

Submissions by Elizabeth Sheehy¹ on Bill C-337 for the Senate Committee on Legal Affairs Committee, 3 June 2019

I make this submission based upon my expertise in sexual assault law as a researcher and professor, and drawing upon the knowledge and expertise of frontline women's groups. It is clear, based upon this expertise, that this bill could and should go further than it currently does. However, the bill represents an important step forward in grappling with the ongoing gaps in judicial knowledge about sexual assault law as well as the crisis of public confidence in the criminal justice system's handling of sexual assault allegations. On that basis I support Bill C-337 and I would urge the Senate to pass this bill.

Bill C-337 originally proposed that all judges deciding sexual assault trials would be required to provide written reasons. This proposal arose from several notorious sexual assault cases where judges delivered oral reasons that only came to light either because journalists happened to be in the court room—as was the case for the *Al-Rawi* trial decision (the Halifax taxi driver case reported at 2018 NSCA 10), where the judge made legal errors regarding capacity to consent and made the controversial comment “a drunk can consent” or because the decision was appealed and feminist researchers sought a transcript of the original oral decision—as was the case in the *Wagar* decision, where former judge Robin Camp committed multiple legal errors and made the shocking comment that the complainant could have avoided penetration by the accused if she had kept her knees together.

By requiring written reasons for all sexual assault cases the goal was to increase public access to the courts and open the sexual assault trial to public scrutiny, thereby enhancing the potential for judicial transparency and accountability as well as generating public confidence in the criminal justice system—much-needed improvements for sexual assault. However, due to concerns about the system costs and the delays that written reasons would engender, the bill was amended in the House of Commons to require written reasons only if oral reasons are not entered in the record of the proceedings.

Since the vast majority of criminal cases are already recorded, it remains to be seen what, if anything, this part of the bill adds, beyond signaling the particular importance of providing reasons for judgment in sexual assault cases. Without a further legislative requirement that those oral reasons be transcribed and made available publicly through the court's website, there is no appreciable enhancement of transparency or accountability, as promised by the bill's Preamble. In particular, complainants/victims/survivors of men's violence deserve to have access to the reasons for a judge's decision in their matter. As noted by Coming Forward, an organization representing survivors of sexual violence, and the Federal Ombudsman for Victims of Crime (both of which made submissions to the House of Commons committee that studied the bill), sexual assault complainants are often too overwhelmed in court to be able to digest and retain what the judge has said in oral reasons. At the very least we owe women the dignity of an explanation that they can read and process when their perpetrators are acquitted.

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The other main reforms proposed in C-337 center on judicial education. First there is the requirement that to be eligible for *federal* judicial appointment, lawyers must have completed:

“recent and comprehensive

(i) education in sexual assault law that has been developed in consultation with sexual assault survivors, as well as with groups and organizations that support them, and that includes 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, and

(ii) social context education.”

Second it would also impose requirements on the Canadian Judicial Council (CJC) to offer this kind of sexual assault education to judges on a continuing education basis, and to report annually on the content of these seminars, the number of judges who attend and from which courts, and the number of judges presiding over sexual assault trials who have not participated in sexual assault education.

The judicial education aspects of the bill are urgently needed, as the recent Supreme Court of Canada decision in *R v Barton* (2019 SCC 33) illustrates. The presiding trial judge made multiple errors in law and process—failing to apply the legal strictures on the admissibility of the deceased’s sexual history, the legal understanding of consent, the availability of the mistaken belief in consent defence, and the need to insulate the jury from misogynist and racist myths and stereotypes. These are not uncommon errors by Canadian judges with regard to sexual assault law, as evidenced by the number of high-profile cases that made the news because of judicial failings in the last few years: *R v Wagar* (2015 ABCA 327) *R v Al-Rawi* (above); *R v Blanchard* (known as the Angela Cardinal case, where the complainant was shackled in court and detained in a cell next to her perpetrator for five nights 2016 ABQB 706); and *R v Barton* (above).

Although judicial education on sexual assault law would not be made mandatory pursuant to the bill (thereby avoiding a challenge to the law on the basis of the principle of judicial independence), it is especially critical that it be a requirement for federal appointments because unlike provincial appointments, these appointees often do not have a criminal practice background and, once appointed, sexual assault trials are not necessarily on their weekly dockets. Further, the reporting requirements for the CJC seem to be a creative way to put pressure on judges to participate in sexual assault education that is designed to reflect current knowledge and expertise around sexual assault law.

However, the content of such programs as described in the bill needs to be enhanced. First, it should be aimed at sexual assault *and* intimate partner assault, as should the requirement for reasons, given that these offences are deeply intertwined and subject to the same biases and stereotypes, as well as difficulties in legal interpretation. The Federal Ombudsman for Victims of Crime made this submission to the House committee, but this recommendation was apparently ignored.

Second, given the pervasiveness of men’s violence against Indigenous women and the appalling record of the criminal justice system in addressing this violence, the reform ought to require

judicial education on the specific barriers that Indigenous women experience as victims of sexual and intimate partner assault, including racist assumptions and the inexplicable neglect of ordinary legal standards that seems all too common when the victim is Indigenous. The Native Women's Association of Canada made this suggestion to the House committee, and I fully support it.

It should be noted that three of the cases referenced above (*Wagar, Blanchard and Barton*) involved Indigenous victims. For commentary on the discrimination faced by Indigenous women and girls in the criminal law treatment of sexual and intimate violence see Lucinda Vandervort, "Legal Subversion of the Criminal Justice Process? Judicial, Prosecutorial and Police Discretion in *R. v Edmondson, Kindrat and Brown*" in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (Ottawa: University of Ottawa Press, 2012) 111, and Tracey Lindberg, Priscilla Campeau and Maria Campbell, "Indigenous Women and Sexual Assault in Canada" in Sheehy, *ibid* at 87. Both papers are available on Open Access: https://ruor.uottawa.ca/bitstream/10393/19876/12/Sexual_Assault_in_Canada.pdf.

Third and finally, sexual assault education must include experts and materials regarding the neurobiology of trauma and traumatic memory, and trauma-informed frameworks that expose the fallacies so often invoked in assessments of credibility such as inconsistencies in recollection or behaviour that appears to conflict with "real rape". Again this was a suggestion made by women's groups before the House committee that was not taken up by the House.

These forms of judicial education go to the heart of dismantling discriminatory beliefs about men's violence against women, wives, and partners, and against Indigenous women, and to challenging fundamental misunderstandings about the reliability of the evidence of those traumatized by violence. Nonetheless, I support this bill as a first step toward the goal of creating an open-minded and educated judiciary capable of responding to women's lived experience of sexual violence and of applying the law of sexual assault as enacted by Parliament in response to decades of feminist advocacy.