Good afternoon and thank you for inviting me to address you regarding those aspects of Bill C-75 that would affect the CJS response to wife battering and sexual assault.

I am Professor Emerita at the U of Ottawa Faculty of Law where my life’s work has focused on legal responses to men’s violence against women. Although I do not speak on behalf of any group today, whenever I have the opportunity to work with feminist advocates of the independent women’s movement, I take it. This is because the leadership and analysis these women provide is based on decades of frontline experience and strategy confronting VAW, as well as on their unwavering political commitment to the liberation and equality rights of all women. The insights they have to offer are the ones I want to support.

Their work tells us that without attention to the specific conditions of women’s lives and men’s violence, we cannot develop legislation or sound policy approaches. Concepts like “gender-based violence” and neutral language choices like “domestic violence” or “assault” lend the misleading appearance of parity between men and women when it comes to violence. These vague concepts also incapacitate us from developing effective legal strategies to address the massive threat that men’s violence presents to women’s lives, freedoms, and equality rights.

I applaud the fact that the bill aims to improve the CJS response to this violence. For example, the provisions that extend the limitation period for summary conviction offences from 6 to 12 months and that remove the preliminary inquiry for all but those offences carrying a potential life sentence will make it easier for women to report sexual and physical assault and to withstand the brutality of the trial process.

However, the good intentions behind the provisions in C-75 are, to some extent, undermined by the fact that the bill is not anchored in a national VAW strategy or informed by frontline feminist expertise. For example:

1. The bill would now aggravate sentences for crimes of threat or violence based on commission by a former or current “intimate partner,” which includes a dating partner.

Most frontline feminist activists are not proponents of jail. The main concern is conviction: holding men to account for VAW. Nevertheless, it is symbolic when the CJS pays attention to this category of offenders and victims by calling out the abuse of power that is implicated in these crimes.
Further, marking the records of those convicted of these crimes of misogyny offers at least the possibility that the CJS will track, anticipate and deter the threat these men pose to other women.

I note, however, that this amendment does not include those men who obsess about and stalk women who have refused them access to even a dating relationship—men like Basil Borutski who became obsessed with Carol Culleton and hunted her down along with two other women, regardless of the fact that she had never dated him. These men are motivated by the same ideas that infect other men who assault intimate partners—ideas that women belong to them, owe them something, or must be punished for failing to love or to obey them. They can be as dangerous as men who batter their wives or their ex-partners, and the threat they pose to the women they harass should be recorded in CJS records to help assess the risk they pose to other women.

The new definition also fails to respond to the targeting of others—whether new boyfriends, family members or friends—by the perpetrator. Perpetrators may harm or threaten others as part of a strategy to intimidate and control the woman and they may also strike out against those who attempt to protect her. These forms of violence are part of the dynamic of wife battering, and should be similarly treated for the purposes of these amendments.

The fix: amend S 2 of the Code to define “intimate partners” in S 2(3) as including a current or former spouse, common-law partner, dating partner, a person who attempted to date the complainant or victim and any third party who is targeted because of their connection or relationship to an intimate partner.

2. The bill will re-set the default sentencing maximum for summary conviction offences at a 2-year maximum, up from 6 months and in some cases 18 months.

This new maximum will apply to several forms of assault used to prosecute wife assault, namely ss 264.1, 266, 267, 269 (uttering threats, assault tier one, assault tier two and assault causing bodily harm). However, the one summary conviction offence left out in this context is sexual assault s 271, which retains its sentencing maximum of 18 months.

Again, my point is not to advocate for higher jail sentences but rather to point out the inconsistency and failure to “see” sexual assault as a form of wife battering or “intimate partner” or “domestic” violence. We know that the vast majority of sexual assaults are in fact committed in the course of spousal and dating relationships, and so it shows a bifurcated thinking to treat assault and sexual assault differently in terms of the sentencing parameters.

The fix: Use the same sentencing maximum of 2 years less a day for all summary conviction crimes of assault, including sexual assault. Paragraph 271(b) of the Act is replaced by the following:

(b) an offence punishable on summary conviction, and, if the complainant is under the age of 16 years, to a minimum punishment of imprisonment for a term of 90 days.
3. The bill would add choking, suffocating or strangling the victim as a factor that would aggravate the crimes of assault (s 267) and sexual assault (s 272), bringing each crime to tier two in terms of seriousness and exposing the men convicted to a prosecution by indictment and a sentence maximum of 10 years of imprisonment.

This is an important amendment, which I fully support. It relieves the Crown of having to prove that strangulation either caused bodily harm or endangered the life of the complainant, while recognizing these forms of assault and sexual assault as more dangerous, harmful and deserving of more serious sanction.

We know from the research that: strangulation poses heightened risks of brain damage and death; is a significant risk factor for lethality and intimate femicide; and is used by men to terrify and subjugate women, whereby the offender communicates the message that the woman’s life is literally in his hands. It is critically important as well that conviction for this offence will show up on an offender’s record as assault by strangulation, or sexual assault by strangulation so that police, prosecutors and judges are fully aware of the risk the person poses. This addition to the Code follows reforms in US states as well as other jurisdictions in specifically recognizing men’s use of strangulation as requiring denunciation, tracking, and alleviation the burden on the Crown of trying to prove bodily harm on an individual basis.

However, other Code amendments are necessary to breathe life into this one. This is because the law is seemingly unsettled as to whether women can consent to strangulation, particularly in the context of sexual relations. The Supreme Court of Canada was clear in R v Jobidon (1992) that men engaged in consensual fighting cannot consent to the intentional infliction of such harm. The Court was prepared to infer that when a man hits another with force intended to put the other out of action, he intends to cause such harm. An early decision of the Ontario Court of Appeal, R v Welch (1995), accepted this reasoning as applied to sexual assault, emphasizing the objective foreseeability of bodily harm as arising from the degree of violence used by the accused.

Since Welch, some courts have moved away from a simple application of Jobidon and have instead emphasized the need for the Crown to prove that the accused specifically intended to inflict serious bodily harm. Under this regime, while it might still be possible to infer that intent for a fist fight where there is seemingly no other legitimate purpose than to seriously hurt another—if an accused can raise a doubt that strangulation was for sexual pleasure, then he may be acquitted. Somehow, we suspend our disbelief and are prepared to accept the possibility that even women on a first date with a man like Ghomeshi “consent” to strangulation without prior discussion or awareness of the tremendous risks to life and health that strangulation poses.

R v Gardiner, 2018 ABCA 298, is the most recent—and arguably most alarming—decision on this issue. The trial judge had convicted the accused for strangling his female partner in the course of a physical altercation. She had testified that “she and Mr. Gardiner ‘fought consensual’ and by this she said she meant ‘we both fought together... [we] were both equal’,” (per dissenting judgment at para 13), but that she never agreed to be strangled. The trial judge had found she did not in law consent either to the fight or to strangulation. The appeal court called this an error of law (at para 5) and stayed the charges:
The proper question was not whether the complainant consented to each and every application of force during the course of the fight, or whether she "wanted" to be choked or hit. The proper question was whether choking was something that both parties accepted might reasonably occur during the fight. In other words, was choking within the ambit of the consent that the two fighting parties gave, or did it materially change the nature of the fight…. If choking was a reasonable part of the risk that was consented to, it would be immaterial which party choked which.

There is no doubt that “consent” will be raised by those men charged with this new form of assault/sexual assault. In the UK, for example, the campaign We Can’t Consent to This has documented 52 homicides where men who have killed women claimed consent, “a sex game gone wrong.” Two-thirds of these victims died by strangulation. Since 2010, there has been a 90% increase in such defences. Most of the men were ultimately convicted of murder, but 14 were convicted of manslaughter and another 5 were either acquitted or had charges dropped. Of course, those data do not include the far more numerous cases of assault and sexual assault involving strangulation where the victim did not die.

There is no justification for a criminal law policy that fails to prohibit strangulation in unequivocal terms. This failure will have sex discriminatory impacts for women, especially those who experience male violence and those subjected to the violence of prostitution. Bill C-75 therefore also needs a section that anticipates and closes this avenue of defence if we are to succeed in condemning strangulation of women.

The fix: Sections 265(3) and 273.1(2) are amended by adding “where the accused engaged in strangulation, suffocation or choking of the complainant.”

4. Bill C-75 would also add a new reverse onus for bail release in circumstances where the accused is charged with assault or threat of assault against an “intimate partner” and where he has a previous conviction for similar crimes of violence or threat against an “IP.” It also makes prior conviction for IP violence a consideration for bail and the terms of release.

By putting the onus on the accused in such cases to bear the burden of proof and show cause why he is safe to release, this clause would require justices presiding over bail hearings to engage in a searching inquiry as to the risk the accused presents to the woman he is charged with assaulting or threatening. This is an important reform, because a study commissioned by the DOJ showed that DV offenders in fact breach their conditions while on bail at a rate of around 50%, and 50% of those are actually violent breaches. See Adamira Tijerino & Charlotte Fraser, “Exploring Differences between Those Who Violate Bail and Those Who Successfully Complete Bail Among a Sample of Accused Persons at Domestic Court” (26 November 2010) obtained through access to information and published by Dean Beeby “Study: Assault suspects on bail likely to be violent” The Chronicle Herald (6 November 2011) [https://globalnews.ca/news/174136/justice-department-study-says-women-batterers-on-bail-batter-again-3]. This means that DV offenders in fact are high risk releases, particularly for their partners and children. The reverse onus may give battered women precious time to escape without looking over their shoulders.
However, the proposed reverse onus only applies for those previously convicted of an offence in relation to an IP. This therefore excludes those men found guilty but granted an absolute or conditional discharge by the sentencing judge.

We see very few convictions for VAW in the criminal courts, for the reasons we are familiar with: women do not report for many good reasons; women’s reports are not properly investigated or pursued; women withdraw from prosecution; men’s excuses and defences prevail….In the end, even if men plead guilty or are found guilty, discharges are not uncommon sanctions for men guilty of assaulting their female partners, even for very serious assaults.

The reverse onus is framed too narrowly here. It should extend to all those found guilty of these crimes.

The fix: Paragraph 515(6)(c) of the Act is replaced by the following:

(b.1) with an offence in the commission of which violence was allegedly used, threatened or attempted against their intimate partner, and the accused has been previously found guilty of an offence in the commission of which violence was used, threatened or attempted against any intimate partner of theirs.

5. Finally, the bill would allow judges to increase the maximum sentence for those previously convicted of forms of intimate partner assault who have been convicted again for such crimes. I don’t see this provision as particularly helpful to women.

It will be a rare day when a judge invokes this provision, given how low sentences are already for these offences and given that the maximum sentence is almost never even approached in current practice.