

Questions & Answers

A number of public health departments and community organizations in Canada distribute safer crack use kits to people who use crack cocaine. The kits typically include mouthpieces, glass stems and screens, as well as condoms and referral information for other health and support services. This document outlines why such health programs are needed and answers a number of legal questions related to the distribution of safer crack use kits.



Distributing safer crack use kits in Canada

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Why is harm reduction important for people who smoke crack?

In Canada, the rates of HIV and hepatitis C virus (HCV) infection among people who use drugs are much higher than in the population as a whole.¹ Studies of people who use drugs have found that between 3 percent and 23 percent of study participants had HIV and up to 88 percent of participants had HCV.² In addition, new infections remain high among people who use drugs. Approximately 14 percent of all new HIV infections in Canada in 2005 were attributable to injection drug use.³ Estimates in 2006 from enhanced surveillance of HIV risk behaviours among people who inject drugs found that roughly 12 percent of participants were infected with both HIV and HCV.⁴

Harm reduction programs represent a pragmatic public health response for people who are unable or unwilling to stop using drugs immediately. First and foremost, harm reduction services seek to reduce the negative health consequences of drug use for these people, with blood-borne infections and overdose being the most serious and immediate harms. Harm reduction

services should be offered in addition to efforts to prevent problematic drug use and to provide addiction treatment services.

Harm reduction services are effective in protecting and promoting the health of people who use drugs and public health more broadly. Studies from around the world have shown that providing sterile needles and other injecting equipment through needle and syringe programs (NSPs) to people who inject drugs is among the most important of services for reducing the risk of HIV transmission among this population.⁵ Similarly, a significant body of peer-reviewed evidence has associated supervised injection sites with benefits for both people who use drugs and communities where drug use takes place.⁶

While unsafe injecting represents a major public health concern, other methods of drug use also carry health risks. Many people who use drugs concurrently use more than one illicit drug and take drugs in different ways (i.e., snorting, injecting, smoking). A pragmatic approach to protecting health and reducing harm takes into account the multiple ways in which people use drugs and the potential harms associated with each. As this document

explains, harm reduction services in Canada should therefore include the distribution of safer crack use kits to people who smoke crack cocaine.

What are safer crack use kits?

Crack is the street name for a crystallized form of cocaine that is formed into small lumps. A lump is often referred to on the street as a “rock.” Crack can be either smoked or injected.

Safer crack use kits include materials to prevent the harms associated with smoking crack: typically a glass stem (often made out of heat-resistant glass, used as a pipe), a rubber mouthpiece and several brass screens (to cradle the crack when it is inserted into the pipe so that a flame can pass over the surface of the “rock”). These things allow people to reduce their health risks when smoking crack. In particular, people can reduce the risk of burned or cracked lips and the associated risk of becoming infected with blood-borne viruses such as HCV or HIV. These kits sometimes include items used to insert crack in a pipe (e.g., a chopstick), to prepare crack for injecting (e.g., ascorbic acid)

or to prevent the spread of blood-borne viruses (e.g., alcohol swabs, hand wipes), and substances used to protect or heal lips (e.g., lip balm, petroleum jelly). Written information about safer drug use, emphasizing the risks of sharing drug use equipment and promoting the safe disposal of such equipment, is often included in kits. Such kits also often include safer sex information and materials (e.g., condoms and lubricant) so as to help reduce other risks of HIV transmission.

Why should kits for safer crack use be distributed?

While the sharing of equipment to inject drugs represents a major public health concern, other ways of consuming drugs also carry health risks. Crack smoking has been identified as a possible risk factor for transmission of HIV and HCV.⁷ Research has found that HCV infection is much more prevalent among people who smoke heroin, crack or cocaine, but who report that they have never injected, than in the population as a whole.⁸

People who smoke crack have a high prevalence of oral sores, cuts and burns on their lips and in their mouths.⁹ Unsafe crack pipes are a common cause of these injuries. Crack pipes are often reused many times and made from materials with sharp edges such as pop cans, small glass vials and other objects that can cut people's lips. Because crack must be heated with a flame in order to smoke it, pipes overheat and crack or break, and people commonly burn or cut their lips on them. If people continue to smoke crack, injuries to their lips and mouths often take longer to heal and remain as open sores.¹⁰ In addition, people may inadvertently inhale flakes from brass screens or steel wool (materials commonly used to cradle the crack in the pipe), burning their mouths and causing injury to their lungs.¹¹

There is the potential for infections such as HIV and HCV to be transmitted among people who share pipes when

they smoke crack. Through sharing pipes, cuts and sores on or in the mouth of one person may be exposed to the blood of an HIV-infected or HCV-infected person. Studies have found that sharing crack pipes and other materials are significant and independent predictors of HCV infection among people who use drugs in ways other than injecting.¹² A recent Canadian study reported HCV can be found on crack pipes collected shortly after use by an HCV-positive person with oral sores.¹³ In that study among 51 street-involved people who used crack, 22 people tested HCV-positive.

Distributing safer crack use kits provides each person who receives a kit with his or her own crack pipe. This means that people who smoke crack do not have to share pipes and their pipes are less likely to get broken or damaged as a result of intense heat or excessive reuse. These distribution programs also provide an opportunity to bring isolated and marginalized people who smoke crack into contact with health and social services. This opportunity can also be used to educate people about the health risks associated with crack use and to connect them with appropriate health and social services, including addiction treatment services.¹⁴

Where are safer crack use kits being distributed?

Safer crack use kits have been distributed in numerous cities, in all regions of Canada, including but not limited to Toronto, Edmonton, Winnipeg, Ottawa, Vancouver, Yellowknife, Halifax, Montréal and Guelph.¹⁵ Some programs have been successfully integrated into cities' public health programs, while some municipal governments have publicly outlined why such programs are important.¹⁶

The distribution of safer crack use kits has been a source of controversy in some communities. In June 2007, a Vancouver Island Health Authority pilot program in Nanaimo, B.C.

was temporarily put on hold due to community and city council concerns. However, in 2008 the program was re-instated and expanded across Vancouver Island.¹⁷ News reports also indicate that the B.C. Ministry of Health will distribute crack pipe mouthpieces through outreach workers in needle exchanges and other community health services in 2008.¹⁸ In July 2007, Ottawa city council voted to discontinue funding for Ottawa Public Health's safer crack use kit distribution program, disregarding the advice from the city's medical officer of health. However, the program continued with funding from the Ontario provincial government.¹⁹

Have safer crack kit distribution programs been evaluated?

There are several published studies of Ottawa Public Health's safer crack kit distribution program. Over time, the people who used the program showed evidence of a gradual change in behaviours so as to reduce the risk of HIV and HCV transmission. There was a significant decrease in the frequency with which people who shared their crack pipes did so "every time," from 37 percent six months before the program began to 13 percent one year later.²⁰ Further, among people who reported injecting drugs at the start of the study, the safer crack kit distribution program was associated with a significant decline in injecting drugs and a significant increase in smoking crack.²¹ The study authors conclude that this is "evidence of transitioning from a higher risk method of drug use [i.e. injecting] to one with somewhat lower risks [i.e. smoking]."²²

Does the distribution of safer crack use kits encourage drug use?

A common concern is that supplying people with new or unused crack pipes will encourage drug use. However, there is no evidence to support this. As explained above, there is some evidence

that distributing safer crack use materials may affect the pattern of drug use among people who inject, leading some to decrease their injecting in favour of smoking, which is less risky (although still of concern). But there is no evidence that distributing new or unused crack pipes increases drug use among people who were already smoking crack or injecting drugs. Nor is there any evidence that such programs initiate people into the use of hard drugs. Similar concerns have been raised previously about needle and syringe programs, which have been around much longer, but the evidence also shows these programs do not lead to increased drug use.

Is it illegal to possess or distribute new or unused crack pipes and safer crack use kits?

The mere *possession* of a new or unused crack pipe, or other materials that usually make up a safer crack use kit, is not illegal.

The Canadian HIV/AIDS Legal Network is of the opinion that the *distribution* of new or unused crack pipes or safer crack use kits is not a crime. Therefore, it is unlikely that people involved in the distribution of new or unused crack pipes and safer crack use kits would be charged with or convicted of a crime. Here is the legal reasoning for the Legal Network's opinion:

- Under the *Criminal Code*²³ (section 462.2), a person who knowingly distributes “instruments for illicit drug use” is guilty of an offence.
- Under the *Criminal Code* (section 462.1), an “instrument for illicit drug use” is “anything designed primarily or intended under the circumstances for consuming or to facilitate the consumption of an illicit drug.”
- **However**, the *Criminal Code* (section 462.1) definition of an “instrument for

illicit drug use” **does not include a “device”** as defined in the *Food and Drugs Act*.

- The *Food and Drugs Act*²⁴ (section 2(2)(a)), defines “device” as “any article, instrument, apparatus or contrivance, including any component, part or accessory thereof, manufactured, sold or represented for use in the diagnosis, treatment, **mitigation or prevention of a disease**, disorder or abnormal physical state, or its symptoms, in human beings or animals...”

According to this reasoning, under the law, new or unused crack pipes are “devices,” not instruments for illicit drug use. Therefore, it is not illegal to distribute new or unused crack pipes or safer crack use kits. This is same legal reasoning that supports the conclusion that NSPs, and the distribution of sterile syringes, are legal — and these programs have operated for years, often by municipal public health departments or by community agencies with government funding.

It is important to note that no court in Canada has ruled on this interpretation of the law, neither for NSPs nor for programs that distribute safer crack use kits. The penalty for a first offence of distributing “instruments for illicit drug use” can be a fine of up to \$100,000, six months in prison, or both. The penalty for any subsequent offence can be a fine of up to \$300,000, one year in prison, or both.²⁵

Are there special considerations when distributing safer crack use kits to minors?

Because there are no laws that regulate harm reduction services, the question of distributing safer crack use kits to minors will often be governed by program guidelines or policies. These guidelines or policies have often been developed in consultation with, or in compliance with policy from, a provincial, territorial, municipal or

regional health authority.

Canadian law recognizes that people under 18 can make their own medical decisions. A minor may give valid consent to a medical procedure if he or she understands both the nature and consequences of the procedure.²⁶ Provinces and territories have laws that recognize this.

In addition, the *Canadian Charter of Rights and Freedoms* prohibits governments from discriminating on the basis of age in providing health and social services.

Therefore, prohibiting the distribution of safer crack use kits to minors arguably amounts to unjustifiable discrimination. A minor is just as much at risk of harm, including infections such as HCV and HIV, as an adult who uses drugs unsafely — and may even be at higher risk because they lack experience and may have less information. Restricting minors' access to such services would be detrimental to their health, leaving them at greater risk than adults of contracting blood-borne infections. There is no good legal basis or public health reason for limiting the distribution of safer crack use kits only to people over the age of 18.

Is it illegal to possess a used crack pipe?

The *Controlled Drug and Substances Act*²⁷ (CDSA, section 4) prohibits a person from unauthorized possession of a “controlled substance.” Under the CDSA (section 2(2)) a “controlled substance” includes “anything that contains or has on it a controlled substance and that is used or intended or designed for use... in introducing the substance into a human body.”

In one case, a court reasoned that actual possession of a crack pipe with drug residue in it “leads only to one rational conclusion, there exists a substantial likelihood that the person possessing it is in possession of crack cocaine, the substance burned and consumed by the use of the crack pipe, either in terms of the residue in the pipe or a further

quantity held on his or her person.”²⁸ Possession of a used crack pipe was considered as providing reasonable grounds for arrest.

Convicting people of a crime for having a used crack pipe runs counter to the public health reason for distributing safer crack use kits — namely, to reduce the harms associated with using unsafe equipment, sharing used equipment, and to reduce rates of unsafe disposal of used equipment. If carrying a used crack pipe exposes a person to possible arrest and criminal prosecution, this is a reason to borrow someone else’s pipe when using rather than carry his or her own. Or the person may discard the pipe immediately after use, potentially exacerbating the problems associated with discarding used pipes in public places.

The Legal Network considers that the federal government should make it clear that it is not illegal to possess used crack pipes (or needles used for injecting drugs), for at least two reasons.

First, even if a pipe or needle with some drug residue on it is considered to be a “controlled substance” in itself, the law as it stands prohibits only the “unauthorized” possession of a controlled substance. If the pipe (or needle, or other material) was distributed by a city’s public health department or community agency with government funding, this is clearly done for the purpose of ensuring that people who are using controlled substances do so in less risky ways, so as to protect individual and public health. Possessing that equipment, including after it has been used, should be considered “authorized” possession.

Second, under the *CDSA* (section 56), the federal Minister of Health has the power to “exempt any person or class of persons or any controlled substance or precursor or any class thereof” from the prohibitions in the *CDSA*, including the prohibition on unauthorized possession of a controlled substance. The Minister can exercise this power where he or she considers that “the exemption is necessary for a medical or scientific purpose or is otherwise in the public

interest.” The Minister could use the power to exempt from criminal prosecution persons who possess used crack pipes (containing a trace amount of crack cocaine or other smoked drug) that were originally distributed as new or unused pipes by safer crack pipe distribution programs. The Minister has issued this type of exemption to permit Insite, the supervised injection site in Vancouver, to operate within the law. Similarly, the regulations that allow some people to possess marijuana for medical purposes operate as an exemption — granted by the federal Cabinet, rather than just the Minister of Health — to the general prohibition in the *CDSA* on possessing marijuana.

Another way to decrease or eliminate the risks of criminal charges being laid against people who possess used crack pipes is by agreement with police or other government authorities responsible for enforcing the criminal law. Police exercise a broad discretion when deciding whether to charge people; Crown prosecutors exercise a broad discretion when deciding whether to proceed with criminal charges laid by police. This opens up the possibility of local, regional or provincial groups entering into agreements about the exercise of police or prosecutorial discretion in cases where people are found in possession of crack pipes, both new and used. Police services boards and local police forces, the offices of provincial Attorneys-General or local Crown attorneys could agree not to lay (or proceed with) charges against a person who has a used crack pipe originally obtained from a distribution program.

Do police have the legal authority to detain, search or arrest a person who has a crack pipe?

Detention

Police are permitted to *detain* a person — in other words, to briefly

prevent a person from leaving for the purposes of questioning — when they have reasonable grounds to suspect that the person is connected to a particular crime.²⁹ The courts have repeatedly ruled that being found in possession of a crack pipe provides reasonable grounds to detain a person when the circumstances — e.g., the neighbourhood being known for drug use, the police officer’s experience, and the location and behaviour of the individual and others — give rise to a reasonable suspicion that the person possesses drugs.³⁰ Investigative detentions must be brief, police officers must tell a person the reason for his or her detention and the person is not obliged to answer questions.

During an investigative detention, police officers may conduct a pat-down search of a detained person if they believe on reasonable grounds that police safety or the safety of others is at risk (e.g., suspected possession of a weapon). However, when detaining someone, the police may not search the person to look for evidence of a crime. In a recent case, the court found that a police officer had removed a glass pipe from a person to investigate a possible drug offence rather than to avoid risk of injury.³¹ Therefore, the court decided that the search breached the person’s right to be secure against unreasonable search and seizure (under section 8 of the *Canadian Charter of Rights and Freedoms*) and decided that the pipe could not be used at trial as evidence of a crime. (The pipe in the case was obviously used but did not have any measurable drug residue on it.)

Arrest

A police officer may legally arrest a person for possession of crack cocaine without a warrant where it is necessary to establish the identity of the person, to preserve the evidence of the offence, to prevent the continuation of or repetition of the offence, or to secure the attendance of the accused in court.³² If the police arrest a person, they have the power to search that person and seize anything in the person’s possession (or immediate surroundings) as evidence

of an offence, to prevent escape, or as a way to protect their safety or that of others.³³

If the police see a person with a crack pipe, in circumstances consistent with drug use, they might have reasonable grounds to arrest the person for cocaine possession. However, it is not clear that simply possessing a crack pipe would, on its own, provide reasonable grounds for arrest. In one case, where the crack pipe was obviously used because it had a blackened end, but had no visible cocaine residue, the judge held that there were no grounds for arrest.³⁴ The judge did agree that if residue had been observed in the pipe, in circumstances consistent with drug use, it would have given the police officer reasonable grounds to arrest the owner of the used crack pipe for possession of cocaine.

Do police have the right to destroy or seize a crack pipe when found in a person's possession?

Destruction

Destroying or taking property that belongs to someone else without the legal right to do so is illegal. The common law (i.e., the body of law that has developed over time through court decisions) has long supported the right of an individual not to be deprived of his or her property, except by due process of law.³⁵

The police lack legal authority to destroy arbitrarily someone's personal possessions. A police officer crushing a crack pipe underfoot would violate this principle, regardless of whether the police detained or arrested the person and charges were pursued. The *Criminal Code* (section 490) and the *CDSA* (section 14(4)) require that property seized by the police be retained until a court makes an order for its disposal.

Seizure

Police officers do not have an unlimited right to take a person's possessions without the person's consent. However, it would be lawful for the police to seize a person's crack pipe if they were arresting the person.

Aside from these legal questions, destroying or confiscating crack pipes undermines public health. Destroying crack pipes encourages or forces people who smoke crack to fashion makeshift pipes and to share pipes, with all the consequent risks of transmission of blood-borne infections.

Can a court impose a "red zone" on a person who is accused or convicted of a drug-related offence?

As a condition of bail (before going to trial), sentencing (after being convicted or pleading guilty) or parole (upon release from prison), a person convicted of certain drug-related offences may be prohibited from entering a certain geographic area. This area is commonly known as a "red zone" or "no-go zone." In the case of people accused or convicted of drug-related offences, "red zones" typically include areas known for drug trafficking and consumption. Such restrictions have the potential to affect a person's access to health and social services. In some cases, crack pipe distribution programs or NSPs may be located in the "red zone" imposed on a person.

In *R v. Reid*, a British Columbia trial court recognized the problems a "red zone" can create for someone who needs to access health and social services.³⁶ Reid was convicted, in part, of possession of marijuana for the purposes of trafficking. The Prosecution asked for a "red zone" as part of his sentence, as it had been as a condition of his bail before his trial. Reid testified that the "red zone" had limited his access to medical

services provided at a needle exchange program, among other necessities. He also testified that he had occasionally breached the "red zone" to get access to these services.

The judge reviewed in detail the widespread use of "red zones" as a condition of sentences. He found that "the imposition of a 'red zone' condition on all people convicted of trafficking and possession for the purpose of trafficking has not been shown to be effective in reducing the incidents of such activities from the streets of downtown Victoria ... that being subject to a 'red zone' condition has interfered with those who want and need the help that may improve or save their lives, it has interfered with their ability to use public transport, and has excluded them from their community of friends."³⁷ The judge found that a "red zone" would prevent Reid from legally getting the sort of assistance that he needed, which was almost exclusively available within downtown Victoria.³⁸

"Red zones" that limit people's access to safer crack use kits suffer from the same shortcomings noted by the judge in the *Reid* case and, therefore, should not be routinely imposed on people who are charged or convicted for offences related to their crack use.

Can an organization be sued for distributing safer crack use kits?

There is nothing specific to distributing safer crack use kits that would expose an organization to legal liability in a civil lawsuit. However, if a person believed that he or she had suffered harm as a result of the organization's distribution of a new or unused crack pipe, or safer crack use kit, it is possible that he or she could start a lawsuit against the organization. Just because someone can start a lawsuit does not necessarily mean it has any merit.

If a person did bring such a lawsuit, he or she would likely argue that the organization had acted negligently in how it operated its safer crack use kit

distribution program. To prove a case of negligence, the person suing the organization would have to prove all of the following:

- the organization owed the person a duty of care;
- the organization's behaviour fell below the accepted standard of care;
- the person suffered harm as a result of this failure to exercise reasonable care; and
- the harm suffered was a direct and foreseeable result of the organization's conduct.

There has never been a Canadian case about the negligent distribution of safer crack use kits and there is no established standard of care for such programs. If a court were called upon to determine the standard of care, it would likely take into account whether the organization had procedures and policies in place to govern its operations, the reasonableness of these, and whether they were followed in the circumstances of the case. A court would likely also look at procedures and policies for similar programmes (e.g., NSPs) and any professional standards of the staff of the organization (e.g., professional codes of conduct of nurses, social workers, etc.).

An organization can take steps to protect itself against losing a civil lawsuit. It can put in place a reasonable policy for its safer crack kit distribution program that: (1) sets out the evidence that is the basis for having such a program; (2) anticipates potential issues and problems in operating such a program; (3) sets out procedures for staff, including procedures to respond to anticipated problems; and (4) provides a mechanism for periodically reviewing the policy. Organizations can also minimize their potential civil liability by ensuring that program staff are properly trained and supervised.

Is government support for safer crack use kit distribution programs consistent with Canada's human rights obligations under international, federal, provincial and territorial laws?

Government support for the distribution of safer crack use kits is consistent with Canada's obligations under international human rights law and with the purpose of provincial and territorial public health laws.

The *International Covenant on Economic, Social and Cultural Rights* recognizes "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health".³⁹ In order to ensure realization of this standard, Canada is required to take all necessary steps for "the prevention, treatment, and control of epidemic ... diseases".⁴⁰ This obligation includes "the establishment of prevention and education programs for behaviour-related health concerns such as sexually transmitted diseases, in particular HIV/AIDS", as well as making "available relevant technologies, ... and other strategies of infectious disease control".⁴¹ The right to health includes availability of health care facilities, goods and services in sufficient quality and accessible to all without discrimination.⁴² A country should not limit a person's access to preventative health care and national public health plans must be devised with particular attention to marginalized or vulnerable groups.⁴³

The *International Guidelines on HIV/AIDS and Human Rights* reinforce Canada's obligation to ensure the availability and accessibility of goods, services and information for HIV/AIDS prevention, "with particular attention to vulnerable individuals and populations."⁴⁴ The *International Guidelines* stress that "[s]tates should

support the implementation of specially designed and targeted HIV prevention and care programmes for those who have less access to mainstream programmes due to language, poverty, social or legal or physical marginalization."⁴⁵ Under the *Canadian Charter of Rights and Freedoms*, and under anti-discrimination laws in every jurisdiction, governments should not discriminate in the provision of health services based on disability. Addiction is considered a disability under these laws. Therefore, if governments create or maintain laws or policies that block people with addictions from getting access to health services that they need, or if governments refuse to make needed health services accessible to people with addictions because of stigma and prejudice surrounding drug use, this could be characterized as unjustifiable discrimination.⁴⁶

Not only is there a good human rights rationale for programs ensuring access to safer crack use kits, their distribution is also consistent with the purpose of provincial and territorial public health laws. For example, the purpose of Ontario's *Health Protection and Promotion Act* is "[t]o provide for the organization and delivery of public health programs and services, the prevention of the spread of disease and the promotion and protection of the health of the people of Ontario."⁴⁷ (In fact, Ontario's health minister has adopted guidelines specifically requiring local health units to consider whether similar harm reduction services such as NSPs are required in their region and, if so, to direct funding to them.⁴⁸) Similarly, the purpose of Quebec's *Public Health Act* is "the protection of the health of the population and the establishment of conditions favourable to the maintenance and enhancement of the health and well-being of the general population" with measures directed "to the prevention of disease, trauma and social problems having an impact on the health of the population".⁴⁹

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- ⁴² *Ibid.*, para. 12.
- ⁴³ *Ibid.*, paras. 34, 43(f).

⁴⁴ UNAIDS and Office of the UN High Commissioner for Human Rights. *HIV/AIDS and Human Rights: International Guidelines*. UN doc. HR/PUB/98/1.

⁴⁵ *Ibid.*, para. 38j.

⁴⁶ R. Pearshouse, R. Elliott. *A Helping Hand: Legal Issues Related to Assisted Injection at Supervised Injection Facilities* (Toronto: Canadian HIV/AIDS Legal Network, 2007), pp. 11–14, on-line via www.aidslaw.ca/drugpolicy.

⁴⁷ R.S.O. 1990, H.7, s. 2.

⁴⁸ Ontario Ministry of Health. *Mandatory Programs and Services Guidelines* (Toronto, 1997).

⁴⁹ R.S.Q. S-2.2, ss. 1–3.

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