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Women's Legal Education and Action Fund | Fonds d'action et d'éducation juridiques pour les femmes

Charity Registration Number
10821 9916 RR0001
Numéro d'enregistrement

June 8, 2017

The Honourable Jody Wilson-Raybould, P.C., M.P
Minister of Justice and Attorney General of Canada
House of Commons
Ottawa, Ontario
K1A 0A6

Dear Minister:

Re: ***Bill C-51, An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act***

We write to you on the subject of Bill C-51, announced June 6, 2017, in the hopes that we can engage in further discussion with you and your office about the content of the proposed reform as it pertains to the prosecution of sexual assault.

First, we commend your office for taking seriously the need for *Criminal Code* reform in this area and for your hard work on the proposal. Sexual violence is a women's equality issue: men's sexual violence against women is enabled by women's inequality in our society, and women's inequality is in turn reinforced by this violence. Sexual assault profoundly affects the lives and the well-being of thousands of Canadian women every day, and the failure of the criminal justice system to respond effectively to condemn this violence exacerbates their suffering and compromises our ability to stop perpetrators. We have not had the opportunity to undertake a detailed clause-by-clause analysis of the bill, but generally we are pleased and hopeful that the provisions hold the potential to improve the criminal law's response to sexual assault, to reduce discrimination within the trial process, and to enhance women's equality rights. We are particularly pleased to see an explicit ban on the admission of sexual history evidence to support the "twin myths," the inclusion of sexually explicit communications within the reach of s. 276, as well as provision of standing for complainants in hearings.

Second, however, we must register our surprise and disappointment that the Women's Legal Education and Action Fund (LEAF) was not consulted on the bill. LEAF has more than thirty years of litigation and law reform experience on sexual assault law and its impact on women's equality rights. LEAF has intervened to provide its expertise in almost every Supreme Court of Canada case that has set precedent in the area, including: *Canadian Newspapers v Canada (AG); Norberg v Wynrib; R v Seaboyer*; *R v Ewanchuk*; *R v O' Connor*; *R v Mills; R v Darrach*; *R v JA*; *R v NS* and *R v DAI*. LEAF has been involved in almost every significant law reform that affects sexual assault, including: Bill

C-49 (post-*Seaboyer*); Bill C-72 (extreme intoxication); and Bill C-46 (complainants' confidential records). We believe that LEAF's insights and demonstrated track record would have enriched the law reform discussions that you engaged in and would have produced an even stronger bill. We are further concerned that feminist legal experts, whose core research is sexual assault, were excluded from this process, and that most importantly, women's frontline advocacy organizations, particularly women's rape crisis and sexual assault centres, were also not broadly consulted. Any legislation that fails to draw upon this wealth of expertise and political commitment to women's equality will be the weaker for that omission.

Third and finally, we write to urge you to remove from the bill s 273.2(a.1) and s 273.2(b). We are concerned that this addition could be misread by defence lawyers and judges as suggesting that the bright line for incapacity to consent is total unconsciousness. It is critical that judges be able to find that a complainant is incapacitated if she is in an altered state of consciousness or is only semi-conscious—women's rights to safety, non-discrimination and equality require no less. The Crown appeal in the *R v Al-Rawi* case, headed to the Nova Scotia Court of Appeal, illustrates exactly this issue. We see that the following section, s 273.2(b) keeps open the possibility that incapacity could be found for reasons other than unconsciousness, and we understand that it was not the intention to foreclose a finding of incapacity short of total unconsciousness. Nonetheless this paragraph could be read as referring to entirely different forms of incapacity that were not at issue in *JA*, for example drug-induced delirium or mental illness or disability. We suggest further that s 273.2(a.1) and s 273.2(b) add nothing to the law of Canada, which has clearly held for decades that consent cannot be obtained from someone who is unconscious. Contrary to your intent, this draft provision is emphatically not a codification of *JA*. *JA* held that advance agreement to engage in sexual activity when unconscious does not constitute consent. We are very concerned that this part of your bill can send us backwards—into re-litigating *JA*—and could undermine efforts to establish new standards for findings of incapacity to consent in other contexts. The section adds nothing to the existing law; we encourage you to remove it.

We hope that you will consider our proposed change to the bill. We remain ready and willing to engage in discussion of this critical point.

Yours truly,

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