Submissions on the Draft National Policy on Narcotic Drugs and Psychotropic Substances

Submitted by: Lawyers Collective

To: Department of Revenue
Ministry of Finance
Government of India

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At the outset, we commend the Department of Revenue for bringing out the proposed policy, as there is considerable overlap, duplicity and sometimes, contradiction in the Government of India's response to Narcotic Drugs and Psychotropic Substances. This is compounded by Court orders, which have tended to lay down widely divergent interpretation of the law on Narcotic Drugs and Psychotropic Substances. We hope that the proposed policy will go a long way in clearing confusion and securing a uniform and consistent response to drugs in the country.

We would like to reiterate that a policy instrument must sit within the constitutional and legal framework on the subject matter under consideration. In this context, the National Policy on Narcotic Drugs and Psychotropic Substances must be based on Constitutional obligations including the protection of Right to Life and Health under Article 21, the Right to the Highest Attainable Standard of Health provided under Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which has been ratified by India and has been held, under various judgments, to inform the content of Article 21 in accordance with General Comment 14, as well as the system of prohibition, regulation and control contained in the Narcotic Drugs and Psychotropic Substances (NDPS) Act, 1985.

We are confident that proposed policy will state the objectives, principles and direction for drug control, with sufficient breadth and flexibility. In outlining these facets of drug policy, we hope that the Department will be guided by evidence and pragmatism rather than ideology or rhetoric on drugs. We also hope that in evolving a policy on NDPS, the Department will not stigmatize or demonize people affected by drugs; instead, it will see them as a part of the solution to the problem of illicit drugs.

Below are **para wise comments** on the proposed policy:

INTRODUCTION

- **Para 1:** In addition to stating Article 47, which is a Directive Principle of State Policy, the document may reaffirm obligatory and enforceable provisions in Part III of the Constitution. Specifically, the document may refer to Article 21 Right to Life and Liberty, which includes the right to

health. It may be pointed out that international drug conventions begin with the Preamble …*"Concerned with the health and welfare of mankind"* in order to remind the States that drug control is subservient to and not in derogation of the right to health.

The first 3 lines of Para 3 may read: –

"Narcotic Drugs and Psychotropic Substances are indispensable to the medical and scientific needs of the community. However, they are also liable to misuse and abuse, endangering the health of the nation. Recognizing this double edged nature of Narcotic Drugs and Psychotropic Substances, India's approach towards Narcotic Drugs and Psychotropic Substances is subject to Article 21 of the Constitution of India, read with Articlle 12 of the ICESR, which read with General Comment 14, requires the State to respect, protect and promote the right to health and Article 47, which mandates that the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs that are injurious to health"

- **Para 4:** Under the NDPS Act, the rule making powers of the Central and State Governments extend beyond Sections 9 and 10 respectively.

  Therefore, the second line in Para 4 may read - "Sections 9 and 76 of the Act listed various activities which the Central Government can, by rules, regulate while Sections 10 and 78 lists out various activities which the State Governments can, by rules, regulate."

  After the third line in Para 4, insert –

  "At the same time, the Central Government can give directions to a State Government and such directions are binding on the State Government (Section 74). Besides, Section 4 vests overarching power and responsibility upon the Central Government."

- After Para 5, add another Para as Para 5A that reads: –

"5A. The NDPS Act applies in addition to and not in derogation of the Drugs and Cosmetics Act (DCA), 1940 or the Rules made thereunder (Section 80). Some of the drugs covered under the NDPS Act are also regulated by the DCA with regard to manufacture, marketing, sale and distribution."

NEED FOR THIS POLICY

- In the **Table under para 8**:
  i. Entry No 3. should include Section 76.
  ii. Entry no.4 should include Section 78.

- After Para 9, the policy may state that – "Courts also interpret and lay down law, especially on matters related to search, seizure and sampling procedure, purity and determination of quantity of the seized drug. Such guidance is binding on drug law enforcement authorities."

- In **Para 11**, it may be pointed out that USA, Russia and China do not follow the 'abstinence only' policy. China has programmes for provision of sterile needles and syringes and large scale clinics for Methadone maintenance for persons who inject drugs. Similarly, the US Government endorses harm reduction domestically as well as in US Government funded programmes abroad. Russia allows needle syringe prorgammes but not Methadone or Buprenorphine substitution. Consequently, Russia reports staggeringly high rates of HIV and Hepatitis C infection among its 1.8 million injecting drug users.

  We also wish to point out that while widely used to address public health consequences of drug use, harm reduction is one of the key pillars of drug policy, along with demand and supply reduction, in many countries of Europe, Canada and Australia. As a policy objective, harm reduction intends to 'manage' rather than 'eradicate' drugs by addressing the problems associated with drug use including ill-health, crime and social exclusion, rather than targeting drug use *per se*. Harm reduction policies benefit drug users who are unable to reconcile themselves to abstinence or require time and assistance to do so by allowing them to come out of stigma and crime into a net of health, economic and social security. They also benefit the rest of society, by containing disease and crime and promoting social inclusion.

  The NDPS Act supports harm reduction principles, as is evident from provisions that allow opium supply to registered addicts (Section 10 (a)(vi)), depenalisation of drug users enrolling in treatment (Section 64A), and supply of narcotic drugs and psychotropic substances to addicts registered with the government (Section 71). The draft policy must uphold and elaborate on harm reduction measures and not adopt a restrictive view of the same.

  Para 11 may be redrafted as below: -

  "There are other issues on which there has been no uniform position of various Government agencies. For instance, persons who inject drugs are at risk of acquiring and transmitting blood borne infections including HIV, Hepatitis B and Hepatitis C, if they share and/or use contaminated injecting equipment. There are different approaches towards addressing this problem. The harm reduction approach aims to reduce the risks

associated with drugs, without necessarily requiring the person to give up drugs. The most commonly practiced harm reduction methods are – i) provision of clean needles and syringes to persons who inject drugs so that they avoid using contaminated injections and, ii) substitution of illicit drug injecting with licit, oral drugs like Buprenorphine and Methadone, which are administered under medical supervision and have the same effect as the illegal drug. The Department of AIDS Control of the Ministry of Health and Family Welfare employs harm reduction as a strategy to prevent HIV transmission among injecting drug users (See, National AIDS Prevention and Control Policy, 2002, para 5.10). The Ministry of Social Justice and Empowerment however, prefers the abstinence only approach, to the exclusion of harm reduction services from its Scheme of Assistance for Prevention of Alcoholism and Substance (Drugs) Abuse and for Social Defence Services, as revised in October 2008. This policy seeks, inter alia, to address divergence in this approach."

The NDPS Act is not inimical and supports harm reduction principles, as is evident from provisions of Sections 10 (a)(vi), 64A, and Section 71.

CULTIVATION OF CANNABIS

- **Para 20:** According to Section 10 of the NDPS Act, the power to permit and regulate cannabis cultivation by making Rules is vested with State Governments. It is submitted that the line reading "*Cultivation of cannabis will not be permitted given its limited proven uses for medical purposes"* in Para 20 amounts to the Central Government encroaching powers that it does not possesses. Para 20 may be *ultra vires* to the extent that the Central Government does not have jurisdiction to lay down policy on cannabis cultivation.

  It is submitted that medical uses of cannabis are fairly well known. Consumption of cannabis is known to ameliorate symptoms of different diseases and conditions, for instance – controlling nausea and vomiting associated with cancer chemotherapy, reducing intraocular pressure in glaucoma, and beneficial effects on spasticity caused by multiple sclerosis or spinal cord injury. In the US, 15 states have laws allowing possession of a specified quantity of marijuana for medical purposes. In light of this, the line reading *"Medicinal use of cannabis has so far been extremely limited and confined to alternate medicine such as homeopathy and ayurveda*" is not entirely accurate and therefore should be deleted.

  ILLEGAL CULTIVATION
  ROLE OF THE STATE AND CENTRAL GOVERNMENTS

- **Para 27:** It is submitted that the statement "*The Central and State Governments shall follow a policy of zero tolerance and take severest*

possible action against anyone involved in illicit cultivation" is rhetorical and does not convey the precise nature of action required against illicit cultivation. It may be replaced with the following line –

> "The Central and State Government will strengthen surveillance, detection and enforcement against illicit cultivation in accordance with law".

ALTERNATIVE DEVELOPMENT (Paras 29 to 31)

It is submitted that alternative development not only be seen as a means of reducing illicit drug supply, but also be considered as a means of promoting sustainable development in communities affected by illicit crops. This is in keeping with decisions and resolutions of the United Nations Economic and Social Council (ECOSOC) and the Commission on Narcotic Drugs (CND) that encourage Member States to give due attention and resources to alternative development and not just pursue coercive methods of crop eradication.

- **Para 30** It is submitted that the proposed policy adopts a very constricted approach towards alternative development, which will fail to yield results. While illicit poppy cultivation may not be a survival strategy for all farmers, it is certainly a means to climb out of agrarian poverty. The proposed classification between poppy growers for "survival" and those "making a quick buck" or "earning easy money" or "getting more funds to their region" appears to be a surmise and prejudicial. It is suggested that government's policy on alternative development be informed by a comprehensive survey of regions and communities affected by illicit cultivation, including examination of the needs and conditions of affected households/villages. In its annual report of 2005, the International Narcotics Control Board considers "the full participation of crop growers, their families and the community as necessary, in designing, implementing, monitoring and evaluating alternative development strategies".

- **Para 31:** It is submitted that making destruction of crops and prosecution of growers the primary strategy will only widen mistrust and alienate communities engaged in poppy cultivation. This was noted by many enforcement officials at the National Conference on the draft policy in Delhi on February 1-2, 2011. Evidence from other parts of the world, particularly coca growing regions in Latin America and poppy growing states in Burma has shown that crop eradication merely shifts illicit crops from one village/region to another, without reducing illicit cultivation.

  It is suggested that the Central Government devise a broad and inclusive strategy for alternative development, in consultation with affected

communities, villages and panchayats. It is also suggested that instead of NCB which is a law enforcement agency, State and local administration be entrusted with the responsibility of coordinating alternative development programmes.

WILD GROWTH OF CANNABIS

- **Para 32:** The statement *"Wildly grown cannabis shall not be permitted to be used for any purpose except the leaves of wildly grown cannabis for production of bhang"* is out of step with Section 10 (a) (iii) of the NDPS Act. The Central Government should avoid framing policy on a subject matter that is outside its legislative purview.

TRADE IN NARCOTIC DRUGS

- **Para 40**: It may be pointed out that in addition to State NDPS Rules governing the sale, transport, use and consumption of narcotic drugs, the Drugs and Cosmetics Act, 1940 (which operates in addition to and not in derogation of the NDPS Act) also concerns itself with the distribution of narcotic drugs. Entry 346 in Schedule H of the Drugs and Cosmetics Act reads - *"Narcotic drugs listed in the Narcotic Drugs and Psychotropic Substances Act, 1985*". Thus, morphine, which is a narcotic drug under the NDPS Act can be dispensed, used and consumed in accordance with the Drugs and Cosmetics Act, 1940, if State NDPS Rules are non-existent, silent or non-contradictory to the former.

  Secondly, it may be pointed out that the Central Government itself has the power to make rules for the supply of narcotic drugs to addicts or "others" where such supply is a medical necessity (Section 71 (1) and Section 76 (2) (e)). It is safe to argue that the term "others" includes patients in need of pain relief (including cancer, AIDS etc.) It is therefore suggested that the Department of Revenue exercise its law/policy making powers to address the non-availability of morphine and other opioids to patients in need of pain relief.

DIVERSION OF LICITLY GROWN OPIUM

- **Para 46**: In point (c), substitute*"…take stringent legal action against any farmer found to be diverting opium"* with "*take action in accordance with law*".

STREET PEDDLERS

- **Para 52**: It is submitted that the proposed policy on street peddlers is out of line with the legislative intent of the NDPS Act. Since its

amendment in 2001, the NDPS Act prescribes punishment on the basis of the quantity of drugs involved in the offence (small, commercial and intermediate). In introducing this scheme in the Act, Parliament clearly expressed its intention to target persons dealing in narcotic drugs or psychotropic substances at a large scale while adopting a benign approach towards those caught with small amounts, especially if they are dependent on drugs. This category of persons includes "street peddlers", described in Para 52 of the proposed policy.

- **Para 53:** It may be pointed that Section 39 of the NDPS Act empowers a Magistrate to divert an addict found guilty of consumption or any offence involving small quantity from jail into treatment. Section 64A goes a step further and suspends criminal proceedings, if such a person enrolls in treatment. These provisions clearly cover street peddlers who are addicted to drugs.

  It has been observed that neither the Police nor Magistrates are aware of these provisions. Non-availability of a list of treatment facilities at Police Stations and Courts also dissuades diversion of addicts into treatment.

  It is therefore suggested that the proposed policy adopt measures to "work" the law by training Police and Magistrates to facilitate the entry of low level drug offenders into education, treatment and support services.

  The proposed policy of directing Police to focus attention on street peddlers may also be counter productive. Having the Police chase petty drug criminals may result in more serious crime going undetected. World over, countries are abandoning policies of arrest and incarceration of low level drug offenders and freeing up the Police to investigate and prosecute organized drug networks. Given that the financial and human resources for policing in the country are already stretched, this may be a wise strategy for India too, to pursue.

  SMUGGLING OF DRUGS INTO PRISONS

- **Para 56**: One of the ways of reducing illicit drug activity in prisons is depenalisation or decriminalization of drug use. While this is outside the ambit of the existing policy, we hope that that the Department of Revenue will be open to examining changes to Section 27 NDPS Act at some stage.

It may be pointed that in Delhi, Tihar jail has been successfully running oral substitution treatment for opioid dependent inmates since 2008. This programme is more effective than simple detoxification in managing dependence and reducing illicit drug use in prison. It is suggested that the proposed policy adopt a realistic approach in dealing with illicit drug use in prisons and incorporate measures that are effective and safeguard the right to health of prisoners.[1]

DRUG RELATED CRIME

- **Para 57:** It is submitted that methods suggested for addressing drug related crime such as *"drug courts, compulsory testing of persons arrested for crime for possible use of drugs and testing and treatment of prison populations addicted to drugs"* further entrench drugs with crime. It is difficult to treat something as a medical problem when it is also a crime.

In order to reduce the nexus between drugs and crime, the Department may consider the following suggestions:

i. Encourage application of Sections 64A and 39 of the NDPS Act so that drug offenders who are dependent on drugs are able to receive treatment in civil institutions that are conducive to recovery rather than jails, which further blight such persons' chances of re-integrating in society.

ii. Offences involving small quantity of drugs are bailable.[2] Yet, there is great reluctance from the prosecution in releasing persons accused of small quantity offences. There is no gain in filing prisons with low level drug offenders. Instead enforcement activity must focus on investigation and prosecution of organized drug trafficking networks.

iii. Promote drug treatment services that are voluntary, effective and above all, attractive to drug users. Despite advances in addiction medicine, including the availability of long term pharmacotherapy, drug treatment in the country continues to be dispensed as "de-

[1] *Rama Murthy v. State of Karnataka* AIR 1997 SC 1739. See also: *Supreme Court Legal Aid Committee through Hon. Secretary v. State of Bihar and others* 1991 (3) SCC 482 where the apex Court ruled that it is the obligation of the Police to ensure appropriate protection of the person taken into custody, including medical care if such person needs it.

[2] *Abdul Aziz v State of UP* 2002 CriLJ 2913; *Stefan Mueller v. State of Maharashtra,* Bom HC judgment dated 23 June 2010 in CRIMINAL WRIT PETITION NO. 2939 OF 2009.

addiction", often devoid of any clinical or otherwise meaningful intervention. It is well known that drug users enrolled in Methadone or Buprenorphine substitution programmes are able to stay in treatment longer, keep away from crime and return to family and work. The following remark from a former heroin addict who attends a oral substitution clinic on the Delhi-UP border describes these effects:

> *"I am going to my village for a family wedding. I will be away for a week. I am carrying my seven day dose of sublingual buprenophine. If I didn't have the medicine, I would have to steal to procure heroin supply for seven days. Else, I would have to decline to be a part of the family celebration. Today, I am out of crime and look forward to being with my family back in the village."*

Despite obvious benefits to drug users and society, substitution treatment is not widely offered in treatment facilities. Instead, costlier and less effective de-addiction centres are promoted, with no measurable results.

The draft policy must mark a break from this "more of the same approach" and endeavour to reach people who use drugs with beneficial services.

TREATMENT, REHABILITATION AND SOCIAL REINTEGRATION OF DRUG ADDICTS

DRUG DEMAND REDUCTION

- **Para 64:** The causative factors listed in Para 64 are out of step with contemporary understanding of drug dependence among expert bodies.

  According to the World Health Organization (WHO) and the United Nations Office on Drugs and Crime (UNDOC) -:

  > "*Drug dependence is considered a multi-factorial health disorder that often follows the course of a relapsing and remitting chronic disease…Over recent years, the biopsychosocial model has recognized drug dependence as a multifaceted problem requiring the expertise of many disciplines. A health sciences multidisciplinary approach can be applied to research, prevention and treatment."*[3]

[3] UNODC and WHO, *Principles of Drug Dependence Treatment*, Discussion Paper, March 2008.

It is suggested that Para 64 be revised to appropriately reflect the above understanding.

- Insertion of a new Para, as Para 67A after Para 67:

"It is suggested that the policy commit greater resources for effective prevention treatment and harm reduction programmes services and incorporate the National Fund for Control of Drug Abuse (Section 7A and the NDPS (National Fund for Drug Abuse) Rules, 2006) for financing such programmes."

HARM REDUCTION (Paras 68 to 73)

It is submitted that the contents of Paras 68 to 73 on harm reduction are not entirely accurate. The proposed chapter is cast in negative terms and overlooks the positive consequences of harm reduction measures. it is therefore suggested that the chapter be redrafted along the following lines:

"There are an estimated 2 lakh persons who inject drugs in India. In the early 1990s, injecting drug use was predominantly seen in the north eastern states of Manipur and Nagaland. Over the years, the practice is reported in nearly all States in the country, including metropolitan cities and towns.

Persons who inject drugs are susceptible to a wide range of health consequences, including blood borne infections like HIV, Hepatitis B and Hepatitis C. HIV prevalence among injecting drug users is as high as 9.2%, as compared to the national adult prevalence of 0.29%. The situation in certain States is much worse. For instance, of the estimated 23,000 injecting drug users in Punjab, one in four is infected with HIV (prevalence of 26.1%). Prevalence of Hepatitis B and C is even higher. In Mizoram, nearly 71.2% of all injecting drug users are infected with Hepatitis C.

High incidence of blood borne infections among people who inject drugs is attributed to the use of non-sterile injections including sharing of needles and syringes. Unsafe sex with sexual partners, who may or may not be injecting drugs themselves, exposes them to HIV transmission. If left unaddressed, the public health consequences of drug injecting can be quite alarming.

While people are encouraged to give up drugs, the immediate health risks of injecting drugs must be averted. It is now established that provision of sterile needles and syringes to injecting drug users reduces the risk of HIV transmission but does not increase illicit drug use. The Ministry of Health

and Family Welfare has been supporting needle syringe programmes for injecting drug users from 1999 onwards as part of the National AIDS Control Programme. These 'targetted interventions' are run by NGOs who contact injecting drug users, educate them about the risk of needle sharing and provide sterile injections. The Government of India supports this policy in view of its public health benefits.

Oral substitution treatment is another intervention that is known to reduce transmission of HIV and other blood borne infections among persons who inject drugs. The programme entails substituting drugs that are injected (like heroin, morphine, diazepam etc) with another drug, usually a licit one, which is administrated orally. This reduces and gradually eliminates drug injecting, thereby significantly lessening the risk of HIV infection. Methadone and Buprenorphine are the most widely substitutes and are enlisted on WHO's essential drug list. In June 2008, the Expenditure Finance Committee of the Cabinet approved Buprenorphine substitution for prevention of HIV among persons who inject drugs. Since then, NACO has been providing oral Buprenorphine substitution to approximately 6,000 injecting drug users through accredited NGOs and more recently, government hospitals/medical colleges. Support to these programmes will continue while ensuring that there is no diversion of drugs into the illegal market.

Until recently, Methadone was not permitted for marketing in India. In 2010, the DCGI approved the drug for treatment of drug dependence. A pilot study is being initiated currently underway to assess the feasibility of large scale Methadone substitution.

Decisions regarding the choice, availability and use of drugs for harm reduction programmes shall be made by the concerned authorities like MOHFW, DCGI, NDDTC and other medical experts. The Department of Revenue will review these decisions through an expert committee, as and when the need arises."

COLLECTION OF STATISTICS

CURRENT STATUS

- **Para 75:** In addition to compiling statistics of the number of arrests, seizures etc, it is suggested that the National Drug Enforcement Statistics analyze arrests and prosecution for small and commercial quantity. The penal scheme of the NDPS Act is premised on the quantity of drugs involved in the offence. Such comparative analysis will indicate the scale of the illicit drug market in the country and also show the extent to which

the Act is targeting organized drug trafficking as opposed to prosecuting low level drug offenders.

LABORATORIES

- **Para 82**: Rewrite the 11th line as: - *"Successful prosecution of offenders hinges on the quality and accuracy of test reports. Each of the seized samples has to be tested quickly, precisely and accurately as the test report confirms the nature, purity and quantity of drug and thus forms the basis for trial of the accused"*

  In para 82, insert the following line:

  "Courts have also expressed dissatisfaction with the existing FSL procedure for seizure, sampling and testing of articles and have asked the Government to take steps to streamline the same." [4]

INTERNATIONAL COOPERATION

UN AND MULTILATERAL CONVENTIONS AND RESOLUTIONS

- **Para 86:** Given the multi-Ministerial response to drugs, it has been observed that sometimes one Department/ Ministry is unaware about the position and programmes of another Ministry. As a result, there have been instances where attending delegates have not been able to present the accurate position, resulting in misinformation at international meetings. Therefore, it is suggested that in addition to having representation on official delegations from different Ministries, there must also be inter-ministerial /departmental discussion before the delegation leaves for the international meeting/conference.

  It is also submitted that Indian diplomats, particularly staff at the Permanent mission to Vienna (who interact with various drug control agencies, most of which are headquartered in Vienna) be adequately apprised of Government of India's position on topical drug policy matters.

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[4] *Radhey Prasad Chaurasia v State of Bihar*, Patna HC order dated 3.12.2010 in Cr. Misc. No.6651 of 2010