

Submission to the Commission on the Rights of the Child

RE: 5th & 6th PERIODIC REVIEW OF CANADA

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Summary

This submission by the Elizabeth Fry Society of Greater Vancouver (EFry) highlights instances of substantive non-compliance with the CRC regarding Juveniles Denied their Liberty, and opportunities to codify consideration of the best interest of the child into the Criminal Code of Canada to increase alignment with the CRC. Issues identified relate to health care, measures being used against children in contravention to the CRC and failure to provide them opportunity to express their concerns, as well as discrimination against Indigenous youth and females. The proposed remedies are intended to give these children a greater voice and enhance compliance with the CRC.

Unequal Health Care CRC/C/CAN/CO/3-4, para 56(c)

Unequal provision of health care for children continues. Children held on remand or under sentence in at least two provinces are provided lesser health care than other children in their province.

Juvenile Justice System Compliance CRC/C/CAN/CO/3-4 para.85(d), (e), 86 (d)

The use of solitary confinement for children under the age of 18 continues., as does the excessive use of force. A recent British Columbia Ombudsperson Report found those most affected are Indigenous, and predominantly female or gender diverse.

Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment A/HRC/28/68 para, 29 / CRC/C/CAN/CO/3-4 para.85(d), (e), 86 (d), 37

International Law is clear that the prolonged use of solitary confinement is torture and that there is no justification for it. Multiple Provincial Ombudsperson reports and Provincial Child and Youth Advocates have noted its use on children. Reports also identify the diminishment of youth's concerns about their treatment, and the failure to respect the views of the child.

Discrimination CRC/C/CAN/CO/3-4 para.32 / CRC/C/CAN/CO/3-4 para.8-11, 85,

The over-representation of Indigenous youth continues in youth custody settings. The vulnerability and specialized needs of females, especially Indigenous females, remains unaddressed.

Female Juveniles and the Children of Parents in Conflict with the Law CRC/C/CAN/CO/3-4 para.35

Opportunities exist for Canada to align its legislation with the principle of the best interests of the child. Safeguards set out within the Bangkok Rules pertaining to the best interests of children and female juveniles could be set out pertaining to diversion or pre-sentencing reports, and absolute and conditional discharges, all of which, if taken advantage of, would enhance the care and protection of children.

Juveniles Deprived of Their Liberty

The Preamble to the CRC recalls the provisions of the **Beijing Rules**, of which **Rules 13.3** and **27** set out the protections for youth under detention pending trial or sentencing. They are entitled to all rights and guarantees set forth in the Standard Minimum Rules for the Treatment of Prisoners adopted by the United Nations, commonly referred to as the **Mandela Rules**. Both the **Mandela Rules** and the **Beijing Rules** call for the well-being of youth, the avoidance of punitive sanctions, and responses that are in proportion to the circumstances.

Health Care

Article 24 of the **CRC** sets out the obligations of State Parties to provide for the health of children and provide access to health care services. **Rule 24** of the **Mandela Rules**¹ makes health care for prisoners a State responsibility, makes the standard of health care for prisoners the standards available in the community, and says that health care services should be organized in close relationship to those of the general public.

- Contrary to **Rule 24** of the **Mandela Rules**, in British Columbia, Canada's 3rd most populous province, youth incarcerated under sentence or pending trial are provided health care through privatized health contracts, in contrast to both adult prisoners and members of the community.
- Similarly, in Ontario, the most populous of Canada's provinces, youth under sentence or pending trial in both provincial and privately run prisons are provided privatized health care and do not have access to the full spectrum of care provided through State delivered health care.

Mental Health Care

In Canada, mental health services are provided through provincial health care systems, and thus fall under **Rule 24** of the **Mandela Rules**. **Rule 109** requires that those whose mental condition has been exacerbated by prison should be transferred to the appropriate health facilities as soon as possible. They should also be under the supervision of qualified health-care professionals. Furthermore, General Comment 15, published by the UN Committee on the Rights of the Child (UNCRC), provides a detailed interpretation of Article 24 of the CRC, which includes mental health

- British Columbia's Youth Justice Act has no legal requirement to consider a youth's mental health in determining their institutional placement or release from separate confinement, the phrase used in the Youth Justice Act for youth held separate from other detained youth,
- In June 2021 the British Columbia Office of the Ombudsperson released its report, *Alone: The Prolonged and Repeated Isolation of Youth in Custody*.² It looked at the use of separate confinement for the three year period 2017-2019, paying particular attention to youth held for longer than 72 consecutive hours. The Report noted on page 42, that 65% of those cases renewed

¹ [The United Nations Standard Minimum Rules for the Treatment of Prisoners \(unodc.org\)](https://www.unodc.org/)

² Office of the Ombudsperson, Province of British Columbia. (2021) https://bcombudsperson.ca/assets/media/OMB-Alone_Youth-in-Custody-06-11-2021.pdf

for longer periods were in response to youth who were self-injuring or suicidal: “The records showed the youth struggling in this environment, and we concluded that separate confinement contributed to a deterioration of their mental health over time.” It then documented how the mental health of the three youths held the longest was negatively affected, and transfer to a mental health facility was either brief or came after the end of their sentence. (p 42-43).

Conditions of Detention

Article 19 of the **CRC** provides that State Parties will protect children from all forms of physical or mental violence, injury or abuse. **Rule 67** of the **United Nations Rules for the Protection of Juveniles Deprived of Their Liberty** prohibits the use of solitary confinement for anyone under the age of 18. As well, all disciplinary measures that involve cruel, inhuman, or degrading treatment are strictly prohibited. This includes corporal punishment, placement in a dark cell, closed or solitary confinement, or any other punishment that may compromise the physical or mental health of the juvenile concerned.

The B.C. Ombudsperson’s Report notes on page 1, and then discusses, the following matters:

- 101 youth were held under separate confinement a total of 307 times. The conditions of **separate** confinement meet the UN definition of **solitary** confinement (22 or more hours without meaningful human contact) as set out in **Rule 44** of the **Mandela Rules**.
- The breaching of **Rule 45** of the **Mandela Rules** regarding the use of separate confinement in the case of prisoners with mental health issues when their conditions would be exacerbated by such measures.
- The failure to provide any independent review of the use of separate confinement, as called for in **Rule 45.1** of the **Mandela Rules** (further details pages 109-111 of the Report)
- The repeated use of force contrary to **Rule 64** in the **United Nations Rules for the Protection of Juveniles Deprived of Their Liberty** (further details on page 53 of the Report)
- Six instances that met the definition of cruel and inhumane treatment resulting from separate confinement in excess of 15 days, which is contrary to **Article 19** and **Rule 43 of the UN Rules** (further details on page 40 of the Report)
- The conditions of separate confinement, (pages 48, 85)--including limited light, limited space, no access to outside space, and no educational or other programming---meet the definition of inhumane and degrading treatment in contravention of **Rule 67** of the **United Nations Rules for the Protection of Juveniles Deprived of Their Liberty**.
- Youth statements regarding unfair treatment and requests for changes to separate confinement and access to their belongings were dismissed, minimized, and not further considered (details: pp. 56, 103-107) in contravention of Article 12 and 13, Rule 56, 57 and 71 of the **Mandela Rules** regarding complaints and the obligation to investigate regardless of complaint in the event of cruel or inhumane treatment.

These findings, however, are not unique to the Province of BC.

- Similar findings were made by the Province of Manitoba Representative for Children and Youth, in 2021 in their report *Breaking the Cycle: An update on the use of segregation and solitary confinement in Manitoba youth custody facilities*.³ As detailed on page 4, incidents of segregation (equivalent to BC's separate confinement) occurred routinely. 63% of those segregated had an identified mental health issue, the use of segregation for administrative reasons of breaching probation or bail conditions is unjustifiable, and there were prolonged periods of segregation.

Use of Weapons and Force

Oleoresin capsicum spray, also known as OC spray, and pepper spray meet the definition of a prohibited weapon under the Criminal Code of Canada, Statutory Orders and Regulations⁴. The OC spray causes swelling in the eyes, nose, and throat, coughing, difficulty breathing, and a burning sensation in exposed skin. It thus breaches: **Rule 43** of the **United Nations Rules for the Protection of Juveniles Deprived of Their Liberty**, which prohibits the use of corporal punishment, as does Rule 17.3 of the **Beijing Rules**; **Rule 64**, which precludes instruments of restraint and force other than in exceptional cases where all other control methods have been exhausted and failed, and only as explicitly authorized and specified by law and regulation; and **Rule 65**, which prohibits the use of weapons by staff in juvenile facilities.

- In a 2019 document entitled *CARE IN CUSTODY A Special Report on OC Spray and Segregation in Alberta's Young Offender Centres*, the Alberta Office of the Child and Youth Advocate reports the use of OC is a government policy not governed by regulation (page 7). The Alberta Report found evidence of escalating use of it, and it was used routinely, rather than after all other methods had been exhausted.
- IN 2019, the Manitoba Advocate for Children and Youth released a report, *LEARNING FROM NELSON MANDELA A Report on the Use of Solitary Confinement and Pepper Spray in Manitoba Youth Custody Facilities*. That same day, the Manitoba Ombudsman's Office released *Use of Pepper Spray and Segregation in Manitoba's Youth Correctional Facilities*. That report found the frequent use of segregation and solitary confinement, including 400 days for one youth with serious mental health issues.

Discrimination Based on Race and Gender

The British Columbia and Manitoba Reports found discriminatory use of separate confinement/segregation on the basis of race and/or gender, which is contrary to **Article 2** of the **CRC**.

- The British Columbia Report stated (p. 42) "These prolonged periods of separate confinement in response to self-injury were experienced almost exclusively by female youth and mostly by Indigenous and racialized female youth." They found that "female and gender-diverse youth

³ Available at <https://manitobaadvocate.ca/wp-content/uploads/MACY-2021-Solitary-Confinement-Update-Web.pdf>

⁴ Regulations Prescribing Certain Firearms and Other Weapons, Components and Parts of Weapons, Accessories, Cartridge Magazines, Ammunition and Projectiles as Prohibited or Restricted (SOR/98-462), section 4. Available at <https://laws-lois.justice.gc.ca/eng/regulations/SOR-98-462/index.html>

experienced 95 percent of the hours of these prolonged periods of separate confinement. Moreover, 65 percent of the use was experienced by Indigenous female youth.”⁵

- The Manitoba Report stated (p 4) that 94 percent of the youth placed in isolation (inclusive of periods under 24 hours) were Indigenous.

Children of Parents in Conflict with the Law/Bangkok Rules and their Application to Female Juvenile

The importance of the family for children is well documented and is recognized in Article 9 of the *Convention on the Rights of the Child*. Children have the right to be raised by their parents unless it is unavoidable or harmful to them to do so, in which case it remains their right to have contact with them.

- Courts in Canada continue to fail to recognize children and hear their voices. The Government of Canada is responsible for the Criminal Code while provinces and territories administer the judicial system (Courts). Potential provisions to recognize the best interests of the child, and set out other provisions related to pregnant and parenting women inclusive of juveniles, and the use of community alternatives to imprisonment have not been set out in the Criminal Code.

The federal government can improve the carrying out of these responsibilities by enhancing current provisions.

Action

Criminal Code of Canada

Three opportunities exist in the Criminal Code to consider the best interests of the child.

- The Criminal Code of Canada, section 720.3 (a) sets out the minimum requirements for a pre-sentencing report about the individual who goes to the court at the time of sentencing. The Government of Canada, as the legislator of the Code, can add to the current requirements to require consideration of factors such as parenting responsibilities, the best interests of the child, and the impact of incarceration and disruption of the parent-child relationship. The best interests of the child and the disruption of the parent-child relationship are not currently considered, even in the Gladue Reports for Indigenous women.
- The Youth Criminal Justice Act, section 40 (2), sets out the minimum requirements for a pre-sentencing report. The Government of Canada, in keeping with its obligations under the CRC and those recommended in the Bangkok Rules, must consider 1) gender-based vulnerability of adolescent girls and the avoidance of institutionalization (Rule 65), 2) non-custodial sentences for pregnant or parenting juvenile girls with children, and 3) the best interests of their children.

⁵ BC Ombudsperson’s Office, description of the frequency and duration of separate confinement is provided in pages 28-40 of the Report, with discussion of the noted findings on race and gender noted on pages 41 and 42.

- The Criminal Code of Canada in section 140 (2) (b) provides for the "diversion" of indictable offences, without however defining the use of the word, or providing there or elsewhere for the express use of diversion for summary convictions. Diversion is commonly understood to be the opportunity to avoid any criminal record if the offender agrees to complete conditions intended to benefit the victim, themselves, and the community.
- The Criminal Code of Canada in section 730 provides for conditional and absolute discharges and provides the basis upon which determination can be made for doing so. This includes the best interests of the accused, and it presents the opportunity to consider the responsibility for caregiving and the best interests of children.

Such changes would strengthen the rights of children under Article 9 of the CRC by codifying consideration of their relationship with their parent(s) and consideration of their best interests.

Health Care

The Federal Government is responsible for setting and administering national standards for the health care system through the Canada Health Act. It provides funding support for provincial and territorial health services and has mechanisms for accountability related to those standards. The denial of publicly funded health care to a particular group of children – those incarcerated – violates those standards, and EFry believes the Federal Government has both the obligation and means to ensure compliance.

Mental Health Care for Adjudicated Youth

The Government of Canada Youth Justice Fund agreements with the provinces and territories is intended to encourage a fairer and more effective youth justice system, respond to emerging youth justice issues, and enable greater citizen and community participation in the youth justice system. Canada could negotiate terms under those funding agreements to incentivize community mental health for adjudicated youth and reduce the use of solitary confinement for mentally ill youth while enhancing compliance with the **Beijing Rules**.

Recognition of the Rights of Youth Denied their Liberty

In Article 24 The Committee on the Rights of the Child CRC/C/GC/1525 recognized the role of voluntary organizations in remedying violations of the right to health (para. 119, 120). Canada does not have functional and accessible complaint mechanisms for youth on remand or under sentence. However, the Youth Justice Fund, mentioned above, provides a mechanism to support youth, particularly in relation to Articles 12 and 13 and their conditions of confinement. The different provincial youth justice systems call for a regional approach to funding both community based voluntary organizations to support incarcerated youths, and individual advocacy in order to draw attention to discrimination, particularly on the basis of gender and equity, and in order to reduce the harsh treatment of Indigenous youth, and girls particularly, and to ensure that they are aware of their right to use, and have support during, the complaint process.

Conclusion

The obligations of the Commission on the Rights of Children are clear. Countries need to ensure that their legislation upholds the rights of children. The Convention on the Rights of the Child and the Havana Rules “have extended this protection to children deprived of their liberty, specifying that no member of the detention facility or institutional personnel may inflict, instigate or tolerate any act of torture or any form of harsh, cruel, inhuman or degrading treatment, punishment, correction or discipline under any pretext or circumstance whatsoever.” A/HRC/28/68

The unlawful detention of children in solitary confinement and conditions of torture and inhuman treatment continues. Canada has its advanced knowledge pertaining to child rights and those deprived of their liberty. If the most vulnerable, invisible children in a society cannot rely upon their government to uphold their rights, a robust voluntary sector is critical to engage in civic discourse and advance child rights. We urge the Commission to call, in their Concluding Observations for investment by Canada in the Voluntary Sector, to uphold the economic, social, and cultural rights of the Universal Declaration of Human Rights. Rights can only be upheld when they are recognized and there is apparent limited recognition with the youth penal system, by children themselves, and voluntary organizations of those rights. Strengthening the understanding and recognition of human rights and their basis is what will encourage citizens and their organizations to call for change and to hold governments to account, both provincially and federally, for the welfare of youths within the justice and prison systems.