Summary Submission to the Standing Committee on Justice and Human Rights on Bill C-5, An Act to amend the Criminal Code and the Controlled Drugs and Substances Act[1]

The Canadian criminal justice system discriminates against members of marginalized communities, and in particular against Black and Indigenous women and gender-diverse people. Indigenous women face staggeringly high rates of incarceration,[2] while the Canadian justice system simultaneously fails to protect them in the way it does non-Indigenous women.[3] Black women, and in particular low-income Black women, face high levels of incarceration, and lengthy prison sentences for non-violent drug offences.[4] For Black and Indigenous trans women and gender-diverse individuals, these harms are compounded by correctional practices grounded in transphobic views of sex and gender.[5]

This government rightly recognizes that this mass incarceration is shameful and unacceptable. The Black Legal Action Centre (BLAC), the Canadian Association of Elizabeth Fry Societies (CAEFS), and the Women's Legal Education and Action Fund (LEAF) are heartened to see this government acknowledge that mandatory minimums and restrictions on the availability of conditional sentences contribute to the overrepresentation of Black and Indigenous people in custody, and take action on the issue.

BLAC, CAEFS, and LEAF see Bill C-5 as an important first step to combating systemic discrimination in Canada's criminal justice system. However, several amendments are needed to fully realize the

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[2] In 2021, the Office of the Correctional Investigator released new data that show that the proportion of federally-incarcerated women who are Indigenous will soon constitute over half of the women in federal prisons, up from 30% in less than two years: Canada, Office of the Correctional Investigator, "Proportion of Indigenous Women in Custody nears 50%: Correctional Investigator Issues Statement" (17 December 2021).

[3] See Canada, National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, Volume 1A* (Vancouver: Privy Council, 2019) at 717.

[4] The Office of the Correctional Investigator's report on the "Black Inmate Experience in Federal Penitentiaries" noted that over half of federally-incarcerated Black women had been convicted for Schedule II drug offences, and in particular drug trafficking charges. In interviews, "[m]any indicated that they willingly chose to carry drugs across international borders, primarily as an attempt to rise above poverty". Others explained that they had "been forced into these activities with threats of violence to their children and/or families": Canada, Office of the Correctional Investigator, *A Case Study of Diversity in Corrections: The Black Inmate Experience in Federal Penitentiaries, Final Report* (Ottawa: Office of the Correctional Investigator, 2013) at para 19.

[5] For more information on the treatment of trans, Two Spirit, and gender-diverse individuals under the responsibility or jurisdiction of Correctional Services Canada, see this recent letter.

government's stated commitments to racial justice and reconciliation. This document summarizes those recommended changes, and the full submission can be accessed here.

The changes BLAC, CAEFS, and LEAF propose align with this government's goals for Bill C-5, its commitment to reconciliation and implementing the Truth and Reconciliation Commission of Canada's Calls to Action, and its long-standing efforts to champion gender equality.

I. Remove all mandatory minimums, or at least all those that have been found to be unconstitutional

BLAC, CAEFS, and LEAF support the repeal of **all** mandatory minimums in the *Criminal Code*.[6] Mandatory minimum sentences do not deter crime.[7] At the same time, they contribute to the significant incarceration and over-policing faced by members of marginalized communities.[8] This is particularly true for life sentences. In addition, mandatory minimums are inconsistent with evolving *Charter* and sentencing jurisprudence.

If Parliament is not prepared to repeal all mandatory minimum sentences, BLAC, CAEFS, and LEAF call on it to amend Bill C-5 to repeal those mandatory minimums which have been found unconstitutional by superior and/or appellate courts, as outlined in Appendix A of the full submission.

Removing mandatory minimums for offences such as these would provide consistency across different jurisdictions, more effectively use judicial resources, and promote equitable sentencing.[9] It would increase the availability of conditional sentences, which (as discussed below) are currently unavailable for offences with a mandatory minimum penalty.

II. Remove the bar on conditional sentences for offences with mandatory minimum penalties

As it stands, even if Bill C-5 is enacted, individuals who otherwise meet all requirements for a conditional sentence under s. 742.1 of the *Criminal Code* will be ineligible to serve their sentence in the community if the offence for which they are sentenced has a mandatory minimum penalty. This is the case even if the mandatory minimum penalty is a sentence that could be served intermittently.[10]

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[6] In doing this, BLAC, CAEFS, and LEAF join the calls already made by individuals and groups including the British Columbia Civil Liberties Association, the Parliamentary Black Caucus and allies, Pivot Legal Society, Professor and Chair in Feminist Legal Studies Debra Parkes, and Unifor National Chair in Social Justice and Democracy Kikélola Roach.

[7] See e.g., Anthony N. Doob, Cheryl Marie Webster, and Rosemary Gartner, "Issues Related to Harsh Sentences and Mandatory Minimum Sentences: General Deterrence and Incapacitation" (2014) Criminological Highlights.

[8] This is both through requiring longer sentences than might otherwise be imposed, and by putting pressure on individuals to plead guilty to a lesser offence even where they may have a viable defence. Debra Parkes, for example, points to women who kill abusive partners pleading guilty to manslaughter despite the existence of a viable self-defence claim to avoid the risk of the mandatory minimum sentence for murder (Debra Parkes, "Mandatory minimum sentences for murder should be abolished", *The Globe and Mail* (25 September 2018).

[9] See the Advocates' Society's January 6, 2022 letter to the Honourable David Lametti, Minister of Justice and Attorney General of Canada, regarding Bill C-5.

[10] As set out in s 732(1) of the *Criminal Code*, sentences of 90 days or less may be served intermittently.

Allowing intermittent sentences but not conditional sentences for offences with mandatory minimum sentences perpetuates systemic discrimination and inequality. For example, a person who is convicted of a second "over 80" offence and receives the mandatory minimum sentence of 30 days imprisonment would be eligible to serve that sentence on an intermittent basis. They would be able to maintain ties to their family and community, continue employment during the week, and access available community supports. For an Indigenous woman living in a rural, remote, or fly-in community, however, the bar on conditional sentences for offences with a mandatory minimum penalty means the only real available option is jail.

Removing the bar on conditional sentences for offences with mandatory minimum penalties will broaden the availability of conditional sentences in appropriate situations. This will allow more women to serve their sentences in their communities, keeping families together and reducing the over-incarceration of Indigenous women in particular.

III. Fulfill the Truth and Reconciliation Commission of Canada's Call to Action 32 to allow trial judges, upon giving reasons, to depart from mandatory minimum sentences and restrictions on the use of conditional sentences

Where mandatory minimum penalties and restrictions on the use of conditional sentences remain, injustice will inevitably result. The Truth and Reconciliation Commission of Canada (TRC)'s Call to Action 32 recognizes and responds to that reality, enabling judges to pass sentences proportionate to the circumstances of the offence and the individual's degree of moral blameworthiness.[11]

It is critical to note that the application of this Call to Action is not limited to Indigenous people. The broad wording could – and should – be applied to reduce all incarceration. This is particularly true for Black men, women, and gender-diverse people.[12] Sentencing judges considering the impact of race and racism on a particular individual may reasonably conclude that the only fit sentence is one that departs from a mandatory minimum and/or limitation on the availability of conditional sentences.

IV. Amend s. 718.2(e) of the *Criminal Code* so that sentencing judges will have the information required to pass appropriate sentences on Black defendants

Since 1997, s. 718.2(e) of the *Criminal Code* has required that sentencing judges take into account the principle that "all available sanctions, other than imprisonment, that are reasonable in the

[11] Professor Debra Parkes provides the example of an 18-year-old Indigenous teenager who kills her abusive drug dealer, who could be convicted of second degree murder and face a mandatory life sentence without the possibility of parole for at least 10 years: Debra Parkes, "Mandatory minimum sentences for murder should be abolished", *The Globe and Mail* (25 September 2018). This would be so regardless of the constellation of *Gladue* factors which might be present in her life.

[12] As recently noted in *R v Anderson*, "while the history of Indigenous people in Canada is distinct, as is their place in our legal and constitutional framework, African Canadians have experienced many of the same effects of discrimination and marginalization": 2021 NSCA 62 at para 92.

circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders."[13]

In response to this direction from Parliament, the Supreme Court developed the *Gladue* jurisprudence. Through *Gladue* reports, sentencing judges receive critical background information about the individual before them and the community and context in which that person lives.[14]

Courts are increasingly recognizing the existence and impact of "anti-Black racism, including both overt and systemic anti-Black racism",[15] and its role in sentencing. Through Bill C-5, this government has the opportunity to amend the language of s. 718.2(e) so as to more explicitly establish that judges have an independent legal duty to seek out social context evidence in all cases involving Black defendants, as they do under the *Gladue* framework. The small change in language would enable sentencing judges to develop a deeper understanding of the impact of anti-Black racism. It would also deepen the impact of this government's investment in improved access to Impact of Race and Culture Assessments (IRCAs) for Black defendants.[16]

V. Fully decriminalize simple drug possession, and provide for automatic expungement of records for simple drug possession

BLAC, CAEFS, and LEAF support this government's characterization of substance use as a public health matter, rather than a criminal one. The criminalization of drugs, and those who use them, harms public health, diminishes public safety, and wastes resources.[17] Bill C-5's proposed diversion measures, however, are inconsistent with an understanding of substance use as a public health concern, and with the Bill's own text.[18]

Only full decriminalization of simple drug possession will meaningfully help address the over-policing and over-incarceration of members of marginalized communities.[19] Decriminalizing simple drug

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[13] Though the term appears throughout the *Criminal Code*, LEAF and BLAC acknowledge that the use of "offender" is problematic. This is because it saddles someone with the permanent and derogatory identity of being an "offender", rather than a person who has been convicted of an offence.

[14] *Gladue* reports "can help put an individual's actions into proper context, which often includes the devastating effects of colonial state programs, dislocation and economic marginalization" and "can also tell a judge if the defendant comes from a community with a long history of restorative justice laws and practices": Lisa Kerr and Maria Dugas, "The federal bill to reduce mandatory minimum sentences is missing a few crucial words", *The Globe and Mail* (10 December 2021).

[15] *R v Morris*, 2021 ONCA 680 at para 1; see also *R v Anderson*, 2021 NSCA 62.

[16] Department of Justice Canada, "Pre-Sentencing Impact of Race and Culture Assessments receive Government of Canada Funding" (13 August 2021).

[17] For a thorough canvassing of the harms of the criminalization approach, see this February 10, 2021 letter sent to The Honourable Patty Hadju, then Minister of Health, by the HIV Legal Network, the Canadian Drug Policy Coalition, and Pivot Legal Society.

[18] Bill C-5 explicitly acknowledges that "criminal sanctions imposed in respect of the possession of drugs for personal use can increase the stigma associated with drug use and are not consistent with established public health evidence", while at the same time maintaining those criminal sanctions.

[19] In advocating for full decriminalization of simple drug possession, BLAC, CAEFS, and LEAF follow the lead of organizations already calling for this. These organizations include (in alphabetical order): The Advocates' Society, the BC Association of Aboriginal Friendship Centres, the British Columbia Office of the Provincial Health

possession needs to be accompanied by amendments to Bill C-5 providing for the automatic expungement of criminal records for simple drug possession.

Racism is embedded in policing and all aspects of the Canadian criminal justice system.[20] The reality is that Black and Indigenous users of drugs will be less likely to be referred out of the justice system, and more likely to have charges brought against them.

This discrimination is compounded by the barriers that Black and Indigenous people face in accessing health care. The limited race-based data available in Canada show significant disparities in health care access and outcomes for Black women compared to white women.[21] As Professor Brenda Gunn observes, "Indigenous people are often treated by the healthcare system as if they do not belong, or as if they are a problem that should be treated elsewhere."[22]

As these statistics reflect, there is a significant risk that the health care sector will fail to provide adequate addictions-related health care to Black and Indigenous women. Simultaneously, the criminal justice system will continue to criminalize addiction and substance use rather than provide meaningful, evidence-based interventions.

Criminal records further marginalize the most marginalized in Canadian society. They impose barriers to employment, rehabilitation, and community reintegration. At the same time, the process for accessing record suspension in Canada is slow, challenging, and too expensive. As a first step before moving towards a spent regime,[23] this government has the opportunity to truly embrace a public health and substantive equality-driven approach by automatically removing past criminal records for simple drug possession.

Officer, the Canadian Association of Chiefs of Police, the Canadian Association of People Who Use Drugs, the Canadian Drug Policy Coalition, the HIV Legal Network, Pivot Legal Society, the Thunderbird Partnership Foundation, Toronto Public Health, and the Vancouver Police Board.

[20] Compared to non-racialized Ontarians, Black Ontarians are arrested four times more than expected for drug-related crimes, and twice as likely to be held overnight on suspicion of drug possession: Nan DasGupta, Vinay Shandal, Daniel Shadd, Andrew Segal, and in conjunction with CivicAction, "The Pervasive Reality of Anti-Black Racism in Canada" (14 December 2020).

[21] In Ontario, Black women are three times less likely to have a family doctor than non-racialized women: *ibid*.

[22] Brenda Gunn, "Ignored to Death: Sy8stemic Racism in the Canadian Health Care System", Submission to the Expert Mechanism on the Rights of Indigenous Peoples (no date) at 4.

[23] Under a spent regime, an individual's criminal record is automatically sealed after a certain period of time, without the need for that individual to submit or pay for an application (see Fresh Start Coalition, "The Solution – A Spent Regime" (no date).