



Women deprived of liberty due to drug-related offences in Canada

Submission to the United Nations Working Group on the issue of discrimination against women in law and in practice

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INTRODUCTION

The Canadian HIV/AIDS Legal Network (“Legal Network”) welcomes this opportunity to provide comments to the United Nations Working Group on discrimination against women in law and in practice (“Working Group”) on the issue of women deprived of liberty, in advance of the Working Group’s presentation of its report on this topic at the 41st session of the Human Rights Council.

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 brief, the Legal Network provides information about women deprived of liberty due to the criminalization of people who use drugs in Canada. Many of these women commit non-violent drug-related offences and are incarcerated with little public safety rationale, and would be better served by non-custodial alternatives to prison. Moreover, women who use drugs in detention lack equivalent access to essential harm reduction measures. Canada’s punitive approach to drug policy has resulted in severe human rights violations against women, and continues to disproportionately affect women who use drugs, especially those from racialized and Indigenous communities.

WOMEN DEPRIVED OF LIBERTY DUE TO DRUG-RELATED OFFENCES

According to Canada’s prison ombudsperson, women are the fastest-growing prison population in the country, with the number of women being sentenced to federal prisons increasing by 66 percent over the last decade.¹ During the same period, the number of Indigenous women being sentenced to federal prisons increased by 112 percent.² Under Canada’s *Controlled Drug and Substances Act*, a person faces criminal charges for having prohibited drugs in their possession at any time — charges which could lead to a fine, jail time or both.³ As a result, approximately one-third of all federally incarcerated women are serving sentences for drug-related offences.⁴ Indigenous and Black women are more likely than White women to be in prison for that reason,⁵ and a staggering 53 percent 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.⁶ Moreover, an estimated 80 percent of federally incarcerated women in Canada are reported to have a history of substance use.⁷ The excessive use of incarceration as a drug-control measure continues to deprive women of liberty, particularly those from disadvantaged communities.

Indigenous women, as well as women with mental health issues, are particularly vulnerable and affected by criminalization and criminal justice approaches that flow from punitive drug policy.⁸ According to Statistics Canada, women report higher rates of use of both psychoactive pharmaceutical drugs and sedatives than men, which are linked to substance use problems that are exacerbated by the failure of available services to provide appropriate, integrated services for women with co-existing mental health, substance use and trauma histories.⁹ It is also widely acknowledged that women who are heavy substance users rarely use a single substance, exacerbating their risk of overdose and death.¹⁰ As the UN Office on Drugs and Crime (UNODC) acknowledged in its World Drug Report 2016, women are more likely than men to engage in the use of a range of drugs, including the non-medical use of opioids and tranquilizers.¹¹ UNODC has also stated that women affected by drug dependence and HIV are more vulnerable and more stigmatized than men, as well as more likely to suffer from co-occurring mental health disorders and have been victims of violence and abuse.¹²

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 Canada¹³ and globally.¹⁴ Public health approaches to drug control, by contrast, have “proven their efficiency in responding to HIV and hepatitis, reducing fatal overdoses, improving the health and social situation of people dependent on drugs, and empowering people who use drugs.”¹⁵ For these reasons, a number of human rights organizations,¹⁶ prominent political figures and public health organizations,¹⁷ including municipal and provincial agencies,¹⁸ have urged Canada to decriminalize the use, possession and cultivation of all drugs for personal use.

WOMEN DEPRIVED OF LIBERTY DUE TO MANDATORY MINIMUM SENTENCES

Mandatory jail time for drug offences contributes to the deprivation of liberty of women in Canada and results in unfair, disproportionate prison sentences that do not reduce the problems associated with drug use, or drug use itself.

In 2012, the federal government passed the *Safe Streets and Communities Act*, which introduced for the first time mandatory minimum sentences for the offences of trafficking; possession for the purpose of trafficking, importing and exporting; and production of substances set out in Schedules 1 and 2 of the *Controlled Drugs and Substances Act*.¹⁹ Despite purporting to only target those who traffic in drugs while offering alternatives to incarceration for those struggling with drug dependency — including through the expansion of drug treatment courts (DTCs) — the burden of harsher enforcement still falls most heavily on those with drug dependency, particularly

those who may engage in small-scale dealing to support their own drug use.²⁰ Moreover, DTCs present serious problems with accessibility, with research revealing the inability of such courts to engage women, Indigenous people, racialized minorities and youth, as well as difficulties in retaining them once they have entered.²¹

The Canadian Department of Justice's own review of the evidence in 2002 concluded that mandatory minimum sentences are "least effective in relation to drug offences" and that "drug consumption and drug-related crime seem to be unaffected, in any measurable way, by severe mandatory minimum sentences."²² Studies have shown that of the most vulnerable, street-involved people who use drugs, many are involved in low-level tasks such as carrying drugs and steering buyers towards dealers.²³ Those serving jail time for drug offences are more frequently individuals working as "mules" and street dealers, since the real profiteers in the drug market distance themselves from visible drug-trafficking activities and are rarely captured by law enforcement efforts.

A 2013 study of people who use drugs in Vancouver found that, for people with drug dependence, criminal activity was related to survival, and that such involvement in criminal activity would trigger mandatory minimum sentences under the *Safe Streets and Communities Act*.²⁴ In a recent case in the province of Ontario, a court struck down the mandatory minimum sentence for drug importation, finding it would be cruel and unusual punishment to sentence an impoverished, single Indigenous mother to two years in prison.²⁵ The judge found the mandatory minimum sentence of two years to be "a grossly disproportionate punishment".²⁶ As the Supreme Court of Canada acknowledged most recently in *R. v. Lloyd*, the imposition of a minimum penalty of one year in prison for anybody who has, within the 10 preceding years, been convicted of a "designated substance offence"²⁷ has the potential to capture drug-dependent people involved in small-scale, street-level drug distribution to support their drug use.²⁸

By effectively preventing judges from considering the individual circumstances of a case when imposing a sentence (including a person's Indigenous heritage or connection, as prescribed by the *Criminal Code*²⁹ and the Supreme Court of Canada in *R. v. Gladue*³⁰), mandatory minimum sentences hurt the most vulnerable members of our communities, who are more likely to be caught in the vast net of these sentences.³¹ Mandatory minimum sentences thus open the door to widespread discrimination against already marginalized groups, particularly women, drug-dependent people, people living in poverty and Indigenous and racialized people.³²

ILL-HEALTH OF WOMEN DEPRIVED OF LIBERTY DUE TO A LACK OF HARM REDUCTION MEASURES

Women deprived of liberty face prison conditions that fail to address the health needs of people struggling with problematic drug use. A lack of harm reduction and other health measures has led to significantly higher rates of HIV and hepatitis C virus (HCV) in prison compared to the community as a whole³³ — a harm that has been

disproportionately borne by the rapidly-growing population of women behind bars.³⁴ A 2016 study indicated that about 30 percent of people in federal facilities, and 30 percent of women (compared to 15 percent of men) in provincial facilities are living with HCV, and 1–9 percent of women (compared to 1–2 percent of men) are living with HIV.³⁵ Indigenous women, 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 percent and 49.1 percent, respectively.³⁶

Research shows that the incarceration of people who inject drugs is a factor driving Canada's HIV and HCV epidemic.³⁷ In a national study of people incarcerated in federal institutions, 14 percent of women admitted to injecting drugs while in prison, many of whom shared their injection equipment.³⁸ Yet in spite of the overwhelming evidence of the health benefits of prison-based needle and syringe programs and opioid substitution therapy (OST), only two Canadian prisons currently permit the distribution of sterile injection equipment to prisoners on a very limited basis, and a number of provincial and territorial prisons do not offer OST to prisoners.³⁹

Moreover, in spite of an increasing number of reported drug overdoses behind bars,⁴⁰ no Canadian prison provides prisoners with direct access to naloxone, a drug used to treat an opioid overdose. Prisoners are not permitted to have naloxone kits in their cells, where they could use them in the event their cellmates suffer an opioid overdose. Correctional health care staff will not always be immediately available in overdose situations, yet a timely response to an opioid overdose can mean the difference between life and death. As Health Canada itself has noted, “Naloxone is a safe drug and administering naloxone to a person that is unconscious because of a non-opioid overdose is unlikely to create more harm.”⁴¹

Federal prisoners are further subject to the recently enacted *Drug-Free Prisons Act*, a law that empowers correctional authorities to (1) cancel an individual's parole if they test positive for illegal drugs or fail or refuse to provide a urine sample and (2) stipulate that a condition of an individual's release include abstinence from the use of drugs or alcohol.⁴² Yet women with substance use issues often do not have adequate access to appropriate services in prison. For example, the federal correctional service offers an “Aboriginal Offender Substance Abuse Program”, a high-intensity program geared toward Indigenous men who have a history of drug use, which has demonstrated more beneficial effects for Indigenous men than mainstream substance use programs.⁴³ But the program is only available to Indigenous men, and research is lacking on its potential benefits for Indigenous women. More broadly, research has shown that current programs and services available to incarcerated women living with and vulnerable to HIV and HCV have been marked by inconsistent implementation and accessibility, both within individual institutions and across the system as a whole.⁴⁴

RECOMMENDED ACTIONS

Numerous human rights experts have urged Canada to address its ongoing criminalization of people who use drugs, noting the severe impact it has had on women and racialized communities. In its Concluding Observations of Canada, 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.”⁴⁵ The UN Committee on the Elimination of Racial Discrimination, in its Concluding Observations on Canada, recommended that the government “address the root causes of over-representation of African-Canadians and Indigenous Peoples at all levels of the justice system, from arrest to incarceration” including by “re-examining drug policies” and “evidence-based alternatives to incarceration for non-violent drug users.”⁴⁶

As the UN Special Rapporteur on the right to health recommended in 2016, States should “seek alternatives to punitive or repressive drug control policies, including decriminalization and legal regulation and control.”⁴⁷ The Special Rapporteur has also 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.”⁴⁸ The *Vienna Declaration*, the central policy position articulated at the XVIII International AIDS Conference, articulates that “there is no evidence that increasing the ferocity of law enforcement meaningfully reduces the prevalence of drug use.”⁴⁹

Moreover, the UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules) recommends that prisoners enjoy the same standards of health care that are available in the community.⁵⁰ A number of UN agencies, including the UNODC, UNAIDS and the World Health Organization (WHO) have also recommended that prisoners should have access to a series of key interventions, including needle and syringe programs and drug dependence treatment including OST.⁵¹ 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.⁵² The 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.

To implement the recommendations of these international experts in order to address the deprivation of liberty of women who use drugs or are incarcerated for a drug-related offence, the Legal Network urges the Working Group to call upon States to:

- **Repeal mandatory minimum prison sentences for drug-related offences;**
- **Expand evidence-based, non-custodial alternatives to incarceration for people who use drugs, develop appropriate 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;
- 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;
 - Implement key health and harm reduction measures in all prisons in Canada, including prison-based needle and syringe programs and opioid substitution therapy, train all prisoners on naloxone administration, and ensure all prisoners have direct access to naloxone kits (including nasal naloxone sprays) in their cells, 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; and
 - Expand care, treatment and support services in prison for women living with and vulnerable to HIV and HCV, including peer health programs, and ensure such support is developed and implemented to meet the specific needs of women in each institution and made consistently accessible across the country.

¹ The Correctional Investigator of Canada, *Annual Report 2013–2014 of the Office of the Correctional Investigator* (2014). Available at www.oci-bec.gc.ca/cnt/rpt/pdf/annrpt/annrpt20132014-eng.pdf.

² Ibid.

³ *Controlled Drugs and Substances Act*, SC 1996, c. 19.

⁴ K. DeBeck et al., "Incarceration and drug use patterns among a cohort of injection drug users," *Addiction* 104,1 (2009): pp. 69–76.

⁵ The Correctional Investigator of Canada, *Annual Report 2014–2015 of the Office of the Correctional Investigator*, 2015.

⁶ Ibid.

⁷ Ibid.

⁸ British Columbia Office of the Provincial Health Officer, Health, Crime, and Doing Time: Potential Impacts of the Safe Streets and Communities Act on the Health and Well Being of Aboriginal People in BC (Vancouver: BC Office of the Provincial Health Officer, 2013).

⁹ N. Poole and C.A. Dell, *Girls, Women and Substance Use* (2005) at 10. Available at <http://www.ccsa.ca/Resource%20Library/ccsa-011142-2005.pdf>.

¹⁰ Ibid.

¹¹ United Nations, "Record 29 million people drug-dependent worldwide; heroin use up sharply – UN report" (23 June 2016). Available at <http://www.un.org/apps/news/story.asp?NewsID=54302>.

¹² United Nations Office on Drugs and Crime, *World Drug Report 2016* (2016) at xvii. Available at http://www.unodc.org/doc/wdr2016/WORLD_DRUG_REPORT_2016_web.pdf.

¹³ 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.

¹⁴ 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; 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; 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; Global Commission on HIV and the Law, *Risks, Rights and Health* (New York: UNDP, 2012).

¹⁵ Global Commission on Drug Policy, "Regulation: the responsible control of drugs" (2018). Available at <http://www.globalcommissionondrugs.org/reports/regulation-the-responsible-control-of-drugs/>.

¹⁶ Pivot Legal Society, "Why drug prohibition is the 'radical' policy, not legal regulation" (29 March 2018). Available at http://www.pivotlegal.org/drug_prohibition_is_the_radical_policy_not_legal_regulation. Canadian HIV/AIDS Legal Network, "Submission to the United Nations Human Rights Council Universal Periodic Review Working Group: Third Universal Periodic Review (UPR) of Canada" (5 October 2017). Available at <http://www.aidslaw.ca/site/submission-to-the-united-nations-human-rights-council-universal-periodic-review-working-group-third-universal-periodic-review-of-canada/?lang=en>.

¹⁷ Globe and Mail, "Liberal caucus proposes decriminalization of illegal drug use, simple possession" (29 January 2018). Available at https://www.theglobeandmail.com/news/politics/liberal-caucus-proposes-decriminalization-of-all-illegal-drugs/article37764543/?click=sf_globeftb. Toronto Star, "Jagmeet Singh sets sights on opioids, pushes Trudeau to decriminalize all drugs" (7 November 2017). Available at <https://www.thestar.com/news/canada/2017/11/07/jagmeet-singh-sets-sights-on-opioids-pushes-trudeau-to-legalize-all-drugs-to-tackle-crisis.html>.

¹⁸ Toronto Medical Officer of Health, "A Public Health Approach to Drug Policy" (28 June 2018). Available at <https://www.toronto.ca/legdocs/mmis/2018/hl/bgrd/backgroundfile-118060.pdf>. Vancouver Mayor's Office, "Vancouver sees alarming trend with steady increase in overdose deaths" (8 March 2018). Available at <https://mayorofvancouver.ca/news/vancouver-sees-alarming-trend-steady-increase-overdose-deaths>.

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- ¹⁹ *Safe Streets and Communities Act*, SC 2012, c 1. Schedule 1 substances include heroin, fentanyl, opium, codeine, cocaine, amphetamine and methamphetamine. Schedule 2 substances include cannabis and its various derivatives.
- ²⁰ Canadian HIV/AIDS Legal Network, *Mandatory Minimum Sentences for Drug Offences: Why Everyone Loses*, 2006; D. Bennett and S. Bernstein, *Throwing Away the Keys: The Human and Social Cost of Mandatory Minimum Sentences* (Vancouver: Pivot Legal Society, 2013).
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- ²² T. Gabor and N. Crutcher, *Mandatory minimum penalties: Their effects on crime, sentencing disparities, and justice system expenditures*, Justice Canada (Research and Statistics Division), January 2002.
- ²³ L. Maher and D. Dixon, "Policing and public health: Law enforcement and harm minimization in a street-level drug market," *British Journal of Criminology* 39,4 (1999): 488–412; E. Wood et al., "The impact of police presence on access to needle exchange programs," *Journal of Acquired Immune Deficiency Syndromes* 34,1 (2003): 116–118; R. N. Bluthenthal et al., "Collateral damage in the war on drugs: HIV risk behaviours among injection drug users," *International Journal of Drug Policy* 10 (1999): 25–38; Canadian HIV/AIDS Legal Network, *Do Not Cross: Policing and HIV Risk Faced by People Who Use Drugs*, 2007, and sources cited therein.
- ²⁴ Pivot Legal Society, *Throwing Away the Keys: The human and social cost of mandatory minimum sentences*, 2013.
- ²⁵ *R. v. Sharma*, 2018 ONSC 1141.
- ²⁶ *Ibid.*
- ²⁷ *Controlled Drugs and Substances Act*, SC 1996, c. 19, s. 5(3)(i)(d).
- ²⁸ See *R. v. Lloyd*, 2016 SCC 13 at para. 33: "Another foreseeable situation caught by the law is the following. A drug addict with a prior conviction for trafficking is convicted of a second offence. In both cases, he was only trafficking in order to support his own addiction."
- ²⁹ *Criminal Code*, s. 718.2(e).
- ³⁰ *R v. Gladue*, [1999] 1 SCR 688.
- ³¹ Canadian HIV/AIDS Legal Network, *Mandatory Minimum Sentences for Drug Offences: Why Everyone Loses* (2006); Darcie Bennett & Scott Bernstein, *Throwing Away the Keys: The Human and Social Cost of Mandatory Minimum Sentences* (Vancouver: Pivot Legal Society, 2013).
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- ³³ D. Zakaria et al., *Summary of emerging findings from the 2007 National Inmate Infectious Diseases and Risk-Behaviours Survey Research Report R-211*, Correctional Service of Canada, 2010 and F. Kouyoumdjian et al., "Health status of prisoners in Canada: Narrative review," *Canadian Family Physician* 62:3 (March 2016): 215-222.
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- ⁴² *Drug-Free Prisons Act*, S.C. 2015, c. 30.

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⁴⁴ A. DiCenso et al.

⁴⁵ UN Committee on the Elimination of Discrimination Against Women, *Concluding Observations: Canada*, November 2016, para. 45.

⁴⁶ UN Committee on the Elimination of Racial Discrimination, *Concluding observations on the combined twenty-first to twenty-third periodic reports of Canada*, CERD/C/CAN/CO/21-23, September 13, 2017, para. 16(d), 16(e).

⁴⁷ D. Puras, *UN Special Rapporteur on the right of everyone to the highest attainable standard of mental and physical health*, A/HRC/32/32 (April 4, 2016), para. 113.

⁴⁸ D. Puras, UN Special Rapporteur on the right of everyone to the highest attainable standard of mental and physical health. Open letter to UNODC Executive Director Yury Fedetov, in the context of the preparations for the UN General Assembly Special Session on the Drug Problem (UNGASS), dated December 7, 2015.

⁴⁹ Vienna Declaration. Available online: <http://www.viennadeclaration.com/the-declaration>.

⁵⁰ Rule 24 of the *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, UN Doc. A/RES/70/175, December 17, 2015.

⁵¹ UNODC, ILO, UNDP, WHO and UNAIDS, *Policy brief: HIV prevention, treatment and care in prisons and other closed settings: a comprehensive package of interventions*, 2013.

⁵² 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.