



NGO alternative report
Columbia Legal Services

Responding to the list of themes developed by the Committee for the
Elimination of Racial Discrimination in preparation for the review of the
United States of America at the Committee's 107th session

Columbia Legal Services (CLS) is a nongovernmental legal aid organization based in Washington, a state located in the northwest corner of the continental United States with a population of 7.8 million people.¹

In the United States, legal aid organizations provide legal assistance to people with low incomes who cannot afford to pay for an attorney. Legal aid typically focuses on the civil legal arena: providing legal assistance with issues related to health, housing, consumer, employment, and family matters, among others. Contrast this with public defense, which provides legal assistance in criminal cases.

Legal aid organizations that receive federal government funding through the Legal Services Corporation are prohibited from representing people held in confinement and people without lawful immigration status. Federally-funded legal aid organizations are also barred from petitioning the government to seek changes in the law. These restrictions originated from a desire by US policymakers to limit the influence and voice of migrant farm workers and to silence people held in prisons and jails seeking to exercise their civil legal rights. These restrictions are rooted in racism.

Columbia Legal Services is a product of these racist federal and state restrictions. To be able to represent low-income clients furthest from power, we decline federal or state funds. We focus our limited resources on providing legal assistance to those people whose access to justice is wrongly denied by federal and state laws: people without lawful immigration status and people in confinement.

By not taking restrictive government funds, we can also seek policy changes at the state and federal level in the United States. One way we continue to exercise this right is by respectfully submitting this brief alternate report regarding United States compliance with the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD), and responding to the list of themes developed by the Committee on the Elimination of Racial Discrimination in preparation for the United States of America review at the Committee's 107th session.

¹ <https://ofm.wa.gov/about/news/2022/06/washington-tops-78-million-residents-2022>

We urge the Committee to focus on sub-federal laws and policies at its review of the United States. Most of the themes identified by the Committee are created and shaped by state laws, not federal ones. Addressing racial disparities within the federal criminal legal system would address only a small fraction of the problem. For example, only ten percent of people in confinement in the United States are held by the federal government.² Full compliance with the requirements of the ICERD by the United States requires engagement by sub-federal actors.

What follows is a brief response to a selection of themes raised by the Committee, numbered according to the list of themes.

4. Information on the effective implementation of current special measures and on the adoption of additional measures, at the federal and state levels, to eliminate persistent disparities based on race or ethnic origin in the enjoyment of human rights and fundamental freedoms, including actions to strengthen the use of these measures in light of increasing de jure and de facto restrictions on their use.

Washington state currently denies access to most special measures (known in Washington as affirmative action programs). Through a plebiscite in 1998 Washington voters approved Initiative 200 (I-200), which prohibited the use of special measures. I-200 reads, in part:

“The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”

Under the guise of a “civil rights initiative”, I-200 effectively banned the use of affirmative action programs by the state. The state legislature attempted to amend I-200 in 2019. That legislation would have allowed the state to use special measures to remedy “discrimination against, or underrepresentation of, disadvantaged groups as documented in a valid disparity study or proven in a court of law.”

While that legislation did pass the legislature, it was again put before Washington voters via a referendum, which subsequently failed to pass. Therefore I-200 still stands in WA.

Special measures continue to be an important tool in the effort to provide redress for the systemic harms created by racist laws and policies in existence for much of the history of Washington state. As of 2018, 76% of Washington’s eligible voters were white while only 3% were Black.³ Placing minority protections like the availability of special measures at the whims of the majority through a plebiscite undermines the obligations of the United States to the ICERD.

The Committee should urge the United States to allow for the use of special measures and to establish protections for the use of special measures and other ICERD rights from repeal through popular votes.

² <https://www.prisonpolicy.org/reports/pie2022.html>

³ <https://www.pewresearch.org/2020/09/23/the-changing-racial-and-ethnic-composition-of-the-u-s-electorate/>

6. Further measures to improve inequalities in the access to public legal aid, exacerbated by the COVID-19 pandemic, and to ensure effective access to legal representation for non-citizens and indigent persons belonging to racial and ethnic minorities and in criminal and civil proceedings.

The United States has long restricted access to legal aid in civil proceedings. Efforts to prevent migrant farm workers from accessing civil legal aid can be traced back to the 1970s, when President Richard Nixon attempted to defund legal services for farm workers.⁴ While that effort was unsuccessful, the Reagan Administration in the 1980s was successful in limiting legal aid funds going to programs that served undocumented immigrants. In 1994, the US Congress barred federal legal aid money from going to programs that served people in prisons, and in 1996 the Clinton administration exacerbated these restrictions by prohibiting federal legal aid funds from going to any program that spent any of its funds (federal or other) on serving undocumented immigrants or people in confinement. Washington state followed suit in 1997, adding similar restrictions to its statutes.⁵

The bar on providing legal aid to undocumented immigrants is rooted in anti-immigrant animus. When the Reagan Administration tried to fully eliminate the Legal Services Corporation in the 1980s, it noted that the *Plyer v. Doe* case was argued by a legal aid program.⁶ (The US Supreme Court decision in *Plyer v. Doe* guaranteed the availability of basic public education to all children, regardless of immigration status.)

The bar on providing legal aid to people in prison is also rooted in racism and has a disproportionate impact on Black people, their families and their community. In 2022, 17.5% of Washington state prisoners were Black⁷, while only 4% of the state's population.⁸ While in prison, they may face civil legal needs related to their family or other matters. Lack of legal assistance in these matters has an outsized, unfair and racist effect on Black people not in prison. Ultimately, 95% of people in prison return to their communities, and their unmet civil legal needs serve as yet another obstacle to a successful return home.⁹

The Committee should urge the United States to end its federal bar on providing legal aid to people in prison and to people without lawful immigration status.

⁴ Alan Houseman & Linda E. Perle, *Securing Equal Justice for All: A Brief History of Civil Legal Assistance in the United States*, May 2018,

https://www.clasp.org/sites/default/files/publications/2018/05/2018_securingequaljustice.pdf.

⁵ Engrossed Substitute House Bill 2276, Chapter 319, Laws of 1997 (Washington),

<https://lawfilesexternal.wa.gov/biennium/1997-98/Pdf/Bills/Session%20Laws/House/2276-S.SL.pdf?>

⁶ Geoffrey Heeren, *Illegal Aid: Legal Assistance to Immigrants in the United States*, 33 *Cardozo Law Review* 619, 625 (2011),

https://digitalcommons.law.uidaho.edu/cgi/viewcontent.cgi?article=1394&context=faculty_scholarship

⁷ Washington State Department of Corrections Fact Card, May 31, 2022,

<https://www.doc.wa.gov/docs/publications/reports/100-RE004.pdf>

⁸ Population by race, Washington State Office of Financial Management, <https://ofm.wa.gov/washington-data-research/statewide-data/washington-trends/population-changes/population-race> (accessed July 7, 2022).

⁹ Nathan James, *Offender Reentry: Correctional Statistics, Reintegration into the Community, and Recidivism*, Congressional Research Service, January 12, 2015, <https://sgp.fas.org/crs/misc/RL34287.pdf>

13. Further measures to eliminate racial disparities at all stages of the criminal justice system, notably with regard to overrepresentation of racial and ethnic minorities, in particular people of African descent and Hispanic/Latino communities, who continue to be disproportionately arrested, incarcerated, subjected to harsher sentences, including life imprisonment without parole and the death penalty, and impacted by collateral consequences, such as felony disenfranchisement and welfare bans, especially in the context of the enforcement of minimum drug-offense sentencing policies.

The Committee is well informed of the long history of racial disparities in the United States criminal legal system and will no doubt hear from other NGOs much more on this particular theme during the upcoming US review. The situation in Washington is unfortunately reflective of these national disparities. In 2020, the arrest rate for Black people in Washington was 2.2 times that of white people.¹⁰ Black and Indigenous People are sentenced to legal financial obligations in Washington more frequently and at higher rates per capita.¹¹ A 2021 report of the Washington State Institute for Public Policy found that BIPOC (Black, Indigenous and People of Color) defendants faced longer sentences, were burdened with more sentence enhancements, and were given fewer sentence alternatives than white defendants.¹²

The 13th Amendment ended slavery in the United States, but did not prohibit slavery for anyone convicted of a crime; there is a definitive link between the United States system of mass incarceration and our history of slave labor. Exploitive prison economies create significant profits for private industries and savings for state agencies who use these products and services.¹³ People in prison are paid little (usually between \$.70 cents to \$2.70 per hour) or paid nothing for their labor, which is concerning given the high levels of racial disproportionality within Washington's prisons. This racialized labor system reinforces centuries of exploiting the labor of Black and Brown communities for profit.

Columbia Legal Services has advocated for many years against excessive sentencing, including urging legislators to roll back the harms of "three strikes" sentences in Washington.¹⁴ Washington was the first state in the nation to pass a three strikes law, which requires life-without-parole sentences for people convicted of three serious offenses. (Notably this three strikes law, which passed in 1993, was also enacted via a plebiscite.)

The racial disparities in the application of three strikes sentences is stark. When we first reported on these sentences over a decade ago, 40% of people sentenced to life without parole due to a third strike were Black, even though they were less than 4% of the state's population.

¹⁰ The Task Force 2.0 Research Working Group, *Race and Washington's Criminal Justice System: 2021 Report to the Washington Supreme Court*, 97 Wash. L. Rev. 1, 40 (2022).

¹¹ *Id.*

¹² Examining Washington State's Sentencing Guidelines: A Report for the Criminal Sentencing Task Force, Washington State Institute for Public Policy, May 2021, https://www.wsipp.wa.gov/ReportFile/1736/Wsipp_Examining-Washington-State-s-Sentencing-Guidelines-A-Report-for-the-Criminal-Sentencing-Task-Force_Report.pdf

¹³ Captive Labor: Exploitation of Incarcerated Workers, American Civil Liberties Union, June 2022, https://www.aclu.org/sites/default/files/field_document/2022-06-15-captivelaborresearchreport.pdf.

¹⁴ Washington Three Strikes Law: Public Safety & Cost Implications of Life Without Parole, Columbia Legal Services, 2010, <https://columbialegal.org/report-washingtons-three-strikes-law/>

Legislators in Washington have begun to realize the harms of three strikes policies and have taken small steps to reform them. In 2019 they removed robbery in the second degree as a crime that would qualify as a strike. However, they failed to make the reform retroactive, which left more than 60 people, disproportionately Black, without remedy under the new law.¹⁵ The legislature appropriately remedied this denial of retroactive application in 2021.¹⁶ However, the underlying racist structure of three strikes sentences remains in place.

The Committee should urge the federal government and state governments in the United States to:

- 1) *ban slave labor and ensure that confined workers are covered by labor laws that apply to other workers in the United States including minimum wage, overtime, collective bargaining, and safety standards;*
- 2) *ban the application of life without parole sentences;*
- 3) *reassess current criminal sentencing laws that result in racially disparate application; and*
- 4) *commit to not enacting new or enhanced sentences without a race equity analysis.*

14. Further efforts to address racial disparities at all levels in the juvenile justice system, including overrepresentation of racial and ethnic minorities, in particular people of African descent, Indigenous Peoples and Hispanic/Latino communities, who continue to be disproportionately arrested in schools and referred to the criminal justice system.

Columbia Legal Services has been advocating to reduce the harms of juvenile court records for over a decade. In Washington juvenile records are public until they are sealed. Some juvenile records are not eligible for sealing due to the type of offense, and those that are sealed often get improperly disseminated. Publicly accessible juvenile records can lead to difficulty in eligibility for higher education scholarships, getting employment, qualifying to rent an apartment, long after the record was created.

There are obvious and documented racial disparities that exist in our juvenile justice system and the disproportionate harm that comes from the public dissemination of juvenile records. In a 2015 case related to press access to juvenile records, the Washington Supreme Court noted that “[c]ombined with the indisputable detrimental effects of open juvenile records, the racial imbalances in the juvenile justice system create and perpetuate barriers to economic and social advancement that vary, in the aggregate, on the basis of race.”¹⁷

Youth of color are disproportionately represented at every stage of the juvenile justice system in WA.¹⁸ Just under one in five children and youth admitted to state juvenile rehabilitation facilities in 2018 were Black, vastly overrepresented. Youth of color also have a disproportionate share of the unsealed

¹⁵ *Blacks Left Behind by Three Strikes Sentencing Reform*, Associated Press, May 21, 2019, <https://www.courthousenews.com/blacks-left-behind-by-three-strikes-sentencing-reform/>

¹⁶ *Washington Legislature revises 3-strikes sentencing law*, Associated Press, April 8, 2021, <https://www.opb.org/article/2021/04/08/washington-legislature-revises-3-strikes-sentencing-law/>

¹⁷ *State v. S.J.C.*, 183 Wn.2d 408, 433-34 (2015).

¹⁸ Washington State Juvenile Justice Report to the Governor and the Legislature, Washington State Department of Children, Youth and Families, August 2020, p. 9, <https://www.dcyf.wa.gov/sites/default/files/pdf/2020WA-PCJJgov.pdf>

juvenile records. A 2013 study showed that BIPOC youth who were eligible for record sealing were less likely to have those records sealed.¹⁹

Washington is one of seven states that makes all juvenile records public.²⁰ The public availability of those records, the difficulty in sealing those records, and the possibility that even sealed records are improperly disseminated all fall disproportionately on children and youth of color.

The Committee should urge the United States to make juvenile records confidential.

26. Further measures to address excessive use of force by Customs and Border Protection (CBP) personnel, in particular cases leading to killings of non-citizens, criminal prosecution for breaches of immigration law, mandatory detention of non-citizens for prolonged periods of time, deportation of undocumented non-citizens without access to justice and legal representation, inadequate conditions and treatment in detention centres.

Washington state is the site of the fourth largest privately operated immigration detention center in the United States.²¹ With a capacity to detain 1575 people, the Northwest ICE Processing Center (NWIPC) (previously known as the Northwest Detention Center) is operated by GEO Group, the second largest private prison company in the United States.

Immigration detention is a civil form of detention, not punitive. However, the conditions at the NWIPC are egregious, not even up to the standards of criminal prisons. The Northwest ICE Processing Center has been the site for various human rights violations, many documented by La Resistencia²² and the University of Washington's Center for Human Rights.²³ These include reports of sexual abuse, medical neglect, and use of solitary confinement, among others.

One particularly harmful practice was GEO Group's payment of one dollar per day of work to the detainees in the facility. The minimum wage in Washington is \$14.49 per hour. As the state's attorney general Bob Ferguson described the practice, GEO Group "illegally exploited the people it detains to line its own pockets."²⁴ The state sued and prevailed at the trial court, which ordered GEO Group to pay its detainees the state minimum wage. GEO Group has appealed.

¹⁹ Tony Calero, Open Juvenile Records in Washington State: Process, Effects, and Costs of Protective Mechanisms (2013), <https://www.yumpu.com/en/document/read/50342356/examining-open-juvenile-records-in-washington-state>

²⁰ Riya Saha Shah & Jean Strout, Future Interrupted: The Collateral Damage Caused by Proliferation of Juvenile Records, Juvenile Law Center, May 2016, <https://juvenilerecords.jlc.org/juvenilerecords/documents/publications/future-interrupted.pdf>

²¹ Julia Knoerr, Washington State to Shutter Private Detention Center, The American Prospect, July 9, 2021, <https://prospect.org/justice/washington-state-to-shutter-private-detention-center/>

²² La Resistencia home page, <http://laresistencianw.org/>

²³ University of Washington Center for Human Rights, Conditions at the Northwest Detention Center, <https://jsis.washington.edu/humanrights/projects/human-rights-at-home/conditions-at-the-northwest-detention-center/> (accessed July 12, 2022).

²⁴ Washington State Office of the Attorney General, AG Ferguson: Jury finds GEO, for-profit operator of Tacoma ICE detention center, must pay detainee workers minimum wage, Oct 27, 2021 <https://www.atg.wa.gov/news/news-releases/ag-ferguson-jury-finds-geo-profit-operator-tacoma-ice-detention-center-must-pay>

In a friend of the court brief Columbia Legal Services has documented some of the harms of the practice of paying detainees only a dollar per day for their work at the NWIPC. Detainees at the facility were provided such little food that they were consistently forced to supplement their diets with food purchases from the detention facility commissary, often at steep prices. Workers testified at trial that they worked in order to purchase additional food to stave off hunger. In the brief we documented how the exploited labor of detainees was essential to the company's own operations. People detained were forced to trade their labor for wages under conditions created and controlled by GEO Group—conditions that can be dangerous and deleterious to health and designed to benefit GEO Group and maximize its profits.

The appeal of the trial court decision on this case is pending. Columbia Legal Services helped to successfully ban most private, for-profit detention facilities in Washington in 2021, but the GEO Group is also currently fighting that ban in court.

The Committee should urge the United States to ban the use of private detention facilities and to move to end the excessive and unnecessary detention of immigrants.