Bill C-5: An Act to amend the *Judges Act* and the *Criminal Code*

Brief by

Women's Legal Education and Action Fund (LEAF)[1]

To the Standing Committee on Justice and Human Rights

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About LEAF (Women's Legal Education and Action Fund):

Founded in 1985, and with branches across the country, LEAF is a leading national organization dedicated to strengthening equality rights in Canada. LEAF has extensive expertise and experience in promoting and protecting women's substantive equality. LEAF uses litigation, law reform work and public education to advance the rights of women and girls in Canada, particularly those who experience multiple and distinct forms of discrimination arising from the intersection of several grounds of discrimination, such as sex, gender, marital or family status, race, sexual orientation, disability, Indigenous ancestry, and socio-economic status.

LEAF engages in a substantive approach to equality, which recognizes historically and socially-based disadvantages, and challenges systemic discrimination. LEAF also has unique expertise in law reform informed by a gender equality analysis, and has been at the forefront of advocating for and defending legislation designed to advance and protect women's substantive equality. In addition to challenging discriminatory law and policy, LEAF has regularly advocated for the implementation of legislative changes that would advance women's equality, and has intervened in cases to defend laws that improve women's socioeconomic status.

Relevant to Bill C-5, LEAF has intervened in almost every Supreme Court of Canada case that has set precedent in the law of sexual offences. The advancement of sexual assault law through a feminist and equality lens is a fundamental element of LEAF's work, because freedom from violence is a necessary condition for women's equality rights. LEAF's interventions have played a critical role in shaping the interpretation of the sexual offences provisions in the *Criminal Code* in a manner that is consistent with women's substantive equality rights.

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1. Introduction:

LEAF recognizes the symbolic importance of providing judicial training on sexual assault as outlined in Bill C-5, and generally supports the Bill in its current version. If this Bill is enacted, it would send an important message that Parliament recognizes the need for further judicial training in this specialized and complex area of criminal law, which requires unique consideration of the dignity and equality rights of complainants. The justice system continues to fail complainants in sexual assault cases by perpetuating discriminatory myths and stereotypes about them. This continuing failure has led to a crisis in the public's confidence in the justice system when it comes to sexual assault trials, which can discourage complainants from reporting to the police and for fear of enduring further trauma. Passing the Bill in its current version may address some of these persistent myths and stereotypes.

However, in order to be effective, the Bill requires further clarification as to how this training should be implemented. In section 3 of this Brief, we propose concrete revisions to Bill C-5 that, in our view, are critical to ensuring that the training developed as a result of the Bill will actually address the persistent and recurring issues in the judicial treatment of sexual offences.

2. Positive Aspects of Bill C-5:

Despite a cultural shift in how we talk about sexual assault, we continue to witness profound misconceptions about sexual assault complainants in the courts.

For close to 30 years, it has been the law in Canada that a complainant's previous sexual history should not play a role in determining whether the complainant is believable, or whether the complainant consented to the sexual act in question.[2] Yet trial judges continue to allow complainants' previous sexual history into evidence for precisely these purposes.[3] Their errors are frequently rooted in harmful myths and stereotypes and, probably not coincidentally, a lack of understanding of the legal definition of consent,[4]

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[2] *Criminal Code*, RSC 1985, c C-46, ss 276-276.5. See also *R v Darrach*, 2000 SCC 46.

[3] See, for example, *R v Barton*, 2019 SCC 33.[*Barton*] The accused testified that the victim had consented to a supposedly "similar" sexual activity the night before the sexual assault in question occurred as evidence of his defence of honest but mistaken belief in consent. The Supreme Court of Canada clarified that "'prior' sexual activities between the accused and the complainant" do not constitute legal consent, and that consent must be "renewed — and communicated — for each sexual act." (para 118).

[4] The *Criminal Code* provides for the definition of consent for the purposes of sexual assault offences in section 273.1. Section 273.1(1) defines consent as the "voluntary agreement of the complainant to engage in the sexual activity in question." Section 273.1(2) states that no consent is obtained if the complainant "expresses, by words or conduct, a lack of agreement to engage in the activity." The Supreme Court of

such as the belief that if a complainant was not actively fighting back or yelling out, the complainant was not saying no. Recent cases have seen trial judges acquitting the accused or questioning the credibility of the complainant because a complainant did not close her knees;[5] because she was wearing loose-fitting pyjamas and no underwear;[6] because she did not immediately leave;[7] because she'd consented before.[8]

Training is also necessary, because in order to combat such myths and stereotypes about complainants while still respecting the rights of the accused, sexual assault law has become very complex. Many judges have had little to no experience in criminal law before being appointed to the bench,[9] and it is difficult to imagine that they will be able to effectively preside over a sexual assault hearing without training.

It is left to appellate courts to correct the errors in law made in lower courts. However, not every sexual assault trial in which a trial judge makes these mistakes is, or can be appealed. Moreover, even where an appeal is allowed, this may not feel like a "victory" to the complainant – who will once again need to tell her story at a new trial. Judicial training on sexual assault law is needed to stop these errors before they happen in order to ensure trial fairness, minimize re-traumatizing complainants, and save judicial resources.

For these reasons, among others, LEAF believes judges require training on sexual assault in particular, and generally supports the Bill in its current version. However, in order to strongly support the Bill, we believe clarifications are required in certain key parts of the Bill.

Canada established that there is no defence of implied consent in Canadian sexual assault law in *R v Ewanchuk* [1999] 1 SCR 330 (at para 31).

[5] Judge Robin Camp became a subject of an inquiry by the Canadian Judicial Council (CJC) over his questioning of the complainant in the sexual assault trial *R v Wagar* (Docket: 130288731P1) at the Alberta Provincial Court. The CJC found that Judge Camp failed to meet the standards expected of a judge, and recommended his removal in its report to the Minister of Justice.

[6] *R v Lacombe*, 2019 ONCA 938. In this case, the Ontario Court of Appeal overturned the trial decision acquitting the accused on charges of sexual assault. The trial judge found it "significant" that the complainant was wearing a "loose fitting pyjama top with no bra and underwear" (para 36). The Court of Appeal strongly rejected the trial judge's findings and clarified that "[d]ress does not signify consent, nor does it justify assaultive behavior" (para 39).

[7] *Ibid* at para 42.

[8] *Barton*, *supra* note 3.

[9] For a detailed account of how judges in Canada have contributed to perpetuating myths and stereotypes about complainants, see Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (Montreal & Kingston: McGill-Queen's University Press, 2018).

3. Proposed Revisions to Bill C-5:

In order to fully achieve the purpose and goals of Bill C-5, we believe the Bill requires clarification in certain areas. In particular, we recommend the following revisions:

a. "Social context" should be expressly defined as systemic inequality;
b. Consultation should include those with direct experiences of oppression;
c. Training should include social science evidence on the impact of trauma;
d. If written reasons are not available, the transcript of the decision should be made publicly available.

We elaborate these concerns and suggested revisions below.

a. Social Context Should be Expressly Defined as Systemic Inequality

The term "social context" in section 2 of the Bill is vague and does not provide sufficient clarity as to what we would be covered by training on "social context". Social context should be defined as: factors contributing to systemic inequality in Canadian society, including but not limited to colonialism, misogyny, sexism, racism, ableism, homophobia and transphobia.[10]

Education about sexual assault cannot be conducted in a historical vacuum. In order to understand how sexual violence has proliferated in the Canadian context, and in order to be attuned to stereotyping in our current context, it is essential to learn about Canadian history and current social conditions. This includes, but of course is not limited to, the historical and ongoing impacts of colonialism.

Judges need to understand that sexual assault is a gendered crime that continues to affect too many Canadian women. Although most violent crime rates have been declining in Canada generally, crimes of sexual violence against women have not followed this trend; in 2017, the number of sexual assaults reported to police was higher than it has been since 1998.[11]

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[10] As our understanding of Canadian history evolves and more diverse voices contribute to the narrative of Canada as we know it, other factors of oppression that are not included in this list may arise. For that reason, the list of factors should remain open-ended. However, there should still be an explicit linking of systemic inequality with the term "social context" – including the naming of known and specific systemic oppressions – in order for the term to have force in the legislation.

[11] Statistics Canada, Juristat, *Police-reported sexual assaults in Canada before and after #MeToo, 2016 and 2017*, by Christine Rotenberg and Adam Cotter, Catalog 85-002-X (Ottawa: Statistics Canada, 2018) < https://www150.statcan.gc.ca/n1/pub/85-002-x/2018001/article/54979-eng.htm>

Further, judges also need to know that certain groups of women are disproportionately the target of such violence. They need to understand that Indigenous women in Canada are three times more likely than non-Indigenous women to experience sexual violence in their lifetime.[12] Judges also need to understand that women with disabilities are twice as likely to have experienced sexual violence in the last 12 months than women without disabilities.[13]

b. Consultation Should Include Those with Direct Experience of Oppression

We recommend that section 3(2) of the Bill be amended to require meaningful consultation and input from individuals with lived experiences of sexual violence and oppression, particularly, individuals or organizations that serve populations that are Indigenous, Black, racialized, trans, live with disabilities, live with addiction, live in poverty, or are engaged in sex work. It is important that sexual assault survivors who are consulted in relation to the development of materials and seminars on the subject reflect the diversity of Canadian society. The Canadian Judicial Council must ensure it consults survivors who have lived through other conditions of marginalization – such as systemic racism – and who therefore understand how marginalization impacts their unique experiences of sexual assault.[14]

c. Training Should Include Social Science Evidence on the Impact of Trauma

Seminars on sexual assault law should also include information about the impact of trauma on a complainant's memory, including how it affects their demeanour and well-being. This Bill currently does not require the inclusion of such information.

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[12] Canada, Department of Justice, JustFacts, *Victimization of Indigenous Women and Girls* (Ottawa: Department of Justice, 2017) <https://www.justice.gc.ca/eng/rp-pr/jr/jf-pf/2017/docs/july05.pdf>. For an in-depth account of how Canada's legacy of colonialism has exacerbated gender-based violence against Indigenous women and girls, see National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Peace: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* (2019) <https://www.mmiwg-ffada.ca/final-report/>.

[13] Statistics Canada, Juristat, *Violent Victimization of Women with Disabilities, 2014* by Adam Cotter, Catalogue 85-002-X (Ottawa: Statistics Canada, 2018) <https://www150.statcan.gc.ca/n1/pub/85-002-x/2018001/article/54910-eng.htm>

[14] In the article introducing the concept of intersectionality, Kimberlé Crenshaw describes how existing institutions and policies on violence against women have failed to serve women of colour by not considering the multiple marginalization experienced by women of colour: "Not only do race-based priorities function to obscure the problem of violence suffered by women of color; certain rhetorical strategies directed at politicizing violence against women may also reproduce the political marginalization of women of color." See Kimberlé Crenshaw, ""Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color" (1991) 43:6 Stan L Rev 1241.

Trauma can have a profound impact on how a complainant reacts to being sexually assaulted, how a complainant will remember an assault, and how they will act (and react) and later, in the courtroom. Judges should understand how trauma can affect an individual's ability to recall an assault as well as their emotional reaction to it, in order to prevent negative stereotyping about how a sexual assault complainant "should" behave.[15]

d. If Written Reasons Are Not Available, the Transcript of the Decision Should Be Publicly Available

Having publicly available written reasons would ensure greater transparency and accountability for the justice system by allowing legislators, researchers and the public to access and review them.[16] In its current version, section 4 of the Bill only requires written decisions to be provided if trial proceedings are not recorded. As a result, any oral judgment entered into the record will still require someone to pay for and order the trial transcripts, which is costly and time-consuming.

As an alternative, we suggest amending section 4 of the Bill so that, where written reasons are not available in a sexual assault trial, the transcript of the trial decision should be made available on publicly accessible domains. To be clear, we are not suggesting that the transcript of the entire trial should be made publicly available. Rather, we are suggesting that a judge's reasons for decision, as read into the record, be reproduced in written transcript form and made available to the public. This can be made possible by the government providing dedicated funding for the transcripts of decisions in sexual assault cases.

4. Note on Judicial Independence:

In drafting Bill C-5, Parliament has responded to the judiciary's call for more education on sexual assault law in the tradition of engaging in dialogue between governmental branches. The harmful myths and stereotypes that persist in the courtroom, and the sheer complexity of sexual assault law, have led to calls from the judiciary to increase judicial

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[15] See for example Lori Haskell and Melanie Randall, "The Impact of Trauma on Adult Sexual Assault Victims", online (2019) Report Submitted to Research and Statistics Division, Justice Canada. <https://www.justice.gc.ca/eng/rp-pr/jr/trauma/trauma_eng.pdf.>

[16] For a detailed discussion of why having written decisions, as opposed to oral decisions that are not available for public review (unless a journalist happens to be in the courtroom and decides to report), see Professor Elaine Craig's testimony before the Standing Committee on the Status of Women, concerning Bill C-337. Canada, Parliament, House of Commons, Standing Committee on the Status of Women, Minutes of Proceedings and Evidence, 42nd Parl, 1st Sess, No 56 (11 April 2017) at 950. < https://www.ourcommons.ca/DocumentViewer/en/42-1/FEWO/meeting-56/evidence#Int-9475870>

training in this area of the law. The Supreme Court of Canada has recognized the ongoing pervasiveness of these myths and stereotypes. Just last year, Karatkatsanis J. stated this outright: "the investigation and prosecution of sexual assault continues to be plagued by myths."[17] Providing training to members of the judiciary is an important step in removing myths and stereotypes from the courtroom.

The Bill would require judges to undertake to complete training in relation to a particularly complex legal issue – sexual assault law – which pertains to judicial competence, in order to prevent errors of law.[18] Judicial competence requires both a clear understanding of the law of sexual assault but also of "social context" – meaning the systemic inequalities in Canadian society that contribute to sexual violence and how the victims of such violence suffer unique experiences.

Systemic inequality (such as sexism contributing to myths and stereotypes about complainants, the ongoing legacy of colonialism, and systemic racism leading to the over-criminalization of Indigenous and racialized people) has been the impetus driving reform and amendments to our criminal law. Bill C-5 does not interfere with judicial independence, but seeks to ensure the members of the judiciary tasked with interpreting these legal reforms do so with appropriate training and background.

5. Conclusion:

Judicial training on sexual assault is a necessary step in ensuring the public's confidence in our judicial system. However, this Bill alone cannot address all existing systemic inequalities in our justice system. For example, we note the Bill does not reach all decision-makers in the justice system, such as provincial court judges and decision-makers in administrative tribunals. In order to address other factors of systemic inequality, more reforms to our justice system are needed. We look forward to further reforms and increased resources that can contribute to advancing substantive equality rights of all in Canada.

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[17] *R v Goldfinch*, *2019 SCC 38*, at para 2. See also *R v Barton*, 2017 ABCA 216 at paras 161-2, and Jennifer Koshan, "Judging Sexual Assault Cases Free of Myths and Stereotypes" (2 November 2015), *Ablawg* (blog), online: <https://ablawg.ca/wp-content/uploads/2015/11/Blog_JK_Wagar_Oct_31_2015.pdf>

[18] See Professor Jennifer Koshan's response on this point before the Standing Committee on the Status of Women, concerning Bill C-337. Canada, Parliament, House of Commons, Standing Committee on the Status of Women, Minutes of Proceedings and Evidence, 42nd Parl, 1st Sess, No 56 (11 April 2017) at 1040. <https://www.ourcommons.ca/DocumentViewer/en/42-1/FEWO/meeting-56/evidence#Int-9476490>