Native Women's Association of Canada

L'Association des femmes autochtones du Canada

Brief on Bill S-12

An Act to amend the Criminal Code, the Sex Offender Information Registration Act and the International Transfer of Offenders Act

Prepared for the Senate Standing Committee on Legal and Constitutional Affairs

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Summary

The Native Women's Association of Canada (NWAC) supports the Senate's efforts to protect and amplify sexual violence victims and survivors' voices. However, the statute must clearly include and consider Indigenous Women, Girls, Two-Spirit, Trans, and Gender-Diverse+ People's ("Indigenous WG2SLGBTQQIA+ People") unique histories as genocide survivors and address Indigenous Peoples' overrepresentation in custody. NWAC does not support automatic registration provisions nor eliminating judicial discretion when registering a convicted person on the Sex Offender Information Registry (the Registry).

Bill S-12 will, among other things, amend the *Criminal Code*, the *Sex Offender Information Registration Act*, and the *International Transfer of Offenders Act*, related to the Registry to:

1. Remove Crown and judicial discretion to make registration mandatory for persons convicted of a sexual offence against a child and who have been convicted on separate occasions of two or more sexually based offences;
2. Require registration of persons convicted of sexually based offences, including those who receive a verdict of not criminally responsible on account of mental disorder (NCR), unless a court is satisfied registration would have no connection to the purposes of the *Act* or the impact on the person would be grossly disproportionate;
3. Authorize a peace officer to obtain an arrest warrant to bring a person into the registration centre if they have not fulfilled their registration obligations;
4. Require a convicted person provide 14-days' advance notice (there was previously no time requirement prescribed), if they will be absent from their residence, unless the person gets an approved exemption; and,
5. Amend the *Criminal Code* (*CC*) to, among other things, codify the process for modifying and revoking publication bans, and adds a requirement for sentencing courts to inquire if the victim wants to receive information about the administration of the person's sentence, and if so, provide the Correctional Service of Canada (CSC) with the victim's contact information.[1]

Through Bill S-12, NWAC expects to see Canada undertake a challenging balance act: protecting Indigenous WG2SLGBTQQIA+ People who are disproportionately survivors of sexual offences; amplifying the voices of Indigenous WG2SLGBTQQIA+

[1] BILL S-12: *An Act to amend the Criminal Code, the Sex Offender Information Registration Act and the International Transfer of Offenders Act,* 44th Parl., 1st Sess., First Reading, online: <https://www.parl.ca/DocumentViewer/en/44-1/bill/S-12/first-reading>.

survivors of sexual offences; and, reducing the overincarceration of Indigenous Peoples.

NWAC's Recommendations for Bill S-12 include:

***Criminal Code* Amendments**

1. s. 486.4(3.1) be amended to read: "… the presiding judge or justice shall inquire, and the prosecutor shall show, all reasonable steps were taken, including reaching out to the victim in their language of choice, and connecting with culturally appropriate victim service liaisons, before the application was made, to consult the victim with respect to the application, paying special attention to Indigenous Women, Girls, Two-Spirit, Trans and Gender-Diverse+ Peoples' unique consultation needs."
2. s. 486.51(2) be amended to read "… the court must take into account any material change of circumstance, including the victim's wishes, paying special attention to whether the victim is an Indigenous Woman, Girl, Two-Spirit, Trans or Gender-Diverse+ Person, and whether the variation or revocation is in the interests of justice."
3. s. 490.012(a) to (c), (2) and (3) should be amended to remove mandatory registration requirements for the prescribed conditions. Instead, prosecutorial discretion to request an order should be eliminated, requiring judges to automatically consider making a registration order, but leaving broad judicial discretion to consider the appropriateness of the order and the convicted persons circumstances.
4. s. 490.012(4) should be amended to require judicial consideration of:
   (h) Indigenous social history factors, including considering whether the person convicted, or the victim, are an Indigenous WG2SLGBTTQIA+ Person, and if all other reasonable options other than registration have been considered.
5. s. 490.12(3) be amended to remove mandatory life registrations and allow for judicial discretion when deciding if a lifetime order is appropriate, requiring judges to consider Indigenous social history factors, including considering whether the person convicted, or the victim, are an Indigenous WG2SLGBTTQIA+ Person, and if all other reasonable options other than lifetime registration have been considered.
6. ss. 490.016 (1.1), 490.027(1.1), 490.02905(2.1), 490.02909, 490.029111(3), 490.02913(1.1), 490.04(6), and any other sections noting factors a judge should consider should be amended to include:
   (h) Indigenous social history factors, including considering whether the person convicted, or the victim, are an Indigenous WG2SLGBTTQIA+

Person, and if all other reasonable options other than registration have been considered.

7. s. 490.03121(1) to (5) warrant to arrest powers be included but only if subsection (5) remains ensuring no charges will be laid against a person after they are arrested and become compliant with their registry requirements.
8. s. 726.3 be amended to read **"**When imposing a sentence, a court must inquire of the prosecutor if all reasonable steps were taken, including reaching out to the victim in their language of choice, and connecting with culturally appropriate victim service liaisons for assistance, while paying special attention to Indigenous Women, Girls, Two-Spirit, Trans and Gender-Diverse+ Peoples unique consultation needs, to determine whether the victim wishes to receive information regarding the sentence and its administration and must, if known, enter the victim's wishes into the record of the proceedings."
9. 743.2 be amended to include "…and the name and contact information for any victim who wishes to receive information, or a person, organization, or other support liaison the victim chooses, under the *Corrections and Conditional Release Act*.

***Sex Offender Information Registration Act* Amendments**

10. ss. 6(1)(a) and (b), 6(1.01)(a) to (d), 6(1.02) be amended to remove the 14-day notice requirement and instead replace it with as soon as practicable;
11. s. 15(a) retention of information section should be amended to remove the 50 years post-death retention requirement and should instead read as "Subject to subsections (2) and (3) and regulations made under paragraphs 19(3)(b) and (d), information is registered in the database in accordance with this *Act* shall be kept in the database only until the expiry of the order, upon which it is automatically removed from the Registry without requiring an application."

***International Transfer of Offenders Act* Amendments**

12. s. 36.2(3) and any other sections with lifetime automatic registrations, be amended to remove mandatory lifetime registrations, allowing for judicial discretion when deciding if a lifetime order is appropriate, requiring judges to consider Indigenous social history factors, including considering whether the person convicted, or the victim, are an Indigenous WG2SLGBTTQIA+ Person, and if all other reasonable options other than lifetime registration have been considered.

Bill S-12 does not sufficiently represent Indigenous WG2SLGBTTQIA+ People's needs

NWAC is interested in balancing protections for Indigenous WG2SLGBTQQIA+ victims and survivors of sexual violence with an interest in reducing Indigenous overincarceration and criminalization.

While NWAC supports some of S-12's amendments as a progressive step towards centering and amplifying sexual offence victims' voices, S-12 currently does not sufficiently represent the needs of Indigenous WG2SLGBTTQIA+ People. The Senate must legislate the specific inclusion of Indigenous WG2SLGBTQQIA+ People, because their experiences as survivors of sexual offences and experiences with the justice system, its actors, and colonial violence, are vastly different from Indigenous Men and other individuals living on Turtle Island and Inuit Nunangat. Without an express acknowledgement of these differences, the legislation will only continue to perpetuate colonial violence by failing to address the unique needs of Indigenous WG2SLGBTQQIA+ as victims, and as a grossly over-represented population in custody.

While NWAC appreciates the Senate is in a challenging position to try to pass this legislation before the Fall of 2023, NWAC urges Canada to undertake a thorough consultation process with Indigenous WG2SLGBTQQIA+ Persons to have a fulsome understanding of their perspectives on the proposed legislation. Colonial imposed time limits cannot excuse the exclusion of Indigenous WG2SLGBTTQIA+ Peoples voices from the decision-making tables. As NWAC's CEO Lynne Groulx, and many advocates before her have said, "nothing about us, without us."

Requiring Crown consultation, along with the amplification and serious consideration of Indigenous WG2SLGBTQQIA+ survivors of sexual offences voices regarding publication bans and information about sentence administration, may advance reconciliation.

Indigenous WG2SLGBTQQIA+ People experience disproportionate rates of sexual victimization with nearly half (46%) of Indigenous Women experiencing sexual assault in their lifetime.[2] Indigenous women are nearly two times more likely (42%) than non-Indigenous women (27%) to have been physically or sexually abused by an adult as a child, resulting in an increased prevalence of lifetime violent victimization.[3] More than four in ten (44%) Indigenous Women compared to one-quarter (25%) of non-

[2] Loanna Heidinger, "Violent victimization and perceptions of safety: Experiences of First Nations, Métis and Inuit women in Canada", Statistics Canada, (26 April 2022), pdf online: <https://www150.statcan.gc.ca/n1/pub/85-002-x/2022001/article/00004-eng.htm> [Heidinger].
[3] *Ibid.*

Indigenous Women, have survived physical or sexual violence by an intimate partner in their lifetime.[4] More than four in ten (43%) of Indigenous Women survived sexual violence by a non-intimate partner, again being grossly overrepresented in comparison to non-Indigenous women.[5]

Indigenous WG2SLGBTQQIA+ People are hesitant to report sexual violence to legal authorities.[6] Indigenous Women (17%) are more than twice as likely to report having little or no confidence in the police compared with non-Indigenous women (8.2%).[7] History illustrates when they report sexual violence, Indigenous WG2SLGTQQIA+ People risk being ignored. These patterns continue to inform distrust and hesitancy when an Indigenous WG2SLGBTQQIA+ Person suffers sexual violence.

Once criminal proceedings begin, victims lose their voice. If their abuser is released, victims may feel unsafe. NWAC supports amendments requiring the prosecutor to meaningfully consult, through a culturally relevant gender-based lens, with survivors of sexual based offences regarding the use of publication bans and updates about the administration of sentences. Prosecutors should not make a decision regarding the implementation of a publication ban until they have consulted with the victim.

The National Inquiry into Missing and Murdered Women and Girls (NIMMIWG) final report calls for Canada's criminal justice system to provide support responsive to Indigenous violence victims' unique needs. Call for Justice 9.2 calls upon police and the judiciary to provide victim support to sexual violence survivors being culturally appropriate and reflecting no bias or racism towards Indigenous Peoples, including victims and survivors.[8] The Truth and Reconciliation Commission of Canada's (TRC) Call to Action 40 also calls on government to work with Indigenous groups to provide adequately funded and accessible Indigenous-specific victim support programs and services.[9]

In its current form, Bill S-12 fails to address the experiences of Indigenous WG2SLGBTQQIA+ People who are victims of sexual offences. It does not address the

[4] Heidinger*, supra* note 2.
[5] *Ibid*.
[6] National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol. 1a, Ottawa, 2019 [NIMMIWG] at p 408.
[7] Heidinger*, supra* note 2.
[8] NIMMIWG, supra note 6, at p 190.
[9] Canada, Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015) at p 325.

unique ways they suffer as survivors or sentenced people. Bill S-12 must go further and adopt NWAC's recommendations to specifically include the voices and unique needs of both survivors, and those convicted of sexual offences, who are Indigenous WG2SLGBTQQIA+ People.

Eliminating judicial discretion does not advance reconciliation and risks perpetuating the crisis of overincarceration of Indigenous WG2SLGBTQQIA+ People.

Colonial harms, such as the intergenerational legacy of the Indian Residential School (IRS) system, the 60's Scoop, the Millennium Scoop, discriminatory child and family service funding, the *Indian Act*, and sexual and physical violence culminating in the MMIWG genocide all cause Indigenous Women's climbing overincarceration rates.[10] Colonialism's indirect impacts also contribute to overrepresentation. These impacts include, poverty, illness, substance misuse, homelessness, poor health and housing, unemployment, low levels of education, and the lack of appropriate social support systems.[11]

Police interactions often intimidate and traumatize Indigenous Women and Girls, which creates a secondary layer of colonial abuse from people in positions of authority.[12] Indigenous Women are significantly more likely "harassed, arrested, charged"[13] and physically and sexually abused by the police or other justice system actors. Investigations into Indigenous Women are more likely tainted with false confessions, poor eyewitness identification, and lack of evidence; all while dismissing the Women's experience of violence.[14] Courts perpetuate police bias by failing to challenge and question circumstances where the police are the primary witnesses in a case against an accused Indigenous Woman.[15]

The Truth and Reconciliation Commission (TRC), National Inquiry into Missing and Murdered Indigenous Women and Girls (MMIWG) and Royal Congress on Aboriginal People (RCAP), among other issue-specific reports, affirm colonial harms

[10] NIMMIWG, *supra* note 6.
[11] Jessica Rumboldt, "An Analysis of the Over-Representation of Aboriginal Offenders in the Canadian Correctional System" (2015) 8 Footnotes [Rumboldt] <https://journal.lib.uoguelph.ca/index.php/footnotes/article/view/5268>.
[12] Office of the Honourable Kim Pate, *Injustices and Miscarriages of Justice Experienced by 12 Indigenous Women: A Case for Group Conviction Review and Exoneration by the Department of Justice via the Law Commission of Canada and/or the Miscarriages of Justice Commission*, (16 May 2022), online: <https://sencanada.ca/media/joph5la2/en_report_injustices-and-miscarriages-of-justice-experienced-by-12-indigenous-women_may-16-2022.pdf> at p 13 to 14.
[13] *Ibid* at p 14.
[14] *Ibid* at p 14.
[15] *Ibid* at p 14.

contribute to the overincarceration of Indigenous Women in Canada. The National Inquiry suggests various colonial measures silenced Indigenous women, contributing to their lack of safety and justice today.[16] This lack of safety and justice compounds in their intersecting experiences being female and Indigenous, subjecting them to both gendered and racial violence.[17]

NWAC maintains judicial discretion is the legal space in which to meaningfully engage *Gladue* principles. *Gladue* principles seek to avoid Indigenous overincarceration by looking to alternatives, rooted in *Criminal Code* s. 718.2(e). Registry is not a jail sentence, but it creates onerous requirements and barriers preventing offenders from meaningfully participating in society. The SCC was clear stating:

> "…the impact on anyone subject to *SOIRA*'s reporting requirements is considerable. The requirements impact privacy and liberty, personal interests that are fundamental to society: liberty of movement and choice, mobility, and freedom from state monitoring or intrusion in our personal lives. The scope of the personal information registered, the frequency at which offenders are required to update their information, the ongoing monitoring by the state, and, of course, the threat of imprisonment make the conditions onerous…."[18]

Where tension exits between avoiding Indigenous overcriminalization and protecting Indigenous WG2SLGBTQQIA+ People from sexual assaults, existing caselaw can provide guidance on how judges exercising their discretion balance the tension in sentencing.[19]

The SCC has already concluded that the mandatory registration provisions in s. 490.012 are overbroad because registering offenders who are not actually more likely to reoffend is not connected with the Registry's purpose.[20] Evidence illustrates: 75 to 80 percent of sexual offenders never reoffend, with 10 percent of the group being at a 2 percent chance of reoffending after 5 years; mandatory registration amendments in 2011 did not result in more arrests; there has not been a single reported case where the Registry assisted police solve or prevent a sex offence; there is no evidence as to how the Registry could *prevent* a sex offence from occurring; and, blanket policies treating all sex offenders as high risk "waste resources by over-supervising lower risk offenders

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[16] NIMMIWG, *supra* note 6.
[17] *Ibid* at p 635.
[18] *R v Ndhlovu*, 2022 SCC 38 at para 45 [*Ndhlovu*].
[19] *R v West*, 2020 BCSC 352 at para 53; *R v Kolola*, 2020 NUCJ 38 at para 68; *R c L.P.,* 2020 QCCA 1239 at para 71; *R v Bunn*, 2022 MBCA 34 at para 110; *R v C.C.C,* 2021 BCSC 599 at para 41; *R v W.F.G,* 2022 BCSC 1394 at para 60 and 65; *R v Piercy*, 2020 NLPC 1720A00080 at para 89; and *R v Doucette and Gunanoot*, 2020 BCSC 907 at para 79 and 102.
[20] *Ndhlovu*, *supra* note 18, at paras 79, 83 to 84, and 132 to 134.

and risk diverting resources from the truly high-risk offenders who could benefit from increased supervision and human service".[21] Forensic risk assessments have been proven to be biased against Indigenous People[22] and there is no reason to believe that risk assessments for sexual offenders do not bear the same biases.[23]

NWAC does not support the elimination of judicial discretion or automatic registrations because it risks perpetuating the discriminatory overincarceration of Indigenous People. Instead, NWAC recommends prosecutorial discretion is replaced with an automatic judicial review for each qualifying sentencing matter, with special consideration of *Gladue* factors, including whether the person convicted, or the victim, are an Indigenous WG2SLGBTTQIA+ Person, and if all other reasonable options other than registration have been considered.

Furthermore, with the recent passing of the *United Nations Declaration on the Rights of Indigenous Peoples Act*[24] (UNDRIPA) in Canada, the Senate Committee has a unique opportunity and a statutory requirement, to consider how to integrate the rights guaranteed in UNDRIPA, with the Registry amendments. Indigenous Women are entitled to rights in the UNDRIPA. This Committee must consider a gendered perspective when drafting legislation to ensure equal benefits for Indigenous WG2SLGBTQQIA+ People. As the MMIWG Final Report tells us, Indigenous WG2SLGBTQQIA+ People's rights must be specifically and deliberately addressed within Indigenous rights frameworks to end the violence they experience when their rights are denied, and not protected.[25]

Indigenous Women are already over-policed and under-protected.[26] Bill S-12's additionally proposed onerous reporting requirements and lifetime retention of sex offender registry information may continue to perpetuate colonial surveillance and overincarceration of Indigenous W2SLGBTQQIA+ People.

NWAC recommends an offenders Registry information only remains retained for the duration of their sentence, meaning the information is automatically removed at the expiration of the sentence without requiring an offender application.

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[21] *Ibid* at para 35, 80 and 98.
[22] *Ewert v Canada*, 2018 SCC 30.
[23] Glenda C. Liell et al, eds, *Challenging Bias in Forensic Psychological Assessment and Testing* (London: Routledge, 2022).
[24] *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14.
[25] NIMMIWG, *supra* note 6 at p 118.
[26] Sean Gallop, *11(e) Shattered: The Historic and Continued Breaching of Indigenous Persons Right to Reasonable and Timely Bail*, (2021), 44 Man. L.J. 170.

NWAC also recommends eliminating further onerous reporting requirements. For example, NWAC recommends instead of a strict 14-day advanced notification requirement of an offender's intent to be absent from their residence for seven days or more, the notification requirement simply read "as soon as practicable".

Additionally, NWAC does support peace officers being legislatively permitted to apply for compliance arrest warrants to bring an offender to the Registration Centre. However, NWAC does not support the laying of charges for first time failures to report. Again, NWAC impresses upon this Honourable Senate Committee the need to balance the interest of Indigenous WG2SLGBTTQIA+ victims and survivors, with the reconciliation goals of eliminating the overrepresentation of Indigenous People in custody.

The onerous reporting requirements have already been flagged by the SCC as being problematic, and even impossible, depending on a person's circumstances, such as being employed as a trucker or for people experiencing homelessness.[27] Indigenous People disproportionally experience poverty, homelessness[28] and overincarceration, thus, it is logical to be concerned that onerous reporting requirements will target Indigenous People and continue to contribute to their overincarceration.

NWAC's Concluding Position

NWAC supports the Senate's efforts to protect and amplify the voices of survivors of sexual offences. However, the statute must clearly include consideration of Indigenous WG2SLGBTQQIA+ Peoples' unique histories as survivors of genocide and address the overrepresentation of incarcerated Indigenous Peoples. NWAC does not support automatic registration provisions nor the elimination of judicial discretion when registering a convicted person on the Registry.

About NWAC

NWAC is a national Indigenous organization representing political voices of Indigenous Women, Girls, Two-Spirit, Transgender, and Gender-Diverse+ (WG2STGD+) People in Canada. NWAC is inclusive of First Nations—on- and off-reserve, status, non-status, and disenfranchised—Inuit, and Métis. An aggregate of Indigenous Women's organizations from across the country, NWAC was founded on a collective goal to enhance, promote, and foster social, economic, cultural, and political well-being of IndigenousWG2STGD+ People in their respective communities and Canadian societies.

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[27] *Ndhlovu*, *supra* note 18, at paras 55 to 57.

[28] Statistics Canada, "Study: A portrait of Canadians who have been homeless", (14 March 2022), online: <https://www150.statcan.gc.ca/n1/daily-quotidien/220314/dq220314b-eng.htm>.

Since 1974, NWAC established strong and lasting governance structures, decision-making processes, financial policies and procedures, and networks, to achieve its overall mission, vision, and goals. Today, NWAC engages in national and international advocacy aimed at legislative and policy reforms to promote equality for Indigenous WG2STGD+ and LGBTQQAI+ People. Through advocacy, policy, and legislative analysis, NWAC works to preserve Indigenous culture and advance the wellbeing of all Indigenous WG2STGD People, and their families and communities.

NWAC works on a variety of issues, including: employment, labour and business, health, violence prevention and safety, justice and human rights, environment, early learning childcare, and international affairs. NWAC provides support much like a "Grandmother's Lodge." We—as aunties, mothers, sisters, brothers, and relatives—collectively recognize, respect, promote, defend, and enhance our Indigenous ancestral laws, spiritual beliefs, language, and Traditions provided by the Creator.[29]

[29] The Native Women's Association of Canada, *About Us* (2022), online: <https://nwac.ca/about-us>.