Submission to the Standing Senate Committee on Legal and Constitutional Affairs:
Review of Bill C-5, *An Act to amend the Criminal Code*
and the Controlled Drugs and Substances Act

October 18, 2022

Introduction

The BC Civil Liberties Association ("BCCLA") is the oldest and most active civil liberties and human rights group in Canada. BCCLA has been actively advancing human rights and civil liberties through litigation, law reform, community-based legal advocacy, and public engagement and education for the last 60 years.

We appreciate the opportunity to comment on Bill C-5, *An Act to amend the Criminal Code and the Controlled Drugs and Substances Act* (the "Bill" or "Bill C-5"). This Bill represents an important opportunity to shift the approach taken in the criminal legal system. These submissions will highlight the ways in which Bill C-5, as currently drafted, comes short in protecting human rights and promoting equitable outcomes. In order for the stated goals of (a) addressing systemic discrimination in the criminal legal system, (b) ensuring consistency with *Charter* rights and values, and (c) shifting towards a public health approach towards problematic substance use[1] to be realized, these shortcomings must be addressed before the Bill is passed by Parliament.

We urge the Standing Senate Committee on Legal and Constitutional Affairs (the "Committee") to take bold action and propose meaningful amendments to Bill C-5. This requires:

1) Repealing all mandatory minimum sentences;
2) Removing unnecessary restrictions on the availability of conditional sentence orders;
3) Repealing section 4 of the *Controlled Drugs and Substances Act* and decriminalizing necessity trafficking; and
4) Ensuring that the implementation of diversion measures is consistent with human rights.

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[1] Canada, Parliament, *House of Commons Debates*, 44th Parl, 1st Sess, Vol 151, No 016 (13 December 2021) at 1100-1110 (G Anandasangaree) and 1530-1545 (Hon D Lametti).

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It is uncertain when these pressing issues will be before Parliament again. Marginalized communities should not have to wait any longer. The present opportunity should not be wasted. More than incremental reform is required: this Bill must go further and this Committee has the power to make it happen.

Our Obligations

On the heels of this country's second annual National Day for Truth and Reconciliation, it is incumbent upon Parliament to take concrete steps to address the legacies and ongoing injustices that flow from settler colonialism. Seven years ago, the Truth and Reconciliation Commission ("TRC") released its final report. Most of its Calls to Action remain unaddressed.[2] We urge the Committee to consider its obligations to Indigenous peoples and the present opportunity to disrupt the pattern of colonial intrusion and disruption of Indigenous lives. With respect to Bill C-5, the TRC called for the following actions:

> 30. We call upon federal, provincial, and territorial governments to commit to eliminating the overrepresentation of Aboriginal people in custody over the next decade, and to issue detailed annual reports that monitor and evaluate progress in doing so.[3]
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> 31. We call upon the federal, provincial, and territorial governments to provide sufficient and stable funding to implement and evaluate community sanctions that will provide realistic alternatives to imprisonment for Aboriginal offenders and respond to the underlying causes of offending.
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> 32. We call upon the federal government to amend the Criminal Code to allow trial judges, upon giving reasons, to depart from mandatory minimum sentences and restrictions on the use of conditional sentences.
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> …
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> 42. We call upon the federal, provincial, and territorial governments to commit to the recognition and implementation of Aboriginal justice systems in a manner consistent with the Treaty and Aboriginal rights of Aboriginal peoples, the *Constitution Act, 1982*, and the *United Nations Declaration on the Rights of Indigenous Peoples*, endorsed by Canada in November 2012.[4]

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[2] See Eva Jewell & Ian Mosby, *Calls to Action Accountability: A 2021 Status Update on Reconciliation* (Toronto: Yellowhead Institute, 2021) at 6 <https://yellowheadinstitute.org/trc>.

[3] Call to Action 38 calls for the same with respect to Indigenous youth.

[4] Canada, Truth and Reconciliation Commission of Canada, *Calls to Action* (Winnipeg: Truth and Reconciliation Commission of Canada, 2012) at 3-4 <https://nctr.ca/records/reports/#trc-reports> [TRC

As this Committee has already heard, and as Parliament is well aware, the mass incarceration of Indigenous people in Canada is worsening, and the problem is particularly acute for Indigenous women.[5] While countering this trend will require a multi-pronged approach, we cannot ignore the tools that are available and the barriers to change that we know exist.

Honouring our obligations requires us to take bold action, rather than the path of least resistance. BCCLA recommends the following amendments to Bill C-5 in order for the legislation to facilitate equitable outcomes for Indigenous, Black, and other racialized people.

Repeal Mandatory Minimum Sentences

BCCLA calls upon Parliament to repeal all mandatory minimum sentences in the *Criminal Code* and *Controlled Drugs and Substances Act* ("*CDSA*"). Mandatory minimum sentences ("MMS") are demonstrably ineffective, disproportionately impact marginalized communities, and are inconsistent with the principles of proportionality, rationality, and individualization that characterize the sentencing process. The full repeal of MMS is supported by decades of research.[6]

MMS have proven remarkably ineffective in their stated goal of deterring crime.[7] It is also well-established that MMS have contributed to the mass incarceration of Indigenous, Black,

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Calls to Action]. In addition, Calls to Action 33 and 34 address the need to reform the criminal legal system to better address the needs of participants with Fetal Alcohol Spectrum Disorder. Importantly, this includes increased community resources and exemptions from mandatory minimum sentences.

5 Canada, Office of the Correctional Investigator, "Proportion of Indigenous Women in Federal Custody Nears 50%: Correctional Investigator Issues Statement" (17 December 2021) <www.oci-bec.gc.ca/cnt/comm/press/press20211217-eng.aspx> accessed 12 October 2022.

6 See for example Debra Parkes, "From *Smith* to *Smickle*: The Charter's Minimal Impact on Mandatory Minimum Sentences" (2012) 57 Sup Ct L Rev (2d) 149 at 150-151 [Parkes, "From *Smith* to *Smickle*"]; Anthony Doob, Cheryl Marie Webster & Rosemary Gartner, "Issues Related to Harsh Sentences and Mandatory Minimum Sentences: General Deterrence and Incapacitation" (2014) Criminological Highlights at A2-A3 [Doob et al, "Issues Related to Harsh Sentences"]. See also *R v Nur*, 2015 SCC 15 at para 114.

7 Doob et al, "Issues Related to Harsh Sentences" at B-11-B-12; Dianne L Martin, "Distorting the Prosecution Process: Informers, Mandatory Minimum Sentences, and Wrongful Convictions" (2001) 39:2 Osgoode Hall L J 513 at 526; Marie Manikis & Peter Grbac, "Bargaining for Justice: The Road Towards Prosecutorial Accountability in the Plea Bargaining Process" (2017) 40:3 Man L J 85 at 90-91.

and other racialized people.[8] Likewise, MMS can be devastating for people with mental illnesses, who suffer disproportionate harms when incarcerated.[9]

BCCLA strongly supports Bill C-5's repeal of certain MMS from the *Criminal Code* and all MMS from the *CDSA*. However, we are concerned that the Bill will leave many MMS in the *Criminal Code* unaltered, each of which raise the problems discussed above. As such, we recommend Parliament repeal all MMS, thereby permitting judges to craft appropriate sentences for the specific circumstances that come before them.

In urging Parliament to repeal all MMS, we emphasize that most of these measures are relatively new additions to the *Criminal Code*. Although some MMS date back further, many of these provisions were introduced in the 1990s and between 2007 and 2014; in 1987, Canada had only nine MMS in its criminal legislation, while by 2012, there were nearly one hundred MMS.[10] If we look at the past thirty years as an experiment in the efficacy of MMS, it is perfectly sensible to repeal these measures as they have failed to deliver any sense of justice.

Should Parliament not be willing to repeal all MMS at this time, BCCLA urges it, at minimum, to adopt a provision to allow sentencing judges to depart from the remaining MMS upon providing reasons. This type of legislative provision has been introduced in other common law jurisdictions,[11] and has been raised by legal scholars and experienced practitioners as a viable option in Canada.[12] It is also consistent with the TRC Calls to Action.[13] While not a perfect solution to the problems presented by MMS, such a provision would allow judges to exercise discretion in cases where the imposition of a MMS would produce injustice. We emphasize that this would be a stopgap measure, until the remaining MMS can be properly repealed.

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8 Canada, Department of Justice, Research and Statistics Division, *The Impact of Mandatory Minimum Penalties on Indigenous, Black and Other Visible Minorities* (JustFacts, September 2017) <www.justice.gc.ca/eng/rp-pr/jr/jf-pf/2017/docs/oct02.pdf>.

9 The Hon Justice Richard D Schneider, *The Mentally Ill: How They Become Enmeshed in the Criminal Justice System and How We Might Get Them Out* (Ottawa: Department of Justice Canada, 2015) at 11-14.

10 Sarah Chaster, "Cruel, Unusual, and Constitutionally Infirm: Mandatory Minimum Sentences in Canada" (2018) 23 Appeal 89 at 92, citing Parkes, "From *Smith* to *Smickle*" at 149.

11 See Yvon Dandurand, Ruben Timmerman & Tracee Mathison-Midgley, *Exemptions from Mandatory Minimum Penalties: Recent Developments in Selected Countries* (Ottawa: Department of Justice Canada, 2016) at 17, 22, and 30.

12 Uniform Law Conference of Canada Criminal Section, *Statutory Exemptions to Mandatory Minimums: Final Report* (2013) at paras 36-37 <www.ulcc-chlc.ca/ULCC/media/Criminal-Section/Statutory-Exemptions-to-Mandatory-Minimum-Penalties.pdf>.

13 TRC Calls to Action at 3-4.

Remove Restrictions on the Availability of Conditional Sentence Orders

Conditional sentence orders ("CSOs") exist as one tool to combat the crisis of mass incarceration of Indigenous and Black people. Parliament enacted section 742.1 of the *Criminal Code* in 1996, as part of the package of amendments that introduced section 718.2(e).[14] These provisions were intended to address the trend of mass incarceration of Indigenous people, which was already identified as a significant problem in the mid-1990s. In addition to the guidance contained in the *Gladue*[15] and *Ipeelee*[16] cases, courts have held that the analysis under section 718.2(e) applies to Black people at sentencing.[17]

In many cases, the direction contained in section 718.2(e) for a sentencing court to consider the circumstances of Indigenous people, and to consider all available sanctions other than imprisonment, is given practical effect by the availability of CSOs as a viable alternative to incarceration. The restrictions contained in paragraphs 742.1(b)-(f), limit the ability of courts to appropriately sentence Indigenous and Black people, and individuals from other marginalized communities.

BCCLA submits that the only necessary restriction on the availability of CSOs is contained in paragraph 742.1(a). In other words, in addition to repealing paragraphs 742.1(e) and (f) as Bill C-5 currently does, paragraphs 742.1(b)-(d) should be repealed. The effect would be to have section 742.1 read as follows:

> If a person is convicted of an offence and the court imposes a sentence of imprisonment of less than two years, the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the conditions imposed under section 742.3, if
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> > (a) the court is satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2.

Importantly, the restrictions currently contained in paragraphs 742.1(c) and (d) were only added to the *Criminal Code* between 2007 and 2012.[18] Consistent with our submissions above

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[14] *An Act to Amend the Criminal Code (Sentencing) and Other Acts in Consequence Thereof*, SC 1995, c 22, s 6; *R v Sharma*, 2020 ONCA 478 at paras 29-31.

[15] *R v Gladue*, [1999] 1 SCR 688, 1999 CanLII 679 [*Gladue*].

[16] *R v Ipeelee*, 2012 SCC 13 [*Ipeelee*].

[17] For a recent example, see *R v Anderson*, 2021 NSCA 62

[18] *An Act to Amend the Criminal Code (Conditional Sentence of Imprisonment)*, SC 2007, c 12, s 1; *Safe Streets and Communities Act*, SC 2012, c 1, s 34.

respecting MMS, paragraph 742.1(b) should be repealed. Amending section 742.1 in this way is therefore a return to the original purpose of the sentencing reforms and the introduction of CSOs in 1996.[19] Additional restrictions are unnecessary and cannot be justified, especially in light of Parliament's duty to address the crisis of mass incarceration of Indigenous and Black people.

Removing restrictions on the availability of CSOs also creates space for Indigenous legal orders to be respected and implemented in ways that are meaningful for Indigenous people. Since time immemorial, Indigenous peoples have had their own laws and systems of accountability. Through colonization, the criminal legal system has been imposed on Indigenous peoples with devastating consequences. Indigenous Nations are actively working to reclaim and reinvigorate their systems of law and governance, systems that have been targeted by the state – including Parliament itself – for hundreds of years. Reconciliation demands that Canadian laws are reformed to support these efforts.

As the Supreme Court of Canada directed over 20 years ago in *Gladue*:

> What is important to note is that the different conceptions of sentencing held by many aboriginal people share a common underlying principle: that is, the importance of community-based sanctions. … one of the unique circumstances of aboriginal offenders is that community-based sanctions coincide with the aboriginal concept of sentencing and the needs of aboriginal people and communities. It is often the case that neither aboriginal offenders nor their communities are well served by incarcerating offenders, particularly for less serious or non-violent offences. Where these sanctions are reasonable in the circumstances, they should be implemented.[20]

By restricting the availability of CSOs and mandating imprisonment for certain offences, paragraphs 742.1(b)-(f) and the remaining MMS constrain the ability of Indigenous legal orders to respond to community harms and hold offenders accountable in ways that are meaningful for Indigenous communities. Many Indigenous communities are rural and remote; as a result, incarceration often means disproportionate and distant removals from community. Such removals are inconsistent with the goal of community reintegration. Further, requiring incarceration rather than a CSO may deprive Indigenous people of a sentence that resonates with their sense of justice.

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[19] *An Act to Amend the Criminal Code (Sentencing) and Other Acts in Consequence Thereof*, SC 1995, c 22, s 6.

[20] *Gladue* at para 74. [Emphasis added].

The Supreme Court of Canada has affirmed that appreciating these "fundamentally different world views" may mean giving effect to alternative sanctions to imprisonment.[21] CSOs are a necessary part of the toolkit in redressing the legacies of colonialism. To reiterate, expanding the availability of CSOs is a small but important step Parliament can take to support Indigenous peoples' work in revitalizing their legal orders. Parliament should play a facilitative, rather than obstructive, role.

Repeal Section 4 of the *CDSA* and Decriminalize Necessity Trafficking

While Bill C-5 makes some important changes to the *CDSA*, it fails to address the enduring effects of criminalizing both simple possession under section 4 and necessity trafficking under section 5. This is a major gap in legislative changes directed at ushering in a public health approach towards problematic substance use. With respect to section 4, we endorse the submissions of the HIV Legal Network and the Centre for Drug Policy Evaluation.[22]

Section 5 of the *CDSA* provides, in part:

> (1) No person shall traffic in a substance included in Schedule I, II, III, IV or V or in any substance represented or held out by that person to be such a substance.
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> (2) No person shall, for the purpose of trafficking, possess a substance included in Schedule I, II, III, IV or V.[23]

As per section 2(1) of the *CDSA*, to "traffic" includes selling, administering, giving, transferring, or delivering a controlled substance, and does not require a profit.[24]

Necessity trafficking is defined as "the selling and sharing of a controlled substance for subsistence, to support personal drug use costs, and to provide a safe supply."[25] As noted in the Civil Society Platform on Drug Decriminalization:

> It is common for people to sell limited quantities of drugs to others in their network as a means of livelihood, to support their own independent use, or to provide a safe supply. It is a poor use of public resources to criminalize selling or sharing in these

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21 *Ipeelee* at para 74.

22 Written submissions of the HIV Legal Network and the Centre on Drug Policy Evaluation to this Committee, dated September 21, 2022, at 2-3.

23 *Controlled Drugs and Substances Act*, SC 1996, c 19, ss 5(1) and (2) [*CDSA*].

24 *CDSA*, s 2(1).

25 Canadian Drug Policy Coalition, *Decriminalization Done Right: A Rights-Based Path for Drug Policy* (2021) at 9 <www.drugpolicy.ca/wp-content/uploads/2021/12/EN-PTL-Decrim.pdf> [*Decriminalization Done Right*].

> circumstances. Instead, focus should be put on improving accessibility of harm reduction, treatment services, education, access to a safe supply of substances, and other supports and any law enforcement efforts focused exclusively on more serious offences within and outside the drug trade.[26]

Section 5 of the *CDSA* criminalizes trafficking and possession for the purposes of trafficking, regardless of the quantity of drugs involved or the circumstances. This provision, to which serious penalties attach[27], catches a wide range of behaviour. Criminalizing necessity trafficking, like criminalizing simple possession, creates significant harms which are disproportionate when assessed against the targeted behaviour. The stigma associated with a conviction for trafficking can follow a person for life, with severe impacts on housing, family life, employment, and health and social services.[28]

Section 5 of *CDSA* should be amended to decriminalize necessity trafficking, as distinct from other forms of trafficking in controlled substances such as large-scale trafficking. Decriminalizing both simple possession and necessity trafficking are "fundamental, necessary steps towards a more rational and just drug policy."[29] Criminalizing drug use has disproportionate impacts on Indigenous and Black people.[30] Further, continuing to criminalize simple possession and necessity trafficking places people who use drugs at an increased risk of harm, including the risk of overdose. Maintaining the role of the police and the criminal legal system in drug policy is at odds with research and the lived experience of people who use drugs: for example, police encounters have been shown to act as barriers to accessing health services which are key in preventing overdoses.[31]

Implement Diversion Measures that are Consistent with Human Rights

If section 4 of the *CDSA* is not repealed and section 5 of the *CDSA* is not amended to decriminalize necessity trafficking, the diversion measures proposed in Bill C-5 must be

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26 *Decriminalization Done Right* at 9.

27 *CDSA*, s 5(3). Even with the anticipated amendment to s 5(3) removing the mandatory minimum sentences contained in ss 5(3)(a)(i) and (ii), persons convicted of an offence under s 5 are liable to prison sentences up to and including imprisonment for life, depending on the substance involved and how the Crown elects to proceed.

28 *Decriminalization Done Right* at 5.

29 *Decriminalization Done Right* at 2.

30 See the written submissions of the HIV Legal Network and the Centre on Drug Policy and Evaluation to this Committee, dated September 21, 2022, at 4-5.

31 Geoff Bardwell et al, "Implementation Contexts and the Impact of Policing on Access to Supervised Consumption Services in Toronto, Canada: A Qualitative Comparative Analysis" (2019) 16:30 Harm Reduction Journal 1; see also *Decriminalization Done Right* at 6.

strengthened to have the desired impact and to protect human rights. BCCLA has four major concerns about the specific language and amendments proposed for the new Part I.1 of the *CDSA*.

First, we urge Parliament to strengthen the language around sections 10.2(1) and 10.3, with regard to police and prosecutorial discretion not to proceed with charges. The starting presumption should be that an arrest or prosecution will not proceed for cases under section 4, as well as necessity trafficking, and that diversion measures are the default method of proceeding. Further, the Bill should include clear directions and strict limitations for when police can stop, search, and investigate a person for drug possession. Such rules are particularly necessary to combat the impacts of systemic discrimination in policing, and the criminal legal system by extension.[32]

As it stands, even without the amendments in Bill C-5, police and prosecutors already have the discretion to issue a warning, do nothing, or direct someone to a diversion program. Bill C-5 would not change the underlying issues regarding when and how police and prosecutors choose to exercise their discretion, nor would it ensure accountability and transparency in these decisions. If problematic substance use and the issues surrounding it are properly characterized as health and social concerns, and not a criminal law matter, then the default action taken by police and prosecutors should reflect this fact. We recommend that Parliament place stricter limits on police and prosecutorial discretion in these matters.

Secondly, while section 10.2(1) directs a peace officer to consider certain factors before laying an information, using the mandatory language "shall", it is undermined entirely by section 10.2(2), which states that a peace officer need not have considered these matters before laying a charge. This qualification does not advance the aim of encouraging diversion and will certainly limit the effectiveness of these amendments. We therefore recommend that section 10.2(2) be deleted altogether from Bill C-5.

Our third concern involves the set of provisions at section 10.4(1) and 10.4(2), dealing with the retention and use of records of warnings or referrals. While it is certainly important to ensure that records of referrals and warnings be kept for the purpose of future study and evaluation, such records should not include the identity of the individual. The current formulation of the Bill specifies that peace officers should record the individual's identity, and allows records of warnings or referrals to be used against the individual in a case pertaining to the same matter. If the peace officer issuing a warning or making a referral can

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[32] See the open letter to Minister David Lametti on Black Canadians Justice Strategy prepared by the Black Legal Action Centre, dated April 1, 2022 at 2 <www.blacklegalactioncentre.ca/open-letter-re-black-canadians-justice-strategy>.

later change their mind and lay an information against the individual, which does not appear to be precluded by Bill C-5, this would undoubtedly have a chilling effect on the likelihood of people who use drugs seeking help when they need it. We are also concerned that this type of record-keeping amounts to another form of surveillance, and may feed into the criminalization of people who use drugs.

If these provisions are intended to keep administrative records for the purpose of oversight and future research, then there should be no need to include the identity of the individual in records made under section 10.4(1), nor should section 10.4(2) be included in the amended legislation. We therefore suggest that sections 10.4(2) be removed entirely, and that section 10.4(1) be amended to exclude the identity of the individual being warned or referred.

Finally, with regard to the proposed section 10.6, sequestering records of conviction for offences under section 4(1) of the *CDSA* may assist in combatting the stigma associated with substance use. This, coupled with expungement of such records, would go a long way in reducing the harms of criminalization. However, the Bill as currently drafted contains an arbitrary cut-off with regard to who is eligible for expungement of their record of conviction. Only those who have been convicted under section 4(1) of the *CDSA* after Bill C-5 comes into force are "deemed never to have been convicted of that offence" once two years have passed from the date of conviction or expiry of their sentence. A person convicted of the same offence up to the coming into force date will not benefit from expungement.

Given that the goal of these provisions is to reduce stigmatization and lower barriers to social needs such as jobs and housing,[33] we can see no justification for arbitrarily denying one group of people such benefits. We therefore recommend that section 10.6(1) be amended to mirror the language of section 10.6(2) by stating: "and the person convicted of the offence is deemed never to have been convicted of that offence."

To bring Bill C-5 in compliance with a human rights approach to substance use, Bill C-5 should be amended to provide for the automatic expungement of records of conviction for simple possession, whenever the offence occurred, and an applications-based expungement process for necessity trafficking. This must include processes to expunge records related to breaches of conditions that flow from convictions for both offences. The Bill in its current form falls short of that. At minimum, the approach taken to section 4(1) of the *CDSA* in Bill C-5 should also apply to necessity trafficking. Without these changes, the Bill will fail to achieve the desired impact of diverting people out of the criminal process and towards health and social supports.

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[33] Canada, Parliament, *House of Commons Debates*, 44th Parl, 1st Sess, Vol 151, No 088 (14 June 2022) at 1325.

Conclusion

In sum, BCCLA urges the Committee to put forward amendments to advance equitable outcomes and protect human rights, which involves:

1) Repealing all mandatory minimum sentences;
2) Removing unnecessary restrictions on the availability of conditional sentence orders;
3) Repealing section 4 of the *CDSA* and decriminalizing necessity trafficking; and
4) Ensuring that the implementation of diversion measures is consistent with human rights.

We thank the Committee for considering these submissions.