



Human rights violations against people living with, at risk of or affected by HIV or AIDS in Canada

Submission to the United Nations Human Rights Council
Universal Periodic Review Working Group: Third Universal
Periodic Review of Canada

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Submitted by the
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INTRODUCTION

1. The Canadian HIV/AIDS Legal Network (“Legal Network”) makes this submission to the United Nations Human Rights Council’s Universal Periodic Review (UPR) Working Group in advance of the third review of Canada, to take place in April/May 2018.
2. 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. Formed in 1992, we are one of the world’s leading organizations tackling the legal and human rights issues related to HIV. 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.
3. In September 2013, Canada accepted 122 of the recommendations made during the oral review of the second cycle of the UPR. In particular, Canada accepted a number of recommendations to combat racial discrimination, including one to “[take] the necessary measures aimed at removing the root causes of racial discrimination, xenophobia and the overincarceration of Aboriginals, Afro-Canadians and ethnic minorities including women.”¹ Canada also accepted recommendations to commit to realizing the right to health, “with a special focus on the most disadvantaged groups,” and to addressing violence against women.²
4. Despite Canada’s commitments to implement these recommendations at the previous UPR, the human rights of numerous marginalized communities continue to be routinely violated. In this submission, the Legal Network describes four key areas requiring action from the government of Canada to fulfil the commitments it made at the second UPR cycle as well as to address ongoing violations of its international human rights obligations. These human rights priorities are
 - the rights of people who use drugs,
 - the rights of people in sex work,
 - the rights of people in prison and
 - the rights of people living with HIV.

THE RIGHTS OF PEOPLE WHO USE DRUGS

5. In Canada, the human rights of people who use drugs, who are often among the most marginalized of Canadians, are consistently violated. Racialized communities, in particular, 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.
6. According to one report, “persons described as black are most over-represented among

prisoners charged with drug offences”³ with almost 20% of Black federal prisoners incarcerated for a drug-related offence.⁴ In particular, Indigenous and Black women are more likely than White women to be in prison for that reason,⁵ 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.⁶

7. In 2012, the federal government intensified that discrimination with the passage of the *Safe Streets and Communities Act*, which introduced mandatory minimum sentencing for non-violent drug offences.⁷ Despite purporting to only target those who *traffic* in drugs, the burden of harsher enforcement still falls most heavily on those with drug dependence, particularly those who may engage in small-scale dealing to support their own drug use.⁸ Mandatory minimum sentences deny Indigenous Peoples their right to more culturally appropriate and restorative alternatives to incarceration by effectively preventing judges from considering a person’s Indigenous heritage or connection, as prescribed by the *Criminal Code*⁹ and the Supreme Court of Canada in *R. v. Gladue*.¹⁰ Eliminating mandatory minimum sentences would be in line with recommendations by the Truth and Reconciliation Commission of Canada¹¹ and consistent with Canada’s acceptance of a recommendation at the previous UPR to address the “overincarceration of Aboriginals.”¹²
8. An immense body of evidence demonstrates that the continued overwhelming emphasis on drug prohibition — from policing to prosecution to prisons — undermines efforts to address the health needs of people struggling with problematic drug use and results in costly damage to the public purse, public health and human rights.¹³ Continuing to criminalize people who use drugs, including through the use of mandatory minimum sentences, ignores Canada’s previous commitments to combat racial discrimination, to address the overincarceration of Indigenous Peoples, and to fulfill the right to health, including for people who may be dependent on drugs. 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.”¹⁴ Notably, the UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) recently recommended that Canada “repeal mandatory minimum sentences for minor, non-violent drug-related offences.”¹⁵

9. 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 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; 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.**

THE RIGHTS OF PEOPLE IN SEX WORK

10. Human rights violations against sex workers in Canada have escalated under the 2014 *Protection of Communities and Exploited Persons Act*, which criminalizes sex workers, who continue to be arrested,¹⁶ as well those who purchase sex and third parties (such as managers, security, receptionists, drivers) involved in sex work.¹⁷ 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.¹⁸
11. 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.¹⁹ 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.²⁰ 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.²¹
12. The criminalization of third parties 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*.²² Evidence has demonstrated the role of safer work environments and supportive housing through supportive managerial and venue-based practices, which allow sex workers to work together and promote access to health and support services, in reducing violence and HIV risks among sex workers.²³ A legal framework that subjects all third parties to criminal sanction without evidence of abuse or exploitation does not promote sex workers' health and safety. Instead, it drives the sex industry underground where labour exploitation can flourish, and deters sex workers from the criminal justice system when they experience violence, because they may fear that they or their employer may be charged with prostitution-related offences.²⁴ Migrant sex workers, in particular, are reluctant to seek help from police for fear of deportation.²⁵
13. Decriminalizing sex work, which reduces the risk of violence against sex workers and promotes sex workers' right to health, is in line with Canada's acceptance of recommendations at its previous UPR to realize the right to health and address violence against women.²⁶ Decriminalizing sex work is also in line with recommendations made by UN Special Procedures and other UN agencies which have considered the human rights implications of criminalizing sex work. The UN Special Rapporteur on the right to health has described the negative ramifications of criminalizing third parties such as brothel owners,

explicitly calling for the decriminalization of sex work, and has spoken out against the conflation of sex work and human trafficking.²⁷ The UN Special Rapporteur on violence against women has noted the need to ensure that “measures to address trafficking in persons do not overshadow the need for effective measures to protect the human rights of sex workers.”²⁸ Similarly, UN Women has expressed its support for decriminalizing sex work, acknowledging that sex work, sex trafficking and sexual exploitation are distinct, and that their conflation leads to “inappropriate responses that fail to assist sex workers and victims of trafficking in realizing their rights.”²⁹

14. 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 significant 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.**

THE RIGHTS OF PEOPLE IN PRISON

15. Canada’s failure to provide prisoners, who are disproportionately Indigenous and Black,³⁰ with equivalent access to health services, including key harm reduction measures, is a violation of their rights to health and social services, security of the person, equality and non-discrimination.
16. Significant numbers of prisoners use drugs. In a national survey conducted by Correctional Service Canada, 17% of men and 14% of women reported injecting drugs during the past six months in prison, many of whom shared their injection equipment.³¹ Other studies have also 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.³² Not surprisingly, research shows that the incarceration of people who inject drugs is a factor driving Canada's HIV and HCV epidemic.³³ Already, rates of HIV and HCV in prison are considerably higher than they are in the community as a whole.³⁴ Indigenous prisoners, in particular, have much higher rates of HIV and HCV than non-Indigenous prisoners.³⁵

17. Overwhelming evidence of the health benefits of prison-based needle and syringe programs and opioid substitution therapy (OST) have led a number of UN experts and agencies, including the UN Office on Drugs and Crime (UNODC), the Joint UN Programme on HIV/ AIDS (UNAIDS) and the World Health Organization (WHO), to recommend that prisoners have access to needle and syringe programs and drug-dependence treatment including OST.³⁶ Yet no Canadian prison currently permits the distribution of sterile injection equipment to prisoners and a number of provincial and territorial prisons do not offer OST to prisoners.³⁷ This 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 as noted above, already have much higher rates of HIV and HCV than non-Indigenous prisoners.³⁸ Denying prisoners access to sterile injection equipment and OST is 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,³⁹ as well as Canada's own commitment to realizing the right to health, "with a special focus on the most disadvantaged groups."⁴⁰
18. The UN Standard Minimum Rules for the Treatment of Prisoners recommend that prisoners enjoy the same standards of health care that are available in the community; these standards necessarily apply to persons with drug dependence.⁴¹ According to the Special Rapporteur on Torture, States should "ensure that all harm-reduction measures and drug-dependence treatment services, particularly opioid substitution therapy, are available to people who use drugs, in particular those among incarcerated populations."⁴² In 2016, the CEDAW Committee asked Canada to "expand care, treatment and support services to women in detention living with or vulnerable to HIV/AIDS, including by implementing prison-based needle and syringe programmes, opioid substitution therapy, condoms and other safer sex supplies."⁴³

19. 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.**

THE RIGHTS OF PEOPLE LIVING WITH HIV

20. In Canada, a person living with HIV is at risk of prosecution for not disclosing their HIV-positive status before sex even if there was no HIV transmission, the person had no intention to harm their sexual partner, and the person used a condom or had an undetectable viral load, meaning there is effectively no risk of HIV transmission. Broadly criminalizing people for not disclosing their HIV-positive status not only infringes on the right to health but numerous other human rights, including the rights to privacy, equality and non-discrimination, as the UN Special Rapporteur on the right to health has noted.⁴⁴ The adverse impact of such criminalization also disproportionately impacts the human rights of groups protected under Canada's international treaty obligations, including racialized communities and women.⁴⁵
21. Canada has the third-largest absolute number of recorded prosecutions for alleged HIV non-disclosure in the world, with more than 200 separate documented prosecutions so far, and one of the higher per capita rates of prosecution given the number of people living with HIV in the country.⁴⁶ The current state of the law allows for an overly broad use of the criminal law against people living with HIV, who are usually charged with aggravated sexual assault — an offence that carries a maximum penalty of life imprisonment and mandatory registration as sexual offender for a minimum of 20 years. Evidence also suggests that the criminalization of HIV non-disclosure is a barrier to health care for some people living with HIV, discouraging access to HIV testing and linkage to HIV treatment, care and support, which is important to promote both individual and population health.⁴⁷
22. Available data indicates that among men who have been prosecuted, Black men are disproportionately represented.⁴⁸ Out of 184 cases prosecuted between 1989 and 2016, for example, 23% of those facing criminal charges were Black men, despite constituting only 1.25% of the Canadian population.⁴⁹ The criminalization of HIV non-disclosure can also have a particularly serious, adverse impact on women living with HIV, especially if facing challenges due to their socio-economic status, discrimination, insecure immigration status, or abusive or dependent relationships.⁵⁰ An overly broad use of the criminal law puts women at increased risk of violence and prosecution by providing a tool of coercion or revenge for vindictive partners.⁵¹ The persistent criminalization of people living with HIV thus undermines Canada's acceptance of previous UPR recommendations to combat racial discrimination, to fulfill the right to health, and to address violence against women.⁵²
23. In light of the numerous human rights and public health concerns associated with HIV-related prosecutions, UNAIDS, UN Development Programme (UNDP),⁵³ the UN Special Rapporteur on the right to health,⁵⁴ Global Commission on HIV and the Law,⁵⁵ and the CEDAW Committee,⁵⁶ among others, have urged governments to limit the use of the criminal law to cases of *intentional transmission* of HIV (i.e., where a person knows their HIV-positive status, acts with the intention to transmit HIV, and does in fact transmit it). Moreover, it is recommended that no prosecutions should take place when people used a condom, had a low viral load or practiced oral sex.⁵⁷

24. 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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- ³ *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen's Printer for Ontario, 1995): pp. 69–70.
- ⁴ 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.
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- ⁶ The Correctional Investigator of Canada, *Annual Report 2012–2013 of the Office of the Correctional Investigator*, 2013.
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- ⁸ 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*, Pivot Legal Society, 2013.
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