



## Reply to Issues 2, 3, 16 & 18:

### INDIGENOUS WOMEN and WOMEN IN DETENTION

Report to the Committee on the Elimination of Discrimination against Women on the Occasion of the Committee's Eighth and Ninth Periodic Review of Canada

Submitted October 2016 by the  
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### Introduction

This report has been prepared by the Canadian Association of Elizabeth Fry Societies (CAEFS), the Chair in Indigenous Governance at Ryerson University, and the Canadian Feminist Alliance for International Action (FAFIA).

CAEFS is an association of self-governing, community-based societies that work with and for women and girls in the justice system, particularly those who are, or may be, criminalized.

The Chair in Indigenous Governance at Ryerson University, Dr. Pamela Palmater, conducts research and scholarship in relation to Indigenous law, governance and politics in a First Nation context.

FAFIA is an alliance of more than sixty women's equality seeking organizations dedicated to making international human rights commitments a reality in women's everyday lives in Canada.

This report responds to Issues 2, 3, 16, and 18 in the List of Issues (CEDAW/C/CAN/Q/8-9).

### (I) Reply to Issue 2: Sex Discrimination in the *Indian Act*

In 2008, the CEDAW Committee recommended that Canada “take immediate action to amend the *Indian Act* to eliminate the continuing discrimination against women with respect to the transmission of Indian status...”.<sup>1</sup>

#### Bill C-3: Outstanding Sex Discrimination

The 2010 *Act to promote gender equity in the Indian Act* (Bill C-3),<sup>2</sup> which was the Harper government's response to court decisions in *Mclvor v. Canada*,<sup>3</sup> failed, once more, to eliminate all the sex discrimination in the *Indian Act*.<sup>4</sup>

Specifically, under Bill C-3 the following groups are still excluded from recognition as Status Indians, based on the ground of sex:<sup>5</sup>

- Aboriginal grandchildren born prior to September 4, 1951, who are descendants of status women who married non-status men, which is commonly referred to as “marrying out” (in contrast, comparable grandchildren of status men are eligible for status);
- Aboriginal grandchildren, born prior to April 17, 1985, to status women who parented in common-law unions with non-status men (in contrast, comparable grandchildren of status men are eligible for status); and

- Aboriginal female children of male Indians, born prior to April 17, 1985, referred to in the legislation as “illegitimate” (in contrast, male “illegitimate” children of status men are eligible for status).

In addition, Bill C-3 relegates Indigenous women, who were victims of sex discrimination under former versions of the *Indian Act*, and their descendants, to inferior categories of status. Women like Sharon Mclvor, who were penalized by the infamous “marrying out” rule, do not have full Indian 6(1)(a) status.<sup>6</sup> Consigning the women to the inferior s. 6(1)(c) (reinstated) category devalues them, and it reduces the quality of the status they are able to transmit to their descendants.<sup>7</sup>

Also, in order for a child of an Indigenous woman to be recognized as having full status, the administrative policy is that the identity of the father must be declared and the signatures of both parents must be presented, otherwise it will automatically be assumed that the father is non-Indian.<sup>8</sup> This sex discrimination was not addressed by Bill C-3.

### IACHR, CEDAW Investigations of Missing and Murdered Women

Both the IACHR report<sup>9</sup> and the CEDAW Committee Report<sup>10</sup> on missing and murdered Indigenous women and girls found that sex discrimination in the *Indian Act* was a root cause of the crisis of violence, and recommended that Canada eliminate the discrimination immediately. These recommendations were echoed by the UN Human Rights Committee in August 2015.<sup>11</sup>

### Mclvor Petition

As a result of Bill C-3’s deficiencies, Sharon Mclvor filed a petition with the UN Human Rights Committee (*Mclvor v. Canada* (Communication No. 2020/2010), claiming that the continuing sex discrimination violates the *International Covenant on Civil and Political Rights*.<sup>12</sup>

The exchange of submissions between Canada and Ms. Mclvor was completed in 2012. Since 2012, there was no action on Ms. Mclvor’s file until May 9, 2016, when Canada requested that the UN Human Rights Committee suspend its consideration of her petition on the grounds that:

- Canada has been directed by the Superior Court in a ruling on *Descheneaux v Canada*<sup>13</sup> to amend the *Indian Act* because it discriminates against Stéphane Descheneaux and Susan Yantha on the basis of sex, and the Court has given Canada until February 3, 2017, to make curative amendments.<sup>14</sup>

At the same time, Canada stated that, if its request to the Committee was not granted, it maintained that no remedy should be granted to Ms. Mclvor.

On June 28, 2016, Canada amended its request for suspension, stating that it is Canada's intention to remove all "known sex discrimination" from the *Indian Act* by February 2017. This commitment goes further than *Descheneaux*, since amendments to cure *Descheneaux* will **not** remove all the sex discrimination.<sup>15</sup>

The Committee granted Canada's request and suspended consideration of the McIvor petition until March 2017.

However, on July 29, 2016, the Minister of Indigenous and Northern Affairs sent out a letter to Aboriginal organizations informing them that it intends to begin consultations on amendments to cure the discrimination identified in *Descheneaux*. This contradicts Canada's undertaking in its revised request for suspension to the Human Rights Committee and in its public announcement issued on amendments to the *Indian Act*, namely that Canada will remove **all** sex discrimination in the *Indian Act* by February 2017.<sup>16</sup>

Despite repeated and urgent recommendations from treaty bodies, Canada has failed to act. Now it has made contradictory undertakings. Instead of removing all remaining discrimination by February 2017, Canada may correct only the discrimination found in *Descheneaux* and follow its previous practice of amending the Act in a piecemeal and incomplete fashion, leaving Indigenous women and their descendants to return to court to litigate each variation of the impact of the sex discrimination.<sup>17</sup>

### Recommendations

#### The Government of Canada should:

- **Implement the CEDAW and Human Rights Committee recommendations.**
- **Amend the Indian Act to remove all sex discrimination by February 2017 and ensure that s. 6(1)(a) of the status registration regime, introduced by the 1985 *Indian Act*, and re-enacted by the *Gender Equity in Indian Registration Act* (Bill C-3), is interpreted or amended so as to entitle to registration under s. 6(1)(a) those persons who were previously not entitled to be registered under s. 6(1)(a) solely as a result of the preferential treatment accorded to Indian men over Indian women born prior to April 17, 1985, and to patrilineal descendants over matrilineal descendants, born prior to April 17, 1985.**

### (II) Reply to issue 3: Section 67 of the *Canadian Human Rights Act*

In its List of Issues, the Committee asks whether the repeal of section 67 of the *Canadian Human Rights Act* (CHRA) has provided "full protection for aboriginal women against discrimination and full redress for any human rights violations," as recommended in 2008.<sup>18</sup>

For complaints regarding sex discrimination in the *Indian Act's* status provisions, this more accessible and less costly route to a remedy appears to have been foreclosed by a decision of the Federal Court of Appeal in *Canadian Human Rights Commission v. Attorney General of Canada*, handed down July 21, 2016.<sup>19</sup> The Federal Court of Appeal ruled that the Canadian Human Rights Tribunal does not have jurisdiction to hear complaints regarding the registration provisions of the *Indian Act* because they are challenges to a law, which can only be dealt with under the *Charter*.

This decision underlines the importance of removing all the sex discrimination from the *Indian Act*, so that the women and their descendants do not have to litigate to obtain a remedy.

Additionally, according to a 2014 report by the Native Women's Association of Canada (NWAC), many Indigenous women are not aware of their rights under the CHRA and do not know how to use them.<sup>20</sup> Recurring issues included the complexity of the complaints process, the lack of legal aid, cultural incompetence, and being redirected to other government bodies/alternative dispute resolution remedies.<sup>21</sup>

### **(III) Reply to issue 16: The Social and Economic Conditions of Indigenous Women and Girls**

#### **CEDAW Committee's Concerns and Previous Recommendations**

The CEDAW Committee recognizes that Indigenous women face multiple forms of discrimination. In its 2008 Concluding observations, the Committee noted that:

[A]boriginal women in Canada continue to live in impoverished conditions, which include high rates of poverty, poor health, inadequate housing, lack of access to clean water, low school-completion rates and high rates of violence. They are underrepresented in all areas of the labour market, in particular in senior or decision-making positions, have higher rates of unemployment and face a greater pay gap in terms of their hourly earnings compared with men [and...] are also exposed to a high level of violence and are significantly underrepresented in political and public life.<sup>22</sup>

The Committee also expressed concerns over the disproportionately high number of Indigenous girls that have been taken into state custody.<sup>23</sup>

At the time, the Committee recommended that Canada:

- Eliminate legal provisions that discriminate against Indigenous women;
- End discriminatory practices that limit Indigenous women's access to education, employment, and physical and psychological well-being;
- Develop a plan to address Indigenous women's poverty, poor health, inadequate housing, low school-completion rates, low employment rates, low income and high rates of violence;
- Provide funding for Indigenous women to address issues impeding their legal and substantive equality issues; and
- Take all necessary measures to address the issue of the separation of Indigenous children from their parents.<sup>24</sup>

With regard to the Committee's 2016 List of Issues,<sup>25</sup> it is important to note that the items listed at paragraph 16 in regards to Indigenous women should not be examined in isolation. Discriminatory laws, lack of access to traditional territories and resources, and the impact of extractive activities on Indigenous peoples' lands are some of the root causes of the deteriorating health and living conditions of, and high rates of violence against, Indigenous women and girls in Canada.

### Deteriorating Health and Living Conditions

In Canada, the socio-economic conditions of Indigenous peoples generally, and Indigenous women and girls specifically, are extremely poor. Former Special Rapporteur on the rights of Indigenous peoples, James Anaya, concluded in his 2014 report on Canada that: "The most jarring manifestation of human rights problems is the distressing socio-economic conditions of indigenous peoples in a highly developed country".<sup>26</sup> Anaya emphasizes that there have been no improvements in the socio-economic conditions of Indigenous peoples since the last report in 2004, a finding confirmed by Canada's Auditor General.<sup>27</sup>

Indigenous peoples suffer from a lack of access to housing, safe drinking water and sanitation, adequate health services, economic development, education and employment.<sup>28</sup> Indigenous women and girls are particularly disadvantaged due to ongoing discrimination in the *Indian Act* and Canada's related policies and funding mechanisms, which often disentitle them from essential social programs.<sup>29</sup> Indigenous women and girls are also particularly vulnerable to abuse within this context of poor socio-economic conditions, which Anaya categorized as "a continuing crisis".<sup>30</sup>

Below are some examples of how the health and living conditions of Indigenous women and girls continue to deteriorate:

- **Children in care crisis:** 48% of children in state care (foster care) in Canada are Indigenous (more than 85% in Manitoba);<sup>31</sup> the number of children in care has “increased rapidly.”<sup>32</sup>
- **Water and sanitation crisis:** 113+ First Nations do not have clean drinking water;<sup>33</sup> 73% of all water systems and 64% of wastewater systems on reserves are at medium to high risk;<sup>34</sup> some reserves have been under boil water advisories for over 10 years.<sup>35</sup>
- **Housing crisis:** 28% of First Nations people live in over-crowded housing; 43% of First Nation homes are in need of major repair;<sup>36</sup> there is a 110,000 home backlog on First Nations reserves;<sup>37</sup> and Indigenous women and children are vulnerable to homelessness upon marriage breakdown due to the fact that the possession of homes on reserves are most often held by men.<sup>38</sup>
- **Health crisis:** life expectancy for Indigenous people is currently eight years less than non-Indigenous Canadians;<sup>39</sup> life expectancy is projected to be 5-15 years less than non-Indigenous Canadians in 2017;<sup>40</sup> Indigenous peoples suffer from higher rates of chronic and infectious diseases, injuries, substance abuse and mental health issues;<sup>41</sup> rates of heart disease and stroke have declined in Canada, but continue to increase for Indigenous peoples;<sup>42</sup> Indigenous women have higher rates of heart disease and stroke compared to Indigenous men and non-Indigenous women.<sup>43</sup>
- **Education crisis:** the gap in education levels between Indigenous peoples and non-Indigenous people is widening – it would take at least 28 years to close the gap;<sup>44</sup> more than 9,500 Indigenous peoples are on a waiting list to obtain post-secondary education;<sup>45</sup> the number of Indigenous people funded for post-secondary education has decreased by 18.3% since 1997;<sup>46</sup> and there have been drastic cuts to First Nation educational institutes that have crippled Indigenous language immersion programs for primary students.<sup>47</sup>
- **Suicide crisis:** First Nation suicide rates are 2-6 times higher than those of Canadians and Inuit rates are 10 times higher;<sup>48</sup> 38% of all Indigenous youth deaths are from suicide;<sup>49</sup> Indigenous women have higher rates of suicide attempts;<sup>50</sup> some First Nations have the highest suicide rates in the world;<sup>51</sup> and suicide rates are increasing.<sup>52</sup>
- **Prison crisis:** 36% of prison populations are Indigenous women;<sup>53</sup> imprisonment of Indigenous women has increased 90% in the last decade;<sup>54</sup> incarceration rates for Indigenous youth are eight times higher than for Canadian youth overall;<sup>55</sup> 41% of admissions to detention were Indigenous youth and Indigenous girls represent 53% of youth in corrections;<sup>56</sup> and incarceration rates for all Indigenous peoples are increasing.<sup>57</sup>
- **Poverty crisis:** 60% of Indigenous children living on reserve live in poverty (76% in Manitoba First Nations) compared to 13% for non-Indigenous and non-racialized Canadians; poverty rates have worsened in the last five years;<sup>58</sup> Indigenous women are more likely to be single mothers and disproportionately live in poverty compared to Indigenous men and non-Indigenous women.<sup>59</sup>
- **Crisis of violence:** There are over 1,181 known cases of murdered and disappeared Indigenous women and girls;<sup>60</sup> research indicates the number is likely more than 4,000;<sup>61</sup> Indigenous women represent 16% of homicide victims but only 4% of the female

Canadian population;<sup>62</sup> while homicide rates are decreasing for Canadian women, they are increasing for Indigenous women and girls.<sup>63</sup>

- **Cultural crisis:** 96% of Indigenous languages are at high risk of extinction (60/63);<sup>64</sup> Indigenous peoples lack access to 99% of their traditional lands and resources;<sup>65</sup> extractive industries cause environmental destruction disproportionately on or near Indigenous lands impacting socio-economic conditions;<sup>66</sup> there is an increasing risk of violence to Indigenous women<sup>67</sup> and criminalization of land and water defenders, many of whom are women.<sup>68</sup>

There has been no improvement in socio-economic conditions in many First Nations. Canada's Auditor General has noted the following reasons for this:

- Canada does not provide adequate, equitable or sufficient funding for critical social programs and emergency management;<sup>69</sup>
- Decision-making for program funding for First Nations lacks transparency, does not adhere to relevant policies, and appears "arbitrary";<sup>70</sup>
- Canada's attempts to implement recommendations that would have the greatest impact on the health and well-being of First Nations have repeatedly failed;<sup>71</sup> and
- Information that would give a clear picture of crises in First Nations is not tracked, adequately recorded, maintained, or reported to Parliament.<sup>72</sup>

The Auditor General concluded that these long-standing problems in First Nations are expected to continue unless Canada acts on the recommendations and makes significant financial investments in its Indigenous peoples.<sup>73</sup> The Truth and Reconciliation Report made 94 Calls to Action, which included increasing funding for education, health, and child welfare.<sup>74</sup> Anaya made similar calls for more funding for housing, health, child welfare, and education.<sup>75</sup> Despite promises to the contrary, Canada has not addressed the chronic underfunding.<sup>76</sup> The 2% cap on education funding put in place in 1996 is still in place and no extra money was given for post-secondary education despite federal promises.<sup>77</sup>

As the CEDAW Committee recognized in its Inquiry Report,<sup>78</sup> the poverty and social disadvantage of Indigenous women exacerbates every form of social, sexual and racialized subordination that they experience. Profound deprivations of personal autonomy, liberty, and safety result.

### Domestic Abuse, Sexualized Violence & the Role of Police

As noted above, high rates of domestic and sexualized violence are one of the manifestations of poor socio-economic conditions and the ongoing discrimination against Indigenous women and girls.<sup>79</sup>

Violence against Indigenous women and girls is addressed in detail in the CASAC-FAFIA report on Violence Against Women (Reply to Issues 7 and 8), and in the NWAC-FAFIA report on the implementation of the recommendations made in the CEDAW Committee's article 8 inquiry report on murders and disappearances of Indigenous women and girls (Reply to Issue 17).

This report highlights the particular role of police in the crisis of violence against Indigenous women and girls. The importance of examining police practices in relation to racist, sexist and neglectful police investigations into violence against Indigenous women and girls, particularly murdered and missing Indigenous women, is essential in ending those practices which contribute to this crisis. Also important is a thorough examination of police conduct in terms of racism, abuse and sexualized violence demonstrated by members of various police forces towards Indigenous women and girls, i.e. as perpetrators themselves.<sup>80</sup> Intimidation, threats, physical abuse, sexual assaults and the sexual exploitation of Indigenous women and girls (including child pornography) by police forces in Canada have been documented by Human Rights Watch<sup>81</sup> and various media outlets in Canada.

High levels of sexism<sup>82</sup>, racism,<sup>83</sup> and police corruption<sup>84</sup> generally, and towards Indigenous women and girls specifically, further compounds the civil right of Indigenous women and girls to redress, as most complaint processes are through the same offending police forces. Canada's failure to address this led the CEDAW Committee to conclude in its 2015 article 8 Inquiry report that reports of police abuse against Indigenous women and girls have left behind "a legacy of fear and mistrust of law enforcement agencies and officials"<sup>85</sup> and that Canada failed to ensure complaints processes against police abuses were accessible to Indigenous women and girls.<sup>86</sup>

### Conclusion to Part III

Indigenous women and girls continue to suffer from deteriorating health and living conditions. They are subject to unacceptably high levels of violence and murder, their children are disproportionately taken by the State, and they are one of the fastest growing prison populations in Canada. The living situations of many Indigenous women and girls continue to deteriorate.

While the CEDAW Committee has made recommendations to Canada to improve the socio-economic living conditions of Indigenous women and girls, other than launching the national inquiry into missing and murdered Indigenous women and girls, little concrete action has been taken.

### Recommendations

### The Government of Canada should:

- Immediately provide adequate needs-based funding for all social programs on-reserve at least on par with provincial funding levels, taking into account significant additional investments which will be required to address the housing and education backlogs, long-standing infrastructure deficiencies, and cumulative social and health problems that developed from lack of funding, with special attention to the particular disadvantages faced by Indigenous women and girls.
- Create joint emergency task force(s) in partnership with, and with adequate funding to support, First Nations, Indigenous women's groups, organizations, and experts to create a strategic plan to address long-standing urgent crises such as emergency management, children in care, over-imprisonment of Indigenous women, and high suicide rates.
- Work in partnership with First Nations, Indigenous women's groups, organizations and experts to develop legislation, policy and funding support mechanisms to fully implement UNDRIP with a special and urgent focus on extractive activities taking place in Canada and the need for free, informed and prior consent, special protections for Indigenous women and girls, and funding for suitable research, legal support and Indigenous institutions to fully and properly engage in ongoing consultations and decision-making, before allowing any further activity on or near Indigenous lands.
- Implement the recommendations of the Auditor General of Canada, Truth and Reconciliation Commission, UN Special Rapporteur on rights of Indigenous peoples, the CEDAW Committee and other United Nations treaty bodies to address the socio-economic crises faced by Indigenous women and girls.
- Investigate and address the vulnerabilities associated with Indigenous children in care, runaways, and homeless Indigenous women and children to police racism and sexualized violence.
- Consider the impact that police racism and violence has on the victims, their families, communities, and Nations and means of compensating them.

## (IV) Reply to issue 18: Women in Detention

### CEDAW's Concerns and Previous Recommendations

In 2008, the CEDAW Committee expressed several concerns about the deplorable conditions for women in detention in Canada. The Committee was concerned with:

- the disproportionate number of incarcerated Indigenous and Afro-Canadian women;
- the number of women unnecessarily classified at the restrictive maximum-security level in federal prisons;
- male guards employed at prisons for women; and

- adolescent girls who are detained in mixed-sex prisons.<sup>87</sup>

The Committee found that these practices violated female prisoners privacy rights, exposed them to physical and sexual violence, and restricted their access to programming, education and employment opportunities.<sup>88</sup>

Other UN committees, such as the Human Rights Committee, have also expressed concerns about Canada's prison system, noting the unacceptably high rates of incarcerated Indigenous women,<sup>89</sup> the over-crowding of detention facilities, the segregation of prisoners, lack of medical support for prisoners with serious mental health issues, and suicides of prisoners.<sup>90</sup>

In its 2008 Concluding Observations, the CEDAW Committee recommended that Canada:

- address the over-incarceration of racialized women;
- redesign its classification system for women in the federal prison system;
- stop employing male guards in prisons for women;
- develop an independent redress and oversight mechanism for women prisoners at federal institutions; and
- not detain young female prisoners in mixed-sex prisons.<sup>91</sup>

Canada has failed to meaningfully implement the 2008 recommendations made by the CEDAW Committee and has done little to address the underlying conditions related to the over-incarceration of racialized women.

### Liberty and Security of the Person

The number of women imprisoned in Canada is increasing at an alarming rate. The overall population of women in prison increased 60% since 2003.<sup>92</sup> Between 2003 and 2013, the number of federally imprisoned women increased by 13.9%.<sup>93</sup> This is happening at a time when Canada's national crime rate is at its lowest since 1969.<sup>94</sup> Indigenous and other racialized women,<sup>95</sup> as well as women with disabling mental health issues,<sup>96</sup> are disproportionately incarcerated.

The overwhelming majority of women in prison have histories of abuse and suffer from post-traumatic stress.<sup>97</sup> 85.7% of all incarcerated women and 91% of Indigenous incarcerated women have experienced physical and/or sexual abuse.<sup>98</sup> Many have never received therapeutic support; rather, they are likely to be medicated and pathologized.

Imprisoned women are more likely to be impoverished, under-educated<sup>99</sup> and unemployed<sup>100</sup> than the general public. 64.2% of federally incarcerated women are single mothers;<sup>101</sup> 57.1% had primary responsibility for their children before they were imprisoned;<sup>102</sup> and the majority

of their children end up in the care of the state.

Most women are criminalized for behaviour occasioned by their attempts to negotiate poverty,<sup>103</sup> violent racism, and other forms of discrimination related to their marginalization and victimization.<sup>104</sup> So slight is the risk that women pose to public safety that this risk can and should be managed in the community.

### Over-incarceration of Racialized Women

A recent report commissioned by Public Safety Canada revealed that the over-incarceration of Indigenous women is nothing short of a crisis.<sup>105</sup> Across Canada, the over-incarceration of Indigenous women is a form of systemic discrimination within Canada's justice system.<sup>106</sup> Increases in marginalization, victimization, criminalization and imprisonment are directly related to the systemic discrimination, poverty, violence and isolation faced by Indigenous and other racialized women.

- Indigenous women prisoners represent the fastest growing prison populations in Canada. Between 2003 and 2013, their numbers increased by over 83.7%.<sup>107</sup>
- In September 2007, Indigenous women were 45% of women classified as "maximum security";<sup>108</sup> they also account for 75% of reported incidents of self-injury.<sup>109</sup>
- The classification system used by the Correctional Service of Canada (CSC), which administers federal prisons, was designed for a predominantly white male population. Although CSC claims it has adjusted the classification system, it still fails to take into account cultural or gender specific issues.<sup>110</sup> Indigenous women are more likely to be classified as medium or maximum security than non-Indigenous women.<sup>111</sup>
- Prisoners of African Canadian heritage represented 2.9% of the Canadian population in 2011, yet Black women represented 9.12% of the federal prisoner population in 2011-2012.<sup>112</sup>
- The majority of African Canadian women in federal penitentiaries are incarcerated for drug trafficking. Many of these prisoners were caught carrying drugs across international borders. All were poor, and most had been coerced or forced into trafficking under threats of violence.<sup>113</sup>

The over-representation of Indigenous women within the justice system in Canada is an increasing problem, and is directly related to women's inequality, marginalization and victimization, including the relative lack of economic support, housing and services, such as therapeutic and mental health services, available to women, particularly in non-urban and northern Canada.<sup>114</sup> Further, the lack of available community-based services results in women being geographically and culturally dislocated from their families and/or communities of support, to serve prison sentences.<sup>115</sup>

### Treatment of Women Prisoners

Although the Task Force on Federally Sentenced Women,<sup>116</sup> the Arbour Commission,<sup>117</sup> the Auditor General, the Public Accounts Committee, the Correctional Investigator and the Canadian Human Rights Commission<sup>118</sup> have consistently concluded<sup>119</sup> that women prisoners pose a low risk to public safety and that they are less likely than men to return to prison on new charges, the Correctional Service of Canada (CSC) continues to use the same risk and needs assessment tools for both men and women.<sup>120</sup>

Women prisoners have less diverse programming, fewer choices for employment related training, and less access to services overall.<sup>121</sup> Sections 77 and 80 of the *Corrections and Conditional Release Act*<sup>122</sup> stipulate that the CSC must provide gender specific and culturally appropriate programming. However, women continue to be provided with programs and services designed for a predominately white, male prison population.<sup>123</sup>

### Male Prison Staff

In its 2006 Concluding Observations, after reviewing Canada's fifth report, the United Nations Human Rights Committee recommended: "The State party should put an end to the practice of employing male staff working in direct contact with women in women's institutions."<sup>124</sup>

The Government of Canada continues to employ male front line staff in its prisons.<sup>125</sup> Despite the reality that 91% of federally imprisoned Indigenous women and the overwhelming majority of all federally sentenced women have histories of physical and/or sexual abuse,<sup>126</sup> since 1995, CSC has employed men as front line workers. In addition, many of the men are inadequately trained and have not been screened to work with women.<sup>127</sup> Women prisoners regularly complain of inappropriate comments and even sexual harassment and assault by male staff, but refuse to file formal complaints against staff for fear of retaliation.<sup>128</sup>

### Segregation (Solitary Confinement)

In 2006, the Human Rights Committee requested that Canada provide information "regarding the establishment of an independent external redress body for federally sentenced prisoners and independent adjudication for decisions related to involuntary segregation, or alternative models."<sup>129</sup> In 2015, the Human Rights Committee recommended that Canada "effectively limit the use of administrative or disciplinary segregation as a measure of last resort and for as short a time as possible and avoid such confinement for inmates with serious mental illness".<sup>130</sup> The Government of Canada has not developed an external redress body,<sup>131</sup> and women in Canadian prisons continue to be disproportionately segregated. The 1996 Arbour Commission documented how women are affected by the isolation of segregation.<sup>132</sup> Segregation aggravates and/or creates mental health issues,<sup>133</sup> reduces motivation and opportunities to

participate in reintegration activities,<sup>134</sup> and has been defined as an act of torture by the United Nations.<sup>135</sup>

- Segregation is a status and a place. Women who are segregated from the general prison population are subjected to overly restrictive conditions of confinement, including being placed in segregation and being isolated for 23 hours a day and may have no human interaction other than when they are physically restrained, or when food or medication are passed through a slot in the door.<sup>136</sup>
- In 2012-2013, there were 390 women in involuntary segregation.<sup>137</sup> 18.2% of the women stayed in segregation for longer than 30 days.<sup>138</sup>
- Indigenous women are more likely to be involuntarily segregated and are held in segregation for longer periods than non-Indigenous women.<sup>139</sup>
- It is typical for the reactions of women who are held in segregation to result in additional criminal charges and therefore longer sentences.<sup>140</sup>
- The Canadian Medical Association and the UN Special Rapporteur on torture have labeled solitary confinement “cruel and unusual punishment,” and the Special Rapporteur has called for an absolute ban on solitary confinement for youth and those with mental health issues.<sup>141</sup>
- The jury at the inquest into the death of Ashley Smith recommended that prisoners with mental health issues never be placed in segregation.<sup>142</sup>
- Since that time, the Honourable Louise Arbour, the Canadian Association of Elizabeth Fry Societies, and the Canadian and Ontario Human Rights Commissions have recommended an end to the use of solitary confinement for women prisoners, particularly Indigenous women and those with disabling mental health issues.<sup>143</sup> Until it is abolished, they recommend that segregation, and any similar measures, should never last longer than 15 days, in line with the Mandela Rules prohibition on the use of prolonged solitary confinement.<sup>144</sup>
- Between 2011 and 2014 nearly half of suicides in federal prisons occurred in segregation cells. Most prisoners who have died in segregation had a documented history of mental health problems. Yet, few, if any, had access to therapeutic intervention.<sup>145</sup>

Given the profound and disproportionate impact of segregation on Indigenous women and women with mental health issues, the use of solitary confinement must end. Placing limits on the duration of time that a woman may be placed in segregation is not enough. Such limits have only proven to be arbitrary and do little to protect those who are most vulnerable.

### Imprisoned Women with Mental Health Issues

Cuts to health and social services, including social housing, have contributed to the increasing numbers of women with disabling mental health issues in prisons and detention centres. The lack of services for women in the community contributes to the burgeoning population of

women in prison, particularly Indigenous women, poor women and those with disabling mental health issues and intellectual disabilities. In what has been dubbed a “revolving door”<sup>146</sup> syndrome, there is ample evidence that homeless women with mental health issues are more likely to be imprisoned, and if released find it almost impossible to find housing, so too often find themselves re-incarcerated.<sup>147</sup>

In its 2006 Concluding Observations, after reviewing Canada’s fifth report, the United Nations Human Rights Committee recommended that:

The State party, including all governments at the provincial and territorial level, should increase its efforts to ensure that sufficient and adequate community based housing is provided to people with mental disabilities, and ensure that the latter are not under continued detention when there is no longer a legally based medical reason for such detention.<sup>148</sup>

In its 2015 Concluding Observations, the Human Rights Committee noted its concern about the “insufficient medical support to detainees with serious mental illness” and called on Canada to take appropriate measures to “effectively improve access to, and capacity of, treatment centres for prisoners with mental health issues at all levels.”<sup>149</sup>

This is a double-faceted problem: women with mental health issues are at particular risk of being imprisoned and, inside prisons, they do not receive treatment or appropriate care.

- Federally sentenced women are twice as likely as men to have a mental health disorder upon being admitted to prison;<sup>150</sup> and in 2012/2013 approximately 75% of women prisoners received a CSC-based mental health service.<sup>151</sup>
- The Office of the Correctional Investigator (OCI) has assessed that CSC cannot adequately deal with mental health issues, especially when it comes to federally sentenced women. The OCI found that CSC has an over reliance on force, physical restraints, restriction on movement, limitations on interaction with other prisoners, and limitations on access to transfers to appropriate psychiatric or mental health resources.<sup>152</sup>
- There are significantly fewer transition options for women released from prisons, particularly those with mental health issues.<sup>153</sup>

In the November 2015 mandate letter to the Minister of Public Safety, Prime Minister Trudeau recognized the need to improve services for incarcerated people with mental health issues. The Prime Minister called on the Minister to “address gaps in services to Indigenous Peoples and those with mental illness throughout the criminal justice system.”<sup>154</sup>

No action has been taken on this yet.

### Conclusion of Part IV

Many women and girl prisoners in Canada are unnecessarily imprisoned as they pose no threat to public safety and would be better managed in the community. This is particularly true for Indigenous women, who are disproportionately incarcerated and often imprisoned far from their home communities.

Women who are incarcerated in Canada are often over classified, face inhumane segregation, and lack mental health supports and access to programming. Canada has not made significant improvements to the living conditions of prisons for women and the number of imprisoned women and girls is increasing, despite their low risk to society.

### Recommendations

The Government of Canada should:

- **Restrict the use of imprisonment for women and develop new protocols to decarcerate women, particularly Indigenous women and those with disabling mental health issues.**
- **Increase income security, health and educational measures such as income assistance, adequate housing, and community supports for women with mental health issues to address the reality that women are being criminalized and incarcerated because of poverty, previous abuse, social disadvantage, racialization, and disabling mental health and intellectual capacity issues.**
- **Put an end to the practice of employing male staff working in front-line contact with women in prisons for women.**
- **Establish an independent judicial oversight body as the external redress for federally sentenced prisoners.**
- **Put an end to the practice of placing women prisoners in segregation or solitary confinement.**

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<sup>3</sup> *Mclvor v Canada*, 2009 BCCA 153, 91 BCLR (4<sup>th</sup>) 1, online: <<http://www.courts.gov.bc.ca/jdb-txt/ca/09/01/2009bccca0153err2.htm>> [Mclvor].

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<sup>85</sup> CEDAW Report, *supra* note 78 at para 151.

<sup>86</sup> *Ibid* paras 156-158

<sup>87</sup> CEDAW 2008 Concluding Observations, *supra* note 1 at para 33.

<sup>88</sup> *Ibid* at para 33.

<sup>89</sup> Human Rights Committee, *Concluding observations on the sixth periodic report of Canada*, UN Doc CCPR/C/CAN/CO/6 at para 18 [HRC 2015 Concluding Observations].

<sup>90</sup> *Ibid* at para 14.

<sup>91</sup> CEDAW 2008 Concluding Observations, *supra* note 1 at para 34.

<sup>92</sup> Office of the Correctional Investigator, *Annual Report of the Office of the Correctional Investigator 2012-2013*, prepared by Howard Sapers (28 June 2013), online: <<http://www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20122013-eng.aspx>> [Office of the Correctional Investigator, *2013 Annual Report*].

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<sup>96</sup> Correctional Services Canada, *File #394-2-88 Evaluation Report: Intensive Intervention Strategy for Women Offenders* (March 2011) at 21-22, online: <<http://www.csc-scc.gc.ca/publications/092/005007-2006-eng.pdf>>.

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<sup>98</sup> *Ibid*.

<sup>99</sup> Correctional Service Canada, *Twenty Years Later: Revisiting the Task Force on Federally Sentenced Women*, prepared by Meredith Robeson Barrett et al (July 2010) at 49, online: <<http://www.csc-scc.gc.ca/research/005008-0222-eng.shtml>> [CSC, *Twenty Years Later*].

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<sup>101</sup> *Ibid* at 39.

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<sup>105</sup> Public Safety Canada, *Marginalized: The Aboriginal Women's experience*, *supra* note 53.

<sup>106</sup> Office of the Correctional Investigator, *Spirit Matters: Aboriginal People and the Corrections and Conditions Release Act*, Catalogue No PS104-6/2013E-PDF (October 2012) at para 79.

<sup>107</sup> Office of the Correctional Investigator, *2013 Annual Report*, *supra* note 92 (also see "Aboriginal women now make up one-third of Canadian female prison population", *CBC News* (27 May 2015), online: <<http://www.cbc.ca/news/canada/thunder-bay/aboriginal-women-now-make-up-one-third-of-canadian-female-prison-population-1.3089050>>.

<sup>108</sup> Public Safety Canada, *Marginalized: The Aboriginal Women's experience*, *supra* note 53 at 24.

<sup>109</sup> Office of the Correctional Investigator, *2013 Annual Report*, *supra* note 92.

<sup>110</sup> Public Safety Canada, *Marginalized: The Aboriginal Women's experience*, *supra* note 53 at 23-4.

<sup>111</sup> CSC, *Twenty Years Later*, *supra* note 99 at 10.

<sup>112</sup> Office of the Correctional Investigator, *2013 Annual Report*, *supra* note 92.

<sup>113</sup> *Ibid*.

<sup>114</sup> Jesse Winter, "Talking prisons and human rights", *Yukon News* (7 October 2013), online: <<http://www.yukon-news.com/news/talking-prisons-and-human-rights/>>.

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<sup>121</sup> Office of the Correctional Investigator, *2013 Annual Report*, *supra* note 92; Public Safety Canada, *Marginalized: The Aboriginal Women's experience*, *supra* note 53.

<sup>122</sup> *Corrections and Conditional Release Act*, SC 1992, c 20.

<sup>123</sup> Public Safety Canada, *Marginalized: The Aboriginal Women's experience*, *supra* note 53 at 23, 49-50.

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<sup>127</sup> CSC, *Twenty Years Later*, *supra* note 99 at 60-1; Correctional Services Canada, *The Cross Gender Monitoring Project 3<sup>rd</sup> and Final Annual Report*, 2013, online: CSC <<http://www.csc-scc.gc.ca/publications/fsw/gender3/cg-22-eng.shtml>>.

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