



## **Comments on Canada's Draft Third Report Under the Universal Periodic Review**

Submission to the Government of Canada, Department of Canadian Heritage

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Submitted by the  
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# INTRODUCTION

The Canadian HIV/AIDS Legal Network (“Legal Network”) welcomes this opportunity to provide comments on the Government of Canada’s draft Third Report (“draft report”) under the Universal Periodic Review (UPR).

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.

In this brief, the Legal Network provides information about Canada’s implementation of its international human rights obligations as raised in the draft report, organized under subheadings included in the draft report. It expands on issues presented in the Legal Network’s Submission to the United Nations Human Rights Council’s UPR Working Group in advance of the third UPR of Canada, to take place during its 30<sup>th</sup> session in May 2018.

## RIGHTS OF INDIGENOUS PEOPLES

As the Legal Network discussed in its submission to the UPR Working Group, Canada is failing to provide prisoners,<sup>1</sup> who are disproportionately Indigenous and Black, with equivalent access to health services, including key harm reduction measures. There is overwhelming evidence of the health benefits of prison-based needle and syringe programs (PNSPs) and opioid substitution therapy (OST), yet no Canadian prison currently permits the distribution of sterile injection equipment to prisoners and numerous provincial and territorial prisons do not offer OST to prisoners.<sup>2</sup> This is in clear violation of the *Canadian Charter of Rights and Freedoms* (“Charter”) and in particular, a violation of prisoners’ rights to security of the person and to equality before and under the law and to the equal protection and equal benefit of the law without discrimination.<sup>3</sup> There is currently a constitutional challenge underway before the Ontario Superior Court of Justice in response to the federal government’s failure to implement PNSPs in federal prisons; given the federal government’s stated commitment to end “appeals and positions not consistent with the Charter,” it should resolve this lawsuit and implement prison-based needle and syringe programs without delay.<sup>4</sup>

Denying prisoners access to sterile injection equipment and OST has had a particularly harmful impact on Indigenous prisoners, who are disproportionately incarcerated in Canada’s prisons, more likely to acquire HIV and HCV via injection drug use, and already have much higher rates of HIV and HCV than non-Indigenous prisoners.<sup>5</sup> This denial is also in clear contravention of the Truth and Reconciliation Commission of Canada’s recommendation to Canada to close the gaps in health outcomes between Indigenous and non-Indigenous communities, as well as Canada’s own commitment to realizing the right to health, “with a special focus on the most disadvantaged groups.”<sup>6</sup>

## 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 and opioid substitution**

**therapy, in consultation with prisoner groups and community health organizations to ensure operational success, taking into account the need for culturally appropriate and gender-specific programs.**

## **GENDER-BASED VIOLENCE**

The Legal Network is disappointed to note that the human rights of sex workers are only discussed once in the draft report (at paragraph 3, with regard to the province of Quebec). The *Protection of Communities and Exploited Persons Act* (PCEPA), which reflects the so-called “Nordic approach” to prostitution (in which the purchase of sex is prohibited, while the sale of sex is technically not), continues to criminalize sex workers, who continue to be arrested,<sup>7</sup> as well those who purchase sex and third parties involved in sex work.<sup>8</sup> Criminalizing sex work is a profound violation of sex workers’ right to health, as well as their rights to life, security of the person, freedom from torture and cruel, inhumane and degrading treatment, work, privacy, equality and non-discrimination.<sup>9</sup>

Numerous studies 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.<sup>10</sup> In Canada, research has demonstrated that police targeting clients (and third parties) rather than sex workers has not affected rates of violence against sex workers or enhanced sex workers’ control over their sexual health, including HIV prevention measures.<sup>11</sup> By facilitating the removal of sex workers from public spaces, such tactics have merely perpetuated labour conditions that subject sex workers to greater risk of violence and poor health.<sup>12</sup> Criminalizing third parties (such as managers, security, receptionists, drivers) who work with or for, or employ sex workers also 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*.<sup>13</sup>

## **RECOMMENDED ACTIONS**

The Legal Network recommends that Canada

- **Immediately repeal all sex work–specific criminal laws, which endanger sex workers’ lives, health and safety;**
- **Put in place legislative measures to ensure that sex workers’ rights, safety and dignity are respected, protected and fulfilled, ensuring that sex workers and their allies are consulted in doing so;**
- **Stop raids, detentions and deportations of sex workers by using 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; and**

- **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 resources for income support, poverty alleviation, housing, childcare, education and training, and treatment and support for substance use, including for youth, Indigenous Peoples and migrants.**

## IMMIGRANTS, REFUGEES AND MIGRANTS

Since before Confederation, Canada has excluded immigrants with disabilities, beginning with a prohibition on admitting persons with disabilities who were believed to impose financial burdens on the state or charities.<sup>14</sup> Similarly, today's *Immigration and Refugee Protection Act* stipulates that foreign nationals are inadmissible to Canada if their health condition, or that of a family member, might reasonably be expected to cause an "excessive demand" on health or social services.<sup>15</sup> Due to the high cost of HIV medications, people living with HIV are generally medically inadmissible.

Human rights advocates, immigration and HIV organizations, and people with disabilities have long argued that the "excessive demand" regime is discriminatory, rooted in the outdated idea that people with disabilities are a burden on Canada, and unjustifiably violates the human rights of newcomers with disabilities. The excessive demand regime violates the Charter by discriminating against prospective Canadians on the basis of their disability and relying on outdated and discriminatory attitudes about people living with HIV and other disabilities.<sup>16</sup> The regime focuses solely on alleged use of health services as grounds for exclusion and ignores the important contributions that people with HIV make to Canadian society.

In ratifying the *Convention on the Rights of Persons with Disabilities* in 2010, Canada signaled a commitment to uphold the rights of persons with disabilities, including the right to non-discrimination, full and effective participation and inclusion in society, and equality of opportunity.<sup>17</sup> The Convention obligates State Parties to "take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities" and to "refrain from engaging in any act or practice that is inconsistent with the present Convention and to ensure that public authorities and institutions act in conformity with the present Convention."<sup>18</sup> Article 18 of the Convention specifically calls on State Parties to "recognize the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others" and ensure that persons with disabilities have the right to acquire and change a nationality. In fuelling stigma and preventing people living with HIV from becoming legal residents, the excessive demand regime prevents people living with HIV from exercising their rights to education,<sup>19</sup> employment<sup>20</sup> and the highest attainable standard of physical and mental health.<sup>21</sup>

In response to these criticisms, Canada's Parliamentary Committee on Citizenship and Immigration undertook a study of the law, during which the Immigration Minister acknowledged that the excessive demand regime "does not align with our country's values on the inclusion of persons with disabilities in Canadian society."<sup>22</sup> In December 2017, the Committee released its study recommendations, in which it emphasized "the dignity and human rights of those applying to enter Canada play a central role in the selection of a policy path forward" and recommended an historic repeal of the excessive demand regime.<sup>23</sup>

## RECOMMENDED ACTIONS

The Legal Network recommends that Canada

- **Remove excessive demand inadmissibility from the *Immigration and Refugee Protection Act* by repealing section 38(1)(c) in its entirety.**

## CRIME PREVENTION AND CRIMINAL JUSTICE SYSTEM

### a. DRUG POLICY

In Canada, racialized communities are disproportionately charged, prosecuted and incarcerated 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.<sup>24</sup> 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,"<sup>25</sup> with almost 20% of Black federal prisoners incarcerated for a drug-related offence.<sup>26</sup> In particular, Indigenous and Black women are more likely than White women to be in prison for that reason,<sup>27</sup> and 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.<sup>28</sup>

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 Canada<sup>29</sup> and globally.<sup>30</sup> In 2015, the Truth and Reconciliation Commission of Canada issued calls to action which included recommendations to federal, provincial, and territorial governments to commit to eliminating the overrepresentation of Indigenous people in custody and to amend the *Criminal Code* to allow trial judges to depart from mandatory minimum sentences and restrictions on the use of conditional sentences.<sup>31</sup>

## RECOMMENDED ACTIONS

The Legal Network recommends that Canada

- **Repeal all mandatory minimum prison sentences for non-violent 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 Peoples, racialized minorities and youth;**
- **Ensure access to health and social support services (including evidence-**

based harm reduction services), and scale up access to evidence-based drug dependence treatment (including culturally appropriate and gender-specific treatment), for people who use drugs in need of such supports; and

- **Decriminalize the possession of all drugs for personal use and commit to examining appropriate models for the legalization and regulation of other currently illegal substances as part of an evidence-based, public-health approach to drug policy.**

## **b. HIV CRIMINALIZATION**

The Legal Network is also concerned about people living with HIV in Canada, who continue to be singled out for criminal prosecutions, convictions and imprisonment for allegedly not disclosing their HIV status to sexual partners. People have been charged and convicted even when there has been little to no possibility of HIV transmission.<sup>32</sup> Police and prosecutors rely most frequently on the charge of *aggravated sexual assault*, one of the most serious offences in the *Criminal Code*. Conviction carries a maximum penalty of life imprisonment and mandatory designation as a sex offender. Canada's approach has come under repeated criticism domestically and internationally, including from United Nations expert agencies, human rights bodies, judges, women's rights advocates and scientists.<sup>33</sup>

On World AIDS Day 2017, both the federal and Ontario governments recognized the need to limit the "overcriminalization of HIV" in Canada.<sup>34</sup> Both took a first step toward by recognizing that criminal prosecution for alleged HIV non-disclosure is not warranted in the case where a person living with HIV had a "suppressed viral load." The release of the federal government's report on this issue and the new Ontario directive to prosecutors are welcome first steps. What is needed, however, is deeper, broader reform. In particular, criminal prosecutions must be limited to cases of actual, intentional transmission of HIV. HIV-related criminal charges are never appropriate where a person living with HIV engaged in activities that, according to the best available scientific evidence, posed no significant risk of transmission.

## **RECOMMENDED ACTIONS**

The Legal Network recommends that Canada

- **Limit the use of the criminal law to the intentional transmission of HIV;**
- **Ensure that 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; and**
- **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.**

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- <sup>1</sup> *Annual Report 2014–2015 of the Office of the Correctional Investigator*.
- <sup>2</sup> G. Dias and G. Betteridge, *Hard Time: HIV and Hepatitis C Prevention Programming for Prisoners in Canada*, Canadian HIV/AIDS Legal Network and PASAN, 2007.
- <sup>3</sup> The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11, ss 7, 15.
- <sup>4</sup> Government of Canada, “Canada’s Third Report under the Universal Periodic Review (Draft)” (22 January 2018), para 6.
- <sup>5</sup> D. Zakaria et al.
- <sup>6</sup> Report of the Working Group on the Universal Periodic Review, Second UPR of Canada, UN General Assembly (June 28, 2013) UN Doc. A/HRC/24/11, para 128.12 (recommendation 12; Ecuador, Nicaragua, Paraguay), 128.81 (recommendation 81; Botswana), 128.82 (recommendation 82; Côte d’Ivoire).
- <sup>7</sup> B. Sawchuk, “Undercover cops take aim at sex trade,” *St. Catharines Standard*, July 20, 2016. Available at [www.stcatharinesstandard.ca/2016/07/20/undercover-cops-take-aim-at-sex-trade](http://www.stcatharinesstandard.ca/2016/07/20/undercover-cops-take-aim-at-sex-trade).
- <sup>8</sup> S. Chu et al., *Reckless Endangerment: Q&A on Bill C-36: Protection of Communities and Exploited Persons Act*, Canadian HIV/AIDS Legal Network, June 2014.
- <sup>9</sup> M. Decker et al., “Human rights violations against sex workers: burden and effect on HIV,” *Lancet* 385:9963 (2015): pp. 186–199.
- <sup>10</sup> 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.
- <sup>11</sup> A. Krüsi et al., “Criminalisation of clients: reproducing vulnerabilities for violence and poor health among street-based sex workers in Canada—a qualitative study,” *BMJ Open* 4 (2014): e005191; Sex Workers United Against Violence, Pivot Legal Society and Gender and Sexual Health Initiative, *My Work Should Not Cost Me My Life: The Case Against Criminalizing the Purchase of Sexual Services in Canada*, 2014.
- <sup>12</sup> A. Krüsi et al., “‘They Won’t Change It Back In Their Heads That We’re Trash’: The Intersection of Sex Work Related Stigma and Evolving Policing Strategies,” *Sociology of Health & Illness* (April 26, 2016).
- <sup>13</sup> *Canada (Attorney General) v. Bedford*, 2013 SCC 72.
- <sup>14</sup> The 1859 *Act Respecting Emigrants and Quarantine* prevented the admission of immigrants with physical or mental disabilities who were believed to impose financial burdens on the state or charitable institutions, followed by the 1910 *Immigration Act* which introduced “prohibited classes” of immigrants, stipulating an absolute prohibition of individuals with mental disabilities, while individuals who were “physically defective” were still allowed to immigrate if they could prove sufficient support. The 1927 *Immigration Act* removed the exception for people with physical disabilities. Individuals in the prohibited classes were absolutely banned from coming to Canada, and the list of prohibited classes was expanded to include individuals who were either “mentally or physically defective to such a degree as to affect their ability to earn a living.” As a result, from the years 1927 to 1976, individuals with physical and mental disabilities were prohibited from immigrating to Canada.
- <sup>15</sup> *Immigration and Refugee Protection Act*, SC 2001, c 27.
- <sup>16</sup> HIV is recognized as a disability. For example, the Ontario Human Rights Commission *Policy on HIV/AIDS-related discrimination* states “AIDS (Acquired Immunodeficiency Syndrome) and other medical conditions related to infection by the Human Immunodeficiency Virus (HIV) are recognized as disabilities within the meaning of the Code.” This policy was approved on 27 November 1996 and is available at [www.ohrc.on.ca/en/policy-hiv-aids-related-discrimination](http://www.ohrc.on.ca/en/policy-hiv-aids-related-discrimination).
- <sup>17</sup> Article 3 of the *Convention on the Rights of Persons with Disabilities*.
- <sup>18</sup> *Ibid.*, Article 4a.
- <sup>19</sup> Article 13 of *International Convention on Economic, Social and Cultural Rights* and Article 24 of the *Convention on the Rights of Persons with Disabilities*
- <sup>20</sup> Article 6 of *International Convention on Economic, Social and Cultural Rights* and Article 27 of the *Convention on the Rights of Persons with Disabilities*
- <sup>21</sup> Article 12 of *International Convention on Economic, Social and Cultural Rights* and Article 25 of the *Convention on the Rights of Persons with Disabilities*.
- <sup>22</sup> Report of the Standing Committee on Citizenship and Immigration, *Building An Inclusive Canada: Bringing The Immigration and Refugee Protection Act in Step with Modern Values*, December 2017.

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- <sup>23</sup> Report of the Standing Committee on Citizenship and Immigration, *Building An Inclusive Canada: Bringing The Immigration and Refugee Protection Act in Step with Modern Values*, December 2017.
- <sup>24</sup> The Correctional Investigator of Canada, *Annual Report 2013–2014 of the Office of the Correctional Investigator*, 2014.
- <sup>25</sup> *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen’s Printer for Ontario, 1995) at pp. 69–70.
- <sup>26</sup> Office of the Correctional Investigator, *A Case Study of Diversity in Corrections: The Black Inmate Experience in Federal Penitentiaries Final Report*, 2013. Available at [www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20131126-eng.aspx](http://www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20131126-eng.aspx).
- <sup>27</sup> The Correctional Investigator of Canada, *Annual Report 2014–2015 of the Office of the Correctional Investigator*, 2015.
- <sup>28</sup> The Correctional Investigator of Canada, *Annual Report 2012–2013 of the Office of the Correctional Investigator*, 2013.
- <sup>29</sup> Canadian HIV/AIDS Legal Network, *Drug policy and human rights: The Canadian context — Submission to the Office of the UN High Commissioner for Human Rights*, May 19, 2015. Available at [www.aidslaw.ca/site/drug-policy-and-human-rights-ohchr](http://www.aidslaw.ca/site/drug-policy-and-human-rights-ohchr).
- <sup>30</sup> K. DeBeck et al., “HIV and the criminalisation of drug use among people who inject drugs: a systematic review,” *The Lancet HIV*, May 14, 2017; S. Boyd, C.I. Carter and D. MacPherson, *More Harm Than Good: Drug Policy in Canada* (Halifax and Winnipeg: Fernwood Publishing, 2016); Office of the UN High Commissioner for Human Rights, *Study on the impact of the world drug problem on the enjoyment of human rights*, Report to the UN Human Rights Council, UN Doc. A/HRC/30/65, 2015; T. Babor et al., *Drug Policy and the Public Good* (Oxford: Oxford University Press, 2010); S. Rolles et al., *The Alternative World Drug Report*, 2nd ed. (London: Transform Drug Policy Foundation, 2016). Available at [www.countthecosts.org/alternative-world-drug-report-2nd-edition](http://www.countthecosts.org/alternative-world-drug-report-2nd-edition); Global Commission on Drug Policy, *The War on Drugs and HIV/AIDS: How the Criminalization of Drug Use Fuels the Global Pandemic*, 2012. Available at [www.globalcommissionondrugs.org/reports/the-war-on-drugs-and-hiv-aids](http://www.globalcommissionondrugs.org/reports/the-war-on-drugs-and-hiv-aids); Global Commission on Drug Policy, *The Negative Impact of the War on Drugs on Public Health: The Hidden Hepatitis C Epidemic*, 2013. Available at [www.globalcommissionondrugs.org/reports/the-negative-impact-of-the-war-on-drugs-on-public-health-the-hidden-hepatitis-c-epidemic](http://www.globalcommissionondrugs.org/reports/the-negative-impact-of-the-war-on-drugs-on-public-health-the-hidden-hepatitis-c-epidemic); Global Commission on HIV and the Law, *Risks, Rights and Health* (New York: UNDP, 2012).
- <sup>31</sup> Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action*, 2015.
- <sup>32</sup> E. J Bernard and S. Cameron, *Advancing HIV Justice 2: Building momentum in global advocacy against HIV criminalisation* (Brighton/Amsterdam: HIV Justice Network and Global Network of People Living with HIV (GNP+), April 2016).
- <sup>33</sup> See e.g. *Convention on the Elimination of All Forms of Discrimination Against Women*, December 18, 1979, United Nations, Treaty Series, vol. 1249, p. 13. *International Covenant on Economic, Social and Cultural Rights*, December 16, 1966, United Nations, Treaty Series, vol. 993, p. 3.
- <sup>34</sup> Government of Canada, “Government releases Report on the Criminality of HIV non-disclosure” (1 December 2017). Available at [https://www.canada.ca/en/department-justice/news/2017/12/government\\_releasesreportonthecriminalityofhivnon-disclosure.html](https://www.canada.ca/en/department-justice/news/2017/12/government_releasesreportonthecriminalityofhivnon-disclosure.html); Government of Ontario, “Sexual Offences against Adults: Sexually transmitted infections and HIV exposure cases” (1 December 2017). Available at <https://www.ontario.ca/document/crown-prosecution-manual/d-33-sexual-offences-against-adults>.