



Native Women's  
Association of Canada



L'Association des  
femmes autochtones  
du Canada

**Brief on Bill C-40**

*An Act to amend the Criminal Code, to make consequential amendments to other Acts and to repeal a regulation (miscarriage of justice reviews)*

**Prepared for the House of Commons Standing Committee  
on Justice and Human Rights**

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## Summary

The Native Women's Association of Canada (NWAC) supports Bill C-40 as a progressive step towards reconciliation, however, the statute itself must clearly include representation of Indigenous Women, Girls, Two-Spirit, and Gender-Diverse+ People ("Indigenous WG2SLGBTQQIA+ People"). NWAC calls on Canada to take accountability and recognize the importance of reconciliation with Indigenous WG2SLGBTQQIA+ People, specifically.

Bill C-40 will, among other things, make the following amendments to the *Criminal Code of Canada*:

- Establishes an independent body called the Miscarriage of Justice Review Commission ("Commission");
- Replaces the Minister of Justice with the Commission, as the authority responsible for reviewing applications for reviews of miscarriages of justice;
- Confers on the Commission investigatory powers to carry out its functions;
- Gives the Commission the power to either direct a new trial or hearing, or refer the matter to a court of appeal, if it has reasonable grounds to conclude that a miscarriage of justice may have occurred and considers that it is in the interests of justice to do;
- Authorizes the Commission to deliver supports to applicants, and to provide the public and future applicants with information about the Commission and its mandates;
- Requires the Commission to draft and publish policies and to publish annual reports with demographic and performance measurement data; and,
- Makes consequential amendments to other Acts and repeals the *Regulations Respecting Applications for Ministerial Review — Miscarriages of Justice*.<sup>1</sup>

Through Bill C-40, NWAC expects to see Canada utilize the Commission as an opportunity to begin to address the vast over-incarceration of Indigenous WG2SLGBTQQIA+ People; to amplify the voices of Indigenous WG2SLGBTQQIA+ People; and, to incorporate their knowledge and recommendations through all phases of the drafting and implementation of Bill C-40 pertaining to policy, investigation, outreach, reporting, referrals, and final decisions on applications.

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<sup>1</sup> BILL C-40: *An Act to amend the Criminal Code, to make consequential amendments to other Acts and to repeal a regulation (miscarriage of justice reviews)*, 44<sup>th</sup> Parl., 1<sup>st</sup> Sess., First Reading, online: <<https://www.parl.ca/DocumentViewer/en/44-1/bill/C-40/first-reading>>.

**NWAC's Recommendations for Bill C-40 include:**

1. s. 696.3(1) clearly define what “as expeditiously as possible” means with respect to timelines for providing incremental updates to applicants on the status of their application;
2. s. 696.4(4) be amended as follow to ensure legislative clarity that the committee is to pay specific attention to, and expedite the applications of, Indigenous WG2SLGBTQIA+ Persons:
  - (e) Whether or not a Gladue report was completed for an Indigenous applicant;
  - (f) Whether the applicant is an Indigenous WG2SLGBTQIA+ Person;
  - (g) Whether the applicant is an Indigenous Woman who has been separated from their child(ren); or,
  - (h) any other factor that it considers relevant;
3. NWAC supports the investigative two-prong approach in s. 696.5(1) and appreciates that the Commission should have some discretion in determining applications. However, NWAC recommends that legislation provide a non-exhaustive list of examples of when it may be in the interest of justice to investigate an application. The non-exhaustive list should include the examples noted under recommendation 2 above;
4. Clear indication that the Commission is able to review the guilty pleas and/or sentences of Indigenous WG2SLGBTQIA+ People who are still actively serving their sentences, despite whether a Gladue report was ordered or not;
5. s. 696.5(2) and s. 696.5(7) define what a “reasonable period” means to ensure the Commission is accountable to the applicants and processing applications as expeditiously as possible;
6. that s. 696.5(6) provide a non-exhaustive list as to what should be included in the investigation reports. For example, the report must include a section for a culturally relevant gender-based analysis (“CRGBA+”) analysis and an explanation as to how the applicants Indigeneity was considered with respect to the application;
7. 696.6(5) must be amended to clearly indicate that the Commission must consider whether an applicant is an Indigenous WG2SLGBTQIA+ Person:
  - (d) the personal characteristics of the applicant, including but not limited to: whether a Gladue report was completed for an Indigenous applicant; whether the applicant is an Indigenous WG2SLGBTQIA+ Person; Whether the applicant is an Indigenous Woman who has been separated from their child(ren); or, any other factor that it considers relevant
8. s. 696.71(2) be amended to reflect that the number of commissioners must be increased to a minimum of nine and a maximum of eleven, to ensure expediency of applications;

9. s. 696.71(3) reflect that the Headquarters be in Toronto or Winnipeg with regional offices coast-to-coast-to-coast; specifically ensuring that there are regional offices in Indigenous communities and in communities that have proven higher rates of incarceration of Indigenous WG2SLGBTQQIA+ People;
10. s. 696.73 and its subsections are crucial and must be amended to reflect adequate representation of Indigenous WG2sLGBTQQIA+ People on the Commission:
  - a. There must be at least one Indigenous Woman on the Commission;
  - b. There must be at least one Indigenous Two-Spirit, Transgender, or Gender-Diverse+ identifying individual on the commission;
  - c. The Commission should consider the benefits of an entirely Indigenous specific panel to process all Indigenous wrongful convictions claims. This panel should include:
    - i. One-third of commissioners with expertise in the causes and consequences of miscarriages of justice for Indigenous People;
    - ii. One-third of the commissioners are Indigenous lawyers;
    - iii. One-third represent groups that are overrepresented in prison (Indigenous Women and gender-diverse people); and,
    - iv. There must be active efforts to avoid pan-Indigenous approaches in the Commission's work.
11. s. 696.8 be amended to reflect that Commission must ensure that potential or current applicants are able to communicate with the Commission in their preferred language of choice, including all major Indigenous languages. Further, the legislation should include a guarantee that the Commission will undertake to ensure that Indigenous WG2SLGBTQQIA+ People are not prevented from communicating with the Commission due to lack of accessibility to internet, technology, or place of residence, paying specific attention to the accessibility issues for rural Indigenous communities;
12. s. 696.81 and its subsections be amended to include:
  - a. Outreach and support should be provided directly in Indigenous communities, with an emphasis on assisting Indigenous WG2SLGBTQQIA+ People, as well as assisting family members;
  - b. Outreach and assistance should be provided locally, with in-person options at regional and community-based offices, or in partnership with existing local grassroots organizations and service providers in Indigenous communities;
  - c. All outreach and support should be provided in all major Indigenous languages with requests for other Indigenous languages being accommodated;

- d. The Commission should commit via legislation to conducting consultations with Indigenous WG2SLGBTQQIA+ People about what outreach and support should look like and entail;
  - e. Outreach services ought to be provided by Indigenous WG2SLGBTQQIA+ People to their respective communities and to their community members who are in custodial institutions presently;
  - f. Commitment to avoid a pan-Indigenous approach to outreach activities;
  - g. Funding in their enabling statute that leaves room for NIOs, grassroots organizations and services providers, and people with lived experiences, to assist with conducting the consultations and provide the outreach and support;
  - h. Reintegration services must be attentive to the pathways that bring Indigenous Women into contact with the criminal justice system and are exacerbated by a wrongful conviction. These factors include poverty, violence, sex work, mental health concerns, addiction, homelessness, poor health, lack of or inadequate housing, unemployment, low levels of education, and the lack of appropriate social support systems;
  - i. Before creating or implementing any reintegration services, the Commission should be legislated to fund consultations with Indigenous WG2SLGBTQQIA+ People, those with lived experiences in the justice system, Elders, Knowledge Keepers, national and grassroots Indigenous organizations, and service providers, to determine what outreach services would look like;
  - j. Reintegration services should be provided in Indigenous communities, by Indigenous WG2SLGBTQQIA+ People;
  - k. Reintegration services should be permanent and have long term, consistent funding, through the establishment of regional healing lodges, for example;
    - i. Reintegration supports should include assistance with navigating the Child and Family Services regimes and applications for family court legal aid certificates;
  - l. Reintegration services must be offered in all Indigenous languages; and,
  - m. Reintegration services should avoid a pan-Indigenous approach.
- 13.s. 696.83 and its subsections must be amended to ensure that it is clearly legislated that:
- a. One of the commissions primary mandated goals is to investigate and free wrongfully convicted Indigenous WG2SLGBTQQIA+ People, starting with

the 12 Indigenous Women noted in the Honourable Kim Pate's investigative report<sup>2</sup>; and,

- b. The Commission must expedite the applications of Indigenous Women who have been separated from their child(ren).

14. s. 696.87(1) and its subsections be amended as follows:

- a. Statistics should reflect any other identity factors that are considered in the course of a culturally relevant gender-based analysis (CRGBA+);
- b. In addition to the number of applicants in need who received supports, information should be collected and provided on the number of applicants who: requested support but did not receive it and why; were referred to supports but have yet to receive them and why; what types of supports applicants were referred to; what types of supports are lacking but required by applicants; and any other information that may be helpful to improve the commissions service provisions.
- c. The Annual report should conclude with a critical analysis of the findings with the Commission making specific recommendations on how they will improve.
- d. The annual report should be readily available in English, French and all major Indigenous languages. In addition, the Commission should commit to providing the report in any other Indigenous language at the request of the public.

15. s.10(3) be amended to ensure that there is an option to have an applicant's previous application automatically converted to the new regime. This will protect applicants who applied but did not have a preliminary assessment completed from having to submit a new application or be subject to any additional delay because of the new legislation; and,

16. Canada should enact a no-fault compensation scheme for victims of miscarriages of justice to fulfil international law obligations under Article 14(6) of *the International Covenant on Civil and Political Rights*.<sup>3</sup> The scheme would provide speedy no-fault relief but would not preclude an individual from further civil or Charter litigation.

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<sup>2</sup> Office of the Honourable Kim Pate [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](https://sencanada.ca/media/joph5la2/en_report_injustices-and-miscarriages-of-justice-experienced-by-12-indigenous-women_may-16-2022.pdf)>.

<sup>3</sup> United Nations (General Assembly). 1966. *International Covenant on Civil and Political Rights*. Treaty Series 999 (December): 171, online: <<https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>> at article 14(6).

## **Bill C-40 does not sufficiently represent the needs of Indigenous WG2SLGBTQIA+ People**

While NWAC supports Bill C-40 as a progressive step towards examining, remedying, and hopefully preventing the many existing miscarriages of justice, Bill C-40 currently does not sufficiently represent the needs of Indigenous WG2SLGBTQIA+ People. The Commission must legislate the specific inclusion of Indigenous WG2SLGBTQIA+ People, because their experiences with the justice system, its actors, and colonial violence, are vastly different from Indigenous Men and other individuals living within Turtle Island and Inuit Nunangat. The most recent data indicates that Indigenous Women are incarcerated at a rate that is 12.5 times higher than non-Indigenous women.<sup>4</sup> Without an express acknowledgement of these differences, the Commission will only continue to perpetuate colonial violence by failing to address the over-incarceration and over-representation of wrongly convicted Indigenous WG2SLGBTQIA+ People in custody.

Professor Kent Roach and a team of Indigenous law students at the University of Toronto Faculty of Law have built Canada's first Registry of Wrongful Convictions ("CRWC") that went live in February of 2023 and which should be considered by this Committee.<sup>5</sup> The CRWC has recorded 83 instances where people received remedies from the criminal justice system.<sup>6</sup> One report from the CRWC centres around the "...15 instances, or 18% of the wrongful convictions in the Registry, [that] were the result of guilty pleas by the accused."<sup>7</sup> This means that even the majority of cases that do not result in trials and are resolved by way of a guilty plea are still at risk for wrongful convictions.<sup>8</sup> Further, the report found that 40 percent of the people who entered wrongful guilty pleas were women.<sup>9</sup> Shockingly, none of the wrongful guilty pleas involved Indigenous Women, despite Indigenous Women representing 40 percent of Canada's prison population and 50 percent of the federal prison population. This lack of representation "with respect to those who have received remedies for false guilty pleas

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<sup>4</sup> Government of Canada, *Overrepresentation of Indigenous People in the Canadian Criminal Justice System: Causes and Responses*, (2019), Department of Justice Canada, online: <<https://www.justice.gc.ca/eng/rp-pr/jr/oip-cjs/oip-cjs-en.pdf>> at p 9.

<sup>5</sup> Kathleen Martens, *New registry shows Indigenous Peoples largely shut out of wrongful conviction cases*, (24 February 2023), online: <<https://www.aptnnews.ca/national-news/wrongful-convictions-registry-indigenous-peoples-prison-innocence/>>.

<sup>6</sup> Kent Roach, *Canada Has a Guilty Plea Wrongful Conviction Problem: The First Report from The Canadian Registry of Wrongful Convictions*, Canadian Registry of Wrongful Convictions, (February 2023), online: <<https://www.datocms-assets.com/75199/1676311113-report-on-the-guilty-plea-wrongful-convictions-in-the-canadian-registry-of-wrongful-convictions-feb-13.pdf>> at p 2.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

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

likely represents access to justice problems including problems with respect to withdrawing guilty pleas.”<sup>10</sup>

In their 1991 Manitoba Aboriginal Justice Inquiry, the Honourable Justices Alvin Hamilton and Murray Sinclair, reported that there were “inappropriate guilty pleas”, “passivity” and “indifference” to the “alienation of Indigenous [P]eople from a colonial criminal justice system.”<sup>11</sup> Indigenous People in custody further advised that “it was easier to plead guilty because they don’t really believe us.”<sup>12</sup>

In 2011, the Honourable Justice Frank Iacobucci advised that “may Indigenous people in northern Ontario “plead guilty to their offences, rather than electing trial, in order to have their charges resolved quickly but without appreciating the consequences of their decision... believe[ing] they will not receive a fair trial owing to racist attitudes prevalent in the justice system, including those of jury members.”<sup>13</sup> In a 2017 DOJ study of 25 interviews with court workers and lawyers it was reported that many Indigenous People plead guilty to “get it over with”, particularly those who already had existing criminal convictions.<sup>14</sup>

In 2019 a legislative amendment was made requiring judges to consider the factual basis of a guilty plea when deciding whether to accept it or not. The amendment has not improved the situation and a failure to consider the factual basis for a plea is not critical to the validity of a guilty plea.<sup>15</sup> In 2021, the Ontario Court of Appeal<sup>16</sup>, decided that the circumstances of an Indigenous accused Person does not always need to be consider when accepting a guilty plea. The court had concerns that a more investigating inquiry for Indigenous People wanting to plead guilty would result in delays and be “paternalistic”.<sup>17</sup> A 2018 report from the Heads of Prosecutions Subcommittee acknowledged for the first time that Canada has a false guilty plea problem but that no studies to date have quantified the problem, until the recent work of the CRWC.<sup>18</sup>

Of further concern, the office of the Honourable Senator Kim Pate, published a report on May 16, 2022, which highlighted the situations of 12 Indigenous Women who

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<sup>10</sup> *Supra* note 6 at p 5 to 6.

<sup>11</sup> *Ibid* at p 6.

<sup>12</sup> *Ibid*.

<sup>13</sup> *Ibid*.

<sup>14</sup> *Ibid* at 7.

<sup>15</sup> *Ibid*.

<sup>16</sup> *Ibid*; *R. v. C.K.*, 2021 ONCA 826.

<sup>17</sup> *Ibid*.

<sup>18</sup> *Ibid* at p 19; Public Prosecution Service of Canada, *Innocence at Stake: The Need for Continued Vigilance to Prevent Wrongful Convictions in Canada*, ch. 8, section VI, online: <<https://www.ppsc-sppc.gc.ca/eng/pub/is-ip/toc-tdm.html>>.



have experienced miscarriages of justice. The report notes, and NWAC echoes, that Indigenous Women disproportionately experience miscarriages of justice as

*“they are charged, prosecuted, convicted and imprisoned following systemic and discriminatory failures of the criminal legal and prison systems to adequately recognize, contextualize or address the inequities, racism, sexism, violence and ongoing trauma of their lives. The result is layer upon layer of compounding inequality, beginning with the circumstances that lead to Indigenous Women being subject to but under protected by the state, deputized to protect themselves and those in their care, but then disproportionately charged and criminalized when they respond to violence.”<sup>19</sup>*

The Honourable House of Commons Standing Committee on Justice and Human Rights should specifically consider the following 10 systematic factors that lead to miscarriages of justice for Indigenous Women, including:

1. Genocide through colonial violence which resulted in forced removals from lands, institutionalization, violence, forced assimilation, and exclusion from the safety of community via the Indian Act leading to intergenerational trauma, marginalization, and lack of access to economic, social, health and other supports;<sup>20</sup>
2. “Victimization, hyper-responsibilization and deputization”;<sup>21</sup>
3. Survival efforts to combat marginalization and violence resulting in hyper-responsibilization and criminalization;<sup>22</sup>
4. Police bias regarding investigation and charging;<sup>23</sup>
5. Prosecution bias in their execution of discretion, distortion of charging and plea-bargains with mandatory minimum sentences;<sup>24</sup>
6. Section 718.2(e) of the *Criminal Code* being improperly applied and not contextualizing racism, sexism and violence in the legal defences presented by Indigenous Women;<sup>25</sup>
7. Courts not considering alternatives to punitive sentences, Often the justice system actors focus on normalizing the mass overincarceration of Indigenous Women, including through trying to Indigenize correctional settings, instead of returning Women to their homes;<sup>26</sup>

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<sup>19</sup> *Supra* note 2 [Office of the Honourable Kim Pate] at p 3.

<sup>20</sup> *Ibid* at p 9 to 10.

<sup>21</sup> *Ibid* at p 11.

<sup>22</sup> *Ibid* at p 12 to 13.

<sup>23</sup> *Ibid* at p 13 to 14.

<sup>24</sup> *Ibid* at p 14 to 15.

<sup>25</sup> *Ibid* at p 16 to 17.

<sup>26</sup> *Ibid* at p 18 to 19.

8. The CSC risk assessment and classification tools, practices and policies, are discriminatory, resulting in limited access to programs, services and conditional releases for Indigenous Women;<sup>27</sup>
9. Ongoing impacts of life sentences via releases with conditions or parole surveillance;<sup>28</sup>
10. “Perpetuation of vicious circle of children in foster care, forced separation of Indigenous Women from their children and communities and greater likelihood of them ending up in prison than in post-secondary education”.<sup>29</sup>

The report calls for, and NWAC fully supports, that the 12 Indigenous Women’s cases to be reviewed as a group to ensure that there is an adequate identification and analysis of the intersections and patterns of systematic inequality and violence that all the Women experienced both before and during their efforts to navigate the criminal justice system.<sup>30</sup>

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 that colonial harms 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.<sup>31</sup> This lack of safety and justice compounds in their intersecting experiences being female and Indigenous, subjecting them to both gendered and racial violence.<sup>32</sup>

Furthermore, with the recent passing of the *United Nations Declaration on the Rights of Indigenous Peoples Act* (UNDRIPA) in Canada, the Commission has a unique opportunity to consider how the rights outlined in this legislation can be included in the drafting the Commission’s DNA, including legislation drafted in connection with the Commission’s work. Indigenous Women are entitled to rights in the UNDRIPA. It is important to include 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

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<sup>27</sup> *Supra* note 2 [Office of the Honourable Kim Pate] at p 19 to 20.

<sup>28</sup> *Ibid* at p 20 to 21.

<sup>29</sup> *Ibid* at p 21.

<sup>30</sup> *Ibid* at p 26 to 28.

<sup>31</sup> 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*, (2019: Ottawa) [MMIWG].

<sup>32</sup> *Ibid* [MMIWG] at p 635.

addressed within Indigenous rights frameworks to end the violence they experience when their rights are denied, and not protected.<sup>33</sup>

### **NWAC's Concluding Position**

While NWAC supports Bill C-40 as a progressive step towards examining and hopefully remedying miscarriages of justice, it does not sufficiently represent the needs of Indigenous WG2SLGBTQIA+ People. The Commission must legislate the specific inclusion of Indigenous WG2SLGBTQQA+ People, because their experiences with the justice system, its actors, and colonial violence, are vastly different from Indigenous Men and other individuals living within Turtle Island and Inuit Nunangat. Without an express acknowledgement of these differences, the Commission will only continue to perpetuate colonial violence by failing to address the over-incarceration and over-representation of wrongly convicted Indigenous WG2SLGBTQQA+ People in custody. While there is currently little research pointing to the wrongful conviction rates of these individuals in Canada, NWAC predicts that where there are such significant over-incarceration rates, there will also be an increased likelihood that wrongful convictions are also over-represented.

### **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.

Since 1974, NWAC has 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 LGBTQQA+ People. Through advocacy, policy, and legislative analysis, NWAC works to preserve Indigenous culture and advance the wellbeing of all Indigenous WG2STGD People, as well as 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

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<sup>33</sup>*Supra* note 31 [MMIWG] at p 118.

“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.<sup>34</sup>

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<sup>34</sup> The Native Women’s Association of Canada, *About Us* (2022), online: <<https://nwac.ca/about-us>>.