



Canadian Human Rights Commission

**Submission to the Committee Against Torture in
advance of the Committee's development of the List
of Issues Prior to Reporting for Canada's 8th Periodic
Review**

June 2021

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1. THE CANADIAN HUMAN RIGHTS COMMISSION

The Canadian Human Rights Commission (the Commission) is Canada's national human rights institution. It has been accredited "A-status" by the Global Alliance of National Human Rights Institutions, first in 1999 and again in 2006, 2011 and 2016.

The Commission was established by Parliament through the Canadian Human Rights Act (CHRA) in 1977.¹ It has a broad mandate to promote and protect human rights. The Constitution of Canada divides jurisdiction for human rights matters between the federal and provincial or territorial governments. The Commission, pursuant to the CHRA, has jurisdiction over federal government departments and agencies, Crown corporations, First Nations governments and federally-regulated private sector organizations. Provincial and territorial governments have their own human rights codes and are responsible for provincially/territorially-regulated sectors.

The Commission also conducts compliance audits under the Employment Equity Act (EEA).² The purpose of the EEA is to achieve equality in the workplace so that no person is denied employment opportunities or benefits for reasons unrelated to ability, and to correct the historic employment disadvantages experienced by four designated groups: women, Indigenous peoples, persons with disabilities and racialized people.³

In 2019, the Commission was mandated with several new responsibilities under the Accessible Canada Act, the Pay Equity Act, and the National Housing Strategy Act. The Commission was also designated as a body responsible for monitoring the Government of Canada's implementation of the United Nations Convention on the Rights of Persons with Disabilities, in accordance with article 33.2 of the Convention.

The Commission's efforts to promote and protect human rights include investigating and, where possible, mediating discrimination complaints, representing the public interest in the litigation of complaints, developing policy and conducting research in consultation with rights holders and stakeholders, issuing public statements, and tabling special reports in Parliament. The Commission is committed to working with the Government of Canada, as well as domestic and international partners and stakeholders, to ensure continued progress in the protection of human rights, including those rights enshrined in the Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (CAT). It is in the spirit of constructive engagement that the CHRC submits this report to the Committee against Torture (the Committee) on the occasion of its consideration of Canada's 8th periodic report.

¹ Available at: laws-lois.justice.gc.ca/PDF/H-6.pdf. Although Canada's human rights laws are not part of the Constitution, they are considered "quasi-constitutional" in nature, meaning that all other laws must be interpreted in a manner consistent with human rights law.

² Available at: laws-lois.justice.gc.ca/PDF/E-5.401.pdf.

³ The Commission notes that the terms "visible minority" and "Aboriginal" are increasingly outdated, and as such, they are used only to reflect their official usage in Canadian legislation and in Statistics Canada survey data. Where other terms (such as Indigenous or racialized) can be used, the Commission supports this. The term "Indigenous" or "Indigenous peoples" is used throughout this submission to refer to First Nations, Inuit and Métis peoples in Canada.

2. RATIFICATION OF THE OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE

In May 2016, Canada announced its intention to ratify the Optional Protocol to the Convention against Torture (OPCAT). At present, however, the status of the commitment is unclear. During Canada's most recent Universal Periodic Review, several recommendations were made for Canada to ratify the OPCAT. Although Canada's response indicated that it would consider ratification, further details or developments have yet to be provided. The CHRC notes that various stakeholders and international human rights experts and mechanisms have continued to call on Canada to ratify the OPCAT, including the Special Rapporteur on the Rights of Persons with Disabilities.⁴

Recommended Question #1: What is the status of Canada's commitment to ratify the OPCAT?

3. ISSUES IN THE FEDERAL JUSTICE SYSTEM

In light of the anti-racism protests that have taken place this past year across Canada and around the world, the CHRC wishes to highlight the particular experiences and concerns of Indigenous, Black and other racialized individuals who continue to face historic and ongoing systemic and institutionalized racism and discrimination in a variety of aspects of their everyday lives, including when interacting with the justice system.

In Canada's federal justice system, the realities of systemic and institutionalized racism and discrimination, including against people with mental health disabilities, have been repeatedly recognized by international and regional human rights mechanisms, by civil society, and by domestic human rights institutions. Nevertheless, substantive progress towards addressing these realities remains largely elusive.

3.1. Antecedents to Incarceration and Overrepresentation

A web of complex and intersecting factors lie at the root of the "pipeline to prison" and over-incarceration of certain segments of the population. These factors include, amongst others: historical disadvantage, systemic and institutional racism, colonization and the residential school system, discrimination and violence, socio-economic disparity, including inadequate housing and a lack of educational and employment opportunities, disturbingly-high rates of mental illness, a lack of appropriate and culturally-relevant health and community services and supports, and over-policing of

⁴ UNGA, Report of the Special Rapporteur on the Rights of Persons with Disabilities, 43rd Sess, Item 3, UN Doc A/HRC/43/41/Add.2, (19 December 2019), available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/346/54/PDF/G1934654.pdf?OpenElement>.

certain groups including Indigenous people, racialized individuals, people with mental health disabilities, and those experiencing homelessness.

The CHRC notes that, across Canada, concerns continue to be raised that racial profiling by police, security agencies, and other authority figures is a daily reality, reducing public trust, and having harmful impacts on Indigenous, Black and other racialized communities. In addition, the CHRC remains deeply concerned with reports that Indigenous, Black and other racialized individuals, in particular, are “over-policed”. Of further concern are an increasing number of reports of injurious and deadly interactions between police and Indigenous, Black and other racialized individuals with mental health disabilities.

These concerns have also been expressed by the UN Working Group of Experts on People of African Descent. For instance, following an October 2016 visit to Canada, the Working Group indicated that “there is clear evidence that racial profiling is endemic in the strategies and practices used by law enforcement,” and further expressed concern over the “excessive use of force and police-involved deaths, especially when responding to cases involving vulnerable people of African descent, such as those who are mentally ill.”⁵

Several provincial human rights commissions in Canada have also raised these concerns through various inquiries, reports and recommendations related to racial profiling and harmful policing practices.⁶ A 2020 report from the Ontario Human Rights Commission (OHRC) on racial profiling and racial discrimination of Black persons by the Toronto Police Service⁷ found that Black people are more likely to be proactively arrested, charged and subjected to uses of force in a wide range of police interactions. In addition, the data obtained by the OHRC further confirmed that Black communities are subjected to a disproportionate burden of law enforcement in a way that is consistent with systemic racism and anti-Black racial bias. All of these findings have added considerable weight to the groundswell of calls for systemic reform to policing services across Canada.

⁵ UNGA, Report of the Working Group of Experts on People of African Descent on its mission to Canada, 36th Sess, Item 9, UN Doc A/HRC/36/60/Add.1, (16 August 2017), para. 78, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/239/60/PDF/G1723960.pdf?OpenElement>.

⁶ See: Commission des droits de la personne et des droits de la jeunesse, Review of Implementation of the Recommendations Issued in the Report of the Consultation on Racial Profiling and its Consequences, 2020, at: https://cdpdj.qc.ca/storage/app/media/publications/bilan-profilage-racial_synthese_EN.pdf; See Nova Scotia Human Rights Commission, Halifax, Nova Scotia: Street Checks Report, 2019, at: https://humanrights.novascotia.ca/sites/default/files/editor-uploads/halifax_street_checks_report_march_2019_0.pdf; See Ontario Human Rights Commission, Under Suspicion: Research and Consultation Report on Racial Profiling in Ontario, 2017, at: http://www3.ohrc.on.ca/sites/default/files/Under%20suspicion_research%20and%20consultation%20report%20on%20racial%20profiling%20in%20Ontario_2017.pdf.

⁷ Available at: <http://www.ohrc.on.ca/sites/default/files/A%20Disparate%20Impact%20Second%20interim%20report%20on%20the%20TPS%20inquiry%20executive%20summary.pdf#overlay-context=en/disparate-impact-second-interim-report-inquiry-racial-profiling-and-racial-discrimination-black>.

Further, police have increasingly become first responders in situations involving people with mental health disabilities and have considerable discretion around how to respond. It has been reported that many individuals with mental health disabilities are charged with public nuisance offences related to their symptoms, rather than charges due to real criminal activity, leading to what is known as the criminalization of mental illness.⁸

Recommended Question #2: Please provide details of efforts being undertaken to address and eliminate systemic and institutionalized racism and discrimination in policing across Canada. What steps are being taken to reform policing practices that disproportionately and negatively affect groups in vulnerable circumstances such as Indigenous, Black and other racialized communities, as well as individuals with mental health disabilities? What efforts are being made to ensure coordination between the various jurisdictions in Canada in relation to these issues?

3.2. Criminal Justice

Beyond policing and the factors mentioned above, the CHRC notes that additional disparities in Canada's criminal justice system can also contribute to the over-incarceration of certain segments of the population.

The CHRC recognizes that a lack of diversity and representation of Indigenous, Black and other racialized people in the legal process – including amongst judges, lawyers and juries – as well as a lack of familiarity and consideration of the unique circumstances and social histories of marginalized groups by individuals within the legal profession, can contribute to racial bias and unfair treatment. The Truth and Reconciliation Commission of Canada (TRC) has called on Canada to address disparities in the criminal justice system, including by providing necessary training on Indigenous culture and history to individuals within the legal profession.

There is also a recognition of the need to consider alternatives to incarceration for marginalized groups and individuals in vulnerable circumstances. For example, the TRC has recommended:

- implementing community sanctions that provide realistic alternatives to incarceration for Indigenous people and responding to the underlying causes of offending; and
- allowing trial judges, upon giving reasons, to depart from mandatory minimum sentences and restrictions on the use of conditional sentences.

While the CHRC has previously acknowledged that the legal framework for incarceration in Canada contains some provisions intended to address systemic disadvantage by providing for alternatives to incarceration for Indigenous people, the CHRC has also previously noted that these provisions do not appear to be operating as

⁸ See: John Howard Society of Ontario, Broken Record: The Continued Criminalization of Mental Health Issues, 2021, at: <https://johnhoward.on.ca/wp-content/uploads/2021/01/Broken-Record.pdf>.

intended. For instance, the Supreme Court of Canada in *R v. Gladue*⁹ compelled judges to use a different analysis in determining a suitable sentence for Indigenous people by paying particular attention to their unique circumstances and social histories. However, reports have indicated that the *Gladue* principles are often not well understood, unevenly applied or not fully considered.¹⁰

The CHRC has further noted that no such provisions exist for racialized individuals, despite the complex and intersectional factors – including systemic racism – that leads to over-incarceration. In addition, despite needing more treatment-based alternatives, most individuals with mental health disabilities proceed through regular court processes, often exacerbating the challenges they face and further enmeshing them in a criminal justice system that is not designed to meet their needs.¹¹

Relatedly, the CHRC also wishes to raise concerns with respect to mandatory minimum sentences. The Government of Canada has itself acknowledged the systemic racism in Canada’s criminal justice system, and that sentencing policies focused on imprisonment disproportionately affect Indigenous, Black and marginalized people, who are more likely to be admitted to federal prisons for an offence punishable by a mandatory minimum penalty.¹² Such penalties have resulted in longer and more complex trials, a decrease in guilty pleas, and have removed a judge’s ability to consider individual and proportionate factors during sentencing, including systemic factors such as the impacts of colonialism when sentencing Indigenous people.¹³

The CHRC wishes to acknowledge the federal government’s recent introduction of Bill C-22, which proposes several amendments to remove mandatory minimum penalties for some offences under the Criminal Code of Canada and for all drug offences under the Controlled Drug and Substances Act. The CHRC supports steps like this, which appropriately frame certain conduct as health and social issues, and move the focus away from stigmatization and punishment and towards respecting health, dignity and human rights. The CHRC also recognizes that more reforms and action are needed to address the complex and intersectional factors that lead to the over-incarceration of

⁹ [1999] 1 SCR 688; see also *R. v. Ipeelee* [2012] 1 SCR 433.

¹⁰ See: Report of the Standing Committee on the Status of Women, *A Call to Action: Reconciliation with Indigenous Women in the Federal Justice and Correctional Systems*, June 2018, available at: <https://www.ourcommons.ca/Content/Committee/421/FEWO/Reports/RP9991306/feworp13/feworp13-e.pdf>; *Spirit Matters: Aboriginal People and the Corrections and Conditional Release Act*, available at: <https://oci-bec.gc.ca/en/content/spirit-matters-aboriginal-people-and-corrections-and-conditional-release-act>; OCI Annual Report 2016-2017 at p. 50, available at: <https://oci-bec.gc.ca/en/content/annual-report-office-correctional-investigator-2016-2017>.

¹¹ *supra* note 8.

¹² See: <https://www.canada.ca/en/department-justice/news/2021/02/bill-c-22-mandatory-minimum-penalties-to-be-repealed.html>. (Original reference unavailable as of January 22, 2024).

¹³ See <https://www.canada.ca/en/department-justice/news/2021/02/bill-c-22-mandatory-minimum-penalties-to-be-repealed.html>; (Original reference unavailable as of January 22, 2024) and <https://bccla.org/2021/04/bill-c-22-aims-to-address-systemic-overrepresentation-in-the-criminal-legal-system-but-does-it-go-far-enough/>.

certain groups, and acknowledges the concerns expressed by stakeholders who feel that these proposed reforms do not go far enough.

Recommended Question #3: Please provide details of efforts being undertaken to address and eliminate systemic and institutionalized racism and discrimination in Canada’s criminal justice system.

Recommended Question #4: What steps are being taken to ensure the wide application of the *Gladue* principles? What steps are being taken to implement other reforms to judicial proceedings and sentencing practices that disproportionately and negatively affect groups in vulnerable circumstances such as Indigenous, Black and other racialized communities, as well as individuals with mental health disabilities? What steps are being taken to develop and implement alternatives to incarceration for such groups?

3.3. Conditions of Confinement and Situations of Disproportionate or Unique Impact

The CHRC wishes to highlight a number of concerns with respect to prison conditions and the disproportionate or unique impacts experienced by certain groups within the prison population. While the section below is largely organized by population group, the CHRC recognizes the multiple and intersecting identities and experiences of prisoners.

The CHRC recognizes that COVID-19 has had a disproportionate impact on the prison population, and that COVID-related restrictions on movement and programming have created harsher conditions of confinement, further exacerbating the vulnerability of the populations mentioned below. While the CHRC acknowledges the challenges facing correctional facilities during the pandemic, it maintains that the health and human rights of everyone in these facilities must remain a priority when implementing COVID-19 measures.

Indigenous, Black and Racialized prisoners:

The CHRC remains deeply concerned by reports that recent prison population growth has been exclusively driven by increases in the composition of racially, ethnically and culturally diverse prisoners, and that the situation for certain groups, such as Indigenous prisoners, has deteriorated further.

For instance, in January 2020, the Office of the Correctional Investigator (OCI) issued a press release and statement to highlight that Indigenous overrepresentation in federal custody had reached a “new historic high”, surpassing 30% despite the fact that Indigenous peoples account for only 5% of the general Canadian population. It was further noted that this overrepresentation is even higher in institutions designated for women where Indigenous persons now account for 42% of the prison population in

Canada.¹⁴ Of additional concern is the overrepresentation of Black individuals in Canadian prisons, who account for 8.6% of the federally-incarcerated population, while making up only 2.9% of the general population.¹⁵ In contrast, there has been a relative and proportional decline in the number of White prisoners, which has steadily decreased over the past 10 years.¹⁶

As noted above with respect to the incarceration and overrepresentation of certain segments of the population, there are complex and intersectional factors underlying these realities. However, beyond overrepresentation, these populations also experience discrimination in relation to their conditions of confinement, including with respect to classification and treatment. For instance, Indigenous and Black prisoners, in particular, are more likely to be over-classified as maximum security and are more likely to be involved in incidents of use of force.¹⁷ Various oversight bodies, including the OCI and the Auditor General of Canada, have also noted that culturally-relevant programming and services are both limited for Indigenous and Black prisoners and not reflective of their rehabilitative needs.¹⁸ The CHRC has received a number of complaints that allege that the Correctional Service of Canada (CSC) fails to provide culturally relevant services and fails to accommodate certain religious or spiritual practices.¹⁹

¹⁴ OCI Annual Report 2019-2020 at p. 20, available at: <https://oci-bec.gc.ca/en/content/office-correctional-investigator-annual-report-2019-2020>.

¹⁵ OCI Annual Report 2016-2017 at p. 56, available at: <https://oci-bec.gc.ca/en/content/annual-report-office-correctional-investigator-2016-2017>.

¹⁶ OCI Annual Report 2018-2019 at p.79, available at: <https://oci-bec.gc.ca/en/content/office-correctional-investigator-annual-report-2018-2019>.

¹⁷ OCI Annual Report 2019-2020 at p. 20, available at: <https://oci-bec.gc.ca/en/content/office-correctional-investigator-annual-report-2019-2020>; and OCI Annual Report 2016-2017 at p. 56, available at <https://oci-bec.gc.ca/en/content/annual-report-office-correctional-investigator-2016-2017>. In addition, for but one example, the CHRC received complaints filed by an inmate who identifies as a Black Sufi Muslim. He alleges that the Correctional Service of Canada (CSC) engages in systemic discrimination against Black and Muslim inmates. Among other things, he alleges: a) that CSC subjected him to excessive force, violence and institutional discipline, and that CSC's practices and policies on institutional discipline, use of force and security classification disproportionately affect Black and Muslim inmates; and b) that CSC failed to accommodate his religious requirements, including refusing to accommodate Friday prayers for Muslim inmates and refusing to provide a religious diet. The CHRC is participating in the hearing of these complaints before the Canadian Human Rights Tribunal. For a preliminary ruling, see: [2020 CHRT 27](#) (ruling on scope).

¹⁸ See, for example: A Case Study of Diversity in Corrections: The Black Inmate Experience in Federal Penitentiaries, available at <https://oci-bec.gc.ca/en/content/case-study-diversity-corrections-black-inmate-experience-federal-penitentiaries-final>; 2016 Fall Reports of the Auditor General of Canada: Preparing Indigenous Offenders for Release, available at http://www.oag-bvg.gc.ca/internet/English/parl_oag_201611_03_e_41832.html.

¹⁹ The CHRC has received complaints filed by or on behalf of Indigenous persons relating to adverse differential treatment in the federal corrections system. For but one example: an Indigenous man with mental health disabilities filed a complaint alleging, among other things, that CSC has: i) failed to provide him with adequate mental health care, including culturally appropriate treatment; ii) placed him in administrative segregation for excessively long periods of time; and iii) failed to provide him with sufficient access to Indigenous cultural and spiritual practices. The CHRC is participating in the hearing of this complaint before the Canadian Human Rights Tribunal. The hearing will consider the complaint alongside a related complaint, filed on behalf of prisoners with mental disabilities in the federal corrections system, alleging that CSC discriminates against prisoners in the areas of security classification, access to

Without access to these programs and services, Indigenous and Black prisoners are less likely to be granted conditional release, and in some cases, are ill-prepared to reintegrate in their communities, placing them at a higher risk of reoffending and further contributing to their overrepresentation in the correctional system.²⁰

The CHRC also wishes to highlight a 2019 interim report²¹ from the Standing Senate Committee on Human Rights echoing the above-mentioned concerns and detailing the systemic and institutionalized racism and discrimination in Canada's correctional system. Further, the CHRC wishes to acknowledge that on June 16, 2021, the Committee released the final report,²² which provides more information on vulnerable groups, as well as a number of recommendations to safeguard human rights in the federal correctional system.

Prisoners with disabilities:

The CHRC notes that the proportion of prisoners with disabilities – and mental health disabilities in particular – continues to increase in federal prisons, with mental health issues more prevalent in Canadian prisons than in the general population.²³ The CHRC further notes that individuals with mental health disabilities are one of the most vulnerable populations within correctional facilities. The OCI has repeatedly noted that correctional institutions lack the appropriate capacity, resources and infrastructure to manage serious mental health conditions, and, as a result, many prisoners are incarcerated in settings that are ill-equipped to respond appropriately to their symptoms and behaviours, which can often exacerbate or amplify their mental health disabilities. The CHRC has previously noted that the problem is particularly acute in institutions designated for women, despite the fact that the vast majority of federally-sentenced women have a mental health disorder.²⁴ These women are more likely to be placed in maximum security and a significant number engage in chronic, repetitive self-injurious or suicidal behaviour.²⁵

treatment, use of administrative segregation and use of force, based on disability, race, national or ethnic origin and religion: [2021 CHRT 3](#) (ruling on single inquiry).

²⁰ See: Interim Report of the Standing Senate Committee on Human Rights, Interim Report – Study on the Human Rights of Federally-Sentenced Persons: The Most Basic Human Right is to be Treated as a Human Being, February 2019, at:

https://sencanada.ca/content/sen/committee/421/RIDR/Reports/RIDR_Report_Prisoners_e.pdf.

²¹ supra note 20.

²² See: Report of the Standing Senate Committee on Human Rights, Human Rights of Federally-Sentenced Persons, June 2021, at: <https://sencanada.ca/en/info-page/parl-43-2/ridr-federally-sentenced-persons/>.

²³ OCI Annual Report 2014-2015 at p.13, available at: <https://oci-bec.gc.ca/en/content/annual-report-office-correctional-investigator-2014-2015>.

²⁴ OCI Annual Report 2017-2018 at p. 85, available at: <https://oci-bec.gc.ca/en/content/office-correctional-investigator-annual-report-2017-2018>; and OCI Annual Report 2016-2017 at p. 14, available at: <https://oci-bec.gc.ca/en/content/annual-report-office-correctional-investigator-2016-2017>.

²⁵ OCI Annual Report 2017-2018 at p. 87, available at: <https://oci-bec.gc.ca/en/content/office-correctional-investigator-annual-report-2017-2018>; and OCI Annual Report 2016-2017 at p. 62, available at: <https://oci-bec.gc.ca/en/content/annual-report-office-correctional-investigator-2016-2017>.

The CHRC also wishes to bring the Committee's attention to an issue previously highlighted in the CHRC's 2018 submission to the Committee relating to the accommodation of substance dependence in federal corrections, and the provision of adequate and appropriate health care in such situations. The CHRC has been made aware of concerns that federal prisoners with opioid use disorders are at greater risk of fatal overdose, and HIV or hepatitis C infection because of barriers to treatment with suboxone or methodone – including long wait lists – as well as a lack of adequate harm reduction initiatives and psychosocial therapy. Some inmates report having been cut-off from treatment on the basis of speculation that they were sharing medication with other inmates, some without having had the opportunity to first speak with their doctor. The CHRC has referred some complaints relating to these issues to the Canadian Human Rights Tribunal for resolution.

Older prisoners:

The CHRC continues to be concerned about the issue of aging and older prisoners, defined as those 50 years of age and older. This population has grown by 50% over the last decade, comprising more than 25% of the total prison population. These individuals are vulnerable to victimization, and often reside in facilities that are inaccessible and ill-equipped to manage their health care needs. Further, there is a lack of legal or policy recognition that older prisoners represent a vulnerable population with unique characteristics and needs. This has serious impacts on their health, safety, dignity and human rights.

In 2019, the CHRC and OCI released a joint report²⁶ highlighting challenges associated with older prisoners, including the management of chronic health conditions, accessibility and accommodation of disability, reintegration barriers, end-of-life care and dying with dignity in prison. For instance, the report identified that:

- the physical infrastructure of institutions does not adequately meet the needs of older individuals in federal custody;
- there is still no practice to assess whether older prisoners, including those with health deterioration, could be placed in more appropriate facilities in the community;
- incidents of bullying, victimization, intimidation and assaults on older prisoners are commonplace, largely unreported, and rarely investigated or addressed;
- many older prisoners have become institutionalized, and there is lack of meaningful participation in rehabilitation programs; and
- federal corrections lacks adequate, compassionate and responsive release options for older prisoners who do not pose an undue risk to public safety.

The report provides CSC with a number of recommendations on how best to balance public safety while respecting the unique needs of this group of prisoners. In addition, while the report acknowledges CSC's development of a framework and proposed

²⁶ Available at: <https://www.chrc-ccdp.gc.ca/sites/default/files/publication-pdfs/oth-aut20190228-eng.pdf>.

initiatives to promote and support the wellness and independence of its older prisoners, both the OCI and CHRC believe the framework to be too narrow, as nearly all of the initiatives are focused on helping older individuals better function within the prison walls. This proposed “aging in place” approach does not adequately consider alternatives to incarceration, which may offer more dignified and safer alternatives to unnecessary incarceration.

Recommended Question #5: Please provide details of efforts being undertaken to address and eliminate systemic and institutionalized racism and discrimination in prisons across Canada.

Recommended Question #6: What steps is Canada taking to develop a concrete and specific strategy to ensure that its policies and practices meet the unique needs of prisoners in vulnerable circumstances in relation to their conditions of confinement, including Indigenous, Black and older prisoners, as well as prisoners with mental health disabilities?

Trans, non-binary and gender-diverse prisoners:

The experiences of trans, non-binary and gender-diverse prisoners in federal correctional facilities continues to be of concern for the CHRC and for civil society groups. Federal correctional facilities continue to be constructed and maintained in a binary manner and, therefore, prisoners continue to be placed in institutions designated for either men or women. Trans, non-binary and gender-diverse prisoners are often subjected to sexual assault, coercion and violence, bullying, and harassment from other prisoners and from correctional staff, particularly when they have been incorrectly placed in an institution that does not accord with their gender identity or gender expression, making them one of the most vulnerable groups within the prison population. According to the OCI, trans prisoners may also be placed in segregation-like conditions, purportedly for their own safety, which can severely restrict their movement and participation in programming and employment.²⁷

While the CHRC has acknowledged that CSC has made some progress in addressing the needs of trans, non-binary and gender-diverse prisoners and has committed to a series of policy changes, the CHRC remains concerned that CSC’s commitments to these changes have yet to be fully implemented. Given the time that has passed since these commitments were first made, the CHRC is also concerned that these changes may not be sufficient to address the current health and safety needs of transitioning, or gender non-binary prisoners, particularly with respect to transfer requests.

The OCI has reported that CSC uses a series of risk assessment tools when determining whether a trans prisoner should be transferred to an institution designated

²⁷ OCI Annual Report 2018-2019 at p. 115, available at: <https://oci-bec.gc.ca/en/content/office-correctional-investigator-annual-report-2018-2019>.

for women.²⁸ The OCI has raised concerns whether these tools are appropriate when evaluating whether transfers should take place.²⁹ In order to ensure that trans and gender-diverse prisoners are able to live safely and with dignity in their gender identity, the CHRC maintains that CSC practices must be focused on responding to the needs of this population, including when responding to transfer requests.

Recommended Question #7: What steps are being taken to ensure that correctional policies and practices fully respect the rights and meet the needs of trans, non-binary and gender-diverse prisoners, including with respect to transfer requests?

Sexual coercion and violence:

The CHRC also wishes to bring to the Committee's attention the issue of sexual coercion and violence in Canada's prisons. The OCI reports that violence and victimization disproportionately affect those who are already the most vulnerable to maltreatment and negative correctional outcomes, including: individuals with a history of trauma and abuse; individuals who identify as, or are perceived to be, lesbian, gay, bisexual or trans; young and juvenile individuals; women; and individuals who have a physical disability, mental health disability or cognitive/developmental disabilities.³⁰

The CHRC notes that while this problem cannot be addressed without effective reporting and accountability measures, the OCI has found that CSC "does not publicly report on this problem, does not collect, record or track statistics and has never conducted research in this area. It is largely by virtue of this silence and organizational indifference that there are considerable gaps in the Service's approach to detecting, tracking, responding to, investigating, and preventing sexual coercion and violence."³¹ Therefore, the number of reported allegations of sexual assault within the federal correctional system is undoubtedly much smaller than the actual number of prisoners experiencing sexual coercion and violence.

In addition to the lack of systematic reporting and data collection on this issue, prisoners may not report incidents of sexual coercion and violence due to a fear of reprisal, among other reasons. For instance, according to the OCI, "[m]any are afraid to report, fearing retaliation, retribution or re-victimization by the perpetrators, be it other inmates or staff. Furthermore, they face the risk of not being believed, being ridiculed, or even

²⁸ OCI Annual Report 2018-2019 at p. 116, available at: <https://oci-bec.gc.ca/en/content/office-correctional-investigator-annual-report-2018-2019>.

²⁹ OCI Annual Report 2018-2019 at p. 116, available at: <https://oci-bec.gc.ca/en/content/office-correctional-investigator-annual-report-2018-2019>.

³⁰ OCI Annual Report 2019-2020 at p. 24, available at: <https://oci-bec.gc.ca/en/content/office-correctional-investigator-annual-report-2019-2020>.

³¹ OCI Annual Report 2019-2020 at p. iii, available at: <https://oci-bec.gc.ca/en/content/office-correctional-investigator-annual-report-2019-2020>.

punished for reporting coerced sex.”³² With respect to sexual coercion and violence perpetrated by CSC staff, including the use of unnecessary and intrusive strip searches – which can be particularly distressing for trans and non-binary prisoners – the inherent power imbalance also often leaves these incidents to go unreported, making it difficult to fully understand the magnitude of the problem.

The CHRC maintains that the environment in which individuals are serving their sentences must not perpetuate additional violence and abuse, and that protecting and supporting the victims of these crimes must be a priority. However, without strong leadership and concrete measures to address and report on this pervasive problem, the CHRC remains concerned that sexual coercion and violence will continue to harm prisoners in the correctional system. The CHRC acknowledges Canada’s commitment to releasing an interim report on this issue in spring 2021, and encourages swift action to implement measures to address its conclusions.

Recommended Question #8: Please provide details of efforts being undertaken to address and eliminate sexual coercion and violence in prisons across Canada. What steps are being taken to develop effective reporting and accountability measures, as well as a concrete and specific preventative strategy for incidents of sexual coercion and violence, particularly for prisoners who are most vulnerable?

3.4. Changes to the Use of Solitary Confinement

Until recently, the Corrections and Conditional Release Act, which regulates the federal prison system, provided for a regime known as “administrative segregation” to isolate prisoners who were deemed to pose a risk to the safety and security of themselves, others, or the institution in which they were housed. The CHRC has long expressed concern that this regime is tantamount to solitary confinement as defined within the international human rights system. The CHRC has also expressed concern for many years that this regime was being used to manage prisoners with mental health disabilities.

The Courts in the Canadian jurisdictions of Ontario and British Columbia have ruled that the administrative segregation regime used in federal prisons is akin to solitary confinement and violates provisions of the Canadian Charter of Rights and Freedoms that protect life, liberty and security of the person.

In response to these decisions, the federal government passed legislation that purports to end the practice of solitary confinement by ending the existing regime of administrative segregation and replacing it with an alternate regime in which prisoners who are deemed to pose a risk will be housed in “Structured Intervention Units” or SIUs. Once in an SIU, prisoners are to be isolated for fewer hours a day than under the

³² OCI Annual Report 2019-2020 at p. 23, available at: <https://oci-bec.gc.ca/en/content/office-correctional-investigator-annual-report-2019-2020>.

previous regime, have greater access to “meaningful human contact” and receive “appropriate interventions,” including access to correctional programming.

However, the CHRC is deeply concerned by recent reports that prisoners being held in SIUs continue to experience conditions of solitary confinement. The CHRC is also concerned by reports that CSC did not provide the necessary data within the agreed upon timeframe to allow the SIU Implementation Advisory Panel to properly serve its oversight function, resulting in the absence of systematic information about the operation of this new regime. The CHRC further notes that the Panel’s mandate expired in mid-2020, and has not since been re-established or renewed in any other form.

Following the expiration of the mandate of the Panel, some of its members released four reports³³ regarding the implementation and operation of the SIUs, which raise a number of serious issues that the CHRC wishes to bring to the Committee’s attention. For instance:

- when applying the United Nations Standard Minimum Rules on the Treatment of Prisoners (the Mandela Rules) to CSC’s data, 28.4% of the SIU stays qualified as “solitary confinement”, and an additional 9.9% of stays fall under the definition of “torture or other cruel, inhuman or degrading treatment”;
- those sent to SIUs tended to be disproportionately male, young, and Indigenous;
- within a relatively short period of time (9 months), multiple stays in SIUs were fairly common, and those who had multiple stays tended to be male and had identifiable mental health needs before being transferred to an SIU;
- the mental health of an individual – or the mental health flag used by CSC – does not play a significant role in determining whether the SIU is an appropriate place for an individual to remain;
- Black prisoners’ stays in SIUs are longer than the stays of other groups;
- there were large regional differences in the use of SIUs, and the stated reasons for transferring prisoners to SIUs varied substantially across regions; and
- the requirement for prisoners who are transferred to SIUs to be provided with a minimum of four (4) hours out of their cell, with two (2) of those hours engaged in “meaningful human contact”, was seldom met.

Therefore, the CHRC wishes to express the following on-going concerns with respect to the SIU regime.

There is a need for continued systematic monitoring and independent oversight of the SIU regime. The failure to achieve four (4) hours out of the cell and two (2) hours of meaningful human contact is of particular concern, making an independent oversight body with a mandate to monitor and carry out research to track the operation of this new regime all the more necessary. It is also crucial that CSC implement effective and timely data collection and public reporting practices to facilitate the analysis and monitoring of the experiences of prisoners placed in SIUs, so that such an oversight body is able to

³³ Available at: <https://crimbrary.blogspot.com/2020/11/solitary-confinement-continues-in.html>; and <https://johnhoward.ca/drs-doob-sprott-report/>.

effectively serve its mandate. It is also crucial for recommendations and decisions that are made through such a review, and which are related to conditions and duration of confinement, to be transparent, timely, binding and open to examination.

The SIU regime also continues to give wide discretion to CSC to decide whether, when and for how long a prisoner should be confined in isolated and restrictive conditions. However, given that various groups within the prison population experience intersectional vulnerabilities, the CHRC is of the view that special attention must be given to how the following specific groups are experiencing conditions of isolation: Indigenous and racialized prisoners, women, trans and gender non-binary prisoners and those with serious physical, mental health and intellectual disabilities.

Recommended Question #9: Please provide details of the steps being taken to ensure that the current SIU regime does not continue to create conditions of de facto solitary confinement for prisoners. What steps are being taken to ensure effective and timely data collection practices to facilitate the analysis and monitoring of the experiences of prisoners placed in SIUs, including Indigenous and racialized prisoners, women, trans and gender non-binary prisoners, and those with physical, mental health and intellectual disabilities?

Recommended Question #10: What steps are being taken to establish an effective independent oversight body to monitor the operation of the SIU regime?

4. IMMIGRATION DETENTION

The CHRC remains deeply concerned by Canada's immigration detention regime, including the treatment of individuals who are detained, as well as the associated conditions of confinement. Every year, thousands of migrants who are not serving a criminal sentence are detained in Canada at the direction of the Canada Border Services Agency (CBSA). This detention can occur for a variety of reasons: some are detained as a result of past criminality, while others are detained because they are deemed a flight risk, because their identity cannot be confirmed, or because they are otherwise deemed to pose a danger to the public. A significant portion of migrants are held in institutions intended for criminal populations, rather than immigration holding centres, sometimes for significant periods of time. Limited services are available to these detainees.

The CHRC continues to share the concerns that have been expressed by civil society organizations engaged on this issue, and echoes the recommendations that have been made to Canada – including in its most recent Universal Periodic Review – to dramatically revise its migration detention regime to better align with its international human rights obligations, including by:

- ensuring that detention is used only as a last resort, and that alternatives to detention are explored in all cases;
- ending the practice of indefinite migration detention and ensuring that individuals detained for immigration purposes have access to habeas corpus procedures to avoid the risk of arbitrary detention;
- ensuring that detainees are not held in maximum security correctional facilities, and that they are not subject to solitary confinement; and
- establishing a regime to ensure independent oversight and monitoring of immigration detention.

The CHRC notes that while the federal government has undertaken extensive consultations on CBSA's National Immigration Detention Framework, concerns with respect to Canada's migration detention regime remain. In addition, although the government has introduced legislation that would ostensibly introduce an oversight body for the CBSA, including a complaint mechanism for detainees, progress on this legislation has stalled since the beginning of the COVID-19 pandemic.

Recommended Question #11: Please provide details of the steps being taken to revise Canada's immigration detention regime, including by: ensuring that detention is used only as a last resort and that alternatives to detention are explored in all cases; ending the practice of indefinite immigration detention; and ensuring that detainees are not held in maximum security correctional facilities or subject to de facto solitary confinement.

Recommended Question #12: Please provide details of the steps being taken to establish a regime to ensure independent oversight and monitoring of immigration detention.

Beyond oversight and monitoring, a significant gap exists in the human rights protections afforded to migrants detained in Canada.

While all individuals present in Canada are able to access the protections of the Charter, many migrant detainees are not able to appropriately assert and claim their rights, both as a result of their lack of awareness of what those rights are, and their lack of necessary resources, including legal assistance, to advocate for those rights through the courts.

The CHRA could potentially provide detainees with a more accessible manner in which to challenge discriminatory conduct by the state, including failure to provide appropriate services, in the course of their confinement. However, at this time, the CHRA states that in order to file a complaint under the CHRA about a situation or practice occurring in Canada, an individual must be either "lawfully present" in Canada or, if temporarily absent, entitled to return to Canada.³⁴ The CHRC believes that human rights protections

³⁴ Section 40(5).

should be available to all individuals present in Canada – lawfully or not – and has highlighted the need for Parliament to repeal these provisions both in submissions to UN mechanisms and during appearances before Parliament.

Recommended Question #13: Please detail the steps being taken to ensure that migrant detainees are able to access human rights protections on an equal basis with all others present in Canada, including access to the CHRA.

5. VIOLENCE AGAINST INDIGENOUS PEOPLES

5.1. Violence Against Indigenous Women and Girls

Indigenous women and girls continue to experience systemic racism and discrimination, bear a disproportionate burden of violence and are murdered or go missing at a disproportionately high rate. For too long, systemic racism, discrimination and violence against Indigenous women and girls, including those who are 2SLGBTQQIA,³⁵ has gone unacknowledged, undocumented, uninvestigated, and unexamined. The root causes of this racism, discrimination and violence are varied, complex, and intersectional.

While the CHRC welcomed the release of the Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls³⁶ (MMIWG) in 2019, the CHRC has remained concerned over the lack of overall progress in implementing the 231 Calls for Justice contained in the report.

The CHRC notes that on June 3, 2021, Canada launched a National Action Plan³⁷ to respond to the issues identified in the Final Report. The CHRC welcomes this critical step, and acknowledges the important work that has gone into the Plan's preparation. The CHRC wishes to note, however, that the Plan does not include concrete steps for implementation of its priorities, nor is there information about how the implementation will be monitored or how those responsible for action will be held accountable. Although the Plan makes note of this gap, and indicates that the development of an implementation plan is the next step in this process, no timeline for this has been clearly articulated.

Further, the National Action Plan is composed of multiple components developed by sub-working groups representing provincial, territorial and Indigenous governments,

³⁵ This refers to people who are Two-Spirit, lesbian, gay, bisexual, transgender, queer, questioning, intersex and asexual. This is used throughout the Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls both to include non-binary people and people with diverse sexualities, and as an explicit reminder that gender-diverse people's needs must equally be taken into account.

³⁶ Available at: <https://www.mmiwg-ffada.ca/final-report/>.

³⁷ Available at: <https://mmiwg2splus-nationalactionplan.ca/>.

communities, and organizations. The CHRC notes that not all of these components were complete at the time the Plan was launched, and it is unclear what impact this will have on implementation of the Plan as a whole.

Finally, the CHRC is also aware that a number of organizations led by and advocating for the rights of Indigenous women, girls and 2SLGBTQQIA people have expressed concerns over the consultation and engagement process that took place during the Plan's development. These organizations have expressed that the process of developing the Plan was not sufficiently inclusive of a diversity of grassroots voices, and that as a result, the Plan is not fully reflective of the priorities and realities of Indigenous women, girls, and 2SLGBTQQIA people.³⁸

Recommended Question #14: When does Canada expect to launch an implementation plan to address the issues identified in the Final Report of the National Inquiry into MMIWG, as well as the highlighted priorities in the National Action Plan? What steps are being taken to ensure the timely completion and coordinated implementation of all components of the National Action Plan? What steps are being taken to ensure inclusive engagement in the process?

5.2. Forced or Coerced Sterilization of Indigenous Women

Historically, policies of sterilization in Canada existed under the guise of public health, where sterilization was used as a condition of release from mental health institutions. However, these policies disproportionately affected Indigenous women, who were labeled as “feeble-minded” or “mentally defective”.³⁹ Unfortunately, the practice of forced or coerced sterilization of Indigenous women continues to this day.

Access to sexual and reproductive health care is a critical issue for women. Yet, Indigenous women across the country continue to recount experiences of forced or coerced sterilization. Several proposed class action lawsuits have been filed against the federal government and various provincial governments on behalf of Indigenous women who claim that they were sterilized without their free, full and informed consent. Indigenous women who have undergone coerced sterilization have been found to engage in self-harm, suffer from various physical, emotional and psychological ailments, and have withdrawn from seeking preventive healthcare services due to profound mistrust of the healthcare system and its authorities.⁴⁰ The Final Report of the National Inquiry into MMIWG stated that “[t]he forced sterilization of women represents directed

³⁸ For instance, one of these organizations is the Native Women's Association of Canada (NWAC), which has released its own Action Plan, called “Our Calls, Our Actions”, available at: <https://www.nwac.ca/wp-content/uploads/2021/06/NWAC-action-plan-FULL-ALL-EDITS.pdf>.

³⁹ Available at: <https://www.mmiwg-ffada.ca/final-report/>. See Volume 1a, Chapter 6: Confronting Oppression – Right to Health, at pp. 266-267.

⁴⁰ Saskatoon Regional Health Authority, External Review: Tubal Ligation in the Saskatoon Health Region: The Lived Experience of Aboriginal Women, 2017, available at: <https://senatorboyer.ca/wp-content/uploads/2021/09/Tubal-Ligation-in-the-Saskatoon-Health-Region-the-Lived-Experience-of-Aboriginal-Women-Boyer-and-Bartlett-July-11-2017.pdf>.

state violence against Indigenous women, and contributes to the dehumanization and objectification of Indigenous women, girls, and 2SLGBTQIA people.”⁴¹

Many civil society organizations, including Indigenous women’s organizations, have called on the government to take urgent action on this issue by:

- thoroughly investigating all allegations of forced or coerced sterilizations of Indigenous women in Canada;
- establishing policies and accountability mechanisms across Canada that provide clear guidance on how to ensure sterilizations are only performed with free, full, and informed consent; and
- providing access to justice for survivors and their families.⁴²

The CHRC notes that during Canada’s last review by this Committee, the Committee recognized the involuntary sterilization of Indigenous women in Canada as a form of torture, and asked Canada to provide an interim progress report on the issue by December 2019, signalling both its urgency and importance. While the CHRC acknowledges that Canada provided follow-up information on this issue in February 2020, the CHRC shares the concerns expressed by this Committee in August 2020 that Canada has not yet launched a thorough, impartial investigation into this serious issue, and has not met with survivors to discuss options for redress and justice.

The CHRC further notes that in June 2021, the Standing Senate Committee on Human Rights released a report⁴³ following a study it had conducted on the extent and scope of forced and coerced sterilization in Canada. The Committee recommended further study on this issue, inclusive of other marginalized groups such as women with disabilities, racialized women, intersex children and institutionalized persons, with the goal of identifying solutions to stop the practice.

Recommended Question #15: Please provide details of the steps being taken to respond to ongoing allegations about the forced or coerced sterilization of Indigenous women across Canada, including calls for an impartial investigation, further study, and redress and justice options for survivors? What efforts are being made to ensure coordination between the various jurisdictions in Canada in relation to this issue?

5.3. Residential Schools

⁴¹ Available at: <https://www.mmiwg-ffada.ca/final-report/>. See Volume 1a, Chapter 6: Confronting Oppression – Right to Health, at p. 267.

⁴² See:

https://www.amnesty.ca/sites/amnesty/files/Amnesty%20Sterilization%20Briefing%20Senate%20HR%20Committee%20March%202019_0.pdf.

⁴³ Available at:

https://sencanada.ca/content/sen/committee/432/RIDR/reports/ForcedSterilization_Report_FINAL_E.pdf.

Canada has a long and dark history of institutionalized child neglect, abuse and discrimination, including systematically separating Indigenous children from their families, culture and identity. The legacy of the residential school system looms large over many aspects of Indigenous people's lives, and continues to have a detrimental effect on the well-being of Indigenous communities in Canada.

In light of the recent discovery of the remains of 215 children at Kamloops Residential School, the CHRC joins the call for a thorough investigation of all former residential school sites, and stands with residential school survivors and their families, Indigenous leaders and communities, the Truth and Reconciliation Commission (TRC), and the Office of the United Nations High Commissioner for Human Rights who have called for prompt and meaningful action.⁴⁴

For decades, residential school survivors, their families, and communities have insisted that many children were buried in unmarked graves on school grounds, but had to fight to be believed or heard in the face of racist indifference and callous disregard. The TRC estimates that the real number of deaths in residential schools across Canada far exceeds the known total. The TRC's Calls to Action include six (6) calls related to missing children and burial information, which the CHRC maintains must be implemented without delay. Further, the CHRC wishes to emphasize that these efforts must be led by Indigenous peoples, informed by their wishes, and respectful of their rights.

Recommended Question #16: What steps are being taken to implement the TRC's Calls to Action related to missing children and burial information?

6. INSTITUTIONALIZATION AND INVOLUNTARY TREATMENT OF PEOPLE WITH DISABILITIES

Beyond the situation of people with disabilities in prisons, the CHRC wishes to bring to the Committee's attention the broader issue of institutionalization of people with disabilities, their treatment in these institutions, and the lack of access to adequate and appropriate supports and services that people with disabilities require to realize their right to live independently and with dignity in their communities. Underpinning these concerns is the lack of comprehensive data on the situations of persons living in institutions across the country, as well as related gaps in monitoring and oversight.

The CHRC notes that COVID-19 has shone a light on the situation of people with disabilities living in institutions, with reports highlighting how health restrictions have left some individuals, including young people with disabilities, living in nursing homes,

⁴⁴ See: <https://www.chrc-ccdp.gc.ca/en/resources/investigate-the-grounds-every-residential-school-canada>.

feeling “like a prisoner”.⁴⁵ Additionally, people with disabilities living in institutions such as long-term care residences and psychiatric facilities may be particularly vulnerable to COVID-19, leading UN experts to call for the accelerated deinstitutionalization of people with disabilities worldwide.⁴⁶

As the National Monitoring Mechanism for the United Nations *Convention on the Rights of Persons with Disabilities*, the CHRC has been made aware of stakeholder concerns regarding people with disabilities who have had no choice but to live in institutions due to a lack of adequate community-based supports and services.⁴⁷ These concerns are in line with the findings from the former Special Rapporteur on the Rights of Persons with Disabilities. In her report following her April 2019 visit to Canada, she noted “the lack of adequate services and support to live in the community, resulting in increased use of residential institutions.”⁴⁸

Of further concern are the issues highlighted by the Special Rapporteur regarding the involuntary treatment of people with disabilities, including the involuntary hospitalization of people with psychosocial and intellectual disabilities, and the forcible treatment of some individuals without their free and informed consent. In addition, the extensive use of seclusion and restraints, including chemical restraints, were highlighted as especially concerning given that there is no independent monitoring of mental health facilities.

The Special Rapporteur made a number of recommendations to Canada with respect to the institutionalization, deprivation of liberty, and involuntary treatment of people with disabilities, including calling for immediate action to stop all coercive practices and all new admissions of people with disabilities in institutions. She also recommended that Canada develop community-based, non-coercive services that are respectful of the rights and dignity of people with disabilities, and address the gaps in access to the supports that people with disabilities require to live independently in their communities.

Recommended Question #17: Please provide details of the steps being taken to stop the institutionalization and involuntary treatment of people with disabilities across Canada.

Recommended Question #18: What steps are being taken to collect comprehensive data and improve independent oversight on the situations of people with disabilities living in institutions?

⁴⁵ See: <https://www.cbc.ca/news/canada/nova-scotia/disability-restrictions-covid-pandemic-rules-enhanced-care-1.5965829>.

⁴⁶ See: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25765&LangID=E>.

⁴⁷ See: <https://ici.radio-canada.ca/nouvelle/1726042/personne-handicapee-jonathan-marchand-chsld-cage-parlement>.

⁴⁸ UNGA, Report of the Special Rapporteur on the Rights of Persons with Disabilities, 43rd Sess, Item 3, UN Doc A/HRC/43/41/Add.2, (19 December 2019), para. 60, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/346/54/PDF/G1934654.pdf?OpenElement>.

Recommended Question #19: What steps are being taken to address gaps in access to supports and services that people with disabilities require to live independently and with dignity in their communities? What efforts are being made to ensure coordination between the various jurisdictions in Canada in relation to this issue?

7. INTERSEX, TRANS AND GENDER DIVERSE YOUTH

The CHRC wishes to highlight two specific issues that harm intersex, trans and gender diverse youth: so-called “conversion therapies”, and unnecessary surgical interventions on intersex children.

Intersex, trans and gender diverse people are often still forced to adhere to a psychopathologizing and over-medicalized model of care, that is based on cis-normative assumptions about medically “correct” or “normal” bodies. However, non-consensual medical interventions, such as coerced examinations, unnecessary surgeries and conversion therapies, are cruel and harmful to intersex, trans, and gender diverse people.⁴⁹ Unnecessary intersex surgeries on children have been rightly characterized as a form of cruel, inhuman or degrading treatment or punishment by Canadian and international rights advocates, as well as by UN experts.⁵⁰ Conversion therapy is also now denounced by UN experts, medical associations, advocacy groups, faith leaders, and by most Canadians.⁵¹

The CHRC notes that Canada must work to reduce stigma, to recognize and normalize variations of sex characteristics and gender diversity, and to provide intersex, trans and gender diverse people with better access to appropriate care and supports that enable them to enjoy their right to health and to fully exercise their human rights. This should include legal and policy changes to ensure a full ban on conversion therapy everywhere, and a ban on unnecessary surgical interventions on intersex children.

While the CHRC welcomes the introduction of federal legislation⁵² to ban conversion therapy, as well as a myriad of municipal bans, the CHRC notes that the current

⁴⁹ See: <https://egale.ca/egale-canada-urges-the-federal-government-to-meet-domestic-and-international-human-rights-requirements-of-intersex-people-on-international-intersex-awareness-day/>; and <https://yogyakartaprinciples.org/relating-to-the-right-to-freedom-from-torture-and-cruel-inhuman-or-degrading-treatment-or-punishment-principle-10/>.

⁵⁰ See: <https://egale.ca/egale-submission-to-the-un-committee-against-torture/>; <https://www.wlu.ca/news/spotlights/2019/june/professor-morgan-holmes-is-pushing-for-change-for-intersex-people,-through-research-and-activism.html>; <https://www.hrw.org/report/2017/07/25/i-want-be-nature-made-me/medically-unnecessary-surgeries-intersex-children-us>; and <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20739&LangID=E>.

⁵¹ See: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=26051&LangID=E>; <https://static1.squarespace.com/static/5bfd4aab6365f02c7e82f8a82/t/5f8096b08038bb156ace2413/1602262710756/Conversion+Therapy+in+Canada+%28Oct+2%2C+2020%29+-+FINAL.pdf>; and <https://researchco.ca/2019/07/26/wrapped-in-sorrow-words-are-token/>.

⁵² See: <https://www.parl.ca/LegisInfo/BillDetails.aspx?Language=E&billId=10871883>.

legislation may not go far enough to provide full prevention, healing and compensation to those who were subjected to this practice.

Recommended Question #20: What steps are being taken to ensure that there is a full ban on conversion therapies in Canada, as well as unnecessary surgical interventions on intersex children? What efforts are being made to ensure coordination between the various jurisdictions in Canada in relation to these issues?

8. TECHNOLOGY AND PRIVACY

The CHRC notes that it is critically important for human rights protections to evolve to take into account advancements in technology. There are serious emerging and growing concerns about the use of technologies such as algorithms, artificial intelligence (AI) and assisted decision-making that can accelerate or amplify biases in the justice system, which can in turn lead to cruel, inhuman and degrading treatment.

Within the justice systems, the use of risk assessments, predictive analyses, surveillance and facial recognition, and automated and algorithmic decision-making in areas like policing,⁵³ law enforcement,⁵⁴ border security,⁵⁵ immigration,⁵⁶ and criminal justice⁵⁷ can further embed unfairness and systemic racism. Of particular concern is the use of biometric technologies such as facial recognition by policing and security organizations.⁵⁸ There is a growing call for caution, including a possible moratorium or

⁵³ See: Royal Society of Canada Infoveillance Working Group, AI Technologies—Like Police Facial Recognition—Discriminate Against People of Colour, September 2, 2020, available at: https://rsc-src.ca/sites/default/files/Infoveillance_EN_0.pdf; and <https://www.politico.eu/article/europe-artificial-intelligence-blindspot-race-algorithmic-harm/>.

⁵⁴ See: The Citizen Lab, To Surveil and Predict: A Human Rights Analysis of Algorithmic Policing in Canada, 1 Sept. 2020, available at: <https://citizenlab.ca/2020/09/to-surveil-and-predict-a-human-rights-analysis-of-algorithmic-policing-in-canada/>; and The Citizen Lab, Algorithmic Policing in Canada Explained, 1 Sept. 2020, available at: <https://citizenlab.ca/2020/09/algorithmic-policing-in-canada-explained/>; and <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26548>.

⁵⁵ See: <https://edri.org/wp-content/uploads/2020/11/Technological-Testing-Grounds.pdf>; and <https://www.ohchr.org/EN/Issues/Racism/SRRacism/Pages/CallRaceBordersDigitalTechnologies.aspx>.

⁵⁶ See: <https://ihrp.law.utoronto.ca/news/canadas-adoption-ai-immigration-raises-serious-rights-implications#overlay-context=news/canadas-adoption-ai-immigration-raises-serious-rights-implications>.

⁵⁷ See: Law Commission of Ontario, The Rise and Fall of AI and Algorithms In American Criminal Justice: Lessons for Canada, October 2020, available at: <https://www.lco-cdo.org/wp-content/uploads/2020/10/Criminal-AI-Paper-Final-Oct-28-2020.pdf>.

⁵⁸ See: Office of the Privacy Commissioner, Police use of Facial Recognition Technology in Canada and the way forward, June 10, 2021, available at: https://www.priv.gc.ca/en/opc-actions-and-decisions/ar_index/202021/sr_rcmp/; https://www.priv.gc.ca/en/opc-news/news-and-announcements/2021/an_210510_02/; and Office of the Privacy Commissioner, Announcement: Facial Recognition and Artificial Intelligence: International Privacy Guardians Call for More Protection and Accountability, 27 Oct. 2020, available at: https://priv.gc.ca/en/opc-news/news-and-announcements/2020/an_201027/.

prohibition on the use of facial recognition in these high-stake contexts,⁵⁹ where they can be used to make decisions that affect an individual's liberty, freedom, or human rights – at least until legal and regulatory frameworks can be implemented to ensure appropriate human rights protections.

The CHRC supports human rights-based privacy law reform and notes that Canada is undertaking legislative revisions of its privacy and consumer protection laws.⁶⁰ Although there are now numerous publications, guidance documents, and directives on ethical or responsible AI, there remain significant legal and regulatory gaps both domestically and internationally. The CHRC urges Canada to consider legislative and regulatory steps such as those recommended by the Australian Human Rights Commission,⁶¹ including the development of a national strategy. The CHRC supports further legislative and regulatory action to ensure human rights are fully protected as technology advances, as well as appropriate roles for National Human Rights Institutions in these regimes.

Recommended Question #21: What steps are being taken to ensure that racism and discrimination in the justice system are not being perpetuated through the use of technology, such as AI and assisted decision-making?

9. CANADA'S IMPLEMENTATION OF ITS INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

The CHRC continues to be of the view that the current system for implementation of Canada's international human rights obligations, including those under the CAT, is both structurally inadequate and practically ineffective.

This system continues to contribute in a substantial way to a demonstrable lack of progress in implementing the recommendations that have emanated from the international human rights system, including those made by this Committee. To close the gap between aspiration and reality, Canada must find a new way of working by both enhancing existing systems and creating new ones.

The CHRC appreciates the voluntary commitments made by Canada during its 3rd Universal Periodic Review to strengthen intergovernmental cooperation and public dialogue on human rights. The CHRC notes the recent progress made, including the development of a protocol for following up on the recommendations Canada has

⁵⁹ See <https://freedomonlinecoalition.com/wp-content/uploads/2021/06/FOC-Joint-Statement-on-Artificial-Intelligence-and-Human-Rights.pdf>; and <https://www.msn.com/en-ca/news/technology/human-rights-commission-calls-for-a-freeze-on-high-risk-facial-recognition/ar-AAKrcW> (Original reference unavailable as of January 22, 2024).

⁶⁰ See: Government of Canada, Department of Justice, Privacy Act Modernization: A Discussion Paper - Privacy Principles and Modernized Rules for a Digital Age, 20 Aug. 2019, available at: https://www.justice.gc.ca/eng/csj-sjc/pa-lprp/dp-dd/modern_1.html; and Proposed Legislation - Canada's System of Justice, 10 Feb. 2017, available at: <https://www.justice.gc.ca/eng/csj-sjc/pa-lprp/modern.html>.

⁶¹ See: <https://tech.humanrights.gov.au/overview/summary>.

received from international human rights bodies, the creation of a senior-level intergovernmental mechanism, and the hosting of more regular federal, provincial and territorial human rights ministerial meetings. While it is too early to see what the impact of these new and renewed mechanisms will be, the CHRC recognizes that they must be transparent and inclusive to lead to meaningful implementation.

While the CHRC welcomes its designation as the body responsible for monitoring the Government of Canada's implementation of the United Nations Convention on the Rights of Persons with Disabilities and the developments listed above, the CHRC remains concerned that the current system continues to perpetuate a patchwork approach to progress without a foundational structure of monitoring and implementation of interdependent, interrelated, and indivisible human rights. Therefore, the CHRC believes strongly that, in order to effectively implement the recommendations made to Canada during this and other reviews, it is imperative that substantial, meaningful and coordinated progress be made in ensuring a robust implementation and monitoring framework.

Recommended Question #22: What efforts are being made to ensure that the enhanced systems being created by Canada towards a robust implementation and monitoring framework of its international human rights obligations, including those under the CAT, are inclusive and transparent?