



Canadian Association of Elizabeth Fry Societies™  
Association canadienne des sociétés Elizabeth Fry  
701-151 Slater Street, Ottawa, Ontario K1P5H3  
Telephone : (613) 238-2422  
Facsimile : (613) 232-7130  
e-mail : caefs@web.ca  
Home Page : www.elizabethfry.ca

Submission  
of the  
Canadian Association of Elizabeth Fry Societies  
to the  
Standing Committee on Justice, Human Rights, Public Safety and  
Emergency Preparedness  
(39<sup>th</sup> Parliament)

*Regarding*

**Bill C-10: An Act to amend the Criminal Code (Minimum Penalties for Offences Involving Firearms)**

November 2006

**Contact:**

Kim Pate  
Canadian Association of Elizabeth Fry Societies  
#701, 151 Slater Street  
Ottawa, Ontario  
K1P 5H3  
Telephone: (613) 238-2422  
Facsimile: (613) 232-7130  
Home Page: [www.elizabethfry.ca](http://www.elizabethfry.ca)  
E-mail: [kpate@web.ca](mailto:kpate@web.ca)



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## Introduction

The Canadian Association of Elizabeth Fry Societies (CAEFS) was originally conceived of in 1969 and was incorporated as a national voluntary non-profit organization in 1978. Today there are 25 member societies across Canada. CAEFS is incorporated pursuant to the provisions of the *Canada Corporations Act*. Local societies are incorporated under provincial statutes.

Both volunteer and paid staff are involved in governance as well as program and service delivery throughout the association. Programs and services are developed at the grassroots level, in accordance with the needs of the community and range from early intervention and crime prevention activities, to pre and post release work with criminalized and imprisoned women and girls.

In the last year, 31 volunteers, including Board members, devoted a total of 6,073 hours of work to the CAEFS' office. This supplemented the work of CAEFS' two full-time staff members. In our 25 member societies, 1,545 volunteers put in a total of 109,555 hours, supplementing the time of 275 full-time staff and 169 part-time staff.

At the national level, CAEFS focuses on law and policy reform initiatives, informed by its membership and those women with the lived experiences of criminalization and imprisonment. The interactions of CAEFS with women serving federal terms of imprisonment have led us to take note of numerous instances of abuse of rights by the Correctional Service of Canada (CSC). In conjunction with the Native Women's Association of Canada (NWAC), CAEFS has combined these personal accounts with the findings of other equality seeking women's groups in Canada to serve as the basis for these submissions.

## Background

A mandatory minimum sentence is a fixed penalty legislated by Parliament to be applied, without exception, to any and all convicted of committing the criminal offence to which it is linked. In Canada, there are currently approximately 40 *Criminal Code* 'offences' – including murder, impaired driving and various sexual offences – for which a mandatory minimum sentence of imprisonment must be imposed.<sup>1</sup>

Bill C-10 proposes the introduction of several new fixed penalties as mandatory minimum terms of imprisonment, as well as increases to pre-existing mandatory minimum sentences for 'offences' committed with a restricted or prohibited firearm, by an individual with a previous conviction for a firearm-related offence, or where the individual is connected with a gang or criminal organization.<sup>2</sup> Consistent with the recommendations of the Sentencing Commission of Canada,<sup>3</sup> our membership does not support the establishment of mandatory minimum sentences.

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<sup>1</sup> Raaflaub, Wade Riordan. *Legislative Summary – Bill C-10: An Act to Amend the Criminal Code (Minimum Penalties for Offences Involving Firearms) and to Make a Consequential Amendment to Another Act*. Ottawa: Library of Parliament, Parliamentary Information and Research Service, Law and Government Division, 2006, p. 1.

<sup>2</sup> Ibid.

<sup>3</sup> Canadian Sentencing Commission. *Sentencing Reform: A Canadian Approach*. Ottawa: Supply and Services, 1987.

It is our view that mandatory minimum sentences do not deter crime or alleviate racial and gender disparities, but do contribute to exponential increases in prison populations, and that they will result in further overcrowding of our prisons.<sup>4</sup> In order to accommodate the influx of prisoners that this and other proposed legislation will generate, the government will have to authorize huge increases in spending. In addition, the proposed legislation will likely create a new class of repeat prisoners and will shift decision-making authority on sentencing from experienced judges to the police who lay charges and the prosecutors who process them.

Although there are occasional temporary fluctuations in numbers, overall, crime rates in Canada are declining. Paradoxically, the picture is quite different for women, since the numbers of women being imprisoned is increasing. In fact, the fastest growing prison population worldwide is women, particularly racialized, young, poor women, and women with mental health and intellectual disabilities.<sup>5</sup> The escalating numbers of women in prison is unmistakably linked to the evisceration of health, education, and social services in this country.

According to the data collected by the Correctional Service of Canada, women account for less than 5 percent of all individuals serving sentences of 2 years or more and the vast majority of women prisoners are first time prisoners. In 2001, 82 percent of federally sentenced women were serving their first federal sentence. As of July 2003, 45 percent of federally sentenced women (374 out of 822) were in prison and 55 percent (448) were out on bail or under community supervision. For Aboriginal women, however, the majority were imprisoned with only about 40 percent in the community. Relative to men, women are less likely to commit violent offences, they pose a far lower risk to the safety of the community upon release and they have much lower rates of recidivism.<sup>6</sup>

## **Issues Raised by Bill C-10**

### **1. Constitutionality and Contravention of Sentencing Principles**

It is important that Canada's commitment to taking a principled approach toward all facets of our criminal justice system be maintained. A system built squarely upon the foundation of our *Charter* and human rights protections, is the most sound approach to protecting the safety of the public as well as the best situated to promote a fair and just legal system for all Canadians.

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<sup>4</sup> "Forum – Mandatory Sentencing Legislation." *University of New South Wales Law Journal*. (1999) 22:1, 271; Graycar, Adam. "Mandatory Sentencing," *Australian Institute of Criminology: Trends and Issues*, (1999) 138, p. 1.

<sup>5</sup> Canadian Association of Elizabeth Fry Societies, "Aboriginal Women: Criminalization, Over-Representation and the Justice System," Ottawa: CAEFS, 2004. Available on line at <http://www.elizabethfry.ca/eweek06/pdf/aborig.pdf>

<sup>6</sup> Canadian Human Rights Commission, *Protecting Their Rights: A Systemic Review of Human Rights in Correctional Services for Federally Sentenced Women*. Ottawa: Canadian Human Rights Commission, 2003; Correctional Investigator. *Annual Report of the Office of the Correctional Investigator 2005-2006*. Ottawa: Minister of Public Works and Government Services Canada, 2006; Arbour, Louise. *Commission of Inquiry into Certain Events at the Prison for Women in Kingston*. Ottawa: Public Works and Government Services Canada, 1996, p. 199.

Mandatory minimum sentences raise the spectre of *Charter of Rights and Freedoms* violations.<sup>7</sup> Indeed, the current mandatory minimum sentence for offences involving firearms have previously been condemned because they offend *Charter* guarantees such as the right to be free of ‘cruel and unusual punishment’ (s. 12), the right to be free of a punishment that is disproportionate to one’s degree of moral culpability (s. 7), and the right to be free of arbitrary detention (s. 9).<sup>8</sup> In addition, mandatory minimum sentences violate the s. 15 equality rights of women and racialized groups because they have a disparate impact upon these groups – especially Aboriginal and African Canadians.<sup>9</sup> -- in part because the inequalities that produce their criminalization are hidden by mandatory sentencing.

Mandatory prison sentences also offend principles accepted in international law, such as the International Covenant on Civil and Political Rights, to which Canada is a signatory, on the basis that they violate the principles of proportionality of punishment, as articulated in articles 7, 9, 10, 14, and 15.<sup>10</sup>

In jurisdictions such as Australia and the United States, where the application of mandatory minimum sentences is widespread, studies have shown consistently that minority groups are the ones targeted by these laws.<sup>11</sup> In the United States, it is well recognized that the harshest impact of mandatory minimum sentencing is felt by African-American people, and particularly by African-American women, who, compared to non-racialized American women, have eight times the chance of being charged, convicted and sentenced under mandatory sentencing laws.<sup>12</sup>

In Australia, Aboriginal people and other marginalized groups are also disproportionately and discriminatorily affected by mandatory sentencing laws. For instance, since 1997, when mandatory sentencing laws were introduced in the Northern Territory, judicial use of non-custodial dispositions has declined dramatically. Not surprisingly, that State documented a corresponding increase in the imprisonment rates of Aboriginal adults and youth.<sup>13</sup> In addition, as of 2001, Aboriginal people received mandatory minimum sentences at a rate of 3,728 per 100,000 compared to 432 for non-Aboriginal populations.<sup>14</sup> Faced with these outrageous results, the government of the Northern Territory has begun to repeal some of their mandatory sentences.

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<sup>7</sup>Raaflaub, Wade Riordan. *Legislative Summary – Bill C-10: An Act to Amend the Criminal Code (Minimum Penalties for Offences Involving Firearms) and to Make a Consequential Amendment to Another Act*. Ottawa: Library of Parliament, Parliamentary Information and Research Service, Law and Government Division, 2006, p. 2; “Forum – Mandatory Sentencing Legislation.” *University of New South Wales Law Journal*. (1999) 22:1, 260.

<sup>8</sup>Dumont, H. “Désarmons les Canadiens et Armons-Nous de Tolerance: Bannir les Armes à Feu, Banner les Peines Minimales dans le Contrôle de la Criminalité Violente, Essai sur une Contradiction Apparante,” *Criminal Law Review*, (1997) 2, p. 43; Manson, A. “The Reform of Sentencing in Canada,” in D. Stuart et al. (Eds.) *Towards a Clear and Just Criminal Law: A Criminal Reports Forum*. Toronto: Thomson, 1997, p. 457.

<sup>9</sup>Mirza, Faizal R. “Mandatory Minimum Sentences: Law and Policy – Mandatory Minimum Prison Sentencing and Systemic Racism.” *Osgoode Hall Law Journal*. (2001), 39, 491-512, para. 12.

<sup>10</sup>Zdenkowski, G. “Mandatory Imprisonment of Property Offenders in the Northern Territory,” *University of New South Wales Law Journal*, (1999) 22, p. 311.

<sup>11</sup>Raaflaub, 2006, p. 7.

<sup>12</sup>National Law Journal, 2, November, 1998.

<sup>13</sup>Howse, C. “Covering a Multitude of Sins,” *Alternative Law Journal*, (1999) 24, p. 227-228.

<sup>14</sup>Northern Territories Office of Crime Prevention. *Mandatory Sentencing for Adult Property Offenders. The Northern Territory Experience*, 2003, from

[http://www.nt.gov.au/justice/ocp/docs/mandatory\\_sentencing\\_nt\\_experience\\_20031201.pdf](http://www.nt.gov.au/justice/ocp/docs/mandatory_sentencing_nt_experience_20031201.pdf).

In Canada, sentencing an individual to prison has historically been viewed as a last resort. In fact, s. 718.2 of the *Criminal Code* directs courts to consider sanctions other than imprisonment for all individuals, “with particular attention to the circumstances of Aboriginal offenders [sic].” The Royal Commission on Aboriginal Peoples and many provincial reports, such as the Report of the Commission on Systemic Racism in the Ontario Criminal Justice System, state that we already have a problem with systemic racism in the enforcement of our criminal law. This, combined with the judicial notice taken by the Supreme Court of Canada of the specific tendency of police officers to mistreat racialized people,<sup>15</sup> the need for specific sentencing considerations for Aboriginal people,<sup>16</sup> as well as the recommendations made by countless commissions into the discriminatory treatment and resulting high rates of incarceration experienced by Aboriginal and other racialized people in Canada,<sup>17</sup> should trigger a presumptive rejection of mandatory minimum sentences.

Mandatory minimum sentences will only reinforce the aforementioned trends by further targeting the African Canadian community and generating a false impression that gun violence can be stemmed by punitive responses. The fact that there is virtually no evidence that increased or mandatory minimum penalties deter others from committing offences has been described as the mythology or “Phantom of Deterrence”<sup>18</sup> Since mandatory sentences “aimed at the use of firearms in the course of violent offences have not, in the US, had any sustained impact,”<sup>19</sup> experts in Australia have argued that, “[a]t the very least, the onus is clearly on those who argue for a deterrent effect to produce evidence to support their thesis.”<sup>20</sup>

## 2. Interference with Judicial Discretion

CAEFS views mandatory sentencing laws as an unacceptable usurpation by the legislature of the judicial function, contradicting a basic principle of democracy that executive and judicial powers must be separate. Mandatory minimum sentences prevent judges from sentencing individuals in accordance with the unique circumstances of each case and each individual.<sup>21</sup> A 2005 Department of Justice survey of Canadian judges found that most judges felt that mandatory minimum sentences hindered their ability to impose a just sentence.<sup>22</sup>

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<sup>15</sup> *R. v. R.D.S.* [1997] 3 S.C.R. 484.

<sup>16</sup> *R. v. Gladue*, [1999] 1 S.C.R. 688.

<sup>17</sup> Such as, the Daubney Report, the Report of the Commission on Systemic Racism in the Ontario Criminal Justice System; the Royal Commission on Aboriginal Peoples et cetera.

<sup>18</sup> Broadhurst, R. and Loh, N. “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, p. 55.

<sup>19</sup> “Forum – Mandatory Sentencing Legislation.” *University of New South Wales Law Journal*. (1999) 22:1, 272.

<sup>20</sup> *Ibid.* p. 273.

<sup>21</sup> Raaflaub, 2006, p. 15.

<sup>22</sup> Roberts, Julian V. *Mandatory Minimum Sentences of Imprisonment in Common Law Jurisdictions: Some Representative Models*. Ottawa: Research and Statistics Division, Department of Justice Canada, 2006.

It is not simply that the legislation itself replaces the judicial function, but that the power of police and prosecutors to decide penalties is increased dramatically.<sup>23</sup> Unlike judges who are required to act neutrally and who can be publicly exposed and legally challenged if they fail to live up to their obligations of fairness and impartiality, police and prosecutors do not have the same level of accountability.<sup>24</sup> In Australia, “[t]he laws have meant that police and prosecution are often placed in the position of ‘sentencer’. And, of course, unlike judicial decisions, the DPP’s [Department of Public Prosecutions] decisions are unpublished, unrecorded and unreviewable (save perhaps in exceptional circumstances of abuse of power).”<sup>25</sup>

Bill C-10 would create new, longer mandatory minimum sentences in Canada. By contrast, some jurisdictions in the United States and Australia, including some of the most conservative, “insist that sentencing that is responsive to specific circumstances is far more effective than a mandatory penalty.”<sup>26</sup> Furthermore, while some jurisdictions, such as Michigan (U.S.), England and Wales, Scotland, Northern Territory (Australia), South Africa and Sweden do have mandatory sentences, they also have so-called ‘escape clauses’ built in to their legislative schemes. These clauses permit judges to exercise discretion to impose lesser sentences in extraordinary circumstances.<sup>27</sup>

CAEFS agrees that sentencing requires the consideration of the special circumstances of individual cases, and posits that mandatory minimum sentences do not allow a judge who has heard all the evidence to *judge* the circumstances of the ‘offence’ and the individual and come to a decision based on all facets of a case. In addition, current trends portend the continued contributions of mandatory minimum penalties to the over-incarceration of racialized groups, especially Aboriginal people. The profound over-representation of Aboriginal people in Canadian prisons has been described by the Supreme Court of Canada as a “crisis in the Canadian justice system.”<sup>28</sup>

The manner in which the imposition of mandatory minimum sentences is experienced is also influenced by such factors as one’s access to justice in general. Those who face the prospect of criminalization who are poor, those with disabilities and those who are racialized, especially women, are likely to require legal aid resources in order to ensure that their rights are protected as they face the charges levied against them by the state. At the very least, they will need someone to make legal representations on their behalf.

Accordingly, despite the recognition by the Supreme Court of Canada of the imperative that the state must take steps to address these inequities,<sup>29</sup> it is clear that Aboriginal and other racialized

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<sup>23</sup> Wallace, H. S. “Mandatory Minimums and the Betrayal of Sentencing Reform: A Legislative Dr. Jekyll and Mr. Hyde,” *Federal Probation*, (1993) 57.

<sup>24</sup> Vincent, B. and Hofer, P. *The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings*. Washington, D.C.: Federal Judicial Center, 1994, p. 21.

<sup>25</sup> Goldflam, R. and Hunyor, J. “Mandatory Sentencing and Concentration of Powers,” *Alternative Law Journal*, (1999) 24, p. 213.

<sup>26</sup> Stannow, Lovisa. “Memo to Canada: Don’t ape U.S. crime policy.” *Toronto Star*. October 20, 2006. Letter to the Editor retrieved on line from [www.thestar.com](http://www.thestar.com).

<sup>27</sup> Roberts, Julian V. *Mandatory Sentences of Imprisonment in Common Law Jurisdictions: Some Representative Models*. Ottawa: Research and Statistics Division, Department of Justice Canada, 2006.

<sup>28</sup> *R. v. Gladue*, [1999] 1 S.C.R. 688 at para. 64.

<sup>29</sup> *R. v. Gladue*, [1999] 1 S.C.R. 688.

and disempowered groups will be disproportionately affected by mandatory sentencing laws. This is in part because, with the exception of possibly offering to testify against a co-accused, they will not likely have the resources or authority to influence the police charging decisions, nor will they likely be seen to have much to bargain regarding a possible sentence deal with the prosecutor.

### 3. Increased Human and Fiscal Costs of Imprisonment

The United States and Australia have employed mandatory minimum sentences for some time. U.S. studies conclude that mandatory minimum sentencing laws have not resulted in reductions in the incidence or severity of levels of crime.<sup>30</sup> Furthermore, it is estimated that even though the European Union has a population that exceeds that of the United States by approximately one hundred million, there are 100,000 more people convicted of non-violent offences in the U.S. than the entire prison population of the European Union.<sup>31</sup>

It is also incontrovertible that even where incapacitation of individuals is the sole objective, “[i]ncarceration of such individuals for long periods of time is ineffectual, costly and unjust.”<sup>32</sup> As such, the costs associated with any possible corresponding reduction in crime achieved via the resulting incapacitation will be exorbitant and not easily sustained. For example, a RAND Corporation study in 1996 revealed that California’s so-called ‘three strike laws’ required an increase from 9-18% of the state’s budget being allocated to corrections, which in turn required a corresponding 40% reduction in state budgets previously allocated for such vital resources as education, health, workplace safety, environmental and social services.<sup>33</sup>

Despite the rhetoric emerging from some conservative lobbyists, increasingly, those who have ventured down the route of adopting mandatory minimum sentences are desperately seeking a means of retreat.<sup>34</sup> As authorities in Australia have commented, “Mandatory penalties are like SCUD missiles; however sophisticated and accurate their makers proclaim them to be, they may miss their target and cause immense ‘collateral damage’. The damage is not only to the lives of people caught in their path but also to the fabric of our legal system.”<sup>35</sup>

It may come as no surprise, therefore, that, increasingly, jurisdictions in Australia and the United States are working on retreating from the use of mandatory minimum sentences in light of their negative experience with its consequences.<sup>36</sup> Such jurisdictions have clearly identified the negative

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<sup>30</sup> Tonry, Michael. *Sentencing Matters*. New York: Oxford University Press, 1996.

<sup>31</sup> Ibid.

<sup>32</sup> Hogg, R. “Mandatory Sentencing Laws and the Symbolic Politics of Law and Order,” *University of New South Wales Law Journal*, (1999) 22(1), p. 263.

<sup>33</sup> Ibid.

<sup>34</sup> Fox Butterfield, “With Cash Tight, States Reassess Long Jail Terms,” *New York Times*, 10 November 2003, p. 1; Paul von Zielbauer, “Rethinking the Key Thrown Away,” *New York Times*, 28 September 2003, p. 41.

<sup>35</sup> Morgan, Neil. “Capturing Crims of Capturing Votes? The Aims and Effects of Mandatories,” *University of New South Wales Law Journal*, (1999) 22(1), p. 277.

<sup>36</sup> Roberts, Julian V. *Mandatory Sentences of Imprisonment in Common Law Jurisdiction: Some Representative Models*. Ottawa: Research and Statistics Division, Department of Justice Canada, 2006; Wool, Jon and Stemen, Don. *Issues in Brief: Changing Fortunes or Changing Attitudes? Sentencing and Corrections Reforms in 2003*. New York: Vera Institute of Justice, 2004.

impact of mandatory minimum sentences as including unfairness, wrongful convictions and skyrocketing incarceration rates for African Americans, Aboriginal people, and women in particular, without any discernible deterrent, incapacitation or related safety or cost benefit. Beyond the immediate and abysmal consequences of systemic discrimination and lengthy prison sentences produced by mandatory minimum sentences, there is no solid evidence that these sentences make any positive contribution to reducing 'crime.' On the contrary, in some jurisdictions, like Western Australia, it appears that the incidence of 'offences' to which the mandatory minimum was attached increased by 50 percent in the first year after the introduction of the new sentence.<sup>37</sup> A similar increase in the crime statistics for home burglaries was also reported there in the period immediately following the enactment of a new mandatory minimum sentencing law.<sup>38</sup>

The Correctional Service of Canada reports that it currently deals with 36,000 serving or former prisoners in 54 penitentiaries, 17 community correctional centres and 71 parole offices throughout the country. It is estimated by the Minister of Public Safety and Emergency Preparedness that new criminal justice sentencing regimes will result in many more prisoners in the federal prison system. Researchers, such as Neil Boyd at Simon Fraser University, estimate that Canada will need upwards of 23 new prisons in order to meet the expected influx of prisoners who will be created by these new policies.

At even the most conservative estimates of \$50,000 to \$150,867<sup>39</sup> or \$250,000+ per year,<sup>40</sup> the costs of the proposed new legislation are exorbitant. Comparatively, Canadians pay \$1,792 per year to supervise an individual in the community.<sup>41</sup> Furthermore, these costs are compounded each year by the additional strain on mental health, child welfare and other social services occasioned by burgeoning prison populations. Moreover, a criminal justice system based on increased lengthy imprisonment, usually of the most socially disadvantaged is counterproductive for all of society.<sup>42</sup> Simply put, society bears the cost, but receives no benefit and the criminalized are further stigmatized with no substantive change in terms of the pre-existing conditions which contributed to their criminalization and imprisonment in the first place.

In the United States, the last two decades have seen the implementation of similar criminal justice law reform initiatives. There, the cost of fighting crime (police, courts, and sentence administration) is said to have risen by 350% since 1982, so that Americans now spend about \$40

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<sup>37</sup> Thomson, C. "Preventing Crime or Warehousing the Underprivileged? Mandatory Sentencing in the Northern Territory," *Indigenous Law Bulletin*, 1999-2000, p. 4.

<sup>38</sup> Yeat, M. "'Three Strikes' and Restorative Justice: Dealing with Young Repeat Burglars in Western Australia," *Criminal Law Forum*, (1997) 8, p. 369.

<sup>39</sup> Correctional Service of Canada (2005) *Basic Facts about the Correctional Service of Canada*. Ottawa: Public Works and Government Services of Canada.

<sup>40</sup> The cost of imprisoning adults in Canada generally ranges from \$50,000-\$250,000 per year, depending upon the gender (the Correctional Service of Canada estimates the cost of imprisoning women at between \$150,000-\$250,000 per annum, depending upon the security level and location of the imprisoned woman), security level, treatment needs, and provincial/federal differences.

<sup>41</sup> MacKay, 2006.

<sup>42</sup> Roberts, Julian V. and Simon Verdun-Jones, "Directing Traffic at the Crossroads of Criminal Justice and Mental Health: Conditional Sentencing after the Judgment in Knoblauch." *Alberta Law Review*, (2002) 39: 788-809.

billion per year on incarceration; and, in the states of California and New York, more resources are now allocated to imprisoning people than are expended on education<sup>43</sup> or health services.<sup>44</sup>

In California, whose population is approximately the same as that of Canada, correctional costs have grown by more than 230% in the last 15 years, as a direct result of the inception of the state government's 'tough-on-crime' policies.<sup>45</sup> In 1980, California's prison population was under 25,000. In 2004, the prison population had exploded to 161,000.<sup>46</sup> The state has had to build 21 new prisons since 1980, all of which are now overcrowded. Additionally, its corrections budget accounts for over \$7 billion of their taxpayers' money annually. If we compare this to the Canadian context, according to the 2006-07 Main Estimates, this figure is larger than the expected spending for all Canadian government departments except for the Department of Finance, the Department of Human Resources and Skills Development, and the Department of National Defence.

In Canada too, one of the long-term consequences of Bill C-10 will be the need for massively increased budgets to provide billions of taxpayers' dollars every year to put more individuals in prison, build more prisons, and address the inevitable corresponding results of the further destruction of our faltering social services. In addition, as other jurisdictions have experienced, the introduction of mandatory minimum sentences tends to reduce the incentive for individuals to plead guilty.<sup>47</sup> As such, a decision to enact Bill C-10 will also be a decision to significantly increase court costs and other expenses associated with the administration of justice.<sup>48</sup>

#### **4. Context of Women's Criminalization**

The context in which women use guns and other weapons is vital in understanding the risk they pose to public safety and the consequent potential impact of Bill C-10. In many cases, their actions are defensive or otherwise reactive to violence directed at them, their children, or another third party.

Statistics Canada reports that although crime rates have been dropping since 1996, the fear of crime and the criminalization of women and girls have both increased. The decline in basic support systems for Canadian women, combined with our amplified reliance on the use of imprisonment, has resulted in the increased criminalization of women, especially those who are racialized and those with mental health and intellectual disabilities.

In fact, women are the fastest growing prison population world wide and this is not accidental. In Canada, we recognize that the now globalized destruction of social safety nets – from social and

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<sup>43</sup> Mauer, Marc. *Comparative International Rates of Incarceration: An Examination of Causes and Trends*. Washington, D.C.: The Sentencing Project, 2003.

<sup>44</sup> Human Rights Watch. *Ill-Equipped: U.S. Prisons and Offenders with Mental Health Illness*. Washington, DC, 2003. Retrieved May 4, 2004, from [http://hrw.org/reports/2003/usa1003/3.htm#\\_Toc51489445](http://hrw.org/reports/2003/usa1003/3.htm#_Toc51489445)

<sup>45</sup> Martin, Mark. "Critics Say New State Prison Defies Logic," *San Francisco Chronicle*, Monday, January 5<sup>th</sup>, 2004.

<sup>46</sup> Ibid.

<sup>47</sup> Cushman, R. C. "Effect on a Local Criminal Justice System," in D. Sichor and D. Sechrest (Eds.) *Three Strikes and You're Out: Vengeance as Public Policy*. Thousand Oaks: Sage, 1996; Harris, J. C. and Jesilow, P. "It's Not the Old Ball Game: Three Strikes and the Courtroom Workgroup," *Justice Quarterly*, (2000) 17.

<sup>48</sup> Raaflaub, 2006, p. 6.

health services to economic and education standards -- is resulting in the increased abandonment of the most vulnerable, marginalized, and oppressed.<sup>49</sup> In 2003, Canada was criticized by the United Nations Committee examining Canada's record regarding the Convention on the Elimination of All Forms of Discrimination Against Women. Criticisms included: neglect of women, particularly with regards to social welfare, poverty, immigration policy; the treatment of Aboriginal women and trafficked women; lack of funding for equality test cases; and lack of funding for crisis services and shelters for victims of violence against women. Current and proposed criminal justice laws and policies are increasingly coming into conflict with peoples' lives, resulting in the virtual inevitability of criminalization, pathologizing, homelessness, and even death of those who are most marginalized and disadvantaged by virtue of their sex, race, class, and/or disability.

Many women prisoners serving life sentences for murder have been charged, convicted and sentenced as a result of their involvement in defending themselves and/or their children against violent partners.<sup>50</sup> In 40% of spousal homicides where men are the victims, police determined that the men initiated the violence that led to women's use of lethal force against them.<sup>51</sup> This reality, combined with additional state practices which punish women for resisting abuse, like 'gender-neutral' zero tolerance policies and counter-charging practices, contribute to the equation that results in women being criminalized and imprisoned for 'violent offences'.<sup>52</sup>

In respect of both spousal assault and spousal homicide, rates are higher for Aboriginal women than for non-Aboriginal women.<sup>53</sup> Furthermore, women's use of self-injurious violence is also too often interpreted as an expression of violent pathology. The Royal Commission on Aboriginal

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<sup>49</sup> For example, it is incontrovertible at this stage, that since the 1996 elimination of the Canada Assistance Plan, we have witnessed in Canada the shredding of our social safety net. There are no provinces where social assistance rates are actually adequate to support the poor. In order to survive, most people, especially poor mothers who are the sole supports of their families, are required to obtain income by means that would be considered fraudulent if welfare authorities become aware of it. Accordingly, by creating criminally low welfare or social assistance rates, renaming it as work fare, and even placing bans on receipt of state resources, many poor people are immediately relegated to the criminalized underclass.

<sup>50</sup> In 2001, 29% of all homicide victims were women, and 52% of these women were murdered by someone to whom they had been married or whom they dated. The corresponding statistic for men is 8%. In 2001, one in five homicides were spousal homicides, an increase from the previous year that may be due in large part to the increase in murder perpetrated by legally married husbands. On April 15, 2002, Statistics Canada recorded 6286 residents in 482 women's shelters, of which 52% were women and 48% were dependent children. 73% of these women had suffered abuse, 85% of the abuse victims escaped psychological abuse, 74% physical abuse, 53% threats, 44% financial abuse, 36% harassment, and 29% sexual abuse. 66% of these women were abused by a spouse or partner, 10% by a former spouse or partner, 6% by a relative, and 6% by a current or ex-boyfriend. 54% of the abused women were admitted with children, 70% of which were under the age of ten. Of those women fleeing abuse who were admitted with children, 57% were protecting their children from witnessing the abuse, 43% were protecting them from psychological abuse, 23% from physical abuse, 21% from threats, and a further 12% from neglect.

<sup>51</sup> Statistics Canada. *Measuring Violence Against Women: Statistical Trends 2006*. Ottawa: Minister of Industry, 2006.

<sup>52</sup> Women are now being bashed by those with state authority and resources, as well as by their partners. Women are being induced and encouraged to abandon any hope that the rule of law and civil society can or will take responsibility for holding individual men or the state accountable. Increasingly, when they seek the protection of the state, they are likely to find themselves facing criminal charges after they call the police.

<sup>53</sup> Statistics Canada data reveals that from 1991-1999, spousal homicide rates of Aboriginal women were eight times higher than those of non-Aboriginal women (4.72 per 100,000 couples and 0.58 per 100,000 couples, respectively).

Peoples<sup>54</sup> linked the high rate of violence in Aboriginal communities to the long-term effects of colonization and systemic discrimination, economic and social deprivation, substance abuse, and cycles of violence across generations.

Legislation passed in 1995 requires a judge to impose a minimum sentence of incarceration in a federal institution for at least four years for individuals convicted of specific ‘offences’ of violence against the person if a firearm was used. This mandatory sentence of at least four years of imprisonment is imposed even where there are compelling mitigating circumstances such as long-term abuse of the woman who kills her mate.

The legal recognition of the significance of such factors, which was achieved only after lengthy struggles by equality-seeking women’s groups, was essentially obliterated by the mandatory minimum sentences introduced in 1995. Furthermore, sentences are applied indiscriminately to women who use firearms even though women are very rarely gun owners or collectors. In other words, in a case where a woman used one of her husband’s guns, which he had amassed as an arsenal of weaponry and had threatened to kill her and her children prior to the woman’s use of lethal force against him would not entitle her to avoid the mandatory minimum sentence of at least four years imprisonment.<sup>55</sup> Bill C- 10 will exacerbate the inequities of current mandatory minimum sentences.

## **Concluding Observations**

### **1. Lack of Empirical Evidence**

Like most people in Canada, CAEFS abhors violence and is extremely concerned about gun violence and other gun related crimes. We recognize that some people believe that a simplistic response of longer and more punitive sentencing is an appropriate response to real and perceived increases in particular crimes. There is, however, no empirical evidence supporting the validity of these ‘law and order’ approaches. For instance, in 2002 a Canadian study concluded that existing research does not support mandatory minimum sentences, especially in terms of deterrence objectives.<sup>56</sup>

In 2001, in an attempt to address the lack of Canadian research related to mandatory minimum sentencing, our organization partnered with Osgoode Hall Law School and, together, we co-sponsored a Colloquium on Mandatory Minimum Sentences from which a special double edition of the *Osgoode Hall Law Journal* was issued.<sup>57</sup>

Much like the mandatory minimum sentences introduced in 1995, Bill C-10 is described as a strategy for achieving greater public safety from gun-related violence by severely punishing the

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<sup>54</sup> Report of the Royal Commission on Aboriginal Peoples. *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada*. Ottawa, 1996.

<sup>55</sup> As discussed in *R. v. Getkate*, [1998] O.J. No. 6329 (Ont.Gen.Div.).

<sup>56</sup> Gabor, Thomas and Crutcher, Nicole. *Mandatory Minimum Penalties: Their Effects on Crime, Sentencing Disparities, and Justice System Expenditures*. Ottawa: Research and Statistics Division, Department of Justice Canada, 2002, from <http://canada.justice.gc.ca/en/ps/rs/rep/2002/rr2002-1a/pdf>.

<sup>57</sup> *Osgoode Hall Law Journal*. Summer/Fall 2001, Issues 2 & 3.

‘real criminals’ – those who use guns in the course of committing other crimes.<sup>58</sup> Another mandatory minimum sentence or two is not the answer. The problem of increased gun violence requires a long-term and sustained solution that is focused on social and community development and increased opportunities for full participation in Canadian society for African Canadian youth, Aboriginal peoples, and other marginalized individuals.

In the United States those jurisdictions that have mandatory minimum sentences and have taken a ‘law and order’ approach to crime, have seen a sharp increase in the incarceration rates of the African American community and a rise in gun violence. Rather than reduce crime, these approaches to crime have in fact exacerbated the problem. Clearly, this approach has failed and, paradoxically, has resulted in unsafe communities and increased violence. Further, it is well-documented that the over-incarceration of racialized communities depletes social capital and has a negative impact on children and youth.

While some people seem to believe that mandatory minimum sentencing amount to ‘equal treatment,’ this assumption is falsely simplistic. Mandatory sentencing could only be said to be based on ‘equal treatment’ if everyone has an equal chance at receiving one. Everyone does not have an equal chance at receiving a mandatory prison sentence for a number of reasons.

For individuals with cognitive and psychiatric disabilities, mandatory sentences require that judges ignore their reduced capacities, unless their condition amounts to a mental disorder that deprived them entirely of their ability to distinguish between right and wrong, pursuant to s. 16 of the *Criminal Code*. Again, this means that for some categories of criminalized individuals, mandatory sentences deliver ‘equality’ with a vengeance.

Disparity is partly created by the choice of ‘offences’ that are targeted for mandatory minimums – usually the ‘offences’ committed by the socio-economic underclass of a particular society. Simply put, mandatory minimum sentences do not address some of the root causes of crime – such as persistent poverty, unemployment, lack of educational opportunities and social marginalization – and will not reduce crime or create safer communities. Ignored in Bill C-10 is the enormous impact of Canada’s rapidly deteriorating social safety net and the fact that most people’s reasons for committing a crime go way beyond lack of swift, certain, and severe punishment.

As experts in Australia have succinctly concluded with respect to the lack of empirical evidence to support the reliance on mandatory minimum sentences:

“Mandatory penalties do not operate as a general deterrent. They do not work as a tool for selective incapacitation. They do not promote ‘just deserts’. They do work to undermine justice, to discriminate against minority groups and to encourage the subversion of open and accountable legal processes.”<sup>59</sup>

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<sup>58</sup> Doob, Anthony. “Sentencing Reform: Where Are We Now?” in J. Roberts and D. Cole (Eds.) *Making Sense of Sentencing*. Toronto: University of Toronto Press, 1999.

<sup>59</sup> Morgan, Neil. “Capturing Crims of Capturing Votes? The Aims and Effects of Mandatories,” *University of New South Wales Law Journal*, (1999) 22:1, p. 278.

Moreover, mandatory minimum sentences fail to hold gun manufacturers accountable for their irresponsible practices, which have resulted in a significant increase in the trafficking of illegal guns and firearms.

## 2. Public Knowledge and Opinion

Many Canadians are unaware that we already have mandatory minimum sentences for about 40 offences in Canada, including impaired driving, sexual offences involving children, and crimes involving the use of firearms.

Supporters of mandatory minimum sentences argue that legislation such as Bill C-10 represents the will of the Canadian people. However, a recent poll found that 62 percent of Canadians think focusing on the social and economic problems that lead to crime is better than building more prisons and intensifying law enforcement.<sup>60</sup> Even in the United States, where support is thought to be the strongest, only a third of polled respondents were in favour of mandatory minimums in 2001, compared to over half in 1995.<sup>61</sup>

Moreover, public support is only strong in situations where questions posed are very simplistic. For instance, if the question posed is: “Do you support or do not support the use of mandatory minimum sentences?” survey results may suggest broad public support for mandatory minimum sentences. In a similarly posed British poll, for instance, 80 percent of respondents appeared to support mandatory sentences.<sup>62</sup> Similarly, in the United States, almost 90 percent of sample participants were in favour of a simplistic query regarding ‘three-strikes’ mandatory sentencing legislation.<sup>63</sup>

Whenever respondents are given information on specific cases (such as costs and consequences), however, there is significantly less public support for mandatory prison sentences.<sup>64</sup> In fact, researchers found a 71 percent reduction, in that support for ‘three-strike’ legislation plummeted from 88% to 17%, when respondents were asked to consider individual cases.<sup>65</sup>

We are consequently left to wonder whether or not the mandatory minimum sentences proposed in Bill C-10 have anything to do with the prevention or deterrence of crime, much less public safety. Indeed, our Australian colleagues seem to appropriately question the moral and legal implications of the promotion of mandatory minimum sentences as essentially politically expedient solutions to

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<sup>60</sup> NUPGE. *New Poll Finds 62% of Canadians Don’t Share the Harper Government’s Approach to Crime Reduction*. Ottawa: National Union of Public and General Employees, May 11<sup>th</sup>, 2006, from [http://www.nupge.ca/news\\_2006/n11my06b.htm](http://www.nupge.ca/news_2006/n11my06b.htm).

<sup>61</sup> Roberts, Julian V. “Public Opinion and Mandatory Sentences of Imprisonment: A Review of International Findings,” *Criminal Justice and Behavior*, (2003) 20: 1-26.

<sup>62</sup> Observer. “Crime Uncovered: A Nation Under the Cosh? The Truth About Crime in Britain in 2003.” *The Observer Magazine*, April 27, 2003.

<sup>63</sup> Roberts, Julian V. and Stalans, L. *Public Opinion, Crime, and Criminal Justice*. Boulder: Westview Press, 1997.

<sup>64</sup> Roberts, 2006.

<sup>65</sup> Applegate, B., Cullen, F., Turner, M., and Sundt, J. “Assessing Public Support for 3-Strikes and You’re Out Laws: Global Versus Specific Attitudes,” *Crime and Delinquency*, (1996) 42: 517-534.

grave social problems when they question “whether the symbolic power of mandatories is such that they help politicians win elections.”<sup>66</sup>

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<sup>66</sup> Morgan, Neil. “Capturing Crims of Capturing Votes? The Aims and Effects of Mandatories,” *University of New South Wales Law Journal*, (1999) 22:1, p. 279.

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