

Joint Submission

To

**UN Special Rapporteur On The Human Rights Of
Migrants**

Theme: Access To Justice

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By

**COLOUR OF POVERTY - COLOUR OF CHANGE
CHINESE & SOUTHEAST ASIAN LEGAL CLINIC
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INTRODUCTION

Colour of Poverty - Colour of Change (COP-COC) is a community initiative based in the province of Ontario, Canada, which is made up of individuals and organizations working to build community-based capacity to address the growing racialization of poverty and the resulting increased levels of social exclusion and marginalization of racialized communities (both Indigenous Peoples and peoples of colour) across Ontario.

The **Chinese & South East Asian Legal Clinic (CSALC)** – formerly known as the Metro Toronto Chinese & Southeast Asian Legal Clinic (MTCSALC) – is a Canadian NGO mandated to provide free legal services to low income members of Chinese and Southeast Asian communities in Ontario. Apart from providing legal services, CSALC also engages in systemic advocacy to advance the rights of immigrants, racialized communities and other disadvantaged members of society. CSALC has ECOSOC consultative status at the UN.

OCASI - Ontario Council of Agencies Serving Immigrants is a council of autonomous immigrant and refugee-serving organizations in Ontario and the collective voice of the immigrant and refugee-serving sector in the province. Formed in 1978, OCASI has 220 member organizations across the province of Ontario. OCASI's mission is to achieve equality, access and full participation for immigrants and refugees in every aspect of Canadian life.

South Asian Legal Clinic of Ontario (SALCO) is a not-for-profit organization established to enhance access to justice for low-income South Asians in the Greater Toronto area. Since 1999, SALCO has been working to serve the growing needs of South Asians in a culturally and linguistically sensitive manner. As a specialty clinic funded by Legal Aid Ontario, SALCO provides advice, brief services and/or legal representation in various areas of poverty law.

CSALC, OCASI and SALCO are founding Steering Committee members of Colour of Poverty - Colour of Change.

Background

Racial Discrimination

Most of the issues included in this submission fall under the Federal Government's sole jurisdiction or shared jurisdiction between the Federal and Ontario governments. They draw on joint reports submitted to the UN Universal Periodic Review (UPR) 2018 and UN Convention on the Elimination of Racial Discrimination (CERD) 2017.

This submission highlights the impact on migrants of persistent and systemic racism in Canada. While the Prime Minister stated in February 2018 that Canadians must acknowledge anti-Black racism and unconscious bias exist in Canada, the Government of Canada is yet to fully acknowledge the exclusion and discrimination long experienced by communities of colour (referred to by governments as "visible minority groups") or propose concrete measures to tackle the urgent and serious issues these ethno-racially diverse communities face. Additionally all orders of Government - federal, provincial/territorial and municipal – have failed to continue working on and delivering on their respective obligations under the World Conference Against Racism (WCAR) Programme of Action – commitments that include a comprehensive and robust national action plan against racism.

We therefore recommend that:

- The Federal Government must take the leadership role by working on and delivering on its WCAR Program of Action related commitments – including by meaningfully engaging with civil society, and in particular actively consulting with Indigenous Peoples, peoples of colour and non-governmental organizations working to advance racial justice and racial equality in Canada in its development of a renewed enhanced and comprehensive National Action Plan Against Racism; and
- The Federal Government must adopt a racial equity impact analysis tool to examine and evaluate all laws and policies at the federal level to minimize, if not eliminate, adverse impact of such laws and policies on racialized group members.

We put forward several additional recommendations under the following themes:

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Statistics on people of colour

The migrant population in Canada is growing, and they are increasingly people of colour.

As of May 10, 2016 (Census day) 21.9% of the population reported they are landed immigrants or permanent residents now or in the past. The majority of immigrant arrivals for almost two decades are people of colour.¹ The most recent Census reports that almost half the foreign-born residents are from Asia (including the Middle East), and the number of African-born migrants is growing.² The majority of migrants, both permanent and temporary residents, are in the province of Ontario.

The number of temporary migrant workers in Canada has more than quadrupled since 2000. As of 2014, there were 567,977 temporary status workers in the country.³ The majority are people of colour.

Systemic racism, racial discrimination and racial profiling persist in Canada. Police-reported hate crimes data showed that between 2012 and 2015 hate crimes against Muslims in Canada increased by 253%. Hate crimes motivated by race increased by 5% between 2014 and 2015 and Black people remain the highest-targeted.⁴

Statistics on low-income migrants

Migrants – especially migrant women - are over-represented among those who are low-income, and face greater barriers in access to justice.

In 2015, recent immigrants had an income of 63% compared to non-immigrants, a gap of 37%. Recent immigrant women earned much less, facing a 59% income gap when compared to non-immigrant men. Recent immigrants also have higher low-income rates. At 31.4 per cent, that's more than double the 12.5 per cent poverty rate for non-immigrants.

A significant number of migrant workers are in low-wage streams of temporary migration, and they are disproportionately workers of colour from the global South. Precarious migrants do not qualify for income support programs and many do not have a valid work permit. They are more likely to be over-represented in precarious and low-wage employment.

¹ Facts and Figures 2007: Immigration Overview, Permanent and Temporary Residents. Citizenship and Immigration Canada. 2008

² Immigration and Ethnocultural Diversity: Key results from the 2016 Census. Statistics Canada. 2017-10-25

³ Fay Faraday, "Canada's Choice: Decent Work or Entrenched Exploitation for Canada's Migrant Workers?" (2016) *Metcalf Foundation*, <http://metcalffoundation.com/stories/publications/canadas-choice/>

⁴ Police-reported hate crimes, 2015. Statistics Canada. 2017-06-13

1. Data Collection

The failure of governments in Canada to collect disaggregated data with respect to ethno-racial background and immigration status prevents the measurement and tracking of racial inequities and disparities especially in critical areas of access to justice such as immigration detention, national security policies and policing; impairs assessment of the impacts of government laws, policies, and programs on marginalized communities; and impedes political and legal recognition of racial discrimination.

- A welcome change is the restoration of the national mandatory long-form census – which includes questions relating to race, ethnicity, Indigeneity, and immigration status – in time for the 2016 Census.⁵ While Statistics Canada once again collects data on immigration status and ethno-racial background, the data is not provided freely to the public as the non-correlated data sets - for example, separate data tables are available each on immigration status and on ethno-racial background. Complementary race-based administrative data sets, especially ones that also collect and disaggregate by immigration status, are lacking across all orders of government – Municipal, Provincial and Federal.
- Disaggregated data is not collected or shared by Administrative tribunals, thus making it impossible to learn how disadvantaged groups such as migrants of colour fare with respect to human rights or employment rights.
- In Ontario, there is currently no systematic province-wide collection of race-based data. The Ontario Anti-Racism Directorate (ARD), created in February 2016 to “address and prevent systemic racism in government policy, legislation, programs and services,”⁶ has indicated that it plans to collect data in the areas of child welfare, justice, education, and health. The Directorate is still at a very early stage of its development, precluding evaluation of its framework for data collection and analysis. However, it is problematic that the ARD’s enabling legislation, the Anti-Racism Act, presently specifically exempts the collection of race-based data in the area of health, information that is fundamental and critical to its baseline data collection regime.⁷

Recommendations:

- The Federal, Provincial, Territorial and Municipal governments in Canada must collect and track disaggregated data with respect to ethno-racial and faith background and immigration status across all Departments, Ministries, Divisions and relevant institutions, and use this data to develop strategies to address systemic racism and human rights violations.

⁵ Statistics Canada, “2016 Census of Population Questions, Long Form (National Household Survey),” online: < <http://www12.statcan.gc.ca/nhs-enm/2016/ref/questionnaires/questions-eng.cfm>>.

⁶ Government of Ontario, “Anti-Racism Directorate,” online : <<https://www.ontario.ca/page/anti-racism-directorate>>

⁷ Bill 114, *Anti-Racism Act, 2017*, online: <http://ontla.on.ca/web/bills/bills_detail.do?locale=en&Intranet=&BillID=4694>, article 6(7).

- Data should be collected and publicly shared in a way that enables analysis of the intersecting effects of ethno-racial and faith background with gender identity, sexual orientation, socioeconomic status, immigration status, age, and (dis)ability.

2. Access to Justice

Migrant people of colour – especially migrant women of colour - are over-represented among the low income population and face heightened risk of homelessness, incarceration, and human rights violations. However, access to justice, and the fair representation of racialized individuals before courts, administrative tribunals and government agencies, and access to legal aid is made that much more difficult because of their race and immigration status as well as the lack of culturally and linguistically responsive and safe services in the justice system.

- Federal and Provincial/Territorial governments in Canada use a cost-sharing program to fund legal aid across the country. In Ontario, Canada's largest province, while the majority of legal clinics provide services in such areas as housing and social assistance law, the inadequate level of funding means many still have to turn clients away. Furthermore, in other areas of law where racialization of poverty has resulted in enormous need for racialized communities, such as employment law, family law, and immigration and refugee law, lack of resources and funding is even more pronounced. Immigration and refugee legal aid services are provided only in seven provinces (including Ontario). While Ontario has legal aid clinics across the province, many do not provide immigration services. The system responds poorly to addressing intersections of legal matters, such as criminality and immigration status, or violence against women and immigration status – a factor that Legal Aid Ontario has acknowledged and proposes to address.⁸

- In addition to their socio-economic challenges, people of colour communities also face systemic discrimination as a result of their race, and in some cases, their immigration status. These systemic challenges have resulted in barriers in accessing legal services for many people of colour, a challenge that is further compounded by the lack of representation of people of colour groups within the justice system as a whole and within the administrative tribunal sector in particular.

- Currently, there are no concerted efforts on the part of the courts and administrative tribunals to document and research experiences of people of colour – including at the intersection of immigration status and race+ethnicity - in their access to the justice system. Most, if not all, administrative tribunals and courts do not have any policy to collect data and information with regard to the demographics of the parties who

⁸ Legal Aid Ontario's Domestic Violence Strategy. Legal Aid Ontario. September 2017.

come before them. No information is collected, for instance, to find out whether racialized communities members are more, or less likely, to be unrepresented when they come before the courts and tribunals.

- Similarly, while many administrative tribunals strive to provide an impartial, objective and bias free adjudicative processes for the parties, there is no legal requirement for any of the tribunal members or staff to be conversant in human rights law to have received any training on the issues of discrimination. As an example, the “emodule” developed by the Ontario Public Appointment Secretariat for all new public appointees currently does not contain any reference to the Human Rights Code, even though the same “emodule” does make specific reference to the Accessibility of Ontarians with Disabilities Act as well as the French Language Services requirement of Ontario.

Recommendations:

- Significantly increase the Federal Government’s contribution to legal aid programs in all provinces and territories, with a significant portion earmarked for civil law and poverty law.
- Work with provinces and territories to develop a centrally accredited interpretation and translation program for all courts and administrative tribunals.
- Develop a National Access to Justice Strategy in tandem with the National Poverty Strategy based on social determinants of health that recognizes particular vulnerability of marginalized groups on the basis of Indigeneity, ethno-racial background, gender identity, disability, sexuality, and other human rights grounds.

3. Immigration Detention

- The Canadian Border Services Agency (CBSA) does not publish detention statistics disaggregated on the basis of race, ethnicity, or country of origin. However, anecdotal evidence suggests that long-term detainees are disproportionately racialized: because racialized undocumented migrants are more likely to be detained rather than receive a notice to appear for a hearing; because of difficulty obtaining identity documents from their countries of origin; and because of the paucity of legal aid for detention reviews.
- Canada does not impose a maximum time limit on immigration detention. This raises the spectre of indefinite detention based entirely on immigration grounds. In April 2017, the Ontario Superior Court ordered the release of a West African immigration detainee held in a maximum-security jail for seven years (including 103 consecutive days spent in solitary confinement).⁹

⁹ Brendan Kennedy, “Jailed Seven Years by Canada, Kashif Ali Now Walks Free,” *Toronto Star* (28 April 2017), online: <<https://www.thestar.com/news/canada/2017/04/28/jailed-seven-years-by-canada-kashif-ali-now-walks-free.html>>.

- In addition, the best interests of Canadian children detained with their parents are not sufficiently or consistently accounted for: “de facto detained children do not have their own detention review hearings, and until recently, adjudicators explicitly declined to consider the best interests of Canadian children in the detention reviews of their parents.”¹⁰

Recommendations:

- Impose a time limit on immigration detention.
- Develop robust and meaningful community-based alternatives to detention to make detention truly an avenue of last resort.
- Immediately cease holding immigration detainees in provincial jails.
- Immediately abolish the practice of keep children in immigration detention facilities.
- Ensure that the best interests of all children are a primary consideration in detention-related decisions.
- Collect and publish data disaggregated by ethno-racial and faith background and country of origin with respect to all aspects of detention (including data regarding reasons for detention and length of detention).

4. Migrant workers

- The Federal Government has refused to ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, and ILO Convention 189 concerning decent work for domestic workers. In addition, many social entitlement programs are denied to Temporary Foreign Workers despite their mandatory payroll contribution into these programs when they work in Canada.
- The number of temporary migrant workers in Canada has more than quadrupled since 2000. As of 2014, there were 567,977 temporary status workers in the country.¹¹ Migrant workers in low-wage streams of temporary migration – disproportionately workers of colour from the global South – are exceptionally susceptible to exploitation and abuse.
- Workers in the Seasonal Agricultural Workers Program (which is largely based on bi-lateral agreements with Mexico and several Caribbean states) are denied the opportunity to settle permanently in Canada, are bound to particular employers with exclusively tied work permits, and are required to live in employer-provided housing on

¹⁰ University of Toronto International Human Rights Program, “Invisible Citizens: Canadian Children in Immigration Detention” (2017), http://ihrp.law.utoronto.ca/utfl_file/count/PUBLICATIONS/Report-InvisibleCitizens.pdf.

¹¹ Fay Faraday, “Canada’s Choice: Decent Work or Entrenched Exploitation for Canada’s Migrant Workers?” (2016) *Metcalf Foundation*, <http://metcalffoundation.com/stories/publications/canadas-choice/>.

or near the farms and greenhouses where they work.¹² Workplace injuries frequently result in medical repatriation. “They live under persistent threat of deportation that forces them to work under difficult and exploitative conditions, especially in cases of conflict with employers, workplace injuries, shortages in work, or merely by virtue of employer whim”.¹³

- Migrant agricultural workers are located predominantly in rural and remote communities making access to justice even more difficult. There are few legal services available and few opportunities to seek recourse for employer exploitation and abuse or when they are subject to racial profiling.¹⁴
- Workers in the Caregiver Program (formerly the Live-In Caregiver Program), primarily women recruited from the Philippines, are similarly prone to exploitation and ill-treatment by employers. Again tied work permits make it difficult for caregivers to complain about abuse, non-payment of wages, and employers’ refusals to adhere to occupational safety standards. Changes introduced in 2014 eliminated the requirement that caregivers live with their employers, reducing their vulnerability. However, other changes – particularly the removal of the previously-existing guaranteed route to permanent residence, the imposition of a new cap on the number of caregivers who can apply for permanent residence in any given year, and the proliferation of limited spheres in which migrant caregiving is permitted – have increased the precariousness of workers in the Caregiver Program.
- While migrant workers contribute to social entitlement programs in Canada like Employment Insurance, the Canada Pension Plan, Old Age Security, health care, and child benefits, their temporary status largely precludes them from accessing the programs.¹⁵ Migrant workers who are injured on the job are routinely sent back to their countries of origin, thus preventing them from accessing needed treatment, treatment which may not be available in their own countries, and the workers compensation benefits to which they are entitled.¹⁶

¹² Gerardo Otero and Kerry Preibisch, “Citizenship and Precarious Labour in Canadian Agriculture” (2015) *Canadian Centre for Policy Alternatives*, <https://www.policyalternatives.ca/publications/reports/citizenship-and-precarious-labour-canadian-agriculture>.

¹³ Justicia for Migrant Workers, “Submission to the Standing Committee on the Review of the Temporary Foreign Worker Program,” <http://www.ourcommons.ca/Content/Committee/421/HUMA/Brief/BR8361852/br-external/JusticiaforMigrantWorkers-e.pdf>.

¹⁴ “Allegations of racial profiling of migrant workers troubling”. Ontario Human Rights Commission. July 17, 2014. http://www.ohrc.on.ca/en/news_centre/allegations-racial-profiling-migrant-workers-troubling-ohrc

¹⁵ Edward A Koning and Keith G Banting, “Inequality Below the Surface: Reviewing Immigrants’ Access to and Utilization of Five Canadian Welfare Programs” (2013) 39:4 *Canadian Public Policy* 234.

¹⁶ Rosa Marchitelli. “Migrant worker program called ‘worse than slavery’ after injured participants sent home without treatment”. CBC News. May 16, 2016. <http://www.cbc.ca/news/canada/jamaican-farm-worker-sent-home-in-a-casket-1.3577643>

Recommendations:

- Sign and ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families and ILO Convention 189.
- Provide permanent residency to migrant workers upon arrival.
- Allow access to social entitlement programs for all migrant workers.
- Extend the protections of federal, provincial and territorial labour relations legislation to all domestic and migrant agricultural workers and increase support for collective organizing and bargaining of any and all workers.
- Include migrant workers themselves in government consultations on all programs implicating temporary migrant labour.

5. Racial Discrimination in National Security

- National security agencies have so far ignored the Canadian Human Rights Commission's call to collect and analyze race-disaggregated data on their operations, so that the impact of security practices and policies on Indigenous communities and communities of colour can be assessed. "Analysis of a decade of research clearly shows that there are no means to assess the human rights performance of Canada's national security organizations. Not only is there no accountability framework in place, national security organizations are not required to collect and report data on human rights performance in practice," the Commission points out.¹⁷

Racial Profiling

- Government reports on national security by Public Safety Canada and the Canadian Security Intelligence Service (CSIS) focus almost exclusively on Muslim individuals and organizations as the source of terrorism¹⁸ – ignoring the more than 100 extreme right-wing and White supremacist groups active across Canada.¹⁹
- Young Muslims have reported being targeted for monitoring by CSIS or police intelligence because of participation in activism for causes like Palestinian rights.²⁰

¹⁷ Canadian Human Rights Commission, "Human Rights Accountability in National Security Practices: A Special Report to Parliament," (November 2011), online: <<http://www.chrc-ccdp.gc.ca/sites/default/files/chrc-specialreport-28112011.pdf>>.

¹⁸ See, for example, Public Safety Canada, "Building Resilience Against Terrorism: Canada's Counter-Terrorism Strategy," (2012), <http://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/rslnc-gnst-trrrsm/index-en.aspx>; Public Safety Canada, "2013 Public Report on the Terrorist Threat to Canada," (2013), <http://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/trrrst-thrt-cnd/index-en.aspx>; Public Safety Canada, "2014 Public Report on the Terrorist Threat to Canada," (2014), <http://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/2014-pblc-rpr-trrrst-thrt/index-en.aspx>; Public Safety Canada, "2016 Public Report on the Terrorist Threat to Canada," (2016), <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/2016-pblc-rpr-trrrst-thrt/index-en.aspx>.

¹⁹ Barbara Perry and Ryan Scrivens, "Uneasy Alliances: A Look at the Right-Wing Extremist Movement in Canada" (2016) 39:9 *Studies in Conflict and Terrorism* 819.

²⁰ Ontario Human Rights Commission, "Under Suspicion: Research and Consultation Report on Racial Profiling in Ontario" (2017), <http://ohrc.on.ca/en/under-suspicion-research-and-consultation-report-racial->

Instances of university students, among others, being aggressively recruited by security agencies to become informants on “radicalized” peers have been reported.

- Muslim, South Asian, Arab, and Black travellers have reported experiencing racial profiling at airports and border crossings: being stopped, being followed by air marshals, being placed on no-fly lists, having their names flagged, being selected for “random” screening, being subjected to body and/or luggage searches, and being questioned about religious beliefs.²¹ The National Council of Canadian Muslims notes that 15% of the human rights complaints it received in 2014 were from Muslims who were “turned away from border crossings without any explanations.”²²
- The proposed Preclearance Act (Bill C-23), which will give US border guards new powers to question, search, and detain in pre-clearance areas on Canadian territory, threatens to exacerbate Muslims’ and other racialized travellers’ experiences of discriminatory securitization.²³
- There have been several reported cases of Muslims being denied security clearance for employment purposes, for apparently discriminatory reasons. For example, according to a lawyer specializing in national security cases, one Muslim client’s participation in paintball (described by CSIS as “a form of jihad for Sunni Muslims”) was cited as a reason for denial.
- Indigenous activists have also been targeted as national security threats by security agencies. The RCMP’s Project Sitka, for instance, monitored 89 Indigenous activists deemed threats for participation in protests.²⁴

Security Certificates

- Security certificates have been applied to non-citizens deemed inadmissible to Canada on security grounds, on the strength of secret evidence – permitting indefinite detention or imposition of extremely stringent house arrest conditions.²⁵ Two Arab

profiling-ontario; Baljit Nagra and Paula Maurutto, “Crossing Borders and Managing Racialized Identities: Experiences of Security and Surveillance Among Young Canadian Muslims” (2016) 41:2 *Canadian Journal of Sociology* 165.

²¹ International Civil Liberties Monitoring Group, “Report of the Information Clearinghouse on Border Controls and Infringements to Travellers’ Rights” (2014), <http://iclmg.ca/wp-content/uploads/sites/37/2014/03/R-Clearinghouse-border-controls.pdf>.

²² Ontario Human Rights Commission, “Under Suspicion: Research and Consultation Report on Racial Profiling in Ontario” (2017), <http://ohrc.on.ca/en/under-suspicion-research-and-consultation-report-racial-profiling-ontario>.

²³ Aurangzeb Qureshi, “This Bill Will Make it Even Riskier for Muslims to Cross the Border to the US” *CBC News*, 8 March 2017, <http://www.cbc.ca/news/opinion/bill-c-23-1.4014113>.

²⁴ Sean Craig, “RCMP Tracked 89 Indigenous Activists Considered ‘Threats’ for Participating in Protests” *National Post*, 13 November 2016, <http://news.nationalpost.com/news/canada/rcmp-tracked-89-indigenous-activists-considered-threats-for-participating-in-protests>.

²⁵ Audrey Macklin, “The Canadian Security Certificate Regime” (2009) *Centre for European Policy Studies*, <http://aei.pitt.edu/10757/1/1819.pdf>.

Muslim security certificate detainees – Mohamed Harkat and Mohammad Mahjoub – are currently facing deportation to possible torture in Algeria and Egypt, respectively.²⁶

The Anti-Terrorism Act, 2015

- Anti-terrorism legislation passed in 2015 drastically augments the powers of security agencies and police, without counter-balancing oversight and review mechanisms.
- Civil liberties organizations have raised concerns about many of the changes introduced by the Anti-Terrorism Act, 2015, which include: expansion of information-sharing powers between government bodies about activities that “undermine the security of Canada”; widening of the criteria for placement on Canada’s no-fly list; creation of a new, broad criminal offence of “advocating or promoting the commission of terrorism offences in general”; lowering of the threshold for preventive arrest and imposition of recognizances with conditions; extension of the maximum time of preventive detention; and expansion of CSIS’s mandate from intelligence-gathering to threat disruption, including permission to violate the Charter of Rights and Freedoms if a judicial warrant has been obtained.²⁷

Complicity with Torture

- The Canadian government has compensated Maher Arar, Ahmad El-Maati, Abdullah Almalki, and Muayyed Nureddin for its involvement in their secret imprisonment and torture, and recently announced compensation for Omar Khadr. However, another Muslim man tortured with Canadian complicity - Abousfian Abdelrazik has not yet received any compensation or apology.
- Canadian security and foreign affairs officials implicated in torture have not been prosecuted, and the recommendations of two official inquiries into the Arar, El-Maati, Almalki, and Nureddin cases (the Iacobucci and O’Connor Inquiries) for preventing future abuses have not been implemented.²⁸ Moreover, memos allowing security agencies to share information with regimes known to torture have not been rescinded.²⁹

²⁶ Andrew Duffy, “Government Launches Deportation Proceedings Against Harkat” *Ottawa Citizen*, 18 September 2015, <http://ottawacitizen.com/uncategorized/government-moves-to-deport-harkat>; Matthew Behrens, “Trudeau’s Torture Policies No Different Than Trump’s” *Rabble*, 24 February 2017, <http://rabble.ca/columnists/2017-02-24t000000/trudeaus-torture-policies-no-different-trumps>.

²⁷ British Columbia Civil Liberties Association, “8 Things You Need to Know About Bill C-51” 11 March 2015, <https://bccla.org/2015/03/8-things-you-need-to-know-about-bill-c-51/>; Canadian Civil Liberties Association and Canadian Journalists for Free Expression, Challenge to Bill C-51 in Ontario Superior Court, <https://ccla.org/cclanewsites/wp-content/uploads/2015/08/Issued-Notice-of-Application-Bill-C-51-C1383715xA0E3A.pdf>.

²⁸ Frank Iacobucci, “Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin” (2008), http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/internal_inquiry/2010-03-09/www.iacobucciinquiry.ca/pdfs/documents/final-report-copy-en.pdf; Dennis O’Connor, “Report of the Events Relating to Maher Arar” (2006), http://www.sirc-csars.gc.ca/pdfs/cm_arar_bgv1-eng.pdf.

²⁹ Public Safety Canada, “Ministerial Direction on Information Sharing with Foreign Entities” (2011), <http://iclmg.ca/wp-content/uploads/sites/37/2014/04/Vic-Toews-Torture-memos.pdf>.

Double Punishment

- The 'serious criminality' provision in the Immigration and Refugee Protection Act results in a permanent resident convicted of a crime being penalized once through the justice system and then again through the immigration system – amounting to double punishment. Most recently the Government of Canada began proceedings to deport Mr. Abdoul Abdi following completion of his sentence for a criminal offence. Mr. Abdi was taken away from his family by the Nova Scotia Department of Community Services which took on the role of legal guardian, but which then failed to pursue citizenship status on his behalf. Not being a citizen, Mr. Abdi then became a casualty of the double punishment rule. While Mr. Abdi arrived in Canada as a refugee when he was six years of age, his experience is similar to that of many child migrants of colour who are taken away from their families by child welfare authorities. In its 2012 concluding observations on Canada, the United Nations Committee on the Rights of the Child (UNCRC) noted the over-representation of Indigenous and Black children and youth in Canada's child welfare system, and recommended that Canada "take urgent measures" to address the disparity.³⁰

Recommendations:

- Study and publish analyses on the phenomenon of White supremacist and right-wing political violence.
- Collect and publish ethno-racially disaggregated data including immigration status regarding counter-terrorism practices, including on visitations by security officials, composition of the no-fly list, and security clearance denials.
- Abolish the security certificate regime, and cease deportation proceedings under it.
- Repeal the Anti-Terrorism Act, 2015 (and not just amend it).
- Adhere to obligations under the United Nations Convention Against Torture to compensate the tortured and prosecute complicity in torture.
- Revoke the torture memos, and implement the Iacobucci and O'Connor Inquiry recommendations.
- Revoke the double punishment rule in the Immigration and Refugee Protection Act.

6. Racial Discrimination in Policing and Criminal Justice

Policing

- Indigenous communities and communities of colour have reported experiencing racial profiling and discrimination in police street checks, traffic stops, investigations,

³⁰ Committee on the Rights of the Child, "Concluding Observations on the Combined Third and Fourth Periodic Report of Canada, Adopted by the Committee at its Sixty-First Session" CCR/C/CAN/CO/3-4 (2012),

<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsh8%2fU426pHwccUxzN5kmmhLtdnrWm1hJzGwfirOtSF7im%2btj4%2bJ5n5CPIpIDWXA35DpHXskxTdDvCoa0RW9yOJTACORyOJ17Auf%2bpplgz6CB>.

searches, DNA sampling, arrest decisions, and use of force.³¹ A significant number of people of colour are likely migrants.

- Data on traffic stops collected by the Ottawa Police Services from 2013 to 2015 found that Black drivers were stopped 2.3 times more often than expected given their representation in the driving population; young Black men were stopped 8.3 times more; Middle Eastern drivers were stopped 3.3 times more; and young Middle Eastern men were stopped 12 times more.³²
- In its 2016 review of Canada, the UN Working Group of Experts on People of African Descent concluded that “there is clear evidence that racial profiling is endemic in the strategies and practices used by law enforcement (in Canada). Arbitrary use of ‘carding’ or street checks disproportionately affects people of African descent.”³³ A 2014 study by the Toronto Star newspaper, for example, found that Black people were 3.4 times more likely to be carded by Toronto police than expected, given their representation in the population.³⁴
- In 2017, the Government of Ontario implemented regulations to restrain police carding practices.³⁵ However, the regulations still permit street checks to be conducted in connection with investigations³⁶ – leaving space for the continued operation of racial profiling. Moreover, the regulations do not require destruction of the police databases of personal information already amassed through racially-discriminatory carding. This is of heightened concern given the ever expanding information-sharing agreements between Ontario municipal police and national security agencies (e.g. the Royal Canadian Mounted Police (RCMP), and the Canadian Security Intelligence Service (CSIS); see section on National Security above).³⁷
- Indigenous People and people of colour have also reported being subjected to excessive use of police force, unnecessary strip and cavity searches, and reprisals for

³¹ Ontario Human Rights Commission, “Under Suspicion: Research and Consultation Report on Racial Profiling in Ontario” (2017), <http://ohrc.on.ca/en/under-suspicion-research-and-consultation-report-racial-profiling-ontario>.

³² Lorne Foster, Les Jacobs, and Bobby Siu, “Race Data and Traffic Stops in Ottawa, 2013-2015: A Report on Ottawa and the Police Districts” (October 2016), online: https://www.ottawapolice.ca/en/about-us/resources/.TSRDGP_York_Research_Report.pdf.

³³ “Statement to the Media by the United Nations’ Working Group of Experts on People of African Descent, on the Conclusion of its Official Visit to Canada, 17-21 October 2016,” online: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20732&LangID=E>.

³⁴ Jim Rankin, Patty Winsa, Andrew Bailey, and Hidy Ng, “Carding Drops but Proportion of Blacks Stopped by Toronto Police Rises” *Toronto Star* (26 July 2014), online: https://www.thestar.com/news/insight/2014/07/26/carding_drops_but_proportion_of_blacks_stopped_by_toronto_police_rises.html.

³⁵ *O Reg 58/16: Collection of Identifying Information in Certain Circumstances – Prohibition and Duties* (2017).

³⁶ *O Reg 58/16: Collection of Identifying Information in Certain Circumstances – Prohibition and Duties* (2017), s 1(2).

³⁷ Jim Rankin and Wendy Gillis, “Ontario Police Forces Share Carding Data with Mounties, CSIS” *Toronto Star* (23 April 2017), online: <https://www.thestar.com/news/canada/2017/04/23/ontario-police-forces-share-carding-data-with-mounties-csis.html>.

complaining or asserting their rights vis-à-vis the police.³⁸ A 2006 study by criminologist Scott Wortley found that Black and Indigenous Peoples were highly overrepresented in police use of force cases. While Black people constituted 3.6% of the population of Ontario, they represented 16% of all investigations involving police use of force, 27% of investigations into police shootings, and 34.5% of all deaths caused by police shootings.³⁹

- Police profiling on the basis of race intersects with profiling on the basis of immigration status. A 2015 study documented how immigration status checks performed by Toronto police are a form of racial profiling, making undocumented residents of colour vulnerable to the prospect of indefinite immigration detention and deportation⁴⁰ (see section on Immigration Detention above).
- In December 2013, Justicia for Migrant Workers filed a complaint with the Ontario Independent Police Review Director (OIPRD), alleging that the Ontario Provincial Police collected DNA samples from approximately 100 male “Indo and Afro-Caribbean” migrant workers as part of a sexual assault investigation – even though the migrant workers did not match the description of the suspect, apart from their skin colour. In a disappointing decision, the OIPRD Director found that racial profiling was not a factor in the OPP’s decision to conduct the DNA sweep, although the sweep was “overly broad.”⁴¹
- Racialized communities have consistently raised concerns about the inefficacy, non-transparency, and apparent partiality of police oversight bodies. Investigations by Ontario’s Special Investigations Unit (SIU), which is mandated to investigate police-civilian interactions that result in serious injury or death to a civilian, have only resulted in charges being laid against police officers in 129 out of 3,932 cases between 2002 and 2016.⁴² Redacted SIU reports on incidents involving civilian deaths, like that of South Sudanese refugee Andrew Loku, have only been released following intense public pressure by activist groups.⁴³
- In his 2017 evaluation of police oversight in Ontario, Justice Michael Tulloch recommended, inter alia, that: all police oversight bodies should collect ethno-racially

³⁸ Ontario Human Rights Commission, “Under Suspicion: Research and Consultation Report on Racial Profiling in Ontario” (2017), <http://ohrc.on.ca/en/under-suspicion-research-and-consultation-report-racial-profiling-ontario>.

³⁹ Scot Wortley and Akwasi Owusu-Bempah, “Crime and Justice: The Experiences of Black Canadians” in B Perry, ed. *Diversity, Crime, and Justice in Canada* (Oxford University Press, 2011).

⁴⁰ No One is Illegal – Toronto, “Often Asking, Always Telling: The Toronto Police Service and the Sanctuary City Policy” (2015), http://rabble.ca/sites/rabble/files/often_asking_always_telling_-_kredits_dec_1.pdf.

⁴¹ Gerry McNeilly, “Casting the Net: A Review of Ontario Provincial Police Practices for DNA Canvasses” (July 2016), *Office of the Independent Police Review Director*, http://www.oiprd.on.ca/EN/PDFs/OIPRD_Casting_The_Net_Systemic_Review_Report.pdf.

⁴² Michael Tulloch, “Report of the Independent Police Oversight Review” (2017), https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/police_oversight_review/.

⁴³ “Heavily-Redacted SIU Report Into Andrew Loku’s Death Released” *CityNews*, 29 April 2016, <http://www.citynews.ca/2016/04/29/heavily-redacted-siu-report-into-andrew-lokus-death-released/>.

disaggregated data; no more than half of SIU investigators should be former police officers; anti-bias measures should be incorporated into the training for investigators; “serious injuries” should be given a standard definition; all incidents involving discharge of a firearm by a police officer at a person should be investigated; and in the interest of transparency and accountability that public reports should be provided for all SIU investigations.⁴⁴

- Justice Tulloch’s welcome recommendations are non-binding; so while the Ontario government has indicated that it is committed to implementing them, there is no accountability mechanism ensuring that it does. Furthermore, commentators have critiqued the Tulloch report for recommending that the names of investigated police officers should not be released unless they are charged – inhibiting the identification of ethno-racial and other biased patterns of violent behaviour by particular police officers.

Pre-Trial Detention

- A 2016 report by Legal Aid Ontario on the bail system observes that Indigenous Peoples and peoples of colour “...who are subject to over-policing practices and racial profiling are more likely to find themselves in pre-trial detention...”⁴⁵ than those from non-racialized backgrounds. The much earlier Commission on Systemic Racism in the Ontario Criminal Justice System, for example, found that Black adult males were three times more likely than White adult males to be denied bail for drug charges in Toronto courts.⁴⁶ In 2014, Indigenous People comprised 13% of persons in remand detention, despite constituting only 2% of Ontario’s population.⁴⁷
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- This racialization of pre-trial detention is exacerbated by the racialization of poverty and mental health issues. As the Canadian Civil Liberties Association has argued, the Canadian bail system is one that “disproportionately penalizes – and criminalizes – poverty, addiction and mental illness. Canadian bail courts regularly impose abstinence requirements on those addicted to alcohol or drugs, residency conditions on the homeless, strict check-in requirements in difficult to access locations, no-contact conditions between family members, and rigid curfews that interfere with employment and daily life.”⁴⁸
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⁴⁴ Michael Tulloch, “Report of the Independent Police Oversight Review” (2017), https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/police_oversight_review/.

⁴⁵ Legal Aid Ontario, “A Legal Aid Strategy for Bail,” (2016), <http://www.legalaid.on.ca/en/publications/paper-legal-aid-strategy-for-bail-2016-11.asp>.

⁴⁶ “Report of the Commission on Systemic Racism in the Ontario Criminal Justice System” (Toronto: Queen’s Printer for Ontario, 1995).

⁴⁷ Legal Aid Ontario, “A Legal Aid Strategy for Bail,” (2016), <http://www.legalaid.on.ca/en/publications/paper-legal-aid-strategy-for-bail-2016-11.asp>.

⁴⁸ Canadian Civil Liberties Association, “Set Up to Fail: Bail and the Revolving Door of Pre-Trial Detention” (July 2014), https://ccla.org/dev/v5/_doc/CCLA_set_up_to_fail.pdf.

- Pre-trial detention impairs access to counsel, and increases pressure on an accused to plead guilty or agree to onerous release conditions.⁴⁹ The disadvantages are compounded for Indigenous defendants from remote communities, who are removed to provincial detention centres many kilometres away from the community supports that could help them secure pre-trial release.⁵⁰
- Racial disparities in the court system are reinforced by the serious under-representation of members of Indigenous and non-Indigenous racialized groups in the judiciary. A 2016 study estimated that 1% of the 2,160 judges in the Ontario provincial superior and lower courts are of Indigenous background (though they are roughly 4.3% of the Canadian population), and 3% are people of colour (though they make up around 19% of the total Canadian population); and there are no Indigenous or judges of colour in the Supreme Court of Canada and the Federal Court of Appeal.⁵¹

Corrections

- The federal prison system is the only segment of Canada's correctional system that regularly collects and publishes race-based data.⁵² These data reveal that Indigenous and Black people are significantly and increasingly over-represented in Canadian prisons. However immigration status data is not included. Black people comprise 3% of the general Canadian population, but 10% of the federally incarcerated population.⁵³ The Black prison population has grown by nearly 90% since 2003.⁵⁴
- Black inmates are more likely than White inmates to be charged with misconduct that involves subjective judgement on the part of correctional officers (such as disrespect toward staff).⁵⁵ And Black and Indigenous inmates are disproportionately more likely to be subjected to use of force by correctional officers; in 2015-2016, Indigenous prisoners accounted for 30% of use of force incidents in federal corrections, and Black prisoners for 18% of incidents.⁵⁶

⁴⁹ As Justice Iacobucci noted in *R. v. Hall*, when an accused is denied access to bail he or she is "...rendered more likely to plead guilty, and, as a result, to waive the various safeguards against unjust conviction that the system provides".

⁵⁰ Legal Aid Ontario, "A Legal Aid Strategy for Bail," (2016), <http://www.legalaid.on.ca/en/publications/paper-legal-aid-strategy-for-bail-2016-11.asp>.

⁵¹ Andrew Griffith, "Diversity Among Federal and Provincial Judges" *Policy Options*, 4 May 2016, <http://policyoptions.irpp.org/2016/05/04/diversity-among-federal-provincial-judges/>.

⁵² Akwasi Owusu-Bempah and Scot Wortley, "Race, Crime, and Criminal Justice in Canada" in *The Oxford Handbook of Ethnicity, Crime and Immigration* (2014).

⁵³ Office of the Correctional Investigator, "A Case Study of Diversity in Corrections: The Black Inmate Experience in Federal Penitentiaries" (2014), online: <<http://www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20131126-eng.aspx>>.

⁵⁴ Office of the Correctional Investigator, "Annual Report of the Office of the Correctional Investigator" (2012-2013), <http://www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20122013-eng.aspx>.

⁵⁵ Office of the Correctional Investigator, "A Case Study of Diversity in Corrections: The Black Inmate Experience in Federal Penitentiaries" (2014), online: <<http://www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20131126-eng.aspx>>.

⁵⁶ Office of the Correctional Investigator, "Annual Report of the Office of the Correctional Investigator" (2016), <<http://www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20152016-eng.aspx>>.

- In October 2016 the UN Working Group of Experts on People of African Descent expressed “extreme concern about the practice and excessive use of solitary confinement or ‘segregation’ in correctional facilities, the absence of appropriate monitoring, and lack of data being kept on inmates’ race, mental health status or gender.” The Working Group noted that as many as 40% of inmates in segregation at the Toronto South Detention Center were Black.⁵⁷

Recommendations

- Ontario must abolish all arbitrary street checks, require the issuing of receipts – that allow for ethno-racial and other relevant self-identification – for all police contact and engagement with members of civil society, and purge historical databases of information collected through carding.
- Ontario must implement the Tulloch recommendations to strengthen police oversight, while addressing the limitations of the Tulloch recommendations.
- Ontario must ban immigration status checks by police.
- Collect national data on ethno-racial discrimination including by immigration status in the criminal justice system, from bail hearings to sentencing to custody ratings.
- Provide greater financial and legal support for bail.
- Strengthen procedures for dealing with public complaints about police, especially those involving allegations of discrimination.
- Give federal and provincial a more robust complaints mechanism for in-corrections abuses, including access to courts and protection from reprisals.
- Ensure that federal and provincial governments adhere to international law limitations on the use of solitary confinement.
- Implement all of the Sapers recommendations with respect to solitary confinement.

⁵⁷ “Statement to the Media by the United Nations’ Working Group of Experts on People of African Descent, on the Conclusion of its Official Visit to Canada, 17-21 October 2016” 21 October 2016, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20732&LangID=E>.