

**Brief to the Senate Standing Committee on Legal and Constitutional Affairs re *Bill C-37: An Act to amend the Controlled Drugs and Substances Act and to make related amendments to other Acts***

**February 26, 2017**

**PART I – OVERVIEW**

1. Canada currently faces an unprecedented overdose epidemic. Fentanyl, carfentanil, and other highly potent synthetic opioids continue to flood the ever-growing illegal drug market as first responders and community members across the country struggle to respond quickly and effectively to a rising death count. In British Columbia, the rate of opioid overdoses has reached an all-time high, but prospective supervised consumption sites (“SCS”) that would reduce death rates continue to await the federal exemption that is required to begin operating. In the meantime, the Provincial Health Minister (“Provincial Minister”) ordered that “overdose prevention sites” be set up in several major BC cities as an emergency measure.<sup>1</sup> At some of those sites, people can inject illicit drugs while being monitored by trained staff equipped with naloxone.

2. BC’s decision to implement emergency services is exceptional, particularly given that any supervised injection taking place at these sites is prohibited by *the Controlled Drugs and Substances Act (“CDSA”)*. Without expedited access to a section 56 exemption or other specific legislation enabling legal operation of supervised injection services, it is foreseeable that other provinces will not implement the same measures that would allow them to be more responsive to a public health emergency.

3. On December 12 2016, the Government of Canada responded to the need for streamlined s. 56 applications for exemptions by introducing *Bill C-37: An Act to amend the Controlled Drugs and Substances Act and to make related amendments to other Acts*. Bill C-37 is part of a new federal Drugs and Substances strategy that promises to “replace the existing National Anti-Drug Strategy with a more balanced approach, [restoring] harm reduction as a core pillar of Canada’s drug policy, alongside prevention, treatment and enforcement and supports all pillars with a strong evidence base.”<sup>2</sup>

4. One objective of Bill C-37 is to “simplify the process of applying for an exemption that would allow certain activities to take place at a supervised consumption site, as well as the process of applying for subsequent

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<sup>1</sup> This submission deliberately uses the term ‘emergency supervised consumption site’ to refer to the ‘overdose prevention sites’ implemented by the BC government in December 2016 on the basis that ‘overdose prevention sites’ and exempted ‘supervised consumption sites’ are not materially different. While one has been federally exempted and the other has not, Pivot submits that federal drug laws capture activities taking place at both types of facilities, resulting in a need for drug law reform to protect operators and participants at emergency SCSs.

<sup>2</sup> Health Canada, News Release, “Government of Canada announces new comprehensive drug strategy supported by proposed legislative changes” (12 December 2016) online: < <http://news.gc.ca/web/article-en.do?nid=1168519>> [Health Canada News Release].

exemptions.”<sup>3</sup> While the proposed legislation is an important step in that direction, the new application process will still demand significant time, resources, and expense.

5. Whereas people living in Canada continue to die in growing numbers, Pivot Legal Society (“Pivot”) recommends two amendments to Bill C-37 that would improve immediate and long-term access to necessary health and safety services for people who use drugs.

6. The first recommended amendment would enable Provincial Ministers of Health, where necessary, to exempt emergency SCSs from application of the *Controlled Drugs and Substances Act* on a temporary basis. This would allow provinces to respond quickly to local health concerns and ensure that health care providers who offer life-saving services to people who use drugs are not at risk of contravening federal drug laws (with the same protections also afforded to those who use such services).

7. The second recommended amendment would further streamline the new exemption process under s. 56.1 by narrowing the information that applicants are required to submit in their application. The language that Pivot proposes for s. 56.1(2) will ensure that the federal Minister of Health (“Federal Minister”) has the requisite public health information to make a determination on the necessity of the SCS. However, it will also make the process more expedient for communities in need to apply for life-saving supervised consumption services.

## **PART II – CANADA’S OPIOID CRISIS**

8. The number of overdose deaths in Canada has risen dramatically in recent years, with the highest number of deaths to date recorded in 2016.<sup>4</sup> In December 2016, the Federal Minister called the epidemic “a national public health crisis” and confirmed that it is “absolutely essential that we put all tools on the table to address it.”<sup>5</sup>

9. The rate of overdose deaths is disproportionately high in BC. In 2016, there were 922 apparent illicit drug overdose deaths—a 78% increase from the year before (513). December 2016 was the deadliest month on record, with 142 apparent illicit drug overdose deaths across the province.<sup>6</sup> In the same month, the BC Coroners Service announced that morgues in the City of Vancouver were “frequently full” as a result of the unprecedented number of overdose deaths, forcing health authorities to store bodies at funeral homes.<sup>7</sup>

10. This crisis is in large part the legacy of Canada’s now-defunct Anti-Drug Strategy. Decades of drug prohibition have proven to be counterproductive, fueling Canada’s unregulated, illegal drug market and leaving a scarcity of evidence-based health services, including harm reduction and treatment programs, for people who

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<sup>3</sup> Bill C-37, *An Act to Amend the Controlled Drugs and Substances Act and to make related amendments to other Acts*, 2<sup>nd</sup> Sess, 42<sup>nd</sup> Parl, 2016.

<sup>4</sup> Health Canada News Release supra note 2.

<sup>5</sup> Karen Howlett, “Jane Philpott promises use of ‘all tools’ in opioid crisis”, *The Globe and Mail* (18 November 2016), online: <<http://www.theglobeandmail.com/news/national/medical-experts-urge-ottawa-to-declare-public-emergency-over-opioid-crisis/article32926287/>>

<sup>6</sup> British Columbia Coroners Service, Coroners Report, *Illicit Drug Overdose Deaths in BC: January 1, 2007 – December 31, 2016, January 18 2017* (18 January 2017) at 2, 4, online: <<http://www2.gov.bc.ca/assets/gov/public-safety-and-emergency-services/death-investigation/statistical/illicit-drug.pdf>> [Coroners Report].

<sup>7</sup> Travis Lupick, “Overdose deaths involving fentanyl fill Vancouver morgues to capacity”, *The Georgia Straight* (6 December 2016), online: <<http://www.straight.com/news/840756/overdose-deaths-involving-fentanyl-fill-vancouver-morgues-capacity>>

use drugs.<sup>8</sup> International research demonstrates that the criminalization of drugs increases rates of drug production, consumption, availability, and adverse drug-related health effects.<sup>9</sup>

### **PART III – SUPERVISED CONSUMPTION SITES**

11. SCSs are specialized health care facilities that can provide a range of services to mitigate harms associated with substance use. Their core function is to connect people who use drugs with sterile injection equipment, supervision while using psychoactive drugs, overdose reversal, First Aid/wound care, and referrals to other health care services. In many cases, they also provide referrals to addiction treatment programs.

12. Rigorous evaluations of Insite, North America’s first SCS, found that it is used by people who would often otherwise inject in public or alone. Insite has reduced HIV risk behavior (such as needle-sharing and the use of non-sterile equipment), improved public order, and provided safety for women who inject drugs. Insite has been fundamental in connecting people with addiction to longer-term treatment strategies. In its over thirteen years of operation, there have been no fatal overdoses at Insite. Research also shows that Insite has been cost-effective and has had no negative impacts in terms of increased crime, injection initiation, or relapse into injecting.<sup>10</sup>

13. As the Supreme Court of Canada (“SCC”) confirmed in *Canada (Attorney General) v PHS Community Services Society* 2011 SCC 44 (“*PHS*”), the activities of participants and staff at Insite are a *prima facie* violation of the possession prohibition under s. 4(1) of the *CDSA*.<sup>11</sup> For this reason, a SCS can only operate legally if it is granted an exemption by the Federal Minister that immunizes site staff and participants against criminal charges for possession of drugs under the *CDSA* (“a s. 56 exemption”).<sup>12</sup>

14. In order to receive a s. 56 exemption, operators of SCSs must first submit an application for Ministerial consideration. The existing criteria to be addressed in the application has been criticized as being onerous, time-consuming, and a barrier to the establishment of health and safety services for people who use drugs.

15. If enacted in the form it was first presented to the House of Commons, Bill C-37 would reduce the categories of evidence required in an application for an exemption from twenty-six to five. Bill C-37 also proposes a number of other important legislative changes, including the removal of the “exceptional circumstances” criteria that is currently found in s. 56.1(5) and the ability of the Federal Minister to begin reviewing application components as they are submitted.

16. While this would undoubtedly decrease the legislative barriers to obtaining an exemption to operate a SCS, the application process will still take significant time and resources, leaving health service providers with two unreasonable options: delay the provision of life-saving services while an application is underway, or proceed without the exemption and face the possibility of criminal charges.

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<sup>8</sup> Susan Boyd, Connie I Carter & Donald Macpherson, *More Harm than Good: Drug Policy in Canada* (Nova Scotia: Fernwood Publishing, 2016) at 60.

<sup>9</sup> Transform Drug Policy Foundation, *After the War on Drugs: Tools for the Debate* (UK: Transform Drug Policy Foundation, 2007) at 25.

<sup>10</sup> See: BC Centre for Disease Control, *British Columbia Overdose Action Exchange: Supplementary Material: Primers*, 2016, online: <http://www.bccdc.ca/resource-gallery/Documents/BCOAE-supplementary-materials.pdf> [BC Action Exchange]; See also: Urban Health Research Initiative, BC Centre for Excellence in HIV/AIDS, *Insight into Insite*, 2010, online: [http://www.cfenet.ubc.ca/sites/default/files/uploads/publications/insight\\_into\\_insite.pdf](http://www.cfenet.ubc.ca/sites/default/files/uploads/publications/insight_into_insite.pdf)

<sup>11</sup> *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at para 89 [*PHS*].

<sup>12</sup> *Controlled Drugs and Substances Act* RSC 1996, c 19 s 56.1.

## **PART IV – EMERGENCY SUPERVISED CONSUMPTION SITES IN BRITISH COLUMBIA**

17. In December 2016, BC’s Minister of Health, Terry Lake, issued a directive that emergency health services be established in Vancouver, Victoria, and Surrey. At some of these sites, people are able to inject illicit substances while being monitored by trained professionals equipped with naloxone.<sup>13</sup> Despite not having received federal exemptions, these services continue to operate while more appear to be opening in communities across BC.<sup>14</sup>

18. The need for emergency measures to address the provincial crisis was evident. At the time of implementation, BC was experiencing an average of four overdose deaths per day.<sup>15</sup> The two applications for exemptions for SCSs in Vancouver that were submitted on October 31, 2016 are still awaiting federal approval, as are the three applications for exemptions for SCSs in Victoria that were submitted in early January 2017.<sup>16</sup> On these grounds, health service providers and community organizations felt they had no choice but to channel their resources into emergency life-saving initiatives. In the DTES, grassroots efforts were already well underway in the form of popup sites, mobile needle exchanges, a bicycle overdose response unit, and ‘alley patrols.’ These endeavors began without any formal funding and in the absence of resources to apply for a s. 56 exemption.

19. The overdose crisis is increasingly impacting other provinces, including Alberta, Ontario, and Quebec. BC, however, remains the only province with a legally sanctioned injection site and a provincial government that has taken emergency measures to prevent fatal overdoses. Many factors contribute to the desperate lack of harm reduction services across Canada, but it is clear that the legislative barriers to securing s. 56 exemptions have played a critical role. So long as these barriers remain in place, provinces will be unable to stem the tide of fatal overdoses in an effective and timely way.

## **PART V: RECOMMENDATIONS**

### **Recommendation 1:**

#### **A. Substance of the provision**

20. Pivot recommends the inclusion of a provision that would empower Provincial Ministers to grant temporary exemptions to emergency SCSs if, in the opinion of the Provincial Minister, such measures are necessary to respond to a localized or regional event posing a significant risk to public health.<sup>17</sup>

21. While Parliament’s ability to delegate powers to provincial legislatures is limited, it can delegate to, or empower, other provincial bodies by way of administrative inter-delegations.<sup>18</sup>

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<sup>13</sup> Vancouver Coastal Health, News Release, “VCH opens new overdose prevention sites on DTES” (8 December 2016) online: <<http://www.vch.ca/about-us/news/vch-opens-new-overdose-prevention-sites-on-dtes>> [VCH News Release].

<sup>14</sup> Vancouver Island Health Authority, News Release, “Island Health implementing overdose prevention site in Nanaimo” (16 January 2017) online: <[http://www.viha.ca/about\\_viha/news/news\\_releases/nr\\_ODP\\_Site\\_Nanaimo\\_16Jan2017.htm](http://www.viha.ca/about_viha/news/news_releases/nr_ODP_Site_Nanaimo_16Jan2017.htm)> See also: Sarah Petrescu, “Amid crisis, more overdose prevention sites open on Vancouver Island”, *Times Colonist* (1 February 2017), online: <<http://www.timescolonist.com/news/local/amid-crisis-more-overdose-prevention-sites-open-on-vancouver-island-1.9712273>>

<sup>15</sup> Coroners Report, supra note 6 at 4.

<sup>16</sup> Applications for exemptions in Toronto and Ottawa are also awaiting approval.

<sup>17</sup> Note that the nature of the event warranting the exemption is based on the definition of “medical emergency” as set out in Part 5 of BC’s *Public Health Act*, S.B.C. 2008, c.28.

<sup>18</sup> *Attorney General of Nova Scotia v Attorney General of Canada* [1950] 4 DLR 369; *R v Furtney*, [1991] 3 SCR 89.

22. The recommended provision would be inserted into Bill C-37 immediately after the proposed s. 56.1(1) of the *CDSA*. It would follow the structure and language of the new proposed s. 56.1 and would dispense with what would be the new information, notice, and decision requirements of ss. 56.1(2), (4) and (5). In short, exemptions granted under the recommended provision would bypass the s. 56.1 criteria to be addressed in the application.

23. The proposed text is set out in **Appendix A** to these submissions.

## **B. Rationale for the recommendation**

24. This amendment to Bill C-37 would enable provinces to respond to overdose crises more effectively by (i) delivering a more immediate response to overdose epidemics (ii) providing legal protections for people who operate or are employed at emergency SCSs, and (iii) benefitting from local knowledge and expertise regarding the health needs of communities.

### **i. Delivering a more immediate response to overdose epidemics**

25. Delegating the s. 56.1 exemption power to Provincial Ministers would empower provinces to take emergency actions during localized or regional health events that create a need for supervised injection services. Without legislation allowing them to do so, provinces will, in most cases, delay the provision of health services in order to apply for an exemption under s. 56.1.<sup>19</sup> It is likely that other provinces will not be willing to take action similar to that of the BC Minister of Health and establish overdose prevention services without a federal exemption.

26. The delay caused by the application process threatens timely access to crucial health and safety services for people who use drugs. Even if the application process is streamlined, Health Canada requires time to review and assess the merit of the application. Even when applications are expedited by Health Canada, as in the case of the two outstanding Vancouver s. 56 applications, they can take many months to process. At the time of this submission, the two Vancouver applications that were submitted on October 31, 2016 and are being expedited were still under review.

27. In that time, BC's emergency SCSs went ahead without an exemption and have been extremely successful in limiting the number of fatal overdoses and increasing access to sterile injection equipment. On its first day of operation, BC's emergency mobile medic unit reversed 15 overdoses.<sup>20</sup> Statistics from the Coroner's Office at the end of 2016 show that of the 922 fatal overdoses in BC last year, none occurred in any supervised consumption facilities.<sup>21</sup>

28. In order to be responsive to urgent public health crises, it is necessary to empower Provincial Ministers to grant temporary exemptions to emergency SCSs. In situations where the need for the service is ongoing, it will be incumbent on an SCS to apply for a s. 56 exemption to operate as a continuing service.

### **ii. Providing legal protections for people who operate or are employed at supervised consumption sites**

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<sup>19</sup> Some applicants for exemptions, for instance, have abstained from implementing such measures for fear that their potentially illegal actions will threaten their chances of being approved on a pre-existing application for an exemption. See: Kevin Diakiw, *The Leader* "Pop-up safe injection site sets up in Whalley" (27 July 2016) online: <<http://www.surreyleader.com/news/388470661.html>>

<sup>20</sup> VCH News Release, supra note 13.

<sup>21</sup> Coroners Report, supra note 6 at 3.

29. In *PHS*, the SCC agreed that the activities of staff at SCSs are *prima facie* criminal in nature:

[89] I conclude that, without a s. 56 exemption, s. 4(1) applies to the staff of Insite because, by operating the premises — opening the doors and welcoming prohibited drugs inside — the staff responsible for the centre may be “in possession” of drugs brought in by clients. They have knowledge of the presence of drugs, and consent to their presence in the facility over which they have control.<sup>22</sup>

30. Given the opioid crisis in BC, many community members, social services, and health service providers have had little choice but to supervise or witness injections and offer emergency first aid and naloxone if necessary. This means that in the absence of a federal exemption, these individuals are vulnerable to criminal sanction. While no staff have yet been arrested or charged criminally in relation to their involvement with emergency SCSs, they remain vulnerable under the current law.

31. Pivot’s recommended amendment to Bill C-37 would ensure that where a provincial ministerial exemption has been granted, employees who provide service at emergency SCSs would not be in violation of the *CDSA* and would not bear legal risk when they are providing life-saving health services. No person should be penalized for providing public health services, but the reality of administrative delay and the degree of urgency could force well-intentioned people to run afoul of the law in the interest of providing immediate safety to neighbours, friends, and clients.

### **iii. Benefitting from local knowledge and expertise regarding the health needs of communities**

32. Provincial Ministers have more timely and extensive knowledge, expertise, and information than the Federal Minister about the health circumstances and needs of local communities in their province. Their familiarity with regional Health Authorities, medical services, frontline service providers, community health indicators, and gaps in existing services puts them in a better position to assess the nature and degree of need for SCSs in a given community.

33. By contrast, the distance between the Federal Minister and local communities increases the need for more extensive information gathering, consultation, and investigation prior to reaching a decision, which in turn translates to greater delays in the delivery of emergency services.

34. The recommended provision provides a degree of flexibility because SCS services that are being provided on an emergency basis might not need to become a permanent site. If the number of fatal overdoses declines or the services are best delivered at a different venue or in a different way, some SCSs may be discontinued. Temporary exemptions would relieve applicants, as well as the federal powers tasked with reviewing and approving applications, of the unnecessary burden of approving temporary services. Conversely, the option of temporarily authorized services will allow local health authorities and provincial health ministers to decide on the efficacy of a particular service and whether it should continue or not.

## **Recommendation 2:**

### **A. Substance of the provision**

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<sup>22</sup> *PHS* supra note 11 at para 89.

35. Pivot recommends a second amendment to Bill C-37 that would make the application process far more realistic and reasonable for applicants. We recommend reducing the number of criteria to be addressed in a s. 56.1 application for an exemption from five to one, which will streamline the new application process while still including the necessary information for Health Canada to determine whether the s. 56 criteria are met.

36. We recommend that applicants be required to submit evidence only of the local conditions indicating a need for the site.

37. It is our submission that the following four factors should not appear as factors for consideration because they are not relevant to the public health objectives of SCSs:

- i. the impact of the site on crime rates;
- ii. the regulatory structure in place to support the site;
- iii. the resources available to support the maintenance of the site; and
- iv. expressions of community support or opposition

38. Our proposed text is set out in **Appendix B** to these submissions.

## **B. Rationale for the Recommendation**

39. This amendment to Bill C-37 is in keeping with the aim stated in the Bill's legislative summary to simplify the process of applying for an exemption in relation to SCSs. The current amendments to s. 56.1 proposed in Bill C-37 do not go far enough and continue to threaten the access of people who use drugs to crucial health and safety services.

40. Streamlining the criteria will decrease delay and improve access to life-saving facilities for communities in need. Most importantly, it will remove the onus currently placed on minimally-resourced applicants that are, especially at this time, over-burdened and channelling all available resources into emergency measures to save lives.

41. Requiring only that applicants demonstrate a need for the site aligns with the federal government's recent commitment to treating drug use as a public health issue rather than a criminal justice issue. It also reinforces the role of harm reduction as a key component of Canada's new federal drug strategy.

### **All of which is respectfully submitted by:**

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## APPENDIX A

### A. Express Delegation Alternative

#### 56.1 (1.1)

For the purpose of allowing certain activities to take place at a supervised consumption site, a **Provincial Minister** may, on any terms and conditions that the **Provincial Minister** considers necessary, exempt for a twelve-month period the following from the application of any or all of the provisions of this Act or the regulations if, in the opinion of the **Provincial Minister**, the exemption is necessary to respond to a localized or regional event posing a significant risk to public health:

- a) any person or class of persons in relation to a controlled substance or precursor that is obtained in a manner not authorized under this Act; or
- b) any controlled substance or precursor or any class of either of them that is obtained in a manner not authorized under this Act.

#### 56.1 (1.2)

An exemption granted under subsection (1.1) may be renewed at the election of the **Provincial Minister** up to three times, provided that in each case the **Provincial Minister** is of the opinion that the localized or regional event giving rise to the exemption is continuing.

#### 56.1 (1.3)

In subsections (1.1) and (1.2):

“**Provincial Minister**” means a minister in the government of a province in which the medical emergency is occurring who has responsibility for public health in that province

### B. Non-Delegation Alternative

#### 56.1 (1.1)

For the purpose of allowing certain activities to take place at a supervised consumption site the Minister may, on the written request of a **Provincial Minister** and on any terms and conditions that the **Provincial Minister** considers necessary, exempt for a twelve month period the following from the application of any or all of the provisions of this Act or the regulations if, in the opinion of the **Provincial Minister**, the exemption is necessary to respond to a localized or regional event posing a significant risk to public health:

- a) any person or class of persons in relation to a controlled substance or precursor that is obtained in a manner not authorized under this Act; or
- b) any controlled substance or precursor or any class of either of them that is obtained in a manner not authorized under this Act.

#### 56.1 (1.2)

An exemption granted under subsection (1.1) must be granted within seven days of the receipt by the Minister of the **Provincial Minister’s** request.

#### 56.1 (1.3)

An exemption granted under subsection (1.1) may be renewed by the Minister at the written request of the **Provincial Minister**, and may be renewed as many as three times provided that in each case the **Provincial Minister** is of the opinion that the localized or regional event giving rise to the exemption is continuing.

#### 56.1 (1.3)

In subsections (1.1), and (1.2) and (1.3)

“**Provincial Minister**” means a minister in the government of a province in which the medical emergency is occurring who has responsibility for public health in that province

**APPENDIX B**

56.1 (2) An application for an exemption under subsection (1) shall include evidence, submitted in the form and manner determined by the Minister, of the local conditions indicating a need for the site.