



Review of Canada's Compliance with the *Convention on the Elimination of All Forms of Racial Discrimination*

Submission to the United Nations Committee on the Elimination
of Racial Discrimination

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The Canadian HIV/AIDS Legal Network promotes the human rights of people living with, at risk of or affected by HIV or AIDS, in Canada and internationally, through research and analysis, litigation and other advocacy, public education and community mobilization.

Le Réseau juridique canadien VIH/sida fait valoir les droits humains des personnes vivant avec le VIH ou le sida et de celles qui sont à risque ou affectées autrement, au Canada et dans le monde, à l'aide de recherches et d'analyses, d'actions en contentieux et d'autres formes de plaidoyer, d'éducation du public et de mobilisation communautaire.

INTRODUCTION

The Canadian HIV/AIDS Legal Network (“Legal Network”) submits this briefing to the UN Committee on the Elimination of Racial Discrimination in advance of its review of the periodic report of Canada, held during its 93rd session from July 31 to August 25, 2017.

The Legal Network promotes the human rights of people living with, at risk of or affected by HIV or AIDS, in Canada and internationally, through research and analysis, litigation and other advocacy, public education and community mobilization. We envision a world in which the human rights and dignity of people living with HIV and those affected by the disease are fully realized, and in which laws and policies facilitate HIV prevention, care, treatment and support.

Our organization recognizes that Canada has taken some important steps in reversing the previous government’s punitive approach to drug policy, such as restoring federal support for harm reduction services, repealing a law that hindered the establishment of safer consumption injection services, and introducing legislation that would decriminalize and regulate cannabis. Canada’s ongoing, excessive use of incarceration as a drug-control measure, however, continues to result in racialized communities — specifically Indigenous and Black people — being disproportionately charged, prosecuted and incarcerated under laws that criminalize people who use drugs.

As such, the Legal Network has focused this briefing on its concerns about Canada’s implementation of the *Convention on the Elimination of All Forms of Racial Discrimination* (“Convention”) as they relate to:

- the **criminalization of people who use drugs**, resulting in racialized communities being disproportionately charged, prosecuted and incarcerated, and depriving them of their rights to equal treatment in the justice system, to security of the person, and to health and social services; and
- the failure to provide equivalent **access to health services in prisons**, including key harm reduction measures, where Indigenous and Black people are disproportionately represented, violating their rights to health and social services, security of the person, equality and non-discrimination.

CRIMINALIZATION OF PEOPLE WHO USE DRUGS

Racialized communities are disproportionately charged, prosecuted and incarcerated in Canada under laws that criminalize people who use drugs, depriving them of their rights to equal treatment in the justice system, to security of the person, and to health and social services.

According to Canada’s federal prison ombudsperson, 80% of federal prisoners experience problematic substance use.¹ A 2007 national study conducted by Correctional Service Canada revealed that almost 60% of men and women used drugs in the months immediately preceding their incarceration.² As the *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* found, “persons described as black are most over-represented among prisoners charged with drug offences, obstructed justice and weapons possession,”³ with almost 20% of Black federal prisoners incarcerated for a drug-related offence.⁴ In particular, Indigenous and Black women are more likely than White women to be in prison for that reason,⁵ and a

staggering 53% of Black women in federal prisons are serving sentences for a drug-related offence, many of whom were carrying drugs across borders as a way to alleviate their situations of poverty.⁶

In 2012, the federal government intensified that discrimination with the passage of the *Safe Streets and Communities Act*, which introduced a number of punitive reforms, including mandatory minimum sentencing for certain non-violent drug offences.⁷ Despite purporting to only target those who *traffic* in drugs while offering alternatives to incarceration for those struggling with drug dependence, the burden of harsher enforcement still falls most heavily on those with drug dependence, particularly those who may engage in small-scale dealing to support their own drug use.⁸ Mandatory minimum sentences also deny Indigenous people their right to more culturally appropriate and restorative alternatives to incarceration by effectively preventing judges from considering the individual circumstances of a case, including a person's Indigenous heritage or connection, as prescribed by the *Criminal Code*⁹ and the Supreme Court of Canada in *R. v. Gladue*.¹⁰

Criminalizing the possession of drugs for personal use undermines efforts to address the health needs of people struggling with problematic drug use. An immense body of evidence demonstrates that the continued, overwhelming emphasis on drug prohibition — from policing to prosecution to prisons — is not only failing to achieve both the stated public health and public safety goals of prohibition, but also resulting in costly damage to the public purse, to public health and to human rights, in Canada¹¹ and globally.¹² In 2015, the Truth and Reconciliation Commission of Canada issued calls to action which included recommendations to federal, provincial, and territorial governments to commit to eliminating the overrepresentation of Indigenous people in custody and to amend the *Criminal Code* to allow trial judges to depart from mandatory minimum sentences and restrictions on the use of conditional sentences.¹³ The UN Special Rapporteur on the right to the highest attainable standard of health has stated that “[a]t the root of many health-related problems faced by people who use drugs is criminalization itself, which only drives issues and people underground and contributes to negative public and individual health outcomes.”¹⁴ It is worth underscoring that the UN Committee on the Elimination of Discrimination against Women recently recommended that Canada “repeal mandatory minimum sentences for minor, non-violent drug-related offences.”¹⁵

RECOMMENDED ACTIONS

The Legal Network recommends that Canada

- **Minimize custodial sentences for people who commit non-violent offences, including repealing all mandatory minimum prison sentences for such offences;**
- **Expand evidence-based alternatives to incarceration for people who use drugs, taking into account the need for culturally appropriate care, including for women, Indigenous people, racialized minorities and youth;**
- **Ensure access to appropriate health and social support services (including evidence-based harm reduction services), and scale up access to evidence-based drug dependence treatment (including culturally appropriate and gender-specific treatment), for people who use drugs in need of such supports;**

- **Decriminalize the possession of all drugs for personal use and commit to examining appropriate models for the legalization and regulation of other currently illegal substances as part of an evidence-based, public-health approach to drug policy; and**
- **Ensure and support the full involvement of civil society organizations, including organizations and networks of people who use drugs, in the elaboration, implementation and evaluation of drug policy and services for people who use drugs.**

LACK OF HARM REDUCTION MEASURES IN PRISONS

Canada's failure to provide prisoners, who are disproportionately Indigenous and Black,¹⁶ with equivalent access to health services, including key harm reduction measures, is a violation of their rights to health and social services, security of the person, equality and non-discrimination.

Significant numbers of prisoners use drugs. In a national survey conducted by Correctional Service Canada, 34% of men and 25% of women reported using non-injection drugs during the past six months in prison, while 17% of men and 14% of women reported injecting drugs.¹⁷ Other studies have revealed high rates of syringe-sharing among people who use drugs in Canada's prisons, due to the lack of sterile injection equipment behind bars.¹⁸ Not surprisingly, research shows that the incarceration of people who inject drugs is a factor driving Canada's HIV and HCV epidemic.¹⁹

Already, rates of HIV and HCV in prison are considerably higher than they are in the community as a whole. A 2016 study indicated that about 30% of people in federal facilities, and 15% of men and 30% of women in provincial facilities are living with HCV, and 1–2% of men and 1–9% of women are living with HIV.²⁰ Indigenous prisoners, in particular, have much higher rates of HIV and HCV than non-Indigenous prisoners. For example, Indigenous women in federal prisons are reported to have rates of HIV and HCV of 11.7% and 49.1%, respectively.²¹ At the same time, an estimated 45% of new HIV infections among Indigenous people are attributed to injection drug use — more than four times the estimate for the population as a whole.²²

In spite of the overwhelming evidence of the health benefits of prison-based needle and syringe programs (PNSPs) and opioid substitution therapy (OST), no Canadian prison currently permits the distribution of sterile injection equipment to prisoners and a number of provincial and territorial prisons do not offer OST to prisoners.²³ The UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules) recommend that prisoners enjoy the same standards of health care that are available in the community; these standards necessarily apply to persons with drug dependence.²⁴ A number of UN agencies, including the UN Office on Drugs and Crime (UNODC), UNAIDS and the World Health Organization (WHO), have recommended that prisoners have access to a series of key interventions, including needle and syringe programs; condoms; drug-dependence treatment including OST; programs to address tattooing, piercing and other forms of skin penetration; and HIV treatment, care and support.²⁵ In the *International Guidelines on HIV/AIDS and Human Rights*, for example, UNAIDS and the Office of the UN High Commissioner on Human Rights call on prison authorities to “provide prisoners ... with access to ... condoms, bleach and clean injection equipment.”²⁶ Furthermore, the Madrid Recommendations — a series of recommendations on health protection in prisons

that have been endorsed by representatives from 65 countries as well as the WHO, UNODC and the Council of Europe — recognizes “the urgent need in all prison systems for measures, programmes and guidelines which are aimed at preventing and controlling major communicable diseases in prisons,” including PNSPs, OST and condom distribution.²⁷ These interventions should be made available; in addition, incarcerated women should have access to gender-specific health care that is at least equivalent to that available in the community.²⁸

In 2009, the UN Special Rapporteur on torture, Manfred Nowak, recommended that “needle and syringe programmes in detention should be used to reduce the risk of infection with HIV/AIDS.”²⁹ In 2013, the UN Special Rapporteur on torture, Juan Méndez, urged States to “ensure that all harm-reduction measures and drug-dependence treatment services, particularly opioid substitution therapy, are available to people who use drugs, in particular those among incarcerated populations.”³⁰ In 2016, the UN Committee on the Elimination of Discrimination against Women asked Canada to “expand care, treatment and support services to women in detention living with or vulnerable to HIV/AIDS, including by implementing prison-based needle and syringe programmes, opioid substitution therapy, condoms and other safer sex supplies.”³¹ These recommendations are in line with a key call to action of the Truth and Reconciliation Commission of Canada, which urged the federal government to establish measurable goals to identify and close the gaps in health outcomes between Indigenous and non-Indigenous communities.³²

RECOMMENDED ACTIONS

The Legal Network recommends that Canada

- **Implement key health and harm reduction measures in all prisons in Canada, including prison-based needle and syringe programs, opioid substitution therapy, condoms and other safer sex supplies, and safer tattooing programs, in consultation with prisoner groups and community health organizations to ensure operational success, taking into account the need for culturally appropriate and gender-specific programs.**

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- ¹ The Correctional Investigator of Canada, *Annual Report 2013–2014 of the Office of the Correctional Investigator*, 2014.
- ² D. Zakaria et al., *Summary of Emerging Findings from the 2007 National Inmate Infectious Diseases and Risk-Behaviours Survey*, Correctional Service Canada, 2010.
- ³ *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen’s Printer for Ontario, 1995) at pp. 69–70.
- ⁴ Office of the Correctional Investigator, *A Case Study of Diversity in Corrections: The Black Inmate Experience in Federal Penitentiaries Final Report*, 2013. Available at www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20131126-eng.aspx.
- ⁵ The Correctional Investigator of Canada, *Annual Report 2014–2015 of the Office of the Correctional Investigator*, 2015.
- ⁶ The Correctional Investigator of Canada, *Annual Report 2012–2013 of the Office of the Correctional Investigator*, 2013.
- ⁷ *Safe Streets and Communities Act*, SC 2012, c 1.
- ⁸ Canadian HIV/AIDS Legal Network, *Mandatory Minimum Sentences for Drug Offences: Why Everyone Loses*, 2006; D. Bennett and S. Bernstein, *Throwing Away the Keys: The Human and Social Cost of Mandatory Minimum Sentences*, Pivot Legal Society, 2013.
- ⁹ *Criminal Code*, s. 718.2(e).
- ¹⁰ *R v. Gladue*, [1999] 1 SCR 688.
- ¹¹ Canadian HIV/AIDS Legal Network, *Drug policy and human rights: The Canadian context — Submission to the Office of the UN High Commissioner for Human Rights*, May 19, 2015. Available at www.aidslaw.ca/site/drug-policy-and-human-rights-ohchr.
- ¹² K. DeBeck et al., “HIV and the criminalisation of drug use among people who inject drugs: a systematic review,” *The Lancet HIV*, May 14, 2017; S. Boyd, C.I. Carter and D. MacPherson, *More Harm Than Good: Drug Policy in Canada* (Halifax and Winnipeg: Fernwood Publishing, 2016); Office of the UN High Commissioner for Human Rights, *Study on the impact of the world drug problem on the enjoyment of human rights*, Report to the UN Human Rights Council, UN Doc. A/HRC/30/65, 2015; T. Babor et al., *Drug Policy and the Public Good* (Oxford: Oxford University Press, 2010); S. Rolles et al., *The Alternative World Drug Report*, 2nd ed. (London: Transform Drug Policy Foundation, 2016). Available at www.countthecosts.org/alternative-world-drug-report-2nd-edition; Global Commission on Drug Policy, *The War on Drugs and HIV/AIDS: How the Criminalization of Drug Use Fuels the Global Pandemic*, 2012. Available at www.globalcommissionondrugs.org/reports/the-war-on-drugs-and-hiv-aids; Global Commission on Drug Policy, *The Negative Impact of the War on Drugs on Public Health: The Hidden Hepatitis C Epidemic*, 2013. Available at www.globalcommissionondrugs.org/reports/the-negative-impact-of-the-war-on-drugs-on-public-health-the-hidden-hepatitis-c-epidemic; Global Commission on HIV and the Law, *Risks, Rights and Health* (New York: UNDP, 2012).
- ¹³ Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action*, 2015.
- ¹⁴ D. Puras, *UN Special Rapporteur on the right of everyone to the highest attainable standard of mental and physical health*. Open letter to UNODC Executive Director Yury Fedetov, in the context of the preparations for the UN General Assembly Special Session on the Drug Problem (UNGASS), December 7, 2015.
- ¹⁵ UN Committee on the Elimination of Discrimination Against Women, *Concluding Observations: Canada*, November 2016, para. 45.
- ¹⁶ *Annual Report 2014–2015 of the Office of the Correctional Investigator*.
- ¹⁷ D. Zakaria et al.
- ¹⁸ E. van der Meulen, “‘It Goes on Everywhere’: Injection Drug Use in Canadian Federal Prisons,” *Substance Use & Misuse* 52, 7 (2017): pp. 884–891; D. Zakaria et al.; C. Hankins, “Confronting HIV infection in prisons,” *Canadian Medical Association Journal* 151,6 (1994): pp. 743–745; C.A. Hankins et al., “HIV infection among women in prison: an assessment of risk factors using a non-nominal methodology,” *American Journal of Public Health* 84,10 (1994): pp. 1637–1640.
- ¹⁹ M.W. Tyndall et al., “Intensive injection cocaine use as the primary risk factor in the Vancouver HIV–1 epidemic,” *AIDS* 17,6 (2003): pp. 887–893; H. Hagan, “The relevance of attributable risk measures to HIV prevention planning,” *AIDS* 17,6 (2003): pp. 911–913.

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- ²⁰ F. Kouyoumdjian et al., “Health status of prisoners in Canada,” *Canadian Family Physician* 62 (2016): pp. 215–222.
- ²¹ D. Zakaria et al.
- ²² Public Health Agency of Canada, *Summary: Estimates of HIV Incidence, Prevalence and Proportion Undiagnosed in Canada*, 2014.
- ²³ G. Dias and G. Betteridge, *Hard Time: HIV and Hepatitis C Prevention Programming for Prisoners in Canada*, Canadian HIV/AIDS Legal Network and PASAN, 2007.
- ²⁴ Rule 24 of the *United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules)*, UN Doc. A/RES/70/175, December 17, 2015.
- ²⁵ UNODC, ILO, UNDP, WHO and UNAIDS, *Policy brief: HIV prevention, treatment and care in prisons and other closed settings: a comprehensive package of interventions*, 2013.
- ²⁶ Office of the High Commissioner for Human Rights (OHCHR) and UNAIDS, *International Guidelines on HIV/AIDS and Human Rights, Consolidated Version*, U.N. Doc. HR/PUB/06/9, 2006, Guideline 4, para. 21(e).
- ²⁷ WHO, *The Madrid Recommendation: Health protection in prisons as an essential part of public health*, 2010.
- ²⁸ Rule 10 of *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders*, UN Doc. A/RES/65/229, March 16, 2011.
- ²⁹ UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak*, UN Doc. A/HRC/10/44, January 14, 2009, para. 74.
- ³⁰ UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez*, UN Doc. A/HRC/22/53, February 1, 2013.
- ³¹ UN Committee on the Elimination of Discrimination Against Women, *Concluding Observations: Canada*, November 2016, para. 49.
- ³² *Truth and Reconciliation Commission of Canada: Calls to Action*, 2015.