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## **Women's Legal Education and Action Fund (LEAF)**

### **Submission to the Standing Committee on the Status of Women**

#### **Study of Sexual Harassment in the Federal Workplace**

**April 23, 2013**

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## **I. Introduction**

1. The Women's Legal Education and Action Fund (LEAF) appreciates the invitation to make submissions to the Standing Committee on the Status of Women with respect to its study of sexual harassment in the federal workplace.
2. LEAF respectfully submits that sexual harassment continues to be a barrier to women's equal participation in the federal workplace. While progress has been made with respect to the Treasury Board policies now in place to address this form of discrimination, LEAF submits that the implementation of those policies is lacking. A different complaints model is needed, one that removes from the harassed worker the burden of addressing the harassment, along with improvements in hiring and promotion practices.

## **II. Background and Expertise of LEAF**

3. LEAF is a national organization dedicated to promoting substantive equality for women through legal action, research and public education. LEAF has intervened in over 150 cases on substantive equality since its founding in 1985 and is a leading expert in the inequality and discrimination experienced by women in Canada. Central to LEAF's commitment to substantive equality is addressing the inequalities suffered by women who experience discrimination on multiple or intersecting grounds, such as on the basis of poverty, Aboriginal identity, disability, race, sexual orientation and religion.
4. LEAF intervened in the landmark case of *Janzen v. Platy Enterprises* in which Chief Justice Dickson, writing for a unanimous Court, cited our factum when declaring that: "sexual harassment is a form of sex discrimination because it denies women equality of opportunity in employment because of their sex."<sup>1</sup> LEAF has continued to advocate on behalf of women who experience sexual harassment in the workplace. Our organization represents a diversity of women across Canada, has particular expertise concerning sex discrimination and harassment experienced by women, human rights law, equality law, employment law, tort law and discrimination.

## **III. Sexual Harassment: Costly for Women and for Employers**

### **A. Harassment in the Canadian federal public service is a concern**

5. Harassment on the job is a serious issue for Canadian women. In the 2011 Public Service Employee Survey, of the 198,536 responses, 17% (or 33,751 people) said that they had been a victim of harassment on the job once in the past two years. An

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<sup>1</sup> *Janzen v. Platy Enterprises* [1989] 1 SCR 1252 at 1290-1291.

additional 12% (or 23,824 people) stated that they had been the victim of harassment on the job more than twice in the past two years. In 2011 only 31% of workers strongly agreed that their department or agency was working hard to create a workplace that prevents harassment.<sup>2</sup>

6. While these figures include all forms of harassment, as the survey did not track data for sexual harassment separately, LEAF submits that workplace harassment often involves an element of discrimination based on gender.<sup>3</sup>
7. Sexual harassment acts as a significant barrier to women's full participation in the paid workforce. Close to 95% of victims are women, and over 95% of sexual harassers are men. However, only about 10% of women who experience harassment initiate external complaints, some of which are human rights complaints. Sexual harassment attacks a woman's dignity, autonomy and self-worth. It is power-based, predatory, and intimidating in nature, and can be a form of violence against women. Sexual harassment creates a poisoned work environment for all members of the group whose member is harassed. It violates women's security interests and often causes loss of employment, career prospects and status, and exacerbates existing and historical social and economic inequalities.<sup>4</sup>

#### **B. Harassment has a direct negative impact for employees and employers**

8. Employees who are being harassed can suffer from headaches, ulcers, tension, depression, insomnia, anxiety, Post-Traumatic Stress Disorder, and other stress-related illnesses that reduce their well-being and productivity, or force them onto sick leave. If a harassed employee resigns, this will financially penalize not only the individual employee but potentially the employer too, if legal proceedings ensue. Ongoing harassment also causes general disruption and a loss of productivity in the

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<sup>2</sup> Treasury Board of Canada Secretariat. *2011 Public Service Employee Survey*. <<http://www.tbs-sct.gc.ca/pses-saff/2011/introduction-eng.asp>>.

<sup>3</sup> As the Committee is aware from the testimony of David Langtry, Acting Chief Commissioner, Canadian Human Rights Commission, "we simply have no contemporary data on the prevalence of sexual harassment in Canada": "Sexual Harassment Persists in Canada." Speaking Notes, Presentation to the Standing Committee on the Status of Women (October 16, 2012) <[http://www.chrc-ccdp.ca/media\\_room/speeches-eng.aspx?id=709](http://www.chrc-ccdp.ca/media_room/speeches-eng.aspx?id=709)>.

<sup>4</sup> The information in this paragraph is drawn from LEAF's factum in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, citing the following sources: Welsh S., Dawson M. and Griffiths E., 1999, "Sexual Harassment Complaints to the Canadian Human Rights Commission" *Women and the Canadian Human Rights Act: A Collection of Policy Research Reports*, Status of Women Canada, p.177-215, at 187, 214; Gruber J.E., 1998, "The Impact of Male Work Environments and Organizational Policies on Women's Experiences of Sexual Harassment", *Gender & Society* 12(3):301-20; *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252, at 1284-1285 per Dickson C.J.; *R. v. Osolin*, [1993] 4 S.C.R. 595, at 669, per Cory J.; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at 362, at para.69, per L'Heureux-Dubé J.; *Sears Canada Inc. v. Davis Inquest (Coroner of)*, [1997] O.J. No. 1424 at ¶14 per Adams J. (Div. Ct.); Welsh, Sandy, 1999, "Gender and sexual harassment" *Annual Review of Sociology* 25:169-90 at 183.

workplace related to high staff turnover, diminished morale, and loss of work time as co-workers are drawn into the situation as witnesses in internal investigations.<sup>5</sup>

#### **IV. Current Complaint Channels are Not Effective**

##### **A. Legislation and Treasury Board policy**

9. Pursuant to the *Canadian Human Rights Act*, employees are entitled to a workplace free from harassment.<sup>6</sup> Employers are required under the *Canada Labour Code* to have anti-harassment policies.<sup>7</sup>
10. New Treasury Board policies on harassment came into force on October 1, 2012. These policies set out objectives, expected results, responsibilities of the deputy heads, monitoring and reporting requirements, consequences if the complaint is upheld (or not) and also allow for an informal resolution process.
11. On paper, the policies look good. However, LEAF wishes to express concern with their application.

##### **(i) Vulnerable women**

12. Sexual harassment is still a problem for all women and particularly for more vulnerable women:

Usually, the most vulnerable women are those in lower-paying or less secure jobs; those of a different race or colour than the majority of workers: women in non-traditional types of employment; women with a visible or invisible disability; lesbians; older women; and women whose religion sets them apart from the majority. People also harass others for more than one reason at a time: a combination of racial and sexual harassment, or sexual and disability harassment, for example.<sup>8</sup>

13. As a result, different categories of women experience sexual harassment differently from each other.<sup>9</sup> Nonetheless, all sexual harassment has a harmful, discriminatory effect.

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<sup>5</sup> Canadian Human Rights Commission. *Anti-harassment Policies in the Workplace: An Employer's Guide* (March 2006) at 3-4.

<sup>6</sup> *Canadian Human Rights Act*, RSC 1985, c H-6, s. 14

<sup>7</sup> *Canada Labour Code*, RSC 1985, c L-2, Div. XV.1

<sup>8</sup> Canadian Human Rights Commission. *Anti-harassment Policies in the Workplace: An Employer's Guide* (March 2006) at 18.

<sup>9</sup> See Crenshaw, Kimberle. 1991. "Mapping the Margins of Intersectionality, Identity Politics, and Violence Against Women of Colour" *Stanford Law Review* 43: 1241; Monture-Angus, Patricia. 1999. "Standing Against Canadian Law: Naming Omissions of Race, Culture, and Gender" in *Locating Law*:

**(ii) Complaint driven process<sup>10</sup>**

14. The system still relies on the complainants of harassment bringing the complaint forward. Yet in some federal workplaces, such as the RCMP, there is an institutional culture that strongly discourages women from bringing forward such complaints.<sup>11</sup>
15. No matter how well-written the policies, if they are triggered by complaints and women are afraid to bring those complaints, the policies cannot be effective.
16. Further, these are internal complaint processes requiring complainants to report the harassment to people within their own workplace, often their direct supervisors. These individuals may have a connection with the harassing activity or the culture that has allowed it to exist. For example, the investigator may have a relationship with the harasser (a boss or colleague), which can make it difficult for the complainant to feel comfortable making the complaint. Indeed, a 2012 anonymous internal survey of the work environment at Correctional Service Canada (CSC) found that a significant number of employees in the federal correctional service and the prisons it runs reported harassment or discrimination by co-workers and bosses.<sup>12</sup> More than a quarter of those who stated they had experienced harassment did not make a formal complaint, fearing workplace reprisal or because the harassing behaviour came from their boss:

It is worrisome that among all parties CSC employees deal with, most frequently, supervisors, others in senior positions and colleagues abused their power, discriminated and harassed others .... Many believed the harasser would be protected. Quite a few mentioned the cultural norms in their workplace that

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*Race/Class/Gender Connections*, Elizabeth Comack ed. Halifax: Fernwood Publishing; Harris, Angela. 1990. "Race and Essentialism in Legal Theory" *Stanford Law Review* 42: 581; Fiona Sampson "Globalization and the Inequality of Women with Disabilities" Spring, 2003 Vol.2, No. 1, *Journal of Law and Equality*, 1; Fiona Sampson, "Beyond Compassion and Sympathy to Respect and Equality: Gendered Disability and Equality Rights Law" in *Critical Disability Theory: Essays in Philosophy, Politics, Policy, and Law* (Toronto: UBC Press, 2006) 267; Tanya Kateri-Hunandy, "The Racism of Sexual Harassment" in Catharine A. MacKinnon and Reva Segal, *Directions in Sexual Harassment Law* (Cambridge: Harvard University Press, 2004) at 479.

<sup>10</sup> Unless otherwise noted, information in this section is drawn from LEAF's discussions with experienced counsel for complainants who have experienced sexual harassment in the federal workplace.

<sup>11</sup> It appears that this Committee has previously been advised of the situation regarding the RCMP: CBC.ca News. "RCMP Culture Needs to Change to Fight Harassment, MPs Told" (November 20, 2012) <<http://www.cbc.ca/m/rich/news/story/2012/11/20/pol-rcmp-status-women-committee.html>>

<sup>12</sup> 2,200 corrections staff, in positions ranging from prison guards to top office managers, took part in the survey. Almost one third of survey participants said they were harassed at least once within the past year. In this group, nearly 60 per cent were harassed weekly or monthly. Roughly 20 per cent of respondents who said they were harassed cited sexually suggestive remarks or invitations, the displaying of sexist or racist images and inappropriate emails, while one in 10 reported unwanted physical contact such as touching or pinching: Canadian Press. "Harassment, discrimination make correctional service workplace 'toxic': survey" *Macleans* (April 1, 2013) <<http://www2.macleans.ca/2013/04/01/harassment-discrimination-make-correctional-service-workplace-toxic-survey/>>.

turned against those who reported harassment such as a code of silence, calling individuals 'rats' and 'troublemakers'.<sup>13</sup>

17. LEAF submits that without a third party who is neutral and removed from the situation, many complainants in the federal workplace will not be comfortable coming forward, and the existing policies will not be triggered.
18. Further, even if the internal complaint process is triggered, the complainants frequently receive very little support or information. They are often left in the dark about the steps being taken or the outcome of any investigation.
19. Investigations are completed by investigators hired through the private sector. Though the Treasury Board has provided a list of Competencies for Harassment Investigators, these are broad. The consultant controls the questions asked, parts of the process and what evidence is considered in the final report. Further, this occurs behind closed doors. While confidentiality is important, both complainants and respondents can experience the process as lacking in fairness.
20. There are also no remedies available for the complainant. The best case scenario is the complaint is upheld, and then the harasser will face discipline. However, depending on the level of harassment, the harasser may remain in the workplace, leaving the complainant feeling vulnerable and intimidated.
21. When the process does not give harassment complainants adequate recourse, they will conclude that the best approach is to suffer in silence.
22. For the complainant, the prior harassment, combined perhaps with ongoing harassment issues, can often lead to the need for sick leave, stress, anxiety, and poor work performance. These symptoms and feelings can cause the complainant to feel she must switch positions or departments, or leave the public service entirely, thereby stunting her career.
23. A poorly functioning complaint process leads to harassment in the workplace continuing unchecked, which in turn leads to the creation of institutional cultures that are highly problematic. As noted with respect to the internal survey of Correctional Service Canada:

The [2012] poll of workplace values follows ethics questionnaires done in 2007 and 2009. Results from those surveys — which had generally similar findings — were not acted upon at most participating correctional institutions, a subsequent audit found.<sup>14</sup>

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<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

24. That is, even where a “toxic” work environment is identified, the currently available processes do not ensure that the harassment is addressed. This means that inequality is being perpetuated for women in the federal workplace. LEAF submits that where victims of discrimination in the form of sexual harassment have no access to justice, or incomplete access to justice, they are disadvantaged.

**(iii) The existing third-party process: Canadian Human Rights Commission and Tribunal**

25. Currently, the sole third party option available to complainants is to proceed through the Canadian Human Rights Commission and Tribunal. However, this process requires the Commission to do an initial review before deciding which cases will go forward to the Tribunal.

26. The Commission consists of up to eight members appointed by the Governor in Council. In 2011, there were two full-time and three part-time Commissioners. In 2011, the Commission received 1,914 potential complaints and referred 129 of them to the Tribunal.<sup>15</sup> This is a fraction of the over 57,000 potential complainants of harassment in the federal public service.<sup>16</sup>

27. The Tribunal is comprised of a Chair, a Vice-Chair and up to 13 additional full-time or part-time members. In 2006, they had four full time and six part-time members. Currently, the Commission is comprised of an Acting Chair, one full-time and seven part-time members. They too have limited resources. In 2012, the Tribunal released only 30 decisions, including interim rulings on procedural matters. It released six decisions and 17 rulings in 2011 and 17 decisions and 17 rulings in 2010.<sup>17</sup> The allocated resources are clearly insufficient to handle the sheer volume of complaints arising from harassment in the federal public sector.

## **V. Suggestions for Improvement: Possible Next Steps**

### **A. Third party complaint process**

28. LEAF calls upon the federal public service to consider a third-party direct access model similar to the model implemented in Ontario on June 30, 2008. Direct access to a third-party would eliminate some of the issues relating to lack of reporting. Such a process is not perfect, but it is infinitely better than the federal system as it currently exists. Further, as the complaint process is improved to actually allow the complaints to go forward on the merits, in an efficient manner, this will educate the federal public service as a whole. If it is clear that the behaviour will not be

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<sup>15</sup> Canadian Human Rights Commission. *Annual Report 2011*. (March 2012) at 3.

<sup>16</sup> Treasury Board of Canada Secretariat. *2011 Public Service Employee Survey, supra*, note 2.

<sup>17</sup> Canadian Human Rights Tribunal. *Annual Report 2010*. at 13-14, and Canadian Human Rights Tribunal. *Annual Report 2011*. at 13-14.



tolerated, then perhaps over time the problematic institutional cultures can be changed.

## **B. Hiring practices**

29. The federal government must actively seek to make the workforce more representative of society as a whole. If the workplace is diversified, there are fewer groups forming a minority of the workforce, and these are the groups who tend to be targeted for harassment. This will require a change in hiring and promotion practices in the workplace. LEAF submits that while it is important to ensure workplace diversity in general, it is also important to ensure that any such focus must seek to increase female representation.<sup>18</sup> We concur with the submissions of the Canadian Human Rights Commission that the persistent inequality in the promotion of women to senior management in the public service requires attention.<sup>19</sup>

## **VI. Conclusion**

30. As it currently exists, the new Treasury Board policy released in October 2012 is excellent on paper, but problematic and ineffective in execution. The policy gives false hope to those who are being harassed, and its failures re-victimize them.

31. A third-party direct access model as well as improvements to hiring and promotion within the federal workplace are recommended to ensure that the onus is not on the harassed worker to provide a harassment-free workplace.

32. Sexual harassment is a form of sex discrimination that persists despite several decades of work to eliminate its profoundly negative and costly effects. LEAF urges the Committee to take action to enable women to participate in the workplace equally and with dignity.

All of which is respectfully submitted,

The Women's Legal Education and Action Fund

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<sup>18</sup> LEAF notes that an audit of police organizations reveals:

Many Canadian police organizations include women as a designated group within their diversity efforts. However, a cursory review of initiatives described on organizational websites and in documentation provided shows that in the majority of cases, the primary focus of these units is on ethno-cultural diversity.

Status of Women Canada. *Gender Audits in Policing Organizations*. (March 2012) < <http://www.swc-cfc.gc.ca/rc-cr/gapo-ebop/index-eng.html>>.

<sup>19</sup> Langtry, David. "Sexual Harassment Persists in Canada." Speaking Notes, Presentation to the Standing Committee on the Status of Women (October 16, 2012), *supra* note 4.