



Canadian Aboriginal AIDS Network Réseau Canadien Autochtone du SIDA

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Submission for Canada's Review before the UN Committee on the Elimination of Racial Discrimination, 93rd Session

July 7, 2017

Canadian Aboriginal AIDS Network

This briefing is submitted by the Canadian Aboriginal AIDS Network (CAAN) for Canada's review during the 93rd Session of the United Nations Committee on the Elimination of Racial Discrimination, taking place from July 31 to August 25, 2017. It focuses on violations of the rights to equal treatment in the justice system, to security of the person, to health and social services, and to equality and non-discrimination, as enshrined in the *Convention on the Elimination of All Forms of Racial Discrimination*.

CAAN is a non-profit coalition of individuals and organizations providing leadership, support and advocacy for Aboriginal people living with and affected by HIV/AIDS. In this briefing, we address the continued **criminalization of people who use drugs** in Canada, which highlights ongoing discrimination by the state against Indigenous communities.

With the passage of the *Safe Streets and Communities Act* in 2012, the Canadian federal government introduced a number of punitive reforms, including mandatory minimum sentencing for certain non-violent drug offences. While the law purports 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.¹ At the same time, by effectively preventing judges from considering the individual circumstances of a case (including a person's Indigenous heritage or connection, as prescribed by the *Criminal Code*² and the Supreme Court of Canada in *R. v. Gladue*³) when imposing a sentence, mandatory minimum sentences deny Indigenous people their right to more culturally appropriate and restorative alternatives to incarceration — a decidedly troubling development when federally-

¹ Canadian HIV/AIDS Legal Network, *Mandatory Minimum Sentences for Drug Offences: Why Everyone Loses*, 2006; Darcie Bennett and Scott Bernstein, *Throwing Away the Keys: The Human and Social Cost of Mandatory Minimum Sentences*, Pivot Legal Society, 2013.

² *Criminal Code*, s. 718.2(e).

³ *R v. Gladue*, [1999] 1 SCR 688.

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incarcerated Indigenous people are more likely to present a history of substance use and dependence, as well as mental health concerns.⁴

Criminalizing the possession of drugs for personal use has also undermined efforts to address the health needs of people struggling with problematic drug use. The evidence is clear that the continued overwhelming emphasis on drug prohibition in Canada, from policing to prosecution to prisons, is resulting in costly damage to the public purse, to public health and to human rights.

The use of incarceration as a drug-control measure has resulted in an increase in Canada's prison population, where First Nations, Inuit and Métis Peoples represent over 25% of people in federal prison, despite comprising just 4.3% of Canada's population, with Indigenous women being the fastest growing population among prisoners in federal custody.⁵ In prison, a lack of harm reduction as well as other health measures has led to significantly higher rates of HIV and hepatitis C virus (HCV) in prison compared to the community as a whole. Figures released in 2010 by the Correctional Service of Canada indicate a rate of HIV and HCV among prisoners of 4.6% and 31% respectively, or 15 and 39 times the prevalence in the wider community. Even higher rates of HIV (11.7%) and HCV infection (49.1%) were reported for Indigenous women in prison.⁶ Subsequent studies suggest 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.⁷ Moreover, according to Canada's prison ombudsperson, 80% of federal prisoners experience problematic substance use,⁸ yet no prison in Canada currently permits the distribution of sterile injection equipment to prisoners and a number of provincial and territorial prisons still do not offer opioid substitution therapy (OST), to prisoners, despite clear evidence of the health benefits of OST and prison-based needle and syringe programs (PNSPs).

In 2015, the Truth and Reconciliation Commission of Canada issued calls to action which included recommendations to federal, provincial, and territorial governments, in consultation

⁴ *Annual Report of the Office of the Correctional Investigator 2015-2016*. <http://www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20152016-eng.aspx#s7>

⁵ Office of the Correctional Investigator, *Annual Report of the Office of the Correctional Investigator 2015-2016*.

⁶ D. Zakaria et al., *Summary of Emerging Findings from the 2007 National Inmate Infectious Diseases and Risk-Behaviours Survey*, Correctional Service of Canada, March 2010.

⁷ F. Kouyoumdjian et al., "Health status of prisoners in Canada," *Canadian Family Physician* 62 (March 2016): 215-222.

⁸ Office of the Correctional Investigator, *Annual Report 2013-2014*. Available at <http://www.oci-bec.gc.ca/cnt/rpt/pdf/annrpt/annrpt20132014-eng.pdf>.

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with Indigenous peoples, to commit to eliminating the overrepresentation of Indigenous people in custody, to amend the *Criminal Code* to allow trial judges to depart from mandatory minimum sentences and restrictions on the use of conditional sentences, and to establish measurable goals to identify and close the gaps in health outcomes between Indigenous and non-Indigenous communities.⁹ Notably, in 2016, the Committee on the Elimination of Discrimination against Women also recommended that Canada repeal mandatory minimum sentences for minor, non-violent drug-related offences and provide “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.”¹⁰ Canada has yet to implement these recommendations.

The incarceration of non-violent people who use drugs, many of whom may be dependent on drugs, and the corresponding failure to provide prisoners with equivalent access to health services, including key harm reduction measures, is a violation of their rights to life, health, equality and non-discrimination, as set out in the Convention. **Indigenous people in particular are severely affected by these rights violations, given the disproportionate number of Indigenous people in prison, significantly higher rates of HIV and HCV among Indigenous prisoners, and the stark reality that an estimated 45% of new HIV infections among Indigenous people are attributed to injection drug use — more than four times the estimate for the population as a whole.**¹¹ CAAN urges the Committee to question the government on punitive drug policy that relies heavily on criminal law, including mandatory minimum sentences, to address drug use, and on the denial of equivalent health services such as PNSPs, that contributes to further harms to prisoners’ health.

Recommendations to the Government of Canada:

- Repeal all mandatory minimum prison sentences for people who commit non-violent offences, take into account the persons personal history during sentencing, and expand evidence-based alternatives to incarceration for people who use drugs, taking into account the need for culturally appropriate care, including for Indigenous people and other minorities at risk;

⁹ *Truth and Reconciliation Commission of Canada: Calls to Action*, 2015.

¹⁰ UN Committee on the Elimination of Discrimination Against Women, *Concluding Observations: Canada* (November 2016), para. 49.

¹¹ Public Health Agency of Canada, *Summary: Estimates of HIV Incidence, Prevalence and Proportion Undiagnosed in Canada*, 2014.

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- Decriminalize the possession for personal use of all drugs and in addition to cannabis, commit to examine appropriate models for the legalization and regulation of other currently illegal substances, as part of an evidence and culturally based, public health approach to drug policy (similar to the drug policy measures in Portugal);
- Ensure access to appropriate health and social support services, including scaling up access to evidence-based drug dependence treatment (including culturally appropriate and gender-specific treatment) for those who need it, and improve and increase culturally infused harm reduction services, which have proven to engage with Indigenous peoples who use drugs;
- 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, education on safe sex, and safer tattooing programs, in consultation with prisoner groups and community health organizations including Indigenous health organizations to ensure operational success, taking into account the need for culturally appropriate and gender-specific programs; and
- Ensure and support the full involvement of civil society organizations, including Indigenous organizations and organizations and networks of people who use drugs or who are at risk of drug use, in the elaboration, implementation and evaluation of drug policy and services for people who use drugs or people at risk of drug use.

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