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Submission

of the

Canadian Association of Elizabeth Fry Societies

to the

Senate Committee on Legal and Constitutional Affairs

Regarding

Bill C-25: An Act to amend the Criminal Code (limiting credit for time spent in pre-sentencing custody).

September 2009

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Introduction

The Canadian Association of Elizabeth Fry Societies (CAEFS) 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, 30 volunteers, including Board members, devoted a total of 7,554 hours of work to the CAEFS' office. This supplemented the work of CAEFS' two staff members. Amongst our member societies, 1,243 volunteers put in a total of 163,048 hours, supplementing the time of 345 full-time staff and 237 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 marginalization, victimization, criminalization and imprisonment. Our interactions with women in prison reveal numerous instances of human rights violations and significant concerns regarding brutalizing conditions of confinement, especially in institutions where people are remanded in custody.

Background

The custom of judges giving credit for pre-trial custody served is a long recognized practice. It is meant as a way to compensate individuals for the time they have had to spend prior to a conviction, in abhorrent and egregious living conditions.[1] Moreover, section 719(3) of the *Criminal Code of Canada* reads as follows: "In determining the sentence to be imposed on a person convicted of an offence, a court may take into account any time spent in custody by the person as a result of the offence." This section codifies a sentencing judge's discretion to give credit for pre-sentence custody.[2]

Judicial discretion in sentencing has long been recognized as consistent with principles of sentencing consistently upheld by the Supreme Court of Canada. CAEFS feels it is vital to uphold such principles in order to ensure that our sentencing approaches uphold the rule of law in a manner that also allows for the tailoring of sentences to address the particular circumstances of each individual accused. Bill C-25 erodes the vital role of the judiciary in terms of sentencing. This brief will outline issues that are raised by this Parliamentary proposal to limit judicial discretion to tailor sentences in accordance with the conditions of remand confinement and the context of time served prior to trial and

[1] Bill Siksay, (Debate in the House of Commons, 8 June 2009).
[2] Robert Neilson, "R. v. Fice: Conditional Sentencing in the Wake of Fice, or Fishing for (Wo)men with a "Small Net"" (2006) 69 Sask. L. Rev. 441.

sentencing.

Issues Raised by Pre-Trial Detention

1. Contravention of Sentencing Principles and Human Rights Protections

The Parliamentary Backgrounder to Bill C-25 identifies the apparent motivation for Bill C-25, in that it acknowledges that there is a public misconception that credit for pre-sentence custody represents an unfair benefit or advantage to those incarcerated. Rather than correcting this misperception, Bill C-25 reinforces and entrenches such notions.

Bill C-25 refers to pre-trial detention as "pre-sentence" detention. Although some of the period of detention may occur between the registering of a conviction and the sentencing of an individual. It is misleading to refer to C-25 as essentially addressing only pre-sentence detention. This kind of language shrouds some of the most potentially repugnant aspects of the Bill by failing to identify that most people being detained are awaiting trial.

It may be argued that incarceration prior to trial is a violation of a person's right to be presumed innocent until proven guilt and that it is *prima facie* a violation of section 11(d) of the *Canadian Charter of Rights and Freedoms* to incarcerate someone prior to a determination of guilt. The availability of judicial discretion to compensate those who have experienced such potential Charter and human rights violations is fundamental to our criminal justice system. Indeed, the Supreme Court of Canada has recognized that such deficits as the paucity of programming, as well as overcrowding in detention centres, justify the judiciary remedying such inequitable pre-trial detention when it comes to sentencing.

Rather than attempting to address the unacceptably poor and often inhumane conditions of pre-trial confinement, the Bill tacitly condones and likely therefore entrenches such conditions and essentially results in the elimination of any onus on provincial and territorial authorities to rectify such circumstances. The result is that those who are legally innocent too often suffer more severe and punitive carceral conditions than those who are sentenced. This is not a situation of which Canada should be proud.

2. Increased Human and Fiscal Costs of Incarceration

Pre-trial detention is on the rise in Canada. Detention centre populations of those awaiting trial has increased dramatically over the past few years.[3] The consequences of increased numbers of people incarcerated before their sentence are fiscally severe. It is estimated that the cost per day to keep a person incarcerated in an Ontario detention centre is $141.78;[4] whereas the cost of the range of community supervision orders is

[3] Michael Weinrath, "Inmate Perspectives on the Remand Crisis in Canada." (2009) 51 CJCCJ 355 at 355.
[4] Statistics Canada, *Adult Correctional Services in Canada, 2003/04* (Ottawa: Minister of Industry, 2005) at 21.

between $5.00 and $25.00 per day, depending upon the intensity of the intervention.[5]

Currently, 81% of all prison admissions are for less than six months, so the costs of administering these sentences are borne by the provinces and territories in which incarceration is served.[6] A criminal justice system based on frequent and brief sentences, served usually by the most socially marginalized and disadvantaged, is counterproductive. Communities bears the fiscal and social costs, but receive no benefit from such expenditures. Moreover, the criminalized are further stigmatized and penalized, and the pre-existing conditions which contributed to their imprisonment in the first place remain unchanged.

CAEFS underscores the submission made by the Canadian Bar Association when they provided the following exemplification of the flawed logic of Bill C-25:

> *A and B are the same age with minimal prior records, and are jointly charged with commercial trafficking of cocaine. A is detained prior to trial because he is not from the community and has failed to appear for court in the past. B is released on bail as he lives with his parents and has not previously failed to come to court.*
>
> *Six months later, both A and B are convicted on the same facts and each sentenced to three years' imprisonment. Under the current law, A would normally receive 2:1 credit for the six months served as "dead time" and be sentenced to an additional twenty four months. B would begin serving the full three year sentence.*
>
> *Since neither A or B have prior records of serious offences, under the CCRA they would typically be released on parole after serving one third of their penitentiary sentence. A would serve another eight months over the six months already served, for a total period of incarceration of fourteen months. B would serve twelve months of incarceration before being released on parole. A would serve two months more time incarcerated than B, though both were guilty of the same offence.*
>
> *Bill C-25 would make this discrepancy worse. A would get credit for only the six months pre-sentence and would serve an additional ten months of custody, for a total of sixteen months incarcerated, six served in the generally harsher remand conditions. On the other hand, B will still serve twelve months.*[7]

The Correctional Investigator of Canada has commented on historical evidence to suggest that the impact of Bill C-25 will not be as Parliament suggests. "As witnessed in the early

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[5] "Statistics for 2004/2005" Prison Justice (July 2007), online: Prison Justice <www.prisonjustice.ca>.

[6] Tim Quigley, "Has the Role of Judges in Sentencing Changed… Or Should it?" (2000) 5 Can. Crim. L. Rev. 317.

[7] The Canadian Bar Association, Letter to Ed Fast, *Chair, House of Commons Committee on Justice and Human Rights* (22 May 2009). ,

1990s when correctional populations dramatically increased, timely and comprehensive access to prisoner programs, treatment and meaningful employment opportunities measurably diminished, resulting in delays of safe reintegration into the community and increasing both overcrowding and cost pressures.[8] These measures will likely hinder, rather than augment public safety ob

If, instead the focus was on the enhancement of community based sanctions, the costs associated with administering such sentences by further diminishing the availability of limited resources for crime prevention measures, community based sanctions and post-carceral community integration assistance.

In the United States, states such as California are starting to retreat from previous decades of similar ill-conceived criminal justice law reform initiatives. The cost to our southern neighbours of fighting crime (police, courts, and prison) has reportedly risen by more than 350% since 1982. Americans now spend about $40 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[9] or health services.[10]

3. Health and Mental Health Implications of Pre-Trial Detention

The conditions in detention centres are often appalling. Those who are detained are too often subject to extreme and erratic overcrowding.[11] "Between the overcrowding and transient population, UNAIDS now refers to prisons as "incubators" of HIV infection and other diseases, such as hepatitis C and tuberculosis."[12]

For people with ongoing care or chronic medical needs, pre-trial detention can be an unnecessary and risky interruption of their care. Prisoners can be forced to wait months before being able to resume treatment due to access issues and lack of adequate health care. In too many instances, people may be unable to even access their pre-incarceration prescriptions.[13] We can easily surmise some of the predictable -- and avoidable -- consequences for those who rely on prescription medications to regulate chronic physical or mental health conditions.

4. Interference with Judicial Discretion

Bill C-25 virtually eliminates judicial discretion by interfering with the ability of sentencing judges to take into account pre-trial conditions in sentencing. In the 2000 decision of *R. v. Wust*, the Supreme Court of Canada ruled unanimously on this very

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[8] Correctional Investigator of Canada, Speaking Notes for Mr. Howard Sapers, *Appearance before the Standing Committee on Justice and Human Rights* (25 May 2009).

[9] Marc Mauer, "Comparative International Rates of Incarceration: An Examination of Causes and Trends" (2003) The Sentencing Project: Washington, DC.

[10] Human Rights Watch, "Ill-Equipped: U.S. Prisons and Offenders with Mental Health Illness" (2003) Washington, DC.

[11] "Pretrial detention: scale and relevance to HIV/AIDS" (2008) 13 HIV/AIDS Pol. & L. Rev. para 9.

[12] *Ibid*.

[13] *Ibid* para 13, 14.

issue when they indicated that:

> …the goal of sentencing is to impose a just and fit sentence, responsive to the facts of the individual [person] and the particular circumstance of the commission of the offence. In the past, many judges have given more or less two months credit for each month spent in pre-sentencing detention. This is entirely appropriate even though a different ratio could also be applied, for example, if the accused has been detained prior to trial in an institution where he or she has had full access to education, vocational and rehabilitative programs. The often applied ratio of 2:1 reflects not only the harshness of the detention due to the absence of programs, which may be more severe in some cases than in others, but reflects also the fact that none of the remission mechanisms contained in the Corrections and Conditional Release Act apply to that period of detention.[14]

Judges are appointed to sit in criminal court rooms every day, to hear all sides of an issue, to judge the evidence, or assist the jury in doing so; and, if the process then results in a criminal conviction, to weigh all considerations and decide what sentence is fair to impose on the person convicted. Bill C-25 proposes to virtually remove this essential element of judicial discretion.

5. Context of Women's Criminalization

The impact of our deteriorating social services, educational and health systems is feeding the increased criminalization and imprisonment of women and girls, especially those who are most marginalized as a result of poverty, systemic racism, lack of education and/or access to reasonable employment and child care, as well as their experiences with physical or sexual violence and/or substance abuse.

Many women in prison are mothers, the majority of whom were sole-support parents before prison. When a mother is incarcerated, her children can also face emotional and psychological trauma from the separation. Too often they end up in child welfare systems that do not have adequate resources to fully address their needs,[15] exacting further human, social and economic costs on the children and their communities.[16] When a sole support mother is removed from her employment and her family, she is at a disadvantage for returning to work upon release and her children are all too often left in the care of strangers. This of course costs Canadian taxpayers even more money as foster families must be funded while mothers are in jail.

Women are already more likely to plead guilty in the hopes that it will expedite their return to their children and community. Bill C-25 can only be expected to exacerbate an already worrying trend regarding the likelihood that women will not exercise their due process or Charter protected rights to a fair trial.

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[14] *R. v. Wust*, [2000] 1 S.C.R. 455 at para. 44.
[15] Nekima Levy-Pounds, "From the Frying Pan into the Fire: How Poor Women of Color and Children are Affected by Sentencing Guidelines and Mandatory Minimums" (2007) 47 *Santa Clara L. Rev.*, p 288.
[16] *Ibid* p 241.

Conclusion

Parliament has stated that the purpose in enacting this bill is to encourage "truth in sentencing,"[17] notwithstanding the point made in the parliamentary backgrounder to Bill C-25 that official sentencing statistics mislead, as they appear to give the impression that existing sentencing mechanisms are not particularly harsh.[18] Implementing legislation which feeds, rather than corrects, public misconceptions is less than helpful. Indeed, Bill C-25 feeds inaccurate understandings on the backs of the very marginalized and victimized Canadians who will suffer most as a result of its provisions.

There is no evidence to support the contention that Bill C-25 will reduce waiting times and overcrowding in jails; nor that it will contribute to safer communities. "Any delay as to when trials are held is usually due to court backlog. Even if by some slim chance there was a trial date available for an in-custody [person] within one or two weeks, the police and Crown's offices insist on a minimum of three weeks between the date the trial is set and the date the trial is to take place, in order for them to prepare and serve subpoenas on their witnesses."[19]

The government has failed to show how the current situation, whereby we have a lack of judges and an uncomplicated case usually involves a minimum of a six week trial delay (due to high volume in the courts), will be eased when we have increased numbers of detainees and more stringent sentencing guidelines. Indeed, as the Correctional Investigator of Canada has opined, the Correctional Service of Canada will not be able to sustain the prison population growth that this bill, if passed, will cause.[20] Further, the Correctional Investigator has spoken to and warned of the decrease in public safety that results from the predictable increases in carceral numbers that this and other new legislation will occasion.

"It bears noting that the pervasive effects of prison overcrowding reach far beyond the provision of a comfortable living environment for federal prisoners; stretching the system beyond its capacity to move people through their correctional plans in a timely fashion has negative impacts on the protection of society itself as people are incarcerated for a greater proportion of their sentence only to be released in the community ill prepared and then supervised for shorter periods of time."[21] Surely this is not the future we wish for Canada.

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[17] Lyne Casavant and Dominique Valiquet, "Legislative Summary: Bill C-25: Truth in Sentencing Act" (2009) Library of Parliament.
[18] *Ibid* p 6.
[19] Jason Gilbert, "Pre-sentence custody: give judge some credit" (2009) The Lawyer's Weekly.
[20] Correctional Investigator of Canada, Speaking Notes for Mr. Howard Sapers, *Appearance before the Standing Committee on Justice and Human Rights* (25 May 2009).
[21] *Ibid*.