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Feminist Alliance for
International Action

L'Alliance Féministe pour
L'Action Internationale

Statement on Draft Terms of Reference for the National Inquiry into Missing and Murdered Indigenous Women and Girls in Canada

July 20, 2016—As organizations and human rights experts, we are deeply concerned by the draft Terms of Reference for the National Inquiry into Missing and Murdered Indigenous Women and Girls in Canada, which have been posted on media websites today.

The TOR provide the framework for the National Inquiry and establish the authority of its Commissioners. In our view, the draft TOR risks a weak National Inquiry that lacks clear authority to delve into some of the most crucial factors in this human rights crisis. Our organizations are particularly concerned that the draft TOR provides no explicit mandate to report on, or make recommendations regarding, policing and justice system failures and inadequacies.

Overall, the TOR describe a process of consultation with families and survivors, with an emphasis on healing and reconciliation. This is important. But the National Inquiry must also be able to take a hard look at the programs, practices and policies of governments, which have contributed to, maintained, or exacerbated the violence.

We wish to see a strong and effective National Inquiry that can deal with the realities of violence against Indigenous women and girls and Canada's failed responses to it. To that end, we provide the following analysis of the TOR.

There are positive elements in the TOR, including the following:

- There will be five Commissioners. This provides opportunity for a good mix of representation, experience and expertise.
- There is a mandate to examine the systemic causes of violence, and to make recommendations that will address and remedy those systemic causes.

- There is a mandate to create regional and issue-specific advisory bodies that include family members, violence survivors and civil society advocates with relevant issue knowledge.
- The report of the United Nations Committee on the Elimination of Discrimination against Women and the report of the Inter-American Commission on Human Rights are included in the list of key reports for the Commission of Inquiry to review and consider.
- The Commissioners are authorized to make funding available to enable people to participate in the National Inquiry (though it is unclear how extensive this will be) and to provide culturally appropriate counselling.
- The TOR authorize the Commissioners to hold informal hearings and to travel the country.
- There will be both a preliminary and final report.

Unfortunately, these positive factors are not sufficient to ensure a robust and effective National Inquiry. The follow crucial gaps and omissions must be addressed before the National Inquiry is formally established.

Policing and Justice System

- There is no explicit mandate to review policing policies and practices. Since the failure of the police and the justice system to adequately protect Indigenous women and girls and to respond quickly and diligently to the violence is a central concern, and since this failure has been identified as a violation of Canada's obligations under international human rights law, it should be a central focus of the inquiry. The absence of this critical aspect of the National Inquiry in the TOR is shocking.
- The Commissioners are directed to report on "institutional practices in response to violence experienced by Indigenous women and girls in Canada". But the TOR should explicitly state that the Commissioners are to inquire into and report on police and justice system practices related to the racialized and sexualized violence that Indigenous women and girls experience. The recommendation section should explicitly authorize the Commissioners to make recommendations that will correct inadequacies and improve policing practices, policies, and oversight.
- There is no mechanism for individual file review of cases where there are outstanding concerns over the adequacy and impartiality of police investigations. The Commissioners are authorized to refer families with concerns about ongoing or past investigations to "the appropriate provincial or territorial authority responsible for the provision of victim services". This appears to be sending families back in a circle, to the same authorities with whom they were/are having problems to start with. This risks putting the Commissioners in an untenable position as they will appear to be part of the problem, not the solution.

A number of recommendations during the pre-inquiry consultations were made for parallel investigative, civilian-led processes, at least initially under the oversight of the National Inquiry, which could provide a fresh review and advice to families.

- The only references to law enforcement concern:
 1. the obligation of Commissioners not to jeopardize criminal investigations. Without more detail, this may encourage law enforcement authorities to withhold key information or data on open cases.
 2. the direction to pass evidence that may be of use in a criminal case or evidence of misconduct back to “appropriate authorities.” This seems to obviate any authority on the part of the National Inquiry to analyze or make recommendations regarding inadequate or overtly discriminatory practices by police or justice system officials.

If evidence of misconduct will be remitted to appropriate law enforcement authorities, how will this lead to real change in policing policies and practices? Further, the “appropriate authorities” vary from province to province, placing families at risk of being referred to what may be an inadequate and confusing system. Again, the National Inquiry does not appear to have jurisdiction to thoroughly examine policing agencies and systems.

Powers to Subpoena and Compel Production of Documents

While the inquiry will be conducted under the *Inquiries Act*, which in sections 4 and 5 authorizes Commissioners of Inquiry to summon witnesses and compel production of documents, these sections of the *Inquiries Act* are not specifically referred to in the TOR, even though other sections, with respect to paying remuneration and hiring staff, are. This inconsistency, and the absence of reference to the authority to compel production of documents, may raise a question, and cause disputes, about whether the Commissioners have the necessary authority to require witnesses to testify and to produce documents that the National Inquiry needs. There is also a question regarding the authority of the Commissioners to compel production of documents from provincial and territorial departments and agencies. The Commissioners should be authorized, if necessary, to make use of inquiry powers under provincial legislation to avoid possible jurisdictional disputes.

The power to compel production of documents from all levels of government is essential. But it is not set out clearly in the TOR.

Human Rights Framework

The inquiry does not have a human rights framework. The Commissioners are directed to review and consider the UN CEDAW Committee and Inter-American Commission reports on murders and disappearances of Indigenous women and girls in Canada, which we understand as an acknowledgement that rights are at stake here. But the Commissioners are not directed to identify the relevant

domestic and international civil, political, economic, social, and cultural human rights, including the specific rights of Indigenous peoples. Nor are the Commissioners directed to assess the systemic causes of the violence and institutional practices and policies in light of Canada's international human rights obligations, or to make recommendations that will improve the implementation and fulfillment of the rights of Indigenous women and girls. When the murders and disappearances have been identified as a human rights crisis for Canada, this is a major weakness.

Provincial and Territorial Jurisdiction

The preamble refers to the Government of Canada and the "governments of the provinces and territories" launching the inquiry. But there is no explicit authority for the National Inquiry to deal with matters or evidence that fall in provincial or territorial jurisdiction. Nor do the paragraphs that set out what the National Inquiry is to report on and what it is to make recommendations about refer to provincial and territorial jurisdiction. These sections should specify that the Commissioners are to inquire into and report on relevant policies and practices, whether they are federal, provincial or territorial, and state that the Commissioners are authorized to make recommendations pertaining to any jurisdiction.

There is nothing in the TOR about cross-agency and cross-jurisdictional data sharing, and in particular, there is no authority given to the Commissioners to foster, or compel, data-sharing to ensure that over the course of the National Inquiry the knowledge of the nature and the extent of the violence is improved.

Participant and Witness Supports

- There is no provision made for translation/interpretation to/from Indigenous languages.
- It is unclear whether individuals or groups testifying before the National Inquiry will need to be represented by legal counsel. Should legal counsel be required, it should be funded by the National Inquiry and this should be made explicit in the TOR. The National Inquiry must avoid a situation like the Oppal Inquiry, where public officials and law enforcement had access to legal counsel but individuals and civil society groups did not; this judicial inequality caused groups to withdraw from participation in the Oppal Inquiry.
- Commissioners can share data related to criminal offenses with law enforcement agencies. But no guarantees or protections are provided for people who fear contact with, or retaliation by, police or other officials.

Consultation and Revision

Along with Indigenous women, families and communities across Canada, we welcomed the announcement of the National Inquiry last December. We have great hopes and great expectations that the National Inquiry will help to address

the root causes of violence against Indigenous women and girls and identify practical solutions to prevent further violence and provide justice for Indigenous women and girls and their families.

As presently drafted, however, the TOR will not meet these expectations. Given that the National Inquiry process began with consultations and a commitment to “getting this right”, we are hopeful that the Government of Canada, and the governments of the provinces and territories, will consider our concerns and revise the TOR before the National Inquiry begins.

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