Canadian Human Rights Commission

Submission to the Committee on the Elimination of Racial Discrimination on the occasion of its consideration of Canada's 21st – 23rd Periodic Reports

July 2017

Cat. No.: HR4-118/2024E-PDF

ISBN: 978-0-660-70478-4

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THE CANADIAN HUMAN RIGHTS COMMISSION

The Canadian Human Rights Commission (CHRC) 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 CHRC 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 CHRC has jurisdiction pursuant to the CHRA 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 CHRC 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 members of visible minorities.

The CHRC has taken action to promote and protect the human rights of individuals in vulnerable circumstances by investigating complaints, issuing public statements, tabling Special Reports in Parliament, conducting research, developing policy, consulting with stakeholders, and representing the public interest in the mediation and litigation of complaints. It is committed to working with the Government of Canada to ensure continued progress in the protection of human rights, including Canada's implementation of the rights and obligations enshrined in the Convention on the Elimination of All Forms of Racial Discrimination (CERD). It is in the spirit of constructive engagement that the CHRC submits this report to the Committee on the Elimination of Racial Discrimination (the Committee) on the occasion of its review of Canada's 21st – 23rd periodic reports.

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.

DATA ON EQUALITY RIGHTS (ARTICLE 5)

1.1. Equality Rights Reports

The purpose of these reports is to compare the experience of certain vulnerable groups with others in Canada with respect to 7 dimensions of well-being widely considered critical from an equality-rights perspective: economic well-being; education; employment; health; housing; justice and safety; and political and social inclusion. The report uses data from several surveys conducted by Statistics Canada and provides as comprehensive a statistical portrait as can be drawn from the available data.[3]

The CHRC presents these reports to the Committee in the hopes that it will inform your work by providing empirical reference points regarding the impacts of systemic discrimination on Indigenous peoples and visible minority groups in Canada.

1.1.1. Equality rights of Aboriginal peoples

In 2013, the CHRC released the Report on Equality Rights of Aboriginal People. The report is available at www.chrc-ccdp.gc.ca/sites/default/files/equality_aboriginal_report_2.pdf.

The results of this comparison confirm the persistence of barriers to equality faced by Aboriginal people in Canada. For example, when compared to non-Aboriginal people, Aboriginal people:

- Have a lower life expectancy;
- Have lower median after-tax income;
- Are more likely to experience unemployment;
- Are more likely to collect employment insurance and social assistance;
- Are more likely to live in housing in need of major repairs;
- Are more likely to experience physical, emotional or sexual abuse;
- Are more likely to be victims of violent crimes; and
- Are more likely to be incarcerated and less likely to be granted parole.

[3] The CHRC recognizes the limitations inherent in using data from multiple surveys. For example, none of the surveys used in the report were intended to document equality rights. Since each survey had its own purpose, design, definition of key concepts and sample size, comparisons between surveys were not made. Further, some sample sizes are so low in some surveys that it was necessary to drop some measures in accordance with confidentiality requirements. Finally, some measures were also dropped because the value of the coefficient of variation was too high and results were accordingly considered unacceptable. Additionally, many of the surveys excluded Aboriginal peoples living on reserve.

1.1.2. Equality rights of members of visible minority groups

The CHRC will be releasing the Report on Equality Rights of Visible Minorities later this year.

Currently, 19.1% of the Canadian population identifies as a member of a visible minority. According to Statistics Canada projections, this number will likely be between 29% and 32% by 2031.

South Asians represent the largest visible minority group (24.5% of all those who identify as a member of a visible minority), followed by Chinese (22.7%) and Black (14%). Together, these groups represent more than 60% of the visible minority population in Canada.

The majority of visible minority women (78.4%) and men (75.8%) report being immigrants.

The results of the comparison confirm the existence of some continued barriers to equality when compared to those who do not identify as being visible minorities. For example, visible minorities:

- Are more likely to have a Bachelor's degree, or a university certificate or diploma above bachelor level, but less likely to be employed regardless of their highest educational achievement;
- Have a lower average employment income;
- Are more likely to be in low-income status;
- Are more likely to live in subsidized housing; and
- Are more likely to have unmet health care needs.

Finally, while visible minority women are less likely than women who are not visible minorities to have had contact with the criminal courts, visible minority men are more likely to have had such contact when compared with men who are not visible minorities.

1.2. Human Rights Complaints

Over the past 5 years, the CHRC accepted 817 complaints alleging discrimination in employment or in the provision of services on the basis of race, colour, national or ethnic origin, or some combination of these grounds. This represents 23% of the total number of complaints accepted by the CHRC during this time. More of these complaints related to discrimination in employment than to discrimination in the provision of services.

Of the complaints filed on the basis of national or ethnic origin and race, 224 and 190, respectively, were filed by Indigenous peoples, representing approximately ¼ of all complaints filed on these grounds.[4]

Of the complaints filed on the basis of colour, 334 – or more than 60% -- were filed by persons identifying as Black.[5]

Interestingly, 92% of complaints citing religion as the ground of discrimination also cite one of these grounds (race, colour, or national or ethnic origin).

The nature of the complaints received varies widely. However, for the Committee's information the CHRC offers the following observations:

- Many complaints of discrimination on the basis of race, colour and national or ethnic origin in the provision of services relate to racial profiling. For example, the CHRC has received several complaints against banks which include allegations that the transactions of black customers and other members of visible minority groups were subjected to excessive scrutiny and sometimes lengthy questioning by staff. In one case, a bank staff member, alert to reports of local robberies having been committed by black men, contacted police because the complainant – a black man – was using the ATM. Many of these complaints have been referred to the Canadian Human Rights Tribunal (CHRT).

- A number of complaints have been filed by Indigenous peoples alleging discrimination in a wide range of services provided by the federal government, including policing, housing, and education for Indigenous persons with disabilities.

- Many complaints from Indigenous peoples are also related to recognition of their Indigenous identities, including eligibility for registration – which will be discussed in greater detail in section 3.5 below – and membership in particular First Nation communities. For example, a group of complaints was recently sent to the CHRT in relation to Indigenous families that have been denied membership status and related rights and services, and asked to leave the Indigenous community to which they trace their roots, because of their bi-racial backgrounds.

1.3. Employment Equity in the Federally-Regulated Sector[6]

[4] Based on a keyword search.
[5] Based on a keyword search.
[6] The CHRC conducts audits of federally-regulated employers to ensure their compliance with their obligations under the EEA. The following information is based on data from three soucres: 1) for information relating to the private sector, ESDC Employment Equity Act Annual Reports, available at www.labour.gc.ca/eng/standards_equity/eq/emp/ (Original reference not available as of February 22, 2024); 2) for information relating to the public sector, Employment Equity in the Public Service of Canada, available at www.tbs-sct.gc.ca/reports-rapports/ee/2012-2013/ee-eng.asp (Original reference not available as of February 22, 2024); and 3) for information realting to labour market availability, 2006 Census of Canada and 2006 Participation and Activity Limitation Survey, available at www.labour.gc.ca/eng/standards_equity/eq/pubs_eq/eedr/2006/report/page00.shtml.

Over the past 20 years, the representation of Indigenous persons in the federally-regulated public sector has grown from 2.4% to 5.1%, consistently remaining above labour force availability.[7] However, in the federally-regulated private sector, representation has only grown from 1.2% to 2.1% and has remained consistently below labour market availability.[8]

A somewhat opposite situation exists for members of visible minorities. Representation of visible minorities in the federally-regulated private sector has grown steadily over the past 20 years – from 9.2% to 20.4% -- and has remained near or above labour force availability. However, in the federally-regulated public sector, representation has consistently been below labour market availability, despite almost tripling from 4.7% to 13.8%.

Caution should be taken in viewing these numbers as determinative of the employment situation for Indigenous peoples and members of visible minorities in Canada, as the employment equity regime has some significant shortcomings.

Firstly, federally-regulated entities comprise only approximately 7% of Canadian jobs. Analogous employment equity regimes do not exist in the provinces and territories.

Secondly, labour market availability estimates are generally based on outdated information. For example, the current targets are based on information from the 2011 census. However, as noted above, the proportion of the Canadian population identifying as a member of a visible minority will increase substantially in the coming years. Further, Statistics Canada reports that the Indigenous population is growing at a much greater rate than the non-Indigenous population.[9] A regime that took population projections into account in determining targets would be more appropriate.

Finally, it is not clear that the designation of the 4 groups – women, persons with disabilities, visible minorities and Aboriginal persons – in section 3 of the EEA continues to be appropriate. For example, there may be a need to add an additional group or groups. Further, as it relates to the use of the term “visible minorities”, the CHRC recognizes that this term may not be appropriate, and that the use of the umbrella category of visible minorities may obscure the realities and specific concerns of sub-groups.

While section 44 of the EEA mandates that the legislation be reviewed every 5 years, few substantive reviews have been undertaken and no substantive changes been made. It is the view of the CHRC that the time for a comprehensive review has come.

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[7] It has been observed, however, that this representation reamins highly concentrated in some departments, such as Indigneous Affairs, Correctional Services of Canada and Health Canada. Representation gaps additionally reamin at many occupational groups, including at the Executive levels.

[8] It has been observed, however, that the progress that has been made haslargely been for Indigenous men, with Indigenous women having made little progress.

[9] See http://www.statcan.gc.ca/pub/89-645-x/2010001/growth-pop-croissance-eng.htm.

Recommendation 1: That Canada conduct a comprehensive review of the existing employment equity regime and make such changes as are necessary to increase the representation of members of visible minority groups and Indigenous peoples in the workforce.

INDIGENOUS PEOPLES

The CHRC views the situation of Indigenous peoples[10] in Canada as one of the most pressing human rights issues facing Canada today. Indigenous peoples in Canada continue to experience high levels of socio-economic disadvantage and systemic discrimination in many facets of their daily life. They often face difficulty in accessing justice on a basis equal with others in Canada. All of these realities have been repeatedly recognized by international bodies, including this Committee.

Many of the problems in First Nations communities in Canada have been linked to the Indian Act, a piece of federal legislation. The Indian Act regulates and affects many aspects of the daily lives of Indigenous peoples, including their relationship with the federal government. It sets out criteria for Indian status and band membership as well as criteria for entitlements that flow from having Indian status and band membership, such as access to housing on reserves. Legal challenges to these and other Indian Act provisions continue to be expressed at the national and international levels.

Since its last review before the Committee, Canada has announced its commitment to adopt the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). The CHRC applauds the government's decision. It urges the government to recognize, that this is an important step to contribute to reconciliation and to set out a path to eliminating the individual and systemic discrimination facing Indigenous peoples in Canada. Progress will require a sustained commitment to cooperation, participation and mutual respect. The CHRC urges the federal government, in consultation with Indigenous peoples, to develop a plan for implementation of the UNDRIP.

The CHRC also wishes to draw the Committee's attention to the Final Report of the Truth and Reconciliation Commission of Canada (TRC), Honouring the Truth, Reconciling for the Future.[11] The TRC was created by the Indian Residential Schools Settlement Agreement to examine the history and legacy of the residential schools

[10] The term "Indigenous" or "Indigenous peoples" is used throughout this submission to refer to First Nations, Inuit and Métis peoples in Canada, also commonly referred to as Aboriginal peoples. In specific areas of this submission, the terms Aboriginal or First Nations may be used for greater specificity, for example where this is the official terminology used in a referenced law, or where a law or program is applicable only to this sub-category of the Indigneous population.

[11] Available at http://www.trc.ca/websites/trcinstitution/File/2015/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf.

system and make recommendations. Included in the report are 94 Calls to Action[12], which are recommendations to further reconciliation by dealing with historical disadvantage and ongoing discrimination in a variety of areas, including child welfare, education, language and culture, health, and justice.

Recommendation 2: That Canada develop a concrete and specific strategy to implement the TRC's 94 Calls to Action, including implementation of the UNDRIP, in consultation with Indigenous peoples.

1.4. Violence against Indigenous Women and Girls

Indigenous women in Canada experience systemic discrimination and bear a disproportionate burden of violence. The Royal Canadian Mounted Police recently reported that since 1980, over 1,100 Indigenous women have been murdered or gone missing in Canada.[13] Estimates indicate that the rate at which Indigenous women are murdered or go missing is four times higher than the rate of representation of Indigenous women in the Canadian population, which is 4.3%.

In December 2014, the Inter-American Commission on Human Rights completed its study relating to missing and murdered Indigenous women in British Columbia, concluding that these disappearances and murders are part of a broader pattern of violence and discrimination against Indigenous women in Canada.[14] In March 2015, the Committee on the Elimination of Discrimination against Women concluded its own inquiry concerning this issue with a finding that Canada has violated the rights of Indigenous women victims of violence under the Convention on the Elimination of All Forms of Discrimination against Women.[15]

The root causes of this violence are varied, complex, and intersectional. Indigenous peoples in Canada have experienced historical disadvantage, including systemic discrimination and racism. The legacy of the residential school system looms large over many aspects of Indigenous lives. Indigenous women and girls are disproportionately the victims of domestic and lateral violence.[16] They are also shockingly disproportionately represented in Canada's sex and human trafficking industry[17] – based on available data on prostitution in Canada, Indigenous women and girls represent between 14% and 60% of this population nationally.[18]

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[12] Available at http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf.
[13] See http://www.rcmp-grc.gc.ca/en/missing-and-murdered-aboriginal-women-national-operational-overview.
[14] See www.oas.org/en/iachr/reports/pdfs/Indigenous-Women-BC-Canada-en.pdf.
[15] CEDAW/C/OP.8/CAN/1 (6 March 2015).
[16] Aboriginal Lateral Violence, Native Women's Association of Canada, available at https://www.nwac.ca/wp-content/uploads/2015/05/2011-Aboriginal-Lateral-Violence.pdf.
[17] See Sexual Exploitation and Trafficking of Aboriginal Women and Girls: Literature Review and Key Informant Interviews, Native Women's Associaition of Canada, available at https://www.nwac.ca/wp-content/uploads/2015/05/2014_NWAC_Human_Trafficking_and_Sexual_Exploitation_Report.pdf.
[18] Anupriya Sethi, Domestic Sex Trafficking of Aboriginal Girls in Canada: Issues and Implications, available at http://ir.lib.uwo.ca/cgi/viewcontent.cgi?article=1404&context=aprci.

The CHRC commends the Government of Canada's decision to hold a national inquiry into murdered and missing Indigenous women and girls, and its recent appointment of three Aboriginal women to the five-member inquiry panel, including an Indigenous woman chair. It further applauds the Government's pre-inquiry activities that sought to consult survivors, family members and loved ones, Indigenous peoples, NGOs, provinces and territories, and other experts regarding the design of the inquiry itself. The CHRC was consulted during the pre-inquiry process and made 16 recommendations for the Government's consideration. The full submission can be found at http://www.chrc-ccdp.gc.ca/eng/content/submission-canadian-human-rights-commission-government-canada-pre-inquiry-design-process.

The inquiry is presently scheduled to release its final report in December 2018. However, various organizations have expressed concern with the way in which the inquiry is being conducted. The Native Women's Association of Canada (NWAC) released its second "report card" on the inquiry in May 2017 and noted significant concerns including failures to provide regular progress reports, and to build transparent and accountable relationships with families, survivors and external stakeholders.[19]

Recommendation 3: That Canada apply a human rights-based approach to conducting its inquiry into murdered and missing Indigenous women. This approach should examine the issue comprehensively and holistically, reveal barriers to equality and their root causes, recommend lasting solutions, and establish a way to monitor progress in achieving these. To ensure its credibility, the inquiry must ensure the access, participation and empowerment of Indigenous women and girls who are survivors of violence, and must treat these women not just as victims but as independent rights-holders.

1.5. Challenges in Accessing Justice

For more than 30 years, section 67 of the CHRA prevented people from filing complaints of discrimination resulting from the application of the Indian Act. In June 2008, the CHRA was amended to repeal this section.[20] This is a positive development that the CHRC hopes will have a lasting impact.

Since the repeal of section 67 took effect[21], Indigenous individuals and organizations have filed hundred of complaints against both the federal government and against First Nation governments. Some of these cases raise complex issues and could set precedents that could advance equality and improve the quality of life of Indigenous people for generations to come.

[19] See https://www.nwac.ca/wp-content/uploads/2017/05/NWAC-Inquiry-Report-Card-May-2017-Final.pdf.
[20] See Bill C-21: An Act to Amend the Canadian Human Rights Act, available at www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=3598216.
[21] Numbers are between 18 June 2008 and 18 June 2014.

However, barriers to human rights justice persist for many Indigenous people, and in these situations, protection from discrimination and guarantees of equality of opportunity remain elusive.

Throughout 2013 and 2014, the CHRC held a series of roundtable meetings across the country with Indigenous women, representative Indigenous women's associations, and other organizations that provide services to First Nations, Métis and Inuit women in order to discuss issues of access to justice generally, and access to human rights justice specifically.

The results of these consultations have been published in a report, Honouring the Strength of Our Sisters: Increasing Access to Human Rights Justice for Indigenous Women and Girls. It is available on the CHRC's website at http://www.chrc-ccdp.gc.ca/eng/content/honouring-strength-our-sisters-increasing-access-human-rights-justice-indigenous-women-and (Original reference not available as of February 22, 2024).

A total of 21 barriers to access to justice have been identified through the roundtable process. These include fear of retaliation, accessibility of human rights and justice system processes, power imbalances, historical and ongoing colonization, linguistic barriers, availability of advocacy and legal support, and economic barriers. The report also contains a description of strategies participants suggested to reduce or remove some of these barriers. Many of these relate to increasing human rights awareness and education among Indigenous peoples and communities in Canada.

The CHRC will be engaging in follow-up action to increase access to its processes for Indigenous women. It urges the government to also take action to address these barriers.

Recommendation 4: That Canada develop a concrete and specific strategy to address the issue of access to justice for Indigenous peoples generally, and Indigenous women in particular.

1.6. Equitable Funding for Services on Reserves

Across the country, many First Nation communities continue to live without access to quality health, education and other social services. First Nations often cite lack of funding as the main reason for inadequate services on reserves, arguing that government funding has failed to keep pace with the needs of their communities.

The Auditor General of Canada, an independent parliamentary officer, has noted that structural impediments – including the lack of clarity about service levels, the lack of a

legislative base, the lack of an appropriate funding mechanism, and the lack of organizations to support local service delivery – severely limit the delivery of public services to First Nation communities and hinder improvements in living conditions on reserves.[22]

Funding for services on reserves was noted as an issue of concern by former Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, in his report on his October 2013 visit to Canada. Noting the "rights and significant needs of Indigenous peoples and the geographic remoteness of many Indigenous communities", he recommended that the Government of Canada should ensure "sufficient funding for services for Indigenous peoples both on and off reserve, including in areas of education, health and child welfare" and that "the quality of these services is at least equal to that provided to other Canadians".[23]

A number of complaints have been filed with the CHRC alleging that First Nations communities do not have substantively equal access to social services that are often taken for granted by persons living off reserve.

For example, in 2007, the First Nations Child and Family Caring Society and Assembly of First Nations filed complaints alleging that the Government of Canada systematically underfunds organizations delivering child and family services on reserve, leading to substantially higher rates of foster care for First Nations children. After years of procedural wrangling, preliminary rulings and associated appeals, the CHRT upheld the complaints in January of 2016.[24] The CHRC welcomed the CHRT's decision, and the Government of Canada's decision not to appeal. However, while the Government has made some positive changes, disputes still remain about whether it is moving quickly enough to remedy the problems identified in the CHRT's decision. As a result, the CHRT has had to provide additional directions[25], and more rulings are expected.

Although the child and family services case was the first of its kind to be adjudicated on its merits, similar complaints have also been filed with respect to other services that the Government of Canada funds and provides to First Nations peoples on reserve. For example, there are currently complaints before the CHRT with respect to such matters as special education, health services, assisted living and income assistance benefits, and policing.

It should be noted that, in addition to the adequacy of funding, jurisdictional disputes between federal and provincial service providers also pose barriers to the provision of

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[22] See June 2011 Status Report of the Auditor General of Canada, "Chapter 4 – Programs for First Nations on Reserve", available at www.oag-bvg.gc.ca/internet/English/parl_oag_201106_04_e_35372.html (Original reference not available as of February 22, 2024).
[23] A/HRC/27/52/Add.2 at para 84.
[24] First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian Affairs and Northern Development Canada), 2016 CHRT 2.
[25] First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada), 2016 CHRT 10, 2016 CHRT 16, 2017 CHRT 7, and 2017 CHRT 14.

equitable and adequate services on reserves. Where such disputes arise, First Nations children may be left waiting for services they need, or in some cases they may be denied services that are available to other children. Recognizing the potentially significant impacts of this issue, Jordan's Principle has been developed. It is a child-first principle that provides that, where a government service is available to all other children, but a jurisdictional dispute regarding services to a First Nation child arises, the government department of first contact pays for the service and can seek reimbursement from the other government or department after the child receives the service.

In a May 2017 ruling[26], the CHRT held that Canada had failed to properly implement the full scope and meaning of Jordan's Principle, resulting in unnecessary delays, gaps and denial of essential public services to First Nations children.

Finally, the CHRC notes the intersectional impact of being an Indigenous person with a disability, and the barriers to health care, education and other social services that are often encountered. The CHRC applauds the government for its commitment to enact federal accessibility legislation. This presents an opportunity for consultation with Indigenous peoples and communities on strategies to address and eliminate social, economic, educational and attitudinal barriers and provide Indigenous persons with disabilities the necessary support to fully participate in their communities.

Recommendation 5: That Canada develop a concrete and specific strategy to ensure that services for Indigenous persons in First Nations communities, including Indigenous persons with disabilities, are equitable and adequate.

Recommendation 6: That Canada implement Jordan's Principle in a non-discriminatory manner that does not result in the denial of services to First Nations children.

Recommendation 7: That Canada meaningfully consult First Nations, Métis and Inuit peoples during the development of accessibility legislation to ensure that Indigenous persons with disabilities have access to essential services. Canada should further ensure that First Nations communities are provided with adequate resources to enable them to fulfill their responsibilities under the new legislation.

1.7. Enjoyment of Economic, Social and Cultural Rights

In addition to lacking adequate and equitable social services, many Indigenous peoples continue to be significantly disadvantaged in their enjoyment of important economic,

[26] 2017 CHRT 14, available at: https://fncaringsociety.com/sites/default/files/2017%20CHRT%2014.pdf (Original reference not available as of February 22, 2024).

social and cultural rights resulting in high levels of poverty, inadequate housing, food insecurity, unsafe drinking water and poor sanitation.

The Assembly of First Nations reports that inadequate housing on First Nations reserves has reached a critical point, and that overcrowding, mould contamination and a lack of basic amenities have become realities for many Indigenous people living on reserves.[27]

The CHRC has received complaints alleging that First Nations peoples living on reserve do not have substantively equal access to housing. Several such cases are currently before the CHRT, brought by individuals who are doing their best to survive in substandard or inaccessible houses allocated to them by their First Nations governments. A frequent response from the First Nations respondents is that they are doing the best they can, given a long and documented history of underfunding by the Government of Canada, and a resulting shortage of healthy housing. [28]

In June 2015, the Senate Standing Committee on Aboriginal Peoples released a report, On-Reserve housing and Infrastructure: Recommendations for Change[29], making a number of recommendations to the government in relation to housing on First Nations reserves, including by increasing funding.

The Senate Standing Committee on Aboriginal Peoples has also examined the housing situation for Inuit peoples in Nunavut and released a report in March 2017 on this issue, We Can Do Better: Housing in Inuit Nunangat[30]. The report finds that "[s]evere overcrowding, substandard homes, and a lack of affordable and suitable housing options has left many Inuit families one step away from homelessness; an unsettling reality in one of the harshest climates in the world."[31] The report makes a number of recommendations to the government, including that it develop a funding strategy for northern housing.[32]

The realization of human rights is inextricably bound to considerations related to sustainable development. Unsustainable development, including resource development, has been reported to have had a significant impact on some First Nations

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[27] Fact Sheet – First Nations Housing on-Reserve, Assembly of First Nations, available at http://www.afn.ca/uploads/files/housing/factsheet-housing.pdf (Original reference not available as of February 22, 2024).
[28] See, for example: On-Reserve Housing and Infrastructure: Recommendations for Change, Standing Senate Committee on Aboriginal Peoples, available at https://sencanada.ca/content/sen/Committee/412/appa/rep/rep12jun15-e.pdf.
[29] Available at https://sencanada.ca/content/sen/Committee/412/appa/rep/rep12jun15-e.pdf.
[30] Available at https://www.documentcloud.org/documents/3477215-APPA-RPT-Northern-Housing-Report-2017-02-28.html.
[31] See https://www.documentcloud.org/documents/3477215-APPA-RPT-Northern-Housing-Report-2017-02-28.html, at p.5.
[32] See https://www.documentcloud.org/documents/3477215-APPA-RPT-Northern-Housing-Report-2017-02-28.html, at p.33.

reserves, contributing to a lack of access to clean water and suitable sanitation.[33] Northern Indigenous communities have been observed to be particularly vulnerable to the impacts of climate change due to factors such as remoteness and inaccessibility, aging and inefficient infrastructure, and reliance on diesel for electricity generation and space heating.[34]

Recommendation 8: That Canada develop a concrete and specific strategy to address the housing situation on First Nations reserves on an urgent basis.

Recommendation 9: That Canada work with Indigenous communities to promote sustainable development that balances consideration of environmental, social and economic well-being, and that adequately takes into account Indigenous peoples' right to free, prior and informed consent.

1.8. Eligibility for Registration

The Indian Act historically discriminated against women and children by granting males with Indian status and those of patrilineal descent preference in the granting of Indian status. This had the effect of denying Indian status to the grandchildren of women with Indian status while granting status to the grandchildren of men with Indian status. [35]

While some of this was remedied through two amendments to the Indian Act[36], First Nations people have identified that the current status classification system continues to create discriminatory distinctions based on gender.

In addition, while amendments to the Indian Act have eliminated the practice of enfranchisement, its legacy remains in the Indian registration process. "Enfranchisement" was a legal process for terminating an individual's Indian status and conferring full Canadian Citizenship, and was a key feature of the government's assimilation policies regarding First Nations in Canada. Enfranchisement by application was introduced in the Gradual Civilization Act of 1857 and was based on the presumption that First Nations people would be willing to surrender their legal and ancestral identities in exchange for citizenship and the ability to assimilate into

[33] See, for example: https://www.thestar.com/news/atkinsonseries/2015/08/28/first-nations-bear-the-risks-of-oilsands-development.html; https://www.theglobeandmail.com/news/national/manitoba-premier-apologizes-to-first-nation-for-damage-done-by-dam/article22541829/.
[34] See, for example: http://www.aadnc-aandc.gc.ca/eng/1100100034249/1100100034253?utm_source=climate&utm_medium=url (Original reference not available as of February 22, 2024).
[35] See, for example, McIvor v. Canada, [2009 BCCA 153], available at www.canlii.org/en/bc/bcca/doc/2009/2009bcca153/2009bcca153.html
[36] Bill C-31 – An Act to Amend the Indian Act in 1985 and Bill C-3 – Gender Equity in Indian Registration Act in 2011 (referenced in Canada's report to the Committee at para. 29); see also: www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?Language=E&ls=c3&Parl=40&Ses=3&source=library_prb (Original reference not available as of February 22, 2024).

Canadian society. However, very few First Nations people were willing to voluntarily abandon their cultural and legal identities. As a result, with the introduction of the Indian Act in 1876, enfranchisement became legally compulsory for reasons such as serving in the Canadian Forces, gaining a university education, leaving reserves for long periods of time, and for First Nations women if they married a man without Indian status.

Indigenous organizations and claimants continue to call on the Government of Canada to amend or replace controversial provisions in the Indian Act that define who it will recognize as having "Indian status".

A number of legal decisions over the last 10 years have found different aspects of the federal government's approach to be discriminatory or otherwise unlawful.[37] As at the date of this submission, there are numerous human rights complaints pending before the CHRC or the CHRT, relating to allegations of discrimination in the status provisions of the Indian Act. These complaints are all on hold, waiting for a ruling from the Supreme Court of Canada that is expected to determine whether the CHRA can be used to challenge adverse impacts flowing from the application of legislation, in this case the status provisions.[38]

Recommendation 10: That Canada take all necessary steps to ensure that no residual discrimination exists in the Indian Registration System.

Recommendation 11: That Canada review the Indian Act in consultation with First Nations people and replace it with an appropriate legislative framework.

JUSTICE AND SECURITY ISSUES

1.9. Profiling

Across Canada, concerns continue to be raised that racial profiling by police, security agencies, and other authority figures is a daily reality, reducing trust in public institutions, and having harmful impacts on Indigenous, Black, Muslim and other communities. This has been noted, for example, in reports published by the provincial

[37] McIvor v. Canada (Registrar of Indian and Northern Affairs), 2009 BCCA 153; Descheneaux c. Canada (Procureur Général), 2015 QCCS 3555; Gehl v. Canada (Attorney General), 2017 ONCA 319; Beattie et al. v. Aboriginal Affairs and Northern Development Canada, 2014 CHRT 1.

[38] Canadian Human Rights Commission v. Canada (Attorney General) (Supreme Court of Canada case file no. 37208). In Matson et al. v. Indian and Northern Affairs Canada [2013 CHRT 13], the Canadian human Rights traibunal dismissed the complaint on the basis that the complaint did not establish a discrimintory practice in the provision of a service but rather was a direct challenge to legislation, which it held is not possible under the CHRA.The Federal Court and the Federal Court of Appeal have agreed. The Supreme Court of Canada is scheduled to hear the Commission's appeal on November 28, 2017.

human rights commissions in Ontario[39] and Quebec[40]. At the conclusion of its official visit to Canada in October 2016, the UN Working Group of Experts on persons of African descent expressed its view that racial profiling is "endemic in the strategies and practices used by law enforcement" and that the arbitrary use of "carding" and street checks disproportionately affects people of African descent.[41]

Some of these concerns have been reflected in complaints that have been filed with the CHRC at the federal level. For example, complaints have been sent to the CHRT relating to allegations that Muslim air travelers have been subjected to disproportionate and heightened scrutiny.[42] In addition, the Federal Court of Canada recently upheld a CHRT ruling that the Canada Border Services Agency (CBSA) discriminated against a young Indigenous woman when one of its officers failed to take appropriate steps to de-escalate an interaction, instead engaging in a heated exchange about Canada's ownership of the land on which a port of entry was located.[43] The CHRC welcomed this decision, which leaves in place an order directing the CBSA to adopt a stand-alone policy that clearly prohibits discrimination on the basis of race.

In a 2011 Special Report to Parliament entitled Human Rights Accountability in National Security Practices[44], the CHRC noted that, while many security organizations have policies to prevent discriminatory practices such as profiling, few can demonstrate that these policies are followed. The absence of this information has the potential to impact public trust.

For this reason, the CHRC recommended that Parliament introduce legislation establishing an accountability regime for security organizations. This must include independent oversight, as well as requirements to collect and analyze human rights-based data and to make this information available to the public.

Recommendation 12: That Canada ensure that all security organizations are subject to appropriate independent oversight. The membership of these bodies must reflect the principle of pluralism, for example, by including members of racialized communities, Indigenous peoples, persons with disabilities and LGBTQ individuals, and by ensuring appropriate gender balance.

[39] Ontario Human Rights Commission, Under suspicion: Research and consultation report on racial profiling in Ontario (2017).
[40] Commission des droits de la personne et des droits de la jeunesse du Québec, Racial Profiling and Systemic Discrimination of Racialized Youth : Report of the Consultation on Racial Profiling and its Consequences, One Year Later : Taking Stock (June 14, 2012).
[41] See http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20732&LangID=E.
[42] For a preliminary ruling in such a case, see: Yaffa v. Air Canada, 2016 CHRT 4.
[43] Canada (Attorney General) v. Davis, 2017 FC 159.
[44] Available at http://www.chrc-ccdp.gc.ca/sites/default/files/chrc-specialreport-28112011.pdf.

Recommendation 13: That Canada require all security organizations to collect and analyze human rights-based data in relation to their activities, and to account publicly for their performance.

1.10. Corrections

The following section deals with issues in the federal correctional system[45]. Many of the concerns outlined below are long-standing and have been raised repeatedly by numerous bodies, including the CHRC, the Office of the Correctional Investigator (OCI) and the Auditor General of Canada. These concerns have also been noted by international bodies including the Committee against Torture[46], the Human Rights Committee[47], the Committee on Economic, Social and Cultural Rights[48], and the Committee on the Elimination of Discrimination against Women[49]. Despite this, little progress has been made on many of these issues over a number of years.

The CHRC notes that the Senate Standing Committee on Human Rights is currently conducting a study on the human rights of prisoners in Canada. The CHRC appeared before the committee and urged it to implement meaningful recommendations to address many of the issues outlined below.[50]

1.10.1. Overrepresentation of vulnerable groups

In its 2012-2013 Annual Report, OCI noted that recent inmate population growth has been exclusively driven by increases in the composition of ethnically and culturally diverse offenders. In the preceding 10 years, the Indigenous incarcerated population increased by 46.4% while visible minority groups – including Black, Asian and Hispanic – increased by almost 75%. During the same period, the population of Caucasian inmates actually declined by 3%.[51]

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[45] A federal sentence in Canada is a sentence of 2 years or more.
[46] CAT/C/CAN/CO/6 (25 June 2012) at para 19, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fCAN%2fCO%2f6&Lang=en.
[47] CCPR/C/CAN/CO/6 (15 August 2015) at para 14, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fCAN%2fCO%2f6&Lang=en.
[48] E/C.12/CAN/CO/6 (23 March 2016) at para 45, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fCAN%2fCO%2f6&Lang=en.
[49] CEDAW/C/CAN/CO/8-9 (25 November 2016) at paras 48-49, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fCAN%2fCO%2f8-9&Lang=en.
[50] See http://www.chrc-ccdp.gc.ca/eng/content/our-correctional-system-chrc-states-we-must-do-better (Original reference not available as of February 22, 2024).
[51] See Annual Report of the Correctional Investigator 2012-2013, at p. 3, available at https://oci-bec.gc.ca/sites/default/files/2023-06/annrpt20122013-eng.pdf.

At the conclusion of its official visit to Canada, the UN Working Group of Experts on persons of African descent expressed its concern with the over-representation of Black individuals in Canadian prisons. The statistics would appear to support these concerns: while Black individuals make up only 2.9% of the population of Canada, they account for 9.5% of the federally-incarcerated population.[52]

Indigenous peoples make up 4.3% of Canada's population, yet the OCI estimates that as a group they are incarcerated at a rate that is several times higher than their national representation.[53] Indigenous male offenders make up 25% of the federally-incarcerated population.[54] For Indigenous women, this over-representation is even more pronounced at 36%.[55] Indigenous offenders are also more likely to spend more of their sentence behind bars and significantly less likely to be released on parole when compared with non-Indigenous offenders.[56]

A web of complex and intersecting factors lie at the root of these statistics: historical disadvantage and systemic discrimination, socio-economic disparity, disturbingly-high rates of mental illness, a lack of appropriate community services, over-policing of certain segments of the population, and, in the case of Indigenous peoples, the lingering effects of colonization and the legacy of the residential school system. For example, a recent file review conducted by OCI of the social histories of Indigenous women offenders indicated that: 1) over half reported having attended or having had a family member attend a residential school, 2) two-thirds of their parents had a substance use issue and 48% had been removed from the family home, and 3) almost all files indicated the existence of previous traumatic experience, including sexual and/or physical abuse, as well as substance misuse problems.[57]

The legal framework for incarceration in Canada contains some provisions intended to address systemic disadvantage by providing for alternatives to incarceration. For example, in relation to Indigenous offenders:

- The Supreme Court of Canada in R v. Gladue[58] compelled judges to use a different analysis in determining a suitable sentence for Indigenous offenders by paying particular attention to their unique circumstances and social histories.

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[52] See Annual Report of the Correctional Investigator 2012-2013, at p. 3, available at https://oci-bec.gc.ca/sites/default/files/2023-06/annrpt20122013-eng.pdf.
[53] See Annual Report of the Office of the Correctional Investiagtor 2015-2016, at p.43, available at https://oci-bec.gc.ca/sites/default/files/2023-06/annrpt20152016-eng.pdf.
[54] See Annual Report of the Office of the Correctional Investiagtor 2015-2016, at p.43, available at https://oci-bec.gc.ca/sites/default/files/2023-06/annrpt20152016-eng.pdf.
[55] See Annual Report of the Office of the Correctional Investiagtor 2015-2016, at p.62, available at https://oci-bec.gc.ca/sites/default/files/2023-06/annrpt20152016-eng.pdf.
[56] See 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.
[57] See Annual Report of the Office of the Correctional Investiagtor 2015-2016, at p.43, available at https://oci-bec.gc.ca/sites/default/files/2023-06/annrpt20152016-eng.pdf.
[58] [1999] 1 SCR 688; see also R. v. Ipeelee [2012] 1 SCR 433.

- Section 81 of the Corrections and Conditional Release Act (CCRA) provides the Correctional Service of Canada (CSC) with the capacity to enter into agreements with Indigenous communities for the care and custody of offenders who would otherwise be held in a CSC facility. It further allows Indigenous communities to have a key role in delivering programs within correctional institutions and to those offenders accepted under a Section 81 agreement.

- Section 84 of the CCRA enables Indigenous communities to provide enhanced information to the Parole Board of Canada and to propose conditions for offenders wanting to be released into their communities.

The OCI has found, however, that these provisions do not appear to be operating as intended and that the Gladue principles, in particular, are not well-understood within CSC and are unevenly applied.[59]

More needs to be done to address the root causes of the consistent over-representation of Black and Indigenous individuals in Canadian prisons. A number of recommendations have been made to the government on measures to work towards this goal. For example, the Final Report of the TRC includes amongst its recommendations the following:

- that the Federation of Law Societies of Canada and all law schools ensure that lawyers receive appropriate cultural competency training, including on the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law, and Aboriginal-Crown relations;

- that all levels of government commit to eliminating the over-representation of Aboriginal people in custody over the next decade and issue annual reports that monitor and evaluate the progress in doing so; and

- that all levels of government provide sufficient and stable funding to implement and evaluate community sanctions that provide realistic alternatives to incarceration for Indigenous offenders and respond to the underlying cause of offending.

The CHRC urges the government to implement the Calls to Action of the TRC. It further urges the government to consider how the preventive principles contained therein – education, funding for community services, addressing the underlying causes of offending – may be used to better understand and address the over-representation of other communities in vulnerable circumstances.

[59] See 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.

Recommendation 14: That Canada develop a concrete and holistic strategy to address the over-incarceration of Black and Indigenous peoples on an urgent basis.

Recommendation 15: That Canada provide the necessary training and resources to ensure that existing provisions relating to sentencing and alternatives to incarceration for Indigenous peoples are more fully understood and consistently applied.

Recommendation 16: That Canada fully implement the Calls to Action of the TRC as they relate to the criminal justice system.

1.10.2. Conditions of confinement

Once incarcerated, both Black and Indigenous inmates continue to experience significant discrimination. For example:

- Various oversight bodies, including the OCI and the Auditor General of Canada, have noted that culturally-relevant programming and services is limited for both Black and Indigenous inmates.[60] The CHRC has received a number of complaints as well which allege that CSC fails to accommodate their religious or spiritual practices, for example, by providing opportunities for smudging or access to spiritual advisors, or by accommodating dietary restrictions.

- Both Black[61] and Indigenous offenders[62] are more likely to be classified as maximum security. Indigenous women are significantly over-represented in maximum security (42%).[63] Being so classified has significant impacts in the prison environment and may limit, for example, the inmate's ability to access programming in a timely manner or to be successful in parole proceedings.

  Longstanding concerns have been expressed by various bodies, including the CHRC, about the appropriateness of the tools that CSC uses to determine an inmate's classification, primarily the Custody Rating Scale. Most recently, the

[60] 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.
[61] See 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.
[62] See Annual Report of the Office of the Correctional Investiagtor 2015-2016, at p.43, available at https://oci-bec.gc.ca/sites/default/files/2023-06/annrpt20152016-eng.pdf.
[63] See Annual Report of the Office of the Correctional Investiagtor 2015-2016, at p.62, available at https://oci-bec.gc.ca/sites/default/files/2023-06/annrpt20152016-eng.pdf.

Auditor General examined the application of the tool in relation to Indigenous offenders and found that 1) it does not include consideration of Aboriginal social history factors, and 2) in applying their professional judgment in the determination of an Indigenous offender's security level, staff were not provided with guidance on how to consider an offender's social history appropriately.[64] This issue will be considered by the Supreme Court of Canada in Ewert v. Canada.[65]

- Both Black[66] and Indigenous[67] offenders are over-represented in segregation.[68] This over-representation is even more pronounced for Indigenous women (50%).[69] Indigenous inmates have the longest average stay in segregation when compared with any other group.[70]

  Research has shown that prolonged segregation can have harmful and permanent psychological and physical effects on inmates – particularly those with pre-existing mental disabilities – including insomnia, hallucinations, psychosis, and self-harm. It can also cause mental disabilities to develop. In 2014, the OCI released an investigative report that examined 30 inmate suicides that occurred between 2011 and 2014. It found that 14 of the 30 suicides occurred in segregation cells. 10 of the 14 inmates who had committed suicide in segregation had been there for more than 15 days, the maximum length of time prescribed by the "Mandela Rules" relating to solitary confinement.[71]

As with over-representation, there are complex and intersectional factors underlying the above realities.

The importance of institutional culture cannot be overstated. Training is often identified as the most important tool for ensuring that frontline staff are responsive to the needs and respectful of the human rights of particular segments of the incarcerated population. However, workforce design and hiring decisions are equally important.

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[64] See 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.
[65] See Canada v. Ewert, 2016 FCA 203 (CanLII).
[66] See 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.
[67] See Annual Report of the Office of the Correctional Investiagtor 2015-2016, at p.43, available at https://oci-bec.gc.ca/sites/default/files/2023-06/annrpt20152016-eng.pdf.
[68] The CCRA does not explicitly refer to or use the term "solitary confinement". Rather, it provides for two forms of "segregation", disciplinary segregation and administrative segregation. The CHRC is of the view that segregation as defined by the federal legislation is frequently tantamount to solitary confinement as defined within the international human rights system.
[69] See Annual Report of the Office of the Correctional Investiagtor 2015-2016, at p.62, available at https://oci-bec.gc.ca/sites/default/files/2023-06/annrpt20152016-eng.pdf.
[70] See Aministrative Segregation in Federal Corrections: 10 Year Trends, at p.2, available at https://oci-bec.gc.ca/en/content/administrative-segregation-federal-corrections-10-year-trends.
[71] See A Three Year Review of Federal inmate Suicides (2011-2014), at p.15-18, available at: https://publications.gc.ca/collections/collection_2014/bec-oci/PS104-11-2014-eng.pdf.

Currently, CSC targets for diversity are set in accordance with the EEA, as explained in section 2.3 above. The EEA determines those targets based on the demographic representation of various groups in the Canadian population at large. However, the demographic profile of the prison population is very different. Ensuring that the staffing profile of CSC better reflects the inmate population it is serving may serve to introduce a better level of understanding of the experiences and needs of particular groups in the prison setting, and may improve correctional outcomes for members of these groups.

A lack of adequate resources affects the ability of CSC to carry out its mandate to rehabilitate and reintegrate offenders in profound ways – from its ability to offer culturally appropriate and relevant programming, to the ways in which it manages inmates, to its ability to provide appropriate services including mental health services.

Given the prevalence of prisoners in the correctional setting with an identified mental health need[72], this last point is particularly important. The OCI has repeatedly noted that an overall lack of accessible mental health services means that many offenders – including Black and Indigenous offenders – are incarcerated in settings that are ill-equipped to respond appropriately to their symptoms and behaviours. It has observed that:

In far too many cases, their mental health problems deteriorate to the point where they result in violations of institutional rules, altercations with staff and other offenders, and, often, self-harm. In too many instances, these offenders are placed in segregation or protective custody for their personal safety… In the correctional environment, offenders with mental disorders do not always comprehend, conform to or adjust properly to the rules of institutional life…Irrational, impulsive and compulsive behaviours associated with their disorders can result in verbal or physical confrontations with staff or other inmates, which often lead to institutional charges and long periods in administrative or disciplinary segregation.[73]

Recommendation 17: That Canada effectively limit the use of segregation to exceptional circumstances, as a last resort and for as short a time as possible, in line with the Mandela Rules. Further, given its proven deleterious effects on mental health, Canada should abolish the use of segregation for inmates with mental health disabilities. Finally, recognizing the overwhelming majority of federally-incarcerated women suffer from past trauma and have an indentified mental health need, Canada should place an immediate moratorium on the use of segregation for women in federal prisons.

[72] For instance, in its 2014-2015 Annual Report, OCI reported that mental health issues are 2-3 times more prevalent in Canadian prisons than in the general population; see https://oci-bec.gc.ca/sites/default/files/2023-06/annrpt20142015-eng.pdf at p.13.
[73] See Annual Report of the Correctional Investigator 2008-2009, available at http://www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20082009-eng.aspx (Original reference not available as of February 22, 2024).

Recommendation 18: That Canada set hiring targets for CSC that better reflect the diversity of the prison population.

Recommendation 19: That Canada develop a concrete and specific strategy to ensure that appropriate and culturally-relevant programming and services are available for all offenders, and in particular for Black and Indigenous offenders.

Recommendation 20: That Canada develop a concrete and specific strategy to increase the capacity and effectiveness of treatment and programming for offenders with mental health disabilities.

1.11. Migrant Detainees

Every year, thousands of migrants who are not serving a criminal sentence are detained in Canada at the direction of the 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 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.

Hundreds of children have been and continue to be placed in immigration detention in Canada. In most cases, children are held alongside their parents or adult siblings who have been held for immigration-related reasons. Many of these children are held as "guests" to avoid separating them from their adult relatives. However, they have no right of review of their detention, and inadequate consideration of their best interests is undertaken when their relatives' detention is reviewed.

Many civil society organizations in Canada have expressed concern with this practice. The CHRC wishes to highlight in particular a 2015 report issued by the Human Rights Program (IHRP) at the University of Toronto's Faculty of Law entitled We Have No Rights: Arbitrary imprisonment and cruel treatment of migrants with mental health issues in Canada.[74] This report conducts an analysis of this situation vis-à-vis international human rights standards and concludes that this detention and the associated conditions of confinement violate international human rights law protections relating to cruel, inhuman and degrading treatment, non-discrimination on the basis of mental disability, and the right to an effective remedy. Thirty recommendations have been made including that:

[74] Available at http://www.law.utoronto.ca/utfl_file/count/media/ihrp_we_have_no_rights_report_web_version_final_170615.pdf.

- an independent body be created to oversee and investigate detention-related matters;
- sufficient funding be provided to ensure regular access for detainees to health care (including mental health care), social workers, community supports, and spiritual and family support; and
- a screening tool be created for CBSA offices to assist in identifying vulnerable persons, such as asylum-seekers, those with mental health issues and victims of torture, to ensure that the risk posed by these detainees is accurately assessed.

Many advocates highlight the case of Lucía Vega Jiminéz, a Mexican national without status in Canada who hanged herself in December 2013 while in immigration detention. Ms. Jiminéz was initially detained in an immigration holding centre, but was transferred within days to a correctional facility, where she sought treatment for mental health-related issues prior to her death. A Coroner's inquest into the death of Ms. Jiminéz was held in the province of British Columbia in September 2014. The inquest provided a list of recommendations, including that Canada appoint an ombudsperson to mediate any concerns or complaints, that it create a civilian organization to investigate critical incidents in CBSA custody, and that immigration detainees have access to legal counsel, medical services, services offered by NGOs, and spiritual and family visits.

The IHRP, in September 2016, released a second report No Life for a Child: A Roadmap to End Immigration Detention of Children and Family Separation.[75] The report calls for an end to the practice of detaining migrant children, and provides 11 specific recommendations relating to this goal, including revising existing laws to ensure that the "best interest of the child" principle is a primary consideration in all immigration decisions involving children, and creating policy guidelines to increase access to quality education, recreational opportunities, medical services and appropriate nutrition within immigration detention facilities.

The IHRP's third report, Invisible Citizens: Canadian Children in Immigration Detention[76], highlights the situation of Canadian children who are not formally detained by CBSA, but rather stay in detention facilities with their parents as de facto detainees. The report highlights that the best interests of Canadian children continue to be inadequately accounted for in detention review proceedings and that, because under immigration law Canadian citizens cannot be formally detained, Canadian children are unable to access legal proceedings to review their continued de facto detention.

The CHRC shares the concern that has been expressed by civil society organizations engaged on this issue, and echoes the recommendations that have been made. In its 2016 Annual Report to Parliament, People First, the CHRC highlighted the case of an 8-year-old Canadian child who was detained alongside her Ghanaian mother who had been denied asylum in Canada.[77] The CHRC also appeared before the Standing

[75] Available at http://ihrp.law.utoronto.ca/utfl_file/count/PUBLICATIONS/Report-NoLifeForAChild.pdf.
[76] Available at http://ihrp.law.utoronto.ca/utfl_file/count/PUBLICATIONS/Report-InvisibleCitizens.pdf.
[77] Available at http://www.chrcreport.ca/ (Original reference not available as of February 22, 2024).

Senate Committee on National Security and Defense in May 2016 in relation to Bill S-205, An Act to amend the Canada Border Services Agency Act, to highlight its concerns regarding conditions in detention centres and advocated for independent oversight and monitoring of this practice.[78]

Beyond oversight and monitoring, however, there exists a significant gap 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 Canadian Charter of Rights and Freedoms, 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 provide detainees with a more accessible manner in which to challenge discriminatory conduct, including failure to provide appropriate services, in the course of their confinement. However, 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.[79]

The CHRC has at various times in its history called for the repeal of these provisions of the CHRA, including in submissions to UN mechanisms and during appearances before parliament.

The CHRC understands and agrees with the concern that the human rights system should not be used to undermine immigration enforcement activities. However, it is of the view that human rights protections should be available to all individuals present in Canada – lawfully or not – in a manner that does not interfere with the legitimate operation of the immigration system.

Recommendation 21: That Canada establish a regime to ensure independent oversight and monitoring of migrant detention.

Recommendation 22: That Canada ensure that migrant detainees are able to access human rights protections on an equal basis with all others present in Canada, including by repealing sections 40(5) and 40(6) of the CHRA.

[78] See: http://www.chrc-ccdp.gc.ca/eng/content/16052016-chief-commissioners-presentation-senate-committee-national-security-and-defence (Original reference not available as of February 22, 2024).
[79] Section 40(5).

Recommendation 23: That Canada ensure that this legislation is supported by appropriate infrastructure, including comprehensive and appropriate data gathering, social policies and programs, and evaluations.

OTHER ISSUES

1.12. Trans and Gender Diverse individuals

Racialized and Indigenous transgender, gender diverse and two-spirited individuals in Canada experience multiple and intersecting forms of discrimination.

A recent survey by Transpulse – a community-based research project investigating the impact of social exclusion and discrimination on the health of trans people in Ontario – examined the impact of racism and ethnicity-based discrimination on physical and mental health outcomes. It found, for example, that:

- 67% of racialized and 52% of Indigenous trans individuals reported being made fun of while growing up because of their race or ethnicity;
- 69% of racialized and 46% of Indigenous trans individuals reported being made fun of as an adult because of their race or ethnicity;
- 26% of racialized and 35% of Indigenous trans individuals reported being harassed by police because of their race or ethnicity;
- 22% of racialized and 33% of Indigenous trans individuals reported being turned down for a job because of their race or ethnicity; and
- 31% of both racialized and Indigenous trans individuals reported feeling uncomfortable in trans spaces because of their race or ethnicity.[80]

This last statistic in particular highlights the need to challenge racism and ethnicity-related racism within trans communities.

A further study, Intersecting impacts of transphobia and racism on HIV risk among trans persons of colour in Ontario[81], found that racism and transphobia interact to increase the odds of HIV-related sexual risk behavior and points to the need for greater action to address the impact of intersectional discrimination on all aspects of a trans or gender diverse individual's life, including on their health.

The CHRC applauds the government for adopting legislation to add "gender identity or expression" to the list of prohibited grounds of discrimination in the CHRA. It hopes this addition will make it clear to people in Canada that everyone has the right to be treated with respect and equality regardless of their gender identity or expression.

[80] See http://transpulseproject.ca/wp-content/uploads/2013/03/Racism-E-Bulletin-5-vFinal-English.pdf.
[81] Roxanne Longman Marcellin, Greta R. Bauer, Ayden I Scheim (2013), Ethnicity and Inequalities in Health and Social Care, Vol.6 Issue 4, pp. 97-107, available at http://www.emeraldinsight.com/doi/pdfplus/10.1108/EIHSC-09-2013-0017.

Recommendation 24: That the federal government and federally-regulated entities adjust policies and practices to align with the new legislation, taking into account the particularly vulnerable circumstances of racialized and Indigenous trans and gender diverse individuals.

Recommendation 25: That Canada sponsor and/or support additional research and/or dialogue to better understand the issue of discrimination against trans and gender diverse individuals, including the particular causes and effects of discrimination on racialized and Indigenous trans and gender diverse individuals.

1.13. Economic and Social Status Protection

The multiple and intersecting forms of socio-economic disadvantage experienced by Indigenous persons in Canada has been discussed extensively in section 3 above. Many members of racialized communities find themselves in similarly vulnerable circumstances. For example, at the conclusion of its official visit to Canada in October 2016, the UN Working Group of Experts on Persons of African descent noted: the disproportionately high unemployment rates among African Canadians; the disproportionately high rates of poverty among African Canadian women; and the significantly disproportionate number of Caribbean and continental African children living below the poverty line. It further noted the environmental racism faced by African Canadian communities whereby landfills, waste dumps and other environmentally hazardous activities are disproportionately situated near neighborhoods of people of African descent, creating serious health risks.[82]

All provincial / territorial jurisdictions in Canada recognize some type of economic or social ground of discrimination in their human rights code.[83] The CHRA, however, does not.

Lack of recognition in the CHRA of a ground of discrimination related to social or economic status may result in individuals in vulnerable circumstances falling through the cracks of human rights protection where their lived experience – the totality of their characteristics – may not be a neat and clean fit with the current enumerated grounds. The addition of an appropriate prohibited ground of discrimination provides the potential of better reflecting and addressing the realities of discrimination in that it offers a means for recognizing the way economic and social disadvantage intersects with other grounds of discrimination already recognized in the CHRA such as disability.

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[82] See http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20732&LangID=E.

[83] Three Canadian jusridictions – Quebec, New Brunswick and the Northwest Territories – have adopted "social condition" as a prohibited ground of discrimination. Seven jurisdictions – Alberta, British Columbia, Manitoba, Nova Scotia, Prince Edward Island, the Yukon and Nunavut – prohibit discrimination based on "source of income". "Recepit of public assistance" is a prohibited ground of discrimination in Ontario and Saskatchewan. Newfoundland has adopted the ground "social origin".

The CHRC therefore supports the addition of an appropriate ground. In its Concluding Observations to Canada's 6th periodic review, the Committee on Economic, Social and Cultural Rights recommended that social condition be included in the prohibited grounds of discrimination in the CHRA.[84] It is not clear what steps Canada intends to take to follow up on this recommendation.

Recommendation 26: That Canada add an appropriate ground to the CHRA to protect individuals from discrimination relating to their economic and social status.

[84] See: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/062/37/PDF/G1606237.pdf?OpenElement (Original reference not available as of February 22, 2024), at para. 18.