain "serious personal injury offences" (including sexual assault), terrorism offences, or criminal organization offences, where these carry a sentence of up to 10 years. The amended legislation was passed by the House of Commons on 3 November 2006 and sent to the Senate.

■ 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.

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