CRIMINAL LAWYERS' ASSOCIATION

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# Position paper Bill C-75

The Criminal Lawyers' Association (CLA) is one of the largest specialty legal organizations in Canada, with more than 1,350 members. We are a voice for criminal justice and civil liberties. The CLA is regularly consulted by governments and the media regarding issues that are important to the administration of criminal justice. We also assist our members in every aspect of the practice of criminal litigation. The Association is governed by an executive and board of directors elected by the membership. The organization is also a regular intervener at the Supreme Court of Canada.

## Criminal Lawyers' Association Response to Bill C-75

The Criminal Lawyers' Association (CLA) supports a number of the proposed amendments in Bill C-75 including

- Codifying the principle of restraint for all release and bail decisions [s. 493.1];
- Requiring special consideration for indigenous people and vulnerable groups in release and bail decisions [s. 493.2];
- Creating an alternate process for dealing with some alleged breaches of bail [s. 523.1];
- Restoring discretion to impose fewer victim fine surcharges or not to impose a victim fine surcharge at all [s. 737(1.1) and (5)]; and
- Expanding the powers of case management judges [s. 551.3(1)].

Nonetheless, the CLA has a number of significant concerns about Bill C-75. In particular, the CLA is concerned that many of the amendments will undermine the fairness of trials and will adversely affect already marginalized and over-represented people in the criminal justice system. Below we have highlighted just 5 of the major problems with Bill C-75 and have described how the consequences of the amendments run contrary to the purported goals of this legislation and the overall commitment of the Government to improve the criminal justice system vis-à-vis vulnerable communities.

## 1. Changes to the preliminary inquiry [s. 535]

The purported rationale for this amendment is to reduce delay. According to Statistics Canada data, preliminary inquiries are held in just 3% of cases[1] and the number of preliminary inquiries decreased by 37% from 2005 to 2015.[2] Cases involving preliminary inquiries accounted for only 7% of the cases that exceeded the presumptive ceiling for delay in 2015/2016.[3] Importantly, there is evidence that, overall, preliminary inquiries *reduce* the use of court resources by streamlining the trial in the Superior Court or by eliminating unsubstantiated charges.[4]

[1] http://www.statcan.gc.ca/pub/85-002-x/2018001/article/54900-eng.pdf, p. 12
[2] http://www.justice.gc.ca/eng/rp-pr/jr/jf-pf/2017/jun01.html
[3] http://www.statcan.gc.ca/pub/85-002-x/2018001/article/54900-eng.pdf, p. 12
[4] Webster, C. et al., "Why Re-open the Debate about the Preliminary Inquiry? Some Preliminary Empirical Observations", *Canadian Journal of Criminology and Criminal Justice* (2013), 55(4): 513

The CLA supports the proposed amendments to s. 537 of the *Code* to give preliminary inquiry judges the ability to regulate the course of the preliminary inquiry to promote "fair and expeditious inquiry." The CLA does not support the elimination of preliminary inquiries for most offences. The CLA position is that this is not an evidence-based response to court delay and will, in fact, increase delay and create new pressures on the criminal justice system by

- Lengthening trial estimates for those cases that no longer benefit from a preliminary inquiry to narrow the issues;
- Increasing the total number of cases that go to trial which would otherwise have resolved at or after a preliminary inquiry by way of guilty pleas (to the same or lesser offences) or withdrawal of charges based upon the evidence heard at a preliminary inquiry;
- Causing more and lengthier pre-trial applications as the evidence to be adduced in support of these applications will not have been explored or developed at a preliminary inquiry and will therefore have to be called for the first time at trial;

- Causing mid-trial adjournments to deal with evidentiary issues (including third party records applications in sexual assault trials) that would have been identified during a preliminary inquiry and resolved or litigated in advance of trial;
- Causing mid-trial adjournments to deal with disclosure issues that would have been identified at the preliminary inquiry and resolved before trial; and
- Downloading significantly more trials to the Ontario Court of Justice of accused who are not entitled to a preliminary inquiry and who chose to be tried by a provincial court judge.

There will be added pressure on provincial courts arising from more trials being held in that forum. This increased workload in the provincial courts will likely be exacerbated by the impact of making more offences hybrid offences and increasing the maximum penalty for summary offences. These courts, already strained, are required to clear all cases within 18 months.

Considering all these factors, it is reasonable to conclude that abolishing preliminary inquiries will result in more cases being delayed beyond the presumptive ceilings, not fewer.

**2. Reverse onus bail [s. 515(6)(b.1)] and increased penalties for offences involving "intimate partner violence" [ss. 718.2(a)(ii) and 718.3(8)]**

These provisions send a clear message that those who commit intimate partner violence belong in prison pre-trial and for longer periods if convicted.

While the CLA appreciates the need for the Government to respond to and to address intimate partner violence, these provisions will not reduce incidents of intimate partner violence and will likely have the effect of perpetuating or exacerbating the over-representation of some groups in custody, despite the codification of the requirement for restraint, particularly for some vulnerable groups.

Sadly, intimate partner violence is one of the recognized legacies of residential schools and the 60s scoop. Creating a reverse onus at the bail stage and increasing the sentence on conviction will likely aggravate the crisis of the over-representation of indigenous people in our prisons.

These provisions will also cause significant delays in the bail process as the Crown tries to determine if an assault entry on an accused's record involved an intimate partner or not. This will not be clear on the face of any criminal record and will require the Crowns in busy bail courts to search through old files to determine the victim of previous assault cases and their relationship to the accused. This will likely result in adjournment applications to allow the Crown to determine whether the case is a reverse onus or Crown onus matter.

The CLA is not aware of any evidence to suggest that sentences for intimate partner violence are disproportionately low across Canada or in any particular jurisdiction. Regardless, there is overwhelming evidence that increasing penalties does not, in fact, result in any greater deterrent value.

**3. Abolition of peremptory challenges and creation of an enhanced power to "stand aside" jurors [s. 633]**

This is likely intended to avoid the use of peremptory challenges for racially- motivated or otherwise improper reasons. The CLA does not oppose reform to the jury selection process. However, abolishing peremptory challenges without other significant amendments to permit expanded challenge for cause or enhanced questioning of jurors to screen out jurors with improper biases (that are not limited to race) creates a real risk that jury trials will become less fair.

Abolishing peremptory challenges will not increase diversity on juries throughout Canada or ensure that indigenous or racialized people sit on juries. In fact, in our experience, peremptory challenges are often used in an attempt to ensure there *are* racialized or indigenous people sitting on juries, particularly when the accused is racialized or indigenous. Peremptory challenges are often used in conjunction with restrictive challenge for cause questions to achieve this result. Without significant work to increase the diversity of the jury pool and to make jury service economically viable for everyone, eliminating peremptory challenges will likely make juries less representative, not more.

The new power of judges to stand aside jurors to "maintain public confidence in the administration of justice" appears to be designed to permit a judge to vet and screen jurors. In the current system, judges routinely exercise their discretion to do just that. If the amendment is intended to broaden that discretion, then the current legislation leaves it open to different and competing interpretations by the hundreds of trial judges across the country tasked with exercising it. It will also significantly increase the complexity of jury selection as it invites submissions/challenge to each individual prospective juror. Additionally, sadly, there is still over-representation of white male judges on the Superior Court. The optics of a judge exercising a discretionary power to exclude jurors whom the racialized accused believes should be on the jury may undermine confidence in the administration of justice and perpetuate the idea that the system is not fair to racialized groups.

**4. Admissibility of "routine police evidence" by way of affidavit [s. 657.01(1)]**

This provision should be removed. The definition of "routine police evidence" is so broad that it includes everything the police do during an investigation. This amendment is not evidence-based; there is no evidence that calling police evidence is unduly delaying trials.

As a practical matter, if the amendment is aimed at dealing with non-contentious police evidence, responsible Crowns and defence lawyers introduce this evidence each and every day by way of admissions or agreed statements of fact. It is common practice within the defence bar to make admissions that dispense with time-consuming police evidence whenever possible, such as admitting continuity of pieces of real evidence. The increased powers of Case Management Judges outlined in Bill C-75 will continue to foster this practice. Therefore, the amendment is addressing a problem that does not exist.

This proposed amendment also creates a real risk for miscarriages of justice. The only way to uncover abusive police conduct, particularly in relation to racialized and indigenous people, is through cross-examination of the officers who were involved in the investigation. Permitting their evidence to be presented through affidavit and requiring the defence to seek leave to cross-examine will unfairly insulate police evidence from proper scrutiny. In many cases, the propriety of the police conduct is in issue either as it relates to *Charter* breaches or the adequacy of the police investigation. Hearing from police officers *viva voce,* where necessary, promotes the truth seeking function of the trial. Adducing the evidence by way of affidavit distorts it.

**5. New mandatory minimum sentences**

Canadian courts have struck down many of the mandatory minimum sentences enacted by the previous Government. When the Minister of Justice came to speak at the CLA conference in the fall of 2016, she told our membership to expect legislation to address mandatory minimum sentences in the near future.

The CLA is very disappointed that Bill C-75 does nothing to repeal mandatory minimum sentences or to give trial judges discretion not to impose them. Rather, Bill C-75 creates new mandatory minimum sentences for a number of driving offences that are prosecuted summarily [see, for example, ss. 253 and 254]. The amendments would extend the existing mandatory minimum penalties applicable when the Crown proceeds by indictment to cases when the Crown elects to proceed summarily. It is also worth noting that increasing the minimum penalties for those driving offences will ensure that they remain among the offences most often brought to trial. As it currently stands, impaired driving offences and breach of court order offences account for the largest percentage of cases in the overburdened provincial court system.

Mandatory minimum sentences frustrate the process of resolving cases by limiting the Crown's discretion to offer a penalty that will limit the crowns ability to take a position that will foster resolution before trial. As a result, these mandatory minimum sentences will ensure the continued consumption of judicial resources in the Ontario Court of Justice and further delay trials.
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