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 Senate Committee on Legal and Constitutional Affairs

Regarding

Bill C-2: An Act to amend the Criminal Code and to make consequential amendments to other Acts

February 2008

Contact:

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

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

Table of Contents

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 26 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 staffs 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, 29 volunteers, including Board members, devoted a total of 7,017 hours of work to the CAEFS' office. This supplemented the work of CAEFS' two full-time staff members. In our 26 member societies, 1,495 volunteers put in a total of 163,314 hours, supplementing the time of 272 full-time staff and 195 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.

Summary of the Proposed Legislation

Bill C-2, *An Act to amend the Criminal Code and to make consequential amendments to other Acts*, was introduced and received first reading in the House of Commons on 18 October 2007. By making the short title of the bill the 'Tackling Violent Crime Act', the government starts out by attempting to entice Parliamentarians and the Canadian public to believe that the proposed changes would actually result in decreases in crime and increased public safety. In this brief, we will review why such promises can not and will not be delivered as a result of the law reform initiatives proposed by this bill.

As the Bill C-2 Summary stipulates, this omnibus bill is an amalgam of five bills that were "dealt with separately in the first session of the 39th Parliament. The five broad categories of legislative measures will create two new firearm offences and provide escalating mandatory sentences of imprisonment for serious firearm offences, reverse the onus on those seeking bail when accused of serious offences involving firearms and other regulated weapons, make it easier to have someone declared a dangerous offender, introduce a new regime for the detection and investigation of drug-impaired driving and increase the penalties for impaired driving, and raise the age of consent for sexual activity from 14 to 16 years."

Background

Although crime rates and the imprisonment of men have declined in recent years, women remain the fastest growing prison population in Canada and elsewhere in the developed world. There are currently more than 1000 women serving federal prison sentences of more than two years. As representatives of the Canadian public, CAEFS devotes considerable time and energy to ensuring that the needs, interests and concerns of marginalized, victimized, criminalized and imprisoned women are met in humane and women-centred, community-based settings. It is our belief that this increases the likelihood that our communities will be more inclusive of, and therefore safer for, all citizens. In this brief, we will review the concerns raised by the various sections of the bill.

Issues Raised by Bill C-2

Mandatory Minimum Sentences

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.[1] 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.

Mandatory minimum sentences raise the spectre of Charter of Rights and Freedoms violations.[2] 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).[3] 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[4] - in part because the inequalities that produce their criminalization are hidden by mandatory sentencing.

---

[1] "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.

[2] 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.

[3] 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.

[4] 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.

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.[5] 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.[6] 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.[7]

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.[8] 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.[9] Faced with these outrageous results, the government of the Northern Territory has begun to repeal some of their mandatory sentences.

Discrimination on the basis of disability is experienced by federally sentenced women with intellectual and mental disabilities. A lack of appropriate placement options and treatment programs, re-training, classification as maximum security inmates, contributes to worsening the situation for the growing number of women with disabilities now in Canadian prisons, where those with the most disabling challenges tend to be further isolated in segregation units.[10] Furthermore, Canadian prisons, like their US counterparts, are rapidly becoming "dumping grounds" for the mentally ill in lieu of community-based support and treatment programs.[11]

Age of Consent

Previous legislation was passed in Parliament in 2005, which already prevents anyone from engaging in an 'exploitative' sexual relationship with a person who is under the age of 18 years.[12]

---

[5] Zdenkowski, G. "Mandatory Imprisonment of Property Offenders in the Northern Territory," *University of New South Wales Law Journal*, (1999) 22, p. 311.
[6] Raaflaub, 2006, p. 7.
[7] *National Law Journal*, 2, November, 1998.
[8] Howse, C. "Covering a Multitude of Sins," *Alternative Law Journal*, (1999) 24, p. 227-228.
[9] 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.
[10] See: Submission of the DisAbled Women's Network of Canada to the CHRS. Available at: http://www.elizabethfry.ca/submissn/dawn/1.htm
See: Special Report on US Prisons by Human Rights Watch International. Available at: http://www.hrw.org/press/2003/10/us102203.htm
[11] See: Special Report on US Prisons by Human Rights Watch International. Available at: http://www.hrw.org/press/2003/10/us102203.htm
[12] *An Act to amend the Criminal Code* (protection of children and other vulnerable persons) and the *Canada Evidence Act*

The definition of 'exploitation' is quite broad and open to interpretation. As such, the proposed changes to the law are unnecessary, despite the assertions of Justice Minister Rob Nicholson, that "the age of consent for non-exploitative sexual activity would be raised from 14 to 16 years, to better protect young persons from adult sexual predators."[13] Claims that such provisions will provide increased protection for youth are not evidence-based. In fact, studies show that youth are significantly less likely to seek sexual health information or advice if they fall below the age of consent.[14] Indeed, the Department of Justice Canada issued the following statement in October 2005: *"Educating youth to make informed choices that are right for them is better addressed through parental guidance and sexual health education than by using the Criminal Code to criminalize youth for engaging in such activity."*[15]

In addition, as young people who are likely to be impacted by these provisions reveal:

> In terms of the issue of the peer group exemption, we are well aware that most people do not know and/or are unlikely to have access to legal interpretations of the law. In fact, we know that most people are already unaware of the many exceptions to the age of consent laws currently in the Criminal Code. Most people do not know that the law already provides differential treatment of anal sex, that there is a prohibition on 'exploitative' sex until age 18, that the law provides a peer group exemption for 12 and 13 year-olds. It is very likely that the proposed exception will be equally misunderstood or forgotten, and the age of consent will likely be considered to be 16 years of age. Consequently, many young people may well assume that their relationships are illegal, and might well not seek the information and help they need.[16]

Alcohol & Drug Related Offences

This portion of Bill C-2 proposes to lighten the onus on a peace officer by requiring that s/he have 'reasonable' [rather than the current requirement for "probable & reasonable"] grounds, to order a breath test, a physical coordination test, a urine, saliva or blood test of an accused. CAEFS is of the view that given the potential impact on an individual's constitutional interests of liberty, security of the person (section 7 of the Charter), the right to be secure against unreasonable search or seizure (section 8), and the right not to be arbitrarily detained (section 9), the current standard should be maintained. We are also of the view that the privacy interests associated with the information compelled from an individual should also be protected.[17]

As the Canadian Bar Association rightly pointed out in their submissions, at the roadside, threshold determinations for further investigation of drug impaired driving will depend on the subjective interpretation of physical tests. Moreover, a recent European Union sponsored international study of roadside testing devices in a number of European countries and the United States, left considerable doubt as to the ability of such devices to accurately specify impairment

[13] Nicholson, Robert. Speaking Notes for the Honourable Rob Nicholson, P.C., Q.C.,M.P. For Niagara Falls, Minister of Justice and Attorney General of Canada for the Announcement of the *Tackling Violent Crime Act*. October 18. Department of Justice, Ottawa, 2007.
[14] "Sex not risky, say teenagers", BBC News, February 15, 2000
[15] "Frequently Asked Questions: Age of Consent to Sexual Activity", Department of Justice Canada, October 26, 2005
[16] "Get the Facts About the Age of Consent". 2007. November 2 2007. http://www.ageofconsent.ca/facts.html .
[17] National Criminal Justice Section, Submission on Drug Impaired Driving (Ottawa: CBA, 2003) and Submission on Bill C-16, Drug Impaired Driving (Ottawa: CBA, 2005).

levels.[18] Such technological limitations may have a significant impact on the ultimate efficacy and fairness of the proposed legislative scheme, not to mention its vulnerability to constitutional challenge.

Dangerous Offender Proposals

1. Context for Women and Girls

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.[19] 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 worldwide and this is not accidental. In Canada, we recognize that the now globalized destruction of social safety nets – from social and health services to economic and education standards - is resulting in the increased abandonment of the most vulnerable, marginalized, and oppressed.[20] When you combine women's increased marginalization and criminalization with the ever growing impetus for mandatory minimum sentences, Bill C-2 will enable the capture of cases where the first two convictions of a sentence of two years or more were themselves reluctantly imposed due to the mandatory minimums and not necessarily because the judge believed the women to be deserving of that sentence.

Many women prisoners serving life sentences for murder for example have been charged, convicted and sentenced as a result of their involvement in defending themselves and/or their children against violent partners.[21] 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

[18] Alain Verstraete and Elke Raes, Roadside Testing Assessment Study (ROSITA – 2) - Project Final Report (March 2006), available at http://www.rosita.org

[19] Supra, 9.

[20] In 2003, Canada was criticized by the United Nations Committee examining Canada's record regarding the United Nations 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.

[21] 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.

against them.[22] 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'.[23]

In respect of both spousal assault and spousal homicide, rates are higher for Aboriginal women than for non-Aboriginal women.[24] Unfortunately, women's use of self-injurious violence is also too often erroneously interpreted as an expression of violent pathology by correctional authorities in particular, as it allows them to seemingly divest themselves of responsibility for exacerbating pre-existing trauma. The Royal Commission on Aboriginal Peoples 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.

CAEFS has grave concerns with respect to the increasing numbers of younger women in the provincial and federal prison systems. In addition, we see this as very much linked to overall concerns regarding the shifting philosophy within CSC regarding federally sentenced women, whereby women are increasingly identified as "high risk" as opposed to a recognition that they are primarily extremely marginalized women with high needs.

Because of the male-based classification tools in use, women are being over classified, and there are too many women classified as maximum security prisoners. Men and women are assessed with the same tool despite the fact that they pose different security risks.[25] In fact, CSC and National Parole Board (NPB) records indicate that less than half of 1% (i.e. 0.39%)[26] of federally sentenced women released into the community recidivate for violent offences, thus suggesting that there is actually no need for an assessment of women based on risk.

The classification tool actually punishes women prisoners who already experience disadvantages due to their life experiences and backgrounds. Women are found to pose a greater risk and are classified as higher security if they have been victims of domestic violence, if they have had a "childhood that lacks family ties", if they have a history of low employment, or low education, if they are unattached to a community, or their residence is "poorly maintained", if they have "inappropriate sexual habits" or inappropriate sexual preferences, or are from a "problematic religion".

---

[22] Statistics Canada. *Measuring Violence Against Women: Statistical Trends 2006.* Ottawa: Minister of Industry, 2006.

[23] 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.

[24] 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).

[25] The Canadian Human Rights Commission, *Protecting Their Rights: A Systemic Review of Human Rights in Correctional Services for Federally Sentenced Women*. Ottawa, 2003.

[26] National Parole Board statistics provided to CAEFS in 2004.

Instead of accurately identifying factors associated with a level of security risk an individual can pose, these criteria actually only reveal discriminatory biases of CSC policy. This classist, heterosexist and racist classification system disadvantages women and in particular women from the most marginalized groups. This approach results in unnecessary harm and suffering to women prisoners, the placement of women in overly secure facilities, too often segregation, and a lack of needed programs.

Confining women classified as maximum security prisoners is a challenge that CSC is not dealing with effectively. Many of the women classified are Aboriginal and/or they suffer from mental health problems. Maximum security units do not serve their needs and are actually more likely to aggravate existing problems. These units are segregated units that have their own small prison yards and program space. Generally the women are confined to their very small pods within the new segregated maximum security units. CSC has constructed more maximum units than were required to accommodate the number of women classified as maximum security prisoners. As discussed briefly above, the number also increased due to CSC's decision to mandate that all people convicted of murder be classified as maximum security prisoners for at least the first two years of their sentence.[27]

The CHRC confirmed that most women classified as maximum security prisoners were not classified as maximum security because they were considered dangerous when they entered prison. Most are classified as maximum because they are considered to have 'institutional adjustment' problems. Unfortunately, despite this reality, the Secure Unit Operation Plan focuses more on controlling often hypothetical security risks than on constructively meeting the needs of prisoners.[28] This needlessly results in women being placed in isolation and in segregation units, which too often leads to severe mental suffering that the United Nations and Amnesty International has identified as being experienced by the women as a form of torture.[29]

In addition, women with mental health problems are being housed in increasingly restrictive, isolating and inhumane environments. "Extra control and supervision can not be supported under the guise of "treatment."…[30] The Disabled Women's Network (DAWN) has identified that by sending a woman to prison because of a conviction for an offence related to her mental health issues, classifying her as maximum security and therefore isolating her from the rest of the prison, recreates a worse environment than the non-voluntary mental institutions and asylums that sparked the decades-ago de-institutionalization of those with mental health issues.[31]

---

[27] Canadian Association of Elizabeth Fry Societies. CAEFS' Submission to the Canadian Human Rights Commission for the Special Report on the Discrimination on the Basis of Sex, Race and Disability faced by Federally Sentenced Women May 2003 (online). Available: http://www.elizabethfry.ca/caefs.e.htm. [June 2005].

[28] The Canadian Human Right Commission, *Protecting Their Rights: A Systemic Review of Human Rights in Correctional Services for Federally Sentenced Women*. Ottawa, 2003; National Association of Women and the Law (NAWL) - Federally Sentenced Women: Canada's Breach of Fiduciary Duty and Failure to Adhere to International Obligations 2003, Available: http://www.elizabethfry.ca/caefs.e.htm. [June 2005].

[29] Anmesty International. *The State of the World's Human Rights* London, 2007.

[30] DisAbled Women's Network of Canada. Federally Sentenced Women with mental Disabilities: A Dark Corner in Canadian Human rights February 2003, Available: http://www.elizabethfry.ca/caefs.e.htm. [June 2005].

[31] Ibid.

The Correctional Service of Canada is not adequately addressing the over-classification of women by changing their classification tools and methods, despite the emergence of this clear theme in all relevant reports and recommendations. In addition, the placement of women with mental health issues in maximum security conditions is an abuse of power that results in yet more women needlessly suffering from the condition of segregation units. Furthermore, as the recent death of Ashley Smith underscores, the regional prisons for women are violating the human rights and Charter protections that should exist for all prisoners, but most especially for women classified as maximum security prisoners because of the difficulties they encounter adjusting to prison. In short, the prisons are not equipped to address existing needs, let alone those of the increasing numbers of women that Bill C-2 will bring into custody. CAEFS predicts that a direct consequence if the proposed provisions, if implemented, will be the increased criminalization and imprisonment and consequent creation and/or exacerbation of mental health issues for those women ensnared as a result.[32]

2. Unconstitutional Nature of Reverse Onus

The Dangerous Offender (DO) provisions of the *Criminal Code* were designed to allow the indefinite incarceration of individuals convicted of violent and sexual offences who are considered to pose a significant risk of re-committing future violent or sexual offences. The 1997 re-drafting of this provision changed the initial parole review of a DO designation from the previous three years, to seven years and every two years thereafter. It also created a new designation of "Long Term Offender" and a "long term supervision order." Those prisoners subject to such orders may be subject to community supervision for a period of up to 10 years *upon the completion of their court-imposed sentence*.

The long-term supervision order provision was introduced as an alternative to the dangerous offender designation and was designed to capture individuals who do not meet the statutory prerequisites for a DO designation, but who are perceived to pose a substantial risk of re-offending. The long term supervision orders seem to be applied more to those with mental health issues, however, than the sexual predators whom the public was led to believe were the impetus for the adoption of these approaches, yet another example of the types of effects we can expect to see if Bill C-2 is passed.

The Supreme Court of Canada has stated that, "Apart from death, imprisonment is the most severe sentence imposed by the law and is generally viewed as a last resort i.e., *as appropriate only when it can be shown that no other sanction can achieve the objectives of the system."* [33] Clearly, the dangerous offender designation and the possibility of an indeterminate sentence render it as *the* harshest sentencing option available under the *Criminal Code of Canada.*

The current dangerous offender provisions give the Crown discretionary power to initiate an application for a DO designation where an individual is convicted of a 'serious personal injury offence', and the Crown has reason to believe the individual poses a risk of re-offending. Bill C-2

[32] National Association of Women and the Law (NAWL) - Federally Sentenced Women: Canada's Breach of Fiduciary Duty and Failure to Adhere to International Obligations 2003, Available: http://www.elizabethfry.ca/caefs.e.htm. [June 2005].
[33] *Re B.C. Motor Vehicle Act* [1985] 2 S.C.R. 486 para 126.

proposes to mandate a Crown to submit whether s/he intends to make an application in each case where such a risk may be present and the individual is convicted of a 'personal injury offence' on at least two prior occasions.[34] Bill C-2 also proposes to shift the onus on the convicted individual to show that s/he does not pose a threat to society if the Crown meets the procedural requirements enabling an application for a DO designation.[35] CAEFS joins the ranks of those opposed to these proposals.

It is our position that these proposed amendments violate s. 7 liberty and security of the person safeguards, s. 11 right to be presumed innocent until proven guilty, s. 12 right to be free from cruel and unusual punishment, and s. 15 equality provisions of the *Canadian Charter of Rights and Freedoms.* Furthermore, research reveals that longer prison sentences do not deter crime or make our communities safer.

Bill C-2 does not differentiate between prior offences committed while an individual was in the youth system. As such, as we have already seen in the case of the designation of Lisa Neve as a dangerous offender at the age of 21, the proposed legislation could result in the indefinite imprisonment of individuals who are mostly only guilty of verbalizing anger and frustration.[36] On June 29, 1999, the Alberta Court of Appeal released its decision to overturn the November 17, 1994 designation of Lisa Neve as a dangerous offender.

Lisa was 21 years of age when she was labelled the most dangerous woman in Canada and sentenced to an indeterminate prison sentence. Previously, the first woman labelled a dangerous offender, Marlene Moore, killed herself in the Prison for Women in Kingston. The Alberta Court of Appeal ruled that Lisa Neve was designated a dangerous offender as a result of convictions that merely met the technical requirements of offences, despite there being "no permanent or serious injuries [caused], no gratuitous violence, much less brutality or random violence of any kind" and that "every offence which Neve committed was entangled in some way with her life as a prostitute."[37]

Lisa's initial treatment by the criminal justice system further illustrates how those in the most marginalized positions are trapped by racist, sexist and classist assumptions when virtually no services exist in the community to assist them. Increasing the use of imprisonment will only serve to suck yet more resources out of the already stretched community-based health and social services needed to prevent people from being criminalized and to assist those exiting prison to successfully reintegrate into their communities in ways that are safe for them and for everyone else.

In short, Lisa's case illuminates the failure of current safeguards to protect against the erroneous classification of individuals under existing legislation, much less the proposed reverse onus provisions. The government has indicated that the burden imposed by the Supreme Court in *R. v. Johnson*,[2003] 2 S.C.R. 357, which mandates the Crown to demonstrate beyond a reasonable

[34] S. 41 of Bill C-2; proposed amendment to s. 752.01of the *Criminal Code of Canada*.
[35] *Ibid,* s. 42(2) of Bill C-2; proposed amendment to s. 753 of the *Criminal Code of Canada.*
[36] *R. v. Neve* [1999] ABCA 206, para 259.
[37] *Ibid,* para 265 and 280

doubt that the criminalized individual could not safely be in the community, is too onerous to be observed.[38]

Because of the grave potential for the significant deprivation of liberty occasioned by a DO designation, the DO trial is one of the most legally complex and time consuming procedures in our justice system, mandating expert psychiatric and other evidence.[39] We know that those enmeshed in the criminal justice system tend to be representative of the most marginalized; namely, those who will not generally have the means to mount a good defence, including such facets as expenditures to allow the procuring of expert witnesses. Furthermore, the recent cuts to the Court Challenges Program and the corresponding backlogs in Legal Aid services heighten the likelihood that the proposed provisions will seriously limit the ability of individuals to receive a fair and just hearing.

Furthermore, our concerns regarding the potential gendered impact of Bill C-2 are heightened by its silence vis-a-vis the circumstances of the requisite crimes with respect to crimes committed while incarcerated. As many women, especially those who are most marginalized, experience exploitation and victimization from a young age, whether at the hands of institutional staff or intimate individuals, they develop survival instincts and tactics that further the likelihood of their criminalization and imprisonment.[40] There is no doubt that women, especially First Nations and Aboriginal women, and those with mental health issues, who after long histories of colonization and/or institutional abuse may still defy attempts to confine them, will have higher incidence of convictions or 'violent' offences accrued during their term of incarceration.

It is vital that we consider the context of each and every charge within the prison system to ensure that women are not inappropriately labeled nor locked up unnecessarily. The proposed amendments could not only obscure these realities faced and experience by women such as Lisa and Ashley, but they may also place such young women in the difficult position of being forced to rebut a presumption of intractable violent tendencies that by the very virtue of their marginalized status of criminalization and imprisonment, is likely to make it very difficult for them to do so.

3. Increased Human and Fiscal Costs of Imprisonment

Our organizations, as well as many others, have repeatedly urged our respective governments to consider the human and fiscal consequences of our regressive and punitive law reform agenda. It seems absurdly ineffective to keep pursuing a punishment model of changing human behaviour rather than looking at the social constructs of crime and the circumstances of their commission. Rather than putting money into desperately needed social programs that may assist people to escape poverty and criminalization, our government continues to further erode such programs and instead create more and more prisons to house the most marginalized, as well as those who are most often first victimized and then criminalized.

The result of funding cutbacks to services over the past decades is the obliteration of progressive

[38] Hon Vic Toews speaking about Bill C-27 (predecessor to the current C-2 provisions). Minister of Justice and Attorney General of Canada (as he then was), October 30, 2006.
[39] *Supra 7,* para 191.
[40] *R. v. Neve* [1999] ABCA 206, para 252.

policy developments that have resulted in more people, particularly women and girls and those with mental health issues and intellectual disabilities, literally being dumped into the streets and, ultimately, into the wider, deeper, and stickier social control net of our criminal justice system. The criminal justice system is the least effective and most expensive system that could be used to respond to poverty, marginalization, and disabling mental health issues, yet it is the only system that cannot refuse to "service" anyone.

Mandatory terms of imprisonment have not resulted in reductions in the incidence or severity of levels of crime.[41] This is because the fear of the likely consequence of one's actions does little to deter those driven to their commission out of desperation rather then choice. A RAND Corporation study in 1996 revealed that California's 'three strike laws' resulted in an increase from 9 to 18% of the state's budget being allocated to corrections. This, in turn, necessitated a corresponding 40% reduction in state budgets previously allocated for such vital resources as education, health, workplace safety, environmental and social services.[42]

At even the most conservative estimates of $50,000 to $150,867[43] or $250,000 + per year[44], as opposed to $1, 792 per year to supervise individuals in the community, the financial burden of increasing 'law and order' Bills are exorbitant. These costs are only 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 use of lengthier periods of incarceration, usually of the most socially, economically and racially marginalized, will undoubtedly be aggravated by the imposition of measures such as the proposed reverse onus. Such measures are counterproductive for all of society.[45]

The colossal financial price of incarceration, coupled with the human cost of incarcerating an individual away from family and community, and the ineffectiveness of such measures in terms of encouraging rehabilitating or reformation of the individual, has led many jurisdictions to retreat from the use of incarceration. It may come as no surprise therefore that jurisdictions like Australia and the United States are working on diminishing the use of mandatory minimum sentences in light of their negative experience with the consequences of such approaches.[46] Such jurisdictions have clearly identified the negative impact of mandatory minimum sentences as including unfairness, wrongful convictions and skyrocketing incarceration rates, without any discernible deterrent, incapacitation or related safety or cost benefit.

---

[41] Tonry, Michael. *Sentencing Matters.* New York: Oxford University Press, 1996.
[42] *Ibid,* p. 263..
[43] Correctional Service of Canada (2005) *Basic Facts about the Correctional Service of Canada*. Ottawa: Public Works and Government Services of Canada.
[44] 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.
[45] 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.
[46] 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.

Concluding Observations

The proposed Bill is a clear departure from current legislation and will surely be rendered unconstitutional because it may be triggered after 3 crimes and its presumption of intractable violent criminality, absent an examination of the structural and contextual causes of an individual's criminal behaviour. After all, "whether something is likely to be repeated in the future is linked not only to what happened in the past but why it happened".[47]

Parliament is attempting to disable an examination of these circumstances, vital to an understanding of individual behaviour, by resorting to speculative rhetoric and unsubstantiated assertions that Canadian people want harsher punishment for and protection from 'violent offenders'. 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.[48] Moreover, public support is only strong in situations where questions posed are very simplistic. Whenever respondents are given information on the circumstances of particular cases, there is significantly less public support for the use of imprisonment.[49] In fact, researchers found a 71% reduction in support for 'three-strike' legislation in the U.S. when respondents were asked to consider individual cases rather than generalized propositions.[50] We should learn from these experiences rather than repeat the unenviable history of our neighbours to the south. We urge all elected members to take seriously their responsibility to their electorate by voting to defeat Bill C-2.

[47] *supra* 7, para 118
[48] 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 11th, 2006, from http://www.nupge.ca/news_2006/n11my06b.htm.
[49] Roberts, Julian V. and Stalans, L. *Public Opinion, Crime, and Criminal Justice*. Boulder: Westview Press, 2006.
[50] 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.

References

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

Arbour, The Honourable Louise. *Commission of Inquiry into Certain Events at the Prison for Women in Kingston*. Ottawa: Public Works and Government Services, 1996.

Butterfield, Fox. "With Cash Tight, States Reassess Long Jail Terms." *New York Times.* 10 November 2003, p. 1.

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

Canadian Association of Elizabeth Fry Societies. "*Fact Sheet on Criminalized and Imprisoned Women.*" Available on line at http://www.elizabethfry.ca/eweek06/pdf/crmwomen.pdf.

Canadian Association of Elizabeth Fry Societies. "The Risky Business of Risk Assessment" Available on line at http://www.elizabethfry.ca/risky/Contents.htm.

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.

Carrington, Peter and Sharon Moyer. *The Statistical Profile of Female Young Offenders*. Ottawa: Department of Justice Canada, 1997.

Chesney-Lind, Meda. *The Female Offender: Girls, Women, and Crime*. Thousand Oaks, CA: Sage Publications, Inc., 1997.

Commission on Systemic Racism in the Ontario Criminal Justice System. *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System.* Toronto: Queen's Printer, 1995.

Correctional Investigator. *Annual Report of the Office of the Correctional Investigator 2005-2006.* Ottawa: Minister of Public Works and Government Services Canada, 2006.

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

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.

Get the Facts About the Age of Consent. November 2 2007. Available on line at: http://www.ageofconsent.ca/facts.html

Hogg, R. "Mandatory Sentencing Laws and the Symbolic Politics of Law and Order", *University of New Soulf Wales Journal*, (1999) 22(1), p.263.

Jacobs, Beverley. *Stolen Sisters: Discrimination and Violence Against Indigenous Women in Canada*. Ottawa: Amnesty International, 2004.

Lakeman, Lee. *Why Law and Order Cannot End Violence Against Women and Why the Development of Women's (Social, Economicand Political and Civil) Rights Might End It.* Vancouver: Canadian Association of Sexual Assault Centres, 1999.

Nicholson, Robert. *Speaking Notes for the Honourable Rob Nicholson, P.C., Q.C.,M.P. For Niagara Falls, Minister of Justice and Attorney General of Canada for the Announcement of the Tackling Violent Crime Act*. Department of Justice, Ottawa, October 18, 2007.

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 11th, 2006. Available on line at http://www.nupge.ca/news_2006/n11my06b.htm

Pate, Kim. *Labeling Young Women as Violent: Vilification of the Most Vulnerable.* http://www.elizabethfry.ca/vilifica/Contents.htm

Pate, Kim. *Young Women and Violent Offences*. Available on line at: http://www.elizabethfry.ca/violent/ywomen.htm

Report of the Law Reform Commission of Canada. *The Criminal Process and Mental Disorder, Working Paper 14.* Ottawa 1975.

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

Roberts, Julian V. *Mandatory Sentences of Imprisonment in Common Law Jurisdiction: Some Representative Models*. Ottawa: Research and Statistics Division, Department of Justice Canada, 2006

Roberts, Julian V. and Stalans, L. *Public Opinion, Crime, and Criminal Justice*. Boulder: Westview Press, 2006.

Standing Committee on Justice and Solicitor General. *Review of Sentencing, Conditional Release and Related Aspects of Corrections (Daubney Report).* Ottawa: Ministry of Supply and Services Canada, 1988.

Statistics Canada. *Measuring Violence Against Women: Statistical Trends 2006.* Ottawa: Minister of Industry, 2006.

Toews, Hon Vic. Sponsor's speech at second reading. Minister of Justice and Attorney General of Canada, October 30, 2006.

Tonry, Michael. *Sentencing Matters.* New York: Oxford University Press, 1996.

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

Zdebkiwsju, G. "Mandatory Imprisonment of Property Offender in the Northern Territory", *University of New South Wales Law Journal,* 91999) 22

Cases

Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486.

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

R. v. Johnson,[2003] 2 S.C.R. 357

R. v. Neve, [1999] ABCA 206 para 259.