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Senate Committee on Legal and Constitutional Affairs
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Submissions on *Bill C-10: The Safe Streets and Communities Act*

The Women's Legal Education and Action Fund (LEAF) and West Coast Women's Legal Education and Action Fund (West Coast LEAF) write regarding Bill C-10, the so-called *Safe Streets and Communities Act*. We write to add our organizations' voices to the many calls already made to the Senate Committee on Legal and Constitutional Affairs to delay the passage of Bill C-10 pending a full consideration of the issues raised in these submissions, particularly the impacts of the proposed legislation on women and Aboriginal peoples, the unjustified financial costs the proposed legislation will impose on provincial and territorial governments, and the critical importance of including "safety valve" provisions if the proposed mandatory minimums are to be enacted. It is our position that the federal government's obligation under section 15 of the *Canadian Charter of Rights and Freedoms* to promote and protect the equality rights of disadvantaged persons in Canada mandates that significant amendments be made to Bill C-10 before it is passed into law.

Who we are

LEAF is a national, federally incorporated non-profit organization founded in April 1985 to secure equal rights for Canadian women as guaranteed by the *Canadian Charter of Rights and Freedoms* (the “*Charter*”). To this end, LEAF engages in equality rights litigation, law reform and public legal education relating to women’s inequality. As an intervener in over 150 equality rights related decisions in the areas of sexual violence, pay equity, socio-economic rights, spousal and child support, reproductive freedoms and access to justice, to name a few, LEAF has contributed to the development of equality rights jurisprudence and the meaning of substantive equality in Canada. LEAF also has considerable expertise in criminal law and sentencing. In 2006, LEAF, in partnership with the Canadian Association of Elizabeth Fry Societies (CAEFS), made submissions to the Senate Standing Committee on Justice and Human Rights opposing mandatory minimum sentences for offences involving firearms. LEAF supports the submissions made by CAEFS in 2011 and 2012 opposing the proposed mandatory minimums in this current Bill C-10.

West Coast LEAF is an affiliate and sister organization of LEAF, an incorporated non-profit society in British Columbia and a federally registered charity. West Coast LEAF’s mission is to achieve equality by changing historic patterns of systemic discrimination against women through BC-based equality rights litigation, law reform and public legal education. West Coast LEAF has supported LEAF interventions in numerous cases, and has intervened in its own name at all levels of Superior Court in British Columbia and at the Supreme Court of Canada to make arguments in support of substantive equality for women.

Both LEAF and West Coast LEAF have developed and advanced equality rights arguments in contexts where sex inequality is compounded by other prohibited grounds of discrimination, including race, Aboriginal status, sexual orientation and disability. We have developed considerable expertise in analyzing the potential and actual impacts of proposed and existing legislation on marginalized groups, particularly women experiencing multiple and overlapping forms of discrimination as a result of their race, ancestry, class, sexual orientation and/or (dis)ability. We seek to ensure that this analysis is included in the Committee’s deliberations and recommendations regarding Bill C-10.

Discriminatory Impacts of Bill C-10

In the submission of LEAF and West Coast LEAF, Bill C-10 will have a discriminatory impact on already disadvantaged groups in Canada. The legislation will not promote substantive equality and will in fact perpetuate the inequalities already experienced by those that are the target of this legislation. The Supreme Court of Canada has repeatedly endorsed an understanding of section 15 of the *Charter* that seeks both to prevent discrimination and promote substantive equality. At the heart of substantive equality is an understanding that differential treatment is not, by itself, a violation of equality rights, and that sometimes differential treatment is in fact necessary to achieve equality of results. Through its imposition of mandatory minimum sentences and removal of judicial discretion with respect to sentencing (thus imposing a ‘one size fits all’ approach to sentencing), Bill C-10 adopts a formalistic approach to equality that will serve to perpetuate the historic disadvantage of marginalized groups.

LEAF and West Coast LEAF recognize and endorse the need for appropriate, targeted criminal legislation that addresses the needs of victims of crimes, a significant proportion of whom are women. Women's experience of criminal violence significantly contributes to women's inequality in Canadian society. However, Bill C-10 does not constitute an appropriate response to these legitimate societal concerns. In fact, in our submission, the harms likely to result from the imposition of mandatory minimum sentences and the reduction in the availability of conditional sentences contemplated in Bill C-10 will cause far more harm than good to vulnerable women.

Impacts on Victims

The "law and order" agenda exemplified in Bill C-10 is based in part on the notion that harsher punishment will lead to prevention of crime. However, a vast amount of research supports the view that punishment has little, if any, deterrent effect.¹ Even if punishment can have some degree of deterrent effect, there is no evidence to establish a correlation between the degree of punishment and the degree of deterrence; mandatory minimum sentences have not been shown to deter any better than less harsh, more proportionate sentences.

Clearly, the most effective way to protect the public from crime is to prevent its commission in the first place. Prevention requires an analysis of the societal nature of crime and strategies to address its root causes. Bill C-10, however, is aimed solely at the punishment of offenders. LEAF and West Coast LEAF urge the Committee to recommend a diversion of resources away from this costly, unproductive, individualized approach to the punishment of crime, and towards holistic and multi-faceted approaches that recognize the social nature of crime and are targeted towards prevention. These must include initiatives to address homelessness, addiction, poverty, mental illness, lack of education, and other known drivers of crime. This bill does not serve the needs of women who are victims of crime because it diverts resources away from real crime-cutting measures and towards unproductive, discriminatory and costly punitive measures.

Impacts on Women and other Disadvantaged Groups

Women comprise the fastest growing population in Canada's federal prisons. Last fall, federal prison Ombudsperson Howard Sapers raised concerns about the growing crisis of overcrowding in women's prisons across the country. Due to the increasing number of women being sentenced to jail time, spaces intended for counselling and treatment are increasingly being used as cells, despite lacking toilets or running water, and authorities have been forced to place prisoners in trailers and converted

¹ See, for example, *R. v. Proulx*, [2000] 1 S.C.R. 61 at para. 107, citing Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach: Report of the Canadian Sentencing Commission*, Ottawa: The Commission, 1987 at 136-7; *R. v. Wismayer* (1997), 115 C.C.C. (3d) 18 at 36; R. Broadhurst & N. Loh "Selective Incapacitation and the Phantom of Deterrence" in R. Harding ed., *Repeat Juvenile Offenders: The Failure of Selective Incapacitation in Western Australia* (Crime research Centre, University of Western Australia, 1995) at 55; Thomas Gabor and Nicole Crutcher, *Mandatory Minimum Penalties: Their Effects on Crime, Sentencing Disparities, and Justice System Expenditures* (Ottawa: Research and Statistics Division, Department of Justice Canada, 2002), online: Department of Justice <<http://canada.justice.gc.ca/en/ps/rs/rep/2002/rr2002-1a/pdf>>; The Canadian Sentencing Commission as cited in Alan Manson, "Finding a Place for Conditional Sentences" (1997) 3 C.R. (5th) 283 at 291.

gymnasiums. Accompanying the overcrowding are increased incidents of violence, and particularly incidents of self-inflicted injuries, which have more than tripled over the past two years.²

The conditions in women's prisons are alarming and exhibit a disturbing lack of concern for women's *Charter*-protected rights to equality and freedom from cruel and unusual treatment or punishment. Implementation of Bill C-10 is sure to increase the number of women sentenced to incarceration and exacerbate these appalling conditions.

Aboriginal women, despite comprising less than two percent of Canada's population, make up 34 percent of female federal inmates, and in the last ten years, the number of Aboriginal women prisoners has increased by 86.4%, compared to 25.7% over the same period for Aboriginal men.³ The vast majority of women prisoners have been victimized by crime themselves: 86% of female prisoners report histories of physical abuse, and 68% have experienced sexual abuse at some point in their lives. Almost one-third of the women admitted to federal prisons in 2009 presented with mental health issues.

Despite international admonishment of Canada for the over-representation of Aboriginal women in its prisons,⁴ Bill C-10 will perpetuate the gross disparities already existing in Canada's criminal justice system. Mandatory minimum sentences and decreased availability of conditional sentences will greatly increase the prison population, with devastating impacts on marginalized communities, particularly Aboriginal peoples and those with mental health needs, who are already greatly over-represented in correctional institutions.

Amendments to the *Criminal Code* made in 1995 direct courts to consider "all available sanctions other than imprisonment that are reasonable in the circumstances," with particular regard to the circumstances of Aboriginal offenders.⁵ Incarceration must be viewed as a last resort, and all alternative sanctions must be considered. Alternatives to incarceration, including monitored conditional sentences, are less costly to the justice system, and have been shown to reduce rates of recidivism, a fact acknowledged by Justice Minister Rob Nicholson at a meeting of the Canadian Bar Association last August.⁶ The purpose of the *Criminal Code* amendments was to respond to the problem of over-incarceration, and in particular to the disproportionate incarceration of Aboriginal peoples. Interpreting this provision, the Supreme Court of Canada has held that courts must be alive to the circumstances of Aboriginal offenders because of their uniqueness and difference from non-Aboriginal offenders, and because of the history of colonialism and widespread racism and discrimination that has led to the vast over-representation of Aboriginals in Canadian jails.⁷

² Laura Stone and Vaughn Palmer, "Women behind bars" *The Vancouver Sun*, 12 October 2011, online: <<http://www.vancouversun.com/health/Women+behind+bars/5536830/story.html>>.

³ Annual Report of the Office of the Correctional Investigator, 2010-11.

⁴ Concluding Observations of the Committee on the Elimination of Discrimination against Women: Canada, 2008.

⁵ Section 718.2(e).

⁶ Robert Everett-Green, "Law and Disorder: What Bill C-10 could mean for Canada's native people" *The Globe and Mail*, 22 February 2012, online: <<http://m.theglobeandmail.com/news/politics/law-and-disorder-what-bill-c-10-could-mean-for-canadas-native-people/article2342832/?service=mobile>>.

⁷ *R. v. Gladue*, [1999] 1 S.C.R. 688.

Judicial discretion in sentencing, particularly with respect to Aboriginal peoples, is a cornerstone of Canadian criminal law. Conditional sentences allow judges to apply restorative justice principles to sentencing and respond to the over-incarceration of Aboriginals and other racialized groups. However, this discretion will be undermined by the mandatory minimum sentencing requirements imposed by Bill C-10. Where mandatory minimums are in place, judges will no longer be able to consider the unique situation of Aboriginal offenders or devise alternative sentences that promote healing and community reintegration. The legislation will force judges to impose jail sentences despite the offender's Aboriginal status or the availability of other, more appropriate measures.

Mandatory minimum sentences conflict with legislative and judicial obligations that require judges to impose sentences that are fit for the offender by considering all alternatives to incarceration. Mandatory minimums also thwart the responsibility that must be borne by a system that has perpetuated racialized patterns of crime and punishment. Mandatory prison sentences also offend principles of international law, including those contained in the International Covenant on Civil and Political Rights, to which Canada is a party, on the basis that they violate the principles of proportionality of punishment articulated in articles 7, 9, 10, 14 and 15. There can be little doubt that passage of Bill C-10 will exacerbate the over-representation of Aboriginals in Canadian prisons, contrary to Canada's international human rights obligations, existing law, and the principles of substantive equality enshrined in the *Canadian Charter of Rights and Freedoms*.

Additional concerns

In order to accommodate the influx of prisoners that the proposed legislation will generate, the government will be required to authorize huge increases in spending. This at a time when the justice system in British Columbia has been denounced by the Chief Justice of the BC Supreme Court as "threatened, if not in peril," because of insufficient government funding.⁸ BC courts are already facing severe backlogs and delays; more than 100 cases were thrown out of court last year because of excessive delays, and thousands more are likely to follow. The BC Budget, tabled on February 21, offered no new money to the struggling justice system. The Ontario government estimates that the cost of the proposed legislation will add more than \$1 billion in increased police and court costs in that province. While this legislative change is federal, significant provincial funds are required for implementation and provincial financial priorities and limitations must be considered.

The proposed legislation is likely to result in fewer guilty pleas and longer, more drawn out cases, as accused individuals facing a mandatory minimum sentence have great incentive to fight the charges against them to the very end. The legislation will also incarcerate more individuals for longer periods of time, increasing prison costs and resulting in a decrease in available public funds for community-based crime prevention initiatives, which may well have a more significant impact on reducing crime and making our streets and communities safer – the purported objective of the proposed legislation.

⁸ Jeremy Hainsworth, "System of risk, B.C. chief justice warns" *The Lawyers Weekly*, 9 December 2011, online: <<http://www.lawyersweekly.ca/index.php?section=article&articleid=1556>>.

Conclusion

Bill C-10's approach to addressing crime is not an adequate, viable, or effective strategy to address threats to public safety. Canadians' safety would be better served by funding crime prevention strategies that address the root causes of crime, including poverty, racism, sexism, homophobia, lack of education, histories of trauma and abuse, lack of access to social programs and lack of employment opportunities. A viable and effective criminal justice policy must seek solutions to these social problems as a prerequisite to addressing public safety concerns. The most effective crime prevention strategy is the development of healthy, equal and vibrant communities.

With its focus on punishment and reliance on mandatory minimum sentences, Bill C-10 will not make our streets and communities safer, but rather will lead to further discriminatory adverse effects on historically disadvantaged groups. LEAF and West Coast LEAF urge the Committee to delay the passage of this bill pending a full consideration of the issues raised in these submissions, in consultation with experts and community groups, particularly Aboriginal organizations. We call on the Committee to adopt an approach that prioritizes substantive equality, fairness, proportionality, compassion, and understanding of victims as well as offenders, in pursuit of policy that truly serves the ends of justice.

Yours truly,



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