



Submission to the United Nations Working Group on Arbitrary Detention in relation to its study on arbitrary detention relating to drug policies

June 2020

Canadian HIV/AIDS Legal Network
1240 Bay Street, Suite 600
Toronto, Ontario
Canada M5R 2A7

Telephone: +1 416 595-1666
Fax: +1 416 595-0094

www.aidslaw.ca



I. Introduction

The Canadian HIV/AIDS Legal Network (HIV 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. Since the HIV Legal Network's inception, the organization has advocated for drug policies that respect, protect and fulfill the human rights of people who use drugs, including those who are in prison. We are grateful to the UN Working Group on Arbitrary Detention for the opportunity to make this submission, and respond below to questions relevant to Canada in the Working Group's questionnaire, to the extent that requested data is available in Canada.

II. Questionnaire issues

Does your State consider the acquisition, use or possession of drugs for personal use a minor offence within the meaning of this term as set out in the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (article 3, para. 4(c)? If so, what percentage of people arrested for the acquisition, use or possession for personal use of drugs are diverted out of the criminal justice system, and what alternative measures, if any, are such people subjected to?

Has your State decriminalized the acquisition, use or possession of drugs for personal use? If so, to what drugs does this apply and what are the amounts considered to be for personal use? What is the legislative or judicial basis for such decriminalization? If decriminalization has not taken place, what penalties apply to the acquisition, use or possession of illegal drugs for personal use?

Controlled Drugs and Substances Act offence and penalties

In Canada, "controlled substances" are governed by the federal *Controlled Drugs and Substances Act*, which applies across the country. Under section 4(1) of the *Controlled Drugs and Substances Act*, **unauthorized possession of a substance for personal use is a criminal offence that can result in jail time**. The penalty for contravening this provision depends on the substance and how it is "scheduled".ⁱ While numerous health and human rights organizations and people who use drugs have long called for the decriminalization of personal drug possession,ⁱⁱ the federal government of Canada (which has jurisdiction across the country over drug control) has so far resisted calls for law reform.

Unauthorized possession of a Schedule I substance (e.g. opium poppy, its preparations, derivatives, alkaloids and salts) for personal use can subject an individual to either (i) a fine not exceeding \$1000 CAD or a 6-month prison term, or both (for a first offence) or (ii) a maximum 7-year prison term.

Unauthorized possession of a Schedule II substance (e.g. synthetic cannabinoids) for personal use can subject an individual to either (i) a fine not exceeding \$1000 CAD or a 6-month prison term, or both (for a first offence) or (ii) a maximum 5-year prison term.

Unauthorized possession of a Schedule III substance (e.g. methylphenidate, its salts, derivatives, isomers and analogues and salts of derivatives, isomers and analogue) for personal use can subject an individual to either (i) a fine not exceeding \$1000 CAD or a 6-month prison term, or both (for a first offence) or (ii) a maximum 3-year prison term.

In 2018, there were 83,483 drug arrests in Canada, of which 55,082 (66%) were for personal possession.ⁱⁱⁱ That same year, there were 37,558 criminal charges for personal drug possession, of which 13,667 (36%) were found guilty.^{iv} Over the past five years, on average, **72% of all drug arrests have been for personal possession.**

While overall police-reported crime has decreased since 1998, police-reported drug offences have increased since 1998,^v related in part to increased efforts to crack down on perceived drug crime. **Troublingly, racialized communities are disproportionately charged, prosecuted and incarcerated in Canada under laws that criminalize people who use drugs,** depriving them of their rights to equal treatment in the justice system, to security of the person, and to health and social services. 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,”^{vi} with almost 20% of Black federal prisoners incarcerated for a drug-related offence.^{vii}

Despite meagre options for prison-based substance use treatment (described below), federal prisoners are subject to the *Drug-Free Prisons Act*, a law that has been described as a means to “combat drug use in penitentiaries and ensure that criminals are held accountable for their drug or alcohol abuse while in prison.”^{viii} The law empowers correctional authorities to cancel an individual’s parole if they test positive for illegal drugs or do not provide a urine sample, and stipulates that a condition of an individual’s release includes abstinence from the use of drugs or alcohol.^{ix}

Alternative measures

Certain offences that carry a sentence length of up to two years less a day (including personal drug possession) are eligible for a conditional sentence, allowing a custodial term to be served in the community rather than in prison.^x Persons receiving a conditional sentence are required to abide by mandatory conditions, and judges can further impose a wide range of conditions — including ordering a person into drug treatment. Failure to abide by conditions can result in a person serving the remainder of their sentence in prison.

Pre-trial diversion also allows the suspension of trial proceedings for an agreed period, during which an accused person can undertake some type of rehabilitative effort such as drug treatment, after which the Crown prosecutor can request to have the charges withdrawn. While pre-trial diversion enables a person to avoid the consequences of a criminal conviction, the eligibility criteria established by most pre-trial diversion programs limit the pool of possible participants. Many of the offences for which a person may be selected for diversion are likely to lead to minimal or no jail time; as a result, many of those eligible opt not to enter a diversion program, which is likely to be more intrusive in nature or demand a significantly lengthier time commitment than the alternative of serving a possible sentence.^{xi} Moreover, research in Canada supporting the efficacy of court-mandated treatment is mixed.

Please provide information concerning the number of people held in pre-trial detention as well as the number of those who are imprisoned pursuant to a conviction for drug-related offences. Please indicate what percentage of the total pre-trial detention population are being held for drug-related offences.

Please identify the percentage of the total prison population who have been convicted and imprisoned for drug-related offences. For those convicted of drug-related offences, what

percentage of this group have been imprisoned for acquisition, use or possession of drugs for personal use? How many people convicted of drug use belong to disadvantaged groups (e.g. women, pregnant women, children and youth, indigenous people, sex workers, lesbian, gay, bisexual, transgender (LGBT) persons, homeless people, people with HIV/AIDS, persons with disabilities, ethnic minorities, migrant communities)?

Disproportionate impact of punitive drug policy on Black and Indigenous communities

A legacy of racist law enforcement and criminal law practices has meant that Indigenous and Black people are staggeringly over-represented in prisons in Canada. While accounting for 5% of the population in Canada, Indigenous people represent 23.1% of the federal prison population, and Indigenous women account for 41.4% of all federally incarcerated women.^{xii} These figures are even more grossly disproportionate in some jurisdictions: in the province of Saskatchewan, for example, Indigenous people account for 65% of federal prisoners and 75% of provincial prisoners.^{xiii} Similarly, while accounting for only 3.5% of Canada's total population,^{xiv} Black people represent 8.6% of the federal prison population.^{xv} Since 2010, the number of Indigenous people in prison has increased by 43.4%, whereas the non-Indigenous prison population has declined by 13.7% over the same period.^{xvi}

There is no recent, publicly accessible data regarding the number of people held in pre-trial detention or who have been convicted and imprisoned for personal drug possession. Research shows that a custodial sentence is imposed in about one-third (32%) of all completed drug-related cases in adult criminal court with a finding of guilt; cases involving personal possession have typically involved shorter sentences of custody, with about three-quarters for a period of one month or less.^{xvii} Data from 2013 also indicates that almost half (46%) of drug *supply* convictions included custody as part of the sentence, a proportion nearly double that of possession-related offences (25%).^{xviii}

In 2015-2016, 4,200 (or 18.2%) of prisoners in federal detention (i.e. serving a sentence of 2+ years) were serving a sentence for a "serious drug offence" (i.e. trafficking, importing and exporting, or cultivation). Significantly, 29.7% of women were serving a sentence for a serious drug offence compared to 16.9% of men.^{xix} In 2016-2017, 4,097 (or 17.6%) of prisoners in federal detention were serving a sentence for a serious drug offence. As with the preceding year, a far higher proportion of women (30.2%) compared to men (17.5%) were serving a sentence for a serious drug offence.^{xx}

As noted above, almost 20% of Black federal prisoners are incarcerated for a drug-related offence.^{xxi} In particular, Black women are more likely than white women to be in prison for that reason.^{xxii} As the Correctional Investigator of Canada (Canada's ombudsperson for federal prisons) noted in 2017, 54% of Black women in federal prisons were serving sentences for drug-related offences,^{xxiii} many of whom were carrying drugs across borders as a way to alleviate their situations of poverty, including some who reported being forced into these activities with threats of violence to their children and/or families.^{xxiv}

In recent decades, there has also been a substantial increase in the proportion of women in Canada serving a federal sentence for a drug offence. Whereas only 16% of federally incarcerated women were serving sentences for drug offences in 1981, this proportion increased to about 28% (a 175% increase) by 2007.^{xxv} In 2016-2017, 30.2% of federally incarcerated women were serving a sentence for a serious drug offence.^{xxvi} According to the Correctional Investigator of Canada, federally sentenced women are twice as likely to be

...serving a sentence for drug-related offences as their male counterparts, while Indigenous and Black women are more likely than white women to be in prison for that reason.^{xxvii}

Does your State provide drug treatment to people in custodial or pre-trial detention, or who have been imprisoned following a conviction? Do these drug treatment services include harm reduction services? Please describe what types of drug treatment and harm reduction services are available to detainees and imprisoned people. Please also indicate if such services are available to those in administrative detention such as undocumented migrants or those subject to a deportation order. If no such services are available, does this result in forced confessions or people not being able to participate in their defence?

Failure to provide equivalent access to health care in prison

Significant numbers of prisoners use drugs. In a national survey conducted by the federal correctional service (Correctional Service Canada), 34% of men and 25% of women reported using non-injection drugs during the past six months in prison, while 17% of men and 14% of women reported injecting drugs.^{xxviii} Other studies have revealed high rates of syringe-sharing among people who use drugs in Canada's prisons, due to the lack of sterile injection equipment behind bars.^{xxix} Not surprisingly, research shows that the incarceration of people who inject drugs is a factor driving Canada's HIV and HCV epidemic.^{xxx}

Already, rates of HIV and HCV in prison are considerably higher than they are in the community as a whole. A 2016 study indicated that about 30% of people 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.^{xxxi} Indigenous prisoners, in particular, have much higher rates of HIV and HCV than non-Indigenous prisoners. For example, Indigenous women in federal prisons are reported to have rates of HIV and HCV of 11.7% and 49.1%, respectively.^{xxxii} At the same time, overdose deaths have been increasing in prison. In federal prisons, Indigenous prisoners have in recent years accounted for 36% of all overdose incidents.^{xxxiii}

Despite this, Canada does not provide prisoners, who are disproportionately Indigenous and Black, with equivalent access to drug treatment services, including key harm reduction measures, violating their rights to health and social services, security of the person, equality and non-discrimination. As the UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules) recommend, prisoners must enjoy the same standards of health care that are available in the community,^{xxxiv} including key interventions recommended by the UN Office on Drugs and Crime, UNAIDS and the World Health Organization and numerous other UN entities such as needle and syringe programs and drug-dependence treatment including opioid agonist therapy (OAT).^{xxxv} In addition, incarcerated women should have access to gender-specific health care that is at least equivalent to that available in the community,^{xxxvi} including prison-based needle and syringe programs and OAT.^{xxxvii}

In spite of the overwhelming evidence of the health benefits of OAT and World Health Organization guidelines that state OAT should be available to people in prison and be equivalent to community treatment options,^{xxxviii} federal and provincial prisoners in Canada continue to experience barriers to OAT, including long waiting lists and inappropriate medication terminations.^{xxxix} As Canada's ombudsperson for federal prisons has noted, Correctional Service Canada has failed to provide adequate drug treatment, programs and staff at a time when Canada is experiencing an unprecedented overdose crisis.^{xl} Moreover, a number of provincial and territorial prisons still do not offer OAT to prisoners or impose

severe restrictions on access,^{xli} resulting in acute withdrawal among prisoners and an increased risk of use, relapse and overdose.^{xlii}

Similarly, access to sterile injection equipment in prison is extraordinarily limited. While acknowledging the health benefits of needle and syringe programs in prison with the introduction by Correctional Service Canada of a “Prison Needle Exchange Program” (PNEP) in some federal prisons beginning in June 2018, details of the PNEP reveal serious deficiencies that are not in keeping with public health principles or professionally accepted standards for such programs. Most fundamentally, the PNEP violates prisoners’ confidentiality at many points without reasonable justification, and participation is contingent on the approval of both prison health staff and security staff.^{xliii} As the Correctional Investigator of Canada has observed, “Too much of what should be an exclusively health and harm reduction program has been shaped by security concerns,” leading merely a handful of individuals to enrol in the program.^{xliiv} To date, only 11 out of 43 federal prisons have a PNEP and no provincial or territorial prison system in Canada offers this program. The Correctional Investigator consequently recommended that Correctional Service Canada “revisit” the program and participation criteria with the aim of “building confidence and trust, and look to international examples in how to modify the program to enhance participation and effectiveness.”^{xliv}

What types of circumstances have led to unlawful and arbitrary arrest of people in your State for drug-related offences? What structures/institutions are in place so that people who are arrested for a drug-related offence can make a complaint about unlawful and arbitrary arrest and detention, or the threat thereof?

Disproportionate targeting of Black people for drug offences

As noted above, Black people are disproportionately charged, prosecuted and incarcerated in Canada under laws that criminalize people who use drugs, and Black people and particularly Black women are overrepresented in federal prisons for drug offences. Data from the Toronto police collected from 2003 to 2013 indicate Black people with no history of criminal convictions were three times more likely to be arrested for possession of small amounts of marijuana than White people with similar backgrounds.^{xlvi} In an earlier study of racism in the province of Ontario, report authors noted that intensive policing of low-income areas where Black people live produced arrests of a large and disproportionate number of Black people accused of drug trafficking, and intensive policing of airline travellers produced arrests of a disproportionate number of Black female couriers. The study also found pre-trial admission rate for Black people for drug trafficking or importing charges was 27 times higher than for white defendants; for personal drug possession charges, the pre-trial admission rate for Black people was 15 times higher. Police decisions to detain Black accused at a higher rate than white accused meant that bail courts saw a significantly higher proportion of Black accused, resulting in larger proportions of Black accused being jailed before trial.^{xlvii}

Unnecessary police attendance at overdose emergencies

In May 2017, the *Good Samaritan Drug Overdose Act* was passed, amending the *Controlled Drugs and Substances Act* to give immunity from prosecution for the offence of simple possession of a controlled substance to anyone who calls emergency services to report an overdose, as well as to anyone who is on the scene when emergency services arrive. While a witness is present at most overdose emergencies, research in Canada has shown a primary barrier to calling emergency services is fear of police presence and the potential for criminal charges.^{xlviii}

Despite the passage of this law, people who use drugs in Canada report ongoing police attendance at overdose events when their presence has not been sought. In the context of a medical emergency, police often interrogate and harass people who remain at the scene and in some cases, pursue criminal charges against them, including for drug-related offences. These problematic experiences with police are exacerbated by racism, classism and gender discrimination.^{xlix} A study of people who use drugs noted that police involvement at overdose scenes is problematic and an ongoing barrier to calling emergency services for witnesses; the overwhelming view is that police presence is unwelcome and unnecessary in almost all instances.^l

Do drug courts which seek to use treatment as an alternative to imprisonment exist in your State? Please describe their operations, including applicable procedural guarantees for the accused. Does the accused have to plead guilty to the drug-related offence prior to being diverted into treatment? Are only accused persons who are drug dependent on opioids diverted for treatment, or are people who use other drugs that do not cause drug dependence diverted? Can treatment exist for a period that is longer than the period of imprisonment provided for in the offence for which the accused has been charged? Does the accused still have to serve a period of imprisonment if the treatment is not successful? What constitutes successful treatment and does the person in treatment have the right to a hearing before an independent authority and to be represented by legal counsel and present expert medical testimony on the evolution of his or her treatment?

Human rights concerns regarding Drug Treatment Courts

Drug treatment courts (DTCs) were introduced in Canada in 1998 as a potential alternative to incarceration for adults charged under the *Controlled Drugs and Substances Act* or the *Criminal Code* in cases where their drug dependence was a factor.^{li} The specialized courts provide supervised drug treatment outside the prison system and usually consist of a judge, prosecutor, defence lawyer, probation officer, court staff, police, and treatment staff.

A number of human rights concerns permeate DTCs in Canada. To qualify, an individual is first screened by a prosecutor and then assessed by treatment personnel. While participation is ostensibly voluntary, an individual must enter a guilty plea to be admitted into the program (thus contending with a lifelong criminal record), after which a judge ultimately decides whether to admit the applicant into the program. In most cases, people are incarcerated when encouraged to apply to the DTC program; if they are accepted into the program, they are released from jail and gain access more quickly than other people to a limited pool of treatment spots. Given the difficulty of obtaining drug treatment and social services without participating in the DTC system, the “choice” to enter drug treatment is marked by a considerable degree of coercion by the state.^{lii}

For the duration of the program (approximately one year), a participant is subject to frequent, random urine screening (at least weekly) and is compelled to submit to a rigorous treatment regime and to appear personally in court on a regular basis for highly intrusive judicial supervision. A judge reviews their progress and can impose sanctions, including jail time for drug use, breach of curfew, or missed treatment sessions, urine tests or court appearances. In some courts, participants who repeatedly relapse may be eventually punished with expulsion. To graduate from the program, participants must meet criteria, including being abstinent for a certain period of time, complying with all conditions of the program, and showing evidence of “life skills improvement”, such as finding stable housing or employment.

Participants who successfully graduate from the program may receive a non-custodial sentence, which may include a period of probation, restitution and/or fines. Those who are expelled from or do not complete the program (and have already pled guilty to enter the DTC program) face the traditional criminal sentencing process.

Operating on an abstinence model leaves little room for reduced or moderated drug use as an acceptable measurement of progress. This approach dismisses the underlying premise that for many people, drug dependence often stems from the unaddressed social determinants of health resulting in chronic relapses. Moreover, the most powerful tool DTCs have to coerce people into ending substance use and completing treatment is the threat of incarceration. In a punitive model, people who cannot achieve permanent abstinence are deemed failures deserving of punishment. In the case of DTCs, their defining feature is treatment that could be best characterized as quasi-compulsory.^{liii}

Within the DTC system, the adversarial process is also generally suspended. Lawyers representing participants are considered a member of the “DTC team,” which may alter their perspective of the best interest of the participant. In this new role, many defence lawyers may prioritize the drug- and crime-free objective of DTC, thereby accepting certain penalties and bail conditions as necessary in the treatment process and potentially failing to protect DTC participants from punitive penalties. In this way, participants are stripped of their rights to have a legal defence advancing their interest to be free of punishment, which violates their rights to due process.^{liv}

At the same time, DTC treatment counsellors are given powers of enforcement and judgment. Treatment counsellors can recommend that participants be sanctioned if they do not follow the treatment suggestions they are given, blurring their roles and responsibilities. Participants are also required to sign release of confidentiality forms upon entry into the DTC, resulting in each participant’s treatments being discussed with the DTC team and in open court, raising concerns about the right to confidentiality between participants and therapists. As a consequence of facilitating the rapport between judges and participants, the confidential nature that typically underlies the therapeutic relationship between treatment counsellors and clients can be compromised by the DTC process, inhibiting participants from disclosing personal information to their treatment providers and/or having personal information potentially shared with the DTC team, in open court and/or with other clients and staff. To require the disclosure of personal information in return for their continued freedom from incarceration not only constitutes an affront to DTC participants’ dignity, it also undermines their right to privacy.^{lv}

Studies by the federal Department of Justice have shown that DTCs present serious problems with accessibility, including the inability of such courts to engage women, Indigenous people, sex workers, racialized people, and youth, as well as difficulties in retaining them once they have entered.^{lvi} Evaluations of DTCs have shown that, compared to men, women participants experience greater degrees of poverty and mental illness and are more likely to have children and family responsibilities, which impede their ability to complete the program; in particular, lack of appropriate housing is a major factor in women’s attrition.^{lvii} More broadly, the coercive characteristics of the DTC system result in encroachment on the substance use treatment sphere and can contort the judicial protections of defendants to the point of undermining health needs and infringing on human rights.

Are juveniles (those under the age of 18) subject to arrest, detention and imprisonment for drug-related crimes? For crimes relating to the acquisition, use or possession for personal use of

drugs? If so, are they detained or imprisoned in facilities for children in conflict with the law who are under 18, or are they detained or imprisoned in facilities for adults? Can such juveniles be subjected to compulsory drug treatment or treatment with the consent of their families/legal guardians?

Youth who use drugs

When youth aged 12 to 17 are charged with crimes (including *Controlled Drugs and Substances Act* offences such as personal drug possession), the *Youth Criminal Justice Act* applies to them.^{lviii} This law mandates courts to consider all reasonable alternatives to custody in sentencing and outlines sentencing options for youth, including warnings, community service, discharges, probation, fines, custody and supervision orders. In Canada, the provinces and territories are responsible for administering correctional services for youth.

In 2017, there were 19,466 police-reported charges or diversions from the formal criminal legal system (through the use of warnings, cautions or referrals to community programs) of youth for personal drug possession, and 1,192 for drug trafficking, production, import or export offences.^{lix} In 2016-2017, drug offences including personal possession and trafficking accounted for 6.3% of all youth court cases, and 1,122 youth were in court for personal drug possession.^{lx} In 2018, there were 13,637 police-reported charges or diversions of youth for personal drug possession, and 1,009 for drug trafficking, production, import or export offences.^{lxi}

While there is no publicly accessible data regarding the number of youth in detention for a drug offence, Indigenous youth are generally overrepresented in youth custody. In 2017-2018, Indigenous youth made up 43% of admissions to correctional services, while representing about 8% of the youth population in Canada.^{lxii}

Are there any new or emerging trends in drug-related detention and drug policies that could be addressed by this study?

Prisoners' need for direct access to naloxone

Canada is in the grip of an unprecedented overdose crisis, which has not spared people in prison. In 2016, evidence supporting widespread access to naloxone as a means of reducing the toll of the opioid crisis led Health Canada to reclassify its status and make it available without a prescription, facilitating free, unrestricted access to naloxone through first line responders, health centres and pharmacies.^{lxiii} However, prisoners do not receive the same standard of care. In most cases, naloxone continues to be only accessible to prison health care staff; an increasing number of prison authorities also make naloxone accessible to correctional staff. However, no prison in Canada permits prisoners to have naloxone kits in their cells or in common areas, where they could use them in the event their cellmates or other prisoners suffer an opioid overdose. A limited number of prisoners (i.e., those who are already taking opioid agonist therapy or are known to correctional authorities to have a history of opioid use or overdosing) are given take-home naloxone kits only when they are released back into the community.^{lxiv}

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."^{lxv} Correctional 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.

Training all prisoners on naloxone administration and ensuring all prisoners have direct access to naloxone kits (including nasal naloxone sprays) in their cells will save lives.

Decriminalizing personal drug possession

A growing body of evidence confirms that criminalizing personal drug possession does not protect public health or public safety and has been ineffective in reducing the use and availability of illicit drugs.^{lxvi} Prohibition drives rampant stigma against people who use drugs and puts them at increased risk of harm, including by impeding their access to much-needed services and emergency care in the event of an overdose. As the Canadian Centre on Substance Use and Addiction concluded in a 2018 report, research supports decriminalization as an effective approach to mitigate harms associated with substance use, particularly those associated with criminal prosecution for simple possession.^{lxvii}

The need to decriminalize is all the more urgent in the face of the COVID-19 pandemic, which has further exposed stark health inequities and the many structural factors that increase people's vulnerability to the virus. People who use drugs are more likely to have chronic health issues that will increase their risk of experiencing severe complications should they contract COVID-19. At the same time, continued police enforcement of drug possession laws and the attendant fear of arrest pushes people who use drugs to do so in isolation and compromises their ability to take critical safety precautions. Heightened law enforcement surveillance in the context of the pandemic further hampers their access to vital health services and ability to use drugs safely, while also increasing their risk of arrest and detention. Not surprisingly, many Canadian cities are seeing reports of increasing overdose deaths since the onset of the COVID-19 pandemic.^{lxviii}

As the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health recently stated, "in the current COVID-19 context, people who use drugs face unique needs and risks, due to criminalisation, stigma, discrimination, underlying health issues, social marginalisation and higher economic and social vulnerabilities"; therefore, **to "prevent unnecessary intake of prisoners and unsafe drug consumption practices, moratoria should be considered on enforcement of laws criminalising drug use and possession."**^{lxix}

Not only would decriminalizing personal drug possession protect the health of people who use drugs, preserve police resources, and reduce unnecessary contact and police interactions, it would also mean fewer people in detention. **This would decrease the risk of transmission of the COVID-19 virus in prisons, where a growing number of cases and outbreaks among prisoners and prison staff have already been reported.**^{lxx} Already, the Public Prosecution Service of Canada, which is responsible for prosecuting drug offences under the *Controlled Drugs and Substances Act*, has issued guidance to prosecutors to reduce "to the extent possible, in a principled manner," the "detention population during the pandemic period."^{lxxi} Similarly, the UN High Commissioner for Human Rights has recommended that "[i]mprisonment should be a measure of last resort, particularly during the crisis."^{lxxii} Some courts have followed suit, recognizing that incarceration is inherently at odds with current public health directions to self-isolate during the COVID-19 pandemic, and favouring release on the balance.^{lxxiii}

In Canada, there is strong support for the decriminalization of drug possession for personal use from organizations of people who use drugs and other community organizations, harm reduction and human rights advocates as well as public health associations and authorities

including the Canadian Public Health Association,^{lxxiv} Canadian Mental Health Association,^{lxxv} Canadian Nurses Association,^{lxxvi} and municipal and provincial health authorities.^{lxxvii} Globally, decriminalizing simple drug possession has been recommended by numerous health and human rights bodies as a measure that both protects health and upholds human rights, including the World Health Organization, UNAIDS, UN Special Rapporteurs on the right to health,^{lxxviii} the UN Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment,^{lxxix} and the UN Chief Executives Board for Coordination — which has adopted a call for decriminalization of simple possession as the common position of the UN system.^{lxxx} The *International Guidelines on Human Rights and Drug Policy* also call on States to “decriminalise the possession, purchase, or cultivation of controlled substances for personal consumption.”^{lxxxi} And the Global Commission on Drug Policy has highlighted the tremendous damage caused by the criminalization of people who use drugs and called for the removal of all punitive responses to drug possession and use.^{lxxxii}

III. Recommendations

Repressive drug policy, and particularly the criminalization of people who use drugs, has resulted in profound harms, including towards people in detention. This has had a particularly disproportionate impact on Black and Indigenous communities in Canada. To address these harms and human rights violations of people who use drugs, the HIV Legal Network urges the UN Working Group on Arbitrary Detention to make the following recommendations to Member States:

- Ensure access to appropriate health and social support services (including evidence-based harm reduction services), and scale up access to evidence-based, *voluntary* drug treatment (including culturally appropriate and gender-specific treatment), for people who use drugs in need of such supports;
- Establish protocols for police so they do not attend overdose calls unless there is a specific need for their presence, and in those circumstances in which their presence is requested, ensure police uphold the *Good Samaritan Drug Overdose Act*;
- Repeal all mandatory minimum prison sentences for drug offences and expand evidence-based alternatives to incarceration for people who use drugs, taking into account the need for culturally appropriate care, including for women, gender-diverse people, Indigenous people, racialized people and youth;
- 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;
- Ensure and support the full involvement of civil society organizations, including organizations and networks of people who use drugs and Black and Indigenous communities in the elaboration, implementation and evaluation of drug policy and services for people who use drugs;
- Implement key health and harm reduction measures in all prisons in Canada, including prison-based needle and syringe programs, opioid agonist therapy and naloxone, in consultation with prisoner groups and community health organizations to ensure accessibility and operational success, taking into account the need for culturally appropriate and gender-specific programs.

-
- ⁱ *Controlled Drugs and Substances Act*, S.C. 1996, c. 19.
- ⁱⁱ See, for example, Canadian HIV/AIDS Legal Network, Canadian Drug Policy Coalition and Pivot Legal Society, *Open letter to Health Minister to decriminalize simple drug possession*, May 2020.
- ⁱⁱⁱ Statistics Canada, *Police-reported crime statistics, 2018: Police-reported crime for selected drug offences, Canada, 2018*, July 2019.
- ^{iv} Statistics Canada, *Adult criminal courts, number of cases and charges by type of decision*, June 2020.
- ^v Public Safety Canada, *Corrections and Conditional Release Statistical Overview 2018*, August 2019.
- ^{vi} Commission on Systemic Racism in the Ontario Criminal Justice System, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*, 1995.
- ^{vii} Office of the Correctional Investigator, *A Case Study of Diversity in Corrections: The Black Inmate Experience in Federal Penitentiaries Final Report*, 2013.
- ^{viii} Government of Canada, "Harper government highlights Royal Assent of the Drug-Free Prisons Act," news release, Ottawa, June 18, 2015.
- ^{ix} *Drug-Free Prisons Act*, S.C. 2015, c. 30.
- ^x *Criminal Code*, s. 742.1.
- ^{xi} Canadian HIV/AIDS Legal Network, *Impaired Judgment: Assessing the Appropriateness of Drug Treatment Courts as a Response to Drug Use in Canada*, 2011.
- ^{xii} Office of the Correctional Investigator, *Office of the Correctional Investigator Annual Report 2018-2019*, 2019.
- ^{xiii} M. Djuric, "Indigenous incarceration rates in Saskatchewan 65% federally, 75% provincially," *Global News*, February 5, 2020.
- ^{xiv} Statistics Canada, *Diversity of the Black population in Canada: An overview*, February 2019.
- ^{xv} Office of the Correctional Investigator, *Annual Report of the Office of the Correctional Investigator 2016-2017*, 2017.
- ^{xvi} *Office of the Correctional Investigator Annual Report 2018-2019*, supra.
- ^{xvii} A. Cotter, J. Greenland & M. Karam, *Drug-related offences in Canada, 2013*, Statistics Canada, 2015.
- ^{xviii} *Ibid.*
- ^{xix} Public Safety Canada, *Corrections and Conditional Release Statistical Overview 2017*, July 2018.
- ^{xx} *Corrections and Conditional Release Statistical Overview 2018*, supra.
- ^{xxi} *A Case Study of Diversity in Corrections*, supra.
- ^{xxii} Office of the Correctional Investigator of Canada, *Annual Report 2014–2015 of the Office of the Correctional Investigator*, 2015.
- ^{xxiii} *Annual report of the Office of the Correctional Investigator 2016-2017*, supra.
- ^{xxiv} Office of the Correctional Investigator of Canada, *Annual report of the Office of the Correctional Investigator, 2012-2013*, 2013.
- ^{xxv} R. Gobeil, *Profile of Federally Sentenced Women Drug Offenders*, Correctional Service of Canada, May 2009.
- ^{xxvi} *Corrections and Conditional Release Statistical Overview*, supra.
- ^{xxvii} *Annual Report of the Office of the Correctional Investigator 2014-2015*, supra.
- ^{xxviii} D. Zakaria et al., *Summary of emerging findings from the 2007 National Inmate Infectious Diseases and Risk-Behaviours Survey*, Correctional Service of Canada, 2010.
- ^{xxix} E. van der Meulen, "'It Goes on Everywhere': Injection Drug Use in Canadian Federal Prisons," *Substance Use & Misuse* 52, 7 (2017): pp. 884–891; D. Zakaria et al.; C. Hankins, "Confronting HIV infection in prisons," *Canadian Medical Association Journal* 151,6 (1994): pp. 743–745; C.A. Hankins et al., "HIV infection among women in prison: an assessment of risk factors using a non-nominal methodology," *American Journal of Public Health* 84,10 (1994): pp. 1637–1640.
- ^{xxx} M.W. Tyndall et al., "Intensive injection cocaine use as the primary risk factor in the Vancouver HIV–1 epidemic," *AIDS* 17,6 (2003): pp. 887–893; H. Hagan, "The relevance of attributable risk measures to HIV prevention planning," *AIDS* 17,6 (2003): pp. 911–913.
- ^{xxxi} F. Kouyoumdjian et al., "Health status of prisoners in Canada," *Canadian Family Physician* 62 (2016): pp. 215–222.
- ^{xxxii} D. Zakaria et al.
- ^{xxxiii} Correctional Service of Canada, *Overdose Incidents in Federal Custody, 2012/2013 - 2016/2017*, November 2018.
- ^{xxxiv} Rule 24 of the *United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules)*, UN Doc. A/RES/70/175, December 17, 2015.
- ^{xxxv} 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; Office of the High Commissioner for Human Rights (OHCHR) and UNAIDS, *International Guidelines on HIV/AIDS and Human Rights*,

Consolidated Version, U.N. Doc. HR/PUB/06/9, 2006, Guideline 4, para. 21(e); UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, Manfred Nowak, UN Doc. A/HRC/10/44, January 14, 2009, para. 74; UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, Juan E. Méndez, UN Doc. A/HRC/22/53, February 1, 2013;

^{xxxvi} 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 and UN Committee on the Elimination of Discrimination Against Women, *Concluding Observations: Canada*, November 2016, para. 49.

^{xxxvii} UN Committee on the Elimination of Discrimination Against Women, *Concluding Observations: Canada*, November 2016, para. 49.

^{xxxviii} World Health Organization, *Guidelines for the Psychosocially Assisted Pharmacological Treatment of Opioid Dependence*, 2009.

^{xxxix} F. Kouyoumdjian et al., “Physician prescribing of opioid agonist treatments in provincial correctional facilities in Ontario, Canada: A survey,” *PLoS One* 2018; 13(2): e0192431 and West Coast Prison Justice Society, “Representative human rights complaint against Correctional Service Canada (CSC) on behalf of federal prisoners with opioid use disorder,” June 4, 2018.

^{xl} C. Bains, “Prisons fail to provide adequate addiction treatment: ombudsman,” *Canadian Press*, March 20, 2019.

^{xli} Canadian HIV/AIDS Legal Network and PASAN, *Hard Time: HIV and Hepatitis C Prevention Programming for Prisoners in Canada*, 2007.

^{xlii} C. Bodkin, M. Bonn and S. Wildman, “Fuelling a crisis: Lack of treatment for opioid use in Canada’s prisons and jails,” *The Conversation*, March 4, 2020.

^{xliii} Canadian HIV/AIDS Legal Network, *The Correctional Service of Canada’s Prison Needle Exchange Program: Policy Brief*, 2019.

^{xliv} *Annual report of the Office of the Correctional Investigator, 2018-2019*, supra.

^{xlv} *Ibid.*

^{xlvi} J. Rankin & S. Contenta, “Toronto marijuana arrests reveal ‘startling’ racial divide,” *Toronto Star*, July 6, 2017.

^{xlvii} *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*, supra.

^{xlviii} K.M. Follet et al, “Barriers to Calling 911 During Overdose Emergencies in a Canadian Context,” *Critical Social Work* 2014; 15:1.

^{xlix} Canadian HIV/AIDS Legal Network, *The Good Samaritan Drug Overdose Act: The Good, The Bad, and The Ineffective*, June 2020.

^l *Ibid.*

^{li} Department of Justice Canada, *Drug treatment funding program evaluation, final report*, April 2015.

^{lii} Canadian HIV/AIDS Legal Network, *Impaired Judgment: Assessing the Appropriateness of Drug Treatment Courts as a Response to Drug Use in Canada*, 2011.

^{liii} *Ibid.*

^{liiv} *Ibid.*

^{liv} *Ibid.*

^{lvi} *Ibid* and Department of Justice Canada, *Drug Treatment Court Funding Program Summative Evaluation Final Report*, Evaluation Division Office of Strategic Planning and Performance Management, March 2009.

^{lvii} *Ibid.*

^{lviii} *Youth Criminal Justice Act S.C. 2002, c. 1.*

^{lix} Statistics Canada, *Police-reported youth crime for selected drug offences, Canada, 2017 and 2018*, 2018.

^{lx} *Corrections and Conditional Release Statistical Overview 2018*, supra.

^{lxi} *Police-reported youth crime for selected drug offences, Canada, 2017 and 2018*, supra.

^{lxii} Statistics Canada, *Adult and youth correctional statistics in Canada, 2017/2018*, 2018.

^{lxiii} Health Canada Prescription Drug Status Committee, *Notice: Prescription Drug List (PDL): Naloxone*, 2016.

^{lxiv} S. Taylor, “Correctional Service Canada expands take-home naloxone kit program for inmates,” *CBC*, July 13, 2017.

^{lxv} Government of Canada, *Frequently Asked Questions: Access to naloxone in Canada (including NARCAN™ Nasal Spray)*, June 30, 2017.

^{lxvi} E. Wood et al., “The war on drugs: a devastating public-policy disaster,” *The Lancet* 373:9668 (2009) pp. 989-990.

^{lxvii} Canadian Centre on Substance Use and Addiction, *Decriminalization: Options and Evidence*, 2018.

^{lxviii} J. Azpiri, “Vancouver sees spike in overdose deaths amid COVID-19 crisis,” *Global News*, April 1, 2020.

^{lxix} UN Office of the High Commissioner, *Statement by the UN expert on the right to health* on the protection of people who use drugs during the COVID-19 pandemic*, April 16, 2020.

^{lxx} See, for example, Office of the Correctional Investigator, *COVID-19 Status Update*, April 23, 2020; T. Lovgreen, “All inmates and staff at Mission Institution being tested for COVID-19,” *CBC News*, April 22, 2020; and L. Casey, “COVID-19 outbreak leads to Ontario jail being closed after 60 inmates, eight staff test positive,” *National Post*, April 20, 2020.

^{lxxi} Public Prosecution Service of Canada, *Memorandum - COVID 19: Bail and Resolution Principles*, April 8, 2020.

^{lxxii} UNHCR, Office of the High Commissioner, “Urgent action needed to prevent COVID-19 ‘rampaging through places of detention’ – Bachelet,” March 25, 2020.

^{lxxiii} *R v. Kandhai*, 2020 ONSC 1611 at para. 7; *R v. JS*, 2020 ONSC 1710 at paras. 19-20.

^{lxxiv} Canadian Public Health Association, *Decriminalization of personal use of psychoactive substances*, position statement, October 2017.

^{lxxv} Canadian Mental Health Association, *Care not Corrections: Relieving the Opioid Crisis in Canada*, April 2018.

^{lxxvi} Canadian HIV/AIDS Legal Network, “Canada must adopt a human rights based approach to drug policy,” Statement, November 22, 2018.

^{lxxvii} N. Thompson, “Toronto board of health to urge federal government to decriminalize drug use,” *The Globe and Mail*, July 16, 2018. E. Mathieu, “Chief medical officer calls for decriminalization of all drugs for personal use,” *The Toronto Star*, July 9, 2018; Santé Montréal, “La directrice régionale de santé publique de Montréal salue les recommandations de Toronto” news release, July 27, 2018; Winnipeg Regional Health Authority, *Position statement on harm reduction*, December 2016; British Columbia Office of the Provincial Health Officer, *Stopping the Harm: Decriminalization of People who use Drugs in BC*, April 2019.

^{lxxviii} See, for example, Anand Grover, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, UN General Assembly, 65th Session, UN Doc A/65/255, August 6, 2010; Anand Grover, *Submission to the Committee against Torture regarding drug control laws*, October 19, 2012; Anand Grover, *Open letter by the Special Rapporteur on the right of everyone to the highest attainable standard of mental and physical health, Dainius Pūras, in the context of the preparations for the UN General Assembly Special Session on the Drug Problem (UNGASS)*, to UNODC Executive Director Yury Fedotov, December, 7 2015.

^{lxxix} Juan E. Méndez, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN General Assembly, 22nd Session, UN Doc A/HRC/22/53, February 1, 2013.

^{lxxx} United Nations Chief Executives Board, *Summary of Deliberations: Segment 2: common United Nations system position on drug policy*, UN System, 2nd regular session of 2018, UN Doc CEB/2018/2, January 18, 2019; United Nations Chief Executives Board, *United Nations system common position supporting the implementation of the international drug control policy through effective inter-agency collaboration*, UNCEB, 2nd Session, Annex 1, UN Doc CEB/2018/2, January 18, 2019.

^{lxxxi} International Centre on Human Rights and Drug Policy, UNAIDS, UNDP, WHO, *International Guidelines on Human Rights and Drug Policy*, March 2019.

^{lxxxii} Global Commission on Drug Policy, *Advancing Drug Policy Reform: A New Approach to Decriminalization*, November 2016.