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**Submission in relation to the consultation on a Criminal
Case Review Commission for Canada**

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I. Introduction

The Canadian Civil Liberties Association (“CCLA”) is an independent, national, nongovernmental organization that was founded in 1964 with a mandate to defend and foster the civil liberties, human rights, and democratic freedoms of all people across Canada. Our work encompasses advocacy, research, and litigation related to the criminal justice system, equality rights, privacy rights, and fundamental constitutional freedoms.

The CCLA strongly supports the creation of an independent Criminal Case Review Commission (“CCRC”) and appreciates the opportunity to provide submissions to this important consultation.

Community advocates and justice system actors have been calling for stronger mechanisms to remedy wrongful convictions for decades. Multiple public inquiries into wrongful convictions, including those of Guy Paul Morin and Thomas Sophonow, have addressed the need for an independent commission to prevent gross miscarriages of justice.¹ Such an institution, if properly constituted and resourced, would significantly strengthen Canada’s justice system and assist in remedying some of the worst miscarriages of justice in this country.

CCLA’s submissions on the detailed consultation questions in the discussion document are guided by what we view as the overarching goal: establishing an institution that fairly and effectively pursues the mandate of identifying and assisting in remedying miscarriages of justice.

There are multiple dimensions to both fairness and efficacy.

Fairness in the Commission’s work requires that the Commission be positioned to provide an independent assessment of the possible failings of the criminal justice system through structural guarantees of independence and impartiality. Fairness also requires that individuals have equal access to the commission, and that the commission’s work and processes are actively informed by the larger historical and ongoing patterns of discrimination in the criminal justice system. Particular attention should be given to ensuring that the populations that are over-represented in the criminal justice system, including Indigenous and Black persons, individuals living with mental health and addictions challenges, youth, and those with a history of trauma and victimization, have equal access to the criminal case review process.

The Commission must also be structured so as to maximize its efficacy in pursuing its mandate. Effective work to remedy wrongful convictions informs our positions with respect to the proposed scope of the commission, as well as our recommendations that the work be both individual and systemic, remedial and preventive. Systemic discrimination is also relevant in this respect. An effective CCRC must not only recognize the impact of systemic discrimination; it must be structured in such a way that it actively works to remedy this injustice. A meaningful contribution to a fairer criminal justice system should actively seek to ensure substantive equality by accounting

¹ James Lockyer, “The Need for a Criminal Cases Review Commission in Canada for the Wrongly Convicted – For Consideration by the Liberal Party of Canada: Book of Materials” (October 2015) Innocence Canada, *online*: <<https://www.innocencecanada.com/assets/Uploads/PDFs/James-Lockyer-prepares-letter-to-the-Prime-Minister.pdf>>.

for and confronting discrimination in the criminal justice system, not only through its own internal processes but also in the substantive work it undertakes.

Guided by these principles, the CCLA makes the following 17 recommendations, each of which are explained in further detail below:

Recommendation 1: Commissioners should be appointed via an arms-length process and should possess expertise in the criminal justice system; the source of that expertise, however, should not be confined to formal legal training, and priority should be given to individuals that have a particular understanding of the communities that are over-represented in the criminal justice system.

Recommendation 2: The Commission should be constituted through stand-alone legislation

Recommendation 3: The Commission should have both an advisory board and scheduled, public-facing reviews

Recommendation 4: The Commission should have the mandate to consider serious and less serious cases, as well as applications against sentence

Recommendation 5: The Commission should retain jurisdiction to hear applications about historical cases

Recommendation 6: The Commission should have the ability to engage in systemic reform activities to prevent miscarriages of justice

Recommendation 7: Funding for legal representation should not rely on existing legal aid or private funding

Recommendation 8: Commission outreach, services, and investigative processes must be developed with reference to the unique characteristics of criminalized populations and structured so as to ensure equality of access

Recommendation 9: Key case review thresholds and criteria, including screening and investigative thresholds, should be purposive and clearly set out in statute

Recommendation 10: The Commission should have statutory powers to compel production from public and private entities and to compel a witness to answer questions, with certain safeguards

Recommendation 11: Some modifications should be made to existing jurisprudence to ensure that the Court of Appeal can fully consider a referral from the Commission

Recommendation 12: The court referral test should not incorporate a broad “interests of justice” test for referral

Recommendation 13: Statutory provisions should provide for appeals to the full Commission and/or hearings by the Commission

Recommendation 14: The Commission's decisions should be required to be made public, subject to anonymity and privacy safeguards appropriate to individual cases

Recommendation 15: The Commission should not be directly engaged in pardon recommendations or decision-making

Recommendation 16: There should be a separate legislative scheme for compensation and reintegration. Regardless of whether a statutory scheme for compensation is established, individuals should retain the option to initiate a civil suit to claim compensation and other remedies flowing from wrongful convictions

Recommendation 17: There should be statutory language affirming the importance of abiding by the equality guarantees contained in the *Charter*, the *Canadian Human Rights Act* and applicable international law, as well as an explicit recognition of those groups that are over-represented in the criminal justice system.

II. Recommendations regarding the structure of the Commission

Recommendation 1: Commissioners should be appointed via an arms-length process and should possess expertise in the criminal justice system; the source of that expertise, however, should not be confined to formal legal training, and priority should be given to individuals that have a particular understanding of the communities that are over-represented in the criminal justice system.

Reviewing complex criminal case histories and evidence is facilitated by having commissioners with significant experience in criminal justice. As such, CCLA supports the implementation of a Criminal Justice Expertise Model, although we would urge a broad definition of 'expertise', and prioritize individuals who also have the expertise set out in Option 2 (vulnerable people expertise and cultural competency).

Expertise in the criminal justice system can take many forms and be gained in many ways. In the United Kingdom, the CCRC Commissioners are not required to have a legal background to be considered for the role:² "only half of the Commission's members have to be legally qualified and only two-third require knowledge or experience in criminal justice".³ Many individuals gain relevant criminal justice expertise through lived experience, professional work in a variety of

² UK Cabinet Office, "HM Government Public Appointments" (2021), online: *UK Cabinet Office* <<https://publicappointments.cabinetoffice.gov.uk/appointment/commissioners-of-the-criminal-cases-review-commission/>>.

³ Narissa Somji, "A Comparative Study of the Post-Conviction Review Process in Canada and the United Kingdom" (2012) 58:2 Crim L Q 137 at 143.

social service sectors, or by otherwise assisting populations that are frequently criminalized. All forms of expertise with the criminal justice system should be recognized and a broad range of individuals should be eligible for possible appointment.

Knowledge of systemic discrimination and the realities faced by marginalized communities is also crucial to understanding the broader context that surrounds particular cases as well as the services and processes that might be most appropriate and accessible when engaging with criminalized individuals. As much as possible, commissioners should have an in-depth understanding of vulnerable populations that are frequently criminalized, including but not limited to Indigenous and racialized persons, youth, individuals with mental health needs, the precariously housed, and those living with addictions. This insight may come from personal experience as a member of a particular community or communities, or professional experience having worked alongside and with these populations.

Specific cases, or groups of cases, may require particular cultural, medical, or technical expertise (eg. reviews of cases with questionable expert evidence; reviews of false confessions within particular communities/cultures; reviews of cases involving individuals with developmental disabilities or cognitive deficits). The Commission should therefore have the ability to respond to the expertise required in specific cases, or in specific groups of cases, by appointing, as required, “qualified persons to assist it by giving advice on cultural, scientific, technical or other matters involving particular expertise.”

Prioritizing the inclusion of a range of criminal justice ‘stakeholders’, as envisioned in option 3 in the consultation document is, in our view, not appropriate. The adversarial approach, which we feel is more likely to be replicated under this structure, is not conducive to an accessible wrongful conviction review process. The inquiry into David Milgaard’s wrongful conviction recommended a “proactive and inquisitorial approach on the part of legal counsel for the Minister” rather than a replication of the adversarial roles in a more traditional criminal justice forum.⁴ Similarly, Innocence Canada’s roundtable discussion reported multiple experts pushing for an approach whereby applications in an inquisitorial approach are reviewed “from a standpoint of potential innocence”.⁵ We echo these recommendations.

Finally, CCLA would like to emphasize the importance of establishing an appointment process that is arms-length from the government and is similarly designed to avoid the replication of the “criminal justice stakeholder” model. An independent appointment committee should be established and should be primarily composed of those with a similar expertise to the Commissioners themselves.

⁴ James Lockyer, “The Need for a Criminal Cases Review Commission in Canada for the Wrongly Convicted – For Consideration by the Liberal Party of Canada: Book of Materials” (October 2015) Innocence Canada, *online*: <<https://www.innocencecanada.com/assets/Uploads/PDFs/James-Lockyer-prepares-letter-to-the-Prime-Minister.pdf>> at 89.

⁵ Innocence Canada, “Report from the Wrongful Conviction Round Table: The Future of Innocence Work as Part of the Federal Criminal Justice System Review” (February 22 2017) Submission to the Hon Minister of Justice Jody Wilson-Raybould MP *online* (pdf): <<https://www.innocencecanada.com/assets/Uploads/PDFs/Wrongful-Conviction-Round-Table-Report.pdf>> at 7.

Recommendation 2: The Commission should be constituted through stand-alone legislation

As mentioned above, an effective Commission should not approach its work from an adversarial perspective. It should also be able to operate at arms-length from the justice system, as its role is to search for critical errors and failings at all stages of the criminal justice process. Its purpose and operation should be somewhat distinct from the standard criminal justice process and appeal structure. This distinct purpose and arms-length operation should be reflected in the structure of the constituting legislation.

Recommendation 3: The Commission should have both an advisory board and scheduled, public-facing reviews

CCLA submits that a CCRC advisory board and scheduled parliamentary reviews can serve distinct, complimentary functions.

The purpose of the advisory board should be to support the Commission in achieving its mandate of identifying and addressing possible miscarriages of justice in an equitable and accessible manner. The advisory board can fulfill this function through the provision of ongoing, independent advice and review. These precise nature of these advisory and review activities should not be overly constrained, and should include the possibility of both confidential advice and public-facing statements or reports.

As envisioned by the consultation document, the advisory board should possess expertise on improving access to justice and preventing discrimination. It should assist the commission to ensure that it functions in an accessible and equitable manner help facilitate close ties to different communities across the country. This networking function may be particularly important if the commission is physically located in one region. The advisory board may also draw the commission's attention to new relevant developments in the criminal justice system, or areas in which the commission may want to proactively work due to broader concerns about systemic discrimination and access to justice in the criminal justice system.

In addition to an advisory body, CCLA submits that there should also be a five-year parliamentary review. This review would be able to examine a broad range of issues including the sufficiency of the commission's funding. The advisory body should be given the ability to participate in this review should it wish, and should be free to comment on funding or any other issue it views as appropriate and within its mandate.

III. Recommendations regarding the mandate of the Commission

Recommendation 4: The Commission should have the mandate to consider serious and less serious cases, as well as applications against sentence

CCLA strongly supports a Commission that has the mandate to consider a wide range of cases, including 'less serious' convictions. Many convictions for less serious offences have devastating long-term consequences for people. The existence of a criminal record can present significant and

persistent barriers to accessing housing, employment, education, and volunteer opportunities.⁶ The collateral consequences of a conviction also frequently extend to individuals' personal lives; the reputational and practical fall out from a criminal conviction will often disrupt personal relationships with friends, family and loved ones, and the broader community.⁷

The collateral consequences of a conviction can also have significant impacts in other areas of law. Non-citizens will often face deportation as a result of a criminal conviction. Parents wrongfully convicted of crimes involving children risk losing custody to another guardian, or having their children taken into state care.⁸ These individuals, all of whom will have suffered serious life-altering consequences that extend far beyond the specific sentence administered by the criminal justice system, should be given the opportunity to access the Commission.

The commission should also be able to consider applications against sentence.

The experience in the United Kingdom has been that sentence modification applications are very successful at the Court of Appeal, and as of 2009 the Court had modified almost nine out of ten of the sentences referred to it by the Commission.⁹ This suggests that there are real and substantial miscarriages of justice that occur during the sentencing process; there must be some recourse for these cases.

One class of cases that would benefit from potential sentence modification are those where there is new relevant evidence that was not considered at the time of sentencing. This is the basis for the sentence review function of the CCRC in the United Kingdom. A few examples of recent sentence modifications referred to the UK Court of Appeal serves to demonstrate the nature of the injustices that could be remedied. In one recent case the accused had been convicted of "one count of conspiracy to supply the class B drug mephedrone and three counts of supplying mephedrone."¹⁰ Upon review, the UK CCRC found that his ten-year sentence for the conspiracy would be deemed 'manifestly excessive' in light of "new evidence of material non-disclosure".¹¹ In another instance, the UK CCRC referred a life sentence of a minor, C, "based on new medical evidence relating to C's mental state at the time of the offence which in the Commission's view means there is a real

⁶ Samantha McAleese & Catherine Latimer, "Reforming the Criminal Records Act" (2017) at 10, online (pdf): *John Howard Society* <<https://johnhoward.ca/wp-content/uploads/2017/04/Criminal-Records-Act-Reform-Final.pdf>>.

⁷ Canadian Bar Association, "Collateral Consequences of Criminal Convictions: Considerations for Lawyers" (2017) at 33, online (pdf): *CBA* <https://www.cba.org/CBAMediaLibrary/cba_na/PDFs/Sections/CollateralConsequencesWebAccessible.pdf>.

⁸ *Inquiry into Pediatric Forensic Pathology in Ontario: Final Report, Vol 1*, Executive Summary, (Toronto, Ontario Ministry of the Attorney General 2008) online (pdf):

<http://www.attorneygeneral.jus.gov.on.ca/inquiries/goudge/report/v1_en_pdf/Vol_1_Eng_ES.pdf>. Notably, the convictions secured by the faulty testimonies of Dr. Charles Smith included a less serious offence. Sherry Sherrett-Robinson was convicted of infanticide. The sentence for this crime was 1 year in prison. Per North Carolina's classification of offences this could fall in its Class F tier of felony offences aligning with similar sentencing range. See North Carolina, "Felony Punishment Chart" (2013) online (pdf) <https://www.nccourts.gov/assets/documents/publications/FelonyChart_1013MaxChart.pdf?JOZLdcExFM1TmlzHLiPcH7dUcMjQ8Ls7>.

⁹ Lissa Griffin, "Correcting injustice: Studying how the United Kingdom and the United States review claims of innocence" (2009) 41:1 U Toledo L Rev 107 at 108.

¹⁰ UK CCRC, "Commission refers the sentence of Amin Kaveh to the Court of Appeal" (21 November 2019) online: *CCRC* <<https://ccrc.gov.uk/press-releases/commission-refers-the-sentence-of-amin-kaveh-to-the-court-of-appeal/>>.

¹¹ *Ibid.*

possibility the Court of Appeal will conclude that a discretionary life sentence was wrong in principle and that a restricted hospital order would have been, and remains, the most appropriate sentence”.¹²

In addition to sentencing reviews based on new evidence, the Commission should also be able to review cases in light of new legal developments that occurred after an individual was sentenced. The *Canadian Charter of Rights and Freedoms* (“*Charter*”) guarantees that a person charged with an offence has the right, “if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.”¹³ A sentence review function could support the intent of this *Charter* provision by extending this principle to those individuals who have already been sentenced, allowing a court to re-examine their sentence in light of any subsequent legal developments.

Significant new developments in case law should also be taken into account. Indigenous persons sentenced prior to the Supreme Court’s guidance in *Gladue*, for example, had no ability to have the fairness of their sentences revisited in light of the Supreme Court’s decision. Courts may also find that certain provisions of the *Criminal Code* – including certain sentencing provisions – are unconstitutional and of no force and effect. Individuals who were previously convicted and sentenced under provisions that are later recognized as unconstitutional should also be able to apply for a sentence review.

Finally, the Commission’s mandate regarding sentence review should allow for the Commission to review the impact of significant, unexpected hardship that an individual has experienced while serving their sentence. The standard sentencing process regularly incorporates enhanced sentencing credit for individuals who experience unacceptably harsh conditions in pre-trial detention. While these same unacceptable conditions of confinement can occur after sentencing, there is currently no clear mechanism to review the fairness of an individual’s sentence in light of the actual experience of sentenced imprisonment.

This is not a novel recommendation. The Honourable Louise Arbour, in the report of the Commission of Inquiry into Certain Events at the Prison for Women in Kingston, recommended that courts be authorized to order sentence reductions or, in the case of a mandatory sentence, earlier release if a court found that “illegalities, gross mismanagement or unfairness in the administration of a sentence renders the sentence harsher than that imposed by the court.”¹⁴ More recently, in January 2021 the Correctional Investigator of Canada Ivan Zinger suggested that sentence reductions would be an appropriate response to the harsh conditions that have prevailed during the COVID-19 pandemic:

The bottom line is that inmates in this country, because of COVID, are serving much, much harsher sentences in terms of conditions of confinement. Most of them have been isolated,

¹² UK CCRC, “Commission refers the life sentence in the attempted murder of case of C, a minor“ (28 January 2020) online: <<https://ccrc.gov.uk/press-releases/commission-refers-the-life-sentence-in-the-attempted-murder-of-case-of-c-a-minor/>>

¹³ *Canadian Charter of Rights and Freedoms*, s 11 (i), Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 91(24).

¹⁴ Ten-Year Status Report on Women’s Corrections 1996-2006, Annex A Rec. 8(b) (2006, *Correctional Service of Canada*) online: *Correctional Service of Canada* <https://www.csc-scc.gc.ca/publications/fsw/wos24/annex_A_7-10-eng.shtml>.

and locked up in their cells for an inordinate amount of time. They have no opportunities to work on their correctional plan to try to [move to] lower security, or get early parole, because there's simply no programs and services provided ... and that means they are going to also serve longer sentences ... The judges who sentenced those individuals to prison did not consider that in their sentences.¹⁵

Presumably due in part to the absence of a reliable independent process to systematically pursue this remedy, a month later the Office of the Correctional Investigator formally recommended that “in recognition of the undue hardship, unusual circumstances and extraordinary measures imposed by the COVID-19 pandemic on the federal inmate population, CSC [should] develop and fund a plan that significantly shifts program access and delivery to the community rather than prison.”¹⁶ Clearly remedying this type of substantial injustice would more appropriately rest with an independent institution such as the CCRC.

Recommendation 5: The Commission should retain jurisdiction to hear applications about historical cases

While the Commission's primary focus should be reviewing applications from living persons, the CCLA does support the Commission retaining jurisdiction to hear applications concerning historical convictions and sentences.

The history of Canada's criminal justice system is rife with examples of the criminal law having been used to repress and discriminate against marginalized communities. Canada has a long history of criminalizing Indigenous peoples' cultural practices, including prohibitions targeting traditional dance ceremonies, powwows, and potlaches.¹⁷ Homosexuality was only decriminalized in Canada in 1969¹⁸ equality for same-sex couples not ascertained until 2005.¹⁹ Throughout history the Canadian legal response to sex work has been riddled with discrimination based on class, race, gender, and other markers of identity.²⁰ The consequences of these laws and the other discriminatory, racist, and colonial practices that accompanied them did not end when the specific laws were repealed. Retaining the mandate to address historic case would assist in remedying prior discriminatory uses of the criminal justice system and may contribute to broader societal imperatives such as reconciliation with Indigenous peoples.

¹⁵ Samantha Wright Allen, “Prisoners owed ‘remedy’ for harsh conditions in prisons amid COVID, says watchdog” (January 15, 2021) online: *Hill Times* <<https://www.hilltimes.com/2021/01/15/prisoners-owed-remedy-for-harsh-conditions-in-prisons-amid-covid-says-watchdog/278891>>.

¹⁶ Office of the Correctional Investigator, “Correctional Investigator Releases Third Status Update on COVID-19 in Federal Corrections” (February 23, 2021), online: <<https://www.oci-bec.gc.ca/cnt/comm/press/press20210223-eng.aspx>>.

¹⁷ Wendy Moss & Elaine Gardner-O'Toole, “Aboriginal People: History of Discriminatory Laws” (Ottawa: Library of Parliament, Research Branch, 1991) online: <[https://publications.gc.ca/Collection-R/LoPBdP/BP/bp175-e.htm#CRIMINAL%20LAW\(txt\)](https://publications.gc.ca/Collection-R/LoPBdP/BP/bp175-e.htm#CRIMINAL%20LAW(txt))>.

¹⁸ David Kimmel & Daniel Robinson, “Sex, Crime, Pathology: Homosexuality and Criminal Code Reform in Canada, 1949–1969” (2001) 16:1 *Can J L & Soc* 147-165 (note that scholarly debate continues as to whether the 1969 legal changes constituted full or partial decriminalization).

¹⁹ *Civil Marriage Act* S.C. 2005, c. 33.

²⁰ Constance Backhouse, “Nineteenth-Century Canadian Prostitution Law: Reflection of a Discriminatory Society” (1985) 18:36 *Soc Hist* 387.

Retaining the ability to examine historical cases would also support the truth-finding function of the justice system. Wrongful convictions mean not only that the wrong person was found guilty and punished, but that the true perpetrator of a crime has not been identified. Officially acknowledging a wrongful conviction, even if the convicted person has died, may trigger investigators to re-open a case and increase the likelihood that the correct perpetrator will be identified and brought to justice.

Recommendation 6: The Commission should have the ability to engage in systemic reform activities to prevent miscarriages of justice

A review commission’s mandate should be broad enough to permit it to undertake systemic investigations and reports. This may take the form of partnering in or conducting research, enhancing data collection, investigating systemic issues, and issuing systemic recommendations.

Limiting the Commission’s mandate to individual case-specific work would significantly undermine the Commission’s effectiveness in redressing and preventing miscarriages of justice. Many issues that lead to wrongful convictions are systemic in nature. Some of the most notorious causes of wrongful convictions have revealed systemic issues that extend far beyond the individual case that was considered. Some investigative techniques or expert analyses, even though discredited, may continue to be used in the criminal justice system.²¹ Issues of systemic discrimination may also be particularly relevant to the commission’s work on sentence reviews. Preventing the Commission from approaching these issues in a systemic way by providing education on themes that emerge from individual cases, undertaking systemic investigations, issuing systemic reports and broad reform recommendations would significantly hamper the Commission’s ability to effectively address significant and ongoing miscarriages of justice.

We recognize that concerns have been expressed about the impact that a systemic mandate might have on a body that also has a quasi-judicial nature. There are, however, numerous examples of organizations that exercise quasi-judicial functions under broad mandates that permit them to address both individual cases and systemic issues. The UK CCRC, for example, supports research projects. Some of the topics have included research on modern slavery, digital evidence, expert testimony and its impacts in the courtroom.²² Other Canadian bodies that have an adjudicatory role also have systemic reporting responsibilities. The Office of the Independent Police Review Director, for example, has a broad mandate to both investigate individual complaints as well as engage in systemic reports and issue systemic recommendations.²³ The Office of the Correctional Investigator also receives and adjudicates complaints from federal prisoners while playing a substantial systemic reporting and advocacy role.²⁴ Privacy commissioners also regularly

²¹ See, for example, Timothy E Moore, and Lindsay C Fitzsimmons, “Justice imperiled: False confessions and the Reid technique” (2011) 57 *Crim LQ* 509.

²² UK CCRC, “CCRC invites proposals for new justice research projects” (October 22, 2020) online: *UK CCRC* < <https://ccrc.gov.uk/press-releases/ccrc-invites-proposals-for-new-justice-research-projects/>>.

²³ OIPRD, “Systemic Reviews” (2021) online: OIPRD < <https://www.oiprd.on.ca/news/systemic-reviews/>>.

²⁴ Government of Canada, “Reports” (2021) online: Office of the Correctional Investigator < <https://www.oci-bec.gc.ca/cnt/rpt/index-eng.aspx>>.

adjudicate complaints and issue systemic reports and policy guidance.²⁵ The access that these institutions have to government documents and evidence, and the experience their staff gain through the individual case investigations, allow these bodies to take a unique and extremely important role in systemic reform efforts. The impact of systemic reports from these bodies is very distinct from the impact of individual complaints adjudications. It would be a significant loss to prevent a CCRC from engaging in similar activities.

As with other quasi-judicial bodies that possess a systemic mandate, the Commission would need to be mindful of the imperative to maintain their independence and quasi-judicial function. There are advocacy activities that civil society groups can take that would not be appropriate for these types of bodies with adjudicative functions. These challenges, however, are manageable and there are many existing organizations that successfully undertake both of these roles.

Recommendation 7: Funding for legal representation should not rely on existing legal aid or private funding

The CCLA recommends that funding for legal assistance should not rely on provincial and territorial legal aid. Cuts to legal aid in specific jurisdictions may lead to an increase in unrepresented accused, and therefore miscarriages of justice, in specific jurisdictions. If CCRC funding were to also rely on legal aid, these same cuts would similarly place the efficacy of this redress mechanism at risk in the very jurisdictions where it is needed the most.

We would also like to draw attention to the possible conflicts of interest that may arise when internal staff assist with filing applications. If caseworkers or staff internal to the Commission are used to assist individuals there would need to be significant measures taken to ensure that these staff truly enable access to the review mechanism rather than serve as gatekeepers. An arms-length relationship would need to be established whereby the staff charged with assisting individuals are seen as their advocates and are insulated from any institutional pressures to prematurely ‘weed out’ unmeritorious cases or assist in maintaining manageable caseloads for investigators, other commission staff, and the Commissioners themselves.

Recommendation 8: Commission outreach, services, and investigative processes must be developed with reference to the unique characteristics of criminalized populations and structured so as to ensure equality of access

As discussed in the introduction, the Commission’s work must recognize and grapple with the systemic and direct discrimination that exists in the broader criminal justice system. Its services and procedures must also be attuned to the particular circumstances frequently faced by criminalized individuals.

Generations of discrimination and colonialism are now reflected in the demographic characteristics of those filling our prisons and subject to our criminal justice system more broadly. Although Indigenous people comprise 4.1% of the Canadian population, they comprised 28% of prisoners

²⁵ OPC, “OPC Actions and decisions” (2021) online: Office of the Privacy Commissioner of Canada < <https://www.priv.gc.ca/en/opc-actions-and-decisions/> > (note: links to research, reports to parliament, consultation documents and more).

in federal institutions in 2017-2018.²⁶ Indigenous women account for roughly 40% of the female federal prison population.²⁷ Black persons are also drastically over-represented in our criminal justice system. Between 2005 and 2015 the number of Black federal prisoners increased 69 percent.²⁸

Other characteristics of the criminalized population should directly inform the Commission's service provision. Many of those behind bars are young.²⁹ 73% of federally incarcerated men and 79% of federally incarcerated women meet the criteria for a mental disorder.³⁰ Over half of prisoners in Canada have experienced some form of abuse in childhood.³¹ And in 2016, the Office of the Correctional Investigator reported that "approximately 75% of offenders admitted to federal custody on the first sentence between April 2008 and March 2013 reported that they did not have a high school diploma."³² Individuals who are incarcerated also frequently experience significant practical barriers when attempting to access legal services, including a fear of reprisal.

The Commission's processes must be structured in a way that both recognizes and seeks to proactively remedy the systemic barriers and discrimination faced by criminalized individuals. Concretely, CCLA recommends the following measures be implemented:

- Inadequate interpretation can give rise to significant miscarriages of justice and lead to discriminatory outcomes. Individuals must be given the opportunity to receive Commission services in their primary language, as is – or should be – the case during criminal trials and other steps of the criminal justice process.
- Commission processes should be trauma-informed and culturally appropriate.
- The Commission must provide sufficient support from staff with expertise to ensure that individuals that might face barriers in accessing services due to low levels of literacy, mental health challenges, or lack of legal representation or other services are able to equitably access the Commission's services.
- The Commission should have the power to initiate investigations of its own initiative as well as provide proactive in-person outreach and services to potential applicants. This will ensure those facing the greatest barriers to accessing justice will not automatically be excluded from the Commission's work.

²⁶ See Scott Clark, "Overrepresentation of Indigenous People in the Canadian Criminal Justice System" (2019) online: *Department of Justice Canada* <<https://www.justice.gc.ca/eng/rp-pr/jr/oip-cjs/oip-cjs-en.pdf>> at 8.

²⁷ See National Inquiry into Missing and Murdered Indigenous Women and Girls, "Reclaiming Power and Place" (2019) [Vol 1a] online (pdf): <https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a-1.pdf> at 635.

²⁸ See Robyn Maynard, *Policing Black Lives* (Black Point, Nova Scotia: Fernwood Publishing, 2017) at 211.

²⁹ Jamil Malakieh, "Adult and youth correctional statistics in Canada, 2018/2019" (2020) online: *Statistics Canada* <<https://www150.statcan.gc.ca/n1/pub/85-002-x/2020001/article/00016-eng.htm>>.

³⁰ Mental Health Commission Canada, "Mental Health and the Criminal Justice System" "What We Heard" Evidence Summary Report" (2020) online (pdf): *Health Canada* <https://www.mentalhealthcommission.ca/sites/default/files/2020-08/mental_health_and_the_law_evidence_summary_report_eng.pdf> at 1 (note: for men 73% met the criteria for one or more).

³¹ Claire Bodkin et al, "History of Childhood Abuse in Populations Incarcerated in Canada: A Systematic Review and Meta-Analysis" (2019) 109: 3 *Am J Pub H* e-1.

³² Howard Sapers, "Annual Report of the Office of the Correctional Investigator 2015-2016" (2016) online (pdf): *The Correctional Investigator Canada* <<https://www.oci-bec.gc.ca/cnt/rpt/pdf/annrpt/annrpt20152016-eng.pdf>> at 51.

IV. Recommendations regarding Commission decision-making

Recommendation 9: Key case review thresholds and criteria, including screening and investigative thresholds, should be purposive and clearly set out in statute

It is important that key steps in the case review process, including the threshold for ‘screening out’ cases before significant review or investigation, be set out in legislation.

Without strong statutory criteria, gatekeeping decisions often lack transparency and are difficult to challenge. Screening out mechanisms, if used extensively, are also likely to disproportionately impact already vulnerable populations including unrepresented applicants, those with low levels of literacy, and individuals with disabilities. Such processes can therefore substantially contribute to systemic discrimination. Proactive assistance should be provided to vulnerable applicants to ensure that their cases are not screened out due to their personal circumstances rather than the merits of their application. Finally, it can be a temptation for under-resourced institutions to use more restrictive screening or referral criteria in order to achieve manageable caseloads. While this is in some ways an understandable response, it is not a desirable outcome and should be guarded against by setting clear purposive legislative thresholds.

It is also important that these thresholds be set purposively, with the goal of identifying as many miscarriages of justice as possible. The statutory criteria for determining when a case can be ‘screened out’, for example, should be very narrow and limited to clear cases of frivolous or vexatious applications.

Recommendation 10: The Commission should have statutory powers to compel production from public and private entities and to compel a witness to answer questions, with certain safeguards

Canada should follow the model of all other existing CCRCs and provide the Commission with broad powers of investigations. This should include the power to compel witnesses and the ability to go to court to compel production. Particular attention must be paid to attenuate the possible collateral consequences of compelling witnesses to answer questions. Protections should be afforded to ensure that compelled documents and statements are not admissible in subsequent legal proceedings (other than those that stem directly from the Commission’s decision to refer a case back to the Court), and that publication bans on witness identities are available. Typical legal privileges, including solicitor-client privilege, should also be recognized and protected as they would be in a standard criminal proceeding.

Recommendation 11: Some modifications should be made to existing jurisprudence to ensure that the Court of Appeal can fully consider a referral from the Commission

While CCLA believes that the existing grounds of appeal from conviction or sentence are generally adequate, some modifications should be made to ensure that Courts of Appeal can fully consider all the information and considerations that led the Commission to refer a case back to the Court. The criteria set out in the Supreme Court case *Palmer v The Queen*, for example, limit the

admissibility of new evidence to that which is “relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial”, “credible in the sense that it is reasonably capable of belief” and evidence which “if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result”.³³ Furthermore, *Palmer* states “evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases”.³⁴ If this limit is imposed in cases referred by the Commission it may result in new evidence that was considered by the Commission being ruled inadmissible. This situation should be avoided by ensuring that all new evidence considered by the Commission is admissible at the Court of Appeal upon referral from the Commission. Similarly, to the extent that the Commission identifies broader systemic issues in the justice system or other novel substantive analysis in its referral decision, these arguments should also be deemed relevant – in the sense that they should form part of the Court’s considerations – at the Court of Appeal.

Serious consideration should also be given to narrowing the Court of Appeal’s discretion to dismiss an appeal under s. 686(1)(b) of the *Criminal Code* where the application of this section would inappropriately undermine the efficacy and expertise of the Commission. Subsections 686(1)(b)(i), (iii) and (iv) in particular set out grounds for dismissal that may not be appropriate for Commission-referred cases. Significant deference should be shown to the Commission’s expert determination of the relationship between a particular alleged error, a purported new piece of evidence or a new jurisprudential development, and the overall finding of prejudice or miscarriage of justice. Permitting the Court of Appeal broad scope to dismiss an appeal because, although the facts considered by the Commission were affirmed, the Court finds that there was another proper conviction, no miscarriage of justice, or no prejudice to the applicant would significantly undermine the efficacy of the CCRC process.

Recommendation 12: The court referral test should not incorporate a broad “interests of justice” test for referral

CCLA submits that, if the Commission finds that there is a likelihood or possibility that the conviction or sentence will be overturned by the courts, it will always be in the “interests of justice” for the possible miscarriage of justice to be examined and, if appropriate, remedied. Including a second, broad ‘interests of justice’ criteria for referrals invites the introduction of extraneous and ultimately irrelevant considerations such as the nature of the underlying conviction and public opinion. If it is judged necessary to include additional thresholds to introduce some additional discretion into the case referral process, the Commission should be directed to consider the severity of prejudice to the individual applicant and the damage to the administration of justice should the potential miscarriage of justice go unexamined and unremedied.

Recommendation 13: Statutory provisions should provide for appeals to the full Commission and/or hearings by the Commission

The Commission has specialized expertise and would occupy a unique role within the Canadian justice system. For these reasons, we believe that an option to appeal a decision to the full

³³ *Palmer v. The Queen*, [1980] 1 SCR 759 at 780.

³⁴ *Ibid.*

Commission, in writing or by hearing where necessary, should be allowed. This appeal option may be subject to a leave requirement, decided by an independent panel, if there are concerns about over-extending the Commission's resources.

CCLA also submits that Commission decisions should be subject to judicial review, and that the Federal Court of Appeal should be given jurisdiction pursuant to s. 28 of the *Federal Courts Act*, R.S.C., 1985, C. F-7.

V. Recommendations regarding remedies

Recommendation 14: The Commission's decisions should be required to be made public, subject to anonymity and privacy safeguards appropriate to individual cases

The same open court principles and imperatives that operate with respect to criminal courts should apply to the Commission's decisions. As is the case with criminal proceedings, there should be the possibility for anonymity orders and privacy safeguards to be put in place in individual cases. The Commission should be required to proactively inform Applicants and witnesses of the availability of these mechanisms, and, upon request, assist them in applying for these protections if necessary.

Recommendation 15: The Commission should not be directly engaged in pardon recommendations or decision-making

Pardons, which we understand to mean record suspensions, should operate independently of the Commission's findings. The record suspension process serves a very distinct purpose – supporting reintegration and rehabilitation. This process, which we note has many problems as currently structured, should not depend on a finding that there was a miscarriage of justice in a particular case.

There should, however, be an automatic expungement of an individual's criminal conviction or finding of guilt if it is determined that a miscarriage of justice took place. There should also be clear statutory protections preventing non-conviction records, such as arrest and charging records, from being disclosed on record checks after a conviction or finding of guilt has been expunged. Wrongfully convicted people have called for this mechanism. Robert Baltovich, for example, has described the negative impact of the continued existence of his record of charge and conviction after his acquittal:

It's not only limited my ability to secure employment but also altered the way I secure employment... I have to ask myself is this information my employer may ultimately want to know? If it very well is then... it puts you in a grey area of whether you should even bother applying...The information the police retain allows people to make the assumption that there's a reason for it and the reason may very well be that the police believe that you're guilty.³⁵

Those who have been acquitted after a miscarriage of justice should not have live in fear that the police will continue to release their prior record of arrest, charge, or conviction.

³⁵ JohnHowardSocietyON, "Indeterminate Punishment" (November 18, 2013) online: *Youtube* <https://www.youtube.com/watch?v=uXNRp_RGlhc> at 4:11.

Recommendation 16: There should be a separate legislative scheme for compensation and reintegration. Regardless of whether a statutory scheme for compensation is established, individuals should retain the option to initiate a civil suit to claim compensation and other remedies flowing from wrongful convictions

There are many possible models for achieving meaningful compensation for those who have suffered miscarriages of justice. CCLA submits that the process for determining whether a miscarriage of justice has taken place should be distinct from the process of compensation. Regardless of what process is established, it will be important to ensure that individuals are able to select their preferred mechanism for pursuing compensation after a wrongful conviction has occurred. Although there is merit to a process that facilitates compensation and reintegration for individuals, it should operate as a complement to, not replacement of, existing civil law mechanisms.

Recommendation 17: There should be statutory language affirming the importance of abiding by the equality guarantees contained in the *Charter*, the *Canadian Human Rights Act* and applicable international law, as well as an explicit recognition of those groups that are over-represented in the criminal justice system.

Preambles or statements of principles can inform statutory interpretation and assist in ensuring that the legislative provisions are interpreted in a way that takes into account the broader context of the justice system. As explained at the outset of these submissions, this is context that the Commission should not only explicitly acknowledge but also proactively work to remedy through its substantive work and internal processes. Drawing attention to the importance of substantive equality and explicitly recognizing the systemic discrimination that operates within the criminal justice system in the statute will assist in making this expectation clear and maintaining that focus as the Commission's work develops and evolves.