

**Submission to the House of Commons Standing Committee  
on Justice and Human Rights**

**Bill C-51: *An Act to amend the Criminal Code and the Department of Justice Act and  
to make consequential amendments to another Act***

**October 25, 2017**

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**Introduction**

The Women’s Legal Education and Action Fund (LEAF) supports many of Parliament’s steps to reform the sexual assault provisions of the *Criminal Code*<sup>1</sup> to protect women from sexual violence and eliminate discriminatory myths and stereotypes from sexual assault trials.

However, LEAF has significant concerns about the proposed additions of s. 273.1(2)(a.1) and s. 273.1(2)(b), and s. 153.1(3)(a.1) and s. 153.1(3)(b). As explained in detail below, these provisions add no new protections for sexual assault complainants and risk jeopardizing the law’s protection for intoxicated women who are assaulted while incapable of consenting due to intoxication. LEAF urges the Standing Committee to ensure that the changes are not drafted in a way that could make women vulnerable to predatory sexual behavior and sexual violence. In particular, LEAF proposes drafting that would clarify that no person can consent unless she is capable of making a free and voluntary decision, reasonably informed by the nature of the act and the risks associated with that act, and is aware of her right to decline participation.

**Background and Expertise of LEAF**

Founded in 1985, LEAF is a national organization dedicated to promoting substantive equality for women through litigation, law reform and public education. LEAF’s expertise in the inequality and discrimination experienced by women in Canada encompasses considerable expertise in addressing violence against women including advocating for protections of sexual assault complainants in the criminal justice system.

As Parliament has emphasized in previous rounds of reform to the *Criminal Code*, sexual assault is a women’s equality issue: men’s sexual violence against women is enabled by women’s inequality in our society, and women’s inequality is in turn reinforced by this violence. The preamble to the 1992 sexual assault law reform specifically cited Parliament’s grave concern about the incidence of violence against women and children and Parliament’s intention “to promote and help to ensure the full protection of the rights guaranteed under sections 7 and 15 of

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<sup>1</sup> *Criminal Code*, RSC 1985, c C-46.

the [Charter]”.<sup>2</sup>

Sexual assault profoundly affects the lives and the well-being of thousands of Canadian women every day. The most recent General Social Survey found that while violent crime is decreasing, incidents of sexual assault have remained depressingly high.<sup>3</sup> Based upon self-reported data, Statistics Canada estimates that there were 633,000 incidents of sexual assault in the 12-month period preceding the 2014 General Social Survey.<sup>4</sup> The vast majority of those experiencing sexual assault are women (87%),<sup>5</sup> while the vast majority of those perpetrating sexual assault, whether against men or women, are men (94%).<sup>6</sup> Some groups experience disproportionate levels of sexual violence. Indigenous women recorded a sexual assault rate that was more than three times higher than for other Canadian women.<sup>7</sup> Young women (ages 15-24) also are also extremely vulnerable to sexual assault.<sup>8</sup> The failure of the criminal justice system to respond effectively to condemn this violence exacerbates survivors’ suffering and compromises the ability to stop perpetrators. Even though sexual assault is the most serious offence measured by the General Social Survey, only 5% of sexual assaults were reported to the police in 2014, a proportion that was slightly lower than that recorded a decade earlier (8%).<sup>9</sup> After shame and embarrassment, the most common reason for not reporting a sexual assault to the police is lack of confidence in the criminal justice system.<sup>10</sup>

For more than 30 years, LEAF has engaged in litigation and law reform in order to enhance substantive equality by improving the criminal justice response to sexual assault. LEAF significantly shaped the broad set of amendments enacted in 1992 after the Supreme Court of Canada struck down the *Criminal Code*’s rape shield provision. While this reform re-codified rape shield restrictions in a manner that complied with the *R. v. Seaboyer*<sup>11</sup> decision, LEAF advocated for the federal government to amend the substantive law of sexual assault so as to narrow the range of sexual history evidence capable of being relevant in trials. The resulting amendments defined consent as “the voluntary agreement to engage in the sexual activity in

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<sup>2</sup> Canada, House of Commons, Legislative Committee on Bill C-49, *an Act to Amend the Criminal Code (Sexual Assault)*, 34<sup>th</sup> Parl, 3<sup>rd</sup> Sess, 1992 Preamble (passed by the House of Commons June 15, 1992); *The Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

<sup>3</sup> Samuel Perreault, “Criminal Victimization in Canada” Catalogue No. 85-002-X, (Statistics Canada: Canadian Centre for Justice Statistics, 2015) at 5, online: Statistics Canada at < <http://www.statcan.gc.ca/pub/85-002-x/2015001/article/14241-eng.pdf> > [Perreault].

<sup>4</sup> *Ibid* at 28.

<sup>5</sup> *Ibid* at 33.

<sup>6</sup> *Ibid* at 37.

<sup>7</sup> *Ibid* at 17.

<sup>8</sup> *Ibid* at 33.

<sup>9</sup> *Ibid* at 25.

<sup>10</sup> Melissa Lindsay, “A Survey of Survivors of Sexual Violence in Three Canadian Cities” (Ottawa: Department of Justice Canada, 2014) online: Department of Justice Canada [http://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr13\\_19/rr13\\_19.pdf](http://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr13_19/rr13_19.pdf)

<sup>11</sup> *R v Seaboyer and Gayme* [1991] 2 SCR 577 [*Seaboyer*].

question” (s. 273(1)(2)), enumerated a non-exhaustive set of situations where no consent is presumed to exist (including when agreement is expressed by another person, when the complainant is ‘incapable of consenting,’ when the accused abuses a position of power, trust, or authority, and when the complainant expresses a lack of agreement to engage or continue to engage in the sexual activity) (s. 273(1)(3)), and finally, limited the defense of mistaken belief by a new requirement that the accused must have taken ‘reasonable steps’ to ensure consent, and by explicitly specifying that there can be no such defense when this belief arises through ‘recklessness’ or ‘willful blindness’ (s. 273(2)(b)).

Between 1993 and 1997, the Minister of Justice held yearly consultations with women’s groups on violence against women. During these consultations, LEAF and other feminist organizations called attention to the widespread defense strategy of trying to discredit and intimidate complainants by seeking access to their confidential records. Again, as a direct result of LEAF’s law reform proposals, the federal government amended the *Criminal Code* to add ss. 278.1-278.9, setting out a two-stage process for obtaining production of records that placed greater emphasis on the equality and privacy rights of complainants.

LEAF has also intervened to provide its expertise in almost every Supreme Court of Canada case that has set precedent in the area.<sup>12</sup> LEAF intervened in *R. v. Mills*,<sup>13</sup> a constitutional challenge to ss. 278.1-278.9, to argue that these provisions strike a balance between fair trial rights and the equality rights of women. In *R. v. Darrach*,<sup>14</sup> LEAF emphasized that restrictions on sexual history evidence embedded in s. 276 enhance equality rights and reduce the sway of discriminatory myths in sexual assault trials. In *R. v. Ewanchuk*,<sup>15</sup> a case that created the foundation for an affirmative consent standard in Canadian law, LEAF argued against the existence of defense of implied consent, emphasizing that the values of sexual autonomy and equality demand that consent must be communicated. In *R. v. J. A.*,<sup>16</sup> LEAF argued that one cannot consent in advance to unconscious sex because consent must always be active, voluntary and contemporaneous with the sexual act. LEAF is also currently intervening in *R. v. Al-Rawi*<sup>17</sup> at the Nova Scotia Court of Appeal, with our Halifax-based partner Avalon Sexual Assault Centre. LEAF and Avalon seek to clarify the law of capacity to consent in the context of an intoxicated complainant who has not lost consciousness at the time of the assault, insisting that this area of law must be developed in a manner that advances women’s equality and autonomy.

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<sup>12</sup>*Seaboyer*, *supra* note 111; *Canadian Newspapers Co v Canada* [1988] 2 SCR 122; *Norberg v. Wynrib*, [1992] 2 S.C.R. 226; *M.(K) v. M (H)*, [1992] 3 S.C.R. 6; *R. v. M.L.M.*, [1994] 2 S.C.R. 356; *R v Whitley and Mowers*, [1994] 3 SCR 830; *O’Connor v. The Queen*, [1995] 4 S.C.R. 411; *L.L.A. v. Beharriell*, [1995] 4 S.C.R. 536; *R v Ewanchuk*, [1999] 1 SCR 330 [*Ewanchuk*]; *R v Mills*, [1999] 3 SCR 668 [*Mills*]; *R v Darrach*, 2000 SCC 46 [*Darrach*]; *R. v. Shearing*, [2002] 3 S.C.R. 33; *R v JA*, 2011 SCC 28 [*JA*]; *R. v. D.A.I.*, 2012 SCC 5; *R v. N.S.*, [2012] 3 S.C.R. 726.

<sup>13</sup> *Mills*, *supra* note 12.

<sup>14</sup> *Darrach*, *supra* note 12.

<sup>15</sup> *Ewanchuk*, *supra* note 12.

<sup>16</sup> *JA*, *supra* note 12.

<sup>17</sup> *R v Al-Rawi*, Nova Scotia Court of Appeal, CAC No. 461056 [*Al-Rawi*].

In short, LEAF can claim significant credit for having shaped the law of sexual assault to protect the substantive equality of women and to improve the treatment of complainants in trials. LEAF has longstanding and substantial law reform and litigation expertise on sexual assault law and its impacts on women's rights.

## **Bill C-51**

### ***Proposed Changes that LEAF Supports***

LEAF is supportive of the following changes made by this Bill:

1. LEAF supports the changes made to the defence of honest belief. The addition of 273.2(a)(iii) clarifies that there can be no mistaken belief in consent in the situations referred to in 273.1(2), where no consent was obtained. For example, LEAF supports the clarification that an accused cannot claim to have believed the complainant was consenting where the accused's belief arose from the complainant's incapacity to provide consent. However, LEAF submits that this is already clearly the law, and recommends that this fact be included in the legislative notes or preamble.
2. LEAF supports the addition of s. 273.2(c), which states that the accused cannot rely on the defence of mistaken belief if "there is no evidence that the complainant's voluntary agreement to the activity was affirmatively expressed by words or actively expressed by conduct." Again, this is already the law, but LEAF supports the codification of *Ewanchuk*<sup>18</sup> that requires evidence that a complainant expressed her voluntary agreement to sexual contact in order for an accused to rely on the defence of mistaken belief in consent.
3. LEAF supports the clarified language of s. 276(2). Professor Elaine Craig documents that a central barrier to s. 276 achieving its stated purpose is the judicial tendency to conflate s. 276(1) and s. 276(2), finding that sexual history evidence is only inadmissible where it relies on the "twin myths" set out in s. 276(1)(a) and (b).<sup>19</sup> In LEAF's submission this interpretation is inaccurate. The provisions create a blanket exclusion on all sexual history evidence that serves to perpetuate the "twin myths", *and* establishes a presumption of inadmissibility and an admissibility assessment for any *other* sexual history evidence. Sexual history evidence that does not relate to the "twin myths" is only admissible if it meets the requirements set out in s. 276(2) and s. 276(3). Parliament's proposed changes to s. 276 clarify this two part assessment. They makes clear that no sexual history evidence will be admitted unless it meets the

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<sup>18</sup> *Ewanchuk*, *supra* note 13.

<sup>19</sup> Elaine Craig, "Section 276 Misconstrued: The Failure to Properly Interpret and Apply Canada's Rape Shield Provisions" (2016) 94 Can Bar Rev 45 at 52.

admissibility requirements set out in s. 276(2) and s. 276(3), and the evidence is not being adduced for discriminatory purposes as identified in s. 276(1)(a) and (b).<sup>20</sup>

4. LEAF supports the addition of s. 276(4), which clarifies that “*sexual activity* includes any communication made for a sexual purpose or whose content is of a sexual nature.” Sexual communication is no more probative of whether a complainant provided voluntary and informed consent, contemporaneous with the sexual activity in question, than is sexual activity. This clarification is vital to protect women’s equality and sexual autonomy, particularly in an electronic and social media age in which communications, including sexual communications, are commonplace, documented, and permanent. It bolsters the existing protections that feminists have fought hard to establish and maintain against discrediting complainants through myths and stereotypes. It may also encourage women to report sexual violence, which advances women’s equality and the administration of justice.
5. LEAF supports the presumptive inadmissibility of records in the accused’s possession in which the complainant has a reasonable expectation of privacy, as included in the proposed s. 278.92. It is inherent in the definition of “record”, that these documents engage the complainant’s privacy rights. The purpose of the third party records provisions is to advance women’s equality and privacy rights in sexual assault trials, which encourages reporting of sexual offences and limits an accused’s ability to expose personal, intimate details of the complainant’s life in a public trial. These equality and privacy interests and the legislative purpose at issue in third party records applies with equal urgency and importance to all records in which a complainant has an expectation of privacy. LEAF supports the changes to admissibility hearings for records that engage the complainant’s equality and privacy rights and for sexual history evidence:
  - a. The accused must now provide the Crown and the complainant with 60 days of notice in advance of requesting third party records, per s 278.3(5) of the Bill. This gives the complainant time to contact, retain, and consult with independent counsel in advance of the hearing.
  - b. The addition of ss. 278.94(2) and (3) extends complainants’ right to legal representation to admissibility hearings for records in the accused’s possession to hearings regarding her sexual history. As these hearings engage issues that are fundamental to the complainant’s privacy and personal autonomy, it is proper that she should have representation. Further, as has been documented by Professor Lise Gotell, complainants’ interests in third party records hearings are better represented when they have independent

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<sup>20</sup> *Ibid* at 52-54.

counsel.<sup>21</sup> It is proper that complainants facing disclosure of their sexual history or records in the accused's possession also have access to such assistance.

6. LEAF supports the complainant's right to be represented by counsel and to participate and make submissions in admissibility hearings. LEAF notes that it will be critical to ensure that proper legal aid is available in all provinces and territories so that this right has a meaningful impact on complainants' experiences of the criminal justice system. . LEAF's experience is that women who are marginalized are targeted by sexual violence; the state must ensure that the right to counsel is meaningful by providing counsel to those complainants who may not be able to afford private representation.

### ***LEAF Opposes the Proposed Changes to Sections 153.1(3) and 273.1(2)***

#### Intoxication and Codifying *R v JA*

LEAF has significant concerns about the proposed additions of s. 273.1(2)(a.1) and s. 273.1(2)(b), and s. 153.1(3)(a.1) and s. 153.1(3)(b). Despite the language in s. 273.1(2)(b) and s. 153.1(3)(b) stating that a person's incapacity may be "for any reason other than" unconsciousness, LEAF is adamant that this addition will be misused by defence lawyers and judges as suggesting that the bright line for incapacity to consent is total unconsciousness. It is critical that judges be able to find that a complainant is incapacitated if she is unable to make a voluntary and informed decision about sexual contact, regardless of whether or not she is unconscious— women's rights to safety, non-discrimination and equality require no less.

Judges have no difficulty applying the longstanding rule that unconscious women cannot consent. The real problem in sexual assault law is that judges tend to require evidence of unconsciousness or sleep before finding a complainant is incapable of consenting. Parliament should focus on protecting the many women who are sexually assaulted while they are conscious but whose ability to give meaningful consent to sexual activity is severely impaired (for example by alcohol or drugs), rather than trying to fix a problem that does not exist.

The standard or threshold for incapacity has started to drift toward actual unconsciousness and away from focusing on the woman's ability to assess the risks and benefits of engaging in sexual activity. Making a bright line of unconsciousness, as the current bill does in s. 273.1(2)(a.1) and in s. 153.1(3)(a.1), will simply reinforce this problem.

#### *Intoxicated Women Targeted by Predatory Sexual Behaviour*

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<sup>21</sup> Lise Gotell, "Tracking Decisions on Access to Sexual Assault Complainants' Confidential Records: The Continued Permeability of Subsections 278.1-278.9 of the *Criminal Code*" (2008) 20 Can J Women & Law 154 at 125-126 [Gotell, 2008].

Intoxicated women are particularly targeted by predatory sexual behaviour.<sup>22</sup> Professor Janine Benedet estimates, based on U.S. based statistics, that approximately 50,000 women in Canada are sexually assaulted while incapacitated due to alcohol or drugs each year.<sup>23</sup> In 2014, a question was added to the GSS to take into account sexual assaults in which someone was unable to consent to sexual activity because, for example, she was drugged, intoxicated, manipulated or forced in ways other than physically. This type of sexual assault represented 9% (56,970) of all sexual assaults reported by Canadians.<sup>24</sup> Despite the fact that the sexual assault of intoxicated women is a widespread problem, for a myriad of reasons, convictions in these cases are very difficult to obtain, even though such cases arise frequently.<sup>25</sup> Grant and Benedet have examined how stereotypes about intoxicated women, evidentiary problems caused by memory loss, and uncertainty in the law around what constitutes capacity to consent to sexual contact, have all led to low conviction rates in these cases.<sup>26</sup> Accordingly, it is imperative that any changes to the law of capacity to consent take into account the real problems currently plaguing the law of incapacity, and ensure that those changes advance women's safety and equality.

#### *Legal Threshold for Determining Incapacity to Consent Unclear*

The law is clear that unconscious women cannot consent.<sup>27</sup> The larger concern for women's safety is that courts have a very difficult time determining at what point, short of unconsciousness, is an intoxicated woman incapable of providing consent. Courts have demanded that a woman be virtually unconscious before finding that she is incapable of consenting, particularly if intoxicants were consumed voluntarily.<sup>28</sup> The other difficulty with these cases is that once the court finds that a woman is capable of giving consent, the issue of non-consent is often not given serious consideration.<sup>29</sup>

The Crown appeal in the *R v Al-Rawi* case, now before the Nova Scotia Court of Appeal, illustrates exactly this issue. In that case, the accused was acquitted, despite the police having found the complainant half-naked and unconscious roughly 11 minutes after she had entered the accused's taxi.<sup>30</sup> Judge Lenehan of the Nova Scotia Provincial Court held that there was

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<sup>22</sup> Janine Benedet, "The Sexual Assault of Intoxicated Women" 22 Can J Women & Law 435 [Benedet]. According to Statistics Canada, 9% of self-reported sexual assaults involved sexual activity when the victim was unable to consent due to intoxication (Shana Conroy and Adam Cotter, "Self-reported sexual assault in Canada, 2014" Catalogue No 89-002-X (Ottawa: Statistics Canada, 2014), online: Statistics Canada <https://www.statcan.gc.ca/pub/85-002-x/2017001/article/14842-eng.htm>.

<sup>23</sup> Benedet, *supra* note 22 at 439.

<sup>24</sup> Perreault, *supra* note 3 at p. 5.

<sup>25</sup> Isabel Grant & Janine Benedet, "Capacity to Consent and Intoxicated Complainants in Sexual Assault Prosecutions" (2017) 37 CR (7th) 375. [Grant and Benedet]

<sup>26</sup> *Ibid.*

<sup>27</sup> Benedet, *supra* note 22 at 442.

<sup>28</sup> *Ibid* at 442-443.

<sup>29</sup> *Al-Rawi*, *supra* note 17, see also Factum of the Intervenor the Women's Legal Education and Action Fund and Avalon Sexual Assault Centre Society in *R v Al-Rawi*, Nova Scotia Court of Appeal, CAC No 461056, 2017 at para 13-14 [Al-Rawi Factum].

<sup>30</sup> Elaine Craig, "Judging Sexual Assault Trials: Systemic Failure in the Case of *Regina v Bassam Al-Rawi*" (2017)

insufficient evidence to prove incapacity to consent because he could not conclusively find that the complainant was unconscious at the time the sexual contact began. He concluded that it was possible that the complainant provided consent to sexual contact just before lapsing into unconsciousness.

As articulated by Justice Fish, “as a matter of both language and law, consent implies a reasonably informed choice, freely exercised.”<sup>31</sup> The consent requirement is not satisfied “if, because of his or her mental state, one of the parties is incapable of understanding the sexual nature of the act, or of realizing that he or she may choose to decline participation.”<sup>32</sup>

However, LEAF submits that many courts have not utilized this standard, and instead have required “external indicia of incapacity such as unconsciousness or sleep”<sup>33</sup> before finding incapacity beyond a reasonable doubt.<sup>34</sup> Far from the standard articulated by Justice Fish, courts have described the level of cognitive functioning required to find capacity to consent as “minimal”<sup>35</sup> or “not ... a very significant standard of cognitive awareness”.<sup>36</sup> Accordingly, judges have held that the Crown failed to establish incapacity beyond a reasonable doubt in cases where the evidence showed that the complainant was able to perform basic or routine functions or tasks, such as recall the password to her cell phone<sup>37</sup> or to [appear] to be aware of her surroundings.<sup>38</sup> These indicators do not address the complainant’s ability to understand the nature of the sexual act, the associated risks and consequences, or her right to decline to participate; nor are they probative of her ability to communicate her consent.

Further, courts have a tendency to conflate capacity to consent with consent itself. Once a judge finds a reasonable doubt as to the complainant’s incapacity, that is treated as a reasonable doubt

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95 Can Bar Rev 1 [forthcoming].

<sup>31</sup> *R v. St Laurent* (1993) JQ No 2257, [1993 CanLII 4380 \(QCCA\)](#), at para 98-99.

<sup>32</sup> *Ibid* at 98-99.

<sup>33</sup> Grant and Benedet, *supra* note 25 at 378, *R v Tariq*, 2016 ONCJ 614 at para 93, [*Tariq*]

<sup>34</sup> See *R v Cedeno*, 2005 ONCJ 91, in which the trial judge relied on the complainant’s “insensible condition throughout the evening.”; *R v CP*, 2017 ONCJ 277, in which witnesses observed the complainant lying on the ground motionless or asleep and verbally non-responsive near in time to the assault; *Tariq, supra* note 33, in which the complainant exhibited a “dazed and confused expression”, was “barely responding to her environment” and was “falling asleep or on the verge of passing out”. In other cases, the complainants had lost consciousness for at least a portion of the sexual touching (for example *R v Anderson*, 2010 YKSC 32 at para 134); see also *R v MAP*, 2004 NSCA 27 at para 39, where the NSCA affirmed the trial judge’s decision that an intoxicated complainant lacked the capacity to consent due to “her failure to appreciate the difference between right and wrong, the nature, quality and import of what she was doing and that she did not, at the material time, have an operating mind”, despite this unusual articulation of the test.

<sup>35</sup> *R v Jensen*, (1996) 90 OAC 183 at para 13.

<sup>36</sup> *R v JWM*, [2004] OJ No 1295 at para 56.

<sup>37</sup> *R v Chen*, 2016 ABQB 644 at paras 17, 59, 104.

<sup>38</sup> *R v Heraldson*, 2012 ABCA 147 at para 13, see also *R v Hinds*, 2016 ONSC 95 at para 115, *Tariq, supra* note 33 at paras 86-87.

as to consent itself. She was capable of consenting, and therefore she might have consented.<sup>39</sup> The excessive focus on unconsciousness as the defining point at which someone becomes unable to consent improperly distorts the consent analysis, focusing on consciousness versus unconsciousness as opposed to whether the complainant was able to, and in fact did, give voluntary, ongoing consent.

This is exactly the kind of dangerous reasoning LEAF emphatically seeks to avoid. Total unconsciousness is *not* required for the Court to find that a complainant was incapable of consenting, nor is a level of incapacity approaching unconsciousness the appropriate standard for capacity to consent to sexual activity. Such a legal framework enables predatory behavior towards highly intoxicated women who are not unconscious but who are too intoxicated to understand the nature of the sexual act they are engaging in or that they are entitled to say no. Capacity to consent entails a woman having the ability to assess the risks and consequences of engaging in sexual activity.

#### *Codifying Unconsciousness Risks Perpetuating this Problem*

LEAF recognizes that s. 273.2(b) and s. 153.1(3)(b) keep open the possibility that incapacity could be found for reasons other than unconsciousness, and that it was not the drafters' intention to foreclose a finding of incapacity short of total unconsciousness. However, the changes add nothing new to the legal standard for capacity to consent, but risk being interpreted as Parliament's attempt to clarify the outstanding uncertainty in law regarding incapacity short of unconsciousness. At the very least, we anticipate defence counsel will raise such arguments, which will require the Crown to re-litigate incapacity to consent, at the expense of individual complainants whose lives will be affected by such arguments.

#### *Not a Codification of R v JA*

This draft provision is emphatically not a codification of *JA*. The Court in *JA* did not assess whether or not an unconscious woman can provide consent. It assessed whether a conscious woman can agree to sexual activity that would occur while she is unconscious prior to her becoming unconscious. Chief Justice McLachlin, for the majority, wrote:

[T]he *Code* makes it clear that an individual must be conscious throughout the sexual activity in order to provide the requisite consent. Parliament requires ongoing, conscious consent to ensure that women and men are not the victims of sexual exploitation, and to ensure that individuals engaging in sexual activity are capable of asking their partners to stop at any point.<sup>40</sup>

The significant legal change established by *JA* is not that unconscious women cannot provide

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<sup>39</sup> Al-Rawi Factum, *supra* note 29 at para 13.

<sup>40</sup> *JA*, *supra* note 12 at para 3.

consent, but rather, that any consent obtained at any time prior to the moment at which the sexual activity occurs is not consent for the purposes of the *Criminal Code*. Consent must be **ongoing**, **conscious** and **contemporaneous** with the sexual activity. The proposed codification is less nuanced than *JA* and does not clarify that consent must be ongoing and contemporaneous with the sexual activity. LEAF is very concerned that this part of the Bill can send us backwards—into re-litigating *JA*—and could undermine efforts to establish new standards for findings of incapacity to consent in other contexts.

#### *Capacity to Consent Provisions Would Assist*

LEAF proposes that rather than codifying and potentially restricting the definition of incapacity to consent, Parliament could clarify the law on capacity to consent. For example, Parliament could draw on the standard for capacity articulated by Justice Fish and amend the *Code* to read that a person does not have capacity to consent to sexual contact unless, in the context and circumstances of the case, the complainant:

1. is capable of understanding the sexual nature of the act and the risks associated with that act, and
2. is capable of realizing that he or she may choose to decline participation; and
3. is capable of communicating her voluntary agreement.

Such an approach would directly tackle the problems outlined above that continue to arise in sexual assault law regarding intoxication.

Parliament may also consider including a list of contextual factors to be considered in determining whether or not the complainant has the capacity to consent, such as the level of risk and the nature of the sexual activity. Professors Grant and Benedet advance this approach:

[C]apacity to consent is context-specific. It may, for example, require a higher level of capacity to consent to sex with a stranger in a taxicab than to consent to an intimate partner in a non-abusive relationship. It may also require a higher level of capacity to consent to unprotected sexual intercourse than to a kiss. This situational approach should not be seen as judging the advisability of a woman's decisions under the guise of assessing her capacity. Rather, we are arguing that the risks and consequences of consenting are different in different situations and the ability to understand more serious risks and consequences may in turn require a higher level of capacity....

We would argue that the degree of exploitation on the part of the accused, as well as the risks and consequences of the particular sexual activity for this complainant, should all be relevant to the capacity assessment. The question is simply whether the complainant is able to appreciate the risks and consequences of the activity, and those risks and

consequences will vary with the circumstances of what the activity is and who it is with.<sup>41</sup>

A truly nuanced and feminist approach to codifying incapacity to consent would take into account these contextual factors.

### ***Records and Admissibility Changes***

Third party records are subject to a detailed admissibility hearing as set out in ss. 278.2 – 278.91. These provisions have not changed, except that the defence must give more notice to the Crown and the complainant of their intention to make an application for third party records. Sexual history evidence and records in the accused’s possession are subject to the admissibility hearing set out in s. 278.93-278.94. These provisions almost exactly mirror the repealed ss. 276.1-276.5 (the old sexual history admissibility hearings). The crucial difference is that the complainant now has the right to appear and the right to counsel.

LEAF supports the inclusion of s. 278.92 which limits the accused’s use of the complainant’s personal records that are in his possession, and ss. 278.93-278.94, which give complainants the right to appear with representation at hearings in regards to records in the accused’s possession and sexual history evidence. With that said, LEAF encourages Parliament to use this opportunity to improve the standard for admitting third party records, first by codifying the *Batte* standard<sup>42</sup> for determining when third party records are “likely relevant” under the *Code* and secondly by ensuring that complainants waiving their right to an admissibility hearing for third party records do so in an informed manner, apprised of their right to a hearing.

Funding independent legal advice for sexual assault complainants is critical, so that complainants can be alerted to potential lines of questioning and ways to prepare, discuss potentially relevant documents, and be advised as to how and whether those documents are likely to be relevant to the trial. In 2012, the Senate Standing Committee on Legal and Constitutional Affairs wrote:

[I]n a third party records application, an accused person who is not entitled to disclosure of information is seeking the assistance of the state to set aside the complainant’s privacy interests. In other words, such applications may be viewed as a search and seizure by the state that invokes the complainant’s privacy rights. ...

Given the important rights and interests at play in third party records production proceedings, the committee is of the view that all levels of government and the judiciary need to do more to ensure that complainants’ entitlement to be represented by independent counsel is clearly communicated to them and to provide complainants with adequate information and assistance in order to engage counsel to act on their behalf. We hope that all provinces and territories will aspire to develop effective victims’ services programmes, and to cover the costs associated with representation by independent counsel for complainants in all records applications proceedings, without recourse to a

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<sup>41</sup> Grant and Benedet, *supra* note 25 at 6-7.

<sup>42</sup> *R v Batte*, [2000] OJ No 2186 at para 75.

means test.<sup>43</sup>

### *Records in Accused's Possession*

Regarding records in the accused's possession, LEAF agrees that complainants are better served when they are prepared for cross-examination and not confronted with documentation that they have not had a chance to review. We do not share the concerns of the defence bar regarding the fair trial implications of these provisions, for the following reasons:

1. The provisions do not apply to all the documents in the accused's possession, only those documents in which the complainant has a reasonable expectation of privacy (or documents that contain sexual history evidence.) The fact that the accused possesses the documents, as opposed to a third party, does not reduce the complainant's s. 8 right to privacy in those documents.
2. The provisions do not prevent the accused from relying on documents in their possession in which the complainant has a reasonable expectation of privacy. They simply require the accused to establish that the documents have probative value that outweighs their prejudicial effect, and that the documents are not being used to advance the "twin myths" of sexual assault prohibited in s. 276. The accused's right is balanced against the rights of the complainant and the interests of the proper administration of justice more generally, as is proper in a sexual assault trial. This balancing has been affirmed as constitutional in the context of sexual assault trials in a variety of cases.<sup>44</sup>
3. Further, it would be unfair for a record that triggers the complainant's privacy rights to be admitted as evidence without the Court's full analysis of the factors set out in s. 278. It is crucial that complainants to whom the record relates have standing in such a hearing, as they will be in the best position to inform the Court of the impact of the admission of the record to their own personal privacy and dignity. Should the record be deemed admissible after a hearing, advanced disclosure of the record will have provided the complainant the same degree of fairness that advanced knowledge of questions relating to her sexual history provides in s. 276 hearings, the constitutionality of which has been upheld by the Supreme Court of Canada.<sup>45</sup>
4. Additionally, the outcome of a sexual assault trial has significant consequences for complainants. In cases in which the accused is acquitted, complainants are often labelled as dishonest or vindictive, and can face social consequences and expensive civil suits following the trial. These significant and potentially very expensive repercussions for

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<sup>43</sup> Standing Senate Committee on Legal and Constitutional Affairs, *Statutory Review on the Provisions and Operation of the Act to amend the Criminal Code (production of records in sexual offence proceedings): Final Report* (Ottawa: Senate of Canada, 2012) at 28-29 [Senate Committee Report].

<sup>44</sup> *Mills*, *supra* note 12, see paras 61-68; *R v Barton*, 2017 ABCA 216 at para 262.

<sup>45</sup> *Darrach*, *supra* note 12.

complainants make fairness to the complainant in the conduct of the trial all the more essential.

LEAF's position is that these amendments advance complainants' privacy, dignity, and personal security interests and their right to full protection and benefit of the law under the *Charter*.

### *Funding*

LEAF encourages Parliament to ensure that the criminal trial engages the complainant in proper preparation for sexual assault trials, to minimize the traumatic nature of cross-examination in sexual assault trials. Crown, police, and the Victim Witness Assistance Program should be trained and funded to properly prepare the complainant for trial.

LEAF is pleased that the *Code* now provides the complainant standing and right to counsel in sexual history hearings. However, we underscore the need to provide funding for independent legal counsel for complainants in all admissibility hearings to give meaning to this right.

### *Standard for Producing Third Party Records*

In 2012, the Senate Standing Committee on Legal and Constitutional Affairs conducted a review of the application of the third party records provisions.<sup>46</sup> While the Committee recommendations are extensive, LEAF submits that Parliament should implement two specific recommendations contained in that report.

First, Parliament should implement the Committee's recommendation to codify the standard for "likely relevance" of third party records under s. 278.3(3) of the *Code* established in *R v Batte*. This section requires the accused to establish that a third party record is likely relevant to an issue at trial in order to access that record. However, the application of s. 278 has not done an adequate job restricting access to complainant confidential records. Consistent case law reviews<sup>47</sup> document rates of production to the court as high as 50%, and rates of disclosure to the accused as high as 35%. A national survey of sexual assault centres<sup>48</sup> found that 57% had received defense applications for their records, with 19% indicating that their records had been sought in the previous year.

In *R. v. Batte*, the ONCA established a standard for when a document is likely relevant, writing that the threshold requires the accused to point to "case specific evidence or information" to justify the assertion that the records sought "contain information which is not already available to

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<sup>46</sup> Senate Committee Report, *supra* note 43.

<sup>47</sup> Gotell, 2008 *supra* note 21, Susan McDonald, Siavosh Pashang, Anna Ndegwa, "Third Party Records: The Case Law from 2003-2010," (2016) Victims of Crime Research Digest, Online at <http://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rd7-rr7/p5.html>.

<sup>48</sup> M Beres, B Crow, and L Gotell, "The perils of institutionalization in neoliberal times: Results of a national survey of Canadian sexual assault and rape crisis centres." (2009) 34 Can J of Sociology 135.

the defence or has potential impeachment value.”<sup>49</sup> Professor Lise Gotell has argued that the *Batte* standard requires the Court to engage in a case-specific analysis of why the particular record at issue is relevant to a particular issue at trial, which “reduc[es] the scope for fishing expeditions where the defence counsel would apply for multiple records hoping that they may contain something with impeachment value.”<sup>50</sup> Further, the *Batte* standard can protect against records being accessed on the basis of discriminatory stereotypes that women are irrational, crazy, or that all women who have sought out therapeutic help are unreliable and hysterical. When the accused must make particularized arguments specific to the relevance of a particular document, “possibilities for destabilizing the psychological coherence of complainants and rendering them unreliable on this basis diminish.”<sup>51</sup>

The Senate Committee also found that the more “precise and restricted understanding of likely relevance enhances protection for the privacy and equality rights of complainants” and restricts “so-called “fishing expeditions” by the defence.”<sup>52</sup> LEAF supports the Committee’s recommendation that this standard be codified and implemented nationwide.<sup>53</sup>

Second, Parliament should require a written waiver for complainants who waive their right to privacy in third party records. Subsection 278.2(2) enables complainants and record holders to waive their privacy rights when, “in the case of a record in the possession or control of the prosecutor, the complainant or witness to whom the record relates has expressly waived the application of those sections.” This means that personal and private records can be and often are produced to the defence without going through the rigorous scrutiny required by the regime set out in the *Code*. In *R. v. Mills*, the Court stated that this subsection requires that “the complainant or witness, with knowledge that the legislation protects her privacy interest in the records, indicates by words or conduct that she is relinquishing her privacy right.”<sup>54</sup>

However, there is evidence in the case law that complainants are not being given the opportunity to provide fully informed consent. The Senate Committee wrote:

Complainants may believe that they provided personal records to police and prosecutors in confidence, only to find that those records are then used to try to discredit them after being turned over to the defence pursuant to the Crown’s obligation to disclose relevant information and evidence under *R. v. Stinchcombe*. In this context, witnesses highlighted the need for complainants to make fully informed decisions about the release of personal records to investigators and prosecutors. The committee believes that additional protections are needed to ensure that a complainant’s waiver of the protection offered by the Code regime is fully informed and freely given. In the committee’s view, it would be

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<sup>49</sup> *Batte*, *supra* note 42 at para 75.

<sup>50</sup> Gotell, *supra* note 21 at 139.

<sup>51</sup> *Ibid* at 134.

<sup>52</sup> Senate Committee Report, *supra* note 43 at 21.

<sup>53</sup> *Ibid*.

<sup>54</sup> *Mills*, *supra* note 12 at para 114.

helpful for complainants to receive such an explanation in writing and in plain language.<sup>55</sup>

LEAF supports the Committee's recommendation:

That the Public Prosecution Service of Canada consider the most appropriate way to provide complainants with a standard, written explanation of the waiver provisions found at sections 278.2(2) and 278.3 of the *Criminal Code*, formulated in clear and easy-to-understand language, and that the Public Prosecution Service of Canada share the results of this study with its provincial counterparts. The explanation should also be available in all of the official languages of the Northwest Territories and Nunavut, and in the Aboriginal languages used in the Yukon.<sup>56</sup>

## **Conclusion**

Although LEAF is generally supportive of the changes included in Bill C-51, s. 273.2(a.1) and s. 273.2(b) and s. 153.1(3)(a.1) and s. 153.1(3)(b), add no new protections for sexual assault complainants and risk jeopardizing the law's protection for intoxicated women who are assaulted while incapable of consenting due to intoxication. Parliament's legislative changes should address the real problems emerging from the case law, and require judges to engage in a nuanced assessment of what purpose is served by a doctrine of incapacity and how best to give effect to that purpose.

To the extent that Parliament wishes to codify capacity to consent, LEAF proposes instead that it clarify that no person can consent unless she is capable of making a free and voluntary decision, reasonably informed by the nature of the act and the risks associated with that act, and is aware of her right to decline participation.

Finally, with regard to admissibility hearings for third party records, LEAF emphasizes that any additional procedural requirements in sexual assault hearings must be accompanied by proper funding to ensure sexual assault trials are not stayed due to delay.

All of which is respectfully submitted,

Women's Legal Education and Action Fund (LEAF)

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<sup>55</sup> Senate Committee Report, *supra* note 43 at 16-17.

<sup>56</sup> *Ibid* at 17.