PROPOSED AMENDMENTS AND CONSIDERATIONS RELEVANT TO BILL C 40: AN ACT TO AMEND THE CRIMINAL CODE, TO MAKE CONSEQUENTIAL AMENDMENTS TO OTHER ACTS, AND TO REPEAL A REGULATION (MISCARRIAGES OF JUSTICE ACT/ DAVID AND JOYCE MILGAARD'S LAW)

Submitted to the

STANDING COMMITTEE ON JUSTICE AND HUMAN RIGHTS, HOUSE OF COMMONS

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By the

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Since 1978, the Canadian Association of Elizabeth Fry Societies (CAEFS) has been the leading national organization supporting criminalized women and gender-diverse people at all stages of legal-system involvement: pre, during, and post incarceration[2]. CAEFS national office conducts monthly visits in Canada's federal penitentiaries designated for women to provide direct support to individuals and monitor their conditions of confinement. CAEFS also holds membership for 22 local Elizabeth Fry Societies, who provide a range of integral frontline services in penitentiaries, provincial prisons, and upon community re-entry, including operating one third of Canada's community residential facilities (halfway houses) designated for women, court support, diversion, bail programs, and beyond. This organizational scope provides CAEFS with substantial insight into the lives and realities of the populations this bill will impact.

CAEFS commends the government for advancing bill C 40, especially for the manner of engagement that occurred which culminated in the report from the independent commission to consider wrongful conviction applications produced by the Hon. Harry LaForme and the Hon. Juanita Westmoreland-Traoré (Laforme and Westmoreland-Traoré Report). Centering the perspectives of people who have experienced the horrors of being wrongfully convicted and relevant stakeholders to inform the development of this bill is a practice CAEFS fully endorses- a responsible approach to legislative development.

While CAEFS welcomes Bill C-40, we offer the following context and emphasize the need for a number of amendments across three substantive areas, to ensure the Act can meaningfully and comprehensively respond to the myriad issues in Canada's current approach to miscarriages of justice, especially as raised through the Laforme and Westmoreland-Traoré Report.

Women and gender-diverse people are at elevated risk of indicating guilt for crimes which they are not responsible for

Women and gender-diverse people who become incarcerated represent a critically disadvantaged population. Half of all federally sentenced people in prisons designated for women are Indigenous[3]. Overall, individuals maintain relatively low literacy levels: 65% of people entering the prison system have less than an eighth-grade education and over 79% of people entering the system do not have a high school diploma[4]. Most women and gender-diverse people, and in fact most people overall who

[2] Caefs.ca

3 Zinger (2023) Ten Years since Spirit Matters: Indigenous Issues in Federal Corrections (Part II)**Office of the Correctional Investigator Annual Report 2022-2023 | OCI | BEC (oci-bec.gc.ca)**

[4] Edgar, Lea. "Literacy in Canadian prisons", (3 February 2023), online: *Decoda Literacy Solutions* <https://decoda.ca/literacy-in-canadian prisons/#:~:text=Prisoners%20in%20Canada%20do%20not,or%20level%20of%20literacy%20skills.>.

become incarcerated, are survivors of physical and/or sexual victimization and enter prison with alarming rates of disadvantage and economic precarity[5].

Several reports and commissions have called attention to systemic and social factors which elevate risk of women becoming wrongfully convicted, especially when they are also racialized[6]. We can confirm this through our organizational insight. At present in Canada, we posit miscarriages of justice are systemic for the populations we interact with.

This is, in part, because conditions within most pre-trial detention prisons in Canada are deplorable[7]. Within them, individuals face dehumanizing conditions characterized by isolation, lengthy and frequent lockdowns, confinement to small cells for up to 23 hours daily, very poor food sources, very expensive and infrequent access to family and the outside world, dismal healthcare, and little to no vocational or educational programs. Faced with the reality of losing access to their children, losing their employment and housing while experiencing such conditions, many women and gender diverse-people disclose to us that they would rather—and that they do- plead guilty, regardless of whether they are or are not guilty, in order to get out of prison faster[8].

In our experience, "pleading out", which means taking a plea deal instead of going to trial, is not an outlying experience, but the common result of individuals making the best decisions they can for themselves, within a forced choice where no outcome is a good outcome.

Concerning serious offences which carry lengthy sentences, Justice Lynn Ratushny's 1997 review of 97 homicide convictions of women recommended Canada's mandatory minimum penalty of life sentence greatly pressured women to plead guilty, especially to manslaughter. Since 1997, several calls by lawyers, scholars, national commissions, and legislators have been made to raise attention to the fundamental risks to justice that mandatory minimum sentences of life 10 (2nd degree murder), and life 25 (1st degree murder) create[9], both by eliminating the potential for judicial discretion, by systemic

[5] **https://www.justice.gc.ca/socjs-esjp/en/women-femmes/lm-sp**
Correctional Services Canada, "Women offenders" (2019)
Sapers, "Annual Report of the Office of the Correctional Investigator 2015-2016" (30 June 2016).

[6] Brief submitted by the **NativeWomensAssociationOfCanada-e.pdf (ourcommons.ca)**
Truth and Reconciliation Commission of Canada Calls to Action (2015) **Calls_to_Action_English2.pdf (exactdn.com)**
Brief submitted by the Honourable Harry Laforme and Kent Roach **Microsoft Word - Jointly1.docx (ourcommons.ca)**
Roach, K. (2023). Canada Has a Guilty Plea Wrongful Conviction Problem: The First Report of the Canadian Registry of Wrongful Convictions. *The Wrongful Conviction Law Review*, *4*(1), 16–47. **https://doi.org/10.29173/wclawr92**

[7]"It must be said that the conditions faced by such individuals are often dire. Overcrowding and lockdowns are frequent features of this environment, as is limited access to recreation, health care and basic programming…[Pre-trial detention] comes at a significant cost in terms of their loss of liberty, the impact on their mental and physical well-being and on their families, and the loss of their livelihoods."10 - The Supreme Court of Canada in R. v. Myers (2019)

[8] Cheryl Marie Webster, "Remanding Justice for the Innocent: Systemic Pressures in Pretrial Detention to Falsely Plead Guilty in Canada" (2022) 3:2 Wrongful Conviction L Rev 128.

[9] **'Cruel consequences': Senator Pate's public bill targets mandatory minimum penalties (sencanada.ca)**
Time to end mandatory minimum-sentences for murder: Indigenous women vastly overrepresented among those sentenced to life - Ottawa Life Magazine

processes profoundly impacted by systemic racism and discrimination, and by pressuring disadvantaged women and gender-diverse people to plead guilty to crimes they did not commit out of fear of receiving astronomically more severe sentences.

Working closely in federal penitentiaries with incarcerated women and gender-diverse people, we receive frequent requests, especially from individuals with life sentences and manslaughter convictions, to help them redress their convictions. Many people report to us that they were discouraged from their lawyers post-conviction from filing appeals, and many report to us that their lawyers had encouraged them to plead guilty in the first place. We direct individuals toward Innocence projects, where they exist, and we watch the lengthy process unfold—often, we see them give up.

> **Recommendation 1:** Adopt the key recommendation put forward in the brief submitted by The Innocence Project of the University of British Columbia, that allows the commission to consider exceptional circumstances in which there was no appeal[10].
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> *696.4 "(4) Despite paragraph (3) (a) or (b), the Commission may decide that the application is admissible even if the finding or verdict was not appealed to a provincial appellate court or the Supreme Court of Canada. In making the decision, the Commission must take into account . . ."*

***The pressure to "be guilty" doesn't stop at a verdict*: Interactions between Bill C-40 and the Corrections and Conditional Release Act and Regulations**

Once convicted, individuals who maintain innocence face adverse differential treatment from those in prison who can take responsibility for their conviction. This creates a strong punitive atmosphere for wrongfully convicted individuals' post-conviction. All of this unfolds in institutions regulated by the *Corrections and Conditional Release Act* and *Regulations*, respectively.

The Laforme and Westmoreland-Traoré Report speaks to the institutionalization that wrongfully convicted people develop throughout their incarceration. C-40 has been drafted to respond to this through re-entry supports, but we offer that the Act has a blind spot in consideration of interacting legislation, and that the *Corrections and Conditional Release Act*, and *Regulations,* respectively ought to be included as interacting legislation to facilitate the provision of guidance by the commission to the Correctional Service of Canada in the treatment of women and gender-diverse people, and all people, with innocence claims.

We recommend this strongly: federally sentenced individuals who maintain innocence experience a number of punishments and exclusions from access to programs and services because they do not take responsibility for their convictions. They are routinely denied access to vital programs and services

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Honouring the Truth, Reconciling for the Future Summary of the Final Report of the Truth and Reconciliation Commission of Canada **Executive_Summary_English_Web.pdf (exactdn.com)**

[10] Brief submitted by the Innocence Project of the University of British Columbia, **UniversityOfBritishColumbiaInnocenceProject-e.pdf (ourcommons.ca)**

delivered by the Correctional Service of Canada (CSC), beginning with denials of access to core correctional programming.

In federal penitentiaries, completion of core correctional programming is a precursor for access to a host of additional programs and services, and a requirement to be moved to lower security classifications. Without being allowed to participate in core programming, individuals remain at higher security classifications, which have more restrictions and produce more harm overall. Many important functions of surviving incarceration-- such as access to family, to education, and to gradual release, are significantly restricted for people with higher security classification.

In addition, many supportive programs and services require 'assessment for decision' (A4D) reports to be completed, specific to each application. All A4D reports consider the degree of responsibility an individual takes, as well as the level of institutional adjustment a person is assessed as demonstrating. However, it is next to impossible to adjust well to an institution whose processes you are excluded from. Through A4D reports, in more instances than not, decision makers will deny support based on an innocence claim. We have seen several instances where decision makers have gone beyond this and integrated people's innocence claims into character assessments of them as an indication of their deviance, lack of empathy, or as a behavioral issue.

The result is a broad culture of exclusion of people who maintain innocence, who sit in prison for longer, with less support than their peers. In our opinion, this is a consequence of a lack of education and awareness on the part of correctional case management decision-makers about miscarriages of justice.

Such conditions directly affect pathways for release into the community via parole for people who have been wrongfully convicted. Lack of accountability and lack of institutional progress/adjustment causes people with innocence claims to not be recommended by their institutional parole officers for parole and/or for escorted leave into the community and are also factors measured by Parole Board of Canada members in hearings.

The sum of these conditions produces two common adverse outcomes for individuals in federal prisons who maintain innocence:

a.) Pressure of exclusion from services and programs incentivizes people to avoid or abandon an innocence claim and indicate guilt in order successfully navigate the prison system, or
b.) People maintain their innocence claims, despite the exclusions they experience, and face a harsher version of incarceration. This harsher experience of incarceration elevates risk of adverse mental and physical health outcomes, institutionalization, and produces significant barriers to gaining conditional release back into the community via the legislated pathways within the *Corrections and Conditional Release Act* and *Regulations*.

We caution that in the current drafting of C-40, section 696.8 *(The Commission must ensure that applicants and potential applicants are able to communicate readily with the Commission from any*

place in Canada) becomes inaccessible for federally incarcerated people due to the conditions described above and should be resolved by inclusion of the CCRR and CCRA as interacting legislation.

The commission will need to interact with and provide education to the Correctional Service of Canada and the Parole Board of Canada in the treatment of women and gender-diverse people, and all people, with innocence claims. Guidance and direction must have the capacity to educate correctional case management decision makers about miscarriages of justice. We strongly recommend considering consequential amendments to the CCRA to expressly prohibit the punishment and exclusion of people who maintain innocence.

At minimum, to make more meaningful the commission's statutory mandate of accessibility for applicants, applicant outreach, and re-entry supports for applicants, we recommend that Bill C-40 should be amended to provide legislative direction to agencies regulated by the CCRA.

Recommendation 2:

Under powers 696.84 (1), add subsection that the commission, in carrying out its mandate, add a paragraph to the effect of:

(a.2) direct employees to provide direction and guidance to the Correctional Service of Canada and Parole Board of Canada, to ensure that applicants and potential applicants do not experience barriers and exclusion from programs, services, and conditional release as result of pursuing redress of a potential miscarriage of justice.

<u>The Need for Legislated Timeframes</u>

Perhaps nothing should be underscored more than the irreversible impacts on the life course of wrongfully convicted people. At present, wrongful convictions take years and more generally—decades—to overturn, and life is simply not that long. Through our work, we witness the impacts of wrongful convictions on people, especially those who have lengthy, and life sentences. We maintain relationships with individuals who have been released on bail pending 696 applications, as well as with some those who have been exonerated, and many more whose sentences have simply expired. The impacts of receiving a wrongful conviction are lifelong, and life diminishing.

By this, we emphasize a need to amend the Act to establish defined timeframes which can be accompanied with processes of accountability and redress. We offer that for each additional month and year that a person spends wrongfully convicted without redress, the cumulative harm compounds.

It presently requires an exceptional amount of time and resources to "make it" to the submission of a 696 application. Even with a mandate of support and outreach, this legislation needs to be written with caution that the commission does not maintain the egregious length of process, and dually, that it does not institute an additional time barrier. Consideration of time is especially relevant as the commission will not be a 'last stop' in the justice system for all, but will ultimately redirect individuals back to the appeals courts, or to a new trial.

The redress of wrongful convictions takes something from human beings that is not returnable: time. We witness the cumulative loss resulting from intersections of the loss of physical and mental health, of family and social connections, and educational and vocational prospects. Many wrongfully convicted women and gender-diverse people lose their reproductive years to these miscarriages of justice.

Women and gender-diverse people can be eventually released and expected to “make the best of” what is left of their lives, but the disadvantage they incur from getting through these processes is irreparable. Accordingly, every possible safeguard must be taken to expeditiously resolve their convictions; The language of “as expeditiously as possible” in the proposed legislation institutes a vague structure that will not translate into desired outcomes.

In this recommendation, we acknowledge and emphasize that the investigation processes themselves cannot be rushed, and we do not advocate for the investigative period of an application to have defined associated timelines. For many well-established reasons, constraining investigative processes would limit the pursuit of facts and the sound assessment of applications. However, there will be a material and significant benefit to the goals of justice and fair, safe Canadian institutions through establishing defined timelines associated with the length of time the committee can reasonably take between receiving a file and providing a decision of admissibility, between admitting a file and opening an investigation, and between the completion of investigations and final decisions by the commission.

Recommendation 3: Under section 696.3 (1) when legislating the handling of the case, replace “as expeditiously as possible” with legislated timelines establishing a reasonable and defined period between when an application is received, and when the application will be initially reviewed for admissibility.

Recommendation 4: Under section 696.3 (1) when legislating the handling of the case, replace “as expeditiously as possible” with legislated timelines establishing a reasonable and defined period between when an application is accepted, and when the investigative stage will begin.

Recommendation 5: Under section 696.3 (1) when legislating the handling of the case, replace “as expeditiously as possible” with legislated timelines establishing a reasonable and defined period between when an investigation is completed, and a final decision is made, and shared with the applicant.