



# Brief to the House of Commons Standing Committee on Public Safety and National Security regarding its study *of Bill C-39: An Act to Amend the Corrections and Conditional Release Act and to make consequential amendments to other Acts*

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## 1. About the Canadian HIV/AIDS Legal Network and the Prisoners with HIV/AIDS Support Action Network

The Canadian HIV/AIDS Legal Network (Legal Network) 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 a national non-governmental organization with over 150 members across Canada, many of whom 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 prison law and policy, especially as they relate to people who are at risk of HIV infection as a result of injection drug use.

Prisoners with HIV/AIDS Support Action Network (PASAN) is a community-based organization that provides community development, education and support to prisoners and ex-prisoners in Ontario on HIV/AIDS, hepatitis C and other harm reduction issues. PASAN formed in 1991 as a grassroots response to the AIDS crisis in the Canadian prison system. Today, PASAN is the only community-based organization in Canada exclusively providing HIV/AIDS and hepatitis C prevention education and support services to prisoners, ex-prisoners, youth in custody and their families.

We appreciate the opportunity to comment on the Standing Committee on Public Safety and National Security's study of Bill C-39, *An Act to Amend the Corrections and Conditional Release Act and to make consequential amendments to other Acts*, and to draw the Committee's attention to certain elements of the proposed bill which are relevant from the perspective of human rights and public health.

## 2. Law and Policy on the Rights of People in Prison

The proposed amendments to Sections 4(d), 4(e) and 28 of the *Corrections and Conditional Release Act* (CCRA) represent a radical shift in the guiding principles of the Correctional Service of Canada (CSC) and are contrary to Canadian and international law and policy concerning the rights of people in prison.

### (a) Least restrictive measures

Bill C-39 proposes an amendment to section 4(d) of the CCRA which currently requires CSC to "use the least restrictive measures consistent with the protection of the public, staff members and offenders." The proposed change would have CSC use measures "that are consistent with the protection of society, staff members and offenders and *that are limited to what is necessary and proportionate to the objective for which they are imposed*." [emphasis added] Correspondingly, Bill C-39 proposes amending section 28 of the CCRA, from its current language of providing the "least restrictive environment" for confinement in a penitentiary, to "an environment that contains *only the necessary restrictions*…" [emphasis added]

The justification for these proposed amendments can be found in the December 2007 final report of the CSC Independent Review Panel, entitled "A Roadmap to Strengthening Public Safety". In the report, the Panel contended that the principle of "least restrictive measures" had:

> been emphasized too much by the staff and management of CSC, and even by the courts in everyday decision-making about offenders. As a result an imbalance has been created that places the onus on CSC to justify why the least restrictive measures shouldn't be used, rather than on offenders to justify why they should have access to privileges based upon their performance under their correctional plans. The Panel believes that this imbalance is detrimental to offender responsibility and accountability.

The Review Panel does not cite evidence demonstrating what it claims are CSC's or courts' overemphasis of the least restrictive measures principle, or the resulting imbalance placed on CSC to justify why the least restrictive measures should not be applied. Moreover, the Review Panel does not appear to consider the fact that the "least restrictive measures" approach is consistent with the *Charter of Rights and Freedoms* (*Charter*), from which the *Oakes* test has been derived, stipulating that any limitation on a *Charter* right must impair as little as possible the constitutional right in question. In the prison context, the requirement to only "minimally impair" *Charter* violations has been adopted by the majority of the Supreme Court of Canada in *Sauvé v. Canada* [2002] 3 S.C.R. 519.

While the proposed amendment to the provision describes measures that are "necessary and proportionate to the objective for which they are imposed", thus incorporating part of the *Oakes* proportionality analysis, the failure to incorporate the requirement to minimally impair removes, as Jackson and Stewart argue in *A Commentary on Bill C-43* (September 2006), "a vital check on correctional authority."

The removal of language reflecting minimal impairment is also contrary to recognition under international law of the importance of this principle. For example, the requirement to minimally impair the rights of those in prison is reflected in the *Standard Minimum Rules for the Treatment of Prisoners*, which acknowledge that "[i]mprisonment and other measures which result in cutting off an offender from the outside world are afflictive by the very fact of taking from the person the right of self-determination by depriving him of his liberty."[1] As such, the Rules require prison administrations "to minimize any differences between prison life and life at liberty…"[2] Similarly, the 2006 *European Prison Rules* provide, "Restrictions placed on persons deprived of their liberty shall be the minimum necessary and proportionate to the legitimate objective for which they are imposed."[3]

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[1] *Standard Minimum Rules for the Treatment of Prisoners*, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, s. 57.
[2] Ibid, s. 60.
[3] Council of Europe, Recommendation (2006)2 of the Committee of Ministers to member states on the European Prison Rules. Adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers' Deputies, Part I, Basic Principle 3.

While Bill C-39 has yet to pass, the erosion of prisoners' rights has already been experienced by federally incarcerated prisoners who have reported to staff of PASAN an increase in exceptional searches, greater restrictions on movement and association within institutions, and loss of work resulting from institutional charges prior to any hearing taking place. This erosion of rights has also been observed by the Correctional Investigator of Canada in his 2009–2010 Annual Report. In particular, the Correctional Investigator noted that "[l]ockdowns appear to be more frequent and are sometimes used to facilitate training exercises or staff assemblies"[4] and that

> conditions of confinement, especially at the higher security levels, are becoming more and more restricted in terms of inmate association, movement and assembly…. A more restricted and austere prison regime does not necessarily lead to safer working conditions for staff or a more positive living environment for offenders. We are generally concerned that the regional facilities for federally sentenced women offenders are experiencing a similar tightening of the physical conditions of confinement."[5]

For these reasons, we recommend the preservation of the language of "least restrictive measures" in sections 4(d) and 28 of the CCRA.

### (b) Principle of retained rights

The second proposed change concerns section 4(e) of the CCRA, which provides that people in prison "retain the rights and privileges of all members of society, except those rights and privileges that are necessarily removed or restricted as a consequence of the sentence." The proposed amendment provides that people in prison "retain the rights of all members of society except those that are, as a consequence of the sentence, *lawfully* removed or restricted." [emphasis added]

As the majority of the Supreme Court of Canada in *Sauvé* held, "*Charter* rights are not a matter of privilege or merit, but a function of membership in the Canadian polity that cannot lightly be cast aside."[6] The Court thus recognized that prisoners' rights are not contingent on the whims of the correctional authority or the behaviour of those who are incarcerated. While the proposed change does not appear on its face to significantly alter the principle of retained rights, it paves the way for *lawful* impairments on rights, which may not be necessary or justified (and which may not pass constitutional scrutiny). The breadth of possibilities for the lawful removal or restriction of rights is considerable, especially in light of recently imposed restrictions on visitations and yard-time imposed by CSC at various federal institutions in Ontario, presumably in anticipation of the passage of Bill C-39.[7]

The principle of retained rights is generally accepted by the international community. For example, the *Basic Principles for the Treatment of Prisoners*, which was adopted by the UN General Assembly, provides:

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[4] Correctional Investigator of Canada, *Annual Report of the Office of the Correctional Investigator 2009–2010*, 2010 at p. 33.
[5] Ibid at p. 32.
[6] *Sauvé v. Canada* [2002] 3 S.C.R. 519 at para. 14.
[7] This has been reported by prisoners to staff of PASAN and the Legal Network in Warkworth and Joyceville institutions.

> Except for those limitations that are *demonstrably necessitated* by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants.[8] [emphasis added]

Reinforcing this principle, the UN Human Rights Committee has provided that people in prison retain all rights "subject to the restrictions that are *unavoidable* in a closed environment".[9] [emphasis added] Moreover, the 2006 *European Prison Rules* provide, "All persons deprived of their liberty shall be treated with respect for their human rights."[10] This provision is correctly interpreted as meaning the deprivation of liberty is the singular right that is necessarily removed or restricted as a consequence of incarceration and that the remainder of prisoners' human rights are intact.

If rights can be restricted or removed, as long as this is carried out lawfully, people in prison will undoubtedly suffer severe consequences in an inherently coercive environment. For example, the proposed amendment to the principle of retained rights may provide greater scope for legislated restrictions on the right of people in prison to the *highest attainable standard of health*, which is recognized in Article 12 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), and which is explicitly retained by people in detention.[11] Restrictions on prisoners' right to health would undermine the generally accepted "principle of equivalence", which entitles people in detention to have access to a standard of health care equivalent to that available outside of prison, and includes preventive measures comparable to those available in the general community.[12]

In addition to being a violation of the rights of people in prison, permitting "lawful" restrictions or removals of human rights may have significant public health implications. In a federal prison system where the reported HIV prevalence of 4.6 percent is approximately 15 times greater than the 0.3 percent prevalence reported in the Canadian adult population as a whole and the reported hepatitis C virus (HCV) prevalence at 31.0 percent is approximately 39 times greater than the 0.8

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[8] UN Doc. A/RES/45/111, 14 December 1990, Principle 5.

[9] UN Human Rights Committee, General Comment No. 21, Article 10 (Humane treatment of persons deprived of their liberty), UN CHROR, 44th Sess. 1(1992), UN Doc. HRI/GEN/1/Rev.6(2003), para. 3.

[10] Council of Europe, Recommendation (2006)2 of the Committee of Ministers to member states on the European Prison Rules. Adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers' Deputies, Part 1, Basic Principle 1.

[11] See Article 2(2) of the *International Covenant on Economic, Social and Cultural Rights*, UN Doc. A/6316 (1966).

[12] Prisoners' right of access to health care equivalent to that available in the community is reflected in international declarations and guidelines from the UN General Assembly, the WHO, the UN Office on Drugs and Crime (UNODC) and the Joint Nations Programme on HIV/AIDS (UNAIDS). See *Basic Principles for the Treatment of Prisoners*, supra, at para 9; WHO, *WHO Guidelines on HIV Infection and AIDS in Prisons*, 1993; UNODC, WHO and UNAIDS, *HIV/AIDS Prevention, Care, Treatment and Support in Prison Settings: A Framework for an Effective National Response*, 2006 at 10; and UNAIDS, "Statement on HIV/AIDS in Prisons to the United Nations Commission on Human Rights at its Fifty- second session, April 1996," in *Prison and AIDS: UNAIDS Point of View* (Geneva: UNAIDS, 1997) at 3.

percent prevalence reported in the Canadian adult population as a whole,[13] any restrictions on the right to health, including access to comprehensive harm reduction measures, may lead to the escalating transmission of blood-borne diseases, including HIV.

Further exacerbating this public health crisis in the federal prison system would be the increasing obstacles to parole proposed by Bill C-39, consequently incarcerating people (a significant number who suffer from problematic drug use and HIV and/or HCV infection) for longer periods. As the Correctional Investigator of Canada provided in his 2009–2010 Annual Report (in light of the fact that prison-based needle and syringe programs and safer tattooing programs do not exist), "I recommend that a full and comprehensive range of harm reduction measures be made available to federal inmates."[14]

The Canadian government has a heightened obligation to protect the health of people in prison given that, as a result of incarceration, their integrity and well-being are dependent upon the actions of prison authorities. People in prison deserve the same level of care and protection that people outside prison receive. Moreover, people in prison are part of our communities, and most incarcerated people leave prison at some point to return to their community, some after only a short time inside. Therefore, allowing for the possibility of restricting or removing prisoners' right to health has broader implications for the community as a whole.

## 3. Conclusions and recommendations

We respectfully submit that the language of sections 4(c), 4(d) and 28 of the CCRA be preserved in order to ensure that prisoners' rights, including their right to health, are safeguarded, and that the proposed limitations on parole are reconsidered, given the implications on prison and public health. We hope that any changes to the CCRA focus on ensuring prisoners access to human rights in a concrete way, including through the (1) removal of the structural and institutional barriers to prisoners' basic rights so that they are equivalent to those of the general population and (2) explicit recognition that prisoners' rights and access to services is not only desirable, but essential, in a civil society.

[13] CSC, *Summary of Emerging Findings from the 2007 National Inmate Infectious Diseases and Risk-Behaviours Survey* by Dianne Zakaria *et al.* (Ottawa: CSC, March 2010).
[14] Correctional Investigator of Canada, *Annual Report of the Office of the Correctional Investigator 2009–2010*, 2010 at p. 23.