



Brief to the Standing Committee on the Status of Women: The need for drug policy reform and comprehensive prison-based harm reduction

January 2018

The Canadian HIV/AIDS Legal Network, Prisoners with HIV/AIDS Support Action Network, CATIE and the Canadian Aboriginal AIDS Network work to promote the human rights of people living with, at risk of or affected by HIV and hepatitis C (HCV), including Indigenous women in prison. We appreciate the opportunity to make this submission on Indigenous women in the federal justice and correctional systems.

1. The overrepresentation of Indigenous women in federal prisons

There is no evidence that mandatory minimum sentences (MMS) for people convicted of drug offences reduce the problems associated with drug use. As Justice Canada's 2002 review of the evidence concluded, MMS are "least effective in relation to drug offences" and "drug consumption and drug-related crime seem to be unaffected, in any measurable way, by severe mandatory minimum sentences."¹ Yet the federal government passed the *Safe Streets and Communities Act* in 2012, which introduced MMS for non-violent drug offences.² Despite purporting to only target those who *traffic* in drugs, the burden of harsher enforcement still falls most heavily on those with drug dependence, including those who may engage in small-scale dealing to support their own drug use.³

At the same time, **MMS deny Indigenous Peoples their right to more culturally appropriate and restorative alternatives to incarceration** by effectively preventing judges from considering the individual circumstances of a case, including a person's Indigenous heritage or connection, as prescribed by the *Criminal Code*⁴ and the Supreme Court of Canada in *R. v. Gladue*.⁵ In particular, **Indigenous federal prisoners are more likely than non-Indigenous prisoners to present a history of problematic substance use,**⁶ and **Indigenous women are more likely than White women to be in prison for a drug-related offence.**⁷

Moreover, **MMS fly in the face of long-established sentencing principles aimed at avoiding overzealous use of incarceration.** The Supreme Court of Canada has ruled that MMS constitute cruel and unusual punishment if it is possible for the sentence to be "grossly disproportionate" given the circumstances of that case and has invalidated MMS for drug-related offences,⁸ including most recently in *R. v. Lloyd*, where the Court held that a MMS risked catching "not only the serious drug trafficking that is its proper aim, but conduct that is much less blameworthy."⁹ While individuals charged with a designated drug offence can avoid a MMS by participating in an approved drug treatment court program,¹⁰ to date there is but a handful of operational drug treatment courts in Canada. Emerging research has also illuminated that **drug treatment courts are less accessible to Indigenous Peoples and women, and have difficulty retaining them in treatment once they have entered.**¹¹

In 2015, the Truth and Reconciliation Commission of Canada (TRC) issued calls to action to governments to eliminate the overrepresentation of Indigenous Peoples in custody and to amend the *Criminal Code* to allow trial judges to depart from MMS.¹² In 2016, the UN Committee on the Elimination of Discrimination against Women expressed concern about "the excessive use of incarceration as a drug-control measure against women and the ensuing female over-population in prison" and recommended that Canada "repeal MMS for minor, non-violent drug-related offences."¹³ Similarly, in 2017 the UN Committee on the Elimination of Racial Discrimination urged Canada to "address the root causes of over-representation of African-Canadians and Indigenous Peoples at all levels of the justice system" including by "re-examining drug policies" and recommended that Canada provide "evidence-based alternatives to incarceration for non-violent drug users."¹⁴

2. Absence of essential harm reduction measures in prisons

A 2007 national survey conducted by the Correctional Service of Canada (CSC) indicated that 17% of men and 14% of women reported injecting drugs during the past six months in prison, and roughly half reported sharing

injection equipment, including with people who had HIV or HCV.¹⁵ Not surprisingly, **drug dependence and infectious diseases are among the most prevalent health issues affecting federal prisoners.**¹⁶ In particular, **Indigenous prisoners have much higher rates of HIV and HCV than non-Indigenous prisoners. Indigenous women in federal prisons, for example, have rates of HIV and HCV of 6.03% and 44.8%, respectively.**¹⁷ At the same time, an estimated **45% of new HIV infections among Indigenous Peoples are attributed to injection drug use — more than four times the estimate for the population as a whole.**¹⁸

Programs that ensure access to sterile injecting equipment are thus critical to reduce prisoners' vulnerability to HIV and HCV. The best available evidence suggests that in countries where prison-based needle and syringe programs (PNSPs) exist, they reduce risk behaviour, infection and overdose without increasing drug consumption or endangering staff or prisoner safety, and have other positive outcomes for prisoners' health, including increasing referrals of users to drug treatment programs—findings that have been confirmed by the Public Health Agency of Canada,¹⁹ the Canadian Agency for Drugs and Technologies in Health,²⁰ the WHO, UNAIDS and UNODC.²¹ Additionally, organizations including the Canadian Medical Association,²² Correctional Investigator of Canada²³ and Canadian Human Rights Commission²⁴ have recommended that CSC implement PNSPs.

The *Corrections and Conditional Release Act* also obligates CSC to respect prisoners' right to "retain the rights of all members of society except those that are, as a consequence of the sentence, lawfully and necessarily removed or restricted" including the right to "essential health care" that conforms to "professionally accepted standards,"²⁵ thereby implying a right to needle and syringe programs, which are offered in the community at large.²⁶ The rationale for PNSPs is especially compelling considering the disproportionate impact of HIV and HCV among Indigenous prisoners, **CSC's obligation to provide health services that are "sensitive to the needs of Aboriginal and women offenders, and offenders with special needs"**²⁷ and the TRC's call to action to **close the gaps in health outcomes between Indigenous and non-Indigenous communities.**²⁸

Prisoners' right to access health care equivalent to that available in the community is also reflected in the *UN Standard Minimum Rules for the Treatment of Prisoners*.²⁹ As the former UN Special Rapporteur on the right to health has stated, "If harm reduction programmes and evidence-based treatment are made available to the general public, but not to persons in detention, that contravenes international law."³⁰ In 2016, the UN Committee on the Elimination of Discrimination against Women urged 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,"**³¹ while in 2017, the UN Committee on the Elimination of Racial Discrimination recommended that Canada "implement key health and harm reduction measures across all prisons."³²

3. Recommendations

- Repeal all mandatory minimum prison sentences for non-violent offences, which effectively prevent judges from considering a person's Indigenous heritage or connection;
- Expand evidence-based alternatives to incarceration for people who use drugs, taking into account the need for culturally appropriate care, including for Indigenous women;
- Ensure access to 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; and
- Implement needle and syringe programs in all prisons in Canada, in consultation with prisoner groups, Indigenous organizations and community health organizations, taking into account the need for culturally appropriate and gender-specific programs.

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- ¹ *Mandatory minimum penalties: Their effects on crime, sentencing disparities, and justice system expenditures*, Justice Canada, January 2002.
- ² *Safe Streets and Communities Act*, SC 2012, c 1.
- ³ *Throwing Away the Keys: The Human and Social Cost of Mandatory Minimum Sentences*, Pivot Legal Society, 2013.
- ⁴ *Criminal Code*, s. 718.2(e).
- ⁵ *R v. Gladue*, [1999] 1 SCR 688.
- ⁶ *Annual Report 2015–2016 of the Office of the Correctional Investigator*, 2016.
- ⁷ *Annual Report 2014–2015 of the Office of the Correctional Investigator*, 2015.
- ⁸ *R. v. Smith*, [1987] 1 SCR 1045.
- ⁹ *R. v. Lloyd*, 2016 SCC 13.
- ¹⁰ *Controlled Drug and Substances Act*, s. 10(4) and (5).
- ¹¹ *Drug Treatment Court Funding Program Evaluation*, Department of Justice, 2015.
- ¹² *Truth and Reconciliation Commission of Canada: Calls to Action*, Truth and Reconciliation Commission of Canada, 2015.
- ¹³ UN Committee on the Elimination of Discrimination Against Women, *Concluding Observations: Canada*, November 2016, para. 45.
- ¹⁴ UN Committee on the Elimination of Racial Discrimination, *Concluding Observations: Canada*, August 2017, para. 16(d).
- ¹⁵ *Summary of Emerging Findings from the 2007 National Inmate Infectious Diseases and Risk-Behaviours Survey*, Correctional Service Canada, 2010.
- ¹⁶ *Annual Report 2014–2015 of the Office of the Correctional Investigator*.
- ¹⁷ *Health Services Quick Facts: HIV, Age, Gender and Indigenous Ancestry*, CSC, September 2016 and *Health Services Quick Facts: HCV, Age, Gender and Indigenous Ancestry*, CSC, September 2016.
- ¹⁸ *Summary: Estimates of HIV Incidence, Prevalence and Proportion Undiagnosed in Canada*, PHAC, 2014.
- ¹⁹ *Prison needle exchange: Review of the evidence, report prepared for Correctional Service of Canada*, PHAC, April 2006.
- ²⁰ *Needle Exchange Programs in a Correctional Setting: A Review of the Clinical and Cost-Effectiveness*, CADTH, September 2015.
- ²¹ *Priority Interventions: HIV/AIDS prevention, treatment and care in the health sector*, WHO, 2008; *HIV/AIDS Prevention, Care, Treatment and Support in Prison Settings: A Framework for an Effective National Response*, UNODC, WHO and UNAIDS, 2006, Recommendation no. 60.
- ²² *Annual Meeting Resolution 26*, Canadian Medical Association, August 17, 2005.
- ²³ See Annual Reports of the Correctional Investigator 2003–2004, 2005–2006, 2006–2007, 2009–2010 and 2015–2016.
- ²⁴ *Protecting Their Rights: A Systemic Review of Human Rights in Correctional Services for Federally Sentenced Women*, CHRC, 2004.
- ²⁵ *Corrections and Conditional Release Act (CCRA)*, S.C. 1992, c 20; SOR/92-620, s. 4(d) and ss. 85-88.
- ²⁶ CSC, *Commissioner's Directive 800: Health Services*, 2015, s. 2(a).
- ²⁷ *Ibid.*, s. 10.
- ²⁸ *Truth and Reconciliation Commission of Canada*.
- ²⁹ *UN Standard Minimum Rules for the Treatment of Prisoners*, 17 December 2015, Rule 24(2).
- ³⁰ *Report of the UN Special Rapporteur on the Right to the highest attainable standard of physical and mental health*, UN Doc. A/65/255 (August 6, 2010), para. 60.
- ³¹ UN Committee on the Elimination of Discrimination Against Women, para. 49.
- ³² UN Committee on the Elimination of Racial Discrimination, para. 16(e).