

Brief on Bill C-5, which proposes amendments to the *Criminal Code* and to the *Controlled Drugs and Substances Act (CDSA)*

Background on Joint Submission

This brief is jointly submitted by the Barbra Schlifer Commemorative Clinic, Luke's Place, and Women's Shelters Canada.

Barbra Schlifer Commemorative Clinic ("the Clinic") is the only Clinic of its kind in Canada, providing specialized counselling, legal, and interpretation services. The Clinic has extensive expertise representing and serving women and gender-diverse people who have experienced intimate partner and domestic violence. Since 1985, the Clinic has assisted more than 100,000 women who have experienced gender-based violence.

Luke's Place Support and Resource Centre for Women and Children (Luke's Place) works with women who have been subjected to abuse to support them and their children through the family law process. We provide direct services to women in Durham Region and engage in systemic work such as law reform, advocacy, research, education and training on family violence and family law at the provincial and national levels.

Women's Shelters Canada is a national organization whose mission is to work as a unified voice for systemic change to end violence against women, while providing leadership for collaboration and knowledge exchange among women's domestic violence shelters and transition houses across the country. Shelters support women and children fleeing violence.

Our three organizations are uniquely positioned to provide recommendations on Bill C-5 and its impact on women and the violence against women's movement here in Canada. In what follows, we outline both positives and limitations of the Bill, along with recommendations, to this committee, using an intersectional feminist, trauma-informed approach.

Positives of Bill C-5: Addressing Systemic Racism can have Positive Benefits for Survivors of Gender-Based Violence and their Families

Overall, our organizations are supportive of the Bill's repealing of mandatory minimum penalties as part of a broader strategy for addressing systemic racism in Canada's criminal justice system. Indeed, our organizations remain gravely concerned about the over-incarceration and over-policing of Black communities, Indigenous peoples, and racialized communities living in Canada (henceforth BIPOC communities).

Decriminalizing intimate partner violence (IPV):

When it comes to intimate partner violence (IPV), for example, there is no evidence to suggest that incarceration reduces recidivism among IPV perpetrators.¹ Yet we know that the impacts of incarceration in such cases can have long-lasting effects for the entire family when offenders are unable to secure employment or pay spousal or child support as a direct result of being incarcerated and having a criminal record.

Based on our combined years of experience supporting BIPOC communities, including survivors (or victims) of gender-based violence (GBV), we agree that repealing mandatory minimums would potentially:

- Reduce the negative impacts of systemic racism on over-policed and over-incarcerated communities.
- Avoid the negative impacts of mandatory minimum penalties on family finances. In cases of IPV or domestic violence (DV), this may reduce negative impacts on the payment of spousal or child support by offenders, or the ability to secure employment by removing potential barriers of incarceration and having a criminal record).

Decriminalizing drug related offences:

We also see benefits in terms of the decriminalization of drug-related offences. In fact, a plethora of studies have advocated for the decriminalization of drug-related offences as the best option for people with substance abuse addictions. There is “no evidence to support the association between decriminalization and increased rates of use or other harms.”²

Importantly, research shows a connection between substance abuse and trauma.³ For survivors of GBV, which is a form of trauma, the use of substances can become part of coping strategies, especially for survivors who may lack sufficient access to healthier coping strategies. Mandatory charging for drug offences can exacerbate effects of trauma for survivors who “fall through the cracks” of the public health system. For example, some survivors may be criminalized themselves for drug offences, particularly if they do not present themselves as an “ideal” victim. Indeed, the Schlifer Clinic’s “Criminalization of Women” project has identified systemic racism as a contributing factor in how BIPOC survivors are criminalized when they seek access to justice for GBV.

We therefore see potential benefits to repealing mandatory minimums for survivors of GBV who are charged with drug offences:

- Removing the mandatory minimums around substance misuse is an important step towards ensuring that alternatives such as the creation of health and addiction treatment services

¹https://www.csustan.edu/sites/default/files/groups/University%20Honors%20Program/Journals_two/dis_skustad_connor_final_hons-2.pdf

² <https://www.ccsa.ca/sites/default/files/2019-04/CCSA-Decriminalization-Controlled-Substances-Policy-Brief-2018-en.pdf>, 11.

³ https://www.nctsn.org/sites/default/files/resources/making_the_connection_trauma_substance_abuse.pdf

with supervised consumption sites becomes a site of focus for the government, policy makers, and the public at large.⁴

- The fact that police officers and the prosecutor must consider alternatives in this arena could mean that people of color with addiction issues would be more eligible for programs they would otherwise not have knowledge of or have access to, because they are street involved or unhoused.⁵ This is especially helpful for survivors of violence.

Decriminalization is thus an important step in moving towards better support for survivors and reducing their entanglement with the criminal justice system. Despite these positives of Bill C-5, our organizations are also concerned with significant shortcomings of the proposed legislation and its potential impacts, as articulated below.

Shortcomings of Bill C-5: Needs a more robust GBA+ analysis of potential consequences for survivors of GBV

Even with the potential benefits of Bill C-5, the Bill does not make sufficient use of the GBA+ analysis that the federal government has committed to using in all areas.

A GBA+ analysis uses an intersectional lens to consider the impacts of laws and policies across marginalized communities. It also requires that we consider the unintended consequences of policy changes for those who have multiple disadvantages because of systemic inequalities.

We have outlined examples of how a more robust GBA+ approach can be used to identify potential consequences of the Bill for survivors and their families, followed by recommendations.

I) Proposed Changes to the Criminal Code and its Impacts on Survivors

a) Need for a much more in-depth understanding of the use of firearms in cases of GBV

The threat of gun violence keeps survivors from reaching out to survivor support services or the police for help. In fact, “firearms figure prominently in the cycle of violence against women and the evidence is clear - when firearms are present, women and their children are more likely to die.”⁶

While Bill C-5 does recognize “use of a firearm” in cases of sexual assault and aggravated sexual assault as serious convictions under the *Criminal Code*, the Bill requires a much more in-depth understanding of GBV. As it currently stands, the Bill fails to take into consideration the fact that, in cases of coercive control, the mere possession of a firearm can be used as a form of threat of death and/or violence for survivors.⁷ Abusers may use this as a tactic to coercively control their

⁴ Ibid, 11.

⁵ Ibid, 11.

⁶ Barbra Schlifer Clinic Brief: Consultation: Preventing Firearms Crime, Death and Injury in Canada. Background (Draft)

⁷ <https://efsgv.org/learn/type-of-gun-violence/domestic-violence-and-firearms/>

partners into subjugation. Indeed, research shows that “controls over firearms are associated with a precipitous fall in the murders of women with guns, without evidence of substitution effects.”⁸

A GBA+ approach thus suggests that repealing the mandatory minimum penalties around the following laws would put the lives of GBV survivors (or victims) in danger:

- Possession of firearm or weapon knowing its possession is unauthorized (two separate offences)
Paragraphs 92(3)(b) and (c): MMP of 1 year (second offence) and 2 years less a day (third and subsequent offence)
- Discharging firearms with intent
Paragraph 244(2)(b): MMP of 4 years
- Possession of prohibited or restricted firearm with ammunition
Paragraphs 95(2)(i) and (ii): MMPs of 3 years (first offence) and 5 years (second and subsequent offence)
- Discharging firearm — recklessness
Paragraph 244.2(3)(b): MMP of 4 years⁹

Given this evidence, changes to mandatory minimums in the Criminal Code must address how it would protect survivors should the proposed changes, as outlined in Bill C-5, be implemented.

b) Ensure sufficient alternatives to incarceration to protect GBV survivors

Bill C-5 mentions that in lieu of some of the mandatory minimums sentencing, there will be an emphasis that house arrest and community detention be encouraged for offenders. This change does not take into sufficient consideration that house arrest does *not* remove the threat of violence for survivors. Often a perpetrator lives in the same community as the survivor or has close ties to the community in which the survivor resides. There is no clear explanation about how survivors would be protected if this is the case.

One alternative that the committee may want to consider involves enhanced measures to ensure adherence to bail conditions. As trauma-informed organizations, we are grappling with alternatives that can enhance safety while avoiding criminalization of marginalized communities. What is paramount is the safety of survivors: there must be deterrents that can help ensure that perpetrators of IPV adhere to bail conditions stipulating that the accused must stay away from the victim in a matter. Violation of these conditions must produce a sufficient deterrent that will protect the survivor and save lives.

In truth, there is simply not enough research or evidence about how effective alternatives such as GPS tracking systems really are in supporting survivors. However, we suggest that the committee look closely at new measures being introduced in Quebec. Starting in the spring of 2022, for

⁸ Barbra Schlifer Clinic Brief: Consultation: Preventing Firearms Crime, Death and Injury in Canada. Background (Draft)

⁹ <https://www.canada.ca/en/department-justice/news/2021/12/mandatory-minimum-penalties-to-be-repealed.html>

instance, “Quebec will join the ranks when it introduces a GPS tracking system in GBV cases.”¹⁰ Electronic monitoring devices are potentially cost effective compared to incarceration. More importantly, survivors of DV and IPV can use the electronic device to alert them to a perpetrator’s proximity, which can potentially save lives. While there is a lack of sufficient research in this area, some important questions around this issue include:

- “How will courts decide whether keeping an accused in custody or releasing him with an electronic bracelet is appropriate?”¹¹
- “If someone is dangerous enough to need a bracelet, is he not dangerous enough to be kept behind bars?”¹²
- “What does requiring someone who has not yet been convicted of a crime to submit to electronic monitoring do to the presumption of innocence?”¹³
- “What about people’s privacy rights? Where will the data collected by electronic monitoring be stored, how will it be accessed and by whom? Will it ever be destroyed?”¹⁴
- “If a survivor declines to participate, what impact will this have on how she is treated by police if her partner attacks her?”¹⁵
- “No technology is foolproof. What about malfunctions in the equipment? What if the accuser finds a way to outsmart the technology or remove the bracelet?”¹⁶
- “Will the technology even work for people who live in rural and remote parts of the country, where cell and internet service can be spotty at best? Will police response time be quick enough to be helpful?”¹⁷

To be sure, Bill C-5 must go beyond the changes the province of Quebec is implementing and provide a solution for survivors that addresses questions like the ones posed above and beyond. Survivors’ safety must be taken into consideration when changes to mandatory minimums are made.

c) Mandatory Minimums still affect survivors convicted of murder

Bill C-5 ensures that the charge of murder is still subject to mandatory minimums. This does not allow for “judges to take an offender’s history into account upon sentencing.”¹⁸ There is “no recognition of the history of abuse and trauma for those convicted of murder – especially Indigenous women who are incarcerated for murder.”¹⁹ This is harmful for survivors who move through the system because studies show that the impact of complex trauma, particularly traumatic events in childhood and then in adulthood, can have “often enduring affects such as

¹⁰ [Will GPS tracking of IPV offenders keep women safer? \(pamelacross.ca\)](http://pamelacross.ca)

¹¹ Ibid.

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ [Indigenous women in prison need more help from justice system: Senator \(aptnews.ca\)](http://aptnews.ca)

¹⁹ Ibid.

poor emotional regulation, hypervigilance, and aggressive behavior.”²⁰ All these factors could lead to what we deem as “criminal behavior.”²¹ Trauma and a history of abuse could lead a survivor to resort to abuse or even murder to protect themselves from what they perceive to be a dangerous situation. In a criminal justice context, the significance of a trauma-informed access to justice mandate lies in “the recognition of the psychological, cognitive, and behavioral impact of traumatic events on the person.”²² Bill C-5 lacks a trauma-informed understanding of “the ongoing, and complex effects of traumatic events on an individual's ability to function and interact with the world around them.”²³

d) Include an overhaul of record suspension system

Bill C 5 also does not address the consequences of mandatory minimums prior to the introduction of this Bill. For instance, the provision of criminal records prevents formerly incarcerated folks, those that have completed their sentence and have been reconnected to their communities, the ability to access employment and suitable housing. This is problematic especially for marginalized communities because “for people who have been caught up in the criminal justice system, finding steady employment is a critical part of rebuilding their lives and helping prevent further contact with the justice system.”²⁴ Indeed “social science evidence shows that an old criminal record does not provide a reliable indicator of a person’s future likelihood to commit crimes – in the workplace or elsewhere.”²⁵ And yet, the maintenance of these records ensures that many individuals who have been criminalized face a lifetime of poverty and marginalization because they do not have access to employment and secure housing. “A recent study from the federal government found that 14 years following release from a federal institution, only half of individuals had employment; the median income was \$0. Of those that had an income, the average was \$14 000 – an income that puts people well below the poverty line. The impacts for Indigenous populations are even more pronounced. Indigenous individuals earned an average of \$10 000.”²⁶ Ultimately, this is a racial justice and social justice issue that was created, in part, by mandatory minimums in Canada.

Although the current legal system allows people to apply for a record suspension, the system and process it requires to do this “is slow, difficult to navigate and expensive... High application fees, eligibility restrictions, wait periods that can be over a decade and a complex bureaucratic process discourages and disqualifies many people from even applying.”²⁷ All these problems listed above are” counterproductive barriers to reintegration.”²⁸

²⁰ <https://webjcli.org/index.php/webjcli/article/view/738/104>

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*

²⁴ <https://freshstartcoalition.ca/the-issue/>

²⁵ *Ibid.*

²⁶ <https://freshstartcoalition.ca/the-issue/>

²⁷ *Ibid.*

²⁸ *Ibid.*

It would be helpful if Bill C 5 revisited how Canada deals with criminal records. This would dramatically increase the chances of all who are affected by the criminal justice system, including survivors who were criminalized by a system they originally sought justice from, the ability to access employment, live in safer communities and, and not be subject to systemic discrimination.²⁹ It can be retraumatizing for a survivor to have to retell their story of abuse and trauma that led to becoming criminalized to have their record sealed. The trauma of abuse, criminalization and not being able to rebuild their life even after they have completed sentence causes further harm to these survivors and their communities. A simple erasure of the mandatory minimums does not remove the lasting effects of various criminal laws that carry mandatory minimums.

These examples show the benefits of a more robust GBA+ analysis of Bill C-5 and an intersectional lens to consider how the proposed changes impacts the lives of marginalized communities, especially survivors of violence, across Canada.

II) Proposed Changes to the Drugs and Substances Act Fall Short of What is Needed

While we are supportive of the Bill's efforts to decriminalize drug possession for personal use, repealing mandatory minimums simply does not go far enough. Indeed, the Bill does not address how those who are criminalized for drug misuse will be able to access the treatment facilities and drug rehabilitation programs they need to heal and not re-offend.

Studies show that among policy makers and within the criminal justice system, there exist various knowledge gaps about how best to provide harm reduction for people struggling with addiction. These knowledge gaps include a lack of funding for formal treatment programs and family/community circles of support. There is also a lack of awareness among policy makers about how best to broaden or scale-up specific, targeted interventions.³⁰ Moreover, under the current administration, supervised injection sites have been limited to urban centers.³¹

Within the Bill there is no mention of opening rehabilitation's centers in northern communities or rural communities where rural women and Indigenous communities live. Many rehabilitation centers are in and around (city hubs).³² Indigenous communities and rural women should be able to heal in their communities if they want to. The lack of appropriate and accessible support to remedy addiction related offences could result in continued addiction and incarceration.

Given these knowledge gaps, there is a "need to examine how interventions could be modified to suit different contexts. These contexts include both local and national considerations such as geography, population density, cultural and demographic diversity, substance use trends, legislative frameworks, law enforcement policies and practices, and, most importantly, the

²⁹ Ibid.

³⁰ <https://www.ccsa.ca/sites/default/files/2019-04/CCSA-Decriminalization-Controlled-Substances-Policy-Brief-2018-en.pdf>, 11- 12

³¹Ibid, 12.

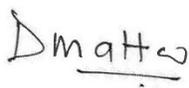
³² <https://www.cbc.ca/news/politics/justice-reform-drug-treatment-criminal-code-1.5917710>

community, financial and administrative resources available to support implementation.”³³
Decriminalization beyond repealing mandatory minimums, would help ensure the least harm for all marginalized folks that move through the system because of substance misuse.

Recommendations:

- 1) A robust GBA+ analysis of the changes suggested with resources and plan for application of changes for all legal actors.
- 2) Reconsider the repealing of mandatory minimums around possession of weapon with intent and possession of a weapon with ammunition so that it takes into consideration the safety of women and other survivors of violence.
- 3) Change language around consequences for unlawful possession or use of firearms –i.e., house arrest and community detention to include the provision that protects survivors from the risk of future violence.
- 4) Mandate training for Judges to understand how history of abuse and trauma can cause a marginalized person to commit murder and other crimes.
- 5) Ensure that alternatives such as rehabilitation centers for those arrested for substance abuse are accessible, intersectional, culturally competent and trauma informed.
- 6) Address the historical consequences of mandatory minimums by including within Bill C-5 a provision to make the record suspension system more accessible, easier to navigate and more financially affordable for formerly criminalized and incarcerated folks. Automatic record suspensions for people who have completed their sentences would ensure barrier free reintegration into society.

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³³ <https://www.ccsa.ca/sites/default/files/2019-04/CCSA-Decriminalization-Controlled-Substances-Policy-Brief-2018-en.pdf>, 11- 12