

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

**Prepared by the National Association of Women and the Law/L'Association nationale Femmes et Droit (NAWL/ANFD)  
for submission to the House of Commons Standing Committee on Justice and Human Rights<sup>1</sup>**

April 13, 2020

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### **Organizational Endorsements**

1. Accessibility for All
2. Action Ontarienne contre la violence faite aux femmes
3. Amnesty International Canada
4. AMS Sexual Assault Support Centre
5. Avalon Sexual Assault Centre
6. Barbra Schlifer Commemorative Clinic
7. BC Society of Transition Houses
8. Campaign 2000
9. Canadian Centre for Gender and Sexual Diversity
10. Canadian Council of Muslim Women
11. Canadian Research Institute for the Advancement of Women
12. Canadian Women's Foundation
13. Colchester Sexual Assault Centre
14. DisAbled Women's Network Canada
15. Egale Canada
16. Ending Violence Association of Canada
17. Feminist Alliance for International Action
18. International Women's Rights Project
19. Les Femmes Michif Otipemisiwak — Women of the Métis Nation
20. Luke's Place Support and Resource Centre for Women and Children
21. Metropolitan Action Committee on Violence Against Women and Children
22. National Congress of Black Women Foundation
23. Native Women's Association of Canada
24. Ontario Association of Interval and Transition Houses
25. PEI Family Violence Prevention Services Inc
26. PEI Rape and Sexual Assault Centre
27. Regroupement des maisons pour femmes victimes de violence conjugale
28. Rise Women's Legal Centre
29. Sexual Violence New Brunswick
30. South Asian Legal Clinic of Ontario
31. WAVAW Rape Crisis Centre
32. West Coast LEAF
33. Women's Centre for Social Justice, o/a WomenattheCentrE
34. Women's Legal Education and Action Fund
35. Women's Shelters Canada
36. YWCA Canada

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## Introduction

NAWL is an incorporated not-for-profit feminist organization that promotes the equality rights of women in Canada through legal education, research, resource development, training and education, and law reform advocacy. NAWL has a long history of work and advocacy on violence against women, and sexual assault in particular. In its work, NAWL uses a gender-based and intersectional feminist analysis that focuses on the lived realities of women in all of their diversity. Canada's constitutional commitment to substantive equality requires that law reform take women's diversity seriously, including in the context of sexual assault. This means accounting for the multiple, overlapping and intersecting ways in which women experience discrimination based on race, Indigenous identity, religion, ethnicity, sexual orientation, citizenship, gender identity or expression, social condition, age and/or disability.

## Comments and Context for NAWL's Recommendations

NAWL congratulates the Government for its commitment to judicial continuing education aimed at increasing women's confidence in the criminal justice system. Bill C-5 is a legislative re-introduction, with important amendments, of Bill C-337, the *Judicial Accountability through Sexual Assault Law Training Act* introduced in Parliament in February 2017. Bill C-337 was a political response to a profound lack of public confidence in the way the criminal justice system dealt with allegations of sexual assault.<sup>2</sup>

NAWL knows that women's mistrust of the criminal justice system is not a new phenomenon. In 1993, the Honourable Bertha Wilson, in her capacity as Chair of the Canadian Bar Association Task Force on Gender Equality, recommended mandatory "sensitivity" training on gender and racial bias for all judges. One year later, the Canadian Judicial Council (CJC) approved a resolution supporting the development of "comprehensive, credible and in-depth education programs on social context issues including gender and race." Special project funding from the Department of Justice assisted with the implementation of the resolution, allowing for the appointment of full-time legal and pedagogic experts, and enabling consultation with public stakeholders. The current approach to judicial education in Canada is a direct result of that initial resolution, and the arms-length funding support it received. That larger context must inform the study of Bill C-5 if it is to begin to achieve the important objectives set out in the preamble.

The amendments are consistent with judicial independence, properly understood. This legislation is far from an attempt to wrest judicial oversight of professional development from the judiciary. Rather, it is a specific and carefully tailored response to the significant and ongoing failure of the criminal justice system to respond adequately to sexual violence. This failure denies women equal access to justice and to the protection of law. Precise drafting and unambiguous objectives, read in the context of a detailed preamble that identifies the rights, specifically women's equality rights at issue, will ensure that judicial independence is not threatened.

The previous government tabled a budget in 2017 which allocated 2.7 million dollars over five years (and .5 million per year thereafter) for the CJC to support programming on judicial education, ethics and conduct.<sup>3</sup> NAWL urges the committee to recommend the provision of additional arms-length funding

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<sup>2</sup> See Rosemary Cairns-Way and Donna Martinson, "Judging Sexual Assault: The Shifting Landscape of Judicial Education in Canada" (2019) 97:2 Canadian Bar Review, available on-line at <https://cbr.cba.org/index.php/cbr/issue/view/571>.

<sup>3</sup> Budget 2017, Building a Strong Middle Class, online:<<https://www.budget.gc.ca/2017/home-accueil-en.html>>. The specific allocation to the judiciary is set out in Part 5, 189 of the PDF version.

linked to this legislation, similar to the funding provided by the Department of Justice for the Social Context Education Project described above. Volunteer judges, even with the support of national organizations such as the NJI and the CJC, will be unable to engage in the kind of careful, thoroughgoing curriculum development this programming requires without support. In addition, the essential and significant consultative obligations contained in the legislation require adequate time and resources to ensure their success, and, in particular to take account of women’s diversity and the impact that diversity has on the experience of sexual assault and of the system’s response to it. Done properly, these consultations will increase the likelihood that judicial education will enhance women’s equality, increase women’s trust in the administration of justice, and reduce the intersecting discriminatory burdens borne by women who choose to report a sexual assault.

Provincial courts hear the vast majority of sexual assaults. The federal government has no jurisdiction to mandate training for provincially appointed judges. The provision of arms-length funding enabling the production of a comprehensive, in-depth and credible curriculum on sexual assault will have an indirect impact on the continuing education available to provincially appointed judges. It will create a judicial education resource available to any court, or group of courts, in Canada. This may encourage the delivery of all-court conferences in particular provinces, something which occurred during the implementation of the Social Context Education Project, and which broke down existing silos between courts dealing with the same issues.

**Overview of the Legislation**

In this brief NAWL will address three key components of the amendments to the Judges Act proposed in Bill C-5. For ease of reference, the relevant current sections of the Judges Act are set out below, with the proposed amendments included in **bold**.

3 No person is eligible to be appointed a judge of a superior court in any province unless, in addition to any other requirements prescribed by law, that person ...

**(b) undertakes to participate in continuing education on matters related to sexual assault law and social context, including by attending seminars established under paragraph 60(2)(b).**

60 (1) The objects of the Council are to promote efficiency and uniformity, and to improve the quality of judicial service, in superior courts.

Powers of the Council

(2) In furtherance of its objects, the Council may ...

**(b) establish seminars for the continuing education of judges, including seminars on matters related to sexual assault law and social context; ...**

**Seminars related to sexual assault law**

**(3) The Council shall ensure that seminars on matters related to sexual assault law established under paragraph (2)(b)**

**(a) are developed after consultation with persons, groups or organizations the Council considers appropriate, such as sexual assault survivors and groups and organizations that support them; and**

***(b) include instruction in evidentiary prohibitions, principles of consent and the conduct of sexual assault proceedings, as well as education regarding myths and stereotypes associated with sexual assault complainants.***

Essentially, these amendments do three things.

- They add an eligibility criterion. Applicants for judicial appointment to the superior courts must now undertake to participate in certain continuing education programs as a condition of appointment.
- They specify the topics and some of the content of the education programs for judicial applicants and for the Canadian Judicial Council (CJC).
- They require the CJC to ensure that “appropriate” stakeholders are consulted during the development of the education.

### **Analysis and Recommendations**

Two foundational constitutional values inform this legislation. One, mentioned in the preamble, is judicial independence. The second, not named in the preamble, but implicit in its provisos, is equality for women.

#### **Recommendation 1: Amend the provisos in the preamble that focus on sexual assault.**

NAWL recommends that the committee amend the preamble to acknowledge explicitly that sexual assault is gender based, that the majority of offenders are men, and that the vast majority of victims/survivors are women and girls. The preamble should acknowledge that women have diverse lived experiences of sexual assault and of the criminal justice system response to allegations of sexual assault. The preamble should specify that lack of faith in the criminal justice system, the potential of sexual assault proceedings to harm survivors, and problematic interpretations of law in sexual assault proceedings are inconsistent with substantive equality for women.

NAWL recommends:

**Whereas in Canada everyone is equally entitled to the law’s full protection and to be treated with dignity, humanity, and respect;**

**Whereas in Canada, women are more likely than men to be victims of sexual assault;**

**Whereas women’s multiple, overlapping and intersecting experiences of discrimination, including discrimination based on race, Indigenous identity, religion, ethnicity, sexual orientation, citizenship, gender identity or expression, social condition, age and/or disability, put them at greater risk of victimization by sexual assault;**

**Whereas sexual assault and the criminal justice system response to sexual assault are experienced by women in multiple ways shaped by gender and other forms of discrimination and disadvantage;**

**Whereas allegations of sexual assault should be tried in proceedings which fully protect the security of the person and equality rights of women, in addition to the fair trial rights of accused persons;**

**Whereas survivors of sexual assault in Canada must have faith in the criminal justice system, and women’s lack of faith in the criminal justice system reflects the existence of gender-based discrimination rooted in systemic inequalities between women and men;**

**Whereas the discriminatory and profoundly damaging historic and ongoing impacts of colonization on Indigenous women continue to inform their experiences of, and lack of faith in the criminal justice system;**

**Whereas interpretations of the law and social context of sexual assault occur in sexual assault proceedings, and these interpretations are often discriminatory;**

**Whereas sexual assault proceedings have the potential to inflict unique and harmful costs on survivors which contribute to women’s unwillingness to report sexual assault and thereby deny women the equal protection of the law.**

## **Recommendation 2: Clarify the provisos on judicial independence and judicial education**

NAWL submits that the attention given to continuing judicial education reflects an evolving understanding of judicial independence (and accountability) in an increasingly diverse society legally and constitutionally committed to equality.

Judicial independence is a foundational constitutional principle essential to the delivery of impartial justice. Every Canadian is constitutionally entitled to impartial justice, and judicial independence is a “means” to that “end”.<sup>4</sup> Every judge, like every person, has a particular and inevitably partial, perspective. When appointed to the bench, judges bring perspectives that reflect, among other things, their background, education, and professional experience. Judicial education intended to fill knowledge gaps in the appointee’s professional background (such as for example, a lack of familiarity with criminal law) is an uncontroversial example of continuing professional development for judges. The recent decision of the CJC to make attendance at the new judges’ program mandatory reflects the fact that all new appointees will share similar knowledge gaps relative to the challenge inherent in becoming a decision-maker, and that the judiciary has an obligation to minimize those gaps quickly and effectively.

More complex, but no less significant, is the effect of incomplete knowledge on the obligation of impartiality. NAWL submits that a judge committed to delivering impartial justice has a professional obligation to learn about the perspectives and experiences of others, and in particular, to learn about the ways in which law can have differential and sometimes discriminatory impacts on vulnerable individuals and communities. Judges, as a group, represent the most powerful and privileged members of Canadian society, and the bench itself, despite recent attempts to increase diversity, remains largely unrepresentative. This means that education intended to educate judges about perspective, difference,

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<sup>4</sup> Canadian Judicial Council, Ethical Principles for Judges, online at [https://cjc-ccm.ca/cmslib/general/news\\_pub\\_judicialconduct\\_Principles\\_en.pdf](https://cjc-ccm.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf) at 7 “Judicial independence is not the private right of judges but the foundation of judicial impartiality and a constitutional right of all Canadians. Independence of the judiciary refers to the necessary individual and collective or institutional independence required for impartial decisions and decision making.” See also, *R. v. Lippé*, [1991] 2 S.C.R. 114, per Lamer J.: “The overall objective of guaranteeing judicial independence is to ensure a reasonable perception of impartiality; judicial independence is but a “means” to this “end”. If judges could be perceived as “impartial” without judicial “independence”, the requirement of “independence” would be unnecessary. However, judicial independence is critical to the public’s perception of impartiality. Independence is the cornerstone, a necessary prerequisite, for judicial impartiality.

and diversity will tend to focus on the experiences of the vulnerable and the disadvantaged, since these are the perspectives that judges are least likely to have experienced. Participation in judicial education intended to protect impartiality is entirely consistent with judicial independence. Participation in ongoing judicial education serves the professional and institutional interests of judges as competent and impartial decision-makers, while at the same time responding to the overarching public interest in the delivery of impartial and inclusive justice, and women’s substantive equality rights.

NAWL recommends that the preamble to Bill C-5 be amended to also include the following:

**Whereas Parliament recognizes the importance of an independent judiciary;**

**Whereas Parliament understands that judicial independence is a means of ensuring judicial impartiality;**

**Whereas Parliament recognizes that effective judicial education is part of judicial professional development and contributes to public confidence in the administration of justice;**

**And whereas Parliament recognizes that public confidence in the administration of justice and women’s equality rights will be enhanced by ensuring that persons seeking to be appointed to the judiciary undertake to participate in continuing judicial education related to sexual assault law and social context.**

**Recommendation 3: Matters related to sexual assault law and social context**

Bill C-5 uses the language of “matters related to sexual assault law and social context” in two places (paragraph 3(b) and 60(2)(b)). The development and delivery of judicial social context education has a twenty-five-year history in Canada. “Social context” is a compendious phrase intended to capture the background factors that may inform judicial decision-making in all contexts in which judicial education occurs. The language in the amendment is not clear.

NAWL recommends the legislation be amended to reflect current best practices in judicial education. Comprehensive and in-depth judicial education on a particular topic requires attention to three elements – the substantive law, the social context of the law, and the relevant judicial skills. Precise language will make both the applicant’s undertaking and the CJC’s power clear. In addition, clearer language here will make section 60(3)(b) superfluous.

NAWL recommends the following amendments to C-5:

***3(b) undertakes to participate in continuing education on matters related to:***

- ***the law of sexual assault;***
- ***the social context of sexual assault and the criminal justice response to it; and***
- ***the judicial skills required to impartially preside over sexual assault trials.***

***including by attending seminars established under paragraph 60(2)(b).***

60 (1) The objects of the Council are to promote efficiency and uniformity, and to improve the quality of judicial service, in superior courts.

Powers of the Council

(2) In furtherance of its objects, the Council may ...

***(b) establish seminars for the continuing education of judges, including seminars on matters related to the law of sexual assault, the social context of women’s experiences of sexual assault and the criminal justice response to it, and the judicial skills required to impartially preside over sexual assault trials.***

#### **Recommendation 4: Consultation and Specific Content**

The original Bill C-337 did not include a commitment to consultation. The committee amended the legislation to include it. Many of the witnesses working directly with survivors indicated an interest in and willingness to assist with program development. These witnesses emphasized the importance of in-person consultation, during which judges learned about the social context of sexual assault from those working towards women’s equality on the ground, rather than through an intermediary.

NAWL strongly supports section 60(3)(a). Community involvement was a foundational principle of the Social Context Education Project at the NJI in the late 1990s. The CJC required that social context programming be credible. Judicial educators understood that credibility had two aspects. First, Judges needed to experience the education as credible, relevant and helpful with the work they did; and second, community stakeholders with relevant information needed to be sure that the education credibly reflected their experiences with law, the judiciary and the administration of justice. This meant that community stakeholders needed to speak for themselves.

The stakes in the adjudication of sexual assault cases could not be higher. Women’s equality, personal safety, security, and their confidence in the fairness of the system are at great risk. Unfortunately, judges trying sexual assault cases may hold unexamined and unacknowledged prejudices.<sup>5</sup> More succinctly, judges may not know what they don’t know.<sup>6</sup> The participation of women-serving groups and organizations, as well as sexual assault survivors, particularly women who are victims/survivors and experience intersecting and multiple forms of discrimination, is particularly valuable in this context. Other judges, lawyers, professionals and academics, essential to the development of much content of a comprehensive program, are unlikely to be able to educate others about the actual lived reality of sexual violence, including the intersecting and complex experiences of inequality and discrimination that many survivors of sexual assault suffer. Survivors of sexual assault and those who work with them to provide support and to ensure the protection of their equality rights, have the expertise, knowledge and experience to provide that context. Participating in the training of judges could also be healing for sexual assault survivors.

NAWL recommends:

#### ***Seminars related to sexual assault law***

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<sup>5</sup> A recent and thorough collection of research materials on sexual assault can be found at the Institute for Research on Policy Options at <https://policyoptions.irpp.org/magazines/january-2020/improving-canadas-response-to-sexualized-violence/>.

<sup>6</sup> Canadian Judicial Council, *In the Matter of an Inquiry Pursuant to s. 63(1) of the Judges Act Regarding the Honourable Justice Robin Camp, Report and Recommendations of the Inquiry Committee to the Canadian Judicial Council* (Ottawa, Canadian Judicial Council, 29 November 2016), online: <[https://www.cjc-ccm.gc.ca/cmslib/general/Camp\\_Docs/2016-11-29%20CJC%20Camp%20Inquiry%20Committee%20Report.pdf](https://www.cjc-ccm.gc.ca/cmslib/general/Camp_Docs/2016-11-29%20CJC%20Camp%20Inquiry%20Committee%20Report.pdf)>

***(3) The Council shall ensure that seminars on matters related to sexual assault law established under paragraph (2)(b)***

***(a) are developed after consultation with persons, groups or organizations, particularly with women who have relevant first-hand information related to the social context of sexual assault, and the criminal justice response to sexual assault, such as sexual assault survivors and groups and organizations that support them, that the Council considers appropriate***

***(b) include instruction in evidentiary prohibitions, principles of consent and the conduct of sexual assault proceedings, as well as education regarding myths and stereotypes associated with sexual assault complainants.***

### **Recommendation 5: Beyond C-5**

Sexual assault and violence against women are systemic challenges that confront decision-makers in a wide range of contexts outside of the criminal justice system. Women need to trust institutional decision-makers wherever they exercise power. It would be naïve to believe that myths and stereotypes inconsistent with women's equality are only found in the criminal justice system. They are systemic. NAWL recommends that the federal government pursue amendments to other laws to ensure that all federal tribunals (including, for example, the IRB) required to make determinations related to sexual assault and other forms of violence against women receive mandatory education and training similar to that included in C-5. In addition, NAWL recommends that the government mandate family violence training for all family court judges. Bill C-5, amended as NAWL suggests, provides a blueprint for the development of education which is consistent with judicial independence, that is developed in consultation with front-line stakeholders, and which addresses the law, the social context of the law, and the necessary judicial skills for presiding in a manner which ensures impartial justice.

### **Summary**

NAWL is pleased to support the legislation as amended by these recommendations for amendments to Bill C-5. These amendments clarify precisely the constitutional values at issue. They make explicit the women's equality rights implicated by the continuing failure of the criminal justice system to respond appropriately to sexual assault. They clearly identify the objectives of the legislation and the importance of enhancing women's trust in the administration of justice. They make it more likely that the legislation will achieve that goal in a manner consistent with judicial independence by connecting the legislation to current best practices in judicial education. Finally, our recommendations acknowledge the complexity and importance of this work. A careful, complete and collaborative effort is essential. Only additional arms-length funding will make that possible.