



Nellie's Position on Women and Criminalization



Nellie's

**Shelter, Education & Advocacy
For All Women and Children**

Nellie's is committed to a critical analysis and framework shaped by an intersectional feminist, anti-racism/anti-oppression approach. This means that while we see society as controlled by the matrix of domination – patriarchy, colonialism and capitalism – we believe there is a further layering of oppressions based on racism, sexism, poverty, homophobia, transphobia, heterosexism, gender identity, gender performance, ableism, colour, place of origin, ethnic origin, citizenship, immigration status, religion, political affiliation, level of education, past history of criminalization or contact with the law, substance use, criminal convictions and/or incarceration, lived experiences, coping survival mechanisms, appearance and other intersectionalities of oppression.

In this paper, we will provide a critical feminist, anti-racism/anti-oppression analysis of women and criminalization in Canada. We propose that the Canadian legal system replicates these systems of oppression and further marginalizes people based on these intersectionalities of oppression. Racialized people, particularly Black and Indigenous women; individuals who use substances or live in poverty; and those who are homeless and precariously housed are over-represented in the Canadian legal system, often experiencing harsher treatment and being subject to over-criminalization. *We at Nellie's understand criminalization not just as people experiencing arrest, contact with the law, criminal convictions or incarceration, but as a systemic targeting of oppressed and marginalized people.* We recognize that once both Cisgender ("Cis") and Trans women have experienced criminalization, they are further oppressed in that they are more likely to be re-criminalized, and experience unstable housing, lack of family support, and reduced access to employment.

Nellie's recognizes the process of criminalization as traumatic, especially to women who have already been traumatized by violence against women (VAW) and other interlocking systems of oppression. In this paper, the term women is inclusive to Trans women and Cis women alike; however, we recognize the unique experiences of Trans women, gender queer and non-binary people within the legal system and highlight it within the position paper.

METHODOLOGY

Our methodology began with a sub-committee within the Social Justice committee, dedicated to writing this paper, who met bi-monthly, over the course of the last three and a half years. We began by doing a literature review and shared our individual findings. We also held several focus groups at different community agencies whose service users identified as women who have experienced criminalization. These included: Nellie's, Fred Victor, South Riverdale Community Health Centre and Elizabeth Fry. Once we compiled all the research, a member of the sub-committee with lived experience of criminalization and incarceration compiled the work into this paper.

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Strengths and Weaknesses of the Methodology:

Women and Criminalization is a very broad topic and we recognized that only certain aspects could be adequately discussed for the purpose of this position paper. Our focus on this paper is the criminalization of Black and Indigenous women, Trans women, women who use drugs, women with Mental Health, sex workers, women experiencing violence, women experiencing poverty – and the barriers these groups face while criminalized, incarcerated and upon release. We would like to acknowledge that many other groups of women are also deeply affected by criminalization, such as immigrant women and women without status, women whose first

language is a language other than English, women with children, lesbian and queer women, women who have experienced criminalization due to activism, women with disabilities and Deaf women, women who are convicted of violent crimes, women with histories of trauma, and women without family support. However, some of these intersectionalities are beyond the scope of our paper and are topics that warrant their own position paper or a future expansion of our current research.

This position paper is informed by all of Nellie's previous position papers, which include: *Nellie's Position on Violence Against Women and Children (2009)*, *Nellie's Position on Homelessness (2009)*, *Nellie's Position on Poverty (2009)*, *Nellie's Position on Harm Reduction (2009)*, *Nellie's Position on Mental Health (2009)* and *Nellie's Position Paper on Accessibility: Women with Disabilities and Deaf Women (2013)*.¹ The Women and Criminalization Subcommittee began writing this paper in 2014. We recognize that the political climate has changed and is continually changing. We acknowledge that some of these gaps have become more salient within the current political climate.

One of the strengths of our methodology is that we not only conducted primary research with women with lived experience of criminalization, but also included a variety of voices in our research, both through our *Women and Criminalization Subcommittee* and our focus groups, including the voices of women with lived experience of criminalization and incarceration, social justice activists, advocates and Nellie's staff and students. We work from a feminist anti-racism/anti-oppression theoretical framework and practice, and we understand that change must be led by those with lived experience of oppression, in collaboration with others, and that is exactly how we have conducted not only our research, but also the writing of this paper.

PRINCIPLES

Women, Criminalization and Drug Use:

We at Nellie's understand that women who are survivors of violence often use drugs to cope with trauma, and are often forced to buy or sell drugs in order to survive when experiencing poverty – and that there is an intersectionality between drug use and sex work. Nellie's has always adhered to harm reduction principles in terms of women's drug use.² However, when a woman's drug of choice, or the buying or selling of it is illegal, she can be criminalized for possession or trafficking. *We disagree with the criminalization, incarceration and unjust treatment of women who use drugs. We advocate for a harm reduction approach and do not view abstinence as the ideal goal, but rather aim to increase the safety and self-determination of women who use drugs.* We understand that women who do not have access to harm reduction supplies, are afraid to access services out of fear their children may be apprehended. The fear of arrest/incarceration and lack of access to harm reduction tools makes drug use unsafe and increases the negative consequences, including homelessness and precarious housing. For example, abstinence based programs or stigma around drug use lead to women who use drugs not being able to access necessary supports, such as housing programs and medical supports.

Nellie's understands there may be many underlying factors involved in women's drug use such as trauma, colonization, racism, poverty and experiences of violence, and therefore women should not be punished or stigmatized. We understand that poverty, classism, racism, social isolation, sex and gender based discrimination, and other forms of oppression impact women's access to harm reduction services and make them more likely to encounter the legal system beyond the issue of drug use.



Women, Criminalization and Poverty:³

Women who experience poverty have an exponentially greater risk of being criminalized. Women living in poverty are often criminalized for property offences, shoplifting, fraud, drug importation and other survival strategies. Once women have a criminal record it is even more difficult to access employment and safe housing, leading to further survival tactics that are criminalized. Women experiencing homelessness and women who are under-housed are more vulnerable to police harassment and criminalization than women who have adequate housing. Women who are housed have the safety of using in the privacy of their own

homes while women without safe housing often use in public spaces,

We see the criminalization of women experiencing poverty as compounded by classism, racism and sexism, as women, especially women of colour, are disproportionately affected.

putting them at higher risk. We at Nellie's recognize that social assistance is grossly inadequate for a woman to support herself, and more so if she has children. Women are criminalized by poverty crimes stemming from class, race, ability, gender location and other interlocking oppressions.⁴ A common theme in our focus groups reiterated that many women experiencing poverty are criminalized through their attempts to survive and feed themselves and their children. Women are the experts in our own experience; women living in poverty do what they need to do in order to survive, and many of these survival strategies are criminalized. We recognize the inaccessibility of social housing, the overtaxed shelter system, and that extremely high market rent

pushes many women and their families into poverty and homelessness. Sexism, including wage disparity and consequences of "welfare reform", results in discrimination that criminalizes poverty. We see the criminalization of women experiencing poverty as compounded by classism, racism and sexism, as women, especially women of colour, are disproportionately affected.

The Criminalization of Indigenous Women:

Indigenous women are often marginalized by the legal system due to social, political and economic status. This marginalization created by the intergenerational trauma of residential schools; the current removal of Indigenous children from their homes through child welfare practices; ecocide; dislocation; discrimination; and poor social and economic conditions, exacerbate the issues women are facing.⁵ With the systemic discrimination that brings more Indigenous children into child protective custody, studies have demonstrated that there is a direct link between children in care and an increased risk of criminalization of those very same children and their parents. Racist discrimination in regards to education and employment; and

discriminatory treatment in state controlled institutions such as child welfare, further perpetuate high rates of incarceration.⁶

At Nellie's we understand the criminalization of Indigenous women as a form of colonization. Indigenous women are unjustly targeted and punished by the legal system.

Indigenous women are grossly over-represented in the

correctional system. According to the *Truth and Reconciliation Commission of Canada*, "Although Indigenous people comprise 4% of the total Canadian population in 2011-2012, 43% of admissions of women sentenced to custody were Indigenous."⁷ Nellie's recognizes these statistics as within the historical and ongoing practice of colonization.

Indigenous women are more likely to be held in maximum security units while incarcerated, which gives Indigenous women less access to programs and support while in prison. This means that Indigenous women become less eligible for parole and are often held until the statutory release date (two-thirds of a federal sentence) – at which time they are released into the community with little or no support.⁸ Indigenous women are also more likely to experience solitary confinement and more likely to die in prison. Ashley Smith, Kinew James and Terry Baker are three Indigenous women who died while in solitary confinement within the last several years, in spite of recommendations from inquests that women and people with Mental Health should not be held in this manner.⁹

The Criminalization of Black Women:

We at Nellie's believe we need to address the alarming rate at which Black women are incarcerated and criminalized. We recognize that Black women experience racism and poverty at a much higher rate than non-Black women.¹⁰ Due to stereotypes and racial profiling, Black women are more likely to experience police harassment, which increases the risk of criminalization. Once criminalized, Black women receive harsher penalties, worse treatment by prison staff and lack of access to ethno-cultural programming, food and products, as well as increased risk of deportation after their sentences are complete than non-lack people experiencing criminalization.¹¹ We at Nellie's recognize there is a current war in North America by the police on Black bodies. We stand in solidarity with Black Lives Matter.



The Criminalization of Women Who Do Sex Work:

Nellie's holds a sex work positive perspective and advocates for the recognition of sex work as real work, allowing sex workers the same rights, freedoms and protections as all other workers. *The Protection of Communities and Exploited Persons Act*, known as Bill C-36,¹² further marginalizes and endangers women who do sex work by criminalizing those who use the services of sex workers.¹³ The criminalization of service users increases fear and stigma, which reduces the ability of sex workers to negotiate their services and prices. This in turn can put sex workers in more dangerous situations with an increased risk of violence.

By criminalizing the purchase of sex work, people who buy the services of a sex worker are unlikely to report if they believe a sex worker is underage or is being trafficked or abused.

We understand that laws are in place to address human trafficking, yet we believe that the failure to distinguish between those who are trafficked from those who choose freely to do sex work, can be harmful to both groups. For those who choose to do sex work, there is a greater chance of coming into contact with law enforcement officials. And for women who are trafficked, as result of this legislation, their traffickers are pushing women further underground, where they are less likely to receive support. Furthermore, the remedies requested by trafficked women are complex and varied, and generally misunderstood by the government. Responses to human trafficking must be led by the voices of women who have experienced trafficking. By criminalizing the purchase of sex work, people who buy the

services of a sex worker are unlikely to report if they believe a sex worker is underage or is being trafficked or abused.

The Criminalization of Women with Mental Health:

We at Nellie's understand that Mental Health stems from violence against women, trauma, poverty, racism, sexism, homophobia, transphobia, ableism and other interlocking systems of oppression. Women with Mental Health are at an increased risk of becoming criminalized.¹⁴ We understand that women with Mental Health are more likely to experience poverty, homelessness and difficulty accessing services. Many are actually banned from resources due to what is viewed as "bad behaviour" often stemming from trauma, and this causes further marginalization and puts them at increased risk of police harassment; for example, when women are sleeping on the street. Furthermore, abusers often use Mental Health as a tactic of abuse against women. *For example, women with Mental Health are less likely to have their experiences of violence believed, and their abuser may use their Mental Health to have them held against their will, through*

incarceration or within the Mental Health system. We believe the police are not adequately trained to deal with women with Mental Health, nor are the prisons and jails adequately able to respond to unique needs of women with Mental Health. Women with Mental Health are often punished and held in solitary confinement. Consequently, this often exacerbates Mental Health concerns, which often stem from the original trauma women have experienced.

The Criminalization of Trans, Genderqueer and Non-Binary People:

We at Nellie's recognize the impact of the legal system on Trans, Genderqueer and Non-binary people. Trans women often have reduced access to employment and housing due to transphobia and oppression based on gender performance; they sometimes have to engage in sex work or drug trafficking in order to pay for surgery and hormones. This can lead to criminalization. The legal and correctional systems do not meet the needs of Trans women, and the criminalization process creates an additional layer of severe trauma for Trans, Genderqueer and Non-Binary people. Trans women experience mis-gendering and do not have the necessary access to the resources they need, such as hormones. Trans women are often subject to degrading strip searches by men, and are then housed in facilities based on their assigned sex at birth as opposed to the gender they identify with. Trans women are often confined to solitary confinement for their "protection" but this is actually double punishment and creates further trauma.¹⁵

The Criminalization of Women Experiencing Violence:

Since the instatement of mandatory charging within the Domestic Violence sector, there has been an increased number of women charged when they were actually experiencing violence. New policy developments around mandatory charging, brought about in the 1980s, led to dual charging, or even the sole charging of women. This legislation ends up criminalizing and re-victimizing the very people it was intended to protect: women experiencing violence. We understand that the cause of the increased sole charging of women experiencing violence is a direct result of abusers' increased knowledge of the legal system and consequential ability to manipulate police and the legal system. One example of this is when abusers "get to the phone first", and create a false report in order to gain increased power and control over women, and avoid their own arrest. Women are



also sometimes arrested for self-defence. We recognize this new facet of violence against women as legal abuse.

Our understanding of the cycle of violence shows that manipulation is a huge factor in violence against women and abusers often manipulate not only their partners, but also the police, to such a degree that abused women are arrested and incarcerated as abusers, for acting in their own defence. When a woman is charged, her first concern is often the safety of her children, over the priority of making bail. This often does not affect men who have been incarcerated to the same degree as they are often not the primary

caregivers. If and when the woman is released, she often has conditions to remain away from her home. If she does not follow these conditions and does go home to see her children, she may be re-arrested and charged with breach of bail – often drawing her case out for months, and even years. The ripple effect on family primary caregivers has more implications when women are charged.

There is the psychological impact of being labelled “the abuser” by the legal system, when she is, in fact, the victim.

The criminalization of a woman experiencing violence has a severe impact on her, for not only does she have to heal from the trauma she experienced from her abuser; she also has to heal from the trauma of criminalization, financial loss, child custody issues, and loss of employment. As well, there is the psychological impact of being labelled “the abuser” by the legal system, when she is, in fact, the victim.

Impacts of Criminalization

We at Nellie’s believe that criminalization and incarceration is traumatizing for women. While incarcerated, the focus should be on rehabilitation rather than punishment, however, this is not the case. All programming and therapeutic models in prison are report-based, meaning that programming is mandatory, and facilitators and write reports on what happens in programming, which are shared with primary workers, other facilitators, inside and outside parole officers and the parole board. In this way, an inauthentic and traumatizing attempt at rehabilitation often has the complete opposite effect. Correctional teams then decide what a woman’s “risk factors” and “problematic behaviours” are, and a “plan” is created from there with no input from the woman on what she needs the most or what would be therapeutic for her. Accountability and individual risk management are the correctional goals, with the result that women receiving services are often traumatized through the experience. Further, criminalized women are unable to raise awareness of the social determinants that contributed to their incarceration. By not taking full personal

responsibility for her criminalization, a woman is perceived as not being accountable. This perception may jeopardize her chance of early release.

We recognize that there are extreme barriers to reintegration into society upon release. Women who have been incarcerated have the same needs as all women: safe, affordable housing; health care; access to employment; access to safe, affordable or free day care; access to education and training programs; support from family and/or community. *However, the conditions of parole are often confining with multiple weekly appointments with parole officers; urinalysis; and mandatory psychology and psychiatry appointments with check-ins every few hours. As a result, women are often unable to work and/or see their families.* A large number of women are unable to follow all these conditions and find themselves going back to prison over and over until their sentence is complete. The stigmatization and discrimination women face upon release create additional barriers to accessing housing, employment, education and other necessities. For example, a rental application for housing that requires a woman to state previous addresses can lead to discrimination based on disclosure of previous incarceration. Women face stigma when they have to submit criminal background checks for employment and housing.



The stigmatization and discrimination women face upon release create additional barriers to accessing housing, employment, education and other necessities.

POSITIONS

- 1.** Nellie's position on women's drug use is that it should not be punished, and should be decriminalized. We advocate for harm reduction principles in the legal system as well as in jails and prisons. We also aim to eradicate factors that may increase women's likelihood to be criminalized due to drug use such as racism, poverty, violence against women and trauma. Our goal is to raise awareness of these factors and reduce stigmatization around women who use drugs, and to increase access to harm reduction supplies.
- 2.** Nellie's position on the criminalization of poverty is to continue our work to dismantle the interlocking systems of oppression. We aim for a society where women are not affected by the wage disparity gap; lack of access to safe and affordable housing; lack of access to day care, decent work and education. We must work to ensure that women experiencing poverty and social isolation are not criminalized and that the oppressions leading to those circumstances are eliminated. We will advocate for transformative justice and alternative measures to ensure women are not convicted and incarcerated for non-violent crimes of survival. We will strive to increase funding for, and access to, community supports such as food banks, safe shelter beds, housing, and other programs, to reduce poverty and achieve income security for women and their families.
- 3.** Our position on the disproportionate number of Indigenous women being criminalized is that the legal system is a racist system of colonization that directly targets and punishes Indigenous bodies. We need to work to undo the impacts of colonization and other systems of oppression that Indigenous women face.
- 4.** Nellie's supports *Black Lives Matter* and we aim to be allies to the movement. We do not support the overt and covert racism inherent in all systems, especially the legal system and Criminal (In)Justice system. We need to work to dismantle racism and other systems of oppression that Black women face.
- 5.** We support sex work and the right for women to choose to do sex work, while recognizing the differences between those who voluntarily choose to do sex work and those who are forced to do sex work. We support both groups and aim to increase safety and reduce stigma. We do not view voluntary sex work as violence against women nor do we wish to eradicate it.
- 6.** We believe that people with Mental Health should not be criminalized or incarcerated. Women with Mental Health deserve choices for counselling and support that is accessible, trauma-informed, and that does not cause further trauma. We support peer interventions within community agencies to prevent people being barred from accessing services such as drop-ins and meal programs.

7. We at Nellie's recognize the need for correctional facilities to be safe for Trans, Gender queer and Non-Binary people. Trans people suffer the same oppressions as cis-gender people who are criminalized, such as poverty, violence, precarious housing and employment, layered on top of transphobia and increased stigmatization. This puts them at risk of increased law enforcement contact and they are therefore more likely to be criminalized.

8. Our position on the criminalization of women who have experienced violence is that mandatory charging legislation has led to dual as well as increased sole charging of women. We understand the cause of the increased sole charging of women: because abusers have realized how to manipulate the police and the legal system. We recognize this new facet of violence as legal abuse. Law enforcement officials need to be trained and have a much greater understanding of violence against women, power and control, the trauma caused by abuse, as well as criminalization due to violence against women.

9. Nellie's advocates for decriminalization and transformative justice that does not rely on increased law enforcement. We adhere to a social justice approach that aims to prevent and divert women from becoming criminalized. We recognize the barriers within the legal and correctional systems, as well as the barriers women face upon release, as further traumatizing women and preventing women from accessing the support they need. We continue to work towards supporting women who have experienced criminalization, and working towards ending systemic barriers and other intersectionalities of oppression.



STRATEGIES FOR CHANGE

- 1.** Board, staff and service users will be active in strategies for change. The work will be based on the organization's mission, and informed by the work we do with women and children in our programs and services.
- 2.** Nellie's will work with other women's groups in coalition and partnership at the municipal, provincial and federal levels to address the issues of women and criminalization.

- 3.** Nellie's will maintain membership in women's organizations and other organizations that address women's criminalization; prevent and divert women from being criminalized; and advocate for decriminalization through a transformative justice approach.
- 4.** Nellie's will advocate for the decriminalization of drug use, and for greater access to harm reduction supplies, programs and safe injection sites. We will continue our social justice work to eradicate patriarchy and colonialism, racism, poverty and other intersectionalities of oppressions that disproportionately affect women who use substances.
- 5.** Nellie's will work to increase awareness of the feminization and racialization of poverty, and how it leads to the criminalization of women. We will strive to increase access to community supports. We will aim to maintain membership in other community organizations working to combat poverty.
- 6.** Nellie's will work as allies and partners with Indigenous women who are criminalized and with organizations that support Indigenous women who have been criminalized. We need to advocate for education about the genocide of Indigenous people, residential schools, and the history of intergenerational trauma. We need to learn, understand and respect Indigenous cultural practices, and to always acknowledge whose land we are on.
- 7.** Nellie's will use methods to effect social change and combat anti-Black racism, such as participating in coalitions, public education, media campaigns; and direct political action involving protests, rallies, deputations, complaints, and refusal to participate in oppressive government programs. We will continue to protest racial profiling and carding and we will fully support *Black Lives Matter*.
- 8.** Nellie's will advocate for sex work to be viewed as real work. We will continue to demand that the government rewrite Bill C-36. We will continue to ask for municipal non-enforcement of Bill C-36 by the police. We will bring light to the privileged nature of the mainstream understanding of sex work – meaning that only the voices of the most privileged and most safe are heard while the voices of sex workers in the most precarious and dangerous areas remain silenced.
- 9.** Nellie's will continue to operate from a trauma informed perspective – meaning that we approach all our work through a lens that recognizes that all women have experienced trauma whether it is interpersonal, societal, systemic or state violence. We recognize the intersectionality between trauma and Mental Health. Women with Mental Health stigma experience greater levels of trauma due to criminalization. We recognize that criminalization is a traumatic experience for all those who have had encounters with police, the court system, jails and prisons.

- 10.** Our position is that there must be an education component for all members of the justice system to change the way we understand and address violence against women and the extension of power and control that abusers have learned to exercise within the system. Until such changes are made and effectively implemented, the violence and criminalization of women will continue to increase and perpetuate itself.
- 11.** Nellie's has made a commitment to raising awareness through public education around all types of violence against women and its effect on women and children.
- 12.** Nellie's will create groups that support women experiencing violence and the trauma of criminalization.
- 13.** Nellie's will actively educate women using our programs and services, as well as community members, about criminalization, using an anti-oppression/anti-racism approach.
- 14.** Nellie's will actively seek to involve women who have been criminalized as well as women at risk of criminalization, in the planning and implementation of programs and services, such as support groups for women who are coping with the trauma of criminalization.
- 15.** Nellie's will respect the voices and experiences of women as experts and will initiate trainings for staff, volunteers, and board members that reflect this. We will work to further include the voices of women with lived experiences.
- 16.** Nellie's will work across sectors in areas of community education and advocacy, to change the social and economic conditions that perpetuate the criminalization of women and their survival strategies.
- 17.** Nellie's will continue to identify the changing realities and oppression in all systems and laws through inclusive consultation with the women who use our services. We will identify the areas where we are failing women who have experienced criminalization, and advocate for changes with the goal of reducing the number of women criminalized.
- 18.** Nellie's will ensure that to all the criminalization discussions and work in which we are involved, we bring a feminist, anti-racism/anti-oppression framework for action.
- 19.** The methods Nellie's may use to effect social change include participation in coalitions, public education and media campaigns; and direct political action such as protests, rallies, deputations, complaints, and refusal to participate in oppressive government programs.
- 20.** Nellie's recognizes that women and women who have experienced criminalization are the experts of our own experience, and that change needs to be not only informed, but led by survivors.

GLOSSARY

Cisgender: A person whose gender identity corresponds to their assigned sex at birth.

Transgender: Describes a person whose gender identity corresponds to their assigned sex at birth. Also used as an umbrella term to include gender identities outside of male and female.

Gender queer: Describes a person whose gender identity falls outside the traditional gender binary.

Non-Binary: Gender identity that does not fit into the traditional gender binary of male and female.

Mental Health is our ability to enjoy life and cope with the demands of daily life. Mental Health is a spectrum unique to each person. Women's emotional and physical well-being are impacted by their social and economic realities, including trauma, violence and other systemic oppressions.

Black Lives Matter is a movement resisting anti-Black racism, state-sanctioned and institutional violence, and fighting for Black Lives.

Feminism: Feminism is a social movement whose goal has been, and continues to be, women's social, legal, political, economic and cultural equality.

Anti-Racism/Anti-Oppression Framework: The process of working towards understanding racism and oppression and how it creates power and privilege for some and actively working for social change.

Intersectionality: A term coined by law professor Kimberlé Crenshaw in the 1980s to describe the way that multiple systems of oppression interact in the lives of those with multiple marginalized identities, such as gender, race, class and ability. Intersectionality looks at the relationships between multiple marginalized identities in order to analyze social problems more fully and promote more inclusive advocacy.

Transphobia: The fear or hatred of transgender people or gender non-conforming behavior.

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