



DELIVERED BY EMAIL

March 25, 2021

Dear Mayor Stewart:

Re: City of Vancouver’s request for a section 56(1) exemption from the *Controlled Drugs and Substances Act* (CDSA) to decriminalize personal drug possession

As you may recall, in May of last year, the HIV Legal Network, Pivot Legal Society and the Canadian Drug Policy Coalition called on the federal Health Minister to exercise her authority under section 56 of the *Controlled Drugs and Substances Act* (CDSA) to issue a nation-wide exemption decriminalizing simple drug possession — a call that has been endorsed by more than 180 civil society organizations to date.¹ We were pleased to see the City of Vancouver request such an exemption to decriminalize personal drug possession within the city and have publicly expressed our support for this initiative. **We write now to urge you to develop a “Vancouver Model” for decriminalization that is appropriately broad and responds to the aspirations and needs of people who use drugs: principally, an exemption must apply to all substances scheduled under the CDSA, to all quantities of substances where possession is for personal use (regardless of the amount possessed), to all instances of transferring drugs (e.g., splitting, sharing, selling) of quantities below specified thresholds, and must not include other unnecessary restrictions or conditions (administrative or otherwise) that would undermine the benefits of decriminalization.**

Threshold quantities

If thresholds are adopted that *prima facie* distinguish simple drug possession from possession for the purpose of trafficking, it is essential that *any threshold quantities specified in an exemption should serve as a floor for any possible criminalization, not a ceiling*, i.e. possession of a quantity *below* the set threshold is always considered in law to be simple possession and covered by the exemption from section 4 of the CDSA.

This would recognize that not only is it unwarranted to criminalize possession for personal consumption, it is also a poor use of public resources to criminalize possession of limited

¹ Canadian HIV/AIDS Legal Network, Canadian Drug Policy Coalition, Pivot Legal Society et al., *Letter to Canadian Government: Decriminalize Simple Drug Possession Immediately*, May 14, 2020 (last updated March 3, 2021), online: www.hivlegalnetwork.ca/site/letter-to-canadian-government-decriminalize-simple-drug-possession-immediately/?lang=en.

quantities even if it may be for the purpose of *selling or sharing*. It is common for people to share drugs when using with friends or acquaintances, or to sell limited quantities of drugs to others in their network as a means of livelihood, to support their own dependent use, or to provide a safe supply (when they have confidence in the quality of the substance). Decriminalizing possession of limited quantities is in line with a human rights and public health-based approach to drug policy.

It will also be important to be clear that possession of a quantity *above* the threshold is never presumptively possession for purpose of trafficking, and the burden of proof remains, as always and as constitutionally required, on the prosecution to prove all elements of the offence. An allegation of possession for the purpose of trafficking above the threshold, for example, still requires the prosecution to prove intent to sell in order to secure a conviction, and a court can still decide, based on the evidence before it in a given case, that the possession was for personal use and not for the purpose of trafficking.

Furthermore, if threshold quantities are specified, they must reflect quantities of substances that people are likely to possess for personal consumption and limited sharing/selling, and must consider factors such as patterns of personal use, geography, individual experience, physical tolerance of certain substances, etc. If threshold quantities are set artificially low, disregarding real-world practices, then decriminalization on paper becomes illusory in practice. As Pivot Legal Society and VANDU underscored in an earlier letter (of March 15, 2021):

[T]hreshold amounts must be appropriately high in order to eliminate both the abuse of police discretion and the enforcement and confiscation of below-threshold amounts. ... If thresholds below an objectively significant amount are adopted, we risk creating a model more restrictive than the one currently permitted by the caselaw (especially if police attempt to retain the ability to enforce [possession for the purpose of trafficking]) where the amount possessed is below threshold).

Determination of thresholds necessarily requires the leadership of people who use drugs, and their perspectives must be centered above other perceived stakeholders, including law enforcement. To best ensure thresholds reflect the realities of drug use, these should be periodically evaluated and adjusted based on monitoring and evaluation (discussed further below). To allow thresholds to evolve, threshold amounts should not be specified in exemption requests, which would require the potentially burdensome approval of the federal Health Minister. Rather, the exemption could reflect a process of defining thresholds, and revising them as warranted, ensuring that threshold amounts are determined locally and responsive to changing patterns of use.

Consultation requirements

The Vancouver Model is intended to be a health-oriented response to dual public health crises. As law enforcement do not have expertise in the area of health or health services (and were in fact found in a recent study to work at cross-purposes with existing health and harm reduction efforts in Vancouver²), police cannot be tasked with key decision-making regarding parameters

² A. Collins et al., “Policing space in the overdose crisis: A rapid ethnographic study of the impact of law enforcement practices on the effectiveness of overdose prevention sites,” *Int J Drug Policy*. 2019 Nov;73:199-207.

of the model. Rather, the primary objective of further consultation should be to engage the leadership of people who use drugs, in addition to drug policy advocates, researchers and lawyers, on technical aspects of the framework and its implementation. This is key to address misinformation and resistance to decriminalization and to inform the broader public about the approach Vancouver is adopting. As we note above, it is critical that the City of Vancouver meaningfully listens to people who use drugs on the issue of thresholds and ensures that their perspectives are documented as part of the monitoring and evaluation process.

Age restrictions

As we have previously noted, the prohibition on simple possession does harm to those criminalized, regardless of their age. Decriminalization must apply to all, including youth whose prosecutions for possession would be also guided by the provisions of the *Youth Criminal Justice Act*. We urge you to reconsider your exemption request and expand its scope so that it does not discriminate based on age.

Penalties and diversion pathways

We reiterate our previous recommendation to you to **remove all sanctions related to possession below the threshold**, including but not limited to fines; “health assessments;” confiscation of substances, paraphernalia or medical supplies; geographic, drug use or personal contact restrictions or curfews; drug treatment courts as a coercive alternative to criminal sanction; and other coerced or involuntary treatment or other health interventions. In no way should such approaches feature in any decriminalization scheme, as it is counterproductive to maintain such measures while seeking to decriminalize and destigmatize people who use drugs. Such an approach also raises human rights concerns and would continue to have a disproportionate impact on the most marginalized people who use drugs, including those who are Black, Indigenous, poor and unsheltered.

In the majority of cases, only a subset of people who use drugs need or welcome health referrals for their substance use. Rather, people who use drugs tend to be experts in their own use patterns and most would chiefly benefit from the cessation of police involvement respecting drug use, full stop. **Requiring or encouraging police to make health referrals — even if they are “voluntary” on paper — will be perceived and experienced as coercive by the marginalized communities with whom the police regularly engage.**³ The police should not serve as gatekeepers to health services, nor are they equipped to decide whether someone is in need of treatment. Conferring responsibility on police to make health referrals may empower them to continue to surveil, detain and harass people who use drugs under the guise of “help.” The harms affiliated with drug prohibition — harms that the Vancouver Model should reduce — stem not only from active enforcement, but also mere police involvement with people who use drugs. Even if police no longer lay charges for simple possession, drug use will continue to be driven underground if police are still part of the equation, in part because of ongoing mistrust and fear of police among marginalized communities.

International drug control conventions

As elaborated in the enclosed brief by the HIV Legal Network on *Drug decriminalization and international law*, **international drug control conventions do not require Canada to impose**

³ *R. v. Le*, 2019 SCC 34.

criminal sanctions or any other punitive measures for possession (or purchase or cultivation) for personal consumption. Decriminalization is also in keeping with Canada’s human rights obligations, and is recommended by all UN agencies in a unanimous common position of the UN system.⁴ Canada also has the latitude under the UN drug control conventions to refrain from imposing convictions or punishment in cases of trafficking, or possession for the purpose of trafficking, that it considers to of a “minor nature” and provide alternative measures instead.

Evaluation requirements

We encourage the City of Vancouver to develop a robust monitoring and evaluation plan that is evidence-based, responsive, and includes the leadership of people who use drugs, drug policy advocates, researchers and others, including on the issue of thresholds. Indicators of success should be based on the objectives of decriminalization (i.e., a reduction in the number of charges laid for simple possession and the number of people being charged, as well as some demographic analysis to address potential continued bias in the application of the law). **If this primary indicator is not being met, or there continues to be disproportionate and discriminatory charging of racialized communities, for example, then factors such as threshold quantities, age restrictions, penalties and diversion pathways must be revisited.**

Other outcomes, including the anticipated benefits for health and well-being of persons previously criminalized, and savings in public expenditures by eliminating enforcement of the prohibition on simple possession are important, and data regarding all other potential benefits ancillary to decriminalization are welcome. However, these are secondary outcomes and not essential to judging the success of decriminalization efforts, the goal of which is to reduce the inherent harm of being criminalized and of the policing that accompanies it.

We thank you and your staff for taking the time to meet and correspond with us on this issue and we hope that we can continue the conversation to ensure the best possible Vancouver Model — one that respects the human rights of people who use drugs and contributes to better health outcomes.

Sincerely,



Richard Elliott, Executive Director, HIV Legal Network



Donald MacPherson, Executive Director, Canadian Drug Policy Coalition

⁴ United Nations Chief Executives Board, *United Nations system common position supporting the implementation of the international drug control policy through effective inter-agency collaboration*, UNCEB, 2nd Session, Annex 1, UN Doc. CEB/2018/2, January 18, 2019.



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