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CSO Report Submitted by
Aboriginal Legal Services

Submitted to Committee on the Elimination of
Discrimination Against Women

In Consideration of **Canada's** 8th and 9th Periodic Report

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Introduction

Aboriginal Legal Services (“ALS”) is a multi-service non-profit legal organization that was incorporated to assist Aboriginal people to gain access to, and control over, justice related issues that affect them. ALS only serves Indigenous people and families. ALS has extensive experience addressing systemic discrimination against Indigenous peoples since it was established in 1990 including intervening on 15 Supreme Court of Canada.

Aboriginal Legal Services is guided by several core principles:

- Indigenous individuals require equitable treatment in the justice system, access to the legal and related resources within the justice system as well as understanding of the system and their options.
- The support required includes advocacy in all areas of the law as well as alternatives which can break the cycles of recidivism and dependency which is all too prevalent.
- These alternatives are more effective when they are community controlled and are based on the traditional cultural norms and values of the Indigenous community.
- It is necessary to re-introduce community controlled and culturally based justice alternatives by ensuring community involvement in the process and by integrating justice related services with complementary programs within the Indigenous community.

This submission focuses on several key issues of discrimination facing Indigenous women in Canada: access to justice issues such as over incarceration and criminalization of Indigenous women, the new approach to prostitution, the inquiry in murdered and missing Indigenous women, inequalities in education, and ongoing sex discrimination in the *Indian Act*.

Aboriginal Legal Services urges the Committee to ensure that the interpretation of the *Convention on the Elimination of Discrimination Against Women* respects, promotes and advances the rights of Indigenous women contained within the *UN Declaration on the Rights of Indigenous Peoples*¹ in their review of Canada. In particular, we note the Outcome Document of the World Conference on Indigenous Peoples,² in which States recommitted

to support the empowerment of indigenous women and to formulate and implement, in collaboration with indigenous peoples, particularly indigenous women and their organizations, policies and programmes designed to promote capacity-building and strengthen their leadership. We support measures which will ensure the full and effective participation of indigenous women in decision making processes at all levels and in all areas, and eliminate barriers for their participation in political, economic, social and cultural life.

As well, the Outcome Document reiterated the need for Treaty bodies to incorporate the standards contained within the *UN Declaration on the Rights of Indigenous Peoples* when reviewing State progress in realizing the rights of Indigenous peoples:

We invite Human Rights Treaty bodies to consider the United Nations Declaration on the Rights of Indigenous Peoples in accordance with their

¹ Resolution 61/295, 13 September 2007.

² Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples, UN Doc A/RES/69/2, 22 September 2014.

respective mandates. We encourage Member States to include, as appropriate, information on the situation on the rights of indigenous peoples, including the measures taken to pursue the objectives of the United Nations Declaration on the Rights of Indigenous Peoples in reports to Human Rights Treaty bodies, and in the Universal Periodic Review.

Access to justice

Access to justice remains a critical issue for Indigenous women's equality in Canada. Key issues for Indigenous women's access to justice includes over incarceration, lack of safeguards in cases of sexualized violence against Indigenous women, and limited access to legal aid. Minimizing root cause of violence through education, employment and more opportunities along with increasing access to justice can improve Indigenous women's equality in Canada.

Canada fails to indicate that incarceration rates for women have increased since Canada's last periodic report; this is especially true for Indigenous women. In fact, there are provincial facilities whose prison population are almost entirely Indigenous women, such as Manitoba's Women's Correctional Center where as many as nine in ten prisoners are Indigenous women.³ Other statistics indicate that three out of five federally sentence women are Indigenous. These statistics suggest that there is a crisis that requires immediate attention.

Indigenous women are less likely to receive bail and are thus incarcerated during the determination of their case. Indigenous women continue to receive harsher or longer sentences and are less likely to get parole. Indigenous women are not only over incarcerated; they spend more time incarcerated than non-Indigenous women. There is increasing reliance on mandatory minimum sentences, which exacerbate the problem of over incarceration. Criminal code provisions requiring judges to consider alternatives to incarceration and the interpretation of these provisions in *Gladue*⁴ and *Ipeelee*,⁵ which also acknowledge systemic discrimination, have failed to address the issue of over incarceration. Despite decades of studies and reports that recognized systemic discrimination against Indigenous peoples, Canada has failed to take effective measures to address the systemic racism that Indigenous women face in the criminal justice and penal system. And in fact, the situation keeps getting worse for Indigenous women.

In addition to being over-represented in the prison system, the experiences once in prison further compound the inequality Indigenous women experience in the criminal justice system. There are few federal female prisons, which mean when women are federally sentenced they are more likely to be further away from their families and communities. While in prison, their children are at increased risk of being apprehended by Child and Family services, which increases their likelihood of future involvement in the criminal justice system. Finally, Indigenous women are disproportionately assessed as high-security, and must serve their sentences in maximum-security facilities without access to programming. Most shocking is Canada's response to the list of issues that claims that the Security Reclassification System for Women was not designed specifically for Indigenous women, but was revalidated for its use on Indigenous women. Canada's response to the issues admits that classification of

³ Nancy McDonald, "Canada's prisons are the 'new residential school'", *McLeans*, 18 February 2016, available at <http://www.macleans.ca/news/canada/canadas-prisons-are-the-new-residential-schools/>.

⁴ *R. v. Gladue*, [1999] 1 S.C.R. 688.

⁵ *R. v. Ipeelee*, [2012] 1 SCR 433, 2012 SCC 13.

female prisons fails to include special consideration for Indigenous women and thus fails to uphold Canada's obligations.

The prosecution of Bradley Barton in the death of Cindy Gladue demonstrates the failures of the criminal justice system to address violence against Indigenous women.⁶ Ms. Gladue died as a result of an 11 centimeter wound to her vagina. During the trial, the trial judge allowed her vaginal tissue to be brought into court as evidence as there was questions whether the injury was caused by a sharp instrument or by "rough but consensual sex." Barton was acquitted at trial. This case has been heavily criticized by Indigenous advocates because the Trial judge allowed the most intimate part of a woman's body to be exhibited in a jury trial. Questions remain whether this dehumanizing decision of the trial judge was influenced by the fact that Ms. Gladue was an Indigenous woman and had engaged in sex work. Regardless, her remains had no place as evidence in a courtroom. This trial exemplifies the failures of the Canadian legal system: it fails to protect Indigenous women who are the most victimized, but rather perpetuates stereotypes; it fails to address Indigenous concerns and protocols including culturally appropriate justice systems; and it fails to provide any meaningful redress or remedy for murdered and missing Indigenous women and girls.

A final access to justice issue is the availability of legal aid to ensure Indigenous women have appropriate representation. Canada's report indicates that legal aid eligibility thresholds have increased in several provinces; but Canada fails to provide disaggregated data on the percentage of legal aid certificates that are provided to women for criminal charges. There is increasing pressure on legal aid budgets in part due to the lack of federal funding. Most legal aid programs give preference to applications where loss of liberty is at risk. However, the majority of legal aid certificates for criminal charges go to men. Women are generally granted legal aid certificates for family matters. This inequality is especially amplified for Indigenous women, given the over incarceration rates for Indigenous women continue to climb.

Some legal aid programs provide enhanced services to Indigenous women, but there is no consistency across jurisdictions. All legal aid services in Canada need to increase competent services for Indigenous women to meaningfully improve access to justice. Without consistent and adequate statistical collection of service needs, capacity to deliver the services or appropriate funding of legal aid representation will not keep pace with the actual need.

Recommendation: Canada remove mandatory minimum sentences that perpetuate over-incarceration of Indigenous women and ensure that all alternatives to incarceration are considered for every Indigenous woman, at every stage of the criminal process (bail, sentencing, parole).

Recommendation: Canada must develop culturally appropriate procedural safeguards to ensure that criminal cases involving sexual violence do not further victimize the victim.

Recommendation: Canada must create culturally appropriate methods of assessing the risk of Indigenous women prisoners that addresses the current discriminatory approaches.

⁶ Christa Big Canoe, "Cindy Gladue suffered her last indignity at murder trial", CBC News, 2 April 2015, <http://www.cbc.ca/news/indigenous/cindy-gladue-suffered-her-last-indignity-at-murder-trial-1.3019500>.

Recommendations: Canada must disaggregate data on legal certificates to ensure equal access to legal aid for men and women with criminal charges.

Question: What steps are being taken at the provincial level to ensure every judge, Crown prosecutor, and defense lawyer fully understand their obligations to consider alternatives to incarceration for Indigenous women?

Question: What measures were used to revalidate the Security Reclassification System for Women for Indigenous women?

Question: What measures are in place to ensure women, including Indigenous women, have equal access to legal aid for criminal prosecutions?

Violence against Indigenous Women and Girls

One of the largest issues preventing Indigenous women from achieving equality is the high rate of violence. Aboriginal Legal Services is pleased that the federal government has called a national inquiry into murdered and missing Indigenous women and girls. However, one of the key challenges is to address the failures of the police to investigate cases of missing Indigenous women and girls. As well, there is a need to determine the extent of police involvement or complicity in the violence perpetrated against Indigenous women and girls.

The terms of reference for the national inquiry did not specifically require a “human rights based approach” to the inquiry. The terms simply mentions the Report of the inquiry concerning Canada of the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to CEDAW (30 March 2015) as a potentially relevant background report to be considered in completing the inquiry.⁷

Another ambiguity in the terms of references is the extent to which policing agencies (both the RCMP and local/provincial police forces) will participate in the inquiry, including assessing the role of police in over-policing and under protecting Indigenous women and girls. There are systemic problems within policing in Canada of failing to investigate when families or friends report Indigenous women and girls missing. For example, Bella Lacoucan-McLean from Sturgeon Lake Cree First nation in Alberta fell 31 storeys at a condominium in downtown Toronto on July 20, 2013.⁸ While the police now consider her death suspicious, there are still no answers. The police indicate there is not sufficient evidence to prove whether she was murdered. It has been extremely difficult for family to get any response from police.

Far too often stereotypes that Indigenous women are sex workers, drug users or have run away are provided as the reason police refuse to investigate or search for missing Indigenous women. Significant efforts must be made to address the stereotypes prevalent throughout police forces. Independent oversight mechanisms must exist for families to bring complaints when police fail investigate reports of missing Indigenous women.

Canada’s report indicates that the RCMP numbers on murdered and missing Indigenous women are the basis to enhance prevention and investigative efforts and accountability.

⁷ The terms of reference can be found at <https://www.aadnc-aandc.gc.ca/eng/1470422455025/1470422554686>.

⁸ “Murdered and Missing: the unsolved cases of Indigenous women and girls: Bella Laboucan-McLean” <http://www.cbc.ca/missingandmurdered/mmiw/profiles/bella-marie-laboucan-mclean>.

However, there have been serious criticisms raised with the RCMP approach to reporting.⁹ A missing person who is reported to police is to be entered into the Canadian Police Information Centre (“CPIC”). CPIC is a national police database used by all police jurisdictions. The RCMP reports that the number of missing Aboriginal women based on CPIC files. Specific concerns include that the RCMP numbers are limited to cases uploaded on the Canadian Police Information Centre (“CPIC”) that has a backlog of two years. Further, cases dismissed outright by police because of stereotypes may not have been uploaded onto CPIC. In addition, the police have likely misidentified some Indigenous women as non-Indigenous because Indigenous origin was only recently added as a field in CPIC.

Even the federal Minister of Indigenous and Northern Affairs acknowledged that the problem is bigger than 1200 cases.¹⁰ Aboriginal Legal Services remains concerned that the outcomes of the inquiry will simply task police with addressing the issues surrounding murdered and missing Indigenous women without addressing the role of the police in enforcing the discriminatory legal system. While police must address internal discrimination and must fully investigate cases as they are reported, the results of the inquiry must empower local Indigenous communities to address the issue of murdered and missing Indigenous women and girls. Greater power and resources should not be given to policing agencies.

Many reports stress the economic and social marginalization of Indigenous women in making them more susceptible to violence and less able to escape violent circumstances. Lack of education and employment opportunities result in high levels of poverty, food insecurity, overcrowding and homelessness, which contribute to Indigenous women’s vulnerability to violence. Canada must work to implement economic, social and cultural rights to address the high rates of murdered and missing Indigenous women and girls. In addition, there is chronic underfunding of services to help Indigenous women address these circumstances.

Finally, approaches must be broadened beyond simply identifying the cause as “male violence against women” to include violence experienced by lesbian, gay, bisexual, transgender, two spirited, and queer women, as well as systemic violence perpetuated through colonial policies, practices, institutions and agencies. Including violence against Indigenous women, children, two-spirited and LGBTQ persons also promotes consistency across international human rights. For example, see the list of issues for Canada’s 7th periodic review before the Committee Against Torture.

Recommendation: Canada should immediately implement the existing recommendations from international human rights bodies to address murdered and missing Indigenous women and girls.

Recommendation: develop a national action plan in collaboration with Indigenous women’s organization to implement economic, social and cultural rights of Indigenous women to address the underlying causes of violence, and ensure that these rights are justiciable in Canada.

⁹ Legal Strategy Coalition on Violence Against Indigenous Women, “Analyzing the 2014 Royal Canadian Mounted Police (RCMP) Report, Missing and Murdered Aboriginal Women: A National Operational Review A Guide for the Study of the RCMP Statistics in the 2015 Report,” <http://www.leaf.ca/wp-content/uploads/2015/06/2015-06-16-MMIW-LSC-2014-Fact-Sheet-final-version.pdf>.

¹⁰ Kathryn Blaze Baum and Tavia Grant, “Missing and murdered indigenous women toll ‘way bigger’ than 1,200: minister” Globe and Mail, 15 February 2016, www.theglobeandmail.com/news/politics/toll-of-missing-and-murdered-indigenous-women-way-bigger-than-1200-minister/article28761649/.

Question: What safeguards are in place to ensure that the national inquiry covers the broad range of issues identified in the pre-inquiry consultations by Indigenous families, such as the role of the police, but not specifically addressed in the terms of reference?

Trafficking and Prostitution

Canada recently amended the Canadian criminal code provisions on sex work. The new approach engages the “Nordic” model, which emphasizes criminalizing the purchaser of sex, as opposed to the provider of sexual services. Aboriginal Legal Services strongly opposes any approach that leads to greater criminalization because of the disproportionate impacts criminalization has on Indigenous women.

Survival sex workers are the most vulnerable and most marginalized of all prostitutes and are the least likely to move off the street, no matter what legal regime is in place. Street-based sex workers come from the most marginalized communities, a disproportionate number of whom are Indigenous women. Indigenous women are overrepresented in street based sex work due to the impacts of colonialism that have pushed many Indigenous people to the extreme margins of society.¹¹

Indigenous women’s involvement in street-based sex work is directly linked to the negative experiences of colonialism, which includes a legacy of racism, colossal neglect, violence and abuse. Some argue that sex trade workers are at risk of violence because of the behaviour of johns and pimps. However, this mischaracterizes it as random acts of individualized violence, as opposed to violence that reflects and perpetuates the marginalization from colonialism and systemic discrimination against Indigenous women.

It is important to not see Indigenous women involved in survival sex as simply victims doomed to a life of addiction and early death, whether at the hands of others or due to the inherent consequences of the life that they live. Those who leave survival sex do so through their own resilience and with the help of Indigenous communities and social service agencies.

Aboriginal Legal Services is concerned with the current approach taken by the federal government because of the acute overrepresentation of Indigenous women in the criminal justice and penal systems. ALS is extremely concerned that this Nordic model approach will have a disproportionately negative impact on Indigenous sex workers, their families and communities, and will thus perpetuate the discrimination against Indigenous women. While divergent opinions are held on whether sex work is empowering or vulnerable, Canada’s approach to addressing sex work may further exacerbate the overrepresentation and disproportionate number of Indigenous women in the criminal justice system.

Recommendation: Canada must review the current approach to sex work to ensure it does not further marginalize and criminalize Indigenous peoples, especially Indigenous women.

Recommendation: Canada must work to address the underlying socio-economic situation of Indigenous women that contributes survivor sex work.

¹¹ British Columbia: “Missing Women Commission of Inquiry” headed by Commissioner by Wally Oppal (2012), <http://www.missingwomeninquiry.ca/obtain-report/>.

Recommendation: Canada should increase available funding to Indigenous community based organizations to support survivors of sex work.

Question: How does the government's current approach distinguish between sex work and trafficking? How does the new approach to trafficking address shortcomings of previous ineffective approaches?

Question: What safeguards exist to ensure that Canada's new approach to regulating sex work does not further the inequality of Indigenous women in the criminal justice system?

Education

One area where Indigenous women's equality is a serious concern is education, particularly First Nations women. The gross inequality is a contributing factor to the violence against Indigenous women. Education is a doorway to all opportunity; improved living conditions and socio-economic wellness. Unequal access to education is a crucial factor as to why Indigenous women cannot achieve equality. First Nations education is grossly underfunded and denies First Nations women's equality. Canada's report mischaracterizes the nature and degree of the problem. It further fails to recognize the severity of the issue. This denial contributes to the poverty and violence that Indigenous women in Canada experience.

Recently, an inquest was completed surrounding the deaths of several First Nations youth living in Thunder Bay, Ontario. The First Nations Youth Inquest jury verdict made several recommendations that we urge CEDAW to reiterate to Canada.¹²

Recommendation: In order to achieve equity for First Nations students, provide funding for education (on and off-reserve) that is sufficient to ensure that:

- i. First Nations schools on and off-reserve can provide the full range of programs and services that are available to non-Indigenous children in Ontario, including new and innovative programs and services;**
- ii. First Nations schools on and off-reserve can provide additional programs and services required as a result of the unique circumstances and challenges faced by First Nations students, their schools and their communities;**
- iii. the gap between educational outcomes for First Nations students and non-Indigenous students is substantially reduced every year, and completely eliminated in 10 years so that the next generation of First Nations children will have the same educational advantages as other children in Canada;**
- iv. First Nations students from remote communities receive the same educational advantages as other children in Canada regardless of where they are born, where their families choose to reside, and whether they attend school away from their home communities; and**
- v. all education decisions regarding First Nations children are made with the best interests of those children in mind.**

Recommendation: In order to improve education outcomes of First Nations

¹² Ontario, Office of the Chief Coroner, "Inquest into deaths of Jethro Anderson, 15; Curran Strang, 18; Paul Panacheese, 21; Robyn Harper, 19; Kyle Morrisseau, 17; Jordan Wabasse, 15; Reggie Bushie, 15." Verdict and Recommendations released 28 June 2016.

- youth, in consultation with First Nations education providers, provide sufficient funding and necessary resources to ensure that First Nations schools are able to:**
- i. develop and implement culturally appropriate curricula and programs. Staff hired for these programs should include on-site Elders; cultural and traditional land-based teachers; and after-school activity co-ordinators;**
 - ii. develop and implement languages curricula and programs (including individual courses and full/partial immersion);**
 - iii. assess and identify students with special education needs and provide the necessary supports to those students including, but not limited to, speech and language therapy; occupational and physical therapy;**
 - iv. ensure the safe transportation of students to and from school;**
 - v. create and implement safe school protocols;**
 - vi. decrease absenteeism by hiring a community-school liaison worker or having a community Elder attend at the homes of absent students to reinforce the importance of attending school and to encourage students and their families to make all efforts to attend school on a regular basis;**
 - vii. increase capacity in new and existing First Nation education institutions;**
 - viii. analyze current and historical education data as provided by First Nations and organizations designated by First Nations;**
 - ix. address and overcome the unique challenges facing First Nations students, schools, and communities (e.g. socio-economic disadvantage, remoteness and isolation, small school size, special needs incidence rates, population growth, etc.);**
 - x. assess needs, develop estimates of cost, and develop processes for adjusting those costs over time to keep pace with inflation, education best practices and changes in legislation and student need; and**
 - xi. educate students on the United Nations Convention on the Rights of the Child, the United Nations Declaration on the Rights of Indigenous Peoples, then work of the Truth and Reconciliation Commission and Treaty Rights to strengthen the knowledge of students regarding their rights and protections.**

Question: How does Canada plan to implement the recommendations of the First Nations Youth Inquest in Thunder Bay, with particular attention to the inequalities of girls?

Ongoing Sex Discrimination in the *Indian Act*

Canada has amended the *Indian Act* several times to address aspects of sex discrimination. In their submission, Canada refers to the *Gender Equity in Indian Registration Act* as their most recent efforts to address sex discrimination. However, this amendment does not fully address the ongoing sex discrimination that exists. One particular issue that remains is the federal policy on unknown and unstated paternity. Although the *Indian Act* is silent on status when paternity is unknown or unstated, Indigenous and Northern Affairs Canada (INAC) developed a policy for status applications with unknown or unstated paternity in their lineage. Based on the policy, the Registrar assumes the child's father is non-Indian. This policy perpetuates sex discrimination and exacerbates the disadvantage of Indigenous women. This policy is particularly problematic in the way it targets Indigenous mothers and children.

The statutory requirement that both parents be status Indians in order for the child to receive "full" status, and the administrative Proof of Paternity policy applied to defeat an application

for registration weigh more heavily on women than on men. It is readily apparent in most cases who is the mother of a child, but not so readily apparent in many cases who is the child's father. There are important reasons why a mother may not wish or be able to put the name of the child's father on the record, as in cases of abuse, rape or incest.

The burden imposed upon these women to prove paternity varies depending on the circumstances such as where the father denies paternity or where the circumstances of the birth do not lend themselves to such disclosure. The policy metes punishment out to women and children where men are not meeting their responsibilities. The children are also effectively punished for the conditions of their birth and unmarried women who give birth face age old stereotyping with respect to the unreliability of the paternity of their children.

Another recent case that considered discrimination under the *Indian Act* found that Discrimination of the same nature as that which historically prevailed against Indian women and their descendants with respect to their being included in the Register still exists today, despite Parliament's attempts to eradicate it in 1985 and 2010. In fact, by benefiting a group that was already advantaged under the former statute, the 1985 Act exacerbated the discriminatory treatment of certain persons, including the plaintiffs and other persons in their situation. The 2010 Act did not remedy the situation, at the very least, not fully. Sex discrimination, though more subtle than before, persists.¹³

Canada ultimately decided not to appeal the decision and has now started a public consultation process that is not readily announced, advertised nor has sufficient outreach occurred to engage those most impacted by the discriminatory provisions of the *Indian Act*. The next proposed step is to change legislation following a time-limited and narrow consultation to meet the court order in *Decheneaux*, which will still not eradicate all the discrimination that continues to exist under the *Indian Act*.

Aboriginal Legal Services is currently in litigation over the issue of unstated paternity, in *Gehl*.¹⁴ Despite claims that the government has addressed sex discrimination in the *Indian Act* or is working to end discrimination, the federal government continues to litigate issues of unknown and unstated paternity perpetuating the discrimination against Indigenous women.

Recommendation: Canada eliminate ambiguities in the law and policies that perpetuate sex discrimination against Indigenous women in the *Indian Act* including unknown and unstated paternity policy.

Recommendation: Canada engage in a vigorous and comprehensive engagement and consultation with Indigenous women that continue to be discriminated against in the *Indian Act*.

Question: How does ongoing sex discrimination in the *Indian Act* impact Indigenous women's experience of violence?

Question: What is Canada's strategic plan to ensure changes in legislation and policy that eliminate all forms of sex discrimination that exist in the *Indian Act*?

¹³ *Decheneaux v Canada (Procureur général)* 2015 QCCS 3555 paras 9-10.

¹⁴ *Gehl v Attorney-General of Canada*, 2015 ONSC 3481.