

**Recommendations from the NAWL Consultation on  
Violence Against Women (VAW) Law Reform in Canada  
to the United Nations Special Rapporteur on Violence  
Against Women, its Causes and Consequences (UN SR  
VAW)**



NATIONAL ASSOCIATION OF WOMEN AND THE LAW

## Considerations and context relevant to framing feminist engagement in VAW law reform in Canada

The visit of the United Nations Special Rapporteur on violence against women, its causes and consequences (SR VAW) presented an important opportunity for the National Association of Women and the Law (NAWL) to convene consultations with other national feminist and equality seeking groups to focus on the potential for feminist engagement in VAW law reform in Canada.<sup>1</sup> It has been a very long time since feminist groups were able to come together to discuss and develop strategies to respond to and drive change in relation to the many ways in which the law is implicated in state responses to VAW. Law reform is a one cornerstone of a comprehensive NAP VAW and must be a cornerstone of the government's actions to meet their obligations to prevent and respond to VAW in Canada.

The consultation with the SR VAW was convened as part of NAWL's project "Rebuilding law reform capacities: substantive equality in the law making process".<sup>2</sup> The impacts of the previous defunding of feminist and equality seeking groups, particularly in relation to advocacy, and the deskilling that accompanied it, including the capacity gaps related to feminist engagement in law reform, are deep and ongoing. However, despite these constraints, on Friday April 13, 2018, NAWL convened a preparatory meeting of 16 national feminist and equality seeking groups to come together to and discuss VAW law reform priorities, the law reform expertise that currently exists within various organizations, as well as the capacity gaps in law reform expertise that need to be filled for there to be feminist law reform leadership across the range of areas where VAW law reform is required. There were other national groups that could not participate, often because organizational capacities are so stretched, including in relation to law reform. Systematic consultations with and among feminist and equality seeking groups will be critical to the framing and implementation of a comprehensive approach to VAW law reform in Canada.

The organizations represented at the consultation were able to come to agreement on a range of issues related to VAW law reform to present to the SR VAW, with the request that she include these in the report of her official visit to Canada. The participants also requested that she reflect the following in her report:

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<sup>1</sup> The NAWL led consultation included participants representing the following organizations: The National Association of Women and the Law (NAWL/ANFD), The Canadian Association of Elizabeth Fry Societies (CAEFS/L'ACSEF), The Canadian Council of Muslim Women (CCMW/CCFM), The Canadian Federation of University Women (CFUW/FCFUDU), The Canadian Feminist Alliance for International Action (FAFIA/AFAI), The Canadian Research Institute on the Advancement of Women (CRIAW/ICREF), The Canadian Women's Foundation (CWF/FCF), Law Needs Feminism Because (LNFB/DBFC), The Native Women's Association of Canada (NWAC/ L'AFAC), Pauktuutit Inuit Women of Canada, the Women's Legal Education and Action Fund (LEAF/FAEJ), Women's Shelters Canada (WSC/HFC ), Action Canada for Sexual Health and Rights, Action ontarienne contre la violence faite aux femmes (AOCVF), Amnesty International Canada, and the Canadian Labour Congress (CLC-CTC).

<sup>2</sup> Funding for the NAWL project; "Rebuilding Feminist Law Reform Capacity: Substantive Equality in the Law Making Process" was generously provided by Status of Women Canada.

- The realities of women in Canada experiencing violence remain dire, and require immediate and systematic actions by all levels of government;
- Women in all their diversity must explicitly and specifically be at the centre of all VAW law reform in Canada;
- All VAW law reform in Canada must reflect intersectional feminist analysis, and be grounded in human rights and specifically women's human rights;
- Particularly because of the jurisdictional issues between federal/provincial and territorial governments in relation to VAW, it is all the more important that the federal government take leadership in ensuring that Canada meets its international and domestic obligations to prevent and respond to VAW in a systematic, comprehensive, coordinated and coherent way;
- All analysis of the legislative framework required to prevent and respond to VAW must be framed to also recognize and redress women's poverty and economic insecurity, which structures and shapes women's experiences of violence, and especially those of groups of women that are particularly vulnerable to VAW in its many forms. Ensuring that the historic and current context is well understood is essential to informing this analysis, particularly in relation to colonialism and the ongoing impacts of colonialism, including as they impact on violence against Indigenous women; and
- Law on the books is very important to framing responses to issues of violence against women, and, as feminist and equality seeking groups have clearly identified, it is also extremely important to systematically monitor the impacts that law in practice is having on women, paying particular attention to the impacts of the law, and law in practice, on specific groups of women.

While there is a wide range of VAW issues that require some aspect of law reform, the participating organizations agreed on specific law reform recommendations in five (5) umbrella areas of violence against women and girls:

1. Intimate partner/domestic violence against women and girls
2. Sexual assault and trafficking of women and girls
3. Sexual harassment and violence against women and girls at work, in schools & facilitated by technology
4. Violence against women and girls related to sexual and reproductive health and rights (SRHR)
5. Violence against women in detention

This list is by no means comprehensive as there are many additional areas where VAW law reform and coherent application and administration of the law is required. However, it is important to highlight that these recommendations are agreed to by all the national and equality seeking groups represented in the NAWL consultations.

Specific law reform efforts must be prioritized to prevent and respond to the many forms of violence experienced by Indigenous women and girls in Canada.<sup>3</sup> The *Indian Act* is a colonial and patriarchal document at its core which is embedded with historical racial and sex-based discrimination, which continues to allow violence to be perpetrated against Indigenous women. Canada's history is coloured by the legacy of the *Indian Act*. NWAC understands the *Indian Act* is the embodiment of a colonial imposition which regulates who is considered to be Indigenous and who is not. It creates jurisdictional and logistical barriers to Indigenous people receiving services. The *Indian Act* works to systemically reduce the number of eligible First Nations people and is a form of cultural genocide. The *Indian Act* also creates hierarchies among Indigenous groups based on whether or not a person has status and what provisions they have status under. This hierarchy perpetrates lateral violence through communities. In the *Act*, Indigenous women were not granted status on the same terms as Indigenous men. Indigenous women faced many sexist barriers to having their identity recognized. Indigenous women have been forcibly disenfranchised from their communities when they marry a non-Indigenous partner, and even when they are born between certain years. Bill S-3 *An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c. Canada (Procureur général)* was passed on December 4, 2017 in response to the *Descheneaux*<sup>4</sup> case, with the purpose of correcting the sex-based discrimination in the *Indian Act*. These corrections apply to the third generation of the descendants of the women who lost status, and the descendants of children perceived to be "illegitimate". There is nothing stopping the Government from going further than the *Descheneaux* decision and Bill S-3 to correct other forms of discrimination in the *Indian Act* that ultimately violate the *Charter of Rights and Freedoms*, and their responsibility to Indigenous

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<sup>3</sup> The information that follows in this section draws from *Eliminating Discrimination under the Registration Provisions of the Indian Act: Culturally Appropriate Consultation with Indigenous Women: Summary Report on Consultation*, Native Women's Association of Canada (February 2018).

<sup>4</sup> *Descheneaux c. Canada (Procureur général)* 2015 QCCS 3555

women. As a proclaimed feminist government, this type of discriminatory language is unacceptable and contradicts the values put in place by the Government of Canada. As stated in UNDRIP,<sup>5</sup> Indigenous peoples have the right to determine their own identity and membership while respecting the principle of gender equality. NWAC recognizes that, in the short-term, legislative amendments are urgently needed in order for women and their descendants to gain status, membership, and have access to essential benefits and services to which they are entitled.

#### **VAW Law Reform Recommendation #1:**

**That the Government of Canada remove ALL sex-based discrimination from the *Indian Act*, which continues to allow violence against Indigenous women.**

#### **The Call for a National Action Plan on Violence Against Women and Girls in Canada**

Under international law, every country has an obligation to address violence against women. The United Nations called on all countries to have a National Action Plan on Violence against women (NAP VAW) by 2015. National Action Plans provide a framework for strengthening the systems that respond to violence against women. They establish national standards and call for collaboration between all levels of government, civil society, survivors, and service responders. They put women's knowledge, experiences and needs at the centre. In February 2015, a Blueprint for Canada's NAP was released. Developed by 22 civil society organizations working at either the national or provincial level and endorsed by over 180 organizations, the Blueprint provides a roadmap for Canada's NAP. The Blueprint covers prevention measures, service responses, legal and justice responses, and social policy responses. Despite the 2015 timeline, Canada still does not have a comprehensive national plan to address violence against women and girls. In June 2017, the federal government announced its Strategy to Address and Prevent Gender Based Violence. Since then, few details have been released. Based on available information, the Strategy, which is only federal in scope, appears to be more of a re-organization plan. It is very much project oriented creating few opportunities for systemic change. The Strategy does include much needed new data collection on GBV and its impacts. One hundred million dollars over five years was allocated to the federal strategy, the equivalent of \$5.80 per woman and girl child over five years. Clearly this is not sufficient given the enormity of the issues. The Strategy is based on the following three pillars:

- Prevention;
- Support for survivors and their families; and
- Promotion of responsive legal and justice systems.

The allocation of funds, however, does not seem to reflect these priorities. The current Federal GBV Strategy needs to be attached to policy change and legislation and needs to be seen as an initial step towards a NAP VAW. Canada needs a coherent, coordinated, well-resourced NAP on

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<sup>5</sup> *United Nations Declaration on the Rights of Indigenous Peoples* [UNDRIP] A/RES/61/295

Violence Against Women to ensure that women in all areas of the country have access to comparable levels of services and protection. This is not the case today.

A NAP VAW is needed to ensure:

- Consistency across and within jurisdictions in policies and legislation that address VAW
- Shared understanding of the root causes of VAW
- Consistent approaches to prevention and responses to VAW
- Collective pursuit of the most appropriate solutions
- High-level commitment to a multi-pronged, coordinated, pan-Canadian approach;
- Coordinated, clear and effective services and systems for survivors of VAW that respect and respond to diversity; and
- National standards with equality of access for women.

As a starting point, there are several areas of federal jurisdiction where the federal government could take a leadership role. The federal government should require all provinces to provide civil legal aid in all cases where there is family violence and a contested custody or access application, and the person who has been abused cannot otherwise afford a lawyer. Canadian statutes should provide that an abused parent is able to request non-disclosure of her address if she is concerned about her safety or the safety of her children. Survivors need to have freedom of movement across provincial borders. Moving to a different province or territory presents a number of barriers, including the lack of enforcement of protection orders across provincial borders.

Developing and implementing a NAP will require leadership on the part of the federal government. In this context leadership means:

- Substantial financial investments. Linkage of the NAP to the Canada Health Transfer and Canada Social Transfer
- Investing in the development of common objectives and measurable outcomes with the provinces and territories
- Strengthening of social policies that affect women’s vulnerability to violence  
Commitment to measurable goals and timelines and the resources required to meet these.

**VAW Law Reform Recommendation #2:**

**That Canada develop, fund, and implement a NAP VAW in accordance with the United Nations guidance on NAP VAW<sup>6</sup>**

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<sup>6</sup> A starting point for the NAP VAW for Canada is reflected in a *Blueprint for Canada’s National Action Plan (NAP) on Violence against Women and Girls*, developed collaboratively by 22 parties (including NGOs, unions and activists) in February 2015.

## **1. Intimate Partner/Domestic violence against women and girls**

Domestic violence or Intimate Partner Violence is still one of the most common forms of violence against women in Canada. A woman is killed by her partner or former partner every 6 days. Many things can be done to prevent domestic violence, to better support survivors and to prevent femicide. One is a major coordinated legislation reform.

### **VAW Law Reform Recommendation #3:**

**That the federal, provincial and territorial governments have to work together to build a more coherent and comprehensive legislative framework on domestic violence that recognizes and acknowledges the specificity of this kind of violence.**

Right now, some forms of violence are criminalized, such as physical and sexual violence and stalking, but domestic violence isn't recognized as a whole. A more comprehensive definition should include all the aspects of domestic violence, including psychological, emotional and economical abuse.

### **VAW Law Reform Recommendation #4:**

**That a section of the *Criminal Code* be dedicated to domestic violence. The *Criminal Code* needs also to include an appropriate and comprehensive definition of domestic violence to hold the abuser fully accountable.**

It's also necessary that laws protect women and their children when separation or divorce occurs. We know that the abuse doesn't stop after a separation and in fact, the period immediately after a separation is the most dangerous for abused women (many are killed by an ex-partner). Given those facts, after a separation, the priority should be given to the protection and the safety of women and their children. For example, the privacy of an abused woman and her children should be guaranteed if she has concerns about her safety and the safety of her children. She should be allowed not to disclose her address and the police shouldn't say where she is if there is a missing person investigation. The question of custody and access to the children needs also to be reviewed. Too often abusers are seen as good fathers despite the abuse and have shared custody and unsupervised visits allowing them to continue the abuse. Domestic violence should be taken into consideration when a decision about custody and visits is made and protective measures need to be taken. A father accused of domestic violence should get limited access to the children.

### **VAW Law Reform Recommendation #5:**

**That family laws and the *Divorce Act*<sup>7</sup> be reviewed to acknowledge domestic violence and the risk it represents for women's safety.**

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<sup>7</sup> *Divorce Act* RSC 1985, c. 3

## VAW Law Reform Recommendation #6:

**That all these reforms be followed by an intensive and mandatory training on domestic violence for all criminal and family court personnel, such as lawyers, crown prosecutors, judges and police.**

### 2. Sexual Assault and Trafficking of women and girls

#### Sexual Assault of women and girls

Canada's rate of sexual assault remains high, despite more than forty years of progressive law reform and increased social awareness. According to the 2014 General Social Survey, there were approximately 636,000 self-reported incidents of sexual assault over a twelve-month period.<sup>8</sup> Unlike the rate of other violent crimes, which have been decreasing, the rate of sexual assault remains unchanged since 2004, reflecting the inaction of the Harper Conservative government on violence against women. Because of the pervasiveness of sexual violence in women's lives, women are now more likely than men to be victims of violent crime in Canada. Some groups of women, including Indigenous women, young women, LGBTQ2S+ women, and women with mental health issues, are especially vulnerable to sexual violence.<sup>9</sup> The 2014 General Social Survey contains a shocking statistic. More than one in five Indigenous women between the ages of 15 and 24 will be sexually assaulted in a single year.<sup>10</sup> The targeting of Indigenous women is rooted in gendered colonization.

Enormous feminist activism and energy has been invested in recent decades in reforming sexual assault laws so they better recognize women's experience of sexual violence and the circumstances in which it occurs. Substantive legal elements, evidentiary rules and the treatment of complainants in the criminal justice process have all been extensively critiqued and reformed. Despite the success of Canadian feminist law reform and litigation in forging one of the strongest legal frameworks in the world, statistical research shows the persistence of low police reporting rates (5%),<sup>11</sup> high rates of police unfounding (20%)<sup>12</sup> and astronomical attrition rates. Despite the often-repeated claim that the pendulum has shifted too far towards complainants, the practice of "whacking the complainant" persists in the day-to-day practice of sexual assault law.<sup>13</sup> Indigenous women are singled out for the worst mistreatment. In 2016, the Canadian Judicial Council recommended the removal of former judge Robin Camp, who repeatedly called a young

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<sup>8</sup> Shana Conroy and Adam Cotter, "Self-reported Sexual Assault in Canada, 2014," *Juristat*, Statistics Canada, 2017, 85-002-X, <https://www.statcan.gc.ca/pub/85-002-x/2017001/article/14842-eng.htm>.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> Robyn Doolittle, "The Unfounded Effect," *Globe and Mail*, December 8, 2017, <https://www.theglobeandmail.com/news/investigations/unfounded-37272-sexual-assault-cases-being-reviewed-402-unfounded-cases-reopened-so-far/article37245525/>.

<sup>13</sup> Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (Montreal and Toronto: McGill-Queen's Univ Press, 2018).

Indigenous complainant “the accused,” asking her why she just hadn’t just kept her “knees together” in order to prevent the accused from penetrating her.<sup>14</sup> In 2015, in a preliminary inquiry in an aggravated sexual assault trial, the complainant, a homeless Cree woman, was remanded into custody on the basis she might be a “flight risk”. She was held in remand for five days, transported to and from the courtroom with the accused, and forced to testify in shackles.<sup>15</sup> The sexual assault justice gap is glaringly wide for Indigenous women in Canada.

We support the proposed changes to the *Criminal Code* in *Bill C-51*, currently before Parliament, but call on the federal government to clarify the legal standard for incapacity. Women who are intoxicated are often singled out for sexual assault and courts have wrongly tended to require evidence of unconsciousness or sleep before finding a complainant is incapable of consenting.

#### **VAW Law Reform Recommendation #7:**

**That the proposed s. 273.2(b) be amended to read that a person does not have the capacity to consent unless she:**

- 1. is capable of understanding the sexual nature of the act and the risks associated with that act, and**
- 2. is capable of realizing that he or she may choose to decline participation; and**
- 3. is capable of communicating her voluntary agreement.**

The National Action Plan requires a coordinated federal-provincial-territorial response to the problem of the sexual assault justice gap. While the federal government has jurisdiction over criminal law, the administration of justice is a provincial responsibility. In order to address the sexual assault justice gap, federal leadership is required to ensure consistent practices across jurisdictions that respect the human rights of women and girls who are survivors of sexual assault.

#### **VAW Law Reform Recommendation #8:**

**That the federal government exercise leadership and aggressively deploy the federal spending power to improve criminal justice responses to survivors, including:**

- Given that independent legal advice has been shown to improve justice responses to sexual assault complainants, and given that federal-provincial cost-shared pilot projects providing independent legal advice for survivors are now in place some provinces, but**

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<sup>14</sup> Canadian Judicial Council, *In the Matter of s. 63 of the Judges Act, R.S., C. J-1, Canadian Judicial Council Inquiry into the Conduct of the Honourable Robin Camp – Report to the Minister of Justice* (Ottawa: 8 March 2017) at paras 13, 53. Available online: <[https://www.cjc-ccm.gc.ca/cmslib/general/Camp\\_Docs/2017-03-08%20Report%20to%20Minister.pdf](https://www.cjc-ccm.gc.ca/cmslib/general/Camp_Docs/2017-03-08%20Report%20to%20Minister.pdf)>.

<sup>15</sup> *Independent Review of Circumstances Surrounding the Treatment of “Angela Cardinal” in R. v. Blanchard*. (Alberta: 15 October 2017). Available online:

<sup>15</sup> *Independent Report on the Incarceration of Angela Cardinal* (Alberta: 23 February 2018). Available online: <<https://justice.alberta.ca/publiccampations/Documents/IndependentReportIncarceration-AngelaCardinal.pdf>>.

not in others, the federal government must ensure at least four hours of legal aid is provided to all sexual assault survivors in all provinces and territories.

- In collaboration with the provinces and territories, the federal government must work to ensure that all police officers receive specialized sexual assault training that includes awareness about rape myths and accurate information about the legal standard for consent. Federal funding must be made available for training of police.
- In collaboration with the provinces and territories, the federal government must work towards the creation of civilian oversight of police, as an important step in monitoring police response to sexual assault and sexual assault survivors.
- In collaboration with the provinces and territories, the federal government must work to ensure that all Crown Prosecutors who prosecute sexual assault receive specialized training. Each province and territory must include a sexual assault policy section in the Crown Prosecutors manual. This section should include substantive directions to Crown Prosecutors responding to the specificities of addressing the treatment of sexual assault complainants and compelling the protection of complainants' equality and privacy rights.

### **Trafficking of women and girls, especially Indigenous women and girls**

Trafficking in women and girls, and particularly of Indigenous women and girls is a serious problem in Canada, and one that is made harder to tackle because of the lack of robust and disaggregated data on this issue. Indigenous women and girls are overrepresented as victims of human trafficking in Canada. Indigenous women make up 4% of Canada's population and some research reflects that they comprise up to 50% of trafficking victims in Canada, and that of these, up to 25% may be under the age of 18.<sup>16</sup>

In addition to Indigenous women, Indigenous LGBTQ2S+ people also are vulnerable to being trafficked. Like Indigenous women, they face many vulnerabilities including precarious housing and employment and lack of supports. However, they also face isolation from their families and communities.<sup>17</sup> In Canada, there is an appalling lack of data on trafficking victims, especially for the three distinct Indigenous groups: First Nations, Metis and Inuit. Women and LGBTQ2S+ people in these groups are significantly differently situated from one another. Data that classifies them as one group misrepresents them.

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<sup>16</sup> [http://www.canadianwomen.org/sites/canadianwomen.org/files//CWF-TraffickingReport-Auto%20%281%29\\_0.pdf](http://www.canadianwomen.org/sites/canadianwomen.org/files//CWF-TraffickingReport-Auto%20%281%29_0.pdf)

<sup>17</sup> See Ayden Scheim et al. "Barriers to well-being for Aboriginal gender-diverse people: Results from the Trans PULSE Project in Ontario, Canada" *Ethnicity and Inequalities in Health and Social Care* (Vol. 6 No. 4, 2013); Ristock, J. et. al. (2010), "Aboriginal Two-Spirit and LGBTQ Migration, Mobility, and Health Research Project: Winnipeg Final Report," Winnipeg; Taylor, C. (2009), "Health and safety issues for Aboriginal transgender/two spirit people in Manitoba", *Canadian Journal of Aboriginal Community-Based HIV/AIDS Research*, Vol. 2, pp. 63-84; Teengs, D.O. and Travers, R. (2006), "'River of life, rapids of change': understanding HIV vulnerability among two-spirit youth who migrate to Toronto", *Canadian Journal of Aboriginal Community-Based HIV/AIDS Research*, Vol. 1, pp. 17-28.

#### **VAW Law Reform Recommendation #9:**

**That there be an increase in culturally specific research focused on Indigenous women and Indigenous LGBTQ2S+ people in Canada's domestic trafficking. To ensure that the research is culturally specific, the research should address the varied needs of all Inuit, Métis, and First Nation women and LGBTQ2S+ people, and that disaggregated and distinction-based data should be gathered and better shared across jurisdictions.**

Indigenous women and LGBTQ2S+ people impacted by human trafficking need to have stigma-free and equal access to culturally-appropriate programs and services. Stigma and moral judgments create shame, and shame hinders them from accessing the legal system, healing resources and permanent, affordable housing. When it comes to health services, Indigenous women and LGBTQ2S+ people need barrier-free access to: reproductive health, trans care, mental health care, testing and treatment for sexually transmitted and blood borne infections and HIV. They need access to basic medicine and drug treatment. To ensure that supports are responsive to the needs of trafficked Indigenous women and LGBTQ2S+ people, they need to be meaningfully and respectfully consulted. It is essential that their communities are also consulted. The outcomes of support services and exit strategies should be tracked clearly and comprehensively. This would ensure that programs are effective and that necessary improvements can be made.

#### **VAW Law Reform Recommendation #10:**

**That Canada increase funding for support services and exit strategies for trafficked women and LGBTQ2S people. It is essential that these support services and exit strategies are culturally-relevant, community-based and survivor-based.**

#### **3. Violence and harassment against women and girls at work, in schools/on campuses and that is facilitated by technology**

##### **Violence and harassment against women in the world of work**

Women experience a broad spectrum of violence and harassment in the world of work, yet the legislative framework to recognize and address this is inconsistent. These issues may be addressed in health and safety, human rights, and labour legislation, employment standards or even stand-alone legislation on sexual harassment. In Canada we have 13 different jurisdictions for employment legislation, each with its own unique approach, and some with very little or no language on harassment and violence at all. So, there are gaps and inconsistencies.

Depending on the jurisdiction, occupational health and safety legislation and regulation on workplace violence may not include all forms of violence, such as psychological harassment and bullying or domestic violence when it impacts the workplace (a phenomenon that the labour movement in Canada has made a priority in recent years and where there has been some law reform). It may not clearly address violence that comes from third parties (a major issue for health care workers, flight attendants, teachers or hotel and restaurant workers). Also, much health and safety legislation is framed around the reporting of incidents of violence, which makes

it challenging to capture more diffuse forms of harassment like hostile workplaces, or the intersections of different forms of harassment for women with multiple and intersecting identities. Finally, gender inequality is a foundational issue when analyzing and framing responses to violence, harassment and discrimination experienced by different groups of women and girls.

Of particular concern is that labour and health and safety legislation does not always apply to all workers, including precarious and part-time workers, workers in the informal sector, migrant workers (including migrant domestic worker) – categories of worker where women are over-represented. Similar gaps in international law and regulation have been observed in the discussions leading up to the standard-setting process currently underway at the International Labour Organization, on Violence against Women and Men in the World of Work – our hope is that Canada will play a leadership role in ensuring these discussions result in a strong Convention and Recommendation, and then proceed to ratification and implementation.

Much has been said about the recent *Bill 65*,<sup>18</sup> which brings harassment and violence into part 2 of the *Canada Labour Code*, and also extends the provisions to include people working on Parliament Hill – especially interns. There are many positive things about the Bill, but unfortunately also some serious deficiencies. These include the absence of a clear definition of violence and harassment and the removal of joint workplace health and safety committees from participating in investigations. Some of the issues can be resolved in the regulatory process – provided there is a robust tripartite process to develop them. We would also like the government to ensure there are sufficient numbers of Health and Safety Officers with appropriate expertise and experience and that they receive comprehensive training to meet the needs the Bill attempts to address.

#### **VAW Law Reform Recommendation #11**

**That Canada ensure that relevant labour legislation addresses the full spectrum of violence and harassment against women in the world of work and ensure consistency across jurisdictions, ensure that all women workers are covered, including nonstandard forms of work and migrant workers. This law reform would benefit from a clear analysis of existing legislation and regulation, identification of principles which should underlie good legislation, and promising practices.**

#### **Sexual violence against women and girls in schools and on campuses**

In Canada, young women between 15 and 25 years old attending an education facility are at high risk of experiencing sexual violence. Of all self-reported sexual assault in 2014, 41% were reported by students, 90% committed against women. Risk of sexual violence is particularly high for students who are Indigenous women, women with disabilities, and LGBTQIA2S students.

Although, a lot of focus has been given to post-secondary settings, prevention of and response to sexual violence at all levels of education including elementary and high school is crucial. A

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<sup>18</sup> *Bill 65*, An Act to amend the Canada Labour Code (harassment and violence), the Parliamentary Employment and Staff Relations Act and the Budget Implementation Act, 2017, No. 1

study from the Center for Addiction and Mental Health revealed that almost half of high school female students experience sexual harassment, which is likely an underestimation. Across Canada there are a lot of inconsistencies in terms legislation to address sexual violence in schools and on campuses. In relation to post-secondary institutions, only four provinces have introduced legislation that require universities and colleges to have stand-alone sexual violence policies (out of our 10 provinces and 3 territories): Québec, Ontario, British Columbia and Manitoba. There is a lot of discrepancy in the existing legislation. Student groups and experts question the efficacy of the current legislation in informing the implementation of comprehensive sexual violence policies. For example, some legislation does not mention training for the individuals involved in complaint processes, nor provide a comprehensive definition of what is sexual violence. Some recognize the intersectional impact of violence others do not. Some address technology facilitated violence (cyber violence) others do not. And the list goes on. In October 2017, the pan-Canadian student initiative *Our Turn* in its report examining 14 sexual violence policies in universities across the country indicated that the policies average a grade of C-. This points to the lack of national standards and legislation to address sexual violence in schools and on campuses. In the latest budget, the federal government has committed to developing a National Framework to Address Gender-based Violence at Post-secondary institutions and to cut funding for institutions that don't implement best practices to deal with sexual assault. This is a positive step forward.

But, when dealing with sexual violence in education, emphasis must be put on legislation that is informed by best practices, coordinated between all jurisdictions, and that includes all school levels (including secondary and elementary). Some provinces are starting to address violence in schools through curriculum changes focusing on healthy relationships, but there is the need for further discussions about prevention initiatives, including access to comprehensive sexuality education for elementary and secondary students. Moreover, discrepancies in transparency measures are also a barrier in holding institutions accountable for cases of sexual violence. For example, if we look at the high school level in Ontario, in 2016, not all incidents of sexual violence which resulted in disciplinary action were reported to the Ontario College of Teachers. Nationwide comprehensive prevention measures, survivor-centred reporting and transparency mechanisms (including monitoring and reporting) are essential in addressing sexual violence at schools and on campuses. Adopting a National Action Plan to Address Violence Against Women is crucial in implementing this.

#### **VAW Law Reform Recommendation #12:**

**That the federal government invest in capacity-building to identify best practices and ensure consistency in legislation across jurisdictions to address sexual violence on campuses and in schools (including using federal spending power to hold institutions to account).**

## **Technologically-facilitated violence against women and girls**

This particular area of violence against women is still, in some respects, an emerging and developing one, given the way our technologies are continually changing. The Canadian Association of Sexual Assault Centres and Feminist Alliance for International Action define technologically-facilitated violence against women and girls as: “revenge porn, non-consensual sharing of intimate images among youth, child sexual exploitation, cyber stalking and gender-based hate speech online, with a special emphasis on the particular vulnerability of Indigenous women and girls and girls from sexual minorities.” The effects of this violence are severe: women’s participation in online spaces is seriously undermined, and their participation is essential to participating in the modern world. Women and girls experience a range of violence including: rape threats, hacking, doxing (the practice of publishing one’s personal contact and identifying information online), and attacks on social media, particularly when women critique sexist media practices online.

Much has already been written on this area of violence against women and girls through a feminist lens; however, the information and data available has yet to build capacity within the feminist community to identify the best practices and possibilities for law reform. Moreover, there has been limited movement by the federal government in terms of criminalizing these online forms of violence against women in the *Criminal Code* itself, rendering the current state of the criminal justice system weak in terms of its response to cases where women and girls’ online participation are attacked. In the provinces of Manitoba and Alberta, there is some legislation enacted to address the issue of revenge porn in the civil context, where some responses include orders for taking down leaked images or digital no contact orders. However, this type of response is not widespread in Canada among other provincial governments.

### **VAW Law Reform Recommendation #13:**

**That the Canadian government invest in capacity-building to inform and develop a law reform agenda on technologically-facilitated violence and that the federal government use its leadership in taking a proactive stance to establishing a consistent approach across all jurisdictions in adequately address, and strongly denounce, these forms of violence against women and girls.**

#### **4. Violence against women and girls related to reproductive and sexual rights and health**

Article 12 of the *Convention on the Elimination of all forms of Discrimination Against Women* (CEDAW) requires State parties to “eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning,” and to “ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary.”<sup>19</sup> The Committee on the Elimination of Discrimination Against Women (the

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<sup>19</sup> CEDAW. General Recommendation 24 on women and health. (1999).

Committee) has, on numerous occasions, outlined States Parties' obligation to ensure access to safe abortion services, as part of the right to health. In General Recommendation 24 on women and health the Committee states that it is "discriminatory for a State party to refuse to provide legally for the performance of certain reproductive health services for women" and "urges states increase the access of women and adolescent girls to affordable health-care services, including reproductive health care."<sup>20</sup> State Parties must "report on measures taken to eliminate barriers that women face in access to health-care services and what measures they have taken to ensure women timely and affordable access to such services. Barriers include requirements or conditions that prejudice women's access, such as high fees for health-care services...distance from health facilities and the absence of convenient and affordable public transport."<sup>21</sup> In General Recommendation 24, the Committee states that "States parties should report on measures taken to eliminate barriers that women face in access to health-care services and what measures they have taken to ensure women timely and affordable access to such services. Barriers include requirements or conditions that prejudice women's access..."<sup>22</sup> Further, the Committee states that "States and parties cannot absolve themselves of responsibility in these areas by delegating or transferring these powers to private sector agencies. States parties should therefore report on what they have done to organize governmental processes and all structures through which public power is exercised to promote and protect women's health."<sup>23</sup>

In accordance with the 1988 Supreme Court of Canada decision *R. v. Morgentaler*,<sup>24</sup> there are no criminal laws restricting access to abortion in Canada. In Canada, the provincial governments are responsible for the administration, organization and delivery of health care. The federal government has constitutionally granted "spending power," which enables it to fund the health systems under provincial jurisdiction, subject to provincial compliance with certain requirements set out in the 1984 Canada Health Act (herein the Act). It regulates the conditions to which provincial and territorial health insurance programs must adhere in order to receive the full amount of the Canada Health Transfer (herein the CHT) cash contribution. If any of the provinces or territories fail to meet any one of the criteria set out in section 13 of the Act, or if the province allows extra billing by medical practitioners or permits user charges for insured health services, the province will face as the penalty a reduction or withholding of the cash contribution. The Act states that provinces and territories must provide universal coverage for all insured persons for all medically necessary hospital and physician services, which includes abortion.

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<sup>20</sup> CEDAW Concluding Observations to Slovakia. (CEDAW/C/SVK/CO/4), 2009, and CEDAW General Recommendation 24. 1999.

<sup>21</sup> CEDAW General Recommendation 24. 1999.

<sup>22</sup> CEDAW. 1999. "CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health). <http://www.ohchr.org/Documents/Issues/Women/WRGS/Health/GR24.pdf>

<sup>23</sup> CEDAW. 1999. "CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health). <http://www.ohchr.org/Documents/Issues/Women/WRGS/Health/GR24.pdf>

<sup>24</sup> *R v Morgentaler* 1 SCR 30.

Lack of access to safe abortion services continues to be an obstacle and a barrier for women who choose to terminate their pregnancies, particularly those in rural or remote regions.<sup>25</sup> Only 1/6th of hospitals provide abortion services,<sup>26</sup> the majority of which (both hospitals and free standing sexual health clinics) are disproportionately dispersed across Canada and located in urban areas.<sup>27</sup> Twenty percent of people in Canada live in rural areas where they must travel sometimes thousands of kilometres to access abortion services, which in particular often require timely care, placing a further impediment to access. Adding to this, there are few points of services that offer services beyond 16 weeks' gestation.<sup>28</sup> This is particularly difficult for women living in areas with only one service provider (where the provider may only offer services until 10 or 12 weeks' gestation, for example). These realities are compounded by other barriers including significant wait times, financial burdens,<sup>29</sup> required doctor referrals, and geographic location. While there are no laws requiring parental consent or laws imposing restrictions to abortion access based on age, young women seeking abortion services have reported experiencing stigma and discrimination from health care providers.<sup>30</sup>

Violence, harassment and intimidation experienced by those seeking abortion services remain a significant barrier. Across the country, there is ample evidence that anti-choice harassment and intimidation is a significant barrier to accessing safe abortion care. Safe Access Zone Legislation works to protect patients, practitioners and their staff. Legislated safe access zones are necessary to ensure the safety of staff and patients as well as protect people's rights to access a medically necessary procedure without being subjected to intimidation, harassment and the threat of violence. Such legislation aims to protect the safety of patients and healthcare providers and increasing access to abortion. Best practice requires this legislation to include provisions for all healthcare providers, including nurses, physicians, pharmacists and potentially midwives (as it does in the Province of Ontario). Only some Provinces have taken steps to rectify this situation by enacting legislation.

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<sup>25</sup> Norman WV, Soon JA, Maughn N, Dressler J (2013). *Barriers to Rural Induced Abortion Services in Canada: Findings of the British Columbia Abortion Providers Survey (BCAPS)*. PLoS ONE 8(6).

<sup>26</sup> Shaw, Jessica (2006). *Reality Check: A Close Look At Accessing Hospital Abortion Services In Canada*. Ottawa: Canadians for Choice. [This qualitative study has not been updated, thus this data has not been validated since 2006 – but to our knowledge a number of hospitals have ceased offering abortion services since that time, and as a result we would expect the current picture to reflect an even more significant disparity.]

<sup>27</sup> Most located within 150 KM of the US border.

<sup>28</sup> There are approximately 20 points of service for those beyond 16 weeks' gestation. The majority are located in Québec and Ontario. There are no providers offering services beyond 16 weeks in Manitoba, New Brunswick, Newfoundland, Nova Scotia, Nunavut, and Yukon. There are some cases in which women can access services beyond 23 weeks in Canada, however, this is mainly in cases of foetal abnormality. There are no physicians or clinics that publicly advertise such services after 24 weeks.

<sup>29</sup> Which include: unforeseen monetary expenses incurred for things such as travel, accommodation, lost wages, childcare, eldercare, and possibly procedural costs (see paragraph 22). These disproportionately impacting low-income women.

<sup>30</sup> The Guardian. "Women turning to desperate measures due to lack of abortion services." November 2011. <http://www.theguardian.pe.ca/News/Local/2011-11-10/article-2802198/Women-turning-to-desperate-measures-due-to-lack-of-abortion-services/1> and for examples of stigma-related barriers facing young women in PEI, visit: [http://projects.upei.ca/cmacquarrie/files/2014/01/trials\\_and\\_trails\\_final.pdf](http://projects.upei.ca/cmacquarrie/files/2014/01/trials_and_trails_final.pdf)

**VAW Law Reform Recommendation #14:**

**That the Federal government withhold cash contributions and initiate dispute resolution procedures under sections 14-17 of the *Canada Health Act* as violations of the program criteria established in sections 7, 10 and 12 of the Act for provinces and territories failing to ensure the availability and accessibility of abortion services, including failure to enact Safe Access Zone legislation.**

**VAW Law Reform recommendation #15:**

**That the federal government:**

- **Investigate allegations of forced or coerced sterilizations in Canada, with particular attention to cases involving Indigenous women and girls, ensuring justice and reparations to survivors and their families.**
- **Ensure non-repetition by changing government policies and practices to explicitly prohibit sterilization without free, full, and informed consent, and through the application of applicable criminal laws.**
- **Enforce healthcare professional accountability through medical college regulations.**
- **Implement Truth and Reconciliation Commission Calls to Action<sup>31</sup> 23 and 24 on increasing the number of Indigenous healthcare professionals and providing cultural competency training to all healthcare professionals.**

**VAW Law reform recommendation #16:**

**That intersex activists are resourced to increase their capacity to convene, strategize, and develop recommendations to end the practice of unnecessary surgeries and other medical interventions conducted on children and youth without their free, full, and informed consent.**

**VAW Law reform recommendation #17:**

**That at a minimum, the Canadian government change policies and practices to ensure that free, full, and informed consent is obtained from children and youth in relations to healthcare decisions.**

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<sup>31</sup> *Truth and Reconciliation Commission Calls to Action* (2016)

## 5. Violence against women in detention

Women in detention are impacted by every theme reflected in the preceding recommendations. What distinguishes women in detention is that the perpetrator of the aggressions they face is the state. Strip searching, segregation, over-policing and imprisonment of Indigenous women are all acts of state sanctioned violence against women. The recommendations that follow focus on three specific issues, ending the practices of strip searching; segregation; and beginning the decarceration of Indigenous women, in accordance with Canada's international human rights treaty obligations, including of the UN *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*,<sup>32</sup> and in accordance with Canada's domestic obligations including following the *Gladue*<sup>33</sup> principles.

### **Decarceration**

The prison system in Canada upholds practices that are cruel, inhumane and degrading to women. It reinforces a societal model of state sanctioned violence against women and must be held accountable through oversight and eventual abolition in favour of community-based models of support and rehabilitation. Why do prisons not work for women? Criminalized women are far more likely to have experienced abuse than are other women, and Indigenous women are more likely than non-Indigenous women to have histories of abuse. Since the prison environment reinforces feelings of powerlessness, extreme power imbalances and unpredictability, it can trigger flashbacks and other post-traumatic effects of abuse such as dissociation, anger and self-harm. Prison can revive controlling aspects and experiences of abuse and feelings of loss of control and power over their lives. Once inside prison, women are subjected to further physical, sexual and psychological abuse at the hands of the state. On October 19, 2007, 19-year-old Ashley Smith was found dead in her segregation cell. Eight staff members were disciplined and five were charged as a result of their alleged assaults or criminal negligence in relation to her death. Although the charges were stayed because of CSC's administrative direction to staff not to assist Ashley, the jury at the inquest into her death ruled her death a homicide and made 104 recommendations as a result of the inquest.

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<sup>32</sup> Among the most relevant articles of the UN CAT to these recommendations are: Article 16: Cruel, inhuman or degrading treatment or punishment, Article 4: Criminalization of Torture, and Article 2: Prevention of Acts of Torture:

*Article 16.1: Each State party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture or references to other forms of cruel, inhuman or degrading treatment or punishment.*

*Article 4(1) 1: Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in Torture.*

*Article 2.1: Each state party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.*

<sup>33</sup> *R v Gladue* [1999] 1 SCR 688.

Prisons do not work, especially if you are Indigenous. Indigenous women represent 39% of incarcerated women in Canada even though they account for 4% of the overall population. Of that number more than 50% are classified as maximum security (segregation within prison) and as a result have limited to no access to programs, education, training including specific pieces of legislation that would allow them to seek alternatives to incarceration. Canada has legislation that allows for the decarceration of prisoners, yet it is hardly ever used. Canada's own Truth and Reconciliation Commission made the recommendation<sup>34</sup> for the immediate reduction of Indigenous incarceration at the local, provincial and federal levels. Indigenous women must be able to access sections 81 and 84 of the *Corrections and Conditional Release Act* that allows those women to serve execute their sentence in their community or apply for early release to an Indigenous community. Unfortunately, as noted by our own Canadian Human Rights Commission and the Office of the Correctional Investigator, this legislation is under-utilized, under-funded and often not communicated to women as part of their intake process.

**VAW Law Reform Recommendation #18:**

**That Canada take systematic steps towards decarceration of women, including to specifically redress the overrepresentation of Indigenous women in detention in Canada.**

**Segregation**

Segregation refers to the practice of confining a prisoner alone in any way for periods of time, however segregation is not merely a place. Prisoners in segregation, including in maximum security, do not have access to the main areas of the prison where programs, yard, gym and education occur. The Canadian Human Rights Commission has in the past noted several research studies that documented the adverse psychological symptoms that can occur as a result of being in segregation. These include, insomnia, confusion, hopelessness, despair, hallucinations, distorted perceptions and psychosis. Due to the mental and physical distress such segregation can cause, the practice can amount to cruel, inhuman and degrading punishment and torture and as such should be categorized as institutional violence against women. Indigenous women who have almost all experienced some form of abuse (physical, sexual, domestic) are then overwhelmingly subject to the practice of segregation, an additional trauma against women enacted on behalf of the government of Canada.

**VAW Law Reform Recommendation #19:**

**That the practice of segregation of women in all places of detention in Canada be abolished.**

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<sup>34</sup> Truth and Reconciliation Commission (2016), recommendation 29.

## **Strip Searching of women and girls**

Strip searches are defined as the removal or rearrangement of some or all of the clothing of a prisoner or detainee so as to permit a visual inspection of a person's private areas, namely genitals, buttocks, breasts, or undergarments. Police and prison guards are also trained to have a woman open her mouth, lift her tongue and take out dentures, show behind her ears and shake out her hair, lift each limb and her breasts and spread her legs, bend over to touch the floor and part her cheeks for inspection or squat over a mirror. If the woman is menstruating, she may be required to remove her tampon in front of the officer supervising the strip search.

Those who are in charge of prison security have seen that strip searches yield very little—if any—contraband and no weapons, but significantly traumatize women. Women prisoners, the vast majority of whom have histories of physical and sexual abuse, frequently experience strip searches as a form of sexual assault.

Strip searching within policing and in the detention systems of Canada amounts to state sanctioned sexual violence against women. With 80% of women and 93% of Indigenous women reporting being survivors of physical, sexual or domestic abuse this federal government action effectively re-traumatizes Canadian women on a regular and consistent basis. There are reports of women being strip searched moving from one section of the prison to another section of the prison. Women who have refused to comply with strip searching and lost their ability to visit with their own children as a result. Some women intentionally avoid applying for jobs or education or health services because they do not want to endure the trauma of being routinely strip searched by the Correctional Service of Canada.

In a letter addressed to the Correctional Service of Canada in October 2017, CAEFS cited that mandatory strip searching violated the Mandela Rules 52.1 which states 'intrusive searches, including strip and body cavity searches, should be undertaken only if absolutely necessary. Prisons administrations shall be encouraged to develop and use appropriate alternatives to intrusive strip searches.'

### **VAW Law Reform Recommendation #20:**

**That there be an immediate end to the practice of strip searching of women and girls in all places of detention in Canada.**

## **Cross Cutting VAW Law Reform Recommendations**

### **VAW Law Reform Recommendation #21:**

**That legislative responses to VAW in Canada must prevent and respond to the ways in which women in all their diversity experience violence.**

### **VAW Law Reform Recommendation #22:**

**That data on VAW in Canada be systematically collected, including on the impacts of the legislative frameworks on VAW, and that the data collected be disaggregated, accessible, and shared across all jurisdictions in Canada (while still ensuring confidentiality of victims/survivors).**

### **VAW Law Reform Recommendation #23:**

**That intersectional feminist analysis and research be undertaken to inform VAW law reform in Canada, particularly in relation to emerging VAW issues, and in areas where there are research gaps or divergencies of analysis within feminist groups.**

### **VAW Law Reform Recommendation #24:**

**That the Federal Government take leadership in ensuring that there is coherence in VAW legislation across all federal/provincial/territorial jurisdictions, including by using federal spending power to drive coherence and cooperation across jurisdictions.**

### **VAW Law Reform Recommendation #25:**

**That the Federal Government commit to ensuring that feminist and equality-seeking group are systematically engaged in the framing and monitoring of all VAW law reform approaches and actions, and that the Federal Government provide the necessary core organizational funding required for feminist and equality seeking groups to do so, including funding to rebuild capacities for feminist engagement in all aspects of VAW law reform in Canada.**