



List of Issues Prior to Reporting: 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

In advance of the adoption of the List of Issues Prior to Reporting for Canada's periodic review under the UN *Convention on the Elimination of All Forms of Racial Discrimination* ("Convention"), to be held during its 93rd session from 31 July to 25 August 2017, the Canadian HIV/AIDS Legal Network ("Legal Network") would like to provide information to the Committee on the Elimination of Racial Discrimination ("Committee").

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.

In this submission, the Legal Network sets out its concerns about the implementation of the Convention by Canada, including:

- the **overly-broad use of the criminal law against people living with HIV**, particularly those from racialized populations, to prosecute individuals for HIV non-disclosure, a violation of their right to equal treatment in the justice system;
- the **criminalization of sex work** in Canada, which exacts an especially negative impact on Indigenous, racialized and migrant sex workers, and violates their rights to security of the person, to work and to just and favourable conditions of work, to non-discrimination and equality, to health care and social services, to freedom of peaceful assembly and association, and to access public spaces;
- 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;
- 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; and
- the **use of "street checks" or "carding" by the police** to stop and record information of individuals not suspected of any crime, which infringes on the rights to free movement, peaceful assembly and association, access to public spaces, privacy and freedom from arbitrary detention and often manifests or leads to breaches of the right to equal treatment without discrimination on the basis of race.

UNJUST PROSECUTIONS FOR HIV NON-DISCLOSURE

The Canadian criminal law is increasingly being used against people living with HIV from racialized populations, a violation of their right to equal treatment in the justice system. Since 2012, almost half (48% [10/21]) of all people charged for whom race is known are Black men. This is a significant increase from the period prior to 2012, in which 30% (32/105) of people

charged for whom race is known are Black men.¹ Of the 184 people who faced criminal charges related to HIV non-disclosure, 18% (33/184) are known to have come to Canada as immigrants or refugees. Immigrant Black men, in particular, are subject to HIV criminalization. Almost three quarters (71% [29/41]) of Black men who faced charges were not born in Canada. Indigenous women in Canada also account for a large proportion of women charged. Of the 18 women who faced charges related to HIV non-disclosure, we know the race/ethnicity of 12 women. To date, 42% (5/12) of women charged are Indigenous.²

The Canadian criminal justice system's approach to HIV non-disclosure on numerous occasions has been recognized as exceptionally punitive and incompatible with international human rights law. The current state of the law allows for an overly broad use of the criminal law against people living with HIV, who are usually charged with aggravated sexual assault — an offence that carries a maximum penalty of life imprisonment and mandatory registration as a sexual offender for a minimum of 20 years. Under the current Canadian legal framework, people living with HIV in Canada are at risk of prosecution and conviction for non-disclosure of their HIV status even if there was no transmission, they had no intention to harm their sexual partner, and they used a condom or had an undetectable viral load.

A number of human rights bodies, including the Joint UN Programme on HIV/ AIDS (UNAIDS) and the UN Development Programme (UNDP),³ the UN Special Rapporteur on the right to health,⁴ the Global Commission on HIV and the Law,⁵ and women's rights advocates (including leading Canadian feminist legal academics),⁶ among others, have urged governments to limit the use of the criminal law to cases of *intentional transmission* of HIV (i.e., where a person knows they are HIV positive, acts with the intention to transmit HIV, and does in fact transmit it). The UN Special Rapporteur on the right to health has pointed out that criminalizing HIV transmission infringes on not only the right to health but also other rights, including the rights to privacy, equality and non-discrimination.⁷ In 2016, the UN Committee on the Rights of the Child noted the need to review legislation "that criminalizes the unintentional transmission of HIV and the non-disclosure of one's HIV status."⁸ In November 2016, the UN Committee on the Elimination of Discrimination against Women recommended that Canada "limit the application of criminal law provisions to cases of intentional transmission of HIV/AIDS, as recommended by international public health standards."⁹

RECOMMENDED ACTIONS

The Legal Network recommends that Canada

- **Limit the use of the criminal law to the intentional transmission of HIV.**
- **Ensure that, at the absolute minimum, the criminal law is under no circumstances used against people living with HIV for not disclosing their status to sexual partners where they use a condom, practice oral sex, or have condomless sex with a low or undetectable viral load.**
- **Mandate that the offence of sexual assault not be applied to HIV non-disclosure, as it constitutes a stigmatizing and harmful misuse of this offence.**

CRIMINALIZATION OF SEX WORKERS

The ongoing criminalization of sex work in Canada continues to exact an especially negative impact on Indigenous, racialized and migrant sex workers, and is a profound violation of their rights to security of the person, to work and to just and favourable conditions of work, to non-discrimination and equality, to health care and social services, to freedom of peaceful assembly and association, and to access public spaces.¹⁰

Under the *Protection of Communities and Exploited Persons Act* (PCEPA), reflecting the so-called “Nordic” approach to prostitution (in which the purchase of sex is prohibited, while the sale of sex is technically not), sex workers continue to be arrested,¹¹ as do those who purchase sex and third parties involved in sex work.¹² Sex workers, including migrant sex workers, may be prosecuted under the offences related to third party benefits and trafficking when they work with, gain material benefits from, or assist other sex workers to enter or work in Canada. In particular, Indigenous women and youth, and people who are immigrants or migrants (especially racialized women) face targeted violence, stigmatization and overpolicing under PCEPA. Predators are aware that in a criminalized regime, sex workers actively avoid police for fear of detection, apprehension and in the case of migrant women, deportation.

Numerous studies of the Nordic approach have concluded that banning the purchase of sexual services has contributed to violence against sex workers, who are forced to work in isolation and in clandestine locations, as well as to rush negotiations with potential clients for fear of police detection.¹³ At the same time, criminalizing third parties (such as managers, security, receptionists, drivers) who work with, work for or employ sex workers forces sex workers to work in isolation, away from social support networks and without proven safety mechanisms, a finding confirmed by the Supreme Court of Canada in *Canada (Attorney General) v. Bedford*.¹⁴ Evidence has demonstrated the role of safer work environments and supportive housing through supportive managerial and venue-based practices, which allow sex workers to work together and promote access to health and support services, in reducing violence and HIV risks among sex workers.¹⁵

Racialized and migrant sex workers are especially vulnerable due to factors of race, immigration status and language barriers. Racialized sex workers, particularly those who are migrant or Indigenous, face increased police profiling and surveillance under PCEPA. Migrant sex workers who are legally prohibited from working in the sex industry are also subject to the misuse and over-application of human trafficking laws across Canada, which has resulted in their profiling, detention and deportation. Although the federal government has claimed that sex workers are no longer subject to criminalization, migrant sex workers have been disproportionately arrested and detained under sex work offences

Decriminalizing sex work is in line with recommendations made by UN Special Procedures and other UN agencies, which have considered the human rights implications of criminalizing sex work. The UN Special Rapporteur on the right to health has described the negative ramifications of criminalizing third parties such as brothel owners and has explicitly called for the decriminalization of sex work as well as spoken out against the conflation of sex work and human trafficking.¹⁶ The UN Special Rapporteur on violence against women has noted the need to ensure that “measures to address trafficking in persons do not overshadow the need for effective measures to protect the human rights of sex workers.”¹⁷ Similarly, UN Women has expressed its support for the decriminalization of sex work, acknowledged that sex work, sex trafficking and sexual exploitation are distinct, and that their conflation leads to “inappropriate

responses that fail to assist sex workers and victims of trafficking in realizing their rights.”¹⁸ The Global Commission on HIV and the Law, as well as international human rights organizations including Amnesty International¹⁹ and Human Rights Watch,²⁰ have also recommended the decriminalization of sex work (including clients and third parties) and called for laws and policies to ensure safe working conditions for sex workers.²¹

RECOMMENDED ACTIONS

The Legal Network recommends that Canada

- **Immediately repeal all sex work–specific criminal laws, which disproportionately endanger the lives, health and safety of racialized, and particularly Indigenous and migrant, sex workers.**
- **Stop raids, detentions and deportations of sex workers that are often justified through anti-trafficking, anti–sex work and immigration laws in the name of protection.**
- **Fund and support programs and services that are developed by people who have lived experience trading or selling sexual services, including sex worker–led outreach, ensuring that such measures are made available to everyone — not only to people who identify as “trafficked.”**
- **Support concrete measures to improve the safety of individuals selling sexual services and to assist those who wish to transition out of the sex industry, including by providing significant resources for income support, poverty alleviation, housing, childcare, education and training, and treatment and support for problematic substance use.**

CRIMINALIZATION OF PERSONS 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.²² A 2007 national study conducted by Correctional Service Canada (CSC) revealed that almost 60% of men and women used drugs in the months immediately preceding their incarceration.²³ 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.”²⁴ Almost 20% of Black federal prisoners were incarcerated for a drug-related offence and Black people are one of the fastest growing sub-populations in federal corrections.²⁵ While federally incarcerated women are twice as likely as men to be serving a sentence for drug-related offences, with Indigenous and Black women more likely than White women to be in prison for that reason,²⁶ 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.²⁷

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. 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.²⁸

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 Canada²⁹ and globally.³⁰ 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.”³¹ 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.”³²

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.**
- **Decriminalize the possession of all drugs for personal use.**

LACK OF HARM REDUCTION MEASURES IN PRISONS

Canada’s failure to provide prisoners, who are disproportionately Indigenous and Black,³³ 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 (CSC), 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.³⁴ 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.³⁵ Not surprisingly, research shows that the incarceration of people who inject drugs is a factor driving Canada’s worsening HIV and HCV epidemic.³⁶

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 those 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.³⁷ 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.³⁸

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.³⁹ 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; this necessarily includes care for persons with drug dependence.⁴⁰ A number of UN agencies, including the UN Office on Drugs and Crime (UNODC), UNAIDS and the World Health Organization (WHO), have also 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.⁴¹ Not only should these interventions be made available, but also incarcerated women should have access to gender-specific health care that is at least equivalent to that available in the community.⁴²

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.”⁴³ 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.”⁴⁴ And in 2016, the 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.”⁴⁵

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.**

CARDING BY POLICE FORCES

The use of “street checks” or “carding” by the police has facilitated unchecked racism, with little countervailing societal benefit. The questionable policy of stopping and recording information of individuals not suspected of any crime — sometimes randomly, and sometimes in a targeted fashion based on bias and prejudice — infringes on numerous human rights, including the rights to free movement, to peaceful assembly and association, and to access public spaces, the right to privacy (which the courts have interpreted as the right to be left alone without undue state

interference), the right to freedom from arbitrary detention, and frequently manifests or leads to breaches of the right to equal treatment without discrimination on the basis of race, ethnicity or other prohibited ground of discrimination.

As a crime-fighting tool, carding has proven less effective than other methods of policing, such as community engagement, and makes the city more unsafe. In some areas of Toronto, for example, Black people are nearly 17 times more likely to be carded, an act that has been identified as a major contributor to members of these communities distrusting police.⁴⁶ As a result, members of these targeted communities withhold critical intelligence that can legitimately help police. An analysis of 21 Canadian police forces showed that the practice lacks a mandated set of procedures to guide interactions between officers and community members who are stopped and questioned.⁴⁷

Following from an official visit to Canada in October 2016, the Working Group of Experts on People of African Descent stated that it was “deeply concerned about the human rights situation of African Canadians.” In particular, the Working Group found “clear evidence that racial profiling is endemic in the strategies and practices used by law enforcement,” citing the arbitrary use of carding against African Canadians as an example.⁴⁸ These concerns were previously raised by the UN Committee on the Elimination of Racial Discrimination in its Concluding Observations to Canada in 2012, where it recommended that Canada “take necessary steps to prevent...stops, searches and investigations...targeting different groups, particularly African Canadians, on the basis of their ethnicity” and “punish the practice of racial profiling.”⁴⁹

RECOMMENDED ACTIONS

The Legal Network recommends that Canada

- **Immediately end the practice of “street checks” or “carding” by police forces.**

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² Ibid.

³ UNAIDS/UNDP, *Policy brief: criminalization of HIV transmission*, August 2008. Available at www.aidslaw.ca/site/wp-content/uploads/2014/02/1.UNAIDSUNDPposition.pdf.

⁴ UN Human Rights Council, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover*, Report on the 14th session, UN General Assembly, agenda item 3, UN Doc. A/HRC/14/20, April 27, 2010.

⁵ Global Commission on HIV and the Law (UNDP HIV/AIDS Group), *HIV and the Law: Risks, Rights and Health* 24, July 2012. Available via www.hivlawcommission.org.

⁶ See the perspectives articulated in the documentary film *Consent: HIV non-disclosure and sexual assault law* (Goldelox Productions and Canadian HIV/AIDS Legal Network, 2015). Available at www.consentfilm.org/.

⁷ *Report of the Special Rapporteur*, paras 2, 51.

⁸ UN Committee on the Rights of the Child, General Comment No. 20, 2016.

⁹ UN Committee on the Elimination of Discrimination Against Women, *Concluding Observations: Canada*, November 2016.

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¹³ See, for example, J. Levy and P. Jakobsson, “Sweden’s abolitionist discourse and law: Effects on the dynamics of Swedish sex work and on the lives of Sweden’s sex workers,” *Criminology & Criminal Justice* 1–15 (March 31, 2014); P. Östergren and S. Dodillet, “The Swedish Sex Purchase Act: Claimed success and documented effects,” paper presented at the International Workshop: Decriminalizing Prostitution and Beyond: Practical Experiences and Challenges, The Hague, Netherlands, March 3–4, 2011; and U. Bjørndah, *Dangerous Liaisons: A report on the violence women in prostitution in Oslo are exposed to*, Municipality of Oslo, 2012.

¹⁴ *Canada (Attorney General) v. Bedford*, 2013 SCC 72 (Supreme Court of Canada).

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¹⁶ Human Rights Council, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover*, UN Doc. A/HRC/14/20, 2010; Human Rights Council, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover*, UN Doc. A/HRC/23/41, 2013.

¹⁷ Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo*, UN Doc. A/HRC/26/38/Add.1, 2014.

¹⁸ UN Women, *Note on Sex Work, Sexual Exploitation and Trafficking*, October 9, 2013.

¹⁹ Amnesty International, *Explanatory Note on Amnesty International’s Policy on State Obligations to Respect, Protect and Fulfil the Human Rights of Sex Workers*, May 26, 2016, p. 42.

²⁰ J. Amon, “Canada’s prostitution bill a step in the wrong direction,” Human Rights Watch, June 18, 2014. Available at www.hrw.org/news/2014/06/18/canadas-prostitution-bill-step-wrong-direction.

²¹ Global Commission on HIV and the Law, *Risks, Rights & Health*, 2012, p. 43.

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- ³³ *Annual Report of the Office of the Correctional Investigator 2014–2015*.
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⁴² 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.

⁴³ 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.

⁴⁴ 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.

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